No. 24-291

IN THE

Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE CHRISTIAN LEGAL SOCIETY, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, AND ASSEMBLY OF CANONICAL ORTHODOX BISHOPS OF THE UNITED STATES OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY
CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF AMICI 1
SUMMARY OF ARGUMENT 2
ARGUMENT 5
I. RFRA is clear and straightforward: the ordinary meaning of "substantial burden" applies to all federal-government action 5
   A. RFRA requires judicial scrutiny where government action would "substantially burden a person's exercise of religion." 5
   B. The meaning of "substantial burden" does not vary with the state's interest.......... 7
   C. Because it is not defined by the statute nor is it a long-standing "term of art," a RFRA "substantial burden" must always be understood by its ordinary meaning 8
II. Because it involved a general law, *Lyng* did not apply the *Sherbert* test. Nor did it define or even use the phrase "substantial burden." 13
III. The Ninth Circuit's "substantial burden" test is otherwise underinclusive, fosters confusion, and permits absurd results............... 16
CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Apache Stronghold v. United States,
101 F.4th 1036 (9th Cir. 2024)......3-4, 7, 13-17, 20

Bostock v. Clayton Cnty.,
590 U.S. 644 (2022).. 6

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014)...................................... 5, 6, 12

E. Texas Baptist Univ. v. Burwell,
793 F.3d 449 (5th Cir. 2015) 18

Emp. Div. v. Smith,
494 U.S. 872 (1990)............................5-6, 10-12, 15

Fulton v. City of Phila.,
593 U.S. 522 (2021)... 15

Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.,
778 F.3d 422 (3d Cir. 2015)................................. 18

Goldman v. *Weinberger*,
475 U.S. 603 (1986).. 7

Gonzales v. O Centro Espírita Beneficente União do Vegetal,
546 U.S. 418 (2006).. 7

Gross v. FBL Fin. Servs., Inc.,
557 U.S. 167 (2009)... 13

Guru Nanak Sikh Soc'y of Yuba City v. Cnty of Sutter,
456 F.3d 978 (9th Cir. 2006) 19

Hernandez v. Comm'r,
490 U.S. 680 (1989).. 10, 11

Jimmy Swaggart Ministries v. Bd. of Equalization of Calif.,
493 U.S. 378 (1990).. 10

Johnson v. United States,
559 U.S. 133 (2010).. 8

Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell,
794 F.3d 1151 (10th Cir. 2015) 18

Lyng v. Nw. Indian Cemetery Protective Assoc.,
485 U.S. 439 (1988)..................................4-5, 13-18

Morissette v. United States,
342 U.S. 246 (1952).. 10

O'Lone v. Estate of Shahazz,
482 U.S. 342 (1987).. 7

Our Lady of Guadalupe Sch. v. Morrissey-Berru,
591 U.S. 732 (2020).. 17

Priests For Life v. U.S. Dep't of Health & Hum. Servs.,
772 F.3d 229 (D.C. Cir. 2014)............................. 18

Roman Cath. Diocese of Albany v. Vullo,
42 N.Y.3d 213 (2024) 19

Schindler Elevator Corp. v. U.S. ex rel. Kirk,
563 U.S. 401 (2011).. 9

Sherbert v. Verner,
374 U.S. 398 (1963)..............................3, 5-8, 10-16

Tanzin v. Tanvir,
592 U.S. 43 (2020).. 8-10

Thomas v. Review Bd. of Ind. Emp. Security Div.,
450 U.S. 707 (1981)... 3, 11

Trinity Lutheran Church of Columbia v. Comer,
582 U.S. 449 (2017)... 15

Wisconsin v. *Yoder*,
406 U.S. 205 (1972).................................... 3, 11, 12

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014) 14, 19

Zubik v. Burwell,
578 U.S. 403 (2016)... 18

Constitutional Provisions

U.S. Const., amend. I 5, 6, 14

Statutes

Religious Freedom Restoration Act of 1993,
Pub. L. No. 103-141, 107 Stat. 1488 (Nov.
16, 1993) 1, 3, 5-7, 9, 11, 13, 16, 20

