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BURDENED, BUT NOT BURDENED ENOUGH: A LONG-TERM SOLUTION TO THE DIFFICULTIES POSED BY RELIGIOUS OBJECTIONS TO RESOURCE DEVELOPMENT

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I. Introduction

Imagine a religion that for millennia has viewed oil as a Satanic object. Next, imagine a government forcing the adherents of that religion to drink oil directly from a pipeline. This hypothetical scenario illustrates the reality of the substantial burdens the government places on Native American religious beliefs that oppose resource development. Although many advocates have attempted to alter the "substantial burden" test used in many of these cases, this article suggests a more permanent, long-lasting solution: ensure the claimants religion is bona fide and give more weight to property claims made by Native American religious groups.

Religious objections to resource development are no strangers to the U.S. court system, but such a case has yet to reach the Supreme Court. Although on-point cases have reached the Ninth Circuit,[1] the Third Circuit,[2] and a couple of federal district courts,[3] existing case law generally disfavors claimants asserting a religious hardship; it imposes an almost impossible

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1. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008); Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207 (9th Cir. 2008).

2. Adorers of the Blood of Christ v. Fed. Energy Regul. Comm'n, 897 F.3d 187 (3d Cir. 2018).

3. Apache Stronghold v. United States, 519 F. Supp. 3d 591 (D. Ariz. 2021); Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77 (D.D.C. 2017).

standard. The substantial burden test allows anything short of government-forced oil drinking during religious rituals.[4] To cure the case law's imbalance, courts should establish a mode of analysis that gives claimants with a sincere religious objection—those with no real alternative to seeing their religious beliefs freely practiced—a way to succeed against opposed resource development. Two categories of religious claims emerge when analyzing assertions against resource development: Native American claims and those made by progressive religious groups—defined for the purposes of this article as groups part of "a new wave of progressive activism guided by religious freedom" that seek "new ways to achieve political or social change under RFRA protections."[5] Native American claimants often hold sincere religious objections to resource development, but their causes are likely withheld; to allow religious objections to overpower resource development involves enormous policy considerations. A prime example is progressive religious groups' willingness to assert politically-motivated, newly-created claims of religious requirements and convictions makes it less likely Native American claimants will succeed.

This comment addresses why Native American religious objections to energy development fail, and what needs to change for them to hold validity in the law. It looks at both the Native American and progressive religious groups' attempts to challenge energy development, and why the latter's attempts to assert claims may harm the viability of legitimate, longstanding Native American claims. The comment outlines the standard the Religious Freedom Restoration Act (RFRA) requires for a violative burden on religion, and how an alteration in the established law could affect religious claimants opposed to energy. In section II, I recount a brief history of RFRA and outline the requirements for a successful claim. In section III, I survey the caselaw for Native American religious objections, followed by those made by progressive religious groups. In section IV, I first analyze these cases by first laying out the need for sincerely held native American beliefs to be practiced, followed by an explanation of why claims have failed, and then by delving into sincerity and its effects. In section V, I

4. *See, e.g.*, Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1070 (9th Cir. 2008) (finding no substantial burden partially because "the Forest Service 'has guaranteed that religious practitioners would still have access to the Snowbowl,'" a sacred site now covered in recycled sewage water); Apache Stronghold v. United States, 519 F.Supp. 591, 607 (D. Ariz. 2021) (finding no substantial burden despite the mining plans having "a devastating effect on the Apache people's religious practices").

5. *See* Colin Sheehan, The Pros and Cons of Empowering Religious Exemptions for Progressive Activism, 21 Rutgers J. L. & Religion 549, 551, 557 (2021).

predict the future of these issues by outlining the current developments in relevant caselaw, explaining their effects, examining the implications of progressive religious claims, and recommending a path for the courts.

II. Background

A. RFRA History

Congress enacted the Religious Freedom Restoration Act (RFRA) in response to the Supreme Court's holding in *Employment Division v. Smith* because it "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[6] In *Smith*, the Court held that a law of general applicability may stand valid—even though in this case the law prohibited the ceremonial ingestion of peyote in line with a Native American religion—because the law only "incidentally" prohibits the religious practice and "is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons."[7] Prior to *Smith*, the Court "used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest."[8] In two key cases, "the Court held in *Sherbert* that an employee who was fired for refusing to work on her Sabbath could not be denied unemployment benefits,"[9] and "in *Yoder*, the Court held that Amish children could not be required to comply with a state law demanding that they remain in school until the age of 16 even though their religion required them to focus on uniquely Amish values and beliefs during their formative adolescent years."[10] However, the Court in *Smith* rejected *Sherbert* on the basis "that use of the *Sherbert* test whenever a person objected on religious grounds to the enforcement of a generally applicable law 'would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.'"[11] As a result of these changes, "Congress enacted RFRA in 1993 in order to provide very broad

6. 42 U.S.C.A. § 2000bb (West).
7. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 872 (1990).
8. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693 (2014).
9. *Id.* (citing Sherbert v. Verner, 374 U.S. 398, 408-09 (1963).
10. *Id*. at 694 (2014) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).
11. *Id.* (quoting *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 888 (1990)).

protection for religious liberty"[12] and to ensure "Congress' view of the right to free exercise under the First Amendment."[13]

B. Requirements for a Successful Claim

"Congress enacted RFRA in direct response to the Court's decision" in *Smith*.[14] RFRA states that the government cannot:

> substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, unless the government can demonstrate that application of the burden to the person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[15]

Unnecessary economic consequences,[16] compelling a business to violate their free exercise of religion,[17] and forcing a group to either violate its beliefs or curtail its mission[18] all qualify as a violation of the free exercise clause of the First Amendment. Under RFRA, a law of general applicability may still burden a person's free exercise of religion, reinstating the previous standard that *Smith* changed.[19] A substantial burden, however, can be shown either by the fact that the government's action compelled the adherent to commit an act prohibited by the religion, or where the government prohibits an act mandated by the religious belief.[20]

A baseline look at sincerity is essential to ensure an asserted stance or belief is rooted in a religion and deserving of First Amendment protections. In order for a religious objection to succeed, the "plaintiff must allege a constitutionally impermissible burden on a sincerely held religious belief."[21] Furthermore, there is only a "Free Exercise claim if . . . the plaintiff holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular."[22] Indeed, the "First Amendment only

12. *Id.* at 693 (2014).
13. Tanzin v. Tanzir, 141 S. Ct 486, 489 (2020).
14. City of Boerne v. Flores, 521 U.S. 507, 512 (1997).
15. 42 U.S.C.A. § 2000bb-1 (West).
16. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014).
17. Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1720 (2018).
18. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1876 (2021).
19. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 888 (1990).
20. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 at 1069-70 (9th Cir. 2008).
21. GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1256 (11th Cir. 2012).
22. *Id.*

protects sincerely held beliefs that are 'rooted in religion.'"[23] Religious beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."[24] The religious beliefs in question must be "actually religious in nature (rather than philosophical or political, for example)" and not stated "for the purpose of draping religious garb" over nonreligious activity.[25] Additionally, the First Amendment does not protect "so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity."[26] The sincerity analysis essentially delineates nonreligious claims from religious ones.

