No. 21-15295

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APACHE STRONGHOLD,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, *et al*.,
Defendant-Appellees,

and

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

On Appeal from the U.S. District Court for the District of Arizona
Case No. 2:21-cv-0050-PHX-SPL
Hon. Stephen P. Logan

BRIEF OF *AMICI CURIAE* TOHONO O'ODHAM NATION AND TRIBAL ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT APACHE STRONGHOLD'S PETITION FOR REHEARING EN BANC BEFORE THE FULL COURT

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CORPORATE DISCLOSURE STATEMENT

Tohono O'odham Nation is a federally recognized sovereign nation, for which no corporate disclosure is required.

Pursuant to Fed. R. App. P. 26.1, the National Congress of American Indians, Inter-Tribal Association of Arizona, Association on American Indian Affairs, and National Association of Tribal Historic Preservation Officers state that they do not have parent corporations, nor are they are publicly traded.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Tohono O'odham Nation is a federally recognized Tribal Nation whose traditional territory and reservation land is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. *Amicus Curiae* the Inter-Tribal Association of Arizona ("ITAA") is comprised of 21 federally recognized Indian tribes with lands located primarily in Arizona, as well as California, New Mexico, and Nevada. Founded in 1952, ITAA is a united voice for tribal governments on common issues and concerns. *Amici Curiae* National Congress of American Indians, the Association on American Indian Affairs, and the National Association of Tribal Historic Preservation Officers are national organizations dedicated to the rights of Tribal Nations and Tribal citizens, and to the preservation of Tribal religions, cultures, and traditions. *Amici* and their members have a vital interest and work daily to advance the protection of Native American religious freedoms, the continuation of Native American religious practices, the protection of sacred places and resources, and access thereto.

[1] Counsel for all parties have consented to the filing of this brief. *Amici* affirm that no counsel to a party authored this brief in whole or in part; no party or counsel to a party contributed money intended to fund preparing or submitting this brief; and no person other than *Amici* and their counsel contributed money intended to fund preparing or submitting this brief.

The destruction and desecration of sacred places causes incalculable harm to the social, cultural, spiritual, mental, and physical wellbeing of *Amici* and their members. It is both a cultural and sovereign imperative of all Tribal Nations to protect their sacred places from destruction.

SUMMARY OF THE ARGUMENT

The impending Resolution Copper Mine threatens "indescribable hardship" to the Tribal Nations and persons who practice their religions at Chí'chil Biłdagoteel (referred to hereinafter as "Oak Flat"). *See* U.S. Dep't of Agric., Final Environmental Impact Statement for the Resolution Copper Project and Land Exchange ("FEIS"), 1-FEIS-29, 3-FEIS-837; and Excerpts of Record ("ER"), 1-ER-12–14. Despite this, six of the eleven judges serving on the en banc panel ("Collins majority") concluded that the land transfer does not constitute a "substantial burden" under the Religious Freedom and Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, albeit according to an atextual interpretation of "substantial burden." Plaintiff-Appellant's Petition for Rehearing En Banc Before the Full Court at 4 ("Full Court Petition"). A separate majority by Judge Murguia came to the opposite conclusion, adhering to the plain meaning of "substantial burden." Full Court Petion at 4. The Collins majority wholly fails to consider the history and relationship between Tribal Nations and the United States. Further, the land transfer itself will entirely preclude Tribal access (3-FEIS-824), and the

proposed mine will "directly and permanently damage" (1-FEIS-29) Oak Flat, a "religious ceremonial ground" held sacred "for centuries." 1-ER-12; *see generally* Opening Brief of Plaintiff-Appellant Apache Stronghold ("Apache Stronghold Op. Br.") at 6. *Amici* write in support of Plaintiff-Appellant Apache Stronghold's petition for rehearing to correct this decision.

Rehearing is warranted because this case is of "exceptional importance." Fed. R. App. P. 35(a)(2). The Collins majority perpetuates the long legacy of historical injustices that led to federal ownership and control of Tribal Nation's sacred places in the first place. Since its inception, the United States deployed various tactics to eradicate Tribal Nations and their religions. These tactics included forcibly dispossessing Tribal Nations of their traditional territories and other efforts designed to change Tribal Nations' relationship to their traditional lands. Despite this, Tribal Nations persisted, and today continue to maintain deep connections to their sacred places. Tribal Nations depend upon maintaining these connections to ensure their continued existence.