42 U.S.C. § 2000bb... 1, 3

42 U.S.C. § 2000bb-1(a)-(b) 6, 13, 16

42 U.S.C. § 2000bb-2(1) 9

42 U.S.C. § 2000bb-2(4) 9

42 U.S.C. § 2000bb-3(a) 6

42 U.S.C. § 2000bb(a) 20

42 U.S.C. § 2000bb(a)(4)................................. 5, 11

42 U.S.C. § 2000bb(b)(1)....................... 5, 6, 11, 13

42 U.S.C. § 2000cc-5 9

42 U.S.C. § 1983 10

Rules

Sup. Ct. R. 37.2 1

Legislative Materials

139 Cong. Rec. 1250 (1993) 11-12

139 Cong. Rec. 9687 (May 11, 1993) 21

139 Cong. Rec. 26416 (Oct. 27, 1993) 21

House Commission on the Judiciary, Religious Freedom Restoration Act of 1993, H.R. Rep., 103-88 (1993) 6, 12

Other Authorities

Black's Law Dictionary (6th ed. 1990) 9

Black's Law Dictionary (12th ed. 2024) 9, 16

Laycock, Douglas, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 20

McConnell, Michael W., *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109 (1990) 20

McConnell, Michael W., *Why Protect Religious Freedom?*, 123 Yale L.J. 770 (2013) 17

Oxford English Dictionary (2d ed. 1989) 9, 16

Scalia, Antonin & B. Garner, Reading Law: The Interpretation of Legal Texts (2012) 9-10

Webster's Third New International Dictionary (1986) 16

INTEREST OF AMICI[1]

Amici are nonprofit organizations dedicated to safeguarding religious liberty as a universal right. They submit this brief to urge the Court to clarify the application of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, in scrutinizing action by the government that inflicts a "substantial burden" on religious exercise. In the instant case, the Ninth Circuit's interpretation of RFRA made it a dead letter when applied to obliteration of an indigenous sacred site on federal land. Beyond that catastrophic harm, this approach defies the statutory text, misreads precedent, and would produce other unjust results.

The Christian Legal Society (CLS) is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors with members in every state and chapters on 90 law-school campuses. CLS's legal advocacy division, the Center for Law and Religious Freedom, works to protect the right of all citizens to freely exercise their religious beliefs. CLS was instrumental in RFRA's passage and the subsequent defense of its constitutionality and intended applicability.

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Cardinals, Archbishops, and Bishops of the United States and the U.S. Virgin

---

[1] No counsel for any party has authored this brief in whole or in part, and no person other than Amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, Amici provided timely notice of intent to file an amicus curiae brief to the parties' counsel of record.

Islands. On behalf of the Christian faithful, the USCCB advocates and promotes the pastoral teaching of the Church in a broad range of areas, from the free expression of ideas and the rights of religious organizations and their adherents, to fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the value of human life from conception to natural death, and care for immigrants and refugees. When lawsuits touch upon important tenets of Catholic teaching, the Conference has filed amicus curiae briefs to assert its view, most often in this Court. In so doing, the Conference seeks to further the common good for the benefit of all. It has frequently participated as an amicus in this Court to further its particular interest in the right of individuals and communities to freely practice their faith.

The Assembly of Canonical Orthodox Bishops of the United States of America consists of all active, canonical Orthodox Christian bishops in every jurisdiction in the United States. The Assembly preserves and contributes to the unity of the Orthodox Church in the United States by furthering her spiritual, theological, ecclesiological, canonical, educational, missionary, and philanthropic aims. It has a particular interest in safeguarding the liberty of all Americans to practice their faith.

SUMMARY OF ARGUMENT

For time out of mind, Western Apaches have practiced their religion at Oak Flat, an indigenous sacred site on federal land in Arizona. Oak Flat provides Western Apaches a corridor to communicate directly with their Creator, and it is the only place on

earth where they can perform certain ceremonies that are essential to their religion.

But the government's planned transfer of Oak Flat to Resolution Copper to create a copper mine would collapse the site into a crater "approximately 1.8 miles in diameter and . . . between 800 and 1,115 feet deep." *Apache Stronghold v. United States*, 101 F.4th 1036, 1047 (9th Cir. 2024). It is undisputed that this would obliterate Western Apache religious practice there.

The urgent question presented is whether such obliteration would "substantially burden" Western Apache religious exercise under the Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb, which requires the government to justify such burdens on religious exercise by showing a compelling interest advanced in the least restrictive manner—a test established in *Sherbert v. Verner*, 374 U.S. 398 (1963).[2] The answer is a resounding yes.

