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## NOTE

# NATIVE AMERICAN RELIGIOUS ACCOMMODATIONS, NATIONAL PARKS, AND THE *CUTTER* TEST

JAMES DOHNALEK\*

### INTRODUCTION

Religious accommodations can be a highly controversial subject in today's society. Whether these accommodations take the form of the government allowing sacramental use of an otherwise illegal drug to certain religious adherents, or exempting corporations on religious grounds from the contraceptive mandate in the Affordable Care Act, there is no shortage of people with opinions on the matter. One area that is particularly ripe for debate is religious accommodations in national parks, given the government's recent activity in managing national parks.<sup>1</sup>

Accommodations are defined as "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."<sup>2</sup> In religious contexts, accommodations protect certain religious exercises by "declaring that otherwise valid regulations should not be applied in ways that significantly interfere with the religious freedom of organizations or individuals."<sup>3</sup> These laws and policies that provide special treatment to certain religious practices often raise constitutional issues due to the Establishment Clause of the

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1. Angela Hart, *California Moves to Block National Park Fee Increases*, THE SACRAMENTO BEE (Nov. 22, 2017), <http://www.sacbee.com/news/politics-government/capitol-alert/article186057603.html>; Nadja Popovich, *Bears Ears National Monument Is Shrinking. Here's What Is Being Cut.*, N.Y. TIMES (Dec. 8, 2017), <https://www.nytimes.com/interactive/2017/12/08/climate/bears-ears-monument-trump.html>.

2. Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

3. Thomas C. Berg, *Religious Accommodation and the Welfare State*, 38 HARV. J.L. & GENDER 103, 105 (2015).

First Amendment of the United States Constitution, which prohibits the federal government from establishing a religion.

As will be discussed in this article, certain religious accommodations should be provided to Native Americans in national parks, including waiver of the park's entrance fee, access to otherwise restricted sites in the park that hold religious significance, and allowing Native Americans to access the park when it is closed. This article will examine these accommodations under the test that the Supreme Court of the United States laid out in *Cutter v. Wilkinson* for determining the constitutionality of statutory accommodations.<sup>4</sup> These accommodations will then be assessed as to how they affect third parties. Finally, the denominational neutrality requirement of *Cutter's* third prong will be considered.

### I. LAND AND NATIVE AMERICAN RELIGIOUS BELIEFS

Prior to analyzing accommodations for Native American religious exercise in national parks, one must first understand the unique nature of Native American religions. In most contexts, Native American religions cannot be thought of as a singular concept due to the great variation of religious beliefs between the different tribes.<sup>5</sup> However, one common element of most Native American religions is that they tend to place a great amount of spiritual value in land.<sup>6</sup> The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being.<sup>7</sup>

Oftentimes land that is designated as a national park also holds religious value to local Native Americans.<sup>8</sup> When analyzing the issue of Native American religious exercise in national parks or other public lands, it must

4. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

5. *Religious Freedom & Sacred Places*, NAT'L CONGRESS OF NATIVE AM. INDIANS, <http://www.ncai.org/policy-issues/community-and-culture/rel-freedom-and-sacred-places> (last visited July 1, 2018) ("In the United States, there are 566 federally recognized tribes that speak hundreds of different Native languages. With the vast geographic, linguistic, and cultural diversity that exists among tribes, it is impossible to refer to Native American religion or spirituality in the singular context. Native religions and traditions vastly differ from tribe to tribe. . .").

6. See generally Joel Brady, "*Land Is Itself a Sacred, Living Being*": *Native American Sacred Site Protection on Federal Public Lands Amidst The Shadows of Bear Lodge*, 24 AM. INDIAN L. REV. 153 (2000) ("At the center of most Native American belief systems is the basic tenet that religion and faith draws heavily upon sacred lands."); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place of Indians as Nonowners*, 52 UCLA L. REV. 1061 (2005).

7. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 461 (1988).

8. See *National Register of Historic Places and National Historic Landmarks Programs*, NAT'L PARK SERV., [https://www.nps.gov/history/tribes/NR\\_NHL.htm](https://www.nps.gov/history/tribes/NR_NHL.htm) (last visited July 1, 2018); Geoff Montes, *Sacred Native American Sites: Bear Butte and Wind Cave*, NAT'L TRUST FOR HIST. PRESERVATION (June 16, 2015), <https://savingplaces.org/stories/sacred-native-american-sites-bear-butte-and-wind-cave#.WiYoXxNSzaY>; Alysa Landry, *Native History: Yellowstone National Park Created on Sacred Land*, INDIAN COUNTRY TODAY (Mar. 1, 2017), <https://indiancountrymedianet.com/history/events/native-history-yellowstone-national-park-created-on-sacred-land/>; *Public Lands, Sacred Sites, and Native American Youth*, THE ASPEN INST., <https://assets.aspeninstitute>

be viewed through the lens that certain practices can hold religious significance to Native Americans only if such practices are performed on that specific area of land. Justice Brennan reaffirmed this point in his *Lyng* dissent: “Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible[.]”<sup>9</sup>

Because many Native American religious beliefs and practices are site-specific, reasonable accommodations should be made to those Native Americans when the religiously significant area is situated on public land, or more specifically, within a national park. Such reasonable accommodations that should be provided to Native Americans include removing the park entrance fee, dismissing access restrictions to sites holding religious value, and allowing entrance when the park is closed. These accommodations would eliminate many of the burdens on Native American religious practices within national parks.

## II. THE FIRST AMENDMENT AND *CUTTER*

The legal framework for analyzing accommodations begins with the First Amendment of the United States Constitution. The First Amendment’s Establishment Clause requires that “Congress shall make no law respecting an establishment of religion[.]”<sup>10</sup> This is intended to prohibit the government from creating or supporting a national religion. Thus, the Establishment Clause is often viewed as preventing the government from providing favorable treatment to certain religions.

However, the Establishment Clause is often in conflict with another provision of the First Amendment. The First Amendment’s Free Exercise Clause prevents Congress from making a law “prohibiting the free exercise” of religion.<sup>11</sup> Consequently, a tension exists between avoiding religious favoritism under the Establishment Clause, and not restricting religious practices under the Free Exercise Clause. This tension makes the issue of religious accommodations incredibly challenging. Accommodations are defined as “government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person’s or an institution’s religion.”<sup>12</sup> While some argue that accommodations by their very nature violate the Establishment Clause,<sup>13</sup> the Supreme Court of the United

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.org/content/uploads/files/content/upload/My%20Native%20Voice%20Fact%20Sheet%20Update.pdf (last visited July 1, 2018).

9. *Lyng*, 485 U.S. at 461.

10. U.S. CONST. amend. I.

11. *Id.*

12. McConnell, *supra* note 2, at 686.

13. See Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL’Y 591 (1990).

States has rejected this idea.<sup>14</sup> Instead, the Supreme Court has stated that “‘there is room for play in the joints between’ the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.”<sup>15</sup>

In *Cutter v. Wilkinson*, the Supreme Court of the United States examined the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA). In doing so, the Supreme Court created a test that defines when a statutory accommodation strikes the right balance between allowing free exercise and avoiding establishment. According to the *Cutter* test, a statutory religious accommodation is constitutional under the Establishment Clause as long as it “(1) alleviate[s] exceptional government-created burdens on private religious exercise, (2) take[s] adequate account of the burdens imposed on nonbeneficiaries, and (3) satisf[ies] the principle of denominational neutrality.”<sup>16</sup>

The proposed religious accommodations for Native Americans set forth in this article are similar to the religious accommodations provided by RLUIPA. The accommodations in both scenarios are provided by legislative action. Given this similarity, it is appropriate to analyze the constitutionality of the Native American accommodations in the same manner in which the constitutionality of RLUIPA was analyzed; by using the *Cutter* test. However, before using the *Cutter* test to analyze the proposed accommodations, two points of uncertainty surrounding *Cutter* must be discussed. First, what does the phrase “take adequate account” in *Cutter*’s second prong really mean? Second, there is debate as to whether legislatures should have the *discretion* to grant religious accommodations, or whether legislatures may only provide accommodations when a court directs it to do so.<sup>17</sup>

14. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987).

15. *Cutter*, 544 U.S. at 713.

16. *Id.* at 720 (“[1] Foremost, we find RLUIPA’s institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. *See* Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 705 (1994) (government need not ‘be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice’); *Amos*, 483 U.S., at 349 (O’CONNOR, J., concurring in judgment) (removal of government-imposed burdens on religious exercise is more likely to be perceived ‘as an accommodation of the exercise of religion rather than as a Government endorsement of religion’). Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: [2] Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, *see* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); and [3] they must be satisfied that the Act’s prescriptions are and will be administered neutrally among different faiths, *see Kiryas Joel*, 512 U.S. 687”); MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 241 (Wolters Kluwer, 4th ed. 2016).

