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I. Introduction

"Holy means it is set apart. It is like the sanctuary of a church; you would not want to desecrate a sacred place. This is a holy place and it should remain holy."[1] Many religious believers would agree with the first sentence of this quote—that holy places are distinguished from all other places. Yet the lack of understanding of what "holy" means to religious followers lies at the heart of a dispute over the San Francisco Peaks in Northern Arizona. The Peaks are sacred to thirteen Native American tribes or chapters.[2] Perhaps analogizing what is holy to the tribes to the sanctuary of a church allows a greater understanding of the plight these tribes face. Imagine for a moment that you are a religious follower and your holy site, the one you hold most dear, will be doused daily with recycled sewage. Would you be consoled by the fact that the sewage effluent contains only trace particles of human waste? Would you feel better knowing that a private corporation is experiencing a higher profit margin because of the burden placed on your holy site?

This is the problem encountered by the Native American tribes in *Navajo Nation v. United States Forest Service*.[3] The holy lands that are dear to these tribes are owned by the federal government, which has approved a proposal to expand a ski resort known as the Snowbowl.[4] The proposal is focused on pumping 1.5 million gallons of sewage effluent per day from the nearby city of Flagstaff, Arizona to the Peaks in order to manufacture artificial snow for the Snowbowl.[5] The purpose of the plan is to improve the economic viability of the ski resort, which has suffered diminished profits from decreased annual

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1. Daniel Kraker, *On Sacred Snow: Culture and Commerce Clash over Development on Arizona's San Francisco Peaks*, AM. INDIAN REP., Apr. 2004, at 6, 6 (quoting Hopi Vice Chair Caleb Johnson).

2. *See infra* note 15 and accompanying text.

3. 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

4. *Id.* at 1064-65.

5. *Id.* at 1081 (Fletcher, J., dissenting).

snowfall.[6] Attempting to halt the plan, the tribes initiated suit against the U.S. Forest Service on a variety of claims. This note will focus on their claim under the Religious Freedom Restoration Act of 1993 (RFRA).[7]

Congress passed RFRA in response to the Supreme Court's ruling in *Employment Division, Department of Human Resources v. Smith*,[8] which held that the First Amendment's Free Exercise Clause offers no protection against laws of general applicability that nevertheless burden religion.[9] Congress recognized that the Supreme Court's interpretation of the Free Exercise Clause in *Smith* was a departure from previous case law and was insufficient to adequately protect the free exercise of religion. In response, it expanded the First Amendment's protections by enacting RFRA.[10] RFRA prohibits government action substantially burdening religion unless it furthers a compelling government interest and is the least restrictive means of furthering that interest.[11] The Ninth Circuit Court of Appeals' application of RFRA in *Navajo Nation* has rendered the statute and the protections conceived by Congress useless.

The Ninth Circuit's interpretation of RFRA in *Navajo Nation* is too narrow to fulfill Congress's intent of expanding First Amendment protection. The court interpreted "substantial burden" to fit only the facts of previous Supreme Court cases in lieu of independently determining whether the use of sewage effluent on the Snowbowl places a substantial burden on the tribes' exercise of religion.[12] This has the effect of completely undermining the congressional intent of RFRA, which was to expand the protection proffered to religious expression.[13]

Part II of this note will first describe the facts of *Navajo Nation* and the reasoning of the Ninth Circuit. Next, Part III explains the background of the modern Free Exercise framework and the cause and evolution of RFRA. Finally, Part IV discusses the implications of the approach taken by the Ninth Circuit and the dangers posed to the free exercise of religion under RFRA.

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6. *Id.* at 1065.
7. 42 U.S.C. §§ 2000bb-2000bb-4 (2006).
8. *Id.* § 2000bb(a)(4).
9. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 882-84 (1990).
10. 42 U.S.C. § 2000bb(a).
11. *Id.* § 2000bb-1(a)-(b).
12. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc), *cert. denied*, 128 S. Ct. 2763 (2009).
13. *See* 42 U.S.C. § 2000bb(a).

II. Statement of the Case

A. The San Francisco Peaks

At the heart of this case are the San Francisco Peaks, located in the Coconino National Forest just north of Flagstaff, Arizona.[14] The Peaks are historically sacred to numerous Indian tribes, including the Navajos and the Hopis.[15] The Navajo people view the Peaks as one of their most sacred sites.[16] Navajo medicine men collect soil and herbs from the Peaks for use in healing ceremonies.[17] In addition, various rocks, plants, and trees are gathered from the Peaks by the Navajos for use in ceremonies and day-to-day activities.[18] The Navajos recognize the Peaks as a source for water and go there to offer prayers for rain.[19]

The Peaks are known to the Hopi as *Nuvatukyaovi*, the "Place of Snow on the Peaks."[20] The Hopis believe that *kachinas*, symbols of the perfect spiritual beings that the Hopis hope to become after death,[21] reside in the Peaks.[22] *Kachinas* represent supernatural beings who may help people if they are asked properly and respectfully.[23] The Hopis believe that *kachinas* may take the form of clouds and bring rain.[24] Like the Navajos, the Hopis gather plants and herbs from the Peaks for use in religious ceremonies.[25] The Peaks are a major

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14. *Navajo Nation*, 535 F.3d at 1064.

