

**RIGHT BY PRECEDENT, WRONG BY RFRA: THE
“SUBSTANTIAL BURDEN” INQUIRY IN *OKLEVUEHA
NATIVE AMERICAN CHURCH OF HAWAII, INC. V.
LYNCH*, 828 F.3D 1012 (9TH CIR. 2016)**

Not long ago, the United States Supreme Court reaffirmed that the Religious Freedom Restoration Act (“RFRA”)¹ is a robust protection of religious freedom.² Still, some federal circuits remain devoted to a more restrictive teaching.³ Recently, in *Oklevueha Native American Church of Hawaii, Inc. v. Lynch*,⁴ the Ninth Circuit held that a church and church founder who used peyote, cannabis, and other substances, purportedly “to enhance spiritual awareness or even to occasion direct experience of the divine,” had no claim for an exemption from laws governing cannabis.⁵ According to the court, because the assertedly religious⁶ actors believed that equivalent alternatives to cannabis use exist, they faced no “choice between obedience to their religion and criminal sanction” and thus no substantial burden under RFRA.⁷ In so holding, the *Oklevueha* court did right by Ninth Circuit precedent,⁸ but wrong by RFRA, which presumptively shields a person from *any* considerable hindrance of *any* religious exercise. Until it recognizes as much, the Ninth Circuit will deny claimants legal protection that they deserve.

1. 42 U.S.C. §§ 2000bb–2000bb-4 (2012).

2. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

3. See, e.g., *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 618 (7th Cir. 2015), *vacated*, 136 S. Ct. 2007 (2016); *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1 (D.C. Cir. 2015) (denying rehearing en banc of *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 772 F.3d 229, 235 (D.C. Cir. 2014), *vacated and remanded sub nom. Zubik v. Burwell*, 136 S. Ct. 1557 (2016)).

4. 828 F.3d 1012 (9th Cir. 2016).

5. *Id.* at 1014, 1017.

6. *Cf. id.* at 1015 (noting district court’s finding that prohibited actions were not religious).

7. *Id.* at 1016.

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

I. THE OKLEVUEHA DECISION

The story of *Oklevueha* begins with Michael Rex “Raging Bear” Mooney, who founded and leads the Oklevueha Native American Church of Hawaii, Inc.⁹ Mooney and Oklevueha described their religion as “peyotism” and called peyote “the significant sacrament,”¹⁰ but they “honor[ed] and embrac[ed] all entheogenic naturally occurring substances.”¹¹ In particular, they consumed cannabis “in addition to and in the [sic] substitute for their primary entheogenic sacrament, Peyote.”¹² They claimed that the purpose of this cannabis use was “similar to the purpose of many other intensive religious practices—to enhance spiritual awareness or even to occasion direct experience of the divine.”¹³ Mooney and Oklevueha sought “a declaration of their right to possess and distribute cannabis, and an injunction preventing the Government from prosecuting Church members for their cannabis-related activities.”¹⁴ On the plaintiffs’ theory, they had a right to an exemption under RFRA, the American Indian Religious Freedom Act, the Free Exercise Clause, and the Equal Protection Clause.¹⁵

After dismissing all but the RFRA claim, the district court granted summary judgment in favor of the government.¹⁶ Under RFRA, the plaintiffs must show that their practice is religious and substantially burdened.¹⁷ According to the court, Oklevueha and Mooney had shown neither.¹⁸ That “[p]laintiffs call[ed] their practice religious, call[ed] themselves peyotists, ha[d] included ‘Native American Church’ in their name, . . . [were] led by Mooney, a Native American,” and “declare[d] that they [were] allowed by law to use peyote” was

9. *Oklevueha*, 828 F.3d at 1014.

10. *Id.*

11. *Id.* at 1016.

12. *Id.* at 1014.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1015.

17. 42 U.S.C. § 2000bb-1(a) (2012).

18. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. CIV. 09-00336 SOM, 2013 WL 6892914, at *6 (D. Haw. Dec. 31, 2013).

insufficient, in the court's view, to establish that their cannabis use was an "exercise of religion" under RFRA.¹⁹ Moreover, because nothing in the record indicated that "cannabis [was] unique or essential to the exercise of [the plaintiffs'] alleged religion," the court held that the prohibition of use and distribution of cannabis was a mere inconvenience, not a substantial burden, on plaintiffs who might use other drugs for religious purposes instead.²⁰ Finding neither an exercise of religion nor a substantial burden, the district court denied the plaintiffs' RFRA claim and closed the case.²¹

The Ninth Circuit affirmed. Writing for the panel, Judge O'Scannlain assumed that plaintiffs were engaged in an "exercise of religion" but upheld summary judgment for lack of a "substantial burden."²² Following Ninth Circuit precedent, the court held that government "substantially burdens a person's exercise of religion" only when it forces individuals to "choose between following the tenets of their religion and receiving a governmental benefit" or when it "coerce[s] [them] to act contrary to their religious beliefs by the threat of civil or criminal sanctions."²³ Applying the second test, the court found that Mooney and Oklevueha faced no choice "between obedience to . . . religion and criminal sanction" because they did not attribute any "unique religious function" to cannabis and because they did not claim to lack equivalent alternatives.²⁴ Absent such a dilemma, the plaintiffs were not "coerced to act contrary to their religious beliefs," and thus had no RFRA claim.²⁵

Judge O'Scannlain distinguished the case at hand from *Burwell v. Hobby Lobby*²⁶ and *Holt v. Hobbs*.²⁷ In those cases, the *Oklevueha* court stressed, the government had contradicted a

19. *Id.* at *11.

20. *Id.* at *12.

21. *Id.* at *12–13.

22. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015–16 (9th Cir. 2016).

23. *Id.* at 1016 & n.1 (citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008)).

24. *Id.* at 1016.

25. *Id.* (quoting *Navajo Nation*, 535 F.3d at 1070).

26. 134 S. Ct. 2751 (2014).

27. 135 S. Ct. 853 (2015).

religious requirement. In *Hobby Lobby*, the government had “demand[ed] that the businesses and their owners ‘engage in conduct that seriously violates their religious beliefs’ by requiring them to provide abortifacients or face significant financial penalties.”²⁸ In *Holt*, a “prison’s refusal to allow [an] inmate to grow a beard [had] forced him to choose between ‘engag[ing] in conduct that seriously violates [his] religious beliefs’ or ‘fac[ing] serious disciplinary action.’”²⁹ In the present case, by contrast, the government required abstention from an activity that the plaintiffs’ religion did not require. Thus, compliance with the mandate entailed no serious violation of religious belief.³⁰ In the *Oklevueha* court’s judgment, that distinction is dispositive under RFRA.³¹

II. RFRA’S “SUBSTANTIAL BURDEN”

Not for the first time, however, a past decision distorted human judgment in this case. Here, blame belonged to *Navajo Nation v. U.S. Forest Service*,³² in which a Ninth Circuit en banc panel applied “substantially burden” as a term of art defined

28. *Oklevueha*, 828 F.3d at 1017 (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

29. *Id.* (quoting *Holt*, 135 S. Ct. at 862).

30. *See id.* The court seems right that Mooney and *Oklevueha* had not been forced to act directly contrary to their religious beliefs. If the plaintiffs did not understand cannabis use to be necessary in the practice of their religion, then their non-use need not be an act contrary to their religious belief. The relevant belief is that cannabis use is a fitting or worthy means of relating oneself to the divine. *See id.* at 1014. Non-use of cannabis is compatible with this belief where one’s reason for non-use is to honor one’s obligation to the wellbeing of the political community, as established by its lawful authority. Given that this authority exists over a limited space and time, compliance with its lawful prohibition of cannabis use does not commit oneself to the proposition that cannabis use is never and nowhere a fitting or worthy means of relating to the divine. Accordingly, Mooney and *Oklevueha* may observe the federal government’s prohibition of cannabis use without violating their religious belief that cannabis use is, in general, good as a facilitator of the human-divine relationship.

31. The *Oklevueha* court affirmed the district court’s dismissal of the plaintiffs’ claim under the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2012), holding that it “does not create a cause of action or any judicially enforceable individual rights.” *Id.* at 1017 (quoting *United States v. Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007)).

