

## APPELLATE COURTS: STOP ACCEPTING AN “ABSURD” FIRST AMENDMENT ANALYSIS FOR NATIVE NATIONS’ SACRED SITE DESTRUCTION

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I do not use the term “absurd” in this title lightly. Judge Marsha Berzon used it in a dissenting opinion to describe the impractical result that comes from repeating the same First Amendment analysis for sovereign Native Nations that consistently fails to protect their sacred sites.<sup>1</sup> U.S. courts fail to recognize that Native Nations are legally afforded protections under the trust responsibility,<sup>2</sup> a doctrine in federal Indian law. Further, the analogies appellate courts use for Native Nations fail to recognize this unique government-to-government relationship between Native Nations and the federal government, which consequently is never analyzed in this line of cases. Thus, an “absurd” result comes each time a court finds that destroying or desecrating a Native Nation’s sacred site is not a burden

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1. *Apache Stronghold v. United States*, 38 F.4th 742, 782 (9th Cir. 2022) (Berzon, J., dissenting).

2. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17–18 (1831) (stating that Native Nations look to the US “government for protection, rely upon its kindness and its power; [and] appeal to it for relief to their wants.”).

on their religion because the destruction or desecration does not “coerce”<sup>3</sup> them into not practicing their religion.

Agreed, absurd.

For these reasons, this Article suggests it is judicial time to develop a new test. Ample precedent exists for creating a new test to address a constitutional right; for example, the United States Supreme Court created the *Central Hudson* test to address the unique nature of commercial speech. Although *Central Hudson* was created by the U.S. Supreme Court, an appellate court could create a new test in the sacred-sites context and expect favorable review should the U.S. Supreme Court be petitioned and grant a writ of certiorari.

## I. FEDERAL COURTS AND FEDERAL INDIAN LAW

For various reasons, it comes as no surprise that U.S. courts struggle with federal Indian law cases. Federal courts of appeals hear about 50,000 cases each year, with roughly 10% of those cases resulting in a petition for U.S. Supreme Court review. Of those, only about 100 are heard.<sup>4</sup> In 2021, the most recent complete year, there were 125 federal Indian law cases in federal courts, with only 35 reaching federal courts of appeals.<sup>5</sup> And to the extent that appellate judges had a course in federal Indian law during law school or any practice experience with Indian law, it may be very limited. Federal Indian law is not a required course in law school, and many law students leave law school not even

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3. See *Apache Stronghold*, 38 F.4th at 766–67 (9th Cir., 2022) (finding that a U.S. land exchange did not substantially burden Apache religious practice even if it made it impossible for the Apache to worship at one of the tribe’s religious sites).

4. *Appellate Courts and Cases—A Journalist’s Guide*, UNITED STATES COURTS, <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide> (last visited Sept. 9, 2022).

5. The 35 cases in federal courts of appeals were distributed with 14 in the Ninth Circuit, five in the Tenth Circuit, five in the D.C. Circuit, four in the Eighth Circuit, two in the Sixth Circuit, two in the Second Circuit, two in the First Circuit, and one in the Fifth Circuit. *National Indian Law Library*, NATIVE AMERICAN RIGHTS FUND, <https://narf.org/nill/bulletins/federal/2021.html> (last visited Sept. 9, 2022).

knowing Native Nations comprise a third group of sovereigns in the United States. This factor, combined with the proportionately small number of cases that come before the appellate courts, means that it is not surprising that there is a high level of uncertainty and concern about the outcome of each appellate case among federal Indian law scholars.

Understanding that Native Nations are sovereigns and that the United States has a trust responsibility to them<sup>6</sup> is a foundational principle that should be a starting point in appellate review for every federal Indian law case. But that is not always so. Because of the treaty and government-to-government relationships developed over centuries, based in the Constitution and interpreted by the U.S. Supreme Court, there is a unique legal foundation that serves as a starting point in any legal analysis involving a Native Nation—a foundation that is sometimes ignored. In fact, appellate courts share no common starting point in these cases, except the citation to the U.S. Supreme Court’s first foundational cases in federal Indian law that established jurisdiction in the courts for Native Nations and recognizes them as a third form of sovereignty (as “domestic, dependent nations”) under the U.S. Constitution.<sup>7</sup>

