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INTRODUCTION

The Coconino National Forest is not the first thing that comes to mind when considering the protection of religious free exercise in the United States. However, a case currently on petition to the United States Supreme Court, *Navajo Nation v. United States Forest Service*,[2] has demonstrated how interconnected our nation's public land is with religious free exercise.[3] This particular case has given rise to a heated debate regarding our willingness to protect free exercise in the face of inconvenient consequences and unconventional religious practice.[4]

Six Native American Tribes[5] ("Tribes") in the southwestern United States have challenged the United States Forest Service ("USFS") under the Religious Freedom Restoration Act of 1993 ("RFRA").[6] RFRA provides legislative protection to free exercise; it mandates that all cases where the free exercise of religion is "substantially burdened" be justified by a compelling state interest accomplished via the least restrictive means.[7] The Tribes' RFRA challenge centers on a decision by the USFS to allow Arizona Snowbowl ("Snowbowl"), a private ski resort operating in the Cocon-

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1. J.D. received May 2009 from The University of Montana School of Law, Missoula, Montana.
2. 408 F. Supp.2d 866 (D. Ariz. 2006) (*Navajo Nation I*); 479 F.3d 1024 (9th Cir. 2007) (*Navajo Nation II*); 535 F.3d 1058 (9th Cir. 2008) (*Navajo Nation III*).
3. *Navajo Nation III*, 535 F.3d at 1063.
4. *Id.* at 1063.
5. The Plaintiff Tribes include: the Navajo Nation, the Hopi Tribe, the Havasupai Tribe, the Hualapai Tribe, the White Mountain Apache Nation, and the Yavapai Apache Nation. *Navajo Nation I*, 408 F. Supp. 2d at 869-70.
6. *Navajo Nation I*, 408 F. Supp. 2d at 869-70.
7. 42 U.S.C. § 2000bb-1 (2008).

ino National Forest under a special use permit, to use treated sewage effluent in an artificial snowmaking operation.[8] The purpose of the snowmaking operation is to stabilize and lengthen the operating season of the private, Arizona ski resort.[9] Unfortunately for the Tribes, Snowbowl is located on the San Francisco Peaks.[10] More specifically the resort lies on Humphrey's Peak,[11] the most sacred mountain in the spiritual traditions of the plaintiff Tribes.[12] The Tribes have claimed, and the courts have recognized at various times, that the use of this sewage water will have devastating effects on tribal and individual spirituality.[13] However, the Ninth Circuit Court of Appeals, sitting *en banc*, has refused to characterize this devastation as a "substantial burden;" consequently the Tribes are refused relief under RFRA.[14] The court's decision is based on an unnecessary, artificially restrictive interpretation of substantial burden under RFRA.[15]

RFRA requires that a person demonstrate the existence of a substantial burden on their ability to freely exercise their religion; after this showing the burden of proof shifts to the government to demonstrate it has a compelling interest in the burdensome action and it is utilizing the least restrictive means possible to accomplish its objective.[16] Despite uncontroverted evidence establishing the devastating effects the planned snowmaking operation will have the Plaintiffs' spiritual practice,[17] on August 8, 2008, the long history of denying Native Americans free exercise protection continued when the Ninth Circuit, sitting *en banc*, determined the Tribes had failed to demonstrate their free exercise was substantially burdened.[18] The court that Tribal free exercise was not substantially burdened because the Tribes' challenge did not fit into either of two discreet factual scenarios laid out in the cases *Sherbert v. Verner* and *Wisconsin v. Yoder*.[19] The court held that the only burdens recognized under RFRA are those arising under circumstances mirroring those present in *Sherbert* and *Verner*.[20]

The Tribes have met both success and failure on their journey to guard their free exercise rights.[21] The ultimate decision not to recognize a substantial burden on the Tribe's exercise will undoubtedly have far-reaching implications for the protection of Native American religious exercise. The

8. *Navajo Nation I*, 408 F. Supp. 2d at 869-71.
9. *Id.* at 873.
10. *Id.* at 870.
11. *Navajo Nation III*, 535 F.3d at 1064.
12. *Id.* at 1080 (Fletcher, J., dissenting).
13. *Navajo Nation I*, 408 F. Supp. 2d at 887-895; *Navajo Nation II*, 479 F.3d at 1029.
14. *Navajo Nation III*, 535 F.3d at 1063.
15. *See id.* at 1063.
16. *Id.* at 1068.
17. *Id.* at 1063-64.
18. *Id.* at 1078.
19. *Id.*
20. *Id.*
21. *See Navajo Nation I*, 408 F. Supp. 2d at 908; *Navajo Nation II*, 472 F. 3d at 1047; *Navajo Nation III*, 535 F.3d at 1067.

most recent incarnation of *Navajo Nation* grossly misstates the legal standard that governs substantial burdens under RFRA.[22] RFRA requires a three part inquiry.[23] The Ninth Circuit's most recent decision has allowed the analytical framework established by Congress to be flipped on its head – the third question surrounding the means utilized by the government in accomplishing its objective is used to define the scope of the initial inquiry into whether a person's free exercise has been substantially burdened.[24]

The *en banc* court's decision tracks a long judicial trend of denying relief to plaintiffs in free exercise challenges.[25] There exists a long history of tension between Congress and the courts over the appropriate standard of review in free exercise cases.[26] Congress favors strict scrutiny while the Court has repeatedly imposed the less rigorous standard of rational basis.[27] However, this debate, at least in part, was "settled" by Congress with the passage of RFRA, mandating strict scrutiny in "all cases where free exercise is substantially burdened."[28] Yet, we again see the court attempting to restrict the protections provided to free exercise in *Navajo Nation III*. By limiting the burdens recognized under RFRA to the discrete factual scenarios of *Sherbert* and *Yoder* the court has conflated the inquiry under RFRA, and infused the first question of whether free exercise has been substantially burdened with the third question of whether the state is furthering its compelling interesting by utilizing the least restrictive means possible.[29] Herein lays the court's greatest mistake. By artificially restricting substantial burdens to either: (1) government benefits conditioned on violation of religious tenets, or (2) threatened criminal or civil liability for adherence to religious tenets,[30] the court effectively eviscerates RFRA and prevents it from fulfilling its stated purpose – the application of strict scrutiny in all cases where free exercise is substantially burdened.[31] Congress specifically stated that its intention was not to constrain the situations under which free exercise was substantially burdened.[32]

RFRA clearly lays out a three step inquiry for determining if free exercise has been unacceptably infringed. The integrity of the inquiry must be maintained if the rule of law is to be preserved. The question of whether

