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Kū Kia'I Mauna: Protecting Indigenous Religious Rights

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KŪ KIA‘I MAUNA: PROTECTING INDIGENOUS RELIGIOUS RIGHTS

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Abstract: Courts historically side with private interests at the expense of Indigenous religious rights. Continuing this trend, the Hawai‘i State Supreme Court allowed the Thirty-Meter-Telescope to be built atop Maunakea, a mountain sacred to Native Hawaiians. This decision led to a mass protest that was organized by Native Hawaiian rights advocates and community members. However, notwithstanding the mountain’s religious and cultural significance, Indigenous plaintiffs could not prevent construction of the telescope on Maunakea.

Unlike most First Amendment rights, religious Free Exercise Clause claims are not generally subject to strict constitutional scrutiny. Congress has mandated the application of strict scrutiny to federal government action that imposes a substantial burden on religious activity through the Religious Freedom Restoration Act (RFRA). However, because most courts narrowly interpret “substantial burden,” it has become nearly impossible for Indigenous plaintiffs to succeed on claims involving violations of religious freedom. Moreover, RFRA does not apply to state governments, and most states—including Hawai‘i—have not enacted similar protections for religious rights.

This Comment suggests that the Hawai‘i State Legislature should enact a state version of RFRA that would apply strict scrutiny to government actions that impose a substantial burden on religious rights. Further, this Comment urges Congress and state legislatures to enact a more expansive definition of “substantial burden” that respects the First Amendment rights of Indigenous people to practice their beliefs.

INTRODUCTION

Located on the island of Hawai‘i,[1] Maunakea[2] is one of the most sacred locations in Native Hawaiian culture.[3] The Native Hawaiian community has long opposed private development on the mountain, but until 2018,

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1. Commonly referred to as the “Big Island.”

2. There are generally two acceptable forms of spelling: “Maunakea” and “Mauna Kea.” The University of Hawai‘i at Hilo College of Hawaiian Language recommends the former as the proper Hawaiian usage. Thus, for the purposes of this article, Maunakea will be used. *See* Larry Kimura, *Why Is Maunakea Spelled as One Word?*, KA WAI OLA, Nov. 2008, at 17.

3. *See* Meghan Miner Murray, *Why Are Native Hawaiians Protesting Against a Telescope?*, N.Y. TIMES (July 22, 2019), https://www.nytimes.com/2019/07/22/us/hawaii-telescope-protest.html [http://perma.cc/NP3W-ANLG].

their opposition had never captured the national spotlight.[4] Despite its religious significance,[5] astronomers continue to fight for private development of additional observatories on Maunakea's summit.[6] Astronomers deem Maunakea one of the best sites in the world for telescope placement because it stands taller than any other mountain on Earth and has a stable climate that is well-suited for astronomical observation.[7]

In 2018, the Hawai'i State Supreme Court permitted construction of the Thirty-Meter Telescope (TMT) on Maunakea, sparking protests that gained national attention.[8] Applying a balancing test, the Court ruled that construction of the TMT on Maunakea would neither interrupt any Native Hawaiian religious practices nor affect the mountain's natural resources.[9] In response to the decision, the Native Hawaiian community led a grassroots movement that delayed the telescope's construction.[10] This movement was popularized on social media and garnered national recognition through the use of the hashtags #A'oleTMT and #weareMaunaKea.[11]

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4. Kanaeokana, *Fifty Years of Mismanaging Mauna Kea*, VIMEO (Dec. 12, 2017), https://vimeo.com/247038723 [http://perma.cc/9CRP-47CW].

5. *See infra* section I.A.

6. *The Facts About TMT on Maunakea*, TMT: THIRTY METER TELESCOPE, http://www.maunakeaandtmt.org/facts-about-tmt/ [https://perma.cc/VSR5-E7P3].

7. *See Our Story in Hawaii: Selecting Maunakea*, TMT INT'L OBSERVATORY, https://www.tmt.org/page/our-story-in-hawaii [http://perma.cc/9W9A-GW2P] (noting that Maunakea was selected for TMT because it has some of the best conditions for astronomy such as dry and cold climate, and an exceptional atmosphere); *see also Highest Mountain in the World*, GEOLOGY.COM, https://geology.com/records/highest-mountain-in-the-world.shtml [http://perma.cc/WAQ5-BRXF] (noting that Mount Everest is the highest, but Maunakea is the tallest).

8. *See In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 757 (Haw. 2018); Murray, *supra* note 3.

9. *See In re CDUA HA-3568*, 431 P.3d at 768. The balancing test applied requires a balancing of cultural, historical, or natural resources in the relevant area; the extent to which those resources—including traditional and customary Native Hawaiian rights—will be affected or impaired by the proposed action; and an assessment of the feasibility of an agency action to reasonably protect Native Hawaiian rights if they are found to exist in the area. *See infra* section II.B.

10. Laurent Banguet, *Giant Telescope Project in Hawaii Delayed by Protests*, PHYS.ORG (Sept. 28, 2019), https://phys.org/news/2019-09-giant-telescope-hawaii-protests.html [http://perma.cc/G8QX-Q7TW].

11. Many celebrities have also demonstrated their support of the cause by either posting on social media or visiting Maunakea to stand in solidarity with the protestors, also known as Kia'i. *See* Jhené Aiko (@jheneaiko), INSTAGRAM (Aug. 18, 2019), https://www.instagram.com/p/B1VRTN6BLMo/ (last visited Jan. 19, 2021); Dwayne "The Rock" Johnson (@therock), INSTAGRAM (July 25, 2019), https://www.instagram.com/p/B0Xfo3gFqxA (last visited Jan. 19, 2021); Jason Momoa (@prideofgypsies), INSTAGRAM (Aug. 12, 2019), https://www.instagram.com/p/B1EMekJARb-/ (last visited Jan. 19, 2021); Nicole Scherzinger (@nicolescherzinger), INSTAGRAM (Aug. 22, 2019),

To Native Hawaiians, Maunakea has a central role in Hawaiian creation stories.[12] Maunakea also provides a deep spiritual connection to Native Hawaiians' ancestors, and is the resting place of numerous burial sites.[13] The existing telescopes that were constructed by the University of Hawai‘i (UH) in 1968[14] have polluted Maunakea's cultural and natural resources after fifty years of mismanagement.[15] Even Hawai‘i Governor Ige, a proponent of TMT, has acknowledged that UH has not met its obligations to the mountain and the community.[16] The community's distrust is compounded by Hawai‘i's history of colonization—specifically the United States' illegal annexation of the Hawaiian Islands.[17] Notwithstanding Maunakea's central importance in Native Hawaiian culture, UH's mismanagement of existing telescopes, and Hawai‘i's history of colonization, the Hawai‘i State Supreme Court still allowed TMT's construction.[18] Thus, one can only wonder: what safeguards protect Indigenous rights?[19]

The First Amendment provides a constitutional right to the free exercise of religious beliefs—a right that extends to all people including Indigenous people.[20] Courts have historically applied strict scrutiny to Free Exercise Clause claims under the First Amendment. Under strict scrutiny, a law is constitutional only if that law is justified by a compelling governmental interest, and is the least restrictive means in furtherance of that government interest.[21] However, the United States Supreme Court decided *Employment Division v. Smith*[22] in 1990, ruling that the state of Oregon could deny unemployment benefits to an employee fired for using

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https://www.instagram.com/p/B1elXCFhvZx/ (last visited Jan. 19, 2021); Ian Somerhalder (@iansomerhalder), INSTAGRAM (July 25, 2019), https://www.instagram.com/p/B0Xb132pQ2Y (last visited Jan. 19, 2021).

12. *See infra* section I.A.

13. *See infra* section I.A.

14. Kanaeokana, *supra* note 4.

15. *See id.*

16. *See OHA Files Lawsuit Against State for Mismanagement of Mauna Kea*, OFF. OF HAWAIIAN AFFS. (Nov. 8, 2017), https://www.oha.org/news/oha-files-lawsuit-state-mismanagement-mauna-kea/ [http://perma.cc/75JA-CQJD].

17. *See generally* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 125–27 (2004).

18. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 782 (Haw. 2018).

19. "Indigenous" is capitalized throughout this Comment as it is being used as a reference to a political community. *See* Christine Weeber, *Why Capitalize "Indigenous"?*, SAPIENS (May 19, 2020), https://www.sapiens.org/language/capitalize-indigenous [http://perma.cc/SGB5-E3E3].

20. U.S. CONST. amend. I.

21. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972); Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

22. 494 U.S. 872 (1990).

peyote—even though the employee used the substance as part of an Indigenous tribe's religious practice.[23] The Court considered Oregon's ban on peyote a "valid and neutral law of general applicability" under which an individual's right to the free exercise of religion does not relieve their obligation to comply with such a law.[24] Moving forward, so long as the challenged law is generally applicable, the Court no longer applies strict scrutiny to Free Exercise Clause claims except in certain situations—further eroding the protections of Indigenous religious rights.[25]

In response to *Smith*, Congress sought to provide protection for religious liberty and enacted the Religious Freedom Restoration Act (RFRA) in 1993.[26] RFRA statutorily requires courts to apply strict scrutiny to religious freedom claims.[27] Accordingly, under a RFRA claim, if a government action substantially burdens a person's exercise of religion, the government must demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[28]

When Congress enacted RFRA, it intended to mandate the application of strict scrutiny to federal and state government action that imposes a substantial burden on religious exercise.[29] However, the Supreme Court ruled that RFRA was unconstitutional as applied to the individual states.[30] As a result, state government action that infringes on Indigenous religious exercise is not subject to strict scrutiny unless states enact their own versions of RFRA. To date, twenty-one states have done so,[31] but Hawai'i has not.[32] Therefore, Hawai'i state courts are under no statutory duty to apply strict scrutiny to Free Exercise Clause claims challenging laws of general applicability. Even though the Native Hawaiian appellants asserted RFRA claims in the Maunakea litigation, the Hawai'i State Supreme Court dismissed them because RFRA is inoperable as applied to

23. *Id.* at 874, 890.

24. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

25. *See infra* section II.A.

26. Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 694 (2014); Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4.

27. 42 U.S.C. §§ 2000bb–2000bb-4.

28. *Id.* § 2000bb-1(b).

29. *Id.* §§ 2000bb–2000bb-4.

30. *See* City of Boerne v. Flores, 521 U.S. 507, 533–36 (1997).

