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Unequal Land: Towards Full Recognition of Indigenous People's Religious Rights

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UNEQUAL LAND: TOWARDS FULL RECOGNITION OF INDIGENOUS PEOPLE'S RELIGIOUS RIGHTS

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Abstract

Indigenous people face disparate treatment regarding religious free-exercise claims in the United States court system. Specifically, courts misconstrue native religious practices and hold native religious practitioners to a higher standard of proof than practitioners of mainstream religions in their free-exercise claims. This Article analyzes the history of oppression of indigenous people in the United States and the congressional intent to remedy such oppression through legislation. Further, this Article argues that despite Congress's efforts to remedy the oppression of indigenous peoples, courts still utilize a problematic analysis of indigenous free-exercise claims. To resolve the inconsistent treatment between native and mainstream religious practitioners, this Article argues that courts should do three things when analyzing an indigenous free-exercise claim: (1) presume indigenous peoples suffer subjective harm from the government action at issue; (2) apply the law through an anti-subordination lens; and (3) broadly construe the Religious Freedom Restoration Act.

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I. INTRODUCTION

On a summer September day, many members from the southeastern Arizona Apache Reservation caravanned from their homes to the Ninth Circuit Court of Appeals in San Francisco.[1] Angry and frustrated, the Apache sought to protest a recent Ninth Circuit decision that delivered another blow to their right to free religious exercise.[2] Specifically, the Apache sought to protest the Ninth Circuit's holding that copper mine construction underneath Apache sacred land in Arizona did not "substantially burden" the Apache's religious practice under the Religious Freedom Restoration Act (RFRA) or the First Amendment's Free Exercise Clause.[3] The copper mine would destroy Apache's sacred land and slowly eradicate more of the Apache's culture and identity.[4] The Apache protest worked, and recently, the Ninth Circuit decided to rehear en banc its earlier decision.[5] But the

1. *Apache Stronghold Begins Caravan to Ninth Circuit Court for Rehearing of Oak Flat Case against the United States*, INDIAN COUNTRY TODAY (Sept. 2, 2022), https://indiancountrytoday.com/the-press-pool/apache-stronghold-begins-caravan-to-ninth-circuit-court-for-rehearing-of-oak-flat-case-against-the-united-states [https://perma.cc/G97Y-FGER].

2. Apache Stronghold v. United States, 38 F.4th 742 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).

3. *Id.* at 748.

4. *Id*.

5. *Federal Court Delivers a Reprieve to Apache Members Seeking to Save a Sacred Site*, SIERRA: THE MAGAZINE OF SIERRA CLUB (Dec. 1, 2022), https://www.sierraclub.org/sierra/federal-court-delivers-reprieve-apache-members-

Apache's struggle to protect their sacred land from desecration and practice free religious exercise highlights the United States court system's flawed reasoning regarding indigenous free-exercise claims.[6]

This Article argues that the United States court system's treatment of indigenous religious claims misunderstands native religious practices, contravenes congressional intent, and holds native religious practitioners to a higher standard of proof than practitioners of mainstream religions in their free-exercise claims.[7] The Article proceeds in five parts. Part I explains native religious practices and the importance of land and sacred sites to indigenous peoples' religious practice.[8] Part II sets out the history of indigenous religious freedom, or lack thereof, in the United States.[9] Part III demonstrates that Congress passed several pieces of legislation with an anti-subordination purpose to remedy the oppression suffered by indigenous people.[10] But, as Part IV illustrates, recent Supreme Court and Ninth Circuit decisions regarding indigenous free-exercise claims have gone against that anti-subordination intent for several reasons, including courts misunderstanding native religious practices, requiring native religious practitioners to prove their subjective belief, and analyzing indigenous free-exercise claims from an individual-rights rather than a collective-rights perspective.[11] Finally, Part V argues that United States courts should correct course to fully protect the religious freedom rights of indigenous people. This change requires that courts (1) assume indigenous free-exercise claimants suffer subjective harm, (2) evaluate indigenous free-exercise claims through an anti-subordination lens to remedy past oppression suffered by indigenous people, and (3) treat native religious claims as a collective rather than individual right. [12]

II. HISTORY OF AMERICAN OPPRESSION OF INDIGENOUS PEOPLES

Before European colonization, hundreds of indigenous nations lived and prospered in North America. These nations were culturally

seeking-save-sacred-site [https://perma.cc/WRM9-WLQ8].

6. *See infra* Part IV.
7. *See infra* Part V.
8. *See infra* Part I.
9. *See infra* Part II.
10. *See infra* Part III.
11. *See infra* Part VI.
12. *See infra* Part V.

diverse, with substantial varieties in language, religion, food, and clothing.[13] But many indigenous nations that once lived in North America have long since disappeared because of the United States' aggressive policies to displace and destroy indigenous peoples.[14] Specifically, the United States intentionally destroyed indigenous religious practices by (1) forcing indigenous peoples to convert to Christianity through "missions" and (2) criminalizing indigenous religious practices.[15]

In the mid-nineteenth century, the United States government sought a way to end the constant conflict between Americans and indigenous people. The United States government felt that the best way to end the conflict was to force indigenous people to convert to an Anglo-American lifestyle.[16] Specifically, the United States government believed that Christianity was intertwined with Anglo-American identity and that if Native Americans adhered to Christian principles, they would convert to the American lifestyle.[17] While the United States could not change older indigenous peoples' beliefs, the government believed they could "kill the Indian" in vulnerable indigenous children by forcing them to convert to Christianity.[18] To do so, government officials forcibly removed indigenous children from their homes and placed them in "Indian Schools" or missions where they would learn Christian principles and "white culture."[19] The missions employed abusive policies enforced by aggressive teachers.[20] Further, indigenous children had to adhere to Anglo-American hairstyle, clothing, and gendered division of labor.[21] These aggressive methods used by the American government to force children from their homes and convert them to Anglo-American

13. Angela R. Riley, *The Ascension of Indigenous Cultural Prop*erty Law, 121 MICH. L. REV. 75, 81 (2022).

14. COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON 477 (2018).

15. Tammie Heise, *Religion and Native American Assimilation, Resistance, and Survival*, OXFORD RSCH. ENCYCLOPEDIAS (Nov. 20,2017), https://oxfordre.com/religion/display/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-394, [https://perma.cc/9672-BK5R].

16. *Id.*

17. JOEL W. MARTIN, THE LAND LOOKS AFTER US: A HISTORY OF NATIVE AMERICAN RELIGION, 80 (1995).

18. Matt Reynolds, *America's Lost Children: Reckoning with the Abusive Legacy of Indian Boarding Schools*, A.B.A. J. Jun.–Jul. 2022, at 42, 44.