32. 535 F.3d 1058 (9th Cir. 2008).

by certain Supreme Court decisions.³³ The *Oklevueha* Court followed *Navajo Nation's* interpretation of RFRA, but that interpretation was mistaken. A close reading of RFRA reveals that “substantially burden” bears its ordinary meaning there. The Supreme Court implied as much in *Hobby Lobby* and *Holt* when it distinguished RFRA from Court precedent on religious liberty and relied instead on a plain reading of the text.

A. *The Navajo Nation Interpretation*

In general, under RFRA, “Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”³⁴ According to the *Oklevueha* court, “the meaning of [‘substantially burden’] can be ascertained by looking to ‘a body of Supreme Court case law’ decided before *Employment Division v. Smith*.”³⁵ For this proposition, the court cited *Navajo Nation*,³⁶ in which the en banc panel held that “*Sherbert [v. Verner]*,³⁷ [*Wisconsin v. Yoder*],³⁸ and federal court rulings prior to *Smith* . . . control the ‘substantial burden’ inquiry.”³⁹ In both *Navajo Nation* and *Oklevueha*, the Ninth Circuit justified its claim by reference to RFRA’s statement of findings and purposes,⁴⁰ but only in the former case did the court explain its reasoning, which follows in reconstructed form.

33. See *id.* at 1069.

34. 42 U.S.C. § 2000bb-1(a) (2012).

35. *Oklevueha*, 828 F.3d at 1016 (internal quotation marks omitted). *Employment Division v. Smith*, 494 U.S. 872 (1990), is a landmark case in the constitutional law of religious liberty. “*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). *Smith* “largely repudiated the method of analyzing free-exercise claims that had been used in cases like *Sherbert v. Verner*, 374 U. S. 398 (1963), and *Wisconsin v. Yoder*, 406 U. S. 205 (1972).” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). “Congress responded to *Smith* by enacting RFRA.” *Id.* at 2761.

36. 535 F.3d 1058 (9th Cir. 2008).

37. 374 U.S. 398 (1963).

38. 406 U.S. 205 (1972).

39. *Navajo Nation*, 535 F.3d at 1069 (footnotes added).

40. See *Oklevueha*, 828 F.3d at 1016; *Navajo Nation*, 535 F.3d at 1068–69.

In the *Navajo Nation* court's view, RFRA does not expressly define the meaning of "substantial burden,"⁴¹ and therefore, courts must infer that Congress meant to "incorporate" that term's "established meaning."⁴² The words "substantial burden" had a meaning established "in numerous Supreme Court cases in applying the Free Exercise Clause,"⁴³ all of which "found a substantial burden on the exercise of religion *only* when the burden fell within the *Sherbert/Yoder* framework."⁴⁴

Further, according to *Navajo Nation*, it is clear that Congress knew of this established meaning because it "expressly adopted and restored *Sherbert*, *Yoder*, and other pre-*Smith* cases."⁴⁵ That is, Congress made clear that the pre-*Smith* compelling interest test was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."⁴⁶ Moreover, Congress stated its purpose "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."⁴⁷ Importantly, Congress defined its compelling interest test by reference both to *Sherbert* and to *Yoder*. This would have been unnecessary if Congress meant only to define "the content of what constitutes a compelling interest" because the content was the same in both cases.⁴⁸ Assuming that Congress did not act "redundant[ly] and superfluous[ly]," it must have cited *Sherbert* and *Yoder* to establish their "two separate and distinct substantial burden standards . . . to determine when the compelling interest test is invoked."⁴⁹ In other words, Congress invoked *Sherbert* and *Yoder* to limit application of the compelling interest test to situations similar to those two cases alone.

41. See 535 F.3d at 1074.

42. *Id.* at 1074 (citing *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 94 (1995)).

43. *Id.* at 1074–75.

44. *Id.* at 1075 (emphasis in original).

45. See *id.* at 1069 (punctuation altered).

46. See *id.* (quoting 42 U.S.C. § 2000bb(b)(1) (2012)).

47. See *id.* (quoting 42 U.S.C. § 2000bb(a)(5)).

48. *Id.* at 1074 n.16.

49. *Id.*

B. Critiquing Navajo Nation

Unfortunately, the Ninth Circuit erred in *Navajo Nation*.⁵⁰ It mischaracterized the findings and purposes of RFRA. It overstated the degree to which pre-*Smith* decisions defined “substantial burden.” It gave insufficient attention to text and structure of RFRA’s actual norms, which indicate independence from *Sherbert* and *Yoder*. In short, the Ninth Circuit misinterpreted RFRA.

