No. _____

In the Supreme Court of the United States

HEREDITARY CHIEF WILBUR SLOCKISH, CAROL LOGAN, CASCADE GEOGRAPHIC SOCIETY, AND MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, AND ADVISORY COUNCIL ON HISTORIC PRESERVATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are Native Americans who, for decades, engaged in traditional religious practices at a sacred site on less than one acre of federal land in Oregon. In 2008, the federal government authorized the destruction of the site to add a turn lane to a nearby highway. The government admits it could have added the turn lane without harming the site. But it destroyed the site anyway, rendering Petitioners' continued religious exercise impossible.

Petitioners challenged the destruction of their sacred site under the Religious Freedom Restoration Act, seeking full or partial remediation of the site. The district court rejected their claim on the merits, concluding that destruction of the site imposed no "substantial burden" on their religious exercise. On appeal—after thirteen years of litigation and hundreds of pages of lower-court opinions—a Ninth Circuit panel dismissed the case as moot in a four-page, unpublished order. The panel said the federal government had granted the Oregon Department of Transportation (ODOT) an "easement" to add the turn lane, and ODOT had been dismissed from the case; therefore, the court lacked authority to order any remediation of the site.

The question presented is:

Whether the Ninth Circuit's mootness ruling warrants summary reversal where the panel clearly misapprehended governing law on mootness and on the authority of federal courts to order equitable relief affecting nonparties.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Hereditary Chief Wilbur Slockish, Carol Logan, Cascade Geographic Society, and Mount Hood Sacred Lands Preservation Alliance. Slockish and Logan are individuals. Cascade Geographic Society is an Oregon nonprofit corporation. Mount Hood Sacred Lands Preservation Alliance is an unincorporated nonprofit association. Neither is publicly held, issues stock, or has a parent corporation.

Respondents are the United States Department of Transportation, the Federal Highway Administration, the United States Department of the Interior, the Bureau of Land Management, and the Advisory Council on Historic Preservation.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, No. 21-35220, *Slockish* v. *United States Dep't of Transportation*, judgment entered November 21, 2021, rehearing en banc denied May 6, 2022, mandate issued May 16, 2022.

U.S. District Court for the District of Oregon, No. 3:08-cv-1169, *Slockish* v. *United States Federal Highway Admin.*, final judgment entered March 19, 2021.

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INTRODUCTION

This case arose because the federal government destroyed a Native American sacred site to add a turn lane to a nearby highway—ending undisputedly sincere, ongoing religious practices even though the government admitted the destruction "could have been avoided."

Petitioners are Native Americans who practiced their religion at that sacred site for decades, and who challenged the site's destruction as a substantial burden on their religious exercise under the Religious Freedom Restoration Act (RFRA). As a remedy, Petitioners requested various forms of full or partial remediation of the site—such as removing an embankment covering a gravesite, replanting trees, rebuilding a small stone altar, or erecting a commemorative sign—all beyond the highway guardrail, away from the turn lane, and removed from traffic.

The federal government repeatedly tried to have the case dismissed as moot, arguing that the damage "cannot be undone," and that the federal government lacks authority to remediate the site because it had granted an "easement" to a state agency to maintain the highway. But the district court repeatedly rejected that argument, in five separate opinions from four different judges, each concluding the government failed to prove that all forms of relief were unavailable.

Instead, the district court rejected Petitioners' RFRA claim on the merits, concluding that the destruction of a Native American sacred site on federal land cannot, as a matter of law, "substantially burden" religious exercise, even when it makes longstanding religious practices impossible.

On appeal, the parties focused extensively on the merits of the RFRA claim, with the government offering only two pages of briefing on mootness. But eight days after oral argument, a Ninth Circuit panel dismissed the case as moot—brushing aside thirteen years of litigation, and hundreds of pages of lower-court opinions—in a four-page, unpublished, unsigned order. The panel said that because the federal government had granted a state agency an easement to maintain the highway, and the state agency had been dismissed from the case, both the federal government and federal courts were powerless to offer any relief.

The panel's opinion is not just a transparent effort to dodge the weighty merits issues at the heart of this case. It also squarely conflicts with this Court's settled precedent in two respects—both independently warranting summary reversal.

First, this Court has repeatedly held that a case is not moot unless it is "impossible" to grant "any effectual relief whatever." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). The "heavy burden" of demonstrating impossibility rests on the party asserting mootness—here, the government. *Michigan* v. *Long*, 463 U.S. 1032, 1043 n.8 (1983). But the panel didn't even purport to hold the government to that standard. It simply assumed, without citation or evidence, that all forms of relief would conflict with the state agency's easement.

Second, even assuming all relief would conflict with the easement, the panel failed to consider its authority to modify or invalidate the easement as unlawful. As this Court has explained, federal courts can enforce federal law "by restraining the unlawful actions

of the defendant," "even though the restraint prevent[s] his performance of" third-party "contracts" like the easement here. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 366 (1940). The panel's failure to consider such relief conflicts with settled law.

This Court has not hesitated to employ summary reversal in cases involving similar departures from settled precedent—including where the Ninth Circuit itself has improperly rejected First Amendment claims, offered insufficient explanation in cursory opinions, or misapplied the same mootness standard at issue here. See pp. 18-19, *infra* (collecting cases). This case features all of these problems and more, amply warranting summary reversal.

The saddest aspect of this case is that the destruction of the sacred site never had to happen. The government admits it could have added a turn lane without harming Petitioner's sacred site. But it ignored Petitioners' pleas for protection and chose the most destructive alternative. The result is the obliteration of a site used by Native Americans for centuries—a site that, as one plaintiff put it, "never had walls, never had a roof, and never had a floor," but was "still just as sacred as a white person's church."

If the government is going to needlessly destroy a place of worship and then try to avoid accountability by saying nothing can be done, it should at least be required to prove that truly nothing can be done. Settled precedent requires no less. And the panel's refusal to apply that precedent warrants summary reversal.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 2021 WL 5507413. App.1a. The district court's opinion granting summary judgment against Petitioners' non-RFRA claims is reported at 2021 WL 683485. App.6a. The related findings and recommendations of the magistrate judge are reported at 2020 WL 8617636. App.9a.

