An "Unfulfilled, Hollow Promise": *Lyng*, *Navajo Nation*, and the Substantial Burden on Native American Religious Practice

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Many Native American religious practices are linked to sacred sites—places in the natural world that have been used for ceremonies and rites since time immemorial. Often, particular ceremonies and rituals can only be performed at these locations. Many such sacred sites are located on what is, today, public land owned by the federal government. The government has at times desecrated, destroyed, or barred access to sacred sites, rendering Native religious exercise extremely difficult or impossible.

Congress enacted the Religious Freedom Restoration Act (RFRA) to provide an alternative source of protection for religious exercise in the wake of Employment Division v. Smith*'s restrictive interpretation of the Free Exercise Clause. RFRA provides that a government measure that "substantially burden[s]" a person's exercise of religion will be subject to strict scrutiny. Litigants have successfully invoked the statute against the government in a wide variety of cases. However, Native American litigants seeking protection for sacred sites located on public lands have been mostly unable to rely on RFRA's protection. This is in large part because courts have mistakenly interpreted RFRA's "substantial burden" requirement as incorporating Free Exercise jurisprudence, which has arbitrarily excluded most sacred site claims from heightened scrutiny simply because the sites were located on public lands. Native Americans are thus denied the same level of religious free exercise that is enjoyed by other groups.*

DOI: https://doi.org/10.15779/Z381G0HW0Z

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This Article illustrates why this overly narrow interpretation of RFRA's "substantial burden" requirement is erroneous. It demonstrates that courts, especially the Ninth Circuit, have construed "substantial burden" in a manner that is inconsistent with fundamental principles of statutory interpretation, with RFRA's purpose, and with the Supreme Court's own reasoning in recent cases including Burwell v. Hobby Lobby *and* Holt v. Hobbs*. It also highlights how courts applying this prevailing interpretation reach the absurd conclusion that government actions that erase sacred sites and destroy practitioners' ability to worship do not constitute a "substantial burden" upon religious exercise.*

The Article then proposes an alternative, textualist, plain-meaning understanding of RFRA's substantial burden requirement. Such an interpretation corrects these serious errors while requiring courts to appropriately weigh sacred sites claims against countervailing government interests. Thus, it realizes RFRA's promise of equal and meaningful religious freedom for Americans of all faiths.

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INTRODUCTION

As longtime advocate and Indian law scholar Walter Echo-Hawk wrote, "[n]owhere is the cultural divide between tribal and nontribal people so vast as the way that we look at the land."[1] This vast divide comes into clear view when examining federal land management decisions that destroy sacred sites located on public lands that are vital for Native American religious exercise. Federal land management decisions often focus on land as a source of profit or site of recreation. But Native Americans use much of the same land for sacred ceremonies and rites, and they have been doing so since time immemorial—long before federal agencies were formed.

Protecting religiously significant land is crucially important to Native communities. For many Native Americans, certain religious practices are linked to specific geographical locations and landscape features in the natural world.[2] Accordingly, some rites and ceremonies may only be practiced in particular locations.[3] In traditional Native religious practice, these locations are where the past, present, and future come together. They are where the essence of Native American existence is passed from our ancestors, through us, to future generations. When a sacred site is destroyed, a piece of Native religion is extinguished, never to be seen or experienced again. It is not just destruction of a landscape feature, but destruction of a religious and cultural identity.

Echo-Hawk pointed out that at the time Moses climbed Mount Sinai, "on this side of the world Sweet Medicine ascended Bear Butte."[4] There, Sweet Medicine faced the Creator and brought back spiritual teachings and gifts to the Cheyenne people from this sacred mountain.[5] Those sacred laws, covenants, prophecies, and ceremonies continue to guide the Cheyenne Nation today.[6] The crucial distinction between Mount Sinai and Bear Butte, Echo-Hawk noted, is that "Bear Butte has no legal protection under the laws of man."[7] This observation is striking in light of the fact that religious exercise is, ostensibly, protected for all Americans by both the Bill of Rights and by statutes, including the Religious Freedom and Restoration Act (RFRA). However, Native religious practitioners who have sought judicial protection of their sacred sites have been met with consistent defeat in the courts.[8]

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1. WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED 325 (2010).

2. *See, e.g.*, Brief of Amici Curiae Nat'l Cong. of Am. Indians et al. in Support of the Petitioners at 13–14, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (No. 08-846) (describing the religious significance of the San Francisco Peaks); *see also* VINE DELORIA, GOD IS RED: A NATIVE VIEW OF RELIGION 275–78 (2003).

3. *See* DELORIA, *supra* note 2, at 275–78.

4. ECHO-HAWK, *supra* note 1, at 331.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 439 (1988); *Navajo Nation*, 535 F.3d 1058; Crow v. Gullet, 706 F.2d 856 (8th Cir. 1983); Badoni v. Higginson, 638 F.2d 172

This Article has two main goals. The first is to identify precisely how courts have failed to protect Native American sacred sites under existing religious freedom jurisprudence. The second is to suggest an alternative approach for courts to employ in applying RFRA to sacred sites claims. The suggested approach is not only more protective of sacred sites, but also more faithful to traditional statutory interpretation principles than the approach most courts currently employ. Further, it is more consistent with Congress's explicit intent to provide heightened protection to religious liberty generally and to establish protections for Native American sacred places in particular.[9] At the same time, this approach considers the government's countervailing interests in land management by underscoring the proper operation of other limitations that RFRA already contains.

Some of the arguments set forth here have been raised before, most notably in Judge Fletcher's dissent from the Ninth Circuit's interpretation of RFRA in *Navajo Nation v. United States Forest Service*.[10] However, additional case law and commentary in the decade since the *Navajo Nation* decision—particularly the Supreme Court's 2014 opinion in *Burwell v. Hobby Lobby*—further illustrate that *Navajo Nation* was wrongly decided and why courts both inside and outside of the Ninth Circuit are mistaken in following its lead.[11]

We begin in Part I with a brief exploration of the significance of sacred sites within many Native religious traditions. Part II then discusses the development of Free Exercise Clause jurisprudence, defining what sort of "burden" on an individual's religious exercise is constitutionally significant. This case law developed alongside—and often in tension with—legislative efforts to offer greater protection to Native religious practitioners. These trajectories culminated in the Court's controversial decision in *Employment Division v. Smith* and Congress's subsequent passage of RFRA.[12] Congress enacted RFRA to provide an alternative source of protection for religious exercise in the wake of the Supreme Court's erosion of Free Exercise Clause protection through *Smith* and related precedent.[13] Unfortunately, in practice, the statute has provided little help to Native American religious practitioners who seek to protect sacred places from government incursion and destruction.

(10th Cir. 1980); Wilson v. Block, 780 F.2d 735 (D.C. Cir. 1983); Sequoyah v. Tenn. Valley Auth., 620 F.2d 1159 (6th Cir. 1980).

9. *See infra* note 34.

10. *Navajo Nation*, 535 F.3d at 1083–93 (Fletcher, J., dissenting).

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

12. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

13. Religious Freedom Restoration Act of 1993 § 2, 42 U.S.C. § 2000bb(a) ("The Congress finds that . . . in *Employment Division v. Smith* . . . the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."); *id.* at § 2000bb(1)(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

Parts III and IV illustrate the several aspects of judicial interpretation of RFRA that have consistently, but wrongfully, prevented Native plaintiffs from bringing successful claims under the statute. Part III addresses the Ninth Circuit decision in *Navajo Nation*, which deployed a blinkered reading of "substantial burden"—the prima facie showing a plaintiff must make in order to invoke RFRA's heightened scrutiny protection—in a manner that excluded Native Americans sacred sites from the statute's protection entirely.[14] Part IV then addresses lower courts' erroneous application of the "incidental effects" test—a First Amendment Free Exercise concept set forth in *Lyng v. Northwest Cemetery Protection Association*—to impose an additional limitation as to what burdens on religious practice trigger heightened scrutiny under RFRA.[15]

The widespread but flawed interpretations of RFRA described in Parts III and IV have constrained the ability of Native American litigants to bring claims for judicial protection of sacred sites. This judicial limitation has persisted in the face of congressional mandates to protect Native American religious practices and sacred places.[16] Furthermore, as Subpart III.C. illustrates, the Supreme Court has recently handed down decisions that are wholly inconsistent with the *Navajo Nation* court's interpretation of RFRA's substantial burden requirement. These more recent Supreme Court decisions suggest a more sensible model for future judicial assessment of Native practitioners' sacred sites claims.

Finally, Part V addresses the often-repeated worry that courts will be left with no limiting principle unless they incorporate into RFRA's "substantial burden" requirement either the constraints imposed by *Navajo Nation*'s limiting framework or *Lyng*'s incidental effects test. In this Part, we argue that the proper statutory limitations are established by RFRA itself. Attention to these limitations, rather than to alternative tests not grounded in the statute's plain meaning or purpose, provides Native Americans with long-denied sacred sites protections while also accounting for the government's legitimate competing interests.

I. THE RELIGIOUS SIGNIFICANCE OF SACRED SITES FOR NATIVE AMERICANS

To better understand the normative and doctrinal problems within existing law regarding the protection of Native American sacred sites, it is important to appreciate the significance of such sites for Native American religious practitioners and Native religious traditions. Sacred sites are "holy, irreplaceable

14. S. Fork Band v. U.S. Dep't of Interior, 643 F. Supp. 2d 1192, 1208 (D. Nev. 2009) (closely paraphrasing *Navajo Nation* in its conclusion that "the court has found no evidence in the record indicating that BLM's approval of the Project (1) forces Plaintiffs to choose between following their religion and receiving a government benefit or (2) coerces Plaintiffs into violating their religious beliefs by threat of civil or criminal sanctions" and thus no substantial burden existed); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 94 (D.D.C. 2017).

15. *Standing Rock Sioux Tribe*, 239 F. Supp. 3d at 93.

16. *See* THOMAS F. KING, "SACRED SITES" PROTECTION: BE CAREFUL WHAT YOU ASK FOR (2002), https://sacredland.org/wp-content/PDFs/Thomas_King.pdf.

places without which many tribal religions cannot exist."[17] Indeed, there is no single "Native American" religion. As of 2020, there are 574 federally recognized tribes in the United States, each having its own unique history, culture, and religious traditions.[18] Despite this wide variance, all of these diverse cultures identify particular geographic locations that are necessary for worship.[19] These places are considered sacred sites.

