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,

and

RESOLUTION COPPER MINING, LLC,
Intervenor-Defendant-Appellee.

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

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC BEFORE THE FULL COURT

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STATEMENT

If any case warrants full-court review, it is this one—where one en banc panel has overruled another, this Court's judges are split 6-6, and a fractured decision has contradicted Supreme Court precedent on a question of existential importance to Native Americans. That question is whether the government "substantially burdens" religious exercise when it physically destroys a Native American sacred site, ending religious exercise forever. And the answer is plain: yes.

A majority of the en banc Court *agreed* this is a substantial burden under RFRA's "plain meaning." Nevertheless, a different majority rejected RFRA's plain meaning in favor of a novel theory never briefed by any party or adopted by any other court: that "substantial burden" has a special meaning that "subsumes" an idiosyncratic interpretation of *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), in just one context—cases involving federally managed land.

This theory is flawed on many levels. It is unsupported by *Lyng*—which never uses the term "substantial burden," much less creates the majority's novel test. It conflicts with *Trinity Lutheran v. Comer*, 582 U.S. 449, 460 (2017), which the majority doesn't cite, and which says the issue in *Lyng* was *not* the lack of a substantial burden but that "the laws in [*Lyng* were] neutral and generally applicable." It contradicts Supreme Court cases holding that RFRA provides greater protection than prior

caselaw—not that RFRA "subsumes" it. And it rips an unprincipled, atextual, and conspicuously Native-American-shaped hole in RFRA.

This is now the *second* time the en banc Court has tried to define "substantial burden" in this context—with two en banc panels adopting contrasting tests. And in this very case, the vote among Circuit judges who have considered the merits is evenly split: six judges have said "[t]his is an obvious substantial burden," ECF 26 at 4 (Bumatay, J., dissenting); Op.180 (Murguia, C.J., dissenting), while six have said the government can knowingly obliterate sacred sites without legal consequence. Given the vast power this Court holds over the lives of Native Americans, the critical importance of the question, and the uncertainty of Supreme Court review, these unique circumstances warrant full-court review.

BACKGROUND

1. Congress enacted RFRA in response to *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause does not require strict scrutiny when the government "incidentally burden[s]" religious exercise via "neutral" and "generally applicable" laws. *Holt v. Hobbs*, 574 U.S. 352, 356-57 (2015). RFRA provides "greater protection" than the Free Exercise Clause, *id.*, by requiring strict scrutiny whenever the government "substantially burden[s]" religious exercise. 42 U.S.C. §2000bb-1(a)-(b). RFRA applies to "all Federal law," including laws burdening religious uses of "real property." *Id.* §§2000bb-2(4), 2000bb-3(a), 2000cc-5(7)(B).

2. Western Apaches have worshipped at Chi'chil Biłdagoteel, or Oak Flat, a 6.7-square-mile sacred site in present-day Arizona, for "at least a millennium." Op.13. Oak Flat is a direct corridor to their Creator and the site of essential religious practices that "cannot take place anywhere else." Op.13.

In 2014, Congress authorized the transfer of Oak Flat to Resolution Copper for a copper mine. Op.16. The government admits the mine will destroy Oak Flat, causing it to "subside" into a massive crater nearly two miles wide and 1,100 feet deep. 3-ER-282. "It is undisputed that this subsidence will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise at their sacred site." Murguia Op.181.

On January 4, 2021, the Forest Service announced the imminent commencement of the land transfer. Op.19. Plaintiff Apache Stronghold sued on January 12, 2021, alleging that the transfer and destruction of Oak Flat violates, *inter alia*, RFRA.

After the district court denied a preliminary injunction, Plaintiff asked this Court for emergency relief. A divided panel denied emergency relief, concluding that the government's promise to delay the land transfer made "examination of the merits" "premature." ECF 26 at 1-2. Judge Bumatay dissented, concluding that the destruction of Oak Flat is an "obvious substantial burden." *Id.* at 4, 7-12.

After briefing and argument, another divided panel denied relief. The majority didn't dispute that destroying Oak Flat was a substantial burden under RFRA's "plain meaning." Panel Op.30. Instead, citing *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc), it held that "substantial burden" is a "term of art" that refers to only "two specific qualitative burdens—denying a benefit or imposing a penalty." Panel Op.27, 19, 31. Under that rubric, destroying Oak Flat didn't count. Judge Berzon dissented, calling this analysis "illogical," "disingenuous," and "absurd." Berzon Op.58, 60, 63, 76.

