

No. 24-291

In the
Supreme Court of the United States

APACHE STRONGHOLD,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

**BRIEF OF RELIGIOUS FREEDOM INSTITUTE
AND ETHICS AND PUBLIC POLICY CENTER
AS *AMICI CURIAE* SUPPORTING PETITIONER**

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INTEREST OF AMICI CURIAE¹

Amicus Curiae Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. Among its core activities, RFI equips students, parents, policymakers, professionals, faith-based organization members, scholars, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that understanding to contemporary challenges and opportunities. RFI works to secure religious freedom for everyone everywhere because human dignity and human nature demand it, and human flourishing depends on it.

Amicus Curiae Ethics and Public Policy Center (EPPC) is a nonprofit research institution founded in 1976 and dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy, law, culture, and politics. EPPC's programs cover a wide range of issues, including government accountability, judicial restraint, and religious liberty.

Amici regularly submit friend-of-the-Court briefs in religious liberty cases, and *amici* write here to

¹ Consistent with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of the intent to file this *amicus curiae* brief pursuant to Rule 37.2(a).

highlight limiting principles under the Religious Freedom Restoration Act that allow courts to protect religious liberty and weed out unwarranted exemption claims.

INTRODUCTION & SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act (RFRA) promises “very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). In the decades since the enactment of RFRA and its sister statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), this Court has acted to fulfill that promise, vindicating the fundamental right to practice one’s faith free of government-imposed burdens that don’t meet a rigorous balancing test. *See ibid.*; *Holt v. Hobbs*, 574 U.S. 352, 355 (2015) (calling RFRA and RLUIPA “sister statute[s]”); *Gonzales v. O Centro*, 546 U.S. 418 (2006).

Some worry, however, that RFRA “fail[s] to impose sensible limits on exemptions” and overprotects religious exercise at the expense of government objectives. *See* Sherif Girgis, *Defining “Substantial Burdens” on Religion and Other Liberties*, 108 Va. L. Rev. 1759, 1762 (2022) (citing such critics); Luke W. Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 Seton Hall L. Rev. 353, 356 (2018) (discussing and dispelling this “common narrative”). Policy concerns like these featured prominently in the opinions below. *See Apache Stronghold v. United States*, 38 F.4th 742,

756 (9th Cir. 2022) (panel opinion) (“Were the scope of a substantial burden under RFRA” too broad, “any” government action “would be subject to the personalized oversight of millions of citizens.” (cleaned up)); *Apache Stronghold v. United States*, 101 F.4th 1036, 1055 (9th Cir. 2024) (en banc) (too-expansive view of free exercise would impose “religious servitude[s]” on government land and “confer *de facto* beneficial ownership of some rather spacious tracts of public property” (cleaned up)).

Whatever the merit of these concerns, they are for Congress to address, not courts. After all, RFRA is a statute—a “super statute,” *Bostock v. Clayton County*, 590 U.S. 644, 682 (2020), but a statute nonetheless—and Congress can alter RFRA’s general rule. It could specify, for example, that RFRA’s balancing test doesn’t apply, or applies differently, to the government’s “internal affairs” (however defined), its management and transfer of federal lands, this land-transfer project specifically, or other federal contexts. But Congress hasn’t done that, and the Ninth Circuit was wrong to take up the legislative pen in Congress’s stead.

In any event, these policy concerns are unfounded. RFRA is indeed a thumb on the scale for religious liberty, but it is not an unconstrained liberty. By its terms, RFRA contains at least five textually based limiting principles that temper religious liberty claims and sensibly limit exemptions. Under RFRA, a plaintiff must make a threshold showing of a (1) substantial (2) burden on (3) sincere (4) religious (5) exercise. Only then must the government come forward with a compelling interest

advanced by the least restrictive means. RFRA's threshold showing isn't onerous, but nor is it toothless. These limiting principles do real work, even in hard cases. *See* Goodrich & Busick, *supra*, at 356 (concluding that “[c]ourts have had no problem weeding out weak or insincere RFRA claims,” and “[i]f anything, RFRA has been underenforced”).

