

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 *AMICI CURIAE* OF THE JEWISH
COALITION FOR RELIGIOUS LIBERTY, THE
INTERNATIONAL SOCIETY FOR KRISHNA
CONSCIOUSNESS, THE SIKH COALITION, AND
PROTECT THE 1st IN SUPPORT OF PLAINTIFF-
APPELLANT AND INJUNCTION
PENDING APPEAL**

JAMES C. PHILLIPS
CHAPMAN UNIVERSITY
DALE E. FOWLER SCHOOL OF LAW
1 University Drive
Orange, CA 92866

GENE C. SCHAERR
Counsel of Record
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K St. NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici* have no parent corporation. They have no stock, and, therefore, no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iii
INTRODUCTION AND INTEREST OF <i>AMICI</i>	1
ARGUMENT.....	2
I. The District Court’s Anemic View of what Constitutes a Substantial Burden Will Harm All Faiths.....	2
II. The District Court’s View of Substantial Burden is Erroneous.	6
III. The Government Cannot Show a Compelling Interest Under These Facts.	10
CONCLUSION	14
APPENDIX	16
CERTIFICATE OF COMPLIANCE.....	18
CERTIFICATE OF SERVICE.....	19

TABLE OF AUTHORITIES

Cases

<i>Burwell v. Hobby Lobby Stores, Inc.</i> , 573 U.S. 682 (2014)	8-9
<i>Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal</i> , 546 U.S. 418 (2016).....	9, 11
<i>Holt v. Hobbs</i> , 574 U.S. 352	8-9
<i>Mack v. Loretto</i> , 839 F.3d 286 (5th Cir. 2016)	3-4
<i>McCurry v. Tesch</i> , 738 F.2d 271 (8th Cir. 1984).....	2-3
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	7, 12
<i>Wisconsin v. Yoder</i> , 406 U.S. (1972).....	7, 11, 12

Statutes

16 U.S.C. § 539p	12
------------------------	----

Other Authorities

Stephanie Hall Barclay & Michalyn Steele, <i>Rethinking Protections for Indigenous Sacred Sites</i> , 134 Harv. L. Rev. 1294 (2021).....	2
--	---

INTRODUCTION AND INTEREST OF *AMICI*¹

For centuries, Apache Nation members have worshiped at Oak Flat with sacred religious ceremonies—given that spot’s paramount importance in their faith. But after years of unsuccessful attempts by members of Congress to transfer the land to mining companies, a midnight rider in a massive defensive spending bill finally gave the mining companies what they coveted. So, in just days, Oak Flat, which the United States has held in trust for the Apaches since 1852, will transfer to a mining company.

The district court found the mining company’s operations “will have a devastating effect on the Apache people’s religious practices.” Yet somehow the court also concluded this would not substantially burden the Apache’s religion. That ruling was as wrong as it was dangerous—not just for the plaintiff here, but for all faiths. *Amici* submit this brief to defend the religious liberty of a minority faith, and because the religious liberty of all rises and falls together.²

¹ All parties consent to this *amicus* brief’s filing. No party’s counsel authored any part of this brief. No party or party’s counsel, or person other than *amici*, contributed money to the brief’s preparation or submission.

² *Amici*’s descriptions are in the Appendix.

ARGUMENT

I. The District Court's Anemic View of what Constitutes a Substantial Burden Will Harm All Faiths.

While this is a case about Native American religious rights, the district court's erroneously narrow standard for what qualifies as a substantial burden under RFRA will harm Christian, Jewish, Muslim, Sikh, Buddhist, Hare Krishna, and all types of religious organizations and individuals. That's because the government can substantially burden religious faith in far more ways than just denying government benefits or coercing individuals or institutions via civil or criminal penalties.

A few examples illustrate the under-inclusiveness and error of the district court's cramped standard.³ In *McCurry v. Tesch*, 738 F.2d 271 (8th Cir. 1984), after finding that a school operated by a Christian church was not in compliance with state law and was still open, a court ordered padlocks placed on the doors of the school and the church, with the sheriff to open the church on weekends and Wednesday evenings “for the

³ For more examples, see Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

singular purpose of religious services.” *Id.* at 272. As a result, shortly after 6:00 on a Monday morning, the sheriff “with fifteen carloads of deputies and state troopers” arrived at the church, only to find about 85 people conducting a prayer vigil in protest. *Id.* at 273. “When the worshippers refused to leave, the law-enforcement officers picked them up, carried them out of the church, and padlocked the building.” *Id.*

Under the district court’s test, these Christian worshipers suffered no substantial burden on their religion because they did not lose a government benefit, nor were they subject to a civil or criminal penalty. They were just forcibly removed from their church and physically prohibited from worshipping there. The same would go for Jewish, Muslim, Sikh, or Hare Krishna worshipers trying to worship in their synagogue, mosque, *gurdwara*, or temple.