On rehearing en banc, the Court splintered into two different 6-5 majorities, issuing seven opinions across 241 pages.

One majority ("Murguia majority") overruled *Navajo Nation*, concluding that the plain meaning of "substantial burden" includes government actions "preventing access to religious exercise." Op.10-11.

Another majority ("Collins majority"), however, held that RFRA's plain meaning doesn't apply to "a disposition of government real property." Op.11. In such cases alone, RFRA "subsumes" the "limits" on "what counts" as a "substantial burden" under the Collins majority's interpretation of *Lyng*. Under that interpretation, destroying Oak Flat doesn't substantially burden Plaintiff's religious exercise because it doesn't "coerce," "discriminate," "penalize" or "deny" "[equal] rights." Op.11.

Five dissenters explained that the Collins majority "tragically err[ed]" by rejecting "RFRA's plain text" and "the Supreme Court's" precedent.

Op.240. These "firmly establish[] that where the government prevents a person from engaging in religious exercise, the government has substantially burdened the exercise of religion." Op.214.

ARGUMENT

I. The Murguia majority agrees that Plaintiff faces a "substantial burden" under RFRA's plain meaning.

A majority of the en banc Court agreed that destroying Oak Flat is a "substantial burden" under RFRA's "plain meaning." Murguia Op.195-96; Nelson Op.107 ("ordinary meaning"); Op.10-11. Rightly so.

"Substantial burden" in RFRA is undefined. Courts typically give undefined terms their "plain meaning." *Tanzin v. Tanvir*, 592 U.S. 43, 48 (2020). That is what this Court did for "substantial burden" in RFRA's sister statute, RLUIPA. *See San Jose Christian Coll. v. Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) ("plain meaning" of "substantial burden" is "a significantly great restriction or onus"). And that is what the Supreme Court has done for other undefined terms in RFRA. *Tanzin*, 592 U.S. at 48 ("appropriate relief").

The plain meaning of "burden" is "[s]omething oppressive" or something that "imposes either a restrictive or onerous load." Murguia Op.196 (quoting dictionary definitions). "Substantial" means "[o]f ample or considerable amount, quantity, or dimensions." *Id.* Thus, the government "substantially burdens" an exercise of religion when it "oppresses" or "restricts" it to a "considerable amount." *Id.*

Here, it is undisputed that destroying Oak Flat restricts the exercise of religion at Oak Flat to a considerable amount. It "literally prevent[s]" it from ever occurring again. Op.29. That easily qualifies as a substantial burden.

II. The Collins majority rejects RFRA's plain meaning in conflict with Supreme Court precedent.

The Collins majority didn't dispute this account of RFRA's plain meaning. Instead, it declined to apply RFRA's plain meaning on two grounds: (a) *Lyng* gives "substantial burden" a special meaning in cases involving "the Government's management of its own land and internal affairs"; and (b) RFRA "subsumes" *Lyng*. Op.29-30, 43-46. Both are mistaken.

A. The majority misconstrues *Lyng* contrary to Supreme Court precedent.

The Collins majority first interprets *Lyng* as a sweeping rule construing the term "substantial burden" to exclude any "disposition of government real property" that doesn't "coerce," "discriminate," "penalize" or "deny" "[equal] rights," even if it "literally prevent[s]" religious exercise. Op.11, 27-29, 46. But this is doubly wrong.

1. First, *Lyng* isn't a substantial-burden case; it's a case, like *Employment Division v. Smith*, involving "neutral" and "generally applicable" laws. 494 U.S. at 881-85.

The Collins majority claims *Lyng* must have been a substantial-burden case because, in its view, "[t]he law at issue in *Lyng*" was "plainly not

'generally applicable.'" Op.32-33 & n.4, 48. The Collins majority repeatedly emphasizes this point, asserting that "the [Supreme] Court has not said, and could not have said, that *Lyng* was *itself* a case involving a neutral and generally applicable law." Op.33.