The *Navajo Nation* court’s account of RFRA’s findings is incomplete. In RFRA, Congress first recognizes “free exercise of religion” as an unalienable right “secured” —not created by— the First Amendment.⁵¹ So, “exercise of religion” indicates a natural category, existing prior to any law, and so too, whether such exercise is “free,” rather than “burden[ed],” for example, by “laws ‘neutral’ toward religion,”⁵² is also a question of nature, not of human law. RFRA continues by stating a general norm of moral-political philosophy, “governments should not substantially burden religious exercise without compelling justification,”⁵³ and reason to fear that this norm might be violated, namely the decision in *Smith*.⁵⁴ Finally, RFRA identifies a legal construct, “the compelling interest test as set forth in prior Federal court rulings,” as a fitting tool for resolving conflicts between religious liberty and other governmental interests.⁵⁵ From its findings alone, RFRA appears to have introduced the “compelling interest test” as an appropriate way to respond to situations where government has, as a matter of natural fact, substantially burdened religious exercise, which is itself a natural category of action.

RFRA’s statement of purposes corresponds with its statement of findings. Congress meant for RFRA “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

50. *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014).

51. *See* 42 U.S.C. § 2000bb(a)(1).

52. *See id.* § 2000bb(a)(2).

53. *Id.* § 2000bb(a)(3).

54. *See id.* § 2000bb(a)(2), (4).

55. *Id.* § 2000bb(a)(5).

religion is substantially burdened.”⁵⁶ In RFRA, then, Congress did not “adopt and restore[] *Sherbert* and *Yoder*, and federal court rulings prior to *Smith*.”⁵⁷ Rather, it adopted and restored a certain “compelling interest test.” Evidently, this test does not itself determine the situations to which it applies, for Congress must state separately and in addition that it means for the “compelling interest test” to apply “in all cases where free exercise of religion is substantially burdened.” Here again, whether free exercise of religion has been substantially burdened seems a question of natural fact, not a component of the legally-constructed “compelling interest test.”

Why, then, did Congress link the “compelling interest test” to both *Sherbert* and *Yoder*? To the *Navajo Nation* court, given that the “compelling interest test” is the same in both cases, it would be “redundant and superfluous” to cite *Yoder* simply to tie it to *Sherbert*’s test.⁵⁸ In general, however, reasonable institutions sometimes use two synonymous terms together to communicate a single meaning,⁵⁹ and here Congress might have had particular reason to do so. *Smith* (the “impetus for RFRA’s passage”)⁶⁰ had distinguished *Yoder* from *Sherbert* as a “hybrid situation,”⁶¹ and thus Congress might have wanted to ensure that its “compelling interest test” applied where religious liberty alone was at stake. Furthermore, Congress might have judged it expedient to connect the case that first articulated the “compelling interest test” with the politically popular Amish defendants in *Yoder*. Because any of these reasons might explain why Congress linked the “compelling interest test” to both *Sherbert* and *Yoder*, no explanation by way of congressional intention to define “substantial burden” exclusively according to the two cases is necessary.

More than that, such an intention is unlikely, not least because *Sherbert* and *Yoder* hardly establish a clear meaning of

56. *Id.* § 2000bb(b)(1); see also *id.* (“to provide a claim or defense to persons whose religious exercise is substantially burdened by government”).

57. *Contra Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008).

58. See *id.* at 1074 n.16.

59. See *id.* (“redundant and superfluous”).

60. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016).

61. 494 U.S. 872, 881–82 (1990).