The Supreme Court in *Wisconsin v. Yoder* considered the sincerity of an Amish religious conviction that their children should not be compelled to attend public school beyond grade eight.[27] Although affected by a law of general applicability requiring all children attend school through a certain age, the Court allowed an exception for the Amish because of the sincerity of their beliefs and the evidence of the adequacy of their alternative lifestyle.[28] Notably, the Court did not question the sincerity of the Amish's beliefs, and the government itself even conceded that the Amish beliefs were indeed sincere.[29] In *Yoder*, the Amish believed that sending their children to high school in compliance with the law would "endanger their own salvation and that of their children."[30] The main issue in the Amish's case was not the sincerity of their beliefs, but whether the state properly and reasonably exercised its government power to require education until the age of sixteen.[31] Nevertheless, the Court took it as an opportunity to delve into the factors it evaluates to determine whether a belief is sincere and religious in nature.

One important factor guiding the Court was the longstanding nature of the belief.[32] The belief must also originate from a bona fide religion.[33] In

23. United States v. DeWitt, 95 F.3d 1374 (8th Cir. 1996) (quoting Thomas v. Review Bd. Of the Indiana Employment Sec. Div., 450 U.S. 707, 713 (1981).

24. Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 714 (1981).

25. United States v. Christie, 825 F.3d 1048, 1056 (9th Cir. 2016).

26. Theriault v. Carlson, 495 F.2d 390, 395 (5th Cir. 1974), cert denied, 419 U.S. 1003 (1974).

27. Wisconsin v. Yoder, 406 U.S. 205, 209 (1972).

28. *Id*. at 235.

29. *Id.* at 209.

30. *Id.*

31. .*Id.* at 213.

32. *Id.* at 235.

United States v. Meyers, a federal district court listed five considerations for finding a bona fide religion: (1) ultimate ideas; (2) metaphysical beliefs; (3) moral or ethical system; (4) comprehensiveness of beliefs; and (5) accoutrements of religion.[34] Using these factors, that court found the plaintiff's claims—that he was compelled by his beliefs to use drugs as a member of the "Church of Marijuana"—were baseless. The court stated the plaintiff's requirements were not "religious" under RFRA, but instead functioned as more of a philosophical belief or lifestyle.[35] The Tenth Circuit Court of Appeals affirmed the district court's decision. The Circuit Court reasoned that the district court's factored analysis sufficiently determined whether the plaintiff's beliefs stemmed from a bona fide religion and stated that "the beliefs more accurately espouse a philosophy and/or a way of life rather than a 'religion.'"[36] Of particular note in this case is the district court's mention of a "slippery slope" if similar beliefs were to be recognized as religious.[37] The court stated that a future on the slippery slope could mean "anyone who was cured of an ailment by a 'medicine' that had pleasant side-effects could claim they had founded a constitutionally or statutorily protected religion based on the beneficial 'medicine.'"[38] In effect, First Amendment protection will not be given for inherently non-religious claims.

III. Oil and Gas Omnipotence

A. Native American Religion

Native American groups have unsuccessfully raised anti-energy claims on religious grounds. However, they have refused to perform acts that negatively affect their religious practice. Regardless, courts consistently deem Native American religious beliefs as not substantially burdened enough to justify alternative actions by the government, but the sincerity of such beliefs has not been an issue.

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33. United States v. Meyers, 906 F. Supp. 1494, 1508 (D. Wyo. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996).

34. *Id.* at 1502-03.

35. *Id.* at 1501.

36. United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996).

37. United States v. Meyers at 1484 ("Were the court to recognize Meyers' beliefs as religious, it might soon find itself on a slippery slope.") (quoting *Meyers*, 906 F.Supp. 1494, 1508 (D. Wyo. 1995)).

38. *Id.* at 1508.

Lyng v. Northwest Indian Cemetery Protective Ass'n is a fundamental decision involving a Native American religious objection to governmental infringement on their land.[39] In *Lyng*, a Native American Tribe challenged the construction of a road through a forest sacred to their religion.[40] The government sought to permit timber harvesting, which along with the construction of the road would significantly impair the Tribe's practice of its religious beliefs.[41] The forest had "historically been used by certain American Indians for religious rituals that depend upon privacy, silence, and an undisturbed natural setting."[42] Although acknowledging the sincerity of the Tribe's religious beliefs, the Court held that the burden was not sufficient to violate the Free Exercise Clause.[43] The Court reasoned that road construction and permitting timber harvesting would not coerce the Tribe into violating their religious beliefs. Largely, the case lacked any specific penalty on the religion implicated "by denying any person an equal share of rights, benefits, and privileges enjoyed by other citizens."[44] The court refused to acknowledge the severe effects on the Native American Tribe and instead reversed an injunction prohibiting the government action from taking place.[45] In effect, *Lyng* has made it very difficult for a Tribe to successfully challenge government burdens on land that affects their religious practices.

Although not directly about energy development, *Navajo Nation v. U.S. Forest Service* has substantially impacted Native American objections to energy development. In fact, the court's language in this case has been used in many different cases involving religious objections to energy development. In *Navajo Nation*, a Native American Tribe made a religious objection to recycled wastewater used to make artificial snow for a portion of a public mountain held as sacred in its religion.[46] The wastewater was used to create artificial snow for a ski area, leading to the Tribe's objection and argument that allowing the wastewater's placement would "spiritually

39. *See* Jeff Pinter, In Cases Involving Sites of Religious Significance, Plaintiffs Will Fall in the Gap of Judicial Deference That Exists Between the Religion Clauses of the First Amendment, 29 Am. Ind. L. Rev. 289, 302 (2005) ("The controlling Supreme Court case on the issue of government action challenged as burdening the free exercise of site specific religious practices under the Free Exercise Clause is Lyng.").

40. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988).

41. *Id.* at 453.

42. *Id.* at 439.

43. *Id.* at 447.

44. *Id.* at 449.

45. *Id.* at 458.

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

contaminate the entire mountain and devalue their religious exercises."[47] The Ninth Circuit held that the Tribe failed to establish a RFRA violation because there was no substantial burden imposed on their religious belief.[48] The court applied *Sherbert* and *Yoder*, thereby explaining that the Tribe's religious beliefs were not substantially burdened because they were not forced to choose between a government benefit and their religious belief, nor were they threatened with criminal punishment for acting out their religious belief.[49] The Tribe did, however, hold a sincere belief.[50] Nevertheless, the dissent pointed out that the majority merely looks to the lack of physical harm directly to the Tribe.[51] Further, the dissent argues that the "emphasis on physical harm ignores the nature of religious belief and exercise" and "characterizes the Indians' religious beliefs and exercise as merely a "subjective spiritual experience."[52] The court's RFRA analysis was misguided, creating excuses "for refusing to accept the Indians' religion as worthy of protection under RFRA" because of its supposed subjectiveness.[53] The dissent in *Navajo Nation* shows both the current consensus of Tribal religious objections and the opposing side's view of the actual burden that is created through the denial of such objections. Moving forward, these arguments are essential to understanding claims made by Native American groups asserting religious objections against resources development.