Or consider *Mack v. Loretto*, 839 F.3d 286 (5th Cir. 2016). There a federal prisoner alleged that two correctional officers created a hostile work environment when one put a sticker declaring “I Love Bacon” on his back and another declared in his presence that “there is no good Muslim, except a dead Muslim!” *Id.* at 292, 304. Because of that environment, the prisoner said he stopped praying at work. *Id.* at 304.

He conceded “that the officers did not directly command him to cease praying, but the Fifth Circuit concluded, under RFRA, that the officers “may very well have substantially burdened his religious exercise” such “that his allegations are sufficient to survive a motion to dismiss.” *Id.* But because the prisoner was not subject to the denial of government benefits or any kind of penalty, the district court here would have found no substantial burden.

Another example is the Orthodox Jewish practice of building *eruv*s—ceremonial wires that Orthodox Jews often build around their communities because they believe that doing so allows them to carry items outdoors on the Sabbath. Without an *eruv*, Orthodox Jews believe that it is religiously prohibited to carry food, keys, prayer books, baby supplies or anything else outdoors on the Sabbath. *Eruvs* are generally built, in part, by putting string on public utility poles. Laws that prohibit putting anything on such poles will result in government workers removing *eruv*s whenever they find them.

Removing *eruv*s does not coerce Orthodox Jews through a penalty, nor does it eliminate some government benefit. It just makes it very difficult for them to fulfill religious obligations like attending synagogue

on the Sabbath. It would be practically impossible for mothers with small children to go to synagogue because they could not carry any baby supplies, or their stroller, or even their child. But that's not a substantial burden under the district court's test.

The facts here likewise illustrate the absurdity of the district court's position. It found that:

- ◆ “the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries,” slip op. at 11;
- ◆ “[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated,” *id.* at 11-12;
- ◆ “the land in this case will be *all but destroyed* to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship,” *id.* at 16 (emphasis added);
- ◆ “the Government’s mining plans on Oak Creek will have a *devastating effect* on the Apache people’s religious practices,” *id.* at 17 (emphasis added); and
- ◆ “[q]uite literally, in the eyes of many Western Apache people, Resolution Copper’s planned mining activity on the land will close

off a portal to the Creator forever and will *completely devastate* the Western Apaches' spiritual lifeblood," *id.* at 12 (emphasis added).

Yet somehow this is not a substantial burden?

Finally, imagine that the federal government decides to conduct nuclear testing on a piece of land it owns. Bordering that land is a Sikh gurdwara. The testing, for as long as it lasts and for years afterward, will make the gurdwara unusable because of high levels of radiation. There is no coercive penalty. There is no lost government benefit. There is just the utter functional prohibition of religious worship. But, according to the district court, as far as a substantial burden goes, there is nothing to see here. At least the district court's parsimonious view of substantial burdens does not discriminate among faiths—all will suffer.

II. The District Court's View of Substantial Burden is Erroneous.

The district court's view of what is a substantial burden is not only dangerous for its practical effects, it is also doctrinally erroneous.⁴ The court held that, "[u]nder RFRA, a 'substantial burden' is imposed only

⁴ To the extent the district court is deemed to be merely faithfully applying Ninth Circuit precedent, then that precedent is erroneous for the same reasons.

when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).” Slip op. at 14 (citation omitted). For at least four reasons, this view is deeply mistaken.

First, it commits an error of logic. The district court has taken conditions that are *sufficient* to find a substantial burden and made them *necessary*. Denying government benefits because of one’s religious beliefs or practices, or coercing individuals to violate their religious beliefs by levying civil or criminal penalties, will always substantially burden one’s religion. But those are not the *only* ways the government can impose a substantial burden on the faithful.

Second, the district court sought to limit RFRA to the facts of *Sherbert* and *Yoder*. But that is not how standards work. Otherwise, the test for whether the government has a compelling government interest would be that it *always* does unless it seeks to run an unemployment compensation program or educate minors. That would be silly. Yet that’s how the district court has framed the substantial burden standard—solely from the facts of those two cases.

