

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

**BRIEF OF *AMICI CURIAE* RELIGIOUS LIBERTY LAW
SCHOLARS SUPPORTING PLAINTIFF-APPELLANT**

NELSON MULLINS RILEY & SCARBOROUGH LLP
Miles E. Coleman
Counsel of Record
2 W. Washington Street, 4th Floor
Greenville, SC 29601
(864) 373-2352
miles.coleman@nelsonmullins.com

Thomas Hydrick
Hunter Windham
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

March 25, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. RFRA’s text, as confirmed by its legislative history, supports a definition of “substantial burden” more expansive than that used by the District Court.....2

A. The plain meaning of RFRA supports an expansive interpretation of “substantial burden.”3

B. RFRA’s legislative history supports an expansive interpretation of “substantial burden.”4

C. RFRA’s purpose confirms this conclusion.6

II. RFRA and RLUIPA contain and apply the same definition of “substantial burden.”6

III. The District Court erred in applying an excessively narrow definition of “substantial burden,” ignoring both RFRA’s text and binding precedent.8

A. The District Court’s ruling diverges from RFRA’s plain language.8

B. The District Court’s ruling is contrary to precedent.9

C. This case is distinguishable from *Lying* and *Navajo Nation* and, in any event, those opinions’ holdings and reasoning do not and should not be extended to this case.13

D. This proceeding gives rise to a “substantial burden” under RFRA.14

CONCLUSION 16

APPENDIX—IDENTITY OF *AMICI CURIAE* A1

CERTIFICATE OF COMPLIANCE C1

CERTIFICATE OF SERVICE C2

TABLE OF AUTHORITIES

Cases	Page(s)
<i>A-Z Intern. v. Phillips</i> , 323 F.3d 1141 (9th Cir. 2003)	3
<i>Agudath Israel of America v. Cuomo</i> , 983 F.3d 620 (2d Cir. 2020)	13
<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014).....	4
<i>Capitol Hill Baptist Church v. Bowser</i> , --- F. Supp. 3d ----, 2020 WL 5995126 (D.D.C. Oct. 9, 2020)	13
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997).....	6
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005).....	6
<i>Davila v. Gladden</i> , 777 F.3d 1198 (11th Cir. 2015)	12
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990).....	4, 5
<i>Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal</i> , 546 U.S. 418 (2006)	8
<i>Greene v. Solano Cnty. Jail</i> , 513 F.3d 982 (9th Cir. 2008)	10
<i>Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter</i> , 456 F.3d 978 (9th Cir. 2006)	9, 16
<i>Holt v. Hobbs</i> , 574 U.S. 352 (2015).....	7, 8

In re Young,
82 F.3d 1407 (8th Cir. 1996)12

Int’l Church of Foursquare Gospel v. City of San Leandro,
673 F.3d 1059 (9th Cir. 2011)9, 16

Lyng v. Northwest Indian Cemetery Protective Ass’n,
485 U.S. 439 (1988).....14

Maryville Baptist Church v. Beshear,
957 F.3d 610 (6th Cir. 2020)13

Murphy v. Mo. Dep’t of Corr.,
372 F.3d 979 (8th Cir. 2004)10

Nance v. Miser,
700 Fed. App’x 629 (9th Cir. 2017)7

Navajo Nation v. U.S. Forest Service,
535 F.3d 1058 (9th Cir. 2008) (en banc)3, 14, 15, 16

Roman Catholic Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020).....12, 13

Tanzin v. Tanvir,
141 S. Ct. 486 (2020).....9, 16

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017).....9

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005)10

Werner v. McCotter,
49 F.3d 1476 (10th Cir. 1995)10, 11, 12

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014)10, 11

Statutes

42 U.S.C. §§ 2000bb *et seq.*.....*passim*

42 U.S.C. § 2000bb-1.....3, 7

42 U.S.C. § 2000bb-2(4).....3
42 U.S.C. § 2000bb(a)(4).....4
42 U.S.C. §§ 2000cc-1 *et seq.*.....*passim*
42 U.S.C. § 2000cc-3(g)7
Pub. L. 106-274, § 7(a)(3), 114 Stat. 803, 807 (2000)7