“substantial burden.” The term “substantial burden” appears in neither case. Rather, the *Sherbert* Court asked “whether the disqualification for benefits impose[d] *any* burden on the free exercise of appellant’s religion” and found it “clear that it [did].”⁶² The Court did not weigh the amount of benefits at stake, suggesting that any denial of governmental benefits would be a “substantial infringement of appellant’s First Amendment right.”⁶³ The *Yoder* Court was less precise about what is necessary to invoke the compelling interest test. In that case, the Court responded to an “objection . . . firmly grounded in . . . central religious concepts,”⁶⁴ “interfer[ence] with . . . freedom . . . to act in accordance with . . . sincere religious belief,”⁶⁵ “interfere[ence] with the practice of a legitimate religious belief,”⁶⁶ a “legitimate claim to the free exercise of religion,”⁶⁷ a claim “rooted in religious belief,”⁶⁸ a “substantial interfere[ence] with . . . religious development,”⁶⁹ and a “severe [and] inescapable” impact on religious practice.⁷⁰ These various terms do not clearly correspond to a single category, much less to the same category denoted by RFRA’s “substantial burden.” If there is any common threshold within *Yoder* that corresponds to *Sherbert*, it is that there must be some burden—any burden—in order to invoke the compelling interest test. *Navajo Nation’s* parapet is quite a construction atop whatever threshold *Sherbert* and *Yoder* established.

Moving beyond findings and purposes, what Congress actually instituted in RFRA are the general and exceptional norms set forth in 24 U.S.C. § 2000bb-1, using terms defined in § 2000bb-2. Those norms contain no textual reference to *Sherbert* and *Yoder*, even though Congress knows how to “link the meaning of a statutory provision to a body of [Supreme Court]

62. 374 U.S. 398, 403 (1963) (emphasis added).

63. *See id.* at 406.

64. 406 U.S. 205, 210 (1972).

65. *Id.* at 213.

66. *Id.* at 214.

67. *Id.* at 215.

68. *Id.*

69. *Id.* at 218.

70. *Id.*

case law.”⁷¹ Instead, they include a definite object of protection: “any exercise of religion, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.”⁷² It would be very odd, if not contradictory, for “substantially burden” to imply another, different definition of the objects of RFRA’s protection (namely those of *Sherbert* and *Yoder*). There is no explicit or implicit place for *Sherbert* and *Yoder* in the norms that Congress instituted in RFRA.

Sherbert and *Yoder* were not nothing in the eyes of the Congress that enacted RFRA, but the *Navajo Nation* court made too much ado about those cases. By all appearances, Congress approved of *Sherbert* and *Yoder*, and it probably wanted to communicate as much to the public. In responding to *Smith*, however, Congress did not simply establish case law in statute; instead, it established an independent set of norms.

C. Getting Right by RFRA

What was the content of those norms, or at least of the substantial burden element of the general RFRA norm? The statute is not impenetrable on this matter. By a natural reading of the text, RFRA prohibits the government from hindering an action to a considerable degree, provided that the action is religious. The Supreme Court has applied such a reading in recent precedent.

To repeat the text of RFRA’s general norm: “Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability.”⁷³ The subject is “government,” defined to “include[] a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.”⁷⁴ This subject shall not do something, namely it “shall not . . . burden” the object.⁷⁵ That is, government shall not “hinder or oppress” the object⁷⁶—at least not “substantially.” Now, “substantial” might

71. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014).

72. 42 U.S.C. § 2000bb-2(4) (2012).

73. *Id.* § 2000bb-1(a).

74. *Id.* § 2000bb-2(1).

75. *Id.* § 2000bb-1(a).

76. *See Burden*, BLACK’S LAW DICTIONARY (10th ed. 2014).

sometimes denote positive evaluation,⁷⁷ but why would RFRA prohibit government from doing something worthily and importantly? It would be more reasonable to read “substantially” as descriptive, not evaluative. So, government shall not hinder, to a “considerable degree,”⁷⁸ “[a] person’s exercise of religion.”⁷⁹ Of course, as a possessive noun, “person’s” denotes a relationship of ownership or belonging between “person” and what follows. That is, “exercise of religion,” defined as “any exercise of religion, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.”⁸⁰ Now, an “exercise” is surely an act, and an act belongs to, or is owned by, any person who chooses or otherwise wills that action.⁸¹ Accordingly, “a person’s exercise of religion” means any exercise of religion chosen or willed by a person, whether or not that exercise of religion is compelled by, or central to, a system of religious belief.

The distinction between a particular exercise of religion and a whole system of religious belief is important for the substantial burden test. Some scholars would judge the substantiality of a burden according to the centrality of a belief burdened.⁸² If “exercise of religion” referred to a system of religious belief, such a reading would seem reasonable. In RFRA, however, an “exercise of religion” is not a religious system itself, but rather follows from (“compelled by”), or constitutes part of (“central to”), a religious system.⁸³ To ask whether government substan-

77. *Substantial*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“important, essential, and material; of real worth and importance”).