On en banc review at the Ninth Circuit, six judges led by Chief Judge Murguia observed that the ordinary meaning of "substantial burden" under RFRA includes the destruction of Oak Flat—triggering the need for the government to justify itself. And although a separate and controlling en banc opinion of six judges led by Judge Collins agreed with that observation, they crafted a carveout to the

[2] In describing RFRA's purpose to apply the compelling-interest test to all substantial burdens on religious exercise, Congress cited *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court in *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981) further clarified this standard. For readability and consistency with other briefing in this matter, however, Amici refer to the test discussed in these cases as "the *Sherbert* test."

phrase's ordinary meaning—and thus to RFRA's protection—for cases involving "the Government's management of its own land and internal affairs." *Apache Stronghold*, 101 F.4th at 1053. Absent this Court's review, therefore, Oak Flat is set for destruction without any judicial consideration of the strength of the government's interest or the less catastrophic alternatives available to meet its needs.

The controlling opinion effectively based its carveout on a two-part premise. First, it said that an ordinary-meaning construction does not apply based on the context of RFRA's adoption. Second, the opinion claimed that this Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988)—a case predating RFRA—had assigned "substantial burden" a limited meaning for challenges under the Free Exercise Clause involving the government's management of its own land and internal affairs. In that situation, according to the opinion, a burden is not substantial unless it coerces, discriminates, penalizes, or denies equal rights. And, applying this narrow definition, the Ninth Circuit held that destroying Oak Flat is not a substantial burden.

Amici ask this Court to address and rectify the Ninth Circuit's mistaken understanding of RFRA and *Lyng*—an important question of federal law on which the future of Native American religious practice depends. They make this request for three reasons.

First, the ordinary meaning of "substantial burden" in RFRA must apply unless Congress stated otherwise—which it did not. Second, *Lyng* provides no definition of "substantial burden" for the simple reason that it regarded the road-building project there as a neutral and generally applicable law wholly

exempt from the *Sherbert* test, per this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990)—a decision that RFRA rejected. In other words, because the Court in *Lyng* had no occasion to apply the substantial-burden test, the Ninth Circuit erred in foisting its analysis based on *Smith* onto a statute intended to repudiate *Smith*. Finally, the Ninth Circuit's purportedly exclusive list of four types of substantial burdens is underinclusive and assumes an unrealistically narrow vision of free exercise as envisioned in RFRA and the First Amendment.

ARGUMENT

I. RFRA is clear and straightforward: the ordinary meaning of "substantial burden" applies to all federal-government action.

A. RFRA requires judicial scrutiny where government action would "substantially burden a person's exercise of religion."

Congress enacted RFRA to repudiate the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) and, in turn, "provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). According to RFRA's findings, *Smith* had "virtually eliminated the requirement that the government justify burdens on religious exercise" resulting from neutral and generally applicable laws. 42 U.S.C. § 2000bb(a)(4).

In response, Congress "restore[d]" through RFRA the test established in *Sherbert*, which *Smith* had refused to apply. 42 U.S.C. § 2000bb(b)(1). In *Sherbert*, this Court had considered whether a work-availability requirement for unemployment benefits imposed "any burden on the free exercise" of a Sabbath-observer's

religion, and upon finding that it did, assessed "whether some compelling state interest" justified that burden. 374 U.S. at 403, 406. Expressly invoking *Sherbert*, RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion" unless doing so is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. §§ 2000bb(b)(1); 2000bb-1(a), (b). This is so "even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a).

As this Court observed, however, it "would be absurd if RFRA merely restored [our] pre-*Smith* decisions in ossified form." *Hobby Lobby*, 573 U.S. at 715. Rather, RFRA provides protections for religious belief and practice that extend "far beyond what this Court has held is constitutionally required" by the First Amendment. *Id.* at 706; *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2022) ("RFRA operates as a kind of super statute displacing the normal operation of other federal laws.").

RFRA's text plainly demonstrates its breadth and depth, in that it extends "to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. §2000bb-3(a). Indeed, RFRA is designed to cover "all governmental actions which have a substantial external impact on the practice of religion." House Comm. on the Judiciary, Religious Freedom Restoration Act of 1993, H.R. Rep. 103-88, at 6 (1993). And the "definition of governmental activity covered is meant to be all inclusive." *Id.* In fact, RFRA may even require the government to "expend additional funds to accommodate citizens' religious beliefs." *Hobby Lobby*, 573 U.S. at 730.

