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)

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF PROTECT THE FIRST FOUNDATION SUPPORTING PLAINTIFF-APPELLANT AND EN BANC REHEARING

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus* has no parent corporation and no stock.

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Circuit Rules 29-2 and 29-3, Protect the First Foundation (PT1) respectfully seeks leave to file the attached amicus brief supporting Plaintiff-Appellant and *en banc* rehearing. The parties agree to the filing, and this motion is unopposed. In support of this motion, PT1 states that it is a 501(c)(3) organization that is dedicated to—among other things—preserving the religious freedoms that this case implicates.

PT1's brief is relevant and helpful to the disposition of the case because the brief provides legal and contextual information that explains the errors in the panel's opinion. Among the information provided is an explanation about why, when the government's actions entirely prevent a religious group from exercising its religious beliefs, those beliefs are substantially burdened, this Court's *en banc* decision in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1069–70 (9th Cir. 2008), notwithstanding.

Because the motion is unopposed, and because the brief will assist the Court, this motion should be granted, and the attached brief filed.

Respectfully submitted,

/s/Gene C. Schaerr

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September 1, 2022

CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with Fed. R. App. P. 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font. I further certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because it contains 201 words according to Microsoft Word.

/s/ Gene C. Schaerr
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INTRODUCTION AND INTEREST OF *AMICUS*[1]

This is a critical case for all people and communities of faith because it raises a fundamental question of what constitutes a "substantial burden" on the "exercise of religion" under the Religious Freedom Restoration Act (RFRA). All agree that, for members of the Apache Stronghold, Oak Flat is a space of paramount and unique religious importance where members of the community have worshipped for centuries. All further agree that the government's transfer of Oak Flat for mining operations will immediately and permanently destroy Oak Flat, effectively prohibiting the Apache from engaging in religious worship there ever again. The question is whether these circumstances constitute a "substantial burden" on the Apache's religious exercise.

The panel erroneously concluded that the Apache will not be "substantially burdened" as defined by RFRA. It did so by applying an erroneous and narrowly prohibitive definition of what constitutes a "substantial burden" under RFRA. Slip op. 25. Because the panel considered itself bound by this Court's decision in *Navajo Nation v. U.S.*

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[1] All parties agree to this brief's filing. No party's counsel authored any part of this brief. No party or party's counsel, or person other than *amicus*, contributed money to the brief's preparation.

Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc), only *en banc* review can fix *Navajo Nation*.

Amicus Protect the First Foundation (PT1) is a 501(c)(3) organization dedicated to preserving the religious freedoms that this case implicates. PT1 believes it is important to defend the religious liberty of minority faiths and religious communities like the Apache Stronghold—because the religious liberties of all rise or fall together.

ARGUMENT

En banc review is warranted because *Navajo Nation* is a uniquely harmful opinion that cannot be squared with the text or purpose of RFRA or Supreme Court precedent.

I. The *En Banc* Court Should Hold That Government Action That Makes Religious Exercise Impossible Imposes A Substantial Burden.

Under RFRA, there are two aspects to a claim for governmental interference with religious free exercise. The first requires the plaintiff to show that the government's actions, even if implemented through a law of general applicability, creates a "substantial burden" on the plaintiff's "exercise of religion." *Navajo Nation,* 535 F.3d at 1068. Once that is done, the government must show that its actions further a

"compelling governmental interest" by using the "least restrictive means." 42 U.S.C. § 2000bb-1(b). Yet, although RFRA does not define "substantial burden," the panel, bound by *Navajo Nation*, held that a "substantial burden" can be shown in "two—and only two—circumstances": (1) when the government "forces individuals to choose between following the tenets of their religion and receiving a governmental benefit" and (2) when the government "coerces individuals to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Slip op. 25 (quoting *Navajo Nation,* 535 F.3d at 1070) (cleaned up).

Contrary to *Navajo Nation,* however, RFRA's text does not narrow "substantial burdens" to the two types of burden at issue in *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972). To the contrary, RFRA clarifies that the compelling interest test set out in *Sherbert* and *Yoder* was to apply "in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Yet the panel and this Court's decision in *Navajo Nation* restrict RFRA's application to a small subset of circumstances where an individual or group's exercise of religion is substantially burdened.