Other Authorities

FS Resolution Copper Project and Land Exchange Environmental
Impact Statement, 2 FEIS at 790 (U.S.D.A. 2021)15
S. REP. 103-111, 8, 1993 U.S.C.C.A.N. 18925

IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Religious liberty law scholars Helen M. Alveré, Thomas C. Berg, Alan Brownstein, Angela C. Carmella, Ronald J. Colombo, Richard A. Epstein, Marie Failinger, David F. Forte, Richard W. Garnett, Robert P. George, Michael J. Perry, and Stacy Scaldo submit this brief as *amici curiae* in support of the requested injunction.² *Amici* have studied and written extensively about the exercise of religion under the law in the United States, with particular attention to 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.* They write to aid the Court in interpreting and applying RFRA.

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.

SUMMARY OF ARGUMENT

The District Court’s ruling giving rise to the pending appeal rests in part on an astonishing and cramped interpretation of RFRA’s text. Believing its hands tied by prior pronouncements of this Court and the Supreme Court, the District Court ruled that Native religious exercise is not substantially burdened by the immediate, permanent, and irreversible destruction of a unique and irreplaceable sacred site that is undisputedly central to Apache religious observance.

This remarkable ruling departs from plain language of RFRA’s text, ignores its legislative history, misapprehends the import of RLUIPA’s identical language and of precedent interpreting it, and is contrary to the Supreme Court’s and the lower courts’ precedent.

This Court should grant the Plaintiff-Appellant’s requested relief; should correct the lower court’s erroneous interpretation of RFRA; and should clarify the scope of RFRA’s “substantial burden” as properly discerned from RFRA’s text and demonstrated in binding and persuasive precedent.

ARGUMENT

I. RFRA’s text, as confirmed by its legislative history, supports a definition of “substantial burden” more expansive than that used by the District Court.

The District Court ruled that, under RFRA, the government substantially burdens the exercise of religion *only* when it withholds a benefit or imposes a sanction in consequence of a person’s religious exercise, *not* when it forcibly prevents religious exercise or destroys the sacred objects or locations necessary for

such exercise. *See* ER.14, 17.³ That interpretation defies not only logic but also RFRA’s text and legislative history.

A. The plain meaning of RFRA supports an expansive interpretation of “substantial burden.”

RFRA states: “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).” 42 U.S.C. § 2000bb-1. RFRA does not define “substantially burden,” nor does it impose any limitation on the plain and ordinary meaning of those words. Accordingly, courts look to the words’ ordinary meanings. *A-Z Intern. v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003). A “burden” is “[s]omething that hinders or oppresses.” Black’s Law Dictionary (11th ed. 2019). A burden is substantial when it is “[c]onsiderable in importance, value, degree, amount, or extent.” Am. Heritage Dictionary (5th ed. 2020). Consequently, RFRA prohibits government action that “hinders or oppresses” a person’s exercise of religion to a considerable degree or extent. *Navajo Nation v. USFS*, 535 F.3d 1058, 1090 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting).

Notably, RFRA’s definition of “exercise of religion” incorporates the definition found in RLUIPA. *See* 42 U.S.C. § 2000bb-2(4). RLUIPA, in turn, defines “religious exercise” to include “any exercise of religion, whether or not

³ Excerpts of Record (Appellate Docket Entry 6-2) will be cited as ER.[##].

compelled by, or central to, a system of religious belief,” including “[t]he use . . . of real property for the purpose of religious exercise.” *Id.* § 2000cc-5(7)(A)–(B).

Taking these definitions together, the plain and ordinary meaning of RFRA’s text prohibits the government from hindering to a considerable degree the use of real property for the purpose of religious exercise. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014) (noting RFRA was enacted “to provide very broad protection for religious liberty.”). The District Court’s more cramped definition lacks any support in the statutory text.