Therefore, any carveouts to the *Sherbert* test no longer govern after RFRA.[3]

B. The meaning of "substantial burden" does not vary with the state's interest.

As described above, the *Sherbert* test contains two parts. First, the plaintiff must show a substantial burden on religious exercise. Second, once the plaintiff shows such an impingement on his or her faith, the burden shifts "squarely [to] the Government" to show that it is furthering a compelling interest using the least restrictive means. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 429 (2006). Properly applied, the *Sherbert* test thus mandates the bifurcation of "substantial burden" and "compelling interest and least restrictive means."

The controlling Ninth Circuit opinion, however, blurs this bifurcation. Essentially, it collapses the government's interest—which is its own distinct prong to be proven as compelling—into the "substantial burden" analysis. According to the Collins majority, the government's interest in managing its land limits the scope of cognizable substantial burdens to coercion, discrimination, penalties, and denial of equal rights. *Apache Stronghold*, 101 F.4th at 1055, 1062. In short, the opinion merges RFRA's "Exception" into its "General" rule. 42 U.S.C. § 2000bb-l (a)-(b). Put another way, the en banc majority allows the

---

[3] Subsequent cases have clarified, for example, that the RFRA test governs prisoner and military claims, even though this Court declined to do so in both contexts pre-RFRA. *Compare Holt v. Hobbs*, 574 U.S. 352 (2015), *and Singh v. Berger*, 56 F.4th 88 (D.C. Cir. 2022), *with O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), and *Goldman v. Weinberger*, 475 U.S. 603 (1986).

government's defense to change the nature of the plaintiff's prima facie case.

At bottom, the en banc majority's misapplication penalizes plaintiffs by giving the government two bites at the apple in contravention of RFRA's plain language. The government's interest in managing its own land is already accounted for by the compelling-interest prong of the *Sherbert* test. By narrowing the definition of "substantial burden" for cases involving the government's internal affairs, however, the Ninth Circuit effectively double counts the government's interest and confuses RFRA's distinction between the two prongs of the test.

C. Because it is not defined by the statute nor is it a long-standing "term of art," a RFRA "substantial burden" must always be understood by its ordinary meaning.

As a matter of statutory interpretation, the ordinary meaning of a term prevails unless (1) the statute provides a definition, or (2) Congress uses "a term of art" that carries a technical meaning established over years of practice. *See Johnson v. United States*, 559 U.S. 133, 138-39, 142 (2010) (explaining that when Congress does not define a phrase nor select it as a term of art, courts "give [it] its ordinary meaning"). Because RFRA does not assign "substantial burden" a definition, nor is it a term of art drawn from case law or other statutes, the term is understood in its ordinary, everyday sense.

No Definition

To determine the ordinary meaning of a term, courts refer to dictionaries. *Tanzin v. Tanvir*, 592 U.S. 43, 47 (2020) (using dictionary definitions to

determine the plain meaning of undefined terms in RFRA); *see also Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 408 (2011) (using dictionaries to illuminate a term's ordinary meaning). Doing so in the present context, a "burden" would include something that hinders, oppresses, or prevents religious exercise or adherence to one's faith. *See* Black's Law Dictionary (12th ed. 2024) (defining "burden" as an affirmative "obligation imposed on a person," as well as something that "hinders or oppresses"). Whereas "substantial" would include something "[o]f ample or considerable amount." Oxford English Dictionary 66-67 (2d ed. 1989); *see also* Black's Law Dictionary (6th ed. 1990) ("substantial" is more than "nominal").

Congress knew how to define terms in RFRA. For example, it defined the term "government" to include "a branch, department, agency, instrumentality, and official . . . ." 42 U.S.C. § 2000bb-2(1); *see also Tanzin*, 592 U.S. at 47 (recognizing that Congress supplanted the ordinary meaning of "government" with a technical definition in RFRA). Similarly, RFRA incorporates a definition of "exercise of religion." 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."). And when a statutory term is not defined, this Court has defaulted to its ordinary meaning. For instance, this Court in *Tanzin* assessed the meaning of "appropriate relief" under RFRA—another undefined term in that statute—by applying the phrase's ordinary meaning. 592 U.S. at 49.

Not a "Term of Art"

Moreover, the phrase "substantial burden" cannot be understood from another statute or as a "term of art" established over years of practice. *See* A. Scalia &

B. Garner, Reading Law: The Interpretation of Legal Texts 323 (2012) ("[W]hen a statute uses the very same terminology as an earlier statute . . . it is reasonable to believe that the terminology bears a consistent meaning."); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (explaining exception to ordinary meaning where Congress "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice").