A given location may be sacred for several reasons.[20] Some sites are sacred because a meaningful historical event occurred there. Wounded Knee, in South Dakota, holds such significance as the site where United States cavalry slaughtered Lakota people for continuing to practice the Ghost Dance after it was prohibited under federal law.[21] A place may also have sacred importance because "something mysteriously religious . . . has happened or been made manifest there."[22] A third type of sacred place is one where sacred plants, materials, and minerals are gathered, such as the Peyote Gardens in Texas and a sacred pipestone quarry in Minnesota.[23] There are also particular places for vision questing, where Native people retreat and communicate directly with the Spirit World.[24] Finally, there are places where the Spirits have revealed themselves directly to human beings, such as Bear Butte in South Dakota[25] or the High Country in the Siskiyou Mountains.[26] These places are "the center of the world for tribes who practice human religiousness in its earliest mode in America."[27]

In order to understand the necessity of legal protections for sacred sites today, it is important not only to recognize the importance of sacred sites in Native religious practice but also to recall two specific aspects of the United States' shameful historical treatment of Native people. The first is the dispossession of Native lands, which brought these sacred sites under the control of the federal government and thus created the need for sacred sites protections in the first place. The second is this nation's history of religious discrimination against Native people generally.

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17. Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases Asserting a Place for Indians as Nonowners*, 52 UCLA L. Rev. 1061, 1068–69 (2005).

18. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5462 (Jan. 30, 2020).

19. Jack F. Trope, *Protecting Native American Religious Freedom The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 376 (1993).

20. *Id.*; *see also, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1081–82, 1096–1102 (9th Cir. 2008) (Fletcher, J., dissenting) (discussing how one location, the San Francisco Peaks, had diverse religious meanings for the thirteen plaintiff tribes, but all regarded it as a uniquely sacred site).

21. Carpenter, *supra* note 17, at 1067.

22. *Id.* at 1068 (citations omitted).

23. ECHO-HAWK, *supra* note 1, at 332.

24. *Id*.

25. *Id.* at 331.

26. Brief for the Indian Respondents at 4–5, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013).

27. ECHO-HAWK, *supra* note 1, at 333.

Because Native religious practitioners bringing RFRA claims to protect sacred sites are not seeking to establish any possessory or jurisdictional rights over such land, it might seem that sacred sites claims under RFRA are at best obliquely connected to America's history of land dispossession. However, all sacred sites are located on land that once belonged to the Tribal Nations originally occupying this continent. Today, while some sacred sites are still located on tribal land, a significant number of sites are located on federal public lands.[28] These are lands that the government either forcibly took from, acquired via treaty with, or purchased from tribes.[29] Native American religious practitioners' RFRA claims then arise when federal agencies' decisions to develop public lands imperil tribes' irreplaceable cultural and religious resources.[30]

The United States' historical treatment of Native religious practices has included not only discrimination, but also attempts to eradicate such practices outright. In a calculated effort to solve the "Indian problem" by extinguishing Native culture, the United States outlawed traditional practices and ceremonies and punished practitioners with imprisonment and starvation.[31]

With this centuries-long record of oppression and denial of the freedom to worship in mind, we move to a consideration of more contemporary American law surrounding Native American religious freedom.

II. LAWS PROTECTING NATIVE AMERICAN SACRED PLACES AND RELIGIOUS EXERCISE

In 1978, Congress attempted to address this history of religious persecution and the continuing pattern of government action impeding Native American religious practice with the passage of the American Indian Religious Freedom Act (AIRFA).[32] With AIRFA, Congress recognized that federal laws governing public lands, resource conservation, and preservation had long ignored the impacts on Native religious practices.[33] It sought to remedy those failures

28. OFF. OF TRIBAL RELS. & U.S. FOREST SERV., U.S. DEP'T OF AGRIC., REPORT TO THE SECRETARY OF AGRICULTURE: USDA POLICY AND PROCEDURES REVIEW AND RECOMMENDATIONS: INDIAN SACRED SITES 6–7 (2012), https://www.fs.fed.us/spf/tribalrelations/documents/sacredsites/SacredSitesFinalReportDec2012.pdf.

29. Carpenter, *supra* note 17, at 1069; *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008).

30. Trope, *supra* note 19, at 376.

31. Daniel K. Inouye, *Discrimination and Native American Religion*, 23 UWLA L. REV. 3, 14 (1992); John Rhodes, *An American Tradition The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 22–23 (1991); DEP'T OF THE INTERIOR, RULES GOVERNING THE COURT OF INDIAN OFFENSES (1883) (banning certain religious practices outright under the fourth item in "Rules"), https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf.

32. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978); *see also* DEAN SUAGEE & JACK F. TROPE, NATIVE SACRED PLACES PROTECTION LEGAL WORKSHOP: SACRED PLACES TRAINING MATERIALS 13 (2008), https://sacredland.org/wp-content/uploads/2017/07/Sacred_places_training_materials.pdf.

33. 92 Stat. at 469.

through an explicit commitment to the protection of tribal sacred sites and the religious practices of Native Americans, stating that: "[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to [sacred] sites . . . ."[34]

Despite Congress's strong statement in AIRFA and its enactment of subsequent pieces of legislation with similar aims,[35] federal land management decisions still continue to destroy sacred sites.[36] The Supreme Court subsequently held that AIRFA does not create a judicially enforceable cause of action,[37] and so tribes have relied primarily on the Free Exercise Clause[38] and RFRA[39] in suits seeking to protect sacred sites.[40] However, even when bringing their claims on these alternative grounds, Native American litigants generally lose in the lower federal courts and have never won a First Amendment Free Exercise case in the United States Supreme Court.[41] As the following Subparts detail, this dismal record is explained by lower courts' reliance on arbitrarily underinclusive legal tests, which Native Americans can rarely satisfy due to their unique religious practices.

A brief review of the Court's relevant Free Exercise Clause jurisprudence prior to RFRA is worthwhile in understanding how the Supreme Court has repeatedly denied religious protection to Native Americans. The First

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34. 42 U.S.C. § 1996.

35. In addition to the two statutes discussed in this Article, Congress passed a succession of measures in the latter part of the twentieth century designed to protect Native American religion and culture, including the Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048, the Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662, the National Historic Preservation Act of 1966, Pub. L. No. 80-665, 80 Stat. 915, and the Archeological Resource Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721.

36. *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (permitting the use of artificial snow containing treated sewage effluent on sacred San Francisco peaks); Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-01169-YY, 2018 WL 4523135 (D. Or. Mar. 2, 2018) (allowing road construction that destroyed and prevented practitioners from accessing a sacred site). For more recent examples, see also Complaint for Declaratory and Injunctive Relief, Native Am. Land Conservancy v. Haaland, No. 5:21-cv-00496 (C.D. Cal. Mar. 23, 2021) (challenging the Bureau of Land Management's approval of a water mining project affecting sacred sites in the California desert); Complaint, Apache Stronghold v. United States, No. 2:21-cv-00050-CDB (D. Ariz. Jan. 12, 2021) (challenging U.S. Forest Service land swap which would permit the construction of a copper mine on land sacred to Arizona tribes).

37. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).

38. U.S. CONST. amend. I.

39. 42 U.S.C. §§ 2000bb to 2000bb-4.

40. *See, e.g.*, *Navajo Nation*, 535 F.3d 1058 (rejecting plaintiff's claims under RFRA, the National Environmental Policy Act, and the National Historic Preservation Act); *Slockish*, 2018 WL 4523135. Tribes and individual Native Americans have also utilized the National Environmental Policy Act, National Historic Preservation Act, and Native American Graves and Repatriation Act in their efforts protect sacred sites through litigation. However, those claims do not seek to protect those places based on a substantive right to religious exercise, but on an agency's failure to properly consider environmental and historical impacts in the decision-making process.

41. *See e.g.*, *Lyng*, 484 U.S. at 439; *Navajo Nation*, 535 F.3d 1058, *cert. denied,* 556 U.S. 1281 (2009); *Sequoyah*, 620 F.2d 1159, *cert. denied*, 449 U.S. 953 (1980); Bowen v. Roy, 476 U.S. 693 (1986).

Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[42] When a plaintiff claims that some government action has violated its rights under the Free Exercise Clause, a court must first ascertain whether the challenged governmental conduct or law actually burdens the challenger's religious exercise. The path-marking cases of this initial inquiry are *Sherbert v. Verner*[43] and *Wisconsin v. Yoder*.[44] In both cases, the Court found that the challenged laws burdened the plaintiffs' religious exercise, applied strict scrutiny,[45] and invalidated the laws as they applied to the plaintiffs.[46]

In *Sherbert*, the Court held that a facially neutral law need not explicitly prohibit a religious practice to impermissibly burden religious exercise.[47] There, a Seventh-day Adventist challenged a state law that denied her unemployment benefits because she refused a job that required she work on the Sabbath.[48] This law did not expressly prohibit the plaintiff from practicing her faith.[49] But it put her to an impossible choice: either accept employment that required her to violate her religious beliefs or follow the tenets of her faith but forgo a government benefit to which she was otherwise entitled.[50] The Court reasoned that the law interfered with her exercise of religion as much as if the government had levied her for keeping the Sabbath.[51]

Nine years later, the Supreme Court again found a Free Exercise violation in the absence of any explicit prohibition. In *Yoder*, the Court struck down a compulsory school-attendance law as applied to members of the Old Order Amish.[52] The Court found that the effect of the law on plaintiffs' religious practice was not only "severe," but "inescapable, for the [challenged] law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[53] The

42. U.S. CONST. amend. I.

43. Sherbert v. Verner, 374 U.S. 398 (1963).

44. Wisconsin v. Yoder, 406 U.S. 205 (1972).

45. Although the Court does not explicitly identify the appropriate standard of review in either *Sherbert* or *Yoder*, it quite clearly applies a strict scrutiny analysis in both cases. After finding that the measure challenged in each case constitutes an infringement upon plaintiffs' rights under the Free Exercise Clause, *see Yoder*, 406 U.S. at 214; *Sherbert*, 374 U.S. at 406, the Court then requires that the state identify a compelling interest justifying its infringement. *Yoder,* 406 U.S. at 215 ("only those interests of the highest order can overbalance legitimate claims to the free exercise of religion,"); *Sherbert*, 374 U.S. at 406 ("we must next consider whether some compelling state interest enforced . . . justifies the substantial infringement of the . . . right.").

46. *See Sherbert*, 374 U.S. at 408–09; *Yoder*, 406 U.S. at 218, 231, 234–36.

47. *Sherbert*, 374 U.S. at 401–04.

48. *Id.* at 399–401.

49. *Id.* at 403–04.

50. *Id.* at 404.

51. *Id.*

52. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

53. *Id.* at 218.