Third, as Apache Stronghold has pointed out, there is no difference between the standards of RFRA and RLUIPA. The district court strained to read the Supreme Court’s declaration that these statutes use “the same standard” to “mean[] that both statutes require the government to pass a strict scrutiny analysis where the law in question imposes a ‘substantial burden’ on religious rights,” but that the standard “has evolved differently under each statute.” Slip op. at 15 n.8 (citation omitted). Not so. If that were true, why did the Supreme Court in *Holt v. Hobbs*, 574 U.S. 352 (2015), a RLUIPA case, heavily rely on RFRA cases for RLUIPA’s compelling interest test?⁵ And why did the Court in

⁵ See *Holt*, 574 U.S. 352 (citing or quoting RFRA cases for the propositions that under RLUIPA, (1) “a prisoner’s request for an accommodation must be sincerely based on a religious belief and not some other motivation,” *id.* at 360-61 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717 n.28 (2014)); (2) a prison’s “grooming policy requires petitioner to shave his beard and thus to ‘engage in conduct that seriously violates [his] religious beliefs,’” *id.* at 361 (quoting *Hobby Lobby*, 720); (3) a compelling interest analysis “contemplates a ‘more focused’ inquiry and ‘requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened,’” *id.* at 363 (quoting *Hobby Lobby*, 726) (internal quotation marks omitted); (4) the court must

Hobby Lobby, a RFRA case, expressly invoke RLUIPA and a RLUIPA case in interpreting and applying RFRA?⁶ That makes little sense if the district court is correct; but it isn't: The RFRA and RLUIPA tests are identical twins, not fraternal ones. *See Hobby Lobby*, 573 U.S. at 695 (declaring that RLUIPA imposes the same test as RFRA).

Finally, the district court appeared to import into the substantial burden analysis the fact that the government owns Oak Flat, finding that this weighed against finding such a burden. But that is also wrong. The substantial burden analysis is focused solely on the religious claimant and is blind to all other factors. Government ownership of

“scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants” and ‘to look to the marginal interest in enforcing’ the challenged government action in that particular context,” *id.* (quoting *Hobby Lobby*, 726-27); (5) “it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress,” *id.* at 364 (quoting a RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 434 (2016)); and the “‘least-restrictive-means standard is exceptionally demanding,’ and it requires the government to ‘sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y],” *id.* at 364-65 (quoting *Hobby Lobby*, 728).

⁶ *See Hobby Lobby*, 573 U.S. at 730 n.37 (quoting a RLUIPA case for the principle that under RFRA’s compelling interest test courts can consider third-party burdens); *id.* at 730 (treating RFRA and RLUIPA interchangeably).

property is still relevant—but in the compelling interest and least restrictive means portions of the strict scrutiny analysis. And no doubt the fact of government ownership *could* make it easier for the government to shoulder its burden under those two elements. But that fact plays no role in answering the preliminary question of whether there is a substantial burden on the plaintiff’s religious exercise.

III. The Government Cannot Show a Compelling Interest Under These Facts.

If this Court agrees that there is a substantial burden here, and if the Court rejects Apache Stronghold’s position that the government waived its compelling interest and least restrictive means arguments by not raising them below, the Court will need to perform a compelling interest analysis. And here too the government must fail.

Judges often wave their hands at compelling interest analysis with comments like, “of course the government has a compelling interest in [fill in the blank].” But that deference reduces what is supposed to be a demanding inquiry into something akin to rational basis review. Doing so is flatly prohibited by Supreme Court precedent. That precedent teaches two things: that broad interests are insufficient, and that only the weightiest of interests are compelling.

As to the first teaching: courts must “look beyond broadly formulated interests justifying ... government mandates and scrutinize the asserted harm granting specific exemptions to *particular religious claimants*.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (describing RFRA’s compelling interest standard) (emphasis added). Thus, a “categorical approach” won’t do. *Id.* at 430. Rather, “RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Id.* at 430-431 (quoting RFRA, 42 U.S.C. § 2000bb-1(b)). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213, 220-221, 236 (1972) (recognizing that the State had a “paramount” interest in compulsory public education generally, but holding that a such a “sweeping” interest would not suffice because the Court “must searchingly examine the interests that the State seeks to promote ... and the impediment to those objectives that would flow from recognizing the claimed Amish exemption,” and thus the State must “show with more particularity how its admittedly strong interest ... would be adversely affected by granting an exemption to the Amish”). In sum, the

Government here cannot claim a general interest in using its land as it sees fit or in facilitating mining—a “more particular[]” showing is required.