B. RFRA’s legislative history supports an expansive interpretation of “substantial burden.”

Although the text of RFRA is unambiguous and requires no resort to legislative history to determine its meaning, such history supports an interpretation of “substantial burden” more expansive than that reached by the District Court. Congress enacted RFRA in direct response to the Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). In Congress’s view, *Smith* had “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,” *see* 42 U.S.C. § 2000bb(a)(4), and Congress enacted RFRA because “governments should not substantially burden religious exercise without compelling justification,” *id.* § 2000bb(a)(3). Thus, RFRA’s purpose was to implement Congress’s desire that

courts require the government to justify substantial burdens placed on religious exercise.

In enacting RFRA, Congress intended to provide a remedy for a variety of government actions it deemed to be substantial burdens on religious exercise. These objectionable actions include not only the withholding of benefits or the impositions of penalties, but also restrictions on land use by religious groups, restriction on religious practices in prisons, and the performance of unconsented procedures violative of religious beliefs. *See* S. REP. 103-111, 8, 1993 U.S.C.C.A.N. 1892, 1897 (“[*Smith*] has created a climate in which the free exercise of religion is jeopardized. . . . Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families’ faith.”).

This history confirms what is apparent from RFRA’s text. If sanctions against the person (*e.g.*, the threat of a misdemeanor arrest or the withholding of unemployment benefits) are a substantial burden, even more so is the government’s use of raw, insuperable force to *prohibit* an entire faith group’s religious observances or to *compel* violations of conscience, for example through the destruction of religious property or forced violations of bodily integrity. Penalties and withheld benefits are coercive incentives to be sure, but prohibitions like those challenged here are greater, more fundamental, absolute burdens that deprive

believers of any choice and, by the imposition of brute force, compel violations of religious strictures or prevent religious exercise *in toto*.

C. RFRA’s purpose confirms this conclusion.

The purpose of the Act supports the textual interpretation described above. RFRA was enacted for two distinct purposes: (1) to restore the compelling interest test set forth in *Sherbert* and *Yoder* and “to guarantee its application in all cases where free exercise of religion is substantially burdened,” and (2) “to provide a claim or defense to persons whose religious exercise is substantially burdened by government.” 42 U.S.C. § 2000bb. Although the statute expressly purports to restore the compelling interest test outlined in *Sherbert* and *Yoder*, it does not adopt those decisions’ definition of substantial burden, nor does it state those decisions’ fact patterns are the *only* burdens qualifying as substantial.

II. RFRA and RLUIPA contain and apply the same definition of “substantial burden.”

Congress enacted RLUIPA in response to the Supreme Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which invalidated RFRA as applied to the States. RLUIPA reimposes the restrictions of RFRA on state and local prisons and on municipal land-use regulations. *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005).

Given this history, it is unsurprising that RFRA and RLUIPA share many similarities. Most significantly, both RFRA and RLUIPA prohibit government

action or policy that creates a substantial burden on the free exercise of religion unless such burden is narrowly tailored and in furtherance of a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1; *id.* § 2000cc; *id.* § 2000cc-1.

In addition, the statutes’ texts and binding precedent demonstrate the substantial burden standard in the two statutes is identical. The statutes’ texts indicate Congress intended RFRA and RLUIPA to be similarly interpreted. Neither statute expressly defines substantial burden, and as a result, Congress intended the term to be defined in both statutes according to its ordinary meaning. *See Phillips*, 323 F.3d at 1146. Accordingly, a court defining the term *in either* statute will necessarily arrive at the same expansive definition.⁴ Further, when Congress amended RFRA in 2000, it expressly incorporated RLUIPA’s definition of “religious exercise” into RFRA, thus further harmonizing the interpretation of the statutes and ensuring they both protect “the use . . . of real property for the purpose of religious exercise.” *See* Pub. L. 106-274, § 7(a)(3), 114 Stat. 803, 807 (2000).

Not surprisingly, then, Supreme Court and Ninth Circuit precedent hold the two statutes impose “the same standard.” *Holt v. Hobbs*, 574 U.S. 352, 358 (2015); *Nance v. Miser*, 700 Fed. App’x 629, 630 (9th Cir. 2017). Because the standards

⁴ This expansive interpretation is consistent with RLUIPA’s construction provision, which requires the Act to “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms . . . and the Constitution.” 42 U.S.C. § 2000cc-3(g).

are identical, courts routinely rely on RLUIPA cases to interpret RFRA and vice versa. *Holt*, 574 U.S. at 357–58 (RLUIPA case relying on RFRA precedent); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (RFRA case relying on RLUIPA precedent). The District Court’s ruling concluding otherwise, *see* ER.14–15 n.8, erred.