The panel itself highlights the irony of that conclusion through its acknowledgment that "this definition [of substantial burden] contains no exceptions for burdens on religion thought to be quantitatively 'greater' than the burdens in *Sherbert* and *Yoder* or for burdens that neither impose a penalty nor deny a benefit but 'objectively' or 'physically' interfere with religious exercise in an incidental way." Slip op. 36. But Congress made it unambiguously clear that the compelling interest test should be applied in *all* cases, such as this one, where the burden on the Apache is substantial and, indeed, quantitatively greater than the prospect of a penalty or the denial of a benefit. *See, e.g.,* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021). Indeed, the government's action here makes it impossible for the Apache to worship on Oak Flat because "the land over the mine would eventually subside, profoundly and permanently altering the landscape." Slip op. 11 (cleaned up). This Court should review this case *en banc* to correct this erroneous standard of when governmental action can and does create a substantial burden on the exercise of religion under RFRA.

II. In The Process, The *En Banc* Court Should Expressly Overrule *Navajo Nation*'s Misreading Of RFRA.

As noted, the panel concluded that governmental devastation of the Apache's sacred land is *not* a substantial burden on religious exercise under RFRA because the government (a) did not deny any governmental benefits or (b) coerce individuals or institutions via civil or criminal penalties. *See* slip op. 25. That limited view of what constitutes a substantial burden under RFRA—guided by *Navajo Nation*—is wrong, and this Court should expressly overrule it here.

While denying someone government benefits or coercing individuals or institutions via civil or criminal penalties will *suffice* to substantially burden a religious exercise, there are *other* ways, including the governmental plan to have Oak Flat mined into destruction, for religious exercise to be substantially burdened. Certainly "[t]he greater restriction (barring access to [a] practice) *includes* the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (emphasis added). So, because a lesser restriction on the *use* of sacred space—such as imposing penalties for its use—would substantially burden a religious practice under RFRA, it necessarily follows that completely denying access to that space must

also substantially burden religious practice—even when the burden is not due to the denial of a governmental benefit or to the threat of penalty.

A. *Navajo Nation* unduly narrows RFRA's text.

Unlike the panel's holding or that of *Navajo Nation*, Congress did not limit RFRA's substantial burdens to the benefit and penalty categories. Instead, RFRA's text—the best indicator of its scope, *see Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985)—forbids the government from "substantially burden[ing] a person's exercise of religion *even if the burden results from a rule of general applicability*," 42 U.S.C. §2000bb-1(a) (emphasis added).

This language forecloses any argument that Congress somehow narrowed the bases for claiming a substantial burden to only the two circumstances set out in the panel opinion and *Navajo Nation*. Indeed, as the Tenth Circuit has recognized, Congress is "quite capable of narrowing the scope of a statutory entitlement," including RFRA's substantial burden clause, "when it wants to," and it did not do so here. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013) (en banc), *aff'd*, 573 U.S. 682 (2014) (*Hobby Lobby I*). Rather, the breadth of RFRA's text has two pertinent implications that foreclose the

panel's approach.

First, substantial burdens on religious exercise created by laws of neutral or general applicability count under RFRA's plain text. 42 U.S.C. §2000bb-1(a). RFRA responded to the Supreme Court's earlier decision in *Employment Division v. Smith*, which had held that such rules were generally exempt from strict scrutiny. 494 U.S. 872, 879 (1990). That RFRA *explicitly* includes "rules of general applicability" as circumstances that can impose substantial burdens strongly suggests that Congress did not limit substantial burden to the two benefits/penalties categories. Generally applicable laws, after all, will rarely—if ever—punish someone's religious exercise as such or deny a person of government benefits for exercising their religion.

