No. 21-15295

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APACHE STRONGHOLD

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants - Appellees.

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

BRIEF OF AMERICAN EXPLORATION & MINING ASSOCIATION, WOMEN'S MINING COALITION, AND ARIZONA ROCK PRODUCTS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* American Exploration & Mining Association ("AEMA"), the Women's Mining Coalition ("WMC"), and the Arizona Rock Products Association ("ARPA") make the following disclosures:

AEMA is a nonprofit organization incorporated in the State of Washington.

WMC is a nonprofit corporation incorporated in the State of Nevada.

ARPA is a nonprofit corporation incorporated in the State of Arizona.

No Amicus has issued stock and therefore no publicly held corporation owns ten percent of more of any stock of an Amicus.

Dated: May 24, 2021

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Exploration & Mining Association ("AEMA") is a 126-year-old, 1,700-member national trade association representing the entire mining life cycle, from prospecting and exploration, to mine development and mineral extraction, to mine reclamation and closure. AEMA members reside in forty-four U.S. states, and more than eighty percent are, or work for, small businesses. AEMA members are actively involved in prospecting, exploring, mining, and mine reclamation and closure activities on both private and federally administered land throughout the United States, and in supplying and servicing those activities. AEMA works with elected officials to develop and coordinate the mining industry's response to legislative and regulatory issues, including protecting and expanding domestic mining opportunities vitally important to our national security and economic prosperity. AEMA also participates in litigation, raising issues of concern to the mining community and serving as the nationally recognized voice for mineral exploration and development.

The Women's Mining Coalition ("WMC"), founded in 1993, is a grassroots organization of women across the country involved in every sector of the mining industry, including metal, coal, iron ore, construction-material, and industrial-mineral companies; manufacturers and suppliers; trade associations; and consultants. Since its founding, WMC has informed members of Congress, policy

makers, and regulators about the technological advances and environmental stewardship of the modern mining industry, as well as the importance of the mining industry to both the U.S. economy and the daily lives of WMC's members. WMC publishes white papers and op-eds on legislative and regulatory issues that impact the U.S. mining industry. And each year WMC's members meet with hundreds of U.S. Senators and Representatives to inform them about current issues facing the mining industry.

The Arizona Rock Products Association ("ARPA") is a trade organization whose members includes producers and suppliers of aggregate asphaltic concrete, ready mix concrete, asphalt, and portland cement, as well as trucking firms, paving contractors, and other aggregate end users, material testing labs, and ancillary companies. For more than 60 years, ARPA has represented companies producing nearly all the aggregate materials in Arizona. ARPA tracks key environmental, safety, transportation, and governmental affairs issues relevant to mining, educates its members on the potential impact of developments on these issues, and engages in advocacy on behalf of its members.

Amici have a vital interest in this litigation in defending Congress's authority to effectuate the strong federal policy favoring the sound development of the nation's mining resources. Through the Mining and Mineral Policy Act, Congress has stated that "it is the continuing policy of the Federal Government in the national interest to

foster and encourage private enterprise" in developing "economically sound and stable domestic mining, minerals, metal and mineral reclamation industries" and "domestic mineral resources" to "help assure satisfaction of industrial, security and environmental needs." 30 U.S.C. § 21a. In 2019, the mining industry generated more than 1.3 million jobs, and contributed $199 billion to the U.S. economy, as well as $40.8 billion in federal, state and local taxes. Nat'l Mining Ass'n *The Economic Contributions of U.S. Mining, 2019*, at E-1 (Feb. 2021), nma.org/wp-content/uploads/2018/09/Economic_Contributions_of_Mining_2019.pdf.

Congress pursued these interests by mandating the transfer of mineable federal land (the "Oak Flat" parcel) to a private party—Resolution Copper Mining, LLC ("Resolution")—in exchange for land owned by Resolution. 16 U.S.C. § 539p. As the U.S. Forest Service recognized, Oak Flat contains "one of the largest undeveloped copper deposits in the world, with an estimated copper resource of 1,970 billion metric tonnes at an average grade of 1.54 percent copper." 3-ER-268. Oak Flat "has the potential to supply nearly 25% of U.S. copper demand." Resolution Copper, *About Us*, www.resolutioncopper.com/about-us.html.

