

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 THE PRESBYTERIAN CHURCH (U.S.A.),
THE MENNONITE CHURCH USA, AND THE LIPAN NA-
TIVE AMERICAN CHURCH AS *AMICI CURIAE* IN SUP-
PORT OF PETITIONER**

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QUESTION PRESENTED

As the Petition explains, the complete physical destruction of an indigenous sacred site, ending forever the ability to engage in religious rituals, constitutes a substantial burden on religious exercise. This brief addresses whether the government would be able to show that its actions are the least restrictive means of achieving its claimed interest when it neglects to investigate and use less restrictive alternatives.

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INTEREST OF *AMICI*

The Presbyterian Church (U.S.A.) is a national Christian denomination with over 1.1 million members in more than 8,000 congregations. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. <https://www.pcusa.org/>.

Mennonite Church USA is an Anabaptist Christian denomination, founded in 2002 by the merger of the Mennonite Church and the General Conference Mennonite Church. Members of this historic peace church seek to follow Jesus by rejecting violence and resisting injustice. MC USA's Renewed Commitments state the following shared commitments among its diverse body of believers: to follow Jesus, witness to God's peace and experience the transformation of the Holy Spirit. Mennoniteusa.org.

The Lipan Native American Church teaches Christianity and traditional indigenous beliefs, with membership largely based in the American southwest. It is committed to religious freedom for all.

SUMMARY OF ARGUMENT

Petitioners ably explain why permanently destroying a sacred site substantially burdens their religious exercise. This brief addresses the proper application of strict scrutiny once that burden is recognized. Over the last thirty years, the Religious Freedom Restoration Act ("RFRA") and many other laws have demanded strict scrutiny of government actions that burden religious exercise. Yet many lower courts still

misapply the test; particularly the least restrictive means prong.

I. Many courts have applied this Court’s precedent correctly and require the government, prior to litigation, to fully investigate less restrictive alternatives and then use the ones it finds. But other courts mistakenly allow the government to not even explore alternatives, wait for litigation, then argue *post hoc* justifications of their actions. This is folly.

After resolving the substantial burden issue, this Court should issue guidance on remand that will clarify the law for all courts: when strict scrutiny applies to religious free exercise cases, government must investigate alternatives with the goal of accommodating religion; it must use the alternatives that investigation uncovers; it must have legitimate reasons for rejecting alternatives; and it must stick to those same reasons in court. These guidelines are not new. They exist piecemeal and are already implied in this Court’s cases, but too many lower courts have failed to understand them.

II. Requiring an actual investigation with the goal of discovering and using alternative means that will not burden religion forces the government to frame its interest with precision and *to the person*, in the context of the specific religious burden at issue. It ensures government will seek and use the best available alternatives. It does not allow government actors to flip the burden of proof back on to religious claimants. It requires that the justifications government uses in court are limited to the justifications government relied on when denying the accommodation. And it ensures that government employees will work *with* religious groups—particularly minority religious

groups—who otherwise may struggle to ensure government actors understand their beliefs.

In contrast, under the no-investigation rule, governments are incentivized not to seek out alternatives but instead to assert without effort that every accommodation is impossible. That is the opposite of what strict scrutiny requires.

III. The present case illustrates the necessity for actual investigation prior to litigation and use of less restrictive alternatives. The Forest Service’s 2021 Environmental Impact Statement (“EIS”) identified multiple means of extracting copper in a less religiously destructive way. This shows that government investigations can *identify* alternatives. But the EIS then rejected those alternatives because they involved “higher operational costs.” In short, the government failed to investigate less restrictive means with the goal of accommodating religion; it was looking to maximize profit. That type of misguided investigation does not meet the demands of strict scrutiny, and it explains why the government here failed to use obviously available alternatives.

When strict scrutiny is properly applied, it shows that the government here failed to satisfy its burden to prove least restrictive means.

ARGUMENT

Over thirty years ago, a near-unanimous Congress passed RFRA. Since that time, much has changed in free-exercise jurisprudence across the United States. Then, RFRA was one of the only sources of the compelling interest test in free exercise cases. In the intervening decades, many states have passed their

own versions of RFRA. After a back and forth with this Court, Congress passed the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), which requires the compelling interest test for burdens on religious exercise in prisons and the land use context. And some state supreme courts have interpreted their state constitutions to employ the compelling interest test.