III. The District Court erred in applying an excessively narrow definition of “substantial burden,” ignoring both RFRA’s text and binding precedent.

In denying Apache Stronghold’s Motion for a Preliminary Injunction, the District Court ruled that the RFRA claim failed because Section 3003 of the NDAA—the provision authorizing the exchange of the land at issue—did not impose a substantial burden on Apache religious exercise. The District Court held that a substantial burden is imposed within the meaning of RFRA in *only* the two circumstances presented in *Sherbert* and *Yoder*, namely (1) when individuals are forced to choose between following their religion and receiving a government benefit or (2) when individuals are directly coerced to violate their religious beliefs by the threat of civil or criminal sanctions. *See* ER.14. This holding was incorrect for the reasons described below.

A. The District Court’s ruling diverges from RFRA’s plain language.

The District Court’s ruling is contrary to the text of RFRA. As explained above, the statute’s plain language states the government shall not “substantially burden a person’s exercise of religion.” Applying the ordinary meaning of this term

and the statute's definition of exercise of religion, RFRA prohibits the government from hindering or oppressing to a considerable degree a person's exercise of religion, including a person's use of real property for religious purposes. The District Court's definition of substantial burden is far narrower than the plain and ordinary meaning of the statutory term and is unduly restrictive.

B. The District Court's ruling is contrary to precedent.

The District Court's ruling is contrary to binding and persuasive precedent from the Supreme Court, this Circuit, and other circuits. The Supreme Court has held a wide variety of government actions to be a substantial burden, including actions that would not fit within the District Court's definition. *See, e.g., Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) (describing the destruction of religious property and an autopsy as RFRA violations); *see also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (noting that the Free Exercise Clause protects against even indirect coercion or penalties).

The District Court's holding is also contrary to binding authority from within this Circuit interpreting the substantial burdens in the RLUIPA context. For example, this Court has repeatedly defined substantial burden according to its plain meaning and has found a wide variety of government actions to impose a substantial burden on the exercise of religion. *See, e.g., Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (substantial burden when church was prevented from building a place of worship); *Guru Nanak*

Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978, 988 (9th Cir. 2006) (same regarding denial of a permit to build a temple); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (same regarding refusal to allow inmate to attend worship services); *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) (same regarding forcing inmate to cut his hair).

Further, the District Court’s holding conflicts with the approach of several other circuit courts, which have all adopted a broader definition of substantial burden than the District Court. The destruction of Oak Flat would plainly constitute a substantial burden under any of these approaches.

The Tenth Circuit, for example, has held that government action is a substantial burden in at least three circumstances: (1) when it “significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person’s] individual beliefs”; (2) when it “meaningfully curtail[s] a [person’s] ability to express adherence to his or her faith”; and (3) when it den[ies] a [person] reasonable opportunities to engage in those activities that are fundamental to a [person’s] religion.” *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995).

Since then, the Tenth Circuit has recognized that a wide variety of government action may be substantial burdens and has held that the withholding of a benefit or the threat of sanction are but a floor—not a ceiling—for determining what constitutes a substantial burden. *See, e.g., Yellowbear v. Lampert*, 741 F.3d 48, 51–52, 55 (10th Cir. 2014) (Gorsuch, J.) (holding government actions that

make religious exercise physically impossible “easily” constituted a substantial burden, and noting that “this court has explained that a burden on a religious exercise rises to the level of being ‘substantial’ when (at the very least) the government (1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in a religious activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief—for example, by presenting an illusory or Hobson’s choice where the only realistically possible course of action available to the plaintiff trenches on sincere religious exercise.”).