78. *See id.*; *see also* Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1086 (9th Cir. 2008) (Fletcher, J., dissenting) (quoting AMERICAN HERITAGE DICTIONARY (4th ed. 2000) (defining “substantial” as “[c]onsiderable in importance, value, degree, amount, or extent” (alteration in original))).

79. 42 U.S.C. § 2000bb-1(a).

80. *Id.* § 2000bb-2(4).

81. *See generally* 2 JOHN FINNIS, *Human Acts*, in COLLECTED ESSAYS: INTENTION & IDENTITY 133 (2011).

82. *See, e.g.*, Marc O. DeGirolami, *Substantial Burdens Imply Central Beliefs*, 2016 U. ILL. L. REV. 19, 21 (“[A] burden on religious exercise is substantial if it interferes in a significant, important, or central way with the claimant’s religious system.”).

83. Professor DeGirolami recognizes that an exercise of religion is not a system, but nevertheless, he holds that the substantiality of a burden should be measured according to impact on the system. *Id.* (“[T]he substantiality of the burden is to be measured against the ‘system of religious belief’ of which the religious exercise at issue forms a part.”). But why should a burden on a part be judged, not by its

tially burdens an exercise of religion, then, is to ask whether it hinders a *particular* religious⁸⁴ action to a considerable degree.

What constitutes a considerable degree?⁸⁵ Except where law prohibits the act in question, judging the substantiality of a bur-

hindrance of that part, but rather by its effect on the whole? Furthermore, one acknowledged implication of DeGirolami's interpretation is that evaluating the substantiality of a burden requires "some understanding of the place . . . or comparative importance of the exercise at issue within a religious system." *Id.* RLUIPA, however, (and by implication RFRA) includes a "prohibition on inquiries into centrality." *Id.* DeGirolami admits as much, and he does not resolve the resulting discord between his interpretation and the interpreted text. *See id.*

84. Notably, although RFRA provides (defeasible) protection of *any* exercise of religion, it shields only an exercise that is *religious*. As a distinct reason for action, religion is harmony with whatever is the transcendent source of universal order. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 89–90, 371–403, 477–79 (2d ed. 2011); *see also* GERMAIN GRISEZ, *GOD? A PHILOSOPHICAL PREFACE TO FAITH* (2d ed. 2005). *Contra* RONALD DWORKIN, *RELIGION WITHOUT GOD?* 10–43 (2013); Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 135 (2002). An otherwise non-religious act, such as giving money to the poor, becomes religious if and only if one intends by that act to live in harmony with the universe's transcendent source. If such harmony is a purpose of one's action, then that action is religious, no matter how insignificant, optional, or even, in the final analysis, unreasonable. *See* ROBERT P. GEORGE, *MAKING MEN MORAL* 222 (1993). A person with free will may or may not choose to act toward such a purpose; indeed, even a person choosing to act conscientiously, that is, to do what he judges he really must do here and now, *see* FINNIS, *supra*, at 125–26, 457, may or may not have the further purpose of honoring or relating to the divine. Accordingly, the *Oklevueha* district court correctly distinguished meaningful action from religious action. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder*, No. CIV. 09-00336 SOM, 2013 WL 6892914, at *11 (D. Haw. Dec. 31, 2013) (distinguishing "a strongly held belief in the importance or benefits of marijuana" from a "belief [that] is religious in nature"). Meaningful action and religious actions are two distinct, if overlapping, categories, and whatever protections there are or should be for all meaningful action, RFRA protects only those actions chosen in order to live in harmony with the divine.

How far government should defer to the claims of persons that the purpose of their action is religious is a separate question, *see, e.g., Yellowbear v. Lampert*, 741 F.3d 48, 53–54 (10th Cir. 2014), that the Tenth Circuit has well addressed, *see id.* at 54 ("When inquiring into a claimant's *sincerity*, then, our task is instead a more modest one, limited to asking whether the claimant is (in essence) seeking to perpetrate a fraud on the court—whether he actually holds the beliefs he claims to hold—a comparatively familiar task for secular courts that are regularly called on to make credibility assessments—and an important task, too, for ensuring the integrity of any judicial proceeding.").

