

WINNER, BEST APPELLATE BRIEF IN THE 2022 NATIVE AMERICAN LAW STUDENT ASSOCIATION MOOT COURT COMPETITION*

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Questions Presented

1. Whether, through general reference to the existence of Native peoples in the Greening of America Act, Congress expressed its “clear intent” to terminate its solemn treaty promises to the sovereign Winomee Nation?
2. Whether the Greening of America’s Act’s transfer of title to and planned destruction of the Winomee Nation’s most sacred mountain substantially burdened the Winomee’s free exercise rights as protected by the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA)?

Statement of the Case

I. Statement of the Facts

This case is about whether Congress intended to abrogate its promises to a sovereign nation when it later passed generally formulated legislation, and whether the Religious Freedom Restoration Act protects religions against their complete elimination by statute.

For hundreds of years, the Winomee have lived in the valley bounded by the Dry and Evergreen Mountains and cradled by the Rivers North and South. Treaty of Winomee of 1852, Oct. 4, 1852, R. at 16. Casting a shadow across the River North and into this valley is Winomee Mountain, where the Winomee have worshipped for hundreds of years. R. at 4. For the Winomee

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people, Winomee Mountain is the “dwelling place of the Creator’s messengers” and “generates a direct connection between the Creator’s spirit and the Winomee people.” *Id.* at 4. Winomee Mountain is at the center of their religious practice, for it is the “eternal home of their sacred religious ceremonies and a historic place of worship.” *Id.* at 5. The entirety of the mountain is sacred to the Winomee: “the grounds, plants, and waters of Winomee Mountain are imbued with unique spiritual significance.” *Id.* at 5. The Winomee only have one sacred mountain and, per a practitioner, “it is the only place where we can conduct our annual ceremony.” Testimony of Albert Smith, *Id.* at 6.

In the mid-nineteenth century, as the United States began to encroach on their sacred territory, the Winomee Nation entered into treaty negotiations with Congress. The two nations emerged with the Treaty of Winomee of 1852, a treaty of “peace and friendship.” Oct. 4, 1852, R. at 16. The Winomee retained title to their lands bounded by the River North, the River South, the Dry Mountains, and the Evergreen Mountains, in what is now the State of Wolf. *Id.* In exchange, the Winomee ceded title to all lands north of the River North, including Winomee Mountain in what is now the Fillmore National Forest, to the United States. *Id.* However, the Winomee reserved rights to use the ceded lands “for all Indian purposes, including but not limited to hunting, gathering, and seasonal visits.” *Id.* The Winomee understood these rights to encompass the rights to continue practicing their annual ceremony. The Winomee so believed in the word of the United States, that they entrusted the title of their most holy mountain to it on the back of a promise: that the United States would continue to allow them to practice their singular annual ceremony at their most sacred site. *Id.* Satisfied with this bargain, Congress ratified the treaty in 1852. *Id.*

After signing the treaty, the Winomee Nation has continued to worship at Winomee Mountain as it is their “religion’s holy site.” R. at 5; Testimony of Albert Smith, R. at 6. The United States has guaranteed the Winomee access since 1852, even as it passed into new management as part of the Fillmore National Forest. R. at 5.

Now, a century and a half later, interested in chasing the tail of the latest energy boom, the United States threatens to renege on its promise via the Greening of America Act, vaguely worded legislation that is effectively a “private land deal.” *Id.* at 6. The few rights the Winomee reserved on those lands now stand in the way of the United States’ vaguely defined interests in the “economy” and the “environment.” *Id.* at 13 (citing The Greening of America Act, 16 U.S.C. §§ 888(a) (2015), R. at 17); R. at 5 (“Lithium is the future of this great nation.”) (quoting Statement of Senator McLean to United

States Senate, October 8, 2015). The Greening of America Act proposes to transfer 1,000 acres of public land in the Fillmore National Forest, including Winomee Mountain, to Lithium for Life, a private joint venture of Operation America, a British mining company from London, and Exploration America, an Australia mining company from Melbourne. 16 U.S.C. §§ 888(b)-(c), R. at 17. In return, the government will receive no lease payments or additional benefit, merely 1000 acres of non-federal land at the market rate. *Id.* §§ (c)-(d), R. at 17-18. Following the land transfer, Lithium for Life plans to construct a mine underneath Winomee Mountain. *Id.* § (f), R. at 18.

The mine will destroy Winomee Mountain and the Winomee religion. On this, the government and the Winomee agree. The Federal Environmental Impact Statement (FEIS) is unambiguous: the mine will “turn[] [Winomee Mountain] into a crater” with “a pile of dust next to it.” FEIS at 1, R. at 5. The FEIS goes further, noting the impact will be “immediate, permanent, and large in scale” and that the Winomee will experience “indescribable hardship.” FEIS at 1-2, R. at 5.

The Winomee people know this to be true. As Cross RedDeer, a Winomee religious practitioner, testified, “We believe that the Winomee religion will end if Winomee Mountain is turned into a mine and the Winomee people are prevented from visiting it.” Testimony of Cross RedDeer, R. at 6. As the Winomee have a singular annual ceremony that can only be practiced at Winomee Mountain, the Mountain’s destruction will end all future Winomee religious practice.

As consolation, the Greening of America Act has permitted the Winomee Nation no special consideration; rather, along with any other member of the public, the Winomee can access the parking lot for Winomee Mountain. Even this right is conditional. Lithium for Life can limit the right for “safety reasons” at its discretion. 16 U.S.C. § 888(i), R. at 18.

The Greening of America Act makes no specific reference to the Winomee. The Act does not even acknowledge the Tribe nor the Treaty of 1852, nor does it take into account any of the history and culture surrounding Winomee Mountain. Within its text, it lumps Indian Tribes together with the general “members of the public.” *Id.* (i), R. at 17. Further, while it requires “consultation” with “affected” Tribes, it makes no reference to who those tribes are or what the consultation would entail. *Id.* (c)(2), R. at 17. The government has provided no legislative history indicating a discussion of Winomee interests. The Greening of America Act is similarly vague about the government’s interest, including only a single sentence stating a general interest in developing lithium deposits for use in battery-powered electric cars. *Id.* (a), R. at 17.

II. Statement of the Proceedings

Following the passage of the Greening of America Act, the Winomee Nation filed a complaint in United States District Court for the District of Wolf seeking declaratory and injunctive relief to prevent the transfer of their holiest site, Winomee Mountain, to the foreign corporation Lithium for Life. The Winomee first argued that the transfer violated the Treaty of Winomee of 1852. Further, the Winomee also argued the destruction of their religion substantially burdened their free exercise and sought relief on behalf of their members under the Religious Freedom Restoration Act (RFRA) and as a treaty rights holder under the Religious Land Use and Institutionalized Persons Act (RLUIPA).

