

**Nos. 25-5185, 25-5189, 25-5197**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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GOUYEN BROWN LOPEZ, ET AL.,

*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA; UNITED STATES FOREST SERVICE;  
BROOKE ROLLINS; UNITED STATES DEPARTMENT OF AGRICULTURE;  
AND TOM SCHULTZ,

*Defendants-Appellees,*

AND

RESOLUTION COPPER MINING, LLC,  
*Intervenor-Defendant-Appellee.*

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On Appeal from the United States District Court  
for the District of Arizona

No. 2:25-cv-2758-PHX-DWL, Hon. Dominic W. Lanza

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**BRIEF OF *AMICUS CURIAE*  
PROTECT THE FIRST FOUNDATION IN SUPPORT OF  
THE LOPEZ, ET AL. PLAINTIFFS-APPELLANTS'  
PETITION FOR REHEARING *EN BANC***

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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## STATEMENT OF INTEREST AND SOURCE OF AUTHORITY TO FILE<sup>1</sup>

*Amicus* Protect the First Foundation (PT1) is a non-partisan 501(c)(3) organization dedicated to preserving the religious freedoms implicated by this case. *Amicus* believes it is important to defend the religious liberty of minority faiths and religious communities, like the Apache people, because the religious liberties of all rise or fall together. PT1 accordingly joins Plaintiffs-Appellants in seeking rehearing *en banc*. A motion for leave to file this brief has been submitted.

### INTRODUCTION

Do-overs in life are rare, but in the law they are sometimes crucial. And rarely has a do-over been more justified than here. The *en banc* panel decision in *Apache Stronghold* was flawed at its birth and has not aged well.

Those flaws are evident in the first two paragraphs of the Per Curiam portion of that opinion, which show an internally incoherent and sharply divided decision. A bare majority of the *en banc* court, 6-5, held

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<sup>1</sup> No party's counsel authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

that the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Religious Freedom Restoration Act (RFRA) are to be “interpreted uniformly” and that “preventing access to religious exercise is an example of substantial burden” without the need to show coercion or a religious discrimination. *Apache Stronghold v. United States*, 101 F.4th 1036, 1043 (9th Cir. 2024), *cert. denied*, 145 S. Ct. 1480 (2025), *reh’g denied*, 146 S. Ct. 285 (2025).

Yet “[a] different majority,” again 6-5, concluded that RFRA incorporated pre-*Smith* precedent such that, in the context of government real property, what is a substantial burden under RFRA is not the same as under RLUIPA, and that to have a substantial burden under the former requires coercion or discrimination among religions. *Id.* at 1044.

The holdings of these two different majorities cannot be reconciled. They are akin to one majority saying it is day and the other majority saying it is night—in the same opinion. The rule of law is strained to the breaking point with such legal confusion, a scenario reminiscent of Lewis Carroll. And, as *Amicus* explains below, the second majority created conflicts with Supreme Court precedent on at least three different issues.

For each of these reasons, rehearing *en banc* is warranted.

### ARGUMENT

In at least three different ways, this Court's *en banc* decision in *Apache Stronghold* conflicts with U.S. Supreme Court precedent, some of which was not evident at the time *Apache Stronghold* was decided.

First, two Supreme Court cases decided after *Apache Stronghold* have clarified that, under the First Amendment, which provides less protection than RFRA, a lesser burden on free exercise than the burden here was *sufficient* to qualify as a substantial burden. Second, as Justice Gorsuch pointed out in his dissent from denial of the petition for certiorari in *Apache Stronghold*, that decision conflicts with Supreme Court precedent on whether the entire pre-*Smith* jurisprudence is incorporated into RFRA. *See* 145 S. Ct. at 1486-87 (Gorsuch, J., joined by Thomas, J., dissenting from denial of certiorari). And third, by interpreting the term “substantial burden” as having a different meaning under RFRA as compared to its sister statute RLUIPA, *Apache Stronghold* conflicts with a series of Supreme Court cases interpreting those two statutes. Any one of these reasons is sufficient to warrant *en*

*banc review*. Combined, they overwhelmingly call for this petition to be granted.

**I. Rehearing is Especially Warranted in Light of the New Supreme Court Developments in *Mahmoud* and *Mirabelli*.**

Two Supreme Court decisions since *Apache Stronghold* was decided undermine that decision and necessitate granting the petition here for *en banc* review. Those two decisions show that lesser harms than those at issue in *Apache Stronghold* constitute a substantial burden. And given that RFRA “aim[s] to ensure *greater* protection for religious exercise than is available under the First Amendment,” *Ramirez v. Collier*, 595 U.S. 411, 424 (2022) (cleaned up) (emphasis added), a greater harm where there is greater protection easily satisfies the substantial burden requirement.