15. 1 SW. REGION, FOREST SERV., U.S. DEP'T. OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS 1-11 (Feb. 2005), *available at* http://www.fs.fed.us/r3/coconino/nepa/2005/feis-snowbowl/ snowbowl-zip-files/vol-1.zip [hereinafter ENVIRONMENTAL IMPACT STATEMENT]. Thirteen tribes or chapters, representing the Hopis, Navajos, Zunis, Acomas, Apaches, Hualapais, Havasupais, Yavapais, and Southern Paiutes were contacted by the Forest Service during the preparation of its Environmental Impact Statement required under the National Environmental Policy Act (NEPA). *Id.*

16. *See* KLARA BONSACK KELLEY & HARRIS FRANCIS, NAVAJO SACRED PLACES 94-95 (1994).

17. *See* ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15, at 3-11.

18. *Id.*

19. *Id.*

20. Appellant Hopi Tribe's Brief of Appeal at 3, Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 128 S. Ct. 2763 (2009) (Nos. 06-15371, 06-15436, 06-15455), 2006 WL 2429669.

21. *See* JOHN D. LOFTIN, RELIGION AND HOPI LIFE IN THE TWENTIETH CENTURY 109 (2d. ed. 2003).

22. *Id.* at 49.

23. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15, at 3-10.

24. *Id.*

25. *Id.* at 3-9.

landmark featured in many Hopi folk tales and oral traditions.[26] Both the Hopis and Navajos conduct religious ceremonies on the Peaks.[27]

A recreational ski resort known as the Snowbowl is located on the highest of the Peaks, Humphrey's Peak.[28] The Snowbowl occupies 777 acres of the Peaks.[29] The resort depends on natural snowfall during the ski season, but in recent years the snowfall has decreased, resulting in operating losses that threaten the viability of the ski park.[30]

In response to the shortage of natural snowfall and the drop in revenue caused by it, the Snowbowl contracted with the nearby City of Flagstaff to provide 1.5 million gallons of treated sewage effluent per day to create artificial snow.[31] Sewage effluent is made from recycled (or "reclaimed") wastewater.[32] The wastewater is treated via a chemical and mechanical process that removes most of, but not all, the bacteria and microscopic pathogens found within it.[33] Because detectable quantities of bacteria cannot be removed by this process and thus remain in the effluent, it is not safe for human consumption as it is not pure water.[34] The State of Arizona has approved the use of treated effluent for irrigation and landscaping.[35]

Because the proposed plan takes place on government-owned property, the U.S. Forest Service was required to act in accordance with the National

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26. *Id.* at 3-10.

27. *Id.* at 3-12.

28. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1064 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

29. *Id.*

30. *Id.* at 1065. In dry years, the skiing facilities are open as few as four days. Conversely, in years with abundant natural snowfall the park was open as many as 139 days. *Id.* at 1082 (Fletcher, J., dissenting).

31. *Id.* at 1082 (Fletcher, J., dissenting).

32. Judge Fletcher notes in his dissent that proponents of the plan euphemistically refer to sewage effluent as "reclaimed water." *Id.* (Fletcher, J., dissenting).

33. ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15, at 3-199.

> Enteric microbial pathogens in wastewater are substantially removed by conventional treatment, although they are not completely eliminated even with disinfection. Fecal coliform bacteria, which are used as an indicator of microbial pathogens, are typically found at concentrations ranging from 10^5 to 10^7 colony-forming units per 100 milliliters (CFU/100 ml) in untreated wastewater. Advanced wastewater treatment may remove as much as 99.9999+ percent of the fecal coliform bacteria; however, the resulting effluent has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia.

Id. For a description of the wastewater-treatment process, see *id.* at 3-202.

34. *Navajo Nation*, 535 F.3d at 1083 (Fletcher, J., dissenting).

35. *Id.* (Fletcher, J., dissenting).