The district court's opinion granting summary judgment against Petitioners' RFRA claim is reported at 2018 WL 2875896. App.106a. The related findings and recommendations of the magistrate judge are reported at 2018 WL 4523135. App.111a.

JURISDICTION

The court of appeals entered its judgment on November 24, 2021. It denied a timely petition for rehearing en banc on May 6, 2022. App.191a. Justice Kagan extended the deadline to file a petition for a writ of certiorari to October 3, 2022. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [and] to Controversies to which the United States shall be a party * * * ."

The text of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb *et seq.*, is reproduced at App.194a-199a.

STATEMENT OF THE CASE

I. Factual Background

A. Petitioners and the Sacred Site

1. Petitioner Slockish is a Hereditary Chief of the Confederated Tribes and Bands of the Yakama Nation. The Yakama lived along the Columbia River since before recorded history, but in 1855 were forced to sign a treaty ceding 12 million acres to the federal government and move to a reservation. *Yakama Nation History*, Yakama Nation, https://perma.cc/TDR4-9D6A. Slockish is a direct descendent of Chief Slakish, the last of the Chiefs to sign that treaty, and who did so under protest. App.269a.

Petitioner Logan is an enrolled member of the Confederated Tribes of Grand Ronde. The Grand Ronde were forced onto a reservation in 1856 so the government could "free [their] land for * * * pioneer settlement." David Lewis, *Confederated Tribes of Grand Ronde*, Oregon Encyclopedia, https://perma.cc/K4EA-SBX6.

Slockish and Logan are also members of Petitioners Mount Hood Sacred Lands Preservation Alliance and Cascade Geographic Society, which are organizations dedicated to preserving the cultural and religious resources of the Cascade Mountains.[1]

2. Slockish and Logan practice their tribes' traditional faiths. Slockish practices Washat, also known as the "Drummer-Dreamer faith" or the "Religion of the Seven Drums." App.302a; see Michael McKenzie,

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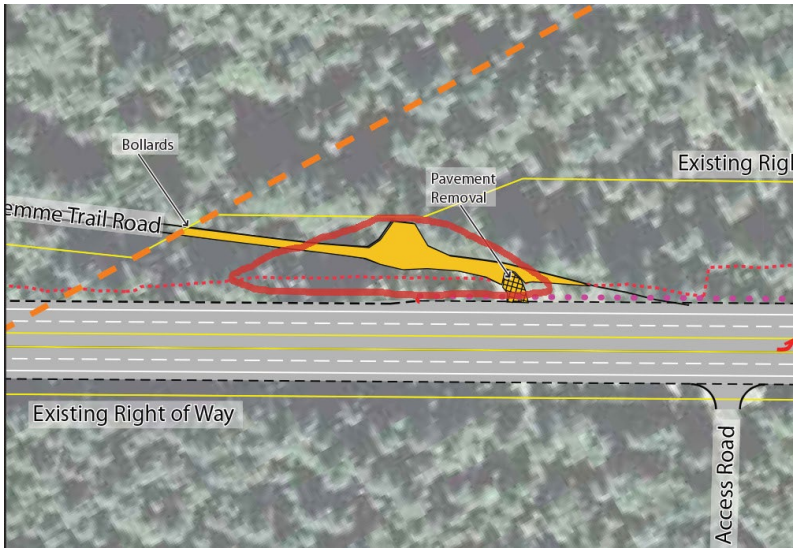
[1] Johnny Jackson was also a plaintiff. He was a Hereditary Chief of the Yakama who passed away in 2020 at age 89, eleven years after this lawsuit was filed.

Washat Religion (Drummer-Dreamer Faith) *in* Encyclopedia of Religion and Nature 1712, 1712 (Bron Taylor, ed., 2006). Logan is a Spiritual Practitioner and Elder of the Clackamas Tribe, responsible for organizing religious ceremonies and maintaining the tribe's traditions. App.233a-235a.

Petitioners worship and seek guidance from a Creator, who "keep[s] all Life in continuance" through a delicate balance. Rex Buck, Jr. & Wilson Wewa, *"We Are Created from this Land": Washat Leaders Reflect on Place-Based Spiritual Beliefs*, 115 Or. Hist. Q. 298, 309-311 (2014). Although Washat and other Native American religions respect all of Creation, certain sacred sites are "accorded special reverence." Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sites on Federal Land*, 19 Ecology L.Q. 795, 800-801 (1992). The visiting of these sacred sites—to give thanks, pray, honor ancestors, and make offerings—is a key aspect of Petitioners' religious practice. App.223a-224a; see also App.230a, 273a.

3. The site at issue here is traditionally known to Petitioners' tribes in the Sahaptin language as *Ana Kwna Nchi Nchi Patat* (the "Place of Big Big Trees"). The site was formerly on tribal land, App.287a, but is now owned by the federal government and managed by the Bureau of Land Management (BLM) as part of the A.J. Dwyer Scenic Area north of U.S. Highway 26 near Mount Hood in Oregon. The site measures approximately 100 by 30 meters, or 0.7 acres. App.208a-209a.

The site lies along a trading route used by Native Americans for centuries—which later became part of the Oregon Trail and is now followed by U.S. 26. App.276a. The site is sacred as a burial ground—which Petitioners have a religious obligation to protect—and because of its traditional use as a campsite for native peoples traversing ancient trading routes. App.229a, 218a, 276a-277a, 305a-306a, 240a-241a. The site is shown circled in red below (see App.385a):



Prior to its destruction in 2008, the sacred site contained several key features. First were the burial grounds and historic campground. App.294a. The campground was marked by a small clearing just north of U.S. 26 (depicted on the map above as a yellow bulge), which could be accessed through a gap in the guardrail. App.216a. The burial grounds were located next to the campground in the strip of trees between the campground and U.S. 26. App.238a-239a, 251a-252a, 262a.

