Utah Law Review

Volume 2023 | Number 5 Article 7

11-2023

Religious Freedom (for most) Restoration Act: A Critical Review of the Ninth Circuit's Analysis in Apache Stronghold

Alex McFarlin

RELIGIOUS FREEDOM (FOR MOST) RESTORATION ACT: A CRITICAL REVIEW OF THE NINTH CIRCUIT'S ANALYSIS IN *APACHE STRONGHOLD*

Alex McFarlin*

Abstract

This Note analyzes sacred site protection under the Religious Freedom Restoration Act ("RFRA") and argues that the Ninth Circuit's upcoming en banc review of Apache Stronghold *is a critical moment for many Indigenous faiths. Against the backdrop of a religious freedom resurgence for other faiths over the past decade, the practitioners in* Apache Stronghold *face the irreparable loss of identity and culture.*

INTRODUCTION

Religious freedom in the United States may be at its zenith under the Roberts Court.[1] In the past ten years the Supreme Court protected religious monuments on public land,[2] exempted religious objectors from fines imposed by the Affordable Care Act,[3] and protected parochial school students' state-funded scholarships.[4] Yet,

[1] *See* Adam Liptak, *An Extraordinary Winning Streak for Religion at the Supreme Court,* N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/us/politics/supreme-court-religion.html [https://perma.cc/F3NF-KVF5] (reviewing the data of pro-religious freedom decisions under the Roberts Court compared with other Supreme Court eras over a seventy-year span). The term "Roberts Court" is used to mark the period beginning at Chief Justice John Roberts' appointment to the United States Supreme Court, in 2005, through the present year.

[2] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (holding that the presence of a forty-foot cross on public land does not violate the First Amendment's Establishment Clause).

[3] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 690–91 (2014) (exempting a closely held for-profit corporation from a mandate requiring contraceptive insurance coverage for employees because the mandate burdened the owners' free exercise under RFRA).

[4] *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2257 (2020) (finding that a state constitution's interference with state-funded tuition assistance for religious school students is unconstitutional under the Free Exercise Clause).

despite this surge in successful religious freedom claims, Indigenous Peoples[5] struggle to protect their sacred sites in federal court.[6]

Apache Stronghold v. United States provides the latest development on this issue.[7] This case arose when an organization comprised of Apache Nation members tried to protect a long-held religious site located on national forest land from a plan to excavate the area for a copper mine.[8] For hundreds of years this site, called "Oak Flat," has been central to Apache faith and culture as a place of worship and ceremonies.[9] Many Apaches believe that this site "embodies the spirit of the Creator," and that mining the mountain "will close off a portal to the Creator forever . . . ."[10] Thus, Apache Stronghold argued that the land transfer and subsequent destruction of the site would burden its members' religious practice under the Religious Freedom Restoration Act ("RFRA")[11] by permanently depriving them of their place of worship.[12] The Ninth Circuit rejected their argument.[13] Relying on a rigid and flawed interpretation of the statute, the court held that the destruction of the Apache sacred site was not a harm recognized under RFRA.[14] After losing at the Ninth Circuit in June of 2022, a rehearing en banc was granted for March of 2023.[15]

This problem is not new. Ample literature discusses the historical challenges Indigenous Peoples have faced when exercising their religious freedom, generally,

---

[5] The term "Indigenous Peoples" is used throughout this Note to refer to various American Indian peoples, Nations, and groups. This collective reference is not meant to broadly classify American Indian Nations or groups as one people or demean the diversity of faiths, practices, histories, cultures, or challenges among these groups. Rather, this term is used because the central legal issue in this Note is common to many Indigenous faiths and practices.

[6] *See* Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1296–97 (2021) (providing examples of government actions that have resulted in sacred site destruction); *see, e.g.*, Slockish v. U.S. Fed. Highway Admin., 682 F. Supp. 2d 1178 (D. Or. 2010) (demonstrating how religious claimants use various legal mechanisms to protect sacred sites).

[7] 38 F.4th 742 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

[8] *Id.* at 749–50.

[9] *See* Apache Stronghold v. United States, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021), *aff'd*, 38 F.4th 742 (9th Cir. 2022), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

[10] *Id.* at 604.

[11] 42 U.S.C. § 2000bb-1.

[12] 38 F.4th at 752.

[13] *Id.* at 756–57.

[14] *Id.*

[15] Apache Stronghold v. United States, 56 F.4th 636 (9th Cir. 2022). Oral argument was held Mar. 21, 2023. *See* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CALENDAR FOR RICHARD H. CHAMBERS US COURT OF APPEALS, PASADENA, U.S. CT. OF APPEALS FOR THE NINTH CIR., https://www.ca9.uscourts.gov/calendar/monthly_sittings/121469.html [https://perma.cc/CT7S-7WBA] (last visited July 1, 2023).

and the complexity of sacred site protection, specifically.[16] The legal landscape features mechanisms that have largely proven ineffective for sacred site protection, including the National Environmental Policy Act,[17] American Indian Religious Freedom Act ("AIRFA"),[18] National Historic Preservation Act,[19] treaties, and property claims.[20] Indeed, the appellants in *Apache Stronghold* asserted First Amendment and treaty claims alongside alternative RFRA claims—none succeeded.[21] While these legal mechanisms seem equally ineffective in their protection of sacred sites, RFRA stands alone in an important respect: it has proven effective for other religions and faith practices.[22] It is against the backdrop of a protective Roberts Court and a decade of religious freedom victories that appellants in *Apache Stronghold* face the irreparable loss of their faith practice. Thus, the primary purpose of this Note is to use *Apache Stronghold* to illustrate a harmful disparity under RFRA.

In analyzing *Apache Stronghold*, this Note proceeds in three parts. Part I reviews the background on the issue by examining the precedent cases, RFRA's enactment, and the facts of *Apache Stronghold*. Part II criticizes the Ninth Circuit's analysis on three grounds. First, the court failed to recognize significant distinctions between the facts at issue in *Apache Stronghold* and those of the precedent cases. Second, the court ignored crucial aspects of RFRA's purpose. Lastly, the court rejected important post-RFRA legal developments that should have altered the court's analysis.

Part III argues that the Ninth Circuit's en banc review provides a critical moment to resolve the issue of sacred site protection under RFRA. Should the full panel fail to correct the original panel's analysis, the remaining avenues available to

---

[16] *See, e.g.,* Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 MICH. J. RACE & L. 269 (2012) (reviewing the issue of Indigenous sacred site protection under RFRA and providing a legislative solution); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 21–23 (1991) (discussing the importance of sacred sites to Indigenous faith practices and culture); Barclay & Steele, *supra* note 6, at 1296–1320; Rayanne J. Griffin, Comment, *Sacred Site Protection Against a Backdrop of Religious Intolerance*, 31 TULSA L.J. 395 (1995) (reviewing the history of Indigenous Peoples' religious freedom challenges in the United States).

[17] 42 U.S.C. §§ 4321–4347.

[18] 42 U.S.C. §§ 1996–1996a.

[19] 54 U.S.C. §§ 300101–307107.

[20] *See* Barclay & Steele, *supra* note 6, at 1317–20 (reviewing the failure of these statutes to adequately protect sacred sites).

[21] Apache Stronghold v. United States, 38 F.4th 742, 748 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

[22] *See* Barclay & Steele, *supra* note 6, at 1338 (noting a Sikh practitioner's successful RFRA claim for accommodation in the military); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 722–23 (2014) (providing protection from fines imposed by federal regulation). For an empirical study of federal religious freedom claims and their success rates, see Luke Goodrich & Rachel N. Busick, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353 (2018).

resolve the issue are limited, namely, Supreme Court petition and congressional amendment to RFRA. Part III further argues that the Ninth Circuit must confront the Supreme Court's analysis in *Lyng v. Northwest Indian Cemetery Protective Association*,[23] and reject its applicability to RFRA cases. Although *Lyng* has been analyzed extensively in the literature, this Note demonstrates through *Apache Stronghold*, that *Lyng* was ultimately misguided. Part IV recognizes Professor Alex Skibine's scholarship on the issue of sacred site protection—specifically, Skibine's critique of *Lyng* and his forewarning of the issue in *Apache Stronghold*. Finally, Part IV offers a conclusion by suggesting that without a reversal in *Apache Stronghold*, a harmful disparity under RFRA will continue for Indigenous Peoples' faith practices.

