No. 21-15295

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APACHE STRONGHOLD,
*Plaintiff/Appellant*,

v.

UNITED STATES OF AMERICA, et al.,
*Defendants/Appellees*.

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Appeal from the United States District Court for the District of Arizona
No. CV-21-00050-PHX-SPL (Hon. Steven P. Logan)

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# APPELLEES' SUPPLEMENTAL BRIEF IN OPPOSITION TO REHEARING EN BANC

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# GLOSSARY

| | |
|---|---|
| Act | Southeast Arizona Land Exchange and Conservation Act of 2014 |
| RFRA | Religious Freedom Restoration Act of 1993 |
| RLUIPA | Religious Land Use and Institutionalized Persons Act |

## INTRODUCTION

This case fails to meet the standards for rehearing en banc. The panel's decision does not conflict with any decision of the Supreme Court or this Court; it is compelled by controlling decisions from both. Indeed, this Court has already granted en banc review and resolved the key issue: in *Navajo Nation v. U.S. Forest Service*, this Court held that the term "substantial burden" in the Religious Freedom Restoration Act (RFRA) is synonymous with that term as used in free exercise jurisprudence prior to *Employment Division v. Smith*, the case that prompted RFRA's enactment—and further held that, as a result, the government's use and disposition of federal land cannot substantially burden the exercise of religion. 535 F.3d 1058, 1073 (9th Cir. 2008) (en banc). The Supreme Court denied certiorari in *Navajo Nation*, 556 U.S. 1281 (2009), and no intervening decision of the Supreme Court or any court of appeals conflicts with it. The Supreme Court's subsequent opinions have instead confirmed that, under RFRA as under the Free Exercise Clause, a "burden" is the coercion or sanction the government applies to the plaintiff, not the effect of the government's action on the plaintiff's religious exercise. Neither plaintiff nor the dissent cite any decision by the Supreme Court or any court of appeals finding a substantial burden based on the government's use or disposition of federal land.

Moreover, this case is an unsuitable vehicle for reconsidering *Navajo Nation*'s interpretation of RFRA because the challenged government action is specifically mandated by a later Act of Congress. Congress legislated with full knowledge of plaintiff's religious and cultural uses of the relevant federal land, and of the need for jobs and copper. It balanced those competing interests by protecting Apache Leap but directing the transfer of Oak Flat. If, as plaintiff urges, RFRA were reinterpreted to forbid what the Act requires, the disposition of this case wouldn't change. Under bedrock principles of law, when two statutes irreconcilably conflict, the later-enacted statute controls.

## BACKGROUND

In 1995, the world's third-largest copper orebody was discovered beneath lands in the Tonto National Forest. Resolution Copper, a mining company, holds unpatented mining claims on much of the deposit, but part of it extends beneath lands withdrawn from mineral entry in 1955. 3-ER-268; 20 Fed. Reg. 7337. Believing the mine would bring jobs and economic development to an economically-depressed part of the state, members of Arizona's Congressional delegation introduced bills over successive Congresses to convey the withdrawn lands to Resolution in exchange for conservation lands of equal value.

Wendsler Nosie, leader of plaintiff Apache Stronghold and former Chairman of the San Carlos Apache Tribe, opposed the legislation because the

"lands to be acquired and mined," known in English as Apache Leap and Oak Flat, "are sacred and holy places." *Hearing on H.R. 3301, H. Comm. on Natural Resources, Subcommittee on National Parks, Forest and Public Lands*, 110th Cong. 18 (2007). He explained that Apache Leap is "sacred and consecrated ground for our People" because "seventy-five of our People sacrificed their lives at Apache Leap during the winter of 1870 to protect their land, their principles, and their freedom." *Id.* at 19. He testified that "Oak Flat and nearby Devil's Canyon are also holy, sacred, and consecrated grounds" that should not be transferred. *Id.* at 21-22.