The District Court sided with the Winomee on all of their claims. The District Court found that Congress had not expressed its “clear intent” to abrogate the Treaty of Winomee of 1852. R. at 10. Drawing on the extensive precedent of courts holding Congress to a high standard in evincing its intent to abrogate a treaty, the Court found that the language in the Greening of America Act was insufficient. R. at 10 (citing *Herrera v. Wyoming*, 139 S. Ct. 1686, 1698 (2019); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993)). Specifically, the Greening of America Act did not “expressly reference the Winomee Indian Nation, its treaty, or any treaty.” R. at 10. A solitary reference to consultation, in the eyes of the Court, did not “express any intent to abrogate treaty rights.” *Id.*

The District Court also rightly found that the Winomee Nation’s free exercise was substantially burdened by the destruction of, and termination of access to, their holiest site. R. at 6. The Court rejected the overly restrictive approaches of other circuits and relied on the plain meaning and intent of RFRA to find that the Greening of America Act was a “substantial burden” under RFRA and did not meet strict scrutiny. The District Court first distinguished the Supreme Court case *Lyng v. Northwest Indian Cemetery Protective Association*, where logging roads were to be built in a sacred area, because the Forest Service was actually able to avoid sacred sites in its routing and the most of the land was to be protected by the California Wilderness Act, unlike the Greening of America Act, which makes no accommodations for the Winomee. 485 U.S. 439; R. at 6-7. The Court also distinguished the Ninth Circuit case *Navajo Nation v. United States Forest Service*, where sewage effluent was to be used on a sacred peak, because the Navajo were allowed to continue accessing the peak for their practice, unlike the Winomee. 535 F.3d 1058 (9th Cir. 2008); R. at 7-8.

The Court found that the government's reliance on the Ninth Circuit's "substantial burden" test and its hyper-focused approach on two old free exercise cases, *Sherbert* and *Yoder*, made little sense for a sweeping act like RFRA. R. at 9 (citing *Sherbert v. Verner*, 374 U.S. 393 (1963)) (imposing fines on Amish parents who refused, for religious reasons, to comply with a public school mandate for their children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (withholding unemployment benefits to a Seventh-Day Adventist who refused to work on the Sabbath)). Instead, the Court turned to the "substantial impacts" test of the 10th Circuit to define "substantial burden." R. at 8 (citing *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014); *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621, at *2, *17 (W.D. Okla. Sept. 23, 2008)). The Court found their use of such a test was justified by the international consensus and law on the rights of Indigenous Peoples. R. at 9 (citing G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007)).

Finally, the District Court found that the Greening of America Act violated RLUIPA. Because the Treaty of Winomee of 1852 was a property right held by the Winomee, the Greening of America Act's transformation of Winomee Mountain into a mine is a land use regulation that "substantially burdens" Winomee religious practice. The Court tied this case to *Northern Cheyenne v. Martinez*, where Tribal plaintiffs successfully received a preliminary injunction against a federally-constructed shooting range near parcels of their land, arguing it would violate their religious practice at nearby Bear Butte. R. at 11 (citing Plaintiff's Third Amended Complaint for Preliminary and Permanent Injunction, *N. Cheyenne Tribe v. Martinez*, No. Civ. 03-5019 (D.S.D. May 23, 2003)).

After finding substantial burdens in both the RFRA and RLUIPA contexts, the Court found that the Greening of America Act failed strict scrutiny in both cases. The government failed to make any showing of compelling interest or least restrictive means. R. at 6 ("The government chose not to make such a showing."); R. at 11 ("The Government has not attempted to justify [the substantial burden].").

The government appealed the ruling to the Thirteenth Circuit, and in a split opinion, the Court of Appeals narrowly reversed the District Court's ruling. R. at 13. Judge Catcher dissented, affirming the reasoning of the District Court, and stressing that "religious freedom must be available to all citizens, including American Indians." R. at 15.

Declining to hold Congress to its promises, Judge Rea's majority opinion instead found that through vague reference to "Indian tribes" in the Greening of America Act, Congress abrogated the Treaty of Winomee of 1852. R. at

14. The Court likened this case to *United States v. Dion*, which found the Eagle Protection Act terminated Indian treaty rights, despite the difference between the complex and considered statutory scheme in *Dion* and the two vague references to “Indian tribes” in the Greening of America Act. 476 U.S. 734 (1986); 16 U.S.C. § 888 (c)(2), (i).

Further, the Thirteenth Circuit found that the destruction of the entire Winomee religion did not violate RFRA. The Court did not doubt the sincerity of the Winomee’s religious practice. Rather, the Court found that RFRA’s protections were not triggered, because the destruction of Winomee Mountain for a lithium mine would not impose a fine or withhold a benefit. R. at 14 (citing *Navajo Nation*, 535 F.3d 1058).

Finally, instead of resolving the RLUIPA claims before terminating the Winomee’s treaty rights, the Thirteenth Circuit found the Greening of America Act eliminated the Winomee’s interest in the land such that no property interest remained to sustain the RLUIPA claim. The Court did not dispute the District Court’s finding that, were the Winomee to have a property interest, the Greening of America Act would violate RLUIPA.

Summary of the Argument

Congress did not abrogate the Treaty of Winomee of 1852 with the Greening of America Act. To abrogate the Treaty, Congress must have “clearly expressed its intent to do so.” *Mille Lacs*, 526 U.S. at 202. Courts require that Congress must have explicitly abrogated the treaty or implied its intent through either detailed legislative history or a carefully considered statutory scheme. *Id.* Congress has not met that burden. The Greening of America Act did not mention the Winomee Nation, nor did Congress mention the Treaty, nor did Congress’ actions implicitly suggest awareness of either. R. at 10. The Government has not produced any legislative history that gives a scintilla of evidence that Congress ever thought about the existence of the Treaty while drafting the Act, to say nothing of Congress’ heavier burden to produce “clear evidence” of abrogation. *Mille Lacs*, 526 U.S. at 202; R. at 10.

The Thirteenth Circuit erred by claiming that a mere general reference to “Indian tribes” was sufficient to find implied abrogation as this Court did in *United States v. Dion*. 476 U.S. at 739; R. at 14-15. The Court inaccurately compares the Act’s vague reference to “Indian tribes” to Congress’s deep analysis when passing the treaty-abrogating Bald Eagle Protection Act at play in *Dion*, including taking testimony from high officials and issuing their own statements connecting their decision to ban directly to the practice. R. at

14; 476 U.S. at 741-742. Mere references to the potential that tribes may be affected is certainly not “clear and reliable evidence” that the Congress of the United States is abrogating a treaty. Further, the single consultation requirement fails to match the complex statutory scheme of exemptions and carve-outs present in *Dion*.

The government does not dispute that if the Treaty was never abrogated, then Congress lacks the power to transfer Winomee Mountain for the purposes of lithium mining, as the Treaty explicitly protects the land for “all Indian purposes” including religious activity.

Even if this court does not find that the Treaty was abrogated, the Act still violates RFRA, because it would prohibit Winomee religious practice entirely. The Act substantially burdens Winomee religious practice under the Tenth Circuit’s “substantial impacts” test because it “prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief.” *Yellowbear*, 741 F.3d at 55. As it substantially burdens Winomee free exercise, the Greening of America Act must be subject to strict scrutiny. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1) (1993). The government failed to make any showing it has a compelling interest in transferring public land to a foreign mining corporation, nor show it to be the least restrictive means of achieving that interest. The Greening of America Act violates RFRA.