22. *See Navajo Nation III*, 535 F.3d at 1081 (Fletcher, J., dissenting).
23. 42 U.S.C. § 2000bb-1(b).
24. *Navajo Nation III*, 535 F.3d at 1069.
25. Student Author, *Religious Land Use in the Federal Courts Under RLUIPA*, 120 Harv. L. Rev. 2178 (June 2007).
26. *See Employment Division v. Smith*, 494 U.S. 872 (1990); *City of Boerne v. Flores*, 521 U.S. 507 (1997); H.R. Rpt. 103-88 (May 11, 1993); 42 U.S.C. § 2000bb(b)(1)-(2).
27. *See Smith*, 494 U.S. 872; *City of Boerne*, 521 U.S. 507; H.R. Rpt. 103-88; 42 U.S.C. § 2000bb(b)(1)-(2).
28. 42 U.S.C. § 2000bb(b)(1).
29. *Navajo Nation III*, 535 F.3d at 1069-70.
30. *Id.*
31. 42 U.S.C. § 2000bb(b).
32. H.R. Rpt. 103-88.

free exercise has been substantially burdened is separate from the question of whether the state is furthering its compelling interest via the least restrictive means. By allowing the third part of the inquiry to consume the first, the court has perverted the statute and made it impossible for the statute to carry out its stated purpose. If the court is reticent to apply the statutory test due to the potentially paralyzing consequences of its application it is acting ultra vires and violates the principles of separation of powers.[33] The setting of national priorities is a political decision that has already been decided by Congress.[34] It is the court's duty to apply the law as written and intended; if there are unintended consequences it is the job of Congress, not the court, to fashion a remedy.[35] The proper role of the court in statutory interpretation is giving effect to the intent of Congress.[36] Tribal success in this litigation is not a foregone conclusion when the statute is applied properly, but the court should not bar the court's door to the Tribes based on a misapplication of the law. In this particular instance, the harsh consequence of the court's decision is to "read American Indians out of RFRA."[37]

This note will demonstrate how the Ninth Circuit has arbitrarily and unnecessarily restricted the circumstances under which a person can bring a RFRA claim. Part II will discuss RFRA, the principles underlying its enactment, and the relevant case law interpreting RFRA. Part III will examine RFRA's companion statute the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). RLUIPA utilizes the same language and framework as RFRA and is informative when interpreting RFRA's standards.[38] Part IV will finally look at the application of RFRA in *Navajo Nation.*

II. THE RELIGIOUS FREEDOM RESTORATION ACT

RFRA requires that any substantial burden on the free exercise of religion be justified by a compelling state interest accomplished by the least restrictive means.[39] Although RFRA does not specifically define what constitutes a "substantial burden" under the statute, it is clear that the purpose of RFRA was to expand the protection of free exercise and reinstate strict

33. *See Friedrich v. City of Chicago*, 888 F.2d 511, 514 (7th Cir. 1989), *vacated* 499 U.S. 933 (1991).

34. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism? A Retrospective*, 21 Harv. J.L. & Pub. Policy 607, 618 (1998). Judge Silberman identifies policy issues as "those questions of public concern on which the body politic or political institutions have free range of choice;" those questions are resolved by legislatures or constitutional conventions when they "crystallize" the majority view into rules. *Id.* According to Silberman, "[i]f a judge exercises policy choice when deciding what these rules mean," that judge is an "activist." *Id.*; Keenan D. Kmiec, *The Origin and Current Meaning of "Judicial Activism,"* 92 Cal. L. Rev. 1441, 1445-49 (2004) (summarizing Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, Fortune, Jan. 1947).

35. Silberman, *supra* n. 34.

36. Ronald Dworkin, *Taking Rights Seriously* 105 (Harvard U. Press 1977).

37. *Navajo Nation III*, 535 F.3d at 1113-1114 (Fletcher, Pregerson, Fisher, JJ., dissenting).

38. *See generally Gonzales v. O'Centro Espiritu Beneficente*, 546 U.S. 418, 436 (2006) (cited in *Navajo Nation III*, 535 F.3d at 1095 (Fletcher, J., dissenting)).

39. 42 U.S.C. § 2000bb-1(b).

scrutiny in *all cases* where religious free exercise was substantially burdened.[40] Congress utilized this broad language intentionally – evidencing a desire to protect free exercise against state infringement whenever possible.[41] The statutory text, underlying purpose of RFRA, the legislative history, prior free exercise jurisprudence, and interpretations of identical provisions in companion statutes all indicate that a substantial burden on free exercise can take many forms and reject the proposition that substantial burdens are narrowly limited to cases where a government benefit has been conditioned on violation of one's religious beliefs or where a person is threatened with criminal or civil liability for adhering to the mandates of their faith.

RFRA was enacted with the explicit purpose of counteracting the narrow reading of free exercise protection under the Supreme Court's decision in *Smith*.[42] Under *Smith* the Supreme Court drastically limited free exercise protections when infringement was caused by neutral, generally applicable laws and regulations.[43] The Court rejected strict scrutiny of free exercise infringement, instead requiring rational basis review unless the statute on its face targets a particular religious practice or implicates another constitutional right.[44] Only under these circumstances were free exercise challenges afforded strict scrutiny.[45] Otherwise, the state action had to merely demonstrate a rational relationship to a legitimate state interest to withstand judicial review.[46] *Smith* was the catalyst to Congressional Action.[47] Following *Smith* the free exercise clause had become almost meaningless; the likelihood of a statute directly targeting a particular religious practice was nil thereby leaving the free exercise clause largely irrelevant; despite its presence in the First Amendment. [48] RFRA was Congress's response to *Smith*.[49]

In passing RFRA Congress noted that the compelling interest test set forth in pre-*Smith* Federal cases provided a "workable test for striking sensible balances between religious liberty and competing prior government interests, and mandated its application "in all cases where free exercise of religion is substantially burdened."[50] The statute requires that when free

40. *Id.*

41. H.R. Rpt. 103-88; *See also* Dworkin, *supra* n. 36, at 109 (the terms used in a statute provide the interpretative parameters). This indicates that in using broad language, "all cases," Congress intended an expansion of free exercise protections.

42. 42 U.S.C. § 2000bb(a)(4).

43. *Smith*, 494 U.S. at 878-879, 885; Craig J. Dorsay and Lea Ann Easton, *Employment Division v. Smith: Just Say "No" to the Free Exercise Clause*, 59 Mo. L. Rev. 555, 584-87 (Spring 1991).