It is also of exceptional importance that the Ninth Circuit rehear this case because of the disproportionate impact the Circuit's decisions have on Tribal Nations and federal lands. Due to this Circuit's jurisdictional reach, more Tribal Nations and federal lands are bound by its decisions than in any other Circuit. As

such, the Collins majority invites dire consequences for most Tribal Nations in the United States and hundreds of millions of acres of their traditional lands.

Finally, the Collins majority completely ignores the United States's trust responsibility to protect Tribal religions. Through its trust responsibility to Tribal Nations, the United States has charged itself to act with "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). These obligations should compel the United States to protect sacred places to ensure the continued survival of Tribal Nations. The Collins majority's endorsement of the United States's derogation of its trust responsibility should not stand as precedent.

Additionally, as Plaintiff-Appellant's brief and other *amici curiae* briefs indicate, rehearing is warranted because the Collins majority contradicts United States Supreme Court precedent, and it must be corrected to restore uniformity and clarity to settled case law. Full Court Petition at 1-2. The Collins majority's new standard is vague and unworkable and uniquely prejudices Tribal religions. *See* Brief *Amicus Curiae* of the Int'l Council of Thirteen Indigenous Grandmothers, the MICA Group, and a Tribal Elder in Support of Pl.-Appellant's Pet. for Full En Bank Reh' at 3-4 (Apr. 25, 2024).

ARGUMENT

I. THE NINTH CIRCUIT SHOULD GRANT REHEARING BECAUSE THIS CASE IS OF EXCEPTIONAL IMPORTANCE TO TRIBAL NATIONS THROUGHOUT THE CIRCUIT.

The magnitude of the outcome in this case for Tribal Nations, their sacred places, and their religions cannot be overstated. It is crucial that the Ninth Circuit correct the Collins majority's holding, which excludes Tribal Nations from RFRA's protections simply because their sacred places are located on what is now federal land. The Collins majority not only elides critical history but is out of step with the United States's trust responsibility to protect Tribal religions. The Collins majority threatens Tribal Nations' religious practices throughout the United States.

A. Sacred Places are Vitally Important to the Continued Existence of Tribal Nations.

The "survival" of Tribal Nations depends on their "ability to practice certain religious traditions and ways of life." Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom*, 134 Harv. L. Rev. 2103, 2114 (2021) ("Living the Sacred"). For many Tribal Nations, the practice of their religious traditions and ways of life are inseparable from the "specific geographical locations" at which they are practiced. Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 Ecology L. Q. 795, 798 (1992). Because "[m]any indigenous religions are place based" their practices require stewardship over

specific places. Hillary Hoffman & Monte Mills, *A Third Way: Decolonizing the Laws of Indigenous Cultural Protection*, Cambridge University Press, 41 (2020). Accordingly, the destruction of sacred places, and attendant loss of religious practices, poses an existential threat to Tribal Nations. *See* Kristen A. Carpenter et al., *In Defense of Property*, 118 Yale L. J. 1022, 1051-52 (2009) ("As Cherokee claimants explained in litigation over a sacred site, 'When this place is destroyed, the Cherokee people cease to exist as a people.'").

Tribal Nations maintain deep connections to and responsibilities to care for and protect their sacred places, regardless of whether they are now under federal ownership or control. *See* Nat'l Park Serv., *Keepers of the Treasures: Protecting Historic Properties and Cultural Traditions on Indian Lands* 67 (1990). Reflective of this, many Tribal Nations have enacted laws to protect their sacred places regardless of their location. Angela Riley, *The Ascension of Indigenous Cultural Property Law*, 121 Mich. L. Rev. 75 (2022). These laws are unique in that many "emphasize the importance of preserving sacred places for the well-being of future generations." *Id*. at 119.

Sacred places are critical to the survival of Tribal Nations because they are the foundation of Tribal Nations' current religious practices as well as those of their next generations. Tribal identity is "expressed as knowledge and participation with tribal heritage, history, traditions, activities and ceremonies." Claudia (We-La-

La) Long et al., *Assessing Cultural Life Skills of American Indian Youth*, 35 Child Youth Care Forum 289, 299-300 (2006). As such, Tribal Nations have obligations to preserve sacred places so they can pass on the customs, values, and traditions practiced at them from one generation to the next. "Culture is essential" to Tribal Nations' survival and sacred places encompass many aspects of Tribal Nations' cultures. Rebecca A. Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L.J. 299, 300 (2002).