Projects like Oak Flat rely critically on uniform and predictable federal land management policies to ensure that the significant investment required to identify and develop mineral deposits can occur. Mining is an "economically vulnerable activity" with "significant capital at risk." Andrew P. Morriss, et al., *Homesteading*

Rock: A Defense of Free Access Under the General Mining Law of 1872, 34 Envtl. L. 745, 754 (Summer 2004). Discovering a mineral deposit that can be developed into an economically viable mine is a high risk, time consuming, and expensive endeavor that requires identifying and evaluating an average of 1,000 mineral targets. Nat'l Research Council, Nat'l Acad. of Scis., *Hardrock Mining on Federal Lands* 24 (1999). Secure rights throughout the entire mining lifecycle are "critical to inducing investment in long-term mining operations." *Id.* *Amici* have an interest in ensuring that projects like Oak Flat may proceed with predictability once Congress deems them appropriate.[1]

ARGUMENT

Plaintiff Apache Stronghold asks the judicial branch to override Congress's authority to alienate the federal government's own land. The federal government owns title to the land at issue here (Oak Flat) free and clear of Plaintiff's claims of aboriginal title and of any trust obligation to Plaintiff. 1-ER-8-12 & n.5. In the National Defense Authorization Act for Fiscal Year 2015, Pub L. No. 113-291 (Dec. 19, 2014), 16 U.S.C. § 539p (the "2014 Act"), Congress recognized the significant public interest in developing the vast domestic mineral resources located on that

[1] All parties have consented to the filing of this brief. Pursuant to Rule 29(a)(4), *Amici* state that no party's counsel have authored this brief in part or in whole, and no person (other than *Amici*, their members, and their counsel) have contributed money to fund the preparation or submission of this brief.

property, and in light of this interest it decided to transfer Oak Flat to Resolution as part of a land exchange. Before doing so, Congress acknowledged, weighed, and accommodated asserted interests in religious exercise on that property, and determined that the public interest in completing a land exchange that allows mining of the property outweighed other interests that the exchange may affect. Congress thus directed the Secretary of Agriculture—in clear and non-discretionary terms—to transfer title in Oak Flat to Resolution within 60 days of publishing a final environmental impact statement ("FEIS"). *Id.* § 539p(c)(10).

Plaintiff asks the courts to stop the land exchange that Congress directed. The district court correctly denied a preliminary injunction, holding that Plaintiff is unlikely to succeed on the merits of its claims. While Appellee offers additional, valid grounds for affirming that ruling—including that Plaintiff failed to show irreparable harm and that the equities and public interest weigh against an injunction—*Amici* focus on the reasons why Plaintiff is unlikely to succeed on its claims under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*., and the Free Exercise Clause of the First Amendment.

Plaintiff's RFRA claim fails at the threshold because RFRA imposes no barrier to Congress's later legislation ordering the transfer of Oak Flat. Under settled precedent, Congress's clear mandate to consummate the land exchange, with no exception based on potential impacts to religious exercise, overrides any directive in

RFRA. Regardless, neither RFRA nor the Free Exercise Clause is implicated by *private* mining activity, and merely approving or providing land for a mining project does not transform that private project into government action subject to either provision. The government's disposition of its own property likewise does not trigger RFRA or the Free Exercise Clause because, under clear Supreme Court and Ninth Circuit precedent, such actions do not substantially burden religious exercise. Moreover, the sale of land to private parties is occurring pursuant to a "neutral law of general applicability" to which the Free Exercise Clause does not apply.

I. The Religious Freedom Restoration Act Does Not Limit Congress's Authority To Direct The Transfer Of Federal Land

RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless "application of the burden to the person" is the "least restrictive means" to further a "compelling government interest." 42 U.S.C. § 2000bb-1. But like all federal statutes, RFRA cannot bind a future Congress's exercise of its legislative powers under Article I of the Constitution. And even if it could, the 2014 Act does not impose any substantial government burden on the exercise of religion. RFRA thus provides no basis to override Congress's clear directive to transfer Oak Flat to Resolution.

A. RFRA Does Not Constrain The Legislative Powers Of Subsequent Congresses

One Congress cannot limit a future Congress's authority in passing new federal statutes. Congress is free to supersede its own enactments—including those of an earlier Congress—either expressly or by implication. And it is clear here that, to the extent there may be any conflict between RFRA and the 2014 Act, Congress intended for the 2014 Act to control.

The principle that "one legislature cannot abridge the powers of a succeeding legislature" is as old as the Republic. *Fletcher v. Peck*, 6 Cranch 87, 135 (1810) (Marshall, C.J.); *see also Lockhart v. United States*, 546 U.S. 142, 147-50 (2005) (Scalia, J., concurring) (listing authorities). It follows that "where two acts are in irreconcilable conflict," the "later" act controls. *United States v. Fisher*, 109 U.S. 143, 145 (1883).