The Eighth Circuit adopted the *Werner* definition of substantial burden in the context of RFRA in *In re Young*, 82 F.3d 1407 (8th Cir. 1996). In defining substantial burden, the Eighth Circuit noted, “It is sufficient that the governmental action in question meaningfully curtails, albeit retroactively, a religious practice of more than minimal significance in a way that is not merely incidental.” *In re Young*, 82 F.3d at 1418–19.

The Eleventh Circuit has held that a government action is a substantial burden when it “significantly hamper[s] one’s religious practice.” *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015) (quoting *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007)).

Under any of these approaches, the destruction of Oak Flat constitutes a religious burden, as it unquestionably prevents, curtails, and seriously hampers the abilities of Western Apaches to exercise their religion. *See Davila*, 777 F.3d at 1205; *In re Young*, 82 F.3d at 1418; *Werner*, 49 F.3d at 1480.

Recently, the Supreme Court and lower courts across the country have concluded that COVID restrictions prohibiting or even severely curtailing religious observances constitute a substantial burden on the exercise of religion under the First Amendment and under RFRA. *See, e.g., Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (holding state restrictions that prevented the attendance of “the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat” “unquestionably constitute[] an irreparable injury” under the First Amendment); *id.* at 72 (Gorsuch, J., concurring) (“Nor may we discount the burden on the faithful who have lived for months under New York’s unconstitutional regime unable to attend religious services.”); *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (“The restrictions challenged here specially and disproportionately burden religious exercise, and thus strike at the very heart of the First Amendment’s guarantee of religious liberty.”); *Maryville Baptist Church v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (“The Governor’s actions substantially burden the congregants’ sincerely held religious practices—and plainly so. Religion motivates the worship services. And no one disputes the Church’s sincerity. Orders prohibiting religious gatherings,

enforced by police officers telling congregants they violated a criminal law and by officers taking down license plate numbers, amount to a significant burden on worship gatherings.”); *Capitol Hill Baptist Church v. Bowser*, --- F. Supp. 3d ---, 2020 WL 5995126, at *6 (D.D.C. Oct. 9, 2020) (“The District has not, as it contends, banned merely ‘one method of worship,’ but instead has foreclosed the Church’s *only* method to exercise its belief in meeting together as a congregation, as its faith requires. Given the District’s restrictions, the Church now must choose between violating the law or violating its religious convictions. This constitutes a substantial burden under RFRA.”).

To the extent COVID restrictions substantially burden religious exercise by preventing or limiting the size of a religious worship services for a limited period of time, so too the destruction of Oak Flat presents a similar—if not exponentially greater—burden by rendering religious worship or exercise at Oak Flat fundamentally impossible forever.

C. This case is distinguishable from *Lyng* and *Navajo Nation* and, in any event, those opinions’ holdings and reasoning do not and should not be extended to this case.

The District Court believed its cramped interpretation of RFRA’s text was compelled by *Navajo Nation v. USFS*, 535 F.3d 1058 (9th Cir. 2008) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). See ER.14, 16. This proceeding, however, is factually distinguishable from those cases. Neither of them involved the physical destruction of a sacred site, and both

acknowledged that if (as here) the challenged action *had* involved the physical destruction of sacred sites and objects, the outcome would have been different. *Lyng*, 485 U.S. at 454; *Navajo Nation*, 535 F.3d at 1063; *see also Lyng*, 485 U.S. at 453 (noting that if, as here, the challenged action “prohibit[ed] the Indian respondents from *visiting* [the sacred site, it] would raise a different set of constitutional questions.”).

Further, *Navajo Nation* did not (as the District Court ruled) hold the burdens imposed in *Sherbert* and *Yoder* are the *only* burdens qualifying as “substantial.” *See* ER.14. Rather, those cases merely set a *minimum* for the degree of oppression necessary to constitute a substantial burden. *See Navajo Nation*, 535 F.3d at 1070 (“Any burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is not a ‘substantial burden’ within the meaning of RFRA”) (emphasis added). Nor should the reasoning of *Navajo Nation* extend to this case, because its application here would conflict with the plain language, purpose, and meaning of RFRA detailed above.

