Judicial Relief Isn't Enough: How Federal Protection of Native American Cultural Landscapes Limit Religious Freedoms

Jennifer Keute*

"Political freedom cannot exist in any land where religion controls the state, and religious freedom cannot exist in any land where the state controls religion." — Sen. Sam J. Ervin Jr.

* J.D. University of California – Irvine School of Law, 2025, jkeute@lawnet.uci.edu.

INTRODUCTION

Speaking to the Senate about his distaste for Senator Dirksen's amendment to allow prayer in public schools, Senator Sam Ervin articulated how government control of religion is an affront to the Establishment Clause of the Constitution.[1] A

1. *See generally* Karl E. Campbell, *Senator Sam Ervin and School Prayer: Faith, Politics, and the Constitution*, 45 J. CHURCH & ST. 443 (2003). While Senator Ervin is often remembered as a champion of religious freedom, it is important to note he held particularly problematic views in other respects, such as forced integration in schools, where he organized resistance to the *Brown* decision. *See id.* at 455

cornerstone of the Bill of Rights, the Religion Clauses[2] of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." While often in contention with each other, the First Amendment's Religion Clauses deem religious beliefs and religious expression too valuable to be either prohibited or endorsed by the State.[3]

Congress has found this constitutional protection of religion vital, opting to broaden it by enacting two statutes.[4] The first is the Religious Freedom Restoration Act of 1993 (RFRA), where the federal government may not "substantially burden" a person's sincere exercise of religion unless that burden is "in furtherance of a compelling governmental interest" by "the least restrictive means."[5] The second, the Religious Land Use and Institutionalized Persons Act (RLUIPA), concerns two areas of government activity in which the state controls access to religious practice: (1) land-use regulation and (2) religious exercise by institutionalized persons.[6] RLUIPA acts as a sister statute to RFRA, also providing that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the burden furthers "a compelling governmental interest" by "the least restrictive means."[7] Under RLUIPA, government actions, such as allowing prayer in prison or allowing prisoners to visit a religious space, do not amount to laws "respecting" religion under the Establishment Clause because access to the religious practice is wholly controlled by the government. Both statutes provide protection for religious liberty beyond the Constitution.

Despite these actions to broaden the protection of religious freedom for all Americans, these rights are significantly more narrow for Native Americans.[8] Tribes have little control over their religious spaces without statutory recourse, as most tribal lands, including those with spiritual significance, were ceded or taken by the United States government and now reside in the public domain of federally acquired lands.[9] The First Amendment alone does not create any judicially enforceable individual rights for Native Americans to use these federal lands for religious

("Ervin never completely resolved all the contradictions of his constitutional ideology, the most troubling of which was his simultaneous defense of civil liberties and opposition to civil rights.").

2. The term "Religion Clauses" is a term Congress and the Supreme Court use to refer to the Establishment Clause and the Free Exercise Clause. *See* Amdt1.2.1 Overview of the Religion Clauses, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267 [web.archive.org/web/20241205175401/https://constitution.congress.gov/browse/essay/amdt1-2-1/ALDE_00013267/] (last visited Nov. 26, 2024).

3. *See* Lee v. Weisman, 505 U.S. 577, 589 (1992).

4. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014).

5. 42 U.S.C. § 2000bb-1.

6. Holt v. Hobbs, 574 U.S. 352, 357 (2015).

7. 42 U.S.C. § 2000cc-1(a)(1)–(2)

8. In this paper, I have chosen to use the term Native Americans to refer to multiple tribes of Indigenous peoples of the Americas and specific tribal names where possible. The term "Indian" is used in some quotes from various judicial opinions, names of government organizations, and historical actions of Congress. *See The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, SMITHSONIAN NATIONAL MUSEUM OF THE AMERICAN INDIAN, https://americanindian.si.edu/nk360/informational/impact-words-tips [perma.cc/FFE2-9PGU] (last visited Nov. 18. 2024).

9. *See* Ann M. Hooker, *American Indian Sacred Sites on Federal Public Lands: Resolving Conflicts Between Religious Use and Multiple Use at El Malpais National Monument*, 19 AM. INDIAN L. REV. 133, 136 (1994).

purposes.[10] Acts of Congress, which are meant to grant broad protection beyond the bounds of the Constitution, also provide virtually no protection. RLUIPA does not explicitly apply to tribes.[11] Moreover, claims brought under RFRA by Native Americans rarely fall into the narrow "substantial burden" framework developed by the courts.[12]

Native American restrictions on religious freedom on their own lands came to a head in a recent case in the Ninth Circuit. In *Apache Stronghold v. United States*,[13] the Court reconsidered what constitutes a "substantial burden" on Native Americans' religious freedom under RFRA.[14] Among other things, the Plaintiffs in this case, a non-profit organization called Apache Stronghold, contend that Congress wrongfully allowed the U.S. Secretary of Agriculture to convey a plot of federal land in Arizona known as Oak Flat to a mining company named Resolution Copper.[15] A portion of this area is sacred to the Apache American Indians, who call it Chi'chil Bildagoteel.[16] Lying on one of the largest undeveloped copper deposits in the world, Resolution Copper aims to profoundly and permanently alter the landscape of Oak Flat to extract the minerals beneath. Plaintiffs allege that the mine will completely desecrate ceremonial grounds in violation of the Apache's religious liberties.[17] Specifically, in their complaint, they allege that the mining style Resolution Copper aims to employ will "destroy the site forever-—swallowing it in a nearly two-mile-wide, 1,100-foot-deep crater,"[18] deep enough that New York City's Chrysler Building could comfortably fit inside it and as wide as the National Mall is long.

Apache Stronghold's claim centers on stopping the sale of the land to Resolution Copper and was initially denied in the district court and the Ninth Circuit. However, the Ninth Circuit vacated this decision and opted to rehear the case en banc.[19] Upon its en banc rehearing, the Ninth Circuit expanded its

---

10. *See, e.g.*, Badoni v. Higginson, 638 F.2d 172, 178 (10th Cir. 1980) (holding that the First Amendment did not give Navajo Indians the ability to challenge the agency decision to grant tourist permits to religious site on federal lands); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (holding that the First Amendment granted no rights to Native Americans seeking an injunction to prevent the building of a road through a religious site on federal land and did not prevent plaintiffs from practicing their religion).

11. 42 U.S.C. § 2000cc(a)(2). RLUIPA only applies to substantial burdens that (a) are imposed by programs that receive federal funds; (b) affect interstate commerce, foreign commerce, or commerce with the Indian tribes; or (c) are "imposed in the implementation of a land use regulation . . . under which a government makes . . . individualized assessments of the proposed uses for the property involved." *Id.*

12. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008) ("Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions . . . .").

13. Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022), *and reh'g en banc*, 95 F.4th 608 (9th Cir. 2024).

14. *Id.* at 766.

15. *Id.*

16. *Id.* at 748.

17. *Id.* at 604.

18. Dana Hedgpeth, *This Land Is Sacred to the Apache, and They Are Fighting to Save It*, WASH. POST (Apr. 12, 2021), https://www.washingtonpost.com/history/2021/04/12/oak-flat-apache-sacred-land [perma.cc/UGS8-ER6Y].

19. Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022).

understanding of a substantial burden but still refused to grant relief.[20] This case is unique because, while other cases have unsuccessfully argued a substantial burden from lack of control or improper preservation of a religious site, none have implicated the complete and permanent destruction of such a site as in *Apache Stronghold*. The case was appealed to the Supreme Court, who recently refused to protect Oak Flat by a slim majority.[21] This was a mistake. A reversal by the Supreme Court in this case would have been monumental, as Native Americans who practice land-based religions and depend on the federal government for access to federal land require inclusion in RFRA's coverage in such circumstances. Others should bring a similar challenge to the courts in the future to fix this application of law.

However, inclusion under RFRA alone would still not resolve the issue. This paper examines how the Supreme Court could resolve these issues and how federal laws should be amended to afford Native Americans proper religious protections. Using *Apache Stronghold v. The United States* as an illustration, I first argue that the Ninth Circuit and other courts have incorrectly applied the substantial burden test required under RFRA to Native American religious sites, and that those sites' inclusion under RFRA is inherent. Furthermore, I argue that Native Americans should be eligible for relief under RLUIPA because they are "unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion."[22] Native Americans' dependence on the government is akin to institutionalized persons and land regulations that would circumvent the First Amendment's exclusion of Native Americans from federal lands for religious purposes.[23]

Finally, this paper further considers how inclusion under RFRA alone may not be enough to resolve this issue. I analyze how merely granting federal protection to religious lands does not guarantee that Native Americans will be able to freely practice their religion in these spaces because their access is wholly controlled by the federal government, which can be limited or withdrawn at any time. Put another way, even if Native Americans can bring successful RFRA claims to protect sites, they can still be barred from practicing their religion on federal lands when relying on the First Amendment alone because the government's grant of access for this purpose is a "law respecting an establishment of religion." For Apache Stronghold, this means that even if granted protection, Oak Flat would still be federal land, which is "by definition, land that belongs to everyone,"[24] and the federal government would retain exclusive control over this religious site currently in Tonto National Forest.

---

20. Apache Stronghold v. United States, 95 F.4th 608, 634 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

21. Ryan Colby, *BREAKING: Federal Court Greenlights Destruction of Oak Flat*, BECKET (Mar. 1, 2024), https://www.becketlaw.org/media/breaking-federal-court-greenlights-destruction-of-oak-flat [perma.cc/F47D-MSDA].

22. 42 U.S.C. § 2000bb-1.

23. Lynch v. Donnelly, 465 U.S. 668, 668 (1984) ("The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Cutter v. Wilkinson, 544 U.S. 709, 710 (2005); *Apache Stronghold*, 38 F.4th at 776 (Berzon, J., dissenting) ("In these three [RLUIPA] contexts, the government may exercise its sovereign power more directly than by using carrots and sticks. By simply preventing access to religious locations and resources, the government may directly prevent religious exercise.").

24. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1064 (9th Cir. 2008).

Part I of this paper outlines the legal context of federal land ownership of Native American religious sites while highlighting the problems Native Americans have faced in the past in practicing their religion on federal lands. Part II details the posture of *Apache Stronghold v. The United States*. Part III summarizes the Ninth Circuit's rehearing of *Apache Stronghold* and discusses the inherent failings in the Court's decision. Part IV describes precisely how Native Americans are inherently burdened in a way that practitioners seeking to exercise on private land are not. The government is in control of Native lands through divestiture. Federal protection of land is absolute but can be revoked at any time, and Native people are dependent on the goodwill of the government for access to their places of worship. As a result, government action is needed to accommodate their religious practice. Part V provides a recommendation for future action. The Supreme Court should have granted certiorari and held that Tribes that depend on the federal government for access to federal land are not excluded from RFRA's or RLUIPA's coverage, as this situation is similar to land use regulation or prison contexts protected by RLUIPA, where the government retains total control over the practice of religions.