As a result, Tribal Nations go to great lengths to protect their sacred places. *Tohono O'odham NATION, et al. v. U.S. Dep't of the Interior, et al.*, No. 2024cv00034 (D. Ariz.), *appeal filed* (9th Cir. Apr. 24, 2024). For example, the Blackfeet Nation fought for decades to protect one of their most sacred places, the Badger-Two Medicine in Montana, from destruction. *See* Press Release, U.S. Dep't of the Interior, *Final Oil and Gas Lease to be Relinquished in Montana's Badger-Two Medicine Area* (Sept. 1, 2023). Traditional Chief of the Blackfeet Nation of Montana, Chief Earl Old Person, described the connection between Tribal existence, culture, and sacred places, explaining: "We must act to preserve ourselves by conserving our culture and our lands for future generations." Kathryn Sears Ore, *Form and Substance: The National Historic Preservation Act, Badger-Two Medicine, and Meaningful Consultation*, 38 Pub. Land & Res. L. Rev. 205 (2017).

Likewise, Kootenai Tribes described their responsibility to protect their most sacred place, Kootenai Falls, from hydroelectric development as a religious mandate. At the Falls, the Kootenai seek visions of revelations from the "Nupika." *Kootenai Religious Site Saved*, NARF Legal Review, Vol. 12:3, (1987), https://narf.org/nill/documents/nlr/nlr12-3.pdf. The Kootenai profess that they share a sacred covenant with Nupika to protect the Falls, and if Nupika is disobeyed, they will lose their connection to Nupika and be spiritually destroyed. *Id*.

B. The United States Deployed Various Tactics to Destroy Tribal Religions and as a Result Innumerable Sacred Places are Now Under Federal Ownership or Control.

Throughout history, the United States sought to destroy Tribal religions by land dispossession, forcible relocation, and by erasing Tribal cultures through assimilation. As a result, innumerable sacred places, like Oak Flat, are located on what is now federal land. The United States took Tribal land through various eras of federal policy such as removal, allotment, and termination. *See* Kristen A. Carpenter, *Old Ground and New Directions at Sacred Sites on the Western Landscape*, 83 Denv. U. L. Rev. 981, 983 (2006). Although Tribal Nations tried to protect their sacred places through treaty negotiations, the United States often failed to honor its treaty promises. *See* Monte Mills & Martin Nie, *Bridges to A New Era: A Report on the Past, Present, and Potential Future of Tribal Co-*

Management on Federal Public Lands, 44 Pub. Land & Res. L. Rev. 49, 72 (2021); *accord* Treaty with the Apache, July 1, 1852, 10 Stat. 979 (1852). Today, much of what was once Tribal land is managed by the federal government "as 'public lands,' including National Parks and Forests." Carpenter, *Living the Sacred*, *supra*, at 2116.

The United States's historical federal Indian policies worked to penalize, suppress, and ultimately erase Tribal religions by reducing Tribal landholdings and changing the nature of the relationship between Tribal Nations and peoples to their traditional lands. *See* Eric Hemenway, *Native Nations Face the Loss of Land and Traditions*, Nat'l Park Serv., https://www.nps.gov/articles/negotiating-identity.htm (Last updated: Sept. 13, 2022). These policies intensified throughout the 19th century as the United States embarked on a crusade to "civilize" Native American people and assimilate them into non-Native culture. *See* Indian Trade and Intercourse Act, 23 Cong. Ch. 161, June 30, 1834, 4 Stat. 729; Civilization Fund Act of 1819, Pub. L. No. 15-85, 3 Stat. 516b. The United States sought to accomplish this through christianization of Native American people and the privatization of Tribal land. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 Stan. L. Rev. 773, 819-22 (1997).