1. In *Mahmoud v. Taylor*, parents raised sincere religious objections to the reading of “LGBTQ+ inclusive” books to their public elementary school children without notice and the ability to opt their children out, and so the parents sought a preliminary injunction against the curriculum. 606 U.S. 522, 528–530 (2025). The Fourth Circuit, in a divided opinion, determined that the parents had not demonstrated a substantial burden on their religion because they had failed to “show

direct or indirect coercion arising out of the exposure’ to the storybooks.” *Id.* at 544 (quoting *Mahmoud v. McKnight*, 102 F.4th 191, 212 (2024)).

The Supreme Court disagreed, granting the preliminary injunction. *See id.* at 546. In so doing, the Court held “that the parents are likely to succeed on their claim that the Board’s policies unconstitutionally burden their religious exercise.” *Id.* It did not matter that there was no coercion present—it was enough that the “books carry with them a very real threat of undermining the religious beliefs that the parents wish to instill in their children.” *Id.* at 553 (cleaned up).

Contrary to the dissent in *Mahmoud*, which contended that “parents who send their children to public school must endure any instruction that falls short of direct compulsion or coercion,” the majority declared that “[t]he Free Exercise Clause is not so feeble.” *Id.* at 563.

2. A similar burden was sufficient in *Mirabelli v. Bonta*, 146 S. Ct. 797 (2026) (per curiam). There, parents had won a permanent injunction in district court under the Free Exercise Clause and the Fourteenth Amendment against California policies that prohibited schools from informing parents about a child’s gender transition at school unless the child gave his or her permission, as well as required using a child’s

preferred name and pronouns despite parents' objections. *Id.* at 800. But a panel of this Court stayed that injunction. *Id.*

The Supreme Court vacated the stay, determining that the parents were likely to succeed on the merits of their Free Exercise Clause claim. *Id.* at 802. The Court observed that the parent plaintiffs "have sincere religious beliefs about sex and gender, and they feel a religious obligation to raise their children in accordance with those beliefs." *Id.* And "California's policies violate those beliefs." *Id.* That was a sufficient burden under the Free Exercise Clause, even if the state was not coercing parents in any way. *See id.*

3. Prior to these cases, *Apache Stronghold* held the reverse: that in the context of government property, "a substantial burden arises only when the government coerces people into defying their religious beliefs or discriminates between religions." 145 S. Ct. at 1485 (Gorsuch, J., dissenting) (citing 101 F.4th at 1055, 1063). But that cannot be squared with *Mahmoud* and *Mirabelli*. In those two cases, the burdens on free exercise were less than the burden here. Those burdens were about threats to or undermining parental religious teaching. Here "[i]t is undisputed that the government's plan will permanently destroy the

Apaches’ historical place of worship, preventing them from ever again engaging in religious exercise at Oak Flat.” *Apache Stronghold*, 145 S. Ct. at 1480 (Gorsuch, J., dissenting) (cleaned up).

Thus, if this was a Free Exercise Clause claim, utter destruction of one’s site of worship would be more than sufficient to be a substantial burden in light of *Mahmoud* and *Mirabelli*. And what is more, the operative religious liberty law here—RFRA—provides even greater protection than the First Amendment. Hence, a lesser burden should be sufficient to be “substantial” under RFRA. But *Apache Stronghold* held just the opposite.

For that reason, *en banc* review is warranted.

**II. As Justice Gorsuch Noted in His Dissent from Denial of Certiorari, this Court’s *Apache Stronghold* Decision Conflicts with Pre-existing Supreme Court Decisions, and That Decision Should Be Reconsidered *En Banc*.**

But that is not the only reason *en banc* review should be granted here. When the U.S. Supreme Court denied the petition for certiorari in *Apache Stronghold*, Justice Gorsuch, joined by Justice Thomas, dissented. And in his dissent, Justice Gorsuch noted that this Circuit’s *en banc* panel decision conflicted with at least two pre-existing Supreme Court precedents when it determined that RFRA “should be construed to

subsume [pre-*Smith*] jurisprudence wholesale.” *Apache Stronghold* 145 S. Ct. at 1486 (Gorsuch, J., joined by Thomas, J., dissenting from the denial of certiorari).

