No. 08-___

IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The U.S. Forest Service has authorized a ski resort to begin spraying millions of gallons of recycled sewage water (in the form of artificial snow) onto the most sacred mountain of southwest Native American tribes – a site that is a wellspring of the tribes' spirituality and that serves an indispensible role in their religious practices and rituals. The tribes contend that this authorization violates the Religious Freedom Restoration Act ("RFRA"), under which the federal government may not "substantially burden" a person's exercise of religion unless its action is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1. A divided en banc panel of the Ninth Circuit rejected this claim at its threshold, holding that a "substantial burden" exists under RFRA "only when individuals are [1] forced to choose between following the tenets of their religion and receiving a governmental benefit . . . or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." Pet. App. 20a. Spraying sewage water onto the mountain would do neither of these particular things, notwithstanding the profound impact it would have on the tribes' spirituality and religious practices.

The question presented, over which there is widespread disagreement among the circuits, is:

Whether a governmental action cannot constitute a "substantial burden" under RFRA unless it forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or coerces them by threatening civil or criminal sanctions to act contrary to their religious beliefs.

PARTIES TO THE PROCEEDINGS BELOW

The following parties were plaintiffs below and are petitioners here: Navajo Nation, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, White Mountain Apache Nation, Yavapai-Apache Nation, The Flagstaff Activist Network, Hualapai Tribe, Norris Nez, Bill Bucky Preston, and Hopi Tribe.

The Sierra Club and the Center for Biological Diversity were also plaintiffs below but are not petitioners here.

The following parties were defendants below and are respondents here: The United States Forest Service, Nora Rasure (in her official capacity as Forest Supervisor, Coconino National Forest), Harv Forsgren (in his official capacity as Regional Forester, appeal deciding office). The Arizona Snowbowl Resort Limited Partnership was a defendant-intervenor below and is also a respondent here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-113a) is published at 535 F.3d 1058. The panel opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 114a-185a) is published at 479 F.3d 1024. The district court's order (Pet. App. 186a-267a) is published at 408 F. Supp. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2008. Pet. App. 3a. On October 29, Justice Kennedy granted an extension of time and then on November 20, 2008 granted a further extension until January 5, 2009, in which to file a petition for certiorari. App. No. 08-368. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, at Pet. App. 268a-280a.

STATEMENT OF THE CASE

1. The Religious Freedom Restoration Act ("RFRA") provides that "Government shall not substantially burden a person's exercise of religion" unless the governmental action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Congress enacted this landmark legislation following this Court's decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which held that the First Amendment's Free Exercise Clause does not require the government to advance a compelling justification for taking generally applicable actions that impact individuals' exercise of religion. Congress believed that *Smith* "virtually eliminated the [previous] requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Accordingly, Congress sought "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

Notwithstanding RFRA's references to this Court's case law, this Court explained in *City of Boerne v. Flores*, 521 U.S. 507, 532-35 (1997), that the Act affords much broader protection to religious exercise than does the First Amendment. Congress understood RFRA to apply, among other things, to "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious

beliefs, and [to] zoning regulations and historic preservation laws . . . which, as an incident of their normal operation, have adverse effects on churches and synagogues." *Id.* at 530-31 (citing the legislative history of RFRA, including S. Rep. No. 103-111, at 8 (1993)). Indeed, even though "[c]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest," "[a]ny law is subject to challenge at any time by an individual who alleges a substantial burden on his or her free exercise of religion." *Id.* at 532, 534.

While Congress lacks the constitutional authority to apply such an accommodating conception of religious freedom to state and local governments, *id.* at 535-36, RFRA applies with full force to the federal government. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424 & n.1 (2006).[1]

2. a. For centuries, the religious practices of Native American tribes in the Southwest United States have revolved around a mountain in Arizona known as the San Francisco Peaks. The tribes, as acknowledged by the U.S. Forest Service's regional archaeologist, view the Peaks generally as (a) "a home of spiritual beings; (b) a place where significant

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[1] In response to *Boerne*, Congress partially reinstated RFRA's application to state and local governments in the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.* RLUIPA applies RFRA's compelling interest test to state regulation of land use. 42 U.S.C. § 2000cc(a)(1). It also expands RFRA's definition of "exercise of religion." *Id.* § 2000cc-5(7)(A).

mythological events occurred; (c) a place where spirits of the dead went to be changed into bringers of rain; (d) a personification of gods and goddesses; (e) an area where important societies originated; and (f) as a source of life." Pet. App. 226a (district court's summary of testimony from Dr. Judith Propper, Archeologist for the Southwestern Region of the Forest Service). By way of specific examples:

• The Navajo revere the Peaks as "'the Mother of the Navajo People,' their essence and their home," and "the holiest shrines in the Navajo way of life." Pet. App. 227a. That being so, the mountain "has a unique religious significance on their daily religious lives; it has complete bearing on their daily personal lives and the longevity of existence for these members of the tribe, and has complete connection with daily songs and prayers to their supernatural beings." U.S. FOREST SERVICE, FINAL ENVIRONMENTAL STATEMENT: ARIZONA SNOW BOWL SKI AREA PROPOSAL ("1979 FEIS") 57 (1979).