The United States implemented an aggressive campaign to intentionally dispossess Tribal Nations of their collective landholdings and remove them from their traditional lands and sacred places. The United States's largest Tribal land acquisitions were typically achieved through conquest or by treaty. Ned Blackhawk, *The Rediscovery of America* 230 (2023). By 1924, the United States "had seized hundreds of millions of acres of land from Native nations in more than three hundred treaties." *Id*. 2-3. In the West, one of the darkest examples of land seizure is the history of Tribal Nations' land loss in California. In the 1850s, Tribal Nations in California negotiated and signed eighteen treaties that removed them from their traditional lands. Carole Goldberg, *Acknowledging the Repatriation Claims of Unacknowledged California Tribes*, Am. Indian Culture and Res. J. 21:3 183-190, 184 (1997). By terms of the treaties, these Tribal Nations believed they would be moved onto eight million acres of reservation lands. *Id*. at 184. Instead, Congress failed to ratify the treaties and "the[] lands were never set aside for [the Tribal Nations], and the lands [Tribal Nations] left behind weren't protected either." *Id*. at 184-85. Thus, Tribal Nations in California were not only robbed of their traditional lands but were left practically landless. *Id.* at 185. This loss left Tribal Nations in a vulnerable state. *Id*. Not long after, California attempted to exterminate Tribal Nations. *Id.*

The Indian General Allotment Act, 49 Cong. Ch. 119, Feb. 8, 1887, 24 Stat. 388 ("Allotment Act"), is another example of Tribal land takings in the West. The Allotment Act resulted in the reduction of Tribal "landholdings from 138 million acres of lands in 1887" to "48 million acres in 1934." Blackhawk, *supra*, at 334. Under the Allotment Act, Tribal reservations were broken up into 160-acre parcels for individual Tribal citizens. *Id*. Any surplus lands were to be conveyed to non-Indians and opened for development. *Id*. Overall, the Allotment Act worked to change Tribal Nations' relationship to their lands by converting Tribal land status from collective ownership to private ownership. *Id*.

The federal government also terminated Tribal Nations' status as a means of seizing Tribal lands. For example, after the United States allotted the Klamath Tribe's reservation, Congress passed the Klamath Termination Act.[2] Monte Mills & Martin Nie, *Bridges to A New Era*, *supra*, at 73. Under the Act, "70% of the former reservation land ended up in federal ownership" and was thereafter managed as national refuge or national forest land. *Id*. In the West, examples of the loss of Tribal land through allotment and by termination are profuse and archetypical of how the United States built its public land system. *See* Jeanette Wolfley, *Reclaiming A Presence in Ancestral Lands: The Return of Native Peoples to the*

[2] Act of Aug. 13, 1954, Pub. L. No. 83-587, § 1, 68 Stat. 718.

National Parks, 56 Nat. Res. J. 55, 59 (2016) (explaining "[t]he federal policy of reducing the landholding of Indian tribes in the West coincides with the federal movement to preserve large areas of land" as public lands).

The United States's land grabs operated in concert with its efforts to suppress Tribal religions. For instance, through the Allotment Act, the United States reduced Tribal Nations' collective landholdings and conveyed lands directly to religious entities for missionary work on and near reservations. *See* Dussias, *supra*, 781; Steve Talbot, *Spiritual Genocide: The Denial of American Indian Religious Freedom, from Conquest to 1934*, Wicazo Sa Review 21(2) 7, 13-14 (2006), https://doi.org/10.1353/wic.2006.0024; Allotment Act, sec. 5. Confining Tribal Nations to reservations further allowed the United States to monitor and restrict Tribal religious practices. The United States established Courts of Indian Offenses on and near reservations "to administer civil and criminal law" and to "redress complaints from missionaries" about Tribal religious practices. Talbot, *supra*, at 15-16. Courts of Indian Offenses' regulations specifically banned Tribal religious practices such as the "[t]he 'sun dance,' the 'scalp dance,' [and] the 'war dance[.]'" Office of Indian Affairs, *Regulations of the Indian Office*, sec. 580, at 106 (1894), https://narf.org/nill/documents/1894regulations.pdf. Punishment for participation in such practices included imprisonment or withholding of rations. *Id*.

These oppressive tactics illustrate the United States's intent to stamp out Tribal religions.