In addition, every treaty is different, and each treaty applies to only one or a few tribes among the more than 500 federally recognized tribes in the United States. But all treaties have reserved rights. These reserved rights were affirmed in *United States v. Winans*, where the U.S. Supreme Court held that the principle of reserved rights is “not a grant of rights to the Indians, but a grant of rights from them, a reservation of those not granted.”<sup>8</sup> Some treaties have expressly named rights both on and

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6. See *Cherokee Nation*, 30 U.S. at 17–18. The federal government relationship to Native Nations is like that of “a ward to its guardian.” Although the court found the Cherokee Nation has no jurisdiction to bring a case, it ultimately reversed that the next year in *Worcester v. Georgia*, 31 U.S. 515 (1832), so these two cases are read together, making the foundation cases uniquely fused.

7. *Cherokee Nation*, 30 U.S. at 13.

8. *United States v. Winans*, 198 U.S. 371, 381 (1905).

off reserved lands, which can include hunting, fishing, and gathering rights, but also implied rights such as water, healthcare, education, and natural resources. These implied rights also include the continuity of the Native Nations government, which extends to traditional cultural practices tied to sacred sites.

Federally recognizing tribes is a colonized constructed way of politically designating which tribes have been able to negotiate through land disputes, peace agreements, threat of war, or all of the above. This is typically memorialized with a treaty, which was to be ratified by Congress (at least until 1871 when Congress stopped the President's treaty-making authority with Native Nations<sup>9</sup>). So one judicial opinion may be very narrowly written to apply to that particular treaty, but from that opinion, canons of construction have been recognized that should be, but are not always, applied in subsequent cases. Opinions in federal Indian law do not necessarily apply from one case to the next, in part, because of these differences. But canons of construction derived from these cases may apply to future cases.

## II. ADVOCACY IN APPELLATE PRACTICE

Federal Indian law scholars can bring clarity to legal questions that come before the appellate courts through the filing of *amicus briefs*. Anticipating the legal issues the court will decide to address is part of this persuasive strategy. Some cases turn on legal issues not anticipated by the parties. For example, the court may decide to take a particular analytical pathway to resolve a question because it can avoid larger constitutional issues or because it is an important question. Some have referred to this first path as the constitutional avoidance doctrine,<sup>10</sup> which is not to decide bigger issues than necessary to resolve the case or question.

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9. 25 U.S.C. § 71 (1871).

10. *Overview of Constitutional Avoidance Doctrine*, CONSTITUTION ANNOTATED, n.1, [https://constitution.congress.gov/browse/essay/artIII-S2-C1-10-1/ALDE\\_00013153/](https://constitution.congress.gov/browse/essay/artIII-S2-C1-10-1/ALDE_00013153/) (last visited Feb. 7, 2023).

The most insidious principles are those where a precedent has set a course of decisions that produce impractical or negative outcomes and it is clear over time that the line of cases produced by these precedents increasingly reveal a flaw or flaws in the analytical logic. The results are “absurd,” as Judge Berzon notes in her dissent:

The majority’s flawed test leads to an absurd result: blocking Apaches’ access to and eventually destroying a sacred site where they have performed religious ceremonies for centuries does not substantially burden their religious exercise.<sup>11</sup>

The absurdity is evident in *Apache Stronghold*, where the majority finds that the land imploding from an underground mine as a part of the plan does not “coerce” the Apache from practicing ceremonies and gathering traditions on it.

A number of factors suggest that the protection of sacred sites is an issue that scholars in the field of both constitutional law and federal Indian law can join together and advocate to bring clarity to what has been a tragic failing of the federal legal system for Native Nations.

The next sections seek to demonstrate this approach to appellate advocacy by laying the foundation for a test that might be used with the First Amendment analysis when applied to the protection of sacred sites. The proposed test is internally consistent with Free Exercise Clause coercion test and distinct from the Establishment Clause cases. By acknowledging federal Indian law and the well-established federal trust responsibility, applying this test will avoid the otherwise absurd result noted by Judge Berzon. The *Central Hudson* case and test shows this is not unprecedented.

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11. *Apache Stronghold v. United States*, 38 F.4th 742, 782 (9th Cir. 2022) (Berzon, J., dissenting).