• "The San Francisco Peaks are the spiritual essence of what Hopis consider the most sacred landscapes in Hopi religion." 1 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS ("2005 FEIS") 3-9 (2005). The Hopi believe that the Peaks are "a point in the physical world that defines the Hopi universe and serve[] as the home of the Kachinas, who bring water, snow, and life to the Hopi people." Pet. App. 238a. These Kachinas are central to the Hopi way of life. "The Hopi calendar connects the months and seasons in the Hopi year, the coming and going of the Kachina

from the Peaks, and the ceremonies performed in the kivas on the Hopi Reservation." Pet. App. 239a.

• The Havasupai view the Peaks as "the origin of the human race; it is the point of their creation." Pet. App. 233a; *see also* 2005 FEIS at 3-13. They "pray to the Peaks and visit them spiritually daily. . . . [T]raditional practitioners of the Havasupai religion deem the entirety of the Peaks as one living being and that portions of the mountain cannot be carved out from the whole." Pet. App. 234a.

• The Hualapai likewise view the Peaks as their point of creation – a place where a young girl survived a flood that covered the whole Earth and conceived life from the mountain's springs. Pet. App. 86a (Fletcher, J., dissenting).

Southwestern tribes also incorporate the Peaks into their daily religious experiences in more tangible ways, collecting natural resources directly from the mountain for their spiritual rituals. The Navajo collect materials from the Peaks to form "medicine bundles," which the Navajo place in almost every household as a symbol of the Peaks and as a means of maintaining a connection with the divine. Pet. App 84a; 2005 FEIS at 3-11. The Navajo consider the medicine bundles to be their "Bible." They are the "centerpiece" of the Navajo's most important ceremony, the Blessingway, which is used to ensure wellbeing and prosperity. Pet. App. 9a.

The Havasupai similarly "have gathered from the Peaks ceremonial items, food, water and fallen trees for fuel for hundreds of years and still use such articles today." Pet. App. 234a. The Hualapai collect sacred plants, herbs and earth from the mountain,

which they incorporate into numerous religious rituals. The mountain also is the only location where the Hualapai can collect water for ceremonial purposes and for healing the sick. The Hopi undertake "annual pilgrimages and collecting expeditions" to the Peaks, 2005 FEIS at 3-10, gathering water and boughs from Douglas fir trees for religious ceremonies. 2005 FEIS at 3-17 to -18.

b. The Arizona Snowbowl ski area is located on a 777-acre tract of federal forest land on the Peaks. It thus operates under a special use permit issued by the U.S. Forest Service. In 2002, the Snowbowl requested permission to expand the ski area and to begin spraying up to 1.5 million gallons a day of treated sewage effluent as artificial snow onto the mountain. Pet. App. 199a, 221a-223a. Over the objections of numerous Native American tribes, the Forest Service approved this proposal. Pet. App. 190a.

The sewage water the Snowbowl proposes to use includes "wastes from toilets, baths, sinks, lavatories, laundries, and other plumbing fixtures in places of human habitation, employment, or recreation." ARIZ. ADMIN. CODE § R18-11-301 (2008). Even after processing, "the resulting effluent has detectable levels of enteric bacteria, viruses, and protozoa, including Cryptosporidium and Giardia." Pet. App. 137a (citing 2005 FEIS at 3-199). It may contain

fecal coliform organisms up to a concentration of 23/100ml. ARIZ. ADMIN. CODE § R18-11-303(B)(2)(b).[2]

3. a. Petitioners are several tribes residing near the Peaks, certain individual tribal members, and a local tribal interest group. Following an unsuccessful administrative appeal, Pet. App. 190a, petitioners sued the Forest Service in the United States District Court for the District of Arizona alleging, *inter alia*, that the Forest Service's approval of the use of recycled sewage violates RFRA. Pet. App. 214a.[3]

The district court conducted an eleven-day bench trial, making multiple findings of fact on the importance of the Peaks to petitioners' spirituality and religious practices. Nonetheless, the district court denied relief, holding that spraying sewage water on the Peaks would not substantially burden petitioners' exercise of religion. Pet. App. 261a. The district court also concluded that the Forest Service's

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[2] Arizona regulations prohibit the use of recycled sewage water for human consumption, "swimming, wind surfing, water skiing, or other full-immersion water activity with a potential for ingestion," and require signs if reclaimed water is used. ARIZ. ADMIN. CODE § R18-9-704(G)-(H) & tbl.1. Regulations further require that a person irrigating with reclaimed sewage prevent the effluent from coming into "'contact with drinking fountains, water coolers, or eating areas.'" Pet. App. 106a (citing ARIZ. ADMIN. CODE § R18-9-704(F)).

