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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
PHOENIX DIVISION

Apache Stronghold,
Plaintiff,
v.
United States of America, *et al.*,
Defendants,
and
Resolution Copper Mining, LLC,
Defendant-Intervenor.

No. 2:21-cv-00050-PHX-SPL

Plaintiff's Reply Memorandum in Support of Emergency Motion for Lift of Stay and for Injunction Pending Appeal

Oral Argument Requested

Relief Requested by May 14

INTRODUCTION

Apache Stronghold seeks a narrow, temporary injunction to preserve the status quo while the Supreme Court resolves its pending appeal. Defendants don't dispute that six Ninth Circuit judges have agreed that Apache Stronghold is likely to prevail on the merits. Nor do they dispute that the sole purpose of the land transfer is to create a mine that will obliterate Oak Flat, terminating core Apache religious practices forever. Those concessions alone warrant a brief stay to permit the Supreme Court to complete its review—before consummating a transaction that upsets 70 years of the status quo, threatens to place important remedies beyond the power of the federal judiciary, and poses an existential threat to Western Apache religious existence.

Unable to dispute the magnitude or irreparable nature of the harm, Defendants contest the timing—claiming that the final destruction of Oak Flat in a massive crater is still years away. But this ignores the harms that occur immediately upon transfer and its aftermath. Immediately upon transfer, Western Apaches' legally protected right to access Oak Flat for religious purposes will evaporate, turning them into potential trespassers on Resolution's privately owned land. And access rights aside, Resolution concedes that "surface disturbance to the Oak Flat Parcel" short of cratering will begin in a matter of "months," Resolution Opp. 12—well before any merits decision by the Supreme Court would be rendered should it decide to grant review.

Ultimately, the case for an injunction is simple. The Supreme Court is on the cusp of deciding whether to resolve the serious questions at the heart of this case. Allowing the Court to complete its review costs the government nothing; rushing to transfer Oak Flat threatens massive, immediate, irreparable harm. A narrow injunction is warranted.

ARGUMENT

Serious questions on the merits. Defendants don't dispute that "'serious questions' on the merits" can support an injunction, *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 684 (9th Cir. 2023) (en banc) ("*FCA*"), that the merits

of this case have split Ninth Circuit judges 6-6, or that the Supreme Court has repeatedly relisted Plaintiff's cert petition (doing so for the thirteenth time this week). Nor do they identify any cert petition that has ever been relisted this many times and been denied. *Cf.* Resolution Opp. 9-10. Instead, Defendants claim that the en banc Ninth Circuit "held" that "Plaintiff cannot demonstrate … serious questions going to[ ] the merits," and that this supposed "holding" is now "law of the case" that precludes a narrow injunction pending appeal. Resolution Opp. 8; Gov't Opp. 6.

Not so. The snippet of the opinion Resolution touts as what "[t]he Ninth Circuit *en banc* held" is from the Court's retelling of procedural history. *Apache Stronghold v. United States*, 101 F.4th 1036, 1048-49 (9th Cir. 2024) (summarizing district court's "conclu[sion]"). The Ninth Circuit never addressed the "serious questions" standard, and that term does not otherwise appear anywhere in the en banc or panel opinions. Instead, the Court held that Apache Stronghold was "unlikely to succeed on the merits." *Id.* at 1065.

Even if the Ninth Circuit had addressed the serious-question issue, that still wouldn't "preclude[ ]" the narrower relief Plaintiff seeks here as "law of the case." Resolution Opp. 8; Gov't Opp. 6. Defendants overlook the "general rule" that "decisions at the preliminary injunction phase do not constitute the law of the case." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007).

That rule makes perfect sense here, where the controlling legal standard is a "sliding scale," under which "a stronger showing of irreparable harm" can justify "a lesser showing of likelihood of success on the merits," *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), and where both the underlying facts and the requested relief have changed. At the en banc stage, Plaintiff was seeking a potentially years-long injunction against a land transfer that had been halted by the federal government indefinitely, with no indication of when or if it would resume—and a razor-thin majority found an insufficient likelihood of success on the merits in those circumstances. But now a new administration

is barreling ahead to complete the land transfer in a matter of days, and Plaintiff seeks only a brief injunction to allow the Supreme Court to complete its ongoing review. There is no inconsistency in concluding that Plaintiff has not shown a sufficient likelihood of success on the merits to justify a years-long injunction, but has shown sufficiently serious questions on the merits to allow the Supreme Court to complete its review. Indeed, if it were otherwise, then courts would never grant injunctions pending appeal after denying a preliminary injunction. Yet they frequently do just that, "even when [they] 'believe[their] analysis in denying preliminary injunctive relief is correct.'" *NetChoice v. Bonta*, --- F. Supp. 3d ---, 2025 WL 28610, at *2 (N.D. Cal. Jan. 2, 2025) (injunction pending appeal appropriate where "legal question" is "admittedly difficult" and when "the equities of the case suggest that the status quo should be maintained"); *see also* Mot. 10.