In holding to the Ninth Circuit view that a higher “substantial burden” is proper under RFRA, the Thirteenth Circuit again erred. This “fine or benefit” standard is not supported by the text of RFRA, nor this Court’s precedent. Further, the Thirteenth Circuit erred in applying *Lyng* as not only did it pre-date RFRA but the Forest Service took substantial action to mitigate the religious harm therein, which is not present in the case at bar.

Lastly, in addition to violating RFRA, the Act violates RLUIPA. The Thirteenth Circuit never disputed the fact that if the treaty rights hold, then the Act is a direct violation of RLUIPA’s prohibitions. R. at 15. The Thirteenth Circuit incorrectly held that if the Act abrogated the treaty, there would be no property interest to trigger RLUIPA’s protections. *Id.* This holding runs counter to other courts’ precedent clarifying that RLUIPA applies to takings cases. *Cottonwood Christian Center v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002). Further, even if this Court finds that the Treaty was abrogated, the Winomee still hold treaty rights on adjacent public land in Fillmore National Forest. As such, rather than eliminating, the Act merely transformed their rights such that RLUIPA still applies.

If the Court finds the Greening of America Act did not abrogate the Treaty of Winomee of 1852, it should declare the Greening of America Act unlawful, and enjoin the transfer of Winomee Mountain to Lithium for Life. In the alternative, it should still find the Greening of America Act substantially burdens the religious practice of the Winomee under both RFRA and RLUIPA, and that there is no compelling government interest.

Argument

I. Congress Failed to Abrogate the Treaty of Winomee of 1852 by Passing the Greening of America Act.

The Treaty of Winomee of 1852 protects the Winomee Nation's right to access Winomee Mountain. Courts "must [interpret a treaty] in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Mille Lacs*, 526 U.S. at 206. Further, the words of a treaty should be "constru[ed] 'as they would naturally be understood by the Indians.'" *Herrera*, 139 S. Ct. at 1689 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 676 (1979)). The treaty's language that the Winomee can "continue to use these lands for all Indian purposes, including but not limited to . . . seasonal visits," clearly includes religious activity on Winomee Mountain as the Winomee have used the peak and its slopes for hundreds of years. Treaty of Winomee of 1852, R. at 16; R. at 4. This right is not disputed by the government, nor by the Thirteenth Circuit; if the Court determines that the Treaty itself was not abrogated, it must also determine that the Treaty protects access to Winomee Mountain. R. at 14.

Congress has a limited ability to abrogate treaties by legislation, and this Court has carefully circumscribed that right. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). While Congress "may abrogate" a treaty it must "clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202. This court has continuously defined "clearly express" to mean that "there must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Herrera*, 139 S. Ct. at 1698 (quoting *Mille Lacs*, 526 U.S. at 202-03), *see also United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 118 (1938) (abrogation requires a "clear showing" of Congressional intent). Further, this Court has long held that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," a standard that places an especially high burden on Congress when it harms tribal interests. *Cty. of Yakima v.*

Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

Justice Black’s admonition that “[g]reat nations, like great men, should keep their word” stands firm to this day. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960). In order to help keep its word, this Court has determined that Congress bears the burden to clearly express its intent to abrogate treaties with tribes. In the case at bar, Congress never expressed intent: neither by text, nor by implication. Congress has failed to meet its burden and did not abrogate the Treaty of Winomee.

A. The Greening of America Act Does Not Explicitly Consider nor Abrogate the Treaty of Winomee of 1852

Congress has the burden to show both clear contemplation of a treaty and abrogation thereof. *Herrera*, 139 S. Ct. at 1698. This Court has set a stringent requirement for contemplation, stating that there must be at least something beyond “[a] clue that Congress considered the reserved rights of the [Tribe],” cautioning that shreds of evidence do not rise to the level of “clear evidence” the Court demands. *Id.* Congress bears the burden of showing “evidence that Congress intended the right to [be abrogated].” *Id.* Such “intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.” *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (quoting *Pigeon River, etc., Co. v. Charles W. Cox, Limited*, 291 U.S. 138, 160 (1934)).

To determine if Congress has contemplated termination, Courts first consider if the text of the act includes specific reference to the treaty in question; “no mention of Indian treaty rights” indicates Congress has not considered termination. *Mille Lacs*, 526 U.S. at 202. In fact, “[a]bsent explicit statutory language, [this Court] ha[s] been extremely reluctant to find congressional abrogation of treaty rights[.]” *Dion*, 476 U.S. at 739 (quoting *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 690 (1979)).

The Greening of America Act is vague. Even when discussing Winomee Mountain, it makes little mention of the greater context which surrounds the holy site. 16 U.S.C. § 888(i), R. at 18. The Act does not mention the Winomee Nation. *Id.* It does not mention the Treaty of Winomee of 1852. *Id.* It does not even begin to presume that there might be treaty-based restrictions upon the land. *Id.* The Greening of America Act fails to explicitly reference the Winomee, and therefore cannot be held to terminate Congress’s promises in the Treaty of Winomee of 1852.

B. There Is No Legislative History or Detailed Statutory Scheme That Would Imply the Existence of Congress's Intent to Terminate the Winomee's Treaty Right

When a statute's text does not directly mention a tribe or treaty, this Court has found on rare occasion that the act's structure can imply abrogation – if the act explicitly creates new rights for tribes to replace the old, those new rights may serve as evidence that Congress considered the prior treaty regime if they are “difficult to explain except as a reflection of an understanding that the statute otherwise” abrogates the treaty. *Dion*, 476 U.S. at 740. However, these new rights must “reflect[] the understanding” of the lost rights – as in *Dion*, where the statute carved out an explicit and unique exemption for Native peoples. *Id.*

Courts rarely find statutes terminate treaty rights by implication. Congress is not to be “lightly imputed” with automatic knowledge of treaties and must supply some non-trivial positive evidence of consideration in order to abrogate. *Menominee*, 391 U.S. at 413. In *Dion*, that evidence was the carve-out giving tribes special status not held by other members of the public, a recognition both of the special status they had enjoyed by treaty right and of their traditional religious practice. 476 U.S. at 740. In *Herrera*, by contrast, laws authorizing Wyoming's statehood and the creation of Bighorn National Forest lacked any carve-out for tribes and did not terminate the Crow Tribe's reserved hunting rights. 139 S. Ct. at 1698.

Turning to the case at bar, the Thirteenth Circuit alleged that the invocation of “Indian tribes” within the text was sufficient to enable abrogation, relying in part on *Dion*'s notion that by virtue of incorporating some recognition of the pre-existing rights, Congress could be said to “contemplate” their existence. 476 U.S. at 740; R. at 15; 16 U.S.C. § 888(c)(2), (i), R. at 18.

A mere mention of “Indian tribes” does not suggest that Congress meaningfully considered rights granted by the Treaty in nearly the same manner as did the Bald Eagle Protection Act at issue in *Dion*. As Judge Bikamay noted, language acknowledging tribes and requiring consultation is common within the federal government, and prior Presidents have issued orders requiring “consultation” whenever “the development of Federal policies . . . have Tribal implications.” R. at 10; Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13175, 65 Fed. Reg. 67,429 (Nov. 6, 2000). One can certainly imagine “Federal policies that have Tribal implications” that do not have anything to do with a treaty. R. at 10. Take, for example, federal hazardous waste law. Laws require that

when governments choose routes for hazardous waste on highways, they must “consult with appropriate . . . tribal officials.” 49 U.S.C. § 5112(b)(C) (2012). It would push statutory interpretation to the point of absurdity to say such a law would terminate a Tribe’s treaty rights to their lands.