31. *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx [https://perma.cc/5KKC-ERJ6].

32. *Id.*

the individual states and no Hawai‘i state RFRA exists.[33]

Where RFRA does apply, plaintiffs must first establish that the government action imposes a substantial burden on their religious practices.[34] However, the courts have imposed strict limitations on what constitutes a substantial burden.[35] Federal courts generally find a substantial burden in only two situations: where individuals are forced to choose between their religion and receiving a governmental benefit, and where people are coerced to act contrary to their religious beliefs by threat of civil or criminal sanctions.[36] Under this doctrine, any burden outside of these two narrow criteria is not substantial and does not require a strict scrutiny analysis of the government action.[37]

Therefore, this Comment calls for the Hawai‘i State Legislature to enact a state RFRA and adopt a new definition of "substantial burden" that rectifies the denial of Native Hawaiian and Indigenous religious rights. Part I provides a brief overview of Hawai‘i's history and Maunakea's significance to the Native Hawaiian community. This Part also documents Maunakea's existing astronomical usage and the current state of the protests against additional development. Part II outlines the limited constitutional and statutory protections for Indigenous religious exercise, including the First Amendment and RFRA. Moreover, this Part analyzes the application of RFRA to Indigenous religious claims in two federal cases. Part III examines the Hawai‘i State Supreme Court case that allowed TMT's construction and the Court's reasoning in rejecting the Native Hawaiians' claims. Part IV proposes two critical changes in the law to rectify the concerns over Native Hawaiian rights. First, the Hawai‘i State Legislature should enact a Hawai‘i state RFRA. Second, Congress and state legislatures should codify a more expansive definition of "substantial burden" that will adequately protect Indigenous religious beliefs.

I. HAWAI‘I INDIGENOUS RIGHTS AND THE TMT STAND OFF

The increasingly popular Hawaiian phrase "Kū Kia‘i Mauna"—literally translated as "guardians of the mountain"—has echoed across the

33. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 771 (Haw. 2018).

34. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069–70 (9th Cir. 2008).

35. *Id.*

36. *Id.* (combining the holdings in both *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) to establish a rule determining if a substantial burden exists).

37. *See id.* at 1070.

nation over the past few years.[38] This phrase relates to Maunakea, a mountain that Native Hawaiians hold sacred. Notwithstanding Maunakea's cultural significance, telescopes currently occupy Maunakea's summit, which astronomers see as an exceptional site for observation. In 2019, protests erupted as Native Hawaiians and advocates for Native Hawaiian rights sought to block construction of TMT, a $1.4 billion project that would place an eighteen-story telescope atop Maunakea.[39] The protests have delayed construction, but uncertainty remains about whether Native Hawaiians will receive long term legal protection for Maunakea.

A. Native Hawaiian Indigenous Rights History and the Significance of Maunakea

The Maunakea protests have a deep history that stems from the Native Hawaiian community's distrust of both the state and federal governments. This distrust reaches all the way back to what U.S. President Grover Cleveland admitted was the United States' illegal annexation of the Kingdom of Hawai'i.[40] Toward the end of the nineteenth century, Queen Lili'uokalani became the ruler of the Kingdom of Hawai'i.[41] However, a group of U.S. politicians and businessmen organized a military coup to overthrow Lili'uokalani.[42] In a conspiracy organized by U.S. Minister John L. Stevens, American soldiers were sent to the Hawaiian Islands, occupied a government building, and declared themselves the Republic of Hawai'i.[43] Queen Lili'uokalani acquiesced to avoid the bloodshed of her people, in hopes that the U.S. President would rectify the situation.[44]

Although efforts to ratify a treaty of annexation failed in the Senate, the

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38. Ryan Collins, *A Sign of Solidarity for Mauna Kea*, THE GARDEN ISLAND (July 20, 2019, 12:05 AM), https://www.thegardenisland.com/2019/07/20/hawaii-news/a-sign-of-solidarity-for-mauna-kea/ [http://perma.cc/6NJQ-77KM].

39. Murray, *supra* note 3; Amy Goodman, *"We Are Not Anti-Science": Why Indigenous Protectors Oppose the Thirty Meter Telescope at Mauna Kea*, DEMOCRACY NOW! (July 22, 2019), https://www.democracynow.org/2019/7/22/why_indigenous_protectors_oppose_the_thirty [http://perma.cc/GPS8-8YDH].

40. *See generally* SILVA, *supra* note 17 (describing the reasons the United States' annexation of Hawai'i was illegal).

41. *See id.* at 129–31.

42. *Id.*

43. *Id.* For a more in-depth discussion of the illegal annexation of Hawai'i, specifically the messy political intervention of Americans, see *id.*

44. *Id.* at 165; *see also Monarchy Overthrown*, HAWAIIHISTORY.ORG, http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=312 [http://perma.cc/V2W3-BQTB] (explaining that Queen Lili'uokalani acquiesced after the American businessmen staged a coup).

United States annexed Hawai‘i under a Congressional joint-resolution in 1898.[45] Native Hawaiians resisted, but "[d]espite the continuous mass protest, the flag of the United States was hoisted over Hawai‘i."[46] Scholars have explained that the "United States . . . treated the Hawaiian Islands as if it were an American colony in order to disguise the *illegal* nature of its occupation of an independent and neutral State."[47] After the annexation, the United States acquired approximately 1.5 to 1.8 million acres of land—statutorily referred to as the "ceded" lands.[48] Maunakea is part of these ceded lands that originally belonged to the Kingdom of Hawai‘i.[49]

The Territory of Hawai‘i officially became the fiftieth state when the United States Congress passed the Hawaii Admission Act in 1959.[50] The federal government returned the ceded lands to the state with the requirement that Hawai‘i "hold these lands in a trust for specific purposes, including 'betterment of the conditions of Native Hawaiians.'"[51] The Native Hawaiians' outrage comes from the fact that the United States illegally annexed the Hawaiian Kingdom, then returned the ceded lands to the Hawai‘i State Government rather than the Native Hawaiian people. To Native Hawaiians, this makes the Hawai‘i State officials mere

45. Wynell Schamel & Charles E. Schamel, *The 1897 Petition Against the Annexation of Hawaii*, NAT'L ARCHIVES, https://www.archives.gov/education/lessons/hawaii-petition [http://perma.cc/JR28-S772] (noting that U.S. Senate ratification for treaties requires a two-thirds majority, but joint resolutions may be passed by a simple majority in both chambers of Congress).

46. SILVA, *supra* note 17, at 161. In order to preserve the interests of the Kingdom of Hawai‘i, David Keanu Sai and Donald A. Lewis took deliberate political steps to establish an *acting* Regent under the legal doctrine of necessity. *See* David Keanu Sai, Establishing an Acting Regency: A Countermeasure Necessitated to Protect the Interest of the Hawaiian State 2 (Nov. 28, 2009) (unpublished manuscript) (on file with HawaiianKingdom.org), https://hawaiiankingdom.org/pdf/Acting_Government.pdf [http://perma.cc/A5TL-RRLB]. This acting regency was established under article 33 of the Constitution and laws of the Hawaiian Kingdom and operates "on the legal presumption that sovereignty remains vested in the Hawaiian Kingdom since 1843 despite the effectiveness of prolonged occupation." *Id.* at 4.

47. Sai, *supra* note 46, at 4.

48. *See* Hawaii Admission Act, Pub. L. No. 86-3, § 5(g), 73 Stat. 4, 6 (1959); Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation: Lessons from Federal Indian Law Precedents*, 43 AM. INDIAN L. REV. 75, 75 n.1 (2018) (stating that the ceded lands consist of both "crown and government lands that were summarily seized and confiscated when Hawai‘i was annexed to the United States in 1898").

49. *See* Zachary Browning, *A Comparative Analysis: Legal and Historical Analysis of Protecting Indigenous Cultural Rights Involving Land Disputes in Japan, New Zealand, and Hawai‘i*, 28 WASH. INT'L L.J. 207, 234 (2019).

50. Hawaii Admission Act.

51. *See* Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, VOX (July 24, 2019, 12:30 PM), https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii (last visited Feb. 3, 2021) (quoting Hawaii Admission Act § 5(f)).

"temporary stewards of these crown lands."[52]

Maunakea's cultural significance in Hawaiian culture is immeasurable. Hawaiian traditions of creation dictate that Maunakea was named after Wākea,[53] the Sky Father, who together with Papahānaumoku, the Earth Mother, created the Hawaiian Islands. Maunakea's summit is known as Kūkahau'ula and is the place where the gods reside.[54] The Native Hawaiians believe the summit touches the sky, giving them a spiritual connection to their ancestors and ensuring the "rights to regenerative powers of all that is Hawai'i."[55] In the pre-colonial years of Hawai'i, only chiefs and priests of the highest status were permitted to visit Maunakea's summit.[56]

Lake Waiau is among the most religiously significant sites on Maunakea. To this day, Native Hawaiians utilize Lake Waiau's waters, which are associated with the god Kāne, in religious practices.[57] According to members of the Waimea Hawaiian Civic Club, it was a common practice for Native Hawaiians to deposit a child's umbilical cord near Lake Waiau, believing that failure to properly dispose the umbilical cord would alter the child's destiny.[58] Moreover, Maunakea serves as the eternal resting place for those buried across its topography.[59] In discussing the importance of Maunakea, Alexander Kanani'alika Lancaster, a Native Hawaiian cultural practitioner, has emphasized that his family still travels up to the sacred mountain "for ceremonial" purposes to bless the mountain

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52. *Id.* For more information regarding the illegal annexation of Hawai'i, see SILVA, *supra* note 17, at 160 ("The document also recited the history of the failed annexation treaty, and pointed out that 'by memorial the people of Hawaii have protested against the consummation of an invasion of their political rights, and have fervently appealed . . . to refrain from further participating in the wrongful annexation of Hawaii.'").

53. Native Hawaiian traditions identify Maunakea as "Ka Mauna a Wākea," translating to "The Mountain of Wākea." *See* Christine Hitt, *The Sacred History of Maunakea*, HONOLULU MAG. (Aug. 5, 2019), http://www.honolulumagazine.com/Honolulu-Magazine/August-2019/The-Sacred-History-of-Mauna-Kea/ [http://perma.cc/FCV7-QW25].

54. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 757–58 (Haw. 2018).