But Congress heard from supporters of the legislation, too. Another former Tribal Chairman, Harrison Talgo, testified that "[s]even of ten eligible workers in the tribe are unemployed . . . Without jobs our children are forced to move to neighboring communities, or into cities to find work. Not many of them return, and with each passing generation a piece of Apache identity and culture is lost." *Hearing on H.R. 1904, H. Comm. on Natural Resources, Subcommittee on National Parks, Forests and Public Lands*, 112th Cong. 68 (2011). In his view, "it is possible for our traditional values to co-exist with economic progress. In fact, I don't believe one can survive without the other." *Id.*

Ultimately, Congress struck a compromise. The 2014 Southeast Arizona Land Exchange and Conservation Act (Act) directed the Forest Service to

transfer the Oak Flat parcel to Resolution, 16 U.S.C. § 539p(c)(10), but also required Resolution to surrender all rights it held to mine under Apache Leap, *id.* § 539p(g)(3). The Act directs the Forest Service to preserve Apache Leap "for traditional uses of the area by Native American people." *Id.* § 539p(g)(1).

Apache Stronghold, an advocacy organization, sued under RFRA and sought a preliminary injunction. The district court denied the injunction, finding plaintiff unlikely to succeed because its RFRA claims were foreclosed by *Navajo Nation* and *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). A divided panel of this Court affirmed for the same reason.

## REASONS FOR DENYING REHEARING

### I. The panel decision does not conflict with any decision of this Court, the Supreme Court, or any other court of appeals.

#### A. This en banc Court correctly held in *Navajo Nation* that RFRA did not alter the meaning of "burden" developed in pre-*Smith* free exercise jurisprudence.

In every RFRA and Free Exercise Clause precedent in which government action has been held to burden religious exercise, the government has coerced the plaintiff either directly, by threatening or imposing civil or criminal sanction, *see, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); or indirectly, by conditioning an otherwise-available benefit on religiously-motivated conduct, *see, e.g.*, *Sherbert v.*

*Verner*, 374 U.S. 398 (1963). That is not a coincidence but a rule established in two Supreme Court decisions: *Bowen v. Roy*, 476 U.S. 693 (1986), and *Lyng*.

In *Bowen*, the Court held that the government's use of a Social Security number to identify the petitioner's daughter did not impose a cognizable burden, despite his belief that it would rob her of spiritual power, because the "Free Exercise Clause affords an individual protection from certain forms of governmental compulsion," but doesn't "require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." 476 U.S. at 699-700.

In *Lyng*, as here, the plaintiffs claimed the government's proposed use of federal land would make their traditional religious practices "impossible." 485 U.S. at 451. The Court accepted that claim as true, *id*., but found no free exercise violation, explaining that the "building of a road or the harvesting of timber on publicly owned land cannot meaningfully be distinguished from the use of a Social Security number in *Roy*." *Id*. at 449. Both "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," but "[i]n neither case . . . would the affected individuals be *coerced* by the Government's action into violating their religious beliefs; nor would either governmental action *penalize* religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other

citizens." *Id*. (emphasis added). *Lyng* pointedly rejected the argument that an impact on religious exercise, unaccompanied by coercion, is sufficient to establish a burden, observing that "there is nothing whatsoever in the *Yoder* opinion to support the proposition that the 'impact' on the Amish religion would have been constitutionally problematic if the statute at issue had not been coercive in nature." *Id*. at 456-57.

Two years later, the Court held in *Employment Division v. Smith* that the Free Exercise Clause doesn't require religious exemptions from a "valid and neutral law of general applicability." 494 U.S. 872, 878-79 (1990). Congress responded by enacting RFRA, which provides that government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1.

