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The Complicated Interactions of Religion, Business and Government in the Religious Freedom Restoration Act Era

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I. INTRODUCTION

Just north of the historic Route 66 town of Flagstaff, Arizona sit the San Francisco Peaks, beautiful spectacles of nature and the center of prolonged, contentious court battles. On the one side is an argument for economic development with the desired expansion of the Arizona Snowbowl, a relatively small ski resort operated under a special use permit[1] from the United States Forest Service. The ski resort has been a popular destination since the late 1930's for both tourists and southern Arizona residents trying to escape the summer heat of the desert southwest or in search of climate change and skiing in the winter. On the other side is an argument by numerous native tribes who hold the Peaks sacred and desire that they remain as untouched and pristine as possible. Members of these tribes have been making spiritual treks to the Peaks for hundreds of years. The legal dispute between the two sides first appeared in federal courts in the 1970's as a First Amendment Free Exercise case and a recent decision by the United States Forest Service to allow the Snowbowl to expand in size and to use reclaimed water to make snow recently has reignited the dispute, based this time in federal statutes instead of the Constitution.

On December 11, 2007, lawyers appeared before an *en banc* panel of the Ninth Circuit Court of Appeals to debate the legality of the current special use permit issued by the United States Forest Service, particularly as it relates to making snow from reclaimed water. The *en banc* hearing followed a Ninth Circuit panel decision that the Religious Freedom Restoration Act of 1993 (RFRA) prohibits the Forest Service from allowing Snowbowl to expand operations and improve fiscal viability through snowmaking with reclaimed water. The environmental, social, political and legal issues and conflicts are clear and important – federal land management, economic development, religious freedom and an utter lack of clarity with regard to the standards to be used and the judicial interpretations to be given to RFRA. This paper briefly reviews the history of religious freedom law, looks to the current dispute at the Arizona Snowbowl for demonstration of the complexity of the issues and addresses the actions that the Supreme Court can and should take when the inevitable writ of certiorari is filed. Specifically, this paper advocates that the Court should use this case to address two issues: first, the increasing trend over time for Congress and other governmental bodies to disregard the limitations placed on them by the Constitution in hopes that challenges won't occur or that courts will find the rationale and, second, the movement of religion from a key civil liberty as set forth in the First Amendment to a statutory issue of seemingly lower value.

II. RELIGIOUS FREEDOM LAW

A. Early Free Exercise Jurisprudence

The First Amendment of the United States Constitution states that "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."[2] From the beginning, free exercise of

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[1] According to the United Forest Service, there are over 68,000 special use permits currently active across the nation as of the writing of this article (including issued, approved and pending signature). Of these, 130 are for winter recreation resorts, 293 for other resorts, 7 for golf courses, 68 for parks and playgrounds, 15 for water treatment plants, 6 for restaurants, 8 for service stations, 85 for ski –related activities such as snow play areas, 16 for Native American Traditional Religious Activity, 77 for churches, over 14,000 for recreational residences, 301 for privately held residences, 300 for motion picture and TV location, and 1300 for individual recreation events (with another 1400 recreation event permits terminated, revoked or closed). Letter from James D. Bedwell, Director, Recreation and Heritage Resources, United States Forest Service to author (Oct. 23, 2007) (on file with author). It is beyond the scope of this paper to analyze how many of these permits are on land that is considered sacred by any particular group, but based on the number of special use permits, one can surmise that there are a number of industries watching this case closely.

[2] U.S. CONST. amend. I.

religion was not an unlimited license to behave in any way one saw fit.[3] In its first constitutional Free Exercise case that addressed the Amendment, the Supreme Court upheld anti-polygamy laws and noted that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[4] In 1940, the Court affirmed that beliefs were to be free of regulation, and that some actions, but not all, also were not to be regulated and it overturned the conviction of several Jehovah's Witnesses for religious solicitation.[5] These early cases did not give any guidance to the extent of government regulation allowed, and did not enunciate a clear test to determine the constitutionality of a regulation of religious behavior.[6] That type of guidance did not come about until 1963 when the Supreme Court enunciated the compelling interest test for Free Exercise cases in the famous *Sherbert v. Verner*.[7]

B. The Rise of the Compelling Interest Test

In *Sherbert v. Verner*,[8]the Supreme Court held that South Carolina illegally withheld unemployment compensation from a Seventh Day Adventist who was fired (and could not find other work) because she would not work on Saturday.[9] The fired employee believed that Saturday was her Sabbath or day of rest.[10] The Court determined that the South Carolina regulation was unconstitutional by using the "compelling interest test:" in order to burden the religion of the plaintiff, the state action must be the least burdensome way to achieve a compelling state interest.[11]

Nearly ten years later, the Court invalidated a state compulsory school attendance law requiring attendance until the age of 16.[12] In *Yoder v. Wisconsin*, Amish children challenged the state law because of their sincerely held religious belief that education in high school or beyond could endanger their salvation.[13] The court noted that, even though the government may have the jurisdiction to control education, a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[14] The court then used the compelling interest test from *Sherbert* to determine that there was no sufficient justification for compulsory education as applied to the Amish.[15] In doing so, the Court rejected the state's interests in preparing students for participation in the political system, protecting children from ignorance and from unscrupulous employers who may violate the child labor laws if children are readily available instead of in school.[16]

After *Sherbert* and *Yoder*, it seemed that under the compelling interest test, the government had a substantial task in proving that its regulations were necessary and narrowly tailored to satisfy compelling needs – a standard that was not impossible, but that favored religious freedom. During the next 20 years, however, the Court found many compelling interests to support government action that burdened religion and found many exceptions to

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[3] For a comprehensive review of religion clause cases and jurisprudence, see Stephen Pepper, Conflicting Paradigms of Religious Freedom: Liberty Versus Equality, 1993 B.Y.U. L. REV. 7 (1993).
[4] Reynolds v. U.S., 98 U.S. 145, 164 (1878). The Court did address a religious case in 1847, but did not mention the Free Exercise Clause at all. Permoli v. Municipality No. 1, 44 U.S. (3 How.) 588 (1845). See Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 HARV. LAW REV. 1409 (1990) (containing a detailed history of the origins of the Free Exercise Clause).
[5] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).
[6] See Brian A. Freeman, Expiating the Sins of Yoder and Smith: Toward A Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability, 66 MO. L. REV 9, 13 (2001). One scholar has argued that the analysis in the early Free Exercise cases was a coherent jurisdictional analysis – that the amendment put certain things outside the jurisdiction of the government, but not others. Herbert W. Titus, The Free Exercise Clause: Past, Present and Future, 6 REGENT U. LAW REV. 7 (1995).
[7] 374 U.S. 398 (1963).
[8] Id.
[9] Id.
[10] Id. at 402, n. 1.
[11] Id. at 403.
[12] 406 U.S. 205 (1972).
[13] 406 U.S. at 209.
[14] Id. at 220 (citing Sherbert v. Verner, 374 U.S. 398 (1963)).
[15] 406 U.S. at 234.
[16] Id. at 222-229.

the standard analysis.[17] These interests and exceptions included the maintenance of the comprehensive Social Security system,[18] military regulations,[19] and prison regulations.[20]