17. *See* Berg, *supra* note 3, at 147; McConnell, *supra* note 2, at 722–26; Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 605–06 (1991). *See generally* Ira C. Lupu, *The Case Against Legislative*

A. *What Does the Phrase “Take Adequate Account” in Cutter’s Second Prong Mean?*

*Cutter*’s second prong states that an “adequate account of the burdens a requested accommodation may impose on nonbeneficiaries” must be taken.<sup>18</sup> Based on words alone, it is not entirely clear what this means. Is this directing the reader to compare the third party’s burdens against the religious adherent’s burdens, effectively weighing the first and second prongs against each other? Or is each prong isolated and analyzed separately from the other?

There is a strong argument in favor of reading the *Cutter* test as weighing the burdens in the first and second prong against each other.<sup>19</sup> Professor Thomas Berg cites to three reasons why the *Cutter* test should be read as weighing burdens against each other: case law, historical foundations, and the deference usually given to legislative decisions.<sup>20</sup>

Berg’s case law argument is particularly compelling, in which he cites and describes the case of *Estate of Thornton v. Caldor, Inc.*<sup>21</sup> In *Caldor*, the Supreme Court of the United States invalidated a statute giving employees the right not to work on the day of the employee’s Sabbath.<sup>22</sup> In coming to this conclusion, the Supreme Court considered the fact that the statute imposed a large burden on employers and other employees who had to account for the religiously observant employee’s absence. However, the Court’s analysis did not end there. The Supreme Court also analyzed the burden on the religious employee, specifically finding that the burden was created not by the state, but rather the private employer.<sup>23</sup> The interests of the third parties far outweighed the burdens imposed by the private employer onto the religious employee.

The Court continued this method of analysis of weighing burdens in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*. In *Amos*, the Court examined a law where religious

*Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992).

18. *Cutter*, 544 U.S. at 720.

19. Berg, *supra* note 3, at 143 (“The validity of this argument turns on how stringently the test of *Cutter* is applied—and it should not be applied stringently. Under the *Cutter* test, the burden the accommodation imposes on others is not determinative: it must be weighed, if only in a rough way, against the burden the accommodation removes from sincere religious practice.”).

20. *Id.* at 143–47. Berg’s second reason for reading *Cutter* as weighing the burdens against each other is the theoretical foundations of the Establishment Clause, in which he examines the rejection of the “benefit of clergy” accommodation in America. Finally, Berg’s third reason looks at the deference usually given to legislative judgment. Berg discusses how in many non-religious contexts, legislatures are entrusted to “define legal harms in order to balance competing interests[.]”

21. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); Berg, *supra* note 3, at 143–44.

22. *Caldor*, 472 U.S. at 710–11.

23. *Id.* at 709–11.

organizations were exempted from a ban on discriminatory hiring.<sup>24</sup> The discriminatory hiring practices undoubtedly presented a burden to third parties seeking employment. However, the Supreme Court upheld the exemption because it “prevented potentially serious encroachments on protected religious freedoms.”<sup>25</sup> In doing so, the Supreme Court considered the harms to both the religious organizations and the third parties.<sup>26</sup>

Consistent with the Supreme Court’s practice of balancing the religious adherent’s burdens without accommodation against the third party’s burdens with accommodation, this article will read the *Cutter* test to weigh the first and second prongs against each other. The burdens suffered by the Native Americans engaged in religious practice in a national park without accommodations should be assessed against the burdens imposed on non-Native American visitors to national parks.

### B. *The Debate Over Legislative Discretion*

One of the most intense debates surrounding *Cutter* and religious accommodations is whether a legislature should have the discretion to accommodate even when it is not required to do so.<sup>27</sup> In other words, is it permissible for a legislature to accommodate religious exercise absent direction from a court? Scholars are sharply divided on this issue.

This legislative discretion debate often centers on whether legislatures possess the prudence and acumen to grant nonessential accommodations. Professor Ira Lupu, one of the leading advocates against legislative discretion, believes that granting legislatures such discretion will lead to inequality.<sup>28</sup> Specifically, Lupu believes that allowing discretion over religious accommodations will result in legislatures providing special treatment for religious concerns, and will enable certain legislatures to favor the dominant religion over other religions.<sup>29</sup> Under this view, it is necessary to confine the decision-making over accommodations to the courts in order to reduce unequal treatment and the marginalization of unpopular religions.<sup>30</sup>

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24. *Amos*, 483 U.S. at 331.

25. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (discussing the *Amos* decision).

26. *Amos*, 483 U.S. at 336–38.

27. *See supra* note 17.

28. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, *supra* note 17, at 605–06. *See generally* Lupu, *The Case Against Legislative Codification of Religious Liberty*, *supra* note 17; Lupu, *The Trouble with Accommodation*, *supra* note 17.

29. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, *supra* note 17, at 605–06 (“[A]ccommodations by state legislatures will 1) create a nonuniform pattern of special treatment for religious concerns; 2) present an aggravated risk of special treatment for religions dominant in particular states; and 3) create the further risk of invidiously omitted accommodations for those religions which are in disfavor.”).

30. *Id.* at 600–05.

One of the leading scholars in support of legislative discretion, Professor Michael McConnell, points to the fact that legislatures are given discretion in other, non-religious contexts. Specifically, McConnell states:

[L]egislative discretion in other areas of constitutional concern is not confined to the bare requirements of the Constitution. The political branches are entitled, within their delegated authority, to secure the blessings of liberty and promote the values of the Bill of Rights in ways that go beyond what courts could require. Why should the free exercise of religion be an exception? Of course, the substantive scope of permissible accommodation is limited by the Establishment Clause (just as the scope of permissible affirmative action is limited by the Equal Protection Clause). But the Establishment Clause limits the type of action all branches of government may take; it provides no warrant for the proposition that courts may accommodate while legislatures cannot.<sup>31</sup>

McConnell likens legislative discretion over religious accommodations to legislative discretion over racial discrimination. While courts may be the best decision makers for issues involving race, it would be preposterous to suggest that legislatures should be prevented from enacting laws protecting racial minorities.<sup>32</sup> Professor Thomas Berg furthers this argument by applying this principle to the context of same-sex marriage accommodations:

If we presume that modern regulators have leeway to define legal harms in order to balance competing interests, then surely they should have leeway to protect religious freedom along with other statutory interests. It would make little sense, for example, to say that a state that recognized same-sex marriage could not simultaneously exempt the small wedding photographer, in order to balance the two rights. Why is it any different if the legislature responds to a court decision ordering same-sex marriage than if the legislature enacts the accommodation at the time it recognizes marriage legislatively?<sup>33</sup>

The argument in favor of legislative discretion is more compelling. While the concern over unequal treatment raised by those opposed to legislative discretion is absolutely justified, the fact remains that legislatures are

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31. McConnell, *supra* note 2, at 723–24.

32. *Id.* at 723 (“But this is equally true of many other issues of constitutional dimension. For example, racial discrimination—both against minorities and on their behalf—is a knotty problem, entailing great risk of unprincipled and racist decisionmaking. For all the reasons Lupu rehearses, courts might well be the best decision makers. But no one would contend that Congress should have been kept from passing the Civil Rights Act of 1964, or that states and localities should be barred from enacting local codes and ordinances forbidding discrimination. Indeed, in the especially sensitive area of affirmative action, the prevailing view is that Congress—pursuant to its section five authority—has broad latitude to engage in affirmative action, even though the courts’ authority to do so is limited to circumstances in which affirmative action is a narrowly tailored remedy for a specific constitutional violation.”).

33. Berg, *supra* note 3, at 147.

often given the power to govern other issues where the interests of under-represented or vulnerable groups are at stake. It is also worth noting that legislatures, like courts, take an oath to support and uphold the Constitution.<sup>34</sup> Opponents of legislative discretion have failed to put forth a convincing argument as to how these religious issues are distinct from other issues like racial or gender equality. Accordingly, for the sake of consistency among these similar issues, legislative discretion should also extend to religious accommodations.

### III. ANALYZING NATIVE AMERICAN RELIGIOUS ACCOMMODATIONS UNDER *CUTTER*

This section analyzes the proposed Native American religious accommodations using the *Cutter* test. In doing so, the burdens on Native Americans absent accommodation are identified and weighed against the burdens the accommodations impose upon third parties. Finally, the denominational neutrality prong is analyzed.

#### A. *Alleviating an Exceptional Government Burden?*

The first prong of the *Cutter* test asks whether the exemption “alleviates exceptional government-created burdens on private religious exercise.”<sup>35</sup> The definition of an “exceptional burden” is not clearly defined, but the language used by the *Cutter* court itself suggests that “exceptional” is akin to “substantial.” In examining RLUIPA’s Section 3 prohibition against the government imposing “substantial burden[s]” upon a prisoner’s religious exercise, the Court stated that Section 3 of RLUIPA “alleviates exceptional government-created burdens on private religious exercise.”<sup>36</sup> With no distinction made between the terms “exceptional” and “substantial,” the Court’s statement that a law prohibiting “substantial” burdens results in alleviating “exceptional” burdens hints that there is very little difference, if any, between the terms. Several district courts citing *Cutter* seem to adopt the view that the terms are interchangeable, mentioning that Section 3 of

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34. U.S. CONST. art. VI; see also McConnell, *supra* note 2, at 722–23 (“This conception of judicial exclusivity in the enforcement of the Constitution is utterly foreign to our legal system. The commands of the Constitution are addressed to all persons exercising authority under it; that is why our senators and representatives, and executive as well as judicial officers, at both the state and the federal level, are required to take an oath to support the Constitution. Judicial review is not even mentioned in the Constitution. The First Amendment applies to the states by incorporation through the Fourteenth Amendment; Section five of the Fourteenth Amendment vests the authority to enforce that Amendment in the Congress. I cannot fathom on what theory Professor Lupu contends that legislators and executive officers are forbidden to conform their acts to constitutional requirements.”).

