No. 21-35220

In the United States Court of Appeals for The Ninth Circuit

HEREDITARY CHIEF WILBUR SLOCKISH; CAROL LOGAN; CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE,
Plaintiffs-Appellants,

v.

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:08-cv-1169
Hon. Marco A. Hernández

BRIEF *AMICI CURIAE* OF THE JEWISH COALITION FOR RELIGIOUS LIBERTY, THE SIKH COALITION, THE ANGLICAN CHURCH IN NORTH AMERICA JURISDICTION OF THE ARMED FORCES AND CHAPLAINCY, AND PROTECT THE 1ST IN SUPPORT OF PLAINTIFF-APPELLANT

GENE C. SCHAERR
Counsel of Record
RIDDHI DASGUPTA
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

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION AND INTEREST OF *AMICI*[1]

This is a case of enormous importance, not just for members of the Yakama Nation and the Grand Ronde Tribes, but for all people and communities of faith. Virtually every faith community recognizes sacred spaces that are of special religious significance. And this case raises a fundamental, recurring question: When government action makes it impossible for a faith community to use one of those spaces, how (if it all) can the community establish that the action has imposed a "substantial burden" on religious exercise under the federal Religious Freedom Restoration Act (RFRA)—or, more generally, under the federal Free Exercise Clause or other federal or state provisions protecting religious freedom?

Here, all agree that, for members of the Yakama Nation and the Grande Ronde Tribes, "Place of the Big Big Trees" is a sacred space—a place tribal members have used for worship and as a burial ground since before recorded history, and which is of paramount importance in their faith. But that indigenous sacred site was also valued by the government for a highway-widening project. And sadly, despite other alternatives that could have preserved the sacred site, and despite repeated attempts

---

[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.

to dissuade the government from destroying the site, government bureaucrats chose to protect wetlands on the side of the highway but not the sacred site. As a tragic result, the trees were cut down, an ancient stone alter scattered and removed, gravesites unearthed, sacred medicinal plants killed, and the site completely destroyed and covered with a dirt berm.

Despite this utter annihilation of the sacred site and thus the tribal members' ability to exercise their religion there, the magistrate judge concluded this would not substantially burden religious exercise under RFRA because it neither deprived the tribal members of government benefits nor subjected them to civil or criminal penalties. 1-ER-102-03. That ruling is as wrong as it is dangerous—not just for the Plaintiffs, but for all faiths. And, as shown below in detail, that ruling rests upon a misinterpretation of RFRA as well as a misreading of this Court's decision in *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008), and applicable Supreme Court precedent. Further, the magistrate judge also erroneously distinguished some of the cases the Plaintiffs relied on because they involved RLUIPA rather than RFRA. 1-ER-106-07. This misunderstands that these two statutes use the same test and that the Supreme Court invokes them interchangeably.

Amici, described in detail in the Appendix, are all religious communities or organizations representing their interests. *Amici* believe it is important to defend the religious liberty of minority faiths and

religious communities like the Yakama Nation and Grande Ronde Tribes—because the religious liberties of all rise or fall together.

ARGUMENT

I. The District Court's Anemic View of what Constitutes a Substantial Burden Harms All Faiths And Especially Minority Faiths.

While, on its surface, this case concerns Native American religious rights, the district court's erroneously narrow standard for what qualifies as a substantial burden under RFRA will harm Jewish, Muslim, Sikh, Buddhist, Hare Krishna, Christian and all manner of religious communities, organizations and individuals. After all, the Government can substantially burden religious faith in far more varied and ingenious ways than just denying benefits or coercing individuals or institutions via civil or criminal penalties. Making it impossible to observe one's faith by permanently destroying a holy site is the most substantial burden of all.

Just a few examples illustrate the point.[2] In *McCurry v. Tesch*, 738 F.2d 271, 272 (8th Cir. 1984), after finding that a school operated by a

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

Christian church had defied state law by remaining open, a court ordered that the doors of both the school and the church be padlocked. The Court did not merely stop the *school* from operating, it took the additional step of shutting down the *church* for most of the week. *Ibid.* The sheriff was permitted to open the church on weekends and Wednesday evenings, but only "for the singular purpose of religious services." *Ibid*. When, shortly after 6:00 on a Monday morning, the sheriff "with fifteen carloads of deputies and state troopers" arrived at the church and found 85 people conducting a prayer vigil in protest, "the law-enforcement officers picked them up, carried them out of the church, and padlocked the building." *Id*. at 273.