I. THE HISTORY OF SACRED SITE PROTECTION UNDER THE FREE EXERCISE CLAUSE & RFRA

This section reviews the history of sacred site protection under the First Amendment and RFRA leading to *Apache Stronghold*. The central issue in this case can be traced back to the Supreme Court's First Amendment jurisprudence in the 1980s. During this period, the Court interpreted the Free Exercise Clause narrowly, and in doing so, weakened its protection for minority faiths.[24] In *Lyng*, the first Supreme Court case addressing sacred site protection, the Court held that the disruption of a sacred site on federal land is not a cognizable harm under the Free Exercise Clause.[25] Soon after this case, the Court handed down another decision interpreting the Free Exercise Clause narrowly in *Employment Division v. Smith*.[26] Congress then responded to *Smith* by enacting RFRA as an attempt to overturn the Court's holding and restore broader Free Exercise protection.[27] Yet RFRA was not given full effect in the Ninth Circuit where sacred sites were concerned. Specifically, in *Navajo Nation v. U.S. Forest Service*,[28] the Ninth Circuit interpreted the statute narrowly and rejected the argument that the desecration of a sacred site constituted a "burden" on religious exercise as RFRA requires. This decision, alongside *Lyng*, became the barrier that the practitioners in *Apache Stronghold* faced to assert their RFRA claim. [29]

---

[23] 485 U.S. 439 (1988).

[24] *See infra* Part I.A–B.

[25] *Lyng*, 485 U.S. at 450–51; *see* Skibine, *supra* note 16, at 275 ("*Lyng* is the only Supreme Court decision involving Indian sacred sites.").

[26] 494 U.S. 872, 878–79 (1990).

[27] *See infra* Part I.C.

[28] 535 F.3d 1058, 1077 (9th Cir. 2008).

[29] *See infra* Part I.D–E.

A. Does the Free Exercise Clause Protect a Sacred Site? Lyng v. Northwest Indian Cemetery Protective Association

The Supreme Court first addressed whether the Free Exercise Clause protects a sacred site from disruption in *Lyng*.[30] In that case, a group of religious practitioners sought an injunction to halt the United States Forest Service from constructing a road through a land containing sacred sites historically used by the Yurok, Karok, and Tolowa Peoples.[31] The six-mile road was part of a project to connect two California towns.[32] Before construction, the Forest Service commissioned a report on the cultural effects of building the road, and based on its findings, recommended that the project not move forward.[33] The study found that the forest "is an integral and indispensible [sic] part of Indian religious conceptualization and practice."[34] The report also recognized the road's impact on specific rituals, stating that "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] Thus, it concluded that the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples."[36] Despite these findings the Forest Service declined the recommendation and moved forward with the project.[37]

Justice O'Connor's majority opinion began its analysis by recognizing the road construction's severe effect on the religious practitioners[38] but then proceeded to frame the road's interference as an "incidental effect" of a government program.[39] Although disruption caused by the road and traffic made religious practice more difficult, the Court held that the First Amendment cannot provide protection.[40] The Court explained that, because the government did not coerce the religious practitioners into violating their beliefs or penalize their activity with a denial of a privilege or benefit, their religious practice was not harmed under the Free Exercise Clause.[41]

Importantly, the Court refused to assess the road's effect on the claimants' religious practices, stating that "[w]hatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate

---

[30] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); *see also* Skibine, *supra* note 16, at 275.

[31] *Lyng*, 485 U.S. at 442.

[32] *Id.*

[33] *Id.*

[34] *Id.* (citations omitted).

[35] *Id.*

[36] *Id.* (citations omitted).

[37] *Id.* at 443.

[38] *Id.* at 447.

[39] *Id.* at 450.

[40] *Id.* at 450–51.

[41] *Id.* at 449.

conduct by government of its own affairs, the location of the line cannot depend on *measuring the effects* of a governmental action on a religious objector's spiritual development."[42] Further, the Court emphasized that "[e]ven if we assume that . . . the [] road will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding [the practitioners'] legal claims."[43]

The *Lyng* Court's primary concern was how to make a workable limiting principle.[44] A broad favorable ruling for the religious claimants would effectively create a private "veto" power for practitioners who found certain government programs or actions religiously offensive.[45] The Court explained that, should the First Amendment impose an obligation on the government to act in accordance with citizens' religious needs, the "government simply could not operate . . . ."[46] Given the number and range of government activities, as well as the religious diversity of the United States, the Court deemed it inevitable that some religious practitioners will almost always find a government act objectionable.[47] The Court then addressed the judiciary's role in this kind of controversy.

> The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions.[48]

Thus, the Court interpreted the Free Exercise Clause narrowly to apply only in cases where the practitioner has been coerced by the government's action into violating the tenets of their faith with either a penalty or a denial of a government benefit.[49]

In dissent, Justice Brennan criticized the majority for refusing to assess the effect of the government action on the claimants' religious practice, explaining that "[t]he land-use decision challenged here will restrain respondents from practicing their religion as surely and as completely as any of the governmental actions we have struck down in the past, and the Court's efforts simply to define away respondents' injury as nonconstitutional are both unjustified and ultimately unpersuasive."[50] Brennan concluded by rejecting the majority's call for government sensitivity toward the needs of Indigenous Peoples in the future. Brennan stated the following, "I find it difficult . . . to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the

---

[42] *Id.* at 451 (emphasis added).
[43] *Id.* at 451–52 (internal quotation marks omitted) (citations omitted).
[44] *Id.*
[45] *Id.* at 452.
[46] *Id.*
[47] *Id.*
[48] *Id.* (citations omitted).
[49] *Id.* at 449.
[50] *Id.* at 465–66 (Brennan, J., dissenting).

face of uncontradicted evidence that the road will render the practice of respondents' religion impossible."[51]

B. The Court Continues Its Narrow Interpretation of the Free Exercise Clause in Employment Division v. Smith

Two years after *Lyng*, the Supreme Court addressed a different religious freedom issue in *Employment Division v. Smith*, and again declined to protect the practitioners under the Free Exercise Clause.[52] In that case, the claimants were terminated from their jobs for ingesting sacramental peyote as part of a religious ceremony.[53] Consequently, the claimants were denied unemployment benefits because their discharge resulted from illegal drug use.[54] The claimants argued that this denial burdened their religious exercise protected by the First Amendment.[55] The thrust of the claimants' argument was that the Court must analyze their benefit denial under the compelling interest standard[56]—a high burden requiring the government to prove that the law is necessary to achieve a compelling state interest, and that the law does so with the least restrictive means.[57] The Court rejected this argument, distinguishing *Smith* from the other unemployment benefits cases where strict scrutiny was applied.[58] The Court argued that *Smith* was different because, unlike the other cases, the underlying issue in this case included a violation of criminal law.[59] The claimants in *Smith* lost their benefits because a criminal law prohibited peyote use.[60] The Court expressed a concern that, although the compelling interest test is warranted in other contexts where constitutional rights are infringed, applying it in this case "would produce . . . a private right to ignore generally applicable laws [which is] a constitutional anomaly."[61] Thus, the Court broadly ruled that the Free Exercise Clause cannot excuse a person from a neutral law of general applicability.[62] The Court further held that such laws are not subject to the compelling interest test.[63] Without this heightened standard of review, the

[51] *Id.* at 477.
[52] 494 U.S. 872, 890 (1990).
[53] *Id.* at 874.
[54] *Id.*
[55] *Id.* at 875–76.
[56] *Id.* at 882–83.
[57] *Id.* at 899 (O'Connor, J., concurring).
[58] *Id.* at 889 (majority opinion).
[59] *Id.* at 884–85.
[60] *Id.* at 874.
[61] *Id.* at 886.
[62] *Id.* at 879.
[63] *Id.* at 887–88.