Next, in the Ninth Circuit, a Native American Tribe challenged the approval of a hydroelectric dam's construction. Although renewable energy, the court came to a similar conclusion as other energy cases.[54] The hydroelectric dam would affect a waterfall site held to be sacred by around 100 members of the Tribe, and the waterfall itself played a "central role in the Tribe's creation story and is an important location for its religious practices."[55] Analyzing whether it was a substantial burden, the court applied *Navajo Nation,* reasoning that the court is not concerned whether government action impacts the Tribe's ability to practice their religion, but

47. *Id.*

48. *Id*. at 1067.

49. *Id.* at 1069-70; *see* Sherbert v. Verner, 374 U.S. 398, 404 (1963); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972).

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

51. *Id.* at 1096 (Fletcher, C.J., dissenting).

52. *Id.* (Fletcher, C.J., dissenting).

53. *Id.* at 1097 (Fletcher, C.J., dissenting).

54. Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207, 1207 (9th Cir. 2008).

55. *Id.* at 1211.

rather whether the government forces them to "choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction."[56] As there was no threat of loss of government benefit or criminal sanction, the court held there was no substantial burden under RFRA that justified requiring the government to achieve its compelling government interest using the least restrictive means.[57] Therefore, the court allowed the dam's construction despite the Tribe's objections.[58]

Most recently and relevantly, a Native American Tribe challenged a pipeline's construction under a lake because it claimed the pipeline would substantially burden the religious exercise of its members.[59] The Tribe was distressed by the construction due to a religious belief that the pipeline may fulfill of a prophecy of a "Black Snake" that would cause destruction in their land.[60] The Tribe opposes more than a vague risk of an oil spill, it fears the "mere presence" of the oil pipeline will "contaminate the lake's waters and render them unsuitable for use in their religious practices."[61] The prophecy of a destructive Black Snake was not provoked by recent environmental concerns but had been a "long held" belief by the Tribe.[62] Although the court dismissed the Tribe's RFRA claims on procedural grounds, it went on to state that the Tribe would not succeed on the merits.[63] The court held that the Tribe would succeed in proving its sincere belief, but it would fail in its claim that the government's action poses a substantial burden on its religious exercise.[64] The court applied *Lyng,* holding that "the incidental effect on religious exercise of a government action undertaken in furtherance of the management and use of government land, even if extreme, is not alone enough to give rise to a Free Exercise claim."[65] *Standing Rock* demonstrates the consensus on Native American Tribal opposition to energy development: the opposition is unlikely to be

56. *Id.* at 1214; *see* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008).

57. Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207, 1214-15 (9th Cir. 2008).

58. *Id.* at 1219-20.

59. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77 at 85 (D.D.C. 2017).

60. *Id.* at 82.

61. *Id.* at 89.

62. *Id.* at 87-88.

63. *Id.* at 91-92.

64. *Id.*

65. *Id.* at 91.

successful even where government actions threatens an "extreme" incidental effect on religious exercise.

Courts often reuse the language from *Navajo Nation*. In *Apache Stronghold v. United States*, a Native American Tribe challenged a copper mine in an area of sacred religious ceremonial significance.[66] The government had conveyed a parcel of land to a natural resource development company for mineral exploration, even though the parcel contained Oak Flat, an area containing religious significance.[67] In opposition, the Tribe claimed that the resource development would "desecrate" the land and destroy its ability to practice its religion.[68] The sincerity of the Tribe's beliefs was not questioned, but the court held that the Tribe failed to prove its beliefs were substantially burdened.[69] The court leaned on language from *Navajo Nation* to point out that a substantial burden requires the Tribe to choose between their religious practice or a government benefit, or threatening criminal sanction unless a contrary act to their religion is performed.[70] In *Apache Stronghold*, the Tribe's claim failed because it could not satisfy the court's requirements of either form of coercive action, and it held the copper mine was merely an assertion of potential harm.[71]

B. Claims by Progressive Religious Groups

Even though Native American religious claims are at the forefront against energy development, progressive religious groups are not far behind. Progressive religious groups—defined for the purposes of this article as groups part of "a new wave of progressive activism guided by religious freedom" that seek "new ways to achieve political or social change under RFRA protections"[72]—assert anti-energy claims that take a different approach from Native American groups. Although courts apply a similar substantial burden analysis on RFRA claims, they have shown a willingness to question the sincerity of belief by progressive religious

66. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 603 (D. Ariz. 2021).

67. *Id.* at 597.

68. *Id.* at 596.

69. *Id.* at 607.

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

71. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 605 (D. Ariz. 2011).

72. *See* Colin Sheehan, The Pros and Cons of Empowering Religious Exemptions for Progressive Activism, 21 Rutgers J. L. & Religion 549, 551, 557 (2021).

groups when such beliefs are not based in religion.[73] Comparatively, courts have often been reluctant to critically analyze sincerity in Native American claims.[74] Instead, courts facing Native American claims usually interpret such religious beliefs as not sufficiently burdened enough to meet the high threshold which would force the government to find less restrictive means. On the other hand, in claims by progressive religious groups, courts are willing to assert that the religious burdens are insufficient, regardless of sincerity. In addition to these cases, progressive religious groups continue to assert claims against energy development, including construction of the Keystone XL pipeline that would transfer Canadian oil to the Gulf Coast,[75] and the Enbridge Line 3 pipeline, also a Canadian-based project.[76] The prominence of such cases demonstrates the longevity of this category of religious or environmental claims against energy development.

First, and most interestingly, the Third Circuit in *Adorers* decided a RFRA claim brought by a group of nuns who opposed an easement given for a natural gas pipeline through farmland they operated.[77] The group believed their religion compelled it to object to the pipeline that would run through the group's property.[78] It also claimed that it was its duty to preserve the environment from harmful or excessive use, and it asserted "that their intentional decision on how to use the land 'is an integral part of exercising their well-established and deeply-held religious beliefs as active and engaged stewards of God's earth.'"[79] The land had been used to sponsor a retirement community, it had been used for farming, and the group was compelled by their faith to use the land in a specific way that did

73. *See, e.g.*, United States v. Hoffman, 2018 WL 2464115 at *3 (D. Ariz. June 1, 2018).

74. *See* Melissa R. Johnson, Positive Vibration: An Examination of Incarcerated Rastafarian Free Exercise Claims, 34 New Eng. J. on Crim. & Civ. Confinement 391, 408 (2008) (Offering Native Americans as an example of a similar group that has not "had a particularly difficult time persuading state prison officials that their religious beliefs are sincerely held.").