Second, the site featured old-growth Douglas fir trees and rare medicine plants used in Petitioners' ceremonies. The trees were directly incorporated into religious ceremonies, App.218a-219a, and Petitioners are aware of no other site where the medicine plants could be gathered, App.226a-228a.

Lastly, the site contained an ancient altar of smooth river stones. The altar was located amidst the burial grounds and was roughly 6 feet long, 3-4 feet wide, and 1.5 feet high. It served both to mark surrounding burials and as a focal point for religious ceremonies. App.237a. The altar is pictured in the foreground below during a BLM archaeological excavation in 1986, which concluded that the altar "may be at least several hundred years (and possibly much more) old" (9th Cir. Dkt. 40 at 7; see also App.381a, 315a-316a):

4. Indigenous peoples have used this site for religious purposes since time immemorial. App.289a. Petitioners themselves protected and regularly used the site for decades.

Logan, who is now 78, learned of the site as a young girl and engaged in religious practices there for over fifty years until the site was destroyed. She came for "prayer and meditation," to gather sacred medicine plants, and to pay respects to her ancestors through memorial ceremonies. App.289a. These ceremonies included a time of spiritual preparation, commemoration of ancestors by prayer, meditation, and song, and the burning of tobacco offerings in a small fire. App.224a-226a.

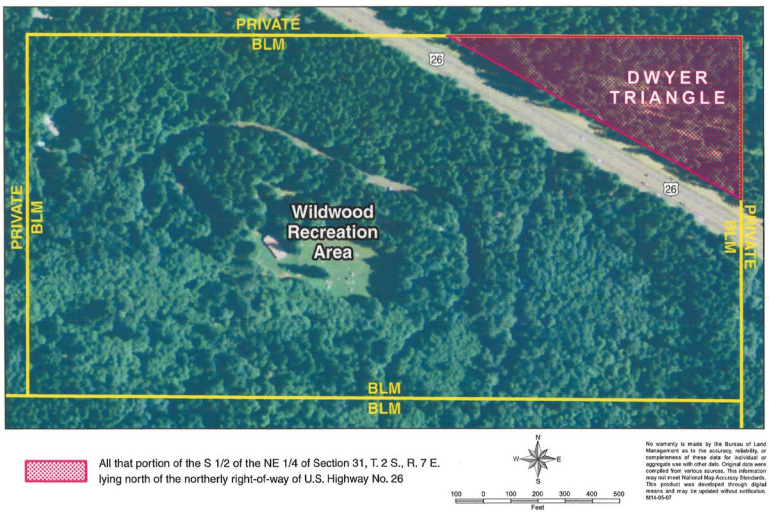
Slockish, who is now 77, began visiting the site thirty years ago and continued at least twice a month since. App.260a. Like Logan, he engaged in prayer, veneration of his ancestors, and giving of tobacco offerings. App.260a. Plaintiff Johnny Jackson, who died in 2020 at age 89, practiced his faith at the site for over forty years. App.273a, 277a-278a. As Jackson described it, the site was "like a church"—one that "never had walls, never had a roof, and never had a floor," but "is still just as sacred as a white person's church." App.273a.

Petitioners testified that no other site served the same spiritual function or had a similar stone altar. App.220a-221a, 223a, 251a-252a, 261a. And the spirits of Petitioners' ancestors who were buried there could not be relocated. App.241a, 250a-251a, 306a.

B. The Sacred Site's Destruction

1. The 0.7-acre sacred site lies within what is now the 5-acre A.J. Dwyer Scenic Area ("Dwyer") north of

U.S. 26, which is owned by the federal government and managed by BLM. Dwyer, in turn, is part of the broader Wildwood Recreation Area, as shown in the map below (App.215a):



In 1995, BLM named Dwyer a "Special Area," "unique" for its "scenic and botanical values." App.396a. And in 1996, Congress designated the parts of Dwyer visible from the highway as "Mt. Hood Corridor Lands" protected for their "scenic qualities." Oregon Resource Conservation Act of 1996, Pub. L. No. 104-208, Div. B, Tit. IV, § 401(g), 110 Stat. 3009-537.

Dwyer is just north of U.S. 26, which is used for travel between Portland and tourism destinations like Mount Hood. Despite Dwyer's protected status, tourism interests have resulted in repeated efforts to widen the highway.

First, in 1985, respondent Federal Highway Administration (FHWA), together with the Oregon Department of Transportation (ODOT), proposed widening U.S. 26, including in the stretch that borders

Dwyer. After widespread community opposition, the project was modified to minimize its impact on Dwyer. Objectors emphasized Dwyer's "historical and cultural significance," noting that the area is "sacred" to Native Americans and explaining that there was a "gravesite" and stone altar. App.401a-402a, 408a.

In 2006, FHWA and ODOT again proposed adding a turn lane through Dwyer. In an Environmental Assessment ("EA"), the government acknowledged that there were many ways to add a lane while still minimizing harms to Dwyer—such as widening the road to the south only, widening equally to the north and south, or widening to the north while using a steeper slope or retaining wall. App.386a-393a. But the government nonetheless proposed widening to the north with a long slope—the most destructive option for Dwyer and the sacred site. App.383a, 395a.

The EA claimed the widening was to address safety—but it simultaneously conceded that the relevant stretch of U.S. 26 was statistically safer than comparable roads statewide. App.384a (24% fewer accidents than "similar rural principal arterials" statewide). Moreover, while the government rejected mitigation measures to protect Dwyer, it proposed to "steepen the slopes * * * and/or install guardrail" to protect a nearby "wetland" on the same side of the highway. App.382a-383a.

2. Petitioners were initially hesitant to voice their opposition to the turn lane. As the federal government's tribal-consultation guidelines note: "Many tribes['] * * * beliefs require that the location and even the existence of traditional religious and cultural properties not be divulged." Tribal Consultation

Guidelines, FHWA, https://perma.cc/256Q-TQY4. Petitioners were also concerned about vandalism. During a public meeting in the 1990s, a government official had cited the stone altar as "the reason why we can't widen the highway," and the altar was vandalized a few days later. App.216a-217a; see also App.290a. Petitioners also lacked legal counsel.