[3] Petitioners also brought claims under the National Environmental Policy Act, the National Historic Preservation Act, the National Forest Management Act, the Grand Canyon Enlargement Act, the Endangered Species Act, and a claim for Breach of Trust. *See* Pet. App. 192a-214a. The district court rejected these claims on summary judgment, *id.*, and the Ninth Circuit affirmed. Petitioners do not press these claims here.

decision was the least restrictive means of furthering various compelling interests related to recreational skiing. Pet. App. 247a-249a.

b. A three-judge panel of the Ninth Circuit unanimously reversed. Pet. App. 118a. Following circuit precedent, the panel explained that a substantial burden is one that "prevent[s] the plaintiff from engaging in [religious] conduct or having a religious experience." Pet. App. 146a (quoting *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (internal quotation marks omitted) (alterations in original). The panel held that petitioners demonstrated such a burden in two ways. First, spraying reclaimed sewage water on the mountain would render petitioners "unable to "perform [] particular religious ceremon[ies], because the ceremon[ies] require[] collecting natural resources from the Peaks that would be too contaminated – physically, spiritually, or both – for sacramental use." Pet. App. 139a. Second, spraying sewage water on the mountain would impede "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." Pet. App. 139a-140a.

The panel also held that the Forest Service's authorization failed both prongs of RFRA's compelling interest test. The panel reasoned that "the use of artificial snow at an already functioning commercial ski area in order to expand and to improve its facilities, as well as to extend its ski season in dry years, is [not] a governmental interest 'of the highest order.'" Pet. App. 150 (quoting *Yoder*,

406 U.S. at 215). And the panel determined that the Forest Service had less restrictive means at its disposal for accomplishing any goal of improving safety at the Snowbowl. Pet. App. 152a.

c. At the government's and the Snowbowl's urging, the Ninth Circuit reheard the case en banc and, by divided vote, reinstated the district court's judgment. The en banc majority did not dispute that the authorized reclaimed sewage discharges would "substantially burden" tribal religious practices under circuit precedent or even the phrase's ordinary meaning. But the majority asserted that it had to give the phrase a narrower meaning than the words themselves suggest because the phrase "substantial burden" is "a term of art" that is limited to the types of burdens imposed in *Sherbert* and *Yoder*. Pet. App. 7a. Based on the specific facts of those two cases, the majority overruled circuit precedent and held that "[u]nder RFRA, a 'substantial burden' is imposed *only* when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*)." Pet. App. 20a (emphasis added). The majority added that it believed that giving "substantial burden" its ordinary meaning would create an untenable situation in which "any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens." Pet. App. 7a.

Applying its newly restrictive construction of RFRA, the majority held that spraying sewage water onto the Peaks would not substantially burden

petitioners' exercise of religion. It would not condition a governmental benefit on petitioners' abstaining from any religious exercise or coerce petitioners into ceasing any such exercise; it would merely, in the Ninth Circuit's words, "offen[d]" them and "decrease the spiritual fulfillment [they] get from practicing their religion on the mountain." Pet. App. 6a-7a; *see also* Pet. App. 21a n.12.

Three judges, per an opinion authored by Judge William Fletcher, dissented. In their view, a "substantial burden," tracking the plain and ordinary meaning of the phrase, means "hinder[ing] or oppress[ing] the exercise of religion to a considerable degree." Pet. App. 55a (internal quotations omitted). And nothing in RFRA's text or purpose requires limiting the term to the facts of *Sherbert* and *Yoder*. Pet. App. 55a-56a. Neither case uses that term, much less suggests that the government impermissibly burden religious exercise only when it invokes one of the two particular mechanisms at issue in them. Pet. App. 58a-60a.

Applying its definition of "substantial burden," the dissent found it "self-evident," Pet. App. 97a, that spraying recycled sewage on the Peaks substantially burdens petitioners' exercise of religion. Pet. App. 89a-97a. The dissent rejected the majority's emphasis on physical harm and concrete compulsion, stating that it "ignores the nature of religious belief and exercise, as well as the nature of the inquiry mandated by RFRA. . . . Contrary to what the majority writes, and appears to think, religious exercise invariably, and centrally, involves a 'subjective spiritual experience.'" Pet. App. 75a-76a.

The dissent, following the panel decision, also determined that the Forest Service's decision to allow the Snowbowl to spray sewage water on the Peaks failed both prongs of RFRA's compelling interest test. Pet. App. 98a-100a.

REASONS FOR GRANTING THE WRIT

Congress enacted RFRA "[t]o assure that all Americans are free to follow their faiths free from governmental interference." S. Rep. No. 103-11, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1897. An individual invokes the statute's protections by showing that a governmental action "substantially burdens" religious exercise. Yet during the fifteen years in which RFRA has been on the books, this Court has never construed this central and often determinative provision of the statute. Meanwhile, the federal courts of appeals have adopted divergent rules, culminating with the en banc Ninth Circuit's decision to discard the plain meaning of the phrase as it relates to so-called "subjective" spiritual expression or fulfillment. Pet. App. 6a, 21a n.12.

It is time for this Court to step in. RFRA is too important a statute to allow the lower courts to continue floundering in a state of confusion and disarray. This case presents an ideal vehicle for bringing order to the "substantial burden" requirement: it implicates the current splintering of authority, and it presents the issue in the recurring context of Native Americans' religious exercise that is tied to land. Finally, the Ninth Circuit's holding that RFRA's protections do not apply when the governmental actions desecrate holy sites or otherwise interfere with individuals' "subjective

spiritual experience[s]," Pet. App. 6a, is incorrect. It limits RFRA's coverage in ways that its language does not allow and that frustrate its purpose. Indeed, as Judge William Fletcher observed in dissent, "[i]f Indians' land-based exercise of religion is not protected by RFRA in this case, I cannot imagine a case in which it will be." Pet. App. 113a.