75. Melissa Denchak & Courtney Lindwall, What is the Keystone XL Pipeline?, NRDC (Nov. 1, 2021), https://www.nrdc.org/stories/what-keystone-pipeline.

76. Karla Hovde, Faith spurs differing views on Line 3 pipeline, Minnesota Annual Conference of the United Methodist Church (Sept. 2, 2021), https://www.minnesotaumc.org/newsdetail/faith-spurs-differing-views-on-line-3-pipeline-15405055.

77. Adorers of the Blood of Christ v. Fed. Energy Regul. Comm'n, 897 F.3d 187, 191 (3d Cir. 2018).

78. *Id.* at 189.

79. *Id.* at 191 (citation omitted).

not include a natural gas pipeline.[80] The court decided the case against the nuns on procedural grounds; finding a lack of subject matter jurisdiction, it avoided a decision on the merits of the underlying RFRA claim.[81] Notably, the court did not question the nuns' religious sincerity, but it instead focused on the procedural defect.[82]

Despite different central focuses, other RFRA claims by progressive religious groups maintain a similar theme to those used in energy-based claims. In *United States v. Hoffman*, a group faced criminal charges for leaving food in the desert for undocumented border crossers.[83] The group did not attempt to get permits to access the wildlife refuge where the event occurred, and there was no denial because of a religious belief.[84] Initially, the magistrate judge rejected their RFRA defense because it was motivated more by politics and there were alternatives to fulfill their convictions.[85] However, the District Court reversed the magistrate judge's decision and held that their beliefs were religious, sincere, and the government did not demonstrate that its actions furthered a compelling interest.[86] The court used language from *Navajo Nation*, reasoning that the accepted sincere religious beliefs were valid, but there was no burden for the limited access to the wildlife refuge.[87] The group initially had their sincerity questioned, but instead the court decided to evaluate only the burden on their religious beliefs.[88]

Additionally, in *United States v. Kelly*, several members of a progressive religious group[89] were charged with trespass and depredation of government property after they broke into a naval installation holding

80. *Id*.

81. *Id*. at 196.

82. *Id.* at 187, footnote 10 ("nothing in this opinion should be construed to call into question the sincerity of the deeply-held religious beliefs expressed by the Adorers").

83. United States v. Hoffman, No. MJ-17-0339-TUC-BGM, 2018 WL 2464115 at *1 (D. Ariz. June 1, 2018)

84. *Id.* at *3.

85. *Id.*

86. United States v. Hoffman, 436 F. Supp. 3d 1272, 1289 (D. Ariz. 2020).

87. United States v. Hoffman, No. MJ-17-0339-TUC-BGM, 2018 WL 2464115 at *3 (D. Ariz. June 1, 2018). *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008).

88. *Id*. at *3.

89. *See* United States v. Kelly, No. 2:18-CR-22, 2019 WL 5077546 at *1 (S.D. Ga. Apr. 26, 2019), report and recommendation adopted, No. CR 2:18-022, 2019 WL 4017424 (S.D. Ga. Aug. 26, 2019). ("Defendants are members of the Plowshares Movement, a Christian protest and activism group opposed to nuclear weaponry.").

submarine missiles.[90] The government argued that those who broke into the installation lacked a sincere belief that their actions were "religious exercise."[91] In *Kelly*, the claimants argued that "rather than trust in God for safety and security, Defendants believe the United States has placed its faith in nuclear weapons."[92] Nonetheless, the court decided to not question the sincerity of their religious convictions, but it instead reasoned that the members' course of action—cutting the locks and fences to enter—was not the only way that their belief-compelled actions could be accomplished.[93] Specifically, the protesters failed to verify whether there was a valid less-restrictive means before they took action.[94] The Eleventh Circuit later took up the case and found no dispute to the fact "that the defendants were exercising sincerely held religious beliefs, the government substantially burdened the defendants' religious exercise, and the government has a compelling interest."[95] However, the Circuit concluded that "it would be impossible to achieve all of the government's compelling interests in the safety and security of the Kings Bay naval base, its base personnel, and its base assets, and also accommodate the defendants' destructive religious exercise in this case."[96] The government's "interest of the highest order" was too compelling to allow the free practice of their sincere religious beliefs.[97] Therefore, the Eleventh Circuit affirmed the defendants' convictions.[98]

IV. Analysis of Cases and Claims

A. The Need to Allow Sincere Native American Beliefs to be Practiced

Native American objections to resource development are sparsely established by case law, but they crop up where the government impairs a Native American group's longstanding practices such that the group's ability to freely exercise its religion is substantially burdened. Dissecting the beliefs of a religion is not only outside the purview of courts;[99]courts

90. *Id.* at *3.
91. *Id.* at *19.
92. *Id.* at *3.
93. Id. at *26.
94. Id. at *29.
95. United States v. Grady, 18 F.4th 1275, 1285 (11th Cir. 2021).
96. *Id.* at 1288.
97. *Id.*
98. *Id.* at 1295.
99. Thomas v. Rev. Bd. of Indiana Emp. Sec. Div., 450 U.S. 707, 715 (1981) ("Courts should not undertake to dissect religious beliefs.").

have repeatedly stated that such determinations are harmful and too far-reaching.[100] When both courts and outsiders attempt to dissect and understand Native American beliefs—which are often quite different than other religions and involve land and location in a central manner[101]—their ways of life and religious dedications can be severely altered.[102]

Thiry v. Carlson demonstrates the potential danger of caselaw hostile to valid religious liberty claims. In *Thiry*, the Tenth Circuit Court of Appeals dissected and interpreted the theology of the established Native American religion to justify its stance that the substantial burden was not substantial enough.[103] The Thirys "practice[d] many tenets of American Indian spirituality which includes . . . the sanctity of gravesites."[104] However, the government planned "condemnation action" and "construction of planned highway improvements" that required the Thirys to exhume, transport, and rebury their daughter.[105] In its analysis, the court stated that "[t]heir American Indian spirituality and Christian beliefs allow for the moving of gravesites when necessary."[106] Additionally, as the Thirys also adhered to Quakerism, the court pointed out that "a basic tenet of Quakerism is that God is within individuals and one particular location is no more or less sacred than another."[107] Indeed, the court delved into and determined what religious practices were most important for the Thirys despite a strong basis of caselaw that prohibits such analysis.[108] The court used this religious analysis to cast aside the Thirys' claim.[109]

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100. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) ("For good reason, we have repeatedly refused to take such a step."); Employment Div., Dep't of Hum. Res. Of Oregon v. Smith, 494 U.S. 872 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); Hernandez v. C.I.R., 490 U.S. 680 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.").

101. *See* Sarah B. Gordon, Indian Religious Freedom and Governmental Development of Public Lands, 94 L.J. 1447, 1448 (1985) ("Native American religions view gods, people, and nature as an integral whole.").

