15-826

No. 15-____

In the Supreme Court of the United States

LA CUNA DE AZTLAN
SACRED SITES PROTECTION CIRCLE
ADVISORY COMMITTEE ET AL.,

Petitioners,

–v–

UNITED STATES DEPARTMENT
OF THE INTERIOR ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

CORY J. BRIGGS
COUNSEL FOR PETITIONERS
BRIGGS LAW CORPORATION
99 EAST "C" STREET, SUITE 111
UPLAND, CA 91786
(909) 949-7115
CORY@BRIGGSLAWCORP.COM

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QUESTIONS PRESENTED

Whether there is a Religious Freedom Restoration Act violation when the Government denies Native Americans access to land necessary for religious rites by the threat of civil or criminal trespass prosecution.

PARTIES TO THE PROCEEDING

Petitioners

- La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee
- CAlifornians for Renewable Energy
- Alfredo Acosta Figueroa
- Phillip Smith
- Patricia Figueroa
- Ronald Van Fleet
- Catherine Ohrin-Greipp
- Rudy Martinez Macias
- Gilbert Leivas

Respondents

- United States Department of the Interior
- Ken Salazar, Secretary of the United States Department of the Interior (official capacity)
- United States Bureau of Land Management
- Robert Abbey, Director of the United States Bureau of Land Management (official capacity)
- Teri Raml, District Manager of the California Desert District of the United States Bureau of Land Management (official capacity)
- Rusty Lee, Field Manager of the Needles Field Office of the United States Bureau of Land Management (official capacity)

- United States Department of Energy
- Steven Chu, Secretary of the United States Department of Energy (official capacity)
- United States Treasury
- Timothy F. Geithner, Secretary of the United States Treasury (official capacity)
- Federal Financing Bank
- Solar Partners I, LLC
- Solar Partners II, LLC
- Solar Partners VII, LLC
- Brightsource Energy, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioners La Cuna de Aztlan Sacred Sites Protection Circle Advisory Committee and CAlifornians for Renewable Energy state that they are not-for-profit entities that have not issued shares to the public and have no affiliates, parent companies, or subsidiaries that have issued shares to the public. The remainder of Petitioners are individuals for which no disclosure is required.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF OPINIONS AND ORDERS IN THE CASE

The citation of the United States District Court's unpublished order is *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. et al. v. United States Dept. of the Interior et al.*, No. CV 11-00400 DMG (DTBx) (D. Cal. Aug. 16, 2013), and is reprinted at Appendix ("App.") 5a-31a.

The citation of the Ninth Circuit Court of Appeals' unpublished opinion is *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. et al. v. United States Dept. of the Interior et al.*, No. 13-56799 (9th Cir. May 19, 2015), and is reprinted at App.1a-4a.

The citation of the Ninth Circuit Court of Appeals' denial of Petitioners' petition for rehearing or rehearing en banc is *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. et al. v. United States Dept. of the Interior et al.*, No. 13-56799 (9th Cir. July 27, 2015), and is reprinted at App.32a-33a.

JURISDICTIONAL STATEMENT

The United States District Court for the Central District of California had undisputed jurisdiction of this matter under Sections 1331 (federal question) and 1346 (United States as defendant) of Title 28 of the United States Code. 28 U.S.C. § 1491(a). The decision of the United States District Court for the Central District of California was a final and appealable decision.

The United States Court of Appeals for the Ninth Circuit had jurisdiction to review the decision of the District Court under Section 1291 of Title 28 of the United States Code.

The United States Court of Appeals for the Ninth Circuit denied Petitioner's petition for rehearing on July 27, 2015, and the mandate was issued on August 5, 2015. This petition for writ of certiorari was timely filed and this Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.* They are too lengthy to be reproduced verbatim in this Petition, but are reprinted at App.34a-47a.

INTRODUCTION

The Religious Freedom Restoration Act ("RFRA") provides that the federal government may not substantially burden a person's exercise of religion unless the application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. This case focuses on whether there is a substantial burden on Petitioners' exercise of religion. There was no dispute in the courts below regarding Petitioners' factual allegations or whether they hold a sincere religious belief. Nonetheless, the district court entered summary judgment in favor of Respondents.

On appeal, the Ninth Circuit examined the issue of whether there is a RFRA violation where Native Americans are denied access to land necessary for religious rites by threat of civil or criminal trespass prosecution. The panel determined there was not and affirmed without modification the district court's order. (App.4a). As a result, the panel adopted an opinion that (1) conflicts with a decision of the United States Supreme Court, (2) conflicts with another Ninth Circuit opinion, and (3) presents a question of exceptional importance with far-reaching implications.