In a series of recent cases, this Court has clarified that many laws assumed to be “neutral” and “generally applicable,” see *Employment Division v. Smith*, 494 U.S. 872 (1990), are not, and that governments will need to face strict scrutiny when those laws burden religious exercise. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 584 U.S. 617 (2018) (providing guidance on the meaning of “neutrality”); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (providing guidance on “general applicability”); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (same).

The result is that, today, in most instances where government burdens the exercise of religion, it must survive strict scrutiny. As the Petition notes, the Ninth Circuit avoided strict scrutiny by determining the destruction of a religious site would not burden religious exercise. Pet. at 21–24. Assuming this Court reverses, it should also give guidance to lower courts about what strict scrutiny requires. Many lower courts do not understand the burden government faces when it must prove that its actions are the least restrictive means for achieving its claimed interest. They need clear direction, as do government actors.

I. In free exercise cases involving strict scrutiny, some circuits have misapplied and misunderstood this Court’s precedents by failing to require government to fully investigate and use less restrictive alternatives prior to litigation.

When the compelling interest test applies to government actions burdening the free exercise of religion, federal appellate courts have split on how government can satisfy its burden to demonstrate least restrictive means. Some properly hold that the government’s least restrictive means obligation requires actual consideration of alternative measures prior to acting. Others are confused; they allow *post hoc* litigation arguments to suffice. The first group has carefully examined this Court’s jurisprudence and has recognized that the former approach is the clear and better rule. The second group has missed it entirely.

On one side of the split, the Ninth Circuit has found that to satisfy the least restrictive means requirement the government must have “*actually considered* and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) (emphasis added). The Fourth Circuit has also adopted the “actually considered” approach to the least restrictive means test. *Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012) (“[T]he government . . . cannot meet its burden to prove least restrictive means unless it demonstrates that it has *actually considered* and rejected the efficacy of less restrictive measures before adopting the challenged practice.”) (emphasis added). Both the First and Third Circuits have adopted it as well. *See Spratt v. Rhode Island Dep’t of*

Corrs., 482 F.3d 33, 41 (1st Cir. 2007) (adopting *Warsoldier*'s proof requirement); *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same).

On the other side of the split, the Tenth and Eleventh Circuits allow government to satisfy its least restrictive means burden without showing that it considered alternatives. *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (“[T]he government’s burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger, but it must do both through the evidence presented in the record.”); see *Knight v. Thompson*, 797 F.3d 934, 946–47 (11th Cir. 2015) (rejecting the *Warsoldier* standard and holding that defendants need not have “considered alternatives to its policy”).

These two interpretations of the least restrictive means prong of the compelling interest test are incompatible. The first properly places the burden on government to consider alternatives and use them when they find them. The second relieves the government of its burden by relying on litigation justifications instead of *considering* and using less restrictive alternatives during policy implementation. The split reflects a confusion among lower courts regarding how strict scrutiny works. It also illustrates a misunderstanding among some circuits of this Court’s decisions.

II. This Court’s decisions in *Ramirez* and *Holt* compel governments to “actually consider” and use alternatives.

Over the past decade, this Court has clarified the burden on government when strict scrutiny applies.

In *Holt v. Hobbs*, nine Justices explained that “[t]he least-restrictive-means standard is exceptionally demanding,’ and it requires *the government* to ‘sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].” 574 U.S. 352, 364–65 (2015) (emphasis added) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). Later, in *Ramirez v. Collier*, eight Justices reiterated that once strict scrutiny is triggered, “the burden flips and the government must ‘demonstrate[] that imposition of the burden on that person’ is the least restrictive means of furthering a compelling governmental interest.” 595 U.S. 411, 425 (2022) (citations omitted).