35. *Cutter*, 544 U.S. at 720.

36. *Id.*

RLUIPA (which only references “substantial burdens”) was designed to alleviate “exceptional” burdens.<sup>37</sup>

Additionally, while “exceptional” may sound more demanding than “substantial” to some readers, under the theory of legislative discretion discussed earlier, it is well within a legislature’s authority to determine what constitutes an exceptional burden on religious exercise.<sup>38</sup> Congress could very well decide that an exceptional burden is no more serious than a substantial burden, or perhaps even less.

As mentioned previously, certain accommodations should be given to Native Americans seeking to engage in religious exercises in a national park, including allowing Native Americans to enter the park for free, permitting Native Americans to access restricted areas of the park, and allowing Native Americans to visit the park for religious purposes, even when it is closed. In order to fulfill the first prong of *Cutter*, these accommodations must alleviate an exceptional government-created burden. The following subsections will examine some possible government-created burdens that harm Native Americans wishing to engage in religious exercises in a park, including tourism in the park, entrance fees, and restricted access to certain areas within the park.

### 1. Tourism

One of the possible government-created burdens to the Native Americans is tourism to the religious site. If the government designates an area as a national park, the area will likely see increased tourism. The increased tourism may in turn make Native American religious practice more difficult. With more tourists would come more noise, more people walking near the spiritual site, and less privacy. Native Americans seeking to practice religious exercises in the park may claim that these factors make their practice more difficult, and thus the government has created an exceptional burden.

One of the landmark decisions on what constitutes a burden is *Lyng v. Northwest Indian Cemetery Protective*. In *Lyng*, the United States Forest Service constructed a paved road through Chimney Rock, an area of Six Rivers National Forest.<sup>39</sup> Chimney Rock was used by the local Native

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37. See *Guess v. McGill*, No. 13-CV-02260, 2014 WL 5106735, at \*10 (D.S.C. Oct. 10, 2014) (citing *Cutter* and stating that “RLUIPA’s institutionalized persons provisions was intended to alleviate only ‘exceptional’ burdens on religious exercise[.]”); *Hall v. Martin*, No. 1:11 CV 416, 2012 WL 1536457, at \*3 (W.D. Mich. Mar. 15, 2012) (citing *Cutter* and “recognizing that RLUIPA’s institutionalized persons provision was intended to alleviate only ‘exceptional’ burdens on religious exercise”); *Trotter v. Ramsey*, No. 13-1087-JDT/EGB, 2015 WL 4163345, at \*4 (W.D. Tenn. July 9, 2015) (citing *Cutter* and stating that “RLUIPA’s institutionalized persons provision was intended to alleviate only exceptional burdens on religious exercise”); see also *Selby v. Caruso*, No. 2:09-CV-152, 2010 WL 3892209, at \*3 (W.D. Mich. Aug. 20, 2010).

38. See *Berg*, *supra* note 3, at 103–51; *McConnell*, *supra* note 2, at 685–742.

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

Americans for religious purposes, and the land was considered sacred.<sup>40</sup> The Native Americans opposed the construction of the road, claiming it was a burden on their exercise of religion. Specifically, the road would disrupt their religious rituals, as their religious rituals required “privacy, silence, and an undisturbed natural setting.”<sup>41</sup>

The Supreme Court of the United States ruled against the Native Americans, finding that their burden was not great enough. The Court stated that significant government interference with one’s ability to “pursue spiritual fulfillment according to their own religious beliefs” is not a heavy enough burden.<sup>42</sup> Instead, to constitute a significant enough burden, the individual must “be coerced by the Government’s action into violating their religious beliefs.”<sup>43</sup>

The Supreme Court’s reasoning in *Lyng* was rooted in a prior burden case, *Bowen v. Roy*, which examined a federal statute requiring states administering certain welfare programs to use the recipient’s Social Security number.<sup>44</sup> A Native American man claimed his religious beliefs prevented him from providing his daughter’s Social Security number, as doing so would “‘rob the spirit’ of his daughter and prevent her from attaining greater spiritual power.”<sup>45</sup> The Supreme Court rejected this argument, stating that the government is not required to

conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . [t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government’s internal procedures.<sup>46</sup>

*Lyng*’s rule that no substantial burden exists when a government action merely makes a religious exercise more difficult has been applied in other Native American religious exercise cases. In *Snoqualmie Indian Tribe v. F.E.R.C.*, the Federal Energy Regulatory Commission approved a hydroelectricity project on the Snoqualmie River near Seattle.<sup>47</sup> The project would affect the water flow of the Snoqualmie Falls down river and eliminate the mist created by the waterfall. The Snoqualmie Tribe opposed the project, claiming it represented a substantial burden on their religion because the waterfall was sacred, and its mist was necessary for their vision quests. The Ninth Circuit rejected the Tribe’s claims, stating that the

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40. *Id.*

41. *Id.*

42. *Id.* at 449.

43. *Id.*

44. *Bowen v. Roy*, 476 U.S. 693 (1986).

45. *Id.* at 696.

46. *Id.* at 699–700.

47. *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1211 (9th Cir. 2008).

Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.<sup>48</sup>

In *Navajo Nation v. U.S. Forest Service*, the U.S. Forest Service approved the use of treated wastewater to create artificial snow at the Snowbowl ski area in Arizona.<sup>49</sup> The Snowbowl ski area was located on a set of peaks that held religious and cultural significance to the local Native American tribes. The tribes complained that the snow made from treated wastewater, containing .0001 percent human waste, "desecrate[d] the entire mountain, deprecate[d] their religious ceremonies, and injure[d] their religious sensibilities."<sup>50</sup> The Ninth Circuit rejected the Native Americans' argument, declaring that

[t]he use of recycled wastewater on a ski area that covers one percent of the Peaks does not force the Plaintiffs to choose between following the tenets of their religion and receiving a governmental benefit, as in *Sherbert*. The use of recycled wastewater to make artificial snow also does not coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions, as in *Yoder*. The Plaintiffs are not fined or penalized in any way for practicing their religion on the Peaks or on the Snowbowl. Quite the contrary: the Forest Service "has guaranteed that religious practitioners would still have access to the Snowbowl" and the rest of the Peaks for religious purposes.

The only effect of the proposed upgrades is on the Plaintiffs' subjective, emotional religious experience. That is, the presence of recycled wastewater on the Peaks is offensive to the Plaintiffs' religious sensibilities. To plaintiffs, it will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain. Nevertheless, under Supreme Court precedent, the diminishment of spiritual fulfillment—serious though it may be—is not a "substantial burden" on the free exercise of religion.<sup>51</sup>

Thus, the *Lyng* and *Roy* decisions, as well as those following *Lyng*, refused to find a substantial burden unless the government coerced an individual into violating their religious beliefs. Government action that merely makes religious practice more difficult does not constitute an exceptional burden.

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48. *Id.* at 1214.

49. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1065–66 (9th Cir. 2008).

50. *Id.* at 1062–63.

51. *Id.* at 1070.

A government act designating a religiously significant area as a national park, and therefore increasing tourism, is very similar to the facts of *Lyng*, *Snoqualmie Indian Tribe*, and *Navajo Nation*. The burden of increased tourists that accompanies a designation as a national park, and subsequently more noise and less privacy, appears to be no different than building a road close to a religious site, using treated wastewater to cover a spiritual site with snow, or eliminating mist from a sacred waterfall. The common feature in each of these situations is that the government has made religious practice more difficult.<sup>52</sup> However, none of these situations coerce the individual to violate their beliefs.

Strictly applying *Lyng*, courts would likely find no exceptional burden in a scenario where Native American sacred land became a national park. The noise and lack of privacy of increased traffic to sacred land could certainly make the Native Americans' religious exercise more difficult, as Native American religious practices may require an undisturbed natural setting. Nevertheless, the increased noise and decreased privacy would not *coerce* the Native Americans into violating their beliefs. By designating sacred land as a national park and increasing tourism, the government is not forcing the Native Americans to abandon their beliefs in order to comply with the law. For this reason, under *Lyng*, it cannot be said that increased tourism to a sacred area, caused by the government designating it as a national park, places an exceptional burden on the Native Americans.

However, there is a significant distinction between the cases that apply *Lyng* and a situation where sacred land is designated as a national park. Designation of land as a national park generally only occurs through an act of Congress.<sup>53</sup> As such, Congress may be inclined to also provide accommodations to Native Americans to whom that land contains religious value. The plaintiffs in *Lyng*, *Snoqualmie Indian Tribe*, and *Navajo Nation*, on the other hand, instead sought accommodations through the *courts*.