Court thus found that the law represented a "grave interference" with Amish religious practice in violation of the Free Exercise Clause.[54]

Following *Sherbert* and *Yoder*, the Supreme Court did not opine on the Free Exercise Clause for another fourteen years and so had no occasion to further explain what might constitute a "burden" upon religious exercise. Then, three cases involving claims by Native Americans brought about significant changes in the Court's Free Exercise Clause jurisprudence. The two that are significant for the instant analysis[55] are *Lyng v. Northwest Indian Cemetery Protective Ass'n* and *Employment Division, Department of Human Resources of Oregon v. Smith.*[56]

In *Lyng*, Native Americans challenged the U.S. Forest Service's decision to pave through a portion of the Chimney Rock section of Six Rivers National Forest.[57] The proposed road was to cut through the High Country, an area that the Yurok, Karuk, and Tolowa Indians use for religious purposes.[58] The Court did not doubt either the sincerity of the Native practitioners' religious beliefs or the extent to which the project would interfere with their religious practice.[59] It acknowledged that a draft environmental impact statement issued by the Forest Service determined 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."[60]

Nevertheless, the Court refused to find that the Native American litigants faced a burden triggering strict scrutiny—in the Court's words, that the litigants had proven "that the burden on their religious practices is heavy enough to violate the Free Exercise Clause unless the Government can demonstrate a compelling need to complete the G–O road or to engage in timber harvesting in the Chimney Rock area."[61] In reaching this puzzling conclusion, *Lyng* established two enduring legal barriers to Native American sacred sites claims.

The first of these barriers is the "incidental effects" test, which arose from the *Lyng* Court's narrow interpretation of the Free Exercise Clause's term "prohibit."[62] The Court determined that only "outright prohibitions," "indirect

54. *Id.*

55. The case not discussed here is *Bowen v. Roy*, 476 U.S. 693 (1986) (holding that the federal statute requiring state governments to utilize social security numbers did not violate the Free Exercise Clause, even though the Native American plaintiffs believed the number's use would rob their child's spirit). Its chief significance is that it laid a foundation for *Lyng* and *Smith*. Accordingly, we have chosen to focus on the analysis set forth in those two cases.

56. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).

57. *Lyng*, 485 U.S. at 442.

58. *Id.*

59. *Id.* at 451.

60. *Id.* at 442.

61. *Id.* at 447.

62. *Id.* at 450–51. The Court also seems to rely heavily on use of the word "prohibit" in the Free Exercise Clause when it discusses the necessity for uniformity of its application: "[The Free Exercise

coercion," or "penalties" are properly "subject to scrutiny under the First Amendment."[63] But government action that has mere "incidental effects," making it "difficult to practice certain religions" does not trigger such scrutiny.[64]

Although *Lyng* was unclear in distinguishing a "prohibition" from a mere "incidental effect" on religious exercise, it explained that the line between the two "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[65] Thus, the Court concluded that its decision would remain unchanged even if the Forest Service's road-building effectively destroyed the only site at which those religious practices could be observed and thus deprived the observers of their ability to worship at all.[66]

Lyng thereby created a "cruelly surreal"[67] paradox, where government action that makes religious exercise impossible can still pass constitutional muster as long as it does not involve an outright prohibition, penalty, or narrowly defined "coercion."[68] Such extreme conduct thus escapes strict scrutiny. Courts, relying on *Lyng*'s cramped understanding of the Free Exercise Clause, invariably find that its protections do not extend to federal land use decisions affecting sacred sites.

The second barrier *Lyng* created was in the scope of religious claims entitled to judicial protection. Justifying its narrow interpretation of the Free Exercise Clause in part by the need for some limiting principle, the Court underscored the consequences of requiring the government to accommodate each citizen's religious needs. In such a world, individual citizens would be able to extract a "religious servitude" from the government by asserting a veto over a wide range of government actions.[69] This, the Court reasoned, would be untenable; the government "simply could not operate" under such constraints.[70] The rationale that more expansive legal protection for Native sacred sites on government-owned land cannot be implemented because it would effectively paralyze the government is cited in support of rulings against Native American litigants in sacred sites cases to this day.[71]

Clause] can give to [no citizen] a veto over public programs that do not prohibit the free exercise of religion." *Id.* at 452.

63. *Id.* at 450.

64. *Id.* at 450–51.

65. *Id.* at 451.

66. *Id.* at 451–52.

67. *Id.* at 472 (Brennan, J., dissenting).

68. *Id.* at 450.

69. *Id.* at 452.

70. *Id*.

71. *See, e.g.*, Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-01169-YY, 2018 WL 4523135 at *4 (D. Or. Mar. 2, 2018); Havasupai Tribe v. United States, 752 F. Supp 1471, 1486 (D. Ariz. 1990) (citing *Lyng*, 485 U.S. at 453) ("Giving the Indians a veto power over activities on federal land that [sic] would 'easily require de facto beneficial ownership of some rather spacious tracts of public property.'"); United States v. Means, 858 F.2d 404, 407–08 (8th Cir. 1988).

Two years after *Lyng*, the Court dealt a further blow to Native religious rights in *Employment Division v. Smith*.[72] As members of the Native American Church, plaintiffs used peyote in religious ceremonies but were fired from their jobs and subsequently denied government unemployment benefits.[73] They argued that the state's prohibition against peyote, even for sacramental purposes, violated their Free Exercise rights.[74] The Court disagreed, holding that a law of general applicability that interferes with religious exercise passes muster under the Free Exercise Clause if the law is rationally related to a legitimate government interest.[75] It thus reversed decades of jurisprudence applying strict scrutiny to such laws.[76] *Smith* eroded existing Free Exercise protection so dramatically that Congress took corrective measures. Concerned that the decision "left insufficient room in civil society for the free exercise of religion,"[77] Congress responded with heightened statutory protections for religious exercise by enacting RFRA in 1993.

Under this new statutory scheme, a prima facie claim is established when a plaintiff shows: (1) their activity is an exercise of religion and (2) the government action *substantially burdens* their religious exercise.[78] Once the plaintiff establishes a prima facie case, the burden shifts to the government to prove that the restriction furthers a compelling government interest by the least restrictive means.[79]

Congress's use of the phrase "substantially burden" was notable, given that Free Exercise precedent had consistently referred simply to "burden(s)."[80] As it is used within the context of RFRA's overall structure, this phrase should be understood to establish a test different from that which was employed by pre-RFRA Free Exercise precedent. Yet lower courts have largely failed to appreciate this distinction. As the following discussion will illustrate, judicial interpretations of "substantial burden" under RFRA have been a significant obstacle for Native American sacred sites claims. Although *Smith*—a Native American religious liberty case—prompted RFRA's passage, courts interpreting the statute have failed to apply it in a manner that protects Native American religious exercise tied to sacred sites.

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72. *See generally* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872 (1990).
73. *Id.* at 874.
74. *Id.* at 878.
75. *Id.* at 884–85.
76. *Id.* at 888.
77. Yellowbear v. Lampert, 741 F.3d 48, 52 (10th Cir. 2014) (Gorsuch, J.).
78. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008).
79. 42 U.S.C. § 2000bb-1.
80. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 717–18 (1981) ("[W]here the state conditions receipt of an important benefit upon conduct prescribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief . . . a burden upon religion exists.").

III. JUDICIAL INTERPRETATION OF RFRA: *NAVAJO NATION* AND THE "*SHERBERT*/*YODER* FRAMEWORK"

Judicial interpretation of RFRA's "substantial burden" requirement has proven problematic for Native Americans bringing sacred sites claims. And because the statute does not define the term, most lower courts have interpreted it by referencing pre-*Smith* case law.[81] Grafting this body of law onto the statute has resulted in the continued denial, rather than the intended restoration, of Native Americans' ability to exercise religious freedoms. This erroneous reasoning is most influentially set forth in what has become the leading case addressing RFRA's application to Native American sacred sites claims: *Navajo Nation v. U.S. Forest Service*.[82]

Navajo Nation arose from several Native tribes' efforts to protect sacred sites on the San Francisco Peaks from desecration. Since time immemorial, the San Francisco Peaks have been the center of religious life for Native Americans of the Southwest.[83] For the Navajo, the four sacred mountains of the Peaks are the Mother of the Navajo people and play a role in every Navajo religious ceremony.[84] In nearly every Navajo household, there are medicine bundles that represent the Peaks and contain stones, herbs, shells, and soil from the four sacred mountains.[85] According to the Hualapai people, the Earth was once deluged with water and they put a young girl on a log for her survival.[86] She landed alone on the Peaks, where she bathed in the water and birthed twin warriors, from whom all Hualapai descend.[87] Similarly, the Havasupai people come from the Peaks, the tribe having been founded by a grandmother who survived a flood there.[88] For those tribes and numerous others, the Peaks are the center of religious life.

The land that the San Francisco Peaks occupy was forcibly taken from Native people by the United States and today is part of the Coconino National Forest in Northern Arizona.[89] The Snowbowl ski area sits on Humphrey's Peak, the highest of the San Francisco Peaks, and is privately operated by a ski resort

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81. *See, e.g.*, Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-01169-YY, 2018 WL 4523135, at *3 (D. Or. Mar. 2, 2018); Washington v. Klem, 497 F.3d 272, 278 (3d Cir. 2007) ("The Supreme Court has defined 'substantial burden' in the Free Exercise Clause context, and several courts of appeals have looked to this line of cases to interpret what the phrase means for RLUIPA purposes.") (citing Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006); Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir.2005); Adkins v. Kaspar, 393 F.3d 559, 569 (5th Cir. 2004)). Although these cases all address the use of the term "substantial burden" in RLUIPA, rather than RFRA specifically, the Supreme Court has held that RLUIPA's language in this provision precisely "mirrors" RFRA's. Holt v. Hobbs, 574 U.S. 352, 357 (2015).

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

83. *Id.* at 1113 (Fletcher, J., dissenting).

84. *Id.* at 1100 (Fletcher, J., dissenting).

85. *Id.*

86. *Id.* at 1101 (Fletcher, J., dissenting).

87. *Id.*

88. *Id.* at 1102 (Fletcher, J., dissenting).

89. *Id.* at 1064, 1113.

pursuant to a special use permit issued by the Forest Service.[90] When the Forest Service approved a plan for Snowbowl to begin making artificial snow using treated sewage effluent, numerous tribes and individual Indians sued under RFRA as well as under various environmental protection statutes.[91]

The dispute was eventually reviewed by the Ninth Circuit en banc. The Ninth Circuit held that the use of "treated sewage effluent to make artificial snow on the most sacred mountain of southwestern Indian tribes" imposed no "substantial burden" on the plaintiffs' religious exercise.[92] Because this desecration failed to trigger strict scrutiny under RFRA, the Snowbowl project was permitted to move forward and the effluent was spread across the sacred Peaks.[93]

In *Navajo Nation,* the Court acknowledged that RFRA itself does not define the term "substantial burden."[94] Nevertheless, the Ninth Circuit constructed a definition from the "express language of RFRA" and "decades of Supreme Court precedent" regarding Free Exercise rights.[95] While the majority saw this approach as "crystal clear,"[96] in reality, it is deeply flawed.