I. LIMITATIONS OF CONSTITUTIONAL AND STATUTORY PROTECTION OF NATIVE AMERICAN RELIGIOUS SITES

This section reviews the history of Native American religious site protection under Acts of Congress and the First Amendment prior to *Apache Stronghold*. This issue was initially addressed by the Supreme Court in *Lyng v. Nw. Indian Cemetery Protective Association*, where the Court provided no relief to Native American groups seeking protection of their religious sites based on the First Amendment alone.[25] Congress later broadened the coverage of the First Amendment's protections of religious freedom, but Native American tribes still find protecting their religious sites owned by the government to be an uphill battle. The Ninth Circuit's decision in *Apache Stronghold* constitutes a turning point in this struggle.

A. First Amendment Protection and the American Indian Religious Freedom Act

Litigants have attempted to protect Native American religious sites from federal destruction using the Free Exercise Clause of the First Amendment. This clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[26] A series of cases brought in circuit courts in the 1980s consistently were unsuccessful in using this clause to challenge government actions that harmed sacred sites.[27] These cases sought to identify a cause of action through the American Indian Religious Freedom Act of 1978 (AIRFA).[28] Committee reports prepared by

25. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).

26. U.S. CONST. amend. I.

27. *See, e.g.*, Wilson v. Block, 708 F.2d 735, 746 (D.C. Cir. 1983) (holding that AIRFA was not intended to overrule agency action and thus denying to rule on the Establishment Clause issue); Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159 (6th Cir. 1980) (holding that flooding of sacred Cherokee lands by Tellico Dam did not violate the Free Exercise Clause as the lands were not shown to be "central" or "indispensable" to Cherokee religious observances), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 638 F.2d 172 (10th Cir. 1980) (holding the creation of Lake Powell through a dam project which flooded the Rainbow Bridge National Monument and sacred Navajo cave was outweighed by government compelling interest in maintaining the level of Lake Powell), *cert. denied*, 452 U.S. 954 (1981).

28. 42 U.S.C. § 1996.

the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs in passing the Act indicate the purpose of AIRFA is "to ensure that the policies and procedures of various federal agencies, as they may impact upon the exercise of traditional Indian religious practices, are brought into compliance with the constitutional injunction that Congress shall make no laws abridging the free exercise of religion."[29] While AIRFA requires agencies ordinarily to consult Native leaders before approving a project, it does not declare the protection of Native religions to be an overriding federal policy, or grant Native religious practitioners a veto on agency action.[30]

The Supreme Court first considered whether the Free Exercise Clause of the First Amendment required the protection of a Native American religious site in *Lyng*.[31] In *Lyng*, the United States Forest Service sought to build six miles of paved road through the Chimney Rock section of the Six Rivers National Forest in Northern California.[32] The project's draft environmental impact statement spurred the Forest Service to commission a study of the American Indian cultural and religious sites in the area.[33] The resulting report recommended that the road not be completed because the entire area was "significant as an integral and indispensable part of Indian religious conceptualization and practice" of the Yurok, Karok, and Tolowa Indians.[34] The report further stated that "successful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[35] In preparing for a final environmental impact statement for the project, the Forest Service did not adopt the recommendation of the study and instead merely selected a route that avoided archaeological sites and was as far removed as possible from contemporary religious sites.[36] As a result, a Native organization, individuals, nature organizations, individual members of those organizations, and the State of California, challenged the project in federal court, claiming, among other things, that the Forest Service's decisions placed a heavy enough burden on Native groups that, unless the government could demonstrate a compelling need, the project violated the Free Exercise Clause.[37]

The Supreme Court rejected this claim, basing much of its decision on the holding in *Bowen v. Roy*.[38] In *Bowen*, the Court had considered whether a statute requiring the states to use social security numbers in administering certain welfare programs amounted to compulsion of conduct that was objectionable for religious reasons and, as a result, a violation of the Free Exercise Clause.[39] Roy, a Native American descended from the Abenaki Tribe, claimed that the use of a social

29. H.R. REP. NO. 95-1308, at 2–3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 1262.
30. *Wilson*, 708 F.2d at 746.
31. Lyng v Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988).
32. *Id.* at 442.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 443. The Forest Service rejected alternative routes which avoid the area altogether because "they would have required the acquisition of private land, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.*
37. *Id.* at 447.
38. Bowen v. Roy, 476 U.S. 693 (1986).
39. *Id.* at 695–96.

security number as an identifier would "'rob the spirit' of his daughter and prevent her from attaining greater spiritual power."[40] The Court rejected Roy's claims, asserting that while the Free Exercise Clause grants individual protection from some forms of government coercion in religious exercise, "it does not afford an individual a right to dictate the conduct of the Government's internal procedures."[41]

The Court found no reason to distinguish *Lyng* from the situation in *Bowen*. In each case, the government's actions were to interfere with a private person's ability to pursue spiritual fulfillment. However, neither action coerced the parties into violating their religious beliefs or penalized religious activity by denying a person an equal share of the rights, benefits, and privileges enjoyed by other citizens.[42] The Court opined, "[h]owever much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[43]

The respondents in *Lyng* also suggested that AIRFA authorized the injunction against the completion of the road, placing the interest of Native American religion at the forefront.[44] However, the Court in *Lyng* held that AIRFA does not create a cause of action or any judicially enforceable individual rights.[45]

In sum, the Court found the parties were not entitled to relief through AIRFA or under the First Amendment.[46] At the time, there were no additional avenues for relief available in *Lyng*. Justifying their decision on the reach of the First Amendment, the Court held that "[e]ven assuming that the Government's actions here will *virtually* destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding respondents' legal claims."[47] The difference between *Lyng* and *Apache Stronghold* could not be more striking. In *Apache Stronghold*, the government's actions will *actually* and *permanently* destroy the tribe's ability to practice their religion, making this case a new test on the bounds of constitutional protection in this area.

B. Religious Freedom Restoration Act of 1993

Five years after the Court's ruling in *Lyng*, Congress enacted RFRA.[48] RFRA creates a claim for persons "whose exercise of religion is substantially burdened by government action" and applies "even if the burden results from a rule of general applicability."[49] Under RFRA, if Congress has passed a religiously neutral law of general applicability that substantially burdens the exercise of religion, the government must have a compelling interest and use the least restrictive means to further that interest .[50]

---

40. *Id.* at 696.
41. *Id.* at 700.
42. *Lyng*, 485 U.S. at 449.
43. *Id.* at 452.
44. *Id.* at 455.
45. *Id.*
46. *Id.*
47. *Id.* at 440.
48. 42 U.S.C. § 2000bb-1.
49. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (citing 42 U.S.C. § 2000bb-1).
50. *Id.*

Congress passed RFRA specifically to reject the Supreme Court's analysis in *Employment Division v. Smith*.[51] In *Smith*, the Court held that the Free Exercise Clause cannot excuse a person from a neutral law of general applicability, which is not subject to the compelling interest test.[52] The claimants in *Smith* were denied unemployment benefits after being terminated from their jobs for ingesting sacramental peyote as part of a religious ceremony.[53] In enacting RFRA, Congress agreed with claimants that the Court must analyze their benefit denial under the compelling interest standard. This standard specifically mandates the government prove that the law is necessary to accomplish a compelling state interest using the least restrictive means.[54] Congress's goal in enacting RFRA was to provide very broad protection for religious liberty.[55]

In enacting RFRA, Congress essentially reestablished the method of analyzing free exercise claims that had been used in prior cases. Prior decisions used this balancing test by considering whether the challenged action imposed a substantial burden on the practice of religion, and, when it did, whether it was needed to serve a compelling government interest. Applying this test, for example, the Court held in *Sherbert*, that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits.[56] Additionally, in *Yoder*, the Court found that requiring Amish children to comply with a state law demanding that they remain in school until the age of sixteen substantially burdened their religion, which required them to focus on uniquely Amish values and beliefs during their formative adolescent years.[57] The substantial burden test employed by these foundational cases was restored when RFRA was enacted and the Court's holding in *Smith* was thus rejected by Congress. RFRA did not merely restore prior precedent, and challenges and amendments to the Act quickly followed.

C. Beyond the First Amendment: Congress Alters RFRA by Passing the Religious Land Use and Institutionalized Persons Act of 2000

When RFRA was enacted, it applied to both the federal government and the states. Applied to federal agencies, RFRA is based on Congress's enumerated power that supports an agency's particular work. However, in regulating the states, Congress relied on its power under Section 5 of the Fourteenth Amendment to enforce the First Amendment.[58] The Court held that Congress overstepped its Section 5 authority in *City of Boerne* because the test under RFRA "far exceed[s] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[59]

In response, Congress passed RLUIPA in 2000.[60] Relying on Congress's Commerce and Spending Clause powers, RLUIPA imposes the same standard as

51. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990).
52. *Id.*
53. *Id.* at 874.
54. Alex McFarlin, *Religious Freedom (for Most) Restoration Act: A Critical Review of the Ninth Circuit's Analysis in Apache Stronghold*, 2023 UTAH L. REV. 1163, 1169–70 (2023).
55. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014).
56. Sherbert v. Verner, 374 U.S. 398, 408 (1963).
57. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).
58. City of Boerne v. Flores, 521 U.S. 507, 516 (1997).
59. *Id.* at 534.
60. 42 U.S.C. § 2000cc *et seq*.

RFRA to a limited category of governmental actions: a general compelling interest by the least restrictive means test. In essence, RLUIPA provides freedom of religious exercise in contexts of government control that inherently interferes with religious practice. In such contexts, an individual cannot freely practice their religion without the government affirmatively acting to lift its coercive power through a religious accommodation.[61] Two of these contexts are noted in the Act. First, RLUIPA prohibits the imposition of burdens on prisoners' ability to worship.[62] Second, it prevents the government from implementing a land-use regulation in a way that burdens an individual, religious assembly, or institution.[63] RLUIPA creates a presumption that the government must not remain apathetic toward religion but must instead affirmatively act to accommodate prisoners and religious institutions or groups so that they can practice their religion.[64] The Supreme Court has ruled that a government accommodation in this circumstance does not violate the Establishment Clause because the actions have a legitimate purpose of "alleviat[ing] exceptional government-created burdens on private religious exercise."[65] RLUIPA thus further broadens the protections of individual liberties far beyond what they had been in previous years.