As a matter of policy, allowing the mere mention of “effects” or “implications” on tribes to stand in for contemplation of a treaty is dangerous. Such boilerplate, commonly used language would imply that the government is constantly contemplating the effects of its policies on treaties with tribes. R. at 10. Such a system would be an accidental step back towards the legacy of colonialism, rejecting the notion of tribes as sovereign entities of their own right. Congress would essentially be an unwitting clod, breaking tribal sovereignty not out of desire, but simply out of legislative clumsiness.

The Thirteenth Circuit also erred by declaring that “as a practical matter, Congress knows of the Treaty.” R. at 15. Such knowledge is not to be “lightly imputed”, and as a practical and political matter we should not assume that Congress is omniscient as far as its prior dealings are concerned, especially regarding the Indian tribes to which Congress owes a moral fiduciary duty. *Menominee*, 391 U.S. at 413. Congress should therefore be required to give positive evidence of consideration, which it fails to meet.

If all else fails, this Court allows legislative history to indicate if Congress considered the effects of legislation on tribes. For example, in *Dion*, the Court looked to the “the weight of authority” indicating an “intent to abrogate”, and required “clear and reliable evidence in the legislative history of a statute” in lieu of an “explicit statement by Congress.” 476 U.S. 734, 739. The Court took careful note of the House committee’s choice to cite tribal feather use as a driver of the need for regulation, noting in particular that “[c]ertain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers.” *Id.* at 742 (quoting H.R. Rep. No. 1450, 87th Cong., 2d Sess., 2 (1962)).

The Greening of America Act makes no reference to the Winomee, so it is no surprise there is no legislative history in the record to support treaty termination. Neither the District Court nor the Court of Appeals found any evidence of legislative history to support the termination of the treaty rights. The only reference to any legislative history at all is the District Court’s use of a quote from Senator McLean, the Act’s sponsor, who proclaims “Lithium is the future of this great nation.” R. at 5 (citing Statement of Senator McLean to United States Senate). Like the Act itself, Senator McLean fails to mention the Winomee, and such history is insufficient to abrogate the Treaty of Winomee of 1852.

C. Congress Failed to Consider Essential Elements of the Winomee Nation's Rights to Winomee Mountain by Not Compensating Them for A Fifth Amendment Taking

It is well established that a treaty right to use land is a property right subject to the same treaty protections. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 358 (7th Cir. 1983) (applying the clear evidence standard to usufruct rights). As such, a transfer of land upon which a tribe has a property right does not, by dint of that transfer alone, extinguish the property right. *United States v. Winans*, 198 U.S. 371, 384 (1905) (holding that the sale of public land did not end treaty fishing rights).

Historically, this Court has seen compensation as highly indicative, if not strictly necessary, evidence of legal seizure of tribal rights. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344 (1998) (holding that compensation of \$600,000 for seizure of certain reservation lands was “precisely suited” to terminate reservation status). No such compensation was provided for in the Greening of America Act. 16 U.S.C. § 888; R. at 17-18. Given Congress’ unique fiduciary duty to tribes and the canon of this Court to interpret legislation “liberally to favor tribes,” this lack of compensation is strong indication that Congress failed to recognize the existence of a property right guaranteed by treaty, and therefore did not give it due consideration. *Yakima*, 502 U.S. at 269 (quoting *Blackfeet Tribe*, 471 U.S. at 766 (1992)).¹

D. The Thirteenth Circuit Erred by Ignoring United States v. Dion's “Compelling Evidence” Requirement That Requires “Legislative History” in Lieu of Explicit Evidence

In order to apply *Dion* when a statute lacks clear language abrogating a treaty, there must be some “legislative history” that “compel[s]” this Court to read in Congress’s intent. 476 U.S. at 739. As such, the application of *Dion* actually supports the Winomee Nation’s claim that Congress failed to abrogate.

1. As this is a mere transfer of a property right between two parties without serious public interest, akin to a “private land deal” in the view of the District Court, per *Kelo v. City of New London*, the eminent domain action itself runs counter to the admonitions of this Court that “it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.” 545 U.S. 469, 477 (2005); R. at 6. We would argue that this further demonstrates Congress’ lack of consideration, as we should not presume that Congress intentionally engaged in illegal behavior.

The Thirteenth Circuit properly saw the important position of “the exception for Indian tribes to take eagles” in *Dion*. R. at 15. The Bald Eagle Protection Act’s passage was explicitly informed by the effects upon tribal religious practice, with Justice Marshall’s opinion making clear note of testimony given to Congress by Assistant Secretary of the Interior Frank Briggs that “There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites . . . If enacted, the bill should therefore permit the Secretary of the Interior, by regulation, to allow the use of eagles for religious purposes by Indian tribes.” *Dion*, 476 U.S. at 741-42. Further, the House committee directly cited tribal use as a driver of the need for regulation, stating “[c]ertain feathers of the golden eagle are important in religious ceremonies of some Indian tribes and a large number of the birds are killed to obtain these feathers.” *Id.* at 742, quoting H.R.Rep. No. 1450, 87th Cong., 2d Sess., 2 (1962). In this case, the Government has not attempted to show any such legislative history. This absence is telling. This Court must conclude that Congress did not come close to giving due consideration to the Treaty of Winomee of 1852, as there is no “legislative history” giving “compelling evidence” that Congress sought to abrogate the treaty. *Dion*, 476 U.S. at 739.

The Thirteenth Circuit faltered in its argument that access to the parking lot is sufficiently similar to the exemptions carved out for tribes in the Bald Eagle Protection Act. R. at 15. Unlike in *Dion* there is no clear connection between Congress’ decision to require public access to the parking lot and the prior treaty rights of the Winomee Nation. The Winomee, along with other members of the public, have always had access to the Winomee Mountain parking lot, and will continue to – the Winomee have not been given a new right or exemption. In *Dion*, meanwhile, there was an explicit new right granted to recover the treaty right that Congress was set on taking away when it “adopted an exception for Indian religious use drafted by the Interior Department.” 476 U.S. at 742.

As such, the Thirteenth Circuit’s belief in a logical order in this case that matches *Dion* is untenable. *Dion* relied on a straightforward analysis: “[t]he provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute, but by authorizing the Secretary to issue permits to Indians where appropriate.” 476 U.S. at 740.

This in no way matches the case at bar. There is no indication that Congress recognizes a special “hardship” in preventing Winomee access to the mountain, as there was in *Dion*. *Id.* There likewise appears to be no balancing in the service of tribal interests, and the mere mention of “Indian tribes” does not give rise to an inference that Congress materially considered the balance. *Id.* Nor does Congress requiring “consultation” with tribes rise to an inference of contemplation of the Treaty, as discussed in §I(B) *supra*. As such, the Thirteenth Circuit misapplied *United States v. Dion* to this case, and its correct application would show that Congress did not meet the *Dion* standard with the Greening of America Act.