The *Navajo Nation* majority opinion's definition of substantial burden relies on two propositions: (1) that pre-*Smith* case law "define[d] what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test,"[97] and (2) that Congress expressly adopted and restored pre-*Smith* case law as a test for whether government conduct constituted a "substantial burden."[98] For the reasons discussed in the following Subparts, both of these propositions are wrong.

*A. Pre-*Smith *Case Law Did Not Define "Substantial Burden"*

As noted above, the *Navajo Nation* court's first error lay in its conclusion that RFRA's "substantial burden" could be defined by direct reference to pre-*Smith* case law. It reasoned that:

> Congress expressly referred to and restored a body of Supreme Court [Free Exercise Clause] case law that defines what constitutes a substantial burden on the exercise of religion (i.e., *Sherbert*, *Yoder* and other pre-*Smith* cases) . . . . Thus, we must look to those cases in interpreting the meaning of 'substantial burden.'[99]

90. *Id.* at 1064.
91. *Id.* at 1064–66.
92. *Id.* at 1080 (Fletcher, J., dissenting).
93. *Id.* at 1073.
94. *Id.* at 1068.
95. *Id.* at 1068.
96. *Id.* at 1077.
97. *Id.* at 1069.
98. *Id.* at 1074.
99. *Id.*

Here, the *Navajo Nation* court overestimated the clarity that pre-*Smith* case law could offer in defining a "substantial burden."[100] The term "substantial burden" did not carry an established, technical meaning at the time of RFRA's enactment. Only three Supreme Court Free Exercise majority opinions prior to RFRA's enactment used the term at all, and none of those three defined it.[101]

The Ninth Circuit's second misstep lay in its expansion upon an already-dubious portion of *Lyng*'s reasoning. *Lyng* held that a sufficient "burden" existed only where the challenged government regulation was "coercive," and that such "coercion" arose under two circumstances:[102] (1) where the religious practitioner is required to violate his or her religious tenets under threat of criminal or civil penalty (as in *Yoder*); (2) where the religious practitioner is required to choose between adhering to his or her religious beliefs or receiving a government benefit (as in *Sherbert*).[103]

The Ninth Circuit took the *Lyng* Court's reasoning a step further. It held that because these two cases represented the only two circumstances where the Supreme Court had so far found that an actionable Free Exercise claim under the First Amendment existed,[104] they should be understood to capture the complete range of circumstances under which a court *could* find that a plaintiff suffered a substantial burden under RFRA.[105] It concluded that the Native American plaintiffs' claim did not qualify because their asserted harms fell outside of what the *Navajo Nation* majority called the "*Sherbert*/*Yoder* framework."[106]

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100. Washington v. Klem, 497 F.3d 272, 278 (3d Cir. 2007) ("Supreme Court precedent with respect to the definition of 'substantial burden' in the Free Exercise Clause context has not always been consistent.") (citing Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226–27 (11th Cir. 2004)); *see also* Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1213 (1996) (concluding that neither *Sherbert* nor *Yoder* provided a satisfactory explanation for the substantial burden threshold).

101. 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, 67 (2010). The three cases are: Jimmy Swaggart Ministries v. Bd. of Equalization of Cal., 493 U.S. 378, 391 (1990) (holding that the State's imposition of a sales and use tax on the Ministries's sale of religious material did not substantially burden Free Exercise rights); Tex. Monthly v. Bullock, 489 U.S. 1, 18 n.8 (1989) (discussing legal requirements for religious accommodation that would not place a substantial burden on non-beneficiaries of the accommodation); Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden."). Justice O'Connor also used the term "substantial burden" in her *Smith* concurrence, but she did not define the term. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring). One of the three pre-RFRA cases using the term "substantial burden" did not even invoke the term in describing the religious practitioner's prima facie case (as it is used in RFRA and RLUIPA), but rather in reference to the effect of certain religious exemptions upon non-beneficiary third parties. *Tex. Monthly*, 489 U.S. at 18 n.8.

102. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988); *see also Navajo Nation*, 535 F.3d at 1069–70.

103. *Lyng*, 485 U.S. at 449; *see also Navajo Nation*, 535 F.3d at 1070.

104. *Navajo Nation*, 535 F.3d at 1069.

105. *Id*. at 1075.

106. *Id*.

Supreme Court precedent at the time of the *Lyng* decision—up to and including *Sherbert* and *Yoder*—had established that criminal punishment, civil penalties, and the denial of a government entitlement each constituted a coercive measure subject to heightened scrutiny under the First Amendment Free Exercise Clause.[107] But, as Justice Brennan noted in his dissent from *Lyng*, "[i]n sustaining the challenges to these laws, however, we nowhere suggested that such coercive compulsion exhausted the range of religious burdens recognized under the Free Exercise Clause."[108] The *Navajo Nation* court thus erred in presuming that RFRA's term "substantial burden" had been defined by pre-RFRA case law, and in deriving from *Lyng* powerful limitations on religious freedom claims not established by *Lyng* itself.

*B. Congress Did Not Adopt and Restore Pre-*Smith *Case Law as a Test for Whether Government Conduct Constitutes a "Substantial Burden"*

The text of the statute offers no clear reason to believe—and indeed, gives good reason to doubt—that Congress intended for RFRA to restore pre-*Smith* case law defining the plaintiff's prima facie burden. The *Navajo Nation* court did correctly note that RFRA "expressly adopted" one component of the *Sherbert* and *Yoder* decisions: the requirement that courts apply the compelling interest test once the claimant proves a substantial burden.[109] Unfortunately, the court then leaped to the conclusion that "[t]he same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test."[110] To support this conclusion, the majority relied on Section (a)(5) of RFRA, which provides that "the compelling interest test as set forth in . . . federal court rulings [prior to *Smith*] is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[111]

However, a closer look at RFRA's text demonstrates that Congress was not codifying the "*Sherbert*/*Yoder* framework" for either element of the plaintiff's prima facie burden. Where the statute refers to *Sherbert* and *Yoder* in section 2(b)(1), it does so to restore pre-*Smith* case law regarding the *defense's* burden in the two cases: "The purposes of this Act are . . . to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ."[112] Applying the compelling interest test, courts must examine whether the *government* has

107. *See Lyng*, 485 U.S. at 450.
108. *Id.* at 466.
109. *Navajo Nation*, 535 F.3d at 1068–69.
110. *Id.* at 1069 (citing Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989)).
111. *Id.* at 1068–69 (quoting RFRA Section 2000bb(a)(5)) (ellipses and brackets added by the court).
112. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (1993).

justified its action once the plaintiff has demonstrated the existence of a substantial burden.[113]

This narrower understanding of RFRA's reference to *Sherbert* and *Yoder* finds further support in a careful examination of the grounds on which those two cases were decided. In both decisions, the Supreme Court held that the plaintiffs demonstrated that a burden existed and so the compelling interest test was warranted.[114] Resolution of these cases turned on whether the government defendants had demonstrated compelling interests, not on the sufficiency of the plaintiffs' prima facie demonstrations.[115]

Congress's choice to refer to a "substantial burden"—a term not commonly used in pre-RFRA Free Exercise cases—fails to support the theory that Congress *intended* to import that body of law.[116] If Congress's true intent had been for RFRA to implement the same test for assessing the sufficiency of a plaintiff's burden as had been employed in pre-*Smith* case law, it would make more sense for it to use the terminology the Court itself had more commonly employed in those cases, such as "prohibition" or simply "burden."[117]

The interpretive question of what "substantial burden" means cannot be resolved by disregarding the adjective "substantial" as inconsequential. As Judge Posner observed, equating "burden" (which appears often in pre-*Smith* cases) with "substantial burden" (which rarely appears in pre-*Smith* cases) reads the word "substantial" out of the statutory text in a marked departure from traditional approaches to statutory interpretation.[118] This commonsense interpretive principle is further supported by RFRA's legislative history. While earlier drafts of RFRA used the term "burden" alone, the Senate eventually added "substantial" in an effort to limit RFRA's application based on the level of interference with a claimant's religious exercise.[119]

Moreover, the *Navajo Nation* court's broad reliance on pre-*Smith* case law in its understanding of RFRA's "substantial burden" requirement is inconsistent with the congressional purposes suggested by both the statute's legislative

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113. *Id*. at § 2000bb(1)(b).

114. Sherbert v. Verner, 374 U.S. 398, 403–04, 406 (1963); Wisconsin v. Yoder, 406 U.S. 205, 211–12 (1972).

115. *See* Dorf, *supra* note 100, at 1213–15; *Navajo Nation*, 535 F.3d at 1087 (Fletcher, J., dissenting).

116. *See* Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2445 (2021) ("[T]his Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption.") (citing Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2365 (2019)).

117. *See* Lyng v. Nw. Indian Cemetery Prot. Ass'n, 485 U.S. 439, 459 (1988); Hobbie v. Unemp. Appeals Comm'n of Fla., 480 U.S. 136, 143–44 (1987); Bowen v. Roy, 476 U.S. 693, 702, 703, 706–07, 720, 728, 730–31 (1986); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718–19 (1981); *Yoder*, 406 U.S. at 220; *Sherbert*, 374 U.S. at 404.

118. World Outreach Conf. Ctr. v. City of Chicago, 591 F.3d 531, 539 (7th Cir. 2009) ("[T]he adjective 'substantial' must be taken seriously . . . .").

119. 103 Cong. Rec. 27,240 (1993) (statement of Sen. Henry Hyde) ("With respect to the legislation before us, the other body has amended the House-passed bill to add the word 'substantially' at several points.").

history and the broader legislative context in which it was enacted. As noted in Part III, RFRA was intended to safeguard individuals' rights to free religious exercise.[120] Crucially, it was also intended to *correct* the damage to those rights that had been wrought by the Court's decision in *Smith*—a case that disrupted once-settled Free Exercise jurisprudence when it denied a Native American plaintiff's Free Exercise claim. This history suggests that the *Navajo Nation* court's reading of RFRA should be viewed with particular suspicion for its tendency to deprive religious practitioners generally of their rights to worship—precisely what RFRA was enacted to remedy.[121] This suspicion is perhaps especially appropriate when that reading eliminates religious protection for a uniquely Native American form of religious practice, which the United States has an acknowledged history of repressing.

To read RFRA as providing *no* protection for sacred sites is inconsistent not only with Congress's express reasons for passing RFRA, but also with Congress's intent to safeguard Native American religious freedom and sacred sites expressed in other statutes, including AIRFA and the Native American Graves Protection and Repatriation Act (NAGPRA).