D. Defining a Substantial Burden to Religion and the Compelling Interest-Least Restrictive Means Test

In enacting RLUIPA, Congress altered RFRA's framework beyond the bounds of the Constitution that, in previous years, limited the courts. RLUIPA amended RFRA's "exercise of religion" definition to remove reference to the First Amendment rights and instead include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[66] Moreover, Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."[67]

The Supreme Court most recently interpreted the substantial burden and compelling interest test of RFRA as amended in two decisions: *Burwell v. Hobby Lobby Stores Inc.*,[68] and *Holt v. Hobbs*.[69] In *Hobby Lobby*, the Court found that the Affordable Care Act's requirement that businesses provide certain contraceptive

61. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1333 (2021).

62. 42 U.S.C. § 2000cc-1.

63. 42 U.S.C. § 2000cc ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (a) is in furtherance of a compelling governmental interest; and (b) is the least restrictive means of furthering that compelling governmental interest.").

64. 42 U.S.C. § 2000cc-1(a) (providing that "[n]o government shall impose a substantial burden on the religious exercise" of an institutionalized person unless the government demonstrates that the burden "is the least restrictive means of furthering [a] compelling governmental interest").

65. Cutter v. Wilkinson, 544 U.S. 709, 710 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore *dependent* on the government's permission and accommodation for exercise of their religion.") (emphasis added).

66. 42 U.S.C. § 2000cc-5(7)(A).

67. 42 U.S.C. § 2000cc-3(g).

68. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

69. Holt v. Hobbs, 574 U.S. 352 (2015).

methods as a part of employee healthcare benefits or pay large fees substantially burdened religious beliefs.[70] The Court explicitly noted that determining the reasonableness of a religious belief asserted under RFRA is not required of courts assessing such claims.[71]

Moving onto the second prong of RFRA's inquiry, the Court in *Hobby Lobby* found that the government's broad interests in "public health" and "gender equality" were not focused enough to demonstrate a compelling interest.[72] The Court has previously emphasized that RFRA requires the government to show the compelling interest test is satisfied to the specific claimant whose sincere exercise of religion is being substantially burdened.[73] Thus, in *Hobby Lobby*, the compelling interest in society as a whole was not specific enough of an interest to overcome the particular burden placed on the claimants. The Court further opined that "[t]he least-restrictive-means standard is exceptionally demanding" and was also not met in this case because the least restrictive means would be for the government to assume the cost of providing the contraceptives at issue to any woman unable to obtain them.[74] In their analysis, the Court did not limit its analysis to the holdings in *Sherbert* and *Yoder*.[75]

In *Hobbs*, a prisoner brought action under RLUIPA's identical substantial burden test for the denial of religious accommodation by the Arkansas Department of Corrections and other prison officials.[76] The petitioner was an inmate who wished to grow his beard in accordance with his religious beliefs, and this was in conflict with the correctional facility's prohibition on prisoners growing beards.[77] Citing *Hobby Lobby*, the Court emphasized that the challenging party bears the initial burden in proving that the religious exercise is grounded in a sincerely held religious belief, which was then substantially burdened, not whether the claimant is able to engage in other forms of religious exercise.[78] The Court held this action substantially burdened the claimant, and the correctional facility's safety concerns in preventing the concealment of contraband did not constitute a compelling interest by the least restrictive means.[79] The correctional facility failed to establish it could not satisfy its security concerns by simply searching an inmate's beard and did not satisfy the exceptionally demanding least-restrictive-means standard. The Court concluded that "if a less restrictive means is available for the Government to achieve its goals, the Government must use it."[80]

In sum, under RFRA and RLUIPA, a substantial burden is readily established where claimants have a sincerely held religious belief that the government impedes.

---

70. *Hobby Lobby*, 573 U.S. at 726.

71. *Id.* at 724; *see, e.g.*, Emp. Div., Dept. of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine . . . the plausibility of a religious claim.").

72. *Hobby Lobby*, 573 U.S. at 727.

73. *Id.* at 727; Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006).

74. *Hobby Lobby*, 573 U.S. at 728.

75. *See* Sherbert v. Verner, 374 U.S. 398, 399 (1963); *see also* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

76. Holt v. Hobbs, 574 U.S. 352 (2015).

77. *Id.*

78. *Id.* at 360–61.

79. *Id.* at 365.

80. United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 815 (2000).

When a substantial burden is established, few claims survive the strict second prong of the test, which requires the government interest to be specifically compelling to the case at bar and the least restrictive possible. Despite congressional intent and courts' strict applications, strains on Native American religious practice rarely qualify as a substantial burden requiring the government to apply the least restrictive means.

E. Application of Broad Religious Freedom Protections to Native American Land-Based Religions

Even though Congress intended for the application of RFRA to be broad, courts' interpretation of the compelling interest and least restrictive means thresholds have been difficult to traverse. Native Americans specifically have continued to face challenges in protecting their religious spaces.

The most prominent case illustrating these challenges and foreshadowing the Ninth Circuit's initial decision in *Apache Stronghold* is *Navajo Nation v. U.S. Forest Services*.[81] In *Navajo Nation*, claimant tribes filed suit to enjoin the federal government under RFRA to prevent the U.S. Forest Service from using artificial snow on a ski slope that the Agency managed.[82] The contested plan made the artificial snow out of recycled sewage water, which the claimant tribes argued desecrated the sacredness of the long-standing religious sites on the federally owned and operated mountain.[83] The Ninth Circuit held that these actions did not amount to a substantial burden under RFRA because they did not relate exclusively to government coercion under previous relevant case law—namely, *Sherbert*,[84] *Yoder*,[85] and *Lyng*.[86] Bizarrely, the Ninth Circuit limited its definition of substantial burden under RFRA in *Navajo Nation* to the two specific situations in *Sherbet* and *Yoder*, even though the Supreme Court has not done so.[87] The Court opined that if the claimants' religion was not substantially burdened, then the government was not required under RFRA to prove a compelling interest for its actions by the least restrictive means.[88] The Ninth Circuit justified its decision by citing concerns that

81. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th. Cir. 2008).

82. *Id.* at 1063–65.

83. *Id.*

84. Sherbert v. Verner, 374 U.S. 398, 399 (1963) (explaining that the denial of unemployment benefits on condition of exercise of faith deemed substantial burden).

85. Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (holding that a state law compelling Amish students to attend school contrary to their religion under threat of criminal sanctions amounted to a substantial burden).

86. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445–47 (finding that a road built by U.S. Forest Service that interfered significantly with Native American tribes' ability to practice their religion did not impose a heavy enough burden to be considered "substantial").

87. For example, in *Holt* and *Hobby Lobby*, the Supreme Court cites *Sherbert* and *Yoder* as the cases establishing the substantial burden test, but they do not limit their analysis of what constitutes a substantial burden to the events arising in *Sherbert* and *Yoder*. In fact, the situation in *Holt* is starkly different from the government coercion identified in *Sherbert* and *Yoder*, but the Court still finds the claimants' religion substantially burdened; *see also*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1087 (9th Cir. 2008) (Fletcher, J., dissenting) ("Had Congress wished to establish the standard employed by the majority, it could easily have stated that 'Government shall not, through the imposition of a penalty or denial of a benefit, substantially burden a person's exercise of religion. . . .' It did not do so.").

88. *Id.* at 1077 (discussing the key issue of the case to be a "threshold question [of] whether a 'substantial burden' exists").

"any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens."[89]

Navajo Nation initially appeared to cement the Ninth Circuit's position that Native American religious sites on federal lands are unprotectable under the current legal framework for religious freedoms. But this interpretation was overruled by the Ninth Circuit in their rehearing of *Apache Stronghold*, as will be discussed below. First, *Navajo Nation* and the initial decision in *Apache Stronghold* included dissenting opinions,[90] arguing that the Ninth Circuit's analysis of a substantial burden under RFRA is seriously flawed.[91] Second and most importantly, claimants in *Apache Stronghold* are not just having their religion burdened; their primary location for religious practice is altogether on the chopping block. If claimants in *Apache Stronghold* are not successful in this litigation, they will be wholly unable to practice their religion. This is starkly different from prior case law. Where the government's actions in *Navajo Nation* would "spiritually contaminate the entire mountain and devalue their religious exercises,"[92] here, the site would cease to exist, and religious exercise will become impossible.

II. *APACHE STRONGHOLD V. THE UNITED STATES*

"The spiritual importance of Oak Flat to the Western Apaches cannot be overstated and, in many ways, is difficult to put into words."[93] Despite multiple courts recognizing this importance and the impending damage that will occur, the land conveyance is set to go ahead. In this section, I discuss the context of this case and its disorderly path through the federal courts. The District Court of Arizona, armed with problematic precedent from the Ninth Circuit, first ruled that selling the Western Apaches sacred site for copper mining would not violate their religious freedoms under RFRA.[94] The Ninth Circuit shortly followed suit.[95] In this section, I discuss how the conflict at issue in the case transpired. I then discuss the flaws in the Arizona District Court's and Ninth Circuit's analysis. The shortcomings of the decision resulted in a vote of a majority of non-recused active judges to vacate this decision, opting to rehear the case en banc.[96]

A. Factual Overview

It is impossible to exaggerate the importance of Oak Flat to the Apache. Here, I aim to briefly describe the site's importance, but detailed descriptions can be found elsewhere.[97] The Western Apache people believe their Creator, Usen, made Oak

89. *Id.* at 1063.

90. *See infra* Section III.B.

91. *See, e.g.*, *supra* note 71.

92. *Navajo Nation*, 535 F.3d at 1063.

93. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021), *aff'd on reh'g en banc*, 95 F.4th 608 (9th Cir. 2024).

94. *Id.*

95. Apache Stronghold v. United States, 38 F.4th 742, 769–70 (9th Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022), *and reh'g en banc*, 95 F.4th 608 (9th Cir. 2024).

96. Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022).

97. *See* Alejandra Molina, *Why Oak Flat in Arizona is a Sacred Space for the Apache and Other Native Americans*, EARTHBEAT (March 16, 2021), https://www.ncronline.org/earthbeat/justice/why-oak-flat-arizona-sacred-space-apache-and-other-native-americans [perma.cc/C7LQ-WXQQ]; *see also* Hedgpeth, *supra* note 18.