This distinction between who is providing the accommodation, a legislature or a court, is important because the courts in *Lyng* and the subsequent cases were bound to provide accommodation only when accommodation

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52. One may argue that *Lyng* is not even applicable because the harms from tourism (noise, less privacy) are imposed not by the government, but rather by private parties (the tourists). However, this argument seems contrary even to *Lyng*. In *Lyng* the issue was noise created from traffic on a logging road near a Native American spiritual site. *Lyng*, 485 U.S. at 442. Presumably, not all of the logging road's traffic noise came from government vehicles; it is almost certain that some of the traffic creating noise on the road was caused by private individuals. Nevertheless, the Supreme Court found this burden to be government created. *See id.* at 449. In the context of declaring sacred land as a national park, it is the government's action of designating that land as a national park that is enabling the increased noise and distraction. This is consistent with the *Lyng* court holding the government responsible for noise created by private citizens driving on a public road. As such, any noise created by tourism would likely be attributed to the government in a burdens analysis under *Cutter*.

53. *America's Public Lands Explained*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/blog/americas-public-lands-explained> (last visited July 1, 2018).

was *required*. Legislatures, on the other hand, should be given the discretion to decide what constitutes an exceptional burden on religious exercise, and consequently provide accommodations even when such accommodations are not required.<sup>54</sup>

As the preceding discussion applying *Lyng* demonstrates, the increased tourism could have a significant negative impact on Native American religious exercise. If Congress were to provide religious accommodations to Native Americans in national parks, under the legislative discretion doctrine, it could likely be justified on the grounds that the effect of such tourism constitutes an exceptional burden on the Native Americans seeking to engage in religious practices.<sup>55</sup>

## 2. Entrance Fee

Another potential burden arising out of the government creating a national park on land sacred to Native Americans is an entrance fee. Many national parks require visitors to pay a fee to enter for a certain amount of time.<sup>56</sup> There can be no doubt that this burden is government-created, but does it rise to the level of an exceptional burden?

The financial burden imposed by the park entrance fee is comparable to the penalty at issue in *Burwell v. Hobby Lobby Stores, Inc.* In that case, the plaintiff, Hobby Lobby, argued that the Affordable Care Act's contraceptive mandate, which required certain employers to provide insurance to cover preventative care, substantially burdened their religious exercise.<sup>57</sup> The employer could choose not to comply with the contraceptive mandate, but it would be subject to a fine of \$100 a day per affected individual.<sup>58</sup> The Supreme Court of the United States agreed with Hobby Lobby, finding that the contraceptive mandate created a scenario where Hobby Lobby was

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54. See Berg, *supra* note 3, at 103–51; McConnell, *supra* note 2, at 685–742.

55. Justice Brennan's dissent in *Lyng* provides another view to this analysis. Justice Brennan stated that there is no significant distinction between "government[ ] actions that compel affirmative conduct inconsistent with religious belief, and those governmental actions that prevent conduct consistent with religious belief." *Lyng*, 485 U.S. at 468. Furthermore, Justice Brennan stated that "religious freedom is threatened no less by governmental action that makes the practice of one's chosen faith impossible than by governmental programs that pressure one to engage in conduct inconsistent with religious beliefs." *Id.* Brennan's dissent in *Lyng* is less concerned with how religious practices are harmed, and instead more focused on the extent of harm. Applying Brennan's arguments to this situation's noise and privacy concerns associated with increased tourism could be considered a burden. If certain Native American religious practices require an undisturbed natural setting in order to be effective, and increased tourism disrupts the natural setting, then it appears that the government will have created a situation where the Native Americans are prevented from practicing their religious rituals. Accordingly, under Brennan's analysis, increased tourism could be a substantial burden.

56. *Plan Your Visit*, NAT'L PARK SERV., <https://www.nps.gov/planyourvisit/passes.htm> (last visited Feb. 14, 2019).

57. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2766 (2014); see also Brief for Respondents at 9, *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014) (No. 13-354).

58. *Hobby Lobby*, 134 S. Ct. at 2762.

forced to “engage in conduct that seriously violate[d] their religious beliefs” or suffer severe economic consequences.<sup>59</sup> To the Supreme Court, this was a substantial burden.

One of the propositions *Hobby Lobby* stands for is that requiring one to pay a substantial fee simply to act in accordance with one’s religious beliefs creates a substantial burden.<sup>60</sup> Other courts have supported this reading as well.<sup>61</sup> If the government did not provide accommodations (in the form of eliminating the entrance fee) to Native Americans in a scenario where the government designates sacred land as a national park, the Native Americans would be required to pay the park entrance fee in order to practice their religious rituals in the park. Should the Native Americans refuse to pay the fee, they would be denied access to the park, and consequently be deprived of an opportunity to exercise their religion on site-specific sacred ground. Thus, applying the reasoning of *Hobby Lobby*, the government-imposed fee to enter a national park to engage in religious practices would impose an exceptional burden on Native Americans.

Certain distinctions can be made between the fee in *Hobby Lobby* and a park entrance fee to a national park. Opponents of accommodation will point out that in *Hobby Lobby*, the plaintiff was required to pay a fine or *take affirmative steps* that violated their religious beliefs. In the context of a national park, however, the consequence of not paying the entrance fee would not result in Native Americans being coerced into affirmatively acting against their beliefs. The Native Americans would instead be *prevented* from engaging in religious acts. Thus, the outcomes in avoiding the fee are different.

However, this is not a material distinction. While the *fee-avoiding outcome* may be different in a national park scenario than it is in *Hobby Lobby*, the analysis is only focused on the *fee-paying outcome*. With regard to the fee-paying outcome, the Supreme Court in *Hobby Lobby* recognized that paying a fee to act in accordance with one’s religion is a substantial burden on one’s religious exercise. This concept applies perfectly well to the national park context; the Native Americans must pay a fee in order to act in accordance with their religion. Under *Hobby Lobby* analysis, this is an ex-

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59. *Id.* at 2775.

60. *Id.* at 2759 (“If the owners comply with the HHS mandate, they believe they will be facilitating abortions, and if they do not comply, they will pay a very heavy price—as much as \$1.3 million per day, or about \$475 million per year, in the case of one of the companies. If these consequences do not amount to a substantial burden, it is hard to see what would.”).

61. *See generally* *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 16 (D.C. Cir. 2015) (“The ‘substantial burden’ in this case comes from the large monetary penalty imposed on religious organizations that choose not to submit the required form.”); *Hobby Lobby*, 134 S. Ct. at 2775–76, 2779. It is settled that a direct monetary penalty on the exercise of religion constitutes a “substantial burden.”; *id.* (penalty for not providing contraceptive coverage); *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (fine for not sending children to high school); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (describing hypothetical fine for Saturday worship).

ceptional burden because the Native Americans are coerced against practicing their religion.<sup>62</sup>

Opponents will also point out that the fees are very different between the two scenarios. In *Hobby Lobby*, the plaintiff would be forced to pay \$1.3 million per day.<sup>63</sup> For entrance into a national park, the fee would be substantially less.<sup>64</sup> However, comparing the funds available to a large corporation to the funds available to an individual is not appropriate.<sup>65</sup> A more apt comparison would be comparing Native American religious observers to members of other religions. Most religious adherents do not need to pay the government a fee solely to attend their place of worship. Native Americans entering a national park to access sacred land, with no accommodation present, would have to pay an amount each time they wanted to worship. In light of this, the entrance fee certainly appears exceptional.

### 3. *Restricted Access to Certain Areas*

Restrictions on accessing certain sites represent a third possible burden to Native Americans created by the government's designation of sacred land as a national park. Many national parks limit activities in or access to certain areas of the park. For example, federal regulations allow park superintendents to "restrict hiking or pedestrian use to a designated trail or walkway system," which could effectively cut off access to Native American spiritual sites.<sup>66</sup> These same regulations also prohibit "[w]alking on, climbing, entering, ascending, descending, or traversing an archeological or cul-

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62. Also, *Lyng* indicates that a government action is unconstitutional if an individual is "coerced by the Government's action into violating their religious beliefs[.]" *Lyng*, 485 U.S. at 449. If Native American religious beliefs require them to enter sacred land within a national park, there is an issue under *Lyng*, as well.

63. *Hobby Lobby*, 134 S. Ct. at 2759.

64. For example, a seven-day pass to Grand Canyon National Park is thirty-five dollars. See *How Much Does the Grand Canyon Cost?*, MYGRANDCANYONPARK.COM, <http://www.mygrandcanyonpark.com/fees/> (last visited July 1, 2018). The Yellowstone National Park entrance fee is fifteen dollars for an individual. See *Entrance Fees*, YELLOWSTONE, <http://yellowstone.net/intro/introduction-to-yellowstone/entrance-fees/> (last visited July 1, 2018).