Environmental Policy Act (NEPA).[36] NEPA requires federal agencies to prepare an Environmental Impact Statement (EIS) if their actions will significantly affect the human environment.[37] The Forest Service determined that the proposed plan would significantly affect the environment, so it prepared an EIS pursuant to NEPA.[38] The EIS considered the relevant implications of this measure, including the effect on the tribes' exercise of religion.[39]

The Hopis believe that snow generated on the Peaks is a result of the *kachinas* and that this method of artificial snowmaking would desecrate those beliefs.[40] Both the Hopi and Navajo tribes believe that wastewater cannot be purified and that the use of sewage effluent would negatively impact the spiritual beings living on the Peaks.[41] The Forest Service determined that the use of sewage effluent "[w]ould further contaminate the spiritual purity of the entire Peaks beyond the historic and existing levels."[42] Despite concluding that the proposed plan would adversely affect the tribes, the Forest Service approved the plan.[43]

B. A Legal History

The San Francisco Peaks are the focus of a long battle between the preservation of tribal religion and custom and the development and maintenance of a ski resort in northern Arizona. The Forest Service built a road and ski lodge in 1937.[44] This became the Snowbowl, and it has been used for downhill skiing ever since.[45] In 1977, the Forest Service transferred the operating permit for the Snowbowl to Northland Recreation Company.[46] Northland submitted plans to construct additional ski lifts, parking lots, and lodges.[47] Pursuant to NEPA, the Forest Service prepared an EIS detailing the

36. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4368 (2006).

37. *Id.* § 4332(C).

38. *See* ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15.

39. *See id.* at 3-7 to -30.

40. *See id.* at 3-17. The EIS quotes a statement made at a meeting with the Hopis: "[I]f Snowbowl makes their own snow, the *Katsinam* will say: 'they can make their own moisture, they don't need us' and they will leave. Snowmaking would desecrate our beliefs. Let the *Katsinam* make the moisture." *Id.* at 3-17 to -18.

41. *Id.* at 3-17.

42. *Id.* at 3-18.

43. *See* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1066 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009).

44. Wilson v. Block, 708 F.2d 735, 738 (D.C. Cir. 1983).

45. *Id.*

46. *Id.*

47. *Id.*

impact renovations would have on the Navajo and Hopi tribes.[48] In 1979, the Forest Service ultimately decided to allow development on the Peaks.[49] In 1981, the Hopi tribe, the Navajo Medicinemen's Association, and nearby ranchers initiated suit to halt development under the Free Exercise Clause of the First Amendment.[50] They argued that because the San Francisco Peaks were sacred, the development would cause the Peaks to lose their spiritual healing power and would cease to benefit the tribes.[51] The Court of Appeals for the D.C. Circuit held that because the government did not impair the tribes' physical access to the Peaks, it did not burden their religious practices under the Free Exercise Clause. Thus, development was allowed to continue.[52]

C. The Current Lawsuit

Following the Forest Service's approval of the Snowbowl plan, numerous tribes brought suit in federal court, alleging inter alia that the Forest Service's approval of the plan violated RFRA.[53] Specifically, the tribes argued that the use of sewage effluent on the mountain placed a substantial burden on their free exercise of religion and that the government must demonstrate both that the use of effluent furthers a compelling interest and that the burden placed on the tribes is the least-restrictive means of accomplishing that interest.[54]

The district court found the proposed action did not violate RFRA because the tribes failed to demonstrate a substantial burden.[55] The district court determined that to demonstrate a "substantial burden" the tribes must show that the proposed plan "coerces them into violating their religious beliefs or penalizes their religious activity."[56] Holding that the dispersal of sewage effluent on a mountaintop does neither of these, the court determined the Forest

48. *Id.* at 738-39.

49. *Id.* at 739.

50. *Id.*

51. *Id.* at 740.

52. *Id.*

53. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1066 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009). The plaintiffs also brought suit under the National Environmental Policy Act of 1969, the National Historic Preservation Act of 1966, the Endangered Species Act of 1973, the Grand Canyon National Park Enlargement Act of 1975, and the National Forest Management Act of 1976. The district court granted defendants' motion for summary judgment on all claims except the RFRA claim. *Id.*

54. *See* 42 U.S.C. § 2000bb-1 (2006) (providing general elements of a claim under RFRA).

55. *Navajo Nation*, 535 F.3d at 1066-67.

56. *Id.* (quoting Navajo Nation v. U.S. Forest Serv., 408 F. Supp. 2d. 866, 905 (D. Ariz. 2006), *aff'd*, 535 F.3d 1058 (9th Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2763 (2009)).

Service did not violate RFRA and thus did not have to demonstrate a compelling interest.[57]

The tribes appealed this decision to the Ninth Circuit Court of Appeals. Relying on a statutory interpretation of RFRA, a three-judge panel of Ninth Circuit judges reversed, holding that the proposed action substantially burdened the tribal members' free exercise of religion under RFRA and that the government had not advanced a compelling interest.[58]

The Forest Service moved for rehearing, which was granted, and the case went before the Ninth Circuit en banc.[59] Sitting en banc, the Ninth Circuit vacated the judgment of the panel and affirmed the district court's ruling, holding the Forest Service did not substantially burden the tribes because it did not threaten criminal sanctions or deny a government benefit.[60] The court relied on the same substantial-burden analysis as the district court—that "substantial burden" should be defined only as a denial of a government benefit under *Sherbert v. Verner* or a threat of incarceration or other punishment under *Wisconsin v. Yoder*.[61]

III. Background

The Free Exercise Clause is found in the First Amendment.[62] It provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[63] The Court has broadly interpreted what constitutes "religion" within the context of the First Amendment:

> [T]he test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.[64]

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57. *Id.*

58. *Id.* at 1067.