Second, under RFRA, *how* a substantial burden is imposed is irrelevant. RFRA itself does not attempt to list the ways that the government might substantially burden religious exercise. *See* 42 U.S.C. §2000bb-1(a); *Hobby Lobby I*, 723 F.3d at 1130. And the fact that Congress did not limit the forms or categories of substantial burdens that fall within RFRA is clearer still because the Religious Land Use and Institutionalized Persons Act (RLUIPA)—RFRA's "sister statute,"

Ramirez v. Collier, 142 S.Ct. 1264, 1277 (2022)—provides that the "protection of religious exercise" is to be "maxim[ally]" "broad." 42 U.S.C. §2000cc-3(g). RFRA's qualification that a "burden" must be "substantial" goes to the *degree* of the burden, not to its origins, forms, or the manner of imposition. Both "indirect" penalties (putting the religious adherents to some choice as a price for their devotion) and "outright prohibitions" constitute substantial burdens on religious exercise. *See Trinity Lutheran Church of Columbia v. Comer*, 137 S.Ct. 2012, 2022 (2017) (citation omitted).

Resolution of the burden question becomes easy when—as here—the government prohibits a religious practice (like worship) outright. Whenever the government "*prevents* the plaintiff from participating in [a religious] activity," giving the plaintiff no "degree of choice in the matter," that action "easily" imposes a substantial burden on religious exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55–56 (10th Cir. 2014) (Gorsuch, J.) (emphasis added). It is difficult for a burden to be more substantial than making an act of worship impossible. *See, e.g., Tanzin v. Tanvir*, 141 S.Ct. 486, 492 (2020) (recognizing that the "destruction of religious property" may violate RFRA); *Int'l Church of Foursquare*

Gospel v. City of San Leandro, 673 F.3d 1059, 1066–70 (9th Cir. 2011) (denial of a church's request to expand its operations substantially could burden the church's religious exercise). Yet that is exactly what the government is doing to the Appellant here.

B. The panel erroneously refused to follow RLUIPA precedents.

Further illuminating the panel's error is its failure to follow precedent interpreting RLUIPA. The Supreme Court has made it clear that both statutes should be interpreted consistently. *Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015) (a RLUIPA case invoking RFRA cases to apply RLUIPA); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695, 729 n.37 (2014) (*Hobby Lobby II*) (a RFRA case invoking RLUIPA to apply RFRA).

Last term, in *Ramirez*, a RLUIPA case, the Supreme Court found a substantial burden on a prisoner's religious exercise when Texas denied his request to have his pastor place hands on him and pray vocally during his execution even though that situation did not involve either the denial of a benefit or the threat of penalty. 142 S.Ct. at 1277–78.

Despite *Ramirez*'s guidance, the panel declared that these "sister statutes" should be interpreted differently, limiting RFRA to the "*Sherbert/Yoder* framework" while interpreting RLUIPA "by the 'plain meaning' of the phrase 'substantial burden.'" Slip op. 30 (quoting *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir. 2004)). While RLUIPA does not reference *Sherbert* or *Yoder* like RFRA does, neither statute defines "substantial burden" or provides any statutory text to limit the definition of "substantial burden" beyond its "plain meaning." Even so, the panel, guided by *Navajo Nation*, implausibly concluded that, although Congress used the same term in each statute, the term has a different meaning in RLUIPA cases than it has in RFRA cases. *Id.* That conclusion departs from both Supreme Court precedent and the presumption of consistent usage which "applies also when different sections of … [a] code are at issue," particularly where, as here, there is a recognized "connection" between "the cited statute" and "the statute under consideration." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172–73 (2012).

These errors underscore the need for *en banc* review. The Court should take this opportunity to correct the *Navajo Nation's* erroneous limitations on the substantial burden standard under RFRA.

CONCLUSION

Congress enacted RFRA to "provide very broad protection for religious liberty." *Hobby Lobby II*, 573 U.S. at 693. Because the panel—guided by *Navajo Nation*—ignored RFRA's plain terms, this Court should correct this error *en banc*.

Respectfully submitted,

/s/ Gene C. Schaerr

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September 1, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Federal Rule of Appellate Procedure 29(a)(5) and 9th Circuit Rule 32-3(2) as it contains 1986 words, excluding the portions exempted by Fed. R. App. P. 32(f). This is less than half of the words afforded to the parties by this Court's *sua sponte* August 15, 2022, order.

The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 14-point Century Schoolbook, a proportionally spaced font.

Dated: September 1, 2022

/s/ *Gene C. Schaerr*
Gene C. Schaerr

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: September 1, 2022

/s/ *Gene C. Schaerr*
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