I. The Federal Courts Of Appeals Are Deeply Fractured Over What Constitutes A "Substantial Burden" Under RFRA.

The question of what constitutes a "substantial burden" on religious exercise – the gateway to RFRA's compelling interest analysis – has deeply fractured the courts of appeals. The nine federal circuits to consider this question have split broadly into three groups, with variations existing even within these categories. This inconsistency has been growing for more than a decade and is now considered, openly acknowledged, and entrenched.

A. The Circuits Have Adopted Three Different Approaches To The "Substantial Burden" Concept.

1. The Ninth Circuit's en banc decision adopts the narrowest possible test for identifying when government action substantially burdens religious exercise. Under this test, "a 'substantial burden' is imposed *only when* individuals are forced to choose between following the tenets of their religion and receiving a government benefit . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanction." Pet. App. 20a (emphasis added). In other words, the Ninth Circuit limits the

notion of a substantial burden to the particular mechanisms by which the government impacted religious practices in *Sherbert* and *Yoder.* According to the Ninth Circuit, any other type of burden on religious practices cannot constitute "a 'substantial burden' within the meaning of RFRA," and thus cannot trigger any of the statute's protections. Pet. App. 20a.

The Fourth and D.C. Circuits share the Ninth Circuit's restrictive conception of substantially burdening religious exercise. In *Goodall v. Stafford County School Bd.*, 60 F.3d 168, 172-73 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996), the Fourth Circuit rejected a RFRA claim because the plaintiffs "have neither been compelled to engage in conduct proscribed by their religious beliefs, nor have they been forced to abstain from any action which their religion mandates that they take." Similarly, the D.C. Circuit has held that a substantial burden exists only where a "regulation forces [religious adherents] to engage in conduct that their religion forbids or . . . prevents them from engaging in conduct their religion requires." *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001) (citing *Goodall*, 60 F.3d at 172-73), *cert. denied*, 535 U.S. 986 (2002).

2. The Eighth and Tenth Circuits have adopted a much broader conception of "substantial burden." Under the Tenth Circuit's definition, the government substantially burdens religious exercise when it "significantly inhibit[s] or constrain[s] [religious] conduct or expression[;] . . . meaningfully curtail[s] [an individual's] ability to express adherence to his or her faith; or [] den[ies] [an individual] reasonable opportunities to engage in those activities that are

fundamental to [an individual's] religion." *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (citation omitted), *cert. denied*, 515 U.S. 1166 (1995).[4]

The Eighth Circuit expressly has adopted the Tenth Circuit's test. *See In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996) (citing *Werner*), *vacated on other grounds sub nom. Christians v. Crystal Evangelical Free Church*, 521 U.S. 1114 (1997); *Weir v. Nix*, 114 F.3d 817, 820 (8th Cir. 1997) (same). In doing so, the court explained – in direct contrast to the Ninth Circuit (*see* Pet. App. 6a, 20a) – that it is not "relevant" to the substantial burden inquiry whether individuals "can continue" to engage in the religious practice at issue. *In re Young*, 82 F.3d at 1418. All that matters is whether the governmental action causes religious adherents, by virtue of their subjective beliefs, to "meaningfully curtail[] . . . a religious practice of more than minimal significance." *Id.*

The Eighth Circuit has continued to adhere to this test in a more recent case involving the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, which uses the "same" substantial burden standard as RFRA, *O Centro*, 546 U.S. at 436. *See Murphy v. Missouri*

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[4] A panel of the Tenth Circuit questioned the circuit's *Werner* standard in *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661-62 (10th Cir. 2006). *See also Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996), *cert. denied*, 519 U.S. 821 (1996). But the full court denied rehearing en banc. *Grace*, 451 F.3d at 675. *Werner* thus remains the law of the circuit.

Dep't. of Corrections, 372 F.3d 979, 983, 988 (8th Cir.) (citing *Weir*), *cert. denied*, 543 U.S. 991 (2004). And the Eighth Circuit has reaffirmed its standard in response to express disagreement by the Third Circuit. *Compare Washington v. Klem*, 497 F.3d 272, 280 n.60 (3rd Cir. 2007) (criticizing *Murphy*), *with Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (continuing to apply the *Werner*/*Murphy* standard).

The recent decision in *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), illustrates just how significantly the law in the Eighth and Tenth Circuits diverges from that in the Ninth, Fourth, and D.C. Circuits. In *Comanche Nation*, a Native American tribe challenged the government's plan to build a military training facility directly south of the Medicine Bluffs, a site "held in deep reverence by the Indian Tribes of the area from time immemorial." *Id.* at *6. For these tribes, "the unobstructed view of all four bluffs is central to a spiritual experience of the Bluffs." *Id.* at *7. Explicitly rejecting the government's request to apply the Ninth Circuit's restrictive definition of "substantial burden" in place of the Tenth Circuit's *Werner* test, *id.* at *3 n.5, the *Comanche Nation* court held that RFRA's threshold requirement was satisfied because the governmental action would significantly inhibit the "spiritual experience" of tribal members. *Id.* at *17.[5]

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[5] After the Comanche Nation obtained a preliminary injunction from the district court, the government canceled its plans to build the military training facility. The government

3. Between these two poles, four other circuits have adopted various intermediate standards that are broader than the approach taken by the Ninth, Fourth, and D.C. Circuits but narrower than the approach taken by the Eighth and Tenth Circuits.