59. *Id.*

60. *Id.* at 1078.

61. *See id.* at 1069-78 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963)).

62. U.S. CONST. amend. I.

63. *Id.*

64. United States v. Seeger, 380 U.S. 163, 165-66 (1965) (holding that an agnostic was entitled to receive an exemption from the Selective Service).

A. The Foundation of the Modern Free Exercise Clause: Sherbert and Yoder

Sherbert v. Verner[65] supplies the modern framework for interpreting the Free Exercise Clause. Adell Sherbert, a member of the Seventh-day Adventist Church, was fired because she refused to work on Saturdays.[66] The Seventh-day Adventist Church recognizes Saturday as the Sabbath Day, and Sherbert refused to work because it would violate her religious beliefs.[67] After losing her job, Sherbert was unable to find any other employment that would not compel her to work on Saturdays, so she filed for state unemployment benefits in South Carolina.[68] Sherbert was subsequently denied unemployment benefits by the Employment Security Commission because she failed to accept suitable work when offered.[69]

After the Commission denied Sherbert unemployment benefits, she challenged its decision on the basis that it was prohibiting her free exercise of religion in violation of the First Amendment.[70] Justice Brennan, writing for the United States Supreme Court, concluded that a mere rational basis for a law that prohibits granting unemployment benefits because of one's religious practices would not justify such a substantial infringement on the free exercise of religion.[71] He crafted a four-part test to determine whether a claim under the Free Exercise Clause would stand. For the first part of the *Sherbert* test, a court must determine whether the claim involves a sincere religious belief.[72] Next, a court must look to whether the government act imposes a burden on the individual's free exercise of religion.[73] If an individual makes such a showing on the first two parts, the burden passes to the government to demonstrate that a compelling state interest justifies refusing to grant an exemption and that its actions are the least-restrictive means of achieving that interest.[74]

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65. 374 U.S. 398 (1963).
66. *Id.* at 399.
67. *Id.* at 399-400.
68. *Id.*
69. *Id.* at 401.
70. *Id.*
71. *Id.* at 406.
72. *See id.* at 402 n.1. "No question has been raised in this case concerning the sincerity of appellant's religious beliefs." *Id.*
73. *Id.* at 403. It is worth noting that the Court in *Sherbert* does not use the phrase "substantial burden."
74. *Id.* at 406-09.

The Supreme Court reinforced its *Sherbert* framework in *Wisconsin v. Yoder*.[75] A Wisconsin law required parents to enroll their children in public or private schools up to the age of sixteen.[76] The respondents Jonas Yoder and Wallace Miller were members of the Old Order Amish religion, and respondent Adin Yutzy was a member of the Conservative Amish Mennonite Church.[77] The respondents did not enroll their children, aged fourteen and fifteen, in a private or public school because it was contrary to their religions and ways of life.[78] Yoder was found guilty of violating the law and was fined a nominal amount.[79]

Applying the *Sherbert* test, the Supreme Court first acknowledged that the record indicated the Amish claims were "rooted in religious belief."[80] The Court then turned to the second and third parts of the test. In examining the burden on the Amish claimants, the Court determined that the burden was "not only severe, but inescapable" because the law compelled them to act contrary to their religious beliefs under threat of criminal sanction.[81] The Court found the State failed to show that compulsory education beyond the eighth grade was sufficient enough of a state interest to outweigh the burden on the Amish's religion.[82]

B. The Dry Period: Few Religious Exemptions Granted Outside the Unemployment Context

After the ruling in *Yoder*, the Court stalled in allowing more protection for free-exercise claimants outside of the unemployment-benefits framework. A trend appeared where the Court would refuse to grant an exemption because doing so would undermine the purpose of the state system or because the situation and circumstances were themselves unique.[83]

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75. 406 U.S. 205 (1972).
76. *Id.* at 207 n.2.
77. *Id.* at 207.
78. *Id.* at 209.
79. *Id.* at 208.
80. *Id.* at 215-16.
81. *Id.* at 218.
82. *Id.* at 227. "Against this background it would require a more particularized showing from the State on this point to justify the *severe interference* with religious freedom such additional compulsory attendance would entail." *Id.* (emphasis added). The Court does not use the phrase "substantial burden" in *Yoder*.
83. *See* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that logging and construction of roads in a national forest on land sacred to Native Americans did not violate the Free Exercise Clause because the government was acting internally with respect to its own land); Bowen v. Roy, 476 U.S. 693 (1986) (holding that Native American parents