C. A Failed Attempt to Clarify Free Exercise Jurisprudence: Employment Division. v. Smith

In 1990, the Supreme Court moved away from the compelling interest test in the case entitled *Employment Division v. Smith*[21]. In *Smith*, two men were denied unemployment benefits after being terminated by a drug rehabilitation center for using peyote, a controlled substance with a sacramental purpose in some Native American religions.[22] An Oregon statute forbad the use of peyote without exception for religious purposes.[23] Hearkening to the *Reynolds* opinion, the Supreme Court reaffirmed that the state may not regulate religious beliefs and further noted that it would seem to violate the free exercise provisions of the First Amendment for the state to regulate conduct specifically for religious reasons or limited to religious circumstances.[24] Because the Oregon statute did not forbid the use of peyote only when used in a religious ceremony, but instead banned the use of peyote as a controlled substance regardless of the reasons for use, the Court held that the prohibition was constitutional.[25] Justice Scalia stated that when "prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[26] In stating such, the Court rejected the proposition that the compelling interest test of *Sherbert* and *Yoder* applies to laws of general applicability.[27] The Court limited the compelling interest test to unemployment compensation rules (as opposed to criminal law which was the underlying question in this case).[28] Justice Scalia noted a long line of free exercise cases where the test was not applied to facially neutral government action with an incidental burden to religion.[29]

Justice O'Connor agreed with the result of the case, but strongly disagreed with the Court's interpretation of First Amendment jurisprudence, noting that the First Amendment "does not distinguish between laws that are generally applicable and laws that target particular religious practices."[30] In her analysis of First Amendment jurisprudence, joined by three other justices, she noted that the Court historically chose not to apply strict scrutiny only in very narrow fields where the government traditionally has great leeway (such as military and prison regulations).[31] Justice O'Connor noted that the limits given by the majority were frivolous as "few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such."[32] According to Justice O'Connor, to allow the compelling interest test to be used for evaluating the denial of unemployment benefits, but not to use the same test to evaluate a statute that imposes criminal sanctions is illogical.[33] The proper and constitutional analysis would be to apply the test even when it is generally agreed that the state has a compelling interest, as is the case with criminal prohibitions.[34] Because of her belief that the compelling interest test should

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[17] Titus, supra note 6 at 19-22.
[18] U.S. v. Lee, 455 U.S. 252 (1982).
[19] Goldman v. Weinberger, 475 U.S. 503, (1986) (stating that the "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.").
[20] O'Lone v. Shabazz, 482 U.S. 342 (1987) (giving great deference to the penal system similar to that given the military).
[21] 494 U.S. 872 (1990).
[22] Id. at 874.
[23] Id. at 876.
[24] Id. at 877 (noting that it is likely true, but that no Supreme Court decision has specifically stated such). See supra note 4 and accompanying text for more on the Reynolds case.
[25] 494 U.S. at 882.
[26] Id. at 878.
[27] Id. at 883.
[28] Id. at 880.
[29] Id. at 880, 883-4 (Included in the list were prohibitions on polygamy and child labor, validity of Sunday closure laws, the military draft and the requirements to have a Social Security number, government logging and road building, military dress regulations and prisoner work requirements.)
[30] Id. at 894 (O'Connor, J., concurring).
[31] 494 U.S. at 900-1 (O'Connor, J., concurring).
[32] Id. at 894.
[33] Id. at 898.
[34] Id. at 899.

have been applied, Justice O'Connor applied the test and determined that the compelling interest in regulating controlled substances, combined with the lack of exception for peyote use, was sufficient for the law to be constitutional.[35]

The three justices who joined Justice O'Connor's analysis of First Amendment jurisprudence also went on to apply the compelling interest test but determined that the interests of the state were not sufficient.[36] Justice Blackmun pointed to the fact that Oregon does not actively prosecute religious users of peyote for drug crimes and thus the State could not have a truly compelling interest in a universal prohibition of that drug.[37] Justice Blackmun and those who joined him would have held the prohibition was a violation of the First Amendment and would have found that Oregon must pay the unemployment benefits.

The decision that the compelling interest test does not apply to laws of general applicability not only created a stirring dissent and concurrence, but also struck a nerve with the legislative branch sparking immediate, though slow moving action.

D. The Religious Freedom Restoration Act of 1993

Almost immediately after the *Smith* decision, Congress began discussions of legislation to restore the prior First Amendment jurisprudence as set forth by Justice O'Connor in *Smith*.[38] Bills were introduced in 1991 and 1992 before RFRA finally passed in 1993.[39] The stated 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."[40]

The key provision of RFRA states that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided."[41] The statute then provides that the government may create a substantial burden if there is a compelling governmental interest and the burden is a result of the least restrictive means to further that interest.[42] Such language was derived from *Sherbert* and *Yoder*, both mentioned specifically in the statute. In *Sherbert*, the Court stated that, if the regulation in question was to be upheld it would be, in part, "because any incidental burden on the free exercise" of religion is justified by a compelling government interest.[43] Similarly in *Yoder*, the court noted that a facially neutral regulation may violate the constitution "if it unduly burdens the free exercise of religion."[44]

After the passage of the RFRA, commentators and scholars argued at great length whether the statute was constitutional. Opponents to RFRA argued that its passage violated the principles of separation of powers and federalism and was beyond any authority of Congress.[45] Proponents argued that RFRA was not a constitutionally based law as applied to the federal government, but was instead a form of self-regulation, committing the government to not burden religion in the future.[46] In 1997, in the *City of Boerne v. Flores*, the Supreme Court declared that RFRA was not constitutional as to state and local governments, but made no comment on its constitutionality regarding the federal government.[47]

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[35] Id. at 906.
[36] 494 U.S. at 921 (Blackmun, J., dissenting). Justice Blackmun was joined by Justices Marshall and Brennan and the dissent.
[37] Id. at 911.
[38] S. REP. 103-111 at 2 (1993).
[39] Id. See 42 U.S.C. §§ 2000bb – 2000bb-4 for the final RFRA as amended in 2000.
[40] 42 U.S.C. § 2000bb(b)(1) (2000).
[41] 42 U.S.C. § 2000bb-1(a) (2000).
[42] 42 U.S.C. § 2000bb-1(b) (2000).
[43] 374 U.S. at 403.
[44] 406 U.S. at 220.
[45] See, e.g., Eugene Gressman and Angela Carmella, The RFRA Revision of the Free Exercise Clause, 57 OHIO ST. L.J. 65 (1996) (arguing that RFRA violates separation of powers principles); and Christopher Eisgruber and Lawrence G. Sagar, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. REV. 437 (1994) (arguing that RFRA is unconstitutional for various reasons).
[46] See, e.g., Gregory Magarian, How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution, 99 MICH. L. REV. 1903 (2001).
[47] 521 U.S. 507 (1997).