The Seventh Circuit holds that a "regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental *responsibility* for rendering religious exercise . . . *effectively impracticable*." *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004) (emphasis added).[6] While this definition is broader than the Ninth Circuit's coercion requirement, the Seventh Circuit also asserted in adopting it that the Eighth and Tenth Circuits' construction of "substantial burden" "cannot be correct." *Id.*

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has filed a motion to dismiss this case as moot. U.S. Mot. to Dismiss, *Comanche Nation v. United States*, at 2, No. CIV-08-849-D (D. Okla. Oct. 30, 2008).

[6] Until 2003, the Seventh Circuit followed the "broad[] definition" of substantial burden that the Tenth Circuit enunciated in *Werner*. *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996) (citing *Werner*, 49 F.3d at 1480), *vacated on other grounds,* 522 U.S. 801 (1997); *see also McNair-Bey v. Bledsoe*, 165 F.3d 32 (7th Cir. 1998); *Arguello v. Duckworth*, 106 F.3d 403 (7th Cir. 1997); *Cubero v. Burton*, 96 F.3d 1450 (7th Cir. 1996). Following the passage of RLUIPA, a divided panel in *Urban Believers* abandoned the *Mack* formulation in favor of the "effectively impracticable" rule. While the precise bounds of this "impracticability" test are unclear, it appears to afford narrower protection to religious practices than the *Mack* standard.

Although neither the Fifth Circuit nor the Third Circuit have defined the substantial burden standard in the RFRA context, both courts have addressed the "same standard," *O Centro*, 546 U.S. at 436, under RLUIPA, and have adopted another intermediate approach. After noting that "the courts that have assayed [the definition of substantial burden] are not in agreement," *Adkins v. Kaspar*, 393 F.3d 559, 568 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005), the Fifth Circuit concluded that:

> government action or regulation creates a 'substantial burden' on a religious exercise if it *truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.* . . . On the opposite end of the spectrum, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Id. at 570 (emphasis added); *accord Longoria v. Dretke*, 507 F.3d 898, 903 (5th Cir. 2007). Unlike the Ninth Circuit, the Fifth Circuit has made "no effort to craft a bright-line rule" and instead "requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden." *Adkins*, 393 F.3d at 571. But unlike the Eighth and Tenth Circuits, the Fifth Circuit requires the government action to create some form of "pressure" – instead of simply inhibiting

religious expression – to constitute a substantial burden.

The Third Circuit recently concluded that "the Fifth Circuit in *Adkins* enunciated the proper standard for what constitutes a substantial burden." *Klem*, 497 F.3d at 280 n.7 (3d Cir. 2007). Under the Third Circuit's test:

> a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available . . . versus abandoning one of the precepts of his religion . . . ; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Id. at 280. While the first prong of the Third Circuit's "disjunctive test," *id.*, incorporates the coercion-based test that the Ninth, Fourth, and D.C. Circuits apply, the Third Circuit determined that limiting itself to this narrow standard would not "accurately reflect the statute's plain text" or "effect its purpose." *Id.* at 280.

Finally, the Eleventh Circuit has formulated a standard that combines elements of the Ninth and Fifth Circuit's tests to create yet another definition of substantial burden. Expressly "declin[ing] to adopt the Seventh Circuit's definition" of the term, Eleventh Circuit law provides that "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to *significant pressure* which *directly coerces* the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of*

Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (emphasis added). It is unclear from this formulation whether "significant pressure" is enough to trigger RFRA or whether an individual must show "direct coercion." But contrary to the Ninth Circuit, the Eleventh Circuit believes that this Court's pre-*Smith* decisions do not offer definitive guidance on the subject because "[t]he Court's articulation of what constitutes a 'substantial burden' has varied over time." *Id.* at 1226.

B. The Conflict Is Entrenched.

Congress enacted RFRA in order to "establish *one standard* for testing claims of Government infringement on religious practices." S. Rep. No. 103-111, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1898 (emphasis added). Yet the federal courts of appeals now concede that they define "substantial burden" differently. And there are no indications that the courts are likely to converge around a uniform test.

For example, upon surveying the approaches taken by other courts, a recent decision by the Third Circuit recognized that "[t]he courts of appeals to have addressed the definition of 'substantial burden' . . . have defined it in several ways." *Klem*, 497 F.3d at 279. Even within the intermediate category of courts described above, the court asserted that "[t]he standards from the Seventh and Eleventh Circuits appear to be at opposite ends of the definitional spectrum." *Id.* at 279 n.5. The Third Circuit then went on to endorse an approach it attributed to the Fifth Circuit, *id.* at 280 & n.7, although the language of the test it adopted varies considerably from Fifth Circuit law. *Compare Klem*, 497 F.3d at 280 (Third Circuit) *with*

Adkins, 393 F.3d at 570 (Fifth Circuit). This type of confused sorting and choosing without any hope of achieving consistency will continue until this Court fleshes out once and for all what RFRA's triggering requirement means.