102. *Id.* at 1449 ("actual spiritual residence in . . . certain locations makes the destruction of an Indian sacred site a cataclysmic event").

103. Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996).

104. *Id.* at 1493.

105. *Id.* at 1494.

106. *Id.* at 1496.

107. *Id.* at 1495-96.

108. *See, supra*, Footnote 99.

109. Thiry v. Carlson, 78 F.3d 1491, 1496 (10th Cir. 1996).

Moreover, Congress has expressed that the religious practices of Native Americans ought to be defended. Specifically, the American Indian Religious Freedom Act (AIRFA) provides that "it 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 . . . including . . . the freedom to worship through ceremonials and traditional rites."[110] However, the statute itself does not create rights that Native American claimants can enforce against the government's encroachment on their free exercise of religion.[111] In *Lyng*, the Court discussed AIRFA, outlining how the bill's sponsor had explained that "the bill would not 'confer special religious rights on Indians,' would 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'"[112] In effect, AIRFA "merely requires that agencies consider" Native American religious values that conflict with federal agencies adopting certain land uses.[113] Additionally, it does not provide any more protection than that of the First Amendment.[114] Although AIRFA expresses the policy that Native American religious beliefs have value deserving of consideration, such consideration is shallow and does not effectively protect such beliefs.

Courts often minimize and trivialize Native American religious beliefs in the "substantial burden" cases. Such cases arise in an increasing number and crop up in developing areas, especially since much of their historic land—even land that holds immense longstanding, spiritual significance—is no longer under their ownership.[115] Compounding the issue, some courts have loosely applied the "substantial burden" standard due to no clear definition existing in RFRA or caselaw.[116] For example, in *Navajo Nation* the court concluded "that spraying up to 1.5 million gallons of treated sewage effluent per day on Humphrey's Peak, the most sacred of the San Francisco Peaks, does not impose a "substantial burden" on the Indians'

110. 42 U.S.C.A. § 1996 (West).

111. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 920 (1990) (Blackmun, J., dissenting).

112. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 455 (1988) (quoting 124 Cong. Rec. 21444 (1978)).

113. Spiritual practice-based protection, American Indian Law Deskbook § 3:18 (July 2021).

114. Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983).

115. *See* Spiritual practice-based protection, American Indian Law Deskbook § 3:18 (July 2021).

116. *See* Tiernan Kane, Right by Precedent, Wrong by RFRA: The "Substantial Burden" Inquiry in Oklevueha Native American Church of Hawaii, Inc. v. Lynch, 828 F.3d 1012 (9th Cir. 2016), 40 Harv. J. L. & Pub. Pol'y 793, 798 (2017).

'exercise of religion.'"[117] However, it was "clear that their religious beliefs and practice do not merely require the continued existence of certain plants and shrines. They require that these plants and shrines be spiritually pure, undesecrated by sewage effluent."[118] If the court was willing to acknowledge the fact that such acts were a sufficiently substantial burden to the constitutionally-protected free exercise of religion, the claim would have been successful. With the interpretation of a "substantial burden," courts advance an agenda that degrades Native American beliefs and culminates in the loss of sacred sites forever.

Courts can fix this and recognize valid religious objections of Native American groups without threatening the very framework of our society. Despite the government arguing that allowing success in such objections would lead to the inability of essential government interests to stand,[119] in reality many of these claims are land-based and only expand at the rate of further development into formerly undeveloped areas.[120] Moreover, government action has the potential to impair or destroy the "entire religious beliefs" of Native Americans.[121] Comparatively, progressive religious groups' claims are often philosophically compelled and merely implicate land as a byproduct,[122] and they usually don't involve land whatsoever.[123] As a result, the number of potential claims by progressive religious groups is endless.[124] Additionally, the need for recognition of

117. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 at 1096 (9th Cir. 2008) (Fletcher, C.J., dissenting).

118. *Id.* (Fletcher, C.J., dissenting).

119. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 888 (1992); U.S. v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996).

120. *See* Michelle Kay Albert, Obligations and Opportunities to Protect Native American Sacred Sites Located on Public Lands, 40 Colum. Hum. Rts. L. Rev. 479, 521 (2009) ("As the population of the West grows, urban sprawl spreads, wild places dwindle, and our need for natural resources accelerates, the pressure . . . to disregard or inadequately protect American Indian sacred sites will only grow.").

121. *Id*.

122. *See, e.g.*, Adorers of the Blood of Christ v. FERC, 897 F.3d 187, 190 (3d Cir. 2018) ("their deeply-held religious beliefs require that they care for the land"); United States v. Kelly, 2019 WL 5077546 at *21 (S.D. Ga. 2019) ("their actions attempting to 'reconsecrate' the land were, consequently, sacramental actions, in Defendants' view").

123. *See, e.g.*, United States v. Hoffman, 2018 WL 2464115 at *3 (D. Ariz. 2018) ("they have a moral, ethical, and spiritual belief to assist humans in need of basic necessities").

124. *See* Colin Sheehan, The Pros and Cons of Empowering Religious Exemptions for Progressive Activism, 21 Rutgers J. L. & Religion 549, 557 (2021) ("As more courts recognize the legitimacy of a RFRA defense for progressive causes, activists can look for new ways to achieve political and social change under RFRA protections.").

Native American claims can be accommodated without making government ineffective in accomplishing its goals and taking large swaths of land from its control. In *Lyng*, the Court was concerned with the Native American religious objection to timber harvesting in a sacred forest, but it reasoned that "[n]o disrespect for these practices is implied when one notes that such beliefs could easily require de facto beneficial ownership of some rather spacious tracts of public property."[125] The district court's order prevented timber harvesting and road construction on more than 17,000 acres of land.[126] Conversely, granting a religious objection would not require the entire 17,000 acres if the government focused on the claim itself and not on some hypothetical worst-case scenario created to justify its decisions.

However, a sort of middle ground should be pursued to ensure that a religious objection by a Native American tribe is not completely ignored for want of a more serious religious burden. More consideration of Native American religious claims, while analyzing and giving a baseline look at sincerity and roots in longstanding religious beliefs and traditions, along with a tighter matching of the government's actions to the burden caused, may indeed lead to a more beneficial outcome. For example, in *Lyng* the Court could have allowed a smaller-scale intrusion on the Native American religion while protecting large, less important swaths of the forest. Such a compromise would not be "courting anarchy" by granting exemptions to all laws.[127] Nor would it send the United States down a "slippery slope" that would lead to the creation of a religious belief for the purposes of bypassing a law.[128]

B. Why Claims Have Failed

Religious objections to energy development continuously fail for a number of reasons. First, claimants who assert a religious objection are rarely subject to a sufficiently "substantial burden" in the current RFRA framework. Second, Native American groups asserting religious claims usually do not have property rights to the land where the government action takes place, negatively affecting the importance that the government will give to their claims. Third, progressive religious groups deter the courts' use of a more solid framework in essential claims because they compel courts to continue a trend of disregarding longstanding claims.