No other statute defines "substantial burden." In this same statute, for example, this Court held that the phrase "persons acting under color of law" carried a "technical" meaning because it drew upon "one of the most well-known" statutes—42 U.S.C. § 1983. *Tanzin*, 592 U.S. at 48. But "substantial burden" does not draw upon any other statute, let alone one of the most well-known.

Further, this Court's pre-*Smith* use of the phrase was, at best, scarce and indeterminate. It originates in *Hernandez v. Commissioner*, where the Court deliberated on whether the IRS's prohibition of charitable deductions imposed a "substantial burden" on the religious exercise of the Church of Scientology. 490 U.S. 680 (1989). The Court expressed "doubts" that the alleged burden was "a substantial one," noting that payment of taxes was not forbidden by the Scientology faith. *Id.* at 699. Regardless, the Court said it "need not decide" whether the burden was substantial, given the government's compelling interest in maintaining a sound tax system. *Id.*[4]

---

[4] In *Jimmy Swaggart Ministries v. Board of Equalization of California*, this Court quoted *Hernandez*'s use of the phrase but provided no definition. 493 U.S. 378, 384-85 (1990).

This Court thereafter referenced "substantial burden" in *Smith*, when it described the *Sherbert* test as follows: governmental actions that "substantially burden" religious exercise must be justified by a compelling governmental interest. *Smith*, 494 U.S. at 883 (citing *Sherbert,* 374 U.S. at 402-03). But in *Smith*, as in *Hernandez*, the Court nowhere provided a definition of "substantial burden." And even if the Court in *Smith* had done so, RFRA was enacted expressly to repudiate—not incorporate—*Smith*. 42 U.S.C. §§ 2000bb(a)(4), (b)(1).

In sum, this Court's pre-RFRA precedent scarcely mentions the phrase, and nowhere supplies an established definition of "substantial burden" for RFRA to adopt. This cannot suffice to establish "substantial burden" in RFRA as a term of art.[5]

Lastly, RFRA references no case that defines "substantial burden." RFRA mentions only three cases: *Smith*, *Yoder*, and *Sherbert*. And, even then, it cites *Smith* to repudiate its deviation from the *Sherbert* test, and it cites *Sherbert* and *Yoder* solely to "restore the compelling interest test" outlined therein. 42 U.S.C. § 2000bb(b)(1); *see also* 139 Cong. Rec. 1250

---

[5] The Court respectively used the phrases "substantial infringement," "substantially interfere," and "substantial pressure" in *Sherbert*, *Yoder*, and *Thomas*. *Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 218, *Thomas*, 450 U.S. at 718. But this Court did not use the phrase "substantial burden" until *Hernandez*, and Congress chose it when adopting RFRA after the intervening *Smith* decision a year later.

Indeed, the fact that the Court had employed several phrases to describe the sort of effects on religious exercise that would warrant strict scrutiny further demonstrates that "substantial burden" lacked a term-of-art definition.

(1993) (explaining that RFRA is "the only means" to restore the *Sherbert* test). RFRA references none of these cases for the purpose of reinstating a special definition of "substantial burden." After all, Congress could not revive a definition of "substantial burden" from *Yoder* or *Sherbert* that never existed.

Not Limited to Pre-RFRA Cases

Finally, this Court has expressly rejected the argument that RFRA's protection is "limited to cases that fall squarely within the holdings of pre-*Smith* cases." *Hobby Lobby*, 573 U.S. at 706 n.18. Rather, burdens that pre-RFRA cases recognized create a floor—not a ceiling—for defining "substantial burden" under RFRA. *Id.* at 715 (insisting that it would be absurd if RFRA's reach were confined to pre-*Smith* decisions in "ossified form").

As the Committee Report observed, for government activity to violate RFRA it "need not coerce individuals . . . nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen . . . [r]ather, the [compelling governmental interest test] applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion." H.R. Rep. 103-88, at 6 (1993).

Contrary to the Ninth Circuit's conclusion below, pre-RFRA cognizable burdens—e.g., imposing a penalty in *Yoder*, 406 U.S. at 218, or conditioning government benefits in *Sherbert*, 374 U.S. at 403—serve only as mere examples of substantial burdens, not as an exhaustive list of them.