65. In its 2017 fiscal year, Hobby Lobby had revenue of \$4.6 billion. *America's Largest Private Companies*, FORBES, <https://www.forbes.com/largest-private-companies/list/2/#tab:rank> (last visited Jan. 21, 2019). In contrast, the median household income for single-race American Indians and Alaska Natives in 2016 was \$39,719. *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html>. While revenue is not a perfect metric for determining available funds, it does provide context as to how the meaning of the term "substantial" could vary between an individual and a large corporation.

66. 36 C.F.R. § 2.1(b) (2017). These regulations also prohibit "the taking, use, or possession of fish, wildlife, or plants for ceremonial or religious purposes, except for the gathering and removal of plants or plant parts by enrolled members of an Indian tribe" in certain circumstances. 36 C.F.R. § 2.1(d) (2017). As such national park rules could prevent Native Americans from participating in religious ceremonies that require the taking of wildlife or plants in a manner inconsistent with the regulations.

tural resource, monument, or statue” except under certain conditions.<sup>67</sup> Violations of these rules often result in fines, and in some cases, imprisonment.<sup>68</sup>

Many Native American religions have close ties to archeological and cultural sites, and federal regulations allow park superintendents to limit or restrict access and activities on these sites. It is possible that absent accommodation, Native Americans could be denied access to sites containing religious significance. Alternatively, even if permitted access to such religious sites, it is possible that the Native Americans could be prohibited from engaging in religious practices at those sites due to regulations. Consequently, it could be argued that such government-created rules burden Native American religious exercise, which occurs when a government act coerces an individual into violating their religious beliefs.<sup>69</sup> To this end, the case of *Sherbert v. Verner* is informative.<sup>70</sup>

In *Sherbert v. Verner*, an employee of a textile mill refused to work on Saturdays as that was the day of her religion’s Sabbath.<sup>71</sup> The woman was fired from her job and could not find other employment due to her refusal to work on Saturdays. The state of South Carolina refused to provide the woman with unemployment benefits on the grounds that her refusal to work on Saturdays did not constitute “good cause.”<sup>72</sup>

The Supreme Court of the United States held that South Carolina could not withhold unemployment benefits from the woman, as doing so constituted a burden on her religious exercise. The Court said that

[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.<sup>73</sup>

Government action prohibiting Native Americans from accessing spiritual sites within a national park would be even more egregious than the state’s refusal to give unemployment benefits in *Sherbert*. Unlike the woman in *Sherbert*, the Native Americans would not be deprived of a benefit if they practiced their beliefs, but rather would be punished likely through a fine or imprisonment if they attempted to practice their religious rituals by accessing restricted areas. Without accommodation, the Native Americans

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67. 36 C.F.R. § 2.1(a)(5) (2017).

68. 36 C.F.R. § 1.3 (2017).

69. *Lyg*, 485 U.S. at 449.

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

71. *Id.* at 401.

72. *Id.*

73. *Id.* at 404.

would be forced to choose between following the precepts of their religion and being fined or imprisoned, or abandoning one of the precepts of their religion in order to avoid a fine or imprisonment. Subjecting Native Americans to restrictions on accessing archeological sites that hold religious significance would be a burden on their religious exercise.

One could distinguish the facts of *Sherbert* from Native Americans seeking religious practice in a restricted area of a national park, the argument being that Native Americans could avoid breaking the rules and being fined by practicing their religion elsewhere, such as in another environment with similar qualities. The unemployed woman in *Sherbert*, on the other hand, had no option of moving her Sabbath to a different day. Thus, under this view, the Native Americans have alternatives in their spiritual practice, while the woman in *Sherbert* did not.

In many contexts, however, this counterargument will likely fail. Native American religious beliefs often attach religious importance to specific areas.<sup>74</sup> Finding a similar area of land simply will not work because the substituted land will not hold any religious significance. Justice Brennan's dissent in *Lyng*, which was quoted previously, perfectly explains this concept:

Native American faith is inextricably bound to the use of land. The site-specific nature of Indian religious practice derives from the Native American perception that land is itself a sacred, living being . . . . Rituals are performed in prescribed locations not merely as a matter of traditional orthodoxy, but because land, like all other living things, is unique, and specific sites possess different spiritual properties and significance. Within this belief system, therefore, land is not fungible[.]<sup>75</sup>

Accordingly, Native Americans who are prohibited from accessing spiritual sites due to park regulations really have no other option when it comes to their method of worship. This would effectively put the Native Americans in the same situation as the unemployed woman in *Sherbert*, meaning the burden would likely rise to the level of "exceptional."

A further counterargument could be made that, while *Sherbert* is relevant to analyzing the issue of restricted access, the cases of *Sequoyah v. Tennessee Valley Authority* and *Badoni v. Higginson* are even more relevant.<sup>76</sup> In these cases, the courts determined that the government action of flooding land that held significance to Native Americans was not a violation of the Native Americans' Free Exercise rights.<sup>77</sup> Accommodation opponents could argue that the act of flooding sites significant to Native Ameri-

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74. Brady, *supra* note 6; Carpenter, *supra* note 6.

75. *Lyng*, 485 U.S. at 460–61.

76. *Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).

77. *See Sequoyah*, 620 F.2d at 1165; *Badoni*, 638 F.2d at 177.

cans effectively restricts Native American access to such sites, and thus these two cases support the proposition that restricting access to sites is acceptable.

However, these cases do not stand for the proposition that such restrictions never constitute an exceptional burden. In *Sequoyah v. Tennessee Valley Authority*, the plaintiff Cherokee Native Americans claimed that the proposed flooding of sacred land would deny the Cherokee of their right to freely exercise their religion.<sup>78</sup> The Sixth Circuit ultimately found that the harm claimed by the Cherokee was “damage to tribal and family folklore and traditions, more than particular religious observances[.]”<sup>79</sup> Because there was no *religious* burden, the Sixth Circuit ruled that there was no harm to an interest protected by the Free Exercise clause.<sup>80</sup>

In *Badoni v. Higginson*, the plaintiff Navajo Native Americans asserted that the government’s action of flooding a sacred site infringed on their Free Exercise right because the flooding denied the Navajo access to a prayer spot.<sup>81</sup> Like the Sixth Circuit in *Sequoyah*, the Tenth Circuit found in favor of the government. However, the Tenth Circuit did not assess the extent of the Navajo’s burdens. Rather, the court’s analysis examined the government’s interest. The court stated:

In the instant case unrebutted evidence, by affidavit, shows that the storage capacity of the lake would be cut in half if the surface level were dropped to an elevation necessary to alleviate the complained of infringements. The required reduction would significantly reduce the water available to the Upper Basin States of Colorado, New Mexico, Utah and Wyoming from the Colorado River.<sup>82</sup>

The court found this government interest to be compelling, and as such, decided not to assess “the question whether the government action involved infringes plaintiffs’ free exercise of religion.”<sup>83</sup>

In addition to the lack of relevant analysis provided by the Sixth Circuit and the Tenth Circuit in *Sequoyah* and *Badoni*, the facts surrounding the restricted access in those cases are materially distinct from the restricted access scenario laid out in this article. The restricted access in *Sequoyah* and *Badoni* resulted from the government flooding the sacred land. This article examines restricted access resulting from park regulations enforced through fines and imprisonment. This distinction is important because a

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78. *Sequoyah*, 620 F.2d at 1163.

79. *Id.* at 1164.

80. *Id.* at 1165.

81. *Badoni*, 638 F.2d at 177 (“With respect to the government action of impounding water in Lake Powell the stated infringement is the drowning of the Navajo gods, the increased tourist presence attributable to the level at which the lake is kept, and the denial of access to the prayer spot now under water.”).

82. *Id.* at 177.

83. *Id.* at 177 n.4.

government action that merely makes religious practice more difficult does not constitute a substantial burden. Rather, a substantial burden occurs when the government coerces an individual into violating their religious beliefs.<sup>84</sup> Flooding sacred land would clearly make religious exercise more difficult. However, the act of flooding would not involve coercion. Restricting access through fines and imprisonment, on the other hand, would involve coercion, as the Native Americans could be subject to penalties for engaging in religious practices.

In this regard, the case of *Crow v. Gullet* is more helpful.<sup>85</sup> In *Crow*, the government was in the process of constructing roads, bridges, parking lots, and facilities in Bear Butte State Park.<sup>86</sup> Bear Butte State Park contains Bear Butte, a geological formation used by the Lakota Nation and the Tsistsistas Nation for important religious ceremonies.<sup>87</sup> Due to the construction, the government prohibited overnight camping in the area traditionally used by the Lakota and the Tsistsistas for religious ceremonies.<sup>88</sup> The Lakota and the Tsistsistas were still allowed to use the sacred land during the daytime.<sup>89</sup>

Certain members of the Lakota Nation and the Tsistsistas Nation brought suit, claiming that, among other things, the restricted access to the ceremonial site violated their Free Exercise rights.<sup>90</sup> In finding in favor of the government on the issue of restricted access, the fact that the restrictions were temporary and partial played an important role in the court's analysis:

Although plaintiffs have concluded that their right of access was unduly restricted, the record fails to show that a single person was ever denied access to Bear Butte for religious purposes. Defendants closed the ceremonial area temporarily and partially, in the interests of protecting the safety of the public and assuring the most expedient completion of construction. . . any right of access possessed by plaintiffs is restricted only partially and temporarily. Plaintiffs failed to establish that overnight camping at the ceremonial area is an indispensable part of their religious practices. Conversely, defendants met their burden of demonstrating that the State has a compelling interest in completing the construction projects[.]<sup>91</sup>

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84. *Lyng*, 485 U.S. at 449.