II. The Greening of America Act Violated the Religious Freedom Restoration Act

Government action is subject to strict scrutiny when it substantially burdens religious exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691 (2014). Early religious freedom jurisprudence vindicated plaintiffs when the government infringed on their free exercise. In *Sherbert v. Verner*, the Court held that denying an employee unemployment benefits who was fired for working on the Sabbath was not the least restrictive means to fulfill the government interest. 374 U.S. at 408. Similarly, in *Wisconsin v. Yoder*, the Court found that the government could not compel Amish parents to send their children to school by imposing fines on them. 406 U.S. at 228-29.

In the five years prior to the passage of RFRA, the Court took up two Native American religious freedom claims and denied plaintiffs relief in both. In *Lyng v. Northwest Indian Cemetery Protective Association*, the United States Forest Service planned to build a logging road across lands sacred to the Hoopa, Yurok, Karok, and Tolowa peoples. 485 U.S. at 442. The Court held that the First Amendment, standing alone, was not enough for the Tribes’ claims to proceed. Later, in *Employment Division, Department of Human Resources of the State of Oregon v. Smith*, a case in which two members of the Native American Church were fired for peyote use, the Court found that laws of general applicability do not violate the Free Exercise Clause. 494 U.S. 872, 890 (1990).

Motivated in part by the Court’s failures to protect the religious practice of Native American plaintiffs in these two cases, especially in *Smith*, Congress passed RFRA in 1993. In so doing it aimed “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and to guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1) (citations omitted). Congress passed RFRA to make it easier for plaintiffs to prove their

religious practice was burdened, and then, for courts apply the compelling interest test articulated in earlier cases.

A. The Winomee Nation's Only Annual Ceremony at Their Only Sacred Mountain Is Religious Exercise Protected by the Religious Freedom Restoration Act

RFRA protects conduct motivated by sincere religious belief against government intrusion. 42 U.S.C. § 2000cc-5(7)(A). Assessing whether religious exercise is protected is an extremely limited inquiry, asking only whether the plaintiff is “seeking to perpetrate a fraud on the Court.” *Yellowbear*, 741 F.3d at 54. Courts protect not only beliefs held in one’s mind, but the exercise of those beliefs through “the performance of (or abstention from) physical acts” including “assembling with others.” *Smith*, 494 U.S. at 877. Moreover, Court must not inquire into the centrality of a religious practice, RFRA protects “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A). This Court has recognized the importance of access to and protection of physical space in religious practice. *Lynng*, 485 U.S. at 453 (“The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred”). Such place-based religious practice is not unique to the Winomee’s: Muslim observants must visit Mecca for the Hajj, the Holy Sepulchre in the Old City of Jerusalem is the most sacred site in Christianity, and Latter-Day Saints travel to the Sacred Grove in New York. The Winomee’s annual ceremony at Winomee Mountain is such an exercise. The Winomee have worshiped at the mountain since time immemorial, even after its absorption into Fillmore National Forest in 1906. The Court of Appeals does not even dispute that the Winomee’s religious exercise is sincere. The Winomee Nation’s worship at Winomee Mountain is protected by RFRA.

B. The Destruction of Winomee Mountain ‘Substantially Burdens’ the Winomee Nation’s Religious Exercise

Courts find the government has substantially burdened a person when it substantially impacts their religious practice. The Greening of America Act substantially burdens Winomee religious practice as it destroys their most sacred mountain and prevents them from worshipping at the site. However, the Thirteenth Circuit adopted an overly restrictive standard from the Ninth Circuit focused only on two mechanisms of government action.

1. When Read According to Its Ordinary Meaning, RFRA Protects the Winomee from Government Action That Substantially Impacts Their Religious Practice

Under RFRA, the government must not “substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” 42 U.S.C. § 2000bb–1(a). Because RFRA does not define “substantial burden,” we turn to the phrase’s plain meaning. *See Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 175 (2009) (quoting *Engine Mfrs. Assn. v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004)) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”); *cf. Burwell*, 573 U.S. at 707–717 (using plain meaning in interpreting RFRA’s usage of the word “person” to mean a corporation). A “substantial burden” is best defined as “government action that “hinders or oppresses” the exercise of religion ‘to a considerable degree.’” *Navajo Nation* at 1086 (Fletcher, J., dissenting) (quoting *Black’s Law Dictionary* (8th ed. 2004); *American Heritage Dictionary* (4th ed. 2000)).

Using the plain meaning of substantial burden, most Circuits have rightly focused on the impact, rather than the mechanism, of government intrusions on religious freedom.² In *Yellowbear*, a case in which the Tenth Circuit held that the denial of a sweat lodge to a prisoner was a “substantial burden” on his religious practice, then-Judge Gorsuch articulated the Circuit’s definition of “substantial burden” as one that “(1) requires the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief, or (3) places considerable pressure on the plaintiff to violate a sincerely held religious belief.” 741 F.3d 48 at 55. The Western District of Oklahoma had previously explained how the Tenth Circuit applied to the sacred sites context in *Comanche Nation*. 2008 WL 4426621 at *3, *17. There, the Court found the construction of a federal warehouse in the sacred Medicine Bluffs area would substantially burden the free exercise of the Comanche Nation, who gathered plants, prayed, and worshipped at the site. *Id.* Here, the construction did not even take place on the Bluffs themselves,

2. *Burwell*, 573 U.S. at 686 (“RFRA’s question is whether the mandate imposes a substantial burden on the objecting parties’ ability to conduct business in accordance with *their religious beliefs.*”); Petition For a Writ of Certiorari at 12–19, *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, *cert. denied*, 556 U.S. 1281 (2009) (citing *Washington v. Klem*, 497 F.3d 272, 279 (3rd Cir. 2007)) (surveying the different Courts of Appeals’ approaches).

rather the Court granted a preliminary injunction on the basis that the warehouse's construction's obstruction of the view from the Bluffs would impact Comanche religious practice.

The Greening of America poses two such substantial burdens on the Winomee people. First, it restricts their ability to perform the annual ceremony. This Court has regularly held that convening for religious ceremony is protected by the Free Exercise Clause, and a fortiori, RFRA. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam) (finding that occupancy restrictions on houses of worship violated the Free Exercise Clause). Winomee Mountain "is the only place where [the Winomee] can conduct our annual ceremony." Testimony of Albert Smith. The Winomee will not be able to even visit what will eventually become "a crater" for "the several years of construction, the 66 years of operation, or for many years of clean up afterwards, if ever." Federal Environmental Impact Statement (FEIS) at 1, 3. Rather, the government has decided that a parking lot is an acceptable substitute. Such a restriction is surely a greater burden than the visual impact of construction in *Comanche Nation*. 2008 WL 4426621 at *3, *17.