But the Supreme Court has said exactly that. *Trinity Lutheran* explained that, "[i]n recent years," the Court has "rejected free exercise challenges" where "the laws in question have been neutral and generally applicable"—and cited *Lyng* as the leading "example." 582 U.S. at 460. Thus, the linchpin of the Collins majority—that "[t]he law at issue in *Lyng* was manifestly *not* generally applicable" (Op.48)—is, according to *Trinity Lutheran*, manifestly wrong. Remarkably, the Collins majority never cites *Trinity Lutheran*.

But *Trinity Lutheran* isn't just a binding reading of *Lyng*; it's also correct. First, *Lyng* "does not even use 'substantial burden' or any analogous framing of the phrase." Nelson Op.136. Instead, *Lyng* says the burden was "incidental," in contrast with laws that "discriminate against religions." 485 U.S. 445-50, 453. This is the classic language of general applicability adopted in *Smith*. 494 U.S. at 878 (no strict scrutiny for burdens that are "the incidental effect of a generally applicable [law]").

Second, *Lyng* insisted that the "crucial word in the constitutional text is 'prohibit.'" 485 U.S. at 450-51. But the crucial term under RFRA is "substantially burden," not "prohibit." Indeed, the word "prohibit" is

where *Smith* expressly grounded the neutrality-and-general-applicability standard. 494 U.S. at 878. And both *Smith* and *Lyng* said the laws there didn't "prohibit" religious exercise for the same reason: they had only the "incidental effect" of making religious exercise "more difficult." *Id.* at 878, 880; *Lyng*, 485 U.S. at 450, 456. But again, the point of RFRA was to reject that standard, requiring strict scrutiny "without regard to whether … the exercise of religion has been burdened in an incidental way by a law of general application." *City of Boerne v. Flores*, 521 U.S. 507, 534-35 (1997).

Third, *Smith* not only interpreted "prohibiting" the same way as *Lyng*; it also "drew support for the neutral and generally applicable standard from ... *Lyng*." *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021). Specifically, in rejecting "the *Sherbert* test," which starts with the "substantial burden" inquiry, *Smith* cited *Lyng* as a leading example of a case that "abstained from applying the *Sherbert* test" "at all"—not a case that applied the test but found no substantial burden. 494 U.S. at 883-84.

In short, the Supreme Court has *thrice* characterized *Lyng* as a neutral-and-generally-applicable-law case (*Smith*, *Fulton*, *Trinity Lutheran*); it has *never* characterized it as a substantial-burden case.

2. Even assuming *Lyng* was a substantial-burden case, at most it supports only a narrower proposition not implicated here: that plaintiffs can't prove a substantial burden by alleging solely "subjective spiritual

harm," but must also identify an objective, substantial restriction on specific religious practices. Murguia Op.217-19.

Only this reading makes sense of how *Lyng* itself described plaintiffs' claims. *Lyng* repeatedly notes the road was "removed as far as possible from [religious] sites," and "[n]o sites where specific rituals take place were to be disturbed." 485 U.S. at 443, 454. Thus, the plaintiffs weren't restricted from "visiting" the area or continuing their religious practices; rather, they claimed the road would "create distractions" rendering their practices spiritually "ineffectual." *Id.* at 448, 450, 452-53.

That's why the Court analogized *Lyng* to *Bowen v. Roy*, where the plaintiffs claimed the government's use of their daughter's Social Security number would "'rob [her] spirit.'" 485 U.S. at 448 (quoting 476 U.S. 693, 696 (1986)). In neither case did plaintiffs point to any religious practice the government curtailed. Instead, the plaintiffs claimed the government's actions rendered their practices spiritually "ineffectual" or undermined their "spiritual development." *Id.* at 450-51.

Those cases have no application here, where it is undisputed that the physical destruction of Oak Flat will render continued religious practices there objectively "impossible." Murguia Op.221. Unlike *Lyng* and *Bowen*, the Court need not "measur[e] the effects of a governmental action on a religious objector's spiritual development." *Lyng*, 485 U.S. at 451. It need only recognize, as is undisputed, that physically destroying Oak Flat will

"literally prevent its future use for religious purposes." Op.29. That is a substantial burden.

B. The majority misinterprets RFRA contrary to its text and Supreme Court precedent.

Even assuming the Collins majority correctly interprets *Lyng*, there's no reason to believe that interpretation was "subsumed" into RFRA. Spatchcocking that interpretation into RFRA contradicts both RFRA's text and Supreme Court precedent.