RFRA was a legislative response to *Smith*, not *Lyng*. 42 U.S.C. § 2000bb(a)(4); *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). "RFRA was meant to restore the legal framework in place prior to *Smith.*" *Wooden v. U.S.*, 142 S.Ct. 1063, 1077 (2022) (Barrett, J., concurring). The House and Senate Reports agreed that RFRA "does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free

exercise jurisprudence under the compelling governmental interest test prior to *Smith*." S. Rep. 103-111 at 12; H. Rep. 103-88 at 8 (substantially identical). And, as particularly relevant here, Congress recognized that, in light of *Roy* and *Lyng*, "pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources." S. Rep. at 9; *see also* 139 Cong. Rec. 26,193 (1993) (Sen. Hatch) (observing that *Lyng* held that "the way in which Government manages its affairs and uses its own property does not constitute a burden on religious exercise" and reaffirming that RFRA "does not [a]ffect [*Lyng*], a case concerning the use and management of Government resources").

Thus, the "rule" established in *Bowen* and *Lyng* "that government does not prohibit the free exercise of religion unless it regulates or penalizes a religious practice" is "generally unaffected by RFRA." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Texas L. Rev. 209, 227 (1994). "The level of scrutiny under RFRA is strict, but that scrutiny applies only to government action that 'substantially burdens' the exercise of religion. . . . Some government actions, though devastating to religions in which believers may suffer for the acts of others, may not 'burden' religious exercise.

For example, both *Bowen* [ ] and *Lyng* [ ] suggest that RFRA would have little effect on cases that involve the use of government property." *Id*. at 228.

Thus, this en banc Court rightly held that under RFRA as under the Free Exercise Clause, a "burden" exists only when government coerces the plaintiff through civil or criminal sanctions or by conditioning a benefit on religiously-motivated conduct. *Navajo Nation,* 535 F.3d at 1070. Plaintiff contends that future courts will be compelled by that holding to approve government actions such as "forcibly rounding up Amish children and sending them to boarding school," "padlocking the doors of a church to prevent worship," "forcibly removing religious clothing," or performing an autopsy against the religious beliefs of next-of-kin. Opening Brief 39, 41. But unlike this case, all of those hypotheticals involve government *coercion*. *See* Answering Brief 38, 40-41. The panel's decision does not remotely authorize such results; instead, it is a straightforward application of existing precedents, including *Navajo Nation* and *Lyng*. It is plaintiff who seeks a dramatic departure from settled precedent by attempting to use RFRA to "divest the Government of its right" to control the use and disposition of federal land. *Lyng*, 485 U.S. at 453.

### B. This case is controlled by *Navajo Nation* and *Lyng*

The dissent contends that *Navajo Nation* is distinguishable because it held that any burden "short of that described by *Sherbert* and *Yoder* is not a 'substantial

burden,'" and the Act imposes a "greater" burden by making future religious exercise at Oak Flat impossible. Dissent at 71, quoting 535 F.3d at 1070. That reasoning misconstrues *Navajo Nation*'s statement, which clearly refers to how coercive the government's action is, not how severely it conflicts with a claimant's religious exercise. Of necessity, the latter is for the claimant to decide; as then-Judge Gorsuch stated in *Yellowbear v. Lampert*, "we can't interpret his religion for him. Instead, the inquiry focuses only on the coercive impact of the government's actions." 741 F.3d 48, 55 (10th Cir. 2014).

The dissent's argument is irreconcilable with *Navajo Nation* and *Lyng*. In *Navajo Nation*, this Court explained that "even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will 'virtually destroy the Indians' ability to practice their religion,'" there would still be no substantial burden because there was no coercion. 535 F.3d at 1072. And *Lyng* acknowledged that the planned road would render the plaintiffs' traditional religious practices "impossible," but found no burden because there was no coercion. 485 U.S. at 451. Plaintiff's contention that the land transfer will make their religious exercise impossible cannot distinguish this case from *Navajo Nation* and *Lyng*.