### III. FREEDOM OF RELIGION FAULTY JURISPRUDENCE

The use of the First Amendment<sup>12</sup> to protect sacred sites for Native Nations relies on tests that are doomed to fail from the start, demonstrated by the fact that not a single sacred site has ever been protected based on a freedom of religion argument. Further problematic is that the courts interpret these issues applying cases that are not factually analogous and do not involve property destruction.

The Establishment Clause prevents the government from protecting “religious” sites because of the fatal test of “entanglement” of the government with religion. The courts use Thomas Jefferson’s “wall”<sup>[13]</sup> that separates Church and State as an ever-present tool for breaking treaty promises to allow Tribal nations to continue collective traditions. It is also limited by the Free Exercise Clause where the balancing test proves that no matter what the burden on Tribe’s freedom of religion, there has never been a burden too great (or not narrowly tailored enough) to outweigh the government’s compelling state interest.<sup>14</sup>

Advocates and courts immediately believe “freedom of religion” is the issue at stake in the sacred sites case. But freedom of religion, like freedom of speech, is an individual right. Sacred sites are collective traditions that rely on tribal recognition and continuity. Unlike a church that is a building, a sacred site is part of the earth, and the mountains, air, and direction of the sun may all be a critical part of that site. A sacred site is not only part of the identity of the tribe but is part of its

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12. U.S. CONST. amend. I.

13. James Hutson, ‘A Wall of Separation’, LIBRARY OF CONGRESS, <https://www.loc.gov/loc/lcib/9806/danbury.html> (last visited Apr. 19, 2021). Thomas Jefferson’s reply on Jan. 1, 1802, to an address from the Danbury (Conn.) Baptist Association, which has come to be considered Jefferson’s analysis of the Establishment Clause.

14. Victoria Sutton, *Lost in Translation: A Translation that Set in Motion the Loss of Native American Spiritual Sites*, 7 UCLA INDIGENOUS PEOPLES’ J. OF L., CULTURE & RESISTANCE 93, 103 (2022), <https://escholarship.org/uc/item/2jk9w76p>.

regulation and governance. A church is made of individuals that are free to join or not to join. Native Nations have citizens who are born into the culture and are part of it for life, and leaving does not mean simply to move to a new tribe, like one may move to a new church. First Amendment jurisprudence relies on the individual and individual rights and burdens in the analysis of the freedom of religion. Native Nations have a different relationship to the federal government, not as individuals but as sovereigns and sovereign governments.

Erroneously, federal courts fail from the beginning of the analysis by mischaracterizing the First Amendment as recognizing solely individual rights and treating Native Americans as individuals rather than as nations in relation to this legal issue. They fail to recognize the first principle in federal Indian law is that Native Nations are sovereigns under the Constitution<sup>15</sup> and the United States has a trust responsibility<sup>16</sup> to Native Nations, which includes the continuity of the governments of Native Nations. As Vine Deloria has said, “There is no salvation in tribal religions apart from the continuance of the tribe itself.”<sup>17</sup>

The Establishment Clause jurisprudence has been a barrier to any effort to protect sacred sites because of the fatal test of “entanglement,” because by definition government involvement in protecting “religion,” which would include sacred sites in this analysis, is always doomed to fail—and it has consistently failed.

#### IV. FREE EXERCISE CLAUSE

The Free Exercise Clause is also limited by the balancing test which to date, has demonstrated that no matter how great the burden on Native Nations in the

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15. U.S. CONST. art. I (to “regulate Commerce with . . . the Indian Tribes,” interpreted in *Cherokee Nation v. Georgia*, 30 U.S. 1, 18–19 (1831)).