For that reason, Plaintiff's claim that the 2014 Act "violates" RFRA, Opening Brief ("Br."), at 1, is nonsensical. Congress cannot "violate" RFRA by enacting subsequent legislation, because its legislative power is not and cannot be constrained by an earlier statute. Any apparent "conflict between the … statut[es]" is simply a matter of interpretation to be resolved by "ascertain[ing] the intent of Congress." *Kenai Peninsula Borough v. Alaska*, 612 F.2d 1210, 1212 (9th Cir. 1980), *aff'd sub nom. Watt v. Alaska*, 451 U.S. 259 (1981).

Here, Congress's mandate is clear and unyielding: The Secretary of Agriculture is "directed" to convey Oak Flat to Resolution, 16 U.S.C. § 539p(c)(1), and "shall" do so within 60 days after publication of a final environmental impact statement, *id.* § 539p(c)(10). Thus, even if Plaintiff could prove a substantial government burden under RFRA (which it cannot, *see infra* at 16-24), the 2014 Act would control.

The 2014 Act's mandatory language ("shall") leaves no room for a narrowing construction that could somehow "reconcile" the two statutes by having RFRA limit the 2014 Act's operation. Instead, accepting Plaintiff's arguments would effectively read the word "shall" in the land-exchange provision out of the 2014 Act. That would contravene the "well-established" statutory interpretation requirement to "giv[e] effect to all … provisions" enacted by Congress, *U.S. ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 933 (2009), "'so that no part will be inoperative or superfluous, void or insignificant,'" *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018).

The 2014 Act also controls for another reason: It is more specific. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384 (1992). When "a general … prohibition is contradicted by a specific … permission," the "specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v.*

Amalgamated Bank, 566 U.S. 639, 645 (2012) (citing *Morton v. Mancari,* 417 U.S. 535, 550-51 (1974)). The 2014 Act specifies a clear alternative to RFRA's general framework for accommodating religious-exercise concerns: The Secretary of Agriculture must "engage in government-to-government consultation with affected Indian tribes concerning issues of concern" to them, 16 U.S.C. § 539p(c)(3)(A), "assess" the effects of mining and related activities on "cultural and archaeological resources that may be located" on the land, *id.* § 539p(c)(9)(C)(i), "identify measures that may be taken, to the extent practicable, to minimize potential adverse impacts on those resources," *id.* § 539p(c)(9)(C)(ii), and "consult with Resolution Copper and seek to find mutually acceptable measures to" "address the concerns of the affected Indian tribes" and "minimize the adverse effects" on them, *id.* § 539p(c)(3)(B)(i)-(ii). At the end of that process, the Secretary "shall" complete the transfer. *Id.* § 539p(c)(10). Congress was thus well aware of the potential cultural effects of the project, and the 2014 Act set forth the exclusive manner for accommodating those interests in this specific context. The 2014 Act "'deliberately targeted specific problems with specific solutions,'" and those specific solutions are binding irrespective of RFRA's more general approach. *RadLAX*, 566 U.S. at 645.

The 2014 Act's mandate is not diminished by the "[r]ule of construction" codified in RFRA, stating that subsequent laws are "subject to" RFRA "unless such law[s] explicitly exclud[e] such application by reference" to RFRA. 42 U.S.C.

§ 2000bb-3(b). That language covers later statutes where Congress's intent was unclear and the later enactment does not necessarily conflict with RFRA—for example, where a federal agency's discretionary implementation of a broadly applicable non-mandatory statutory provision raises religious-exercise concerns as applied in specific circumstances. *See*, *e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 n.30 (2014) (applying RFRA to agency-imposed contraceptive-coverage mandate). But § 2000bb-3(b) can have no effect where (as here, if Plaintiff is correct) applying RFRA would require rewriting the later statute.

The Supreme Court has consistently held that express-statement laws like § 2000bb-3(b) "'cannot justify a disregard of the will of Congress as manifested either expressly or by *necessary implication* in a subsequent enactment.'" *Dorsey v. United States*, 567 U.S. 260, 273-75 (2012). In *Dorsey*, for example, the Court applied this principle to a federal saving statute, which provided that a new criminal statute that "'repeal[s]' an older criminal statute shall not change the penalties 'incurred' under that older statute 'unless the repealing Act shall so expressly provide.'" *Id.* at 272. And in *Marcello v. Bonds,* 349 U.S. 302, 305 (1955), the Court applied the same principle to an Administrative Procedure Act provision specifying that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly," 5 U.S.C. § 1011 (1952). In both cases, the Court found implied repeals

despite Congress's failure to satisfy the earlier statute's express-statement requirement. *Dorsey*, 567 U.S. at 273-75 (holding that the later Congress "remains free to express" its intention to "exempt the current statute from the earlier statute" "either expressly or by implication as it chooses"); *Marcello*, 349 U.S. at 305.