In addition to preventing the annual ceremony, the Greening of America Act also substantially burdens Winomee religion by destroying the center of their religious practice. Even when not practicing ceremony, "Winomee Mountain is the spiritual lifeblood of the Winomee peoples." R. at 5. If Winomee Mountain is destroyed, the Winomee will no longer be able to practice their religion. Testimony of Cross RedDeer, R. at 6 ("We believe that the Winomee religion will end if Winomee Mountain is turned into a mine."). Again, destroying a religion is equivalent to "prevent[ing] the plaintiff from participating in an activity motivated by a sincerely held religious belief." *Yellowbear*, 741 F.3d 48 at 55. The destruction of a religion "substantially impacts" the religious practice of its practitioners.

2. A "Substantial Impacts" Test Is Supported by International Norms for the Protection of Indigenous Peoples

International law governing the rights of Indigenous peoples also supports a finding of a substantial burden on the Winomee Nation's free exercise. Despite the Thirteenth Circuit's insistence otherwise, this Court and others regularly incorporate principles of international law into their decision-making, finding it "instructive" and providing "respected and significant confirmation." *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (relying in part on the United Nations Convention on the Rights of the Child among other international laws to justify ending the juvenile death penalty); *see also*

Pueblo of Jemez v. United States, 430 F.Supp.3d 943, 1103 n.28 (D.N.M. 2019) (citing the United Nations Declaration on the Rights of Indigenous Peoples to find an aboriginal title case was justiciable). Indeed, the earliest decisions that divested Tribes of their lands, relied on principles of international law to incorporate the Doctrine of Discovery into American law. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 567 (1823) (“On the part of the defendants, it was insisted, that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil.”). It would be perverse to deny Native plaintiffs the same sources of law to vindicate their right to religious freedom.

The United States has expressed support for the United Nations Declaration on the Rights of Indigenous Peoples. *Remarks by the President at the White House Tribal Nations Conference* (Dec. 16, 2010); G.A. Res. 69/2 U.N. Doc. A/RES/69/2 (Sept. 22, 2014). The Declaration supports the rights of Indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.” G.A. Res. 61/295, art. 25.

The Winomee have conducted their annual ceremony at Winomee Mountain since time immemorial, and it is their “religion’s holy site.” Testimony of Albert Smith, R. at 6. Under the declaration, indigenous peoples must also provide Free, Prior, and Informed Consent prior to government action that would destroy sacred sites. G.A. Res. 61/295, art. 19 (“States shall consult . . . to obtain [Indigenous peoples’] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”). The Winomee have not provided their consent to the Greening of America Act. When confronted with ambiguous language like “substantial burden,” Courts should use UNDRIP to guide and confirm the plain meaning of the phrase.

C. The Thirteenth Circuit’s Cramped Definition of ‘Substantial Burden’ Has No Basis in the Text of RFRA

Rather than follow the lead of this Court and most circuits, the Thirteenth Circuit chose to ignore the plain text of RFRA. It adopted the minority view of the Ninth Circuit in *Navajo Nation*, that “only government coercion in the form of the imposition of a penalty or denial of a benefit would burden religion under RFRA.” R. at 14 (citing *Navajo Nation*, 535 F.3d at 1058). This definition wrongly focuses on the mechanism of government action, rather than its impact.

1. The Thirteenth Circuit's Adoption of Navajo Nation's "Fine Or Benefit" Standard Is Inconsistent With the Text of RFRA and This Court's Precedent

The Ninth Circuit misread the plain language of RFRA in *Navajo Nation*. “Substantial burden” is not a “term of art” used to refer to only the kinds of government action in *Sherbert* and *Yoder*. § 2000bb(b)(1) has two distinct and independent clauses. The first requires courts to “restore the compelling interest test” from *Sherbert* and *Yoder*. The second instructs that courts should apply that test when free exercise is “substantially burdened.” *Id.* The Ninth Circuit held that *Sherbert* and *Yoder* define both the phrase “compelling interest” and “substantial burden.” *Navajo Nation*, 535 F.3d at 1069. Unfortunately, this awkward reading requires turning a blind eye to the structure of the sentence – Congress referenced *Sherbert* and *Yoder* when defining “compelling interest,” but does not reference either case when using the phrase “substantial burden.” And why would it? The Court did not use the phrase “substantial burden” in its opinions in *Sherbert* and *Yoder*. 374 U.S. 398; 406 U.S. 205. “Substantial burden” has shown up in other parts of the Court’s pre-Smith jurisprudence that RFRA adopted, but not in the two cases the Ninth Circuit uses to cabin “substantial burden” to cases of government coercion. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990) (citing *Hernandez v. Comm’r*, 490 U.S. 680, 699 (1989)).³ Similarly, this Court has declined to find pre-Smith jurisprudence conclusive in interpreting other provisions of RFRA. *Burwell*, 573 U.S. at 714-717. Substantial burden should be defined according to its plain meaning, not restricted to the two kinds of government action held unconstitutional in *Sherbert* and *Yoder*. As Judge Bikamay notes, “if the government cannot prohibit religious exercise by means of a \$5 truancy fine as in *Yoder* or denial of unemployment benefits as in *Sherbert*, nor can it prohibit religious exercise by destroying the site of practice.” R. at 7.

The Ninth Circuit “fine or benefit” standard is also inconsistent with this Court’s precedent pre- and post-Smith. If § 2000bb(b)(1) is read to incorporate the Court’s pre-Smith jurisprudence defining burden, the cases that *actually use* the phrase “substantial burden,” would counsel a definition focused on the impact of government action rather than its mechanism. While recognizing the coercion in *Sherbert* and *Yoder* as two such kinds, the Court

3. RFRA is regularly inconsistent about its codification of pre-Smith jurisprudence. For example, the Court has recognized that the least restrictive means test was not used consistently in pre-Smith jurisprudence. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

found that “a burden upon religion exists” when the government “put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.” *Hobbie v. Unemployment Appeals Comm’n*, 480 U.S. 136, 141 (1987) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)) (emphasis removed). And other Pre-*Smith* jurisprudence notes “[i]f the . . . effect of a law is to impede the observance of one or all religions” that law is “constitutionally invalid even though the burden . . . [is] only indirect.” *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961). To be sure, withholding unemployment benefits or mandating a child attend public school are “substantial burdens,” but they are substantial burdens because of their effect on free exercise, not the mechanism of their regulation.

And the Court’s post-RFRA cases acknowledge that RFRA applies to a larger universe of cases than those easily likened to *Sherbert* and *Yoder*. In *City of Boerne v. Flores*, the Court notes Congress intended that RFRA apply to cases like “autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs . . . and zoning regulations . . . [that] have an adverse effects on churches and synagogues.” 521 U.S. 507, 531 (1997). When the government conducts an autopsy in violation of a Jewish person’s beliefs, no one is being denied a benefit or penalized, so would not have a claim under the Ninth Circuit standard. The Ninth Circuit coercion standard writes out Congressional intent in passing RFRA.