85. *Crow v. Gullet*, 541 F. Supp. 785 (D.S.D. 1982).

86. *Id.* at 787–88.

87. *Id.* at 787.

88. *Id.* at 789–90.

89. *Id.* at 790.

90. *Id.* at 788.

91. *Crow*, 541 F. Supp. at 792. The court also mentions the *Sequoyah* and *Badoni* cases in its analysis, stating that those courts “held that Native Americans’ right to free exercise of religion was not unduly burdened even though their access to sacred ceremonial sites was completely barred by the permanent flooding of the sites for dam and reservoir projects.” *Id.* However, as

Under the *Crow* court's analysis, a partial and temporary restriction on accessing a religious site would likely not rise to the level of an exceptional burden. However, the court's emphasis on the partial and temporary nature of the restrictions suggests that a more permanent or total restriction would constitute a heavy enough burden. In such a case, an outright prohibition on accessing a religious site could very well rise to the level of an exceptional burden.

In summary, there are several government-created burdens that could potentially rise to the level of exceptional, including tourism, entrance fees, and restrictions on accessing certain areas within a park. At this point, the analysis now shifts to examining whether the accommodations relieve the religious adherents of these burdens. Can the identified government-created burdens be relieved by admitting Native Americans into the park without a fee, permitting Native Americans to access restricted areas of the park, and allowing Native Americans to access the park for religious purposes, even when it is closed?

The answer to this question is clearly yes. First, the removal of the entrance fee would eradicate the state imposed financial burden on the Native Americans' religious exercise. Second, eliminating restrictions on accessing cultural or archeological sites would allow Native Americans to reach religiously significant sites, while also increasing the privacy available, as other park visitors attending for non-religious purposes would not be allowed to approach those areas. Finally, allowing Native American religious adherents to enter the park during hours when the park is closed would provide even more opportunities for privacy. Consequently, each of these accommodations would alleviate the Native Americans of the burdens created by the government.

### *B. Burdens Imposed on Third Parties*

The second prong of *Cutter* requires that one "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]"<sup>92</sup> When examining the harm to third parties, there are two different factors that should be taken into account: the *magnitude* of third-party harm, and the *likelihood* of third-party harm.<sup>93</sup> The magnitude of third-party harm takes into account how seriously injured the third party is.<sup>94</sup> The likelihood of harm examines the probability of the harm actually occurring.<sup>95</sup>

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discussed previously, neither the *Sequoyah* nor the *Badoni* decision actually analyzed the extent to which the plaintiff Native Americans' religious rights were burdened.

92. *Cutter*, 544 U.S. at 720.

93. Christopher C. Lund, *Religious Exemptions, Third-Party Harms, and the Establishment Clause*, 91 NOTRE DAME L. REV. 1375, 1377–79 (2016).

94. *Id.* at 1377.

95. *Id.* at 1378.

Under this analysis, the focus of this section will shift towards the harm caused to third parties if the religious accommodations in the previous section were granted to Native Americans. Put differently, how would third parties be affected if Native Americans were exempt from entrance fees, rules restricting access to certain areas of the park, and could enter the park when closed? Additionally, a complete restriction on rock climbing during Native American religious rituals will be examined, as this issue has been raised in past cases. Under this framework, possible third-party burdens include the fact that non-Native American visitors will be subject to higher entrance fees, non-Native American visitors will be deprived of the full experience of archeological and cultural sites, and the ban on rock climbing for a certain periods of time.

### 1. Higher Entrance Fees for Visitors

One possible third-party burden is higher entrance fees. The theory behind this burden is that national parks need to raise money in order to offset the cost of maintenance and repair to roads, trails, and buildings, as well as administrative costs (law enforcement, etc.) and visitor centers. The parks raise a portion of these revenues through charging visitors an entrance fee.<sup>96</sup> By eliminating park entrance fees for Native Americans through accommodation, more of the maintenance and repair costs will shift onto the non-Native American visitors. Essentially, non-Native American visitors are paying the costs of the Native Americans' religious exercise.

In *Texas Monthly, Inc. v. Bullock*, the Supreme Court of the United States examined a Texas statute that exempted religious periodicals "consisting entirely of writings promulgating the teaching of the faith" from the state's sales tax.<sup>97</sup> The Supreme Court held that Texas' tax exemption violated the Establishment Clause. In particular, the Supreme Court noted that the statute "burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications. The fact that such exemptions are of long standing cannot shield them from the structures of the Establishment Clause."<sup>98</sup>

The *Texas Monthly* majority also distinguished the case from *Zorach v. Clausen*. In *Zorach*, the Supreme Court of the United States held that it was constitutional for New York City to allow its public schools to release students during the school day so the students could "go to religious centers

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96. See Kevin Freking, *U.S. Raises Entrance Fees for Some National Parks*, PBS NEWSHOUR (Apr. 1, 2015), <http://www.pbs.org/newshour/rundown/u-s-raises-entrance-fees-national-parks/>; Kurt Repanshek, *Entrance Fees Generate Hundreds of Millions of Dollars a Year for National Park Service*, NAT'L PARKS TRAVELER (Feb. 18, 2010), <http://www.nationalparkstraveler.com/2010/02/entrance-fees-generate-hundreds-millions-dollars-year-national-park-service5360>.

97. *Bullock*, 489 U.S. at 5.

98. *Id.* at 18 n.8.

for religious instruction or devotional exercises.”<sup>99</sup> The Supreme Court, in *Texas Monthly*, noted that New York City’s “resealed time program” in *Zorach* was distinct from Texas’ tax law because it did not “impose monetary costs on their parents or other taxpayers who opposed, or were indifferent to, the religious instruction given to students who were released.”<sup>100</sup>

Thus, the relevant takeaway from the *Texas Monthly* decision is that if an accommodation places a greater financial strain on third parties, a third-party burden has occurred that must be considered in the weighing process.<sup>101</sup> But surely there must be a limit to the financial burden on third parties. Does an accommodation impose a harm onto third parties if the financial burden on the nonbeneficiaries amounts to mere pennies?

Courts seem to draw the line at “de minimis costs.” In *Kong v. Min De Parle*, the United States District Court for the Eastern District of California examined whether a section of the Balanced Budget Act burdened third parties by imposing a higher tax burden on those third parties.<sup>102</sup> The District Court stated that “[e]ven if treatment in a RNHCI were more expensive, however, the effect on the individual taxpayer would be de minimis. . . . [r]eligious accommodations are not unconstitutional merely because they place a slight cost on others.”<sup>103</sup> The de minimis standard has also been used in U.S. Supreme Court decisions.<sup>104</sup>

Accordingly, accommodations that place more than a de minimis financial expense on nonbeneficiaries are often treated as a third-party burden that must be weighed against the religious adherent’s burden.<sup>105</sup> For purposes of *Cutter*’s second prong and the subsequent weighing of burdens, it must be determined whether or not the increase in entrance fees for non-Native American park visitors is merely de minimis.

While there is no data that conclusively states the number of Native Americans visiting national parks to engage in religious practices, research suggests that the percent of Native American visitors to national parks is approximately equal to the percent of the general U.S. population that is

99. *Zorach v. Clauson*, 343 U.S. 306, 308 (1952).

100. *Texas Monthly, Inc.*, 489 U.S. at 18 n.8.

101. *Id.* (“Texas’ tax exemption, by contrast, does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause. Moreover, it burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.”).

102. *Kong v. Min De Parle*, No. 00-4285, 2001 WL 1464549, at \*1 (N.D. Cal. Nov. 13, 2001).

103. *Id.* at \*8.

104. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (“To require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship.”) (emphasis added).

105. The fact that a financial expense imposed upon a third party is considered more than de minimis does not automatically invalidate the accommodation. See *Amos*, 483 U.S. at 339 (religious accommodation declared constitutional even though third party suffered burden of losing his job). Rather, the expense is a factor to be considered in weighing the first and second prongs of *Cutter*.

