No. 08-846

IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

Louis Denetsosie[b]
ATTORNEY GENERAL
NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

Terence M. Gurley[d]
Zackeree Kelin
Kimberly Y. Schooley
DNA PEOPLE'S LEGAL
SERVICES
P.O. Box 306
Window Rock, Navajo
Nation (AZ) 86515

Jeffrey L. Fisher[a]
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

A. Scott Canty[c]
OFFICE OF GENERAL
COUNSEL
THE HOPI TRIBE
P.O. Box 123
Kykotsmovi, AZ 86039

[Counsel affiliations and additional counsel listed
on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

ADDITIONAL COUNSEL

Howard M. Shanker[b]
Laura Lynn Berglan
THE SHANKER LAW FIRM PLC
700 East Baseline Road, Bldg B
Tempe, AZ 85283

James E. Scarboro[c]
Timothy Macdonald
Holly E. Sterrett
ARNOLD & PORTER LLP
Suite 4500, 370 Seventeenth Street
Denver, CO 80202-1370

Jack F. Trope[d]
ASSOCIATION OF AMERICAN INDIAN AFFAIRS
966 Hungerford Drive, Suite 12B
Rockville, MD 20850

Thomas C. Goldstein[a]
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe[a]
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

---

[a] *Counsel for Petitioners*

[b] *Counsel for Petitioners Navajo Nation, White Mountain Apache Tribe, Yavapai-Apache Tribe, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, and Flagstaff Activist Network*

[c] *Counsel for Petitioner Hopi Tribe*

[d] *Counsel for Petitioners Hualapai Tribe, Norris Nez, and Bill Bucky Preston*

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REPLY BRIEF ROR PETITIONERS

Respondents cannot deny the extraordinary significance of this case to the petitioner tribes. Congress itself recognized in the American Indian Religious Freedom Act of 1978 that "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage" because "such practices form the basis of Indian identity and value systems." Pub. L. No. 95-341 (1978). No religious practices are more fundamental to Southwest Indian tribes than those related to the San Francisco Peaks. *See* Pet. for Cert. 3-6. That is why the Navajo Nation, for instance, views the potential desecration of the Peaks with treated wastewater as "an emergency matter which directly threatens the sovereignty of the Navajo Nation." Resolution of the Twenty-First Navajo Nation Council, CAP-16-09 (Apr. 22, 2009). The twelve other tribes that revere the Peaks share this view with respect to their own tribal identities and religious customs.

This serious threat to the cultural traditions of thirteen dependent nations – representing over 400,000 Native Americans – is reason alone to grant review. *See, e.g.*, *United States Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (granting certiorari in absence of circuit split because of appellate decision's "significant impact on the relationship between Indian tribes and the Government"); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for

many eastern Indian land claims"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."). But even setting that consideration aside, this case, contrary to respondents' arguments, easily meets this Court's criteria for certiorari. The Ninth Circuit erred in concluding that "subjectively" inhibiting the tribes' religious practices relating to their most sacred site would not substantially burden their free exercise of religion. And the Ninth Circuit's decision punctuates years of escalating conflict among the federal courts of appeals over how to construe and to apply RFRA's triggering mechanism.

1. Neither respondent even attempts to argue that the court of appeals' definition of the statutory phrase "substantial burden" accords with the words' ordinary meaning. Nor does either respondent try to reconcile the Ninth Circuit's definition with various types of encumbrances on religious liberty, such as enduring unwanted autopsies, that this Court and others have recognized that RFRA is meant to cover. *See* Pet. for Cert. 25; *Amicus* Br. of Religious Liberty Law Scholars 10-16 (collecting examples). That the Ninth Circuit's opinion cannot be defended on either of these elementary grounds of statutory interpretation – plain meaning and congressional purpose – demonstrates the need to grant certiorari.

The argument that respondents do offer in defense of the Ninth Circuit's opinion does little to

dispel the need for this Court's intervention. Respondents' argument proceeds in two steps. They first argue that "Congress intended courts to look to pre-*Smith* Free Exercise case law in construing the term 'substantial burden.'" Snowbowl BIO 14; *accord* SG BIO 12. Second, respondents argue that this Court's pre-*Smith* decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), establishes that interfering with Native Americans' ability to pursue spiritual fulfillment through land-based religious practices does not substantially burden their free exercise of religion. Neither of these propositions withstands scrutiny.

a. Nothing in RFRA directs courts to define "substantial burden" with reference to pre-*Smith* case law. As the petition for certiorari explains, that was not even a phrase that this Court's pre-*Smith* case law commonly used. *See* Pet. for Cert. 26.

To be sure, RFRA observes that "*the compelling interest test* as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5) (emphasis added). RFRA, therefore, provides that one of its purposes is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." § 2000bb(b)(1). But neither of these statutory passages says anything about how to construe RFRA's distinct "substantial burden" requirement. When RFRA discusses *that* requirement in subsequent passages, it makes no reference whatsoever to pre-*Smith* case law. *See* § 2000bb(b)(1) (purpose of RFRA is "to guarantee [the application of

the compelling interest test] in all cases where free exercise of religion is substantially burdened"); § 2000bb(b)(2) (RFRA is intended "to provide a claim or defense to persons whose religious exercise is substantially burdened").