Following *Flores*, Congress spent three years in debate and then attempted to overturn the Court's decision by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA).[48] RLUIPA imposes the compelling interest test directly to government regulations related to land use decisions[49] or institutionalized persons.[50] As part of the enactment of RLUIPA, the Congress amended RFRA to eliminate the terms or sections deemed unconstitutional in *Flores* and to refer to RLUIPA for the definition of "exercise of religion"[51] to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[52] RLUIPA was held constitutional by the Court in *Cutter v. Wilkinson*, but Justice Ginsburg noted in a footnote that the Supreme Court has not addressed the constitutionality of RFRA.[53]

In its most recent RFRA case, *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Supreme Court implicitly upheld RFRA as constitutional when it upheld a preliminary injunction granted in light of RFRA to prevent the enforcement of a controlled substance law.[54] Justice Roberts, writing for a unanimous Court noted that there is no "cause to pretend that the task assigned by Congress to the courts under RFRA is an easy one," implying that the task is a legitimate task and that the legislation is valid.[55] Even so, the Court has yet to directly declare constitutionality and the current dispute regarding the Arizona Snowbowl is evidence of the confusion that RFRA, RLUIPA and the First Amendment have created with regard to religion.

III. THE SNOWMAKING DISPUTE

A. A History of the Peaks

The San Francisco Peaks, or just The Peaks as residents of northern Arizona call them, rise majestically over 12,000 feet in to the clear blue southwest skies.[56] The Peaks consist of several peaks arranged in a horseshoe pattern to the north of Flagstaff and are part of a large volcanic field on the southern edge of the Colorado Plateau.[57] The Peaks are a significant source of groundwater (though not a tremendous source of runoff) for northern Arizona.[58]

The Arizona Snowbowl Ski Resort operates on federal land in the San Francisco Peaks under a special use permit granted by the United States Forest Service.[59] It is just minutes away from the historic Route 66 in Flagstaff, Arizona, approximately two hours from the saguaro cacti and sandy deserts of Phoenix, one hour away from the red rocks of Sedona and 1.5 hours from the grandeur of the Grand Canyon. The ski resort resides on approximately one percent of the Peaks.[60]

People have been skiing at Snowbowl since 1937 when the Forest Service first built a road and a ski lodge.[61] Over time, the ski resort was sold to private owners, and was upgraded and modified to meet the demands of modern skiers. During the 1950s and 1960s, a new lodge was built and ski lifts were added.[62] In 1979, the owners of Snowbowl submitted a master plan for the development of the ski resort, including new parking, another

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[48] 42 U.S.C. §§ 2000cc – 2000cc-5 (2000). See Sara Smolik, The Utility and Efficacy of the RLUIPA: Was It a Waste?, 31 B.C. ENVTL. AFF. L. REV. 723, 724 (2005) (giving a brief legislative history of RLUIPA).
[49] 42 U.S.C. §§ 2000cc(a)(1) (2000).
[50] 42 U.S.C. §§ 2000cc-1(a) (2000).
[51] 42 U.S.C. §§ 2000bb-2(4) (2000).
[52] 42.U.S.C. §§ 2000cc-5(7)(A) (2000).
[53] 544 U.S. 709 at n.1 (2005). In Cutter, the Court upheld the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) as it applied to prisoners.
[54] 546 U.S. 418 (2006).
[55] Id. at 439.
[56] Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024, 1029 (9th Cir. 2007) (Navajo Nation II) (noting that Humphrey's Peak is Arizona's highest point at 12,633 feet).
[57] John A Taylor, Hydrothermal Regimes of the San Francisco Peaks Volcanic Field and The Southern Verde Valley, North-Central Arizona (May 1997) (unpublished MS Thesis, Northern Arizona University) (on file with Cline Library, Northern Arizona University).
[58] Id. at page 17.
[59] Navajo Nation v. U.S. Forest Serv., 408 F.Supp.2d 866, 870 (D.Ariz. 2006), (Navajo Nation I).
[60] Id. at 883.
[61] Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert den. 464 U.S. 1056 (1984).
[62] 708 F. 2d 735.

new lodge, 120 acres of new ski runs and a number of new ski lifts.[63] At that time, the Forest Service completed an environmental impact study according to the National Environmental Protection Act, evaluated a number of different proposals for development, sought input from numerous constituencies (including the Navajo and Hopi tribes) and issued a final environmental impact statement. That statement gave the Snowbowl owners the permission to clear fifty acres of new runs, build a new lodge, improve road access and construct three new lifts.[64] Many native tribes filed an unsuccessful lawsuit alleging violations of the free exercise clause of the First Amendment as well as a number of federal statutes.[65]

In 2002, new owners of Snowbowl decided to complete all of the upgrades approved in the 1979 environmental impact statement and also to submit a proposal to implement snowmaking using reclaimed water and to add a snow play area.[66] Two and a half years later, after periods of public comment and participation, consultation with the tribes, scientific analysis and other assessment, the Forest Service completed its environmental impact statement and approved the proposal.[67] The approval did not expand the acreage available for skiing beyond the 1979 EIS, but did allow for the additional developments requested.[68] Again, many of the northern Arizona native tribes filed a lawsuit to prevent expansion and development.[69]

Today, the Snowbowl hosts thirty-two runs and has four ski lifts.[70] Recent statistics show that the Snowbowl was open for a low of four days in 2001-02 with just under 3000 skiers to a high of 139 days in 2004-05 with over 191,000 skiers purchasing tickets.[71] Even so, information on the impact of the snowmaking on the northern Arizona economy is unclear. The Flagstaff Chamber of Commerce supports snowmaking, arguing that the economy of the town would be vastly improved if Snowbowl were able to be open more regularly during the winter.[72] The argument is countered by the Flagstaff Convention and Visitors Bureau which released statistics showing that revenue from lodging, restaurant and bar sales grew significantly in 2005-2007 when the Snowbowl had few to no days open compared to 2004-05 when Snowbowl had one of its best seasons.[73]

B. The Religious Significance of the Peaks

Northern Arizona is home to a large number of Native American tribes, including the Navajo, the Hopi, the Havasupai, the Hualapai, the Yavapai-Apache, and the White Mountain Apache.[74] Each of these tribes considers the Peaks significant to, if not central to, their religious beliefs and practices.[75] Members of these tribes do not casually visit the Peaks; they make pilgrimages to the Peaks which require sacrifice and preparation for the members to be spiritually prepared to physically enter the sacred ground.[76] Each tribe holds the Peaks in reverence and awe, but for different reasons and in different ways. The focus of the legal battles, and of this section of this paper, will be the significance of the Peaks to four tribes: the Hopi, the Navajo, the Havasupai and the Hualapai.

The Hopi view the Peaks as the home of the spiritual beings who act as intermediaries between humans and the gods (Katsinam or Kachinas).[77] The Peaks are the source of knowledge and instruction, as well as the heaven where spirits reside after death.[78] According to court records, the Hopi have been journeying to the Peaks for over 450 years.[79] The Hopi direct their daily prayers toward the Peaks.[80] In addition, the Hopi collect water and tree branches from the Peaks for their religious ceremonies.[81]

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[63] Id. at 738.
[64] Id. The 1979 decision was the impetus for the first lawsuit by the tribes against the Forest Service and the Snowbowl. See infra notes 89-102 and accompanying text for more discussion on the 1979 case.
[65] See infra text accompanying notes 89-102.
[66] Navajo Nation I at 870.
[67] Id. at 870-871.
[68] Id. at note 3.
[69] See infra Part III.D. for a discussion of the current litigation.
[70] See http://www.arizonasnowbowl.com/pdfs/trail_map.pdf (last viewed on April 26, 2007).
[71] Navajo Nation II at 1030.
[72] J. Ferguson, Local Businesses Leaders Lament Lost Opportunity, ARIZ. DAILY SUN, March 13, 2007, at A-1.
[73] Navajo Nation II at 1030.
[74] Id. at 1029.
[75] Id. at 1034.
[76] Id.
[77] Id.
[78] Navajo Nation II, at 1034.
[79] Id.