Recognizing the obvious here—that destroying a unique religious site works a substantial burden on the Apaches' sincere religious exercise—is a straightforward application of RFRA's plain language. It does not open the floodgates for “any individual” to “exact” “easement[s]” on “all federal land,” nor does it invite courts to engage in theological speculation. *Contra Apache*, 101 F.4th at 1083 (opinion of Bea, J.). To the contrary, it is the Ninth Circuit's novel conception of the substantial burden analysis—walling off from RFRA's scrutiny whatever vaguely qualifies as the government's “internal affairs”—that will have pernicious effects far beyond this case. Certiorari is warranted.

ARGUMENT

RFRA's central command is that “[g]overnment shall not substantially burden a person's exercise of religion” unless doing so is the “least restrictive means” of furthering a “compelling governmental interest.” 42 U.S.C. § 2000bb-1(a), (b). RFRA is not, however, a “categorical strict scrutiny regime,” applicable just because a plaintiff *claims* her free exercise is burdened. *Cf. Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021) (Barrett, J., concurring). Rather, built into its statutory text are at

least five meaningful limits. At the threshold, RFRA applies only when a plaintiff can show a (1) substantial (2) burden on (3) sincere (4) religious (5) exercise. Taking these elements in reverse order facilitates the analysis.

First, the claim must seek to protect a specific religious “**exercise**”—an act or abstention rooted in religious belief. Mere subjective feelings of offense or sacrilege don’t qualify.

Second, the exercise must be “**religious**,” deriving in some sense from the “duty which we owe to our Creator.” James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785). Acts or abstentions rooted in personal, philosophical, or ideological opposition don’t qualify.

Third, the religious exercise must be “**sincere**”—a genuinely held, good-faith expression of religious conviction. Practices contrived for litigation don’t qualify.

Fourth, government action must “**burden**” a sincere religious exercise, meaning it must inhibit or penalize it in some way. Mere refusals to subsidize or support religious observance don’t qualify.

Fifth, the burden must be “**substantial**”—that is, of ample or considerable amount. Interference that is fleeting or de minimis, or that allows religiously acceptable alternatives, doesn’t qualify.

As the discussion below demonstrates, courts don’t always precisely distinguish these concepts, often simply lumping them into a conclusion about

“substantial burden.” But these principles are in play in every case, even if not always disputed, and they help courts sift the wheat of religious liberty from the chaff of unwarranted exemption claims.

Further, even when RFRA’s fivefold threshold showing is met, the government still has the opportunity to show it is furthering a compelling interest by the least restrictive means. This is a demanding and “focused” inquiry to be sure, but not insurmountable, and this Court has never “doubt[ed] that there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA.” *O Centro*, 546 U.S. at 436; *see also Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014) (Gorsuch, J.) (“RLUIPA anticipates that its solicitude for religious exercise must sometimes yield to other competing state interests.”).

I. RFRA’s five threshold limiting principles

A. RFRA requires specific religious “exercise,” not mere subjective feelings of offense.

The “exercise” that RFRA protects is an act or abstention rooted in religious belief. “Religious exercise necessarily involves an action or practice,” and to trigger RFRA, government must pressure an adherent to “modify his religious behavior” or “interfere with [a] religious act in which he engages.” *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). By contrast, simply taking offense at something the government does isn’t protected.

Kaemmerling illustrates the point. The plaintiff there didn't object to the government's collection of his tissue sample. His objection, rather, was to the government's later analysis of the sample to collect DNA information, which the plaintiff claimed to "kno[w]" was an "unholy act of an oppressive regime." *Id.* at 678–69 (cleaned up). This failed to "identify any 'exercise' which is the subject of the burden to which he objects." *Id.* at 679. "Kaemmerling alleges no religious observance that the DNA Act impedes, or acts in violation of his religious beliefs that it pressures him to perform." *Ibid.*

This Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986), rests on the same principle. While the Court framed the plaintiff's claim as an effort to "dictate the Government's internal procedures," *id.* at 700, rightly understood, *Bowen* is a case about lack of religious exercise at all. The Court reasoned that the plaintiff could "no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets." *Ibid.* His objection was only to the way "the Government *itself*" behaved without any actual "impair[ment]" of his "freedom to believe, express, and *exercise* his religion." *Id.* at 699–700 (cleaned up, second emphasis added). As Professor Girgis has argued, *Bowen*'s result is correct, not because of a distinction between "internal affairs" and "external effects" of government action, but because the relevant government action did not "inhibit the claimant's religious conduct." Girgis, *supra*, at 1806.

