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
Honorable Steven P. Logan
(2:21-cv-00050-PHX-SPL)

REPLY BRIEF OF PLAINTIFF-APPELLANT APACHE STRONGHOLD

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INTRODUCTION

Plaintiffs' position on RFRA is simple: Government "substantially burdens" religious exercise when it makes religious exercise *significantly more costly or difficult*. Here, the Government isn't just making Plaintiffs' religious exercise more difficult; it's making it *impossible*—forever.

To evade this logic, the Government focuses on a stilted theory of *Navajo Nation*, claiming that only two types of governmental action can ever result in a substantial burden: "impos[ition] [of] punishment" or "denial of an otherwise-available benefit." Resp.26. But its brief eventually abandons that theory. It admits that *Navajo Nation* says any burden "short of" these doesn't count—suggesting that burdens *greater than* these do. And it admits that this theory can't account for a host of cases—from the denial of religious accommodations in prison, to the confiscation of religious objects, to the performance of an unwanted autopsy. Instead, the Government says, these cases are governed by various exceptions to its theory—for "coercive control" in prison, violation of "personal and real property" rights, or even "a 'quasi-property' right in the body of the deceased." Resp.34, 38, 40-41. But these *ad hoc* exceptions explode the Government's two-category theory of *Navajo Nation*.

So the Government offers a second, even more sweeping theory: RFRA simply doesn't apply to "the management of [Government's] own property." Resp.1. But the Government backs off this theory even more quickly than the first—admitting that RFRA applies to "all Federal law,"

including "federal land-management statutes and their implementation" (Resp.16-17), and admitting that it would be a substantial burden if the Government simply "fenced off Oak Flat and threatened 'sanctions' for trespassing" (Resp.26). Conspicuously absent from the Government's brief is any principled explanation of why fencing off Oak Flat is a substantial burden, but blasting it to oblivion is not. The only discernable "principle" appears to be that Native Americans must lose. But that simply confirms that the only principled theory on offer is Plaintiffs'—which also coheres with RFRA's text, longstanding precedent, and common sense.

The Government fares no better under the Free Exercise Clause. It doesn't dispute that it made an individualized, value-laden decision to prefer a copper mine over religion; it says only that it harbored no "discriminatory purpose." Resp.50. But the Supreme Court's recent decisions in *Fulton* and *Tandon* reject any requirement of discriminatory purpose. Instead, they imposed strict scrutiny simply because the government retained discretion to make individualized decisions (*Fulton*), or prioritized secular over religious interests (*Tandon*)—both of which the Government did here.

The destruction of Oak Flat also violates the 1852 Treaty, in which the Government promised to protect Apache territory and the normal incidents of Indian life thereon, including religious exercise. In response, the

Government claims the Treaty was too vague to mean anything, was abrogated by Congress, or doesn't protect individual Apaches. But the Supreme Court has repeatedly found language like the 1852 Treaty to create specific treaty obligations; it has rejected abrogation when Congress never mentioned the treaty; and it has routinely allowed individual tribal members to enforce treaty rights. The Government cannot account for these cases.

Finally, there is no question that Plaintiffs face irreparable harm warranting a preliminary injunction. Courts have repeatedly held that a colorable violation of RFRA, which protects First Amendment rights, constitutes irreparable harm. And the Government's own FEIS admits the destruction of Oak Flat will be "immediate," large-scale, and "permanent." Accordingly, Plaintiffs are entitled at minimum to have their claims fully heard before their sacred site is forever destroyed.

ARGUMENT

I. The Government's actions violate RFRA.

The substantial-burden analysis is not complicated. Government "substantially burdens" religious exercise when it makes religious exercise *significantly more costly or difficult*. It can do this by threatening sanctions or loss of benefits—*e.g.*, *if you possess eagle feathers, we will fine you*. Or it can do this by making the exercise impossible—*e.g.*, *we are confiscating your feathers*. *Cf. McAllen Grace Brethren Church v. Salazar*,

764 F.3d 465, 472 (5th Cir. 2014). When government makes religious exercise impossible, its actions "easily" qualify as a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.). The Government's efforts to evade this rule contradict RFRA's text, controlling precedent, and common sense.

1. Text. Looking to "ordinary, contemporary, common meaning," this Court defined "substantial burden" as "a 'significantly great' restriction or onus on 'any exercise of religion.'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Destroying Oak Flat obviously qualifies, because it makes Plaintiffs' religious practices impossible—which the Government doesn't dispute.

Instead, the Government redefines "substantial burden" to mean only the use of "the *coercive power* of the state *against the plaintiff* to *deter or punish*" religious conduct. Resp.18 (emphasis added). But this definition alters RFRA in several ways. It narrows RFRA to one specific type of government action: the use of "coercive power." It changes the object of the burden from "a person's *exercise of religion*" to the person himself ("against the plaintiff"). And it adds a further restriction that the coercive power must be used "to deter or punish" religious conduct. None of this is required by RFRA's text—which asks simply whether "Government" (by whatever means) has "substantially burdened" (by punishment, deterrence, or otherwise) a person's "exercise of religion" (not the person himself). Indeed, far from limiting its application to "coercive" laws that

"deter or punish," RFRA "applies to *all Federal law*, and *the implementation of that law*, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a) (emphasis added).