19. *Id.*

20. *Id.* at 46.

21. HEISE, *supra* note 11.

beliefs represent the violent and intentional policy of the United States during the nineteenth century to destroy indigenous culture.

The missions did not prove as successful as the United States had hoped.[22] Still bothered by the indigenous way of life, the United States government sought to further destroy indigenous culture by regulating indigenous conduct on reservations.[23] Accordingly, in 1883 the United States created the Code of Indian Offenses to abolish indigenous religious practices held on reservations.[24] Specifically, the Code of Indian Offenses banned ceremonial dances, medicine men, polygamy, funeral proceedings, and gift exchanges.[25] The law described indigenous religious practices as "wicked conduct" that was a "great hindrance" to mankind."[26] An indigenous person found that participating in the banned indigenous religious practice resulted in a fine, more than ten days in prison, and the loss of government rations.[27] By threatening indigenous people with prison time if they practiced certain banned religious ceremonies under the Code of Indian Offenses, the United States again chose violent and aggressive means to intentionally destroy indigenous culture.

The missions and the Indian Code of Offenses represent just two examples of how the United States created intentional policies to destroy indigenous culture. Indeed, the United States continued devasting indigenous culture until the Civil Rights Movement.[28] From the outside, it seems as though the United States government ended its aggressive policies against indigenous people. However, the court system, a branch of the United States government, still oppresses indigenous people through their dismissiveness of indigenous free-exercise claims.

22. Vine Deloria, *American Indians in Historical Perspective*, in AMERICAN INDIANS AMERICAN LIFE 11 (1983).

23. Heise, *supra* note 15.

24. SHARON O'BRIEN, *A Legal Analysis of the American Indian Religious Freedom Act*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 27, 28 (Christopher Vecsey ed., 1991).

25. Christopher Vecsey, *Prologue*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 7, 16 (Christopher Vecsey ed., 1991).

26. O'BRIEN, *supra* note 24.

27. Heise, *supra* note 15.

28. *See* MICHAEL D. MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS RIGHT BEYOND THE FIRST AMENDMENT 35 (2020).

III. SACRED LAND AND NATIVE RELIGION

In this Section, this Article will discuss why land is so vital to native religions and why native religions are difficult for United States courts to understand. The Article will argue that native religions are difficult for United States courts to understand because: (1) native religions do not have institutional structures, and (2) native religions are local or regional.

First, native religions remain difficult for courts to understand because of structural differences. Specifically, "majority" or "mainstream"[29] religions in the United States all have manmade "institutional structures" where followers participate in religious ceremonies.[30] For example, Christians attend weekly religious services at a manmade church building. Nevertheless, for these majority religions, the institutional structure does not determine their religious experience because "God is everywhere at all times," and to define sanctity according to a physical place only limits and reduces God's power and his all-knowingness.[31]

But unlike mainstream religions in the United States, indigenous peoples do not worship or attend religious services at manmade institutional structures.[32] Instead, native religions are "land-based," and indigenous people revere the natural world.[33] In contrast to institutional structures, native religions engage in their religious activities at sacred sites, such as mountains, rivers, or canyons. Indigenous rituals or ceremonies may only take place at these sacred sites.[34] Due to the sanctity of these sites, native religions require individuals to make pilgrimages to these sacred locations or that prayers, ceremonies, or rituals be held at that specific site.[35] Sacred sites may not be replaced, and worship at a particular site is imperative to a tribe's success. Further, most native religions hold that

29. This article uses the terms "majority" or "mainstream" religions to refer to dominant religions in the United States such as Christianity, Islam, or Judaism.

30. Amber L. McDonald, *Secularizing the Sacrosanct: Defining "Sacred" for Native American Sacred Sites Protection Legislation*, 33 HOFSTRA L. REV. 751, 755 (2004).

31. VINE DELORIA, JR., GOD IS RED: A NATIVE VIEW OF RELIGION 287 (2d ed. 1994).

32. McDonald, *supra* note 30, at 755–56.

33. Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Site*s, 17 MICH. J. RACE & L. 269, 270 (2012).

34. McDonald, *supra* note 30, at 754.

35. *Id.*

substituting an alternate location in place of a sacred site is sacrilege.[36] Finally, the destruction or alteration of a sacred site is thought to weaken its spiritual power.[37] Thus, unlike traditional religions, indigenous peoples belong to a natural location, and as a result, indigenous cultural identity is inextricably linked to sacred places.[38]

Second, native religions are difficult for United States courts to understand because they are local or regional to a particular place.[39] Mainstream religions hold the same beliefs throughout the United States and point to the same sacred site, such as "The Holy Land."[40] However, indigenous religions involve "a considerable amount of internal diversity"[41] because of the ties to local landscapes and bodies of water.[42] An example of this substantial diversity amongst indigenous religions is the different origin stories based on physical location.[43] For instance, the Navajo's origin story points to sacred mountains where they believe their people ascended from the underworld.[44] But Iroquois people's origin story describes the fall of "Skywoman," who descended from the sky, landed on a turtle's back, and formed "Turtle Island," also known as the Great Lakes Area.[45] Accordingly, indigenous religions' local and diverse nature contrasts the universality of mainstream religions.

Indigenous religions confuse courts for many reasons, but much of this confusion is due to the land-based and regional nature of native religions.[46] While institutional structures and sameness define majority religions, ties to land and variety define native religions.[47] This lack of uniformity in native religions causes discomfort for many judges, most likely followers of majority religions, who must face a belief system that deeply contrasts theirs.

IV. THROUGH LEGISLATION CONGRESS INTENDED TO REMEDY ITS

36. *Id.* at 755.
37. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1305 (2021).
38. *Id*. at 1306.
39. MCNALLY, *supra* note 28, at 7–8.
40. DELORIA, JR., *supra* note 31, at 67.
41. McDonald, *supra* note 30.
42. MCNALLY, *supra* note 28, at 7–8.
43. Angela R. Riley & Kristen A. Carpenter, *Decolonizing Indigenous Migration*, 109 CALIF. L. REV. 63, 77 (2021).
44. McDonald, *supra* note 30.
45. ROBIN WALL KIMMERER, BRAIDING SWEETGRASS 4–5 (2013).
46. Skibine, *supra* note 33, at 273.
47. MCNALLY, *supra* note 28, at 7-8.