That being so, when the government says that "RFRA specifically points the courts to 'Federal court rulings' prior to *Smith* to assess whether a governmental action places an impermissible burden on religion," SG BIO 12 (quoting § 2000bb(a)(5)); *see also* SG BIO 19, it quotes RFRA's language out of context and misrepresents what RFRA provides. The fact is that Congress coined the term "substantial burden" in RFRA. While respondents and courts such as the Ninth Circuit may wish Congress had used the First Amendment's restrictive term "prohibit" (or some synonym such as "coerce") to tether the statute's triggering mechanism to pre-*Smith* case law, this does not justify acting as if Congress actually did so.

b. Even if this Court's pre-*Smith* free-exercise case law were relevant to construing RFRA's substantial burden requirement, nothing in *Lyng* suggests that significantly inhibiting individuals' subjective spiritual expressions does not "substantially burden" their exercise of religion. To the contrary, this Court took for granted in *Lyng* that the governmental action there would have "devastating effects" on traditional religious practices and would "virtually destroy the . . . Indians' ability to practice their religion." 485 U.S. at 451 (internal quotation marks and citation omitted).

This Court rejected the Native Americans' free exercise claim in *Lyng* not because of the absence of a

substantial burden, but rather because "[t]he crucial word *in the constitutional text* is 'prohibit.'" *Id.* (emphasis added). The *Lyng* Court acknowledged that it had stretched that term in other pre-*Smith* cases to cover "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id.* at 450. This Court also has held that governmental action that "target[s]" an activity "because of its religious motivation" triggers strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 542 (1993); *accord id.* at 559 (Souter, J., concurring); *id.* at 577-78 (Blackmun, J., concurring). But the Court in *Lyng* refused to extend the term "prohibit" to cover "incidental" – that is, unintentional – "effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. at 450. *Lyng* held, in other words, that although the government's desecration of the Indians' sacred site would substantially burden their exercise of religion, the burden was incidental and therefore insufficient under the Free Exercise Clause to trigger *Sherbert* and *Yoder*'s compelling interest test. *See Employment Div. v. Smith,* 494 U.S. 872, 883 (1990) (explaining that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities" because those activities were "generally applicable" governmental actions).

Once *Lyng*'s holding is brought into focus, the only real question is whether RFRA, like the Free Exercise Clause as explicated in *Lyng*, excludes substantial but incidental burdens on religious

practice from its coverage. The government claims that it does, asserting that "Congress did not intend RFRA's compelling interest test to apply to any incidental effects on religious exercise." SG BIO 17. But this Court has already squarely rejected that argument, explaining that the very purpose of RFRA is to trigger strict scrutiny *whenever* "the exercise of religion has been burdened in an *incidental* way," "without regard to whether [the governmental action] stifl[es] or punish[es] free exercise" or targets it for harmful treatment. *City of Boerne v. Flores,* 521 U.S. 507, 534-35 (1997) (emphasis added). (In fact, this expanded coverage beyond what the First Amendment provides is one reason why this Court held RFRA unconstitutional as applied to states. *See id.*) Neither respondent offers any answer to the import of that holding here.[1]

2. Respondents contend that no conflict exists here because every court of appeals, like the Ninth

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[1] While ignoring *Boerne*, the government claims that two snippets of RFRA's legislative history show that Congress intended RFRA's "substantial burden" test to exclude burdens like the one here. *See* SG BIO 16-17. To whatever extent legislative reports are relevant, however, the House Judiciary Committee's Report on the legislation makes clear that the Ninth Circuit's coercion-based definition of the phrase is unduly restrictive. That report explains that in order to trigger the statute, "government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6 (1993).

Circuit, defines "substantially burdening" as "coerc[ing] an individual to engage in or to forgo engaging in religious exercise." SG BIO 20; *accord* Snowbowl BIO 30. This is incorrect. The test that the Eighth and Tenth Circuits have adopted has nothing to do with coercion. Those circuits ask whether governmental action "significantly inhibit[s] or constrain[s] [religious] conduct or expression" or "meaningfully curtail[s]" an individual's "ability to express adherence to his or her faith." *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995); *accord Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997).

While the government suggests there are nothing more than "semantic differences" between this test and the Ninth Circuit's, SG BIO 20, the government's own actions belie this suggestion. In *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), a Native American tribe objected to the government's plan to build a military training facility in a location that would have significantly inhibited the "spiritual experience" of tribal members. *Id.* at *17. Faced with the strength of that claim, the government urged the district court to disregard Tenth Circuit RFRA law in favor of the more "restrictive" definition of "substantial burden" that the Ninth Circuit adopted in this case. *Id.* at *3 n.5. The district court naturally rejected that dramatic request. The government then cancelled the project, further suggesting it did not think it could prevail under Tenth Circuit law. And even now, neither the government nor Snowbowl contests the correctness of the district court's ruling, under binding Tenth Circuit precedent, that the government's noncoercive

activity imposed a substantial burden on the Comanche Nation's religious liberty. This silence confirms that this case would come out differently in that circuit or in the Eighth Circuit.