Under the test applied by the district court here, these Christian worshipers suffered no substantial burden on their religion because they neither lost a governmental benefit nor faced civil or criminal penalties. Indeed, under that test, even the act of forcibly removing—and physically prohibiting—people from worshipping in their church building would fall short of a substantial burden, and therefore the government would not have to justify its actions. By the same logic, the Government could deprive Jewish, Muslim, Sikh, or Hare Krishna

worshipers of the right to worship in their synagogues, mosques, *gurdwaras*, and temples, respectively.

Mack v. Loretto, 839 F.3d 286 (3rd Cir. 2016), provides another example. There, a Muslim 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. Although he conceded "that the officers did not directly command him to cease praying," the Third Circuit concluded that, under RFRA, the officers "may very well have substantially burdened his religious exercise." *Ibid.* 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.

Yet another example is the Orthodox Jewish practice of building *eruvs*—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 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 could result in government actors removing an *eruv* whenever they find one.

Removing an *eruv* does not coerce Orthodox Jews by imposing a penalty, nor does it eliminate some government benefit. Nevertheless, such a removal makes it very difficult for Orthodox Jews 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. The elderly who might need to carry necessary things presumably could not go to synagogue on the Sabbath, either. But, under the district court's test, the removal of an *eruv* would not substantially burden an Orthodox Jew's exercise of religion.

Or imagine that the federal government decides to conduct nuclear testing on federal land. 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. Yet the federal government imposes no coercive penalty on the Sikhs. There is also no

lost government benefit. There is just the utter functional prohibition of the Sikhs' religious worship. But, according to the district court, this is not a substantial burden. In fact, according to the district court, bombing the *gurdwara* and completely obliterating it would also not substantially burden Sikh religion (as long as it was not done for the purpose of coercive punishment).

The facts here likewise illustrate the absurdity of the district court's position. The court (via the magistrate[3]) found that:

- "[t]his site is sacred and holds spiritual importance to plaintiffs for numerous reasons, including that it is a burial ground along an ancient trading route," 2018 WL 4523135, at *2 n.1;
- "[t]he site contained an altar of rocks that marked surrounding graves and was a focal point for religious ceremonies," *id.*;
- the government "destroy[ed]" the site, including the burial grounds and altar, "through tree cutting and removal, grading, and

[3] Because the district court adopted the magistrate's findings and recommendations, this brief will refer to the court and the magistrate interchangeably.

> ultimately burying [the site]" and "blocking off access to [it] by installation of a new guardrail," *id.* at *2.

Yet somehow this is not a substantial burden?

At least the district court's stingy view of what counts as a substantial burden does not discriminate *among* faiths—all will suffer.[4] As explained below, the district court's view is misguided because it rests on a misreading of RFRA as well as of *Navajo Nation*.

[4] Though the district court's standard will be particularly harmful to Native Americans—a historically disadvantage group whose religious practices are often tied to lands that were taken from them by force.

II. The District Court's Substantial Burden Analysis Rests On a Misreading of RFRA.

As noted previously, the district court said that the "actual destruction of the[] religious site," 1-ER-102-03 is *not* a substantial burden on religious exercise under RFRA so long as the Government (a) does not deny anyone governmental benefits, as in *Sherbert v. Verner*, 374 U.S. 398 (1963), or (b) coerce individuals or institutions via civil or criminal penalties, as in *Wisconsin v. Yoder*, 406 U.S. 205, 213, 220–21, 236 (1972). *See* 2018 WL 4523135, at *5. Specifically, although the district court found that "plaintiffs contend that the sacred site . . . has been desecrated and destroyed," the court held that "plaintiffs have not established that they are being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." *Id*.

At its very foundation, the district court's analysis was logically flawed: While denying someone government benefits or coercing individuals or institutions via civil or criminal penalties will *suffice* to substantially burden a religious exercise, the district court ignored that there are *other* ways, including the government's total destruction of

Place of the Big Big Trees, for religious exercise to be burdened. The district court also ignored that "[t]he greater restriction (barring access to [a] practice) *includes* the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) (emphasis added). That is to say, if a lesser restriction on the use of sacred space—such as imposing penalties for its use—would (as the district court acknowledged) substantially burden that practice, it follows that completely denying access to that space must also substantially burden religious practice.