55. *Id.*

56. *Id.* at 758.

57. *See* Hitt, *supra* note 53.

58. *See* KEPA MALY & ONAONA MALY, "MAUNA KEA–KA PIKO KAULANA O KA 'ĀINA": A COLLECTION OF NATIVE TRADITIONS, HISTORICAL ACCOUNTS, AND ORAL HISTORY INTERVIEWS FOR: MAUNA KEA, THE LANDS OF KA'OHE, HUMU'ULA AND THE 'ĀINA MAUNA ON THE ISLAND OF HAWAI'I 637 (2005), http://www.malamamaunakea.org/uploads/culture/CulturalDocuments/MalyK_2005_MaunaKeaOralHistory_HiMK67_OMKM033005b_web.pdf [http://perma.cc/2T2B-CSFL].

59. *See* PATRICK C. MCCOY, SARA COLLINS, STEPHAN D. CLARK & VALERIE PARK, A CULTURAL RESOURCE MANAGEMENT PLAN FOR THE UNIVERSITY OF HAWAI'I MANAGEMENT AREAS ON MAUNA KEA KA'OHE AHUPUA'A, HĀMĀKUA DISTRICT, ISLAND OF HAWAI'I 2-24 (2009); *In re CDUA HA-3568*, 431 P.3d at 769.

for all of their ancestors buried on Maunakea.[60]

Maunakea is considered among the most sacred sites in the Hawaiian archipelago. The protests demonstrate this cultural and religious importance and the extraordinary measures the Native Hawaiian community will take to protect its sacred lands.

B. Maunakea's Historic Mismanagement and Its Current Protectors

Thirteen telescopes currently occupy Maunakea's summit.[61] Their mismanagement has led Native Hawaiians to distrust the promises made by the TMT International Observatory and the Hawai‘i state government to preserve and protect Maunakea's cultural importance and landscape.[62] The telescope takeover of Maunakea commenced in 1968, when the University of Hawai‘i (UH) signed a sixty-five year general lease with the Hawai‘i State Board of Land and Natural Resources (BLNR) for 13,321 acres of ceded lands at Maunakea's summit.[63] UH selected Maunakea because it was an "exceptional site for astronomical observation."[64] Despite the government's promise to protect Maunakea, significant pollution on the mountain led the Sierra Club to file a complaint that forced UH to clean up accumulated trash on the summit—at a reported cost of $20,000.[65]

The extent of this pollution remained unclear until increased public concern led the state legislature to order an audit of Maunakea's management.[66] In 1998, the state auditor "release[d] a scathing report documenting 30 years of mismanagement of [Maunakea] by both the BLNR and UH."[67] Subpoenaed documents later revealed that sewage, ethylene glycol, diesel fuel, and toxic mercury had polluted Maunakea

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60. MCCOY ET AL., *supra* note 59, at 2-24.

61. Kanaeokana, *supra* note 4.

62. *The Facts About TMT on Maunakea*, *supra* note 6.

63. Kanaeokana, *supra* note 4. Maunakea is also in a conservation district in which the Department of Land and Natural Resources (DLNR) and BLNR are responsible for overseeing and ensuring that the use of the land is in compliance with state regulations such as the "allowable uses . . . on conservation lands 'consistent with the conservation . . . of land and natural resources adequate for present growth and future needs, and conservation and preservation of open space areas for public use and enjoyment.'" *See* OFF. OF HAWAIIAN AFFS., INTRODUCTION TO HAWAI‘I'S LAND CLASSIFICATION AND MANAGEMENT SYSTEM 21 (2015), http://www.oha.org/wp-content/uploads/HRDC-LUTPManual_PRF6_FINAL.pdf [http://perma.cc/48BJ-YA33].

64. N. Jamiyla Chisholm, *Watch: The 50-Year History of Mismanagement at Hawai‘i's Mauna Kea*, COLORLINES (July 19, 2019, 11:10 AM), https://www.colorlines.com/articles/watch-50-year-history-mismanagement-hawaiis-mauna-kea [http://perma.cc/UE9N-7GYA].

65. Kanaeokana, *supra* note 4.

66. *Id.*

67. *Id.*

and caused substantial harm to Maunakea's cultural and natural resources.[68] Further, the construction projects generated significant amounts of trash, including "remnants of [old] testing equipment . . . [and] two concrete slabs located on one of the [sacred] sites."[69] The state auditor continuously pressed UH and the BLNR to review and update their leases, subleases, permits, and agreements as they "lack[ed] provisions providing for adequate stewardship of [Maunakea], such as ones addressing cultural and historical preservation."[70] Community members attribute this mismanagement to UH's place among academia, favoring astronomy research over everything else.[71] While UH has taken steps to address these issues,[72] the state audit explicitly stated that UH's 1986 Historic Preservation Plan is "over ten years late."[73] Native Hawaiians argue that the years of mismanagement have already demonstrated UH's "inability to ensure that the environmental and cultural significance of the mountain is recognized and protected."[74]

The 1998 state audit found a "lack of recognition for cultural or religious sites on Mauna Kea."[75] UH's astronomy projects force many Native Hawaiian cultural practitioners to either forgo their customary and traditional religious exercises or accept the impact of the existing telescopes and observatories on Native Hawaiian practices.[76] Native

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68. *Id.*; Debbie Dickinson, *The Issue of TMT on Mauna Kea, with Insights by SU Students*, SPECTATOR (Oct. 23, 2019), https://seattlespectator.com/2019/10/23/destruction-of-sacred-mountain-in-hawaii-impacts-su-students/ [https://perma.cc/AMJ8-JD8L].

69. THE AUDITOR, STATE OF HAWAI'I, REP. NO. 98-6, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE 24–25 (1998).

70. Dan Ahuna, *Mauna Kea Deserves New Management*, HONOLULU CIV. BEAT (Dec. 18, 2017), https://www.civilbeat.org/2017/12/mauna-kea-deserves-new-management/ [http://perma.cc/7XM5-BGCK].

71. *Id.*

72. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 759 (Haw. 2018) (discussing UH's Master Plan that updated its management guidelines to make protecting Maunakea's cultural and natural resources one of its primary goals).

73. THE AUDITOR, *supra* note 69, at 22.

74. Chad Blair, *OHA Sues State, UH Over 'Longstanding Mismanagement' of Mauna Kea*, HONOLULU CIV. BEAT (Nov. 8, 2017), https://www.civilbeat.org/2017/11/oha-sues-state-uh-over-longstanding-mismanagement-of-mauna-kea/ [https://perma.cc/D6QA-KYS4] (quoting OHA Trustee Dan Ahuna). In fact, this management has led the Office of Hawaiian Affairs (OHA) to file a lawsuit on behalf Native Hawaiian people to hold the state and UH accountable for its "well-documented mismanagement of Mauna Kea." *See Mauna Kea*, OFF. OF HAWAIIAN AFFS., https://www.oha.org/maunakea/ [https://perma.cc/YEX4-42KU] ("[T]he state and UH have failed as trustees and stewards of this beloved sacred place. Even the governor and the university president have both publicly admitted to failing to meet their management responsibilities.").

75. THE AUDITOR, *supra* note 69, at 23.

76. *Id.* (noting that Native Hawaiian practitioners had to partake in an onerous process just to have access to use the land for religious reasons).

Hawaiians are only allowed to practice their religion if they first receive permission to access the land from the Institute for Astronomy *and* submit a Conservation District Use Application to the Department of Land and Natural Resources to use the land for religious practices.[77]

According to TMT proponents, Maunakea was selected for the project because of its stable climate and other exceptional conditions.[78] Additionally, Maunakea rises 13,796 feet above sea level and over 33,000 feet in all, making it the tallest mountain on Earth.[79] The TMT organization theorizes that this project will result in groundbreaking astronomical discoveries, including the observation of other galaxies.[80]

The protestors, or Kia‘i,[81] defending Maunakea, reject the notion that they are anti-science; rather, they state that they are merely "against the building of anything 18 stories over [their] watershed, water aquifers, on [their] sacred mountain."[82] Their frustration is exacerbated by TMT's selection of Maunakea over La Palma, in the Canary Islands, as the site for the project.[83] TMT officials have acknowledged that their alternative mountain peak in La Palma is a comparable option,[84] and there is no significant opposition there.[85]

While protests against development on Maunakea began as early as

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77. *Id.*

78. *Our Story in Hawaii: Selecting Maunakea*, *supra* note 7.

79. *See Mauna Kea Facts*, PROTECT MAUNA KEA, https://www.protectmaunakea.net/mauna-kea-facts [https://perma.cc/N9DB-WZES] ("Mauna Kea is the tallest—though not the highest—mountain on Planet Earth. Rising 13,796 ft above sea level, it is over 33,000 ft tall when measured from its base at the bottom of the sea."); *Highest Mountain in the World*, *supra* note 7; ("Mauna Kea is an island, and if the distance from the bottom of the nearby Pacific Ocean floor to the peak of the island is measured, then Mauna Kea is "taller" than Mount Everest.").

80. *See TMT Hoping to Add to New Discoveries Made Atop Maunakea*, HAW. NEWS NOW, https://www.hinowdaily.com/tmt-hoping-to-add-to-new-discoveries-made-atop-maunakea [http://perma.cc/WC8C-FCK7]; Chloe Fox, *Everything You Need to Know About the Viral Protests Against a Hawaii Telescope*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/hawaii-telescope-protests-tmt-mauna-kea_n_7044164 [http://perma.cc/F65P-WQUJ].

81. Translated on https://www.wehewehe.org, "Kia‘i" means guard, watchman, and caretaker. The protestors have given themselves the name Kia‘i and this article will refer to them both as "protestors" and "Kia‘i" interchangeably.

82. Goodman, *supra* note 39.

83. Caleb Jones, *TMT Backup Site "Excellent," Comparable to Maunakea, Experts Say*, HAW. TRIB. HERALD (Aug. 26, 2019, 12:05 AM), https://www.hawaiitribune-herald.com/2019/08/26/hawaii-news/tmt-backup-site-excellent-comparable-to-maunakea-experts-say [http://perma.cc/TTH8-2KHR].

84. *Id.*

85. *Id. But see* Jonathan Saupe, *Environmentalists in Canary Islands Gear Up for a Fight Against TMT*, HAW. NEWS NOW (Aug. 7, 2019, 1:20 PM), https://www.hawaiinewsnow.com/2019/08/07/environmentalists-canary-islands-gear-up-fight-against-tmt/ (last visited Feb. 3, 2021) (discussing how Ecologistas en Acción has vowed to take legal action to stop TMT from building in the Canary Islands).