This is also why a majority of the Court ruled *in favor* of the *Bowen* plaintiff on the one aspect of his claim that involved his own religious exercise. Besides his unsuccessful challenge to the government’s own internal use of a Social Security number for his daughter, the plaintiff in *Bowen* objected to the requirement that he himself “furnish” a number to obtain benefits. 476 U.S. at 701. On that claim, a majority voted in his favor—because conditioning governmental benefits on a religiously forbidden action impeded his own religious exercise. *Id.* at 716 (Blackmun, J., concurring) (“[T]he Government may not deny assistance” where the “parents’ religious convictions prevent them from supplying the Government with a social security number for their daughter.”); *id.* at 732 (O’Connor, J., joined by Brennan and Marshall, JJ.) (same); *id.* at 733 (White, J., dissenting) (same).

Other cases recognize that adverse effects on subjective feelings and experiences don’t clear RFRA’s threshold. See *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018) (rejecting RFRA claim because mere subjective feelings of “guilt, shame, and ... fear” to the presence of “In God We Trust” on U.S. currency were not a “substantial burden”); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1063 (9th Cir. 2008) (RFRA claim fails where “sole effect of [government action] is on the Plaintiffs’ subjective spiritual experience”), *overruled on other grounds by Apache Stronghold*, 101 F.4th 1036.

B. The exercise must be “religious” in nature, not personal, philosophical, or ideological.

“Courts are not arbiters of scriptural interpretation.” *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). But RFRA’s protection for “religious” exercise requires a threshold look at whether an objection has its source “in religious belief” as opposed to personal, philosophical, or ideological considerations. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). “A way of life, however virtuous and admirable, ... based on purely secular considerations” “does not rise to the demands of the Religion Clauses.” *Ibid.* Thus, for example, the Free Exercise Clause would not protect Thoreau’s decision to “reject[] the social values of his time,” given that his “choice was philosophical and personal rather than religious.” *Ibid.* So, too, with RFRA and RLUIPA, which protect “only” those convictions “motivated by religious faith—in recognition, no doubt, of the unique role religion, its free exercise, and its tolerance have played in the nation’s history.” *Yellowbear*, 741 F.3d at 53; see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1498 (1990) (“From the perspective of the advocates of religious freedom in 1789, the protection of private judgment (secular ‘conscience’) fundamentally differs from the protection of free exercise of religion.”).

That is why the court rejected the defendant’s RFRA defense in *United States v. Barnes*, 677 Fed. Appx. 271 (6th Cir. 2017). His “belief in marijuana was primarily a personal one,” a finding bolstered by

his “long history of marijuana use, his quick epiphany and conversion to the Church of Anyana-Kai, ... and [his] admission that marijuana was not a necessary part of his religion.” *Id.* at 277; *see also United States v. Meyers*, 95 F.3d 1475, 1484 (10th Cir. 1996) (drawing on First Amendment precedents for definition of “religious” and rejecting RFRA defense because belief in “[m]arijuana’s medical, therapeutic, and social effects” was “secular, not religious”); *Friedman v. S. Cal. Permanente Med. Grp.*, 125 Cal. Rptr. 2d 663, 685 (Cal. App. 2002) (extensively discussing what counts as “religious” and concluding that “[w]hile veganism compels plaintiff to live in accord with strict dictates of behavior, it reflects a moral and secular, rather than religious, philosophy”).

C. Religious exercise must be “sincere,” not contrived for litigation.

Under RFRA, courts don’t ask whether a particular practice is “compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). But they do ask about a plaintiff’s sincerity. Sincerity is a “threshold question” “in every case” because “[w]hile the truth of a belief is not open to question, there remains the significant question whether it is truly held.” *United States v. Seeger*, 380 U.S. 163, 185 (1965).