SUBORDINATION OF INDIGENOUS PEOPLE

This Section will discuss Congress's continued attempts to create anti-subordination legislation to protect indigenous religious free-exercise rights despite the Supreme Court's efforts to thwart such legislative efforts.[48] First, the Article will provide a brief overview of anti-subordination theory.[49] With the meaning of anti-subordination theory clearly defined, then the Article will discuss Congress's passage of the American Indian Religious Freedom Act and the two Supreme Court cases that destroyed AIRFA's applicability to indigenous free-exercise claims—*Lyng v. Northwest Indian Cemetery Protective Association* and *Employment Division, Department of Human Resources of Oregon v. Smith*.[50] Second, the Article will discuss how Congress passed the Religious Freedom Restoration Act ("RFRA") to protect minority religious groups from inequity following the devasting *Lyng* and *Smith* cases.[51] Finally, the Article will discuss how Congress again passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA") after the Supreme Court *Boerne* decision that destroyed much of the religious protections Congress intended to create with RFRA.[52]

A. Anti-Subordination Theory

Anti-subordination theory shares similarities with equal protection theory, as anti-subordination legislation aims to remedy past oppression suffered by minority groups.[53] However, unlike equal protection, anti-subordination theory focuses on specific issues within minority groups and "assesses the rationality of the [legislative] means" employed to remedy such issues.[54] Accordingly, the goal of anti-subordination legislation is to create a "community of equals" by stopping the government from participating in acts that "aggravt[e],

48. Barclay & Steele, *supra* note 37, at 1320.

49. Abigal Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 300 (2014).

50. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439–40 (1988); Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 878 (1990).

51. Thomas Scott–Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act (RFRA) Could Protect Sanctuary Churches*, 128 YALE L.J. 408, 455 (2019).

52. City of Boerne v. Flores, 521 U.S. 507, 536 (1997); Protection of Religious Exercise in Land Use and By Institutionalized Persons, 42 U.S.C. §§ 2000cc-5.

53. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 108 (1976).

54. *Id*.

perpetuat[e] or . . . carry over a disadvantage" of a minority group. [55] In other words, anti-subordination legislation aims to place disadvantaged groups on an equal footing with privileged groups by restricting the government from committing acts that worsen or continue inequality over the disadvantaged group.[56]

B. AIRFA, Lyng*, and* Smith

Congress's first attempt to pass anti-subordination legislation occurred in 1978 with the passage of the American Indian Religious Freedom Act (AIRFA).[57] The passage of AIRFA occurred following the Civil Rights Era when Native American groups across the United States lobbied Congress for a bill to protect their religious rights.[58] Indeed, following years of suffering from the United States' aggressive policies against indigenous culture, indigenous groups demanded a formal declaration recognizing the government's numerous horrific acts.[59]

Thus, in many ways, AIRFA served as the United States' first acknowledgment of the numerous egregious acts it committed against Native Americans.[60] Specifically, the AIRFA preamble recognized that the federal government intentionally destroyed indigenous religious practices since colonization.[61] Because of the federal government's consistent oppression of indigenous people, Section 1 of AIRFA stated that it was the United States' duty to protect native religious practices, including sacred sites.[62] AIRFA also required federal agencies to consult with indigenous religious leaders and evaluate their current policies to ensure all policies protected and preserved indigenous culture.[63]

However, the Supreme Court thwarted Congress' first attempt to create anti-subordination policy in *Lyng*.[64] In *Lyng*, the Supreme Court held that AIRFA did not create legislative protection or remedies for

55. Scott–Railton, *supra* note 51, at 456.
56. *Id*.
57. O'BRIEN, *supra* note 24, at 29.
58. Steven C. Moore, *Sacred Sites and Public Lands*, *in* HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 82 (Christopher Vecsey ed., 1991).
59. MCNALLY, *supra* note 28, at 182.
60. O'BRIEN, *supra* note 24, at 30.
61. 42 U.S.C. 1996 § 1.
62. *Id*.
63. *Id.* at § 2(b).
64. MCNALLY, *supra* note 28, at 116–17.

indigenous peoples.[65] Rather, the Court held that AIRFA was merely a policy statement that directed agencies to review their procedures and regulations.[66] Because AIRFA did not provide protection or remedies for indigenous free exercise, the Court analyzed the indigenous peoples' claim under the First Amendment's Free Exercise Clause. Accordingly, the Court held that timber construction at an indigenous sacred site did not burden native religious practice.[67] Instead, the Court held that the construction was merely an "incidental effect" that would affect the "spiritual development" of indigenous peoples' religious practice.[68] Thus, with *Lyng*, the Supreme Court destroyed any possible remedy offered by AIRFA protection and fundamentally misunderstood the effect of government actions on native religious practice.

The Supreme Court further denied Native Americans religious free-exercise rights in *Smith.*[69] In *Smith*, a private drug rehabilitation facility fired two native church members because they used peyote during religious ceremonies.[70] The two members applied for unemployment compensation with Oregon, but the state denied their application because they had been fired for "misconduct" at work.[71] In response, the two members argued that the benefit denial by Oregon violated the First Amendment.[72] Specifically, the members argued that Oregon violated the *Sherbert*/*Yoder* strict scrutiny test under which a government action substantially burdening religious practice must be justified by a compelling state interest.[73] The Court declined to apply the *Sherbert*/*Yoder* strict scrutiny test and used a lower level of scrutiny.[74] The Court held that Oregon's actions against the members because of their religious practices was only an "incidental effect" of company policies. Thus, Oregon's actions did not violate the tribal members' free-exercise rights.[75]

65. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).
66. *Id.* at 455.
67. *Id*. at 449.
68. *Id*. at 450–51.
69. Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).
70. *Id*. at 874.
71. *Id*. at 875.
72. *Id*.
73. *Id.* at 882–83.
74. *Id.* at 884.
75. *Id*. at 890.

As a result, the *Smith* ruling lowered the scrutiny level required for indigenous free-exercise claims.[76] The Court no longer required states to prove that they had a compelling state interest for a governmental action in free-exercise cases.[77] Because states no longer had to prove a compelling state interest, the Court's ruling made it easier for states and other governmental entities to discriminate against indigenous religions.[78] Accordingly, between the Supreme Court's decisions in *Lyng* and *Smith*, the Court ignored Congress's clear intent to create anti-subordination legislation to protect indigenous culture.