But beyond its logical deficiencies, the district court's approach radically contravenes RFRA's text and purposes. It also contravenes controlling Supreme Court precedent as well as persuasive precedents from other circuits.

A. The District Court's Approach Violates RFRA's Text.

The district court's approach departs from RFRA's text and purpose. Unlike the district court, Congress in RFRA did not limit substantial burdens to the benefit and penalty categories. Instead, RFRA's text—the best indicator of its scope, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985)—forbids the Government from "substantially burden[ing] a person's exercise of religion *even if the burden results from a rule of general applicability*," 42 U.S.C. §2000bb-1(a) (emphasis added). And courts are to construe the term "substantial burden" in a way that provides "broad protection of religious exercise, to the maximum extent permitted by [its] terms . . . and the Constitution." *Id.* §2000cc-3(g).[5]

This language forecloses any argument that Congress somehow

[5] As explained *infra* in Section II.C, the Supreme Court has interpreted RFRA and RLUIPA to impose the same test.

narrowed the bases for claiming a substantial burden, for, as the Tenth Circuit has recognized, Congress is "quite capable of narrowing the scope of a statutory entitlement," including RFRA's substantial burden clause, "when it wants to," and it did not do so here. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1130 (10th Cir. 2013) (en banc) (opinion of the Court joined by Gorsuch, J.), *aff'd*, 573 U.S. 682 (2014).

The breadth of RFRA's text has two implications that are pertinent here and that foreclose the district court's approach.

1. First, *neutral but substantial burdens on religious exercise count under RFRA*. Had RFRA's substantial burden clause open-endedly prevented the Government from "substantially burden[ing] a person's exercise of religion"—without more—it would still cover neutral and generally applicable policies. But RFRA's text goes further. In a belt-and-suspenders approach, it declares that a burden counts as "substantial" even if it "results from a rule of general applicability." 42 U.S.C. §2000bb-1(a). This of course was a direct response to the Supreme Court's earlier decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, which had held that such rules were generally exempt from strict scrutiny. 494 U.S. 872, 879 (1990). That this clause

in RFRA *explicitly* refuses to exempt "rules of general applicability" from being considered to impose substantial burdens puts the matter beyond dispute.

Nevertheless, the district court appeared to import into the substantial-burden analysis the fact that the Government owns Place of the Big Big Trees, finding that this fact—and the related notion that ownership rules are by their nature neutral and generally applicable—weighed against finding a burden on religion. 2018 WL 4523135, at *3, *6 n.4.[6] But that is also wrong. RFRA's substantial-burden analysis focuses *solely* on the governmental infliction of a burden on the religious claimant. Government ownership of property is still relevant—but only

---

[6] *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), also does not justify the district court's approach. To be sure, *Lyng* stressed the range of authority belonging to the government when it acts as a property owner. *Id.* at 453. But nothing in *Lyng* remotely suggested that its ownership interests permit the government to *destroy* a Native American religious site while denying affected tribe members any relief. *Id.* at 453, 454 (determining that "[n]o sites where specific rituals take place [would] be disturbed" and that "prohibiting the Indian [plaintiffs] from visiting [the sacred sites] would raise a different set of constitutional questions"). And since RFRA offers "very broad" protections that exceed pre-*Smith* decisional law, the question here—as in all cases of statutory construction—is whether the district court read the statute correctly. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 695 n.3, 706 (2014). As we explain above, it did not.

in considering the compelling-interest and least-restrictive means aspects of the strict-scrutiny analysis. It is not implicated in the substantial-burden analysis.

2. Second, *under RFRA, the origin, form, or category of a substantial burden is irrelevant*. RFRA does not attempt to enumerate the ways in which a substantial burden might arise. *See* 42 U.S.C. §2000bb-1(a); *Hobby Lobby*, 723 F.3d at 1130. And Congress did not limit the forms or categories of substantial burdens that fall within RFRA because RFRA's drafters wanted the "protection of religious exercise" to be "maxim[ally]" "broad." 42 U.S.C. §2000cc-3(g).