D. This proceeding gives rise to a “substantial burden” under RFRA.

Given the text of RFRA and the authority noted above, the District Court erred in applying an excessively narrow definition of substantial burden. Applying the proper definition, the government’s challenged action unquestionably hinders or oppresses Native religious exercise to a considerable degree. In fact, the government action at issue does not merely inhibit or limit the exercise of religion,

it outright denies Apaches the opportunity to practice their religion by both effectively prohibiting religious exercise *and* destroying the site of such religious exercise.

Western Apaches have used Oak Flat as a sacred religious ceremonial ground since time immemorial. And as the District Court itself recognized, “[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated.” ER.11. The land is not simply *where* Apaches conduct religious ceremonies; it is itself essential to those religious exercises, and without Oak Flat, the Western Apaches cannot practice their faith.

The government action challenged here will prohibit Apaches’ religious use of Oak Flat and forever destroy key aspects of the religious site. As the Forest Service itself recognized in its Final Environmental Impact Statement, once mining begins, “[a]rcheological sites cannot be reconstructed,” “[s]acred springs would be eradicated,” and there will be “[c]hanges that permanently affect the ability of tribal members to use [the site] for cultural and religious purposes.” 2 FEIS at 790 (U.S.D.A. 2021), *available at* <https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-2.pdf>.

Such prohibition and destruction plainly constitute a substantial burden on Apaches’ religious exercise, and the District Court erred in concluding otherwise. *See Tanzin*, 141 S. Ct. at 492; *International Church of Foursquare Gospel*, 673

F.3d at 1066–70; *Guru Nanak Sikh Soc.*, 456 F.3d at 987–92; *see also Navajo Nation*, 535 F.3d at 1090 (Fletcher, J., dissenting).

CONCLUSION

For the foregoing reasons, *amici* respectfully request this Court grant Plaintiff-Appellant’s requested relief; correct the lower court’s erroneous interpretation of RFRA; and clarify the scope of RFRA’s “substantial burden” as properly discerned from RFRA’s text and from binding and persuasive precedent.

Respectfully submitted,

s/ Miles E. Coleman

MILES E. COLEMAN

Counsel of Record

NELSON MULLINS RILEY & SCARBOROUGH LLP

2 W. Washington Street, 4th Floor

Greenville, SC 29601

(864) 373-2352

miles.coleman@nelsonmullins.com

Thomas Hydrick

Hunter Windham

NELSON MULLINS RILEY & SCARBOROUGH LLP

1320 Main Street, 17th Floor

Columbia, SC 29201

(803) 799-2000

Attorneys for amici curiae

March 25, 2021

APPENDIX

IDENTITY OF *AMICI CURIAE*

Helen M. Alvaré
Professor of Law
Antonin Scalia Law School, George Mason University

Thomas C. Berg
James L. Oberstar Professor of Law and Public Policy
University of St. Thomas School of Law (Minnesota)

Alan Brownstein
Professor of Law emeritus
UC Davis School of Law

Angela C. Carmella
Professor of Law
Seton Hall University School of Law

Ronald J. Colombo
Professor of Law
Associate Dean for Distance Education
Maurice A. Deane School of Law
Hofstra University

Richard Epstein
Laurence A. Tisch Professor of Law
NYU School of Law
Peter and Kirstin Bedford Senior Fellow, Hoover Institution
Senior Lecturer, University of Chicago.
Senior Fellow, Center for Clinical Medical Ethics at the University of Chicago
Division of Biological Sciences

David F. Forte
Professor of Law
Cleveland State University
Cleveland Marshall College of Law

Richard W. Garnett
Paul J. Schierl / Fort Howard Corporation Professor of Law
Director, Notre Dame Program on Church, State & Society
Concurrent Professor of Political Science, Notre Dame Law School

Robert P. George
McCormick Professor of Jurisprudence
Director of the James Madison Program in American Ideals and Institutions
Princeton University

Michael J. Perry
Robert W. Woodruff Professor of Law
Emory University School of Law

Stacy Scaldo
Associate Dean of Library; Associate Professor of Law
Florida Coastal School of Law

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 type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,552 words excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

s/Miles E. Coleman
MILES E. COLEMAN

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, 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/ Miles E. Coleman
MILES E. COLEMAN