Court narrowed the Free Exercise Clause's protection against laws that infringe on religious exercise.[64]

Both *Lyng* and *Smith*'s narrow interpretation of the First Amendment limited Indigenous faith practices. But, whereas *Lyng*'s holding garnered criticism in the legal literature, the *Smith* decision triggered a swift and powerful response from Congress.

C. Congress Answers the Smith *Decision with RFRA*

Congress enacted RFRA to expressly reject *Smith*'s analysis and restore the compelling interest standard where a person's religious exercise is substantially burdened.[65] The statute received overwhelming support in the Senate by an extraordinary 97 to 3 vote and was signed by President Bill Clinton.[66] Moreover, interest groups across the political spectrum supported the statute's protection of religious minorities.[67]

RFRA states plainly that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ."[68] It then outlines an exception for those laws that pass the compelling interest test: "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[69] Although RFRA was

---

[64] *See* MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 147–58 (2008) (reviewing the *Smith* Court's ruling and its effect on Indigenous Peoples, specifically).

[65] 42 U.S.C. § 2000bb (stating plainly that its purpose is to reject *Employment v. Smith* and restore the compelling interest test).

[66] *See* LUKE GOODRICH, FREE TO BELIEVE: THE BATTLE OVER RELIGIOUS LIBERTY IN AMERICA 56 (2019) (reviewing RFRA's political support and explaining that the response to *Smith* was "swift, strong, and bipartisan").

[67] *Id.* at 56–57 (noting that the ACLU, Concerned Women for America, Americans United for Separation of Church and State, and the National Association of Evangelicals all supported RFRA's enactment).

[68] 42 U.S.C. § 2000bb-1(a).

[69] 42 U.S.C. § 2000bb-1(b).

held unconstitutional as applied to the states,[70] it has proven an effective shield against federal actions for religious practices that are not land-based.[71]

D. Does RFRA Protect a Sacred Site? Navajo Nation v. U.S. Forest Service

Even though RFRA restored the compelling interest analysis, Indigenous Peoples continued to face a challenge when protecting their sacred sites. In *Navajo Nation*, the Ninth Circuit, sitting en banc, addressed whether the desecration of a sacred site substantially burdened religious exercise.[72] However, this time, the practitioners asserted a claim under RFRA.[73]

The federal action at issue was a plan to use artificial snow made from recycled sewage water on a ski slope managed by the U.S. Forest Service.[74] The claimant tribes filed suit to enjoin the federal government under RFRA, arguing that the use of the snow would desecrate the sacredness of the long-standing religious sites located on the mountain.[75] While the Ninth Circuit acknowledged the plan's offensiveness to the claimants' religious beliefs, the court rejected the RFRA claim, holding that the use of the recycled wastewater did not constitute a substantial burden.[76]

In its analysis, the court explained that "substantial burden" in the statute is "a term of art chosen by Congress to be defined by reference to Supreme Court

---

[70] RFRA was controversial from a separation of powers perspective—Congress squarely attempted to reject a Supreme Court First Amendment decision and "expand" a constitutional right. *See* Erwin Chemerinsky, *The Religious Freedom Restoration Act Is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 603–04 (1998) (explaining that City of Boerne v. Flores, 521 U.S. 507 (1997), the case interpreting RFRA as unconstitutional, was "[b]y any measure . . . an enormously important decision. It speaks to basic issues concerning the powers of Congress and the Supreme Court in interpreting the Constitution"). Nevertheless, RFRA has been used effectively as a shield against federal action since *Flores*. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1384–85 (6th ed. 2019). Thus, issues relating to RFRA's validity were not raised in *Apache Stronghold* and are beyond the scope of this Note.

[71] *See, e.g.,* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (exempting a closely held for-profit corporation from a mandate requiring contraceptive insurance coverage for employees because the mandate burdened the owners' free exercise under RFRA); Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (recognizing that RFRA permits money damages against federal officials in their individual capacities); United States v. Hoffman, 436 F. Supp. 3d 1272 (D. Ariz. 2020) (holding that criminal defendants had established that their alleged unlawful activities were exercises of their sincere religious beliefs and were protected under RFRA); *see also* Goodrich & Busick, *supra* note 22, at 382–87 (reviewing RFRA's success rates in federal court).

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

[73] *Id.* at 1067.

[74] *Id.* at 1063–65. Ultimately, this was intended to increase the number of ski days on the mountain. *Id.*

[75] *Id.* at 1063.

[76] *Id.* at 1070.

precedent—on the free exercise of religion."[77] Guided by *Lyng*, the court explained that a substantial burden relates exclusively to government coercion.[78] Reviewing pre-RFRA cases, the court noted that sufficient coercion in *Wisconsin v. Yoder* was the threat of a fine,[79] and in *Sherbert v. Verner*, it was the denial of a government benefit.[80] Because RFRA expressly references *Yoder* and *Sherbert*, the Ninth Circuit held that a substantial burden is limited to the two forms of coercion in those cases.[81] And because the desecration of the sacred site is neither of these harms, the court held that it fell short of a substantial burden.[82] Citing *Lyng*, the court explained that, "[e]ven were we to assume . . . that the government action . . . will 'virtually destroy the . . . Indians' ability to practice their religion,' there is nothing to distinguish the road-building project in *Lyng* from the use of recycled wastewater . . . ."[83] Thus, because *Lyng* squarely dismissed the Free Exercise claim without applying the compelling interest test, the Ninth Circuit likewise refused to apply the test in *Navajo Nation* under RFRA.[84]

In this analysis, the Ninth Circuit created an initial barrier for Indigenous faiths to bring a RFRA claim.[85] The court explained that "the government is not required to prove a compelling interest for its action or that its action involves the least restrictive means to achieve its purpose, unless the plaintiff first proves the government action substantially burdens his exercise of religion."[86] Thus, before the compelling interest standard can be applied, the claimant's injury must have been recognized in the pre-RFRA cases, namely, *Sherbert* and *Yoder*.[87]

Like *Lyng*, the Ninth Circuit expressed a concern for the private "veto" power.[88] The court explained that if the sacred site desecration at issue posed a substantial burden, "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] Thus, the Ninth Circuit narrowed the circumstances that require the compelling interest test to only those where a penalty or denial of a benefit were at issue.[90]

In dissent, Judge William Fletcher criticized the majority for "misstat[ing] the evidence . . . misstat[ing] the law under RFRA, and misunderstand[ing] the very

---

[77] *Id.* at 1063.

[78] *Id.*

[79] *Id.* at 1069 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[80] *Id.* (citing Sherbert v. Verner, 374 U.S. 398 (1963)).

[81] *Id.* at 1075; *see also* 42 U.S.C. § 2000bb(b)(1) (establishing the purpose of RFRA to restore the compelling interest test in *Sherbert* and *Yoder*).

[82] *Navajo Nation*, 535 F.3d at 1071–72.

[83] *Id.* at 1072 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451–52 (1988)).

[84] *Id.* at 1073 (finding that, in *Lyng*, the compelling interest was not necessary because a substantial burden was not established).

[85] *See id.* at 1077 (referring to the analysis expressly as a "threshold question").

[86] *Id.* at 1069 (internal quotation marks omitted).

[87] *See id.* at 1077.

[88] *See id.* at 1063–64.

[89] *Id.* at 1063.

[90] *Id.* at 1078.

nature of religion."[91] Among other issues, Fletcher contested the en banc majority's interpretation of RFRA and explained that the statute's reference to "substantial burden" provides broader protection against federal action than a strict textualist reading of the First Amendment.[92] For this proposition the dissent compared the term "burden" in the statute with the *Lyng* Court's focus on the term "prohibit" in the text of the First Amendment, explaining that the former includes more government actions than restrictions on practice.[93] Furthermore, the dissent contested the majority's categorical approach to the statute's applicability, stating that "[t]he text of RFRA does not describe a particular *mechanism* by which religion cannot be burdened. Rather, RFRA prohibits government action with a particular *effect* on religious exercise."[94] Emphasizing RFRA's purpose, Fletcher explained that "[h]ad 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."[95] Thus, the dissent squarely rejected the majority's statutory interpretation.[96]

The dissent also expressed a broader concern that the majority's interpretation creates a harmful disparity for Indigenous Peoples in the protection of sacred sites, explaining that the problem "could be seen more easily by the majority if another religion were at issue."[97] On this point, Fletcher criticized the court's western-centered approach, stating that the court would not "accept that the burden on a Christian's exercise of religion would be insubstantial if the government permitted only treated sewage effluent for use as baptismal water, based on an argument that no physical harm would result and any adverse effect would merely be on the Christian's 'subjective spiritual experience.'"[98] Indeed, while the Ninth Circuit's

---

[91] *Id.* at 1081 (Fletcher, J., dissenting). Judge Fletcher authored the majority opinion for the panel before the en banc review and reversal. *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

[92] *Navajo Nation*, 535 F.3d at 1084 (Fletcher, J., dissenting) (citing United States v. Bauer, 84 F.3d 1549, 1558 (9th Cir. 1996)).