16. See *Cherokee Nation*, 30 U.S. at 17–18.

17. VINE DELORIA, JR., *GOD IS RED. A NATIVE VIEW OF RELIGION* 200 (1994).

destruction of their sacred site, it is never enough to outweigh the government's compelling state interest<sup>18</sup> when it comes to sacred sites. The test that the government action cannot "coerce" one to abandon their religion is a box easily checked by the prudential jurist who insists that destruction of a sacred site does not prevent a Native Nation from practicing its religion at that sacred site. Yes, that is the test, and it has resulted in this absurdity of a conclusion that should embarrass even the most stalwart prudential jurist who has their name on such an opinion as the *Apache Stronghold* opinion.<sup>19</sup>

Another problem with few federal Indian law cases coming before the appellate courts is that cases that may be relevant or lend insight into cultural and legal conflicts may be forgotten or decided in a context not recognized in a typical electronic search. One such case is *Sequoyah v. T.V.A.*<sup>20</sup> In *Sequoyah*,<sup>21</sup> the Sixth Circuit almost admonished the plaintiffs for starting their claim for defending their sacred site premised on the importance of the site to their cultural or religious practices, rather than the freedom of religion claim:<sup>22</sup>

The record in the present case discloses that some of the plaintiffs objected to the dam and sought to prevent its construction as early as 1965. However, the documents in the record indicate that the Cherokee objections to the Tellico Dam were based primarily on a fear that their cultural heritage,

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18. Victoria Sutton, *Lost in Translation: A Translation that Set in Motion the Loss of Native American Spiritual Sites*, 7 UCLA INDIGENOUS PEOPLES' J. OF L., CULTURE & RESISTANCE 93, 103 (2022).

19. See generally Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294 (2021). It appears this may have happened in the *Apache Stronghold* case, where one judge asked for an en banc hearing.

20. *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980).

21. *Id.*

22. Jimmy Carter, *American Indian Religious Freedom Statement on Signing S.J. Res. 102 Into Law*, THE AMERICAN PRESIDENCY PROJECT (August 12, 1978), <https://www.presidency.ucsb.edu/node/248389>.



rather than their religious rights, would be affected by flooding the Little Tennessee Valley.<sup>23</sup>

Yet, the court must have realized a freedom of religion analysis would fail. When this court analyzed the Free Exercise Clause issue in this case, it made a determination that the claim did not meet the standard for “quality of claims,” so the court would not need to reach the balancing test or the “compelling interest” analysis. The court reached this conclusion by distinguishing *Wisconsin v. Yoder*—where the U.S. Supreme Court held that the religious faith and the mode of life of the Amish are “inseparable and interdependent”<sup>24</sup>—yet the Cherokee Nation’s faith was not. Quoting this holding, in an *ipse dixit* leap of logic, the Sixth Circuit found “no such claim of centrality or indispensability of the Little Tennessee Valley to Cherokee religious observances.”<sup>25</sup>

The Sixth Circuit then characterized the religion of “individual plaintiffs” rather than the tradition and culture of the Cherokee Nation. It further reduced the Cherokee religion to that “which honors ancestors and draws its spiritual strength from feelings of kinship with nature.”<sup>26</sup> Yet, the Sixth Circuit found this fails the *Yoder* test, which requires “demonstrating that worship at the particular geographic location in question is inseparable from the way of life.” The court concluded the constitutional claims were nothing more than “personal preference” rather than those “shared by an organized group.”<sup>27</sup>

The dissent agreed with the court’s centrality analysis but argued that the jurisprudential uncertainty around the test at the time the complaint was filed necessitated a remand to the district court so that the

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23. *Sequoyah*, 620 F.2d at 1162.

24. *Id.* at 1164–65 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

25. *Id.* at 1164.

26. *Id.*

27. *Id.* at 1164–65 (quoting *Yoder*, 406 U.S. at 216).

Cherokee Nation could have a chance to prove the centrality claim.<sup>28</sup>

The Sixth Circuit purported to understand the tradition and culture of the Cherokee Nation that is inseparable from a sacred site, while comparing it to the practice of the Amish not connected in any way to a physical location.

## V. ESTABLISHMENT CLAUSE

Appellate courts rely on precedent and rarely create new tests, especially for individual rights in the First Amendment. Yet, for the First Amendment right of freedom of speech,<sup>29</sup> the U.S. Supreme Court crafted a test for the First Amendment that applied collectively to commercial speech, like speech by cigarette manufacturers and other corporations, called the “*Central Hudson* test.”<sup>30</sup> Corporations are legal organizations sanctioned and defined by state law, but have a form of “personhood.” This is the basis for a free speech test that changed commercial speech from low value, unprotected speech, to protected speech at a somewhat diminished level. The same kind of crafting is called for with the freedom of religion and Establishment Clause barrier to protecting the collective sacred sites category.

