2022

Sacred Land, Not the Sacrificial Lamb: An Unfair Treatment of Native American Sacred Sites

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Abstract

If Lyng v. Nw. Indian Cemetery Protective Ass'n *is not overturned by the Supreme Court, the Religious Freedom Restoration Act ("RFRA") claims of Native Americans may be foreclosed for years to come while mainstream religions thrive. Differing notions of property ownership—Western and Indigenous—were at the center of the conflict in* Lyng*, where the Court upheld the Forest Service's approval of the G-O Road through a sacred site in Six Rivers National Forest. The Court did not find that the sacred site's diminishment was a substantial harm because it relied on the government coercion in* Sherbert v. Verner *and* Wisconsin v. Yoder *in defining a substantial harm. The precedent set by* Lyng *has made it nearly impossible for Native American plaintiffs to succeed on RFRA claims, because, like* Lyng*, all sacred site cases involve proposed government action on government owned land. Thus, Courts have consistently decided that* Lyng *is controlling.*

The Supreme Court may have an opportunity to revisit RFRA and Lyng*, given the Court's current composition and deep support for religious freedom. Following the dismissal* in Slockish v. U.S. Federal Highway Admin.*,* Stronghold v. United States *is the most recent sacred site case to rise to the Ninth Circuit. While similar to* Lyng*, the Apache Stronghold has a stronger case because the government plans on allowing oil mining companies to physically demolish Oak Flat, an Apache sacred site. The Apache Stronghold is also fortunate because this composition of the Supreme Court has heavily favored religious freedom. In recent cases like* Burwell v. Hobby Lobby Stores, Inc.*, the Court found in favor of religious freedom even when the burden was as attenuated as the possibility of an employee using an insured abortifacient and the possibility that it could stop an egg from attaching to the uterine wall. Considering the vast exemptions created by this case, holding that the destruction of a Native American sacred site is a substantial burden is not a stretch of the imagination. Nor is this burden as attenuated and incomparable to mainstream religion as* Lyng *would have readers believe. This paper argues that the Supreme Court should hold that a diminishment of sacredness of Native American sacred sites on public land is a substantial burden to Native Americans' right to free exercise and a failure to overturn* Lyng *will be a violation of the Establishment Clause.*

I. Introduction

Unlike the "mainstream" Abrahamic religions of the United States, the indigenous people of the Americas practice religions that are dependent on the peace and preservation of their sacred land. If the Eucharist's body of Christ was a body of land, any misuse of that land would burden the religious freedom of Catholics everywhere. Courts have treated Native American sacred site litigation as a unique issue on the basis that there no is clear analogy between the significance of sacred sites and other constitutionally protected religious practices. However, the Native Americans' belief that there is a spirit within their sacred sites is not so different from the Christian belief of the Holy Spirit or the belief that Christ is fully present in the Eucharist. While

the vast differences in ideologies and history regarding land ownership between Indigenous and Western culture play a part in sacred site litigation, the real issue is the colonization of indigenous land, which is the reason sacred sites are owned by the federal government. As a result of colonialism, courts have not adequately protected Native Americans' practice of religion.

A. Standard of Review

The First Amendment of the United States' Constitution offers two religious protections: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] The Supreme Court cases *Sherbert v. Verner* and *Wisconsin v. Yoder* created the Sherbert/Yoder test, which was used to decide Free Exercise Clause cases until the 1990s. In *Sherbert*, a Seventh-day Adventist could not work on Saturdays for religious reasons and was consequently fired.[2] The plaintiff was then denied unemployment benefits because the Employment Security Commission found that there was available employment, which would require her to work on Saturdays, and held that Sherbert was failing to accept such employment without good cause.[3] The Court held that Sherbert was unconstitutionally denied unemployment benefits because a governmental benefit was conditioned upon conduct that would violate Sherbert's religious beliefs.[4] In *Yoder*, Amish families wanted to withdraw their children from public school before the age of sixteen and faced criminal sanctions as a consequence.[5] The Court held that the plaintiffs' right to free exercise was violated because the government coerced Amish families to act contrary to their religious beliefs or face the threat of criminal sanctions as

[1] U.S. CONST. amend. I.
[2] Sherbert v. Verner, 374 U.S. 398, 401 (1963).
[3] *Id.*
[4] *Id.* at 409.
[5] Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

a consequence.[6] As a result of these two cases, the Sherbert/Yoder test triggered strict scrutiny when the government burdened a plaintiff's free exercise. Strict scrutiny requires the plaintiff to prove that there is a substantial burden on the free exercise of their religion; the government must then prove that the burden is justified by a compelling interest and is the lease restrictive alternative.[7] A plaintiff would prevail under the Sherbert/Yoder test when a court found that the plaintiff was forced to choose between the practice of their religious and the receipt of a government benefit or imposition of a civil or criminal penalty. [8]

The Sherbert/Yoder test was overturned, but Congress stepped in to create greater religious freedom. In 1990, *Employment Division v. Smith* overturned the Sherbert/Yoder test to the extent that a neutral, generally applicable law that burdened religion would no longer trigger strict scrutiny and was constitutional so long as it passed a rational basis standard.[9] However, Congress passed the Religious Freedom Restoration Act of 1993 ("RFRA"), which effectively brought back the Sherbert/Yoder test at the federal level.[10] Under RFRA, if a plaintiff can prove that the government substantially burdens their free exercise of religion, the burden shifts to the government to prove that they have a compelling interest that is achieved by the least restrictive means on religion.[11] If the government fails to meet this burden of proof, the plaintiff will prevail on a RFRA claim.[12]