Flat, or Chi'chil Bildagoteel in the Apache language, as a place for the Ga'an to live, who are considered the Creator's messengers or guardians.[98] The Ga'an protect the Apache and are the "buffer between heaven and Earth."[99] The Western Apache believe interaction with the Ga'an constitutes a crucial part of their "personal being," and that Oak Flat thus provides them "a unique way . . . to communicate" with their Creator.[100] For centuries, the Apache have conducted sacred ceremonies at Oak Flat.[101] Paramount to these rituals is a tradition called a sunrise ceremony, a four-day rite of passage for a teenage girl to transition to womanhood.[102] The ceremony requires collected plants from Oak Flat that have the "spirit of Chi'chil Bildagoteel," or embody the spirit of the Creator.[103] For the Apache, Oak Flat is "the Sistine Chapel" of their religion.[104] Testimony from Apache members during the litigation revealed that if the site is destroyed, the Apache believe "we are dead inside. We can't call ourselves Apaches."[105]

Apache Stronghold is a 501(c)(3) nonprofit community organization from San Carlos, Arizona, connecting Apaches and other Native and non-Native allies to defend holy sites and freedom of religion.[106] Apache Stronghold operates within the San Carlos Apache Tribe of the San Carlos Reservation, a federally recognized Native tribe located on the San Carlos Reservation, around one hundred miles east of Phoenix.[107] Along with the Becket Fund for Religious Liberty, a non-profit public interest law firm based in Washington, D.C., Apache Stronghold has vowed to take the decision to the Supreme Court.[108]

Unfortunately for Apache Stronghold, 4,500 to 7,000 feet beneath Oak Flat is an ore deposit containing approximately two billion tons of copper resource, the third largest copper deposit in the world.[109] Despite Oak Flat being a federally protected site,[110] members of Arizona's congressional delegation have drafted legislation to compel the government to transfer Oak Flat to a private mining

98. Hedgpeth, *supra* note 18.

99. *Id.* Terry Rambler, chairman of the San Carlos Apache Tribe, compared "the significance of Oak Flat for Native Americans to the importance of St. Peter's Basilica in Vatican City, or Angkor Wat in Cambodia, or the Western Wall in Jerusalem." *Id.*

100. Apache Stronghold v. United States, 95 F.4th 608, 615 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

101. *Id.*

102. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021), *aff'd on reh'g en banc*, 95 F.4th 608, 614 (9th Cir. 2024).

103. *Id.*; Hedgpeth, *supra* note 18.

104. Hedgpeth, *supra* note 18.

105. *Apache Stronghold*, 519 F. Supp. 3d at 604.

106. *About Us*, APACHE STRONGHOLD, http://apache-stronghold.com/about-us.html [perma.cc/3YTY-82LC] (last visited Nov. 18, 2024). Apache Stronghold is supported by nearly forty Native American Tribes and numerous organizations. *See Alliances and Allies*, APACHE STRONGHOLD, http://apache-stronghold.com/alliances.html [perma.cc/N52J-4AY2] (last visited Nov. 18, 2024).

107. *About Us*, *supra* note 106.

108. Colby, *supra* note 21. Becket Law has served as counsel for eight religious freedom cases at the Supreme Court since 2012, including cases such as *Burwell v. Hobby Lobby Stores, Inc., Holt v. Hobbs*, and *Fulton v. City of Philadelphia*. TOP BECKET VICTORIES, BECKET, https://beck etfund.org/about-us/top-victories [perma.cc/AZ43-PF8G] (last visited Nov. 18, 2024).

109. Apache Stronghold v. United States, 95 F.4th 608, 616 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

110. Oak Flat was first protected from mineral exploration by President Eisenhower. Public Land Order No. 1229, 20 Fed. Reg. 7319, 7336–37 (Oct. 1, 1955). President Nixon renewed this protection. Modification of Public Land Order No. 1229, 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971).

company, Resolution Copper, since 2005.[111] This fight was an uphill battle in Congress after former Congressmen Rick Renzi spent three years in federal prison for attempts to force the companies of Resolution Copper to buy his friend's land in 2005 in exchange for his support of selling the area of Oak Flat in Congress.[112] One of these attempts to convey the land was finally successful in 2014 when Senator John McCain[113] attached a rider to the National Defense Authorization Act for fiscal year 2015 (NDAA), transferring Oak Flat.[114] Section 3003 of the NDAA is the Southeast Arizona Land Exchange and Conservation Act, and it authorizes the exchange of land between the federal government and Resolution Copper.[115]

The Resolution Copper project is a joint venture owned by British-Australian mining companies Rio Tinto (55%) and BHP (45%).[116] The project boasts the ability to supply 25% of U.S. copper demand, create several thousand jobs, and provide an economic value of several billion dollars over the estimated life of the mine.[117] Despite their economic promises, Rio Tinto and BHP are two of the one hundred companies found to be the source of over 70% of the world's greenhouse gas emissions since 1988.[118] Rio Tinto specifically is no stranger to destruction of sites with cultural and archaeological significance. In 2020, the company used explosives to destroy the Aboriginal sacred site of Juukan Gorge in Western Australia, which had evidence of continuous human occupation for over 46,000

111. *See, e.g.*, Southeast Arizona Land Exchange and Conservation Act of 2005, H.R. 2618, 109th Cong. (2005); Southeast Arizona Land Exchange and Conservation Act of 2005, S. 1122, 109th Cong. (2005); Southeast Arizona Land Exchange and Conservation Act of 2006, H.R. 6373, 109th Cong. (2006); Southeast Arizona Land Exchange and Conservation Act of 2006, S. 2466, 109th Cong. (2006); Southeast Arizona Land Exchange and Conservation Act of 2007, H.R. 3301, 110th Cong. (2007); Southeast Arizona Land Exchange and Conservation Act of 2007, S. 1862, 110th Cong. (2007); Southeast Arizona Land Exchange and Conservation Act of 2008, S. 3157, 110th Cong. (2008); Southeast Arizona Land Exchange and Conservation Act of 2009, H.R. 2509, 111th Cong. (2009); Southeast Arizona Land Exchange and Conservation Act of 2009, S. 409, 111th Cong. (2009); Southeast Arizona Land Exchange and Conservation Act of 2011, H.R. 1904, 112th Cong. (2011); Southeast Arizona Land Exchange and Conservation Act of 2013, H.R. 687, 113th Cong. (2013); Southeast Arizona Land Exchange and Conservation Act of 2013, S. 339, 113th Cong. (2013).

112. *See* Ryan Randazzo, *McCain Was Crucial Backer of Superior Copper Mine for Jobs and National Security*, THE REPUBLIC (Aug. 31, 2018, 6:00 AM), https://www.azcentral.com/story/news/politics/arizona/2018/08/31/sen-john-mccain-legacy-resolution-copper-project-near-superior-arizona/1110685002/ [perma.cc/SYE3-PJRS].

113. For more details about McCain's involvement in the project, see *id.* ("McCain moved mountains in Congress so that the Resolution Copper Project could one day move mountains of ore out of the hillsides near Superior, 70 miles east of Phoenix.").

114. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014), https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf [perma.cc/6UEA-SYQ8].

115. 16 U.S.C. § 539p.

116. *About Us*, RESOLUTION COPPER, https://resolutioncopper.com/about-us [perma.cc/D3SD-V6AM] (last visited Nov. 26, 2024).

117. *Id.*; *see also* Apache Stronghold v. United States, 95 F.4th 608, 615 (9th Cir. 2024) ("Oak Flat is also a place of considerable economic significance."), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

118. Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, THE GUARDIAN (July 10, 2017, 1:26 AM), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change [perma.cc/VC7V-XJGA].

years.[119] As a result, CEO Jean-Sebastien Jacques and two other Rio Tinto executives ultimately stepped down and were stripped of their bonus earnings.[120]

Regardless of the economic pursuits of Resolution Copper, the mining project will obliterate Oak Flat using panel caving, a technique that the Forest Service estimates will span approximately 1.8 miles in diameter and involve a depression between 800 and 1,115 feet deep.[121] As a result, Apache religious practices will be impossible. For nearly ten years, Apache Stronghold has attempted to preserve this sacred space, including challenging the land conveyance through the judicial system.

B. Flawed Analysis at Every Step in the Courts

Apache Stronghold's attempt to stop the conveyance of Oak Flat for copper mining has been a long and complicated journey. The struggle over Oak Flat first began in the District Court of Arizona.[122] Apache Stronghold sought to prevent the conveyance of the land to Resolution Copper as authorized by the NDAA through various claims, including that the United States breached its trust duty by way of an 1852 treaty with the Western Apaches.[123] Apache Stronghold argued that the conveyance violated their Due Process rights, and mining the land would destroy religious ground in violation of RFRA and the Free Exercise Clause of the First Amendment.[124] The Arizona District Court rejected all of Apache Stronghold's claims.[125] The district court held the conveyance of land did not amount to a substantial burden because "[t]he facts of this case are similar to those of *Navajo Nation*" while also recognizing "that the burden imposed by the mining activity in this case is much more substantive and tangible than that imposed in *Navajo Nation*."[126] The district court's decision foreshadowed a tumultuous journey Apache Stronghold was about to experience when seeking judicial relief.

On appeal, the Ninth Circuit rehashed flawed precedent in *Apache Stronghold*.[127] Similar to the district court, the Ninth Circuit cited their opinion in *Navajo Nation*, finding that Apache Stronghold was not substantially burdened in practicing their religion because "the government imposes a substantial burden on religion *only* when the government action fits within the framework established by

---

119. *Rio Tinto Reaches Historic Agreement with Juukan Gorge Group*, REUTERS (Nov. 27, 2022, 5:01 PM), https://www.reuters.com/world/asia-pacific/rio-tinto-reaches-historic-agreement-with-juukan-gorge-group-2022-11-28/ [web.archive.org/web/20221128010858/https://www.reuters.com/world/asia-pacific/rio-tinto-reaches-historic-agreement-with-juukan-gorge-group-2022-11-28/].

120. Shaimaa Khalil, *Rio Tinto Chief Jean-Sébastien Jacques to Quit Over Aboriginal Cave Destruction*, BBC (Sept. 10, 2020), https://www.bbc.com/news/world-australia-54112991/ [perma.cc/N93E-TDHG]; Nicolas Perpitch, *Rio Tinto Executives Stripped of Bonuses Over Destruction of Juukan Gorge Rock Shelters*, ABC NEWS (Aug. 23, 2020, 9:15 PM), https://www.abc.net.au/news/2020-08-24/rio-tinto-executives-lose-bonuses-over-juukan-gorge-destruction/12588516/ [perma.cc/UAA3-XF26].

121. Apache Stronghold v. United States, 95 F.4th 608, 618 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

122. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 591 (D. Ariz. 2021), *aff'd on reh'g en banc*, 95 F.4th 608, 614 (9th Cir. 2024).

123. *Id.* at 597.

124. *Id.*

125. *Id.* at 608.

126. *Id.* at 606.

127. Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022), *reh'g en banc granted, opinion vacated*, 56 F.4th 636 (9th Cir. 2022), *and reh'g en banc*, 95 F.4th 608 (9th Cir. 2024).

Sherbert and *Yoder*."[128] To be more specific, the Ninth Circuit found the conveyance of religious land used by the Apache to a mining company did not force the Apache to choose between following their religion and losing a benefit, and therefore Apache were not entitled to relief under RFRA.[129]

This initial Ninth Circuit decision had significant and obvious shortcomings, which eventually led to a majority of the judges voting to rehear the case.[130] First, the Ninth Circuit's interpretation of substantial burden was far narrower than Supreme Court precedent. Congress explicitly expanded the protection under RFRA when it was amended through RLUIPA to extend beyond the protection provided by the First Amendment. [131] The Supreme Court has explained that there is "no reason to believe" that RFRA "was meant to be limited to situations that fall squarely within the holdings of pre-*Smith* cases," that is, those coming from *Sherbert* and *Yoder*, which existed before RFRA.[132] For instance, the Supreme Court found in *Ramirez v. Collier* that the government substantially burdened a death row inmate's religion by not allowing a pastor to touch him in prayer during his death, as the inmate was likely to succeed in proving that his religious requests were sincerely based on a religious belief.[133] This example is far broader than the Ninth Circuit's understanding which limited substantial burden to instances where claimants choose between following their religion and losing a government benefit.

Second, the initial ruling from the Ninth Circuit incorrectly addressed conflicting interests between the claimants and the government. Courts are not meant to assess compelling government interests until after a substantial burden has been established. In their initial decision, the Ninth Circuit claimed a substantial burden did not exist based on concerns that "giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone."[134] But a cause of action under RFRA requires that a plaintiff first establish a substantial burden on his exercise of religion before the burden of persuasion shifts to the government. Then, the government must prove that the challenged government action is in furtherance of compelling governmental interest and is implemented by the least restrictive means.[135] If the Ninth Circuit wished to find the government had a compelling interest in keeping federal lands available to the public, they first needed to find that the Apache Stronghold's religion was substantially burdened. In short, the interest the government has in federal land use is irrelevant here if the Ninth Circuit sincerely finds no substantial burden on the Apache religious exercise at Oak Flat.

Finally, the Ninth Circuit ignored significant factual differences between *Apache Stronghold* and prior case law in their initial decision. The decision mainly rested on what the Ninth Circuit viewed as significant similarities between *Apache Stronghold*, *Navajo Nation*, and *Lyng*, but these cases could not be more different. In

128. *Id.* at 754 (emphasis added).

129. *Id.* at 756.

130. Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022).

131. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1085 (9th Cir. 2008); *see also* Guru Nanak Sikh Soc'y v. Cnty. of Sutter, 456 F.3d 978, 994 n. 21 (9th Cir. 2006) (noting the same).

132. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 n. 18 (2014).

133. Ramirez v. Collier, 595 U.S. 411, 425 (2022) (emphasizing the mere sincerity of the claimants' beliefs are conclusive in establishing a substantial burden).

134. *Apache Stronghold*, 38 F.4th at 767 (citing *Navajo Nation*, 535 F.3d at 1063–64).

135. *See Hobby Lobby*, 573 U.S. at 695.

Lyng, the U.S. Forest Service selected a route for a new road based on a study it commissioned that avoided archeological sites and was removed as far as possible from the sites used by contemporary Native Americans for religious activities.[136] While the claimants in *Lyng* could not rely on RFRA's compelling interest balancing test, the government action did not destroy the site in question. Instead, the road at issue disturbed the natural setting and peacefulness of the site while avoiding harm to buried cultural resources.[137] In *Navajo Nation*, "[n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified. The Plaintiffs continued to have virtually unlimited access to the mountain . . . ."[138] The Ninth Circuit, in its initial *Apache Stronghold* decision, referred to the situation in *Navajo Nation* as "facts that mirror those here" despite these remarkable differences.[139] While seeming to acknowledge the burden placed on the claimants, the Ninth Circuit in *Apache Stronghold* virtually ignored the stark realities of the case at bar in their decision. With these clear issues in the court's analysis, the Ninth Circuit opted to vacate this decision and rehear the case.[140] The Ninth Circuit created a perfect opportunity to correct these major flaws and grant meaningful relief. Instead, the en banc rehearing created more confusion.

III. A REHEARING OF *APACHE STRONGHOLD* BRINGS LITTLE CLARITY

The Ninth Circuit's initial decision was confusing at best. In its rehearing en banc, the Ninth Circuit still did not grant plaintiffs relief. The Court first overruled their prior decision in *Navajo Nation* and held that preventing access to religious exercise is an example of a "substantial burden" under RLUIPA and RFRA.[141] The Ninth Circuit further held that plaintiffs' religious freedom rights, whether under statute or the Constitution, were not violated. It further held that Apache Stronghold was not likely to succeed on the merits of any of its claims and, therefore, was not entitled to a preliminary injunction.[142] This holding was heavily influenced by the Supreme Court decision in *Lyng*, which found that internal affairs of the government in the disposition of real property do not violate religious freedom under the First Amendment.[143] However, the decision in *Lyng* from 1988 was limited because the protection of religious freedom has been significantly broadened by the Supreme Court and Congress since. Additionally, the Ninth Circuit found the facts at issue in *Lyng* to be identical to *Apache Stronghold* when they are distinctly unalike. Here, I summarize the rehearing and describe the flaws in the Ninth Circuit's analysis.

136. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442–43 (1988).
137. *Id.*
138. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1063 (9th Cir. 2008).
139. *Apache Stronghold*, 38 F.4th at 753.
140. Apache Stronghold v. United States, 56 F.4th 636, 636 (9th Cir. 2022).
141. Apache Stronghold v. United States, 95 F.4th 608, 614 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).
142. *Id.* at 635.
143. *Id.* at 620.

A. Summary of the Rehearing

Upon rehearing the case en banc, the Ninth Circuit overruled its narrow definition of a substantial burden under RFRA as defined in *Navajo Nation*.[144] As mentioned in Section III.B. above, the Ninth Circuit had wrongfully limited its application of RFRA to the unique situations in *Smith* and *Yoder* when deciding *Navajo Nation*. The Ninth Circuit instead determined that preventing access to religious exercise is an example of a "substantial burden" under RLUIPA and RFRA.[145] The court's prior limitation on substantial burdens is thus seemingly corrected in the new en banc rehearing of *Apache Stronghold*.[146]

However, more problematic, the Ninth Circuit also held that a disposition of government real property does not impose a substantial burden on religious exercise under RFRA.[147] They reasoned that under *Lyng*, a substantial burden under RFRA excludes the government's actions in regard to its real property unless it discriminates, coerces, or penalizes practitioners.[148] Put another way, the Ninth Circuit, in a 5-4 majority, believed the government could not substantially burden a person's religion on federal property. This means the Ninth Circuit's en banc decision upheld the district court's ruling and allowed the conveyance of Oak Flat to Resolution Copper for mining, forever preventing Native American tribes like the Western Apache from practicing their religion there.

The Ninth Circuit based most of their reasoning in the rehearing on *Lyng* when analyzing Apache Stronghold's claims under the First Amendment and RFRA. The Supreme Court in *Lyng* determined that, under the First Amendment and before RFRA or RLUIPA were enacted, the government's internal affairs regarding its real property were not subject to strict scrutiny when Native practitioners were prevented from accessing federal land.[149] The Court reasoned that the government's internal affairs did nothing to prohibit Native practitioners' free exercise of religion.[150] Thus, the Ninth Circuit found the land conveyance did not violate the plaintiff's rights under the Free Exercise Clause.[151]

Focusing again on the Supreme Court's decision in *Lyng*, the Ninth Circuit found that when RFRA was enacted, it was meant to adopt the limits set in *Lyng* regarding what qualified as a substantial burden on religion.[152] In its reasoning, the Ninth Circuit found that the Supreme Court had never questioned the core holding in *Lyng* since Congress passed RFRA.[153] As a result, the Ninth Circuit held that Apache Stronghold was, therefore, not burdened under RFRA and failed to grant relief.[154]

---

144. *Id.* at 614.
145. *Id.*
146. *Id.*
147. *Id.* at 622.
148. *Id.*
149. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 457 (1988).
150. *Apache Stronghold*, 95 F.4th at 626 ("In such circumstances, the essential ingredient of 'prohibiting' the free exercise of religion is absent, and the Free Exercise Clause is not violated.").
151. *Id.*
152. *Id.* at 632 ("When Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that *Lyng* placed on what counts as a governmental imposition of a substantial burden on religious exercise.").
153. *Id.* at 625.
154. *Id.* at 614.

B. Analysis of the Rehearing

Despite some improvement, the Ninth Circuit got its decision wrong on this rehearing. The Ninth Circuit's decision makes two critical errors. First, the court failed to recognize that RFRA and RLUIPA grant individuals broader protection of their religious freedom than the First Amendment. Second, the court incorrectly found that religious practice under RFRA and RLUIPA cannot be substantially burdened on federal property based on an outdated and factually dissimilar decision in *Lyng*. The following subsections describe these in more detail.

While it was correct for the Ninth Circuit to recognize the unique nature of religious sites wholly on government land, because practitioners seeking to access these spaces substantially rely on the government for access to their religion, the government is more likely to wrongfully intervene in a claimant's religious freedom. This relationship should be explicitly included in RFRA, not carved out as an exception.[155] The Supreme Court should grant certiorari in this case and remedy these mistakes.

1. Protection of Religious Freedom Is Broad Under RFRA and RLUIPA

First, the Ninth Circuit incorrectly found that the facts in *Apache Stronghold* were identical to the Supreme Court's decision in *Lyng*, which therefore barred any relief to Apache Stronghold. *Lyng* was decided in 1988, before RFRA was enacted in 1993 and expanded by RLUIPA in 2000, meaning the Supreme Court was limited to granting the petitioners only the protection afforded by the First Amendment. In turn, the Ninth Circuit believed that Congress did not intend to displace the holding in *Lyng* by statute when enacting RFRA and, thus, that Apache Stronghold's claims for protection under RFRA had no likelihood of success on the merits.[156]

The Ninth Circuit analysis here was erroneous. RFRA's coverage was expanded beyond the bounds of the First Amendment when Congress passed RLUIPA in 2000, making the Supreme Court's analysis in *Lyng* antiquated. RLUIPA amended RFRA's "exercise of religion" definition to remove reference to the First Amendment rights and replace it with "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[157] Moreover, in passing RFRA, Congress mandated that this concept "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution."[158] The Supreme Court has explicitly noted this mention of broadened protection granted by RFRA and RULIPA.[159] RFRA did more than restore the balancing test used by the courts. It expanded the protection of religious freedom beyond the safeguards available to the claimants in *Lyng*.