These concerns are borne out in post-RFRA jurisprudence. The Ninth Circuit standard leads to perverse government standards of coercion. Numerous plaintiffs would not have claims under RFRA. In *McCurry v. Tesch*, the Eighth Circuit found a substantial burden when the state installed padlocks on the church doors of Nebraska’s Faith Baptist Church because it was out of compliance with state education law. 738 F.2d 271, 276 (8th Cir. 1984), *cert. denied*, 469 U.S. 1211 (1985). In *Mockaitis v. Haclearod*, a Ninth Circuit case overruled by *Navajo Nation*, the Court found a substantial burden state officials recorded the confessions of prisoners during the Catholic Sacrament of Penance. 104 F.3d 1522, 1531 (9th Cir. 1997). In both these cases, the government action was arguably more coercive than a fine or withholding a benefit, and yet, the Ninth Circuit standard would rule out RFRA claims, simply because the government chose not to use two specific policy tools. The Ninth Circuit perversely allows government action when it uses its brute force and acts in disregard of individual choice, and only finds burdens when an individual is given a choice and the government merely tips the scale.

2. The Policy Concerns Motivating a “Fine or Benefit” Standard Are Not Borne Out in Practice

The government will argue the Ninth Circuit test is necessary to prevent excessive individual vetoes over government action, echoing “the classic rejoinder of bureaucrats through history.” *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006). Slippery slope arguments are particularly weak in the RFRA context, for “RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” *Id.* at 436. It is part and parcel of the statutory scheme to offer exceptions. Moreover, concerns about a slippery slope of a citizen’s veto over any government project are misplaced. Studies show that in the aftermath of the passage of RFRA and RLUIPA, government actions withstood strict scrutiny seventy-two percent of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L.R. 793, 860 (2006). Courts should show deference to plaintiffs in finding a substantial burden, then carefully weigh the government and plaintiff’s interest via the compelling interest test.

3. Even If This Court Adopts the Navajo Nation “Fine or Benefit” Test, the Case of the Winomee Is Distinguishable Because the Destruction of a Religion Is Coercion

If the Court finds that *Navajo Nation* should apply, the destruction of Winomee Mountain is distinguishable on the facts. In *Navajo Nation*, the Court found the burden on exercise to only affect “Plaintiffs’ subjective, emotional religious experience.” 535 F.3d at 1070. The destruction of Winomee Mountain will not simply “decrease the spiritual fulfillment” of the Winomees. *Id.* at 1070. Rather, “Winomee religion will end if Winomee Mountain is turned into a mine and the Winomee people are prevented from visiting it.” Testimony of Cross RedDeer. The government’s own report states that the destruction will be “immediate, permanent, and large in scale,” and that “mitigation measures cannot replace . . . the sacred places that would be destroyed.” R. at 1-2. Unlike *Navajo Nation*, the government action will not just detract from Plaintiffs subjective experience, rather the destruction of Winomee mountain *objectively* prevents the Winomee from hosting their annual ceremony.

Destroying Winomee mountain is functionally equivalent to coercing the Winomee Nation into violating their religious beliefs. The Ninth Circuit has recognized, “a place of worship” that is “consistent with their theological requirements,” is a right “at the very core of the free exercise of religion.”

Int'l Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1069 (9th Cir. 2011) (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F.Supp.2d 1165, 1171 (C.D. Cal. 2006)). The Winomee people are commanded to worship at Winomee Mountain for it is “the eternal home of their sacred religious ceremonies.” R. at 5. By transferring the land of Winomee Mountain, and prohibiting Winomee religious practice at the site, the government is “compel[ling] affirmation of a repugnant belief”: disconnection with their creator. *Sherbert*, 374 U.S. at 402 (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)); R. at 5.

4. The Thirteenth Circuit Erred in Its Reliance on Lyng, a Free Exercise Clause Case Decided Before RFRA, Where the Government Made Extensive Accommodations

In its reliance on *Lyng*, the Court of Appeals incorrectly conflates First Amendment and RFRA claims. *Lyng* was decided before RFRA and does not use the phrase “substantial burden.” And RFRA’s protections extend beyond what the First Amendment offers in and of itself. *United States v. Bauer*, 84 F.3d 1549, 1558 (9th Cir. 1996) (as amended) (“[RFRA] goes beyond the constitutional language that forbids the ‘prohibiting’ of the free exercise of religion and uses the broader verb ‘burden.’”). The First Amendment protects against government intrusion when it “prohibits” religious practice, RFRA offers a more liberal standard, focusing on a substantial burden. First Amendment, RFRA. The Court recognized that RFRA’s protections extended beyond the First Amendment in *City of Boerne v. Flores*, noting that RFRA is a “substantive change in constitutional protections” and is not solely “remedial or preventive.” 521 U.S. at 532.

Even if the Thirteenth Circuit’s reliance on *Lyng* were justified, this case is distinguishable on the facts: the Greening of America Act does not merely infringe on Winomee free exercise, it prohibits it. Following the language of the First Amendment, Justice O’Connor acknowledges that “a law prohibiting the [Tribes] from visiting the Chimney Rock area” would raise constitutional concern *Lyng*, 485 U.S. at 453. The Greening of America Act is such a law. By destroying the mountain itself and prohibiting entrance for construction, the 66 years of operation, and the years of clean up after, Congress has prohibited visitation and prohibited Winomee free exercise. R. at 5.

Second, the Winomee Nation’s claim is more limited than the tribes in *Lyng*. In *Lyng*, the Court raised concern with the scope of the Tribal plaintiffs’ claims, expressing shock that the District Court’s order “permanently forbade commercial timber harvesting, or the construction of

a two-lane road, anywhere within . . . more than 17,000 acres[] of public land.” *Lyng*, 485 U.S. at 453. The Winomees claim is not so broad. It only aims to protect a single mountain on 1,000 acres of public land (to which they have treaty-protected use rights) from its wholesale destruction by foreign mining corporations. R. at 4.

The Court of Appeals also likens access to a parking lot to the accommodations in *Lyng*. The two are nothing alike. In *Lyng*, the Forest Service avoided every site “where specific rituals take place.” 485 U.S. at 454. The Greening of America Act destroys the only site where the Winomee’s only annual ritual occurs.

5. *There Is No “Public Lands” Exception to RFRA*

The government argues it has total authority to manage its land, outside the scope of RFRA. R. at 6 (citing US Const., Art. IV, sec. 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”)). However, despite dicta in *Navajo Nation*, no such exception exists to RFRA. 535 F.3d at 1069 n. 9. RFRA’s coverage is “sweeping” at “every level of government,” with application to “every government agency and official” and to “all statutory or other law.” *City of Boerne*, 521 U.S. at 509 (citing 42 U.S.C. §§ 2000bb-2(1), 3(a)). The statute is clear, RFRA applies to government land management.

D. Destroying Winomee Mountain for the Benefit of Foreign Corporations Does Not Survive Strict Scrutiny

Government action that substantially burdens religious exercise is subject to strict scrutiny, “the most demanding test known to constitutional law.” *City of Boerne*, 521 U.S. at 534. The “compelling interest” test of *Sherbert* and *Yoder*, asks whether the government has a “compelling interest” in the action, and whether it is using the least restrictive means to accomplish that objective. 374 U.S. at 407; 406 U.S. at 228-29. Determining whether the government has a compelling interest is a fact-specific inquiry. *O Centro*, 546 U.S. at 431 (“requires a case-by-case determination of the question, sensitive to the facts of each particular claim” (quoting *Smith*, 494 U.S., at 899 (O’Connor, J., concurring in judgment))). “[B]roadly formulated interests justifying the general applicability of government mandates” are insufficient. *O Centro*, 546 U.S. at 431.