1968 when UH signed the first set of leases, they had subsided until the Hawai‘i State Supreme Court upheld the BLNR's grant of a construction permit for TMT.[86] The current protests commenced around July 15, 2019, when construction of TMT was slated to begin.[87] An estimated 10,000 to 15,000 protestors from all over the State of Hawai‘i and the mainland[88] came to Maunakea to voice their concerns.[89] The Kia‘i blocked the only access road to the summit, preventing construction of TMT.[90] Many advocates of Native Hawaiian rights living across the nation organized protests within their respective cities.[91] This demonstration has evolved beyond a mere protest as the Kia‘i have used this opportunity to educate others about Native Hawaiian culture.[92] Across from the Maunakea access road, the Kia‘i have established "Pu‘uhonua o Pu‘uhuluhulu," an academic institution dedicated to educating protestors and visitors about Native Hawaiian culture, further preserving Hawaiian culture in a continuing effort to protect Indigenous rights from private development.[93]

II. THE CLASH BETWEEN INDIGENOUS RIGHTS AND DEVELOPMENT

When balancing Indigenous groups' religious rights against competing private- and public-development interests, courts often favor the latter. In *Smith*, the Supreme Court held that strict scrutiny does not apply to First Amendment Free Exercise Clause claims so long as the challenged law is valid, neutral, and generally applicable—even if it substantially burdens

86. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 757 (Haw. 2018); *see infra* Part II.

87. Kristin Lam, *Why Are Jason Momoa and Other Native Hawaiians Protesting a Telescope on Mauna Kea? What's at Stake?*, USA TODAY (Aug. 21, 2019, 8:55 PM), https://www.usatoday.com/story/news/nation/2019/08/21/mauna-kea-tmt-protests-hawaii-native-rights-telescope/1993037001/ [http://perma.cc/L5SA-DTA6].

88. People from Hawai‘i refer to the continental United States as the "mainland," although many Native Hawaiians refer to it as the "continent," reflecting their disdain at the U.S. government for the illegal annexation of Hawai‘i.

89. Lam, *supra* note 87.

90. *See* Watson-Sproat, *supra* note 51.

91. *See, e.g.*, *Thirty Meter Telescope Protests Held in Las Vegas, New York*, STAR ADVERTISER (July 20, 2019), https://www.staradvertiser.com/2019/07/20/breaking-news/thirty-meter-telescope-protests-held-in-las-vegas-new-york/ [http://perma.cc/363F-U3TG] (noting that protests of TMT construction on Maunakea have been organized in New York, Las Vegas, and other U.S. cities). Professors from the UH at Mānoa such as Presley Ah Mook Sang come to Maunakea and teach classes. *Id.*

92. Lam, *supra* note 87.

93. Michael Brestovansky, *Makeshift "University" Established at Protestors' Camp*, W. HAW. TODAY (July 25, 2019, 12:05 AM), https://www.westhawaiitoday.com/2019/07/25/hawaii-news/makeshift-university-established-at-*protesters*-camp/ [http://perma.cc/K8WE-CGBH].

the free exercise of religion.[94] Although Congress has mandated the application of strict scrutiny by statute through RFRA, the Supreme Court held RFRA is inapplicable to the states.[95] While some states have passed their own version of RFRA, many—including Hawai‘i—have not.[96] Moreover, because the federal courts have narrowly construed "substantial burden," it has become nearly impossible for Indigenous plaintiffs to overcome this initial obstacle and succeed on their RFRA claims.

A. Development of Free Exercise Clause Jurisprudence

Rooted in the First Amendment of the U.S. Constitution, the Free Exercise Clause aims to secure religious liberties for individuals.[97] Therefore, the Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[98] For Free Exercise Clause claims, there are several strands of jurisprudence that dictate whether courts apply a strict scrutiny analysis. Strict scrutiny requires the government to show that the challenged law is justified by a compelling governmental interest and is the least restrictive means in furtherance of that interest.[99] The first strand is when the challenged law discriminates against or singles out religious people or practices.[100] With these laws, courts apply strict scrutiny.[101] Next, there are generally applicable laws in which courts will only apply strict scrutiny to hybrid claims[102] or a denial of religious exemptions if

94. *See* Emp. Div. v. Smith, 494 U.S. 872, 881 (1990).

95. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

96. *See State Religious Freedom Restoration Acts*, *supra* note 31 (noting that Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia have state versions of RFRA).

97. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 223 (1963).

98. U.S. CONST. amend. I.

99. *See* Wisconsin v. Yoder, 406 U.S. 205, 206 (1972); Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

100. *See* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 534 (1993) ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.").

101. *See id.*

102. Hybrid claims involve the denial of the free exercise of religion in conjunction with another constitutionally protected freedom. *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 881 (1990) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

other exemptions are provided.[103] Lastly, there are cases discussing the Free Exercise clause in contexts where the government is operating its property in a manner that burdens religious practices.[104] Courts generally do not apply strict scrutiny to Free Exercise Clause claims in this context.[105]

Historically, courts applied strict scrutiny to most Free Exercise Clause claims.[106] In *Sherbert v. Verner*,[107] the plaintiff was a member of the Seventh-Day Adventist Church and was fired for refusing to work on Saturdays, the Sabbath Day of her faith.[108] Unable to obtain other employment for this same reason, the plaintiff filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[109] However, the Employment Security Commission noted that, under the state statute, "good cause" is needed to reject suitable work when it is offered.[110] The Commission ruled that the plaintiff's inability to work on Saturdays was not "good cause" and disqualified her from receiving unemployment benefits.[111]

The plaintiff then brought a claim under the Free Exercise Clause of the First Amendment alleging that the South Carolina statute abridged her right to the free exercise of religion.[112] The Supreme Court stated that the

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103. *See, e.g.*, *Smith*, 494 U.S. at 882–84 (noting that strict scrutiny applies when a State has an individual exemptions system and refuses to extend those exemptions to cases of "religious hardship"). Generally applicable laws are those that do not single out or target specific groups. *See, e.g.*, Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. __, 141 S. Ct. 63, 66 (2020) (ruling that the regulation was not neutral nor generally applicable because it "single[d] out houses of worship for especially harsh treatment"). Other courts have seen *Roman Catholic Diocese* as a seismic shift in Free Exercise law as it held that disparate treatment of religion rendered COVID-19 restrictions not neutral or generally applicable. *See* Calvary Chapel Dayton Valley v. Sisolak, No. 20-16169, 2020 WL 7350247, at *3 (9th Cir. Dec. 15, 2020).

104. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 442 (1988) (involving a dispute between the U.S. Forest Service and American Indian tribes over a proposal to construct a paved road through federal land that has historically been used by various tribes for religious activities).

105. *See id.* (declining to apply *Sherbert*'s compelling interest test where the challenged action was the government's construction of a road).

106. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707, 718 (1981) (applying strict scrutiny to an Indiana Employment Security Review Board denial of a claim for unemployment compensation where the claimant was terminated because his religious beliefs interfered with his work); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987) (applying strict scrutiny to a plaintiff's claim where the plaintiff was denied unemployment compensation benefits after being fired for refusing to work on her Sabbath).

107. 347 U.S. 398 (1963).

108. *Id.* at 399.

109. *Id.* at 399–400.

110. *Id.* at 401.

111. *Id.*

112. *Id.*

statute is constitutional if "any incidental burden on the free exercise of [plaintiff's] religion may be justified by a 'compelling state interest.'"[113] To justify the burden imposed on the plaintiff, the state asserted that the infringement was necessary to prevent "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work" that would "dilute the unemployment compensation fund" and "hinder the scheduling by employers of necessary Saturday work."[114] The Court disagreed and did not find this government interest compelling enough to justify the substantial burden imposed on the plaintiff.[115]

Sherbert's broad application of strict scrutiny to Free Exercise Clause claims began to narrow in *Lyng v. Northwest Indian Cemetery Protective Association*.[116] In this case, the Court discussed the application of *Sherbert*'s compelling interest test in a dispute involving Indigenous rights and government action. *Lyng* involved Indian tribes challenging the U.S. Forest Service's approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest in California.[117] The Indigenous groups argued that the construction would disturb the sacred area, interfering with the tribes' free exercise of religion and causing irreparable damage.[118] The Court disagreed, explaining that accommodating all religious rights would not allow the government to operate:

> Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will "virtually destroy the . . . Indian's ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding [the tribes'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.
>
> . . . .
>
> . . . Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.[119]

The Indigenous groups also asserted that, in accordance with *Sherbert*,

113. *Id.* at 403.

114. *Id.* at 407.

115. *Id.*

116. 485 U.S. 439 (1988).

117. *See id.*

118. *Id.* at 443–44.

119. *See id.* at 451–53 (emphasis in original) (citation omitted).

the government must demonstrate a compelling interest in completing the road.[120] However, the Court disagreed, finding that no such interest was necessary because the "incidental effects of government programs . . . [do not] require [the] government to bring forward a compelling justification for its otherwise lawful actions."[121] The Court essentially held the *Sherbert* compelling interest test inapplicable and justified that holding based on the government's inability to function if forced to account for every tribes' religious exercises.[122] *Lyng* applies the Free Exercise Clause in a different context—the government conducting its own internal affairs rather than passing laws that infringe on religious rights—which may indicate that RFRA only applies to challenges against laws. However, courts have applied RFRA in cases involving challenges to statutes and government actions in the same context as *Lyng*.[123]

Lyng was, in part, a precursor to the Supreme Court's ruling in *Smith*—a decision that severely limited the Free Exercise Clause's religious protections.[124] In *Smith*, two Native American plaintiffs were fired for ingesting peyote for sacramental purposes during a religious ceremony.[125] Both applied for unemployment benefits but were denied because of their discharge for work-related misconduct.[126] The Employment Division argued that denial of unemployment benefits was permissible because Oregon law criminalized the ingestion of peyote.[127]

The plaintiffs argued that *Sherbert* required states to demonstrate a compelling interest that justified governmental actions that substantially burdened an individual's religious practices.[128] Rather than following its own precedent, the Court departed from it and severely limited the compelling interest test to the facts of *Sherbert*.[129] The Court noted that the *Sherbert* test was developed in the context of unemployment compensation eligibility rules.[130] Thus, it is inapplicable to an across-the-

120. *See id.* at 447.