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125. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).
126. *Id.*
127. *See* Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 888 (1992).
128. *See* U.S. v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996).

First, due to the current definition of a substantial burden under the RFRA framework, the courts disregard many objections to energy development. There is no definite framework in RFRA for establishing what a substantial burden is either in its text or as defined by the Supreme Court.[129] In fact, even in *Standing Rock*, the D.C. District Court used pre-RFRA caselaw to determine which substantial burden standard to use, holding that the standard was not met.[130] The standard used in *Lyng* is almost impossible to meet; however, even the Supreme Court stated that the Government's actions "could have devastating effects on traditional Indian religious practices."[131] Nevertheless, the Court in *Lyng* refused to acknowledge that the longstanding and "extremely grave" effects justified a halt to the government's construction of a road through a forest used for religious purposes. Instead, it brushed the effects aside, agonizing that the "government simply could not operate if it were required to satisfy every citizen's religious needs and desires."[132] Under the current framework, if asserting the diminishment of a Native American's ability to practice his religious beliefs, courts look to an almost unreachable standard that makes such claims very unlikely to succeed from the outset. The key factor of why the Court used its chosen reasoning is the fact that the land was not owned by the Tribe, and their "rights do not divest the Government of its right to use what is, after all, its land."[133] The certainty and unyielding reasoning in *Lyng* makes Native American assertions of religious objections unsuccessful, even where it shows a "substantial burden" on its free exercise of religion.

Second, a key reason why religious objections to energy development often fail is because real property rights are rarely demonstrated or asserted in Native American religious claims. Numerous cases have favorable results for the government largely because the land in question was not owned by the Native American tribe. First, in *Standing Rock*, the land in question was merely near the Tribe's reservation.[134] Second, *Navajo Nation* involved a claim on federally-owned land operated under a permit by the

129. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77, 91 (D.D.C. 2017).

130. *Id.* at 93.

131. Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988).

132. *Id.* at 451-52.

133. *Id.* at 453.

134. Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77, 80 (D.D.C. 2017).

U.S. Forest Service and used by a commercial ski resort.[135] Third, in *Slockish*, a sacred site containing burial grounds was threatened, but the land was federally owned and operated by the Bureau of Land Management.[136] Fourth, *Lyng* dealt with a license to harvest timber on land owned by the government and the associated effects on a burial ground.[137] Fifth, in *Apache Stronghold*, a Native American group claimed that a land conveyance from the government to mining companies violated an 1852 Treaty, but the property was held to not have any duty assigned to it as claimed, therefore absolving the group from any effective property rights.[138] Sixth, in *Snoqualmie Indian Tribe*, although there was a claim that a waterfall was affected and was under different regulations because it was a "Traditional Cultural Property", the real location creating the effect was a hydroelectric dam, and the Native American Tribe did not possess any property interest.[139] None of these cases involve any valid claims of property interest; without such an interest, courts are likely to look down upon these claims. A sufficiently substantial burden in most courts requires claimants to either be coerced to "act contrary to their religious beliefs" or the conditioning of "a government benefit upon conduct that would violate their religious beliefs."[140] However, there is a hidden requirement. When there is no real property right at issue in the claim, the government and courts are less understanding of what is really at stake for the Native American religious adherents.

For contrast, *Thiry* is an example of a court faced with a Native American claim that involved a valid property interest.[141] But even satisfaction of the hidden element is not determinative. Despite the presence of valid property rights, the Tenth Circuit instead chose to reason that the family could move the affected grave and that their religion allowed such an act, taking a theological argument and stance from "American Indian spirituality and Christian beliefs."[142] However, *Thiry* is distinguishable on a

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

136. Slockish v. United States Fed. Highway Admin., No. 3:08-CV-01169-YY, 2018 WL 4523135 at *5 (D. Or. Mar. 2, 2018), report and recommendation adopted, No. 3:08-CV-01169-YY, 2018 WL 2875896 (D. Or. June 11, 2018).

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

138. Apache Stronghold v. United States, 519 F. Supp. 3d 591, 600 (D. Ariz. 2021).

139. Snoqualmie Indian Tribe v. F.E.R.C., 545 F.3d 1207 (9th Cir. 2008).

140. Navajo Nation v. U.S. Forest Service, 535 F.3d 1058, 1067 (9th Cir. 2008).

141. Thiry v. Carlson, 78 F.3d 1491, 1495 (10th Cir. 1996).

142. *Id.* at 1496.

couple of key points. First, the claim involved a family, not a Tribe.[143] Second, the Thirys "testified that they will still continue their religious beliefs and practices even if the condemnation proceeds as planned."[144] Therefore, despite dangerously delving into the theological aspects of their beliefs, the court determined that the government action imposed no substantial burden on their beliefs and did not violate RFRA.[145]

Lastly, the influx of claims by progressive religious groups lessen the chance that Native American claims will succeed; they are given the same analysis and have related caselaw in such a way that if one fails, they both fail. Different than claims by Native American Tribes, progressive religious groups' religious objections are generally more strategically planned, making judicial changes to the current standard unlikely due to the threats imposed on governmental action. In *Adorers*, the affected group argued that the government's permission for a pipeline to be built through its land violated its property rights and affected its ability to practice their deeply held beliefs.[146] However, although the court did not decide the merits of the RFRA claim due to a procedural defect, related caselaw hints that the court will deny such a claim.[147] Similar claims will ultimately fail under the established substantial burden test, which focuses on whether members are sanctioned for exercising their religious beliefs or making them choose between receiving a government benefit or their religious exercise.[148]

As demonstrated by these cases, courts are reluctant to find substantial burdens when the government allows the development of natural resources.[149] Nonetheless, because Native American and progressive religious claims are lumped together in cases such as the Dakota Access Pipeline, their outcomes are likely to be hand-in-hand with each other. In reality, Native American claims are more likely to be firmly rooted in sincere religious beliefs than those claimed by progressive religious groups. These claims do not merely flow with the political winds; rather, they are

143. *Id.* at 1493.

144. *Id.* at 1495.

145. *Id.* at 1496.

146. Adorers of the Blood of Christ v. Fed. Energy Regul. Comm'n, 897 F.3d 187, 190 (3d Cir. 2018).

147. *See* United States v. Hoffman, No. MJ-17-0339-TUC-BGM, 2018 WL 2464115 at *3 (D. Ariz. June 1, 2018) (citing United States v. Christie, 825 F.3d 1048, 1056 (9th Cir. 2016)).

148. *See* Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F. Supp. 3d 77, 91 (D.D.C. 2017).