44. *Smith*, 494 U.S. at 872, 881-82; Dorsay, *supra* n. 43, at 584-87.

45. *Smith*, 494 U.S. at 872, 881-82; Dorsay, *supra* n. 43, at 584-87.

46. *Smith*, 494 U.S. at 887-89, 883.

47. 42 U.S.C. § 2000bb(a)(4).

48. H.R. Rpt. 103-88.

49. 42 U.S.C. § 2000bb(a)(4); H.R. Rpt. 103-88.

50. 42 U.S.C. § 2000bb.

exercise is substantially burdened the courts should apply the compelling interest test from *Sherbert* and *Yoder*.[51]

A. *Sherbert v. Verner*

Sherbert involved the religious practices of a Seventh Day Adventist.[52] She was employed at a textile factory when it transitioned from a five to a six-day work week.[53] It is a violation of the tenets of the Seventh Day Adventist faith to work on Saturdays.[54] The Plaintiff was fired from her job due to her refusal to work on Saturdays following the transition.[55] She was unable to find employment that did not require Saturday work, and consequently applied for state unemployment benefits.[56] The Plaintiff was denied unemployment benefits because she refused Saturday work.[57]

The Plaintiff succeeded in having the state regulation denying her unemployment benefits declared unconstitutional – a violation of the First Amendment's free exercise protections.[58] The appropriate definition of the burden on the Plaintiff, following the passage of RFRA, was the requirement that she work on Saturday; having to work on Saturday was the substantial burden on her free exercise.[59] The state interest presented was to avoid "the filing of fraudulent [unemployment benefit] claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work."[60] Lastly, the means by which this state interest was furthered was to deny unemployment benefits to persons unavailable for work for personal reasons.

After recognizing that the Plaintiff's free exercise liberty had been burdened the Court evaluated the state's interest in the abridgement.[61] "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[62] The Court went on to require that the state "demonstrate that no alternative forms of regulation" could further their interest before their infringement of free exercise rights could be vali-

51. 42 U.S.C. § 2000bb(b)(1).
52. *Sherbert v. Verner*, 374 U.S. 398, 399 (1963).
53. *Id.* at 399 n. 1.
54. *Id.* at 399.
55. *Id.*
56. *Id.* at 399-00.
57. *Id.* at 401.
58. *Id.* at 401-02.
59. *Id.* (the Court characterized the burden imposed on the plaintiff as the denial of unemployment benefits, however, this characterization was made prior to the passage of RFRA mandating a specific analytical framework).
60. *Id.* at 407.
61. *Id.* at 403, 406.
62. *Id.* at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

dated.[63] Thus the Court here requires not only that the state provide a compelling interest justifying its intrusion into a protected area, but also that the state demonstrate that there was no less restrictive means by which it could accomplish its stated interest. Hence, a two prong test was established for the justification of the state's interest. Thus, the three step analysis presented in RFRA can easily be applied to *Sherbert*. *Sherbert* is mentioned in RFRA to provide the appropriate legal standard to be applied in free exercise cases; it was mentioned because it was the "first full expression of what has come to be known as the compelling state interest test."[64]

B. *Wisconsin v. Yoder*

Wisconsin v. Yoder involved compulsory high school education laws.[65] Wisconsin required that all children attend school until age sixteen.[66] The failure of parents to keep their children in school until age sixteen resulted in criminal prosecution.[67] The Plaintiffs in the case were Amish families who challenged the law on free exercise grounds.[68] The Amish Plaintiffs claimed that "their children's attendance at high school, public or private, was contrary to the Amish religion and way of life."[69] This claim was based on Plaintiffs' assertion that the values taught in public schools, "intellectual and scientific accomplishments, self-distinction, competitiveness, 'worldly' success, and social life with other students[,]" were in conflict with Amish values.[70]

> Amish society emphasizes informal learning-through-doing; a life of "goodness," rather than a life of intellect; wisdom, rather than technical knowledge, community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society.[71]

A group of Amish parents refusing to send their children to public school beyond the eighth grade were "charged, tried, and convicted of violating the compulsory-attendance law" and fined.[72] The Court struck down the statute criminalizing non-attendance as unconstitutionally interfering with Plaintiffs' free exercise, finding that the state had failed to provide a compelling interest justifying the abridgement of the Plaintiffs' fundamental right to

63. *Id.* at 407-08.
64. Dorsay, *supra* n. 43, at 560.
65. *Yoder*, 406 U.S. 205, 207-09 (1972).
66. *Id.* at 207.
67. *Id.* at 208-09.
68. *Id.*
69. *Id.*
70. *Id.* at 210-211.
71. *Id.*
72. *Id.* at 208.

freely exercise their religion.[73] "Where fundamental claims of religious freedom are at stake ... we must searchingly examine the interest that the State seeks to promote ...."[74]

When viewed through the lens of RFRA, the burden with which the Plaintiffs were faced was sending their children to school beyond the eighth grade. "[E]nforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs." [75] The state's interest in compulsory education stemmed from the notion that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[76] Additionally, "education prepares individuals to be self-reliant and self-sufficient participants in society."[77] The means employed by the state of Wisconsin for furthering its interest in education of its citizens was the criminalization of withdrawing children from school before age sixteen. The Court found that the interest as stated was not particularized enough to justify the "severe interference with religious freedom."[78] The marginal benefit to the state achieved via two more years of organized education did not outweigh the burden placed on the religious practices of the Plaintiffs – thus the statute could not stand.[79] *Yoder* is considered the furthest extension of the compelling interest test initially laid out in *Sherbert*.[80] That these two cases form the high-water mark in pre-RFRA free exercise jurisprudence explains their inclusion in RFRA when Congress defined the legal standard to be applied in all cases where free exercise is substantially burdened.

From *Sherbert* and *Yoder* we obtain the compelling interest test required by RFRA for cases where free exercise is substantially burdened.[81] "Where fundamental claims of religious freedom are at stake ... we must searchingly examine the interest that the State seeks to promote ....".[82] "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[83] *Sherbert* supplies the additional requirement that the state demonstrate that there is no other way to further its interest before

73. *Id.* at 227.
74. *Id.* at 221.
75. *Id.* at 219.
76. *Id.* at 221.
77. *Id.*
78. *Id.* at 227.
79. *Id.*
80. Dorsay, *supra* n. 43, at 560.
81. 42 U.S.C. § 2000bb(b)(1).
82. *Yoder*, 406 U.S. at 221.
83. *Sherbert*, 374 U.S. at 407 (citing *Thomas*, 323 U.S. at 530).

the court will legitimize its actions.[84] These two cases embody the test mandated by Congress with the passage of RFRA – once the threshold showing of a substantial burden has been made, the burden shifts to the state to justify the burden imposed with a compelling state interest accomplished via the least restrictive means.