Moreover, RFRA's qualification that a "burden" must be "substantial" goes to the *degree* of the burden, not to its origins, forms, or categories. In RFRA's land-use context, for example, the Ninth Circuit has understood the modifier "substantial" to require that the government-imposed burden "must be 'oppressive' to a 'significantly great' extent." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (*ICFG*) (quoting *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). But

beyond this, RFRA does not constrict the origins, forms, or categories of a substantial burden.

Indeed, it is well established that both "'indirect'" penalties (putting the religious adherents to some choice as a price for their devotion) and "'outright prohibitions'" constitute substantial burdens on religious exercise. *See Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). For example, the Supreme Court has noted that, when the government puts a person "*to a choice* between being religious or receiving government benefits," the sovereign substantially burdens that person's religious exercise. *Espinoza v. Montana Dep't. of Revenue*, 140 S.Ct. 2246, 2257 (2020) (emphasis added). Similarly, when the government puts a Muslim prisoner to a choice between shaving his beard and facing discipline, the government's action "easily" constitutes a substantial burden. *Holt v. Hobbs*, 574 U.S. 352, 357, 361 (2015).

Resolution of the burden question becomes even easier when the government prohibits a religious practice (like worship) outright. Then-Judge Gorsuch correctly stated the pertinent principle: Whenever the

Government "*prevents* the plaintiff from participating in [a religious] activity," giving the plaintiff no "degree of choice in the matter," that action "easily" imposes a substantial burden on religious exercise. *Yellowbear v. Lampert*, 741 F.3d 48, 55–56 (10th Cir. 2014) (emphasis added). It is difficult for a burden to be more substantial than making an act of worship impossible. Indeed, under binding Supreme Court precedent, forbidding religious ministers from serving as delegates to the state constitutional convention, *see McDaniel v. Paty*, 435 U.S. 618 (1978), and prohibiting a church and its congregants from carrying out a ritual central to their faith, *see Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993), are outright bans on the faithful's religious exercise, and thus constitute "substantial" burdens.

The destruction of the worship site at issue here is no less burdensome than the *McDaniel* and *Lukumi* impositions because the sovereign has left the faithful with no real or meaningful worship choice. True, they are not being put to a choice between practicing their faith at Place of the Big Big Trees and avoiding a penalty or obtaining a benefit. But that does not complete RFRA's substantial burden analysis. A crucial step remains: Is the Yakama Nation's and Grande Ronde Tribes'

religious exercise being burdened in any *other* way, given the commodious scope of substantial burdens under RFRA? And the answer is a resounding Yes: By permanently, entirely, and irretrievably depriving the tribal members of their key place of worship, the Government is substantially burdening their religious exercise.

3. In that regard, the religious importance of the Place of the Big Big Trees as a site of worship cannot be overstated. There is no other location where these tribal members can gather sacred medicine plants, where the spirits or their ancestors are located, or that has this ancient altar. And the trees that gave the site its name are gone forever.

It follows that for at least some tribal members the destruction of Place of the Big Big Trees is arguably at least as, if not even more, devastating than an obliterated Vatican for Catholics, or a demolished Kaaba (in Mecca) for Muslims. At least Catholics and Muslims could still worship elsewhere, arguably unlike the Yakama and Grande Ronde here. Accordingly, the Government's destruction of Place of the Big Big Trees amounts to a ban on these tribal members' religious worship and constitutes "a significantly great restriction or onus upon [religious]

exercise," *ICFG*, 673 F.3d at 1067, and hence, under RFRA, a substantial burden.

4. This conclusion is confirmed by other cases involving restrictions on the use of religious property. Recently, for example, the Supreme Court recognized that the "destruction of religious property" and similar governmental impediments to religious exercise through physical force may violate RFRA. *Tanzin v. Tanvir*, 141 S.Ct. 486, 492 (2020) (citing *DeMarco v. Davis*, 914 F.3d 383, 390 (5th Cir. 2019)). Similarly, when a California city denied a church's request to expand its operations on the only suitable space in the city, the Ninth Circuit found this denial to substantially burden the church's religious exercise. *See ICFG*, 673 F.3d at 1066–70. That the city's policy may have been neutral and generally applicable was irrelevant to the Court's RFRA substantial-burden analysis. *See id.* at 1066–67. What mattered was that the faithful's right to "a place of worship . . . consistent with . . . theological requirements" is "at the very core of the free exercise of religion." *Id.* at 1069–70. This meant that the lack of viable site alternatives for the church's expansion made the permit denial a substantial burden. *See id.* at 1068–69.