C. RFRA & RLUIPA, Boerne

Because the Court in *Lyng* and *Smith* destroyed Congress's first attempt at anti-subordination legislation, Congress attempted again to provide greater protections for native religious practices in 1993.[79] Indeed, the Supreme Court's decisions in *Lyng* and *Smith* proved detrimental to indigenous free-exercise rights.[80] As a result, following the *Smith* decision, public interest groups and lobbyists pressured Congress to create legislation to protect Native American religious rights.[81] Accordingly, Congress passed the Religious Freedom Restoration Act (RFRA). With the passage of RFRA, Congress intended to offer greater constitutional religious freedom protections that the *Lyng* and *Smith* decisions erased three years prior.[82]

The primary purpose of RFRA was to protect oppressed, small religious groups from suffering unequal treatment compared to majority religions, like Christianity.[83] Indeed, RFRA's legislative history indicates that Congress was deeply concerned that the *Smith* decision created a world where majority religions would receive religious exemptions while minority religions would not.[84] Specifically, congressional hearings are replete with testimony about protecting minority religions from the overrepresentation of majority religions in the government.[85] Even the Senate committee report

76. *See id.* at 878.
77. *Id.* at 886.
78. *See generally* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
79. MCNALLY, *supra* note 28, at 85.
80. *See id.*
81. *Id*.
82. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890. (1990).
83. Scott–Railton, *supra* note 51, at 454.
84. *Id.* at 457.
85. *Id*.

emphasized the importance of protecting minority religious groups from the grasp of majority religions and government officials.[86]

Because Congress sought to prevent the inequality of minority religions with RFRA, Congress organized the Act under an effects-based model.[87] An effects-based model is a legislative structure used in other areas of civil rights law that aims to more aggressively address systematic oppression.[88] Specifically, the effects-based model prevents a government action from negatively impacting minority religious practices and does not inquire about the discriminatory purpose.[89] Thus, because Congress chose the effects model for RFRA, it is quite clear that Congress intended to provide the strongest mechanism to protect oppressed religious groups so that such groups would not face further discrimination from the court system.[90] Further, with RFRA, Congress aimed to codify the strict scrutiny analysis of free-exercise claims set forth by the Supreme Court in *Sherbert* and *Yoder*.[91] The Act stated that a government action may not "substantially burden" an individual's religious free exercise unless the government offers a compelling interest. [92]

Despite Congress's second attempt at anti-subordination legislation with RFRA, any progress made by Congress to protect indigenous religious rights was short-lived. Again, the Supreme Court went against congressional intent to protect and preserve indigenous religion and culture and dealt another blow in 1997.[93] In *Boerne v. Flores,* the Supreme Court found that RFRA was unconstitutional as applied to state and local governments.[94] The Supreme Court's decision in *Boerne* severely limited the amount of religious free-exercise protection Congress intended to offer with RFRA. Because

86. S. REP. NO. 103-111, at 8 (1993).
87. 42 U.S.C. § 2000bb–1.
88. Scott–Railton, *supra* note 51, at 454.
89. *Id*.
90. MCNALLY, *supra* note 28, at 85.
91. In *Sherbert*, the Supreme Court held that free-exercise cases required strict scrutiny analysis. Under the strict scrutiny analysis, the Court held that a company's denial of government benefits because of its employee's religious beliefs violated the First Amendment. The Supreme Court affirmed its strict scrutiny analysis from *Sherbert* in *Yoder*. In *Yoder*, the Court held that imposing a government penalty because of a person's religion also violated the First Amendment. Sherbert v. Verner, 374 U.S. 398, 410 (1963); Wisconsin v. Yoder, 406 U.S. 205, 234–35 (1972).
92. MCNALLY, *supra* note 28, at 85.
93. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
94. *Id.*

RFRA only applied to federal government actions, indigenous peoples no longer had protection from state or local governments encroaching on their religious freedom.[95]

In response to the Court's finding in *Boerne,* Congress passed additional anti-subordination legislation with the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000.[96] RLUIPA's scope was narrower than RFRA, as Congress sought to create further religious protections within prisons and zoning laws.[97] However, RLUIPA still allowed state and local prisoners more free-exercise rights.[98] RLUIPA amended RFRA and expanded the definition of "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a religious belief."[99] Like RFRA, Congress used an effects-based model with RLUIPA and only required minority religious claimants to demonstrate that their religious beliefs were sincere.[100] Again, RLUIPA showed another attempt by Congress to protect minority religious groups through anti-subordination legislation despite Supreme Court efforts to destroy indigenous free exercise.

Congress's passage of AIRFA, RFRA, and RLUIPA all show a pattern—that the legislature continues to pass anti-subordination legislation following Supreme Court decisions that devastate minority religious exercise. After the Supreme Court's decisions in *Lyng* and *Smith* that diminished indigenous free-exercise protection under AIFRA and the First Amendment, Congress responded and passed RFRA.[101] Again, when the Supreme Court found RFRA unconstitutional as applied to the states in *Boerne,* Congress responded and passed RLUIPA.[102] Congress's constant efforts to protect minority groups through anti-subordination legislation following Supreme Court decisions show its intent to protect smaller groups from inequity.

V. RECENT DECISIONS STILL FAIL TO EFFECT CONGRESS'S ANTI

95. MCNALLY, *supra* note 28, at 85.
96. 42 U.S.C. §§ 2000cc-5.
97. MCNALLY, *supra* note 28, at 85.
98. *Id.*
99. 42 U.S.C. § 2000cc-5.
100. MCNALLY, *supra* note 28, at 85.
101. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988); Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 890. (1990); MCNALLY, *supra* note 28, at 85.
102. 42 U.S.C. §§ 2000cc.

SUBORDINATION INTENT

In this Section, this Article will discuss how recent Supreme Court and Ninth Circuit decisions still treat majority religions differently than indigenous religions and fundamentally misconstrue indigenous religious practices. First, the Comment will discuss the Ninth Circuit's narrow view of indigenous free-exercise claims in its *Navajo Nation v. U.S. Forest Service* decision.[103] Second, the Comment will discuss the Ninth Circuit's most recent decision in *Apache Stronghold v. United States*, where it again repeated the same flawed analysis from *Navajo Nation*.[104] Third and finally, this Comment describes how the Supreme Court's recent decisions in *Burwell v. Hobby Lobby Stores, Inc.* and *Holt v. Hobbs,* both cases involving majority religion free-exercise claims, starkly contrast indigenous free-exercise claims and broadly apply RFRA.[105]

A. Navajo Nation & Apache Stronghold

Despite Congress's efforts to provide broad religious exercise protections for indigenous groups, modern Native American religious freedom claims continue to fail. This failure occurs in part because United States courts construe RFRA narrowly and misunderstand indigenous religious practices.[106] A prominent example of courts' problematic indigenous free-exercise analysis is the Ninth Circuit's decision in *Navajo Nation*.[107] In *Navajo Nation*, the Ninth Circuit held *en banc* that a ski resort's use of artificial snow on a sacred Navajo mountain did not substantially burden the Navajo's religious exercise under RFRA.[108]