[93] *Id.* (explaining that "RFRA goes beyond the constitutional language that forbids the prohibiting of the free exercise of religion and uses the broader verb burden") (citations omitted). For a complete discussion of the religion clauses' text, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1485–88 (1990) (analyzing the terms "prohibit" and "abridge" and explaining that, "[d]espite its plausibility as a textual matter, the narrow interpretation of 'prohibiting' should therefore be rejected, and the term should be read as meaning approximately the same as 'infringing' or 'abridging'").

[94] *Navajo Nation*, 535 F.3d at 1086.

[95] *Id.* at 1087 (emphasis in original).

[96] *Id.*

[97] *Id.* at 1097.

[98] *Id.*

decision was applicable to all RFRA claims, the effect would fall with concentration on Indigenous Peoples' land-based RFRA claims.[99]

Ultimately, *Navajo Nation* solidified the thrust of *Lyng* that sacred site protection is simply not within the gamut of religious freedom protection. Despite Congress's intent to correct the Court's narrow interpretation of the Free Exercise Clause through RFRA, the Ninth Circuit continued *Lyng*'s harmful effect on Indigenous faith practices tied to land.[100] Still, the religious claimants in both cases asserted site disruption or spiritual desecration in their claims.[101] Thus, the question remained whether these cases would apply with full force to the actual *destruction* of a sacred site on federal land. That issue came before the Ninth Circuit in *Apache Stronghold*.

E. Apache Stronghold v. United States

Apache Stronghold is a nonprofit organization dedicated to protecting an Apache sacred site known as "Oak Flat."[102] The organization filed a motion for preliminary injunction to stop the publication of a final environmental impact statement for the transfer of a federal parcel containing Oak Flat to two copper mining developers.[103] The transfer was authorized by Congress in the National Defense Authorization Act for Fiscal Year 2015.[104] Among other claims, Apache Stronghold argued that its members' religious exercise was burdened under RFRA by the imminent transfer and excavation of the site.[105] The trial court assessed the

---

[99] *See* Jessica M. Wiles, Comment, *Have American Indians Been Written Out of the Religious Freedom Restoration Act?*, 71 MONT. L. REV. 471, 497–98 (2010) (explaining that before the en banc decision, the Ninth Circuit originally held for the religious practitioners *because* a contrary decision would have a more severe impact on Indigenous Peoples); *see also* Barclay & Steele, *supra* note 6, at 1301–02 (explaining that the relationship between religious practice and specific land sites renders Indigenous Peoples' issue under RFRA more pronounced than other religions).

[100] *See* 42 U.S.C. § 2000bb(a)(4) (citing Employment Division v. Smith, 494 U.S. 872 (1990) within its declaration of purpose).

[101] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988); *Navajo Nation*, 535 F.3d at 1063.

[102] *See* APACHE STRONGHOLD, http://apache-stronghold.com/ [https://perma.cc/X9UK-ZLTG] (last visited July 1, 2023).

[103] Apache Stronghold v. United States, 519 F. Supp. 3d 591, 597 (D. Ariz. 2021), *aff'd*, 38 F.4th 742 (9th Cir. 2022), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022). The statute states that the transfer of the land will occur "[n]ot later than 60 days after the date of publication of the final environmental impact statement." 16 U.S.C. § 539p(c)(10).

[104] *See* National Defense Authorization Act for Fiscal Year 2015, Pub. L. No 113-291, § 3003, 128 Stat. 3732 (codified as amended at 16 U.S.C. § 539p).

[105] *Apache Stronghold*, 519 F. Supp. at 597. The other claims included a breach of trust claim for failure to honor a treaty and Due Process and Petition Clause claims. *Id.* at 598–603, 609–11. Both were rejected. *Id.*

likelihood of success on the merits of Apache Stronghold's RFRA claim according to the legal standard for preliminary injunctions.[106]

At the motion hearing, ample testimony supported the spiritual significance of Oak Flat to Apache Stronghold members.[107] The sacred site has a history of religious ceremonies stretching over hundreds of years.[108] Further, the district court found that "[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated and, in many ways, is difficult to put into words."[109] The court reviewed the testimony of the hearing as follows:

> Today, the Apache people believe "Usen, the Creator, has given life to the plants, to the animals, to the land, to the air, to the water." Because of this, the Apaches view Oak Flat as a "direct corridor" to the Creator's spirit. The land is also used as a sacred ceremonial ground. Many of the young Apache women have a coming of age ceremony, known as a "Sunrise Ceremony," in which each young woman will "connect her soul and her spirit to the mountain, to Oak Flat." Apache individuals pray at the land and speak to their Creator through their prayers. The Apache people also utilize the land's natural resources, picking acorns, berries, cactus fruit, and yucca to use for consumption. Because the land embodies the spirit of the Creator, "without any of that, specifically those plants, because they have that same spirit, that same spirit at Oak Flat, that spirit is no longer there. And so without that spirit of Chi'Chil Bildagoteel, it is like a dead carcass." If the mining activity continues, Naelyn Pike testified, "then we are dead inside. We can't call ourselves Apaches." Quite literally, in the eyes of many Western Apache people, Resolution Copper's planned mining activity on the land will close off a portal to the Creator forever and will completely devastate the Western Apaches' spiritual lifeblood.[110]

Nevertheless, the district court applied the rule of *Navajo Nation* rigidly—that a burden "short of that described in *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA and does not require the application of the compelling interest test set forth in those two cases."[111] Like *Navajo Nation*, the court found that the federal action did not force Apache Stronghold members to act contrary to their beliefs.[112] Because the destruction of Oak Flat is not a threatened sanction or a denial of a government benefit, the court found that Apache Stronghold "runs into the same problem" as the claimants in *Lyng* and *Navajo Nation*.[113] Without a likelihood of

---

[106] *Id.* at 597–98 (citing Winter v. Nat. Res. Def. Council Inc., 555 U.S. 7 (2008)).

[107] *Id.* at 603.

[108] *Id.* at 603–04.

[109] *Id.* at 603.

[110] *Id.* at 604 (citations omitted).

[111] *Id.* at 605 (quoting Navajo Nation v. U.S. Forest Serv., 535 F.3d. 1058, 1070 (9th Cir. 2008)).

[112] *Id.* at 607.

[113] *Id.*

success on the merits, Apache Stronghold's motion for preliminary injunction was denied.[114]

II. THE NINTH CIRCUIT'S ANALYSIS WAS FLAWED ON AT LEAST THREE GROUNDS

On appeal to the Ninth Circuit, Apache Stronghold faced a panel that included Judge Carlos Bea, the author of the majority opinion in *Navajo Nation*.[115] Apache Stronghold advanced its RFRA argument on several plausible theories: (1) that *Navajo Nation* does not preclude Apache Stronghold's RFRA claim because of significant factual distinctions between the cases, (2) that *Navajo Nation* misread RFRA by creating a categorical approach to the substantial burden analysis, and (3) that legal developments since *Navajo Nation* should alter the Ninth Circuit's analysis.[116]

The Ninth Circuit rejected each argument.[117] Relying heavily on *Lyng* and *Navajo Nation*, the court held that "[w]here there is no substantial burden, there is no ground to apply the 'compelling interest' test, and thus no RFRA violation—no matter how dire the practical consequences of a government policy or decision."[118] Thus, the Ninth Circuit affirmed the district court's analysis and kept in place the categorical approach to RFRA's burden analysis.[119] Yet the court's analysis was flawed on at least three grounds.