Sincerity “is a factual matter,” *United States v. Quaintance*, 608 F.3d 717, 721 (10th Cir. 2010) (Gorsuch, J.), in which a court “seeks to determine an adherent’s good faith in the expression of his religious belief,” *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). Courts adjudicate religious sincerity just like

“any other factual determination of a party’s mental state.” Nathan S. Chapman, *Adjudicating Religious Sincerity*, 92 Wash. L. Rev. 1185, 1191 (2017); see *Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (“Checking for sincerity and religiosity” is well within a “court’s authority and competence” and helps to “weed out sham claims.”). But courts should be careful not to “infe[r] *insincerity* from a religious belief’s *inaccuracy* or *implausibility*.” Chapman, *supra* (emphases in original). As this Court put it in *Thomas*, the question is whether the claimant “drew a line” reflecting an “honest conviction,” not whether that conviction is or isn’t reasonable. 450 U.S. at 715–16.

In *Quaintance*, the Tenth Circuit rejected a RFRA defense because “numerous pieces of evidence” “strongly suggest[ed]” the defendants’ “marijuana dealings were motivated by commercial or secular motives rather than sincere religious conviction.” 608 F.3d at 722; see also *United States v. Martines*, 682 Fed. Appx. 768 (9th Cir. 2014) (similar conclusion). Similar logic obtained in *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996): “[W]e are skeptical that Ochs’s request to be racially segregated, first made in the midst of prison racial disturbances, reflected a sincerely held religious belief.” As numerous decisions attest, sincerity is a robust limiting principle in RFRA and other free-exercises cases. See *Oregon Right to Life v. Stolfi*, No. 6:23-CV-01282-MK, 2024 WL 4345758, at *6 (D. Or. Sep. 30, 2024) (“review of Plaintiff’s organizational documents and requirements for membership, employment, and leadership cast doubt on whether Plaintiff’s opposition is genuinely religious in nature”); *Mahone*

v. *Pierce Cnty.*, No. 10-5847, 2011 WL 2360354, at *7–8 (W.D. Wash. May 24, 2011) (plaintiff was not “sincere in his profession that he is Jewish” because there was “no evidence that [he] ... ever engaged in the practices and tenets of Judaism other than his stated belief that he must eat kosher foods”); *United States v. Manneh*, 645 F. Supp. 2d 98, 111 (E.D.N.Y. 2008) (“[D]efendant’s religious beliefs relating to bushmeat are not the bona fide explanation for the criminal conduct she is charged with committing.”).

Sincerity analysis offers “a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud.” *Patrick*, 745 F.2d at 157. While it may sometimes “appear to overlap with the test for what is ‘religious,’” sincerity is “a discrete element in RFRA and Free Exercise analyses.” *Manneh*, 645 F. Supp. 2d at 111.

D. Failing to subsidize or support religious exercise is not a “burden,” but inhibiting or penalizing it is.

Many courts treat the concept of “substantial burden” as an undifferentiated whole. But the question of whether there is a *burden* at all is analytically distinct from whether that burden is *substantial* enough to trigger strict scrutiny under RFRA.

As a general rule, a burden arises based on something the government *does*, not what it fails to do. In most contexts of American life, “voluntary choice is the baseline.” *Lozano v. Collier*, 98 F.4th 614, 628 (5th Cir. 2024) (Oldham, J., concurring in

judgment). People are free to make their own choices in religious matters, and “government is generally under no legal compulsion to affirmatively subsidize or support those choices.” *Ibid.* RFRA “does not require the federal government to build churches or employ rabbis.” *Ibid.*

In voluntary-choice cases, government creates a burden when it “bring[s] to bear its sovereign power in a way that inhibits ... religious voluntarism,” thereby decreasing a person’s ability to practice their faith “consistent with their own free self-development.” Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1325 (2021). Burden analysis thus begins with a “hypothetical world in which individuals make decisions about religion on the basis of their own religious conscience,” then asks whether and to what extent a particular government action interferes with those decisions. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 169 (1992). The aim is to “ensure that religion remains a matter of voluntary choice by individuals and their associations.” *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 514 (2020) (Gorsuch, J., concurring) (cleaned up). And as long as government doesn’t interfere with voluntary choice, it doesn’t burden free exercise. *See, e.g., Goodall by Goodall v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 172 (4th Cir. 1995) (county not required to pay for child’s cued speech transliterator in private religious school because RFRA and Free Exercise Clause do not “impose upon the government an obligation to subsidize” voluntary choices).