The Ninth Circuit took a narrow view of the strict scrutiny analysis allegedly required by RFRA. Specifically, the Ninth Circuit relied on prior precedent from *Sherbert* and *Yoder* and held that a government action only substantially burdens religious exercise in two instances: (1) when forcing an individual to choose between receiving a government benefit or their religion, or (2) when coercing an individual to act against their religious beliefs to avoid threats of civil

103. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008).
104. Apache Stronghold v. United States, 38 F.4th 742, 757 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).
105. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682,719–720 (2014); Holt v. Hobbs, 574 U.S. 352, 362 (2015).
106. MCNALLY, *supra* note 28, at 11.
107. *Navajo Nation*, 535 F.3d at 1070.
108. *Id*. at 1063.

or criminal sanctions.[109] The Ninth Circuit held that if a government's action does not fall under either of these two categories, the deciding court does not need to apply the strict scrutiny analysis.[110] The plaintiffs, comprised of several Native American tribes, argued that the artificial snow mountain destroyed the sanctity of the site and, by effect, destroyed their religious experience.[111] Because the government's action did not fall within the two narrow circumstances from *Sherbert* and *Yoder*—the government did not force the plaintiffs to act against their religious beliefs or condition a government benefit—the court reasoned it did not need to apply strict scrutiny.[112] The court reasoned that the government action only affected the plaintiffs' "subjective, emotional religious experience."[113] By holding that a government action only violates RFRA in two narrow instances, the Ninth Circuit made it extremely difficult for indigenous people to succeed on a religious freedom claim under RFRA.

B. Apache Stronghold v. United States

The most recent example of courts' fundamental misunderstanding of indigenous free-exercise claims is the Ninth Circuit's holding in *Apache Stronghold.*[114] Rather than seize on the opportunity to overrule the restrictive substantial burden test from *Navajo Nation* in light of recent Supreme Court decisions, the Ninth Circuit heavily relied on the substantial burden test from *Navajo Nation*.[115]

In *Apache Stronghold*, the Ninth Circuit found that transferring federally owned land to a natural resource company to build a copper mine under a sacred Apache mountain did not substantially burden the Apache's ability to practice religion under RFRA.[116] While the Apache argued that the copper mine construction at Oak Flat would make it impossible for them to worship at the sacred site, the Ninth Circuit held that a government action that creates more difficulty for a group's religious practice does not constitute a substantial burden

109. *Id*. at 1070.
110. *Id*. at 1072–73.
111. *Id*. at 1063.
112. *Id.*
113. *Id*. at 1070.
114. Apache Stronghold v. United States, 38 F.4th 742, 768–69 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).
115. *Id*. at 754–56.
116. *Id*. at 756.

under RFRA.[117] The Ninth Circuit applied the same two narrow circumstances that constitute a substantial burden from *Navajo Nation*.[118] The court held that the copper mine did not (1) force the Apache to choose between receiving a government benefit or their religion (*Sherbert*) or (2) coerce the Apache to act against their religious beliefs to avoid threats of civil or criminal sanctions (*Yoder*).[119] Because the Apache's claim did not precisely match either substantial burden claim from *Sherbert* or *Yoder*, the Ninth Circuit held that the copper mine construction and probable destruction of Oak Flat did not substantially burden the Apache's ability to practice religion.[120] Thus, the Ninth Circuit's decision in *Apache Stronghold* narrowly construed RFRA and made it virtually impossible for any indigenous group to prove a government action substantially burdened their religious practice.

C. Hobby Lobby & Holt

In contrast to the Ninth Circuit's narrow RFRA analysis in *Navajo Nation* and *Apache Stronghold*, the Supreme Court broadly construed RFRA in *Hobby Lobby* and *Holt*.[121] Specifically, the Supreme Court's approach to a Christian corporation's religious free-exercise claim in Hobby Lobby Stores seemingly created a broader application of RFRA.[122] In *Hobby Lobby*, the Supreme Court found that forcing a Christian corporation to pay birth control coverage mandated by the Affordable Care Act substantially burdened the corporation's religious exercise.[123] Because the Supreme Court had rejected many similar religious free-exercise claims before, the Court emphasized that the RFRA religious protections were greater than the Constitution.[124] Justice Alito, writing for the majority, held that Congress enacted RFRA to create sweeping religious liberty protections.[125] Further, the Court held that the religious protections offered by the RFRA far exceed those constitutional protections

117. *Id*. at 757.
118. *Id*. at 756.
119. *Id.*
120. *Id*. at 768–69.
121. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719–20 (2014); Holt v. Hobbs, 574 U.S. 352, 362–63 (2015).
122. *Hobby Lobby*, 573 U.S. at 719–20.
123. *Id*. at 726.
124. *Id*. at 706.
125. *Id*. at 693.

offered by the First Amendment.[126] Finally, the Court held that the purpose of the RFRA was not to return to the pre-*Smith* strict scrutiny analysis of religious free-exercise claims but rather to create greater protections than before *Smith*.[127] The Court reasoned that a return to the free-exercise analysis before *Smith* would "be absurd" and, as a result, would allow plaintiffs only to file a RFRA action if they fell within a narrow set of similar claims from *Sherbert* and *Yoder*.[128]

In *Holt v. Hobbs*, the Supreme Court broadly construed RLUIPA—an Act identical to RFRA— and appeared far more willing to accept the subjective harm done to the plaintiff's non–indigenous religious experience because of the government action.[129] In *Holt*, the plaintiff resided in prison and alleged that a prison policy restricting prisoners from growing a beard negatively impacted his Islamic religious experience.[130] Because the prison policy forced the plaintiff to choose between his religious belief that men must grow a beard or face disciplinary action, the Court held that the policy substantially burdened the plaintiff's religious experience.[131] Notably, the Court did not analyze whether the plaintiff suffered subjective harm as the Court did for indigenous claims in *Smith* and *Lyng*.[132] Instead, as in *Hobby Lobby*, the Court presumed the plaintiff suffered subjective harm to his religious experience and offered no further analysis.[133]

The Supreme Court's decisions in both *Hobby Lobby* and *Holt* show how courts treat majority religions differently than minority religions, like those followed by indigenous groups.[134] While the Ninth Circuit in *Navajo Nation* and *Apache Stronghold* narrowly construed RFRA, the Supreme Court had no problem using a broad construction of RFRA in *Hobby Lobby* and *Holt* to protect majority religions.[135] Thus, courts need to resolve the unequal application of RFRA between

126. *Id*. at 706.
127. *Id*. at 714.
128. *Id*. at 716–17.
129. Holt v. Hobbs, 574 U.S. 352, 369 (2015).
130. *Id*. at 355–56.
131. *Id*. at 362.
132. *Id.* at 363.
133. *Id*. at 362.
134. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682,719–20 (2014); Holt v. Hobbs, 574 U.S. 352, 362 (2015).
135. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008); Apache Stronghold v. United States, 38 F.4th 742, 768–769 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021); *Hobby Lobby*, 573 U.S. at 719–20; *Holt*, 574 U.S. at 362.

majority and minority religions to adequately protect indigenous free exercise.