The dissent also attempts to distinguish *Lyng* and *Navajo Nation* on the ground that, in those cases, the government did not "objectively" interfere with

the plaintiffs' religious exercise by "deny[ing] access to or directly damag[ing] the sites." Dissent at 72-73. The plaintiffs in *Lyng* raised the same argument, claiming that *Bowen v. Roy* was distinguishable because "the Social Security number in *Roy* could be characterized as interfering with Roy's religious tenets from a subjective point of view," while in *Lyng*, "the proposed road will physically destroy the environmental conditions and the privacy without which the religious practices cannot be conducted." *Lyng*, 485 U.S. at 449 (cleaned up). But the Court rejected that argument on the sound basis that courts have no business deciding whether sincerely-claimed impacts on religious exercise are real or weighty. *Id*. at 449-50, 456-458; *accord* Opinion at 46 ("Questions like this raise issues on which judges must not pass.").

The dissent's attempts to distinguish *Lyng* and *Navajo Nation* fail for the same reasons. That is especially true given the strikingly similar allegations of harm in this case and in *Navajo Nation*. Opening Brief 29-31.

### C. Subsequent Supreme Court precedent confirms that a "burden" is the punishment or other coercion the government applies to the claimant.

"Finally, and alternatively," the dissent suggests that even if *Navajo Nation* is not distinguishable, it has been "undercut" by subsequent Supreme Court decisions. Dissent at 74. But the opposite is true; the Court's recent decisions under RFRA, the Free Exercise Clause, and the Religious Land Use and

Institutionalized Persons Act (RLUIPA),[1] confirm that a "burden" exists only when coercion or punishment is applied to the plaintiff.

In *Burwell v. Hobby Lobby*, the Court found that the contraceptive mandate imposed a substantial burden on the plaintiffs because it "forces them to pay an enormous sum of money" if they did not comply. 573 U.S. 682, 726 (2014). That fine distinguished *Hobby Lobby* from cases in which claimants "were 'unable to identify any coercion directed at the practice or exercise of their religious beliefs.'" *Id.*, quoting *Tilton v. Richardson*, 403 U.S. 672, 689 (1971). In *Holt v. Hobbs*, 574 U.S. 352, 361 (2015), the burden was the "serious disciplinary action" the prisoner would face if he grew a beard according to the dictates of his faith. *See also Little Sisters of the Poor v. Pennsylvania*, 140 S.Ct. 2367, 2390 n.5 (Alito, J., concurring) (distinguishing *Bowen* because "[i]n *Bowen*, the objecting individuals were not faced with penalties or coerced by the Government into violating their religious beliefs").

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[1] RLUIPA, 42 U.S.C. § 2000cc *et seq.*, requires States and local governments to satisfy strict scrutiny for substantial burdens on religious exercise imposed in two settings: zoning, *id.* § 2000cc, and institutionalized persons, *id.* § 2000cc-1. Like RFRA, RLUIPA "does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. 16,645 (2000) (Statement of Sens. Hatch and Kennedy).

In Free Exercise Clause cases, the Supreme Court has reaffirmed the vitality of *Lyng* and its holding that a burden is the coercive punishment or forced choice that government imposes on the plaintiff. *See Carson v. Makin*, 142 S.Ct. 1987, 1996-97 (2022) (citing *Lyng*; finding violation because State "effectively penalize[d] the free exercise of religion" by "conditioning the availability of benefits" on religious character of schools); *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021) (City "burdened CSS's religious exercise by putting it to the choice" of violating its beliefs or being excluded from government program); *id.* at 1891 (Alito, J., concurring) (distinguishing *Bowen* and *Lyng* because, in those cases, "the challenged law[s] did not implicate the conduct of the individual seeking an exemption"); *Trinity Lutheran Church v. Comer*, 137 S.Ct. 2012, 2020 (2017) (favorably discussing *Lyng*); *id.* at 2022 (burden was forced choice between benefit and being a church).

### D. Coercion, not "access to religious resources," distinguishes zoning and prisoner cases.

The dissent maintains that "government may substantially burden religion simply by controlling access to religious resources" in three contexts—zoning, prisons, and Native American sacred sites on federal land. Dissent at 62-63. Zoning and incarceration involve coercion and thus can burden religious exercise, but no Supreme Court or court of appeals decision supports the

dissent's view that government use of federal land may do so as well, and *Lyng* is directly to the contrary.