The Navajo have different, but equally strong beliefs about the Peaks. The Navajo believe that the Peaks are the source of life, to which daily prayers and songs are directed.[82] The Navajo healers collect herbs, stones and soil from the Peaks for inclusion in their medicine bundles, which are "conduits for prayers."[83] Other medicines used to heal Navajos are derived from plants that are collected from the Peaks.[84] In addition to their reverence of the Peaks as a religious center, the Navajo religion gives responsibility to humans to be the caretakers of the earth.[85]

The Hualapai and Havasupai also hold the Peaks sacred.[86] The Peaks are the focus of the creation story for both tribes, which also shared a historic belief that the world was flat and that the Peaks were at the center of the world.[87] They believe that the plants and water from the Peaks have special healing power.[88]

It is because of the strong religious convictions of the tribes and the importance of the Peaks in their ceremonies that the tribes have been willing to fight development or expansion on the Peaks.

C. The First Battle: Wilson v. Block

The first legal battle between the native peoples and the United States government with regard to the Peaks resulted from the 1979 environmental impact statement, when the Forest Service approved expanding the development at Snowbowl.[89] In *Wilson v. Block*, a three judge panel at the U. S. Court of Appeals for the District of Columbia Circuit (which included now Supreme Court Justice Ruth Bader Ginsburg) affirmed the District Court's grant of summary judgment for the U. S. Forest Service, allowing development at the Snowbowl.[90] Among other laws, the Court held that the decision of the Forest Service did not violate the tribes' free exercise of religion under the First Amendment.[91]

In 1980, as was discussed above, courts were using the compelling interest test of *Sherber* and *Yoder* to decide First Amendment claims.[92] Thus, the tribes had to show that the government's actions constituted a burden on their religion which was not advancing a compelling government interest in the least restrictive way. The D.C. Circuit Court never got to the heart of the compelling interest test because the judges held that the tribes failed to show a burden on their religions. The tribes' religions themselves were not in question: both the trial judge and the appellate panel acknowledged the sincerity of the religious beliefs of the tribes and the significance of the Peaks in their spirituality.[93] In addition, the judges all acknowledged the sincere belief that the tribes have a duty to the gods to protect the mountains and prevent unnatural change or development and that development had already disturbed members of the tribes.[94] Even so, because the Snowbowl ski resort constituted only a small percentage[95] of the Peaks and the tribes continued to have access to other areas of the Peaks, the panel determined that the tribal religions in question were not burdened.[96] The panel stated that the increased development of such a small area did

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[80] Id.
[81] Id. 1035.
[82] Id.
[83] Navajo Nation II, at 1035.
[84] Id.
[85] Id. at 1036.
[86] Id. at 1036-8.
[87] Id.
[88] Navajo Nation II at 1036-8.
[89] Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), cert den. 464 U.S. 1056 (1984). The tribes alleged violations of their First Amendment right to free exercise of religion, the American Indian Religious Freedom Act, fiduciary duties that the government owed the tribes, the Endangered Species Act, the National Historic Preservation Act, the Multiple-Use Sustained Yield Act, the Wilderness Act, the National Environmental Policy Act, the Administrative Procedure Act and two federal statutes regulating private use of federal lands.
[90] 708 F. 2d at 760.
[91] Id. at 739. See supra text accompanying notes 63-64 for a description of the environmental impact statement.
[92] See Part II. B. for a discussion of the compelling interest test.
[93] 708 F. 2d at 740. See also Part III.B. for more information on the beliefs of the tribes.
[94] 708 F. 2d at 740.
[95] Id. at 744 (noting that 777 of 75,000 acres (approximately 1%) were in use as the resort at the time of the Wilson opinion.).
[96] Id. at 745.

not directly limit the tribes' access to the Peaks and did not directly interfere with the tribes' abilities to perform ceremonies or collect ceremonial objects.[97]

The panel was not persuaded by the tribes' attempt to read the *Sherbert* test as a broad statement about religious burdens.[98] Instead, the panel stated that S*herbert* merely held that the government could not force someone to choose between religious beliefs and a government benefit (in that case unemployment benefits conditioned upon the ability to work on the Sabbath).[99] With regard to the argument that development of the Peaks would harm the future of tribal religions because youth would not believe that the Peaks are a sacred location when developed, the panel stated that "many government actions may offend religious believers, and may cast doubt upon the veracity of religious beliefs, but unless such actions penalize faith, they do not burden religion."[100]

Because the panel failed to find a burden to the religions of the tribe, it declined to determine if the development of the ski resort was a compelling interest or whether the approved development was the least restrictive means to achieve that interest.[101] The Supreme Court of the United States denied certiorari, leaving the appellate court's decision to stand and leaving the Snowbowl with permission to develop.[102]

D. The Current Legal Battle: Navajo Nation v. US Forest Service

1. The District Court Opinion

In 2002, almost 20 years after the *Wilson* decision,[103] new owners of Snowbowl decided to complete all of the upgrades approved in the 1979 environmental impact statement and allowed by the *Wilson* decision.[104] New controversy sparked when the owners also submitted a proposal to implement snowmaking using reclaimed water and to add a snowplay area.[105] As it did in the *Wilson* case, the Forest Service completed the process and issued an environmental impact statement which did not expand the acreage available for skiing beyond the statements litigated in *Wilson*, but did allow for the additional developments requested.[106]

Shortly after the Forest Service issued its final ruling on the development, the Navajo Nation and the Sierra Club filed a lawsuit.[107] As in the *Wilson* case, the plaintiffs claimed that the Forest Service violated a host of statutes as well as its trust responsibility to the tribes. Several of the complaints exactly mirrored the complaints brought in *Wilson*: violations of the National Environmental Protection Act, the national Historic Preservation Act, and the Endangered Species Act.[108] New allegations included violations of the Grand Canyon National Park Enlargement Act, the National Forest Management Act and, because of the *Smith* decision and its fallout, the RFRA.[109]

After analyzing the many claims in this litigation, the court granted summary judgment for the Forest Service and the owners of the Snowbowl on all claims except the RFRA claim.[110] As to that claim, the court held an