1. RFRA's text approves two free-exercise precedents by name—*Sherbert* and *Yoder*, 42 U.S.C. §2000bb(b)(1)—but "does not address" *Lyng*. Nelson Op.140. So Congress knew how to incorporate pre-*Smith* precedent, but didn't incorporate *Lyng*.

Other provisions of RFRA squarely conflict with the majority's interpretation of *Lyng*. For example, RFRA expressly "applies to all Federal law, and the implementation of that law"—with no exception for government real property. 42 U.S.C. §2000bb-3(a). Even more, RFRA expressly defines the "exercise of religion" to include "[t]he use ... of real property" for religious exercise. *Id.* §§2000bb-2(4), 2000cc-5(7)(B). These provisions cannot be squared with a special carveout from RFRA for "government real property." Op.34.

Similarly, RFRA specifically applies to "laws 'neutral' toward religion" and to burdens resulting "from a rule of general applicability." 42 U.S.C. §§2000bb(a)(2), 2000bb-1(a). This repudiates *Smith*, which required

plaintiffs to overcome the neutrality-and-general-applicability standard by showing that a law "discriminates" against religious adherents or affords "unequal treatment." *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 532, 542 (1993). Yet the Collins majority reinstates that very requirement: plaintiffs must show a land-use decision "'discriminate[s]' against religious adherents" or "den[ies] them 'an equal share of … rights.'" Op.11. It would be hard to craft a test more inimical to RFRA's text.

Lacking any support within RFRA's text, the Collins majority reaches far outside it—to a most unlikely source: a fractured Supreme Court habeas decision no party or *amicus* ever cited. Op.41-47 (discussing *Williams v. Taylor*, 529 U.S. 362, 411 (2000) ("*Terry Williams*")). Even a Collins majority member expressed "reservations" about such "broad" use of a "theory" the Supreme Court "has not relied on … in the 23 years since" deciding *Terry Williams*, and this Court "never" has. Nelson Op.141. With good reason.

Terry Williams says that where a prior Supreme Court decision "concerned precisely the issue" later addressed by statute, "Congress need not mention [the decision] by name in [the] statute's text in order to adopt ... a meaning given a certain term in that decision." 529 U.S. at 411-12. But the prior Supreme Court decision here—which the Collins majority says is *Smith* (Op.43)—*didn't* "concern[] precisely the issue" of "substantial

burden." Indeed, that issue was never contested in *Smith*. What was contested was, rather famously, "categorically excepting neutral and generally applicable laws from the compelling interest test." Murguia Op.230-31. Thus, the Collins majority's tortuous line of reasoning—that under *Terry Williams*, Congress (*sub silentio*) adopted *Smith*'s (tacit) understanding of a term (substantial burden) that wasn't contested in *Smith*—falls flat.

2. The majority's strained recourse to a habeas case stands in stark contrast to the plethora of Supreme Court RFRA cases directly on point—all contradicting the majority's approach. For example, in *Tanzin*, the Court held that undefined terms in RFRA are interpreted according to their "plain meaning." 592 U.S. at 48. But the majority rejects RFRA's plain meaning. In *Holt*, the Court held that RFRA provides "greater protection" than the First Amendment. 574 U.S. at 357. But the majority says it provides the same protection (in land-use cases alone).

Most strikingly, in *Hobby Lobby*, the government offered an argument analogous to the majority's argument here—that RFRA "codif[ied]" (*i.e.*, subsumed) the legal framework of pre-*Smith* decisions, which had never extended to for-profit corporations. *Burwell v. Hobby Lobby Stores*, 573 U.S 682, 713 (2014). But the Supreme Court rejected this argument, explaining that RFRA's "text" shows Congress hadn't "tie[d] RFRA coverage tightly to the specific holdings of our pre-*Smith* free-exercise cases," and it "would be absurd if RFRA merely restored this Court's pre-*Smith*

decisions in ossified form." *Id.* at 706, 714-16. Yet the Collins majority does just that—holding that RFRA "subsumes" *Lyng* in ossified form—because, apparently, the key to understanding RFRA is not RFRA's text, nor binding RFRA precedent like *Tanzin* and *Hobby Lobby*, but dictum from a habeas decision that no court or litigant has ever cited to interpret RFRA until now.