Even after the passage of RFRA, Congress decided that the United States required more religious freedom that RFRA offered. This sentiment was likely as a result of the *City of Boerne*

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[6] *Id.* at 231.
[7] Sherbert, 374 U.S. at 402.
[8] Sherbert, 374 U.S. at 409; Yoder, 406 U.S. at 231.
[9] Emp't Div. v. Smith, 494 U.S. 872 (1990).
[10] 42 U.S.C. § 2000bb (1993).
[11] *Id.* at sec. 1.
[12] *Id.*

v. Flores striking down RFRA as applied to the states several years after RFRA was enacted.[13] To create more religious protection at the state level, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[14] RLUIPA provides religious protection in the prison context and in the land use regulation context.[15] RLUIPA will trigger strict scrutiny regardless of whether the burden is a generally applicable rule whenever a person or religious group is substantially burdened by a state government.[16]

B. Sacred Sites

While the government regards sacred sites as specifically defined locations on federally owned land that are used for or have some significance to Native American religious practices, Native American sacred sites are not so easily defined. A sacred site is not about the land drawn out on a map, but things that exist at the location like "plants, animals, sound light, view shed, and other sometimes intangible features."[17] The significance of a sacred site's broader landscape is the reason why many cases argue that government action on a sacred site is a desecration even though the Native Americans are not denied access to the land itself.[18]

The conflict surrounding sacred sites is a long-term consequence of the Indian Removal Act of 1830, where President Jackson and Congress exercised an excessive amount of power in facilitating the removal of Native American tribes from the south to land west of the Mississippi river.[19] The removal, infamously known as the trail of tears, led to the physical removal of

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[13] City of Boerne v. Flores, 521, 536 U.S. 507 (1997).
[14] 42 U.S.C. §§ 2000cc (2000).
[15] *Id*.
[16] *Id*.
[17] Advisory Council on Historic Preservation, Protection of Indian Sacred Sites: General Information (2012), https://www.achp.gov/sites/default/files/2018-07/TheProtectionofIndianSacredSitesGeneralInformationJuly2015.pdf.
[18] *Id*.
[19] Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49 (2010).

Native Americans from their ancestral lands but it also stripped their title to those lands.[20] The relocation of Native Americans on federal land began the reservation system and led to years' worth of conflict regarding land ownership and the Native American tribes. While there are cultural differences between western and native concepts of land ownership, the issue of sacred sites is not simply the contradiction between the idea of land as something that is owned versus land as something that is sacred. The crux of the issue in sacred site cases is that the U.S. government took land from the Native Americans and now uses its self-proclaimed ownership of that land as the very foundation of its case against Native Americans' free exercise of religion.

However, despite their contribution to the problem, the government has tried to protect sacred sites. In the 1970s, Congress passed the American Indian Religious Freedom Act ("AIRFA"), which was created with general language that vowed to "protect and preserve" Native Americans' freedom of religion.[21] Congress amended AIRFA over the years to include provisions like the decriminalization of Peyote for religious purposes.[22] In 1996, President Clinton, by Executive Order 13007, added a provision regarding sacred sites.[23] The provision stated that, to the extent reasonable, the federal government would allow Native Americans access to sacred sites on federal land and avoid activity that would diminish the sacredness of that land.[24] While this seemed promising, AIRFA and Executive Order 13007 had no teeth because they did not create a cause of action or rights that may be judicially enforced.[25]

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[20] *Id*.
[21] 42 U.S.C. § 1996 (1978).
[22] *Id*.
[23] Exec. Order No. 13007, 61 Fed. Reg. 26771 (May 24, 1996), https://www.govinfo.gov/content/pkg/FR-1996-05-29/pdf/96-13597.pdf.
[24] *Id*.
[25] Stephanie H. Barclay & Michalyn Steele, Rethinking Protections For Indigenous Sacred Sites, 134 HARV. L. REV. 1294, 1320 (2021).

Some protection is available under the National Historic Preservation Act ("NHPA") and the National Environmental Policy Act ("NEPA"). NHPA was amended to include preservation programs for tribe history and can nominate sacred sites for historic preservation, which could ward off some of the government action that would diminish the sacredness of the site.[26] NEPA does not have as strong of a reach as NHPA, but it requires federal agencies to create environmental impact statements for their actions.[27] These statements may be persuasive to government agencies that have the authority to protect a site.[28]

Given these congressional acts, some federal agencies have been proactive about protecting Native American religious practices on their sacred sites but a consequential issue with respect to these protections are Establishment Clause claims. Establishment Clause claims can have unpredictable outcomes for the Native Americans protected by the challenged governmental action because the test for Establishment Clause violations is unclear, as a court could choose to use the *Lemon* test, Justice Kennedy's coercion test from *Lee v. Weisman*, or Justice O'Connor's endorsement test from *Lynch v. Donnelly*.[29] Fortunately, many Establishment Clause claims against the protection of sacred sites have failed.[30] For example, Devil's Tower is a Native American sacred site, where religious ceremonies are held during the month of June, but the monument has also become a recreational spot for rock climbers.[31] Despite the clear issues this posed for the sacredness of the space, elders also feared that it would be difficult to teach native children of the monument's sacredness when the children could see people playing on the site.[32] In respect of the Native Americans' exercise of religion, the National Park Service