Given Congress's explicit intent to protect Native religion in these other two statutes, it seems very unlikely that it intended in crafting a more general law directed to religious freedom to categorically exclude a substantial subset of Native religious practices, yet that is just what the *Navajo Nation* court found. The Ninth Circuit's *Sherbert*/*Yoder* framework replicates the absurdity in *Lyng* that severely curtailed Native religious practitioners' ability to win protection for their sacred sites in the courts. *Lyng* held that the government could destroy practitioners' ability to practice without "prohibiting" that religion within the meaning of the Free Exercise Clause. *Navajo Nation* applied this reasoning in its interpretation of RFRA to find that the destruction of a sacred site also did not constitute a "substantial burden" on such practices.

Recognizing that RFRA was supposed to *enhance* religious protection and *undo* a case that denied religious rights to a Native plaintiff, a statutory reading that reinstates a similarly restrictive framework is troubling. The manner in which the *Navajo Nation* court's approach resurrects pre-RFRA constraints on Native practitioner's ability to defend their freedom of worship can be illustrated by two related hypotheticals.[122] The general premise is this: there is a sacred site

120. 42 U.S.C. § 2000bb(a)(1); *see supra* Subpart III.A.

121. Holt v. Hobbs, 574 U.S. 352, 357 (2015) (noting that Congress passed RFRA "in order to provide greater protection for religious exercise than is available under the First Amendment").

122. For an example of how the government has used this line of argument to limit Native American sacred sites claims, *see* Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment at 47–48, Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-1169-ST (D. Or. Mar. 2, 2018), ECF No. 292 ("Against this straightforward analysis, the Government argues, in effect, that the burden on Plaintiffs' religious exercise is too great to qualify as a 'substantial burden.' The Government says that a 'substantial burden' is a 'term of art' that encompasses only 'two limited circumstances'—namely, when individuals are (1) 'forced to choose between following the tenets of their religion and receiving a governmental benefit,' or (2) 'threat[ened] [with] civil or criminal sanctions.' Thus, under this view, if the Government

utilized by Native Americans in a national forest. Their ancient stories tell them that this place has been used since time immemorial to offer prayers and ceremonies at the close of each season. Indeed, their religion *requires* that certain ceremonies be held there. Failure to do so offends the Creator and will bring about dire consequences. The Native Americans utilize a fire road to get within a mile of the site, then hike along a narrow trail for the remaining mile.

In Scenario One, the Forest Service discovers a species of bird nesting in the area—one previously thought to be extinct—and closes the area to public use in order to protect the birds in their sensitive nesting habits. The Forest Service imposes a $500 fine on anyone who enters the fenced-off, protective area. In Scenario Two, there are no rare birds. Instead, the Forest Service decides to build a four-lane highway that completely destroys and paves over the sacred site. Once this road is complete, the Native Americans will not be able to perform their ceremonies at that location and will be perpetually in violation of their religious mandates.

Scenario One, which preserves the site but fines Native Americans for entering it for prayer, easily fits within the *Sherbert*/*Yoder* framework and likely would constitute a substantial burden under the *Navajo Nation* court's understanding of RFRA. With the plaintiffs' demonstration that they have suffered such a "substantial burden," the burden would then shift to the government to demonstrate that a compelling interest is furthered by the least restrictive means.[123] However, Scenario Two, where the sacred site is destroyed and the religious exercise is impossible, does not impose a substantial burden according to the *Navajo Nation* court and the government would face no heightened obligation to justify its road. As these hypotheticals illustrate, the *Navajo Nation* rule establishes that government activity that preserves a site but prevents access presents at least a prima facie RFRA claim, while government activity that completely destroys a site and renders religious exercise impossible, does not.

This absurd result departs from RFRA's express purpose of broadly protecting religious exercise. Furthermore, as the following Subpart demonstrates, it is in tension with the Supreme Court's recent interpretations of RFRA's "substantial burden" requirement.

C. Supreme Court Decisions Addressing RFRA's "Substantial Burden" Requirement Conflict with the Navajo Nation *Court's Approach*

Two post-RFRA Supreme Court opinions suggest that the *Navajo Nation* majority was wrong to conclude that Congress expressly adopted the

had fined Plaintiffs for trespassing at the site (thus making their religious practices more costly), Plaintiffs would have suffered a 'substantial burden.' But because the Government destroyed the site (making their religious practices impossible), Plaintiffs have suffered no 'substantial burden.'" (citations omitted)).

123. Yellowbear v. Lampert, 741 F.3d 48, 56 (10th Cir. 2014); Haight v. Thompson, 763 F.3d 554, 566 (6th Cir. 2014).

Sherbert/*Yoder* framework as a test for determining what qualifies as a "substantial burden" upon religious exercise. These cases strongly indicate that the Court does not read pre-*Smith* case law into RFRA's prima facie requirements and illustrate the Court's expansive understanding of RFRA's proper scope.

In *Burwell v. Hobby Lobby*, the Court held that a contraceptive mandate, as applied to closely held corporations, violated RFRA.[124] There, three corporations challenged the Secretary of the Department of Health and Human Services's (HHS) mandate requiring them to provide their employees with health insurance that included coverage for certain forms of contraception.[125] The corporations' owners objected to contraception on religious grounds, and claimed that the mandate substantially burdened their religious beliefs in violation of RFRA.[126] The Court agreed.[127]

Although the *Hobby Lobby* Court did not precisely define the contours of what constitutes a "substantial burden,"[128] the opinion nevertheless demonstrates the limited utility of pre-*Smith* case law in construing RFRA. Relevant here is HHS's claim that the plaintiff corporations failed to meet the second prong of RFRA's prima facie burden because a corporation was not capable of an "exercise of religion."[129] In an argument closely tracking the logic employed by the *Navajo Nation* court's *Sherbert*/*Yoder* framework, HHS asserted that RFRA merely codified pre-*Smith* case law.[130] HHS argued that, because none of those cases held that the First Amendment conferred free exercise rights on for-profit corporations, RFRA likewise conferred no such protection.[131]

The Court flatly rejected the notion that RFRA merely codified pre-*Smith* case law. Writing for the majority, Justice Alito explained that, "RFRA defined the 'exercise of religion' to mean 'the exercise of religion under the First Amendment,' not the exercise of religion as recognized only by then-existing Supreme Court precedents."[132] The Court went on to point out that the RFRA amendments in 2000 eliminated references to pre-*Smith* case law altogether.[133] The amendments also directed that "exercise of religion 'shall be construed in

124. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014).
125. *Id.* at 701, 704.
126. *Id.* at 691.
127. *Id.* at 736.
128. In analyzing the "substantial burden" prong, the Court focused on HHS's argument that the link between the insurance mandate and violation of Hobby Lobby's religious beliefs were too attenuated to constitute a substantial burden. *Id.* at 720–25. Rather than offer any definition of the term, the Court simply concluded that a financial penalty imposed for failing to provide the required insurance would constitute a substantial burden. *Id.* at 726.
129. *Id.* at 714–15.
130. *Id.* at 713.
131. *Id.*
132. *Id.*
133. *Id.* at 714.

favor of broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.'"[134]

While the Court addressed the "exercise of religion" prong rather than the "substantial burden" prong of the plaintiff's prima facie case, its analysis undermines the *Navajo Nation* court's holding that RFRA's prima facie burden may only be met by circumstances that fall squarely within the *Sherbert*/*Yoder* framework. It stands to reason that if Congress did not confine the "exercise of religion" prong to then existing case law, it likewise did not limit the "substantial burden" prong to those cases either.

The *Hobby Lobby* Court's refusal to confine RFRA's application to those forms of religious exercise already protected by pre-*Smith* case law[135] furthers Congress's intent to provide "broad protection" for religious exercise more than *Navajo Nation* does. This understanding of RFRA's "broad protection" is similarly furthered by an interpretation of "substantial burden" that recognizes that the government's complete destruction of an irreplaceable place of worship is an unacceptable interference with religious exercise.

In *Holt v. Hobbs*, the second decision to cast doubt on the Ninth Circuit's holding in *Navajo Nation*, the Court impliedly adopted an expansive understanding of RFRA's scope. At issue was the Religious Land Use and Institutionalized Persons Act (RLUIPA), which imposes an identical "substantial burden" standard on plaintiffs, according to the Supreme Court.[136] Interpreting the protections of RLUIPA, the lower court held that the state prison's restraint on a Muslim prisoner's ability to grow his beard did not substantially burden his religion.[137] It reasoned that the availability of alternative forms of religious exercise—such as meeting with a religious advisor, possessing a prayer rug, and keeping a halal diet—precluded the finding of a substantial burden.[138]

The Supreme Court rejected the lower court's reasoning, in part, because it had "improperly imported a strand of reasoning from cases involving prisoners' First Amendment rights."[139] While the "availability of alternative means of practicing religion" was relevant to determining whether the plaintiff had been "burdened" for the purposes of *First Amendment* protection, "RLUIPA provides greater protection."[140] The logical result of this holding alongside *Holt*'s determination that "substantial burden" carried the same meaning across both RFRA and RLUIPA is that a "substantial burden" under RFRA, too,

134. *Id.* (citations omitted); *see also* Holt v. Hobbs, 574 U.S. 352, 357 (2015).

135. *Hobby Lobby*, 573 U.S. at 714; *Holt*, 574 U.S. at 357 (2015).

136. *Holt*, 574 U.S. at 358 ("RLUIPA thus allows [petitioners] 'to seek religious accommodations pursuant to the same standard as set forth in RFRA.'").

137. *Id.* at 360.

138. *Id.* at 361.

139. *Id.*

140. *Id.*

encompasses a wider variety of burdens than would be protected by the Free Exercise Clause alone.[141]

As illustrated by the Supreme Court's decisions in *Hobby Lobby* and *Holt*, the Ninth Circuit's "substantial burden" framework in *Navajo Nation* rests on tenuous ground. Indeed, the Court's refusal to apply pre-*Smith* case law to RFRA and RLUIPA's prima facie requirements casts serious doubt on the validity of the *Sherbert*/*Yoder* framework fashioned in *Navajo Nation* and widely invoked by courts since.[142]

D. The Ninth Circuit Had, Prior to Navajo Nation*, Established a Viable Definition of "Substantial Burden" That Did Not Rely upon the* Sherbert/Yoder *Framework*

The *Navajo Nation* court's construction of the *Sherbert*/*Yoder* framework to define "substantial burden" is all the more puzzling in light of one additional fact: the Ninth Circuit *already defined* the term in a case just five years prior. In *San Jose Christian College v. City of Morgan Hill*,[143] the Ninth Circuit was faced with deciding whether a generally applicable zoning ordinance applied to a religious college imposed a substantial burden on its religious exercise so as to violate RLUIPA.[144] The Ninth Circuit noted that the statute offered no definition of the phrase, and so applied three traditional principles to its interpretive approach: (1) enforce statutory terms according to their plain meaning; (2) when the statute does not define the term, construe it according to its ordinary, contemporary, common meaning; and (3) if an ambiguity exists in the statute, or an absurd construction results, refer to a statute's legislative history.[145] This

141. *Id.*; Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 435 (2006).