149. *See, e.g.*, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 at 1069-70 (9th Cir. 2008).

longstanding and often originating from time immemorial.[150] Due to the links binding these two groups, courts are rarely able to distinguish between them because they fail to genuinely analyze sincerity. Additionally, when these groups are linked together, courts do a disservice to the drastically different natures of the claims—historic and sincere versus recent and politically-infused. For example, in *Yoder* the Court distinguished between beliefs that are "philosophical and personal rather than religious."[151] If a court was to distinguish between beliefs and evaluate whether a claim was rooted in religion, a claim by a Native American Tribe such as in *Standing Rock* should be more likely to succeed than its counterpart claimed by a progressive religious group. Cementing this important distinction would lead to a more accurate analysis of the real value of the belief and immense burden placed on Native American religion when resource development drastically affects their religious beliefs.

Further, accepting some claims would not manifest the crippling concerns laid out in *Smith*: that having too loose of a substantial burden test "would open the prospect of constitutionally required religious objections from civic obligations of almost every conceivable kind."[152] However, the Court laid out the types of cases it was concerned with: military service, taxes, manslaughter and child neglect laws, vaccination, drug laws, traffic laws, social welfare, child labor, animal cruelty, the environment, and racial discrimination.[153] Clearly, none of these involve a Native American group protecting its ability to practice its religious beliefs against the government permitting resource development. Additionally, because of the longstanding nature of many Native American beliefs, there is even less of a risk that the belief would be "draping religious garb over [political or philosophical] activity."[154]

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150. *Compare* United States v. Kelly, 2019 WL 5077546 at *7 (S.D. Ga. 2019) (Defendants being compelled largely by "Pope Francis's 2017 statement in which he condemned the very possession of nuclear weapons.") with Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 239 F.Supp. 3d 77, 87-88 (D.D.C. 2017) ("the pipeline was the realization of a long-held prophecy about a Black Snake").

151. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

152. Emp. Div., Dep't of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 888 (1990).

153. *Id.* at 888-89.

154. *See* United States v. Hoffman, No. MJ-17-0339-TUC-BGM, 2018 WL 2464115 at *3 (D. Ariz. June 1, 2018) (citing United States v. Christie, 825 F.3d 1048, 1056 (9th Cir. 2016)).

C. Sincerity Analysis

Courts hesitate to question religious sincerity. Indeed, this practice is proper due to the danger of courts attempting to dissect religious doctrine; courts have no place in determining the validity of certain religious beliefs. However, there is still a level of sincerity that is basic to any court applying First Amendment and RFRA protections, which should be applied to the differentiation of progressive religious claims and Native American claims. Longstanding, deeply-rooted beliefs in Native American groups are plentiful; such beliefs are sparse in progressive religious groups.[155] In *Yoder*, the Court looked at sincerity and stated that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation . . . if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief."[156] Courts have indeed meddled with the sincerity of progressive religious groups, pointing to their purely political motivation and "simple recitation" of a proclaimed belief.[157] This simple act of applying a more honest look at sincerity would lead to the possibility that Native American claims can accurately be differentiated from those made by progressive religious groups.

Moreover, despite many courts' general hesitation to question sincerity, they do offer up questions for progressive religious groups.[158] Such a questioning is not coincidental; it is a symptom of the inherent nature of such beliefs that muddle the line between genuine and purely political. However, courts are not certain how or where to draw the line at this time. Some have refused to even consider sincerity if a belief is merely claimed by supposed religious adherents.[159] Others have drawn the line at the clear fact that a belief is a "simple recitation" implicated to invoke religion as a legal safeguard.[160] Clarity is needed, however, as sincere beliefs deserve sincere protection.

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155. *See, supra*, Footnote 149.

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

157. United States v. Hoffman, 2018 WL 2464115 at *3 (D. Ariz. 2018).

158. *See, e.g.* United States v. Hoffman, 2018 WL 2464115 at *2-3 (D. Ariz. 2018) (analyzing whether claims by progressive religious group was "actually religious in nature (rather than philosophical or political)").

159. *See, e.g.* United States v. Kelly, 2019 WL 5077546 at *22 (S.D. Ga. 2019) (the court having "no doubt" that defendants "sincerely" holds religious beliefs that "nuclear weapons and the United States Government's possession of such weapons are not simply undesirable but are fundamentally evil and sinful").

160. *See* United Stated v. Hoffman, 2018 WL 2464115 at *3 (D. Ariz. 2018).

IV. Future Developments

A. The Not-So-Longstanding Caselaw Affecting Relevant Claims

The caselaw surrounding the free exercise of religion is seeing developments that may strengthen protections for sincere religious practices. Two cases may change the nature of the law surrounding the Free Exercise Clause: *Fulton v. City of Philadelphia*,[161] and *Kennedy v. Bremerton School District*.[162] First, *Fulton* may have been part of a general signal that the "newly reconstituted Roberts Court moved to the right in the 2020-2021 term."[163] The Supreme Court in *Fulton* held that Philadelphia substantially burdened a Catholic adoption agency's religious exercise by making it violate its religious beliefs in order to receive the government's cooperation.[164] Additionally, the Court heard an important case in *Kennedy v. Bremerton School District*.[165] *Kennedy* concerned a public high school football coach who desired to pray on the field after games.[166] The case at first did not fare well for the coach, as the Ninth Circuit held that the coach "spoke as a public employee when he kneeled and prayed."[167] However, the Court held that the coach had a right to pray, and it overturned the *Lemon* doctrine.[168] These influential cases may signal that the Court is willing to overturn *Smith*, changing the nature of the law surrounding the Free Exercise Clause. If such a change occurs, there may indeed be new opportunities for Native American claims to succeed with something other than the substantial burden test being applied.

B. How Developments Will Affect the Future and These Cases

An overturning of *Employment Division v. Smith* may render RFRA meaningless if it results in a stronger framework outlining the free exercise of religion. A changed nature of the substantial burden test and analysis could drastically alter the way religious objections to resource development could be approached. However, there will likely be a continued hesitance of courts to allow the success of religious objections to resource development.

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161. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868 (2021).
162. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022).
163. Amy Howe, Looking Ahead: A Post-Covid Return-and A Shift to the Right?, Cato Sup. Ct. Rev., 2020-2021 at 263 (2021).
164. Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1876 (2021).
165. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
166. Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017).
167. *Id.* at 831.
168. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427-28 (2022)

Indeed, relevant cases occurred before *Smith* and the implementation of RFRA.[169] Nevertheless, the long-term solution to potential changes in the nature of religious liberty caselaw should be accompanied with courts' willingness to ensure the base-level of sincerity is met in religious objections to resource development. When claims implicate governmental action and harm is a byproduct of such action, it is improper to ignore the claim and reason that no government action could occur if such objections were granted. Therefore, despite the potential for change in the law, courts' adoption of a base-level sincerity analysis and related understanding of the inherent property interest in Native American claims will lead to more consistent and rational outcomes.

C. The Implications of Progressive Religious Claims on Religious Liberty

As stated, claims by progressive religious groups negatively affect the ability of Native American claims to succeed. Progressive religious claims lack the required level of sincerity that has shaped and worsened the caselaw available to Native American claimants. These holdings enshrine longstanding negative implications on the success of future religious objections.