Admitting its lack of textual support, the Government asks this Court to reject RFRA's "ordinary meaning" and instead construe "substantial burden" as a term of art codifying "pre-*Smith* case law." Resp.19 (quoting *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1074 (9th Cir. 2008)). But the Supreme Court has rejected this same argument. In *Hobby Lobby*, the Government claimed that "RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents"—and therefore couldn't extend to for-profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 713 (2014). But the Supreme Court disagreed, stating that "[w]hen Congress wants to link the meaning of a statutory provision to a body of this Court's case law, it knows how to do so"—and it didn't do so in RFRA. *Id.* at 714. Indeed, the Court said it would be "absurd if RFRA merely restored this Court's pre-*Smith* decisions in ossified form," allowing only RFRA claims that were "entertained in the years before *Smith*." *Id.* at 715-16. So too here. *See also Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (undefined terms in RFRA must be interpreted according to their "plain meaning").[1]

[1] The Government suggests the land-exchange rider exempted itself from RFRA "by implication." Resp.16 n.3. But RFRA requires any exemption to be "explicit[]." 42 U.S.C. § 2000bb-3(b). And the Supreme Court has

2. Precedent. The Government also has no good response to the overwhelming body of precedent interpreting RFRA according to its plain meaning.

First, in *Tanzin*, the Supreme Court said "RFRA violations" can include "destruction of religious property" or the performance of an unwanted "autopsy." 141 S. Ct. at 492. The Government doesn't dispute these are substantial burdens. Instead, it says they involved "personal property *owned by the plaintiff*," or "a 'quasi-property' right in the body of the deceased." Resp.26, 40-41. But this response blows a hole in the Government's two-category theory of *Navajo Nation*—which posits that a substantial burden exists only when the government threatens sanctions or denies benefits. Resp.20-23. Yet the *Tanzin* examples involved neither.

In any event, if Government imposes a substantial burden when it violates a "quasi-property right," Plaintiffs more than qualify here. Oak Flat was undisputedly Apache land before the Government took it by force. Plaintiffs still have enforceable rights under the 1852 Treaty. Br. 47-50; *infra* Part III. And even apart from the Treaty, they currently have usufructuary rights in Oak Flat guaranteed by multiple federal laws—including the right to use, access, and be consulted about Oak Flat. *See,*

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applied this express-reference provision to later-enacted laws. *Hobby Lobby*, 573 U.S. at 719 n.30; *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020) ("super statute" that "displac[es]" other laws).

e.g., Executive Order 13007 (Government must "accommodate … ceremonial use of Indian sacred sites" on federal land and "avoid adversely affecting the[ir] physical integrity"); *Te-Moak Tribe v. DOI*, 565 F. App'x 665, 667-68 (9th Cir. 2014); National Historic Preservation Act; 54 U.S.C. § 302706(b); 36 C.F.R. 800.2(c)(2)(ii). All of these rights will be extinguished by the transfer and destruction of Oak Flat. 3-ER-349. Thus, even under the Government's "quasi-property right" addendum to its two-category theory, Plaintiffs qualify.

The Government likewise fails to distinguish the many prisoner cases finding a substantial burden when the government makes a religious exercise impossible. The Government first claims these cases involved "punishment" of religious practices. Resp.34. Not so. Each involved not punishment but refusal to accommodate religious exercise on government property:

- *Yellowbear*, 741 F.3d at 53 (declining escort to sweat lodge);
- *Greene*, 513 F.3d at 989 (declining escort to group worship);
- *Nance*, 700 F. App'x at 632 (declining purchase of prayer oils);
- *Jones*, 915 F.3d at 1149 (declining kosher food trays);
- *Haight*, 763 F.3d at 565 (declining ceremonial foods).

Yet each court found a substantial burden, because "[t]he greater restriction" of making a practice impossible "includes the lesser one" of threatening punishment—even when the practice takes place on the government's own property. *Id.*

Alternatively, the Government says the prisoner cases involved "coercive control." Resp.34. But that's no distinction at all. Whether managing a prison or managing federal land, the Government has "coercive control" over the location needed for religious exercise. *See* NCAI Br. 19. And when it manages the location in a way that renders religious exercise impossible, it imposes a substantial burden. Indeed, the Government's position bizarrely gives more protection to prisoners wanting to use a sweat lodge in the prison yard (*Yellowbear*) than to Apaches wanting to use a sweat lodge at Oak Flat.

For similar reasons, the Government cannot distinguish the many RLUIPA land-use cases holding that interference with the use of religious property is a substantial burden. Br. 33-34. Repeating its "property-rights" addendum, the Government says these cases involve the plaintiffs' "*own* property." Resp.35. But RFRA doesn't ask who owns the property; it asks whether the Government has substantially burdened plaintiffs' "exercise of religion." Whether the government takes religious property by eminent domain and turns it into a Costco, *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002) (finding substantial burden), or takes it by military force and turns it into a copper mine, the effect on *religious exercise* on the property is the same—termination.