C. Smith *and Laws of General Applicability*

In 1990, the Supreme Court declined to use the *Sherbert* test in *Employment Division, Department of Human Resources v. Smith*.[84] The respondents, members of the Native American Church, ingested peyote as part of a religious ceremony.[85] Because of this, they were fired from their jobs with a private drug-rehabilitation organization.[86] They applied for state unemployment benefits, but were deemed ineligible because they were fired for work-related misconduct.[87] Justice Scalia, writing for the Court, read heavily into the use of the word "prohibiting" in the Free Exercise Clause.[88] The Court determined that requiring compliance with a law of general applicability that is neutral toward religion, even if it burdens religion, does not prohibit the free exercise of religion within the context of the First Amendment.[89]

D. *Congress Reacts to* Smith*: The Religious Freedom Restoration Act of 1993*

1. *Enactment of RFRA*

In response to the Supreme Court's ruling in *Smith*, Congress passed RFRA to afford protection against laws of general applicability that are neutral to religion, but which nevertheless burden the free exercise of religion.[90] Congress found that "in *Employment Division v. Smith* the Supreme Court virtually

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were not entitled to an exemption from assignment of a Social Security number, despite the belief that it would rob their child's spirit, because the Free Exercise Clause does not allow an individual to attack the government's own work); Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that an Orthodox Jewish soldier was not entitled to an exemption from an Air Force rule barring the wearing of headgear indoors because the purpose of military rules is to instill order and uniformity); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that tax-exempt status for a non-profit organization that practiced racial discrimination based on biblical interpretation would undermine the State's interest in preventing racial discrimination); United States v. Lee, 455 U.S. 252 (1982) (holding that Social Security tax exemption for the Amish would undermine the State program).

84. 494 U.S. 872 (1990).

85. *Id.* at 874.

86. *Id.*

87. *Id.*

88. *Id.* at 876-77. "The Free Exercise Clause of the First Amendment . . . provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . .'" *Id.* (quoting U.S. CONST. amend. I (emphasis added)).

89. *Id.* at 878-79.

90. 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ."[91] RFRA provides that the government shall not substantially burden the free exercise of religion, with an exception made only if the government can demonstrate that it is acting in furtherance of a compelling governmental interest and that its actions are the least-restrictive means of furthering that interest.[92] Congress realized that laws neutral toward religion may nevertheless burden one's exercise of religion and that the Founding Fathers sought to preserve this free and unburdened exercise.[93] Congress stated that the purpose of RFRA was "to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened."[94] Because of the widespread unpopularity of the *Smith* decision, RFRA easily passed both houses of Congress with bipartisan support.[95]

2. Constitutional Problems

Immediately after the enactment of RFRA, numerous scholars and commentators questioned whether Congress could constitutionally dictate the standard of review for courts.[96] The Supreme Court answered this question in

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91. *Id.* § 2000bb(a)(4) (citation omitted).

92. *Id.* § 2000bb-1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

93. *Id.* § 2000bb(a) ("The Congress finds that—(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; (2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise . . . .").

94. *Id.* § 2000bb(b)(1) (citations omitted).

95. *See* 139 CONG. REC. 27,239-41 (reporting that the House had no objection to the request for unanimous consent); *id.* at 26,416 (reporting that the Senate voted in favor of passing RFRA by a vote of 97-3).

96. *See, e.g.*, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357 (1994); Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996).

City of Boerne v. Flores.[97] In *City of Boerne*, Catholic Archbishop Patrick Flores was denied a zoning permit by the City of Boerne, Texas to expand his church to accommodate the members of his growing congregation.[98] Flores brought suit under various claims, including RFRA, which were appealed to the Supreme Court.[99] The Supreme Court held that Congress lacked the power to enact RFRA under Section 5 of the Fourteenth Amendment and that RFRA was unconstitutional insofar as it applied to state governments.[100]

In 2006, however, the Court reaffirmed in an 8-0 opinion that RFRA was constitutional as applied to the federal government. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, U.S. Customs inspectors seized a large shipment of *hoasca*, an herbal tea from South America.[101] *Hoasca* is used by members of O Centro Espirita Beneficente Uniao de Vegetal (UDV), a Christian Spiritist sect originally based in Brazil, to receive communion.[102] *Hoasca* is made from two plants, one of which contains a hallucinogen that is enhanced by the other plant.[103] The hallucinogen is classified as a Schedule I substance under the Controlled Substances Act.[104] UDV brought suit, requesting declaratory and injunctive relief, on the basis that applying the Controlled Substance Act to UDV's sacramental use of *hoasca* violated RFRA.[105] The Court determined that UDV demonstrated a substantial burden on its sincere exercise of religion and that the government failed to demonstrate that application of the Controlled Substance Act to UDV would further a compelling interest.[106] The Court recognized that the protections under RFRA were not required under the Free Exercise Clause, but that through RFRA Congress had determined the judiciary should strike a balance

97. 521 U.S. 507 (1997).