Because the inclusion of "substantial burden" in RFRA is not limited to the cases in which the phrase

appeared, and RFRA declined to assign it a definition or tie it to the specific holdings of precedent, the phrase's ordinary meaning applies in all cases. *See, e.g.*, *Gross v. FBL Fin. Servs., Inc.,* 557 U.S. 167, 175 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (internal quotation marks omitted).

II. Because it involved a general law, *Lyng* did not apply the *Sherbert* test. Nor did it define or even use the phrase "substantial burden."

According to the Collins majority, "the proposition that the government must justify, by strict scrutiny, any 'substantial burden' on religious exercise is one that subsumes, rather than overrides, *Lyng*'s holding about the scope of government action that is reached by the constitutional phrase 'prohibiting the free exercise thereof.'" *Apache Stronghold*, 101 F.4th at 1061. With all respect to Judge Collins and his colleagues, this is a palpable misunderstanding.

Lyng never used, much less applied, the phrase "substantial burden." It had no occasion to do so, because it upheld the government's action there on the ground that it was neutral and generally applicable. And that ground for rejecting a religious-freedom claim was expressly repudiated by RFRA and is therefore irrelevant to a RFRA case. Invoking *Sherbert*, RFRA states that, "even if the burden results from a rule of general applicability," the "[g]overnment shall not substantially burden a person's exercise of religion" unless doing so is the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. §§ 2000bb(b)(1); 2000bb-1(a), (b).

Lyng arose when the U.S. Forest Service proposed building a road and permitting timber harvesting near a Native American sacred site. 485 U.S. at 442. Three Native tribes objected to the project because it would "virtually destroy" their ability to practice their religion. *Id*. at 451. Despite this "extremely grave" threat, this Court held that the Free Exercise Clause did not forbid the government from allowing timber harvesting or constructing the road. *Id*. at 452.

In reaching its conclusion, the Court in *Lyng* never applied the *Sherbert* test and thus never decided whether a "substantial burden" existed. Rather, the Court used "burden" only to relay the respondents' position, and the word "substantial" appears just twice on an unrelated topic. *Id.* at 456. Instead, the Court in *Lyng* rejected "respondents' proposed extension of *Sherbert* and its progeny." *Id*. at 452. Because RFRA cannot have adopted a phrase from a case that never used it, the Collins majority is mistaken that Congress "copied the 'substantial burden' phrase into RFRA, [and therefore] must be understood as having similarly adopted the limits that *Lyng* placed on what counts as . . . a substantial burden." *Apache Stronghold*, 101 F.4th at 1061.[6]

[6] The Collins majority tries to circumvent the fact that *Lyng* never uses the phrase "substantial burden" in saying that *Lyng* defines the scope of "prohibit" under the First Amendment; defining "prohibit," apparently, equates to defining "substantial burden" in RFRA. *Apache Stronghold*, 101 F.4th at 1060-61. But RFRA is not a statute about the term "prohibit." Rather, the key phrase in RFRA is "substantial burden"—a phrase that surely includes actions that hinder, oppress, or prevent religious exercise or adherence to one's faith. *See Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014).

Indeed, this Court has characterized *Lyng* as a case that "abstained from applying the *Sherbert* test . . . at all." *Smith*, 494 U.S. at 883; *see also Trinity Lutheran Church of Columbia v. Comer*, 582 U.S. 449, 460 (2017) (construing *Lyng* as one of the cases where "the laws in question have been neutral and generally applicable"); *Fulton v. City of Phila.*, 593 U.S. 522, 536 (2021) (citing *Lyng* in observing that "*Smith* itself drew support for the neutral and generally applicable standard from cases involving internal government affairs").

After all, the Court noted in *Lyng* that the action at issue did not "discriminate against religions," as that "would raise a different set of constitutional questions." 485 U.S. at 453. This is the same distinction drawn in *Smith*, where the Court distinguished "generally applicable" laws and laws "specifically directed" at a religion. *Smith*, 494 U.S. at 878. *Lyng* thus stands for the principle affirmed in *Smith*: neutral and generally applicable laws fall outside the *Sherbert* test.[7] *See Apache Stronghold*, 101 F.4th at 1150 (Murguia, C.J., dissenting) ("*Smith* treated *Lyng* as reflecting not any special exception for challenges to the government's internal affairs, but as concerning the type of neutral and generally applicable laws not subject to the compelling interest test.").[8]

---

[7] Amici do not concede that the government action here is generally applicable under *Smith*. Rather, they point out only that *Smith* does not control RFRA claims.