Alternatively, the Government says the meaning of substantial bur-

den "has evolved differently" under RLUIPA and RFRA. But the Supreme Court said they "impose … the same standard," *Holt v. Hobbs*, 574 U.S. 352, 357-58 (2015), and every circuit considering the question agrees.[2] That the Government even makes this argument only demonstrates that its position cannot be squared with RFRA's text.

Finally, the Government admits it cannot distinguish *Comanche Nation v. United States*, which held that construction of a warehouse on a Native American worship site "amply demonstrate[d]" a substantial burden. 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008). It merely says *Comanche Nation* "conflict[s]" with *Navajo Nation*. Resp.32-33 But the cases don't conflict. In *Navajo Nation*, the "sole effect" of the government's action was on plaintiffs' "subjective spiritual experience," 535 F.3d

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[2] *See*:

- *Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 n.103 (3d Cir. 2016) ("analogous" "substantial burden test");
- *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 n.64 (5th Cir. 2010) ("same 'substantial burden' question");
- *Korte v. Sebelius*, 735 F.3d 654, 682-83 (7th Cir. 2013) ("same understanding");
- *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) ("same definition");
- *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1138 n.13 (10th Cir. 2013) ("interpreted uniformly");
- *Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1181 n.23 (11th Cir. 2016) ("same standard").

at 1063, while in *Comanche Nation*, the government's action made plaintiffs' religious practices objectively, physically impossible. Br. 35-37.

3. Navajo Nation and Lyng. Lacking any response to these cases, the Government relies principally on overreading *Navajo Nation* and *Lyng*. It says the two types of burdens identified in *Navajo Nation*—threat of penalties or denial of benefits—are the full universe of substantial burdens, not an "illustrative list." Resp.23-24. And it says this case is factually indistinguishable from *Navajo Nation* and *Lyng*. *Id.* at 24-32. It is wrong on both counts.

First, *Navajo Nation* didn't purport to identify the full universe of substantial burdens. Immediately after listing the threat of penalties and denial of benefits, the Court said "[a]ny burden … *short of*" these can't be substantial. 535 F.3d at 1069-70 (emphasis added). But that indicates that a burden *greater than* these can be. Tellingly, the Government offers no alternative understanding of this language.

Second, neither *Navajo Nation* nor *Lyng* involved *physical destruction* of a site, rendering the plaintiff's religious practices *objectively impossible*. In *Navajo Nation*, the government didn't destroy the sacred site; it allowed recycled wastewater to be sprayed on it, which plaintiffs claimed would "spiritually contaminate" the mountain and "devalue their religious exercises." 535 F.3d at 1063; *see also id.* at 1070 ("The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience."). Likewise, in *Lyng*, the construction "was removed as far as

possible from the sites used by contemporary Indians for specific spiritual activities"; the plaintiffs' claim was that the construction would "diminish the sacredness of the area" and "create distractions" while they worshiped. 485 U.S. 439, 443, 448 (1988); *see also id.* at 454 ("No sites where specific rituals take place were to be disturbed.").

Thus, as *Navajo Nation* put it, "the sole question" in those cases was "whether a government action that affects *only subjective spiritual fulfillment* 'substantially burdens' the exercise of religion." 535 F.3d at 1070 n.12 (emphasis added). Here, by contrast, the mine wouldn't merely diminish Plaintiffs' subjective spiritual fulfillment from worshiping at Oak Flat; it would swallow Oak Flat in a crater, rendering Plaintiffs' practices physically impossible. So both *Navajo Nation* and *Lyng* are "of little help here, where the religious burden in controversy is not mere interference with 'subjective' experience, but the undisputed, complete destruction of the entire religious site." Bumatay Op. 11.[3]

[3] The same is true of *Snoqualmie*. The Government says the "hydroelectric facility" there "had a profound physical impact on the" sacred waterfall. Resp.28. But the question isn't whether the government burdened the *site*, but plaintiffs' "exercise of religion." 42 U.S.C. § 2000bb-1(a). The facility in *Snoqualmie* didn't "prevent the Snoqualmies' access to" the falls "or the performance of religious ceremonies"; rather, the objective effect was to "produce a *greater* amount of" the mist used in the plaintiffs' religious exercise. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213, 1215, 1219 (9th Cir. 2008) (emphasis added).

Acknowledging as much, the Government inserts a qualifier, saying there is no "*meaningful* distinction" between the cases. Resp.24 (emphasis added). But the meaningfulness of the distinction between spiritual effects and physical impossibility is straightforward. A secular court "cannot weigh" spiritual effects for itself, *Lyng*, 485 U.S. at 449-50, so if spiritual effects alone counted, the Court would simply have to take plaintiffs at their word that the spiritual effects were "substantial." But whether the Government's actions have rendered a particular religious exercise physically impossible is an objective, ascertainable fact, independent of plaintiffs' beliefs, and as easily evaluated as any other sort of substantial burden. Indeed, it is even easier than evaluating, *e.g.*, whether a zoning restriction substantially burdens a church when the availability and suitability of alternative sites is factually complex. *Cf. Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067-69 (9th Cir. 2011).