The government does not dare justify the Greening of America Act's transfer of a sacred site to foreign mining corporations. R. at 6 ("The government chose not to make such a showing."). The Court of Appeals instead relies on the text of the Greening of America Act to cite the supposedly "important" interests in "the economy and the environment. And yet, it is hardly credible that desecrating Winomee mountain to build a mine, "turning it into a crater" with "a pile of dust next to it," advances federal interests in the "environment." FEIS at 1. Moreover, the corporate interests of a joint venture of British and Australian mining companies can hardly be considered a "compelling interest" of American government.

Further, even if the "economy" or the "environment" are compelling interests, the destruction of Winomee Mountain is not the "least restrictive means" of achieving those objectives. The government has made no showing that it has exhausted other sources of lithium for renewable energy development. Further, the District Court has yet to determine whether the environmental review was sufficient, so there is no factual record on which to determine if the government fairly exhausted all alternative mechanisms. R. at 4 n.1.

Finally, access to the parking lot is not an adequate substitute for access to the mountain. The Winomee believe that access to the mountain is the only way to conduct their annual ceremony. It is not the place of the government to tell religious adherents that alternative means of practicing their religion are acceptable substitutes, for courts, "lack any license to decide the relative value of a particular exercise to a religion." *Yellowbear*, 741 F.3d at 54. And insultingly, access to the parking lot itself is conditional. R. at 5 ("The Winomees, along with the rest of the public, may view the mountain from the parking lot, unless the company determines their presence will cause safety concerns.").

III. The Greening of America Act, and Violated the Religious Land Use and Institutionalized Persons Act

A. The Transfer of Winomee Mountain Will Substantially Burden the Winomee Nation's Use of Their Treaty Rights for Free Exercise

Expressing concern for the unique situations where individuals were entirely "dependent on the government's permission and accommodation for exercise of their religion," like zoning decisions and imprisonment, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to protect vulnerable religious adherents. *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005); 42 U.S.C. 2000cc (2000) ("No government shall impose or implement a land use regulation in a manner that imposes a

substantial burden on the religious exercise of a person . . .”). The Winomee are such practitioners. After surrendering Winomee Mountain in 1852, though some access has been guaranteed by treaty, their religious practice at the peak has been closely regulated by the federal government, subject to the complex regulations of the Forest Service since 1906. R. at 5. The Winomee are entirely dependent on the decisions of the government to access the “grounds, plants, and waters” of the peak. *Id.*

The Winomee Nation’s treaty rights are property rights so as to trigger the protections of RLUIPA. RLUIPA applies to any “land use regulation.” The Winomee Nation’s treaty rights were never abrogated. *See* § I, *supra*. This Court has long held that treaty rights guaranteeing tribal access to land outside a reservation’s boundaries are property rights. *Winans*, 198 U.S. at 384. The Winomee Nation must be protected alongside other property-rights holders by RLUIPA.

The Greening of America Act substantially burdens Winomee religious practice. RLUIPA’s substantial burden analysis uses the “same standard” as RFRA. *Holt v. Hobbs*, 574 U.S. 352, 358 (2015). The Greening of America Act substantially burdens Winomee religious practice. *See* § II, *supra*. The Act prevents the Winomee from using their treaty rights of access to practice their only annual ceremony at their only sacred mountain. Further, it prevents them from ever exercising them, because the Greening of America Act’s destruction will be “immediate, permanent, and large in scale.” FEIS at 1, R. at 5 Because the Greening of America Act prevents the Winomee from fully enjoying their treaty rights for their religious practice, this Court must apply strict scrutiny. The government does not attempt to even defend its interests in transferring land to foreign mining corporations, *see* §II(D), *supra*, and as such the transfer must be enjoined.

B. Even if the Greening of America Act Terminated Winomee Treaty Rights, RLUIPA Should Still Apply Because the Elimination of a Property Right Is a Land Use Regulation

Even if the Greening of America Act terminated Winomee treaty rights, Courts have held that in the eminent domain context, the elimination of a property right is sufficient to trigger the protections of RLUIPA. Courts have found that an eminent domain action targeting a religious community’s “only, or even primary, place of worship” constitutes a RLUIPA violation. *Cottonwood Christian Center*, 218 F. Supp. 2d at 1226-27 (holding that eminent domain takings are “quasi-judicial decisions” subject to RLUIPA). Similarly, if this Court holds the Greening of America Act abrogates the Treaty of Winomee of 1852, R. at 16, even the Thirteenth Circuit agreed such

abrogation would likely constitute a taking. R. at 15 (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 421-22 (1980)). Because takings, like eminent domain actions, are land use regulations, the Thirteenth Circuit erred in holding that the termination of the Winomee's treaty rights rendered RLUIPA inapplicable.

C. In the Alternative, the Court Should Find the Winomee Retained Treaty Rights to Other Parts of Fillmore National Forest Sufficient to Retain a RLUIPA Claim

Even if the Court finds that the Treaty of Winomee of 1852 was abrogated with respect to the 1000 acres transferred for lithium mining, such abrogation is not enough to defeat a RLUIPA claim. The Winomee retained rights on all "their traditional lands north of the River North to the United States," not just the 1000 acres around Winomee Mountain. Treaty of Winomee of 1852, R. at 16. Courts interpret treaty abrogation narrowly, so as to not harm the interests of Tribes. *See, e.g., Menominee*, 391 U.S. at 413 (holding Termination Act did not extinguish treaty hunting rights). The Winomee retain treaty rights around the proposed mining site.

Courts have found that property owners can bring RLUIPA claims not only when their land is directly regulated, but when land use decisions on adjacent parcels affect their land. In *Northern Cheyenne v. Martinez*, a Court granted a preliminary injunction under RLUIPA to prevent the construction of a gun range on state land. The tribal plaintiffs did not own the land but argued it would impact their religious practice on trust land, land they owned in fee, and a right of way. R. at 11 (citing Plaintiff's Third Amended Complaint for Preliminary and Permanent Injunction, *N. Cheyenne Tribe v. Martinez*, No. Civ. 03-5019 (D.S.D. May 23, 2003)). The decision to construct a lithium mine will affect the Winomee's ability to practice their religion throughout Fillmore National Forest, because the "grounds, plants, and waters" of the area have a "unique spiritual significance" because of Winomee mountain's connection to their Creator. R. at 5. The effects of construction will radiate through the area, not just in the 1000 acres of the mine, as the mine will create "a pile of dust" and the safety concerns are so great that no one will be able to visit the site for "the many years of cleanup afterwards." FEIS at 1, 3, R. at 5. The Court must find that RLUIPA protects Winomee religious practice.

Conclusion

For the foregoing reasons, the Court should reverse the decision of the Thirteenth Circuit. Instead, the Court should follow the District Court's

opinion and find that 1) the Greening of America Act did not abrogate Congress's promises to the Winomee people in the Treaty of Winomee of 1852 and 2) RFRA and RLUIPA protect the Winomee against the destruction of their religion by the government.