121. *See id.* at 450–51.

122. *See also* Bowen v. Roy, 476 U.S. 693, 699 (1986) ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." (emphasis in original)).

123. *See infra* section II.C.

124. *See* Emp. Div. v. Smith, 494 U.S. 872, 878 (1990).

125. *Id.* at 874.

126. *Id.*

127. *Id.* at 875.

128. *Id.* at 883.

129. *Id.* at 888–89.

130. *See id.* at 882–85.

board criminal prohibition on particular conduct.[131] The *Smith* Court's holding stands for the proposition that the right of free exercise of religion does not warrant strict scrutiny as long as the law curtailing religious freedom is one of general applicability.[132] Accordingly, the Court held that the denial of unemployment compensation benefits did not violate the plaintiffs' religious rights because the Oregon law was a general criminal prohibition on the use of peyote.[133] This case completely changed First Amendment jurisprudence because "[t]he Court found strict scrutiny inapposite, despite the longstanding tradition of applying this heightened scrutiny standard to fundamental interests, and hesitated to deem infringements on the exercise of religion presumptively invalid."[134]

Today, under Free Exercise Clause claims, neutral laws of general applicability are not subject to strict scrutiny besides the aforementioned exemptions. Scholars have called *Smith* "a transformative moment in First Amendment law."[135] With the widespread criticism of *Smith* and the widespread Congressional and public support of RFRA, Congress was primed to pass additional religious statutory protections.[136]

B. Legislative History and Passage of RFRA

In response to *Smith*, Congress passed RFRA in an attempt to restore *Sherbert*'s broad application of strict scrutiny.[137] Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of *general applicability*."[138] Congress's stark disapproval of the Supreme Court's decision in *Smith* is evident in RFRA's language where it explicitly references *Smith*'s general

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131. *See id.*

132. *See id.* at 879; *see also* Sara Movahed, *Hope for the Hopi in a Post*-Hobby Lobby *World: The Supreme Court's Recent Interpretation of RFRA and Strengthening Native Americans' Religious-Based Land Rights Claims*, 31 MD. J. INT'L L. 244, 247 (2016).

133. *See Smith*, 494 U.S. at 890.

134. Movahed, *supra* note 132, at 247.

135. Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 389 (2012).

136. *See* Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 534 (1993).

137. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03 (2020); *see also* United States v. Tawahongva, 456 F. Supp. 2d 1120, 1130 (D. Ariz. 2006) (recognizing that "RFRA is not interpreted by the federal courts as a 'separate' statutory defense to a criminal charge, but as an instruction to the courts to replace the *Smith* standard for evaluating First Amendment free exercise claims with the 'compelling interest' test"); Meyer v. Fed. Bureau of Prisons, 929 F. Supp. 10, 14 (D.D.C. 1996) (stating that the "purpose of the RFRA was merely [to] 'restore the compelling interest test'" that was applicable pre-*Smith* (quoting S. REP. NO. 103-111 (1993)).

138. Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–1(a) (emphasis added).

applicability rule. Many religious groups supported this passage, but "[l]ost in this conversation . . . have been the American Indians who actually lost the right to practice their religion in *Smith*."[139] One scholar speculated that it was "the Court's inability to discern a limit on the Indian religious practices" that led to the outright denial of such claims.[140]

Although Congress's purpose for passing RFRA was to protect the free exercise of religion, courts severely limited RFRA's effectiveness.[141] A significant limiting principle was established in *City of Boerne v. Flores*.[142] In *Boerne*, the Court found RFRA unconstitutional as applied to the states because it exceeded Congress's Fourteenth Amendment enforcement powers.[143] Therefore, for most state actions, plaintiffs' primary legal recourse for religious rights violations is limited to a claim under the Free Exercise Clause where *Smith*'s rule of general applicability remains the law. In contrast, when plaintiffs assert federal violations of the free exercise of religion, courts apply strict scrutiny to their RFRA claims, but *Smith*'s holding to their Free Exercise Clause claims. While unable to constitutionally overrule the decision in *Smith*, Congress effectively mandated—through RFRA—the application of strict scrutiny analysis to federal laws substantially burdening an individual's free exercise of religion. Accordingly, RFRA and the Free Exercise Clause are conceptually distinct; they are two potential legal protections with two completely different standards for plaintiffs suffering a substantial burden on their freedom of religion.

Although some states have their own version of RFRA, Hawai'i does not. In 2017, the Hawai'i State Legislature considered House Bill 823,[144] a bill that would have provided RFRA-like protections, "to ensure that strict scrutiny [would be] applied in *all* cases where state action burdens the exercise of religion."[145] Similar to RFRA, this bill would only allow the government to impose a burden on religious practices if the burden was essential to further a compelling governmental interest and was the

139. Carpenter, *supra* note 135, at 390.

140. *Id.* at 392. Carpenter argues that minority religions have much more difficulty in succeeding under a RFRA claim. *See id.* at 392–93. She attributes this difficulty to the fact that judges rely on their common sense and experiences in religious cases. *Id.* Consequently, judges find it difficult to evaluate the legitimacy and scope of particular minority, religious practices (i.e., Native Hawaiian and Native American religious practices) and instead, "prefer bright line rules over nuanced analysis." *Id.* at 393.

141. *See infra* Part IV.

142. City of Boerne v. Flores, 521 U.S. 507 (1997).

143. *See id.*

144. H.R. 823, 29th Leg. (Haw. 2017).

145. *Id.* (emphasis added).

least restrictive means of furthering that interest.[146] However, it failed to pass.[147] It is unclear why the bill failed, but in general, major challenges with passing state RFRAs include worries of increased litigation and conflict between religious liberty and civil rights.[148] More specifically, civil rights advocates have raised concerns that a state RFRA may allow individuals or corporations to discriminate against others on the grounds of "race, gender, age, nationality, or sexual orientation," which would inhibit enforcement of state civil rights laws.[149]

C. Application of RFRA to Indigenous Rights

Even with federal government action, where RFRA applies, Indigenous plaintiffs face substantial obstacles to their Free Exercise Clause claims. Federal courts have developed a two-part test to determine whether religious rights are protected under RFRA: first, there must be evidence sufficient for a trier of fact to find the activity the Indigenous group claims is burdened by government action is an exercise of religion;[150] and second, "the government action must '*substantially* burden' the plaintiff's exercise of religion."[151] This substantial burden requirement has proven fatal to many Indigenous groups' RFRA claims because federal courts have limited its applicability to two strict situations.

First, an individual incurs a substantial burden when they "are forced to choose between following the tenets of their religion and receiving a governmental benefit."[152] The Court developed this part of the test in *Sherbert* when it held that the South Carolina statute unconstitutionally forced the plaintiff "to choose between following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of

146. *Id.*

147. *Religious Freedom Restoration Act (RFRA)*, REWIRE NEWS GRP., https://rewire.news/legislative-tracker/law-topic/religious-freedom-restoration-act/ [http://perma.cc/X6QR-G3YN].

148. *See* Robert M. O'Neil, *Religious Freedom and Nondiscrimination: State RFRA Laws Versus Civil Rights*, 32 U.C. DAVIS L. REV. 785, 792 (1999) (discussing the conflict between RFRA and state civil rights laws); *see also* Elizabeth Long, Note, *A Case for Kentucky's State RFRA in Its Current Form*, 43 N. KY. L. REV. 251, 252 (2016) (acknowledging that in light of the decision in *Obergefell v. Hodges*, 576 U.S. 644 (2015), state RFRAs have been labeled as "'a license to discriminate' against the LGBT community" (citation omitted)); Alan Reinach, *Why We Need State RFRA Bills: A Panel Discussion*, 32 U.C. DAVIS L. REV. 823, 825 (1999) (explaining that senators in the Arizona State Senate argued that a state RFRA would open the door to a drastic increase in litigation if the bill were adopted).

149. *See* O'Neil, *supra* note 148, at 792; Long, *supra* note 148, at 252.

150. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008).

151. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000bb-1(a)).

152. *Id.* at 1070.

her religion in order to accept work."[153]

Second, an individual who is "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions" suffers a substantial burden.[154] The Court developed this part of the substantial burden requirement in *Wisconsin v. Yoder*,[155] where members of the Amish religion refused to have their kids attend school in violation of a Wisconsin statute that imposed criminal sanctions on the parents.[156] The *Yoder* Court held that the statute imposed a substantial burden and was unconstitutional because it "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[157]

Federal courts have combined the holdings of *Sherbert* and *Yoder* to formulate the substantial burden requirement under RFRA: a substantial burden is imposed only when individuals are either "forced to choose between following the tenets of their religion and receiving a governmental benefit" or "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[158] Courts only apply strict scrutiny and shift the burden to the government if the plaintiff can first establish a substantial burden on their free exercise of religion.[159] Two cases demonstrate the difficulty Indigenous groups face when trying to provide sufficient evidence to establish a substantial burden on their religious rights: *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*[160] and *Navajo Nation v. United States Forest Service*.[161]

1. Standing Rock Sioux Tribe v. United States Army Corp of Engineers

In *Standing Rock*, several American Indian tribes challenged construction of the Dakota Access Pipeline (DAPL).[162] When the suit was initiated, DAPL was nearly complete, except for a stretch that was to run under the bed of Lake Oahe, a federally regulated waterway bordering

153. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

154. *Navajo Nation*, 535 F.3d at 1070.

155. 406 U.S. 205 (1972).

156. *Id.* at 207–08.

157. *Id.* at 218.

158. *Navajo Nation*, 535 F.3d at 1069–70.

159. *See Yoder*, 406 U.S. at 206; Sherbert v. Verner, 374 U.S. 398, 406–07 (1963).

160. 239 F. Supp. 3d 77 (D.D.C. 2017).

161. 535 F.3d 1058 (9th Cir. 2008).

162. *Standing Rock*, 239 F. Supp. 3d at 80.