Resisting, the Government next says "[t]he law does not allow" a distinction between "subjective" and objective burdens, because administering it would require the Court to weigh the "credibil[ity]" of plaintiffs' religious beliefs. Resp.30-31. But the distinction the Government now says the "law does not allow" is the one expressly drawn in *Navajo Nation* itself: "the distinction [we are] drawing today" is "between objective and subjective effect on religious exercise." 535 F.3d at 1070 n.12.

Nor does this distinction require courts to decide whether any given religious belief is more "weighty" or "credible" than another. Resp.30. Here, for example, the Court need not determine whether it's true as a religious matter that Sunrise Ceremonies must be performed at Oak Flat. *Cf.* Resp.31. It merely has to decide whether—given that Plaintiffs undisputedly *do* exercise their religion by performing Sunrise Ceremonies there—the objective effect of the Government's actions will make that exercise more difficult. That is undisputed here.[4]

Nor is the Government correct that *Lyng* rejected a subjective/objective distinction in discussing *Bowen v. Roy*, 476 U.S. 693 (1986). Resp.28-29. Rather, *Lyng* held that this distinction didn't help the plaintiffs before it, because they (like the *Roy* plaintiffs) were on the wrong (subjective) side of the line. Both cases centered on claims about the spiritual "efficacy

[4] Ironically, the Government itself goes outside the record to impugn the weight and credibility of Plaintiffs' religious beliefs—saying Harrison Talgo "disagree[s]" with the significance of Oak Flat, that Sunrise Ceremonies were "reviv[ed]" in 2012, and that other Indians perform Sunrise Ceremonies elsewhere. Resp.7-8, 30. But it is no surprise that other Indians worship elsewhere. Sunrise Ceremonies were "revived" only because they were driven underground—held secretly or on reservations—due to the Government's history of punishing public ceremonies. 2-ER-83-84, 94-95, 123 ¶8, 146 ¶17. And Talgo has a history of securing personal gain by disparaging traditional religious practices—part of the unfortunate history of government and industry using financial incentives to divide and conquer native communities. *See, e.g.*, Steve Lipsher, *Arizona's Star Wars*, Empire Magazine, Denver Post (May 18, 1997), https://perma.cc/3TSZ-AKFZ.

of" plaintiffs' practices, and courts cannot engage in "a factual inquiry into the degree to which … spiritual practices would become ineffectual." 485 U.S. at 450-51. That reasoning is inapposite here, where Plaintiffs aren't claiming the Government's actions render their practices spiritually ineffectual, but objectively, physically impossible.

Finally, the Government fails to rebut the argument that even under a two-category reading of *Navajo Nation*, Plaintiffs *are* denied the benefit of using Oak Flat and *do* face penalties for trespassing. Br. 42. As for the benefit of using Oak Flat, the Government says only a *discriminatory* denial of an "'otherwise available benefit'" counts, citing post-*Smith* constitutional cases. Resp.26-27 (quoting *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2021-22 (2017)). But RFRA doesn't require discrimination; it applies "even if the burden results" from "neutral" or "general[ly] applicab[le]" laws. 42 U.S.C. §§ 2000bb(a), 2000bb-1(a).

As for trespassing penalties, the Government says Plaintiffs must wait until they "face trespassing charges," and then assert RFRA as "a defense." Resp.27. But elsewhere, the Government admits that the mere "threat" of penalties suffices under *Navajo Nation*. Resp.38-39. Plaintiffs here face just such a threat, as it's undisputed that immediately upon transfer, Oak Flat will "become private property and no longer be subject to [laws] or Forest Service management that provides for tribal access." 3-ER-349. When Plaintiffs try to continue their religious practices at Oak

Flat after Resolution Copper closes it, ECF 18-2 at 18, they will face penalties for trespassing.

4. Parade of Horribles. Lacking a coherent theory of RFRA, the Government posits a parade of horribles, claiming "no government … could function" if RFRA is applied according to its text—which lacks any requirement that religious exercise be "compelled," "central," "widely shared," or limited to one place or faith. Resp.43, 45-46. But these are the same slippery-slope arguments made by prison officials in *Cutter v. Wilkinson*, 544 U.S. 709, 725-26 (2005) and *Holt*, 574 U.S. at 361, 369, drug-enforcement officers in *Gonzales v. O Centro*, 546 U.S. 418, 430 (2006), and public health officials in *Hobby Lobby*, 573 U.S. at 735—and rejected by the Supreme Court each time. Indeed, Congress rejected these very concerns in passing RFRA. *Id*. That the Government fears increased liability from application of RFRA's text is no reason to invent extra-textual limitations.

Alternatively, the Government claims a plain-language reading of RFRA would unleash strict scrutiny on its use of "schoolbooks" or "the motto on U.S. coinage," "even if nothing was being required of the claimant." Resp.44-45. But courts can (and have) rejected these challenges on the ground that the burden imposed was a "mere inconvenience," *New Doe Child #1 v. United States*, 901 F.3d 1015, 1026-27 (8th Cir. 2018) (collecting cases), or that the Government's actions had no effect on the plaintiff's *own* "exercise of religion," 42 U.S.C. § 2000bb-1(a).

