9-13-2022

Brief Amicus Curiae of the National Congress of American Indians, a Tribal Elder, the International Council of Thirteen Indigenous Grandmothers, and the MICA Group Supporting Plaintiff-Appellant and En Banc Rehearing

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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)

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, A TRIBAL ELDER, THE INTERNATIONAL COUNCIL OF THIRTEEN INDIGENOUS GRANDMOTHERS, AND THE MICA GROUP SUPPORTING PLAINTIFF-APPELLANT AND EN BANC REHEARING

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CORPORATE DISCLOSURE STATEMENT

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

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INTERESTS OF *AMICI*

Amici are the National Congress of American Indians, a Tribal Elder, and other Native American cultural heritage and rights organizations. *Amici* submit this brief to highlight the history of the U.S. government's seizure of Indigenous lands and sacred sites, the panel's misapplication of *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008), *Navajo Nation*'s incompatibility with subsequent Supreme Court free-exercise precedent, and the problematic double standard the panel's decision creates.

The National Congress of American Indians ("NCAI") is the oldest, largest, and most representative organization comprised of American Indian and Alaska Native tribal governments and their citizens. Established in 1944, NCAI serves as a forum for consensus-based policy development among its member Tribal Nations from every region of the country. Its mission is to promote better education about the rights of Tribal Nations and to improve the welfare of American Indians and Alaska Natives, including working to protect and preserve sacred spaces and areas of cultural significance located on ancestral lands.

Ramon Riley is a respected Apache elder who serves as the White Case Mountain Apache Tribe's Cultural Resource Director, NAGPRA Representative, and Chair of the Cultural Advisory Board. Letters he sent to the U.S. government regarding Oak Flat are included in the record at 2-ER-225–29. Riley has spent most of his life and career working to maintain Apache cultural knowledge and pass it down to future generations. He has spent the last two decades working to defend Oak Flat. He opposes the proposed mining project for Oak Flat, because he believes it is wrong to "destroy sacred land that made us who we are." 2-ER-226.

The members of the International Council of Thirteen Indigenous Grandmothers come together to protect the lands where Indigenous peoples live and upon which these cultures depend.

The MICA Group (Multicultural Initiative for Community Advancement) is a nonprofit organization that has worked with hundreds of Tribal Nations throughout the country on cultural revitalization and other projects.[1]

[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund

SUMMARY OF THE ARGUMENT

Meaningful access to sacred sites such as Oak Flat is an indispensable part of many Indigenous tribes' religious exercise. Nonetheless, the government has repeatedly denied necessary access and even destroyed such sites, thus thwarting the ability of tribal members to exercise core aspects of their spiritual practices. The tribal members in this case face the same fate.

The panel misapplied *Navajo Nation* by erroneously treating government coercion and withholding of benefits as the *only* ways a plaintiff can show substantial burden instead of a baseline. Alternatively, this Court should adjust *Navajo Nation* to accord with subsequent Supreme Court precedent. This Court should reject the panel's decision because it imposes a double standard that gives a narrower reading of the Religious Freedom Restoration Act (RFRA) in the context of Indigenous religions than in other contexts. Finally, this Court should reject the government's contention—absent from the panel

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preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

decision—that the land-exchange rider is exempt from RFRA, as it is plainly inconsistent with Supreme Court precedent.

ARGUMENT

En banc review is warranted because the panel's decision perpetuates a long history of abuses toward Native peoples by misapplying *Navajo Nation* and creating a harmful double standard. The government's argument, not accepted by the panel, that the land-exchange rider is exempt from RFRA altogether, is flatly inconsistent with Supreme Court precedent.

I. The panel's decision perpetuates a government history of callousness and coercion toward Native Americans.

Since time immemorial, the San Carlos Apache have worshipped at Chi'chil Biłdagoteel, or Oak Flat. The San Carlos Apache, like nearly all Native American tribes, have a "land-based" religion. Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012); *see also* Joel West Williams & Emily deLisle, *An "Unfulfilled, Hollow Promise":* Lyng*,* Navajo Nation*, and the Substantial Burden on Native American Religious Practice*, 48 Ecology L.Q. 809 (2021). Specific geographical locations and features are crucial to many rites and ceremonies; there

can be no adequate substitute or adequate compensation for their deprivation. Indeed, traditional Apache teaching understands Oak Flat to not only be a holy site, but the very location of the origin of their religious practices. 2-ER-258. It is the portal between the Apache and the spirit of their creator. 1-ER-067. Without access to important sites like Oak Flat, tribal members cannot meaningfully practice their religion. 1-ER-013; s*ee also* Williams & deLisle, *supra*, at 813–14.