Other federal assimilationist policies aided in the suppression of Tribal religions and land dispossession. The United States established federal Indian boarding schools to break up Native families, suppress Native languages, erase cultural customs, and destroy religious practices and traditions by forcibly removing Native children from their families and communities. Federal Indian boarding school officials "prohibited the conduct of traditional [Tribal] religious activities." Kevin Gover, *Remarks of Kevin Gover, Assistant Secretary, Indian Affairs: Address to Tribal Leaders*, J. of Am. Indian Educ., 39:2 (2000), 4–6. The United States's own investigations into federal Indian boarding schools found that "the United States directly targeted [Native American] children in the pursuit of a policy of cultural assimilation that coincided with [the United States's] Indian territorial dispossession" efforts. U.S. Dep't of Interior, B. Newland, *Federal Indian Boarding School Initiative Investigative Report: Letter from Bryan Newland to Secretary Haaland* (May 2022).

The proposed land transfer leading to Oak Flat's ultimate destruction represents the latest chapter in a shameful history of federal government actions that destroy Tribal Nations' cultural and religious relationships with their traditional lands and sacred places. Tribal Nations have lived within, held

ceremonies on, and cared for the area surrounding Oak Flat from time immemorial. 3-FEIS-826, *see also* Apache Stronghold Op. Br. at 9. Over the last 150 years, however, many of the original stewards of Oak Flat have lost control over "large portions of their homelands" and the sacred places located therein. (See 8-FIES-828.) For the Apache, the federal government's interest in subsidizing mining caused the loss of "some six million acres of their traditional homeland." Lauren Redniss, *Oak Flat: A Fight for Sacred Land in the American West* 43 (2020); Apache Stronghold Op. Br. at 13. For example, when silver was discovered in Globe, Arizona, in 1876, the "United States seized the area by executive order." Redniss, *supra*, at 45. Although Globe, located twenty miles east of Oak Flat, once sat within the San Carlos Apache Reservation boundaries, the area was made public land. *See* David F. Briggs, *Geology and History of the Globe-Miami Mining Region, Gila and Pinal Counties, Arizona*, Ariz. Geological Surv. Contributed Rep. CR-22-B, sec. 4.3, fig. 24 (2022); Redniss, *supra*, at 45.

The United States forcibly removed the Apache from their traditional homelands, including Oak Flat, to reservations to make way for similar mining ventures. Redniss, *supra*, at 36-37; Apache Stronghold Op. Br. at 15. Compounding this injustice, the United States's claim to Oak Flat is dubious, as experts suggest the United States never adequately compensated the Apache for Oak Flat. Apache Stronghold Op. Br. at 14.

Continuing this legacy, the United States authorized the Resolution Copper Mine knowing it would destroy Oak Flat and devastate Tribal Nations' religious practices. Apache Stronghold Op. Br. at 9. As the FEIS itself acknowledges, the identity, culture, and religion of many Tribal Nations are woven into the landscape at Oak Flat and the prospective loss of Oak Flat threatens them all. *See generally* 3-FEIS-820, 826-830, 838-848.

C. There are More Tribal Nations and Traditional Tribal Territories Within the Jurisdiction of the Ninth Circuit Than Any Other Circuit.

By virtue of its size and geographical boundaries, the Ninth Circuit adjudicates more disputes concerning Tribal Nations and Tribal citizens than any other Circuit Court. "[T]he Ninth and Tenth Circuits are located within the heart of Indian country and hear substantially more Indian law cases involving a wider range of issues than the other courts." Richard Guest, *Tribal Supreme Court Project: Ten Year Report*, 1 Am. Ind. L. J. 28, 59 (2017); *see also id*. at 58-59 (28% of the 259 petitions for writ of certiorari filed in Indian law cases between 2001 and 2010 came from the Ninth Circuit.).

The Ninth Circuit's Indian law docket reflects the sheer number of Tribal Nations that live, govern, and maintain their cultures and traditions within its jurisdiction. Four hundred and thirty-nine (439)—nearly 75%—of the 574

federally recognized Tribal Nations are located within the Ninth Circuit.[3] There are 229 federally recognized Tribal Nations in Alaska, 109 in California, 29 in Washington, 28 in Nevada, 22 in Arizona, 9 in Oregon, 8 in Montana, and 5 in Idaho.[4] Accordingly, this Court's decisions have an outsized impact on Tribal Nations and Tribal citizens.