By contrast, it is the Government's position that creates bizarre results. Under the Government's theory, an atheist who rarely visits Oak Flat has a cognizable burden under the Establishment Clause if the Government erects a cross there. *Cf. Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004); Resp.22-23 (citing *Valley Forge*). But Apaches who have worshipped at Oak Flat for millennia have no cognizable burden under RFRA if the Government destroys it. And this despite the fact that "Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment." *Holt*, 574 U.S. at 357.

RFRA's text provides the proper limits on the substantial-burden analysis. The burden must be imposed by the Government, affect sincere religious exercise, and be objectively substantial. Even then, the Government still wins if it satisfies strict scrutiny. This is a crucial limit on RFRA that the Government simply ignores. Indeed, it is "the compelling interest test"—not the substantial burden test—that Congress chose as the "workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Hobby Lobby*, 573 U.S. at 735-36 (quoting 42 U.S.C. § 2000bb(a)(5)) (cleaned up).

The real untoward consequences come not from "enforc[ing] RFRA as written," *id.*, but from the Government's stilted, two-category revision of RFRA—which would immunize the Government not only when it destroys sacred sites, but also when it padlocks church doors (*McCurry*),

confiscates religious relics (*DeMarco*), or forcibly removes religious clothing (*Powell*). Br. 38-39. The Government says "[s]uch deprivations, if legal, would involve the application of a civil or criminal sanction." Resp.38. But the actions in *McCurry*, *DeMarco*, and *Powell* weren't legal and didn't involve sanctions; they simply made a religious practice impossible. *See also* Jewish Coalition Br. 3-7 (collecting examples).

Lacking any defense of its two-category test, the Government proposes another one: "that a substantial burden is not imposed" if the government is "merely conducting its own affairs." Resp.44. But this "test" is hopelessly indeterminate. Whenever the Government acts, it can claim it is "conducting its own affairs." Indeed, that is what the Government claimed in *Hobby Lobby*, *Zubik v. Burwell*, and *Fulton*—and the Supreme Court rejected it each time. *See, e.g.*, *Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253, at *6 (U.S. June 17, 2021). And, of course, the Government concedes that if its "own affairs" involved fencing off Oak Flat and punishing Plaintiffs for trespassing, that would be a substantial burden. Resp.26.

Ultimately, the Government's shape-shifting only demonstrates how unprincipled its position is. It says a burden on religious exercise doesn't count as substantial if it results from Government's "internal affairs, including the management of its own property." Resp.1. But when confronted with the scenario where the Government fences off its property

and imposes penalties for trespassing, it retreats and admits that imposition of penalties or denial of benefits counts. When confronted with prisoner cases with no imposition of penalties or denial of benefits, it retreats and says "coercive control" counts. When confronted with confiscation of property or an unwanted autopsy with no coercive control, it retreats and says invasion of "property" or "quasi-property rights" counts. And when confronted with the fact that Plaintiffs *are* asserting an invasion of property rights, it returns to where it began—asserting that RFRA can't apply to the Government's "internal affairs." The result is an unprincipled, gerrymandered rule under which just about any government action making religious exercise more costly or difficult is a substantial burden—except physical destruction of Native American sacred sites. The Government might like such a rule, but it doesn't come from RFRA.

5. Legislative Appeals. Lacking a principled theory, the Government cherry-picks legislative history. But as we explained (Br. 40-41), the House report rejects the Government's rule—stating that "in order to violate [RFRA], government activity *need not* coerce individuals into violating their religious beliefs nor penalize religious activity by denying … benefits"; rather, "*[a]ll* governmental actions which have a substantial external impact on the practice of religion" trigger strict scrutiny. H.R. Rep. No. 103-88 (1993) (emphasis added); *see also* Scholars Br. 4-5. In response, the Government cites two snippets of legislative history that supposedly cut the other way, including a "floor statement[] by [an]

individual legislator[],” which “rank[s] among the least illuminating forms.” *NLRB v. Sw. Gen. Inc.*, 137 S. Ct. 929, 943 (2017). Resp.39-40. But these snippets simply say RFRA doesn't affect pre-*Smith* cases like *Lyng* or *Bowen*—which are distinguishable. And to the extent the legislative history is “murky,” that simply means the Court should apply the “statute's clear text,” *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019), which supports Plaintiffs.

Lastly, the Government suggests the Court should decline to act on Plaintiffs' claims now because Congress theoretically might in the future. Resp.48. But Congress *already has* acted to protect Plaintiffs' religious exercise—by enacting RFRA. This Court cannot merely “refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.” *Bostock*, 140 S. Ct. at 1750. Its “responsibility is to enforce RFRA as written.” *Hobby Lobby*, 573 U.S. at 735-36.

II. The Government's actions violate the Free Exercise Clause.

The Government's actions also trigger strict scrutiny under the Free Exercise Clause—as underscored by the Supreme Court's recent decisions in *Fulton* and *Tandon*.[5]

[5] The Government says the Supreme Court still imposes a “substantial-burden requirement in Free Exercise cases.” Resp.48 n.11. Not so. Laws that are not “neutral and generally applicable” may be challenged “[r]egardless of the magnitude of the burden imposed,” *Fagaza v. FBI*, 916 F.3d 1202, 1244 (9th Cir. 2019)—as the Court's recent cases confirm.