Despite the importance of these sacred sites, the U.S. government has been taking, desecrating, and demolishing them since its inception. *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1307–17 (2021). While American Indian tribes still possess some of their ancestral land, many sites sacred to them are now located on land belonging to the U.S. government. The government's dispossession of Native lands is what made legal protection for access to these sites necessary to begin with. *See* Williams & deLisle, *supra*, at 814. Despite this fact, the government has refused to maintain robust legal protection for Native tribes. Even

within the past few years, Indigenous sacred sites have been bulldozed,[2] developed for commercial interests, and even blown up at the government's hands.[3] And while other religions have generally enjoyed strong legal protection for their places of worship, Native Americans routinely fail to receive the same. *See* Barclay & Steele, *supra*, at 1297.

Oak Flat is the latest example. For centuries, it has been a sacred site where religious ceremonies are performed by many Native American tribes. 2-ER-227. In 1852, the U.S. government signed the Treaty of Santa Fe with Apache Chief Mangas Coloradas and promised to "pass and execute" laws "conducive to the prosperity and happiness of said Indians." 2-ER-207. The territory nominally remained in the hands of the Apache,[4] and, to this day, it is an active site of prayer and ritual. Oak Flat is revered by Native tribes as a place where holy springs flow from the earth and where holy beings reside. 2-ER-227.

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[2] *See Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018).
[3] *Native Burial Sites Blown Up for US Border Wall*, BBC News (Feb. 10, 2020), https://perma.cc/DC56-Z4DQ.
[4] An 1899 map prepared by the Smithsonian Institute shows Oak Flat as Apache Territory. 2-ER-112-13.

The worship ceremonies conducted at Oak Flat are indescribably significant—modern-day Apache who worship there are deeply connected to centuries of Apache who have worshipped there before them, and to the land itself. 1-ER-067. One significant spiritual practice conducted at Oak Flat is the "sunrise ceremony," where a young girl is initiated into womanhood.[5] 1-ER-070. The girl and her family collect special plants that have the spirit of Oak Flat in them from the sacred site to be used at the ceremony. 1-ER-067. During the ceremony, the girl is introduced to the spirits of Oak Flat as a newly initiated woman, just as her mother and grandmother had been before her and her daughter and granddaughter will be after her. 1-ER-076.

At least, that is what the Apache thought would happen until the government attempted to transfer Oak Flat to a mining company that will destroy the site forever. Despite the objections of many tribal leaders to whom Oak Flat is sacred, a last-minute rider to a 2014 appropriations bill enabled the transfer of the land to mining companies. 2-ER-243.

[5] *See* Mary Stokrocki, *A Special Mountain Place and Sunrise Ceremony for Apache Students*, 32 J. Cultural Rsch. Art Educ. 225, 233–35 (2015).

Last year, a Final Environmental Impact Statement[6] acknowledged that the future mining operations will result in the utter destruction of the centuries-old sacred site. If this court does not intervene, Oak Flat will disappear into a crater nearly two miles wide and 1,100 feet deep. 2-ER-269.

II. The panel's decision misapplied *Navajo Nation* by holding that destruction of a site crucial to religious conduct was not a substantial burden.

RFRA prohibits the government from imposing a substantial burden on a person's exercise of religion unless the government can prove its action advances a compelling interest and is the least restrictive means of accomplishing that interest. 42 U.S.C. § 2000bb-1(a), (b). To establish her prima facie case under RFRA, a plaintiff must first show that the government has substantially burdened her religious exercise. *Id.* If a plaintiff does so, then the government must show that it both has a compelling interest and is pursuing the least restrictive means of furthering it. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–

[6] *Outcry as Trump Officials to Transfer Sacred Native American Land to Miners*, The Guardian (Jan. 16, 2021, 4:30 PM), https://www.theguardian.com/environment/2021/jan/16/sacred-native-american-land-arizona-oak-flat.

95 (2014). RFRA imposes this high burden on the government to secure a "very broad protection for religious liberty." *Id.* at 693. RFRA achieves this protection by operating as a "kind of super statute," displacing the enforcement of other federal laws anytime the government fails to meet its high burden. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

Congress did not define the term "substantial burden." *See* 42 U.S.C. § 2000bb-2; Op. 58–59 (Berzon, J., dissenting). Courts have interpreted "substantial burden" to include any government action that significantly inhibits, constrains, curtails, or denies fundamental religious behavior or expression. *See e.g.*, *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996). In a similar vein, this Court's decision in *Navajo Nation* specified two scenarios in which a plaintiff shows a baseline substantial burden: "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1070.