Undaunted, the Collins majority says RFRA cannot have "the practical effect of displacing, by statute, the pre-*Smith* decision in *Lyng*." Op.35. But that is precisely what RFRA has done to *other* "pre-*Smith*" decisions involving the government's "internal affairs." Op.30. Indeed, *Smith* itself grouped *Lyng* with two other cases departing from the *Sherbert* test in quintessential matters of internal affairs: prisons and the military. 494 U.S. at 883-84 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987); *Goldman v. Weinberger*, 475 U.S. 503 (1986)); Op.62-64 (Bea, J., concurring) (citing these cases). Yet RFRA and RLUIPA indisputably displace these pre-*Smith* decisions. *See, e.g.*, *Holt*, 574 U.S. at 361 (court below "improperly imported" *O'Lone*'s limits; "RLUIPA provides greater protection"); *Singh v. Berger*, 56 F.4th 88, 91-93 (D.C. Cir. 2022) ("military decisions" subject to "RFRA scrutiny" notwithstanding *Goldman*). The majority offers no reason why the lone exception is *Lyng*.

C. The majority renders RFRA incoherent and uniquely hostile to Native Americans.

The majority's substantial-burden test also defies logic. For example, under the majority's test, if the government posts "No Trespassing" signs at Oak Flat and "penalizes" visitors for trespassing, it imposes a substantial burden (Op.11)—even though Apaches can still risk penalties to worship there. But if the government blasts Oak Flat to oblivion, it imposes no substantial burden at all—even though Apaches can never worship there again. The majority never explains why trespassing fines are a substantial burden but complete destruction isn't.

Perhaps the majority would say trespassing fines aren't a substantial burden either—provided they're "*nondiscriminatory*." Op.34. But that defies RFRA's text, which applies "even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a). So there is no escaping the absurdity.

Nor does the majority offer any principled reason why RFRA applies to the management of prisons but not other property. Under the majority's test, RFRA strangely gives greater freedom to prisoners erecting a sweat lodge in prison than to Apaches erecting a sweat lodge on their ancestral land. Op.29 (citing *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014)).

The majority says this is because prison "inherently involve[s] coercive restrictions." Op.47. But so does the government's control of Oak Flat. In

both contexts, "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.'" Op.235 (quoting Barclay & Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1301 (2021)). Thus, just as prisoners are "at the mercy of government permission" to exercise religion in prison, Apaches are at the mercy of government permission to do so at Oak Flat. *Id.* If anything, the government should have *more* discretion to manage prisons than park-lands—yet the majority gives it less.

So too for the military, which by any definition is part of the government's "internal affairs." Op.30; Nelson Op.107. The government readily complies with RFRA in the most sensitive matters of military readiness and national security—like accessing naval bases, *United States v. Grady*, 18 F.4th 1275 (11th Cir. 2021), vaccinating troops, *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022), and testing helmets and gas masks, *Singh v. Carter*, 168 F. Supp. 3d 216, 218 (D.D.C. 2016). Why not in managing land?

The answer, the majority seems to think, is that the government must be free "to use what is, after all, *its* land." Op.27 (quoting *Lyng*); Nelson Op.119 (same). But RFRA applies to "all Federal law," including "[t]he use ... of real property" for religious exercise. 42 U.S.C. §§2000bb-3(a), 2000cc-5(7)(B), 2000bb-2(4). And even when RFRA applies, it's hardly "an automatic loss for the government"; it simply triggers "the second step of

the analysis, the compelling interest test," which is what Congress prescribed for "balancing competing interests." Berzon Op.76-77.

In any event, the government's interest in using land is already constrained by a bevy of restrictive laws. Environmentalists can sue to stop water pollution at Oak Flat under the CWA, air pollution under the CAA, hazardous waste contamination under CERCLA, and inadequate environmental statements under NEPA. Atheists can sue to stop religious promotion under the Establishment Clause or unreasonable speech restrictions under the Speech Clause. Only RFRA claims are too much.

Even endangered animals fare better than Native Americans. If a mine at Oak Flat would kill endangered fish, the project could not proceed. *See TVA v. Hill*, 437 U.S. 153 (1978) (enjoining dam). But if a mine at Oak Flat would terminate Apache religious exercises, the government need offer no justification at all. That interpretation of RFRA is perverse.