When the threat to their site became apparent, Petitioners objected, including directly to FHWA, via multiple phone calls and written memoranda lodged months before construction began. As the administrative record discloses, Logan, Jackson, and Slockish pleaded for protection of the "burials" and "religious sites" in Dwyer, which "continue to be used today," and expressed their belief that "an additional lane c[ould] be added in the Wildwood to Wemme area without destroying heritage resources." App.319a-350a, 359a-375a, 44a-45a.

3. Nevertheless, the government pressed forward. On February 28, 2008, BLM issued a tree-removal permit allowing ODOT to remove Dwyer's old-growth trees. App.351a. On July 28, 2008, it granted ODOT an easement, or right-of-way, for the "construction" and "maintenance" of the highway over BLM's land. App.200a-209a. The land remained under the ownership and jurisdiction of BLM. App.200a-201a. And, importantly, the easement expressly reserved to BLM the right "to use or authorize the use of any portion of the right-of-way for non-highway purposes" that would not "interfere with the free flow of traffic or impair the full use and safety of the highway." App.202a.

Construction began in July 2008 and destroyed all elements of the site used in Petitioners' religious exer-

cise. Scores of trees were cut down. App.397a. The traditional campground and burial grounds were bulldozed and buried beneath an embankment. App.295a. Native vegetation was replaced with grass. App.216a. And the stone altar was "scattered" and then "disposed of." App.315a; D. Ct. Dkt. 287 at 28. The physical destruction of the sacred site has rendered Petitioners' continued religious practices there impossible. App.310a; see Pet'rs 9th Cir. Br. 25-26 (before and after photographs).

II. Proceedings Below

1. Petitioners, who are indigent, were unable to secure counsel until mid-2008, when a solo practitioner who had never litigated in federal court offered to help pro bono. They sued on October 6, 2008, naming as defendants both Respondents here and ODOT's director in his official capacity. D. Ct. Dkt. 1. In a series of amended complaints, they asserted claims under various environmental statutes, the Free Exercise Clause, and RFRA.

For relief, they sought an injunction requiring "remedial measures" that would restore the site and allow their religious practices to resume—such as uncovering the campground and burial grounds, replanting vegetation, installing signage, and replacing the stone altar. D. Ct. Dkt. 223 at 38; App.281a-282a, 296a, 311a.

The federal government moved to dismiss the case as moot, arguing that the project was "substantially complete" and the damage "cannot be undone." App.171a, 176a. But the magistrate and district judges rejected this argument, noting that "[m]any decisions by the Ninth Circuit * * * have held that the

completion of a project was insufficient to moot a challenge to that project," App.173a, and the court could "order removal of offending portions of the Project" or "mitigation of the harm to cultural resources such as monuments or markers," App.146a.

After ODOT was dismissed on sovereign-immunity grounds, D. Ct. Dkt. 131, the case was stayed for several years for settlement negotiations. D. Ct. Dkt. 208. During negotiations, the federal government offered to "place a tree or plant barrier" at the site, "identify and approve of a location for the Plaintiffs to re-construct the rock cluster," and "develop and install one informational/interpretative sign" "reflecting the importance of the area to Native Americans." App.211a-213a. But negotiations stalled over the extent of relief.[2]

When proceedings resumed, and the case had been assigned to a new magistrate and district judge, the government renewed its mootness argument on summary judgment, asserting that after ODOT's dismissal, the court lacked authority to order relief potentially affecting the highway. D. Ct. Dkt. 287 at 28-29. The new magistrate and district judge again rejected

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[2] Federal Rule of Evidence 408 prohibits admission of settlement offers only to (1) "prove or disprove the validity or amount of a disputed claim" or (2) "impeach by a prior inconsistent statement or a contradiction," but permits it for "another purpose." Petitioners cited the government's settlement offers in the district court and Ninth Circuit to support Article III jurisdiction, D. Ct. Dkt. 296 at 10; D. Ct. Dkt. 350 at 29; Pet'rs 9th Cir. Reply Br. 4; 9th Cir. Dkt. 74 at 4-5; 9th Cir. Dkt. 88 at 3, 11-12, which "is perfectly acceptable under Rule 408." *Rhoades* v. *Avon Prods., Inc.*, 504 F.3d 1151, 1161-1163 (9th Cir. 2007).

this argument, explaining that "[e]ven if ODOT's dismissal" could limit some forms of relief, the "remaining defendants" had not shown that all relief was impossible. App.57a. Rather, "[g]iven Plaintiffs' broad request for various forms of equitable relief, it is likely that the Court could craft some relief that would mitigate Plaintiff[s'] injury and improve their access to the site and ability to exercise their religion." App.109a, 8a. In all, the government's mootness and redressability arguments were rejected by four different judges in five separate opinions.[3]

In addition to asserting mootness, the government sought summary judgment on the merits of Petitioners' RFRA claim. RFRA "applies to all Federal law" and provides that the federal government "shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person" is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-3(a), 2000bb-1(a)-(b). The government did not argue that destroying Petitioners' sacred site was the least restrictive means of furthering a compelling interest. To the contrary, the government admitted that the destruction "could have been avoided." Gov't 9th Cir. Br. 43; see also *id.* at 45. Instead, the government argued that "[c]onstruction on public lands * * * is as a matter of law, not a 'substantial burden' on religion." D. Ct. Dkt. 287 at 19.

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[3] The case was reassigned in 2016 from Magistrate Judge Stewart to Magistrate Judge You, and in 2017 from Judge Brown to Chief Judge Hernández, with the government reasserting mootness each time.