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[26] *Id.* at 1318.
[27] *Id.* at 1319.
[28] *Id.*
[29] Joel Brady, Comment, *"Land is Itself a Sacred, Living Being": Native American Sacred Site Protection on Federal Public Lands Amidst the Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153 (1999).
[30] *Id.*
[31] Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 816 (10th Cir. 1999).
[32] Brady, *supra* note 29 at 166.

developed a plan that asked rock climbers to voluntarily refrain from climbing Devil's tower during June, which the Secretary of the Interior approved.[33] The rock climbers, with the Bear Lodge Municipal Use Association, claimed the Secretary's approval was a violation of the Establishment Clause.[34] Rather than decide on the Establishment Clause issue, the court found that the plaintiffs, who were not denied access to the monument, had no standing.[35] Lack of standing has been used in several similar cases to avoid reaching the constitutional issue.[36]

II. Lyng and its Constraints

Lyng v. Nw. Indian Cemetery Protective Ass'n. is the bedrock of sacred site litigation in this country. In *Lyng*, the government sought to construct a road in California that would connect two towns, Gasquet and Orleans, dubbing it the G-O Road.[37] Six miles of the road was to run through the Six Rivers National Forest's Chimney Rock Park, where three Native American tribes were known to hold rituals.[38] The construction of the G-O road was a disruption to the Native American's religious practice, not because it made the land inaccessible, but because it disrupted the "privacy, silence, and undisturbed natural setting" needed for the religious practice.[39] The Supreme Court interpreted the word "prohibit" in the Free Exercise Clause to govern what the government could do to the individual.[40] Relying on the Sherbert/Yoder test, the Court found that the construction of the G-O road did not violate the Native Americans' rights to free exercise because it did not coerce the Native American tribes into choosing between

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[33] Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d at 815.
[34] *Id.*
[35] *Id.* at 822.
[36] Nat. Arch & Bridge Soc'y v. Alston, 209 F. Supp. 2d 1207 (D. Utah 2002) (An Establishment Clause claim against a voluntary ban on non-native people visiting the Rainbow Bridge was dismissed for lack of standing.)
[37] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 461 (1988).
[38] *Id.*
[39] *Id.*
[40] Lyng, 485 U.S. at 450.

practicing their religion and giving up a government benefit (as had been the case in *Sherbert*) or practicing their religion and facing a civil or criminal penalty (as had been the case in *Yoder*).[41]

While neither *Sherbert* nor *Yoder* relate to Native American religion, the Court also compared *Lyng* to an early Supreme Court case with a Native American Plaintiff, *Bowen v. Roy*.[42] In that case, the Native American parents of a two-year-old challenged a statute that would require their daughter be assigned a social security number in order to receive the benefits of certain welfare programs.[43] The parents believed that assigning their daughter a social security number would rob her of her spirt.[44] The parents failed on their free exercise claim as the court in *Bowen* found that the government could not be required to conduct its internal affairs to "comport with the religious beliefs of particular citizens.[45]" The Court argues that *Lyng* and *Bowen* are not distinguishable because both cases challenge government action that interferes with individuals' spiritual fulfillment.[46] Like in *Bowen*, the Court upholds that if the government were required to satisfy "every citizen's religious needs and desires," as opposed to avoiding burdens on religion, it would be impossible to operate.[47]

In his *Lyng* dissent, Justice Brennan argues that the majority's "refusal" to find a constitutional injury in this case could extinguish Native American religious practice altogether, by offering no constitutional protection to Native Americans.[48] Justice Brennan explains that the reason the Court applied strict scrutiny in *Yoder* was not because the law exerted an "affirmative coercion," but because the impact of the law could destroy Amish communities.[49] He suggests

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[41] *Id.*
[42] Bowen v. Roy, 476 U.S. 693 (1986).
[43] *Id.* at 2150.
[44] *Id.*
[45] *Id.* at 2151.
[46] Lyng, 485 U.S. at 448.
[47] *Id.* at 452.
[48] *Id.* at 469.
[49] *Id.* at 466.

that the form of coercion, like a criminal sanction in *Yoder* or a denial of a government benefit in *Sherbert*, should not trigger First Amendment protection.[50] Rather, the Court should consider an "effects test."[51]

The majority acknowledges that the impact of the G-O road on the Native Americans "will doom their religion."[52] However, the majority is not willing to find the impact on the religion is a constitutional injury. They focus on the fact patterns of previous cases and decide on coercion as threshold for free exercise claims, but the Free Exercise Clause has no language that suggests the range of substantial burdens to religion is limited to coercion.[53] The majority notes the importance of the word "prohibit" in the Free Exercise Clause and Justice Brennan agrees, arguing that the word prohibit does not only apply to situations where the government coerces "affirmative conduct."[54] The free exercise of religion is still prohibited when government action makes practicing one's faith impossible.[55]

Justice Brennan proposes that, in the case of Native American sacred sites, Native American plaintiffs should show "centrality" of the site to trigger strict scrutiny, similar to prior sacred site cases like *Sequoyah v. Tennessee Valley Authority*.[56] The court in Sequoyah found that the Native American plaintiff could not prove the sacred site of the Tellico Dam inseparable from their way of life and did not grant the plaintiff's request for injunction against the completion of the dam.[57] This centrality must be greater than claiming a site is sacred but need not rise to the level of proving the government action destroys their religion.[58]

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[50] *Id.*
[51] *Id.* at 469.
[52] *Id.* at 470.
[53] *Id.* at 464.
[54] *Id.* at 468.
[55] *Id.*
[56] *Id.* at 473.
[57] Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159, 1164 (6th Cir. 1980).
[58] *Id.*

III. Lower Court Decisions After Lyng

Justice Brennan's prediction that the majority's holding in *Lyng* would offer no constitutional protection for Native Americans became a reality as the precedent set by *Lyng* continues to frustrate Native American Religious practices up to today.