142. Two lower court decisions since *Hobby Lobby* have rejected claimants' arguments that the 2014 Supreme Court case cast doubt on the validity of *Navajo Nation*'s interpretation of RFRA. Neither case causes additional trouble for the argument advanced in this Part. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers,* the circuit court rejected the claimant's effort to rely on *Hobby Lobby* by concluding that *Hobby Lobby* did not upset *Lyng*'s "substantial burden" analysis. However, as this Article argues elsewhere, the *Lyng* Court never engaged in a true substantial burden analysis at all. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 97 (D.D.C. 2017). A different circuit found *Hobby Lobby* inapplicable because it determined that effectively *no* burden of any kind had been imposed upon the claimants' religious practice. *See* Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1016 (9th Cir. 2016).

143. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1034 (9th Cir. 2004).

144. There is no indication either RFRA or RLUIPA's respective texts or their legislative histories that "substantial burden" is defined differently across the two statutes, nor is there any indication that the standard for "substantial burden" ought to differ depending on whether a given case arises in a prison context, land use context, public lands context, or elsewhere. When the *Navajo Nation* court refused to directly apply the *San Jose Christian College* definition of "substantial burden," nowhere in its detailed analysis did it suggest that this reasoning was based on any interpretive distinction between RLUIPA and RFRA. Indeed, the Supreme Court has since expressly concluded that RFRA and RLUIPA utilize the same standards. *See* Holt v. Hobbs, 574 U.S. 352, 358 (2015) (citing *O Centro Espírita Beneficente União do Vegetal,* 546 U.S. at 436).

145. *San Jose Christian Coll.*, 360 F.3d at 1034 (citations omitted).

approach followed the well-established interpretive principle that the first point for statutory construction is always the plain language of the statute itself.[146]

Adhering to these principles, the *San Jose Christian College* court recognized that its task was to "construe 'substantial burden' in accordance with its plain meaning, referring back to the legislative history only if an absurd construction results."[147] Relying on dictionary definitions to inform its understanding of the term's ordinary meaning, the court concluded that a "substantial burden" is "a significantly great restriction or onus upon [religious] exercise."[148] The court concluded that the zoning ordinance did not impose a substantial burden because it merely required the college to submit a complete rezoning application.[149] The court found that this requirement did not restrict the college's religious exercise because it in fact imposed *no restriction whatsoever* on the college's religious exercise.[150] The court suggested that if the rezoning application was denied, then a substantial burden might be found to exist.[151]

Proposing that their Ninth Circuit panel adopt this definition, the *Navajo Nation* plaintiffs argued that the use of recycled wastewater on the Peaks would render the site unusable for religious ceremonies, and thus impose a "'significantly great restriction or onus' on the exercise of their religion."[152] Judge Fletcher was amenable to this interpretive method in his dissent, writing that "Congress did not define 'substantial burden' either directly or by reference to pre-*Smith* case law," so therefore, the court "should define . . . that term according to its ordinary meaning."[153] However, the majority declined to apply the *San Jose College* panel's interpretation:

> *San Jose Christian College*'s statement of the "substantial burden" test does not support the Plaintiffs' RFRA claims in this case. That "substantial burden" means a "significantly great restriction or onus" says nothing about what kind or level of restriction is "significantly great." Instead, the "substantial burden" question must be answered by reference to the Supreme Court's pre-*Smith* jurisprudence, including *Sherbert* and *Yoder,* that RFRA expressly adopted.[154]

The *Navajo Nation* majority's reasoning is less than satisfactory because, as discussed in Subpart III.A. above, neither *Sherbert* nor *Yoder* say anything about what kind or level of restriction is "significantly great."[155] Even if some

146. *See* United States v. Gonzales*,* 520 U.S. 1, 4 (1997) ("Our analysis begins, as always, with the statutory text."); Conn. Nat'l Bank v. Germain*,* 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn first to . . . [the] cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

147. *San Jose Christian Coll.,* 360 F.3d at 1034.

148. *Id.*

149. *Id.* at 1035.

150. *Id.*

151. *Id.*

152. Navajo Nation v. United States, 535 F.3d 1058, 1078 (9th Cir. 2008) (Fletcher, J., dissenting).

153. *Id.* at 1088 (Fletcher, J., dissenting).

154. *Id.* at 1078.

155. *See supra* Subpart III.A.

understanding of the required magnitude of burden *could* be gleaned by reference to *Sherbert* and *Yoder*, RFRA—properly interpreted—offers no indication that Congress intended to adopt these cases as a guide to the substantial burden inquiry required by the statute. While the *Navajo Nation* majority characterized the dissent's methodology as "invent[ing] a new definition for 'substantial burden' by reference to a dictionary,"[156] that was precisely the task that RFRA called for because no definition existed at the time of its passage. Even if RFRA itself did nothing further to establish a clear definition of the term, the dissent's approach correctly read the statute and appropriately applied traditional tools of interpretation. A closer look at cases from other circuits demonstrates how the *San Jose Christian College* plain meaning approach urged by the dissent is superior.

Lacking the high court's guidance, circuit courts of appeals have developed a number of approaches to defining "substantial burden." As early as 1996, a circuit split emerged.[157] More recently, Professor Mark Strasser noted that the circuits' definitions of "substantial burden" continue to vary.[158] Within this variation, the *San Jose Christian College* court was not alone among circuit courts in adopting and applying a plain meaning definition of "substantial burden."[159] That approach yields a test that is more protective of Native American sacred sites than is the *Sherbert*/*Yoder* framework. For example, the Seventh Circuit, also defining the term according to its plain meaning alone, held that a "substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable."[160] Under this interpretation, claims similar to the *Navajo Nation* plaintiffs' would likely survive a substantial burden analysis.

A plain meaning approach avoids the central problem created by *Navajo Nation*'s *Sherbert*/*Yoder* framework: a myopic focus on the mechanism by which religious exercise is burdened and consequent disregard for the *degree* to which religious exercise is burdened.[161] When one focuses on the quantum of harm to the religious practitioner, as RFRA and RLUIPA instruct, the analysis becomes fairly straightforward.

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156. *Navajo Nation*, 535 F.3d at 1074–75.

157. *See* Roman Catholic Bishop of Springfield v. City of Springfield, 724 F.3d 78, 95 (1st Cir. 2013) ("A number of other circuits have announced tests [for substantial burden] . . . but the standards they have announced have not been consistent."); Adkins v. Kaspar, 393 F.3d 559, 568 (5th Cir. 2004); Mack v. O'Leary, 80 F.3d 1175, 1178–79 (7th Cir. 1996).

158. Mark Strasser, *Free Exercise and Substantial Burdens Under Federal Law*, 94 NEB. L. REV. 633, 679 (2016).

159. *See, e.g.*, Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1226 (11th Cir. 2004) (explaining that to define an undefined statutory term, the court will turn to "ordinary or natural meaning," then "other instances in which courts have defined or discussed the term 'substantial burden,'" only *lastly* resorting to legislative history); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 100 Fed. App'x *70 (3d Cir. 2004); C.L. for Urb. Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003).

160. *C.L. for Urb. Believers,* 342 F.3d at 761; *see also Lighthouse Inst. for Evangelism,* 100 Fed. App'x at *77.

161. *See* Dorf, *supra* 100, at 1216.

The Sixth Circuit's decision in *Haight v. Thompson* neatly demonstrated this possibility. In *Haight,* a prison denied an inmate's request for traditional foods for their annual powwow.[162] The court did not resort to, or even reference, a coercion/compulsion framework. Instead, it determined that a burden surely was placed upon the inmate's religious exercise because the prison "barred access to the foods altogether."[163] The court concluded that, necessarily, "[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)."[164] In this analysis, the *Haight* court considered the plain meaning of "substantial burden"[165] and thus had little trouble recognizing that where the government denies access to something utilized for religious exercise, it necessarily imposes a substantial burden.

This reasoning naturally extends to permit claims that the destruction of a sacred place required for worship constitutes a substantial burden under RFRA, as described in hypothetical Scenario One in Subpart III.B. The destruction of a religiously necessary place, like a ban on a religiously necessary food, is an extreme form of restriction that not only satisfies but surpasses the requirement that a burden be "substantial."

Moreover, the government conduct does not have to be as extreme as outright destruction to impose a substantial burden under this approach. A district court in Oklahoma similarly jettisoned a *Sherbert*/*Yoder* framework in favor of a straightforward analysis that focused instead on the quantum of burden experienced by the religious practitioners.[166] It therefore held that the U.S. Army's planned construction of a building that would block views of a Comanche sacred site imposed a substantial burden under RFRA.[167]

So, we suggest that courts should define "substantial burden" according to its plain meaning. In implementing this approach, courts should determine whether the burden is "substantial" by reference not to the manner in which the government enacts its alleged interference, but instead on the degree of impact on the religious practitioner. This approach is more consistent with well-established statutory interpretation principles, better achieves Congress's aim of broad protection of religious exercise, and is more protective of Native American sacred sites than the *Sherbert*/*Yoder* framework.

IV. COURTS ARE ERRONEOUSLY APPLYING AN INCIDENTAL EFFECTS TEST TO RFRA CLAIMS

Some courts that deny sacred sites protection under RFRA justify their determinations on the basis that the plaintiffs' asserted burdens fail to satisfy the

162. Haight v. Thompson, 763 F.3d 554, 560 (6th Cir. 2014).
163. *Id.* at 565.
164. *Id.*
165. *Id.* at 564–65.
166. Comanche Nation v. United States, No. CIV-08-849-D, 2008 WL 4426621, at *1, *3 (W.D. Okla. Sept. 23, 2008).
167. *Id.* at *20.

"incidental effects" test established in *Lyng*.[168] Under this test, courts conclude that burdens arising merely from the "incidental effects" of a government program do not trigger RFRA's heightened scrutiny protections.[169] Courts that invoke this test do so either relying directly on *Lyng* or on other cases traceable to *Lyng*.[170]

For the reasons outlined above, courts that rely upon pre-RFRA First Amendment jurisprudence to define RFRA's substantial burden requirement do so in violation of the best interpretation of the statute itself. This criticism applies to courts invoking *Lyng*'s incidental effects test for many of the same reasons that it applies to those relying on the *Sherbert*/*Yoder* framework, including the fact that the term "substantial burden" had no well-established legal meaning at the time of the statute's enactment. But courts that invoke *Lyng*'s separate incidental effects test to constrain plaintiffs' available RFRA claims commit several further errors of statutory interpretation distinct from those made in decisions like *Navajo Nation*: they disregard additional aspects of Congress's intent behind RFRA and they neglect the pragmatic considerations that ordinarily justify the use of an "incidental effects" test.