VI. WHY COURTS CONTINUE TO TREAT INDIGENOUS RELIGIONS DIFFERENTLY

In this Section, the Article will discuss why courts continue to misconstrue indigenous religions and treat them differently than mainstream Western religions. First, the Article will argue that courts misunderstand indigenous religious freedom claims because of their unfamiliarity with native religious practices compared to mainstream or majority religions.[136] Second, the Article will argue that courts misinterpret indigenous religious freedom claims because an indigenous person's free-exercise right is a collective right rather than an individual right.

A. Majority Religions vs. Indigenous Religions

First, courts continue to treat indigenous claims differently because native religions are quite different from mainstream religions such as Christianity, Judaism, or Islam.[137] Indeed, native religions are "land-based" and lack many of the characteristics of mainstream religions, such as monotheism or institutional structures like a church, synagogue, or mosque.[138]

The Ninth Circuit's holding in *Navajo Nation* exemplifies courts' fundamental misunderstanding of indigenous religions. In *Navajo Nation*, the Ninth Circuit held that the "sole effect" of artificial snow on a sacred mountain was on the indigenous group's "subjective spiritual experience" that resulted in "diminished spiritual fulfillment."[139] The court also held that the artificial snow "was offensive to Plaintiff's feelings about their religion."[140] Here, the Ninth Circuit's wording completely minimized how the artificial snow would affect the sacred site and indigenous people's religious practice and identity.[141] An indigenous person's identity is deeply tied to the land and the maintenance of land in its purest form.[142] Artificial snow

136. Skibine, *supra* note 33, at 273.
137. *Id*.
138. *Id*. at 270.
139. *Navajo Nation*, 535 F.3d at 1063.
140. *Id.*
141. *Id.* at 1063–71.
142. Barclay & Steele, *supra* note 37, at 1305.

on a sacred site destroys the pureness of the site, and thus, indigenous persons may no longer worship there.[143] As a result, the Ninth Circuit failed to recognize that the artificial snow did not diminish spiritual fulfillment but destroyed an indigenous person's entire identity.[144]

Furthermore, the Ninth Circuit misconstrued the central issue—the problem with the artificial snow was not only about destroying individual spiritual fulfillment but also the continued existence of the indigenous nation.[145] If the Ninth Circuit truly understood that the destruction of sacred sites did not only affect an indigenous person's spiritual fulfillment but rather could lead to the dissolution of the entire indigenous culture, the Ninth Circuit would have likely found that the artificial snow substantially burdened the Native American's religious practice.[146]

Similarly, in *Apache Stronghold*, the Ninth Circuit's lack of knowledge regarding native religions led to an incorrect finding about how a sacred site's destruction would affect indigenous peoples' religion and culture.[147] In *Apache Stronghold*, the court held that destroying an Apache sacred mountain would have only had an "incidental effect" on Apache members' religious exercise.[148] The court further stated that the worship would become "impossible" for Apache members, but the government made religious exercise "more difficult all the time."[149] Again, the Ninth Circuit's fundamental misunderstanding of native religion led the court to conclude that destroying a sacred mountain would make the Apache's religious exercise more difficult.[150] However, the sacred mountain's destruction would not only make religious exercise more difficult for the Apache but rather lead to the destruction of the entire Apache culture.[151]

Conversely, the Supreme Court in *Hobby Lobby* clearly understood the Christian religious beliefs held by the plaintiffs and thus came to a different result than in *Navajo Nation* and *Apache Stronghold.*[152]

143. McDonald, *supra* note 30, at 754.
144. *Navajo Nation*, 535 F.3d at 1063.
145. Skibine, *supra* note 33, at 273.
146. *Id*. at 274.
147. Apache Stronghold v. United States, 38 F.4th 742, 757 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).
148. *Id*.
149. *Id*.
150. *Id*. at 757–59.
151. MCNALLY, *supra* note 28, at 136 (2020).
152. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 701 (2014); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1065 (9th Cir. 2008); *Apache Stronghold*, 38 F.4th at 757.

Based on the Supreme Court's evident in-depth knowledge of Christianity, the Court easily concluded that a mere violation of the plaintiff's Christian beliefs—forcing plaintiffs to purchase healthcare, including contraceptives—was a substantial burden.[153] Because Christianity is a majority religion in the United States and native religions are not, the Supreme Court had a clearer understanding of how the government forcing the plaintiffs to commit an "immoral" action violated their religious exercise.[154]

In contrast to the government actions' effect on indigenous peoples' religious exercise in *Navajo Nation* and *Apache Stronghold*, the government action in *Hobby Lobby* appears less severe.[155] In both *Navajo Nation* and *Apache Stronghold,* the government action would dissolve indigenous peoples' identity and culture.[156] However, because the Supreme Court possessed more extensive knowledge of Christian beliefs, the Court found that forcing the plaintiffs to purchase contraceptive healthcare coverage—a mere violation of plaintiffs' Christian beliefs—constituted a substantial burden.[157] Thus, courts' superior knowledge of majority religions compared to indigenous religions leads to inequity for indigenous free-exercise claimants.

B. Courts treat indigenous religious claims as individual rather than collective rights.

Another reason courts analyze indigenous religions differently than mainstream religions is that courts analyze religious freedom claims from an individual-rights perspective rather than a collective-rights perspective.[158] Collective rights are the shared group or community rights of individuals based on the group's cultural uniqueness.[159] Minority groups such as indigenous peoples traditionally share collective rights.[160] Because the foundation of collective rights is shared cultural life, collective rights are typically the most neglected

153. *Hobby Lobby*, 573 U.S. at 724.
154. *See id.*
155. *Hobby Lobby*, 573 U.S. at 698; *Apache Stronghold*, 38 F.4th at 756.
156. MCNALLY, *supra* note 28, at 136.
157. Barclay & Steele, *supra* note 37, at 1326.
158. RILEY, *supra* note 13, at 95.
159. ANDRZEJ JAKUBOWSKI, CULTURAL RIGHTS AS COLLECTIVE RIGHTS: AN INTERNATIONAL LAW PERSPECTIVE 1 (2016).
160. *Id.* at 7.

category of rights in the United States court system.[161] In contrast, individual rights are those held by one person and "universal to all people just by the virtue of being human."[162]