These cases recognize that when "the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Lockhart*, 546 U.S. at 149 (Scalia, J., concurring) (applying same principle to the Social Security Act). Just as one Congress cannot prevent another from repealing legislation, "a prior legislature cannot abridge" its successor's "power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them." *Id*. Accordingly, while an express-statement law may be relevant to interpreting a later statute that is ambiguous, Congress "remains free to repeal" or "modify" any "earlier statute," or "to exempt the current statute from the earlier statute"; and it "remains free to express any such intention either expressly or by implication as it chooses." *Dorsey*, 567 U.S. at 273.

Congress unquestionably expressed "by implication" an intention that RFRA not nullify the land transfer mandated by the 2014 Act.

B. RFRA Does Not Regulate Private Use Of Federal Land

Plaintiff's RFRA challenge also fails on its own terms, because the burdens that Plaintiff alleges are not government-imposed burdens. RFRA prohibits the "[g]overnment" from "substantially burden[ing] a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). By its plain terms, therefore, the statute applies only "when it can be said that the federal government is responsible for the burden on religious exercise." *Vill. of Bensenville v. FAA*, 457 F.3d 52, 63 (D.C. Cir. 2006). It was not meant to give individuals veto power over the lawful, private activities of others, undercutting the important public and private interests—critical to the mining industry—in managing federal lands with consistency and predictability. Instead, the government "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the" government. *Id.* at 64 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Id*. (quoting *Blum*, 457 U.S. at 1004-05).

In *Village of Bensenville*, the FAA approved federal funding for an airport-layout plan that relocated a cemetery. 457 F.3d at 58-59. The plaintiffs claimed that relocating the cemetery violated RFRA by burdening their free exercise of religion. *Id.* at 59-60. The D.C. Circuit disagreed, holding that the FAA was not responsible

for the alleged burden because the agency merely approved "[t]he specific conduct" at issue and thus had a "peripheral role" in the relocation. *Id.* at 64-65. Under RFRA, the "cause of any burden on religious exercise" was the airport developer—a private entity—because it was the one that ultimately relocated the cemetery. *Id.* at 65. That remained true despite the FAA's use of its "broad regulatory power" to approve of the airport layout plan and its intention to partially fund the plan. *Id.* at 61, 65-66.

The same conclusion holds here. The "specific conduct of which the plaintiff complains," *Vill. of Bensenville*, 457 F.3d at 64 (quotation marks omitted), is, in Plaintiff's own words, the "construction of the mine." Br. 1-2 (alleging that the mine will "destroy" the Oak Flat site). While Plaintiff repeatedly attributes that outcome to the "Government," *see id*. at 3, 5, 45, all agree that a *private party* will carry out whatever mining activity ultimately occurs, and it will do so on behalf of parties other than the government. As in *Village of Bensenville*, the 2014 Act does not compel or coerce Resolution to proceed with the relevant aspects of the mining project or reward Resolution for doing so. The Act merely *allows* Resolution to proceed with the land exchange if it "offers" to do so, at which point the land will belong to Resolution for activities by Resolution. 16 U.S.C. § 539p(c)(1). The federal government's approval of a step towards private activity does not transform a private party's subsequent actions into government action. And just as "receipt of public funds"—"even of 'virtually all' of an entity's funding"—"is not sufficient to

fairly attribute the entity's actions to the government," 457 F.3d at 64 (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982)), Resolution's use of land that previously belonged to the federal government will not transform the mining project into federal action.[2]

Village of Bensenville's holding is a straightforward application of the constitutional principles underlying RFRA. RFRA was a narrow response to the holding of *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that the First Amendment's Free Exercise Clause was not implicated by "'neutral law[s] of general applicability.'" *Id.* at 879. By "restor[ing]" the test set forth in prior free-exercise decisions, 42 U.S.C. § 2000bb(b)(1), RFRA reinstated a "requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion," *id*. § 2000bb(a)(4). Congress thus "expect[ed] that courts would look to