Progressive religious groups assert claims that are often too closely created in response to political events to convincingly establish the basic threshold of sincerity. In *Adorers*, after a pipeline's path was determined to cross over the land of a progressive religious group of nuns, the nuns built a chapel on their land "as an expression of protest against the taking of their land."[170] Indeed, the group built the chapel after eminent domain legal proceedings had already begun.[171] To evaluate similar cases, courts should employ similar language as in *Yoder* and *Meyers* and take into account the durability of the alleged religious belief and whether such a belief is rooted in a bona fide religion. Although there are other Catholic orders that have some sort of land ethic,[172] there still needs to be a sincere religious belief rooted in a bona fide religion in order to qualify; most claims by progressive religious groups, including the Adorers, should fail on at least one of those requirements. They are either so inherently rooted and

169. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

170. Adorers of the Blood of Christ, Adorers: Latest Pipeline Ruling a Disappointment (Sept. 30, 2021), https://adorers.org/adorers-latest-pipeline-ruling-a-disappointment/.

171. *Id*.

172. Diana Stanley, Prayers and Pipelines: RFRA's Possible Role in Environmental Litigation, 30 B.U. Pub. Int. L.J. 89, 111 (2021).

motivated by something other than a bona fide religion,[173] or are simply insincere and more politically motivated or compelled.[174] Instead, in *Adorers*, the court did not determine whether the nuns met the basic threshold of sincerity to qualify as a bona fide religion.[175] However, in this case, it is one of a lack of sincerity rooted in a bona fide religion, and the court should have used its established analysis instead of avoiding the question on procedural grounds.

Cases involving a religious claim that is spontaneous or evidently more of a philosophical or political motivation should be evaluated using similar considerations as the Court considered in *Yoder*. For example, in *Yoder*, the Court stated that the Amish's traditional way of life was "not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living."[176] But the Court did not stop there, further stating that a "philosophical and personal rather than religious" belief does not meet the requirements of the Religion Clauses of the First Amendment.[177] In the case of a claim asserted by a progressive religious group like the anti-submarine protesters in *Kelly*, courts should focus on whether the actions are genuinely rooted in a religious belief or are more philosophical or political than in a genuinely sincere religious belief.[178] Additionally, courts could be more willing to look at the base-level sincerity of a group when their own stated goal for their supposed religious action is to protest against the government on a purely secular activist claim.[179] Despite the difficulty in parsing out sincere from insincere beliefs,[180] it is essential to an even-handed approach of Native American religious claims.

Similarly, courts could follow along the lines of *Meyers* to determine whether beliefs stem from a bona fide religion. The court in *Meyers* recognized the sincerity of a "Church of Marijuana" member, but it also

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173. *See* United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996) (distinguishing between beliefs that sincerely held and burdened and beliefs that are sincerely held and religious "rather than a philosophy or way of life").

174. *See* United States v. Hoffman, No. MJ-17-0339-TUC-BGM, 2018 WL 2464115 at *3 (D. Ariz. June 1, 2018).

175. *See* Adorers of the Blood of Christ v. Fed. Energy Regul. Comm'n, 897 F.3d 187, 197 (3d Cir. 2018) (footnote 10).

176. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972).

177. *Id.*

178. *See* United States v. Kelly, 2019 WL 5077546 at *20 (S.D. Ga. 2019).

179. *See, Supra*, Note 168.

180. *See* Yellowbear v. Lampert, 741 F.3d 48, 54 (10th Cir. 2014) ("trying to separate the sacred from the secular can be a tricky business").

stated that it "cannot rely on his sincerity to conclude that his beliefs rise to the level of a 'religion' and therefore trigger RFRA's protections."[181] As stated, courts will consider ultimate ideas, metaphysical beliefs, a moral or ethical system, the comprehensiveness of beliefs, and accoutrements of religion to determine whether or not the claimed beliefs are actually religious.[182] If courts were willing to apply this analysis to beliefs that are spontaneous and instituted in direct reaction to a purely political sentiment, many objections would be weeded out from those that deserve accommodation.

D. The Path Forward for Courts

In future Free Exercise decisions, the Supreme Court needs to settle the question of religious objections to resource development. Otherwise, the ever-increasing influx of challenges will condemn valid and sincere religious beliefs by Native Americans with no real alternatives. A test should differentiate between claims of governmental intrusion on religious acts and those that involve proactive, politically charged actions that did not exist before such resource development existed or was proposed.

A test that may solve this dilemma—finding the way of how to allow sincere Native American claims and disallow void claims by progressive religious groups—should be the application of a basic look at sincerity to determine whether the religion is bona fide, and to give more weight to land-based Native American claims. In effect, the Court should establish a consideration of sincerity stemming from *Yoder* to parse out and distinguish Native American claims from those of progressive religious groups. In *Yoder*, the Court analyzed the history of the Amish as an "identifiable religious sect" and reasoned that it has "demonstrated the sincerity of their religious beliefs."[183] This same analysis may provide helpful instruction for future claims against energy development. In the case that a Native American tribe may claim a religious assertion on a longstanding area or practice, courts may look at factors including whether the belief is longstanding, the religion is bona fide, and the claim is not asserted purely for philosophical reasons. The sincerity of the Amish beliefs in *Yoder* is similar enough to Native American beliefs that courts should also be able to look toward a longstanding, genuine, and demonstrated religious belief and

181. United States v. Meyers, 906 F. Supp. 1494, 1508 (D. Wyo. 1995), aff'd, 95 F.3d 1475 (10th Cir. 1996).

182. United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996).

183. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972).

require government infringement on the beliefs to be the least restrictive means—or prevent infringement altogether.

V. Conclusion

Seeking to protect their religion from resource development, and pleading for First Amendment and RFRA protections, Native American groups have been passed over. Despite the sincerity of their claims, courts consistently hold that Native American objections lack a substantial burden sufficient to trigger strict scrutiny and limit the government's actions to the least restrictive means for a compelling interest. Additionally, courts wrongfully apply a similar analysis to evaluate the claims of progressive religious groups in their objections against energy development. However, courts ought not evaluate these claims too simply; doing so does not accurately account for a genuine sincerity in such objections. The growing number of claims and affected groups demands a different approach. Courts should determine whether or not the religion is bona fide in order to allow Native American tribes to have a chance at successfully claiming a religious objection to energy development. Holding that all objections are sincere—without a bona fide determination and look at whether or not the practice is motivated by purely political or philosophical reasons—leaves Native American groups with an inability to distinguish their beliefs from progressives. To uphold the Constitution's promised protections, courts must consider the nature of Native American religion—that which holds property very differently than Western ideals—and apply its understanding to the substantial burden analysis in order to accurately determine whether religious objections should succeed. Without change, Native American groups will sink with progressive religious groups; Native American claims will continue to fall victim to government overreach because their claims will be called "burdened," but not burdened enough.