Nor are serious questions on the merits limited to "***factual***" questions. Resolution Opp. 9. Rather, "serious questions" on "*legal* issues" can support an injunction—like (squarely on-point here) "a serious question" as to the proper "interpretation" of a federal statute. *hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 1191, 1185, 1194-1202 (9th Cir. 2022) (emphasis added); *see also, e.g.*, *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1311-14 (9th Cir. 1990) ("serious legal questions," including "proper interpretation" of contract, supported preliminary injunction preventing "irreversible" "environmental consequences"); *Lopez v. Heckler*, 713 F.2d 1432, 1435-36 (9th Cir. 1983) ("serious legal questions" part of "test[ ] for the issuance of a preliminary injunction").

Resolution next floats the extreme argument that RFRA doesn't apply at all because the land-transfer statute "by implication" overrides it. Resolution Opp. 10-11. But Defendants "did not bother raising this" argument before this Court the first time. *Apache Stronghold*, 101 F.4th at 1158 (Lee, J., dissenting). For good reason—because it is foreclosed by Supreme Court precedent.

Congress itself addressed RFRA's applicability to later-enacted statutes in RFRA's text: "Federal statutory law adopted after November 16, 1993, is subject to this chapter

unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). No one contends the land-transfer statute expressly excludes RFRA's application, which is why Resolution is forced to claim that it does so "by implication." Resolution Opp. 10 (citing *Dorsey v. United States*, 567 U.S. 260, 274 (2012)). But the Supreme Court has repeatedly held that § 2000bb-3(b) means what it says—that "any" later-enacted statute "'is subject to [RFRA] unless such law *explicitly excludes* such application by reference to [RFRA].'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 n.30 (2014) (emphasis in original); *see also Little Sisters of the Poor v. Pennsylvania*, 591 U.S. 657, 681 (2020) ("clear" that later-enacted statute was subject to RFRA because it "does not explicitly exempt RFRA"). These precedents foreclose Resolution's "exemption by implication" theory. *See also Apache Stronghold*, 101 F.4th at 1155-58 (Murguia, C.J., dissenting) (rejecting this "eleventh-hour argument[ ]" and explaining that RFRA's express-reference provision is consistent with *Dorsey*).

Irreparable Harm. The second injunction factor likewise favors relief. Defendants do not dispute that "irreparable harm is relatively easy to establish in a First Amendment case." *CTIA - The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 851 (9th Cir. 2019). That's because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *FCA*, 82 F.4th at 694; *see also Singh v. Berger*, 56 F.4th 88, 109 (D.C. Cir. 2022) (same for RFRA).

This case is no exception. The sole purpose of the transfer is to build a mine that "will destroy the Apaches' historical place of worship, preventing them from ever again engaging in religious exercise"—not for a minimal period of time, but permanently. *Apache Stronghold*, 101 F.4th at 1129 (Murguia, C.J., dissenting); *see* USDA, U.S. Forest Service, *Resolution Copper Project and Land Exchange Environmental Impact Statement*, 2-FEIS-789–90 (Jan. 15, 2021), https://perma.cc/N7MF-6EPL ("irreversible").

Defendants claim there is no irreparable harm "during the pendency of the appeal" because "mining operations are years away." Gov't Opp. 11; Resolution Opp. 11-12. But

long before Oak Flat is ultimately destroyed, the undisputed, *immediate* effect of the land transfer will be to work a drastic legal change in Plaintiff's rights at Oak Flat. As things stand, the Apaches have a legally protected right to access Oak Flat and worship as they wish. *See* 3-FEIS-824. "[O]nce the land transfer occurs, Oak Flat will be private property no longer subject to RFRA and other federal protections." *Apache Stronghold*, 101 F.4th at 1145 (Murguia, C.J., dissenting). The Apaches will immediately become "dependent on the good grace of a private copper-mining venture for any access to their sacred religious site," likely rendering them unable to "bring a RFRA or Free Exercise claim." *Apache Stronghold v. United States*, No. 21-15295, 2021 WL 12295173, at *5-6 (Bumatay, J., dissenting). Or as the government itself put it: "the Oak Flat Federal Parcel" will "*become private property* and no longer be subject to the … Forest Service management that provides for tribal access." 3-FEIS-824 (emphasis added) (noting loss of tribal access is "adverse effect" of transfer); *see also* 1-FEIS-314 ("The land exchange would have significant effects on transportation and access. The Oak Flat Federal Parcel would leave Forest Service jurisdiction, and with it public access would be lost to the parcel itself[.]"). That result—which all agree will occur instantaneously with the transfer—alone suffices for irreparable harm.