We begin with a brief review of the *Lyng* Court's initial construction of the "incidental effects" test itself. As noted in Part II, this test is derived from the *Lyng* majority's interpretation of the term "prohibit" in the Free Exercise Clause. Although the *Lyng* Court does not offer a precise definition of what constitutes a mere "incidental" burden on religious exercise,[171] related case law suggests that it refers to burdens imposed on religious exercise that are a side effect of laws or government conduct that does not target religion.[172]

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168. *See infra* note 172.

169. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 448, 470–71 (1988) (discussing the relevance of *Bowen* to the *Lyng* decision).

170. *See* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[W]e agree that 'substantial burden' requires something more than an incidental effect on religious exercise."); Hoever v. Belleis, 703 Fed. App'x 908, 912–13 (11th Cir. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 91 (D.D.C. 2017). It is noteworthy that in *Hoever*, the court concluded that a prison's denial of an inmate's opportunity to engage in daily Bible study did not constitute a substantial burden in part because such study was merely "beneficial, not mandatory" to his religious observance. *Hoever*, 703 Fed. App'x at 912–13. Because RLUIPA does not require that a religious exercise be "compelled by . . . a system of religious belief" in order for a practitioner to sustain a claim, the Eleventh Circuit's analysis on this score is questionable. *See* Holt v. Hobbs, 574 U.S. 352, 358 (2015) (citing 42 U.S.C. § 2000cc–5(7)(A)).

171. *Lyng*, 485 U.S. at 450. It has been observed that in constitutional law more broadly, the "analysis of the Court's treatment of incidental burdens is complicated by the fact that no unified constitutional doctrine of incidental burdens currently exists. Instead, the Supreme Court has generally confined is assessment of incidental burdens on a particular right to the jurisprudence involving only that right." Dorf, *supra* note 100, at 1200.

172. The Court first suggested this distinction in Bowen v. Roy, 476 U.S. 693 (1986) (rejecting the Native plaintiffs' argument that the state's requirement that every recipient of benefits have a Social Security number was impermissible under the Free Exercise Clause, where the assignment of such numbers violated the plaintiffs' religious beliefs). "We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously

While Supreme Court precedent fails to clearly describe the concept of an "incidental" effect, both legal scholarship and dictionaries provide more direct guidance that remains consistent with the Court's own usages. These sources indicate that the question of whether a burden is "incidental" is wholly separate from the question of whether it is "substantial." As *substantiality* is the analysis required by the plain text of RFRA, there is no clear justification for courts' reliance on the *incidental* effects requirement to reject RFRA claims.

"Incidental" is defined as "accompanying but not a major part of something," or "liable to happen as a consequence of" some activity.[173] This definition suggests that an analysis of whether a burden is "incidental" should consider the form of government action that imposed the burden, rather than the degree to which that action affected the individual's ability to adhere to the tenets of his or her faith. The effect on the practitioner is "incidental" in the sense that it is "accompanying but not a major part of" *the government action* at issue.

Professor Michael Dorf's analysis of "incidental" burdens on constitutional rights further clarifies that "incidental" and "substantial" are two distinct and independent qualities that might be attributed to a particular government burden.[174] He notes that a burden might be either direct (facially regulating a constitutionally protected activity) or incidental, but "from the perspective of a rightholder, the severity of a law's impact has no necessary connection to whether the law directly or incidentally burdens the right's exercise."[175] An incidental burden, Dorf argues, may nevertheless be substantial as a result of its impact on the rights-holder's ability to exercise his or her rights: "the test used to determine substantiality should . . . include an assessment of the right-holder's alternative means of exercising the right."[176] Whether a burden is incidental or direct depends upon the mechanism through which the government imposes it.[177] However, whether a burden is substantial depends upon the magnitude of its effect on the individual's ability to enjoy a constitutionally protected right.[178] Thus, a burden might be either incidental, substantial, both, or neither.

RFRA distinguishes between burdens only on the basis of their substantiality. By its own terms, the statute requires that the compelling interest test be applied "in *all cases* where free exercise of religion is substantially

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inspired activity or inescapably compels conduct that some find objectionable for religious reasons." *Id.* at 706. This account, however, hardly seems consistent with the decision in *Sherbert*, where the plaintiff was put precisely to the choice between "securing a government benefit" (unemployment benefits) and "adherence to religious beliefs," yet prevailed in her Free Exercise claim. *See* Sherbert v. Verner, 374 U.S. 398, 399–402 (1963); *see also* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 876 (1990) (offering one interpretation of an "incidental effect"); *id.* at 895 (Blackmun, J., dissenting) (questioning that definition's consistency with court's prior case law).

173. *Incidental*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/incidental (last visited July 18, 2021).

174. Dorf, *supra* note 100, at 1181.

175. *Id.* at 1177.

176. *Id.* at 1236.

177. *Id.* at 1184.

178. *Id.* at 1216, 1220 (describing a "substantiality threshold").

burdened."[179] Courts refusing to apply strict scrutiny when burdens are merely "incidental" depart from the statute's clear directive to address all burdens, incidental or direct, which satisfy the substantiality requirement. As a result, these courts impermissibly curtail plaintiffs' ability to seek judicial relief under the statute.[180]

The exclusion of burdens arising from "incidental effects" also conflicts with Congress's explicit statement in RFRA that the new law was intended to displace the Supreme Court's decision in *Smith*.[181] *Smith*'s central and controversial holding was that generally applicable laws incidentally burdening religious exercise can *never* violate the First Amendment.[182] Therefore, under *Smith*, if government conduct does not *target* religion but merely imposes an incidental burden upon religious practice, the claimant has not made out any cognizable burden whatsoever.[183] Congress was troubled by this aspect of *Smith*[184] and sought to undo it through a statute that recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[185] Courts today may ostensibly rely on *Lyng* instead of *Smith* to reject RFRA claims under an incidental effects test.[186] Yet they are still reintroducing the very aspect of Free Exercise jurisprudence that Congress intended to reject.[187]

This near-resurrection of *Smith* suggests another unjustified departure from traditional methods of statutory construction. If RFRA is construed as inapplicable to most incidental burdens, RFRA accomplishes little that Free Exercise Clause jurisprudence alone would not. This observation should give

179. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b)(1) (1993).

180. *See* Navajo Nation v. United States, 535 F.3d 1058, 1093 (9th Cir. 2008) (Fletcher, J., dissenting).

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

182. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990) (if "prohibiting the exercise of religion . . . is not the object of the [law in question] but merely the incidental effect of a generally applicable [provision], the First Amendment has not been offended."); *see also* Holt v. Hobbs, 574 U.S. 352, 356 (2015).

183. *See* Michael C. Dorf, *Does Employment Division v. Smith Apply in Indian Country? Thoughts on a SCOTUS Ruling Finding Hunting Right Under 1868 Crow Treaty,* DORF ON L. (May 23, 2019), (http://www.dorfonlaw.org/2019/05/does-employment-division-v-smith-apply.html) ("Under the 1990 case of *Employment Division v. Smith*, so long as a state law does not single people out based on religion, there is not even a prima facie free exercise claim when legal and religious obligations conflict."); *see also Smith*, 494 U.S. at 891 (O'Connor, J., concurring).

184. *See also* H. R. REP. NO. 103-88 at 3 (1993) ("In [the *Smith*] opinion written by Justice Scalia, the Court determined that the Free Exercise Clause of the First Amendment does not absolve any person of the duty to adhere to a law which incidentally forbids or requires the performance of an act that a person's religion requires or forbids, if that law is not specifically directed to religious practice.").

185. 42 U.S.C. § 2000bb(a)(2).

186. *See* Navajo Nation v. United States, 535 F.3d 1058, 1071 (9th Cir. 2008) (applying *Lyng* and stating that "[t]he Supreme Court's decision in *Lyng* [] is on point.").

187. *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 93 (D.D.C. 2017); Slockish v. U.S. Fed. Highway Admin., No. 3:08-cv-01169-YY, 2018 WL 4523135, at *6, n.4 (D. Or. Mar. 2, 2018) (applying an incidental effects analysis to reject plaintiffs' sacred sites claims).

pause to those who would support an understanding of "substantial burdens" that includes the incidental effects test, as courts ordinarily avoid construing a statute or its individual provisions in a way that renders them meaningless.[188]

Finally, RFRA claims do not require the pragmatic considerations that ordinarily justify the consideration of the incidental effects test in religious liberty or other constitutional rights claims. This classification of burden as incidental or direct also instructs courts on what degree of scrutiny to afford indirect burdens. For example, in the free speech context, "[t]he secondary effects doctrine allows courts to apply intermediate scrutiny to an ordinance that is content-based if the ordinance is targeted at suppressing the 'secondary effects' of the speech and not the speech itself."[189] Constitutional law also distinguishes laws that impose incidental burdens to limit the scope of individual rights claims that can trigger heightened scrutiny of a government action.[190]

In RFRA cases, however, neither of these considerations apply. There is no need to resort to a distinction between incidental and direct effects to determine the proper level of scrutiny, because the statute commands that the compelling interest test be applied "in all cases."[191] Indeed, applying an incidental effects test to RFRA claims circumvents the congressionally mandated level of scrutiny. The incidental effects test's traditional function in limiting the scope of cognizable individual rights, too, is unnecessary. As the next Part will illustrate, RFRA contains distinct limitations of its own.

V. RFRA CONTAINS LIMITING PRINCIPLES THAT ADDRESS THE *LYNG* COURT'S UNDERLYING CONCERNS

The *Lyng* Court expressed significant concern that Native plaintiffs' efforts to protect their sacred sites through Free Exercise claims could, if too-freely recognized, impose a "religious servitude" on government property and thus impede the government's ability to make decisions about "what is, after all, its land."[192]

In raising these practical considerations, the Court established its "incidental effects" test in part to articulate an additional principle limiting the universe of judicially cognizable burdens upon religious freedom.[193] *Lyng* did not go so far as to reject heightened scrutiny for *any* incidentally imposed burden—that bright-line restriction would not come until *Smith*—but it severely

188. *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) (collecting cases and noting that "it is our duty 'to give effect, if possible, to every clause and word of a statute.' . . . We are thus 'reluctan[t] to treat statutory terms as surplusage' in any setting.") (citations omitted).

189. Christopher J. Andrew, *The Secondary Effect Doctrine The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1181 (2002).

190. Dorf, *supra* note 100, at 1182.

191. Religious Freedom Restoration Act of 1993, § 2000bb(b)(1).

192. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

193. *Id.* at 451–53.

limited what *sorts* of incidental burdens would receive heightened scrutiny.[194] In this framing, the incidental effects test draws a distinction between two different kinds of concededly "incidental" burdens: internal government actions (to which an individual has no valid objection under the Free Exercise Clause) and external ones (recognized as cognizable burdens in cases including *Sherbert* and *Yoder*).