But there are at least two contexts where this general rule is altered. The first is public-benefit cases. When government “makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured.” *Locke v. Davey*, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting). At that point, the relevant question is not whether the religious adherent is “entitle[d] to a subsidy” but whether she has a “right to participate” in the benefit on “equal footing” without disavowing faith. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 463 (2017) (cleaned up). Because denying that right “inevitably deters or discourages”—i.e., *burdens*—religious exercise, heightened scrutiny applies. *Ibid.*

The second exception is when “government so wholly occupies the field” that *government interference* rather than voluntary choice is the baseline. Barclay & Steele, *supra*, at 1333. Under this heading are prison facilities, military environments, zoning, and, as relevant here, government-controlled sacred sites. In these contexts, religious observers are at the mercy of government. They can’t voluntarily practice their faith unless the government affirmatively permits access or “acts to lift its coercive power through a religious accommodation.” *Ibid.* In such cases, courts usually have no trouble recognizing a burden based on government’s denial of access or failure to accommodate. *See id.* at 1333–42; e.g., *Makin v. Colo. Dep’t of Corrs.*, 183 F.3d 1205, 1211 (10th Cir. 1999) (“failure to accommodate” Muslim inmate’s meal requirements violated free exercise rights); *Apache Stronghold*, 38 F.4th at 780 (Berzon, J., dissenting) (numerous cases demonstrate that

“government’s denial of access to religious resources” is a “burden on religious exercise”).

Then-Judge Gorsuch’s opinion for the Tenth Circuit in *Yellowbear* is illustrative. There, a state correctional facility barred a Native American prisoner from accessing a government-owned sacred site, a sweat lodge on prison grounds. 741 F.3d at 56. The prisoner’s faith “require[d] at least *some* access” to the site but because prison policy “refuse[d] *any* access,” the court found a RLUIPA violation. *Ibid.* “[F]latly prohibiting” religious exercise “easily” qualified as a substantial burden. *Ibid.*

This was true even though the prison had done nothing more than maintain its preexisting control over the prison yard. But that didn’t matter. “This isn’t a situation,” then-Judge Gorsuch wrote, “where the claimant is left with some degree of choice in the matter.” *Ibid.* So to ask about the government’s “coercive influence on” or interference with “that choice” would make little sense. *See ibid.* This logic gets the burden analysis exactly right in cases of government control—because when government “regulates the temporal and geographic environment of individuals,” it may have to take steps to “permit” religious exercise lest individuals be “unable to engage in the practice of their faiths.” *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 226 n.10 (1963); *see* Douglas Laycock & Thomas C. Berg, *Protecting Free Exercise Under Smith and After Smith*, *Cato Sup. Ct. Rev.* at 33, 58 (2020–21) (“[T]he government, by seizing sacred lands, took control over the tribes’ ability to practice their traditions fully—in

somewhat the same way that prisons control inmates' ability to practice their faith.”).

While government generally is under no obligation to assume ownership or control of religious sites, once it does so, interference becomes the new baseline and the focus of the burden analysis shifts. The question then is not whether government has acted to interfere with a voluntary religious choice, but whether it has *failed to act* by refusing to alleviate some element of the omnipresent interference. Barclay & Steele, *supra*, at 1333. In other words, the question is not whether the government has *stepped in* but whether it has *failed to step out* in some way. The refusal to grant access to religious resources or otherwise accommodate religious exercise creates the burden. *See also Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *3, *17 (W.D. Okla. Sep. 23, 2008) (construction of government building on federal land in “precise area” of plaintiff’s “traditional religious practices” was substantial burden because it would “significantly inhibit” and “deny reasonable opportunities” for religious exercise).