The district court agreed. The court didn't dispute that Petitioners' sacred site had been destroyed or that this destruction prevented their religious exercise. App.115a n.1. Instead, it asserted that "substantial burden" under RFRA is a "narrow" term, encompassing "only" two situations—"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." App.107a. Accordingly, the court concluded that destruction of Petitioners' sacred site imposed no substantial burden. App.107a-108a.[4]

2. On appeal, the parties focused on the merits of the RFRA claims. The government devoted only two of its brief's sixty-four pages to mootness. Gov't 9th Cir. Br. 19-21. The government acknowledged that "restoration of the site would redress Plaintiffs' asserted injuries," but said restoration of this site "is beyond the power of the federal defendants," because the site "lies within ODOT's" easement. *Id.* at 19-20. However, it pointed to no evidence that any of Petitioners' relief

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[4] In a separate summary-judgment opinion resolving Petitioners' remaining claims, the district court rejected (1) Petitioners' environmental claims on grounds of "administrative waiver" or "exhaustion"; (2) Petitioners' claims of inadequate tribal consultation on grounds of standing (because Petitioners are not themselves tribes); and (3) Petitioners' claims under the Native American Graves Protection and Repatriation Act and Free Exercise Clause on the merits. App.55a-104a, 7a-8a. The court's free-exercise analysis simply tracked its earlier RFRA holding, stating Petitioners' "failure to demonstrate a substantial burden under RFRA necessarily means" their free-exercise claims failed too. App.103a-104a.

would interfere with traffic or safety or otherwise violate the easement. See generally *ibid.* Indeed, the word "safety" appears only once in the government's brief, in quoting the easement. *Id.* at 20.

Eight days after oral argument, the panel (Judges Schroeder, Fletcher, and Miller) issued a four-page, unpublished memorandum concluding that "[t]he language of the easement, in combination with ODOT's dismissal, renders the case moot." App.4a. The panel acknowledged that the easement expressly reserves the federal government's right "to use or authorize the use of the highway for non-highway purposes" that would not "impair the full use and safety of the highway." App.4a (paraphrasing App.202a). But it said "we cannot order any effective relief," because "[a]ll of the relief sought by Plaintiffs implicates highway safety." App.4a-5a. And although Petitioners had also argued the easement itself could be set aside or modified as unlawful, Pet'rs 9th Cir. Reply Br. 3-5, the court did not address this argument or discuss the binding authority supporting it.

Petitioners requested publication of the panel's opinion under Ninth Circuit Rule 36-2(a), which states that an opinion "shall be" published where, as here, it "dispos[es] of a case in which there is a published opinion by a lower court." 9th Cir. Dkt. 72 at 1. Three days later, however, the panel declined publication without explanation. 9th Cir. Dkt. 73. It also denied Petitioners' subsequent request for rehearing. App.193a.

REASONS FOR GRANTING THE PETITION

I. The decision below clearly misapprehends this Court's controlling precedent, warranting summary reversal.

Thirteen years into this litigation, the Ninth Circuit issued a four-page, unpublished order dismissing the case as moot. The court's cursory decision contravenes settled mootness precedent and is a transparent effort to dodge the weighty RFRA and First Amendment issues at the heart of this case. It should be summarily reversed.

1. Summary reversal is appropriate "to correct" a lower court's "clear misapprehension" of governing law. *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). This disposition permits this Court to correct a "plain departure from prior Supreme Court precedent" without "having to go through full briefing and oral argument only to reaffirm a legal rule already announced." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(c), 5-46 (11th ed. 2019) (Shapiro).

This Court has not hesitated to employ summary reversal in analogous cases. In *Pakdel* v. *City & County of San Francisco*, for example, this Court summarily reversed the Ninth Circuit's erroneous imposition of an exhaustion requirement in dismissing a Takings Clause claim. 141 S. Ct. 2226 (2021) (per curiam). In *Roman Catholic Archdiocese of San Juan* v. *Feliciano*, this Court summarily vacated a lower court's misunderstanding of jurisdictional requirements in a case with significant underlying Free Exercise Clause issues. 140 S. Ct. 696 (2020) (per curiam). In *Sause* v. *Bauer*, this Court summarily reversed to ensure adequate consideration of First and Fourth

Amendment claims by a plaintiff allegedly ordered by government officials to stop praying. 138 S. Ct. 2561 (2018) (per curiam). And in *Calderon* v. *Moore*, this Court summarily reversed the Ninth Circuit's misapplication of the same settled mootness rule at issue here—that a case is not moot unless the court "cannot grant 'any effectual relief whatever.'" 518 U.S. 149, 150 (1996).[5]

The decision below warrants the same treatment. Faced with weighty RFRA and First Amendment claims contested over many years of litigation, the Ninth Circuit ducked, claiming the government lacked authority to perform any remediation of Petitioners' sacred site due to ODOT's easement—and therefore the case was moot. But this ruling clearly misapprehends controlling mootness precedent in two respects.

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[5] See also, *e.g.*, *Box* v. *Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (summarily reversing lower court's misapplication of rational-basis standard, "express[ing] no view on" how the case would come out under other theories on remand); *Thompson* v. *Hebdon*, 140 S. Ct. 348 (2019) (summarily reversing Ninth Circuit's rejection of First Amendment claims); *CNH Indus. N.V.* v. *Reese*, 138 S. Ct. 761 (2018) (summarily reversing lower court's misreading of collective-bargaining agreement); *Pavan* v. *Smith*, 137 S. Ct. 2075 (2017) (summarily reversing decision erroneously rejecting claims under right to same-sex marriage); *Caetano* v. *Massachusetts*, 577 U.S. 411 (2016) (summarily reversing decision erroneously rejecting Second Amendment claims); *V.L.* v. *E.L.*, 136 S. Ct. 1017 (2016) (summarily reversing lower court's misapplication of Full Faith and Credit Clause); *Amgen Inc.* v. *Harris*, 577 U.S. 308, 311 (2016) (summarily reversing Ninth Circuit for failing to "properly evaluate the complaint"); *American Tradition P'ship* v. *Bullock*, 567 U.S. 516 (2012) (summarily reversing decision erroneously rejecting First Amendment claims).