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28. Judge Merritt explained:

I agree with the centrality standard and the general reasoning of the Court’s opinion, but I believe the case should be remanded to the District Court to permit plaintiffs to offer proof concerning the centrality of their ancestral burial grounds to their religion. This is a confusing and essentially uncharted area of law under the free exercise clause. At the time the complaint and various affidavits were filed, the centrality standard had not been clearly articulated. It may have been unclear to the Cherokees precisely what they had to allege and prove in order to make a constitutional claim. Indeed, the District Court simply held that the Indians have no free exercise claim because the Government now owns the land on which the burial sites are located.

*Id.* at 1165 (Merritt, J., dissenting).

29. U.S. Const. amend. I.

30. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

The case that best explains the failure of using the Establishment Clause to protect sacred sites is one where the American Indian Religious Freedom Act was tested. This case involved the posting of a sign to prevent hikers from climbing on a part of a sacred mountain on federal lands for a few weeks out of the year.

*Mato Tipila* (Bear Lodge) in Lakota, also known as *He Hota Paha* (Grey Horn Butte) in Lakota, “Bear’s Tipi” in Arapahoe, “Bear’s House” in Crow, and “Tree Rock” in Kiowa,<sup>31</sup> is found on maps as Devil’s Tower, the derisive western name. This mountain is a sacred site to several Native Nations.<sup>32</sup> During certain periods of the year, these Native Nations have prayers and ceremonies on the sacred site. When the National Park Service (“NPS”) was asked to close the area to climbers during these times, the Service eventually made a ban voluntary for the climbers. Still, some climbers objected to this as an unconstitutional entanglement of government with religion—a violation of the First Amendment’s Establishment Clause,<sup>33</sup> because the NPS still contended it had the power to ban climbing.

The District Court of Wyoming stopped short of finding a violation of the Establishment Clause, but concluded that the action to ban climbers was a “type of custodial function [that] does not implicate the dangerously close relationship between state and religion which offends the excessive entanglement prong of the *Lemon* test.”<sup>34</sup> The Tenth Circuit declined to decide whether the NPS action entanglement with religion and instead affirmed the lower court’s holding.<sup>35</sup>

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31. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814, 816 n.2 (10th Cir. 1999).

32. *Id.* at 816.

33. *Id.* at 820.

34. *Bear Lodge Multiple Use Ass’n v. Babbitt*, 2 F. Supp. 2d 1448, 1456 (D. Wyo. 1998).

35. The Tenth Circuit also concluded that the climbers lacked standing because they claimed no injury, which is one of the three prongs required for standing.

## VI. REFLECTION ON ALL THE EFFORTS TO PROTECT SACRED SITES

The actions of presidents, Congress, and Native Nations to protect Native American sacred sites, since 1978, have included executive orders,<sup>36</sup> statutes intended to protect sacred sites,<sup>37</sup> statutes intended to protect religious liberty,<sup>38</sup> creative uses of other statutes<sup>39</sup> and litigation. All have failed.

The executive branch attempted to correct the courts' failure to protect sacred sites with executive orders to direct agency actions. The first attempt to correct this destruction of sacred sites was with an Executive Order in the Clinton administration, giving direction to agencies to consider avoiding harm to sacred sites.<sup>40</sup> In 2021, an Executive Order in the Biden administration also sought to direct agencies to protect sacred sites in agency actions but also to consult with Native Nations about those sites.<sup>41</sup> When the executive branch intervened to limit climbers' access to Devil's Tower, anything more than a voluntary ban could have been held to be an Establishment Clause violation—an unconstitutional entanglement of the government with religion.

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36. Indian Sacred Sites, 61 Fed. Reg. 26771 (May 29, 1996).

37. American Indian Religious Freedom Restoration Act, 42 U.S.C. § 1996 (1978).

38. Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

39. The Antiquities Act of 1906, 16 U.S.C. §§ 431–433.

40. William J. Clinton, *Executive Order 13007—Indian Sacred Sites*, THE AMERICAN PRESIDENCY PROJECT (1996), <https://www.presidency.ucsb.edu/documents/executive-order-13007-indian-sacred-sites>.