1. Justice Gorsuch first pointed to *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). See *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting). There the Court faced the question of whether RFRA allows the federal government to mandate that closely held corporations include contraceptive methods in their company-provided health insurance coverage over the sincere religious objections of the company owners. *Hobby Lobby*, 573 U.S. at 689–690. And the federal government argued that it should prevail because “RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents, and because none of those cases squarely held that a for-profit corporation has free-exercise rights, RFRA does not confer such protection.” *Id.* at 713.

But in *Hobby Lobby* the Supreme “Court emphatically rejected that notion,” *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting), because of the argument’s “many flaws,” *Hobby Lobby*, 573 U.S. at 713. For example, RFRA’s text does not specify that the statute was adopting

wholesale the pre-*Smith* interpretation of the First Amendment, a drafting move Congress knows how to make as it has done so in other contexts, such as the Antiterrorism and Effective Death Penalty Act. *Id.* at 714. Moreover, RLUIPA’s later amendment of RFRA, by deleting reference to the First Amendment, “dispel[ed] any doubt” that “[i]t is simply not possible to read these provisions as restricting [RFRA’s concepts] . . . to those practices specifically addressed in our pre-*Smith* decisions.” *Id.* Additionally, *Hobby Lobby* observed that “the results would be absurd if RFRA merely restored this Court’s pre-*Smith* decisions in ossified form.” *Id.* at 715.

Thus, as Justice Gorsuch observed, *Hobby Lobby* declared that “‘by enacting RFRA, Congress went far beyond what this Court had held to be constitutionally required’ before *Smith*.” *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting) (quoting *Hobby Lobby*, 573 U.S. at 706) (cleaned up).

2. Justice Gorsuch next pointed to *Holt v. Hobbs*, 574 U.S. 352 (2015). *See Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting). In *Holt*, a Muslim prisoner brought a RLUIPA action when the state prison refused to allow him to grow a beard in accordance with

his sincere religious beliefs. *See Holt*, 574 U.S. at 355–356. And the lower court in *Holt* “invoked th[e] [Supreme] Court’s pre-*Smith* First Amendment decisions to hold that a prison regulation prohibiting inmates from growing beards did not ‘substantially burden’ religious exercise under [RLUIPA], RFRA’s ‘sister statute.’” *Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., dissenting) (citing *Holt*, 574 U.S. at 352, 356, 361). But the Supreme Court in *Holt* found that the lower court had “improperly imported a strand of reasoning from [pre-*Smith*] cases involving prisoners’ First Amendment rights,” whereas “RLUIPA provides *greater* protection” with its “‘substantial burden’ inquiry.” *Holt*, 574 U.S. at 361 (emphasis added).

So too here. RFRA provides greater protection than the pre-*Smith* First Amendment jurisprudence. And by attempting to limit RFRA to that jurisprudence, *Apache Stronghold* directly conflicts with the Supreme Court, warranting *en banc* review.

### **III. The *En Banc* Court Should Grant Review to Vindicate the Important Presumption of Consistent Usage—Here Between the Sister Statutes of RFRA and RLUIPA—As the Supreme Court has Recognized in Multiple Cases.**

*En banc* review is also warranted to vindicate Congress’s ability to set presumptions and other ground rules governing the application of

future statutes. That is because one majority in *Apache Stronghold* ignored the well-settled presumption of consistent usage across statutes, particularly those dealing with similar subjects, by refusing to interpret RFRA consistently with RLUIPA. And that refusal also conflicts with Supreme Court precedent.

That Court has made crystal clear that RFRA and RLUIPA should be interpreted consistently. See, e.g., *Holt*, 574 U.S. at 356–357 (a RLUIPA case invoking RFRA cases to apply RLUIPA); *Hobby Lobby*, 573 U.S. at 695, 729 n.37 (2014) (a RFRA case invoking RLUIPA to apply RFRA); *Ramirez*, 595 U.S. at 424 (referring to RFRA as RLUIPA’s “sister statute”). As Judge Nelson noted in *Apache Stronghold*, seven circuits have thus “treated RFRA and RLUIPA as analogous statutes and define ‘substantial burden’ the same.” 101 F.4th at 1101 (R. Nelson, J., concurring). And indeed, one majority of the *Apache Stronghold en banc* panel held that RFRA and RLUIPA “are interpreted uniformly.” *Id.* at 1043 (per curiam). Yet a separate majority refused to interpret “substantial burden” consistently with this Court’s interpretation of that term in RLUIPA cases, asserting that RLUIPA cases “inherently involve coercive restrictions,” while RFRA cases do not. *Id.* at 1061–1062.