It is also uniquely discriminatory toward Native Americans. Native American sacred sites are disproportionately located on federal land because the government has a history of taking them. NCAI Br.4-11. So selectively carving out federal land from RFRA denies Native Americans the same "very broad protection for religious liberty" everyone else enjoys. *Hobby Lobby*, 573 U.S. at 693.

III. If any case merits full-court rehearing, it is this one.

This Court's limited en banc process is premised on the notion that an eleven-judge panel is "sufficiently representative to serve as a proxy for

[the] full court." Chief Judge Sidney R. Thomas, *Examining Ideas for Restructuring the Ninth Circuit*, 115th Cong. ("Thomas") at 30 (2017), https://perma.cc/DHS6-VFU3. Here, however, only six judges—and only five of twenty-nine active judges (17%)—have voted for a result that binds the entire court. *See Compassion in Dying v. Washington*, 85 F.3d 1440, 1446 (9th Cir. 1996) (O'Scannlain, J., dissenting from denial of full-court rehearing) ("It is especially egregious when only eight of the twenty-four active judges"—33%—binds the full court.) In fact, twelve of this Court's judges have now considered the substantial-burden question, splitting 6-6. Murguia Op.180; Bumatay Op.4. Thus, there is strong reason to believe the full court would reach a different result.

Limited en banc review has also been defended on the ground that a "limited en banc panel has rarely, if ever, reversed the decision of a prior en banc panel." Thomas at 33. But that's what occurred here. Op.4.

Worse, the majority's "shapeshifting" new test "leaves litigants in the dark as to what 'substantial burden' means." Murguia Op.181, 234-35. The majority strings together isolated fragments of *Lyng*—"coerce," "discriminate," "penalize," "deny equal rights"—without any discussion of how they relate or what they mean. Several of these elements are redundant: "penalizing" is a form of "coercion," and "denying equal rights" is both "discrimination" and (as *Lyng* said, 485 U.S. at 449) a way to "penalize." At least two elements are also present here: transferring and destroying Oak Flat "coerces" the Apaches to stop their religious activities

and subjects them to "penalties" for trespassing. Berzon Op.79 n.6. Meanwhile, it remains unclear how "discriminating" and "denying equal rights" can be touchstones of the substantial-burden test when RFRA expressly applies to "neutral" and "generally applicable" laws. *See* 42 U.S.C. §§2000bb(a)(2), 2000bb-1(a).

Perhaps all these irregularities could be overlooked if the stakes were low. But this case threatens the permanent destruction of a site essential to Apache existence. More than that: this Circuit encompasses far more Native Americans and federal land than any other—meaning this Court has a far greater say over the lives of Native Americans than any other. And, given the Supreme Court's diminishing docket, this Circuit may have the final say.

In short, the Court has never had a case where the "goals of the en banc process" were so fundamentally disserved—where one en banc panel has overruled another on an issue of unique importance in this Circuit (and existential importance to Native Americans); where twelve judges are evenly split; where only five active judges are dictating the law for the entire Court; and where a splintered majority decision fails to "ensur[e] the coherence" of this Court's law or "its consistency with" Supreme Court precedent. *Abebe v. Holder*, 577 F.3d 1113, 1122 (9th Cir. 2009) (Berzon, J., dissenting from denial of full-court rehearing). Such a rare breakdown of the limited en banc process warrants full-court review.

In the alternative, the en banc panel or full Court should certify the controlling substantial-burden question to the Supreme Court. *See* 28 U.S.C. §1254(2); Sup.Ct.R.19; *see also* Shapiro et al., Supreme Court Practice §9.1 (11th ed. 2019). "[T]he certification process serves a valuable, if limited, function," particularly when a "pure question of law" is "narrow, debatable, and important." *United States v. Seale*, 558 U.S. 985 (2009) (Stevens, J., joined by Scalia, J., respecting dismissal of certificate). At minimum, certification is appropriate here. *See*, *e.g.*, *United States v. Seale*, 577 F.3d 566, 571 (5th Cir. 2009) (certifying under Rule 19); *United States v. Penaranda*, 375 F.3d 238, 245-46 (2d Cir. 2004) (same).

CONCLUSION

The Court should grant rehearing en banc before the full Court.

Respectfully submitted,

/s/ *Luke W. Goodrich*

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 15, 2024. 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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