Resisting, Resolution emphasizes that the land-transfer statute requires them to preserve access to the "Oak Flat ***Campground*** for as long as safely possible." Resolution Opp. 2 (emphasis added); *see also* Gov't Opp. 12. But this is a "hollow promise." *Apache Stronghold*, 2021 WL 12295173, at *5 (Bumatay, J., dissenting). The Oak Flat Campground isn't *Oak Flat*—it's a handful of developed campsites on the edge of Oak Flat. Pub. L. No. 113-291 § 3003(b)(5) (50 acres); Peacey Decl. Ex. C. And even there, the statute affords access only temporarily and conditionally—to the extent "practicable" if consistent with "safety," "as determined by Resolution Copper." *Id.* § 3003(i)(3); Resolution Opp. 6. Beyond the campground, "Oak Flat has numerous springs, seeps and streams" where Apaches "practice specific religious rituals." Br. of San Carlos Apache Tribe et al. as Amici Curiae at 7-

8, 12, *Apache Stronghold v. United States*, No. 24-291 (U.S. Oct. 15, 2024), https://perma.cc/WCG3-TMS8. These include "*Hashibi Bitu'é* (Quail Spring), where Apache men connect with the *Ga'an* and prepared for war, *Tú Łitsogí* (Yellow Water Spring), a place of healing and prayer, and *Tú Nahikaadi* (Changing Woman Spring), where girls become women." *Id.* at 7-8. Also beyond the campground is "*Tséyaa Goges-chin*, a large rock overhang with ancient images carved into and painted on it, each with special meaning to and function for Apache medicine people." *Id.* at 9. Plaintiffs cannot carry out their sacred practices from a tiny, temporary sliver of a campground while deprived of their rights to almost all of Oak Flat. 1-FEIS-314 ("public access would be lost to the parcel itself"); C.A. Dkt. 6-1 at 13 (map); Peacey Decl. Ex. C (map); Dkt. 47 at 42, 47-50, 72-74; Dkt. 7-1 ¶¶ 10-12.

Resolution says it will continue to allow access to "much" of Oak Flat beyond the campground, permitting "many activities" to continue to occur until the area is destroyed. Resolution Opp. 2, 7. But that is just another way of acknowledging that some activities will be foreclosed even before the area is destroyed. And even this "promise" is carefully hedged, unsupported, and unenforceable. The "detailed management plan" Resolution cites describes only maintenance of the campground, not the rest of the parcel. Peacey Decl. ¶¶ 36-39; *Oak Flat Access and Management Plan*, Resolution Copper Mining, LLC (Nov. 13, 2020), https://perma.cc/2FPN-PRCD. And Resolution's alleged commitment to protect Emory oak groves applies "across Arizona"—not at Oak Flat in particular. Peacey Decl. ¶ 27. In short, Resolution has made no "commitments" to "maintain existing public access to" Oak Flat—and certainly none that are legally binding. Peacey Decl. ¶ 54. Their self-interested say-so is no substitute for the judicially enforceable rights Plaintiff now holds vis-à-vis the federal government.

Next, Resolution claims the ultimate destruction of Oak Flat is years in the future. Resolution Opp. 12. But at the same time, Resolution avers that within "months" it plans to begin construction on new drill pads, roads, and a helipad, Peacey Decl. ¶ 52, and the

"construction of" still other "new facilities" could begin by mid-2026, Resolution Opp. 12. The government claims these "harms" are too late given the "period for which Plaintiff seeks an injunction." Gov't Opp. 13. But Plaintiff seeks an injunction continuing through the Supreme Court's resolution of its appeal, Dkt. 158 at 9—so if the petition is granted, irreversible construction would be well underway before a Supreme Court decision next Term. 2-FEIS-789 ("impacts on … tribal sacred sites … would be immediate, permanent, and large in scale").

Finally, neither Defendant disputes that it may be impossible to rescind the transfer once it has occurred. While the government cites some cases rescinding land transfers, it takes pains to emphasize that it "do[es] not concede that it would be appropriate relief here." Gov't Opp. 13-14. Resolution avoids the topic entirely—leaving room to fight any future rescission tooth and nail.