These were the two types of burdens at issue in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), two cases that RFRA references. Specifically, RFRA describes the statute as

restoring "the compelling interest test as set forth in" *Sherbert* and *Yoder*. However, this statutory command describes only the legal standard to be applied, not the factual circumstances in which courts must apply it. *See* Op. 58–59 (Berzon, J., dissenting). The "compelling interest test" is simply the strict scrutiny test. *Yellowbear v. Lampert*, 741 F.3d 48, 52 (10th Cir. 2014) (Gorsuch, J.) (describing the compelling-interest test as "*Sherbert*'s balancing test"). Any discussion of substantial burdens is absent from that test. Had Congress intended to limit "substantial burden" to analogous applications of *Sherbert* and *Yoder*, it could have done so. *Cf.* 28 U.S.C. § 2254(d)(1) (limiting federal habeas relief for state inmates to instances in which the state court's ruling contravened clearly established federal law "as determined by the Supreme Court of the United States").

By holding that denials of benefits and imposition of penalties constituted a substantial burden, the *Navajo Nation* court made clear that government cannot make religious exercise substantially more costly. It excluded any burden that falls "short of" the two scenarios it identified. *Navajo Nation*, 535 F.3d at 1070. For example, in *Navajo Nation*, the burden fell short of this baseline, because the government did

not impose any penalties, deny any benefits, engage in any objective interference with the ability to practice the religious ceremonies, or destroy any "plants, springs, natural resources, shrines with religious significance, or religious ceremonies." *Id.* at 1062–63. The government simply covered a mountain with artificial snow made from recycled wastewater, which only affected the plaintiffs' "subjective spiritual experience." *Id.* at 1063. It didn't make the plaintiffs' religious exercise more costly.

However, *Navajo Nation*'s definition does not exclude burdens extending far beyond burdens that simply make religious exercise more costly. Indeed, this Court has clarified *Navajo Nation*'s baseline definition by finding, with "little difficulty," substantial burdens in scenarios in which religious practice is made wholly impossible. *See Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066–70 (9th Cir. 2011).

This case involves this type of more extensive substantial burden, where religious exercise will be made completely impossible. Unlike the plaintiffs in *Navajo Nation*, the members of Apache Stronghold face the

destruction of plants, natural resources, shrines with religious significance, and religious ceremonies. Their places of worship will become inaccessible simply because those places will cease to exist. Far from retaining virtually unlimited access, they will forever have no access at all. Instead of a diminished "subjective spiritual experience," the Apache face the objective annihilation of the ability to practice their religion in the fashion it demands. *Navajo Nation*, 535 F.3d at 1063.

Even if denials of benefits and imposition of penalties inexplicably occupy the entire universe of what constitutes a substantial burden, the members of Apache Stronghold nevertheless face a substantial burden. Under *Navajo Nation*, a substantial burden exists when believers are "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Id.* at 1070. The Apache religion requires its faithful to practice in a certain fashion at the Oak Flat sacred site. Once the government transfers Oak Flat to Resolution Copper, the Apache will almost certainly face civil sanctions if they attempt to enter Oak Flat—precisely the type of penalty recognized as a substantial burden in *Navajo Nation*. The government tolerates the Apache's access to a sliver of Oak Flat via the Oak Flat Campground (until it is destroyed). *See* 16 U.S.C.

§ 539p(i)(3). But an assurance that preserves only a sliver of a religion's ability to practice—until it can't practice at all—remains a substantial burden.

In a last-ditch effort to ignore the obvious substantial burden in this case, the panel held that plaintiffs are essentially categorically precluded from demonstrating a substantial burden if the destruction occurs on government property. *See* Op. 45. But this argument would render much of *Navajo Nation*'s reasoning completely irrelevant. The fact that "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies" would be affected nor any "places of worship made inaccessible," was pivotal to the *Navajo Nation* court's holding. *Navajo Nation*, 535 F.3d at 1062–63; *see also Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) (noting that the government ensured "[n]o sites where specific rituals take place were to be disturbed"). The plaintiffs retained "virtually unlimited access . . . for religious and cultural purposes," and could still "conduct their religious ceremonies." *Navajo Nation*, 535 F.3d at 1063. This analysis would have been completely superfluous if *Navajo Nation*'s real rule were that RFRA simply doesn't apply on government property.

This Court should review this case en banc. The panel misapplied *Navajo Nation* when it did not recognize a substantial burden that extends far beyond the baseline in *Navajo Nation*.