First, this Court has repeatedly held that a case becomes moot only if the party asserting mootness meets a "demanding standard": proving that "any effectual relief whatever" is not just "uncertain or even unlikely," but "impossible." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019). Given this settled standard, it is unsurprising that all four magistrate and district judges to consider the government's mootness defense in this case rejected it. But the panel did not even purport to hold the government to this standard; it simply announced (without evidence) that all relief would implicate highway safety and therefore conflict with ODOT's easement.

Second, even assuming (contrary to the evidence) that all relief would conflict with ODOT's easement, the panel failed to consider another form of relief entirely: modifying or invalidating the easement as unlawful. The panel asserted (without citation) that a federal court could not order equitable relief that affects an agreement with a nonparty (ODOT's easement). But this Court has held just the opposite—that federal courts can enforce federal laws (like RFRA) "by restraining the unlawful actions of the defendant even though the restraint prevent[s] his performance of" third-party "contracts" like the easement here. *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 366 (1940).

Either one of the panel's errors would independently warrant summary reversal; both combined make this an overwhelming case.

2. Mootness is a high bar. "A case becomes moot * * * 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 161 (2016) (quoting *Knox* v. *SEIU*, 567 U.S. 298, 307

(2012)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin* v. *Chafin*, 568 U.S. 165, 172 (2013). And the "heavy burden" of showing the impossibility of effective relief is on "the party who alleges" mootness, *Michigan* v. *Long*, 463 U.S. 1032, 1042 n.8 (1983)—here, the government. See also *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 221-222 (2000) (reversing because court of appeals put "the burden of proof" of showing mootness "on the wrong party").

Here, Petitioners seek various forms of relief that would restore features of the sacred site outside the guardrail and away from traffic—such as uncovering the campground and burial ground, replacing the stone altar, replanting vegetation, and placing commemorative signage acknowledging the site's importance to Native American religious exercise. The government has never argued that this relief is physically impossible; it claims only that it is legally barred by ODOT's easement. Thus, the question for mootness purposes is whether the government has shown that *every* form of relief *actually conflicts* with the terms of the easement.

That easement, by its terms, grants ODOT a limited, nonpossessory right-of-way "for the construction, operation and maintenance of a highway" over BLM's land. App.201a. BLM remains the owner of "the land itself." See *United States Forest Serv.* v. *Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1844-1845 (2020) (an easement "grant[s] only nonpossessory rights of use limited to the purposes specified in the easement agreement"; the grantor "retains ownership over 'the land itself.'" (emphasis omitted)). And the easement expressly reserves to BLM the right "to use

or authorize the use of any portion of the right-of-way for non-highway purposes"—such as the remediation requested by Petitioners here—as long as such use would not "interfere with the free flow of traffic or impair the full use and safety of the highway." App.202a. So establishing mootness here would require the government to demonstrate that each form of relief Petitioners seek would "interfere with the free flow of traffic or impair the full use and safety of the highway." If at least one form of relief remains "possible"—however "partial" that relief may be—that "is sufficient to prevent th[e] case from being moot." *Church of Scientology of Cal.* v. *United States*, 506 U.S. 9, 13 (1992); accord, *e.g.*, *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 797 (2021).

The panel here didn't even purport to hold the government to this burden. Indeed, the panel couldn't even bring itself to say that Petitioners' relief would "interfere with" traffic or "impair" safety—which are the terms used in the easement. App.4a. It said only, without citation, that Petitioners' relief "*implicates* highway safety." App.4a (emphasis added). That close-enough-for-government-work approach comes nowhere close to the "stringent" mootness inquiry demanded by this Court's precedents. *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); see also *Chafin*, 568 U.S. at 175-176 ("such uncertainty does not typically render cases moot"). Thus, whether every form of relief conflicts with the easement is a question the government has never proved and the panel did not even "address[]"—which "means it is no reason to find this case moot." *Mission Prod.*, 139 S. Ct. at 1661.

Indeed, the notion that every form of relief would violate the easement not only hasn't been proven—it is absurd on its face. For example, one form of relief Petitioners seek is restoring a 1.5-foot-high stone altar—which predated the highway, coexisted with it for decades, and was separated from it by a guardrail. That such a modest feature threatens "safety" is risible, and the government has never argued otherwise.

So too for replanting trees. The project's EA considered alternatives that would have preserved trees, rejecting them for reasons of cost and convenience, not traffic or safety. App.387a-390a, 394a-395a. And some trees in fact *were* replanted after construction, but died from lack of care. App.216a. Even at oral argument before the Ninth Circuit, the government conceded it "maybe" had authority to replant trees, Oral Arg. at 14:09-14:14, No. 21-35220 (9th Cir. Nov. 16, 2021), https://perma.cc/T3RR-8E4Y—and relief that "maybe" can be granted is by definition not "impossible." *Campbell-Ewald*, 577 U.S. at 161.

Petitioners have also sought removal of the embankment covering the campground and burial grounds—which is located behind the highway guardrail and removed from traffic. The government has never identified why the embankment was placed at all, much less explained why it cannot be removed. And as already explained, "safety" did not require an embankment over the nearby wetland—which, unlike Petitioners' sacred site—the government chose to protect. See p. 11, *supra*.

Still another form of relief—expressly relied on by the district court—is requiring commemorative "markers" or "signage" reflecting the site's importance to Native American religious exercise. App.177a. That

relief is not only not foreclosed by the easement, but also expressly *permitted* by it—as the easement on its face reserves BLM's continuing authority to place "information signs" within "the right-of-way." App.202a.

Finally, even assuming (counterfactually) that unilateral remediation by the government would violate the easement, a court could at least order the government to seek permission from ODOT to effect the remediation. ODOT has never claimed it would suffer any hardship from allowing at least some of the modest remediation Petitioners seek. And if it is at least "possible" ODOT would agree, the case is not moot. *Mission Prod.*, 139 S. Ct. at 1661; see *Chafin*, 568 U.S. at 174-175 (case not moot where "Ms. Chafin might decide to comply with an order against her and return E.C. to the United States," especially where the "consequence of compliance" was relatively small).