North and South Dakota.[163] Lake Oahe is located about half a mile north of the Standing Rock Reservation and seventy-three miles north of the Cheyenne River Reservation.[164]

Four separate groups of Lakota people within the Cheyenne River Reservation use Lake Oahe to perform water-based religious ceremonies.[165] These rituals require the water to be pure, and tribes contend that the mere presence of oil in DAPL flowing underneath Lake Oahe contaminates the lake's water and interferes with their religious practices.[166] Further, the tribes believe the crude oil that would flow through DAPL is the "fulfillment of a Lakota prophecy of a Black Snake that would be coiled in the Tribe's homeland and which would harm" or kill them.[167] The tribes also argued that Lake Oahe is incredibly important to their existence because the U.S. removed their access to other bodies of water that are important in their culture.[168]

Despite the importance of Lake Oahe to the tribes, the court denied the Standing Rock and Cheyenne River Sioux Tribes' motion for preliminary injunction to block the government from permitting DAPL to run under Lake Oahe.[169] One of the tribes' main contentions was that the government approval of DAPL violated RFRA.[170] The court acknowledged that the Lakota people have a sincerely held belief that the presence of oil in DAPL running under Lake Oahe interferes with its members' religious ceremonies.[171] Nevertheless, it concluded DAPL was not a substantial burden on their religious rights because the government action did not impose any sanction on the tribes' members for exercising their religious beliefs, nor did it pressure them to choose between a government benefit or practicing their religion.[172] This case emphasizes the onerous nature of the substantial burden requirement that is responsible for denying a majority of Indigenous groups' religious freedom claims.

163. *Id.*

164. *Id.*

165. *Id.* at 89.

166. *Id.*

167. *Id.* at 90.

168. *Id.* at 89.

169. *Id.* at 100.

170. *See id.* at 91.

171. *See id.*

172. *See id.* ("The government action here . . . does not impose a sanction on the Tribe's members for exercising their religious beliefs, nor does it pressure them to choose between religious exercise and the receipt of government benefits.").

2. Navajo Nation v. United States Forest Service

In *Navajo Nation*, American Indian tribes brought a suit to prohibit the federal government from allowing the Snowbowl ski resort to use recycled wastewater for artificial snow on the San Francisco Peaks (the Peaks).[173] The tribes argued that the use of recycled wastewater would "spiritually contaminate the entire mountain and devalue their religious exercises."[174] The Peaks serve as the location for various religious ceremonies, including the Navajo Blessingway Ceremony.[175] Further, the Peaks contain many resources for the tribes such as plants, water, and other materials that are used for medicinal bundles and tribal healing ceremonies.[176] From the tribes' perspective, using artificial snow on this sacred mountain would interfere with their religious ceremonies and desecrate the entire mountain.[177]

However, like the *Standing Rock* court held nine years later, the *Navajo Nation* court reasoned that the presence of wastewater on the Peaks did not coerce the tribes to act contrary to their religious beliefs under threat of sanctions, nor did it condition a governmental benefit upon conduct that would violate their religious beliefs.[178] The court found that the use of artificial snow would not impose a substantial burden on the tribes' exercise of religion, stating that "[t]he only effect of the proposed [project] is on the [tribes'] subjective, emotional religious experience."[179] As discussed below, the majority opinion presented similar reasoning to that of the Hawai'i Supreme Court's decision in the Maunakea case.[180] Even though the entirety of Maunakea is sacred to Native Hawaiians and the entirety of the Peaks is sacred to the Navajo Nation, both courts justified their holdings on the basis that the proposed government action would

173. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1062–63 (9th Cir. 2008). This is not the first time these tribes have challenged government action on the Peaks with regards to Snowbowl. Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983). In *Wilson v. Block*, the American Indian tribes challenged a number of proposed upgrades to the operations of Snowbowl including the installation of new lifts, slopes, and facilities. 708 F.2d 735, 739 (D.C. Cir. 1983). Despite arguments that the proposals would significantly damage the tribes' ability to pray and engage in other religious exercises, the court rejected the challenge. *Id.* at 741–42 ("Many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion.").

174. *Navajo Nation*, 535 F.3d at 1063.

175. *Id.* at 1064.

176. *Id.*

177. *Id.* 1062–63.

178. *Id.* at 1070 ("[T]he diminishment of spiritual fulfillment–serious though it may be–is not a 'substantial burden' on the free exercise of religion.").

179. *Id.*

180. *See infra* Part III.

only affect a small part of the mountains.[181] Notably, neither court considered an argument that damage to even minor areas could impact the religious practices of these Indigenous groups.[182]

In the *Navajo* dissenting opinion, Judge Fletcher contended that the majority's interpretation of substantial burden was extremely restrictive.[183] He further argued that the majority's interpretation erred because RFRA does not incorporate any pre-RFRA definition of substantial burden, attacking the synergy of the rules in *Sherbert* and *Yoder*.[184] Moreover, the purpose of RFRA was to expand religious protection, not *contract* it.[185] Judge Fletcher's dissent suggested adopting the "plain and ordinary meaning [of substantial burden] that does not depend on the presence of a penalty or deprivation of benefit."[186]

The federal court system has set the tone for the individual states, making it increasingly difficult to ensure adequate protection for Indigenous groups' religious and cultural rights. Post-*Smith*, Congress immediately passed RFRA to provide greater protection for religious rights. However, federal courts have severely limited RFRA's application—contrary to Congress's intent. Such a critical issue demands further attention from both Congress and state legislatures.

III. HAWAI‘I STATE SUPREME COURT DECISION: APPROVING TMT CONSTRUCTION

As federal courts have severely limited RFRA protections, so too have many states. The Hawai‘i State Supreme Court's decision exemplifies just how difficult it remains for Indigenous groups to receive religious protections at the state level. The nationally recognized Maunakea protests were sparked by the Hawai‘i Supreme Court's 2018 decision in the *In re Conservation District Use Application HA-3568*.[187] This case upheld a decision by the BLNR that approved the permit for TMT's

181. *See In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 770 (Haw. 2018) (reasoning that TMT would not affect Native Hawaiian religious practices because it was not within the relative area of Native Hawaiian cultural sites); *Navajo Nation*, 535 F.3d at 1070 (noting that the use of recycled wastewater will only affect 1% of the Peaks). The Hawai‘i State Supreme Court did not conduct a RFRA analysis because of the United States Supreme Court's decision in *City of Boerne v. Flores*. *See In re CDUA HA-3568*, 431 P.3d at 771. They did, however, use similar reasoning to the *Navajo Nation* court in denying the Native Hawaiian's claims. *Id.* at 770.

182. *See generally Navajo Nation*, 535 F.3d 1058; *In re CDUA HA-3568*, 431 P.3d 752.

183. *Navajo Nation*, 535 F.3d at 1086 (Fletcher, J., dissenting).

184. *See id.*

185. *See id.*

186. *Id.*

187. 431 P.3d 752 (Haw. 2018).

construction.[188] The Hawai‘i Supreme Court's decision reflects the national trend of favoring competing development interests over the religious rights of Indigenous groups.

Caltech and the University of California formed the original TMT corporation in 2003 with the intention of "fostering astronomy through building a thirty meter telescope"[189] and submitted a conservation land use permit for the TMT proposal in 2010.[190] Despite failing to hold a contested case hearing, the BLNR granted the permit on April 12, 2013.[191] TMT International Observatory, LLC (TIO) was later created as a nonprofit organization in May of 2014 and succeeded the original TMT corporation as owner of the project.[192] However, in 2015, the Hawai‘i Supreme Court unanimously vacated the permit and held that the BLNR's approval of the permit before conducting a contested case hearing violated the due process rights of parties with standing to assert Native Hawaiian rights.[193] Notably, the Court held that state agencies must act consistently with their affirmative obligations under the Hawai‘i Constitution.[194]

After the permit was vacated, the BLNR held a contested case hearing and submitted its findings of fact, conclusions of law, and decision to grant the conservation permit to TIO.[195] Native Hawaiian cultural

188. *Id.* at 782.

189. *Id.* at 759.

190. *See id.* at 760. Maunakea is part of the two million acres of conservation lands around the Hawaiian Islands protected in Hawai‘i's conservation district. *See Sacred Summits: Legal Protections*, KAHEA, http://kahea.org/issues/sacred-summits/legal-protections [http://perma.cc/5CPV-FS56]. The purpose of these conservation district designations is to "conserve, protect, and preserve the important natural resources of [Hawai‘i] through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare." HAW. REV. STAT. § 183C-1 (2020). Commercial use of lands within conservation districts require a Conservation District Use Permit (CDUP), which must be approved by the State Board of Land and Natural Resources (BLNR). *See* KAHEA, *supra*.

191. *In re CDUA HA-3568*, 431 P.3d at 760.

192. *See id.* at 759. TMT International Observatory is "comprised of the Regents of the University of California, Caltech, the National Institutes of Natural Sciences of Japan, the National Astronomical Observatories of the Chinese Academy of Sciences, the Department of Science and Technology of India, and the National Research Council of Canada." *Id.*

193. Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 363 P.3d 224, 238–39 (Haw. 2015).

194. *See In re CDUA HA-3568*, 431 P.3d at 760 (citing *Mauna Kea Anaina Hou*, 363 P.3d at 262). In *Ka Pa‘akai O Ka‘Aina v. Land Use Commission*, the Hawai‘i State Supreme Court held that article XII, section 7 of the Hawai‘i Constitution places "an affirmative duty on the State and its agencies to preserve and protect traditional and customary native Hawaiian rights." 7 P.3d 1068, 1082 (Haw. 2000). The core of this affirmative duty is the responsibility of the State and its agencies to act only after "independently considering the effect of their actions on Hawaiian traditions and practices." *Id.* at 1083.

195. *See In re CDUA HA-3568*, 431 P.3d at 760.

practitioners appealed directly to the Hawai‘i State Supreme Court.[196]

On appeal, the Hawai‘i State Supreme Court considered several issues related to TMT’s construction, including whether TMT infringed on the religious rights of Native Hawaiians and whether TMT violated constitutional public trust and land use requirements.[197]

A. Native Hawaiian Rights Issues

The Court first considered whether the BLNR acted in accordance with the Hawai‘i Constitution to protect Native Hawaiian rights. Article XII, section 7 of the Hawai‘i Constitution provides that the state government must protect “all rights, customarily and traditionally exercised for . . . cultural and religious purposes” that Native Hawaiians possess.[198]

At the outset, the Court reiterated the State’s obligation to protect the reasonable exercise of customary and traditional Hawaiian rights, to the extent feasible.[199] In order to effectuate article XII, section 7, the Court applied the balancing test between Native Hawaiian rights and competing private interests that was articulated in *Ka Pa‘akai OKa‘Āina v. Land Use Commission*.[200] This test requires an administrative agency to, at a minimum, make three specific findings of fact and conclusions of law.[201] First, an agency must determine the “identity and scope of ‘valued cultural, historical, or natural resources’ in the [relevant] area, including the extent to which traditional and customary [N]ative Hawaiian rights are exercised in the . . . area.”[202] Second, the agency must find “the extent to which those resources—including traditional and customary [N]ative Hawaiian rights—will be affected or impaired by the proposed action.”[203] Finally, the agency must assess the feasibility of further agency action to reasonably protect Native Hawaiian rights if they are found to exist in

196. The appeal was made pursuant to a Hawai‘i statute that allows direct appeals for final decisions in contested cases regarding conservation districts. *See* HAW. REV. STAT. § 183C-9 (2020).