In both *Holt* and *Ramirez*, the Court faulted the lower courts for their “unquestioning deference” to the government agency. *Holt*, 564 U.S. at 364; *accord Ramirez*, 595 U.S. at 429. Once strict scrutiny applies, the *Ramirez* Court reasoned, “it is the government that must show its ‘policy is the least restrictive means of furthering a compelling government interest.” 595 U.S. at 432 (internal quotations omitted).

The circuit split reveals that some lower courts have not understood these rules. Simply put, the government cannot “sho[w] that it lacks other means” when it never investigated prior to litigation whether other means exist, or when it discovers plausible alternatives but refuses to use them. *Holt*, 574 U.S. at 352. This rule is not arbitrary. The requirement is deeply rooted in the rationale for the strict scrutiny test.

A. Forcing Government to Investigate and Use Alternatives Will Help Government to Clarify Its Interest.

In far too many free exercise cases, government burdens religious exercise and then manufactures “compelling” interests after litigation ensues. This often leads to excessive court battles over the government’s claimed interest and poorly argued *post hoc* justifications. Forcing government to explore and use the least restrictive alternatives to achieve its interests in advance will have the effect of ensuring government actors have a clear understanding of what their interest is and how they can best achieve it.

This will not prevent all litigation, but it will limit it. And when it does arise, the contours of any dispute will be better defined, for the parties and the courts. In litigation, governments frequently state their interests “at a high level of generality, but the First Amendment demands a more precise analysis.” *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021). Programs and policies will always further *some* interest, but the compelling interest test (and the text of RFRA) require that the government justify “that application of the burden *to the person*.” 42 U.S.C. § 2000bb–1(b) (emphasis added).

An on-notice government actor who thinks about *the person* being burdened will need to have their interest defined with precision to be able to consider and use alternatives at the appropriately narrowed level.

B. Forcing Government to Investigate Alternatives Ensures Government Will Consider and Use the Best Alternatives.

Once litigation ensues, government actors' motivations shift. Even if the burden is placed upon them to show less restrictive measures do not exist, their goal—or, more accurately, the goal of their attorneys—is no longer to explore alternatives. Their goal becomes to show why any conceivable alternative will not work. The regulators and experts who have knowledge about what is possible shift their attention from imagining how something *can* work to focusing on why it *cannot*.

Placing the burden on government to hunt for and use least restrictive alternatives prior to litigation helps avoid this hazard. At that stage, government actors are incentivized to avoid litigation, not to win it. They will spend their time and resources talking over the interest the government is trying to achieve, discussing with religious parties their concerns, and then working with experts (if necessary) to find and use plausible alternatives.

Taking the opposite approach undermines both the compelling interest test and the free exercise of religion. The reasoning of the Tenth and Eleventh Circuits perversely incentivizes government actors *not* to consider how a reasonable accommodation could work. Instead, it incentivizes them to ignore accommodation requests and viable accommodations, wait to get sued, manufacture supposed interests, *again wait* for plaintiffs to proffer alternatives, and then use their resources to shoot down those alternatives. See *Wilgus*, 638 F.3d at 1289; *Knight*, 797 F.3d at 946–47. Many plaintiffs will not have access to the

resources needed to explore and provide those alternatives, so government will often win.

Instead of working together with their constituents to find a workable accommodation, government actors can say, “We’ve tried nothing, and we’re all out of ideas.”

C. Allowing *Post Hoc* Justifications Flips the Burden Back onto Challengers or the Courts.

Allowing the government to argue that no less restrictive alternatives exist without having properly considered them, or to refuse to use alternatives government discovers, impermissibly flips the burden of proof back onto those challenging government action. This directly contradicts this Court’s rulings in *Holt* and *Ramirez*.

Consider the Tenth Circuit’s test: the government’s burden is “two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger.” *Wilgus*, 638 F.3d at 1289. The second part of the Tenth Circuit’s test places the burden on the challenger to offer “alternative schemes.” *Id.* This is a burden that flouts this Court’s strict scrutiny jurisprudence. As eight Justices reasoned in *Ramirez*, it “gets things backward.” 595 U.S. at 432.

It is easy to see why this occurs. In the course of litigation, government litigators no longer have any motivation even to hint that less restrictive alternatives might be available. Their best move is to stay silent and offer only the conclusory argument that no other alternatives exist; or to argue, as in this case, that scarcely considered alternatives would not work.