85. Professor Gedicks wonders whether "religiously burdensome laws with insignificant penalties even exist," and suggests that they are rare. Frederick Mark Gedicks, "*Substantial*" *Burdens: How Courts May (and Why They Must) Judge Bur-*

den is fact-specific. Because the action that government must not burden is a particular “person’s,”⁸⁶ it would seem that, not merely the magnitude of a distinctive prohibition, but rather its weight on a reasonable person facing the circumstances in question, is central. By design, however, prohibitions weigh equally on all—and considerably so.⁸⁷ Beyond prohibitions, taxes,⁸⁸ fees, and regulations can all make it considerably harder to perform a given action,⁸⁹ and thus each or all might constitute a substantial burden on a particular person’s particular (religious) exercise.⁹⁰

dens on Religion under RFRA, 85 GEO. WASH. L. REV. 94, 113–14 (2017). An example of such laws might be traffic laws, which may burden travel to a house of worship, but barring extraordinary circumstances, the burden is insubstantial. Otherwise cognizable but insignificant burdens would be more prevalent if RFRA applied to state governments, as it was originally intended to. Still, similar laws in federal territories, as well as any other minor transportation impediment arising out of the implementation of federal law, *see* 42 U.S.C. § 2000bb-3 (“This chapter applies to all Federal law, and the implementation of that law . . .”), are likely to create insubstantial burdens.

86. 42 U.S.C. § 2000bb-1.

87. For government to deny that legal prohibitions are considerable hindrances to a reasonable person’s performance of prohibited actions, it would have to hold that the law fails to constitute even a considerable reason not to do something. Professor Helfand’s illuminating discussion of “substantial burden” seems to make a minor consequentialist deviation on the question of prohibitions, looking past the substantial burden of a prohibition in itself to the substantiality of the penalties. *See* Michael A. Helfand, *The Substantial Burden Puzzle*, 2016 U. ILL. L. REV. ONLINE 1; *see also* Gedicks, *supra* note 85, at 113 n.94 (“A violation that labels one a convicted criminal, creates a criminal record, and triggers collateral penalties would seem to be per se ‘substantial’ even if the violation is otherwise considered minor and the monetary fine trivial.”).

88. Whether a compelling governmental interest justifies a burdensome tax is a separate question. *See* *United States v. Lee*, 455 U.S. 252, 257 (1982).

89. If the government burdens one’s action by “secular costs,” it thereby burdens one’s religious exercise. Precisely how much “religious cost” a burden on any particular religious exercise imposes on one’s relationship with God is no part of the RFRA inquiry. *See id.* § 2000bb-2(4). *Contra* Gedicks, *supra* note 85, at 114 (“If a claimant suffers insubstantial religious costs in obeying a purportedly burdensome law, then his or her religious exercise has not been ‘substantially’ burdened, regardless of the substantiality of the secular cost of violating the law.”). It may be that Professor Gedicks has misinterpreted “religious exercise” as a reference to a *system* of religious belief.

90. If so, the next question is also particular: is the “compelling interest test . . . satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened”? *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting

Whether conditional taxes considerably hindered Hobby Lobby and Conestoga Wood Specialties in performing the action of running their business for a religious purpose was the decisive question in *Burwell v. Hobby Lobby Stores, Inc.*⁹¹ The Supreme Court refused to interpret “exercise of religion” according to the premise that “RFRA did no more than codify this Court’s pre-*Smith* Free Exercise Clause precedents.”⁹² Relying on a plain reading, it held that plaintiffs were engaged in an “exercise of religion” in running their businesses, including in providing health insurance to employees, because the plaintiffs intended to act in relationship with God.⁹³ The *Hobby Lobby* Court treated the Affordable Care Act’s conditional taxes as the central burden in the case,⁹⁴ and it deemed that burden “surely substantial,”⁹⁵ appealing to the common understanding of the term.

Again in *Holt v. Hobbs*,⁹⁶ the Supreme Court applied the ordinary meaning of statutory terms, finding a substantial burden under RFRA’s sister statute, the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).⁹⁷ The Court identified the religious exercise as “the growing of a beard” and held that the prison’s grooming policy “substantially burden[ed] [the plaintiff’s] religious exercise.”⁹⁸ That is, requiring prisoners to

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31 (2006)).