A. Significant Factual Distinctions

First, the court erroneously rejected significant factual distinctions between *Apache Stronghold* and *Navajo Nation*, explaining that the latter court "faced facts that mirror those here."[120] But in *Navajo Nation*, the use of artificial snow would not actually harm the plants, wildlife, or features of the sacred site, whereas here, the site's features will be utterly destroyed during excavation for the underground copper mine.[121] Next, the federal action in *Navajo Nation* did not prevent the claimants' access to the site, whereas here, the transfer will render the site permanently inaccessible to the claimants.[122] Nevertheless, the Ninth Circuit failed

---

[114] *Id.* at 611.

[115] Apache Stronghold v. United States, 38 F.4th 742 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022); *see* Navajo Nation v. U.S. Forest Serv., 535 F.3d. 1058 (9th Cir. 2008).

[116] *Apache Stronghold*, 38 F.4th at 757.

[117] *Id.*

[118] *Id.* at 756.

[119] *Id.* at 770.

[120] *Id.* at 753.

[121] *Id.* at 749; *see* Navajo Nation v. U.S. Forest Serv., 535 F.3d. 1058, 1063 (9th Cir. 2008).

[122] Apache Stronghold v. United States, 519 F. Supp. 3d 591, 606 (D. Ariz. 2021), *aff'd*, 38 F.4th 742 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

to find these distinctions meaningful enough to support a different outcome.[123] The court explained that a distinction cannot be made based on the varying levels of interference with religious practice caused by the federal action.[124] Thus, the court adhered to its rigid categorical approach to the burden analysis.

However, the problem with applying *Lyng* and *Navajo Nation* to *Apache Stronghold* is that destruction of the site and permanent deprivation of access to it were not at issue in those cases. In *Lyng*, the irreparable harm mentioned in the commissioned report referred to the disruption of the claimants' religious practice due to road construction, traffic, and noise—not a complete deprivation of access to the site.[125] Likewise, in *Navajo Nation*, the site itself would not be physically ruined, nor were the practitioners prevented from continuing to use the sacred site after the ski slope used reclaimed water for snow.[126] By contrast, members of Apache Stronghold will be completely deprived access to Oak Flat after the transfer of title and excavation of the site.[127]

Even if the Ninth Circuit's primary concern was to avoid drawing lines between degrees of harm to sacred sites—disturbance, desecration, destruction—the access issue in this case presents a distinct problem that was absent in the former cases.[128] Thus, the Ninth Circuit should have found that a serious question exists as to whether *Lyng* and *Navajo Nation* actually control in this case. On this point, this Note does not argue that these factual distinctions render the claims in *Lyng* and *Navajo Nation* less significant or invalid. To the contrary, the analyses in both of these cases are flawed, and their effect on sacred site protection is regrettable. But here, even if the Ninth Circuit did not want to disrupt its precedent under *Navajo Nation*, the facts of *Apache Stronghold* provided a place to draw a meaningful line of distinction regarding access. The court could have held that a government's action preventing access to important religious resources constitutes a cognizable burden under RFRA, and at the same time left *Navajo Nation* undisturbed.

Apache Stronghold and Judge Berzon's dissent articulated a potential line of distinction, arguing that *Navajo Nation* phrased its burden analysis as a baseline of actionable injury under RFRA.[129] Berzon explained that "[b]ecause [*Navajo Nation*] held that RFRA did not remedy burdens 'short of' those described in *Sherbert* and *Yoder*, I would read *Navajo Nation* as leaving room for recognizing a greater burden

---

[123] *Apache Stronghold*, 38 F.4th at 753 ("Just as the facts in *Navajo Nation* parallel the facts here, so do the legal issues.").

[124] *Id.* at 760–61.

[125] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 454 (1988).

[126] Navajo Nation v. U.S. Forest Serv., 535 F.3d. 1058, 1063 (9th Cir. 2008).

[127] *Apache Stronghold*, 38 F.4th at 749.

[128] Judge Berzon's dissent focuses on the access issue as it relates to other legal developments. *See id.* at 779–82 (Berzon, J., dissenting); *infra* Part II.C. However, this Note argues that the access issue provides enough of a *factual* distinction to prompt a burden analysis uncontrolled by the precedent cases.

[129] *Apache Stronghold,* 38 F.4th at 759; *id.* at 774 (Berzon, J., dissenting).

as actionable under RFRA."[130] But the majority dismissed this argument, explaining that "[p]roperly understood, *Navajo Nation* did not set out a quantitative floor for a 'substantial burden' such that all 'greater' burdens qualify. Rather, *Navajo Nation* singled out two specific qualitative burdens—denying a benefit or imposing a penalty—that together form the complete universe of 'substantial burdens' under RFRA."[131]

Because the court refused to distinguish the facts of *Apache Stronghold* from the precedent cases, it is difficult to imagine any set of facts that could persuade the court to hold differently. The heart-wrenching testimony provided at the district court's motion hearing demonstrated that Oak Flat is not simply a long-held place of worship—a fungible building or address. Rather, Apache Stronghold members face the destruction of their connection with the deity present within the sacred site.[132] If the Ninth Circuit were to draw the line somewhere, it seems *Apache Stronghold* posed the best opportunity for the court to do so.[133]

B. The Ninth Circuit's Statutory Interpretation Ignores RFRA's Purpose

The Ninth Circuit's analysis was flawed for a second reason in that it failed to recognize important aspects of RFRA's purpose.[134] The court again read the statute's reference to *Sherbert* and *Yoder* as an exhaustive set of injuries that are actionable.[135] The court concluded "that this [was] a harsh result for Apache Stronghold's members. But it [was] the result RFRA commands."[136] Yet, clear indications of RFRA's purpose counter such a rigid interpretation.

The majority and dissenting opinions in *Apache Stronghold* squarely contested this issue.[137] While the dissent correctly emphasized that RFRA's purpose was to restore the compelling interest test to all free exercise claims, the majority stubbornly held that the statute does so only for those injuries defined in the statute by reference

---

[130] *Id.* at 774 (Berzon, J., dissenting) (quoting *Navajo Nation*, 535 F.3d. at 1070) (citations omitted).

[131] *Id.* at 759–60 (majority opinion).

[132] The district court acknowledged this impact. *See* Apache Stronghold v. United States, 519 F. Supp. 3d 591, 604 (D. Ariz. 2021), *aff'd*, 38 F.4th 742 (9th Cir.), *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

[133] *Id.* at 606 ("The burden imposed by the mining activity in this case is much more substantive and tangible than that imposed in *Navajo Nation*—the land in this case will be all but destroyed to install a large underground mine, and Oak Flat will no longer be accessible as a place of worship.").

[134] *Apache Stronghold*, 38 F.4th at 753–68.

[135] *Id.* at 758 ("The two cases that RFRA specifically 'restore[d]' and cited in its very text were indeed *Sherbert* and *Yoder.* Relying on that statutory text, *Navajo Nation* rightly focused on the burdens on religion imposed in those two cases." (citations omitted)).

[136] *Id.* at 766.

[137] *Id.* at 758; *id.* at 775 (Berzon, J., dissenting).

to pre-*Smith* caselaw.[138] But there are at least two problems with the majority's analysis. First, the majority failed to address the statute's inclusion of the congressional finding that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[139] This is important because the inclusion of "striking sensible balances" signals Congress' confidence that the test makes compromise between the federal government and religious claimants possible.[140] Yet, the Ninth Circuit's ruling that, as a threshold matter, complete destruction of a religious site does not even constitute a burden, borders the indefensible. There can be no sensible balance when the compelling interest test is not applied.