41. See *Fact Sheet: Building a New Era of Nation-to-Nation Engagement*, in *Briefing Room: Statements and Releases*, THE WHITE HOUSE (Nov. 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/> (discussing the Biden Administration's executive order and Sacred Sites Memorandum of Understanding with Native American tribes).

VII. DISSENT IN *APACHE STRONGHOLD*  
V. *UNITED STATES*<sup>42</sup>

The *Apache Stronghold* case presented the ideal opportunity for the appellate court to reverse the absurd holdings in the line of cases where the First Amendment was the basis of the failure to protect sacred sites. Judge Berzon argued that the Religious Freedom Restoration Act (RFRA), a legislative effort to better protect religious sites by correcting courts' overly narrow reading of First Amendment protections, was being read too narrowly to an absurd conclusion.<sup>43</sup> But even if RFRA's substantial burden test was read more broadly (and less illogically), it may still be too narrow to protect many important sacred sites. RFRA may need to be abandoned for these cases.

In *Navajo Nation v. U.S. Forest Service*,<sup>44</sup> the Ninth Circuit held that the Free Exercise Clause and the RFRA<sup>45</sup> were not violated where the U.S. approved the desecration of sacred land in the National Park. The sacred land had been desecrated by covering it with artificial snow made from water tainted with human excrement.<sup>46</sup> Judge Bea opined there were just too many religions in the U.S. to accommodate personal preferences.<sup>47</sup>

The lone judge who voted against this opinion, Judge Berzon, said the destruction of the site would “make the site inaccessible and eventually destroy it, objectively

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42. *Apache Stronghold v. United States*, 38 F.4th 742 (9th Cir. 2022).

43. *Id.* at 774 (Berzon, J., dissenting).

44. 535 F.3d 1058 (9th Cir. 2008).

45. 42 U.S.C. §§ 2000bb–2000bb-4 (1993).

46. *Navajo Nation*, 535 F.3d at 1062–63.

47. *Id.* at 1064 (“Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so.”).

preventing Apaches from holding religious ceremonies there.”<sup>48</sup>

Judge Berzon petitioned to have the case reheard, en banc, in the Ninth Circuit, which is a more likely option to address the “absurd” holding given the few cases that the U.S. Supreme Court takes for review. In her dissent, Judge Berzon called the majority opinion “absurd,”<sup>49</sup> “disingenuous,”<sup>50</sup> “flawed,”<sup>51</sup> “illogical,”<sup>52</sup> stating that it is “faulty doctrinal analysis,”<sup>53</sup> and that it also conflicts with U.S. Supreme Court precedent.<sup>54</sup> Further, Judge Berzon characterized the absurdity of the analysis, writing that the majority is “pretending that the question is whether there is a ‘substantial burden’ on the Apaches’ religious exercise”<sup>55</sup> and that the majority proceeds with the “illogical” analysis “without acknowledging its incoherence.”<sup>56</sup>

Because the court never got past the substantial burden test, the compelling government interest test was never reached. In her dissent, Judge Berzon reasoned that once the substantial burden test was read properly and the court moved on to the compelling government interest test, the burden would shift to the government, and the San Carlos Apache Nation could succeed.<sup>57</sup>

### VIII. IS IT TIME FOR A NEW TEST?

In light of the failures of the First Amendment approaches and the inadequacy of RFRA, courts need to

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48. *Apache Stronghold*, 38 F.4th at 784. *Apache Stronghold v. United States* Case: 21-15295 (9th Cir., June 24, 2022) at <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnpweobjnpw/Apache%20Stronghold%20v%20USA%209th%20Cir.pdf> (visited Sept. 16, 2022).

49. *Apache Stronghold*, 38 F.4th at 774.

50. *Id.*

51. *Id.*

52. *Id.* at 776.

53. *Id.* at 782.

54. *Id.* at 774.

55. *Id.* at 783.

56. *Id.* at 776.