Two years after *Lyng* was decided, the U.S. District Court for the District of Arizona held that a proposed uranium mine on the Havasupai Tribe's sacred site in Kaibab National Forest was not a violation of the Free Exercise Clause as it was indistinguishable from *Lyng* and failed on the same grounds.[59] In *Havasupai Tribe v. United States,* the Native American plaintiffs offered three ways in which their case differed from *Lyng*. First, that the site of the uranium mine was central to their "universe," as the mining would "kill their deities, and destroy their religion.[60]" However, the district court did not find that this was any different from *Lyng*, or that the mine offended their constitutional rights.[61] This may not come as a surprise since Justice Brennan's dissent highlighted that the decision in *Lyng* would have the effect of destroying the Native American plaintiffs' religion.[62] Second, the mining was a private activity as compared to the G-O road in *Lyng*.[63] The court found that this was insignificant because the land in both cases was owned by the government.[64] Third, that there was a no trespassing sign that effectively denied access of the Havasupai people to their sacred site.[65] The court decided that plaintiffs were not denied access by the sign because no Havasupai person tried to trespass and, as a result, no one was stopped.[66] Based on the court's response to the plaintiffs' distinguishing factors, the

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[59] Havasupai Tribe v. United States, 752 F. Supp. 1471, 1475 (D. Ariz. 1990).
[60] *Id.* at 1486.
[61] *Id.* at 1484.
[62] *Id.* at 1486.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

court not only relied on *Lyng* but broadened its application to apply even when it completely forecloses religion, a private actor is doing the challenged act, and access is theoretically denied.[67]

While RFRA was enacted in 1993 for stronger protection of religious freedom post-*Smith*, the Ninth circuit held that RFRA simply reinstated the Sherbert/Yoder test of a substantial burden as interpreted in *Lyng*, requiring the threshold of coercive government action. In *Navajo Nation v. United States Forest Services,* the Ninth circuit held that *Lyng* controlled the Navajo Nation's RFRA claim.[68]

To understand *Navajo Nation,* we must first review a pre-Lyng decision of the District of Columbia Circuit, *Wilson v. Block.*[69] Prior to the infamous litigation in *Navajo Nation v. Forest Services,* the Forest Service permitted the expansion of the Snowbowl which threatened to diminish the sacredness of their Peaks, as the Hopi people believed the Peaks were a living deity and the artificial construction atop them would result in a loss of their healing power.[70] The Native American plaintiffs brought both a free exercise claim and an AIRFA claim.[71] The court found that the plaintiffs failed on their free exercise claim because they could not prove that their religious exercise was substantially burdened. They were not penalized for their religious belief, as was the case in *Sherbert,* and they were not denied access to the Peaks.[72] The Native American plaintiffs also failed on their AIRFA claim because the court found that AIRFA only

[67] *Id.*
[68] Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1071 (9th Cir. 2008).
[69] Wilson v. Block, 708 F.2d 735 (1983).
[70] *Id.*
[71] *Id.* 739.
[72] *Id.*

requires government agencies to consider the impact on native people, not to "declare the protection of Indian religions to be an overriding federal policy.[73]"

Twenty-five years later, litigation arose from the Snowbowl again. The Navajo Nation filed a RFRA claim against the Forest Services' use of recycled wastewater to make artificial snow for the Snowbowl ski resort on the San Francisco Peaks.[74] While the use of wastewater to create artificial snow on the Peaks diminished their sacredness, the Navajo Nation was not denied access or the ability to practice rituals on any part of the Peaks.[75]

Based on the Supreme Court's analysis of *Yoder* in *Lyng*, the Ninth circuit held that *Lyng* and *Navajo Nation* were indistinguishable and thus, the Navajo Nation's RFRA claim should fail.[76] While the plaintiffs argued that *Lyng* should not apply because it failed to analyze *Sherbert*, the Ninth Circuit found that the *Sherbert* analysis was not necessary because there was no government benefit in either case.[77] As a result, the Navajo Nation's RFRA claim failed.[78]

The Native American plaintiffs in Navajo Nation also made a RLUIPA claim, but the court found that the claim did not apply in this case because the Forest Services is a federal agency and RLUIPA is reserved for state and local governmental actions.[79] Further, the Peaks are public land and RLUIPA applies to regulations of private land.[80]

One federal district court did not view *Lyng* as an obstacle. In 2008, the same year that *Navajo Nation* was decided, the Oklahoma Western District Court granted the Comanche Nation's preliminary injunction on the basis that the Comanche Nation was likely to succeed on

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[73] *Id.* at 746.
[74] Navajo Nation, 535 F.3d at 1066.
[75] *Id.* at 1071.
[76] *Id.*
[77] *Id.* at 1073.
[78] *Id.*
[79] *Id.* at 1077.
[80] *Id.*

their claims.[81] Regarding the Native American plaintiffs' RFRA claim, the court found that construction of an Army Training Support Center warehouse that would obstruct the view of the Medicine Bluffs, which is central to the Comanche people's religious practice, was a substantial burden.[82] In deciding this, the Judge used the Tenth Circuit's definition of substantial burden in *Thiry v. Carlson*, which occurs when people are severely restricted from religious "conduct or expression" or are denied "reasonable opportunities to engage in" their religious practices.[83]