First, the transfer and destruction of Oak Flat is not the result of a "generally applicable" law; it is the result of a one-off, individualized land-exchange rider addressing a single piece of land. Br. 44-45. In response, the Government says the "logic" of this argument would trigger strict scrutiny for "*all* government land-use decisions." Resp.48. Not so. Land-use laws are "neutral and generally applicable" when their "strictures" "apply automatically by statute to the general population." *Roman Catholic Bishop v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013) (Lynch, J.). But when the government is "vested with discretion" to address one "particular property"—as it did here—its action is "not 'generally applicable.'" *Id.* at 98; *see also San Leandro*, 673 F.3d at 1066 ("individualized" zoning decision not "generally applicable"); *Cottonwood*, 218 F. Supp. 2d at 1222 (collecting cases).[6]

Fulton only underscores the point. There, a city stopped referring children to a Catholic foster-care agency when it learned that the agency would not certify same-sex couples to be foster parents. 2021 WL 2459253, at *3. Although the city's "standard foster care contract" barred

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Tandon v. Newsom, 141 S. Ct. 1294 (2021) (no substantial burden analysis); *Fulton*, 2021 WL 2459253, at *4, *8 (six mentions of "burden," zero of "substantial").

[6] The Government also says this argument is inconsistent with *Lyng*. But *Lyng* was decided before *Smith* and says nothing about neutrality or general applicability. And the road in *Lyng* was carried out pursuant to the California Wilderness Act of 1984 and a broader multiple-use management plan. 485 U.S. at 444.

discrimination based on "sexual orientation," it also gave city officials "discretion" to make exceptions. *Id.* at *5. The Supreme Court unanimously held that the mere existence of this discretion—even without evidence of hostility or "any exceptions [ever] given"—"renders a policy not generally applicable." *Id.* at *7. Thus, under *Fulton*, even broadly applicable laws are subject to strict scrutiny if the government has discretion within those laws to make individualized decisions.

Here, the Government's actions are even worse. There is no broadly applicable law to begin with. The land-exchange itself is a one-time, discretionary, individualized decision to favor a copper mine over Apache religious practices. Thus, this is an *a fortiori* case.[7]

The Government's actions are also subject to strict scrutiny because the destruction of Oak Flat is not the unanticipated, "incidental" effect of a religion-blind law. *Emp. Div. v. Smith*, 494 U.S. 872, 878-79 (1990). Rather, it is the known, calculated effect of the Government's decision to value copper production over Apache religious practices. Such a calculated decision to prefer mining over religion bears no relation to the "incidental" effect of the neutral law in *Smith*. *Id.*

In response, the Government doesn't dispute that the decision to authorize destruction of Oak Flat was calculated, individualized, and value-

[7] *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th. Cir. 2020), Resp.49, is inapposite. The policy there didn't "pertain[]" to religion, and it didn't apply to a single student but to "all transgender students." *Id.* at 1234.

laden. It claims only that the Government harbored no "discriminatory purpose." Resp.50. But in the last three months, the Supreme Court has twice subjected government actions to strict scrutiny under the Free Exercise Clause without any finding of discriminatory purpose. In *Fulton*, the Court expressly declined to rely on evidence that the city was "intolerant" of religion or acted "because of" plaintiffs' religious beliefs. 2021 WL 2459253, at *5. And in *Tandon*, the Court enjoined California's COVID regulations *not* because of any evidence of discriminatory purpose, but simply because they treated "some comparable secular activities more favorably than at-home religious exercise." 141 S. Ct. at 1297. Thus, "discriminatory purpose" is not required; all that is required is a value judgment preferring secular interests over religious—exactly what we have here.

Indeed, the Government's actions here contrast sharply with its actions in the 1990s, when a Canadian company submitted plans to mine a large gold deposit 4.5 miles from Yellowstone National Park. After public outcry, the Forest Service entered a land exchange, agreeing to give the mining company "$65 million worth of federal property" elsewhere in exchange for abandoning the proposed mine. Bob Ekey, *The New World*

Agreement, 18 Pub. Land & Resources L. Rev. 151, 159 (1997). Why? Citing tourism and the environment, President Clinton explained that "everyone can agree that Yellowstone is more precious than gold."[8]

Today's Government may have decided that Apache religious exercise is less precious than copper, but the First Amendment requires that value judgment to face strict scrutiny.

III. The Government's actions violate the 1852 Treaty.

The transfer and destruction of Oak Flat also violates the Government's treaty obligations. The 1852 Treaty protects the normal incidents of Indian life—including religious exercise—on treaty lands. The Treaty has never been abrogated. And tribal members who suffer from a Treaty violation have standing to sue. The Government's response misapprehends Plaintiffs' claim and misstates the law governing treaty interpretation and abrogation.

1. Enforceable Rights. The 1852 Treaty obligated the United States to "designate, settle and adjust [the Apaches'] territorial boundaries, and pass and execute" laws "conducive to the prosperity and happiness of said Indians." 2-ER-207. Conveying Oak Flat for destruction and rendering historical religious exercise impossible violates the Government's duty.

Treaties with Indians are interpreted by how the terms "would naturally [have been] understood by the Indians" when signed. *Confederated*

[8] Remarks on Signing the New World Mine Property Agreement, 2 Pub. Papers 1290-92 (Aug. 12, 1996) https://perma.cc/JQ4Y-JKLP.