Pursuant to Ninth Circuit Rules 35-1 and 40-1, Petitioners filed a petition for panel rehearing and rehearing en banc of the Court's May 19, 2015 opinion and order. The petition was denied, and now Petitioners seek review by way of this petition to this United States Supreme Court. (App.32a-33a).

STATEMENT OF THE CASE

On November 23, 2011, La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee, CAlifornians for Renewable Energy, Alfredo Acosta Figueroa, Patricia Figueroa, Phillip Smith, Ronald Van Fleet, Catherine Ohrin-Greipp, Rudy Martinez Macias,[1] and Gilbert Leivas (collectively "Petitioners") filed the operative Third Amended Complaint against the United States Department of Interior, Ken Salazar, United States Bureau of Land Management, Robert Abbey, Teri Raml, Rusty Lee, United Stated Department of Energy, Steven Chu, United States Treasury, Timothy F. Geitner, and Federal Financing Bank, as well as Solar Partners I, LLC, Solar Partners II, LLC, Solar Partners VIII, LLC, and BrightSource Energy, Inc. (collectively "Respondents"). Generally speaking, this lawsuit challenges the federal government's actions in connection with a major solar-electricity generation project taking place on federal public land: the Ivanpah Solar Electric Generating System Project and Associated Amendment to the California Desert Conservation Plan ("Ivanpah Project"). (App.68a-69a). The Project is designed to generate 370 megawatts of electricity on approximately 3,471 acres of land. (App.69a).

The Ivanpah Project is located in San Bernardino County in a region labeled by Congress as the California Desert Conservation Area ("CDCA"). (App.69a). The region bears this name because it "contains historical,

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[1] Rudy Martinez Macias is now deceased.

scenic, archeological, environmental, biological, cultural, scientific, educational, recreational, and economic resources that are uniquely located adjacent to an area of large population." 43 U.S.C. § 1781(a)(1) (describing Congressional finding for establishment of CDCA). The Ivanpah Project has significant portions of the Salt Song Trails running through it. (App.53a, 58a, 69a-70a). The Salt Song Trails have significant historical, cultural, and religious value to several Indian Tribes. (App.9a, 58a). Petitioners Figueroa, Smith, and Van Fleet are Native Americans. (App.48a, 52a, 56a, 58a). At least some Petitioners regularly visit the Project site. (App.49a, 52a, 58a).

In the district court, Petitioners and Respondents filed cross-motions for summary judgement. The district court granted summary judgment in favor of Respondents and denied Petitioners' motion for summary judgment. (App.5a-6a). Petitioners pursued their RFRA claim on appeal. The appellate panel affirmed the district court's ruling, finding there was no substantial burden on Petitioners' exercise of religion under the RFRA.

Petitioners sought a panel rehearing or rehearing en banc because this case presents a situation of far-reaching importance. Respondents' conduct crosses the line from minimal interference with religious rites and imperfect access to religious sites, into the realm of coercion by threat of prosecution and denial of federal benefits. Further, the Court's decision is contrary to standing Supreme Court and Ninth Circuit precedent. Despite the compelling reasons for review, the Ninth Circuit denied Petitioners' petition

for panel rehearing. (App.32a-33a). This petition for writ of certiorari follows.

REASONS FOR ISSUING THE WRIT OF CERTIORARI

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW

The Ninth Circuit's decision failed to respect the foundational principles of RFRA, and in doing so placed the monetary interests of the government above the religious beliefs and practices of many Native Americans. The purpose of RFRA is to prevent the federal government from substantially burdening the free exercise of religion. 42 U.S.C. § 2000bb-1. The Ninth Circuit's decision misunderstands the importance of the sacred sites within the Ivanpah Project, and as a result it hampers Petitioners' right to exercise their religion free from substantial government interference.

This High Court has illustrated a growing trend and a strong willingness to apply RFRA broadly to protect religious practitioners. *See Gonzalez v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006) ("*O Centro Espirita*"); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("*Hobby Lobby*"); and, most recently, *Holt v. Hobbs,* 135 S. Ct. 853 (2015). The trio of recent cases issued by this Court broadly granting religious challenges under RFRA illustrates the importance of the question raised here.

It makes no difference whether the religious exercise at issue is refraining from shaving one's beard (*Holt*), refraining from paying directly for contraceptive coverage (*Hobby Lobby*), or visiting a sacred site, as in this case. The relevant and dispositive inquiries are whether the religious exercise is "sincere," and whether the believer "will face serious disciplinary action" unless he forgoes the exercise. *Holt, supra*, 135 S. Ct. at 862. When the government "puts [the plaintiff] to this choice, it substantially burdens his religious exercise." *Id.*

There is no dispute that Petitioners' beliefs are sincerely held, satisfying the first prong of their RFRA claim. The key issue is whether Petitioners' exercise of religion has been substantially burdened. Petitioners produced declarations illustrating their use of some of the land within the Ivanpah Project's site for religious rites. (App.49a-50a, 52a-54a, 57a-59a). Petitioners are being coerced to act contrary to their religious beliefs because, if they did visit the sacred sites, Petitioners would face criminal charges.