When it comes to government-controlled religious property, indigenous sites aren’t the only things at stake. “[T]here are around seventy churches within the national parks.” Barclay & Steele, *supra*, at 1341. “The Ebenezer Baptist Church in which Martin Luther King Jr. preached is located on government-leased property.” *Ibid.* Congress established a National Historical Park “around four of the Southwest’s famous Catholic mission churches,” and one—San Xavier del Bac—“remains an important

pilgrimage site that thousands visit each year.” *Ibid.* Under the Ninth Circuit’s reasoning, the government could close these places forever, or even raze them entirely, without ever undergoing RFRA scrutiny. That misunderstands how burden analysis works in cases of government control like this one.²

E. A burden on religious exercise must be “substantial.” Burdens that are fleeting or de minimis or that admit of acceptable alternatives don’t qualify.

Not “every infringement on a religious exercise will constitute a *substantial* burden.” *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010) (emphasis added). A court must examine “the nature and extent to which religious exercise is hampered or restrained by” government action. *Real Alternatives, Inc. v. Sec’y Dep’t of Health & Hum. Servs.*, 867 F.3d 338, 365 (3d Cir. 2017). Substantial “doesn’t mean complete or total.” *Yellowbear*, 741 F.3d at 55. But the interference “must be more than incidental” and “more than an inconvenience”; it “must significantly hamper one’s religious practice.” *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (cleaned up), *abrogated on other grounds by Sossamon v. Texas*, 563 U.S. 277 (2011). RFRA’s substantiality requirement serves as “an imperative safeguard, else religious

² Public schools, where government controls both the physical and informational environment, are another context where interference is the baseline. Here, too, government’s failure to act—such as by refusing to permit a curricular opt-out—can burden free exercise. *See* Pet. for Certiorari, *Mahmoud v. Taylor*, No. 24-297 (Sep. 12, 2024).

beliefs would invariably trump government action.” *Real Alternatives*, 867 F.3d at 365.

Courts have fleshed out the meaning of “substantial” in various contexts, clarifying that a burden is not substantial if it (a) is fleeting, (b) is de minimis, or (c) leaves adherents free to pursue a religiously acceptable alternative.

Fleeting. While religious prisoners generally must be furnished with a religiously compliant diet, in *Norwood v. Strada*, 249 Fed Appx. 269, 272 (3d Cir. 2007), the “short denial of such a diet during an emergency lock-down” was a “mere de minimis intrusion,” not a substantial burden. “[I]t is incredible,” the court wrote, “that in such a short time period Norwood would have been forced to abandon one of the precepts of his religion” or “felt substantial pressure to modify his beliefs.” *Ibid.*

De Minimis. Burdens that are de minimis or attenuated don’t qualify as substantial, particularly when adherents retain a significant element of choice. Thus, in *Real Alternatives*, employees were not substantially burdened by the requirement that their employer’s health plan cover contraceptives. The requirement only “broaden[ed] the availability of services that an employee might or might not access” and it was “still up to the employee to decide what to do with those options.” 867 F.3d at 361.³

³ The situation in *Real Alternatives* was “[u]nlike *Hobby Lobby*” in which the *employer* had to “arrang[e] or provid[e]” the objectionable coverage. 867 F.3d at 362. Here, the *employees* didn’t arrange or provide anything. They simply “bec[ame]

Similarly, in *United States v. Friday*, 525 F.3d 938, 948 (10th Cir. 2008) (McConnell, J.), requiring a religious adherent to obtain a permit before killing an eagle was not a substantial burden because the adherent’s religious tenets were not inconsistent with using the application process. And in *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1035 (9th Cir. 2004), requiring the college “to submit a *complete* [zoning] application, as is required of all applicants,” did not substantially burden religious exercise. In these cases, courts examine “the connection between the conduct and the religious belief” and do not countenance burdens that are “negligible.” *Real Alternatives*, 867 F.3d at 361.

Religiously Acceptable Alternatives. This Court “ha[s] not addressed” whether an available alternative that is religiously “indistinguishable from the prohibited practice” alleviates a substantial burden. *Murphy v. Collier*, 139 S. Ct. 1475, 1484 (2019) (Alito, J., dissenting). But a number of cases have held that a burden isn’t substantial when adherents, by their own admission, have religiously acceptable alternatives for a particular faith practice. *See also* Girgis, *supra*, at 1795 (advocating an “adequate alternatives principle” for substantial-burden analysis, which asks whether a claimant still has “another way” to exercise religion to “about the same degree” and at “not much greater cost” (emphases deleted)).

eligible”—passively—for a “service of [their] choosing.” *Ibid.* In this sense, *Real Alternatives* is as much a no-exercise case as a de-minimis-burden case.