While *Sherbert* and *Yoder* provide the parameters of the scrutiny required by RFRA when reviewing burdens on free exercise, Congress did not provide a definition of substantial burden on free exercise in the statute.[85] However, when viewed in light of RFRA, it can be seen that in *Sherbert* the Plaintiff's free exercise was substantially burdened by the requirement that she work on Saturdays.[86] And the plaintiffs in *Yoder* were substantially burdened by the Wisconsin's requirement that their children attend school until age sixteen.[87] The Court in Yoder noted that compulsory school attendance "carries with it a very real threat of undermining the Amish community and religious practice as they exist today[.]"[88] When analyzing if the plaintiffs' free exercise had been burdened, the Court noted that while "no criminal sanctions directly compel appellant to work a six-day week ... this is only the beginning, not the end, of [the] inquiry."[89] "[I]f the purpose or *effect* of a law is to *impede the observance* of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect."[90]

While in *Sherbert* and *Yoder* the mechanisms for imposing the burden were struck down, the court indicated a broader view of circumstances that could give rise to substantial free exercise burdens.[91] Conditioning government benefits and criminalizing adherence are the discrete factual scenarios that the Court was addressing in those cases, but the principle the Court was protecting was that the free exercise of religion cannot be substantially burdened by state action without demonstration of a compelling state interest. Criminalization and the conditioning of government benefits

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84. *Id.* at 406.

85. *See* 42 U.S.C. § 2000bb.

86. Although the Court characterized the Plaintiff's burden as the denial of unemployment benefits, it was not considering the claim through a RFRA lens. When viewed in relation to the mode of analysis provided in RFRA the characterization of the burden as separate from the mechanism employed to accomplish the state's interest becomes clear. Throughout the analysis the *Sherbert* Court focuses on the fact that Saturday work violates the Plaintiff's religious beliefs. Moreover, reference to *Sherbert* in the statute is not intended to codify its holding; it only adopts the legal standard applied in the case. H.R. Rpt. 103-88.

87. *Yoder*, 406 U.S. at 210-11 (the Court clearly characterizes the burden imposed on the Plaintiffs as sending their children to public school and the entire discussion of burdens focuses school attendance).

88. *Id.* at 218.

89. *Sherbert*, 374 U.S. at 403-404.

90. *Id.* at 403-404 (citing *Braunfield v. Brown*, 366 U.S. 599, 607 (1961)) (emphasis added).

91. *See id.* at 403-04 (finding the non-criminal nature of the statute to be only the beginning of the inquiry, not the end).

were the means by which the states were furthering their interests, but the actual burdens imposed were sending children to school until age sixteen and going to work on Saturdays. A proper understanding of the Court's analysis requires taking one step back to examine the underlying principle being protected by the Court – beyond the exact factual situation reviewing. RFRA's failure to specifically define what constitutes a substantial burden and the analyses in *Yoder* and *Sherbert* indicates a broader view of substantial burdens on free exercise – not a narrower one.

C. *Legislative History of RFRA*

RFRA's legislative history clearly indicates Congress's intent that the legal standard of review restored by RFRA be applied in all cases where "governmental activity [has] a substantial external impact on the practice of religion."[92] RFRA is intended to cover all governmental activity, not merely government activity conditioning government benefits or threatening criminal prosecution.[93] A narrow reading of the substantial burden was specifically rejected by Congress when crafting RFRA.[94] "[I]n order to violate the statute, *government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen.*"[95] Congress did not intend to limit the situations under which a person could state a prima facie RFRA claim to the government actions criminalizing or denying benefits to individuals based on their adherence to their religious traditions through its reference to *Sherbert* and *Yoder*. In referring to the *Sherbert* and *Yoder* in the Act, Congress was not codifying those decisions,[96] but instead "restor[ing] the legal standard that was applied in those decisions."[97] Congress merely intended to specify the test to be applied when analyzing free exercise cases – the demonstration of a compelling state interest accomplished by the least restrictive means possible – in "all cases where the exercise of religion is substantially burdened."[98] *Sherbert* and Yoder are referenced in the statute because they are the high-water mark of pre-RFRA jurisprudence; they are not intended as a limit on actionable burdens. "[RFRA] is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions."[99]

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92. H.R. Rpt. 103-88.
93. 42 U.S.C. § 2000bb(b)(1); H.R. Rpt. 103-88.
94. H.R. Rpt. 103-88.
95. *Id.* (emphasis added).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

D. *Free Exercise Jurisprudence*

Moreover, both RFRA and pre-RFRA case law recognize that substantial burdens on free exercise can manifest in many ways. Substantial burdens have been defined in several different ways.[100] For example, a substantial burden may exist where an adherent is prevented from engaging in conduct or having a religious experience.[101] In another case, a law permitting a state to conduct autopsies under certain circumstances was deemed to impose a substantial burden on free exercise despite threatening neither criminal nor civil liability or conditioning the receipt of government benefits.[102] A substantial burden has also been held to exist when a statute prevents the plaintiff's fulfillment of his personally held religious obligation.[103]

Both prior and subsequent to *Smith*, substantial burdens on the free exercise of religion have been recognized by the courts in circumstances broader than the two scenarios set up by *Sherbert* and Yoder. However, despite demonstrating substantial burdens on free exercise not all plaintiffs have been successful; plaintiffs have at times been denied relief because either the government succeeded in demonstrating a compelling state inter-

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100. *Hicks v. Garner*, 69 F.3d 22, 26 (5th Cir. 1995) (the Court recognized that a substantial burden can exist where receipt of a state benefit is conditioned upon violation of a religious tenet, or where the government compels a person to violate their religious beliefs).

101. *Id.* at 26 (the Court, in its recognition, requires that the experience or conduct prevented be central in the faith, however, the definition of exercise of religion was expanded in RLUIPA and applied to RFRA; the religious experience or conduct no longer must be central to the adherent's faith to constitute exercise of religion. 42 U.S.C. § 2000cc-5(7).

102. *Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990) (the Plaintiffs were ultimately unsuccessful due to the application of *Smith*, but the District Court was able to recognize a substantial burden on the plaintiffs free exercise when an autopsy was performed on their son).