In response, challengers will have no choice but to try to offer alternatives or provide robust evidence as to why alternatives would work. At that point, the burden has flipped. And in many instances, those burdened by the action are often in no position to explore alternatives. Frequently, they are small religious groups or individuals with little funding. The largest empirical study on congregation size in America shows that half of congregations have seventy-five or fewer regular attendees, with fifty or fewer being regular adult participants. MARK CHAVES, CONGREGATIONS IN AMERICA 18–19 & Table 2.1 (2004). In 2004, the median congregation held just \$1,000 in a savings account and operated with an annual budget of \$56,000. *Id.* at 19–20. Their only hope lies in their lawyers making arguments after the fact or experts offering their time for free.

On occasion, the courts will find other, less restrictive means on their own. In *Ramirez*, for example, a death row inmate requested his minister’s touch and audible prayer at the moment of his execution, and the Texas Department of Criminal Justice refused to accommodate him. 595 U.S. at 416. This Court identified requiring training regarding the IV lines as a less restrictive means. *Id.* at 432. The Court conceived of that alternative *sua sponte*; it did not appear in the petitioner’s brief or at oral argument. *Cf. Ramirez v. Collier*, No. 21-5592, Brief of Petitioner at 26. In *Dunn v. Smith*, a case with similar facts, four Justices identified pastor interviews or penalty-backed pledges as less restrictive means that were not proffered by the petitioner. *Compare Dunn v. Smith*, 141 S. Ct. 725, 726 (2021) (Kagan, J., concurring), *with Dunn v. Smith*, Docket No. 20A128, Brief of Petitioner at 15. In *Gonzales v. Collier*, the judge himself toured

Texas’s execution chamber to determine if less restrictive means existed. 610 F. Supp. 3d 963, 968 (S.D. Tex. 2022). He then ruled that they did and that the government had failed to meet its burden. *Id.* at 978–981.

But shifting the burdens to the courts is no better than shifting them to the challengers. In both instances, the one party required to explore, develop, and use alternatives—the government—shirks its responsibility to do so.

Finally, demanding the government only “support its choice of regulation,” *Wilgus*, 638 F.3d at 1289, in court goes against the fundamental legal principle disfavoring *post hoc* justifications. One of the bedrock rules of administrative law is that “courts may not accept appellate counsel’s *post hoc* rationalizations for agency action.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). That same principle governs religious liberty: “Government ‘justification[s]’ for interfering with First Amendment rights ‘must be genuine, not hypothesized or invented *post hoc* in response to litigation.’” *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

But the Tenth Circuit’s *Wilgus* test allows crafty lawyers to do just that: create new justifications for litigation and see what sticks. The better rule is to put the burden where the strict scrutiny test places it: on the government.

D. Placing the Burden on Government to Find and Use Alternatives Forces It to Account for Religious Minorities.

Perhaps the deepest rationale for forcing government to investigate and use least restrictive alternatives lies in our constitutional ideals. By dividing power among thousands of actors and forcing majorities to consider the rights of minorities, our constitutional framework forces different constituencies to engage in dialogue. *See generally* YUVAL LEVIN, AMERICAN COVENANT (2024). Small religious minorities will rarely have the political power on their own to represent themselves before government or to force government to change its regulations. Most often, government actors will not even be aware of them and certainly will not understand their religious traditions.

Placing the burden on government to identify and use less restrictive means requires government officials to open a dialogue with the religious groups in their communities. It demands understanding the beliefs and needs of religious groups, especially minorities who are often not represented during the normal course of business. This helps with religious literacy in our nation, and it ensures little understood religious groups receive at least a bit more understanding.

This concern with dialogue gets to the heart of strict scrutiny. It is designed to allow majorities to govern but to protect minorities at the same time. Requiring government to think creatively and develop and use alternatives will necessarily require dialogue with minority religious groups. Such dialogue legitimizes government action, clarifies the government's interest, and brings into focus the religious exercise

being burdened. Remove the duty on government to explore and use less restrictive means, and that entire dialogical process vanishes.