[2] Indeed, in context of the First Amendment's Establishment Clause, multiple jurists have suggested that even where government action on public land *has already* violated the First Amendment, transferring that land to a private party—far from constituting a new government action—may *cure* the violation by eliminating the government's responsibility for the continued use of the property. *E.g.*, *Salazar v. Buono*, 559 U.S. 700, 723 (2010) (Roberts, C.J., concurring) (presence of cross would no longer implicate the Establishment Clause once federal government "sell[s] the land"); *id.* at 727-28 (Alito, J., concurring) ("'land exchange'" would cure any constitutional violation because once transferred, property would cease to be "*federal* land"); *see also Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000), *as amended on denial of reh'g* (Mar. 22, 2000) ("Absent unusual circumstances, a sale of real property is an effective way for a public body to end its [Establishment Clause violation]."). Transferring Oak Flat will therefore end the government's responsibility for the property.

constitutional precedent for guidance" in applying RFRA. *Vill. of Bensenville*, 457 F.3d at 62; *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc) (applying pre-*Smith* free exercise decisions to RFRA).

Supreme Court precedent makes clear that action is not attributed to the government, under our Constitution, when the government merely approves private conduct. For example, in *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974), the Court explained that "[a]pproval by a state utility commission" of a practice that a privately owned utility company took on its own land "does not transmute a practice initiated by the utility and approved by the commission into 'state action.'" In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972), the Court held that state approval of a liquor license did not turn a private club's conduct into that of the State. And in *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40, 52-53 (1999), the Court concluded that a State's decision to authorize private insurers to withhold payments for disputed medical treatment was not sufficiently significant encouragement of that practice to transform it into state action. These cases make clear that RFRA does not apply to the alleged burdens here.

With no viable claim that the government will be "mining" Oak Flat, Plaintiff pivots to Congress's decision to "transfer control" of the property—its ownership—to the hands of a private mining entity. Br. 1, 42. But the activity Plaintiff complains of is mining—not the land exchange. A mere government transfer of land to private

ownership comes nowhere near establishing a substantial *government* burden under RFRA. *See infra* at 16-24. Plaintiff is therefore wrong to invoke activities that will occur at Oak Flat *after* the land transfer, Br. 31-37, as a way to distinguish this case from RFRA decisions allowing the government to freely dispose of its own land, *see infra* at 20-22.

"Faithful adherence to the "state action" requirement … requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, 457 U.S. at 1003. Because the heart of the complaint is a quarrel with non-governmental activities, RFRA does not apply.

C. Transferring Federal Land Does Not Impose A Substantial Burden On Religious Exercise

RFRA is also inapposite for the reason the district court gave: The 2014 Act does not "substantially burden" Plaintiffs' religious exercise. 1-ER-11-18. Under settled precedent, the government's use or disposition of its *own* land is not a substantial burden under RFRA.

1. Land Transfers Neither Coerce Persons To Act Contrary To Their Religious Beliefs Nor Force A Choice Between Religious Exercise And Receiving Government Benefits

As the district court recognized, 1-ER-14-18, this Court's en banc decision in *Navajo Nation* is dispositive. Because RFRA was expressly intended to reinstate the test for free exercise claims set forth in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972), *see* 42 U.S.C. § 2000bb(b)(1), *Navajo*

Nation looked to both cases to "define what kind or level of burden on the exercise of religion is sufficient to invoke" RFRA. 535 F.3d at 1069. This Court held that "[u]nder RFRA, a 'substantial burden' is imposed" *only* in the circumstances of those two cases—that is, "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Id*. at 1069-70.

Plaintiff asserts that the district court "misrea[d]" *Navajo Nation*, Br. 38, 42, by limiting "substantial burden" to these two "narrow situations," 1-ER-18. But that case could not have been more explicit in holding that a substantial burden exists "only" in these two circumstances. 535 F.3d at 1070. This Court has echoed that core holding, verbatim, time and again. *See, e.g.*, *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 & n.1 (9th Cir. 2016); *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1214-15 (9th Cir. 2008); *see also La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 603 F. App'x 651, 652 (9th Cir. 2015) (finding no substantial burden because neither circumstance was present).

Plaintiff's real quarrel, therefore, lies not with the district court's "reading" of *Navajo Nation*, but with decades of binding precedent announcing the rule of law that governs this case. But this panel is "bound by the en banc decision" in *Navajo*

Nation, *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002), and, in any event, Plaintiff offers no basis to revisit it.