III. Alternatively, this Court should adjust *Navajo Nation* to conform with current Supreme Court precedent.

This Court need not resolve this case simply by parsing the dicta of *Navajo Nation*. Rather, since that case the Supreme Court has further reinforced the commonsense notion that a complete prohibition on religious exercise imposes a substantial burden. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1278 (2022). In *Ramirez*, the government did not dispute that prohibiting Ramirez's long-time pastor from praying and laying hands on him during his execution imposed a substantial burden on his religious exercise. *Id.* The Court then held that Ramirez was "likely to succeed" in demonstrating such a burden. *Id.*

Here, as in *Ramirez*, the Apache face neither coercion nor withholding of benefits. But instead of prohibition, the Apache's religious exercise faces utter destruction. It defies both Supreme Court precedent and logic to conclude that destruction of a holy site would not impose a substantial burden. Yet as the government all but concedes, fencing off Oak Flat and threatening trespass sanctions *would* constitute such a

burden. *See* Appellees' Answering Br. at 26; *see also Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) (identifying "destruction of religious property" as a "RFRA violation[]").

Other federal courts of appeals confirm this understanding. In *Ackerman v. Washington*, the Sixth Circuit recognized that when a prison "barr[ed] access" to ceremonial foods, that restriction imposed a substantial burden. 16 F.4th 170, 184 (6th Cir. 2021) (quoting *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014)); *see also Haight*, 763 F.3d at 565 ("The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)."). And in *Yellowbear v. Lampert*, then-Judge Gorsuch explained that when a prison "refuse[d] *any* access" to religious facilities, "it doesn't take much work to see" that such a refusal imposes a substantial burden. 741 F.3d at 56; *see also Dorman v. Aronofsky*, 36 F.4th 1306, 1314 (11th Cir. 2022) (explaining that a substantial burden is any burden "more than an inconvenience" and is a burden that "tend[s] to force adherents to forego religious precepts") (quotations omitted).

Although *Ramirez* was a RLUIPA case, RLUIPA's "substantial burden" language mirrors RFRA's. And in *Holt v. Hobbs*, the Supreme

Court explained that RFRA and RLUIPA apply the "same standard." 574 U.S. 352, 358 (2015) (quoting *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006)); *see also Austin v. U.S. Navy Seals 1–26*, 142 S. Ct. 1301, 1307 (2022) (Alito, J., dissenting) (explaining that RLUIPA "essentially requires prisons to comply with the RFRA standard"). As the panel majority here explained, the Ninth Circuit applies the "plain meaning" of "substantial burden" in RLUIPA cases. Op. 30 (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). After *Holt*, this Court must apply *that* definition to RFRA as well. *Navajo Nation* presents no barrier; that decision expressed no opinion as to what imposes a "substantial burden" under RLUIPA. *Navajo Nation*, 535 F.3d at 1077 n.23. Accordingly, the panel made a hash of the statutory text when it applied two vastly different definitions to the same statutory term in these "sister statute[s]." *Ramirez*, 142 S. Ct. at 1277.

Furthermore, the Supreme Court's subsequent RFRA interpretations show that courts interpreting RFRA are not tethered to specific pre-*Smith* free-exercise cases. In *Burwell v. Hobby Lobby*, the Court explained that "RFRA defined the 'exercise of religion' to mean 'the

exercise of religion under the First Amendment'—*not* the exercise of religion as recognized only by then-existing Supreme Court precedents." 573 U.S. at 714 (quoting 42 U.S.C. § 2000bb–2(4) (1994 ed.)) (emphasis added). The Court then held that the government violated RFRA, despite the government's argument that its actions were not analogous to any pre-*Smith* First Amendment violations. *Id.* at 713. "[N]othing in the text of RFRA," the Court explained, indicates that Congress limited "exercise of religion" to the facts of prior Supreme Court cases. *Id.* at 714. Because the same is true of "substantial burden," this Court should make clear that *Navajo Nation* is consistent with this broad and protective understanding of RFRA. *See also Holt*, 574 U.S. at 361–62 (explaining that the district court erred when it "improperly imported a strand of reasoning" from pre-RLUIPA cases).

The Supreme Court and this Court's sister circuits have made clear that a prohibition on—much less complete destruction of—a believer's religious exercise imposes a substantial burden under RFRA. And it has also stated that RFRA's protections are not limited to then-existing Supreme Court precedent. This Court should not hesitate to clarify *Navajo Nation* in accordance with these subsequent developments.

IV. The panel's decision creates a problematic double standard that harms Indigenous claimants.

The panel suggests that the control the government exerts over these tribal lands is justification for making it essentially impossible for a plaintiff to demonstrate a prima facie case dealing with the destruction of sacred sites. But the presence of government control should be cause for closer inspection, not less. Government control of access to worship areas and resources creates a baseline of interference with religious exercise, resulting in "de facto coercion." Barclay & Steele, *supra*, at 1301. Courts have recognized this in other contexts, such as prisons, the military, or even government zoning. *See id.* at 1333–38; *see also* Op. 62 (Berzon, J., dissenting) (citing Barclay & Steele). In such cases, without affirmative accommodation of religious exercise, certain religious practices will be impossible.