All this explains why the government put on *zero* evidence—not a single declaration, diagram, document, or other exhibit, at any stage of this fourteen-year-old litigation—attempting to demonstrate that *any* form of relief Petitioners seek would impede traffic or impair safety. And it explains why the district court—in five different opinions rendered by four different judges—rejected the government's mootness argument every time.

In fact, far from attempting to prove that no remediation was possible without endangering traffic or safety, the government expressly offered in settlement negotiations several of the same forms of relief just described. Specifically, the government offered to "place a tree or plant barrier" at the site, "identify and approve of a location for the Plaintiffs to re-construct the

rock cluster," and to "develop and install" an "interpretative sign" "reflecting the importance of the area to Native Americans." App.211a-212a. This authoritative written settlement offer—made by the Department of Justice long after ODOT had been dismissed from the case—is flatly irreconcilable with the panel's assertion (much less the government's) that "none of the Defendants has authority to make the changes sought by Plaintiffs." App.4a.

Lacking any declarations, testimony, or other evidence from the government on the feasibility of relief, the panel said that "the Environmental Assessment" suggested "the removal of vegetation and the rock pile [and] the addition of the earthen embankment * * * were all conducted for the purpose of improving the safety of the highway." App.4a. But this is a blatant fudge—underscored by the panel's failure to cite even a single page of the EA. The EA says the project *as a whole* was undertaken to improve highway safety. App.382a. But it says *nothing* to support the notion that rebuilding the altar, replanting trees, removing the embankment, or placing a commemorative sign—all behind the guardrail and removed from traffic—would threaten highway safety. And any such conclusion would be irreconcilable with the government's unambiguous concession, highlighted on the first page of its Ninth Circuit brief: that it *could have* widened the highway while "avoid[ing] any impact on Plaintiffs' sacred site." Gov't 9th Cir. Br. 1. That concession is dispositive. The panel's contrary conclusion fundamentally misapprehends settled mootness jurisprudence, warranting summary reversal.

3. Even assuming the government could prove that all possible relief would conflict with the easement, the

panel simply ignored another form of relief entirely: modifying or invalidating the easement as unlawful. Petitioners claim the easement violates federal law. If they're right—which is assumed for mootness purposes—then the court can issue an order modifying or invalidating the easement. The panel's contrary ruling conflicts with basic equitable principles and the decisions of this Court, underscoring the propriety of summary reversal.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Hills* v. *Gautreaux*, 425 U.S. 284, 297 (1976). Moreover, "when federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'" *Kansas* v. *Nebraska*, 574 U.S. 445, 456 (2015) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

Reflecting these principles, this Court has recognized that in appropriate cases, a court's equitable authority includes the power to "restrain[] the unlawful actions of the defendant even though the restraint prevent[s] his performance of" third-party "contracts"—like the easement here. *National Licorice*, 309 U.S. at 366. The panel's decision—which takes as given that such relief was simply off the table—cannot be reconciled with this precedent.

The "approach taken" by "other Court[s] of Appeals" in analogous situations "'only underscores' how the decision below 'deviat[ed] from ordinary [mootness] principles.'" *CNH Indus. N.V.* v. *Reese*, 138 S. Ct.

761 (2018) (summary reversal). Indeed, multiple circuits have rejected mootness defenses in cases seeking to reverse or modify projects completed under permission granted by the government to third parties—even where (as here) the party has previously been dismissed from the litigation, and even assuming the relief would "have an adverse effect on" the nonparty's rights. *Vieux Carre Prop. Owners, Residents, & Assocs., Inc.* v. *Brown*, 948 F.2d 1436, 1446 (5th Cir. 1991) ("[W]e fail to see why that should require the dismissal of Vieux Carre's otherwise valid suit against the [government]."); see also *City of Olmsted Falls* v. *EPA*, 435 F.3d 632, 635-636 (6th Cir. 2006) ("should Plaintiffs prevail in their suit," the nonparty's permit could be "invalidated").

But it isn't just other circuits; even prior Ninth Circuit cases have applied the same principle. Before this case, the Ninth Circuit had long recognized that when a court is asked "to remedy the violation of a public law," the court is "not bound to stay within the terms of" the government's "private agreement[s]." *Northwest Env't Def. Ctr.* v. *Bonneville Power Admin.*, 477 F.3d 668, 679-680 (9th Cir. 2007). Instead, it may "vindicate[]" "the public right to compliance with" the law—even if that means undermining contractual "commitments" with third parties. *Conner* v. *Burford*, 848 F.2d 1441, 1460-1461 (9th Cir. 1988). In *Conner*, for example, the Ninth Circuit remedied an environmental violation (like the government's here) by modifying the terms of leases the government had previously granted to nonparties (like ODOT's easement). *Id.* at 1448-1449, 1460-1462.

The panel here, however, offered no distinction of these cases, and cited no authority holding differently.

It simply ignored them—even though they were fully briefed and argued. That is likely why the panel issued an unpublished decision and even refused (contrary to its own rules) to publish it after being formally requested to do so. 9th Cir. Dkt. 72, 73. As a Ninth Circuit judge previously observed: "Some unpublished cases are covert efforts * * * to smuggle a 'just' result past the en banc watchers and the Supremes." Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. Cal. Interdisciplinary L.J. 67, 73 n.23 (2004) (quoting Judge Goodwin). This is worse: It is an unjust effort to dodge serious RFRA and First Amendment issues on specious mootness grounds.

* * *

To summarily reverse, this Court would not need to conclude that any forms of relief requested by Petitioners in fact remain available. It would simply need to recognize that the panel failed to hold the government to the "demanding standard" of proving "any effectual relief whatever" is "impossible." *Mission Prod.*, 139 S. Ct. at 1660. If the Native American Petitioners are to be forever deprived of the right to resume worshiping at their ancestral sacred site, they should at least receive the benefit of a proper application of settled rules under Article III.