91. 134 S. Ct. 2751 (2014).

92. *Id.* at 2772–73.

93. *See id.* at 2764–66 (noting the mission of Conestoga Wood Specialties to operate according to “Christian principles” and to avoid “sin[ning] against God” and Hobby Lobby’s purpose to “[h]onor the Lord in all [it] [does]”).

94. *See id.* at 2775–76. The Court found that the government had imposed a substantial burden, in the form of significant financial penalties, on the plaintiffs’ exercise of religion, running their business in accordance with religious principles that exclude provision of abortifacients. *But see* Oklevueha Native Am. Church of Haw., Inc. v. Lynch, 828 F.3d 1012, 1017 (9th Cir. 2016) (“[*Hobby Lobby*] concluded that the government had imposed a substantial burden by demanding the businesses and their owners ‘engage in conduct that seriously violates their religious beliefs’ by requiring them to provide abortifacients or face significant financial penalties.”).

95. *Hobby Lobby*, 134 S. Ct. at 2776.

96. 135 S. Ct. 853 (2015).

97. 42 U.S.C. § 2000cc (2012).

98. 135 S. Ct. at 862.

shave their beards, on pain of “serious disciplinary action,”⁹⁹ made it considerably more difficult for the plaintiff to grow a beard. The Court emphasized the harmfulness of this substantial burden by noting that a serious violation of religious belief was at stake,¹⁰⁰ but this was not to suggest that RLUIPA protected only exercises of religion the non-performance of which resulted in a serious violation of religious belief.¹⁰¹ As in *Hobby Lobby*, there was no reference to Supreme Court precedent, and judging whether there was a “substantial burden” was an exercise of common reason.¹⁰²

The substantial burden test that Congress established in RFRA and the norm that the Supreme Court applied in *Hobby Lobby* and *Holt* are the same. The Supreme Court applied “exercise of religion” before “substantially burdens,” following a different order of inquiry than the statutory text suggests.¹⁰³ Nevertheless, the content of the substantial burden test was the same: determine whether the government has made it considerably harder for RFRA claimants to perform the action in question.

III. CONCLUSION

If the *Oklevueha* court had applied the ordinary meaning of RFRA’s terms, as the Supreme Court did in *Hobby Lobby* and *Holt*, then it would have found that Mooney and Oklevueha faced a substantial burden. The particular action in question was cannabis use. Justifiably or not, the government did not leave Mooney and Oklevueha free to use cannabis. Instead, Uncle Sam prohibited Mooney’s and Oklevueha’s cannabis use altogether, on pain of criminal sanction strong enough to make

99. *Id.*

100. *Id.* (quoting *Hobby Lobby*, 134 S. Ct. at 2775).

101. *See id.* (“RLUIPA’s ‘substantial burden’ inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a half-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise.”); *id.* (“RLUIPA . . . applies to an exercise of religion regardless of whether it is ‘compelled.’” (citing 42 U.S.C. § 2000cc-5(7)(A))).

102. *See id.* at 862–63.

103. Compare 42 U.S.C. § 2000bb-1 (“Government shall not substantially burden a person’s exercise of religion . . .”), with *Hobby Lobby*, 134 S. Ct. at 2772–73, 2776, and *Holt*, 135 S. Ct. at 862.

a Holmesian bad man sweat.¹⁰⁴ If they were to remain law-abiding citizens, their cannabis use was impossible. Surely, they faced a substantial burden.

Of course, the substantial burden test is only one element of RFRA. The *Oklevueha* court assumed but did not decide that Mooney and Oklevueha used cannabis for religious reasons.¹⁰⁵ It did not consider at all whether government action against Mooney and Oklevueha would further a compelling governmental purpose by the least restrictive means.¹⁰⁶ Depending on the answers to these further questions, the Ninth Circuit's error may have been harmless in this case. Nevertheless, the court did err, and until the Ninth Circuit gets right by RFRA, harm will pend, if not recur.

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104. See Controlled Substances Act, Pub. L. 91-513, 84 Stat. 1242, 1260-70 (1970) (codified at 21 U.S.C. § 841 (2012)).

105. *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1015-16 (9th Cir. 2016).

106. Cf. 42 U.S.C. § 2000bb-1 ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

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