The latter holding was erroneous, as at least two Supreme Court justices have confirmed. *See Apache Stronghold*, 145 S. Ct. at 1486 (Gorsuch, J., joined by Thomas, J., dissenting from the denial of certiorari) (“[T]he Ninth Circuit’s interpretation of the phrase ‘substantial burden’ is difficult to reconcile with the statutory text[] [a]s a matter of ordinary meaning.”). That holding also threatens Congress’s ability to legislate efficiently. As Chief Judge Murguia explained, “Under the majority’s approach, dictionaries can supply the meaning of substantial burden in RFRA cases about zoning and confinement, but dictionaries appear to be irrelevant when a person challenges a different type of government action—as *Apache Stronghold* does here. Either the meaning of ‘substantial burden’ is the same under RFRA and RLUIPA, or the definition under RFRA is case dependent. It cannot be both.” *Apache Stronghold*, 101 F.4th at 1154 (Murguia, C.J., dissenting).

RLUIPA cases make clear that the government’s actions in this case constitute a “substantial burden.” In *Ramirez*, a RLUIPA case, the Supreme Court found a substantial burden on a prisoner’s religious exercise when Texas denied his request to have his pastor place hands on him and pray vocally during his execution even though that situation did

not involve either the denial of a benefit or the threat of a penalty. *See* 595 U.S. at 424–426.

Despite *Ramirez*'s guidance, *Apache Stronghold* declared that these sister statutes should be interpreted differently. The *en banc* panel acknowledged that, in RLUIPA cases, “substantial burden” is interpreted according to its plain meaning. 101 F.4th at 1061–1062. But for RFRA cases, *Apache Stronghold* insists, the term “must be understood as having . . . adopted the limits that *Lyng* placed on what counts as a government imposition of a substantial burden on religious exercise.” *Id.* at 1061. While RLUIPA does not reference *Sherbert v. Verner*, 374 U.S. 398 (1963) or *Wisconsin v. Yoder*, 406 U.S. 205 (1972), like RFRA does, neither statute defines “substantial burden” or provides any statutory text to limit the definition of “substantial burden” beyond its “plain meaning.”

Even so, *Apache Stronghold* implausibly concluded that, although Congress used the same term in each statute, the term has a different meaning in RLUIPA cases than in at least some RFRA cases. *Id.* at 1062. In other words, *Apache Stronghold* concluded that RFRA imports a legal term of art as to the meaning of “substantial burden,” whereas its sister

statute, RLUIPA, uses the term’s ordinary meaning. That conclusion departs from both the Supreme Court’s precedent and the presumption of consistent usage, which “applies also when different sections of . . . [a] code are at issue.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 172 (2012). And that presumption is particularly strong where, as here, there is a recognized “connection” between “the cited statute” and “the statute under consideration.” *Id.* at 173.

That connection is robust in the case of RFRA and RLUIPA, given that RLUIPA was passed in response to this Court’s decision invalidating RFRA’s application to the states. See *Hobby Lobby*, 573 U.S. at 695. Congress’s swift response indicates that it intended to restore the same test in RLUIPA—including the same definition of substantial burden—that it enacted in RFRA. See also *Sossamon v. Texas*, 563 U.S. 277, 281 (2011). Under the settled presumption of consistent usage, it is implausible to read “substantial burden” more narrowly in RFRA cases than it is routinely read in RLUIPA cases.

The presumption of consistent usage, moreover, is important to Congress’s ability to legislate efficiently and consistently. This Court

should grant review to correct *Apache Stronghold*'s error, vindicate that important presumption, and bring this Circuit's interpretation of RFRA in line with the Supreme Court and other circuits.

## CONCLUSION

*Apache Stronghold* has turned sister statutes into distant cousins. That decision is at war with Supreme Court precedent, at war with the text of RFRA, and at war with itself. As Abraham Lincoln observed, "a house divided cannot stand." The same is true of judicial doctrine. This Court should grant the petition for *en banc* review and put *Apache Stronghold* out of its misery.

Dated: May 7, 2026

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## CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of 9th Circuit Rule 29-2(c)(2) because, excluding the parts of the document exempted by the Fed. R. App. P. 32(f), this document contains <4,200 words.
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Date: May 7, 2026

/s/ Gene C. Schaerr

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2026, the foregoing Brief of *Amicus Curiae* Protect the First Foundation was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the ACMS system. I also certify that all participants in the case are registered ACMS users and that service will be accomplished by the ACMS system.

Dated: May 7, 2026

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