Next, the *Apache Stronghold* Court failed to analyze RFRA's purpose through a broader historical lens.[141] The event that led to RFRA's enactment—*Employment Division v. Smith*—is expressly referenced in the statute.[142] At issue in that case, as discussed above, was the denial of unemployment benefits that resulted from illegal peyote use.[143] Ultimately, the religious claimants' injury was the loss of a temporary source of income.[144] And yet, the Supreme Court's ruling ignited a massive and unified response from Congress.[145] The result was a statute that rejected a constrained approach to religious freedom and restored the higher standard of the compelling interest test.[146] Therefore, it seems implausible that Congress intended RFRA to exclude federal actions that permanently destroy a religion simply because the specific kind of action was not at issue in *Sherbert* or *Yoder*.[147]

---

[138] *Compare id.* ("Congress's concern was not with defining "substantial burden"—for which RFRA offers no definition—but with ensuring that the compelling interest standard would be applied once a substantial burden had been demonstrated."), *with id.* at 758 (majority opinion) ("The two cases that RFRA explicitly cited and 'restored'—*Sherbert* and *Yoder*—both defined the 'compelling interest' test *and* set out the two burdens that satisfy the predicate 'substantial burden' inquiry: a penalty imposed and a governmental benefit denied." (citations omitted)).

[139] 42 U.S.C. § 2000bb(a)(5).

[140] *Id.*

[141] Although this may not be a usual tool of statutory interpretation, this Note emphasizes the bipartisan nature of RFRA's enactment to demonstrate that Congress had a broad view of religious liberty in mind when passing this statute, and this breadth was overlooked by the Ninth Circuit's majority opinion.

[142] 42 U.S.C. § 2000bb(a)(4).

[143] Emp. Div. v. Smith, 494 U.S. 872, 874 (1990).

[144] *See id.* This statement is not meant to minimize what was at stake for the claimants in that case. Indeed, the loss of an income source, which may be necessary for subsistence should not be minimized. However, it is crucial to compare this loss with what is at stake in *Apache Stronghold* to demonstrate the magnitude of the Ninth Circuit's limitation of RFRA.

[145] *See* GOODRICH, *supra* note 66, at 56–57.

[146] 42 U.S.C. § 2000bb-1(b).

[147] *But see* Skibine, *supra* note 16, at 284 (reviewing parts of RFRA's legislative history as potential support for the proposition that Congress did not intend RFRA to disrupt *Lyng* and other cases).

C. Developments in the Law Since Navajo Nation

The Ninth Circuit also rejected significant developments in the law post-*Navajo Nation*.[148] Apache Stronghold and Berzon's dissent advanced a persuasive argument that compared the denial of access to Oak Flat to religious freedom issues resolved under RFRA's sister statute, the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[149] Claims under this statute by incarcerated persons or relating to land use regulations do not fit neatly within the Ninth Circuit's categorical framework of substantial burden.[150] Berzon explained that in the contexts of prisons, Native American sacred sites located on government land, and zoning, "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."[151] In support, Berzon cited the work of Professors Stephanie Barclay and Michalyn Steele.[152]

In their article, Barclay and Steele explain that, in contexts where the federal government retains control of a person's access to religious resources, affirmative obligations are required to protect religious liberty.[153] Government's control in prisons, the military, and zoning law presents scenarios where "religious individuals are unable to voluntarily perform their desired religious practices unless the government affirmatively acts to lift its coercive power through religious accommodation."[154] As such, they argue that federal land management encompassing sacred sites presents a similar "baseline of coercion" because this control affects Indigenous Peoples' access to their religion.[155] Accordingly, Barclay and Steele conclude that "Indigenous Peoples should be entitled to the same protections, and the government should be required to offer similar affirmative accommodations."[156]

Nevertheless, the Ninth Circuit rejected the comparison and drew a sharp line between RFRA and RLUIPA, explaining that,

> The dissent . . . equates the two contexts covered by RLUIPA—prisons and local land regulation—to situations involving "Native American sacred sites located on government land." In all three contexts, the dissent

---

[148] Apache Stronghold v. United States, 38 F.4th 742, 763–64 (9th Cir.) *reh'g en banc granted*, *vacated*, 56 F.4th 636 (9th Cir. 2022).

[149] *Id.* at 778–80 (Berzon, J., dissenting); *see generally* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc1–5.

[150] *Apache Stronghold*, 38 F.4th at 759–60, 779–80.

[151] *Id.* at 775–76 (Berzon, J., dissenting).

[152] *Id.* at 775.

[153] *See* Barclay & Steele, *supra* note 6*,* at 1333–43 (comparing the development of religious freedom in the contexts of prisons, the military, and zoning law with sacred site protection).

[154] *Id.* at 1333.

[155] *Id.* at 1340–41, 1359.

[156] *Id.* at 1326.

> contends, the government substantially burdens religion by "denying access" to "religious locations and resources." But while RLUIPA covers the first two contexts (again, prisons and local land regulation), the third context—the context actually at issue here—falls to RFRA. RFRA's definition of a "substantial burden" thus governs here, regardless what the dissent's RLUIPA cases say, because the Land Exchange involves neither prisons nor local land regulation.[157]

Yet, the court gave no substantive reason why it sequestered RFRA from its sister statute on a comparable issue. Rather than analyze why there should be a different standard applied to the government under each of these statutes, the Ninth Circuit, in conclusory fashion, held that RLUIPA cases are inapplicable.[158]

As noted by Barclay and Steele, the problem here is that some Indigenous faiths have an inherent dependence on the government to practice their religion.[159] They explain that "because of the history of government divestiture and appropriation of Native lands, American Indians are at the mercy of government permission to access sacred sites."[160] However, the Ninth Circuit dismissed the comparison between sacred site access and accommodations for incarcerated persons under RLUIPA and did not analyze the historical implications of the Apaches' dependence on federal land access for the preservation of their religion.

Collectively, the Ninth Circuit's refusal to re-analyze sacred site protection under the distinct facts in *Apache Stronghold*—or against the backdrop of a changed legal landscape—demonstrates the court's unyielding posture toward this issue. Indeed, it is because of this posture that the Ninth Circuit's en banc review provides a critical moment for Indigenous faith practice and freedom.

III. THE NINTH CIRCUIT'S EN BANC REVIEW PROVIDES A CRITICAL MOMENT TO RESOLVE A HARMFUL DISPARITY UNDER RFRA FOR INDIGENOUS FAITHS' PRACTITIONERS REGARDING SACRED SITES

To correct the harmful disparity under RFRA, the Ninth Circuit must reject the principle of *Lyng* that has echoed through *Navajo Nation* and *Apache Stronghold*—the refusal to examine the effect of a government action on a religious practice.[161] Should the full panel fail to correct RFRA's analysis, resolution may then depend on Supreme Court review or a congressional amendment.[162]

---

[157] *Apache Stronghold*, 38 F.4th at 759 (citations omitted).

[158] *Id.*

[159] *See* Barclay & Steele, *supra* note 6, at 1301.

[160] *Id.*

[161] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1072 (9th Cir. 2008); *Apache Stronghold*, 38 F.4th at 755–57.

[162] This section focuses on congressional and judicial intervention exclusively because these potential modes of change should have a broader scope and longer effect on the issue

This Part proceeds in two sections. First, that the Ninth Circuit's en banc review provides the best catalyst for a change in the law on this issue. This proposition is supported by the general unlikelihood of Supreme Court review and the specific unlikelihood of RFRA's amendment. Second, that the Ninth Circuit must address the problems of *Lyng*'s analysis and reject its application to RFRA claims. Specifically, the court should clarify that the substantial burden analysis is fact-sensitive, and proper weight must be given to the effect of a government action on the religious claimants' practice.

A. Without a Favorable Ruling En Banc, Resolution of the Issue Will Be Strained

The Ninth Circuit's en banc review provides a critical point in the law on this issue. If the full panel does not correct the disparity for Indigenous Peoples under RFRA, resolution of the issue becomes more strained for two main reasons. First, Supreme Court review is generally unlikely. To be sure, the Court's track record over the past ten years demonstrates a friendly disposition toward religious freedom claimants.[163] This includes protection for minority faith practitioners.[164] Yet, relatively few petitions for certiorari are granted, and thus, the odds are not favorable.[165]

Second, congressional amendment is even less likely. RFRA litigation has sparked stark partisan animosity over the past ten years.[166] Writing in 2019, Luke Goodrich, counsel for The Becket Fund for Religious Liberty, summarized the sea-change: "[a] religious freedom law that unified the country twenty-five years ago provokes a national firestorm today."[167] Goodrich explained that RFRA's current divisiveness stems, in part, from clashes between religious freedom interests and

---

of sacred site protection. However, it is worth noting that, with respect to *Apache Stronghold*, specifically, the executive branch could halt the destruction of Oak Flat indefinitely. Indeed, as of this Note's publication, the U.S. Forest Service has yet to publish its final environmental impact statement—the necessary trigger for the land transfer. *See* Ernest Scheyder, *U.S. Forest Service Pauses Timeline for Rio Tinto Arizona Copper Mine*, REUTERS (May 19, 2023), https://www.reuters.com/legal/us-forest-service-pauses-timeline-rio-tinto-arizona-copper-mine-2023-05-19/ [https://perma.cc/P4GU-4FPX].