Plaintiff's central premise is that the *Navajo Nation* test fails to account for a range of scenarios—drawn from case law, RFRA's legislative history, and Plaintiff's imagination—that purportedly involve a substantial burden on religious exercise: for example, "'razing' a 'house of worship,'" Br. 32 (alteration omitted), "forcibly rounding up Amish children and sending them to a public boarding school," *id.* at 39, "padlocking the doors of a church to prevent worship," *id.*, confiscating religious relics," *id.*, "forcibly removing religious clothing," *id.*, or performing an autopsy in violation of the deceased's religious beliefs, *id.* at 41.

What unites these scenarios is that all involve the use of direct force against an individual's person or property—a classic exercise of "*coercive* power over an individual's liberty or property rights." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). So, too, for the many cases Plaintiff quotes out of context. For instance, when *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), refers to "destruction of religious property," *id.* at 492; *see* Br. 32, the example it gives is *DeMarco v. Davis*, 914 F. 3d 383 (5th Cir. 2019), where prison officials confiscated and destroyed a prisoner's religious books, *id.* at 389-90. And when *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), refers to "prevent[ing] the plaintiff from participating in [a] [religious] activity," *id.* at 55-56; *see* Br. 32, it is talking about physical confinement of a

prisoner that bars access to a sweat lodge vital to religious practice. Far from rebutting *Navajo Nation*'s test, these scenarios each fall squarely within it because they involve "coerc[ing]" persons "to act contrary to their religious beliefs." 535 F.3d at 1069-70.

That explains why Plaintiff is wrong in painting the *Navajo Nation* test as "out of step with every other Circuit." Br. 39. Indeed, just last year, the First Circuit cited it approvingly when it defined "substantial burden" under RFRA as the government conditioning a benefit on conduct that one's religious beliefs proscribes or coercing someone to act contrary to their religious beliefs. *See Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020). The Third Circuit follows the same test. *E.g.*, *Real Alternatives, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 867 F.3d 338, 356 (3d Cir. 2017) ("'[A] substantial burden exists where'" (1) "'a follower is forced to choose between … forfeiting benefits … [and] abandoning one of the precepts of his religion'" or (2) "'the [G]overnment puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.'").

This case falls squarely outside of *Navajo Nation*'s definition of substantial burden. Plaintiff's objections are to the government's use and disposition of its own property, and thus involve no coercive government force against Plaintiff's members whatsoever. Because the 2014 Act directs a land exchange—rather than coercing persons to act contrary to their religious beliefs or denying them government benefits

unless they cease practicing their religion—the district court correctly concluded that the Act does not impose a substantial burden. 1-ER-18.

2. Non-Discriminatory Government Land Management Does Not Burden The Exercise Of Religion

Independent of *Navajo Nation*, the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), confirms that the government's non-discriminatory management of its own land does not "substantially burden" the free exercise of religion, regardless of how others may rely on that land in exercising their religion.[3]

In *Lyng*, the U.S. Forest Service planned to construct a road and allow timber harvesting in an area that was "'significant as an integral and indispensable part of Indian religious conceptualization and practice.'" 485 U.S. at 442-43. Native Americans used the area for rituals requiring "'privacy, silence, and an undisturbed natural setting,'" *id.* at 442, and "'for personal medicine and growth,'" *id.* at 448. Even though the project "could have devastating effects on traditional Indian religious practices," *id.* at 451, the Court held there was not a "heavy enough" burden on religious exercise to trigger the Free Exercise Clause, *id.* at 447.

[3] *Lyng* interpreted the First Amendment's Free Exercise Clause. This Court held in *Navajo Nation* that RFRA incorporates *Lyng*'s holding because RFRA sought to "restor[e]" earlier "Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion," "includ[ing] *Lyng*." 535 F.3d at 1071 n.13, 1074; *see also supra* at 14-15.

In reaching that conclusion, the Court emphasized that "[w]hatever rights the Indians may have to the use of the area, … those rights do not divest the Government of its right to use what is, after all, *its* land." 485 U.S. at 453. A contrary ruling would effect a "diminution of the Government's property rights" by imposing a "religious servitude" on public lands. *Id.* at 452-53. And while "[t]he Constitution does not permit government to *discriminate* against religions that treat particular physical sites as sacred," *id.* at 453 (emphasis added), neutral laws managing the public lands categorically do not substantially burden religion—even if their effect is to "'virtually destroy'" religious exercise at a site. *Id.* at 451-52.