The Comanche people did not need to file for a permanent injunction against the warehouse specifically because the Army decided on a different location.[84] However, the United States did not note *Comanche Nation v. United States'* departure from *Lyng* and *Navajo Nation*'s definition of a substantial burden when opposing *Navajo Nation*'s appeal to the Supreme Court in 2009, nor was this departure ever addressed since the Supreme Court denied certiorari.[85] Despite the *Comanche Nation*'s success, it was a district court decision on a preliminary injunction, and did not hold the precedential weight that *Navajo Nation* has since held over RFRA claims in the sacred site context.

Even a case that began prior to the *Navajo Nation* decision fell victim to its precedent as the case traveled through the courts. In *Snoqualmie Indian Tribe v. FERC*, the Snoqualmie Tribe considered the Snoqualmie Falls a sacred site because the Falls were a part of Snoqualmie Tribe's creation story and the center of their religious practices.[86] The Federal Energy Regulatory Commission ("FERC") relicensed Puget Sound Energy's hydroelectric project for forty years,

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[81] Comanche Nation v. United States, No. CIV-08-849-D, 2008 U.S. Dist. LEXIS 73283 (W.D. Okla. Sep. 23, 2008).
[82] *Id.*
[83] *Id.*
[84] Lieutenant Colonel James E. Key, *This Land is My Land: The Tension Between Federal Use of Public Lands and the Religious Freedom Restoration Act*, 65 A.F. L. REV. 51 (2010).
[85] *Id.*
[86] Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207, 1211 (9th Cir. 2008).

and the Tribe brought a RFRA claim to FERC because the project denied them access to the Falls for religious practices and the dam necessary for the project "eliminat[ed] the mist necessary for the Tribe's religious experiences.[87]" *Navajo Nation* had not been decided when the Tribe brought their RFRA claim to FERC, but by the time *Snoqualmie Indian Tribe* reached the Ninth Circuit, the court relied on *Navajo Nation*. It decided that the diminishment of the Fall's sacredness did not meet the burden necessary to succeed on a RFRA claim, because there was no coercive government action.[88]

Following the Snoqualmie Tribe's case, the decision in *Navajo Nation* has been consistently fatal to RFRA claims brought by Native American plaintiffs. In *South Fork Band v. United States DOI*, a gold mining corporation sought to expand their existing project in Nevada, including parts of Mt. Tenabo, a sacred site.[89] The Native American Plaintiffs filed for a preliminary injunction against the expansion on the basis of a RFRA claim.[90] However, the court affirmed the mining corporation's motion for judgment on the pleadings with respect to the RFRA claim because the Native American Plaintiffs were not likely to succeed on their claims.[91] Due to reliance on *Navajo Nation*, the court found, yet again, that the plaintiffs were not forced to choose between practicing their religion and giving up a government benefit (as in *Sherbert*) or practicing their religion and facing a civil or criminal penalty (as in *Yoder*).[92]

In 2016, the struggles Native Americans faced in protecting their sacred sites became national news as roughly two hundred tribes joined to protest the construction of the Dakota Access pipeline.[93] The protest was highly publicized, likely due to the presence of the National

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[87] *Id.* at 1213.
[88] *Id.* at 1214.
[89] S. Fork Band v. United States DOI, 643 F. Supp. 2d 1192, 1195 (D. Nev. 2009).
[90] *Id.*
[91] *Id.* at 1198.
[92] *Id.*
[93] *Id.*

Guard in armored vehicles and the three hundred protestors who were injured because of it.[94] The issue surrounding the Dakota Access pipeline and its corresponding litigation, *Standing Rock Sioux Tribe v. United States*, is the risk of an oil spill that could contaminate the water of Lake Oahe, which is used by the Native people for religious ceremonies.[95]

Like in the many sacred site cases before it, the Native American plaintiffs failed to prevail on a RFRA claim because the court found that they did not meet the threshold of a substantial burden as defined by *Lyng* and *Navajo Nation*.[96]

While the precedent set by *Lyng* and *Navajo Nation* has been devastating for Native Americans and their religious practice, the Court may have a chance to change this. There was recent hope that ***Slockish v. U.S. Federal Highway Admin.*** would result in a Ninth Circuit decision on the merits, but the case was dismissed as moot.

Slockish arose from a proposed federal highway that would destroy a Native American sacred site composed of campgrounds and burial grounds.[97] In addition to destroying the land to construct the highway, the proposed guardrail accompanying the highway would block access to the land.[98] Relying on the Ninth Circuit's decision that the native plaintiffs were not substantially burdened in *Navajo Nation* and the Supreme Court's acknowledgement in *Lyng* that the Native Americans did not have a constitutional injury despite their religion being destroyed, the court found that the native plaintiffs failed to establish a prima facie RFRA case.[99] While this decision was appealed, the Ninth Circuit dismissed this case as moot because any relief available to the