98. *Id.* at 512.

99. *Id.*

100. *Id.* at 536. In addition, Justice Stevens's concurrence stated that RFRA violated the Establishment Clause because it benefitted owners of religious property. *Id.* at 536-37 (Stevens, J., concurring). In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, however, Justice Roberts, writing for an undivided Court, concluded that *City of Boerne* held RFRA unconstitutional only as applied to the states under Section 5 of the Fourteenth Amendment. 546 U.S. 418, 424 n.1 (2006).

101. 546 U.S. at 425.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 425-26.

106. *Id.* at 428-29.

between the burden on religion and the government's own compelling interest.[107]

E. Congressional Quid Pro Quo: The Religious Land Use and Institutionalized Persons Act of 2000

Despite the decision in *City of Boerne*, which invalidated RFRA as applied to the states, Congress still perceived a legislative need to bolster the religious protections offered by the First Amendment. Namely, Congress was still concerned with the actions of state government that may indirectly burden the exercise of religion. *City of Boerne* made clear that Congress could not afford greater protection under Section 5 of the Fourteenth Amendment, so Congress looked to its original authority under the Commerce Clause.[108] Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in an attempt to provide religious claimants protection against state laws of general applicability.[109] Congress did this by conditioning federal funding on compliance with the Act.[110] The Act was so popular that it passed both houses of Congress with unanimous consent.[111] RLUIPA applies to two topics: prisoners[112] and zoning.[113]

RLUIPA uses language similar to that in RFRA. RLUIPA employs a compelling-interest test whenever the government "imposes a substantial burden on the religious exercise of a person."[114] Unlike RFRA, RLUIPA does not cite Supreme Court precedent, yet it leaves "substantial burden" as an undefined term. The Supreme Court has held that RLUIPA passes constitutional muster on a prisoner-related matter,[115] but has not ruled regarding the constitutionality of the zoning provisions of the Act.

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107. *Id.* at 438.

108. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes").

109. 42 U.S.C. §§ 2000cc-2000cc-5 (2006).

110. *Id.* § 2000cc(a)(2)(A).

111. *See* 146 CONG. REC. 16,621-22 (reporting that the House had no objection to the request for unanimous consent); *id.* at 16,703 (reporting that the Senate had no objection to the request for unanimous consent).

112. 42 U.S.C. § 2000cc.

113. *Id.* § 2000cc-1.

114. *Id.* § 2000cc(a)(1) (affecting land use regulations); *see also id.* § 2000cc-1(a) (affecting institutionalized persons).

115. Cutter v. Wilkinson, 544 U.S. 709, 713-18 (2005) (holding that prisoners in federally funded facilities may not be refused religious accommodations).

F. Shifting Tests: A Brief Analysis of the Reasons Behind Smith*'s Departure from Previous Jurisprudence*

Since the Supreme Court held that RLUIPA was constitutional, Congress has left the free-exercise area relatively undisturbed. Lower courts have struggled with applying RFRA to federal cases because the Supreme Court declined to interpret certain provisions of RFRA, and with the passing of RLUIPA, Congress has seemingly forgotten about its original religious-freedom act.[116] Particularly difficult for lower courts has been the basis of how to interpret RFRA: whether to utilize a constitutional approach or a strict statutory approach. Indeed, RFRA seems to blur the lines between constitutional and statutory law.

The courts in the *Navajo Nation* litigation are no different. The courts cannot agree on how to define "substantial burden." Whether to confine it only to the facts of *Sherbert* and *Yoder*, to use all of the cases preceding *Smith*, or merely to look at the plain meaning of the statutory language, this language has confused the lower courts and left this specific area of law unsettled.

IV. Analysis

A. The Ninth Circuit's Interpretation of RFRA Is Too Narrow to Fulfill Congress's Intent to Expand First Amendment Protection

The intent of Congress in enacting RFRA was to protect the free exercise of religion "by provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government."[117] The centerpiece of this idea was the protection of religion against encroachment by acts of the government. After the Supreme Court ruling in *Smith*, Congress realized that the free exercise of religion could be significantly and adversely affected by the government, perhaps even where the government did not consider the impact on religion when it acted. This rings true because the impact realized by those who are substantially burdened by government action is no different if the government's action were neutral to religion than if it were specifically targeting religion. The harm to the free exercise of religion is the same. The purpose of RFRA was to prevent this infringement on the exercise of religion regardless of whether the law is neutral to religion on its face.