The international human rights community holds that indigenous religious freedom claims for protection of sacred land are based on a collective right rather than an individual right.[163] Indeed, the collective indigenous religious group holds sacred land together as a unit.[164] Further, sacred land is deeply tied to an indigenous person's social, cultural, and religious identity.[165] Accordingly, an indigenous person's identity hinges on the ability to access sacred lands held by the collective group.[166]

Despite clear evidence that access to sacred land is a collective right held by indigenous peoples, United States courts continue to construe indigenous religious freedom claims under an individual-rights structure.[167] For example, the Supreme Court in *Lyng* analyzed the Native American religious freedom claim from an individual rather than a collective-rights perspective. In its analysis of AIRFA, the *Lyng* Court stated that there was nothing in the statute that showed "any hint of intent to create a cause of action or . . . [a] judicially enforceable individual right."[168] Because the *Lyng* Court analyzed the free-exercise claim from an individual-rights perspective, it was nearly impossible for the Court to find that the government action substantially burdened indigenous free exercise.[169]

VII. HOW COURTS SHOULD ANALYZE RFRA CLAIMS

In this Section, the Article proposes a solution to resolve the discrimination and unfair treatment of indigenous free-exercise claims in courts. First, the Article argues that courts should assume indigenous claimants suffer subjective harm when analyzing the effect

161. *Id*. at 1.
162. *Id*.
163. Sofia Olofsson, *Indigenous Peoples' Collective Right to Land, Territories, and Resources – Where Do We Stand Today?*, GEO. PUB. POL'Y REV. (July 24, 2019), https://gppreview.com/2019/07/24/indigenous-peoples-collective-right-land-territories-resources-stand-today/ [https://perma.cc/AKU4-LD97].
164. *Id*.
165. McDonald, *supra* note 30, at 754.
166. RILEY, *supra* note 13, at 76–77.
167. *Id.* at 92–93.
168. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988).
169. Michael D. McNally, *Native American Religious Freedom as a Collective Right*, 2019 BYU L. REV. 205, 242 (2019).

of a particular government action.[170] Second, the Article argues that courts should construe indigenous free-exercise claims from an anti-subordination lens.[171] Finally, the Article argues that courts should construe RFRA broadly based on recent Supreme Court holdings.[172]

A. Courts Should Assume Indigenous Claimants Suffer Subjective Harm

First, to resolve the disparate treatment of indigenous religions compared to majority religions, courts should stop requiring proof that indigenous claimants suffer subjective harm in their free-exercise claims. The subjective harm analysis asks if the government action caused claimants tangible harm, such as destroying a shrine, or whether the government action affected the claimant's subjective experience.[173] There is no substantial burden if the government action minimally affects a claimant's subjective experience.[174] Because courts misunderstand indigenous religions, it is impossible for courts to find that a government action substantially impacts an indigenous person's subjective religious experience.[175] In contrast, if a claimant follows a majority religion, courts believe the claimant's argument that a government action impacts their subjective experience.[176]

For example, in *Hobby Lobby*, the Supreme Court did not question whether the Christian company suffered subjective harm to their religious experience because they had to pay for health insurance, including abortion-related medication.[177] The Court did not analyze or question the subjective harm done to the plaintiffs and held, "it is not for us to say their religious beliefs are mistaken or insubstantial."[178] Similarly, in *Holt*, the Court did not analyze or question the subjective harm done to the plaintiff's subjective religious experience because of a prison policy restricting beard growth that violated his Muslim beliefs.[179] Thus, in both cases, because the Supreme Court did not

170. Rebecca Tsosie, *Challenges to Sacred Site Protection*, 83 DENVER UNIV. L. REV. 963, 970 (2006).
171. Scott–Railton, *supra* note 51, at 455–56.
172. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719–720 (2014); Holt v. Hobbs, 574 U.S. 352, 362 (2015).
173. Tsosie, *supra* note 170, at 970.
174. Barclay & Steele, *supra* note 37, at 1347–48.
175. McNally, *supra* note 169, at 288.
176. *Id.* at 204–05.
177. *Hobby Lobby*, 573 U.S. at 725.
178. *Id*.
179. Holt v. Hobbs, 574 U.S. 352, 353–54 (2015).

question whether the plaintiffs suffered subjective harm, it was far easier for the Court to find there was a substantial burden.

Nevertheless, with indigenous free-exercise claims, courts intensely scrutinize how a government action will impact an indigenous person's subjective experience.[180] For example, the Ninth Circuit took painstaking lengths in *Navajo Nation* to question and criticize the plaintiffs' subjective religious experience.[181] Specifically, the Ninth Circuit offered an in-depth analysis of the validity of the indigenous free-exercise claims.[182] Following this lengthy analysis, the Ninth Circuit held that the government action only minimally affected the indigenous group's subjective experience.[183] The Ninth Circuit held that an impact on subjective religious experience only "decreases the spirituality, the fervor, or the satisfaction" of religious free exercise and thus is not a substantial burden.[184] Accordingly, the Ninth Circuit's lengthy and dismissive subjective experience analysis in *Navajo Nation* sharply contrasts the Supreme Court's complete and willing acceptance of the subjective harm alleged by majority religion claimants in *Hobby Lobby*.

Thus, courts should assume that all indigenous free-exercise claimants suffer harm to their subjective experience because of a government action. Courts intensely question the subjective experience of indigenous religions because courts possess little to no knowledge of native religions.[185] But this intense scrutiny does not occur with majority religion free-exercise claims because courts are familiar with these religions.[186] To avoid the unequal application of RFRA free-exercise claims between majority religions and indigenous religions, courts should assume indigenous free-exercise claimants suffer subjective harm.

B. Apply the Law Through an Anti-Subordination Lens

To resolve the inequity experienced by minority indigenous religions compared to majority religions, courts must construe indigenous free-exercise claims under RFRA with an anti-subordination lens to provide the broadest possible protections.

180. Tsosie, *supra* note 170, at 970–71.
181. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068–74 (9th Cir. 2008).
182. *Id*.
183. *Id*. at 1063.
184. *Id*. at 1070.
185. Tsosie, *supra* note 170, at 970.
186. McNally, *supra* note 169, at 290–91.

Specifically, courts should consider Congress's continued efforts to create anti-subordination legislation over the past fifty years.[187] If courts consider the anti-subordination legislative intent, courts will no longer narrowly construe RFRA.