57. *Id.* at 784–85.

recognize the absurdity of the results of their old approach and develop a new approach to cases involving Native Nations sacred sites. The U.S. Supreme Court is less likely to overturn *Lyng*<sup>58</sup> or *Navajo Nation* on constitutional grounds than it is to change the interpretation of RFRA.<sup>59</sup> Changing the analysis of RFRA may still be too narrow and will fail to account for the factor that the U.S. owes a trust responsibility to Native Nations. Even if Congress amended RFRA to include the trust responsibility as a factor, such a change would almost certainly lead to a review by a federal court. The judicial branch will have the last word on whether the statute is constitutional,<sup>60</sup> so review would require the same courage on the part of the court, but forum shopping could lead to a court lacking that courage and set another precedent in the wrong direction.

Decisions have been overruled based on several prudential and pragmatic factors: quality of reasoning, workability, inconsistency with related decisions, reliance,<sup>61</sup> and erosion of precedent around that issue.<sup>62</sup> Consideration of each of these factors reveals it is time for the courts to develop a new test for the protection of sacred sites for Native Nations:

- **Quality of reasoning.** Judge Berzon struck a blow for the lack of quality of reasoning in *Apache Stronghold*. It is worth repeating the litany of failures in logic in the majority opinion cited by Judge Berzon in her dissent, calling the majority opinion “absurd,”<sup>63</sup>

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58. *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988).

59. See generally *The Supreme Court’s Overruling of Constitutional Precedent*, CONGRESSIONAL RESEARCH SERVICE (Sept. 24, 2018), [https://www.everycrsreport.com/files/20180924\\_R45319\\_3cafb6dc6b134c9a1c83eff9bfb780a3b904bd3a.pdf](https://www.everycrsreport.com/files/20180924_R45319_3cafb6dc6b134c9a1c83eff9bfb780a3b904bd3a.pdf).

60. *Marbury v. Madison*, 5 U.S. 137 (1803).

61. *Supra* note 59.

62. E.g., *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954), which overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), was preceded by several appellate decisions eroding the “separate but equal” doctrine.

63. *Apache Stronghold v. United States*, 38 F.4th 742, 774 (9th Cir. 2022) (Berzon, J., dissenting).

“disingenuous,”<sup>64</sup> “flawed,”<sup>65</sup> and “illogical.”<sup>66</sup>

- **Workability.** This refers to the certainty and ease of applying the test for federal courts. The tests around sacred sites are uncertain, with the definition of RFRA’s substantial burden test being vague and undefined, leaving courts to try to follow cases that are far from analogous and do not involve real property issues. The First Amendment Establishment Clause *Lemon* test was essentially overruled, opening up the opportunity and need to develop a new test.
- **Inconsistency with related decisions.** Judge Berzon rightly noted that the *Apache Stronghold* opinion was inconsistent with U.S. Supreme Court precedent.<sup>67</sup> For example, Judge Berzon concluded: “If Navajo Nation held that RFRA’s definition of ‘substantial burden’ is limited to the types of burdens described in *Sherbert* and *Yoder*, that holding cannot be squared with *Holt*, *Ramirez*, and *Hobby Lobby*, read together.”<sup>68</sup>
- **Reliance.** When it comes to cases brought to protect sacred sites, parties can consistently rely on the federal courts to find there is no burden too great to outweigh any government interest. But is this the type of reliance that is important for the reliance, credibility, and trust in the judicial branch opinions? Arguably, the kind of reliance we would seek from the judicial branch is that which applies consistently, using analogous cases involving the destruction of property. By attempting to ignore federal Indian law doctrines while

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64. *Id.*

65. *Id.*

66. *Id.* at 776.

67. *Id.* at 774.

68. *Apache Stronghold*, 38 F.4th at 782.



treating these cases as if tribes are individual Native Americans, courts lose credibility.

- **Erosion of precedent around that issue.** The recent overruling of the *Lemon* test, the prudential test for the Establishment Clause, in *Kennedy v. Bremerton*, if we are to believe the *Lemon* test is actually dead,<sup>69</sup> signals the opportunity to craft a new test to apply in cases involving sacred sites, which are distinct from cases like *Bremerton*, which involve actions taken in public places.