The panel ignored this baseline of government coercion, resulting in a disparity that provides far less protection for Indigenous religious exercise regarding sacred sites. *Id.* This Court should recognize the coercion inherent in this sort of government action. In other religious-liberty contexts, courts view obstacles that "impede[] the ability of . . . worshippers to access their sacred spaces" as a "particularly egregious

burden on religious exercise." Barclay & Steele, *supra,* at 1331; *see, e.g.*, *Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). But by the panel's logic, "when the government desecrates, destroys, and removes access to Indigenous sacred sites—making previous religious ceremonies physically impossible at those locations—the coercion evaporates." Barclay & Steele, *supra,* at 1331.

If courts applied this narrow standard of coercion in other contexts, it would lead to results directly contrary to the First Amendment. Indeed, as long as the government used only "forceful compulsion without threatening a penalty or denying benefits, it could confiscate religious relics, mock individuals for their religious beliefs, stop individuals from praying in their own homes, or forcibly remove religious clothing—all without any recognition of government coercion." *Id.* at 1332 (citations omitted). The panel's double standard uniquely harms Native peoples. That is reason alone for this Court to rehear the case en banc.

V. The land-exchange rider does not displace RFRA.

RFRA sets forth a clear statement rule of application, stating that all "[f]ederal statutory law adopted after November 16, 1993, is subject"

to RFRA's requirements, "unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). *See* Resp. Br. at 16 (citing 16 U.S.C. § 539p(c)(10)). The government would have this Court ignore that plain language and rule that the land-exchange rider is entitled to an exemption from RFRA simply by virtue of its implicit conflict with RFRA's command. Resp. Br. at 16 (citing 16 U.S.C. § 539p(c)(10)). But the Supreme Court has repeatedly flatly rejected that argument.

In *Hobby Lobby*, the Supreme Court applied RFRA to carve out an exemption to the later-enacted Affordable Care Act (ACA). *See Hobby Lobby*, 573 U.S. at 719 n.30. The Court cited RFRA's clear statement rule specifically for the proposition that a statute like the ACA could not receive priority over RFRA's language unless the law "explicitly exclude[d] such application by reference to RFRA." *Id.* (alteration in original omitted). It took the same position in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020). There, the Court observed that the "ACA does not explicitly exempt RFRA." *Id.* Similarly, in *Bostock* the Supreme Court described RFRA as

a "super statute" that could be interpreted to "displace" other laws like Title VII. 140 S. Ct. at 1754.

The government argues that provisions like RFRA's application clause are constitutionally infirm, because they would prohibit one legislature from limiting the powers of subsequent legislatures to amend a statute implicitly. Resp. Br. at 17. But scholars have recognized that there is nothing constitutionally suspect about rules like RFRA's that simply dictate the terms for how future Congresses should amend legislation like RFRA. *See* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665, 1697–99 (2002) (arguing that such clear statement rules pose no constitutional problem "between one Congress and its successors"). Further, if accepted this argument would render many other important statutory provisions inoperative, including similar clear statement rules in the Administrative Procedure Act, the National Emergencies Act, and the McCarran-Ferguson Act. *Id.* (collecting citations); 5 U.S.C. § 559 (1994); 50 U.S.C. § 1621 (1994); 15 U.S.C. § 1012(b) (1994). The government's interpretation would also require judges to divine when Congress's intent to create a conflict between laws is implicit *enough* to override a statutory

command—a malleable exercise that would lead to unpredictable results. In contrast, RFRA's clear statement rule provides Congress with a straightforward roadmap for how to create exemptions from RFRA, and giving force to that roadmap is consistent with principles of judicial restraint and judicial treatment of other similar statutes.

CONCLUSION

The panel decision warrants review because it misapplied *Navajo Nation*. Alternatively, this Court should rehear the case en banc to bring *Navajo Nation* in line with current Supreme Court precedent. It should repair the problematic double standard it established for Native American religious exercise and follow Supreme Court precedent that RFRA applies to later-enacted statutes.[7]

[7] The Notre Dame Law School Religious Liberty Clinic thanks students William Eisenhauer, Jared Huber, Olivia Rogers, and Athanasius Sirilla for their work on this brief.

Dated: September 13, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 29-2(c)(2) as it contains 4,200 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). This is within 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 13, 2022

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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 13, 2022

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