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[97] Id. at 744.
[98] Id. at 741.
[99] 708 F. 2d at 741.
[100] Id.
[101] Id. at 745.
[102] 464 U.S. 1056 (1984). Many of the activities in the current suit between the tribes and the Snowbowl were approved under this 1979 Environmental Impact Statement. See, Navajo Nation I at 870, n.2.
[103] See Part III.C. for a discussion of Wilson.
[104] Navajo Nation I at 870.
[105] Id.
[106] Id. at note 3.
[107] By the time the case was set for trial, numerous plaintiffs were added and separate complaints were consolidated so that the final list of plaintiffs included the Navajo Tribe, the Sierra Club, the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Center for Biological Diversity, the Flagstaff Activist Network, the Hopi Tribe, the Hualapai Tribe, the Havasupai Tribe and a number of individual members of those tribes. See Navajo Nation I at n. 1.
[108] Navajo Nation I at 871. See n. 88 for details of the complaints alleged in Wilson v. Block.
[109] Navajo Nation I at 871.
[110] With regard to the National Environmental Protection Act, the National Historic Preservation Act, and the National Forest Management Act the court rejected plaintiffs allegations of procedural violations. Navajo Nation I at 873-81. The Court granted summary judgment for claims under the Grand Canyon Enlargement Act and the Endangered Species Act for lack of jurisdiction and inapplicability of the statutes. Id. at 881-2. Finally, the court granted summary judgment with regard to allegations of trust violation determining that the trust obligations were

eleven-day bench trial and enunciated 222 findings of fact.[111] The District Court opinion reads very much like the *Wilson* decision. In a few brief paragraphs, Judge Rosenblatt notes that the RFRA imposes the compelling interest test as it existed prior to the *Smith* case and that lack of definition in RFRA should be clarified using pre-*Smith* free exercise case law.[112] Citing *Wilson*, the Court then found that the plaintiffs failed to demonstrate that the developments and approved upgrades would burden their religion.[113] Because the burdens described by the Plaintiffs were similar to those asserted in *Wilson*, the result also was the same.[114] The court noted that only two potential developments were different from the *Wilson* approved developments: snowmaking with the reclaimed water and the development of a proposed snowplay facility.[115] The court found that these two additions did not change the result as determined by the panel in *Wilson* – that the tribes still have access to the Peaks for ceremonies and collection of ceremonial objects and so no burden exists.[116]

Unlike the panel in *Wilson*, Judge Rosenblatt continued in his opinion to address the "compelling interest" and the "least restrictive means" provisions of the RFRA test to ensure that his rationale was clear to the appellate courts in what would be an inevitable appeal.[117] Judge Rosenblatt cited three compelling interests to support the decision by the Forest Service: first, the mandate by federal law that the Forest Service hold federal lands for multiple uses; second, that the upgrades will ensure the safety of skiers and others at the resort; and third, a refusal to allow the upgrades would potentially violate the Establishment Clause of the First Amendment.[118]

In determining whether the approved upgrades were the least restrictive means to achieve those compelling interests, the court gave deference to the thorough investigation of alternatives completed by the Forest Service in addition to an inability of the tribes to proffer any means that were less restrictive than the Forest Service's approved means.[119] Judge Rosenblatt found for the defendants on the RFRA claim, allowing the owners of the Snowbowl to improve operations through, among other things, the making of snow using reclaimed water. This decision shortly was appealed to the Ninth Circuit Court of Appeals.

2. The Ninth Circuit Panel Opinion

Just a year after the District Court opinion was issued, the Ninth Circuit panel issued its opinion in the appeal.[120] The court affirmed the District Court on all counts, except one claim under the National Environmental Protection Act and the RFRA claim related to snow making.[121]

The more publicly debated and controversial topic in the opinion was the discussion of RFRA. In analyzing whether the trial court decided correctly for the Forest Service on the RFRA claim, the circuit court easily found that significant religious exercises are related to the Peaks[122] and noted that the introduction of reclaimed water to the snow areas would burden the tribes' religions in two ways: first, specific items would be contaminated and therefore rendered useless in specific religious exercises, and second, the Peaks generally would be rendered contaminated and therefore unholy.[123] The court looked to the record and highlighted the testimony of Navajo and

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satisfied when the Forest Service complied with the requirements of the general statutes mentioned above. Id. at 882.

[111] Navajo Nation I at 882-903.

[112] Id. at 903.

[113] Id. at 906.

[114] Id. at 905.

[115] Id. at 886.

[116] Navajo Nation I at 905.

[117] Id. at 906-7.

[118] Id. at 906.

[119] Id. at 907.

[120] Navajo Nation II. The panel consisted of two regular circuit judges and a Senior Judge for the Northern District of California, sitting by designation.

[121] Id. at 1029. The Court reversed the summary judgment for the Forest Service with regard to one NEPA claim: the court stated that the environmental impact statement did not provide a thorough enough discussion of the risks associated with ingesting reclaimed water or, in the alternative, did not address why a more thorough discussion was not necessary. Id. at 1053-4. Though beyond the scope of this paper, there are some potentially significant issues with this decision related to the ability of one governmental agency to rely on the decisions of another governmental agency, in this case the Arizona Department of Environmental Quality's determination about the science and safety of the reclaimed water.

[122] See supra, Part III.B. for a discussion of the Native religions.

[123] Navajo Nation II at 1039.

Hualapai healers who shared that the use of human waste, although treated, on any part of the mountain would contaminate all plants on the mountains and healers would be unable to replenish their medicine bundles or collect required water for ceremonies.[124] The court also looked to the more general testimony of tribal members regarding the tremendous negative psychological effects of praying to a pure and holy place which they know to be contaminated by waters that have contained human waste and may even have passed over or through corpses; thus rendering their entire religious structure at risk.[125] Based on this testimony, the court determined that the burden would be substantial, effectively destroying the foundation of the religion of at least two tribes.[126]

In moving to the compelling interests, the court rejected each interest found by the District Court as too general and insufficient to meet the standard of the test.[127] With regard to the mandate to use Forest Service land for multiple purposes, the court noted that the mere existence of the ski resort creates multiple uses and that the addition of snowmaking was unrelated to that mandate.[128] The Forest Service and the owners of Snowbowl argued that the economic survival of the resort depended on snowmaking and that the closure of Snowbowl would eliminate the multiple uses required.[129] The court looked to the history of Snowbowl, the annual snowfall totals over the years and the past expansions in light of those snowfall totals to conclude that it is too speculative to decide if Snowbowl would cease to exist without snowmaking.[130] The court noted that, even if the closure of Snowbowl was a realistic possibility, there is no compelling government interest in avoiding that result.[131]

The court rejected the public safety argument, stating that snowmaking simply does not advance that interest and that there was no evidence that skiing at the Snowbowl during the past years without snow made from reclaimed water was unsafe.[132] Finally, the court dismissed the Establishment Clause argument by showing that the establishment of religion would call for the removal of the ski resort because of the already negative consequences to the native religions, while disallowing snowmaking only protects the religious practices while not having any impact on the existence or possible future of Snowbowl.[133]

Had the panel simply found that these interests were not compelling, the case would not serve as the example of confusion in the realm of free exercise. But the court did not merely state that the interests were not compelling. The court went beyond the compelling interest test to attempt a clarification of RFRA and how it is to be interpreted. The Ninth Circuit in the Snowbowl case concluded that, though RFRA specifically states that the intention of Congress was to restore the compelling interest test to cases related to free exercise of religion claims,[134] RFRA is more protective of religious liberties than the First Amendment.[135] The court made two basic arguments for the proposition that the RFRA is more protective than prior First Amendment jurisprudence.