It may be true that requiring government to explore and use alternatives at the outset will slow some government action. But that is less expensive than years-long battles that inevitably ensue once litigation begins. It is also the policy choice implemented in RFRA and RLUIPA, demanded by the First Amendment, and required by state strict scrutiny regimes across the country.

III. The government failed to properly investigate and use alternatives before adopting the Land Transfer Act, and thus cannot demonstrate that no less restrictive means are available.

Here, despite awareness of the religious burden, the government did not “actually consider[] and reject[] the efficacy of less restrictive measures” before adopting the plan for destruction of the Apache sacred site at Oak Flat. *See Warsoldier*, 418 F.3d at 999. Rather, it gave cursory attention to potential alternatives and refused to use them because they were less profitable. *E.g.*, U.S. Forest Serv., Final Environmental Impact Statement: Resolution Copper Project and Land Exchange F-3 (2021) [hereinafter EIS] (rejecting less religiously restrictive techniques because they involved “higher operational costs”).

Under its current proposal, Resolution Copper intends to use “panel caving” to extract copper ore from beneath Oak Flat, which will result (as the district court found) in the land being “all but destroyed.” *See Apache Stronghold v. United States*, 519 F. Supp. 3d

591, 606 (D. Ariz. 2021). Panel caving involves the fracturing of ore using explosives, followed by removal of the ore from beneath. U.S. Forest Serv., Resolution Copper Project and Land Exchange Environmental Impact Statement: Draft Alternatives Evaluation Report 4 (2017) [hereinafter 2017 Draft], <https://www.resolutionmineeis.us/sites/default/files/project-files/usfs-tonto-alternatives-evaluation-report-draft-final-201711.pdf>. In the case of Oak Flat, use of this technique is expected to cause land subsidence (collapse) to a depth of up to 1,100 feet over approximately 1,750 acres. *Id.* Oak Flat will no longer exist; “[t]he Western Apaches’ exercise of religion at Oak Flat will not be burdened—it will be obliterated.” *Apache Stronghold v. United States*, No. 21-15295, 2021 WL 12295173, at *4 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).

However, surface-destructive panel caving is far from the only option available to Resolution Copper. The statute authorizing the land transfer was passed in 2014. Pub. L. No. 113-291, § 3003, 128 Stat. 3732-3741. But the Forest Service’s 2021 Environmental Impact Statement (EIS) presents several other mining techniques Resolution Copper could use to extract copper—techniques the Forest Service acknowledged “could substantially reduce impacts on surface resources.” EIS at F-4.

Specifically, the EIS details various “stoping,” or underground mining techniques, of which Resolution Copper (a highly sophisticated mining operation) could avail itself and preserve the sacred religious site. Stoping involves tunneling underground to carve out “stopes” (underground excavations or rooms) and

extract ore. 2017 Draft at 10. The EIS discusses naturally supported stoping methods such as “open stoping,” where the excavation is naturally supported, and “open stoping with pillars,” where the excavation leaves pillars of ore in place to prevent collapse. EIS at F-3; *see* 2017 Draft at 10–11 (providing descriptions of alternative mining techniques). Other stoping options discussed include artificially supported stoping methods such as “cut-and-fill stoping” (where tailings of waste rock are used to support the excavation) and “shrinkage stoping” (where fractured ore is left in the stope during the mining process to provide support). EIS at F-3; 2017 Draft at 10–11.

In each case, the stopes would be backfilled with waste tailings once the copper ore is extracted. 2017 Draft at 11. Naturally supported stopes and artificially supported stopes “do not generally cause subsidence,” especially if they are backfilled. *See id.* And the EIS concedes that “several underground stoping techniques could physically and technically be applied to the deposit.” EIS at F-5. In short, the government could ensure preservation of a crucial and sacred religious site by directing Resolution Copper to proceed with an alternative mining technique.

