

Several sites on a mountain within federal public lands are regarded as sacred to a group of people that has gathered there for years to perform religious ceremonies. The United States Forest Service recently issued a permit to a private developer to construct a ski facility in an area that includes the sites that are sacred to the group.

The group has filed suit in federal district court against the Forest Service to force cancellation of the permit, claiming solely that the permit violates its First Amendment right to the free exercise of religion. The Forest Service has conceded that the group's religious beliefs are sincere and that construction of the ski facility will adversely affect the group's religious practices.

What must the group show to prevail on its First Amendment claim?

- A. Construction of the ski facility will have a discriminatory impact on the group's religious practices in relation to the practices of other religious groups.
- B. The burden on the group's religious practices that will be imposed by construction of the ski facility outweighs the government's interest in allowing the facility.
- C. The government can serve its legitimate interest in allowing the ski facility by issuing a permit that is less burdensome on the group's religious practices.
- D. The permit issued by the government is aimed at suppressing the religious practices of the group.

Explanation:

First Amendment free exercise of religion

Burden	Applicability	Level of scrutiny
Incidental	Generally applicable to all persons	Rational basis scrutiny: <ul style="list-style-type: none">• burden rationally related to• legitimate government interest
Direct	Intentionally targets religious belief/practice	Strict scrutiny: <ul style="list-style-type: none">• burden necessary to achieve• compelling government interest

The United States Forest Service issued a permit for the construction of a ski facility on land sacred to a religious group. As a result, the group filed suit to cancel the permit since the construction would adversely affect its **First Amendment right** to perform religious ceremonies. The group's likelihood of success depends on whether that burden is either:

- **incidental** – triggering **rational basis scrutiny**, where the **challenger will fail** unless the challenger shows that the burden has no rational relation to any legitimate government interest *or*
- **direct** – triggering **strict scrutiny**, where the **challenger will prevail** unless the government meets the nearly impossible task of showing that the burden is necessary to achieve a compelling government interest.

Therefore, to have the greatest chance of prevailing on its First Amendment claim, the group must show that the government-issued permit is aimed at suppressing (ie, directly burdens) the group's religious practices.

(Choice A) The ski facility's **discriminatory impact** on the group's religious practices allows the group to bring a free exercise claim. But that claim will likely fail unless the group can show that the discriminatory impact was *intentional*, which would create a presumption of invalidity that would be difficult for the government to rebut.

(Choice B) A free exercise challenge will be analyzed under rational basis or strict scrutiny, neither of which weighs the burden on religion against the government's interest.

(Choice C) To prevail, the group must show that the permit directly burdens its religious practices. Once it does so, the burden shifts to the *government* to show that its compelling (not merely legitimate) interest in the ski facility cannot be achieved by less burdensome means.

Educational objective:

Incidental burdens on the free exercise of religion are typically upheld under rational basis review. But direct burdens are almost always invalidated under strict scrutiny.

References

- *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (establishing the direct/incidental burden test).
- *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to a city ordinance that intentionally targeted a religious practice).

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