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[94] ACLU, *STAND WITH STANDING ROCK: Protect Protesters' Rights*, https://www.aclu.org/issues/free-speech/rights-protesters/stand-standing-rock.
[95] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 239 F. Supp. 3d 77, 91 (D.D.C. 2017).
[96] *Id*.
[97] Slockish v. U.S. Federal Highway Admin., No. 3:08-cv-01169-YY, 2018 U.S. Dist. LEXIS 98346 (D. Or. Mar. 2, 2018).
[98] *Id*.
[99] Slockish v. U.S. Dep't of Transp., https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/11/24/21-35220.pdf.

native plaintiffs would interfere with safety as the guard rail was a necessary feature of the federal highway.[100]

With *Slockish* dismissed, focus has shifted to *Stronghold v. United States*.[101] The case began when the Apache Stronghold moved for a temporary restraining order and preliminary injunction against the government's sale of Oak Flat, a sacred site, to foreign mining companies.[102] This sacred site is especially significant to the Apache people because it is connected to their creator, who exists through the plants, animals, and other nature at Oak Flat.[103] The destruction of the land for the sake of underground mining will "will close off a portal to the Creator forever" for the Apache people.[104] This and more—the future of sacred site litigation—is at risk as the Apache Stronghold litigates this case in the Ninth Circuit now.

Regardless of these extreme consequences, the federal district court held that *Lyng* and *Navajo Nation* are controlling in their definition of a substantial burden, until the Supreme Court addresses the issue again.[105] The threat to Oak Flat differs from that of the diminished sacredness of the Peaks in Navajo Nation because the Apache people will be denied access altogether and the land will essentially be destroyed.[106] However, the court's reading of *Lyng* and *Navajo Nation* dictates that a plaintiff will not have a RFRA claim unless they fall into the two "narrow situations" of choosing between their religious practice and giving up a government benefit (as in *Sherbert*) or subjecting themselves to a civil or criminal sanction (as in *Yoder*).[107] The court acknowledges that there are many benefits that Oak Flat may offer to the Apache people but

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[100] *Id.*
[101] Stronghold v. United States, 519 F. Supp. 3d 591 (D. Ariz. 2021).
[102] *Id.* at 598.
[103] *Id.* at 604.
[104] *Id.*
[105] *Id.* at 607.
[106] *Id.*
[107] *Id.*

being deprived of these religious or spiritual benefits do not provide for a cause of action because the government did not give this benefit to the Apache people and then take it away.[108]

Despite their clear aversion to it, the court in *Stronghold* had their hands tied by the precedent set by *Lyng* and *Navajo Nation*, but this could change as litigation rises to the Ninth Circuit.

IV. Looking to the Future of Sacred Sites in the Courts

Stronghold v. United States' appeal may seem futile as sacred site litigation has been at a standstill since *Navajo Nation*, but recent Supreme Court decisions on RFRA claims, though not about Native American religions, have created a conflict of precedent.

In recent years, free exercise protection has been interpreted robustly. It is easier for plaintiffs to prove their religious freedom has been burdened, and harder for the government to defend its laws. The provision of RFRA that requires the law to not only advance a compelling interest but also be the least restrictive means of advancing that interest is applied in *Burwell v. Hobby Lobby*.[109] In *Hobby Lobby*, the government's argument essentially fails upon the court's finding that there was a less restrictive act, despite it being inconvenient for the government.[110] This broad interpretation not only applies to RFRA but other free exercise protection as well, like RLUIPA.[111] When RLUIPA was passed, it amended the definition of 'exercise of religion' in RFRA to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[112]

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[108] *Id*.
[109] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).
[110] *Id*.
[111] Holt v. Hobbs, 574 U.S. 352, 369 (2015).
[112] 42 U.S.C. §§ 2000cc (2000).

Following the Hobby Lobby decision, the Court has applied this robust interpretation of the least restrictive means under RLUIPA cases as well. In *Holt v. Hobbs*, the Arkansas Department of Correction prevented a prisoner from growing a beard a quarter inch longer than the permitted length for religious purposes.[113] The *Holt* Court found that this was not the least restrictive means of upholding prison security.[114] The Court's reasoning was that other prisons allowed religious exemptions to this rule, and that the Arkansas prisons could take pictures of the inmate with and without a beard for identification purposes—thus, avoiding the security concern.[115] Unfortunately, despite RLUIPA broad application, courts continue to deny Native American plaintiffs strict scrutiny review of their free exercise claims in the RLUIPA context.[116]

In *Hobby Lobby*, three for-profit companies, including Hobby Lobby, claimed to have sincerely held religious beliefs that were infringed upon by the Affordable Care Act's requirement that the companies provide health insurance that covered four methods of contraception.[117] These methods were abortifacients, meaning the medication could prevent a fertilized egg from attaching to the uterus, in the event that a fertilized egg would have implanted in the uterus but for the use of the abortifacient.[118] Health and Human Services ("HHS") argued that Hobby Lobby and the other companies should not prevail on a RFRA claim because their concern that the insurance coverage would cause the destruction of embryos was too attenuated to be a substantial burden.[119] However, the Court commented that it was not up to HHS or the

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[113] Holt v. Hobbs, 574 U.S. at 366.
[114] *Id.*
[115] *Id.*
[116] Ramapo Hunt & Polo Club Ass'n v. Ramapough Mt. Indians, No. A-5711-18T4, 2021 N.J. Super. Unpub. LEXIS 57 (Super. Ct. App. Div. Jan. 12, 2021).
[117] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 691.
[118] Cathy Lynn Grossman, *What's abortifacient? Disputes over birth control fuel Obamacare fight* (January 2014), https://www.washingtonpost.com/national/religion/whats-abortifacient-disputes-over-birth-control-fuel-obamacare-fight/2014/01/28/61f080be-886a-11e3-a760-a86415d0944d_story.html.
[119] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 724.