So too here. Under RFRA, the deprivation of the Plaintiffs' "place of worship . . . consistent with their theological requirements" is of dispositive importance. *ICFG*, 673 F.3d at 1069. And rightly so, for, as with the church in *ICFG*, there is no viable alternative to Place of the Big Big Trees available to these tribal members. *See id.* at 1068–69. In short, the government's actions left the Yakama and the Grand Ronde with no way to practice an important feature of their worship and would therefore substantially burden their religious exercise. *See Yellowbear*, 741 F.3d 48, 55–56.

The Government fares no better under cases concerning sacred sites on government-controlled land. One such case is *Comanche Nation v. United States*, 2008 WL 4426621, at *6 (W.D. Okla. 2008), which involved a site in Medicine Bluffs, in Western Oklahoma, that is sacred to the Comanche Tribe. The site had been "held in deep reverence by the Indian Tribes of the area from time immemorial," *ibid.* (cleaned up) and remained the site of "significant aspects of traditional Comanche religious practices for hundreds of Comanches," including worship. *Id.* at *7. Yet the federal government sought to build a warehouse there. *See ibid.* Although not all of the sacred site would be used by the

warehouse, this federal physical interference made the Comanches' religious exercise impossible, and thus the district court determined that the plaintiffs had "amply" shown that the government's warehouse construction plans would substantially burden the Comanche tribe's religious exercise. *Id.* at *17. The reasons for reaching such a determination are even stronger here because the Government's actions destroyed the *entirety* of Place of the Big Big Trees.

In short, RFRA and cases construing it compel the conclusion that the land transfer here would substantially burden the Yakama Nation's and Grand Ronde Tribes' religious exercise.

B. The District Court Erroneously Declined to Apply RFRA'S Standards.

The district court's analysis is also erroneous because it improperly limited RFRA to the *facts* of—not the *standards* set by—*Sherbert* and *Yoder*. But that is not how Supreme Court decisions are supposed to be interpreted. Otherwise, a trial court could, without supposedly violating Supreme Court precedent, could say the Government always has a compelling interest unless its violation arises from running an unemployment compensation program (*Sherbert*) or from educating minors (*Yoder*). *See Gonzales v. O Centro Espirita Beneficente Uniao do*

Vegetal, 546 U.S. 418, 432 (2006) (explaining that *Sherbert* and *Yoder* elucidate the general principles of law "required by RFRA and the compelling interest test"). And this rule would work mischief well beyond the RFRA context, as trial courts circuit-wide would be armed with the most convenient level of granularity with which to read ostensibly binding appellate decisions.

For several reasons, such an unprecedented expansion of the authority of trial courts to finesse appellate holdings would frustrate the appellate function. First, it would compel appellate courts to churn out endless decisions on numerous factual scenarios. Second, it would flout the fact that the Supreme Court knows very well how (and when) to limit a case to its own or to analogous facts. *See*, *e.g.*, *Bush v. Gore*, 531 U.S. 98, 109 (2000) (*per curiam*). When enacting RFRA, which is even more protective than *Sherbert* and *Yoder*, Congress did not limit itself to the factual scenarios of those cases; and neither has the Court in interpreting RFRA. *See Hobby Lobby*, 573 U.S. at 695 n.3, 706 ("By enacting RFRA, Congress went far beyond what this Court has held is constitutionally required. . . . RFRA did more than merely restore the balancing test used in the *Sherbert* line of cases; it provided even broader

protection for religious liberty than was available under those decisions."). Third, the district court's position ignores the reality that "most cases are . . . decided with reference to some more general normative principle"—lending the decision its "principled and rational" character—rather than just "the specific circumstances of the case before the court." *See Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 862 (D.C. Cir. 1972).

The district court's error is doubly alarming because it gives the trial court the power to narrow the holdings of an appellate decision or to limit it to its facts. Those prerogatives lie exclusively with the pertinent appellate tribunal, a prerogative, even if it agrees with the ultimate outcome, that it is loath to share with any other entity. *See, e.g.*, *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196 (9th Cir. 2008) ("[I]n the absence of any Supreme Court decision overruling [or abrogating an earlier Supreme Court precedent], we must follow the Supreme Court precedent that *directly* controls, leaving to the

[Supreme] Court the prerogative of overruling its own prior decisions.") (cleaned up; emphasis added).[7]

The district court's mistaken narrowing of *Sherbert* and *Yoder* to their facts should therefore be repudiated and the resulting decision reversed.