In *Navajo Nation*, therefore, this Court held that *Lyng* "foreclose[d]" any RFRA challenge to "a government-sanctioned project, conducted on the government's own land." 535 F.3d at 1072-73. And in *La Cuna*, it affirmed summary judgment for the government on plaintiffs' RFRA claim, agreeing with the district court that the government did not substantially burden plaintiffs' religious exercise by constructing a power plant on government-administered land, even though plaintiffs were denied access to the land as a result. 603 F. App'x at 652; *see also La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 2013 WL 4500572, at *9-10 (C.D. Cal. Aug. 2013) (citing *Navajo Nation* and *Lyng*).

All of these cases make clear that the government is free to manage its own lands, as long as it does not discriminate against a particular religion. Religion-neutral laws managing public lands do not impose a substantial burden on religion.

3. Indirect Effects On Religious Practice Do Not Implicate RFRA

In response to this clear line of authority, Plaintiff argues that "government action" imposes a substantial burden if that action "makes religious practice more difficult in a significant way." Br. 40. This assertion finds no support in controlling precedent, which makes clear that the touchstone of the substantial-burden inquiry is the *nature* of the government action, not the plaintiff's perspective on the action's effects.

As the Supreme Court put it in *Lyng*, "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development," even where the effect on religious practice is "extremely grave." 485 U.S. at 451. Instead, because government coercion is the critical factor, "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not impose a substantial burden. *Id.* at 450-51.

Similarly, in *Snoqualmie*, this Court found it "irrelevant to" the substantial burden inquiry that the government's renewal of a power-plant license would "interfer[e] with the ability of tribal members to practice religion." 545 F.3d at 1214. The dispositive inquiry under *Navajo Nation*, the Court explained, was whether the renewal "either forces [tribal members] to choose between practicing their religion and receiving a government benefit or coerces them into a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction." *Id.*

Plaintiff's assertion that *Lyng* and *Navajo Nation* do not control this case because neither "involved physical destruction of a sacred site" (Br. 35), cannot be reconciled with the text or logic of these decisions. And Plaintiff's claim that both cases "acknowledged the outcome would have been different" if a religiously significant site had been physically destroyed (*id.*) is flatly incorrect. In fact, the Court's statement in *Lyng* that the government had been "solicitous" toward Native American religious practices and ensured that "[n]o sites where specific rituals take place [would] be disturbed" had nothing to do with whether the government imposed a substantial burden. 485 U.S. at 454. After rejecting the "effects" test Plaintiff advocates here and reaffirming "[t]he [g]overnment's rights to the use of its own land," the Court merely noted that its holding "need not and should not discourage [the government] from accommodating religious practices." *Id.*

Similarly, in *Navajo Nation* this Court noted "'that religious practitioners would still have access to the Snowbowl'" in support of its conclusion that the plaintiffs were not being "coerce[d] … to act contrary to their religion under the threat of civil or criminal sanctions." 535 F.3d at 1070 (citation omitted). But the Court never suggested that the extent of damage to a site is part of the substantial burden test. To the contrary, it cited to *Lyng* as support for its conclusion that there would be no substantial burden even if "the government action in this case w[ould] 'virtually destroy the … Indians' ability to practice their religion.'" *Id.* at 1072 (quoting 485 U.S. at 451).

Plaintiff's contention that the 2014 Act substantially burdens its members' religion because future mining operations may physically destroy the Oak Flat site is thus foreclosed by controlling Supreme Court and Ninth Circuit precedent.

II. Plaintiffs' Free-Exercise Claim Fails Too

A. Plaintiff Cannot Show That Religious Exercise Will Be Substantially Burdened By Government Action

Plaintiff's free-exercise claim fails for many of the same reasons as its RFRA claim: Religious exercise will not be burdened by *government* action, and any burden is not substantial in any event.

As with RFRA, the Free Exercise Clause only applies to "government action." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Souter, J., concurring in part). It provides that "*Congress* shall make no law …

prohibiting the free exercise" "of religion." U.S. Const. amend. I (emphasis added). The Clause thus "prohibits the use of state action to deny the rights of free exercise." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963). As explained *supra* at 12-16, Plaintiff cannot show the requisite government action here because the conduct that will allegedly burden religious exercise is private mining activity that the government did not coerce or significantly encourage, and in which it will not jointly participate.