judiciary to decide whether the belief was reasonable.[120] The Court found that there was a substantial burden on the corporation because by refusing to cover their employees for fear that the coverage would destroy embryos, they faced a great financial burden in fines.[121] The corporations prevailed on their RFRA claim.[122]

However, the Court has made it clear in both *Hobby Lobby* and *Holt* that the purpose of RFRA and RLUIPA was to broaden the protection of religious freedom afforded by the First Amendment.[123] Thus, in *Hobby Lobby* and *Holt,* we see a substantial burden test which is far broader than that of *Sherbert* and *Yoder*. First, the two cases use the statutory definition of religion, which does not require the practice to be compelled or central to the religion.[124] Second, substantial burdens are interpreted more broadly, as the Court looks for obstacles to the practice of religion.[125] The obstacles that the plaintiffs face in *Hobby Lobby* and *Holt*, accordingly, are the inability to run your business according to your faith and the ban against wearing a beard in compliance with your religion.[126] These obstacles are like the effects test that Brennan suggests in his *Lyng* dissent, where the court must consider the effects of government action on free exercise when it "actually restrains their religious practices."[127]

This broader interpretation of *Hobby Lobby* and *Holt* is illuminated by Justice Ginsburg dissent in Hobby Lobby, where she argues that the majority departs from the Sherbert/Yoder test. Justice Ginsburg states that while the majority acknowledges that the corporations' have a sincerely held religious belief that life begins at conception and the monetary fine burdens this

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[120] *Id*.
[121] *Id*. at 726.
[122] *Id*. at 736.
[123] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 694; Holt v. Hobbs, 574 U.S. at 357.
[124] *Id*.
[125] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 695; Holt v. Hobbs, 574 U.S. at 358.
[126] *Id*.
[127] Lyng, 485 U.S. at 469.

sincerely held belief, the majority fails to inquire whether this burden is substantial.[128] To emphasize her point, she references *Bowen*, where the Court decided that the government's requirement of a social security number did not restrict the father's beliefs or choices, despite his child's inability to receive welfare without a social security number.[129] The Court in *Bowen* adhered to the substantial burden threshold demonstrated in *Sherbert* and *Yoder*, and reinforced by RFRA, from which the *Hobby Lobby* decision departs.[130] While Justice Ginsburg advocates for strict adherence to the *Sherbert* and *Yoder*, her concern is how far RFRA's definition of the exercise of religion has departed from those cases.[131]

Despite the *Hobby Lobby* majority's clear departure from the Sherbert/Yoder test, there is still doubt that *Hobby Lobby* has abandoned the precedent in *Lyng*. In *Standing Rock Sioux Tribe*, the Native American plaintiffs argued that *Lyng* was no longer controlling because the Supreme Court's holding in *Hobby Lobby* abandoned the presumption that a court could decide there was not a substantial burden on the grounds that the burden was not reasonable "in light of the government regulation."[132] The court in *Standing Rock Sioux Tribe* rejected this argument, stating that *Hobby Lobby*'s holding did not conflict with that of *Lyng* because the substantial burden in *Hobby Lobby* was the coercive fines that resulted from Hobby Lobby's noncompliance with the mandate.[133] The court argued that neither *Lyng* nor *Hobby Lobby*'s plaintiffs were judged based on the reasonableness of their sincerely held religious beliefs.[134]

However, the rebuttal fails to acknowledge the difference in the definition of free exercise since RLUIPA in 2000 and the broader understanding of a substantial burden.

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[128] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 760.
[129] *Id.* at 759.
[130] *Id.*
[131] *Id.* at 748.
[132] Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs, 239 F. Supp. 3d at 96.
[133] *Id.*
[134] *Id.*

Previously, a presence of a fine or affirmative coercion was not enough to create a substantial burden if the affected belief was not central to the religion. Hobby Lobby and the other corporations prevailed on their RFRA claim regarding abortifacients because RFRA, as amended by RLUIPA, no longer requires the religious belief to be central to religious practice and any obstacle their religious practice is a burden.[135] Thus, *Hobby Lobby* did abandon the pre-Smith jurisprudence that controlled in *Lyng*.

Native Americans face the same constraints against their religious practices as the plaintiffs in *Hobby Lobby* and *Holt*, and as a result, *Hobby Lobby*'s precedent should apply to sacred site cases. In *Lyng* and *Navajo Nation*, the plaintiffs could not practice their religion because their sacred sites of worship were diminished by the government's disruption use of the land.[136] Further, the substantial burden in *Stronghold* is distinct from that of *Lyng* and *Navajo Nation* because the plaintiffs will be actually restrained from their religious practices because the sacred site will be physically destroyed.[137]

If given the opportunity to decide *Stronghold*, the Court should find that, like *Hobby Lobby* and *Holt*, the significance to the Apache's access of Oak Flat is necessary to the Apache's religious practice and leveling the land would be an obstacle to that practice.[138] For these reasons, the Apache's RFRA claim meets the substantial burden threshold for a strict scrutiny review.