Native American, or two percent.<sup>106</sup> The National Park Service stated that entrance fees collected in 2016 totaled \$199 million.<sup>107</sup> Using the 2016 entrance fees and the assumption that Native American religious adherents represent two percent of park visitors, exempting Native Americans from park entrance fees would mean the National Park Service would need to, in total, charge an additional \$4 million<sup>108</sup> to non-Native American visitors.<sup>109</sup> Whether this amount rises above the level of *de minimis* to a burden is debatable.<sup>110</sup>

Opponents to accommodation may point out that it appears inconsistent to argue that third parties bearing the Native American's entrance expense is not a harm to third parties, while also arguing that the entrance fee is a substantial burden to Native Americans. If the exceptional burden on Native Americans as a group were \$4 million a year in entrance fees, then why is this not a burden on third parties, as well? The issue with this reasoning is that courts tend to approach fees from the perspective of the individual.<sup>111</sup> Consequently, costs should not be viewed in the aggregate, but rather by its cost per affected constituent. When the size of the populations being compared (Native Americans engaging in religious practice in a na-

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106. In a 2009 study conducted by the National Park Service, where "landline and cellular phone numbers were randomly sampled, American Indians/Alaska Natives were represented among recent visitors in roughly the same proportions as their fractions of the sample as a whole." *National Park Service Comprehensive Survey of the American Public*, NAT'L PARK SERV. (July 2011), [https://www.nature.nps.gov/socialscience/docs/CompSurvey2008\\_2009RaceEthnicity.pdf](https://www.nature.nps.gov/socialscience/docs/CompSurvey2008_2009RaceEthnicity.pdf). Others suggest Native Americans are underrepresented in park visitors. Tik Root, *Meet the People Behind a Movement to Diversify Our National Parks*, NAT'L GEOGRAPHIC (Feb. 1, 2017), <https://news.nationalgeographic.com/2017/02/diversity-in-national-parks/>. According to the U.S. Census Bureau, the American Indians and Alaska Natives population totaled 5.4 million in 2015, or two percent of the U.S. population. *American Indian and Alaska Native Heritage Month: November 2015*, U.S. CENSUS BUREAU (Nov. 2, 2015), [https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2015/cb15-ff22\\_AIAN\\_month.pdf](https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2015/cb15-ff22_AIAN_month.pdf). [https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2015/cb15-ff22\\_AIAN\\_month.pdf](https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2015/cb15-ff22_AIAN_month.pdf).

107. *National Park Service Announces Plan to Address Infrastructure Needs & Improve Visitor Experience*, NAT'L PARK SERV. (Apr. 12, 2018), <https://www.nps.gov/orgs/1207/04-12-2018-entrance-fees.htm>.

108. Two percent of \$199 million is \$3.98 million.

109. As of April 2018, there is "\$11.6 billion in deferred maintenance across the system of 417 parks, historic and cultural sites, and monuments." NAT'L PARK SERV., *supra* note 107. Consequently, it is unlikely that the National Park Service would simply forgo the lost revenue in the event that Native Americans are exempt from entrance fees.

110. The National Park had 330,882,751 recreation visits in 2017, and 330,971,689 recreation visits in 2016. *National Park System Sees More Than 330 Million Visits*, NAT'L PARK SERV. (Feb. 28, 2018), <https://www.nps.gov/orgs/1207/02-28-2018-visitation-certified.htm>. However, of the National Park Service's 417 parks, historic and cultural sites, and monuments, only 117 charge entrance fees. This, along with the fact that entrance fees vary by visitor type and other circumstances, makes nearly impossible to know how this \$4 million shortfall would be distributed. The analysis is not as simple as spreading \$4 million over 331 million visitors.

111. See *Yoder*, 406 U.S. at 208 (parents fined for not sending children to high school); *Sherbert*, 374 U.S. at 404 (withholding unemployment benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

tional park against visitors there for non-religious reasons) is vastly different, the severity of the burden will also vary between the groups.

Supporters of accommodation will highlight the fact that not all of a national park's maintenance costs are covered by entrance fees; Congress provides the parks with significant funding as well.<sup>112</sup> Thus, it cannot be said that all of the Native Americans' costs must be covered by non-Native American visitors, thereby weakening the claim that third parties are burdened. However, this reasoning is also flawed because it ignores the fact that third parties include not only non-Native American visitors to a national park, but also taxpayers in general.<sup>113</sup> In order for Congress to obtain money to fund the national parks' maintenance costs, they must raise the funding from taxpayers. Accordingly, by allowing Native Americans to not contribute to maintenance fees, taxpayers in general could be paying for the costs.

Despite this, expanding the population left paying the maintenance costs may work in the Native Americans' favor. There is a better argument that costs are *de minimis* if those costs are spread out over a larger group of people. As mentioned previously, the way to approach these issues is to look at it from the perspective of the individual.<sup>114</sup> By increasing the population bearing the burden, the total cost remains the same, but the cost per person will decrease.

Overall, it is difficult to say whether or not such an increase in entrance fees would constitute more than a *de minimis* cost without knowing how the new costs would be allocated. The smaller the population the \$4 million is obtained from, the more likely it is that the cost will be exceptional. On the other hand, the larger the population that the \$4 million is obtained from, the more likely it is to be *de minimis*. To enrich the analysis of this article, the increase in entrance fees will be examined as if it were a burden.

## 2. *Restricted Access to Cultural and Archeological Sites*

Another injury third parties may argue is that they are being deprived of experiencing the archeological sites that Native Americans consider sacred. However, bans on accessing the archeological sites are in place to

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112. See *National Parks Maintenance Backlog Reaches \$11.9 Billion*, NAT'L PARK SERV. (Feb. 5, 2016), <https://www.nps.gov/aboutus/news/release.htm?id=1780>; *National Parks Have a Long To-Do List but Can't Cover the Repair Costs*, NPR (Mar. 8, 2016), <http://www.npr.org/2016/03/08/466461595/national-parks-have-a-long-to-do-list-but-cant-cover-the-repair-costs>.

113. See *Bullock*, 489 U.S. at 18 n.8 ("Texas' tax exemption. . .burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.").

114. See *Yoder*, 406 U.S. at 208 (parents fined for not sending children to high school); *Sherbert*, 374 U.S. at 404 (withholding unemployment benefits "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.").

preserve the sites and prevent destruction and tampering.<sup>115</sup> Depriving visitors of fully accessing these sites is the very purpose of the policy. Furthermore, it is well within the authority of park superintendents to issue such restrictions.<sup>116</sup> Any argument of a third-party burden here is essentially in the same vein as the argument that all accommodations are unconstitutional. However, courts have rejected this argument.<sup>117</sup> Therefore, this would not rise to the level of a burden to third parties.

### 3. *Rock Climbing Restrictions During Native American Religious Ceremonies*

One religious accommodation on public land that has been sought by Native Americans in the past is a ban on rock climbing during times of religious significance for Native Americans.<sup>118</sup> Because this issue could arise again in the future, this subsection will examine the harm caused to third parties if the federal government were to temporarily ban rock climbing in a national park in order to accommodate Native American religious rituals.

The most well-known case regarding this issue is *Bear Lodge v. Babbitt*, which dealt with a dispute over Devils Tower, a national monument in Wyoming.<sup>119</sup> Devils Tower is considered sacred to the local Native Americans, and the Native Americans practice many religious activities there, including Sun Dances and Vision Quests.<sup>120</sup> However, Devils Tower is also a popular destination for rock climbing, which some Native Americans have complained “adversely impacted their traditional activities and seriously impaired the spiritual quality of the site.”<sup>121</sup>

To address the Native Americans’ concerns, the National Park Service prepared a climbing management plan that, among other things, asked that rock climbers “*voluntarily refrain* from climbing on Devils Tower during the culturally significant month of June.”<sup>122</sup> If the voluntary June closure

115. 36 C.F.R. § 2.1(a)(6) (2017).

116. 36 C.F.R. § 2.1(b) (2017).

117. *Amos*, 483 U.S. at 334.

118. See *Bear Lodge Multiple Use Ass’n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999); Mindy Sink, *Religion and Recreation Clash at Park*, N.Y. TIMES (July 1, 1996), <http://www.nytimes.com/1996/07/01/us/religion-and-recreation-clash-at-park.html>; Ryan Slattery, *Climbing Banned at Sacred Washoe Site*, INDIAN COUNTRY TODAY (Dec. 30, 2003), <https://indiancountrymedianet.com/news/climbing-banned-at-sacred-washoe-site/>.

119. *Babbitt*, 175 F.3d at 818.

120. *Id.* at 817 (“Devils Tower is ‘vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny.’”).

121. *Id.* at 818.

122. *Id.* at 819 (emphasis added).

turned out to be unsuccessful, the National Park Service would *consider mandatory closure* of rock climbing in June.<sup>123</sup>

A group of local climbers claimed the climbing management plan violated the Establishment Clause. Although the climbers in the lawsuit admitted that they had climbed during the month of June, they argued other climbers had been “coerced by the ban into refraining from climbing.”<sup>124</sup>

The Tenth Circuit determined that the climbers had suffered no harm, and therefore did not have standing to sue.<sup>125</sup> In addressing the alleged “coercion” that the parties who refrained from climbing in June suffered, the court stated, “[e]ven if other Bear Lodge members have elected not to climb in June, that decision is one of several choices available under the plan and is not an injury conferring standing.”<sup>126</sup> Finally, the court determined that the *risk* of mandatory June closure is not an actual harm:

As the district court held, the possibility of mandatory closure is a “remote and speculative possibility,” and is just one of many possibilities FCMP will consider if the present plan proves unsuccessful. The Climbers’ fear of an outright climbing ban in June does not satisfy the constitutional requirement for an injury in fact, which must be “actual or imminent not conjectural or hypothetical.”<sup>127</sup>

Thus, the rule that came out of the *Bear Lodge* decision is that a third party has not suffered actual harm if a government policy merely encourages, but does not require, refraining from rock climbing in order to respect Native American rituals. However, the decision also suggests that if the government were to actually temporarily ban rock climbing activity, that restriction could be a harm to third parties. While a ban on rock climbing is not one of the accommodations suggested by this article, it is worth noting that if such an accommodation were given, it would likely be a burden to third parties to be considered in the weighing process. Those drafting accommodations must be aware that rock climbing restrictions could make an accommodation unconstitutional under the *Cutter* test.