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116. Congress, however, did amend RFRA when it passed RLUIPA. The amendment had the effect of correcting the provisions of RFRA that were held unconstitutional in *City of Boerne*.

117. 42 U.S.C. § 2000bb(b)(2).

Of special concern were minority religions, which are perhaps overlooked or given less deference by those participating in majority religions. Justice O'Connor noted in *Smith* that the First Amendment was proffered to afford protection to such minority religions, and those religions face a much greater probability of being affected by laws of general applicability than do members of mainstream religions whose interests and beliefs are of wide public knowledge.[118]

This is not to say that the government may never act in a manner that substantially burdens religion. Rather, Congress devised RFRA in a way that merely provides the same compelling-interest test to laws neutral toward religion as the Court had provided to laws that are not neutral. This levels the playing field as far as religious observers are concerned because their exercise of religion may not be burdened by the federal government unless the government has a compelling reason to do so.

Congress perceived that the threat to religion was especially great to minority or non-mainstream religions. Congress specifically stated its disapproval of *Smith*, in which the respondents were members of the Native American Church. Minority religions need enhanced protection because the nature of these religions may not be adequately understood by the mainstream or the government.

Unlike the mainstream Judeo-Christian religions that dominate not only the U.S. population as a whole but also correlatively those individuals who comprise the government, many religions put a heavy importance on specific natural sites. Often, these natural sites are viewed as living supernatural beings. Indeed, the San Francisco Peaks are viewed in this manner by the tribes that brought suit against the Forest Service.[119] Because government actors may not understand the significance of such natural sites to religious observers, they are unlikely to appreciate the impact their actions will have on them.

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118. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring in judgment) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.").

119. *See* ENVIRONMENTAL IMPACT STATEMENT, *supra* note 15, at 3-7 to -8.

B. Congress Intended to Incorporate Only the Compelling-Interest Test of Sherbert *and* Yoder *and Did Not Intend to Limit the Definition of "Substantial Burden" to the Facts of Those Cases*

The Ninth Circuit Court of Appeals abruptly and all-too-simply infers that Congress intended to limit the definition of "substantial burden" only to those cases that exhibit the same fact patterns as those of *Sherbert* and *Yoder*. This conclusion is erroneous because the government could act however it wanted, regardless of the substantial burden on religion, so long as it did not deny benefits or criminalize behavior. The dissent notes this, citing an example of clearing a forest and paving over all of the sacred sites.[120] Interpreting "substantial burden" in this manner would significantly diminish the protection of the free exercise of religion and contradicts the stated purpose of RFRA.

The Ninth Circuit fails to acknowledge that if Congress wanted to limit RFRA in this manner, it could have explicitly stated so, as it specifically mentioned three cases in the statute. Because the Ninth Circuit did examine the express language to interpret other areas of the statute,[121] it is noteworthy that it failed to mention the ease with which Congress could have avoided ambiguity by specifically limiting the statute to those two fact patterns (denial of a benefit and criminalization of behavior).

It is unlikely that Congress intended to act so narrowly because it specifically cited Supreme Court cases in the text of the law,[122] which is exceptionally rare for congressional statutes. The more likely possibility is that Congress, in expanding the protection of the exercise of religion, wanted the judiciary to determine "substantial burden" on a case-by-case basis.

C. Reading RFRA in Such a Narrow Context Provides Little Additional Protection for the Exercise of Religion

Interpreting the definition of "substantial burden" to apply only to government actions that criminalize behavior or deny government benefits offers minimal additional protection for the exercise of religion. This interpretation is directly against the will of Congress. Immediately after the Supreme Court decided *Smith*, both parties in Congress began working on legislation that would ultimately become RFRA.

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120. Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1090 (9th Cir. 2008) (en banc) (Fletcher, J., dissenting), *cert. denied*, 129 S. Ct. 2763.

121. *Id.* at 1068-69.

122. 42 U.S.C. § 2000bb.

It is clear that Congress was unhappy with the ruling in *Smith* and felt that it was a departure from previous constitutional law. This could indeed be the case, considering the language employed by the *Smith* opinion. The Court effectively wrote that *Sherbert* never existed: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[123] Congress merely wanted to "restore" the protections offered by the First Amendment as interpreted in *Sherbert* and *Yoder*.[124] The problem was that Congress attempted to override the Supreme Court's definition of the fundamental liberties granted under the Fourteenth Amendment's guarantee of substantive due process. This was outside of Congress's power. Congress, however, could still provide greater rights to the *federal* branch pursuant to its Article I powers under the Constitution.