In *Thiry v. Carlson*, 78 F.3d 1491, 1495–96 (10th Cir. 1996), the required relocation of a gravesite wasn’t a substantial burden because plaintiffs’ religious beliefs didn’t prohibit relocation and they admitted they could voluntarily relocate. In *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1017 (9th Cir. 2016), there was no substantial burden where an alternative means of sacramental practice was available: “We fail to see how prohibiting a substance that [plaintiffs] freely admit is a substitute would force them to act at odds with their religious beliefs.” In *Henderson v. Kennedy*, 253 F.3d 12, 16–17 (D.C. Cir. 2001), plaintiffs’ beliefs didn’t require them to sell T-shirts in any particular place, so a ban on sales on the National Mall was “at most a restriction on one of a multitude of means” and “not a substantial burden”; plaintiffs still could distribute for free on the Mall or they could sell on surrounding streets.

It is worth noting that none of these cases authorized government or courts to second-guess a claimant’s religious beliefs about what counts as an adequate substitute. *Cf. Hobbs*, 574 U.S. at 361 (rejecting prison’s assertion that “availability of alternative means of practicing [Islam]”—such as having a prayer rug and access to a religious diet—defeated a substantial-burden claim based on denial of a religiously mandated beard). Rather, in these cases, the religious claimants themselves identified the substitute as religiously acceptable.

* * *

RFRA's five threshold elements of *exercise*, *religiosity*, *sincerity*, *burden*, and *substantiality* play a gatekeeping role for claims. Though not onerous, each must be satisfied before a plaintiff can put the government to its burden of showing a compelling interest and least restrictive means. As limiting principles, they enable courts to fulfill RFRA's promise of broad religious liberty protection while screening out unwarranted exemption claims. And they preclude the need for courts to second-guess Congress's policy choice and impose their own, extra-textual limits on the RFRA analysis.

II. The Ninth Circuit misconceived the substantial burden analysis under RFRA.

Here, the Ninth Circuit should have respected Congress's choice and adhered to RFRA's plain language. There is no question as to the first three analytical elements: the Apaches have engaged in sincere religious exercise at Oak Flat for centuries. But the Ninth Circuit misconceived the substantial burden analysis, reasoning that "the Government's management of its own land and internal affairs" is categorically walled off from RFRA's scrutiny. 101 F.4th at 1053. As other Circuits have recognized, wholly "prevent[ing]," "flatly prohibiting," and "refus[ing] ... access" to religious exercise—all of which result from the transfer and destruction of Oak Flat here—"easily" qualify as a substantial burden. *Yellowbear*, 741 F.3d at 55–56.

The government's omnipresent coercive control over Oak Flat means that a burden arises based on its refusal to allow access to the site or accommodate religious practice there. That burden only

magnifies—it does not lessen—if the site is destroyed. At that point, the government’s interference becomes permanent and irreversible, making it *impossible* to ensure access or an accommodation. That is a substantial burden, and the Ninth Circuit was wrong to conclude otherwise.

The Ninth Circuit reached its conclusion out of concern for overprotecting religious exercise and underserving the government’s interest in land management and “internal affairs.” But that gets RFRA backward. It “slip[s] it into the substantial burden analysis” the question that must be resolved on strict scrutiny—namely, how to resolve the “competing claims” of religious and nonreligious uses of federal land. *Apache Stronghold*, 38 F.4th at 783 (Berzon, J., dissenting). And it gives the government a free pass on strict scrutiny, where it never has to prove that its ends are compelling and its means the least restrictive, as RFRA requires. This was error, and it deserves correction by this Court.

CONCLUSION

The Court should issue a writ of certiorari, reverse the decision below, and clarify how substantial burden analysis works in this and other cases where the baseline is government control.

Respectfully submitted,

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