---

155. *See* Barclay & Steele, *supra* note 61, at 1302 ("Currently, courts have made it essentially impossible for tribal plaintiffs to demonstrate a substantial burden in the context of sacred sites owned by the government. But when the baseline of government interference is understood, the opposite should be true. The ongoing interference with voluntary religious exercise means that Indigenous religious exercise is being burdened more, not less, than religious exercise in the context of a baseline where voluntary choice is the default.").

156. *Apache Stronghold*, 95 F.4th at 632.

157. 42 U.S.C § 2000cc-5(7)(A).

158. *Id.* § 2000cc-3(g).

159. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694–95 (2014).

Part of why the analysis in *Lyng* is not directly applicable to *Apache Stronghold* is because the protection of religious freedom was limited at the time to constitutional safeguards, and jurisprudence did not require the strict balancing analysis that is now statutorily required. The Supreme Court in *Lyng*, before RFRA, limited its understanding of government actions that impeded First Amendment rights to those of coercion and penalty by the government.[160] Moreover, *Lyng* does not even use the phrase "substantial burden" in its analysis, which is vital to the statutory analysis required in modern jurisprudence. As a result, the Supreme Court in *Lyng* did not require the government to provide a compelling justification for its otherwise lawful actions in building a road on federal land.[161] In short, the Supreme Court in *Lyng* had a limited understanding of what constituted a substantial burden on religion. In direct contention, the Ninth Circuit, in its rehearing of *Apache Stronghold*, takes a broader understanding of substantial burden. The Ninth Circuit interpreted RFRA and RLUIPA to include preventing access to religious exercise to be an example of a substantial burden.[162] This governmental action does not include coercion or penalty by the government, the two situations the Court in *Lyng* was limited to protecting. As a result, the Ninth Circuit insisting they must rely on *Lyng* was nonsensical.

With these issues of the modern legal framework in mind, the facts in *Lyng* could not be more different than *Apache Stronghold*. The Ninth Circuit refused to reverse and remand the decision in *Apache Stronghold* because it believed it would mean *Lyng* is no longer good law. But such a ruling would do nothing of the sort. If *Lyng* were decided today, a court would likely find that the plaintiffs were not substantially burdened from practicing their religion because the road the government wished to build would not prevent access to it in any way.[163] Even if a court found these actions to be a substantial burden, the government would likely win on the second prong of the analysis. In *Lyng*, the government had a compelling interest in the road and changed where it was set to run to avoid the destruction of cultural and archaeological sites of importance to the tribes in the area. A court could determine this to be the least restrictive means. The Supreme Court in *Lyng* did note that "a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."[164] This is the exact issue in *Apache Stronghold*. Oak flat is not merely being disturbed; it is being destroyed, and the claimants are prevented from accessing it ever again. The situations are remarkably different, and a finding for one would not automatically divest the power of the other.

2. Through RFRA and Its Amendments, Religious Practice Can Be Substantially Burdened when Government Affairs Are Involved

Second, the Ninth Circuit was incorrect in finding that RFRA does not include prevention to worship on federal real property as a substantial burden to religious

160. Also referred to as the *Sherbet* and *Yoder* framework. *See supra* Section II.D.

161. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988).

162. Apache Stronghold v. United States, 95 F.4th 608, 614 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

163. *Lyng*, 485 U.S. at 451–52.

164. *Id.* at 453.

exercise.[165] Specifically, the Ninth Circuit believed Apache Stronghold must show more than the "[g]overnment's management of its own land and internal affairs will have the practical consequence of 'preventing' a religious exercise" to warrant relief.[166] Amendments to RFRA and the explicit application of RFRA and the First Amendment to laws of general applicability post-*Lyng* require otherwise.[167]

Where the government's management of its own land's internal affairs prevents religious practice, religion can be substantially burdened. Indeed, since *Lyng*, Congress and the Supreme Court have made this explicit. Congress made RFRA with broad coverage which "ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments."[168] Suggesting that it applies differently or not at all to governmental real property is senseless.

Congress's amendments to RFRA require finding the state preventing access to worship can violate RFRA. Congress broadened the definition of "religious exercise" by adding that it includes "[t]he use, building, or conversion of real property for the purpose of religious exercise . . . ."[169] Therefore, the term "substantial burden" must be construed in light of Congress's express direction that RFRA applies to the use of real property for religious purposes.[170] Congress amending RFRA to expressly include religious use of property shows that the denial of religious exercise at a sacred site is a substantial burden on religious exercise.

Congress also explicitly applied religious protection under RFRA to government internal affairs when it passed RLUIPA. RLUIPA applies to zoning and prisons where "the omnipresent coercive power of the government is obvious and undeniable."[171] These specific settings are completely government affairs where Congress has deemed that the government is unable to substantially burden an individual's religious practice without a compelling interest and using the least restrictive means. Native American access to federal lands should be no exception. The Ninth Circuit, in its rehearing, failed to recognize the flaws in its legal analysis of the Constitution and religious freedom statutes. More importantly, though, it failed to see the bigger picture: A large majority of Native American sites of religious importance are located on federal land, and practitioners are wholly dependent on the government for access to these spaces. These circumstances provide Native Americans with a baseline of government control in their religious practice, a baseline of control which they should be explicitly protected from by statute.

---

165. *Apache Stronghold*, 95 F.4th at 626 ("In sum, *Lyng* stands for the proposition that a disposition of government real property is not subject to strict scrutiny when it has 'no tendency to coerce individuals into acting contrary to their religious beliefs,' does not 'discriminate' against religious adherents, does not 'penalize' them, and does not deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'").

166. *Id.* at 623.

167. It bears repeating once again that *Lyng* was decided before RFRA was enacted or amended, and the Ninth Circuit's insistence on relying on it for analyzing Apache Stronghold's claims is asinine.

168. City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (citing 42 U.S.C. § 2000bb-2(1)).

169. 42 U.S.C. § 2000cc-5(7)(B).

170. *See Apache Stronghold*, 95 F.4th at 710 (Murguia, J., dissenting) (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 455 (1993)) ("[S]tatutory construction 'is a holistic endeavor,' so 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law.'").

171. Barclay & Steele, *supra* note 61, at 1333.

IV. WHY SCOTUS SHOULD HAVE GRANTED CERT: RELIGIOUS FREEDOM REMAINS BURDENED BY THE GOVERNMENT'S INTERNAL AFFAIRS

The unfortunate reality is that even if the Ninth Circuit stopped the land conveyance upon rehearing, the Indigenous plaintiffs are still at an immense disadvantage. If Apache Stronghold prevailed, their sacred land would still be in possession of the federal government. This federal ownership of real property was clearly the most important issue for the Ninth Circuit in their rehearing. What that court failed to recognize, however, is how disadvantaged Native Americans are in this respect compared to practitioners whose place of worship is on private land. This section discusses in more detail why Native tribes will continue to be disadvantaged when it comes to federally owned land and the Supreme Court should grant certiorari to address these concerns. Most tribal lands with religious importance are in the control of the federal government because they were wrongfully taken. The government asserts a high degree of control over land, which is its own property. Thus, access to these spaces is entirely dependent on the government's goodwill and can be revoked at any time. Additionally, affirmative action from the government is needed to accommodate religious practice on federal land, but this action is often barred by the courts.

A. The Government Divested Land To Gain Control of Indigenous Sacred Sites

The federal government has exclusive control over a vast number of Native American sacred sites.[172] Legal doctrine gave the United States the exclusive right to possession of any and all Native American lands through treaty, purchase, or dominion.[173] Until 1871, the United States negotiated treaties with tribal nations to quell violence and obtain legal title to native lands.[174] As a result, the United States obtained millions of acres of land from tribes, often for little or no consideration.[175] The majority of these treaties were renegotiated or unilaterally abrogated when the United States sought more of the lands the treaties guaranteed to the tribes.[176] The Dawes Act, or the General Allotment Act of 1887, divested tribes further of an additional one hundred million acres of land by 1934 through opening "surplus"

---

172. *See generally* FED. AGENCIES TASK FORCE, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT 51 (1979) (reporting that "[m]any of these [sacred sites] are now held by the federal government").

173. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823) ("[D]iscovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.").

174. William Wood, *Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016).

175. David E. Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277, 280–81 (1998) (quoting Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955)) ("Indians ceded millions of acres by treaty in return for blankets, food and trinkets . . . .").

176. Marren Sanders, *De Recto, De Jure, or De Facto: Another Look at the History of U.S./Tribal Relations*, 43 SW. L. REV. 171, 181 (2013) ("Over time the United States renegotiated the treaties with tribal governments, each time pressing Indian nations to give up more and more land."); David E. Wilkins, *The Reinvigoration of the Doctrine of 'Implied Repeals:' A Requiem for Indigenous Treaty Rights*, 43 AM. J. LEGAL HIST. 1, 12–13 (1999) (summarizing the Supreme Court's *Lone Wolf v. Hitchcock* decision that "Indian treaties could be unilaterally abrogated").

lands to non-Indian settlement and government confiscation.[177] As a result of this government divestiture, the most sacred sites for Native Americans are completely within government control.[178]

Much of federal land use law is predicated on a complete disregard for a long history of Indigenous use, occupation, and modification. Indeed, the two most prominent pieces of conservation legislation, the National Park Service Organic Act of 1916 and the Wilderness Act of 1964, are constructed with the purpose of preserving lands in their pristine "unimpaired" state.[179] For example, the Wilderness Act defines a wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[180] But these lands were not "untrampled by man." In fact, the reason they appear this way in modern times is that Native Americans were forcibly removed from national parks, monuments, and wilderness to achieve this "wild" and "untouched" façade.[181] Upon their creation, Congress barred Native American groups from exercising their hunting and fishing treaty rights within national parks. Certain federal lands, like Mesa Verde National Park, were initially reservation land the federal government unjustly took control over.[182] Federal lands set aside for preservation have traditionally excluded Native people by design; they view human exclusion as the ultimate form of preservation.

Government control of land is more detrimental to Native American religion than it is to other forms of religious practice. The Western Apache religious ties to the land at issue in *Apache Stronghold* are not unique to this specific tribe. Native American and Judeo-Christian religious practices have intrinsic differences that are paramount to this discussion. Unquestionably, Native American beliefs differ greatly between tribes, reflecting traditions that have existed in the Americas for over thirty thousand years.[183] Moreover, present-day Native American religions have been impacted by colonialism and Western influence through acculturation.[184] But, there are some generalities that are important for the courts to consider. While Judeo-Christian religions often view God as a male human-form being, the concept of a supreme deity in Native American religion exists as an indefinable presence associated with the natural world.[185] Native Americans view the environment as a

177. *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR: NAT. RES. REVENUE DATA, https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance [perma.cc/PQ9A-WH3E] (last visited Nov. 26, 2024) ("In 1887, tribes held 138 million acres. Forty-seven years later, in 1934, they owned 48 million acres.").