Despite these facts, the Ninth Circuit determined that Petitioners were not forced "to act contrary to their religious beliefs by the threat of civil or criminal sanctions." (App.3a-4a). This conclusion is erroneous and opens the door for courts to make judgment calls on the importance of portions of religious practices.

It is not for Respondents nor the Judiciary to make a value judgment as to the significance of Petitioners' religious practices. *See Thomas v. Review Bd. of Ind. Empl. Sec. Div.*, 450 U.S. 707, 715 (1981) (warning courts not to "undertake to dissect religious beliefs" and determining it is not within judicial

function or competence to inquire into whether parties correctly perceive commands of their faith). The Ninth Circuit's attempt to do so was improper and warrants a second look.

II. THE NINTH CIRCUIT'S ORDER CONFLICTS WITH THIS COURT'S HOLDING IN *GONZALEZ V. O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL*

The Ninth Circuit did not state or apply the relevant legal standard articulated in *O Centro Espirita*, which held that where a government action forces a party to suffer criminal charges for exercising his or her religion, there is a substantial burden on the exercise of religion within the meaning of RFRA. Instead, the panel misapplied the legal standard articulated in the Ninth Circuit in *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en banc) ("*Navajo Nation*"), discussed in Section IV, below.

In *O Centro Espirita,* this Court considered RFRA in a case where a "religious sect in the Amazon Rainforest receives communion by drinking a sacramental tea, brewed from plants unique to that region, that contains a hallucinogen regulated under the Controlled Substances Act by the Federal Government." *O Centro Espirita, supra*, 546 U.S. at 423. In that case, the religion required the sacramental tea and the burden was the threat of a criminal sentence for possession of a controlled substance. *Id.* at 425.

O Centro Espirita controls here because Petitioners' choice to visit the site of the Ivanpah Project to perform religious rites is no different than the choice of the members of a religious sect to drink sacramental tea containing a hallucinogen. Both acts

are compelled by the respective individuals' religious beliefs.[2] If the individuals in *O Centro Espirita* consumed the tea, the burden was the threat of a criminal sentence for possession under the Controlled Substances Act. *Id.* at 425.

Likewise, if Petitioners go to the sacred sites on the Ivanpah Project site to perform their religious rites, Petitioners face the burden of the threat of criminal trespass charges. (App.50a, 55a, 62a). No case holds or even suggests that the threat of criminal prosecution for possession of a controlled substance necessary for a religious practice is different from the threat of criminal prosecution for trespassing on property necessary for a religious practice. Each threat qualifies under RFRA. Consequently, the Ninth Circuit erred when it failed to consider and apply *O Centro Espirita* to the instant case.

III. THE NINTH CIRCUIT DID NOT CONSIDER THE APPEAL IN LIGHT OF THE THIS COURT'S RECENT *HOLT V. HOBBS* DECISION

The Ninth Circuit's decision conflicts with this Court's recent decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015). There this Court held that the government placed a substantial burden on Holt's exercise of his religion when it required him to keep his beard under 1/4-inch long but his religious practices required him not to shave.[3] The Court reasoned, relying upon the

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[2] Even though Petitioners include two non-profit corporations, technically it is their individual members whose religious freedoms are being violated under RFRA.

[3] *Holt* was interpreting RLUIPA. RFRA's initial definition of "exercise of religion" referred to the First Amendment. However,

Hobby Lobby decision, that this placed a substantial burden on Holt because if he continued to grow his beard, he would face disciplinary action. This Court also held that the district court erred in suggesting that Holt's other religious privileges demonstrated a reasonable accommodation of Holt's beliefs. *Id.* at 857.

Like the plaintiff in *Holt*, Petitioners will face adverse action in the form of criminal charges for trespass if they exercise their religious beliefs and attempt to access the Ivanpah Project site. (App.50a, 55a, 62a). It is true that the Salt Song Trails spread across wide expanses of land, and include specific sacred sites that are currently closed off to them within the Ivanpah Project and some that are located elsewhere. But as this Court reasoned in *Holt*, it is of no consequence that Petitioners also exercise religious rites in other areas. *Holt, supra,* 135 S.Ct. at 857 (holding "District Court erred by concluding that the grooming policy did not substantially burden petitioner's religious exercise because he could practice his religion in other ways"). The important fact is that Petitioners exercise their religious practices within the Ivanpah Project's site and are unable to do so now without suffering criminal charges.