Tribes & Bands of Yakama Nation v. Klickitat County, No. 19-35807, 2021 WL 2386396, at *4 (9th Cir. June 11, 2021) (quoting *Herrera v. Wyoming*, 139 S. Ct. 1686, 1701 (2019)). And general assurances like this would have been understood to protect "normal incidents of Indian life"—including religious exercise. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 & n.2 (1968) (interpreting general assurance). This reading is supported by the Treaty's written rule of "liberal construction … to secure the permanent prosperity and happiness" of the Apaches, 2-ER-207, and by black-letter Indian law that "any doubtful expressions … [are] resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *see id.* at 642 (Douglas, J., concurring) (discussing "classic rule that treaties or agreements with Indians are to be construed in their favor, not in favor of commercial interests that repeatedly in our history have sought to exploit them"); *Choctaw Nation v. United States*, 119 U.S. 1, 27-28 (1886) (same).

Without addressing these rules of construction, the Government says the treaty creates no "specific duty" related to Oak Flat beyond a "future plan" to "establish trust lands" that never "occurred"—citing the district-court decisions in *Robinson* and *Uintah Ute*. Resp.53. But these cases addressed title—not, as here, usufructuary rights to use land for traditional purposes regardless of who holds title. Br. 51 n.22. Neither supports the Government's theory that the "prosperity and happiness" obligation is

merely hortatory, nor that the *Apaches* would have understood it that way. *Herrera*, 139 S. Ct. at 1701.

Likewise, the Government does not rebut the fact—grounded in its own FEIS, Br. 51, that Oak Flat is within the land to which the 1852 Treaty applies. For this reason alone, the Government's passing citation to cases dealing with complained-of acts *outside* treaty lands are inapposite. And the Government also fails to connect the treaty texts in those cases to the 1852 Treaty's language. *See, e.g.*, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812-13 (9th Cir. 2006) (treaty related only to "Reservation lands").

2. Abrogation. Nor has the Treaty been abrogated. Congress cannot abrogate treaty rights unless it "'clearly express[es] its intent to do so.'" *Herrera*, 139 S. Ct. at 1698. The Government agrees that "the United States cannot terminate a treaty right by implication"; but then it backtracks—claiming Congress abrogated the 1852 Treaty by passing a law whose "purpose" is in "conflict[]" with its obligations. Resp.55. The Government was right the first time: a likely practical conflict is insufficient; express abrogation is required.

The Government ignores *Mille Lacs*, where the Chippewa retained rights to hunt, fish, and gather on aboriginal lands despite a treaty compelling cessation of "all right, title, and interest" in those lands—because that language did not "expressly mention[]—much less abrogat[e]—usufructuary rights." *Minnesota v. Mille Lacs Band of Chippewa Indians*,

526 U.S. 172, 184, 195 (1999); Br. 52. By that rule, a law that is express regarding title is not necessarily express regarding other rights. And the Supreme Court has repeatedly rejected claims of abrogation based on language far "clearer" than Section 3003. *See Menominee*, 391 U.S. at 410 (statute dissolving tribe and applying state laws "to the tribe and its members"); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2465 (2020) (statutes fragmenting reservation, abolishing tribal courts, and seizing tribal property).

3. Individual harm. The Supreme Court has repeatedly and recently recognized that individuals may assert, on their own behalf, harm from the violation of treaty rights. Br. 54 (citing *Herrera*, *McGirt*, and *Cougar Den*). The Government responds that "neither [*Herrera* nor *McGirt*] addressed a circumstance at all like here, in which a non-Tribe sought to assert the purported rights of an absent Tribe." Resp.52. Yet in both cases, the tribes were not a party, and individual tribal members asserted tribal rights—like the "right to hunt off-reservation," *Herrera*, 139 S. Ct. at 1693. So too here, where individual tribal members have gathered in a plaintiff organization (Apache Stronghold). And the Government does not even acknowledge, let alone distinguish, *Cougar Den*. The Government also does not deny that the injuries here are individually experienced; nor could it, since—as with restrictions on treaty rights to hunt or fish or travel—it is *individual* religious practices that are being curtailed.

None of the cases in the Government's string-cite—all of which predate *Herrera*, *Cougar Den*, and *McGirt*—support its claim that individual tribal members cannot raise treaty rights to protect their religious life. In fact, the Government's lead authority, *Skokomish*, expressly recognizes that "some treaty-based rights might be cognizable" in Section 1983 lawsuits. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515-16 & nn.7-8 (9th Cir. 2005) (distinguishing multiple cases brought by individual tribal members).[9]

"[I]t is clear that an individual Indian enjoys a right of user in tribal property derived from the legal or equitable property right of the Tribe of which he is a member." *Kimball v. Callahan*, 590 F.2d 768, 773 (9th Cir. 1979). Thus, where individual religious exercise is being limited or burdened—here, by the disposal and destruction of land used for worship—individual members can vindicate their rights, just as in *Herrera*, *McGirt*, and *Cougar Den*.