While precedent continues to erode, the public believes that sacred sites should be protected by the federal government from destruction. In a recent poll around the Dakota Pipeline project, almost half of the Americans in the poll believed the protection of the sacred lake should take precedence over the pipeline construction.<sup>70</sup>

Just as the United States Supreme Court created the *Central Hudson* test for commercial speech that recognized corporations were different from individuals, the court should create a test that explicitly recognizes that federally recognized tribes are different from individuals for freedom of religion issues. In *Central Hudson*, the Court developed a new test for an entire category of differently situated groups—corporations. Procedurally, *Central Hudson* began with the utility company plaintiff challenging a Public Utility Commission policy after exhausting administrative remedies in the state court. The state court upheld the restriction as not a violation of free speech, and the New York Court

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69. Justice Scalia famously opined about the *Lemon* test that it was used when convenient: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . .” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J. concurring).

70. Rob Suls, *Public Divided Over Keystone XL, Dakota pipelines; Democrats Turn Decisively Against Keystone*, PEW RSCH. CTR. (Feb. 21, 2017), <https://www.pewresearch.org/fact-tank/2017/02/21/public-divided-over-keystone-xl-dakota-pipelines-democrats-turn-decisively-against-keystone/>.

of Appeals affirmed the trial court's holding.<sup>71</sup> The holdings consistently upheld the lack of protection for commercial speech outweighed by the governmental interest.<sup>72</sup> This, too, was an absurd result that was remedied by the new test using "common sense," known as the *Central Hudson* test.

It was not until the case was before the U.S. Supreme Court that it was recognized that the utility company's commercial speech was not low value, but had some value and it should be protected, though not in the same way as individual's free speech. In *Central Hudson*, as the court began the explanation of the reason for a new test, it opined, "our decisions have recognized 'the commonsense distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" <sup>73</sup>

Similarly, the appellate court should move as did the U.S. Supreme Court in *Central Hudson* and create a new test for Freedom of Religion Clause that recognizes the "common sense" distinction between religion freedom for individuals and religion freedom that must be protected for Native Nations under the trust responsibility obligation. If the U.S. Supreme Court did accept a petition to review this new test for religious freedom and followed the *Central Hudson* reasoning of when a new distinction is needed, it likely would affirm—both for the *Central Hudson* "common sense"<sup>74</sup> logic and to avoid an "absurd"<sup>75</sup> result as in *Apache Stronghold*.

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71. *Cent. Hudson Gas & Elec. Corp. v. Public Serv., Comm'n of New York*, 447 U.S. 557, 560–61 (1980).

72. *Consol. Edison Co. of New York v. Pub. Serv. Comm'n*, 47 N.Y.2d 94 (1979); *Consol. Edison Co. v. Pub. Serv. Comm'n*, 407 N.Y.S.2d 735 (N.Y. App. Div. 3d Dept. 1978).

73. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 562 (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455–56 (1978)).

74. *Id.*

75. *Apache Stronghold*, 38 F.4th at 784. *Apache Stronghold v. United States* Case: 21-15295 at 774 (9th Cir., June 24, 2022) at <https://fingfx.thomsonreuters.com/gfx/legaldocs/jnpweobjnpw/Apache%20Stronghold%20v%20USA%209th%20Cir.pdf> (last visited Sept. 16, 2022).

With relatively few federal Indian law cases reaching appellate courts and the courts' unfamiliarity with the trust responsibility doctrine, it is not surprising that this problem of an "absurd" outcome has not been noticed. Recognizing this problem, Congress acted to protect Native American sacred sites with the American Indian Religious Freedom Act ("AIFRA"),<sup>76</sup> but in *Lyng v. Northwest Indian Cemetery Protective Association*,<sup>77</sup> the U.S. Supreme Court held that it was a violation of the Free Speech Clause, specifically the free exercise clause because of the lack of coercion for Native Americans not to practice their religion just because the site was destroyed with a road—another "absurd" result, quoting Judge Berzon.

This solution to the "absurd" results repeatedly reached by courts' use of First Amendment analysis for sacred sites of federally recognized tribes, the failure of the Congressional "fixes" with RFRA and AIFRA leads to an inevitable conclusion that applying federal Indian law's federal trust responsibility is the prudentially true way to approach these cases. *Apache Stronghold* is such a case that might give the U.S. Supreme Court an opportunity to right this historical and constitutional wrong.

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76. 42 U.S.C. 1996 (1978).

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