However, the government did not properly investigate these alternatives; it rejected them because of the costs involved in implementing them. Although the EIS claims the government is not prioritizing “profitability over environmental protection,” the EIS’s analysis rests on an economic feasibility assessment of current economic conditions like price, administrative costs, and taxes—not strict scrutiny factors. *Id.* at 47. The EIS states that “[w]hile there are other underground stoping techniques that could

physically be applied to the Resolution copper deposit, each of the alternative underground mining methods assessed was found to have *higher operational costs* than panel caving.” *Id.* at F-3 (emphasis added). It says that while other techniques “could substantially reduce impacts on surface resources,” a more surface-protective method would reduce the amount of “ore that could be *profitably* mined.” *Id.* at F-3–F-4 (emphasis added).

The EIS uses company costs to measure the feasibility of least restrictive means. That is not consistent with the demands of strict scrutiny, which require the government to explore and use alternatives that will not burden religion, as opposed to alternatives that will save a company money. At some point, excessive cost renders an alternative unfeasible. But this Court has long held that parties may need to expend additional funds to remedy or protect constitutional rights. *See, e.g., Griffin v. School Bd. Of Prince Edward Cty*, 377 U.S. 218, 233 (1964). Indeed, RFRA specifically “may require the Government to expend additional funds to accommodate citizens’ religious beliefs.” *Hobby Lobby*, 573 U.S. at 730.

A separate and independent federal agency even acknowledged that the government here failed to adequately investigate and use less-destructive alternatives. The Advisory Council on History Preservation, in a letter to the Secretary of Agriculture, advised that the government needed to “reassess[] alternative and more sustainable mining techniques in an effort to prevent subsistence at Oak Flat.” Letter from Rich Gonzales (Vice Chairman of the Advisory Council on Historic Preservation) to Secretary of Agriculture

Tom Vilsack (March 29, 2021), at 7. This included re-visiting the alternatives the government had failed to properly investigate in the first instance. *Id.*

Just as a prison must investigate alternatives before denying an inmate’s request to accommodate his religious beliefs, so must the government investigate alternatives before denying a tribe’s request for an accommodation of its religious beliefs on federal land. In both instances, the goal must be to find ones that are less restrictive of religious exercise.

And “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *Holt*, 574 U.S. at 365. In *Holt*, this Court determined that a prison enforcing its prohibition of an inmate growing a half-inch beard was not the least restrictive means of furthering prison safety and security. *Id.* The compelling interest test “requires the Department not merely to explain why it denied the exemption but to prove that denying the exemption is the least restrictive means of furthering a compelling governmental interest.” *Id.* Just as “it is hard to swallow the argument that denying petitioner a ½-inch beard actually furthers the Department’s interest in rooting out contraband,” so too is it hard to swallow the government’s argument here that barely investigating alternatives and then refusing to use plausible alternatives before destroying a sacred religious site furthers its interest in economic profit. *Id.*

The government cannot meet its burden of proving least restrictive means. Its application of terms like “economically feasible” and “reasonable” plainly differs from a strict scrutiny analysis and departs from its burden to “demonstrate the lack of viable alternatives.” *Apache Stronghold v. United States*, 38 F.4th

742, 783 (9th Cir.), *reh’g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022), and *on reh’g en banc*, 95 F.4th 608 (9th Cir. 2024) (Berzon, J., dissenting). By failing even to fully consider and then use alternative mining techniques that are “physically and technically” possible, and instead approving a highly destructive (if highly profitable) method of extraction, the government substantially burdens Apache religious practices and fails to satisfy the “least restrictive means” prong of the strict scrutiny test.

Demonstrating that no less restrictive means exists requires an investigation into whether alternative means *do* exist. After-the-fact legal briefs are not enough.

Government can only satisfy its least restrictive means burden when it has “actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Warsoldier*, 418 F.3d at 999. And the reasons it rejected the practice must be the reasons it stands on in court: increased operating costs and reduced profitability. The weakness of those reasons may be the reason the government did not even attempt to argue that it satisfied strict scrutiny in the district court, or court of appeals.

But clarifying those points—the government’s duty to investigate alternatives, to use them if they are available, and to rely on that same justification in court—will bring more uniformity to the courts of appeals and more fidelity to this Court’s strict scrutiny jurisprudence.

CONCLUSION

The Court should grant the petition for writ of certiorari, reverse the judgment below, and clarify the burden government faces under the compelling interest test.

Respectfully submitted,

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