**1. Zoning cases involve coercion.**

RLUIPA prohibits states and municipalities from imposing "a land use regulation in a manner that imposes a substantial burden" on a person or religious group. 42 U.S.C. § 2000cc(a)(1). "Land use regulation" is defined as a law "that limits or restricts a claimant's use or development of land" in which "the claimant has an ownership, leasehold, easement, servitude, or other property interest." 42 U.S.C. § 2000cc-5(5). Thus, the element of government coercion is built-in to RLUIPA's land-use cause of action: a claim exists only when the government exercises regulatory power to prohibit the plaintiff from making religiously-motivated use of *the plaintiff's own property*. Because the existence of a burden is a given, RLUIPA land-use cases construing "substantial burden" focus on the meaning of "substantial." *See Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (land-use regulation must be "oppressive to a significantly great extent").

Thus, while RLUIPA precedents have recognized that "a place of worship is at the very core of the free exercise of religion," *Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011), they provide no support for the dissent's view that government burdens religious exercise when

it fails to manage *public property* for that purpose. *See Prater v. City of Burnside*, 289 F.3d 417, 427-28 (6th Cir. 2002) (city's refusal to abandon roadway to church asserting religious calling to expand its facilities onto it did not "burden the Church's rights under the Free Exercise Clause").

**2. Prisoner cases involve coercion.**

Courts have found burdens on prisoners' religious exercise when, *inter alia*, prison officials prohibit prisoners from participating in worship services,[2] forbid them from grooming consistently with their religious beliefs,[3] prohibit them from possessing religious literature or articles,[4] refuse to provide or make available kosher or halal food,[5] or execute them without permitting the rites consistent with their faith.[6] But the burden in those cases arises not from the

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[2] *Yellowbear*, 741 F.3d at 55-56; *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014); *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

[3] *Holt v. Hobbs*, 574 U.S. at 361; *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005).

[4] *Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022); *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022).

[5] *Shakur v. Schriro,* 514 F.3d 878 (9th Cir. 2008); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1320 (10th Cir. 2010); *id*. at 1325 (Gorsuch, J., concurring) (plaintiff "has been forced to choose between violating his religious beliefs and starving to death").

[6] *Ramirez v. Collier*, 142 S.Ct. 1264 (2022).

government's control over "access to religious resources," Dissent at 63, but from its control over the *prisoner*.

Prison officials exercise "a degree of control unparalleled in civilian society" over prisoners. *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). When the conditions of incarceration or execution coercively imposed on the prisoner prohibit his religious exercise, that can create a burden. But no court has ever held that government must supply halal food, or a sweat lodge, or a chaplain, or any other "religious resources" it possesses to persons *not* in government custody. As the Supreme Court observed in *Lyng*, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs." 485 U.S. at 452.

### 3. The dissent understates the consequences of its theory.

The dissent assumes without explanation that claims for access to government-owned religious resources would extend only to Native American plaintiffs and sacred sites, rather than to "any individual" who wishes to make religiously-motivated use of any government-owned "resources." *See Boerne*, 521

U.S. at 532. Even if such limitation were possible, the dissent's theory could still impose a restrictive servitude on vast areas of federal land. *Lyng*, 485 U.S. at 452-53. In a recent RFRA case, a plaintiff testified that the "entire state of Washington and Oregon" were sacred to him. *Slockish v. Federal Highway Admin.*, 9th Cir. 21-35220, 4-ER-716. Another RFRA plaintiff sought the removal of a renewable energy project, claiming religious objections to development within a 40,000-square-mile area. *La Cuna de Aztlan Sacred Sites Prot. Circle v. U.S. Dep't of the Interior*, 9th Cir. 13-56799, 1-ER-27.