Second, most government interests do not rise to the level of compelling. To be compelling an interest must be an “interest of the highest order.” *Yoder*, 406 U.S. at 215. Therefore, a compelling interest must protect against “some substantial threat to public safety, peace or order,” and “only the gravest abuses, endangering paramount interest,” justify limiting religious liberty. *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963).

What is the paramount interest of the highest order here? Congress declared that its purpose in authorizing the land exchange was to “carry out mineral exploration activities under the Oak Flat Withdrawal Area.” 16 U.S.C. § 539p(6)(i). If facilitating mining exploration is a paramount interest of the highest order that protects against substantial threats to public safety, peace, or order, then any interest is compelling.

Several facts further undermine any claim to a compelling interest. First, it’s not even clear the United States owns the land, as the only evidence available—a map made by the Smithsonian Institute in the

1800s—shows the land to be Apache territory, not U.S. territory. ER.110-11; 153n.3. And there’s no evidence that the U.S. government ever compensated the Apache Nation for the land at issue here. ER.154. But even if the United States properly owns this land, the 1852 treaty and the general relationship between the United States and Native American tribes mean that the federal government holds the land in trust for the Apache Nation. ER.205. That compelling government interest cuts against any interests to use the land in a way incompatible with this trust.

Second, Congress couldn’t pass authorization of the land swap out in the open as repeated attempts to failed. Rather, the land exchange only made it through Congress as an unrelated, last-minute rider to a massive defense spending re-authorization bill that few who voted for it likely even realized was there. P.L. 113-291 §3003(b)(2), (4); (c)(1). As Hawaiians and members of Congress have long known, pork is better buried.

Finally, the land exchange was a rotten deal—exponentially worse than the 1920 “trade” of Babe Ruth from the Boston Red Sox to the New York Yankees. According to an appraisal by an Arizona real estate

appraisal company, Congress gave the mining company land worth \$112 billion dollars because of its copper deposit. In return, the United States received land worth \$7.135 million.⁷ That's a \$111,992,865,000 loss—and a corresponding windfall to the mining company! Put another way, the federal government gave land worth 15,700 times more than it got. That's like trading the White House for a one-bed, one-bath mobile home in Killdeer, North Dakota. The government's interest in implementing such a grossly unfair deal is anything but compelling.⁸

CONCLUSION

The Court should grant the Emergency Motion for an Injunction Pending Appeal.

Respectfully submitted,

/s/ Gene C. Schaerr

⁷ See <https://bsnorrell.blogspot.com/2020/02/fwd-news-release-while-apache-march-to.html>.

⁸ The White House is worth \$397.9 million. See <https://www.businessinsider.com/how-much-the-white-house-is-worth-cost-rent-2017-1>. For the home in Killdeer, see https://www.zillow.com/homedetails/62-3rd-Ave-SE-Killdeer-ND-58640/2077109749_zpid/.

JAMES C. PHILLIPS
CHAPMAN UNIVERSITY
FOWLER SCHOOL OF LAW
1 University Drive
Orange, CA 92866

GENE C. SCHAERR
Counsel of Record
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K St. NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

March 1, 2021

APPENDIX

Amicus Curiae **The Jewish Coalition for Religious Liberty** is an association of American Jews concerned with the current state of religious liberty jurisprudence. The Coalition aims to protect the ability of all Americans to practice their faith freely and to foster cooperation between Jews and other faith communities. It has filed amicus briefs in the Supreme Court of the United States and federal courts of appeals, published op-eds in prominent news outlets, and established an extensive volunteer network to promote support for religious liberty within the Jewish community.

The International Society for Krishna Consciousness, Inc. (“ISKCON”) is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 600 ISKCON temples worldwide, including 50 in the United States. As a religious organization, ISKCON has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause.

The **Sikh Coalition** is the largest community-based Sikh civil rights organization in the United States. Since its inception following the tragic events of September 11, 2001, the Sikh Coalition has worked to

defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism. The Sikh Coalition joins this brief in an effort to protect religious freedom.

Amicus **Protect the 1st** (PT1) is a nonprofit nonpartisan 501(c)(4) organization that advocates for protecting First Amendment rights in all applicable arenas. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views.

CERTIFICATE OF COMPLIANCE

I hereby certify that this *amicus* brief complies with Fed. R. App. P. 29(a)(5), Cir. R. 32-3(2), and the length limits in this Court's January 5, 2021 supplemental briefing order (Dkt. 25) as it contains 2,799 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: March 1, 2021

/s/ Gene C. Schaerr _____

Gene C. Schaerr

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2021, 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: March 1, 2021

/s/ Gene C. Schaerr

Gene C. Schaerr
Attorney for Amici Curiae