103. *In re Newman*, 183 B.R. 239, 251 (D. Kansas 1995) (debtors tithed to their church on the eve of filing for bankruptcy and the church challenged the recovery of the tithed funds by the Bankruptcy court has violating the free exercise protections of the debtors and the church under RFRA) (To show that government action substantially burdens a religious practice, "the religious adherent ... has the obligation to prove that a governmental [action] burdens the adherent's practice of his or her religion ... by *preventing* him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine." [Emphasis added.] *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir.1995) (quoting *Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987), *aff'd sub nom., Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1988)); *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). As the Tenth Circuit stated: "To exceed the 'substantial burden' threshold, government regulation must significantly inhibit or constrain conduct or expression that manifests some central tenet of a [person's] individual beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion." *Werner*, 49 F.3d at 1480 (citations omitted). To be a "substantial burden," the government action must either compel a person do something in contravention of their religious beliefs or require them to refrain from doing something required by their religious beliefs. *See Hobbie v. Unemployment Appeals Commn.* 480 U.S. 136 (1987) (denying unemployment benefits to a person who was fired because she refused to work on the Sabbath placed a substantial burden on that person's free exercise of religion); *Fleischfresser v. D. of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (no substantial burden existed where school district reading series did not compel parents to do or refrain from doing anything of a religious nature); *Vernon v. Los Angeles*, 27 F.3d 1385, 1393-94 (9th Cir. 1994) (no substantial burden where "government action is neither regulatory, proscriptive, or compulsory in nature").

est or the court applied the legal standard adopted in *Smith*.[104] Thus, simply because a plaintiff is able to demonstrate a substantial burden on free exercise it is not a foregone conclusion that the government action will be invalidated.

III. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

RLUIPA was passed as a companion to RFRA, and incorporates the same substantial burden standard as RFRA.[105] Hence, substantial burden case law under RLUIPA is informative when interpreting RFRA.[106] On the heels of RFRA's passage,[107] Congress passed RLUIPA.[108] RLUIPA was passed in response to *City of Boerne's* invalidation of portions of RFRA.[109] RLUIPA's "general rule" is modeled after the substantive language of RFRA,[110] stating that "[n]o government shall impose or implement a land use regulation in a manner that imposes a *substantial burden* on the religious exercise of a person...."[111] RLUIPA establishes the same threshold inquiry in whether free exercise has been substantially burdened as RFRA – it requires demonstration that free exercise has been substantially burdened. Thus, where possible, the language of the two statutes should be interpreted in the same manner. While RLUIPA is limited to land use regulations and land marking laws,[112] the substantial burden required to state a prima facie RLUIPA claim is the same burden required to state a prima facie RFRA claim because the two statutes share the same statutory framework and general rule language.[113] This history and the cases under RLUIPA further evince Congress's desire to increase the protections granted religious exercise, and reject a narrow reading of substantial burden.[114]

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104. *See Yang*, 750 F. Supp. 558.

105. *Wyatt v. Therhune*, 315 F.3d 1108, 1112 (9th Cir. 2003).

106. *See generally Gonzales*, 546 U.S. at 436 (RLUIPA allows federal and state prisoners to seek religious accommodation "pursuant to the same standard as set forth in RFRA[.]") (cited in *Navajo Nation III*, 535 F.3d at 1095 (Fletcher, J., dissenting)).

107. In *City of Boerne*, 521 U.S. 507, the Supreme Court held that Congress had exceeded its authority under Section five of the Fourteenth Amendment in RFRA – in that it was unconstitutional as applied to state actions. Shortly thereafter Congress passed the Religious Land Use and Institutionalized Persons Act.

108. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1033 (2004) (RLUIPA and RFRA are inextricably linked and RLUIPA was a direct response to RFRA's partial invalidation in *City of Boerne*).

109. *Id.* at 1034.

110. 146 Cong. Rec. E1563 (Sept. 21, 2000).

111. 42 U.S.C. § 2000cc(a)(1) (emphasis added).

112. 42 U.S.C. § 2000cc(a)(2)(c).

113. *See generally Gonzales*, 546 U.S. at 436 (RLUIPA provides free exercise protection pursuant to the same standard as RFRA) (cited in *Navajo Nation III*, 535 F.3d at 1095 (Fletcher, J., dissenting)).

114. RLPA was RLUIPA's precursor in the House and it was a response to the partial invalidation of RFRA. H.R. 1691, 106th Cong. (1999) (cited in Michael Paisner, student author, *Boerne Supremacy: Congressional Responses to* City of Boerne v. Flores *and the Scope of Congress's Article I Powers*, 105 Colum. L. Rev. 537 (March 2005)).

San Jose Christian College v. City of Morgan Hill provides an interpretation of substantial burden under RLUIPA.[115] A religiously affiliated college sued the city alleging its zoning laws violated RLUIPA.[116] Although the court found that the city's zoning ordinance did not impose a substantial burden on the College's free exercise, the court did discuss the nature of substantial burdens under RLUIPA.[117] The court found that free exercise is substantially burdened when a "significantly great restriction" or "onus" is imposed upon such exercise.[118] The "ordinary, contemporary, and common meaning"[119] embraced by the court in *San Jose Christian College* when defining substantial burden under RLUIPA rejects a narrow reading of substantial burden under RLUIPA. Because RLUIPA is patterned after and intended as a companion to RFRA the broad formulation given substantial burdens under RLUIPA should be informative when interpreting substantial burden under RFRA.[120] Under RLUIPA, substantial burden has been interpreted to mean "[a burden] that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable."[121] The words used by Congress when crafting the statute enable it to be interpreted according to its canonical terms.[122] Giving meaning to the words used in the statute limits the statute's application without unreasonably restricting it. It allows the court to say "the legislature pushed [free exercise protection] to the limits of the language it used, without also supposing that it pushed [free exercise protection] to some indeterminate further point."[123] The courts are protected against frivolous free exercise claims because Congress modified burden with "substantial," thus requiring more than a mere inconvenience to free exercise before strict scrutiny is triggered. There is no indication that burdens were to be further restricted; the clear intent of Congress was to provide broad protection for free exercise.