As this Court knows, environmental plaintiffs challenging proposed timber sales, mineral leases, grazing permits, pipelines, transmission lines, etc., routinely aver that they use the affected federal land for "recreational, aesthetic, and spiritual purposes." Under the dissent's theory, a small change in pleading would replace the arbitrary-and-capricious review currently applied in such challenges with "the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534.

## II. If the Act were irreconcilable with RFRA, the Act would control.

The Act states that the Forest Service "shall convey all right, title, and interest of the United States in and to" the defined parcel "to Resolution Copper." 16 U.S.C. § 539p(c)(10). If, as plaintiff contends, that legislatively-

mandated land transfer imposes a substantial burden unsupported by a narrowly-tailored compelling interest, then the 2014 Act would be irreconcilable with 1993's RFRA. And "where two acts are in irreconcilable conflict," the "later" act controls. *United States v. Fisher*, 109 U.S. 143, 145 (1883); *Branch v. Smith*, 538 U.S. 254, 273 (2003).

That is because "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). A prior enactment "may be repealed, amended or disregarded by the legislature which enacted it, and is not binding upon any subsequent legislature." *United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996).

That remains true when the earlier statute, like RFRA, contains language purporting to take priority over later-enacted laws "unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). Such "express-reference provisions are ineffective," *Lockhart v. U.S.*, 546 U.S. 142, 147-50 (2005) (Scalia, J., concurring), because "statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute [or] to exempt the current statute from the earlier statute . . . [and] to express any such intention *either expressly or by implication as it chooses*." *Dorsey v. U.S.*, 567 U.S. 260, 274 (2012) (emphasis added); *accord Great Northern Ry. Co. v. U.S.*, 208 U.S. 452, 465 (1908); *Ctr. for Investigative Reporting v. U.S. Dep't of*

*Justice*, 14 F.4th 916, 940-42 (9th Cir. 2021) (Bumatay, J., dissenting) ("[T]he weight of constitutional history and precedent show that where two statutes conflict, the later statute controls, regardless of attempts by past Congresses to hobble the current legislature[.]").[7]

Contrary to plaintiff's argument, Reply Brief 5-6 n.1, neither *Hobby Lobby* nor *Bostock v. Clayton County* recognized RFRA's express-reference provision as an exception to that rule. In *Hobby Lobby*, the Court explained that "meager legislative history" about an unenacted amendment to the Affordable Care Act couldn't affect the application of RFRA. 573 U.S. at 719 n.30. *Bostock* stated in dicta that RFRA "might supersede Title VII's commands in appropriate cases." 140 S.Ct. 1731, 1754 (2020). But that is an *application* of the rule that later statutes control earlier ones when they irreconcilably conflict, not an exception from it; Title VII was enacted in 1964. *Id*. at 1738.

If "the plain import of a later statute directly conflicts with an earlier statute," then "the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Dorsey*, 567 U.S. at 274 (cleaned up; emphasis in original). The Act's "plain import" is that the Forest Service "shall" transfer the Oak Flat

[7] The majority did not disagree, but found the issue waived. *Id*. at 932, 943.

parcel to Resolution. 16 U.S.C. § 539p(c)(10). If RFRA were reinterpreted to conflict with that legislative command, the 2014 Act would control. Because plaintiff cannot prevail even on its own revisionist interpretation of RFRA, en banc reconsideration is unwarranted.

* * * * *

The "task" of "reconcil[ing] the various competing demands on government" resources "is for the legislatures and other institutions," not the courts. *Lyng*, 485 U.S. at 452. Here, Congress has balanced competing demands on the Tonto National Forest by preserving Apache Leap, while directing the transfer of Oak Flat. RFRA, like the Free Exercise Clause, "simply does not provide a principle that could justify upholding [plaintiff's] legal claims" against Congress's judgment. *Id.*

## CONCLUSION

For the foregoing reasons, rehearing en banc should be denied.

Respectfully submitted,

s/ Joan M. Pepin

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# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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