The goal of anti-subordination legislation is to create a "community of equals" by stopping the government from participating in acts that "aggravt[e], perpetuat[e] or . . . carry over a disadvantage" of a minority group.[188] Congress passed such anti-subordination legislation with AIRFA and RFRA. In AIRFA, Congress recognized the United States' long history of intentionally destroying indigenous culture, and because of such actions, the Act stated it was the government's duty to protect indigenous free exercise.[189] When the Supreme Court in *Lyng* and *Smith* destroyed all protections provided by AIRFA, Congress again passed anti-subordination legislation with RFRA and again emphasized the importance of protecting minority religious groups.[190]

RFRA's legislative history indicates that Congress intended to create anti-subordination legislation. Indeed, the Senate committee report emphasized the importance of protecting minority religious groups from the grasp of majority religions and government officials.[191] Further, Congress's intent to create anti-subordination legislation is evident from their decision to use an effects-based approach designed to protect minority religious groups' free exercise more aggressively.[192] Thus, despite Supreme Court rulings, Congress's continued attempts to create anti-subordination legislation show that Congress intended to offer minority religious groups, such as indigenous peoples, the most robust protection.

However, courts today do not consider the anti-subordination purpose of RFRA in indigenous free-exercise claims.[193] Instead, courts narrowly construe RFRA and force indigenous free-exercise claimants into one of two narrow substantial burden categories—the government forcing an individual to choose between receiving a government benefit and practicing their religion or coercing an

187. MCNALLY, *supra* note 28, at 180–82.
188. Scott–Railton, *supra* note 51, at 456.
189. O'Brien, *supra* note 24, at 30.
190. McNally, *supra* note 169, at 278.
191. S. REP. NO. 103-111, at 8 (1993).
192. Scott-Railton, supra note 51, at 456.
193. Apache Stronghold v. United States, 38 F.4th 742, 757 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).

individual to act contrary to their religious beliefs to avoid civil or criminal charges.[194] However, if courts used an anti-subordination lens when construing RFRA claims, courts would consider the vulnerability of minority indigenous religious groups. Further, courts would consider the long history of oppression suffered by indigenous people.[195] These considerations would force courts to be more lenient when considering indigenous free-exercise claims outside the two narrow categories.

For instance, the Ninth Circuit may have reached a better decision in *Apache Stronghold* had it considered the anti-subordination legislative intent behind RFRA. While the Ninth Circuit briefly stated that Congress passed RFRA following *Smith*, it did not consider why Congress felt compelled to pass the Act following the devastating *Smith* decision.[196] The Ninth Circuit did not consider that Congress passed RFRA following *Smith* to prevent mainstream religions from dominating minority religions in federal, state, and local governments.[197] The Ninth Circuit also did not consider that Congress designed RFRA under an effects-based model to remedy past oppression of minority groups, like indigenous peoples.[198] If the Ninth Circuit had used an anti-subordination lens, the Ninth Circuit would have contemplated why Congress wanted to remedy past the oppression of minority groups such as Native Americans. As a result, from the perspective of protecting minority groups from further oppression, the Ninth Circuit would have found that the government action in *Apache Stronghold* substantially burdened indigenous free exercise.

Thus, while the Supreme Court and Ninth Circuit have yet to view indigenous free-exercise claims from an anti-subordination lens, now is time for the courts to do so.[199] Because of the United States' long history of violence, oppression, and destruction of indigenous people,[200] it is time for courts to view all indigenous free-exercise claims from an anti-subordination perspective to protect the small pieces left remaining of indigenous culture and religion.

194. *Id*. at 756.
195. Barclay & Steele, *supra* note 37, at 1307.
196. *Apache Stronghold*, 38 F.4th at 752.
197. McNally, supra note 169, at 220–21.
198. Scott–Railton, supra note 51, at 456.
199. *Apache Stronghold*, 38 F.4th at 752.
200. Riley & Carpenter, *supra* note 43, at 88–89.

C. Construe RFRA Broadly

Finally, to resolve the disparate treatment of indigenous and majority-religion religious free-exercise claims, courts should analyze RFRA claims following the Supreme Court decisions in *Hobby Lobby* and *Holt*.[201] In both *Hobby Lobby* and *Holt*, the Supreme Court went to extreme lengths to emphasize that RFRA provided broad protections and far exceeded those protections provided under the First Amendment.[202]

In *Hobby Lobby*, the Court held that Congress created RFRA "to provide very broad protection for religious liberty."[203] Furthermore, the Court held that Congress's passage of RFRA "went far beyond" those protections traditionally offered by the First Amendment.[204] Again, in *Holt*, the Supreme Court emphasized that RLUIPA—an Act identical to RFRA—provided "expansive protection for religious liberty."[205] Accordingly, the Supreme Court holdings require courts to construe RFRA claims broadly. Even if the Supreme Court did not set precedent, the Court's emphasis on the broad protections offered by RFRA in both *Hobby Lobby* and *Holt* should send a signal to courts to liberally analyze RFRA claims.[206]

A liberal construction of RFRA would lead to greater success of indigenous free-exercise claims. Specifically, courts would be far more likely to find that a particular government action substantially burdened an indigenous people's religious free exercise. For example, in *Apache Stronghold*, the Ninth Circuit narrowly construed RFRA and limited the Act's application to only two circumstances.[207] Because the Ninth Circuit construed RFRA narrowly, the government action did not fit into the two limited circumstances, and the court did not find that the government action substantially burdened the Native Americans' religious exercise.[208] If the Ninth Circuit construed RFRA broadly, the court would not limit the Act's application to two narrow

201. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 706 (2014); Holt v. Hobbs, 574 U.S. 352, 362 (2015).
202. *Hobby Lobby*, 573 U.S. at 706.
203. *Id*. at 693.
204. *Id*. at 706.
205. *Holt*, 574 U.S. at 358.
206. *Hobby Lobby*, 573 U.S. at 706; *Holt*, 574 U.S. at 362.
207. Apache Stronghold v. United States, 38 F.4th 742, 755–56 (9th Cir. 2022), *aff'g* 519 F. Supp. 3d 591, 597 (D. Ariz. 2021).
208. *Id*. at 768–769.

circumstances, and the Ninth Circuit would have found a substantial burden.

VIII. CONCLUSION

In conclusion, courts must change their analysis of indigenous free-exercise claims to address the cycle of oppression suffered by indigenous peoples. The United States has a long history of creating policies to destroy indigenous religious culture. Despite Congress's attempts to offer greater religious exercise protection to Native Americans with the passage of AIRFA, RFRA, and RLUIPA, courts continue to frustrate these legislative efforts. Courts should do three things to adjust course and fully protect indigenous free-exercise rights. First, once a claimant articulates a subjective harm on their religious practice, courts should presume that this harm exists. Second, courts should evaluate indigenous free-exercise claims from an anti-subordination lens to remedy past oppression. Third and finally, courts should broadly construe RFRA to offer indigenous peoples the broadest protections.