II. This Case Is An Excellent Vehicle For Elucidating the Substantial Burden Test.

The undisputed facts of this case afford an ideal opportunity to resolve how to define RFRA's "substantial burden" requirement. The issue is the sole ground upon which the Ninth Circuit's decision is based. Furthermore, although the Fourth and D.C. Circuits follow the Ninth Circuit's approach to the "substantial burden" requirement, this case would come out differently in other circuits.

As the *Comanche* case above demonstrates, Petitioners would prevail under the test used in the Eighth and Tenth Circuits because spraying sewage water on their most sacred mountain would "significantly inhibit or constrain" their religious "expression." *Patel*, 515 F.3d at 813 (quoting *Murphy,* 372 F.3d at 988); *accord Werner*, 49 F.3d at 1480. Petitioners would no longer be able to worship the mountain as a spiritually pure giver of life. *See* Pet. App. 90a-91a (Fletcher, J. dissenting). Spraying reclaimed sewage water on the mountain also would significantly hinder religious "conduct." *Patel,* 515 F.3d at 813 (quoting *Murphy*, 372 F.3d at 988). For example, Navajo medicine men "would be unable to perform the fundamental Blessingway ceremony, because 'all [medicine] bundles will be affected'" by the mountain's desecration. Pet. App. 141-42a (panel opinion); *see also* Pet. App. 147a (panel opinion).

Petitioners might also prevail in the Seventh Circuit. Spraying sewage water on their most sacred mountain would render certain religious practices "effectively impracticable." *Urban Believers,* 342 F.3d at 761. Although tribal members would remain free to pray to the mountain and to gather natural resources from it, the mountain's spiritual contamination would drain prayers of meaning and render the mountain's resources effectively useless for ceremonial purposes. Pet. App. 139a (panel opinion).

Petitioners might also prevail in the Third, Fifth, and possibly even Eleventh Circuit. Spraying sewage water on the Peaks could be characterized as "pressur[ing] [them] to significantly modify [their] religious behavior and significantly violate [their] religious beliefs." *Adkins,* 393 F.3d at 570; *see also Midrash Sephardi,* 366 F.3d at 1227 ("a substantial burden can result" in the Eleventh Circuit "from pressure that tends to force adherents to forego religious precepts"). The mountain's desecration would pressure tribal members into altering their worship of the Peaks and forgoing their collecting ceremonial items and medicines from it. *See* Pet. App. 90a (Fletcher, J., dissenting).

III. Now Is The Time For This Court To Provide Guidance Respecting This Important Federal Statute.

For three reasons, this Court should not allow uncertainty over how to construe RFRA to persist in the federal circuits any longer.

1. This particular case alone involves the religious liberties of hundreds of thousands of Native

Americans. There are roughly 300,000 members of the Navajo Nation, making it the country's second most populous tribe. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005 38 (124th ed. 2005). Five additional tribes join the Navajo Nation as petitioners in this case, together representing approximately 100,000 more tribal members. And the Forest Service has acknowledged that the Peaks are sacred to at least seven more formally recognized tribes. Pet. App. 45a.

If the decision below is left standing, these Native American tribes will be irreparably injured. The Peaks "will from this time forward be desecrated and spiritually impure." Pet. App. 112a (Fletcher, J., dissenting). Indeed, the Forest Service has acknowledged that spraying reclaimed sewage water on the mountain, in the tribes' eyes, would "*irretrievabl[y]* impact" the mountain and thereby impose cultural harm that "may in fact be considered *irreversible* in nature." 2005 FEIS at 3-29 to 3-30 (first emphasis added). This is not a case in which further percolation is an acceptable response to legal uncertainty.

2. The Ninth Circuit's newly restrictive definition of "substantial burden" already is affecting litigation and causing friction between federal and tribal governments beyond this case. Just two months after the decision below was announced, the Ninth Circuit considered an Indian tribe's claim that a plan for a hydroelectric project would affect religious ceremonies relating to a waterfall. The court, applying the en banc decision at issue here, deemed it "irrelevant" that the project "interferes with the ability of tribal members to practice religion."

Snoqualmie Indian Tribe v. Federal Energy Regulatory Comm'n, 545 F.3d 1207, 1214 (9th Cir. 2008). Just as this Court often reviews appellate decisions portending profound consequences for states, this Court should at a minimum afford Indian tribes – as sovereigns and "domestic dependent nations," *Oklahoma Tax Comm'n v. Citizen Band Potowotami Indian Tribe*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)) – an opportunity be heard before the Ninth Circuit's new practice of refusing even to consider governmental impacts on tribes' centuries-old religious traditions takes hold.

3. The cacophony of definitions of substantial burden among the various circuits is bound to cause operational difficulties within federal agencies and courts. Entities ranging from the Bureau of Land Management to the Federal Energy Regulatory Commission must regularly consult and implement RFRA. The lack of any uniform conception of its triggering mechanism precludes these agencies from applying any clear and consistent view of the law.