197. *See In re CDUA HA-3568*, 431 P.3d at 761. The Hawai‘i State Supreme Court also considered a number of disqualification issues (such as whether potential prejudice towards Native Hawaiians and the hearing officer having family ties to astronomy centers tainted the contested hearing), public trust and land use issues, and procedural issues. *See id.* However, these issues are beyond the scope of this Comment.

198. HAW. CONST. art. XII, § 7.

199. *See In re CDUA HA-3568*, 431 P.3d at 768; *see also* Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm’n, 903 P.2d 1246, 1271 n.43 (Haw. 1995) (reaffirming the State’s obligation to protect Native Hawaiian rights “to the extent feasible”).

200. 7 P.3d 1068, 1072 (Haw. 2000); *In re CDUA HA-3568*, 431 P.3d at 768–69.

201. *Ka Pa‘akai O Ka‘Āina*, 7 P.3d at 1084.

202. *Id.* (footnote omitted).

203. *Id.*

the area.[204]

The Hawai‘i State Supreme Court ultimately found that the BLNR satisfied the *Kapa‘akai* test, fulfilling its obligations under the Hawai‘i Constitution.[205] Regarding the first requirement, the Court agreed with the BLNR's conclusion that there was no evidence of Native Hawaiian cultural resources or religious exercise at the proposed observatory site or the access road.[206] The Court determined that a majority of the Native Hawaiian cultural practitioners conduct their practices in other areas of Maunakea's summit, such as Lake Waiau, Pu‘u Līlīnoe, or Kūkahau‘ula.[207] The TMT Observatory site is located 600 feet below the summit and because of this, the Court found that the TMT would not interfere with Native Hawaiian religious practices.[208]

For the second requirement, the Court found that the TMT project would not impair or affect the area's cultural, historical, and natural resources.[209] According to the Court, the resources would not be affected because "the TMT Observatory will not be visible from . . . culturally sensitive areas of the summit of [Maunakea]."[210] Further, the Court noted that spiritual practices have been occurring for nearly two decades while astronomy facilities have existed.[211] However, this ignored the argument that Native Hawaiian cultural practitioners were either forced to forgo their customary and traditional exercises or accept the existing telescopes and continue their practices.[212] It also disregarded the fact that the Native Hawaiians believe the *entire* mountain is sacred; therefore, the mere presence of these observatories and astronomy facilities is abhorrent to sacred tradition.[213]

Lastly, because the Court did not find that Native Hawaiian rights were exercised in the TMT Observatory site area, the BLNR was not required to discuss measures to ensure the protection of Native Hawaiian rights and

204. *Id.*

205. *In re CDUA HA-3568*, 431 P.3d at 771.

206. *Id.* at 769.

207. *Id.* at 769–70.

208. *Id.* at 770.

209. *See id.*

210. *Id.*

211. *Id.*

212. *See supra* section I.B.

213. *See, e.g.*, NATIVE HAWAIIAN LAW: A TREATISE 3 (Melody Kapilialoha MacKenzie et al. eds., 2015) ("Kānaka Maoli trace their ancestry to the ‘āina (land), to the natural forces of the world . . . . All are related in a deep and profound way that infuses Hawaiian thought and is expressed in all facets of Hawaiian life.").

practices under the third factor.[214] Accordingly, the Court concluded that the BLNR had met the requirements of the *Ka Pa‘akai* test.

The Hawai‘i State Supreme Court also dismissed the appellants’ arguments that the TMT project violates their federally protected right to the free exercise of their religion.[215] Giving significant deference to the BLNR’s decision that TMT would not substantially burden Native Hawaiians’ religious rights, the Court rejected claims under the Free Exercise Clause.[216] The Court also declined to apply RFRA because the United States Supreme Court held that RFRA’s statutory protections are inapplicable to state government actions.[217]

B. Public Trust and Land Use Issue

In addition to the numerous Native Hawaiian rights issues, the appellants also asserted various public trust and land use claims.[218] The appellants first argued that the TMT project violated article XI, section 1 of the Hawai‘i Constitution.[219] The Hawai‘i Constitution’s public trust provision stipulates that the State “shall conserve and protect [Hawai‘i’s] natural beauty and all natural resources . . . and . . . promote the development and utilization of these resources in a manner consistent with their conservation.”[220] This provision also mandates that “[a]ll public natural resources are held in trust . . . for the benefit of the people.”[221] To comply with article XI, section 1, the government must balance between “conservation and protection of public natural resources, . . . and the development and utilization of these resources.”[222] When balancing these interests, there is a “presumption in favor of public use, access and enjoyment.”[223]

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214. *In re CDUA HA-3568*, 431 P.3d at 770. The BLNR did impose “special conditions” to avoid impact on Native Hawaiian practices although seemingly very minimal and not addressing the core issue of development on an extremely sacred mountain. *Id.* These conditions included limiting daytime activities at TMT on up to four days per year, ceasing construction if historic remains are found, and allowing Native Hawaiians *reasonable* access to the TMT Observatory site to exercise any traditional and customary practices. *Id.* at n.18.

215. *Id.* at 771.

216. *Id.*

217. *Id.* Notably, the Court’s discussion of the Free Exercise Clause was limited to just two short paragraphs and the opinion is absent of any *Sherbert* or *Smith* analysis. *See id.*

218. *Id.* at 773–79.

219. *Id.* at 773.

220. HAW. CONST. art. XI, § 1.

221. *Id.*

222. *In re CDUA HA-3568*, 431 P.3d at 773.

223. *Id.* at 774.

The Court concluded that TMT comports with article XI, section 1.[224] In doing so, the Court reasoned that the "BLNR's finding that the TMT [p]roject will not cause substantial adverse impact to geologic sites is not challenged."[225] The Court further explained that the land will be restored pursuant to the "Decommissioning Plan" at the end of its "50 year useful life" or the end of the lease, whichever comes first.[226] Although the Court was confident that measures implemented by the BLNR would help protect the land, this rationale fails to account for the previous fifty plus years of mismanagement of the existing telescopes. This mismanagement has polluted the area and deepened the distrust within the Native Hawaiian community of the government's ability to effectively maintain and preserve Maunakea's natural resources.[227] The BLNR had similarly imposed conditions on UH's lease, yet severe, irreversible damage resulted regardless of those conditions.[228]

Native Hawaiians also asserted that use of TMT is a private use, while Native Hawaiians' use of the land is public.[229] However, the Court reiterated that there was no evidence that Native Hawaiians used the site area.[230] The Court further explained the astronomical significance of the TMT project, noting that the people of Hawai'i benefit greatly from the selection of Maunakea for its location.[231] After explaining how TMT will provide grants, scholarships, and a workforce pipeline program for science, technology, engineering, and mathematics (STEM) students, the Court concluded that TMT's use of the land is "consistent with conservation and in furtherance of the self-sufficiency of the State."[232] In doing so, the Court established a precedent that says projects indirectly providing substantial benefits to the State will justify substantial burdens on Native Hawaiian rights.

IV. A SOLUTION TO ADEQUATELY PROTECT NATIVE HAWAIIAN RIGHTS

Native Hawaiian rights and the genuinely held religious beliefs of Indigenous people consistently yield to the economic benefits of private

224. *Id.*
225. *Id.*
226. *Id.*
227. *See supra* section I.B.
228. *See supra* section I.B.
229. *See In re CDUA HA-3568*, 431 P.3d at 775.
230. *See id.*
231. *See id.*
232. *Id.*

development under existing federal and state law. Hawai‘i does not have a state RFRA, but even if there were such protections, the arduous substantial burden test has proved to be fatal to most Indigenous groups' RFRA claims. Thus, to ensure protection of Native Hawaiian cultural and religious rights, the Hawai‘i State Legislature should both enact a state version of RFRA and codify a new definition of "substantial burden."

A. Enact a Hawai‘i State RFRA

The Hawai‘i State Supreme Court's decision exemplifies the difficulty of succeeding on Indigenous religious rights claims without the presence of a state RFRA.[233] The United States Supreme Court held that RFRA is unconstitutional as applied to the states[234] and to date, the Hawai‘i State Legislature has not enacted a version of RFRA. Without these statutory protections, Indigenous rights are not effectively protected. The primary alternative to a state RFRA claim would be for Native Hawaiian plaintiffs to bring an action under the Free Exercise Clause. While strict scrutiny has historically applied to Free Exercise Clause claims, *Smith* has severely eroded these constitutional protections by declining to apply strict scrutiny to valid and neutral laws of general applicability that substantially burden religious rights. Consequently, *Smith*'s holding generally controls for neutral, generally applicable state laws that burden the free exercise of religion and strict scrutiny is not applied.[235] A state RFRA that mandates the application of strict scrutiny would provide the more protective legal claim that Congress originally intended for all people pre-*Boerne*.

Even if the Hawai‘i State Supreme Court adopted a common law RFRA-like test, it is always subject to being overturned, or, as seen in *Smith*, severely confined to a very particular set of facts. Therefore, the most effective method to provide protection for religious rights is to call on the Hawai‘i State Legislature to enact its own version of RFRA. A RFRA bill that includes the following language is needed: "Neither the State nor its political subdivisions shall substantially burden a person's exercise of religion unless it demonstrates that the imposition of the burden furthers a compelling governmental interest and is the least

233. *See supra* section II.B.

234. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (holding that Congress exceeded its legislative powers because it enforced RFRA under the Enforcement Clause of the Fourteenth Amendment, which "contradict[ed] vital principles necessary to maintain separation of powers and the federal balance").