Had the Ninth Circuit applied this High Court's guidance in *Holt*, its decision would likely have been different. The Ninth Circuit's order directly conflicts

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with the passage of RLUIPA, RFRA now applies RLUIPA's definition of exercise of religion. *Hobby Lobby, supra,*134 S. Ct. at 2761-2762. The same standard is used to evaluate RFRA and RLUIPA claims. *O Centro Espirita*, 546 U.S. at 436; *Holt,* 135 S.Ct. at 860.

with the recent precedent in *Holt* and requires a review by this Court.

IV. THE NINTH CIRCUIT'S RELIANCE ON (AND MISAPPLICATION OF) *NAVAJO NATION V. U.S. FOREST SERVICE* CONFLICTS WITH THIS COURT'S PRECEDENT

The Ninth Circuit, citing to its *Navajo Nation* decision, found that there was insufficient evidence to support Petitioners' claim that the loss of access to the Ivanpah Project site imposes a substantial burden. (App.2a-4a). However, this is an incorrect conclusion for two reasons: first, it applies a Ninth Circuit case that conflicts with controlling precedent from this Court; and second, it misapplies the holding in *Navajo Nation.*

In that case, the Ninth Circuit found that the use of recycled wastewater on a ski area that covers one percent of the mountains did not force the plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit or coerce the plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions. *Navajo Nation, supra*, 535 F.3d at 1068. The decision came after the district court found that there would be no resources with religious significance or religious ceremonies that would be physically affected and that the "Plaintiffs continue to have virtually unlimited access to the mountain, including the ski area, for religious and cultural purposes." *Id.* at 1063 (emphasis added). The decision in *Navajo Nation* conflicts with this Court's decision in *Holt, supra,* wherein it stated that it is of no consequence that Holt "could practice his religion in other ways." *Holt, supra,* 135 S.Ct. at 857. The determinative factor is whether the governmental

action interfered with his exercise of religion; it is of no matter that he also practices his religion in other ways, as well. It is in this respect that *Navajo Nation* conflicts with this Court's precedent.

Furthermore, the factual basis of *Navajo Nation* is distinguishable from the case at bar. There the federal agency's Memorandum of Agreement, among other things, continued to allow the tribes access to the mountain for cultural and religious reasons. *Id.* at 1066. The Ninth Circuit determined that there was no substantial burden because the federal agency guaranteed that religious practitioners would still have access for religious purposes. *Id.* at 1070. Altogether, in *Navajo Nation* there was no evidence of loss of access and, consequently, no allegation that religious practitioners were forced to decide between practicing their religion and civil or criminal sanctions for trespass.

In contrast, Petitioners have been denied the right to access the sacred sites within the Ivanpah Project entirely. (App.50a, 55a, 62a). Any attempt to access the sacred sites is met with the threat of criminal action. *Id.* Even the federal government did not dispute below that the site is closed to the public. (App.91a-92a, 97a, 100a). There is ample evidence in the record supporting Petitioners' contentions. (App.50a, 55a, 62a). Specifically, Petitioner Van Fleet provided a declaration that supports the following fact:

> The Ivanpah Project is in a sacred place. Plaintiff Van Fleet's ancestors have come to this area for centuries. Not only does he visit the site for his own personal religious fulfillment, but, as a triable elder, he feels an

> obligation to protect certain sacred locations. Depriving him of access to the site not only deprives him of his ability to perform certain rituals that are important to his own spiritual journey, but it prevents him from being able to pray for the land, animals and spirits at the location the way [his] beliefs require of him. The rituals that are performed at the site cannot be meaningfully replicated in accordance with his traditional and religious values at any other location.

(App.49a). Meanwhile, even the federal government has recognized that Native Americans use the land in the area of the Ivanpah Project for religious purposes. For example, the CDCA Plan states:

> Prominent features of the CDCA landscape, wildlife species, prehistoric and historic sites of occupation, worship, and domestic activities, and many plant and mineral resources are of traditional cultural value in the lives of the Desert's Native people. In some cases these resources have a religious value. Specific sites or regions may be important because of their role in ritual or the mythic origin of an ethnic group. These values will be considered in all CDCA land-use and management decisions.

(App.107a-108a) (emphasis added). Even if Respondents dispute the specific placement of the sacred sites within the Ivanpah Project, that is a dispute of a material fact mandating a reversal of the summary judgment and a hearing on the merits.

CONCLUSION

For these reasons, Petitioners respectfully ask this Court to grant their petition for certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

CORY J. BRIGGS
COUNSEL FOR PETITIONERS
BRIGGS LAW CORPORATION
99 EAST "C" STREET, SUITE 111
UPLAND, CA 91786
(909) 949-7115
CORY@BRIGGSLAWCORP.COM

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