Plaintiff's failure to establish a substantial burden on religious exercise independently dooms its free-exercise claim. The Free Exercise Clause does not apply absent intentional discrimination, *Church of the Lukumi*, 508 U.S. at 533, or a substantial burden, *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *see also Hobbie v. Unemp't Appeals Comm'n of Fla.*, 480 U.S. 136, 144 (1987) ("[T]he salient inquiry under the Free Exercise Clause is the burden involved."). Under *Navajo Nation*, which applied the Free Exercise Clause's "substantial burden" test to RFRA, and *Lyng*, which applied the Free Exercise Clause, Plaintiff cannot show a substantial burden here. *See supra* at 16-24.

Plaintiff's cases holding that intentional discrimination alone may violate the Free Exercise Clause—without showing substantial burden—are inapposite because there is no intentional discrimination here. Plaintiff does not seriously contend that the 2014 Act was intended to disadvantage anyone's religious exercise. Instead, the

Act's sponsor explained that the land exchange's purpose was to "protect 5,000 acres of environmentally sensitive lands," and facilitate private "develop[ment] [of] the third largest copper ore body in the world," which would "employ 3,700 Americans." *Resolution Copper: Hr'g Before the Comm. on Energy & Nat. Res.*, 112 Cong. 3 (2012) (statement of Sen. John McCain); 16 U.S.C. § 539p(a), (c). The Act also includes provisions, noted above, to minimize adverse effects on tribes to the extent practicable. *See supra* at 9. Because the 2014 Act does not substantially burden religious practice, Plaintiff's free-exercise claim fails.

B. The 2014 Act Is A Neutral Law That Does Not Violate The Free Exercise Clause

Plaintiff's free-exercise argument fails for the additional reason that the 2014 Act is a neutral law that treats all users of Oak Flat equally, irrespective of religious practice. To invoke the Free Exercise Clause, Plaintiff must show that "the law is not neutral" toward religion—i.e., that its "object or purpose … is the suppression of religion or religious conduct." *Church of the Lukumi*, 508 U.S. at 533. Because "[f]acial neutrality is not determinative," *id.* at 534, courts consider "'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body,'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Plaintiff offers no evidence that "the object of" the 2014 Act—which is facially neutral—was "to infringe upon or restrict" anyone's religious practices "because of their religious motivation." *Church of the Lukumi*, 508 U.S. at 533. Plaintiff's only purported evidence is a remark by former Senator John McCain that Congress should "put an end to" delays in the project because "[t]he people in [Arizona] are hurting, and this mine is an economic opportunity that should not be squandered," and "the San Carlos Apache obviously care more about some issues than they do about the prospect of employment for their tribal members." *Resolution Copper: Hr'g Before the Comm. on Energy & Nat. Res.*, 112 Cong. 4 (2012) (statement of Sen. John McCain). But these statements do not mention or even allude to anyone's religious practices. In fact, they make clear that the Act's goal was to develop the natural resources in Oak Flat and provide economic opportunities to Arizonans—not to restrict religious exercise.

Given the dearth of evidence of intentional discrimination, Plaintiff's argument rests not so much on the Act's *purpose* as its purported disparate *impact* on their religion because only Native Americans use Oak Flat for religious practice. The Supreme Court, however, has soundly rejected this type of disparate-impact argument. In *Smith*, for example, the Court emphasized that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest." 494 U.S. at 886 n.3.

In so holding, the Court looked to *Washington v. Davis*, 426 U.S. 229 (1976), which held that a law does not violate equal protection "solely because it has a racially disproportionate impact"; it must also "reflec[t] a racially discriminatory *purpose*." *Id.* at 239 (emphasis added).

Similarly, in *Church of the Lukumi*, the Court explained that in order to prove a free-exercise claim, the plaintiff needed to show that the challenged ordinances "were enacted '*because of*,' not merely 'in spite of'" their burden on its religious exercise. 508 U.S. at 540 (emphasis added). Plaintiff here cannot show that Congress decided to transfer Oak Flat to Resolution Copper *because* it would have harmful effects on Plaintiff's members' religious exercise.

While a law's "effect" may *sometimes* be "evidence of its object," "adverse impact will not always lead to a finding of impermissible targeting." *Church of the Lukumi*, 508 U.S. at 535. Disparate impact can thus support a free-exercise claim only insofar as it shows that lawmakers enacted the law because they *intended* to discriminate against a particular religion. *Id.* Here, Congress passed the Act in spite of—not because of—its potential impact on Plaintiff's members' religion, so Plaintiff's free-exercise claim cannot succeed.

CONCLUSION

This Court should affirm the decision below.

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Respectfully submitted,

/s/ David Debold

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