The Ninth Circuit's divergence from the Tenth Circuit's definition of "substantial burden" creates particularly thorny administrability problems. Not only do the Ninth and Tenth Circuits border each other, but the Navajo Nation – which spans parts of Arizona, Utah, and New Mexico – occupies territory in both jurisdictions.[7] It is impractical, if not

[7] Similarly, the Goshute Indian Reservation is located in both the Ninth and Tenth Circuits, straddling the Nevada-Utah border.

infeasible, for some on the Navajo reservation to have greater religious freedom rights than others.

IV. The Ninth Circuit's Definition of "Substantial Burden" Is Unduly Restrictive.

The Ninth Circuit's definition of "substantial burden" means that RFRA applies "only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*)." Pet. App. 20a. This test is at odds with the statute's plain language and congressional purpose.

1. The "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The term "substantial burden," according to dictionary definitions, means a "government action that 'hinders or oppresses' the exercise of religion 'to a considerable degree.' Pet. App. 55a (Fletcher, J., dissenting) (quoting BLACK'S LAW DICTIONARY 208 (8th ed. 2004) and AMERICAN HERITAGE DICTIONARY 1727 (4th ed. 2000)). The concept of "hindering or oppressing religious expression to a considerable degree" tracks the Tenth and Eighth Circuits' definition of "substantial burden" as a governmental action that "significantly inhibit[s] or constrain[s]" religious expression. *Werner*, 49 F.3d at 1480; *Weir*, 114 F.3d at 820.

Understanding a "substantial burden" as something that significantly oppresses or inhibits religious practices comports with this Court's description of RFRA in *City of Boerne v. Flores*, 521 U.S. 507

(1997). In *Boerne*, this Court recognized that Congress intended RFRA to apply, among other things, to "autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, and on zoning regulations and historic preservation laws . . . which, as an incident of their normal operation, have adverse effects on churches and synagogues." *Boerne*, 521 U.S. at 530-31 (citing the legislative history of RFRA, including S. Rep. No. 103-111, at 8 (1993)); *see also id.* at 535 (zoning law at issue imposed "substantial burden"). While these actions do not force anyone to act in any certain way, each of them offends religious adherents and hinders their religious experiences to a considerable degree. Likewise, spraying sewage water onto a religion's most holy site – whether it is the mountain at issue here, Mecca, the Western Wall, or even something less singularly sacred, such as St. Patrick's Cathedral – would quite obviously significantly oppress and inhibit religious expression.

2. The Ninth Circuit majority did not dispute that the governmental action at issue substantially burdens petitioners in the ordinary sense of the phrase. Pet. App. 29a-30a. Nor did it dispute that it was necessary to construe RFRA according to its plain meaning in order to accommodate the religious sensibilities that this Court acknowledged in *Boerne* that Congress intended to protect. But the Ninth Circuit asserted the power to disregard the plain meaning of the statute for two reasons: (a) the phrase "substantial burden" is "a term of art" that is restricted to the specific types of burdens imposed in *Sherbert* and *Yoder*; and (b) applying RFRA to land-based religious practices would give "each citizen" an

"individual veto to prohibit the government action solely because it offends his religious beliefs." Pet. App. 7a.

Neither of these contentions withstands scrutiny.

a. The phrase "substantial burden" is not a term of art with a specialized meaning limited to the types of burdens imposed in *Sherbert* and *Yoder*. Congress explained that RFRA's purpose was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The second part of that statement – the part that refers to the substantial burden concept – makes no reference to *Sherbert* or *Yoder*. Nor would it have made any sense to do so: neither case ever uses the phrase. Thus, while the analyses in *Sherbert* and *Yoder* inform RFRA's "compelling interest" test, neither case establishes (much less limits in terms of its specific facts) what it means to substantially burden religious exercise.

To be sure, this Court occasionally used the term "substantial burden" in later, pre-*Smith* free exercise cases to describe the level of impact on religious exercise necessary to trigger strict scrutiny. *See, e.g.*, *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384-85 (1990) (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)). But even if one assumes that Congress meant for those decisions to supply meaning to RFRA, nothing in them suggests that this Court understood the concept of "substantial burden" any differently from the phrase's ordinary meaning. When referencing the

notion of a "substantial burden," this Court inquired into the ultimate *effect* of governmental action on individuals, not into the precise *type* of governmental action at issue. The ultimate question, as this Court put it, was whether the governmental action "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 141 (1987) (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981)) (emphasis removed).

RFRA takes the same approach: it "does not describe a particular *mechanism* by which religion cannot be burdened. Rather, RFRA prohibits government action with a particular *effect* on religious exercise." Pet. App. 55a (Fletcher, J., dissenting) (emphasis in original). No other approach would make sense. The government acts in myriad ways. And religious belief, contrary to the Ninth Circuit's suggestion (Pet. App. 6a), is *inherently* "subjective." Some religions are offended by autopsies; some are not. Some are intimately tied to certain landmarks; some are not. Therefore, the important question from the standpoint of religious freedom is simply whether governmental action significantly interferes with religious practices, not whether it happens to do so by the same means as a prior Supreme Court case.