First, the panel looked to the scope of application to argue that the test under RFRA is not the same as the pre-*Smith* First Amendment test. The expansion of the compelling interest test to <u>every</u> government action that may burden religion and the language of the statute seemed to the panel to be broader than the historic applications of the First Amendment. The court used military regulations, welfare programs and prison regulations as examples where the Supreme Court and lower courts previously used less demanding tests to determine if a regulation that impacted religion was valid.[136] The panel also pointed to the Supreme Court's opinion in *City of Boerne v. Flores*[137] where Justice Kennedy, in declaring RFRA unconstitutional as to state and local governments, stated that RFRA is broader

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[124] Id. at 1040.
[125] Id. But see Jerry Shannon, Letter to the Editor, Snowmaking a Clash of Truth, Tradition, ARIZONA DAILY SUN, Mar. 19, 2007 at ___ (I have yet to learn: "What do the Indians do on the Peaks when they have to excrete human waste?" Do they use leather pouches or porta potties [sic] to remove the waste? Or do they simply leave the waste on the mountain? Although I am not a microbiology expert, I do have a chemical engineering background. I suspect that more "waste" bacteria are residual from the excretion of 100 humans than from thousands of gallons of reclaimed wastewater.")
[126] Navajo Nation II at 1042-3.
[127] Id. at 1045.
[128] Id.
[129] Id. at 1044-5.
[130] Id.
[131] Navajo Nation II at 1044-5.
[132] Id. at 1045-6.
[133] Id. at 1046.
[134] 42 U.S.C. §2000bb(b)(1) (2000).
[135] Navajo Nation II at 1032.
[136] Id.
[137] 521 U.S. 507 (1997).

than the previously used compelling interest test because it imposes the least restrictive means analysis in every circumstance where religion may be burdened – something that was not done in pre-*Smith* cases.[138]

The second argument of the panel to support a broad interpretation of RFRA pertained to the language of the statute. According to the court, the use of the term "burden religion" instead of the First Amendment language of "prohibiting the free exercise thereof" in the statute indicates a difference in meaning.[139] Thus, Congress meant to not only restore the test that the Supreme Court had purportedly used in prior cases, it meant to change that test to create a greater challenge for the government when enacting any legislation or regulation that would have an impact on the religious practices of some person or people. This statement is consistent with prior statements made by the Ninth Circuit with regard to RFRA; within three years of the passage of RFRA, and even before the amendments of RLUIPA, the Ninth Circuit noted that RFRA's language mandates a different analysis than the language of the First Amendment.[140] In 1996, the court stated that the "statute goes beyond the constitutional language that forbids the 'prohibiting' of the free exercise of religion and uses the broader verb 'burden.'"[141] In this opinion, the Ninth Circuit adopted a new definition of burden, stating that it "must prevent the plaintiff 'from engaging in [religious] conduct or having a religious experience.'"[142]

In addition to the definition of the term burden, the panel noted that the Congress intended for the definition of "exercise of religion" to be broader than the Supreme Court had previously defined it because Congress amended RFRA in 2000 to redefine specifically that term.[143] In RFRA, the term "exercise of religion" is defined by reference to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[144] The RLUIPA defines exercise of religion as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief,"[145] a definition not found in prior Supreme Court First Amendment cases.

On May 28, 2007, the United States Forest Service and the owners of the Snowbowl filed a petition for rehearing with the Ninth Circuit.[146]

3. The Continuing Saga: *en banc* at the 9th Circuit

On October 17, the Ninth Circuit agreed to rehear the case *en banc*. On December 11, 2007, arguments were heard for approximately 1 hour before a panel of Ninth Circuit judges.[147] During the hearing, it was clear that the judges were struggling with the definitions and scope of RFRA. Chief Judge Kozinski questioned one of the tribe's attorneys regarding the scope of RFRA and the textual basis for expansion beyond pre-*Smith* doctrine.[148] Another panel judge questioned how far RFRA could expand prior First Amendment jurisprudence without facing an Establishment Clause violation.[149] One judge questioned whether a broad interpretation of RFRA would create some "categorical exclusion" of the ability of the government to control and use government lands.[150] Discussion with counsel from all parties moved to the terminology in the statute, specifically the term "substantial burden."[151] Specifically, one judge asked for a unified definition of "substantial burden" from the tribes and individuals who brought suit.[152] The term "compelling government interest" also came in to the debate as one judge asked why the

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[138] Id. at 535.
[139] Id.
[140] U.S. v. Bauer, 84 F.3d 1549, 1558 (9th. Cir, 1996).
[141] Id.
[142] Navajo Nation II at 1042 (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir., 1995).
[143] Navajo Nation II at 1033.
[144] 42 U.S.C. §2000bb-2(4) refers to U.S.C. §2000cc-5.
[145] 42 U.S.C. §2000cc-5(7)(A) (2000).
[146] See Cyndy Cole, Snowbowl Owner Vows to Pursue Snowmaking, ARIZ. DAILY SUN, March 13, 2007, at A-1. See also, Howard Fischer, Snowbowl Fight Rages On, ARIZ. DAILY SUN, March 13, 2007, at A-1 and Cyndy Cole, Denial of Snowmaking Appealed, ARIZ. DAILY SUN, May 31, 2007, at A-1.
[147] This panel included Chef Judge Alex Kozinski and Judges O'Scannlain, Rymer, Thomas, McKeown, Wardlaw, Fisher, Gould, Paez, Callahan, and N.R. Smith. The hearing is available online at http://www.ca9.uscourts.gov/ (follow :Audio Files hyperlink and enter 06-15371EB as the case number) (hereafter En Banc Oral Arguments).
[148] En Banc Oral Arguments.
[149] Id.
[150] Id.
[151] Id.
[152] Id.

management of the government's own land by the government simply would not be a compelling interest.[153] At the time of this writing, no opinion has issued from that panel.

In the meantime, the owners of the Snowbowl Ski Resort have not begun any of the upgrades that were not directly affected by the earlier opinions.[154] The owners stated that the delay is a result of the cost of litigation as well as their own desire to minimize contention and protest until the legal proceedings have been thoroughly completed.[155]

IV. CORRECTING THE COMPLICATED RELATIONSHIP OF RELIGION TO LAW

The snow-making case is a clear example of the confusion that has been created by the *Smith* decision and the enactment of RFRA in response to it. It appears that the Supreme Court could approach the confusion created by answering either one or three key questions should it accept the inevitable petition for a writ of certiorari. The first is the constitutionality of RFRA. The second and third, if RFRA is constitutional, address the two arguments made by the Ninth Circuit panel: a determination of the scope of RFRA and clarification of the definitions of the terms of RFRA. Based on current case law, it appears the Court will address all three. An analysis of how the Court is likely to answer those questions is addressed below.