This is vital, because rescission of a property transfer rests in the court's equitable "discretion," *Apache Stronghold*, 2021 WL 12295173, at *6 (Bumatay, J., dissenting) (citing *Kettle Range Conservation Grp. v. BLM*, 150 F.3d 1083, 1087 (9th Cir. 1998)), as the government's own cases show. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("federal court will not lightly … disrupt good faith reliance on state property law"). The government says *Kettle Range* is "distinguishable" because "no ground-disturbing activities have begun." Gov't Opp. 14. But those activities *will* begin in a matter of months, and once title transfers, Resolution has every incentive to make massive investments in the property (increasing its reliance interests) and permanent alterations to Oak Flat's surface (potentially rendering rescission futile). Moreover, while the government further notes that here "the private entity to receive title is a party to the action," *id.*, *Kettle Range* was "*also* concerned" about the "impractica[bility]" of undoing the transfer because, by the time the merits appeal was heard, the land had been "denuded," making it too late to "unscramble the eggs." 150 F.3d at 1085, 1087 (emphasis added); *cf. Slockish v. U.S. Dep't of Transp.*, 2021 WL 5507413, at *1 (9th Cir. Nov. 24, 2021) (dismissing Native

American sacred site case as moot where easement was granted and construction was complete). That is precisely the risk here. Without an injunction, Resolution is free to act as it chooses as soon as it retains title. Thus, the land transfer itself may be the point of no return—after which the destruction of Oak Flat is both irreversible and inevitable.

Balance of Hardships and Public Interest. The government can't even pretend that the final two injunction factors cut against relief, mustering only that "they are not as lopsided as Plaintiff suggests." Gov't Opp. 15. That leaves Resolution alone claiming that the harm to Native Americans from permanently losing an ancestral sacred site is outweighed by the harm to a multinational mining giant from having to wait a few weeks longer before potentially taking title to the land it intends to destroy. Resolution Opp. 14-17.

Unsurprisingly, Resolution falls short. It first claims the public interest favors the mine because Congress passed the land-transfer statute. Resolution Opp. 14-15. But Congress *also* passed RFRA, making Resolution's lead theory—that granting Plaintiffs' injunction would "ignore the judgment of Congress," *id.* at 15—entirely question-begging. Indeed, Congress enacted RFRA as a "super statute" that "displac[es] the normal operation of other federal laws" and "supersede[s]" their "commands in appropriate cases." *Bostock v. Clayton County*, 590 U.S. 644, 682 (2020). Thus, just as "it is always in the public interest to prevent the violation of a party's constitutional rights," *FCA*, 82 F.4th at 695, "Congress has given RFRA similar importance," *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1147 (10th Cir. 2013) (en banc), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also X Corp. v. Bonta*, 116 F.4th 888, 904 (9th Cir. 2024) (when a statute "collides with the Constitution," even its "undeniably admirable goals must yield" (cleaned up)).

Next, Resolution touts the supposed benefits of the mine—primarily, the copper it plans to acquire. Resolution Opp. 15-16; *see* Gov't. Opp. 15-16. But as Resolution elsewhere emphasizes, no copper will be acquired from Oak Flat at all for many years. Resolution Opp. 6 ("mine operations … will start only after several years of further exploration"); *see*

also id. at 12 ("much technical work to do before it can extract any ore"). Meanwhile, Plaintiff seeks a "limited" injunction, Gov't Opp. 13, lasting only as long as it takes for the Supreme Court to complete its review, Dkt. 158 at 9. Thus, while denying the injunction could result in the permanent loss of Apaches' legal rights to access their ancestral sacred site, granting it would not stop Resolution from mining a single ounce of copper should the transfer ultimately be upheld. It's hard to imagine a more one-sided balance of hardships.

Resolution also overstates the supposed public interest in the mine. For example, while Resolution notes that the President recently "declared that '[c]opper is a critical mineral,'" Resolution Opp. 15, the federal agency charged by statute with studying the issue, and formally determining which minerals are "essential to the economic or national security of the United States," has declined to list copper as a "critical mineral" despite the industry's lobbying to the contrary. 2021 Draft List of Critical Minerals, 86 Fed. Reg. 62199, 62200, 62202 (Nov. 9, 2021); *see* 2022 Final List of Critical Materials, 87 Fed. Reg. 10381 (Feb. 24, 2022). That is because copper's supposed "supply chain vulnerability is mitigated by domestic production, lack of import dependence, and diverse, secure sources of supply." 86 Fed. Reg. at 62202.