V. Overturning Lyng

Under the reign of *Lyng*, Native American religion is at risk of extinction. If the Court is only willing to uphold the departure set by *Hobby Lobby* when Christian values are at stake, not

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[135] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 748.
[136] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. at 442; Navajo Nation, 535 F.3d at 1071.
[137] Stronghold v. United States, 519 F. Supp. 3d at 604.
[138] *Id*.

only will free exercise suffer in this nation, but there will be an Establishment Clause violation against Native American religions. In *Larson v. Valente*, a Minnesota statute imposed registration and reporting requirements upon some religious organizations and not others, depending on where the organization solicited 50% of their funds from nonmembers.[139] The Court found the statute violated the Establishment Clause because the statute demonstrated denominational preference and the government's reason for doing so did not withstand the demands of strict scrutiny.[140] Again, in *Lee v. Weisman*, the Court affirmed the court of appeals, which expressed that the Establishment Clause is violated when "the effect of the governmental action is to endorse one religion over another.[141]" When plaintiffs who subscribe to Abrahamic religions continue to meet the substantial burden threshold of their RFRA claims while Native American plaintiffs are foreclosed from making a claim that their freedom of religion has been violated, there is no legitimate argument that the government has not endorsed one religion over another.

The issue with *Lyng* for the Supreme Court is legitimacy. The Court is faced with an issue of legitimacy when they are forced to choose between overturning their previous holding in *Lyng* or reinforcing the farcical and unconstitutional conflict of precedent as it stands now. The devil may be in the details, but the truth is in the testimony. To fix the inequality at the heart of *Lyng*, the Court needs to revisit the testimony given by the native witnesses during litigation.

Scholar Dana Lloyd wrote storytelling and the high country: reading Lyng v. Northwest Indian Cemetery Protective Association, which took a deep dive into the testimony given in *Lyng*, which Lloyd argues was not reflected in the Supreme Court's decision.[142] The native

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[139] Larson v. Valente, 456 U.S. 228, 230 (1982).
[140] *Id.* at 255.
[141] Lee v. Weisman, 505 U.S. 577, 585 (1992).
[142] D. Lloyd, *STORYTELLING AND THE HIGH COUNTRY: READING LYNG V. NORTHWEST INDIAN CEMETERY PROTECTIVE ASSOCIATION (1988)*, JOURNAL OF LAW AND RELIGION, 36(2), 181-201 (2021).

testimony, as a firsthand account, more accurately articulates that burden the G-O road imposed on their religion. It was not simply an emotional burden as O'Connor's majority opinion described, nor was the burden lacking a comparator for non-native people as Justice Brennan explained.[143] The burden of government action on Native American sacred sites is no different from the physical destruction of native religions that Native Americans faced when early American colonizers tried to evangelize the indigenous people of American and again and again over the years by the American government.[144] As a witness for the Native American plaintiff, a Yurok elder, Lowanna Brantner, described how different tribes would have to come together and share relics to perform their religious dances properly.[145] She explains that they needed to come together because, after American soldiers destroyed tribal relics, no tribe alone had the necessary relics.[146]

Due to AIRFA requirements, the Forest Service in *Lyng* had Theodoratus Cultural Research create a five hundred page report that studied the culture of the High Country of the Native Americans in the case.[147] The study concluded that the G-O road should not be built.[148] It compared the usual highway debris of "empty beer cans and used condoms" on the land of the High Country to the desecration those inappropriate items would have on a cathedral alter, as both religions emphasis abstinence in the pursuit of spirituality.[149] Further, one of the Native American witnesses described the construction of the G-O road as the equivalent running a bulldozer "through the white man's church.[150]" The research and testimony offered on behalf of the Native American plaintiffs lead to Lloyd to use the expression "burden of invasion" to

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[143] *Id.* at 186.
[144] *Id.* at 193.
[145] *Id.* at 181.
[146] *Id.* at 182.
[147] *Id.* at 183.
[148] *Id.*
[149] *Id.* at 193.
[150] *Id.* at 194.

describe the government action against sacred sites, that is both destructive and the lasting pervasiveness of colonialism.[151]

This idea of a burden of invasion arising from the testimony of the *Lyng* case is what the Court can use to overturn the decision in *Lyng*. The same way that the culmination of *Sherbert* and *Yoder* created the definition of substantial burden that courts have used in the absence of a definition proscribed by RFRA, the Court should expand the definition of substantial burden to include the burden of invasion.[152] Expanding the definition of substantial burden now is no different from the way in which the Court considered the burden of a criminal sanction in *Yoder*, years after *Sherbert.*[153] Further, it is no different than the influence RLUIPA had on the RFRA claim in *Hobby Lobby*.[154] The law changes and grows as the need for it arises. Here, the Native American people need the Sherbert/Yoder standard to broaden for the sake preserving what is left of their religious practice.

VI. Conclusion

The testimony in *Lyng* itself makes the case that the desecration of sacred sites would not be tolerated if it were a Christian Church being destroyed instead. While there may be differences between western and native ideology regarding ownership of land, the sacredness of the High Country in *Lyng* is no different from the belief that Christ is fully present in the sacrament of the Eucharist. The only real difference is that, to save face in light of their narrow precedent and to conform to the social norms of mainstream religion, the Court has thus far refused to understand native testimony and experience. If the Court does not overturn *Lyng* at the

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[151] *Id.* at 193.
[152] 42 U.S.C. § 2000bb (1993).
[153] Yoder, 406 U.S. at 231.
[154] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. at 748.

next available opportunity, it will not only establish that *Lyng* is good law, but it will also establish mainstream religions as the official religions of the United States of America.