[8] The Collins majority rejects this reading of *Lyng* in favor of an exception for internal government affairs. *Apache Stronghold*, 101 F.3d at 1060-61. But even if *Lyng* were not about a generally

RFRA not only supersedes *Lyng*, it directly repudiates it. All that matters under RFRA is whether religious exercise has been "substantially burdened," regardless of whether that burden derives from a generally applicable law. 42 U.S.C. § 2000bb-1(a).

III. The Ninth Circuit's "substantial burden" test is otherwise underinclusive, fosters confusion, and permits absurd results.

Beyond its holding that the obliteration of Oak Flat did not substantially burden the petitioner's faith, the en banc majority erred more broadly when it restricted to four categories the sort of government action that triggers scrutiny as a "substantial burden" on religious exercise.

This Court should take the opportunity to correct this error and clarify that RFRA's capacious protection for religious exercise demands scrutiny of government action that would considerably hinder, oppress, or prevent religious exercise or adherence to one's faith. *See* Black's Law Dictionary (12th ed. 2024) (defining burden as affirmative "obligation imposed on a person" as well as something that "hinders or oppresses"); Webster's Third New International Dictionary 298 (1986) (defining "burden" as something that "'imposes either a restrictive or onerous load"); Oxford English Dictionary 66-67 (2d ed. 1989) (defining "substantial" as "[o]f ample or considerable amount").

In its en banc decision, the Ninth Circuit essentially held that the government can negatively impact religious exercise in any way that it wants,

---

applicable law, one thing remains clear: *Lyng* never applied *Sherbert* or defined substantial burden.

provided its action "[1] has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' [2] does not 'discriminate' against religious adherents, [3] does not 'penalize' them, and [4] does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Apache Stronghold*, 101 F.4th at 1055 (citing *Lyng*, 485 U.S. at 449-50, 453). But RFRA was designed to protect a wide range of religious beliefs and practices, not solely those that the en banc majority considered within its four arbitrary boundaries. Moreover, the en banc majority's ambiguous test, prone to producing absurd results, invites inconsistent and unequal applications—to the detriment of Native American religious practice and religious liberty more generally.

Many historically protected forms of religious exercise, for example, may not fall within the en banc majority's parameters. Religion motivates—indeed, it often mandates—its believers to take affirmative action, from group and individual worship to teaching the faith to one's children, caring for the poor and sick, engaging in public witness, and more. *See* Matthew 25:31-46 (works of mercy and last judgment), 28:16-20 (commission to evangelize); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 753-56 (2020) (education); *see also* Michael W. McConnell, *Why Protect Religious Freedom?*, 123 Yale L.J. 770, 784-85 (2013) (urging that religion concerns much more than moral judgments about right and wrong).

But the Ninth Circuit's test leaves unresolved whether these established forms of affirmative practice would be protected. It offers no guidance on whether coercion includes coercion *not* to affirmatively exercise religion, and it fails to delineate the

boundaries of non-discrimination. Accordingly, under this muddled test, the government could impair religious exercise for any reason—or no reason—at all.

The Ninth Circuit's application of *Lyng* to the meaning of "substantial burden" under RFRA also perpetuates confusion that this Court has had the opportunity to dispel before. In the line of cases leading to *Zubik v. Burwell*, 578 U.S. 403 (2016), each Court of Appeals relied on *Lyng* in various ways to support the conclusion that the "accommodation" from the U.S. Department of Health and Human Services' contraceptive mandate did not constitute a substantial burden.[9] And while this Court's disposition of *Zubik* vacated those rulings, its opinion left unresolved the confusion over the meaning of "substantial burden." Nor did subsequent litigation in the lower courts offer

---

[9] *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.,* 778 F.3d 422, 442 (3d Cir. 2015) ("Under [*Lyng*'s] definition [of "substantial burden"], can the submission of the self-certification form, which relieves the appellees of any connection to the provision of the objected-to contraceptive services, really impose a 'substantial' burden on the appellees' free exercise of religion? We think not."); *Priests For Life v. U.S. Dep't of Health & Hum. Servs*., 772 F.3d 229, 248 (D.C. Cir. 2014) (citing *Lyng* for, inter alia, the finding that "government's action [that] will have severe adverse effects on the practice of [plaintiffs'] religion [is not] heavy enough to subject that action to strict scrutiny") (cleaned up); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Burwell*, 794 F.3d 1151, 1193 (10th Cir. 2015) (citing *Lyng* for the proposition that "[p]re-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable"); *E. Texas Baptist Univ. v. Burwell*, 793 F.3d 449, 456-458 (5th Cir. 2015) (characterizing *Lyng* as "especially instructive" for the court's assessment of the substantial-burden prong).