C. The District Court Erroneously Refused to Follow RLUIPA Precedents.

Yet another deficiency in the district court's substantial burden analysis is its failure to follow case law interpreting the Religious Land Use And Institutionalized Persons Act (RLUIPA). *See, e.g.*, *Holt*, 574 U.S. at 352; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n.37 (2014). The magistrate judge mistakenly declared that "[b]ecause this is not a prisoner case, the RLUIPA [standard] does not apply and [such] cases are therefore inapplicable." 2018 WL 4523135, at *7. Not so. Just a few terms ago, the Supreme Court in *Holt*, a prisoner RLUIPA case,

---

[7] *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is th[e] [Supreme] Court's prerogative alone to overrule [or even to limit] one of its precedents."). This is true even when "changes in judicial doctrine ha[ve] significantly undermined" controlling precedent of a higher court, *United States v. Hatter*, 532 U.S. 557, 567 (2001) (cleaned up), and even when the higher court's prior holding "appears to rest on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

relied heavily on RFRA cases to apply RLUPA's compelling interest test. 574 U.S. at 352.[8] And in the *Hobby Lobby* case, a RFRA case, the Supreme Court expressly invoked RLUIPA and an RLUIPA case in construing and applying RFRA.[9] Indeed, the *Hobby Lobby* Court

---

[8] *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 *Hobby Lobby*, 573 U.S. at 717 n.28; (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,* 573 U.S. at 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,* 573 U.S. at 726) (internal quotation marks omitted); (4) the court must "'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 *id.* at 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, *O Centro*, 546 U.S. at 434); 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*, 573 U.S. at 728)).

[9] *See Hobby Lobby*, 573 U.S. at 729 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).

expressly noted that RLUIPA "imposes the same general test as RFRA." *Hobby Lobby*, 573 U.S. at 695. The RFRA and RLUIPA tests, therefore, are identical, not fraternal, twins. *See ibid.* And the district court erred in failing to follow RLUIPA precedent.

* * *

A government, in short, substantially burdens a person's exercise of religion when it entirely obliterates a worship site. Accordingly, the Government's actions constitute a substantial burden under RFRA.

III. *Navajo Nation* Does Not Support the District Court's Substantial Burden Analysis.

In the face of RFRA's text and all the precedent applying it, the district court cast *Navajo Nation* as disposing of this case. *See* 2018 WL 4523135, at *3 ("Plaintiffs' [RFRA] claim is foreclosed by the Ninth Circuit's decision in *Navajo Nation*."). However, the burden imposed here is significantly more substantive and tangible than the one imposed in *Navajo Nation*. *See id.* (characterizing the burden in *Navajo Nation* as plaintiffs "claimed that the artificial snow desecrated the entire mountain and deprecated their religious ceremonies") (citing 535 F.3d at 1063). Yet the district court declined to find a substantial burden in this case because it viewed the pertinent facts as materially

indistinguishable from *Navajo Nation*. *Id*. at *5. But the district court was incorrect that *Navajo Nation* militates against finding a substantial burden in this case.

First, the two cases are dispositively different because the governmental burden in *Navajo Nation* was limited to *diminishing* "the Plaintiffs' subjective, emotional religious experience," 535 F.3d at 1070, whereas here the Yakama Nation's and Grand Ronde Tribes' entire worship site was entirely destroyed. In *Navajo Nation*, this Court found that the government's use of treated wastewater to make artificial snow on a sacred mountain did not substantially burden tribe members' exercise of religion. *Id*. at 1063. But this artificial snow would not physically affect, let alone destroy, the area: As the Court took care to note, "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected[;] [n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." *Ibid*. The Court thus felt assured that the *Navajo Nation* plaintiffs remained free to engage in

all of their prior religious practice.[10] "[T]he only effect" of the artificial snow, the Court emphasized, was "on the Plaintiffs' subjective, emotional religious experience"—the *Navajo Nation* tribal members' ability to "'physically'" use the sites was not compromised. *Id*. at 1070.