Alternatively, the Court could, and should, take a broader approach to the issue. The Court should push the government to be more transparent about the authority under which it portends to act and in the process, should put religion back in its proper place as a key civil liberty, important enough for mention in our First Amendment. To do so, the Court should eliminate RFRA through overturning *Smith* or by declaring it unconstitutional, should correct the misinterpretation of the First Amendment as set forth in the majority opinion of *Smith* and should send a message to Congress and other governmental units that they are bodies of limited power and must justify their own actions by reference to specific grants of power.

A. The Easy Fix

1. The Constitutionality of RFRA

Based on their statements in previous cases, it is likely that the Supreme Court would finally declare RFRA constitutional as to the federal government in this case.[156]

2. The Scope of RFRA

A more difficult question for the Supreme Court to answer pertains to the first of the two basic arguments made by the original Ninth Circuit panel.[157] When reviewing RFRA and its parallel statute RLUIPA, one finds inconsistency in whether the statutes mandate that courts use the exact analysis of religion cases that existed prior to the *Smith* decision or if the statute goes beyond that and broadens the protection of religion.

The legislative history of RFRA is clear that the intent of Congress was to reverse the effect of the *Smith* decision.[158] Representative Brooks of Texas stated that RFRA "will restore the standard for addressing claims under the free exercise clause of the first amendment as it was prior to the Supreme Court's *Smith* decision in 1990."[159] Representative Hyde, of Illinois, spoke for RFRA stating that it "will overturn the 1990 decision of the U.S. Supreme Court in Employment Division versus Smith."[160] Now Speaker Pelosi, then a California Representative, stated that "it is necessary to return the criteria for abridging religious freedom to pre-*Smith* days."[161] The committee report to the full U.S. Senate declared that RFRA was "intended to restore the compelling interest test

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[153] Id. Other topics of discussion related to the ability of the Forest Service to rely on the Arizona Department of Environmental Quality's determination of the safety of the water. Id.
[154] Cyndy Cole, Denial of Snowmaking Appealed, ARIZ. DAILY SUN, May 31, 2007, at A-1.
[155] Id.
[156] See Part II.D. for a discussion of the prior Supreme Court cases mentioning RFRA.
[157] See, supra text accompanying notes 135-145.
[158] See, e.g. 139 CONG. REC. E1243-03 (1993) (statement of Rep. Franks); 139 CONG. REC. E1234-01 (1993) (statement of Rep. Cardin); 139 CONG. REC. H2356-03 (1993) (statement of Rep. Brooks); 139 CONG. REC. H2356-03 (1993) (statement of Rep. Tucker); S.REP. 103-111, at 1898 (1993); H.R. REP. 103-88 (1993).
[159] 139 CONG. REC. H2356-03 (1993) (statement of Rep. Brooks).
[160] 139 CONG. REC. H2356-03 (1993) (statement of Rep. Hyde).
[161] 139 CONG. REC. H2356-03 (1993) (statement of Rep. Pelosi).

previously applicable to free exercise cases."[162] Never in the available legislative history did a Senator or Representative argue that RFRA should be passed because it increased the protections to religion.

Nowhere in the legislative history is there any discussion of the exceptions that were made in First Amendment jurisprudence prior to *Smith*. For example, just 2 years prior to the *Smith* opinion, Justice O'Connor refused to apply the compelling interest test where Native American tribes brought a First Amendment claim stating that the government violated their free exercise rights by putting a highway through sacred lands, thus destroying the sacred nature of the lands.[163] Justice O'Connor relied on an exception related to the conduct of the "Government's internal procedures" to state that the land at issue was federal land and that individuals do not have the right to extract behavior from the government.[164] In theory, under RFRA, the Court would have to analyze *Lyng* using the compelling interest test, a very different analysis than was used, with quite possibly a different result. In fact, Justices Brennan, Marshall and Blackmun noted in dissent that the majority did "not for a moment suggest that the interests served by the . . . road are in any way compelling, or that they outweigh the destructive effect construction of the road will have on the [tribe's] religious practices."[165]

A broad interpretation of the scope of RFRA, similar to the original Ninth Circuit panel, could result in more Establishment Clause claims if government action is tailored to the individual needs of the religions. For example, if RFRA is read broadly, the tribes in the Snowbowl case could bring a new lawsuit to prohibit any and all expansion to the resort instead of simply the snowmaking components.

3. The Language of RFRA

The Supreme Court has interpreted RFRA to adopt the standard of the pre-*Smith* days. In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, the Supreme Court stated, "[RFRA] adopts a statutory rule comparable to the constitutional rule rejected in *Smith*."[166] They further stated, "Congress' express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test."[167] They reiterated the statutory purpose of RFRA to adopt the compelling interest test that had been used in *Sherbert* and *Yoder*.[168] Even so, confusion as to the definitions has ensued in the Circuit Courts related to the terms in RFRA as well as parallel terms in RLUIPA.

In 2006, the Ninth Circuit looked to Supreme Court jurisprudence to determine the meaning of substantial burden for RLUIPA and stated that a substantial burden "must impose a significantly great restriction or onus" on a religious exercise.[169] In the Snowbowl case, the original Ninth Circuit panel adopted yet a different definition for RFRA, stating that a burden "must prevent the plaintiff 'from engaging in [religious] conduct or having a religious experience.'"[170] Thus for two statutes with similar language, the Ninth Circuit has different definitions to follow.

In interpreting RLUIPA, the Fifth Circuit quoted the legislative history to conclude that the term "substantial burden" should be interpreted under the Supreme Court's prior jurisprudence.[171] In reviewing prior cases, the court stated that a substantial burden exists "if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs."[172] In coming to a similar conclusion in 2007, the Seventh Circuit looked to the legislative history of RLUIPA, where cosponsors Senators Kennedy and Hatch released a joint statement explaining that RLUIPA did not define "substantial burden" precisely because it was not intended to create a new standard and that prior Supreme Court jurisprudence should guide courts in interpreting the statute.[173] In its final determination, the Seventh Circuit adopted a very different definition, stating that a substantial

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[162] S. REP. 103-111at 1898 (1993).
[163] Lyng v Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988). Interestingly, Justice O'Connor wrote the Lyng opinion and then dissented in Smith, the very case that resulted in the passage of RFRA and the potential new standard that will create a result distinctly different from the Lyng opinion.
[164] Id. at 448-453.
[165] Id. at 465.
[166] 546 U.S. at 423.
[167] Id. at 430.
[168] Id. at 430-1 (citing 42 U.S.C. § 2000bb(b)(1) (2000).
[169] Guru Nanak Sikh v. Sutter, 456 F.3d 978, 988 (9th Cir. 2006).
[170] Navajo Nation II at 1042 (quoting Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir., 1995).
[171] Adkins v. Kaspar, 393 D.3d 559, 569 (5th Cir., 2004).
[172] Id. at 570.
[173] Vision Church v. Long Grove, 468 F.3d 975, 997 (7th Cir., 2007).

burden is one that "bears direct, primary, and fundamental responsibility for rendering religious exercise. . . effectively impracticable."[174]

At a minimum, the Supreme Court needs to set forth standard definitions for the terms "substantial burden," and "compelling interest" if they accept RFRA as constitutional. The end result in the snow-making case will depend on the scope and definition adopted by the Court.[175] Should the Court narrowly define "compelling interest" but broadly look at the term "burden," the government may be forced to close down the ski resort on federal land.[176]