IV. The other injunction factors are met.

1. Irreparable harm. The Government does not challenge our assertion that the existence of "'a colorable claim' under RFRA" establishes

[9] The Government's theory also conflicts with the rule that treaties must be interpreted as understood by the Native community. The Treaty was signed long before the birth of modern standing doctrine or the modern conception of tribes. So there is no reason to believe that Western Apaches or Mangas Coloradas, who signed it, would have understood it to exclude protection for individual Apaches—just as there was no reason to infer such a limit in *Herrera*, *Cougar Den*, and *McGirt*.

irreparable harm as a matter of law. Br. 56 (citing *Warsoldier v. Woodford*, 418 F.3d 989, 1002 (9th Cir. 2005)). That is enough to resolve the issue of irreparable harm.

Nevertheless, the Government's own FEIS states that the destruction of Oak Flat will be "*immediate*, permanent, and large in scale." 3-ER-374 (emphasis added). In response, the Government says this "immediate" destruction will occur only after construction of the mine, which could be years after the land transfer. Resp.57 n.13. But this argument fails for three reasons.

First, the Government does not commit to preventing irreparable harm to Oak Flat before the end of this litigation, because it cannot do so. The Government has offered no timeline on the release of a new FEIS. More importantly, it lacks control over what happens *after* the transfer. That is up to Resolution Copper. This litigation could easily last longer than it will take to make the mine operational. *See*, *e.g.*, *Slockish v. U.S. Dep't of Transp.*, No. 21-35220 (9th Cir. Opening Brief filed May 3, 2021) (Complaint filed Oct. 6, 2008). Thus, only a preliminary injunction can ensure that Oak Flat won't be transferred during litigation and irreparably harmed.

Second, the Government admits "the exchange would cause an 'immediate' change of applicable law," Resp.57, removing Oak Flat from federal laws guaranteeing Plaintiffs' rights to "access" the land, 3-ER-349. The transfer thus immediately subjects Plaintiffs to the whim of Resolution

Copper. Even the conditional promise of continued access applies only to the "campground," which comprises only 1% of the Apaches' central sacred area, and only as long as Resolution Copper allows. 16 U.S.C. § 539p, Br. 57, Bumatay Op. 14-15. The Government's hope that Resolution Copper will maintain access is just that—hope. Resolution Copper's unenforceable statements don't ensure that Plaintiffs' religious exercise may continue, and they don't replace the legal protection Plaintiffs have while the property is federally controlled.

Third, as Plaintiffs have explained, Br. 58, nothing stops Resolution Copper from commencing destructive actions on Oak Flat as soon transfer occurs, leaving this Court unable to "unscramble the eggs." *Kettle Range Conservation Grp. v. BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998). In a parenthetical, the Government attempts to distinguish *Kettle Range* by claiming that the only possible irreparable damage is the "ground-disturbing activities" that will happen only after administrative hurdles. Resp.60. But it is not just "underground infrastructure," that irreparably damages Oak Flat: Resolution Copper can immediately begin drilling "new shafts," constructing "new roads," 3-ER-284, and building "electrical installations" that permanently damage Oak Flat and make ongoing religious practices impossible, ECF 18-2 at 46. Resolution Copper's own estimate, which the Government cites, labels the first nine years after the transfer as the "construction" phase, which means that religion-dis-

rupting activities can begin immediately. 3-ER-269. And Resolution Copper has every incentive to take immediate action rendering recission "impractical." *Kettle Range*, 150 F.3d at 1087; *see also Nat'l Parks Conservation Ass'n v. Semonite*, 925 F.3d 500, 501-02 (D.C. Cir. 2019) (Government claimed "that an injunction was unnecessary," then later claimed that vacatur and an injunction were impossible because the Government and private parties had "invested $400 million" and already completed the project). Indeed, Resolution Copper's owner has a tragic record of intentionally destroying sacred sites—including 46,000-year-old Aboriginal caves of "the highest archaeological significance in Australia." ECF 19-2 at 14 (citing report).

2. Balance of equities and public interest. The other factors likewise favor Plaintiffs. Protecting the constitutional and treaty rights of Native Americans is always in the public interest. Br. 59-61. The Government is right that the Court "cannot ignore the judgment of Congress." Resp.61. Here, that means considering not just the midnight rider added to a National Defense Authorization Act, but also the treaty promises made to Native Americans, and RFRA, a "super statute" that has been applied by courts for decades. *Bostock*, 140 S. Ct. at 1754. The Government simply ignores those interests.

CONCLUSION

The Court should reverse and remand for entry of a preliminary injunction preventing transfer and destruction of Oak Flat.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This appeal is related to *Slockish v. U.S. Federal Highway Administration*, No. 21-35220 (9th Cir.). Both cases raise the same issues under the Religious Freedom Restoration Act and Free Exercise Clause. Both cases also involve the same counsel, and the district courts in both cases rejected the plaintiffs' claims on nearly identical grounds. *See* 9th Cir. R. 28-2.6 (cases are related if they "raise the same or closely related issues"). In granting the *Slockish* Appellants' motion to expedite briefing in part, this Court also noted that the two appeals may be calendared together for oral argument. *Slockish*, No. 21-35220, Dkt. 11.

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 21-15295

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,995 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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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 June 24, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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