That is a far cry from what is happening here. Doubtless the federal use of the sacred mountain in *Navajo Nation* offended deeply held sensibilities of Navajo tribal members. Yet that effect is significantly less burdensome than the effect of the Government's actions on the Yakama and Grand Ronde members in bulldozing the Place of the Big Big Trees and burying it under a massive earthen berm. It resulted in the Place of the Big Big Trees's undeniable, utter *destruction* as a religious site. In contrast to *Navajo Nation*, here sacred

---

[10] Subsequent Supreme Court developments have called *Navajo Nation* into question. *See Holt*, 574 U.S. at 361–62 (stating that the "'substantial burden' inquiry asks whether the government has substantially burdened religious exercise," "not whether the . . . claimant is able to engage in other forms of religious exercise"); *Hobby Lobby*, 573 U.S. at 724 (suggesting the key question under RFRA is whether a governmental action "imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs," not "whether the religious belief asserted in a RFRA case is reasonable"). However, as this brief demonstrates, Plaintiffs should prevail even under *Navajo Nation*.

"plants [*were*] destroyed;" "shrines with religious significance [and] religious ceremonies . . . [*were*] physically affected;" and the site of worship was rendered not only "inaccessible" but *obliterated*. 535 F.3d at 1063 (emphases added).

Accordingly, the religious burden imposed on the Yakama Nation and Grand Ronde Tribes does not involve a mere "subjective spiritual experience" (as in *Navajo Nation*, 535 F.3d at 1063), but rather a permanent physical annihilation that puts an *end* to their site-specific religious practices. As a result, *Navajo Nation* does not militate against a finding of substantial burden here. If anything, *Navajo Nation* suggests that a court should find substantial burden in a case like this one. 535 F.3d at 1063, 1070.

Second, the district court also erred when it construed *Navajo Nation* to suggest that, unless someone either was denied a governmental benefit because of their religious exercise or was coerced into violating their religious beliefs, their religious exercise was not substantially burdened. 2018 WL 4523135, at *5. To the contrary, *Navajo Nation* stated that "*[a]ny* burden imposed on the exercise of religion *short of*" losing a government benefit or suffering a criminal or

civil sanction is not a "'substantial burden' within the meaning of RFRA." 535 F.3d at 1070 (emphases added). This means that the deprivation of benefits or threat of sanctions is the *minimum* that would establish a substantial burden. The opinion's language does not remotely suggest, much less hold, that a deprivation of benefits or a sanction exhausts the universe of government actions that could impose a substantial burden. If the governmental burden is *more* severe than a denial of benefits or coercion into contravening one's religious beliefs—as it is here—the logic and language of *Navajo Nation* plainly indicates that such a burden should be considered "substantial" under RFRA.

Moreover, in that circumstance, courts can have "little difficulty" finding a substantial burden on religious exercise. *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008); *see also Haight*, 763 F.3d at 565. A contrary approach, ironically, would exempt more severe burdens—even extreme burdens like destroying a worship site central to a religious community's worship—from RFRA's scope.

CONCLUSION

Congress enacted RFRA to "provide very broad protection for religious liberty." *Hobby Lobby*, 573 U.S. at 693. But the magistrate judge and the district court ignored RFRA's promise to millions of Americans to whom practicing their faith is itself an article of faith. Because the district court ignored RFRA's plain terms, and misread this Court's decision in *Navajo Nation,* the district court should be reversed.

Respectfully submitted,

/s/Gene C. Schaerr

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

May 10, 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.

Amicus 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 the **Anglican Church in North America (ACNA) Jurisdiction of the Armed Forces and Chaplaincy** is part of the Anglican Communion, the world's third largest Christian communion with over 85 million members. ACNA's endorser, Bishop Derek Jones, is a retired U.S. Air Force officer and decorated fighter pilot who served for 27 years and helped lead development of joint military religious affairs doctrine.

Amicus **Protect the 1st (PT1)** is a nonprofit nonpartisan 501(c)(4) organization that advocates for protecting First Amendment rights. 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) as it contains (including the appendix) 6,129 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's typesize and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: May 10, 2021

/s/ *Gene C. Schaerr*
Gene C. Schaerr
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 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: May 10, 2021

/s/ *Gene C. Schaerr*
Gene C. Schaerr
Attorney for Amici Curiae