235. *See, e.g.*, State v. Sunderland, 168 P.3d 526, 530 (Haw. 2007) (concluding that despite the defendant's arguments that "Congress enacted RFRA . . . to expressly supersede *Smith*'s elimination of the compelling interest analysis in the context of generally applicable governmental regulation, . . . *Smith* plainly controls").

restrictive means of furthering that compelling interest."[236]

Passing a state version of RFRA is not without drawbacks. A major issue is the conflict between religious liberty and civil rights, specifically rights of the LGBTQ+ community. Article I, section 5 of the Hawai'i State Constitution expressly prohibits discrimination against individuals on the basis of race, religion, sex, or ancestry.[237] Furthermore, the Hawai'i Employment Practices Act[238] provides it is unlawful for employers to discriminate "[b]ecause of race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, reproductive health decision, or domestic or sexual violence victim status."[239]

While it is beyond dispute that discrimination is an important concern, civil rights can be preserved with protective language. Therefore, the bill for a Hawai'i state RFRA should also include the following language: This law shall provide a claim or defense whenever the free exercise of an individual's religious beliefs or practices is substantially burdened by the government, *unless the religious practice is in violation of the Hawai'i State Constitution, the Hawai'i Employment Practices Act*, or being used as a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services to any member or members of the general public on the basis of sex, sexual orientation, or gender identity.[240] Including this language precludes potential discrimination against individuals under the guise of religious freedom.[241]

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236. While not the exact language used in the Hawai'i State RFRA bill that failed to pass, this language is modeled after that bill. *See* H.B. 823, 29th Leg. (Haw. 2017) ("State action shall not burden any person's right to exercise religion; provided that a burden shall be permissible if the burden results from a law or rule of general applicability and the burden to the person's exercise of religion: (1) Is essential to further a compelling governmental interest; and (2) Is the least restrictive means of furthering that compelling governmental interest.").

237. HAW. CONST. art. 1, § 5.

238. HAW. REV. STAT. § 378 (2020).

239. *Id.* § 378-2(a)(1).

240. This language is modeled after the anti-discrimination provisions in the Hawai'i State Constitution, Hawai'i Employment Practices Act, and the Indiana state RFRA. *See* HAW. CONST. art. 1, § 5; HAW. REV. STAT. § 378-2(a)(1); SEA 50, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

241. There may be potential Establishment Clause issues with this proposed protective language. However, Indiana passed a highly controversial RFRA bill in 2015, which was deemed a license to discriminate by LGBTQ rights advocates. *See* Dwight Adams, *RFRA: Why the 'Religious Freedom Law' Signed by Mike Pence Was So Controversial*, INDYSTAR (May 3, 2018, 3:23 PM), https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002 [http://perma.cc/XN75-HGPM]. As a result of substantial public scrutiny and boycotts from numerous states, companies, and organizations (including the NBA and NCAA), Indiana passed Senate Enrolled Act 50 in 2015—amending the State RFRA to provide similar civil rights protections to the proposed Hawai'i RFRA. *See id.*; SEA 50, 119th Gen. Assemb. SEA 50 states

In addition to discrimination, other state governments have raised concerns about an explosion of litigation from passing a state RFRA.[242] However, contrary to speculation, claims under state RFRA laws have been surprisingly rare among the states that have enacted them.[243] Notably, one scholar asserted that although some states have seen significant amounts of state RFRA litigation, "many state RFRAs seem[] 'to exist almost entirely on the books.'"[244] Of the sixteen states with RFRA laws, four states have not considered any claims under their RFRA, and six other states report only one or two cases.[245] Thus, critics' concerns of increased litigation appear unfounded, or at the very least, overstated.

In the Maunakea litigation, the Hawaiʻi Supreme Court dismissed the plaintiffs' RFRA claim because the federal statute does not apply to the states.[246] Passing a Hawaiʻi state RFRA would give Native Hawaiian rights advocates a more cognizable legal claim where other claims have fallen short of providing adequate protection.

B. Redefining "Substantial Burden"

While a Hawaiʻi state RFRA that imposes strict scrutiny is the first step towards protecting Native Hawaiian rights, it is insufficient standing alone. Before courts even conduct a strict scrutiny analysis, plaintiffs must demonstrate that the government action imposes a *substantial* burden on their religious practices.[247] This burden is so onerous that not a single Indigenous plaintiff was able to produce sufficient evidence to meet this

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that the Indiana RFRA does not "authorize a provider to refuse to offer or provide services . . . on the basis of . . . sex, sexual orientation, [or] gender identity." *Id.* Moreover, SEA 50 does not allow RFRA to be used as "a defense to a civil action or criminal prosecution for refusal by a provider to offer or provide services . . . to any member or members of the general public on the basis of . . . sex, sexual orientation, [or] gender identity." *Id.* While these civil rights protections have withstood numerous legal challenges since 2015, litigation is still ongoing. *See* Crystal Hill, *The Fight Against RFRA Isn't Over. Meet Its Conservative Opponent*, INDYSTAR (Mar. 26, 2020, 6:10 PM), https://www.indystar.com/story/news/politics/2020/03/26/rfra-indiana-why-conservative-lawyer-suing-over-law/4860169002/ [https://perma.cc/W3P6-4D9V]. It is worth noting that this protective language remains current law in Indiana. An analysis of the Establishment Clause implications is however, beyond the scope of this Comment.

242. *See, e.g.*, Reinach, *supra* note 148, at 825 (explaining that senators in the Arizona State Senate argued a state RFRA would open the door to a drastic increase in litigation if the bill were adopted).

243. *See* Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466, 467 (2010).

244. Long, *supra* note 148, at 272 (quoting Lund, *supra* note 243, at 467).

245. *Id.*

246. *See supra* section III.A; *see generally In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752 (Haw. 2018).

247. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008).

requirement in the aforementioned federal case law.[248] Scholars have argued that "[c]ourts grossly misunderstand, and improperly heighten, the threshold requirement of a substantial burden on religious exercise."[249]

The United States Supreme Court's interpretation of a substantial burden creates problems because of its narrowly confined meaning that only applies to two specific situations: (1) "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit"; or (2) "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions."[250] Any lesser burden is not substantial and does not require strict scrutiny.[251] Thus, the Court's interpretation effectively "places beyond judicial scrutiny many burdens on religious exercise that RFRA was intended to prevent."[252] The Hawai'i State Supreme Court indicated that it uses the same test as federal courts when addressing whether government action is a substantial burden on religious practices.[253] Therefore, it is clear that the same restrictive standard would apply to Native Hawaiian religious rights claims.

The solution to this arduous standard is for Congress and state legislatures to statutorily mandate the courts to adopt a new interpretation of what constitutes a substantial burden in order to provide the necessary protection for Native Hawaiian and Indigenous groups' rights nationwide. Such a statute should codify a more literal, plain language definition of substantial burden, similar to the one articulated by Judge Fletcher's dissenting opinion in *Navajo Nation*.[254] Recall that the purpose of RFRA was "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[255] *Black's Law Dictionary* defines burden as "[s]omething that hinders or oppresses."[256] Moreover, the *American Heritage Dictionary* defines substantial as "[c]onsiderable in importance, value, degree,

248. *See supra* section II.C.

249. Lund, *supra* note 243, at 468; *see also* Reinach, *supra* note 148, at 845 ("Government officials are beginning to understand that they can abridge religious liberty and argue that they have not imposed a substantial burden.").

250. *Navajo Nation*, 535 F.3d at 1069–70.

251. *See id.* at 1070.

252. *Id.* at 1091 (Fletcher, J., dissenting).

253. *See* State v. Armitage, 319 P.3d 1044, 1070 (Haw. 2014) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) as its authority for the substantial burden inquiry) ("Having concluded that Petitioners practice of religion was not substantially burdened . . . the *remainder* of the *Sherbert* test need not be applied." (emphasis added)).

254. *See Navajo Nation*, 535 F.3d at 1091 (Fletcher, J., dissenting).

255. 42 U.S.C. § 2000bb(b).

256. *Burden*, BLACK'S LAW DICTIONARY (11th ed. 2019).

amount, or extent."[257] To protect Native Hawaiian religious rights, the Hawaiʻi state RFRA should define substantially burden as "considerably hinder or oppress."

Applying this new definition of substantial burden to the dispute over Maunakea would effectively protect the Native Hawaiian rights. Native Hawaiians believe Maunakea is a "sacred manifestation of their ancestry, [and] should be honored in its natural state."[258] The government's approval of the TMT permit considerably hinders Native Hawaiians' ability to engage in cultural practices on Maunakea. Not only are Native Hawaiians forced to go through numerous procedures to have access to their own stolen land, but the spirituality of their traditions and practices is severely curtailed by TMT's presence on their sacred land. Moreover, the construction of previous observatories already had significant adverse impacts on cultural, archaeological, and historic resources.[259] TMT's construction would further alter and damage the natural state of Maunakea, imposing a substantial burden on Native Hawaiian religious traditions.

Enacting a Hawaiʻi State RFRA, in conjunction with a new, literal definition of substantial burden, would provide a legal avenue for Native Hawaiians to protect their cultural and religious rights.

CONCLUSION

In balancing Indigenous rights with competing development interests, the state and federal courts have generally allowed governmental intrusions on Indigenous groups' religious and cultural rights. By allowing TMT to be built on Maunakea, the Hawaiʻi State Supreme Court has further demonstrated the need for greater protection of Native Hawaiian rights. Without adequate legal remedies, the Native Hawaiian community has been forced to resort to mass protests out of desperation to protect the lands they consider sacred.

To rectify these issues, the Hawaiʻi State Legislature should enact a version of RFRA with a new definition of "substantial burden." These protections are necessary not only to safeguard Native Hawaiian religious and cultural rights, but also to ensure that "religious conscience is respected and that the regulatory state does not unduly infringe on religious belief."[260] Although the Maunakea protests have halted TMT

257. *Substantial*, AM. HERITAGE DICTIONARY, https://www.ahdictionary.com/word/search.html?q=substantial [https://perma.cc/5TRC-LQ26].

258. *In re* Conservation Dist. Use Application (*CDUA*) HA-3568, 431 P.3d 752, 757 (Haw. 2018).

259. *See id.* at 758–59.

260. Reinach, *supra* note 148, at 854.

construction, these additional measures are still necessary to protect the rights of Native Hawaiians.