This understanding of *Lyng* has some appeal. In excluding some claims arising from incidental burdens, it comports with Justice O'Connor's *Smith* concurrence.[195] It also preserves a distinction between *Lyng* and *Smith* consistent with an understanding of *Smith* as a sharp departure from the Court's rulings regarding both the Free Exercise Clause generally and the extent of Constitutional protection for *incidental* burdens on the Free Exercise Clause in particular.[196]

Lyng's concern, since repeated by other courts, is that applying strict scrutiny to *every* governmental burden on religious exercise would paralyze government.[197] But Congress considered this problem and enacted two limiting principles in RFRA to address it. First, it determined that only *substantial* burdens would receive protection under RFRA.[198] Second, it provides that even where the plaintiff demonstrates that they have suffered a substantial burden, the challenged government action will still stand so long as it survives strict scrutiny.[199] Because RFRA contains its own mechanisms to limit free exercise claims, *Lyng*'s additional tests are unnecessary to address the practical concerns that motivated pre-RFRA limitations on Free Exercise claims.

A. Substantial Burden

To illustrate how RFRA already accounts for concerns of government paralysis, consider Professor Chad Flanders's hypothetical involving a government closure of a road that a person usually takes to church.[200] The road

194. *Id.* at 451.

195. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 900 (1990) (O'Connor, J., concurring) ("In both *Bowen v. Roy* [] and *Lyng v. Northwest Indian Cemetery Protective Assn., . . .* for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not 'require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.'").

196. *See, e.g.*, Adkins v. Kaspar, 393 F.3d 559, 566 (5th Cir. 2004) ("In *Smith*, the Court changed course when it ruled that laws of general applicability that only incidentally burden religious conduct do not offend the First Amendment.").

197. *Lyng*, 485 U.S. at 452; Navajo Nation v. United States, 535 F.3d 1058, 1072 (9th Cir. 2008). Notably, the limiting principle utilized by *Lyng* relies on a profound legal fiction: that when the government acts in way that "virtually destroys" a person's ability to practice religion, that "virtual destruction" does not constitute a burden on his religious exercise.

198. 42 U.S.C. § 2000bb(1)(a).

199. *Id*. at § 2000bb(1)(b).

200. Chad Flanders, *Substantial Confusion About "Substantial Burdens,"* 2016 U. ILL. L. REV. ONLINE 27, 28 (May 28, 2016), https://illinoislawreview.org/online/2016/substantial-burdens/substantial-confusion-about-substantial-burdens/.

closure is plainly a burden of some kind on that individual's religious exercise, in that the person may be forced to take a detour and expend more than the usual amount of effort to travel to church. If any burden on religiously motivated behavior were actionable, routine government conduct like the road maintenance could be ground to a halt. This is clearly untenable.

However, Professor Michael Dorf posits that RFRA, by recognizing that neutral laws of general applicability can "burden religious exercise as surely as laws intended to interfere with religious exercise,"[201] imposes its "substantial burden" threshold in order to avoid the "floodgates problem" that would arise from subjecting *all* incidental burdens to strict scrutiny.[202] Thus RFRA's first limiting principle—that relief is available only for those suffering *substantial* burdens—addresses the worries conjured by Professor Flanders's road closure hypothetical. This understanding of the statute's substantiality limitation is both more attentive to the natural meaning of statute's text, as discussed in Subpart III.D., and it avoids the "absurd results" of *Lyng* and *Navajo Nation* identified in Subpart III.B.

To determine whether the government is "prohibiting" religious exercise under the First Amendment, the Supreme Court examines whether the government had placed an impermissible "burden" on religious exercise.[203] Worth emphasizing is that Congress did not pass a statute that creates a cause of action for a mere burden of religious exercise, but only for a *substantial* one.[204] That word limits the universe of actionable claims and excludes de minimis burdens like Professor Flanders's road closure.

Use of the word "substantial" also is important because, when properly applied, it requires courts to examine the quantitative degree of burden imposed. This is an implicit rejection of a key facet of *Lyng*. Instead of drawing a line demarcating what methods burden religious exercise, the Court said that "the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[205] Moreover, it was the Court's focus on the mechanism by which the burden was created, and away from the effect on the religious practitioner, that created the absurd conclusion that the government can virtually destroy a person's ability to exercise their religion without burdening it.

B. Compelling Interest

Congress built the strict scrutiny safeguard into RFRA and RLUIPA. Indeed, it said so in the text of RFRA: "[T]he compelling interest test as set forth

201. Dorf, *supra* note 100, at 1212–13 (quoting RFRA).
202. *Id.*
203. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 220–21 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963).
204. 42 U.S.C. § 2000(bb)(1).
205. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[206]

To illustrate how strict scrutiny addresses Justice O'Connor's concerns in *Lyng* about the possibility of imposing a "religious servitude" on the government,[207] we can look to how it would operate on *Lyng*'s facts. It is not a forgone conclusion that the plaintiffs in *Lyng*—or in any case—automatically win because a court recognizes that a substantial burden exists. Instead, the analysis shifts to whether the government has a compelling interest and whether it has utilized the least restrictive means. The compelling interest asserted must be with regard to the narrow activity challenged, not framed broadly, such as the "[g]overnment's rights to the use of its own land."[208] Assuming that the government has a compelling interest in the specific activity—such as road building or manufacturing snow from processed sewage effluent—then the case turns on whether the government has utilized the least restrictive means. Typically, this requires the government to develop and consider alternatives.[209]

Thus, in *Lyng*, the question would be whether the government had an alternative route for the road that would not disturb the burial site. If so, then the government must use it. This is not a religious veto on government decisions, nor the religious servitude that Justice O'Connor feared in *Lyng*, but simply the religious accommodation that the statute requires and has been applied in scores of cases in every circuit since RFRA and RLUIPA's passage.

Concerned that a broad application of the Free Exercise Clause could result in a religious veto of many governmental activities, the *Lyng* Court imposed the incidental effects test as a limitation on certain types of religious freedom claims. RFRA and RLUIPA, however, provide limitations of their own—rendering any application of *Lyng*'s incidental effects limitation superfluous at best.[210] The incidental effects test is also an encroachment on congressional prerogatives. In *Lyng*, Justice O'Connor wrote:

> 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.[211]

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206. 42 U.S.C. § 2000bb(a)(5).

207. *Lyng*, 485 U.S. at 452.

208. *Id.* at 454.

209. *See, e.g.*, Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 41 (1st Cir. 2007) ("A prison 'cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" (quoting Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005))).

210. *See* Haight v. Thompson, 763 F.3d 554, 565 (6th Cir. 2014) ("The existence of a 'substantial burden' on a religious practice, even if stemming from a sincerely held belief, does not end the inquiry. The State still may show that its policy furthers a compelling governmental interest and does so in the least restrictive way.").

211. *Lyng*, 485 U.S. at 452 (citations omitted).

In the wake of *Smith*, Congress took up Justice O'Connor's task of reconciling competing demands by enacting RFRA. In so doing, it chose broader protection for religious practices[212] and less stringent limits on claims than the Court had chosen in its Free Exercise jurisprudence. Although one may argue these are not sufficient limitations, it is the choice Congress made. By smuggling *Lyng*'s limitations into their RFRA analysis, lower courts are not respecting the policy choices of the legislative branch and are instead imposing their own policy views.

CONCLUSION

In a nation that purports to value religious freedom, tolerance, and equality, the legal system ought to provide protection to Native American sacred sites. In practice, however, Native American religious practitioners have rarely enjoyed the judicial protection afforded to adherents of faiths more familiar to most Americans and American judges.

Practitioners of Native religions face unique difficulties beyond those experienced by other religious minorities because their traditions are tied to sacred places located on public lands. By definition, any protections afforded to these sacred sites will constrain what the government may do with "its own" land. As a result, Native litigants seeking to protect sacred sites find themselves in direct conflict with the asserted interests of the federal government. Pre-RFRA Free Exercise jurisprudence established a restrictive definition of what constitutes a cognizable burden on religious practice that consistently resolved this conflict in the government's favor. Indeed, the Supreme Court's decision in *Lyng* seemed to all but foreclose the possibility that Native religious practitioners could ever rely on Free Exercise claims to protect sacred sites from government destruction.

Congress's enactment of RFRA in 1994 ought to have marked the beginning of a post-*Lyng* era in which the nation's courts were at last open to sacred sites protection claims. That such a transformation did not occur is, as this Article has argued, the result of a widespread misinterpretation of the prima facie requirement RFRA places on plaintiffs as exemplified by the Ninth Circuit's decision in *Navajo Nation*.

Contrary to the *Navajo Nation* court's determination, the statute's use of the term "substantial burden" is best understood to signify legislative intent to replace the narrow standards of prior Free Exercise jurisprudence with a less formalistic, plain-meaning approach. Such an approach would focus on the

212. Holt v. Hobbs, 574 U.S. 352, 357 (2015) ("Following our decision in *Smith,* Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.").

quantum of harm inflicted on the practitioner. A plain-meaning understanding of RFRA's substantial burden requirement would ensure that sincere religious beliefs of all kinds receive equal and appropriate protection under the law. This is in stark contrast with the *Sherbert*/*Yoder* framework—which, despite its superficial neutrality, necessarily favors some types of religious practice over others.

This interpretation is further supported by the Supreme Court's recent decision in *Hobby Lobby*, which rejected the application of pre-RFRA Free Exercise case law to interpret the same clause of RFRA in which the term "substantial burden" also appears. This decision underscores that the *Navajo Nation* court, and all others that have followed its lead in RFRA sacred sites cases, was mistaken in its understanding of the statute.

The approach advanced by this Article would not require that the courts open the proverbial floodgates to any plausible claim of religious interference. First, RFRA claimants must prove not merely a burden on their religious exercise, but a *substantial* burden. This requirement filters out claims of mere inconvenience and allows the government to place at least some measure of burden upon religious exercise. Second, RFRA allows the government to impose a substantial burden where it proves that it is furthering a compelling government interest by the least restrictive means.

In short, the widespread application of the *Sherbert*/*Yoder* framework and *Lyng*'s incidental effects test to determine what burdens satisfy RFRA's "substantial burden" requirement is not supported by the statutory text, context, history, or subsequent Supreme Court treatment of the statute. It produces bizarre, counterintuitive outcomes, and unjustifiably excludes ancient, deeply held religious traditions of Native communities from meaningful legal protections. The plain-meaning interpretation of RFRA proposed in this Article would provide these long-denied legal protections while striking an appropriate balance with competing government interests, just as Congress intended.
