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PERSPECTIVE

Wending from *Hobby* Lobby to bald eagles

By Norman Carlin and Anthony Cavender

In June, the U.S. Supreme Court struck down Department of Health and Human Services regulations under the Affordable Care Act — commonly known as Obamacare — mandating coverage for contraception in employee health insurance plans in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014). The decision was widely discussed, involving the contentious issues of contraception, religion and Obamacare, and applying Religious Freedom Restoration Act (RFRA) to a private, for-profit, albeit closely held, corporation.

Also controversial was the court's stringent reading of the RFRA requirement that regulations burdening the exercise of religion must utilize the "least restrictive means" of furthering a compelling government interest. Reasoning that the least-restrictive-means standard is "exceptionally demanding," the court held that, if regulations already provide an exception for one group — in *Hobby Lobby*, for religious nonprofit organizations which are not required to provide contraception coverage — the government bears a higher burden in showing that the standard is met.

Two months later, in *McAllen Grace Brethren Church v. Salazar* (Aug. 20, 2014), the 5th U.S. Circuit Court of Appeals applied *Hobby Lobby* to a very different religious issue: the possession of eagle feathers used in Native American ceremonies.

The Bald and Golden Eagle Protection Act prohibits taking, possessing, buying or selling, exporting or importing bald or golden eagles or their parts — including feathers — without a permit from the Department of Interior, U.S. Fish & Wildlife Service. Similarly, the Migratory Bird Treaty Act prohibits harming, selling or possessing migratory birds — including eagles — or their parts, without a permit from the service. While these statutes date back to 1940 and 1916, respectively, the use of eagle feathers in Native American rituals goes back centuries.

Acknowledging the religious significance of eagles, in 1962 Congress amended the Eagle Protection Act to authorize permits "for the religious purposes of Indian tribes." The service adopted implementing regulations in 1966, providing for issuance of permits to "individual Indians who are authentic, bona fide practitioners of such religion." In 1975, the Secretary of the Interior issued a policy statement limiting permits to members of federally recognized Indian tribes, and 1999 amendments expressly required applicants to demonstrate their membership; see 50 C.F.R. Section 22.22(a)(5).

Thus, the eagle protection regulations contain a religious exemption, but Native Americans who do not belong to federally recognized tribes do not qualify, even if their religious practices require eagle feathers. This was the problem posed in *McAllen Grace Brethren Church*. Robert Soto, a member of the Lipan Apache tribe and pastor of the McAllen Grace Brethren Church, sought the return of eagle feathers confiscated by the service at a religious ceremony. His request was denied on the grounds that the Lipan Apache tribe is not federally recognized and this litigation ensued. The district court granted summary judgment against the plaintiffs, but the 5th Circuit reversed.

Under the RFRA, regulations that substantially burden the exercise of religion must further a compelling government interest and utilize the least restrictive means of doing so. The sincerity of Soto's religious beliefs and the substantial burden from denying him access to eagle feathers were uncontested. Agreeing with other courts that eagle protection is a compelling government interest (while rejecting the argument that the Department of Interior's special responsibilities to federally recognized tribes also constitute a compelling interest), the 5th Circuit turned to the least-restrictive-means test and found that its heavy burden had not been met. Citing *Hobby Lobby*, the court

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A bald eagle prepares for flight on top of a power pole on Isabella Lake, in Lake Isabella, Jan. 14, 2007.

noted that the "very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less restrictive alternatives could exist."

In this case, the regulations include exceptions not only for religious use by federally recognized tribes, but also for other purposes including scientific study and falconry. The government argued that less restrictive means — allowing members of non-federally recognized tribes to possess eagle feathers — would undermine efforts against poaching and force law enforcement personnel to become "religious police" verifying the genealogy of those who assert the right to possess feathers. Such speculations, the court found, failed to meet the high standard set by *Hobby Lobby*. The regulations may have effectively limited illegal trade in eagle feathers, because fewer individuals can legally possess them — or, conversely, the black market might exist because religious practitioners cannot otherwise obtain them. Difficulties for law enforcement, the court concluded, do not justify diminishing individual rights, especially if a less restrictive alternative could achieve the same goals without harming the rights of sincere religious adherents in non-federally recognized tribes.

The 5th Circuit therefore remanded to the trial court for further proceedings, allowing both plaintiffs and defendant to further develop the record. In a concurring opinion, Judge Edith Jones indicated that the case would be very close if, on remand, the government does demonstrate that the supply of eagle feathers for religious ceremonies is limited, and that increasing access to feathers for sacred purposes will endanger the eagles and the interests of federally recognized tribes. Presumably the government will attempt to make that demonstration in this and future cases.

Meanwhile, the service probably need not fear being besieged with demands for feathers by professed eagle worshippers who are not Native Americans, and cannot claim the tradition of religious practices shared by federally recognized and non-recognized tribes. Nevertheless, the court's comment that "sincerity is an inherent issue in a RFRA case" suggests that "religious policing" may pose a greater problem than this ruling acknowledges.

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