B. The More Correct Systemic Solution

While addressing the three key questions above could resolve some of the problems created by *Smith* and RFRA, this case provides an opportunity to reflect on larger systemic issues. To garner a larger and more profound change in the system, the Supreme Court should grant the writ of certiorari in the Snowbowl case and should declare RFRA unconstitutional or least render it useless as it overturns its prior *Smith* decision.[177]

In overturning *Smith*, the Court should acknowledge that the compelling interest test is the appropriate test for any governmental burden on religion. In addition, the Court should give direction for the application of the key terms used in the compelling interest test: substantial burden and compelling interest. The Court also should recognize that many of its prior exceptions to the use of the compelling interest test were based in the fact that the government interest was compelling. For example, in *Smith*, Justice O'Connor argued correctly that the state of Oregon had a compelling interest in a uniform drug law.[178] In the *Lyng* case, the Court did not use the compelling interest test because the burden on religion stemmed from internal government procedures.[179] Instead, the Court should acknowledge that the government had a compelling interest in building the road at question and for building the road where it was being built.[180] Other exceptions can be viewed similarly.[181] While this may be viewed as a matter of semantics, there is an important difference that could result in a systemic change should the Court send the right message to Congress and the other bodies.

The changes spurred by the decision recommended could help the legislative branch and administrative agencies re-focus on the limited nature of their existence.[182] The Court should remind the governmental entities that they have limited power, and that it is the responsibility of those entities to demonstrate from where the authority to act comes.

1. Focus for the Government

Historically, the *courts* have found compelling government interests during the course of litigation for a number of regulations that burden religion.[183] The duty to enunciate the compelling government interest, however,

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[174] Id.

[175] More important than the actual result of the case is a cleaner legal environment in which to move forward.

[176] It is unclear how many other businesses would be affected by this interpretation of the Court. See supra note 1 for a discussion of the number and type of special use permits on federal lands.

[177] Several commentators have given significant rationale for declaring RFRA unconstitutional. See supra note 45. Unfortunately the Court is not likely to overturn *Smith* as the only Justices still sitting on the Court from the Smith decision voted in the majority (Scalia, Kennedy and Stevens) and several of those who have left have been replaced by justices unlikely to overturn such precedent: Chief Justice Roberts, Justice Alito and Justice Thomas. Only Justices Ginsburg, Souter and Breyer may be inclined to overturn Smith.

[178] 494 U.S. at 903-907.

[179] 485 U.S. at 448-453. See, supra, notes 163 and accompanying text.

[180] In Lyng, the government was building a road to connect two California towns. 485 U.S. at 442. The Forest Service placed the road in a particular location to avoid soil stability problems as well as potential eminent domain problems. Id. It is unclear whether the need for the road between the two towns would be a compelling interest.

[181] See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986), where the Supreme Court did not apply the compelling interest test to a challenged military regulation prohibiting a Jew from wearing a yarmulke. The Court exempted the military from the compelling interest test out of deference to the military's role and its standing as a separate governmental entity, distinct from civilian society. The Court just as easily could have stated that the uniform dress in the military is a compelling government interest for any number of reasons. The key difference would be that the military would have to set forth those interests.

[182] See U.S. CONST. art. I, and U.S. CONST. amend X.

[183] See supra notes 178-180 and accompanying text. It always amazes the author that the Court has done this so readily. See *Heart of Atlanta v. U.S.*, 379 U.S. 241 (1964), for an example of the Court finding Congressional

should reside with the government and should be addressed before laws are passed or regulations issued. Congress and the administrative agencies are involved in thousands of different issues.[184] The source of Congressional authority to regulate is not clear in reviewing recent bills; none of the bills gives the slightest inclination as to the source of power to Congress.[185] Statements by the Court indicating that this responsibility lies with the regulating body could result in more clear legislation – perhaps fewer pieces of legislation as the governmental units reflect on their given limitations. This is wholly consistent with the notion of accountability in government as well as the limited powers for the federal government.[186] In addition and specifically to legal issues that require a compelling government interest, the regulating bodies should address the compelling interest in the regulation.

In the case of the Snowbowl, the recommended analysis would require that the Forest Service and the Snowbowl ski resort set forth with particularity the compelling government interest that is advanced in the least restrictive manner (or least burdensome manner) that would lead to the decision to allow snow-making on the Peaks with reclaimed water.

2. Specific Impact on Religion

The current federal paradigm for religious freedom law includes RFRA for federal actions, RLUIPA for any government actions covering land use or incarceration and the First Amendment for analysis of state and local laws or regulations. There also are state acts that parallel RFRA that were passed after the Supreme Court decided *City of Bourne*.[187] This splintered approach to free exercise analysis could lead to different results for the same actions depending on which government entity took the action. For a right that was foundational enough to warrant inclusion in the First Amendment, this is not acceptable. A Supreme Court decision to unify free exercise analysis under the First Amendment, with use of the compelling interest test, would be consistent with the desires of the nation, as evidenced by the strength of the vote for RFRA. It also would create the predictability and stability desired of the law.

If the Court were to apply the compelling interest test to all free exercise cases, inevitably certain interests will be deemed compelling and then government action that advances those interests, in the least restrictive ways, will be upheld as constitutional. One key aspect of the test that was not addressed in the snow-making case was the "least restrictive manner" element.[188] Analyzing this factor is more objective than analyzing whether an interest is compelling or whether a religion is burdened. One can do an economical cost-benefit analysis of alternatives to determine if the chosen activity is the least restrictive (or least burdensome) way to achieve the compelling government interest. No matter what alternatives meet the "compelling interest" and "least restrictive manner" tests, this analysis properly would place religion back on the constitutional level.

V. CONCLUSION

The Free Exercise clause of the First Amendment has undergone a number of growing pains in the history of our country. As demonstrated by the Snowbowl case, religious freedom jurisprudence is complicated and fragmented. The most appropriate analysis used by courts has been the compelling interest test, enunciated in the 1960's and used directly until 1990. The Supreme Court has an opportunity, through the Snowbowl case, to correct a series of events that have done nothing but complicate free exercise jurisprudence. The justices should take this opportunity to encourage Congress and the other federal units to become more accountable for the authority of their actions and to place religion back in its rightful sphere as a constitutionally protected civil liberty.

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authority under the Commerce Clause to pass the Civil Rights Act of 1964 though Congress never mentioned it, and quite possibly never gave it a thought.

[184] The 110th Congress had over 7200 bills before the House or Senate in 2007. http://thomas.loc.gov/home/c110bills.html (last viewed December 21, 2007).

[185] Id.

[186] See U.S. CONST., amend X. A cursory view of the bills before the 110th Congress indicates that none of the bills states any authority for Congressional regulation. See, http://thomas.loc.gov/home/c110bills.html for a list of bills before the 110th Congress (last viewed Dec. 21, 2007).

[187] See e.g., 775 ILL. COMP. STAT. 35 (found at http://www.ilga.gov/legislation/ilcs/ilcs.asp) and N.M. STAT. §§28-22-1 through 28-22-5 (1978).

[188] See Part II.B. for a discussion of the compelling interest test.