178. Barry Goode, *A Legislative Approach to the Protection of Sacred Sites*, 10 HASTINGS W.-NW. J. ENV'T L. & POL'Y 169, 170 (2004).

179. 16 U.S.C. § 1.

180. 16 U.S.C. § 1131(c).

181. Isaac Kantor, *Ethnic Cleansing and America's Creation of National Parks*, 28 PUB. LAND & RES. L. REV. 41, 49 (2007); David Treuer, *Return the National Parks to the Tribes*, THE ATLANTIC (May 2021), https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/ [perma.cc/5UY8-WA9Z].

182. Kantor, *supra* note 181; Treuer, *supra* note 181.

183. Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1295 (1996).

184. *See id.*; *see also* Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 GEO. WASH. L. REV. 782, 785–86 (1992) (discussing the acculturation process).

185. Winslow, *supra* note 183, at 1296 (citing JOHN MANCHIP WHITE, EVERYDAY LIFE OF THE NORTH AMERICAN INDIAN 144 (1979)) ("Indian gods and goddesses have taken the shape of animals

place for gods and spirits to inhabit; they pray through these spirits in much the same way that Christians pray to God through Christ and the saints.[186] As a result, worship at specific sites is paramount.[187] The courts often fail to recognize these religious differences that exist in contention with the Judeo-Christian ideal of religious institutions being associated with individuals and real property.[188] This is all to say the issue in *Apache Stronghold* is not isolated. Many Native American tribes have had similar issues with federal control inhibiting their practice of religion.[189] The problem is widespread and warrants statutory relief.

The sacred land being conveyed by Congress in *Apache Stronghold*, Tonto National Forest, came under federal control through divestiture. Bands of Apaches occupied Oak Flat for centuries before the U.S. government existed.[190] The Apaches were forced off this land when Chief Mangas Coloradas signed the Treaty of Santa Fe in 1852 with the U.S. government.[191] In the treaty, the government promised to "designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."[192] However, this treaty was never honored and the bounds of Apache lands were never set aside. There is no evidence the Apache treaty rights holders were compensated for this land.[193] Later, in the 1870s, gold and silver were found in Oak Flat. Settlers flocked to the area, and federal legislation allowed mining. Thus, a conflict between settlers, the government, and the Apache ensued.[194] U.S. Army General James Carlton ordered troops to kill Apache men wherever they were found and required Apache "removal to a Reservation or by the utter extermination of their men, to ensure a lasting peace and a security of life to all those who go to the country in search of precious metals".[195]

Through a twenty-five-year struggle for their homeland, the Apache were attacked at least thirty-five times while the federal government used removal policies to forcibly remove Native Peoples from their homelands.[196] Approximately four thousand Apaches were forced onto the San Carlos Reservation by 1874, an area

---

(including birds and reptiles) and natural objects (including the sun, moon, stars, winds, mountains, woods, lakes, rivers, and the like).").

186. *Id.* at 1298.

187. *Id.* at 1301.

188. *Id.* (discussing that courts often "attempt to analogize sacred sites with churches and to apply Western views of property use and ownership toward those sites" at the expense of Native Americans religious freedoms).

189. For examples and broad discussion, see Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 L. & INEQ. 157 (2002); Michael D. McNally, *The Sacred and the Profaned: Protection of Native American Sacred Places That Have Been Desecrated,* 111 CALIF. L. REV. 395 (2023).

190. Hedgpeth, *supra* note 18.

191. *Id.*

192. Treaty with the Apaches, Apache Nation-U.S., art. IX, July 1, 1852, 10 Stat. 979.

193. Hedgpeth, *supra* note 18.

194. John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874*, SAGE OPEN, Oct.–Dec. 2017, at 1, 12, https://journals.sagepub.com/doi/full/10.1177/2158244017747016 [perma.cc/Z9WR-HTLA].

195. *Id.* at 8.

196. *Id.* at 12 ("The 1860s and early 1870s were, for Western Apaches, a cataclysmic period of loss—of life, of land, of liberty, and of sovereignties over people and territory. . . ."); PAUL ANDREW HUTTON, THE APACHE WARS: THE HUNT FOR GERONIMO, THE APACHE KID, AND THE CAPTIVE BOY WHO STARTED THE LONGEST WAR IN AMERICAN HISTORY (2017).

Native Americans call "Hell's 40 Acres" because it was a "barren wasteland."[197] In 1886, a band of Apaches surrendered and agreed to a two-year detention and, in exchange, were promised they would get their land back.[198] Instead, after serving extended sentences, some for even two decades, they were all sent back to the San Carlos Reservation.[199]

It is a misconception that many federal lands like Oak Flat have always been possessed by the government. But this is incorrect. The San Carlos Reservation Apache, who make up a majority of Apache Stronghold, were forced off this land after years of fighting with the U.S. Army and settlers seeking minerals just before the twentieth Century. This situation is common for many tribes in the United States. Many tribes are not in possession of important religious sites because they were wrongfully divested of them, not because they were willingly given up or sold.[200]

B. The Government Exercises a High Degree of Control over Land with Native Religious Sites

Native Americans are at the mercy of the government for access to religious sites because the government has divested tribes of their Native lands. In essence, "some Indigenous faiths have an inherent dependence on the government to practice their religion."[201] This colossal level of control the government exercises with Oak Flat and similar Native American places of worship on federal lands makes tribes more burdened in practicing their religion than in most circumstances. Instead of being excluded from coverage under RLUIPA or RFRA, these circumstances should be explicitly included.[202]

The federal government's ownership of sacred sites means that tribal members are not on the same footing as individuals seeking to practice their religion in a private space. When courts are assessing a religious freedom claim, they look to whether an individual is able to voluntarily practice their religion without the government using its power to inhibit them.[203] However, other scholars have noted that the courts have failed to ask this question for Indigenous religious practice and created a double standard by failing to recognize the immense coercion the government already wields in controlling access to native American sacred sites in the first place.[204]

The governmental control of federal land is so obvious and absolute that Native American religious practices are dependent on government accommodation.

---

197. Hedgpeth, *supra* note 18 (describing the claims outlined by the Apache in their complaint to the District Court).

198. *Id.*

199. *Id.*

200. For background on similar sites, see McNally, *supra* note 189.

201. McFarlin, *supra* note 54, at 1181.

202. *See* Barclay & Steele, *supra* note 61, at 1302 ("Currently, courts have made it essentially impossible for tribal plaintiffs to demonstrate a substantial burden in the context of sacred sites owned by the government. But when the baseline of government interference is understood, the opposite should be true. The ongoing interference with voluntary religious exercise means that Indigenous religious exercise is being burdened more, not less, than religious exercise in the context of a baseline where voluntary choice is the default.").

203. *Id.* at 1299.

204. *Id.*

Scholars have proposed only three other similar circumstances where government interference with voluntary choice in religious practice is the baseline: prisons, the military, and some zoning laws.[205] For prisons, while some religious exercises can be done voluntarily, other practices are impossible without the government affirmatively acting.[206] In such circumstances, courts have recognized the government has a duty to provide such accommodations even where it burdens the government.[207] RULIPA explicitly requires prions must affirmatively accommodate prisoners and not remain passively indifferent to their religious practice.[208] In the military, the government exerts immense control over its members, and courts have routinely held that the First Amendment and RFRA require active accommodation to religious practice.[209] Zoning regulations determine where religious institutions can access, build, or expand places of worship and are affirmatively accommodated through RUIPLA.[210] In zoning, the government maintains a high level of coercive power because through it, it is able to substantially burden religion by denying practitioners a place to exercise their religion.[211] In each of these three situations, the government affirmatively acts to lift its coercive power. But it does not when it comes to Native American religious sites.[212] Native Americans are instead subject to governmental interference in their choice of religious practice in access to and use of federal land.[213]

The Ninth Circuit in the rehearing for *Apache Stronghold* would not grant relief for Native American claimants because it believed that what the federal government did with its own property was wholly its own affairs.[214] But Native American sacred sites on federal property, by their very nature, are exclusively part of the government's own affairs. Similar to prisons, tribes require the government's permission to access their religion. As a result, courts should find that these practitioners are more likely to be substantially burdened by the government, not less likely.

---

205. *Id.* at 1333 ("Notably, in each of these contexts . . . the relevant legal framework creates an affirmative duty on the government to offer fairly robust religious accommodations to protect religious voluntarism.").

206. *See* Nance v. Miser, 700 F. App'x 629, 631–32 (9th Cir. 2017) (holding that the denial of scented oils constituted substantial burden); *see also* Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019) (halting execution after state denied petitioner access to a Buddhist spiritual leader in the execution room); Greene v. Solano Cnty. Jail, 513 F.3d 982, 988 (9th Cir. 2008) (finding substantial burden where prison did not enable inmate to attend worship service); United States v. Sec'y, Fla. Dep't of Corr., 828 F.3d 1341, 1343–44 (11th Cir. 2016) (requiring prison to offer kosher meals).

207. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014) ("[B]oth RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs.").

208. 42 U.S.C. § 2000cc-1(a).

209. *See* Singh v. Carter, 168 F. Supp. 3d 216, 218–19, 236 (D.D.C. 2016) (holding that the army must accommodate Sikh serviceman in wearing a turban and growing a beard).

210. 42 U.S.C. § 2000cc(a)(1).

211. Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) ("Preventing a church from building a worship site fundamentally inhibits its ability to practice its religion. Churches are central to the religious exercise of most religions. If Cottonwood could not build a church, it could not exist.").

212. *Id.*

213. Barclay & Steele, *supra* note 61, at 1339–40.

214. Apache Stronghold v. United States, 95 F.4th 608, 622 (9th Cir. 2024), *amended and superseded on denial of reh'g en banc*, 101 F.4th 1036 (9th Cir. 2024).

C. Federal Land Protection Is Not Guaranteed in Perpetuity

Oftentimes, federal ownership of land includes express protection of sites of religious importance for Native Americans. One might argue that the burden of government control in these spaces, which inherently constrains religious practice, is thus outweighed by this benefit towards Native Americans and the public at large. However, this is misguided. Federal protection can be quickly backtracked. This leaves Native Americans in an unpredictable reality where their most important places of worship, which they believed to be untouched forever, are subject to sudden destruction.