If RFRA applies only to substantial burdens that are the denial of governmental benefits or threats of incarceration, then there is no measurable increase of the protection of the free exercise of religion. RFRA is designed to protect against laws that are neutral toward religion. A law that threatens incarceration for following a religion, however, would not be neutral toward religion.[125] In *Yoder*, the Supreme Court struck down a law that threatened to imprison Amish parents who did not send their children to secondary school; the Court held this invalid under the First Amendment. The First Amendment already protects against laws that threaten this type of liberty. Any law that would have this effect would be unconstitutional under the First Amendment—there would be no reason for a RFRA analysis.

The denial of governmental benefits may be somewhat different. The denial of benefits under *Sherbert* was held to be unconstitutional, but the denial of benefits under *Smith* was not. *Smith* had the effect of overruling *Sherbert*, and RFRA merely restored the *Sherbert* standard for laws passed by the federal government. So perhaps RFRA would offer somewhat more protection for this type of burden than would current Supreme Court jurisprudence under *Smith*. Even keeping this in mind, it cannot be argued that Congress intended only this limited expansion of protection because it mentioned *Yoder* as well. A much more plausible explanation is that Congress intended to restore what had been a rollback of First Amendment protections in the cases following *Sherbert* and *Yoder*.

123. *Smith*, 494 U.S. at 878-79.
124. 42 U.S.C. § 2000bb(b)(1).
125. *See* Mockaitis v. Harcleroad, 104 F.3d 1522, 1531 (9th Cir. 1997).

This explanation is especially persuasive since Congress did not limit "substantial burden" to the *facts* of *Sherbert* and *Yoder*. The term "substantial burden" is not stated in either of those cases. "Burden" and "significant burden" are stated in these cases. "Substantial burden" is not a term of art defined in those cases and was first coined in text accompanying a string cite in a subsequent Supreme Court case.[126] Perhaps it would have been easier for Congress to state that the government may not pass laws that deny government benefits or threaten incarceration without a compelling interest. But Congress did not do this, instead alluding specifically to the *Yoder*, *Sherbert*, and *Smith* cases in the text of RFRA.

Additionally, the specific language employed in the statute indicates that Congress did not intend to define "substantial burden" by the facts of *Sherbert* and *Yoder*, but expressed only the intention to use the compelling-interest test as used in those two cases. The Ninth Circuit greatly confuses this point.

D. The Ninth Circuit Should Have Applied a Substantial Burden Test to the Facts of the Case

Because Congress did not expressly limit "substantial burden" to the facts of *Sherbert* and *Yoder*, the Ninth Circuit should have independently evaluated whether the use of recycled sewage effluent on a sacred Native American site substantially burdens the claimants' free exercise of religion. Although, admittedly, it may be unclear what constitutes a substantial burden, there must be a test. Some circuit courts have previously applied tests under RLUIPA.[127]

The Ninth Circuit should have applied principles of *statutory* interpretation to define "substantial burden," not those of *constitutional* interpretation. Presumably because of the absence of specific cases cited in RLUIPA, the lower courts have treated "substantial burden" according to its plain and clear meaning.[128]

The failure of the Ninth Circuit to independently analyze whether the use of sewage effluent on the mountain constitutes a substantial burden effectively robs the Navajo Nation of the opportunity to succeed on a RFRA claim because the test stops there and does not proceed to the compelling-interest test

126. *Navajo Nation*, 535 F.3d at 1088-89 (Fletcher, J., dissenting) (citing Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989)).

127. *See, e.g.*, Shakur v. Schriro, 514 F.3d 878, 888-89 (9th Cir. 2008) (holding that the denial of halal or kosher meats to a Muslim prisoner could constitute a substantial burden under RLUIPA); Lovelace v. Lee, 472 F.3d 174, 197-99 (4th Cir. 2006) (holding that a prisoner has rights under RLUIPA to religious diet).

128. *See Navajo Nation*, 535 F.3d at 1093-95 (Fletcher, J., dissenting).

specified in the statute. Although the court does not fully elaborate on this matter, it is unlikely that making a private ski resort more profitable would fulfill a compelling government interest. Even if it did, it would not pass the least-restrictive-means test since there are other ways to create artificial snow.[129]

V. Conclusion

The protection of the free exercise of religion was paramount to our Founding Fathers. Through judicial interpretation, the Supreme Court held that laws that are neutral toward religion may nevertheless substantially burden the exercise of religion. Congress, concerned about the practical implications of this pronouncement, passed RFRA to afford protection to minority and non-mainstream religions that perhaps are not given as much consideration by the federal government. The Ninth Circuit Court of Appeals' application of RFRA effectively strips any additional protection of the free exercise of religion by interpreting "substantial burden" to mean only those government acts that deny a government benefit or criminalize behavior. In the case of the Navajo Nation, the Hopi, and other tribes, this has the effect of allowing millions of gallons of sewage effluent to be sprayed on their holiest sites.

129. For example, by using water to manufacture artificial snow instead of sewage effluent.