All of the background materials to RFRA embrace a broad definition of substantial burden. Whether a substantial burden exists is the threshold inquiry in the RFRA free exercise analysis. As previously established, the statute clearly sets up a three step analysis method with built in protections. By restricting the burdens that trigger strict scrutiny to substantial ones the Congress has inherently limited government actions falling under the statute. Moreover, the legislative history clearly indicates that all government actions substantially burdening free exercise are subject to the review laid

115. *San Jose Christian College*, 360 F.3d at 1034.
116. *Id.* at 1027-28.
117. *Id.* at 1033-35.
118. *Id.* at 1034 (internal citation omitted).
119. *Id.* (citing *A-Z Int'l v. Phillips*, 323 F.3d 1141, 1146 (9th Cir. 2003)).
120. *Id.* at 1033 (RLUIPA and RFRA are inextricably linked to one another).
121. *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003).
122. Dworkin, *supra* n. 36, at 109-110.
123. Dworkin, *supra* n. 36, at 110.

out in the statute – strict scrutiny.[124] The legislative history explicitly rejects limiting the circumstances under which the compelling interest test is triggered to the discrete factual circumstances of any particular case, including cases cited in the statute.[125] Finally, both RFRA and RLUIPA case law demonstrate that the threshold substantial burden inquiry is not to be read narrowly. However, reading substantial burden narrowly is exactly what the Ninth Circuit Court of Appeals has done in *Navajo Nation v. U.S. Forest Service.*

IV. *NAVAJO NATION V. UNITED STATES FOREST SERVICE*

A. *Background*

The discussion of free exercise in the context of public land management was brought into the light in *Navajo Nation v. U.S. Forest Service.* Snowbowl has been an operating ski resort within the Coconino National Forest since 1938.[126] Snowbowl covers 777 acres of National Forest land on the western flank of the San Francisco Peaks ("Peaks").[127] The Peaks consist of four mountains[128] known to be sacred to at least thirteen formally recognized Native American Tribes.[129] Snowbowl is located at Humphrey's Peak,[130] the most sacred mountain in the spiritual traditions of several Native American tribes.[131] The ski resort is surrounded on three sides by the Kachina Peaks Wilderness Area.[132]

In 2002 Snowbowl sought Forest Service approval to make several improvements to the ski area.[133] One of the improvements proposed was the implementation of an artificial snowmaking system.[134] Snowbowl proposed implementing artificial snowmaking operations in order to prolong and secure its operating season.[135] Because Snowbowl was unable to obtain fresh water for the operation of its snowmaking system it proposed using treated sewage effluent in the snowmaking operation.[136] The treated sewage effluent is comprised of waste water from Flagstaff, Arizona's, households, hospitals, business, and industries.[137] Even after several rounds of treatment, the water remains contaminated and is never considered

124. H.R. Rpt. 103-88.
125. *Id.*
126. *Navajo Nation I*, 408 F. Supp. 2d at 870.
127. *Id.*
128. *Id.* at 883.
129. *Navajo Nation III*, 535 F.3d at 1081 (Fletcher, J., dissenting).
130. *Id.* at 1064.
131. *Id.* at 1098.
132. *Navajo Nation I*, 408 F. Supp. 2d at 870.
133. *Id.*
134. *Navajo Nation II*, 479 F.3d at 1030-31.
135. *Navajo Nation III*, 535 F.3d at 1065.
136. *Id.*
137. *Id.* at 1083.

"pure."[138] The treated water still contains "detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia.[139]

The Peaks are particularly holy to the surrounding Tribes, and Humphrey's Peak, the location of Snowbowl, is the most sacred of the Peaks.[140] Many of the Tribes conduct religious ceremonies on the Peaks, utilize plants, water and other materials from the Peaks in tribal healing ceremonies, and maintain shrines on the Peaks.[141] The use of sewage water on the Peaks will contaminate the Peaks with respect to the Tribes' religious and cultural traditions; affecting their purity and making it very difficult, if not impossible, for the Tribes to use the Peaks in their religious practice.[142]

B. *Procedural History*

The Tribes challenged the Forest Service's approval of Snowbowl's plan to use treated sewage effluent in its artificial snowmaking operations under RFRA in 2006.[143] The Tribes sought to show that the proposed snowmaking operation substantially burdened the free exercise of their religious beliefs.[144] As previously mentioned, once this threshold showing of a substantial burden on free exercise is demonstrated the burden shifts to the government to justify its actions with a compelling interest, and ultimately demonstrate that it is furthering its interests using the least restrictive means possible.[145] However, due to the misapplication of what constitutes a "substantial burden" under RFRA the Tribes have yet to have their free exercise rights vindicated.[146]

The Tribes have met both success and failure in their efforts to assert a RFRA claim.[147] The Tribes were initially unsuccessful at the Arizona District Court.[148] The court determined that the Tribes had failed to state a prima facie RFRA claim because they failed to demonstrate a substantial burden on their free exercise.[149] The district court reached this conclusion despite the presence of uncontroverted evidence that the Tribes would suf-

138. *Id.*
139. *Id.*
140. *Id.* at 1098.
141. *Navajo Nation I*, 408 F. Supp. 2d at 887-88.
142. *Id.* at 887-888.
143. *Id.* at 882.
144. *Id.* at 883.
145. 42 U.S.C. § 2000bb.
146. *Navajo Nation I*, 408 F. Supp. 2d at 906; *Navajo Nation III*, 535 F.3d at 1078.
147. *Navajo Nation I*, 408 F. Supp. 2d at 906 (district court finding that Tribes' free exercise was not substantially burdened); *Navajo Nation II*, 479 F.3d at 1029 (finding that Tribes stated a prima facie RFRA claim and Forest Service failed to justify burden with a compelling state interest); *Navajo Nation III*, 535 F.3d at 1078 (denying Tribes' claims under RFRA for failing to prove free exercise was substantially burdened).
148. *Navajo Nation I*, 408 F. Supp. 2d at 906.
149. *Id.* at 907.

fer devastating religious, spiritual, and cultural consequences if Snowbowl were permitted to use treated sewage effluent on the Peaks.[150]

The Tribes appealed the district court's ruling to the Ninth Circuit Court of Appeals, and a panel of Ninth Circuit judges reversed.[151] The panel determined that the Tribes had demonstrated a substantial burden on their free exercise rights as a result of the Forest Service's approval of artificial snowmaking operations using treated sewage effluent.[152] The court reasoned that the Tribes were burdened in either of two ways.[153] First, they suffered an inability to perform a particular religious ceremony, because the ceremony requires collecting natural resources from the Peaks that would be too contaminated – physically, spiritually, or both for sacramental use.[154] The Forest Service itself, in its Environmental Impact Statement, had conceded that "...the use of reclaimed water, would contaminate the natural resources needed to perform the required ceremonies that have been, and continue to be, the basis for the cultural identity for many of these tribes.... and would have an irretrievable impact on the use of the soil, plants, and animals for medicinal and ceremonial purposes throughout the entire Peaks, as the whole mountain is regarded as a single, living entity."[155]