The Ninth Circuit's jurisdictional reach over federal lands further magnifies the significance of this case for sacred places. The Ninth Circuit spans more of the United States than any other circuit. The United States "owns and manages roughly 640 million acres of land . . . ." Carol Hardy Vincent, et al., Cong. Res. Serv., R42346, *Federal Land Ownership: Overview and Data* (2020) 1. Of that, nearly 458 million acres are within the Ninth Circuit, including roughly 222.7 million acres in Alaska, 28 million in Arizona, 45.5 million acres in California, 830,000 acres in Hawai'i, 32.8 million acres in Idaho, 27.1 million acres in Montana, 56.3 million acres in Nevada, 32.2 million acres in Oregon, and 12.2 million acres in Washington. *Id*. at 7-8. Prior to colonization, the traditional territories of Tribal

[3] *See* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 89 Fed. Reg. 944 (Jan. 8, 2024)*; see also* U.S. Dep't of the Interior, Tribal Leadership Directory, https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes (directory of federally recognized Tribal Nations by state).
[4] *See id*.

Nations in the United States spanned the entire continent.[5] As a result, this Circuit encompasses significantly more traditional Tribal territories than any of its sister circuits.[6]

As a result, the outcome in this case will impact innumerable sacred places. With more Tribal Nations and more federal lands than any other Circuit, the impact of this case will be immediate to most Tribal Nations and will likely reverberate throughout Indian Country.

D. The Ninth Circuit's Decision Fails to Recognize the United States's Trust Responsibility to Protect Tribal Nations' Religious Practices.

The en banc opinions repeatedly assert that because Oak Flat is on federal land, the United States can do with it what it pleases, and that the federal government's management of "*its* land" cannot be constrained by RFRA. Collins majority at 27; Judge R. Nelson's Concurrence at 119-20; Judge VanDyke Concurrence at 146 n.2, 151 n.3, 161. Not only does this glib characterization fail to grapple with the problematic history of how the United States acquired *its* land—and, particularly, Oak Flat—it fails to recognize that the federal government is not actually free to do with its land what it pleases. As Apache Stronghold

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[5] *See, e.g.,* William C. Sturtevant, U.S. Geological Survey, *Early Indian Tribes, Culture Areas, and Linguistic Stocks*, (1991) (map depicting locations of tribes and cultural areas prior to the formation of the United States), https://www.loc.gov/item/95682185/.

[6] *See* 89 Fed. Reg. 944.

describes in its brief, the federal government's management of its land is limited by a myriad of federal statutes, including RFRA. Additionally, the United States's management of federal lands, particularly those that are the traditional homelands of Tribal Nations and locations of sacred places, are subject to the federal government's overarching trust responsibility to Tribal Nations.

The United States has a special trust relationship with all federally recognized Tribal Nations. *See* 1 Cohen's *Handbook of Federal Indian Law* § 5.04[3][a] (2023). This relationship developed through hundreds of years of treaty negotiations, agreements, and interactions between the United States and Tribal Nations on a sovereign-to-sovereign basis. *Id*. As the Supreme Court has observed, the United States has charged itself, pursuant to its trust responsibility, with moral obligations of the highest responsibility and trust. *Seminole Nation*, 316 U.S. at 297; *see also Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001) ("The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship."). Consistent with this trust responsibility, federal courts have recognized the federal government has an affirmative obligation to protect Tribal religious practices. *See, e.g.*, *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991) (observing that preserving Native American

cultural and religious practices "is fundamental to the federal government's trust relationship with tribal Native Americans.").

The federal government's responsibility to manage federal public land in a manner that protects Tribal religions is reflected in many laws. *See, e.g.*, 42 U.S.C.A. § 1996. The Ninth Circuit should interpret RFRA faithful to the trust responsibility and other federal laws requiring the trust responsibility's implementation. The Ninth Circuit's exemption of federal land management decisions regarding sacred places from RFRA is inconsistent with the United States's overarching trust responsibility to Tribal Nations.

CONCLUSION

Amici respectfully urge the Ninth Circuit to grant Apache Stronghold's petition for rehearing, given this case's exceptional importance to a vast number of Tribal Nations and their sacred places within the Circuit. The Ninth Circuit's current decision threatens all sacred places and Tribal existence and is out of step with the United States's trust responsibility to Tribal Nations.

Dated: April 25, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 29-2(c)(2) because this brief contains 4,167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Furthermore, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2024, I electronically this brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM / ECF system. I certify that all participants in this case are registered CM / ECF users and service will be accomplished by the CM / ECF system.

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