One cannot predict with equal certainty how this case would come out in the circuits adopting intermediate definitions of RFRA's "substantial burden" requirement. But the government's suggestion that these courts would reach the same conclusion as the Ninth Circuit because they, too, "look[] to this Court's pre-*Smith* Free Exercise Clause cases to determine whether a challenged government action substantially burdens religious exercise," SG BIO 23, surely oversimplifies the matter. It is widely acknowledged, with all due respect to this Court, that "the pre-*Smith* accommodation jurisprudence as a whole was laced with confusion and contradiction." Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. Chi. L. Rev. 1245, 1307 (1994). Indeed, the Eleventh Circuit itself, one of the courts taking the intermediate view, has noted that this Court's pre-*Smith* jurisprudence "varied over time," such that *Lyng*'s emphasis on coercion was inconsistent with earlier decisions applying strict scrutiny to less oppressive governmental actions. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1226-27 (11th Cir. 2004). Accordingly, confusion over the concept of substantially burdening religion will continue to reign until this Court steps in and articulates a uniform test.

3. Respondents' final gambit is to assert, as the Ninth Circuit did, that recognizing the effect of the government's action here for the substantial burden

that it is "would significantly interfere with the government's ability to manage its own land." SG BIO 15; *accord* Snowbowl BIO 32-34. This, of course, is a pure policy argument that should be directed to Congress, not to this Court. That respondents nonetheless press it here is particularly ironic in light of the fact that the *Smith* decision itself emphasized that the proper forum for debating the desirability of accommodating religious practices is "the political process." 494 U.S. at 890. Such a debate commenced following *Smith*, and religious groups succeeded in obtaining enhanced protection of religious liberty in RFRA. It is not for the government, or for this Court, to second-guess the wisdom of the result of that legislative process.

In any event, there is nothing alarming about affording RFRA's "substantial burden" requirement its ordinary meaning. This Court already has explained that it is entirely "feasib[le]" to conduct a "case-by-case" analysis of purported justifications for impinging on religious liberty. *Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 436 (2006). And as a practical matter, the vast majority of governmental actions involving federal land – perhaps including the logging and road-building activities in *Lyng* itself – are narrowly tailored to serve compelling governmental interests in creating energy, developing and harvesting natural resources, and the like. *See* Pet. for Cert. 29-30.

This, however, is the outlier case. Here, the government, in its own words, proposes to allow "contaminat[ion of] the natural resources needed" for the petitioner tribes to perform religious "ceremonies

that have been, and continue to be, the basis for the[ir] cultural identity." Pet. App. 140a (panel opinion) (quoting 1 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS 3-18 (2005)). The Navajo medicine man, for example, explained at trial (in testimony that the government insists it does not dispute, *see* SG BIO 15), that spraying recycled wastewater onto the Peaks will render him "unable to perform" the tribe's most important ceremony, the Blessingway – a ceremony that the Navajo have used for centuries to ensure wellbeing and prosperity through a connection with the divine. Pet. App. 141a-42a (panel opinion); *see also* Pet. App. 9a (en banc opinion). And all this to enable slightly better skiing at an already functioning commercial ski facility.

It is worth remembering that our government took the Peaks from petitioner tribes. It placed the tribes on reservations and pledged to respect their cultures and traditions. It is hardly implausible that Congress passed a law in 1993 providing under these rare circumstances that the tribes' religious liberty should be respected.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

Louis Denetsosie[b]
ATTORNEY GENERAL
NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

Terence M. Gurley[d]
Zackeree Kelin
Kimberly Y. Schooley
DNA PEOPLE'S LEGAL SERVICES
P.O. Box 306
Window Rock, Navajo Nation (AZ) 86515

Howard M. Shanker[b]
Laura Lynn Berglan
THE SHANKER LAW FIRM PLC
700 East Baseline Road, Bldg B
Tempe, AZ 85283

Jack F. Trope[d]
ASSOCIATION OF AMERICAN INDIAN AFFAIRS
966 Hungerford Drive, Suite 12B
Rockville, MD 20850

Amy Howe[a]
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Jeffrey L. Fisher[a]
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

A. Scott Canty[c]
OFFICE OF GENERAL COUNSEL
The Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86039

James E. Scarboro[c]
Timothy Macdonald
Holly E. Sterrett
ARNOLD & PORTER LLP
Suite 4500, 370
Seventeenth Street
Denver, CO 80202-1370

Thomas C. Goldstein[a]
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

[a] *Counsel for Petitioners*

[b] *Counsel for Petitioners Navajo Nation, White Mountain Apache Tribe, Yavapai-Apache Tribe, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, and Flagstaff Activist Network*

[c] *Counsel for Petitioner Hopi Tribe*

[d] *Counsel for Petitioners Hualapai Tribe, Norris Nez, and Bill Bucky Preston*

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