Nothing in *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988), on which the Ninth Circuit relied so heavily*, see* Pet. App. 22a-27a, suggests otherwise. In *Lyng*, this Court held that the Forest Service's approval of a logging road through sacred tribal land did not violate the Free Exercise Clause. Although this Court never used the exact phrase "substantial burden," it explained that the

road would "interfere significantly" with tribal members' ability to pursue spiritual fulfillment. *Id.* at 449. Indeed, this Court assumed that building the road would have "devastating effects on traditional Indian practices" and would "virtually destroy the . . . Indians' ability to practice their religion." *Id.* at 451 (quotation marks omitted) (alterations in original). By any reasonable understanding of the English language, therefore, this Court accepted that the governmental action in *Lyng* would substantially burden tribal members' exercise of religion.

The tribal members ultimately lost in *Lyng* because this Court held that the Free Exercise Clause subjects governmental action to strict scrutiny only when the action actually "prohibit[s]" religious expression. *Id.* at 451; *see* U.S. CONST. amend I. The Clause does not "require the government to bring forward a compelling justification for its otherwise lawful actions" when those actions merely "make it *more difficult* to practice certain religions." *Id.* at 450 (emphasis added); *see also Smith*, 494 U.S. at 883 (explaining that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities"). Alternately stated, more than a substantial burden is necessary under the First Amendment for governmental action with an "incidental effect" on religion to trigger strict scrutiny. *Lyng*, 485 U.S. at 450-51.

RFRA, however, sets a softer threshold in cases involving federal governmental action for triggering strict scrutiny. RFRA applies, in this Court's words, whenever "the exercise of religion has been burdened in an incidental way," "without regard to whether [the law] stifl[es] or punish[es] free exercise."

Boerne, 521 U.S. at 534, 535; *see also* 42 U.S.C. 2000bb(b)(1) (strict scrutiny applies to "*all cases* where religious exercise is substantially burdened") (emphasis added). The Ninth Circuit misconstrued and gave improper weight to First Amendment precedent in holding otherwise.

b. The Ninth Circuit was likewise mistaken in asserting that if RFRA's "substantial burden" test were construed to effectuate its plain meaning, "[e]ach citizen would hold an individual veto to prohibit [] government[al] action solely because it offends his religious beliefs." Pet. App. 7a. Satisfying the "substantial burden" requirement merely triggers RFRA's "compelling interest" test. The government satisfies that test whenever it shows that an action that substantially burdens religious exercise "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1.

This Court has made clear that it is entirely "feasib[le]" to employ this "case-by-case" approach to challenged governmental action. *O Centro,* 546 U.S. at 436. Indeed, RFRA expressly contemplates that making an exception to accommodate one group does *not* mean that the government must accommodate all similar claims. *Id.*

It thus comes as no surprise that the government regularly satisfies the compelling interest test in cases involving religious liberty. A recent study found that federal courts subjecting governmental actions to strict scrutiny under RFRA or RLUIPA upheld the actions seventy-two percent of the time. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal*

Courts, 59 VAND. L. REV. 793, 860 (2006). Pre-RFRA case law dictates as much. In *United States v. Lee*, 455 U.S. 252 (1982), for example, this Court held the federal law assigning social security numbers is the least restrictive means of pursuing the "broad public interest in maintaining a sound tax system," and thus that the law is constitutional despite the fact that it "interferes with the free exercise rights of the Amish." *Id.* at 257, 260.

In *Lyng*, this Court similarly remarked that it was "difficult to see" how the Government could have been more accommodating of tribal religious practices in pursuing its interest in timber harvesting. 485 U.S. at 454. The Ninth Circuit made similar observations in *Snoqualmie Indian Tribe*, noting that "FERC considered several alternatives" and chose the option (short of decommissioning the entire hydroelectric project) that appeared to be the least burdensome means of achieving its goals. 545 F.3d at 1211.

Whether or not the governmental actions in *Lyng* and *Snoqualmie Indian Tribe* clearly were narrowly tailored to compelling interests, it *is* clear that the governmental actions in those cases are miles away from the Forest Service's action here. As the Ninth Circuit dissent explained without disagreement from the majority, the government hardly has a compelling interest in "expand[ing] and improv[ing]" an "already functioning commercial ski resort." Pet. App. 99a. This is exactly the kind of situation that RFRA is designed to address.

At any rate, insofar as interpreting RFRA in accordance with its plain meaning leads in some cases to restricting federal governmental actions that

are "valid under *Smith*," *Boerne,* 521 U.S. at 534, the desirability of that reality is one for Congress, not this Court, to assess. Congress has emphasized that it intends RFRA to be read broadly. *See* 42 U.S.C. § 2000bb(a)(5); *see also id.* § 2000cc-3(g) (declaring that RLUIPA "shall be construed in favor of a broad protection of religious exercise."). If Congress ever determines that RFRA's protections unduly burden the federal government, it may curtail those protections. Unless and until that happens, the Ninth Circuit's displeasure with congressional policy gives it no warrant to judicially narrow an intentionally "[s]weeping" statute. *Boerne,* 521 U.S. at 532.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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