II. Summary reversal is particularly appropriate given the panel's cursory disposition of exceptionally important issues.

Summary reversal is warranted not just because the panel misapprehended this Court's settled precedent, but also because the panel resolved exceptionally

important issues in a cursory, unreasoned memorandum.

1. The Court is hesitant to summarily reverse when the decision below is a "'carefully reasoned decision' on a difficult or highly factual proposition." Shapiro § 5.12(c), 5-46. But the decision below is the opposite. The Ninth Circuit disposed of this long-running litigation in a four-page, unpublished order issued eight days after oral argument—reversing course after five lower-court opinions, issued over a period of twelve years, had gone the other way. And rather than engage in the fact-intensive inquiry whether the terms of the easement foreclosed each form of relief Petitioners seek, the court evaded the inquiry altogether—finding the case moot based simply on the fact that the easement exists.

Then, when Petitioners asked the panel to publish the opinion, noting that it met several of the Ninth Circuit's publication criteria, 9th Cir. Dkt. 72, the court denied that request three days later without awaiting a response, 9th Cir. Dkt. 73. The Ninth Circuit's refusal to stand by its own opinion only underscores the need for this Court's review. See *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 502-503 (2019) (summary reversal where Ninth Circuit "offered no explanation" for decision that "contravened * * * settled principles"); *Plumley* v. *Austin*, 574 U.S. 1127 (2015) (Thomas, J., dissenting from denial of certiorari) (issuing an "unpublished" opinion contrary to the circuit's "own" "standard" for publication was "disturbing" and "another reason to grant review").

2. The panel's decision also warrants intervention because it resolves issues of profound significance—

ending core religious practices on contrived procedural grounds.

The panel's faulty mootness ruling alone is exceptionally important. The Ninth Circuit includes more federally recognized tribes and more federal land than any other circuit.[6] And "because of the history of government divestiture and appropriation of Native lands," many tribal sacred sites are now located on federal land. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1340 (2021).

Meanwhile, the facts generating the panel's mootness holding are hardly unique. An agreement like ODOT's easement is routine for federal-land development. 43 C.F.R. 2801.9; see also 43 C.F.R. 2888.10, 9262.1. And the easement language is standard. See 43 C.F.R., Part 2800, Subpart 2805 ("Terms and Conditions of Grants"). Thus, the panel's decision offers a roadmap for the government to evade judicial review for projects destroying Native American sacred sites: simply contract with a state agency or private entity that is not itself amenable to suit or not subject to RFRA, and move swiftly. See *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (RFRA cannot apply to states); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (RFRA cannot apply to private entities unless "acting under color of law"). As the district court said, it would be particularly "poor practice to dismiss claims as moot in instances where governmental agencies move swiftly and without appropriate

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[6] Federally Recognized Tribes, U.S. Dep't of Interior, Indian Affairs, https://perma.cc/7UKU-ET74; Bureau of Land Mgm't, Infographic (May 2016), https://perma.cc/SFG9-WJXY.

consideration to complete a project before lawsuits challenging such projects may be brought." App.148a. That would be a perverse approach to the freedom of religion.

Second, the underlying RFRA issue in this case—which the panel's mootness holding permitted it to dodge—is likewise exceptionally important. As already explained, the district court held that the complete destruction of Petitioners' sacred site, rendering their continued religious exercise there impossible, did not constitute a "substantial burden" triggering heightened scrutiny under RFRA. App.107a-108a, 115a-131a. That holding would have a devastating effect on Native American religious exercise. Yet if the panel's mootness decision were sustained, that holding would be insulated from this Court's review.

Indeed, the district court's "substantial burden" holding was recently adopted by a panel of the Ninth Circuit in another case involving the destruction of a Native American sacred site: *Apache Stronghold* v. *United States*, 38 F.4th 742 (9th Cir. June 24, 2022). There, the government seeks to transfer land to a copper mining company that intends to destroy the central sacred site of the Western Apaches, swallowing it in a massive crater and ending their religious ceremonies forever. The *Apache* panel issued a divided opinion that precisely tracks the district court's reasoning here (and mirrors the government's arguments in both cases). It held that even if destroying the site would make the Apaches' continued religious exercise "impossible," that would not constitute a "substantial burden" under RFRA. *Id.* at 756.

Yet as separate dissents from Judges Berzon and Bumatay explained, that reasoning "cannot be

squared with" this Court's or other circuits' precedents and defies both the plain language of RFRA and common sense. 38 F.4th at 779, 782 (Berzon, J., dissenting); Order Den. Mot. for Inj. Pending Appeal at 4, *Apache Stronghold* v. *United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting), ECF No. 26. And such a holding, if sustained, would eviscerate RFRA's promise for Native Americans—who, unique among this Nation's religious practitioners, depend heavily on the government for access to their sacred sites.

The Ninth Circuit has sua sponte called for a vote on whether to rehear *Apache* en banc. Order, No. 21-15295 (9th Cir. Aug. 15, 2022), ECF No. 86. If the en banc court corrects the *Apache* panel's mistaken interpretation of "substantial burden," then the only thing standing between Petitioners here and relief under RFRA is the panel's grossly mistaken mootness ruling—because the government has conceded it can't satisfy strict scrutiny under RFRA. Gov't 9th Cir. Br. 43, 45. In that case, summary reversal here would be dispositive under RFRA.

If the Ninth Circuit doesn't correct the panel's ruling in *Apache*, the *Apache* plaintiff (who is also represented by undersigned counsel) intends to immediately seek certiorari from this Court. In that case, given the overlapping issues in this case and *Apache*, the Court could hold this petition pending disposition of the petition in *Apache*.

CONCLUSION

The Court should grant the petition, summarily reverse the lower court's mootness judgment, and remand for further proceedings. Alternatively, it should

either grant the petition and set this case for plenary review or hold the petition pending disposition of any forthcoming petition in *Apache Stronghold* v. *United States*, 38 F.4th 742 (9th Cir. 2022).

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