Similarly, Resolution claims a "*domestic* copper supply" is "essential to the American economy and national security." Resolution Opp. 2, 15 (emphasis added). But it fails to disclose that the copper mined at Oak Flat would have to be exported overseas to be refined[1]—most likely to China, which "controls over 50% of global smelting"[2]—or that Resolution itself is owned in significant part by the Chinese government, America's primary

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[1] *Mineral Commodity Summaries 2024: Copper* at 65, U.S. Geological Survey (Jan. 2024), https://perma.cc/K7SP-RCFC (showing that the United States already mines far more copper than it refines).

[2] *See Fact Sheet: President Donald J. Trump Addresses the Threat to National Security from Imports of Copper*, White House (Feb. 25, 2025), https://perma.cc/Y9QT-RDHE ("Despite possessing ample copper reserves, America's smelting and refining capacity lags behind global competitors like China, which controls over 50% of global smelting.").

copper competitor.[3] It also fails to note that the "valuable conservation lands" (Resolution Opp. 5) it is transferring to the United States have been publicly appraised at $9.8 million, while the copper Resolution is receiving in return is valued at current market prices at over $180 *billion*. *Compare Appraisals, Resolution Copper Project and Land Exchange Environmental Impact Statement*, USDA, https://perma.cc/WU38-59UW (value indications totaling $9,848,000), *with Project Overview*, Resolution Copper, https://perma.cc/G9S5-YQY2 ("Our aim is that the mine will produce as much as 40 billion pounds of copper over 40 years."); *Copper Continuous Contract*, MarketWatch, https://www.marketwatch.com/investing/future/hg00 (last accessed May 2, 2025 2:10 p.m. EST) (valuing copper at $4.684 per pound).

Resolution further opines that it "is committed to the public interest through environmental and cultural stewardship," and claims to have "worked with the Forest Service and community stakeholders to develop comprehensive environmental and cultural mitigation efforts in the project area." Resolution Opp. 16. But the San Carlos Apache Tribe begs to differ; it has sued, alleging that neither the government nor Resolution has meaningfully consulted with the Tribe, as required by the land-transfer statute and other laws. *See* Am. Compl. ¶¶ 75-105, 110-15, *San Carlos Apache Tribe v. U.S. Forest Serv.*, No. 2:21-cv-68 (D. Ariz. Jan. 25, 2021), https://perma.cc/7Z2N-MQ27. *But see, e.g.*, Pub. L. No. 113-291 § 3003(c)(3)(A), (B) (requiring government to consult with Resolution and tribes to "find mutually acceptable measures" to address tribes' concerns and minimize adverse effects). Meanwhile, tribal officials have expressed serious concerns that Resolution's efforts to change public opinion through financial incentives have crossed the line into bribery in

[3] Resolution is a joint venture of two multinational mining companies, Rio Tinto and BHP. Peacey Decl. ¶ 7. The single largest shareholder of Rio Tinto, in turn, is Aluminum Corporation of China ("Chinalco"), "a key state-owned enterprise directly supervised by the [Chinese] central government." *Overview, About Chinalco*, Aluminum Corp. of China, https://perma.cc/D29Q-9VZQ; *see* Neil Hume, *Rio faces rebellion from biggest shareholder*, Financial Times (Apr. 10, 2019), https://perma.cc/MG62-S8LM.

violation of tribal and federal law. *See, e.g.*, Gabriel Pietrorazio, *San Carlos Apache chairman among those alleging bribes are dividing tribe over Oak Flat*, 91.5 KJZZ Phoenix (Mar. 20, 2025), https://perma.cc/XC7T-8JS7. And despite those efforts, the mine remains vehemently opposed by the San Carlos Apache Tribe, 21 of 22 tribes in Arizona, and by the National Congress of American Indians—the oldest, largest, and most representative body of Native Americans on the Continent. *See* Br. of 52 Tribal Nations and Organizations et al. as Amici Curiae, *Apache Stronghold v. United States*, No. 24-291 (U.S. Oct. 15, 2024), https://perma.cc/ER8N-W7U9.

It is not hard to see why. All of the supposed "environmental and cultural mitigation efforts" in the world—replanting Emory oaks, employing tribal monitors, starting a tribal youth program, funding tribal scholarships, and so forth (Resolution Opp. 16; Peacey Decl. ¶ 57)—can't disguise the naked truth: The government and Resolution are knowingly ripping out the irreplaceable heart of the Apache religion, ending longstanding religious practices forever. Before the government sets that irreversible destruction in motion, the Supreme Court should at least be allowed to complete its review.

CONCLUSION

The Court should grant the motion.

Dated: May 2, 2025

Respectfully submitted,

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