The second way in which the Tribes had been burdened was they suffered "the inability to maintain daily and annual religious practices comprising an entire way of life, because the practices require belief in the mountain's purity or a spiritual connection to the mountain that would be undermined by the contamination."[156] "[T]he presence of treated sewage effluent on the Peaks would fundamentally undermine all of [the Tribes'] religious practices because their way of life, or 'beliefway,' is largely based on the idea that the peaks are a pure source of their rains and the home of the Katsinam."[157] "[The] tribes' religions have revolved around the Peaks for centuries; that their religious practices require pure natural resources from the Peaks; and that, because their religious beliefs dictate that the mountain be viewed as a whole living being, the treated sewage effluent would in their view contaminate the natural resources throughout the Peaks."[158] Based on these findings regarding the impact of the presence of treated sewage effluent on the Peaks the Ninth Circuit panel determined that the Tribes' free exercise was, in fact, substantially burdened.[159] After making this initial finding, the court looked to the Forest Service to justify

150. *Id.* at 887-896.
151. *Navajo Nation II*, 479 F.3d at 1029, 1033-34.
152. *Id.*
153. *Id.* at 1042-43.
154. *Id.* at 1039, 1043.
155. *Id.* (internal citations omitted).
156. *Id.*
157. *Id.* at 1041 (referring to Hopi traditions and spirits).
158. *Id.* at 1043.
159. *Id.*

its decision with a compelling state interest accomplished via the least restrictive means.[160] However, the Tribes' success was short-lived.

The Ninth Circuit reviewed the Tribes' claims *en banc*, and reversed the panel decision – again finding that the Tribes had failed to make the threshold showing of substantial burden on free exercise.[161] Without this showing the tribes had failed to state a prima facie RFRA claim and thus did not have an actionable claim.

C. *Reading Native Americans out of RFRA*

The *en banc* court came to its conclusion despite uncontroverted evidence that the use of treated sewage effluent on the Peaks would undermine, and likely destroy, the Tribes' entire way of life and religious traditions.[162] The court reached this conclusion based on its restrictive view of substantial burdens under RFRA.[163] This view is premised on the reasoning that reference to the cases in defining the legal standard of review, Congress also sought to limit the scope the burdens recognized by the statute.[164] Consequently, the court interpreted substantial burden as embracing only two discrete scenarios: (1) religious adherents are threatened with criminal or civil liability as a consequence of exercising their religious beliefs; or (2) receipt of government benefits is conditioned upon violation of the adherent's religious beliefs.[165] These are the two scenarios giving rise to the cases *Sherbert* and Yoder.[166]

The court reasoned that because Congress specifically referenced reinstating the compelling interest test from these two cases it was actually two things.[167] First, it was reinstating the compelling interest test (the legal standard) from those two cases as declared, but it was also defining substantial burden as used in RFRA.[168] The court states that "[t]he same cases that set forth the compelling interest test also define what kind or level of burden on the exercise of religion is sufficient to invoke the compelling interest test."[169] The court cites *Hernandez v. C.I.R.*[170] as supporting that proposition.[171] Specifically, the court cites *Hernandez's* finding that "'the free exercise inquiry asks whether the government has placed a substantial burden' on the free exercise of religion."[172] The court uses this innocuous

160. *Id.*
161. *Navajo Nation III*, 535 F.3d at 1067.
162. *Id.* at 1072.
163. *Id.* at 1067-78.
164. *Id.*
165. *Id.* at 1069-70.
166. *Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205.
167. *Navajo Nation III*, 535 F.3d at 1069.
168. *Id.*
169. *Id.*
170. 490 U.S. 680, 699 (1989) (cited in *Navajo Nation III*, 535 F.3d at 1069).
171. *Navajo Nation III*, 535 F.3d at 1069.
172. *Id.* (citing *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989)).

statement to justify its extremely narrow reading of substantial burdens under RFRA, however, *Hernandez* does not contemplate the "kind or level of burden on the exercise of religion sufficient to invoke the compelling interest test."[173] On the contrary the *Hernandez* Court merely recognizes that the question of whether a substantial burden is being imposed upon free exercise is a distinct question from whether the government has a compelling interest justifying the imposition under RFRA.[174] The Court recognizes that the burden alleged in *Hernandez* is insubstantial, but more importantly, the plaintiffs' claims in that case were defeated by the government's compelling interest in a sound tax system.[175] No where in the *Hernandez* reasoning is there any indication that the compelling interest test, or the requirement of least restrictive means, should be used to define the scope of actionable burdens on free exercise.[176] The case merely recognizes that the initial question in free exercise cases is whether free exercise has been substantially burdened.[177] Thus, this reference does not accurately support the court's contention in *Navajo Nation III.*

The court's reasoning conflates the three step method of analysis laid out in RFRA, and consequently defeats the purpose of RFRA. The merging of the first and third questions creates a situation where the method employed by the government to accomplish its interest defines the scope of the initial question – whether free exercise has been substantially burdened. RFRA establishes a mode of analysis that asks three distinct questions in a particular order. Step one asks if free exercise has been substantially burdened.[178] If the answer to this question is yes, the second question is asked – does the government have a compelling interest justifying the burden.[179] Finally, if the answers to the first two questions are yes, the third and final question is asked. Is the government furthering its compelling interest through employment of the least restrictive means?[180]

The court's interpretation of the importance of Congress's reference to *Sherbert* and *Yoder* confuses and misapplies the mode of analysis provided by Congress, and as a result artificially constrains RFRA's application and operates to undermine the legitimacy of Native American religious practice. *Sherbert* and *Yoder* were both decided prior to the passage of RFRA and thus do not adhere to the mode of analysis prescribed by RFRA. However, this does not prevent viewing them in light of the statute. Moreover, they

173. *Hernandez*, 490 U.S. at 699.
174. *Id.*
175. *Id.* at 699-00.
176. *Id.*
177. *Id.*
178. *See* 42 U.S.C. § 2000bb.
179. *See id.*
180. *See id.*

are referenced in the statute with the sole purpose of establishing a particular legal standard of review.[181]