[163] *See* Liptak, *supra* note 1.

[164] *See, e.g.,* Holt v. Hobbs, 574 U.S. 352 (2015) (protecting an inmate's freedom to grow a beard consistent with his Islamic faith); Tanzin v. Tanvir, 141 S. Ct. 486 (2020) (providing a damages remedy under RFRA for Islamic travelers placed on a "no-fly" list by the federal government).

[165] *Supreme Court Procedures*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/W2BA-BNGA] (last visited July 1, 2023) (explaining that the Supreme Court "accepts 100-150 of the more than 7,000 cases that it is asked to review each year").

[166] *See* GOODRICH, *supra* note 66, at 56–57; David Masci, *The Hobby Lobby Decision and the Future of Religious Liberty Rights*, PEW RSCH. CTR. (June 30, 2014), https://www.pewresearch.org/short-reads/2014/06/30/the-hobby-lobby-decision-and-the-future-of-religious-liberty-rights/ [https://perma.cc/8S8W-ED6B].

[167] *See* GOODRICH, *supra* note 66, at 58.

issues involving reproductive autonomy and marriage equality.[168] For example, in *Burwell v. Hobby Lobby*,[169] the Supreme Court ruled that RFRA permitted a closely-held corporation to deny employees insurance coverage for specific contraceptives.[170] And in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,[171] although not a RFRA case, religious liberty was pitted against same-sex civil rights interests.[172] Thus, religious freedom issues today rarely find the same consensus of support as they did in 1993.[173] As a result, this avenue, too, is highly unlikely.

Considering these obstacles, the Ninth Circuit's en banc review becomes that much more urgent. Importantly, Apache Stronghold still faces another critical obstacle: addressing the Supreme Court's analysis in *Lyng*.

B. The Effect of a Government Action on a Religious Practice Must Be Given Weight

On review, the Ninth Circuit must address the principle in *Lyng* that has permeated the post-RFRA cases: a burden on religious exercise cannot be weighed by examining the effect of a government action on a religious practice.[174] On this point, *Apache Stronghold* illuminates the *Lyng* Court's flawed rationale in at least two key respects.

First, the Court wrongly refused to examine the effect of a government action out of a flawed concern for a limiting principle—that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[175] This concern diverges from other pre-RFRA cases. The Court's decisions in *Sherbert* and *Yoder* each resulted in the government yielding to accommodate the

---

[168] *Id.* at 58–60.

[169] 573 U.S. 682 (2014).

[170] *Id.* at 690–91.

[171] 138 S. Ct. 1719 (2018).

[172] *Id.* at 1723–24. Importantly, religious freedom cases are often lumped into the same category, regardless of the legal mechanism—RFRA, First Amendment, Title VII, etc. *See* Liptak, *supra* note 1.

[173] *Compare* GOODRICH, *supra* note 66, at 56–68 (reviewing RFRA's 97 to 3 Senate vote and endorsement by a Democratic Party president), *with Using Religion to Discriminate*, ACLU, https://www.aclu.org/issues/religious-liberty/using-religion-discriminate [https://perma.cc/4DJ2-CXXV] (last visited July 1, 2023) (noting that "[w]ith increasing frequency, we are seeing individuals and institutions claiming a right to discriminate—by refusing to provide services to women and LGBT people—based on religious objections").

[174] *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1072 (9th Cir. 2008); Apache Stronghold v. United States, 38 F.4th 742, 755–57 (9th Cir.), *reh'g en banc granted, vacated*, 56 F.4th 636 (9th Cir. 2022).

[175] *Lyng*, 485 U.S. at 452.

religious claimants, even though they belonged to minority faiths.[176] Arguably, if the Court was concerned for the government's overall function in light of religious exceptions, these two cases would have had different outcomes.[177] Instead, the Court protected the claimants in those cases without envisioning an unworkable system of endless accommodation. Moreover, from a broader perspective, concern for a limiting principle in this context should cut in both directions—while the government's internal affairs should not be restricted by every religious claimant's objection, neither should the government be permitted to destroy a claimant's faith out of fear that a line cannot be drawn. *Navajo Nation*'s original three-judge panel framed this issue well, explaining that,

> The Court in *Lyng* denied the Free Exercise claim in part because it could not see a stopping place. We uphold the RFRA claim in this case in part because otherwise we cannot see a starting place. If Appellants do not have a valid RFRA claim in this case, we are unable to see how any Native American plaintiff can ever have a successful RFRA claim based on beliefs and practices tied to land that they hold sacred.[178]

Thus, *Lyng*'s concern for an unworkable accommodations policy helped establish a different unworkable policy, one that irreparably harms minority faiths' religious practices.

Second, the *Lyng* Court wrongly refused to examine the effect of a government action out of a misguided concern that courts are ill-equipped to assess religious harms. Part of the problem with this concern is that *Lyng* and its progeny conflate offenses to religious sensibilities with an objective obstruction of religious practice.[179] The Court explained in *Lyng* that "[a] broad range of government activities" will be deemed by some "deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment."[180] In support, the Court analyzed a prior case, *Bowen v. Roy*, where it rejected the Free Exercise claim of a parent who objected to the assignment of a social security number to his daughter, arguing that it would "rob [her] spirit."[181] The *Lyng* Court refused to distinguish those facts from sacred site disruption, explaining that it "cannot determine the truth of the underlying beliefs that led to the religious objections" in either case and "cannot weigh the

---

[176] Sherbert v. Verner, 374 U.S. 398, 409–10 (1963); Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).

[177] Indeed, the concern that accommodations will open the floodgates of exceptions would likely have guided the Court in *Hobby Lobby*, where a *corporation* argued that a Health & Human Services contraception coverage mandate violated its rights under RFRA. *See* Burwell v. Hobby Lobby, 573 U.S. 682, 682–83 (2014).

[178] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1048 (9th Cir. 2007), *on reh'g en banc*, 535 F.3d 1058 (9th Cir. 2008).

[179] *See Lyng*, 485 U.S. at 451; *Navajo Nation*, 535 F.3d at 1072; *Apache Stronghold*, 38 F.4th at 755–57.

[180] *Lyng*, 485 U.S. at 452.

[181] Bowen v. Roy, 476 U.S. 693, 696 (1986).

adverse effects on the [religious claimant] in *Roy* and compare them with the adverse effects on the [religious practitioners in *Lyng*]."[182] Thus, "[w]ithout the ability to make such comparisons, we cannot say that the one form of incidental interference with an individual's spiritual activities should be subjected to a different constitutional analysis than the other."[183]

Navajo Nation echoed this approach stating, "respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another."[184] And this argument reverberated again in *Apache Stronghold*, where the Ninth Circuit expressed the concern that expanding RFRA's substantial burden "would force judges to make decisions for which we are fundamentally unsuited. . . . Who are we to say whether government action has an objective impact on religious observance or merely diminishes [a worshipper's] subjective spiritual fulfillment?"[185] Thus, the court insisted that "[q]uestions like this raise issues on which judges must not pass."[186]

But *Apache Stronghold* illustrates the danger that results when the concern for a court's competence to address religious issues is stretched too far. The facts here go beyond a practitioner's disagreement with the government's internal affairs. Rather, at issue in this case is the permanent removal of the practitioners' place of worship—a sacred site that has been used for religious purposes "for centuries."[187] Here, a judge does not need to understand the tenets of Apache faith practice to recognize the burden that results from the destruction of a place of worship—even

---

[182] *Lyng*, 485 U.S. at 449–50.