clarity; in fact, litigation on the matter continues to this day. *See State of Calif., et al. v. Becerra*, No.: 4:17-cv-5783-HSG (N.D. Cal.); *Commonwealth of Penn. & State of New Jersey v. Biden*, No. 2:17-cv-04540 (WB) (E.D. Pa.); *see also Roman Cath. Diocese of Albany v. Vullo*, 42 N.Y.3d 213 (2024). The Court should take this opportunity to provide that clarity.

Furthermore, strict adherence to the en banc majority's test yields inconsistent—perhaps even absurd—results. For instance, the government substantially burdens religious exercise by preventing an inmate's access to a sweat lodge in prison. *See Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (denying "*any* access" to a religious activity "easily" constitutes a substantial burden under RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc et seq.). But under the en banc majority's test, the government can demolish a sweat lodge at Oak Flat without imposing any burden at all.

Similarly, denying a permit to construct a sweat lodge would trigger strict scrutiny. *See Guru Nanak Sikh Soc'y of Yuba City v. Cnty of Sutter*, 456 F.3d 978, 992 (9th Cir. 2006) (finding that the denial of a permit to build a temple was a substantial burden under RLUIPA). But under the en banc majority's test, while the government would be required to justify the imposition of a small fine for visiting Oak Flat, it need not account for the site's obliteration. Apparently, total destruction is deemed less "substantial" than a minimal monetary penalty, a rejected permit application, or denial of access to a sweat lodge.

Finally, per the en banc majority's approach, destruction of Oak Flat would constitute a substantial

burden if the government intended to target Apaches. Yet that same destruction would be presumptively permissible if the government were motivated by financial gain rather than religious animus. This result is squarely incompatible with RFRA's mandate that impact—not intent—governs. *See* 42 U.S.C. § 2000bb(a) (finding that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1140 (1990) (analogizing religion to disability in addressing otherwise-neutral exclusions); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-07 (1990) (proposing theory of "substantive neutrality").

In lieu of the four-pronged test adopted by the Ninth Circuit, which reflects a fundamental misreading of RFRA's robust protections, Amici suggest that a "substantial burden" should include government action that considerably hinders, oppresses, or prevents religious exercise—including with respect to an individual's adherence to his religious beliefs. *See supra* pp. 8-9.

This would be consistent with the term's ordinary meaning, more faithful to this Court's precedent, and yield more reasonable outcomes—in this case and others. As the en banc majority recognized, the destruction of Oak Flat is "substantial in the ordinary sense" because it would be fatal to Western Apaches' religious practices and traditions. *Apache Stronghold*, 101 F.4th at 1086 (noting the destruction of Oak Flat would "easily qualify" as a substantial burden under the term's ordinary meaning).

With respect, any arguably intuitive appeal of the Ninth Circuit's opinion rests on the notion that there would be serious and unpredictable consequences to restricting the government from determining the best use of government property. But that intuition should not be allowed to override all claims of religious liberty. If the government's chosen use of Oak Flat is as important as they say, it can prevail under RFRA's compelling interest test. But it was a mistake for the Ninth Circuit to dispense with that inquiry for all religious freedom cases involving public lands and internal government affairs—an inquiry required by a near-unanimous Congress. 139 Cong. Rec. 9687 (May 11, 1993); 139 Cong. Rec. 26416 (Oct. 27, 1993).

CONCLUSION

The Ninth Circuit's holding that the destruction of Oak Flat is not a "substantial burden" stems from a grave misunderstanding of RFRA that fails to apply its protections in evaluating that destruction.

This Court should grant certiorari to correct that error, which has fractured the Ninth Circuit and jeopardizes Native American religious practice and religious liberty more broadly.

Respectfully submitted,

Michael W. McConnell
559 Nathan Abbott Way
Stanford, CA 94305

James A. Sonne
Counsel of Record
STANFORD LAW SCHOOL
RELIGIOUS LIBERTY CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 723-1422
jsonne@law.stanford.edu

October 15, 2024