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123. *Id.* at 820 (“If NPS determines that voluntary June closure and the educational programs have not been successful, it will consider several actions, including, but not limited to: (a) revise the climbing management plan; (b) reconvene a climbing management plan work group; (c) institute additional measures to further encourage compliance; (d) change the duration and nature of the voluntary closure; (e) convert the June closure to mandatory; (f) write a new definition of success for the voluntary closure.”).

124. *Id.* at 821.

125. *Babbitt*, 175 F.3d at 821 (“The named individual recreational climbers whose climbing activities have been undeterred by the FCMP have established no injury in fact and therefore do not have standing.”).

126. *Id.*

127. *Id.* at 821–22.

### C. *The Balancing Test*

Once the third-party burdens that would be imposed by the accommodation have been identified, a balancing test must be performed, whereby the Native Americans' burdens absent the accommodation need be compared against the third parties' burdens caused by the accommodation. If the third-party burdens are not clearly disproportionate to the Native American burdens, the accommodation will have passed the balancing test, and the analysis will then shift to *Cutter's* third prong, determining if the accommodation is denominationally neutral.

The possible government-created burdens that Native Americans could experience absent accommodation include reduced privacy when conducting religious ritual, paying a fee to access religiously significant sites, and restricted access to religiously significant sites. The potential burdens suffered by third parties with accommodation include the potential of slightly higher entrance fees.

When these two sets of burdens are weighed, it is clear that the Native American burdens absent accommodation outweigh the third-party burdens with accommodations. Native Americans stand to suffer the financial burden of paying the government a fee to enter the park to access spiritual sites. Third parties also may suffer financially, because exempting Native Americans from entrance fees could cause national parks to raise their rates to offset the decrease in park passes sold. While the third-party harms end here, the Native Americans' burdens do not. Native Americans also must endure decreased privacy during religious rituals, and could be prohibited from accessing sites of religious significance. The third parties, on the other hand, suffer no religious restrictions. Thus, given that Native Americans could endure all of the burdens suffered by the third parties and then some, it is clear that the scale tips in favor of the Native Americans when weighing these burdens.

### D. *Denominational Neutrality*

*Cutter's* third and final prong necessitates that accommodations "be administered neutrally among different faiths[.]"<sup>128</sup> The case of *Board of Education, Kiryas Joel Village School District v. Grumet* fleshed out the concept of denominational neutrality.<sup>129</sup> In *Kiryas Joel*, the New York Legislature passed a law that purposefully drew the lines of a school district to match the boundary of Kiryas Joel, a village whose population was comprised entirely of adherents to Satmar Hasidim.<sup>130</sup> In passing this law, the legislature ignored customary practice in creating school districts. The end result of drawing the school district's boundary in this manner was to create

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128. *Cutter*, 544 U.S. at 720.

129. *Kiryas Joel*, 512 U.S. 687.

130. *Id.* at 693.

a school district composed entirely of people of the same religion. In examining this issue, the Supreme Court of the United States stated:

[b]ecause the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority.<sup>131</sup>

Furthermore, "Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law[.]"<sup>132</sup> The Supreme Court declared the law unconstitutional, as it failed the neutrality requirement by "singl[ing] out a particular religious sect for special treatment[.]"<sup>133</sup>

The Supreme Court distinguished between other cases in which denominational neutrality was present:

[i]n *Walz* . . ., for example, the Court sustained a property tax exemption for religious properties in part because the State had "not singled out one particular church or religious group or even churches as such," but had exempted "a broad class of property owned by nonprofit, quasi-public corporations." . . . And *Bowen* . . . upheld a statute enlisting a "wide spectrum of organizations" in addressing adolescent sexuality because the law was "neutral with respect to the grantee's status as a sectarian or purely secular institution." . . . Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole[.]<sup>134</sup>

Accordingly, the *Kiryas Joel* case stands for the proposition that a law is not denominationally neutral when it singles out a particular religion. If the government were to provide religious accommodations to Native Americans visiting national parks, it would need to make sure to follow this rule. This would mean that the law creating the accommodations must avoid providing those accommodations only to Native American religions, both facially and substantively.

In order to be facially neutral, the law would need to abstain from using words explicitly singling out Native American religions. Words that make the accommodation available to all religions with religious ties to the particular land would likely achieve facial neutrality. In addition to facial neutrality, the law would also need to be substantively neutral. Substantive neutrality focuses on the practical effect of the law, as opposed to the actual

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131. *Id.* at 702.

132. *Id.* at 703.

133. *Id.* at 706.

134. *Id.* at 704–05.

words used in the law.<sup>135</sup> An accommodation would lack substantive neutrality if the *effect* of the government action is to single out a particular religious sect for special treatment. Applied to Native Americans seeking religious accommodations in a national park, the law providing such accommodations would need to effectively accommodate other religions that believe the land in national parks holds religious value. For example, Wicca, Neo-druidism, and the Goddess movement all have close ties to nature, and would likely also need to be covered under the accommodation, in order to achieve denominational neutrality.

One may argue that there is no one Native American religion; there are many types of Native American religions, each with its own diverse set of beliefs. Consequently, an accommodation applying only to Native American religions is not “singl[ing] out a particular religious sect for special treatment[.]”<sup>136</sup> However, while this may be true in theory, this argument would likely fail, as courts tend to treat Native American religions as a single religious entity.<sup>137</sup> Accordingly, singling out Native American religions for protection would likely violate denominational neutrality.

In summary, any law providing accommodations to Native Americans seeking to engage in religious exercises in a national park would need to be denominationally neutral. This would entail making sure that the law is both neutral on its face, as well as neutral in substance. In application, this would mean ensuring that the text of the accommodation law does not explicitly single out Native Americans, and that the law is also written in a manner so that the accommodations would extend to other religions with religious ties to sites within national parks. While a definitive conclusion as to this prong cannot be determined until such an accommodation law is actually drafted, there are feasible means through which the law could be drafted that would satisfy the denominational neutrality prong.

#### IV. CONCLUSION

Accommodations should be available to Native Americans seeking to perform religious exercises in a national park. These accommodations should include allowing Native Americans to enter the park for free, permitting Native Americans to access restricted areas of the park, and authorizing Native Americans to enter the park for religious purposes, even when it is closed.

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135. “Such standard-like *substantive neutrality* extends beyond the words of a statute, or the intent of the legislature, and encompasses the effect of legislation on religious people.” Lisa W. Hanks, *Justice Souter: Defining “Substantive Neutrality” in an Age of Religious Politics*, 48 STAN. L. REV. 903, 922 (1996).

136. *Kiryas Joel*, 512 U.S. at 706.

137. *See Lyng*, 485 U.S. at 442 (“[T]he Forest Service commissioned a study of *American Indian cultural and religious sites* in the area.”) (emphasis added); *Bowen*, 476 U.S. 695 (“Appellees contended that obtaining a Social Security number for their 2-year-old daughter, Little Bird of the Snow, would violate *their Native American religious beliefs*.”) (emphasis added).

Because these proposed accommodations would take place through a legislative action, the relevant governing case is *Cutter v. Wilkinson*, wherein the Supreme Court examined the constitutionality of the accommodations provided by the Religious Land Use and Institutionalized Persons Act. In *Cutter*, the Supreme Court stated that a statutory religious accommodation is constitutional if the accommodation (1) alleviates an exceptional government-created burden on religious exercise, (2) takes adequate account for the accommodation's burden on third parties, and (3) is denominationally neutral.<sup>138</sup>

Consistent with the standard set forth in *Cutter*, this article examined the Native American religious accommodations using the three-pronged approach. Under the first prong, the harms suffered by Native Americans absent accommodations include reduced privacy when conducting religious ritual, paying a fee to access religiously significant sites, and restricted access to religiously significant sites. With respect to the second prong, third parties may suffer from paying higher entrance fees if the accommodations were granted. When the burdens of the first two prongs are weighed against each other, it is clear the Native Americans' burdens outweigh the third-party burdens. Regarding the third prong, there is a clear path to passing *Cutter*'s denominational neutrality requirement: the accommodation must be written so as not to single out Native American religions, but to include any religious group with spiritual ties to the national park. Should any law providing such accommodations be written in a denominationally neutral manner, it will likely pass constitutional muster.

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138. *Cutter*, 544 U.S. 720.