[183] *Id.* (citations omitted).

[184] *Navajo Nation*, 535 F.3d at 1064 (explaining further that "[n]o matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.").

[185] *See* Apache Stronghold v. United States, 38 F.4th 742, 767 (9th Cir.) (citations omitted) *reh'g en banc granted, vacated*, 56 F.4th 636 (9th Cir. 2022); s*ee also* Oral Argument, Apache Stronghold v. United States, No. 21-15295 (9th Cir. argued Mar. 21, 2023), https://www.youtube.com/watch?v=vUFke60kiTU [https://perma.cc/24CF-DBJR] (recording of oral argument for *Apache Stronghold v. United States*, No. 21-15295). Many of the questions at oral argument were *Roy*-like hypotheticals where the government fails to satisfy a practitioner's subjective religious needs. *See id.* For example: Judge Lawrence VanDyke asked, "say God tells me I need to be buried in Arlington Cemetery in order to go to heaven [] and let's assume that's a genuine need of mine . . . then your [] view is that we need to analyze that under compelling interest?" *Id.*

[186] *Apache Stronghold*, 38 F.4th at 767.

[187] Apache Stronghold v. United States, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021), *aff'd*, 38 F.4th 742 (9th Cir. 2022), *reh'g en banc granted, vacated*, 56 F.4th 636 (9th Cir. 2022) ("[T]he evidence before the Court shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial ground for centuries.") (citation omitted).

assuming the place is fungible.[188] This is as objective of a burden that can be imagined—one that transcends religious particularities.

To be sure, there may be future cases that come closer to the line and present challenges for courts to distinguish between subjective and objective religious burdens.[189] But even for the tough cases, a federal court can and should assume the important role of adjudicating these matters and assess the extent of the injury—that is, whether the practical effect of the government's action interferes with the claimant's ability to practice their faith.[190] A court should consider all the facts and circumstances surrounding each claim and take it case by case—hear testimony, assess the evidence, and determine whether the claimants' burden is supported by the record. In short, courts are competent to decide whether a religious practice is substantially burdened on the facts of each case.[191] After this first inquiry, the remainder of the RFRA claim must then turn on strict scrutiny, as the statute demands.[192]

Whether out of a concern for government's function or uncertainty surrounding a judge's competence to handle religious claim issues, the *Lyng* Court's refusal to assess the effect of a government action on religious exercise has had harmful consequences for Indigenous Peoples regarding sacred site protection. *Apache Stronghold* illustrates the extent of this problem to an unconscionable result. As such, the Ninth Circuit should reject *Lyng*'s application to RFRA claims respecting sacred sites.

---

[188] The issue presented in *Apache Stronghold* does not involve a fungible place of worship, but instead, a site that is connected to the faith's deity and respectively unique from any other site. *See Appache Stronghold*, 38 F.4th at 748.

[189] Indeed, *Navajo Nation* presented such a question because the reclaimed sewage snow did not harm the place of worship, but instead spiritually "desecrated" it. *See Navajo Nation*, 535 F.3d at 1063.

[190] Although the *Lyng* majority found it impossible to draw lines between subjective and objective infringement, Justice Brennan's dissent provided a workable test: that religious practitioners "challenging a proposed use of federal land should be required to show that the decision poses a substantial and realistic threat of frustrating their religious practices," and that a guide to this is the "external effects" on the faith practice. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 471 n.5 (1988) (Brennan, J., dissenting) (distinguishing *Roy* and explaining that "federal land-use decisions are fundamentally different from government decisions concerning information management, and that, under *Roy,* this difference in external effects is of constitutional magnitude."). This test could help a court distinguish between the practitioners who may be offended by the government's actions, as in *Roy*, and those whose religious practice will be obstructed, as will occur here.

[191] On this point, although the concern for line-drawing with respect to religious injuries seems to have a noble appeal in that it is guided by a sensitivity for diverse beliefs and faiths, this rationale *was employed to refuse protection* to the religious claimants, not bolster it. *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1216 (1996) (explaining that "[t]he very concept of a substantiality test implies a subjective weighing process. Judicial inquiry under a substantiality test must therefore be subjective if courts are to be sensitive to different contexts").

[192] *See* 42 U.S.C. § 2000bb-1.

IV. ECHOING PROFESSOR ALEX SKIBINE'S CALL TO PROTECT INDIGENOUS SACRED SITES

In his critique of *Lyng* in 2012, Professor Alex Skibine forewarned that "most judges, reluctant to force the government to come up with a compelling interest protected by the least restrictive means, will take refuge in *Lyng*'s substantial burden definition and dismiss tribal sacred site cases."[193] *Apache Stronghold* fulfills this forewarning. Skibine argued that at the heart of *Lyng*'s analysis is a misconception of sacred site importance.[194] He explained that the *Lyng* Court "seem[ed] to equate Indians' religious exercises at sacred sites with Western yoga-like practices," and "this view portrays Native religious activities at sacred sites as only about spiritual peace of mind."[195] The problem with this view is that assessing the benefits of spiritual practice "do[es] not go to the heart of why these sacred places are important to Indian people or why management practices like cutting down trees and spilling recycled sewage water on sacred land are extremely disturbing to many Indian tribes."[196] Skibine pleaded that sacred sites are about "the continuing existence of Indians as a tribal people. The preservation of these sites as well as tribal people's ability to practice their religion there is intrinsically related to the survival of tribes as both cultural and self-governing entities."[197]

Thus, responding to the Ninth Circuit's decision in *Navajo Nation*, Skibine provided a workable test to address sacred site protection—a proposed amendment to AIRFA that struck a balance between the competing interests at stake with this issue.[198] He proposed that sacred site disruption be cognizable as a burden, but with the lower standard of intermediate scrutiny to follow, and this amendment would include definitions for what constitutes a sacred site.[199] In this proposal, Skibine articulated a framework of compromise to avoid the result that is pending before the Ninth Circuit—claimants facing the destruction of their religion without any statutory protection. Fearing that Indigenous Peoples would continue to be excluded from protection altogether, Skibine offered a viable solution for Congress to adopt and the courts to follow.[200]

---

[193] Skibine, *supra* note 16, at 288.

[194] *See id.* at 273.

[195] *Id.*

[196] *Id.*

[197] *Id.* at 273–74 (citations omitted).

[198] *See id.* at 301.

[199] *See id.* ("The essential elements of the new test are: First, the adoption of an intermediate type of scrutiny modeled along the lines of tests the Court has formulated in some free speech cases. Second, the broadening of the threshold element of burden beyond the coercion/denial of benefit test and towards a substantial impact or disparate impact test that combines the test suggested by Justice Brennan in his *Lyng* dissent and currently in use in the Tenth Circuit with the test proposed by Professor Dorf. And third, the adoption of a manageable definition of sacred sites.").

[200] *See id.*

Forewarnings of future harm and proposed solutions are myriad in the legal literature; most, if not all, law review articles call attention to some problem of a legal framework, analysis, or enforcement measure. But where, as here, a scholar called attention to an issue so clearly that since has materialized so firmly, such insight merits acknowledgment and reconsideration. Having dedicated his work to the legal protection of Indigenous Peoples, Skibine's scholarship on sacred site protection should not go unrecognized.

In *Apache Stronghold*, RFRA should provide an effective legal mechanism for Indigenous Peoples to protect their religious sites and practices. Yet, if federal courts construe "substantial burden" to exclude the destruction of sacred sites, RFRA cannot provide this mechanism. Consequently, Indigenous Peoples face not only the loss of their religious sites, but the loss of their identity and culture.[201] As Skibine framed the issue, sacred sites "are essential not only to the practice of Native religions but also to the continuing vitality of tribal cultures. . . . [T]hey are . . . in many ways what connects one generation of Native Americans to another."[202]

In this respect, it is crucial that Indigenous faiths gain equal footing with other religions under RFRA. *Apache Stronghold* presents an opportunity for the Ninth Circuit to correct the harmful disparity that has developed in its jurisdiction. Until this law is a viable defense for all faiths, religious freedom in the United States remains harmfully biased.

[201] *Id.* at 269.
[202] *Id.* at 302.