When viewed through a RFRA lens it is easy to see how Congress intended the analysis to operate. When analyzing *Sherbert* post-RFRA it is easy to see the three step analysis at work. The burden imposed on the plaintiff was being required to work on Saturdays. The justifying interest asserted by the state was preventing fraudulent unemployment claims from being filed. The means employed by the state for accomplishing this interest were denying benefits to applicants that cannot work on Saturdays for personal reasons. Although the court does not frame its analysis this way,[182] when the case is considered with RFRA in mind it is clearly seen that the burden on the plaintiff's free exercise is not being denied unemployment benefits but working on Saturdays. The means by employed by the state for accomplishing its goal of preventing fraudulent unemployment benefit claims is an important part of the RFRA analysis, however it is not first to be considered. This portion of the analysis comes last – after the plaintiff has established a substantial burden on his free exercise and the government has demonstrated a compelling interest. The same is true in *Yoder*. When viewed through a RFRA lens the burden on the Amish families was sending their children to school beyond the eighth grade. The state's interest in educating its children was offered by the state in justification of the burden imposed on the Plaintiffs' free exercise. The means employed by the state of accomplishing its educational interest is to criminalize keeping children out of school. Thus, the means utilized by the state – threat of criminal liability – is not part of the inquiry into whether the Plaintiffs' free exercise is burdened, but part of the third inquiry into whether the state has utilized the least restrictive means possible to accomplish its goal of educating its youth.

Therefore, the burdens imposed come from Saturday work and compulsory education. A substantial burden could, conceivably, also come from government corruption of necessary religious resources. For example, if a state law authorized state officials to enter every Catholic Church in the state and dump a bucket of sewage water into the churches' baptismal fonts no one would deny that free exercise has been substantially burdened – Catholics require blessed holy water for their baptisms – and they are now unable to use clean water in their baptisms. Ignoring the other implications of a state law such as this, the state action neither conditions a benefit nor threatens criminal liability – but it does make it exceedingly difficult for Catholics to have a necessary religious experience. This is essentially what has happened to the Tribes.

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181. H.R. Rpt. 103-88.

182. *Sherbert*, 374 U.S. at 403 (the Court describes the burden faced by the Plaintiff as disqualification for benefits).

What the court has done in *Navajo Nation III* is take the third portion of the analysis – the part considering how the state is accomplishing its interest – and superimpose that over the top of the initial inquiry into whether free exercise has been burdened. That type of analysis defeats the underlying purpose of RFRA because it relieves the state of having to justify infringements on free exercise a large portion of free exercise cases. By limiting RFRA's application to cases where plaintiffs are facing criminal or civil liability for exercising their religious beliefs and cases where plaintiffs are denied government benefits due to adherence to their beliefs the court has ignored Congress's goal to have strict scrutiny apply in *all* cases where free exercise is substantially burdened.

If the mode of analysis established in RFRA is respected, an analysis of the Tribes' claims in *Navajo Nation III* would take the following form. The court would initially ask whether the Tribes' free exercise has been substantially burdened. This question, however, would not be artificially constrained by the method employed by the state for accomplishing its interests. It would be based on whether a "significantly great onus" or "restriction" has been placed on the Tribes' ability to freely exercise.[183] Therefore, the fact that the Tribes' cultural and religious traditions would be devastated would permit a threshold finding that the Tribes' free exercise had been substantially burdened. Permitting the question to be answered without limiting the mechanism of substantial burden to the facts of *Sherbert* and *Yoder* would demonstrate fidelity to RFRA's purpose and intended application: that it apply in all cases where religion is substantially burdened, and not be limited to instances where adherents face liability or are denied government benefits.[184]

The burden would then shift to the Forest Service to justify the burden imposed on the Tribes' free exercise with a compelling state interest. Because the analysis does not end with the inquiry into the presence of a substantial burden, Tribal success is not a foregone conclusion. It is possible that the federal government has a compelling interest justifying the burden placed on the Tribes' free exercise. Perhaps it has a compelling interest in managing federally owned lands according to its own prerogatives, in providing multiple use recreation in the National Forest, or any other reason that the federal government has provided for its decision to permit artificial snowmaking operations on the Peaks.

Only after we have recognized the existence of a substantial burden on free exercise and a compelling governmental interest in the action causing the burden do we need to examine the means employed by the government for accomplishing its objectives. The last question will assess the means employed by the Forest Service for accomplishing its compelling interest.

183. *See San Jose Christian College*, 360 F.3d at 1034.
184. H.R. Rpt. 103-88.

This final question is distinct from the threshold inquiry into whether the Tribes' free exercise has been substantially burdened. The means employed in this case are permitting treated sewage effluent to contaminate the Peaks. The means do not criminalize the Tribes' adherence nor do they deny the Tribes a government benefit because of their adherence. Instead, the means take the form of federal approval of an artificial snowmaking system. However, when the statute is properly interpreted it is clear that a substantial burden can take many forms, and the means adopted by the government in accomplishing its compelling interest cannot define the level or kind of burdens recognized by the statute.

CONCLUSION

Analyzing the Tribes' claim in this way maintains integrity between the judicial determination of the rights of these particular plaintiffs and the statute. It does not guarantee victory for the Tribes; however, it also does not relieve the Forest Service of its burden – to justify the infringement of the Tribes' free exercise rights. By kicking the Tribes out of court on the basis of the first question, the legitimacy of Tribal spiritual traditions is undermined. The court cannot rationally find that the Forest Service's action will devastate and destroy the spiritual foundations of these Tribes while simultaneously finding that their free exercise is not substantially burdened – more importantly the statute does not permit this.

Congress specifically cited to Justice O'Connor's harsh, concurring language in *Smith* when passing RFRA: "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of the Bill of Rights.'"[185] The "luxury" that Justice O'Connor refers to is our ability to deem presumptively invalid, "as applied to religious objectors, every regulation of conduct that does not protect an interest of the highest order."[186] Protecting the free exercise rights of Native American practitioners is not a luxury – it is a requirement of RFRA. It is the responsibility of the courts to uphold the rule of law. In doing so a court's legal decisions should display fidelity to decisions made by Congress. Congress has mandated that all government actions substantially burdening free exercise of religion be subjected to strict scrutiny. Congress has chosen not define the exact circumstances that give rise to a substantial burden on free exercise, but instead embrace a broad reading of substantial burdens. Congress provided a particular legal standard of review to apply to "all governmental actions which have a substantial external impact on the practice of religion."[187] Consequently, the cir-

185. *Smith*, 494 U.S. at 903.
186. *Id.* at 888.
187. H.R. Rpt. 103-88.

cumstances giving rise to substantial burdens on free exercise cannot be limited to the circumstances outlined in *Sherbert* and *Yoder* without "writing Native Americans out of RFRA."