Unfortunately, the situation in *Apache Stronghold* is a quintessential example of this unpredictability. Beginning in 1955, Oak Flat enjoyed federal protection from development through an executive order from President Eisenhower.[215] The area had been managed by the U.S. Forest Service for over half a century, where Apache people enjoyed easy access to religious settings.[216] Now, with little warning, the site is subject to total destruction.

Another more recent example is the Bears Ears National Monument. President Obama granted federal protection to Bears Ears in 2016, [217] making it the first Native American Cultural Landscape to receive broad protection by virtue of the Antiquities Act of 1906.[218] Encompassing 1.35 million acres and over one hundred thousand archaeological sites in southern Utah, Bears Ears carries profound significance for members of the Hope, Navajo, Ute Mountain Ute, Uintah and Ouray Ute, and Zuni tribes.[219] The proclamation of Bears Ears National Monument is monumental and employs an innovative collaborative management scheme. The management structure requires active tribal participation in the care and management of the monument to incorporate Native traditional knowledge and culture within the existing framework of federal public land management practices.[220] What should have been a celebrated step forward was pushed back merely a year later. On December 4, 2017, President Trump revoked this federal protection and issued his own proclamation, reducing the monument by 85% to 201,876 acres.[221] Tribes were forced to jump into instant action and, within hours, filed a lawsuit to avoid disassembling the National Monument and protect their heritage.[222] In 2021, Biden issued a proclamation restoring the territory.[223]

These instances highlight the instability that federal protection provides. Thus, federal ownership of land puts Native Americans in precarious position that worshipers on private land rarely worry about.

---

215. Public Land Order No. 1229, 20 Fed. Reg. 7337 (Sept. 27, 1955).

216. *See* McNally, *supra* note 189, at 434.

217. Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

218. 54 U.S.C. § 320301.

219. Charles Wilkinson, *"At Bears Ears We Can Hear the Voices of Our Ancestors in Every Canyon and on Every Mesa Top": The Creation of the First Native National Monument*, 50 ARIZ. ST. L.J. 317, 325 (2018).

220. *Id.* at 331–32 (describing the management regime for Bears Ears which requires Secretaries to meaningfully engage with a commission of five tribes and to have a written explanation of their reasoning if they reject a commission recommendation).

221. Proclamation No. 9681, 82 Fed. Reg. 58081 (Dec. 8, 2017).

222. Amber Penn-Roco, *Trump's Dismantling of the National Monuments: Sacrificing Native American Interests on the Altar of Business*, 75 NAT'L L. GUILD REV. 35, 40 (2018).

223. Proclamation No. 10285, 86 Fed. Reg. 57321 (October 8, 2021).

D. Courts Often Obstruct Government Attempts to Accommodate Religion on Federal Land

Not only can federal protection be revoked at any time, but the government currently cannot accommodate Native American religious practices on their land. This is because the government's grant of access for this purpose is a "law respecting an establishment of religion" in violation of the First Amendment.[224] As mentioned previously, the courts have interpreted the First Amendment to require government accommodation for religious practice in the military and prisons, but the same has never been held for Native Americans.[225] Congress and the courts have doubled down on this, requiring the government to accommodate religious practice under RFRA and RULIPA, but again, this has never applied to Native Americans' access to federal land.[226] This has created a stark double standard: The government must accommodate religion in its own affairs, except when it comes to sacred Native landscapes it owns and controls.

When the government attempts to accommodate Native American religions, it has been extensively limited. For instance, Devil's Tower National Monument is considered sacred for many tribes, including the Cheyenne River Sioux.[227] In 1995, the Superintendent of Devils Tower National Monument adopted a management plan that sought to grant greater access for Native Americans to practice culturally significant summer solstice ceremonies at the tower after concern over the impact the recreation was having on tribal religious practices.[228] This required the park to prohibit recreational climbing of the tower for the month of June. As a result, a lawsuit occurred, and injunctive relief was granted to nonnative climbers who argued that the mandatory closure violated the Establishment Clause.[229] The National Monument had to settle for a management plan that relied on climbers volunteering to stay off the monument for the month of June. This provision did as little as possible to protect Native interests in the use of the monument as a religiously important space.

In other instances, courts have allowed government actions related to the management of federal lands to burden religious practices. The foremost example of this is the Rainbow Bridge National Monument in Arizona. Rainbow Bridge is a sandstone arch that rises 309 feet high and spans 278 feet, the largest freestanding natural stone arch in the world.[230] Local tribes consider the bridge to be the "doorway between life and death."[231] The region around the arch includes a cave, spring, and prayer spot, which have been important to the Navajo for over one

---

224. U.S. CONST. amend. I.

225. *See supra* Section V.B; *see also supra* note 17.

226. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014) ("[B]oth RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs.").

227. Lydia T. Grimm, *Sacred Lands and the Establishment Clause: Indian Religious Practices on Federal Lands*, 12 NAT. RES. & ENV'T 19 (1997).

228. Raymond Cross & Elizabeth Brenneman, *Devils Tower at the Crossroads: The National Park Service and the Preservation of Native American Cultural Resources in the 21st Century*, 18 PUB. LAND & RES. L. REV. 5, 19 (1997).

229. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999).

230. Badoni v. Higginson, 638 F.2d 172, 175 (10th Cir. 1980).

231. Bonham, *supra* note 189, at 190.

hundred years.[232] When Glen Canyon Dam was built, the prayer spot and springs flooded into what is now well-traveled Lake Powell. As a result, the site was made more accessible for tourists that adversely impact the site.[233] As a result, a group of Native plaintiffs sued federal officials, claiming the government action infringed the practice of their religion in several ways: by drowning some of the plaintiffs' gods, denying plaintiffs access to the prayer spot, permitting desecration of the sacred nature of the site by allowing tourists, and denying plaintiffs' right to conduct religious ceremonies at the site.[234] The Tenth Circuit denied plaintiffs' claims, holding that the government had not prohibited plaintiffs' religious exercise, as they were able to enter the federal land on the same basis as all other citizens.[235] Furthermore, the Tenth Circuit viewed this action neutrally, finding that the government's interest in maintaining the capacity of Lake Powell was paramount to the plaintiffs' religious interest.[236] The Tenth Circuit found that any action by the government to accommodate plaintiffs' religious practice would violate the Establishment Clause.[237] In its view, accommodating religious practice on federal lands resulted in an unconstitutional "government-managed religious shrine."[238]

But what the Tenth Circuit believed to be a "government-mandated religious shrine" is ubiquitous. For example, the Supreme Court has upheld the display of creche in a city's public park.[239] Additionally, there are over seventy churches within National Parks.[240] There is a Catholic Church inside the Grand Canyon.[241] There are chapels in Yosemite National Park, Grand Canyon National Park, Great Smoky Mountains National Park, Grand Teton National Park, and Yellowstone National Park.[242] Moreover, accommodations under RFRA and RLUIPA create "government-mandated" religious spaces, particularly in the prison context as mentioned.[243] According to the courts, such accommodations do not violate the Establishment Clause.[244]

---

232. *Badoni*, 638 F.2d at 175.

233. *Id.*

234. *Id.* at 176.

235. *Id.* at 178.

236. *Id.* at 177 ("This Court has previously considered the importance of the Glen Canyon Dam and Reservoir as a crucial part of a multi-state water storage and power generation project.").

237. *Id.* at 179.

238. *Id.*

239. Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

240. Margot Hornblower et al., *Funds for Historic Missions Scuttled*, WASH. POST (Feb. 18, 1979), https://www.washingtonpost.com/archive/politics/1979/02/18/funds-for-historic-missions-scuttled/e2b29cdf-f9e9-4c02-89f8-fa32ccff3ff1 [web.archive.org/web/20240708032005/https://www.washingtonpost.com/archive/politics/1979/02/18/funds-for-historic-missions-scuttled/e2b29cdf-f9e9-4c02-89f8-fa32ccff3ff1/]; Barclay & Steele, *supra* note 61, at 1342.

241. U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., NATIONAL HISTORIC LANDMARK NOMINATION—REGISTRATION FORM, GRAND CANYON VILLAGE, GRAND CANYON NATIONAL PARK (1996), https://npgallery.nps.gov/GetAsset/84bf2b02-7d17-4998-8d79-e6eeede07fb7 [perma.cc/3A97-6R47].

242. *See* Howard Kramer, *Chapels of the National Parks*, COMPLETE PILGRIM (May 23, 2021), http://thecompletepilgrim.com/chapels-national-parks [web.archive.org/web/20180422231359/http://thecompletepilgrim.com/chapels-national-parks].

243. *See* Yellowbear v. Lampert, 741 F.3d 48 (10th Cir. 2014) (finding genuine issue of material fact on compelling interest test where claimant prisoner's religious exercise was substantially burdened when denied access to his prison's sweat lodge—a house of prayer and meditation).

244. Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

The Supreme Court has interpreted the Constitution to mandate government accommodation of religious practice.[245] Courts have interpreted an exception for Native American religion on federal lands because the prohibitions on religion are often the result of what the courts view as neutral land management decisions. However, even if we believe these neutral land management decisions do not create a burden on religious practice, the government still has an obligation to accommodate them. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions."[246] Moreover, Congress passed RFRA to overturn the Supreme Court's holding in *Smith* that the Free Exercise Clause cannot excuse a person from a neutral law of general applicability.[247] As a result, these "neutral" laws are still subject to the compelling interest test under RFRA and RLUIPA and require government accommodation to religion under the Constitution.

GOING FORWARD

Following this decision, the Supreme Court should have granted certiorari in *Apache Stronghold* and fixed the mistakes in the analysis outlined by the Ninth Circuit. The Supreme Court could have found that the plaintiffs' religion will be substantially burdened if Congress transfers Oak Flat to Resolution Copper for mining. The actions of Congress will prevent access to the site indefinitely, completely preventing religious exercise. This holding would have recognized the realities that Native Americans face in practicing their religion. Native Americans whose religious sites are on federal land are at the mercy and will of the government to practice their religion, similar to incarcerated individuals, and their access to religious practice should be expressly accommodated based on the Constitution and RFRA. In other situations where the government is in complete control of an individual's religious practice, courts have found that the government is expressly required by statute and the Constitution to accommodate this practice, otherwise it would be violating rights to religious freedom. Either way, Congress should pass legislation recognizing the level of coercion the government wields in Indigenous land-based faiths and require the government to accommodate worship.

245. Lynch v. Donnelly, 465 U.S. 668, 673 (1984) ("[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.").

246. *Id.*

247. Emp. Div., Dep't of Hum. Res. of Oregon, 494 U.S. 872, 879 (1990).