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Kathryn E. Kovacs
Rutgers School of Law

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HOBBY LOBBY AND THE ZERO-SUM GAME

KATHRYN E. KOVACS*

ABSTRACT

*In a zero-sum game, one person's gain is another person's loss. Some claims under the Religious Freedom Restoration Act present such zero-sum circumstances in that easing the claimant's religious burden increases someone else's burden. This Commentary explores the effect of *Burwell v. Hobby Lobby Stores* on such zero-sum claims using a paradigmatic example: RFRA claims challenging the Bald and Golden Eagle Protection Act. This inquiry reveals that Hobby Lobby did not open the door for cases involving true zero-sum games, including those under the Eagle Act and some under the anti-discrimination laws. In such cases, granting the requested religious accommodation merely shifts the claimant's burden onto a third party. RFRA provides for easing burdens, not transferring them to others. Hence, even after Hobby Lobby, such zero-sum claims should fail.*

I. INTRODUCTION

No sooner did the Supreme Court decide in *Burwell v. Hobby Lobby Stores, Inc.*, that the contraception coverage requirement in the Affordable Care Act violates the Religious Freedom Restoration Act (RFRA)¹ than the debate about the breadth of the Court's decision commenced.² There is no doubt, however, that *Hobby Lobby* opened the door wider for RFRA claims.³ The Court broadened the availability of relief under RFRA by

* Associate Professor, Rutgers School of Law.

1. 134 S. Ct. 2751, 2759 (2014).

2. See, e.g., Joey Fishkin, *Hobby Lobby and the Politics of Recognition*, BALKINIZATION (June 30, 2014), <http://balkin.blogspot.com/2014/06/hobby-lobby-and-politics-of-recognition.html>, archived at <http://perma.cc/TR5N-BFRL>; Ryan Grim, *8 Other Laws That Could Be Ignored Now That Christians Get to Pick and Choose*, HUFFINGTON POST (June 30, 2014, 3:42 AM), http://www.huffingtonpost.com/2014/06/30/religious-companies-opt-out-of-laws_n_5544582.html?ncid=txtlnkus_aolp00000592, archived at <http://perma.cc/6EBV-6X56>; Amy Howe, *Court Rules in Favor of for-Profit Corporations, but How Broadly? In Plain English*, SCOTUSBLOG (June 30, 2014, 5:17 PM), <http://www.scotusblog.com/2014/06/court-rules-in-favor-of-for-profit-corporations-but-how-broadly-in-plain-english/>, archived at <http://perma.cc/KLK4-9CWG>; Brian Leiter, *Shorter Hobby Lobby*, BRIAN LEITER'S LAW SCHOOL REPORTS (June 30, 2014), <http://leiterlawschool.typepad.com/leiter/2014/06/shorter-hobby-lobby.html>, archived at <http://perma.cc/7REL-YQLR>.

3. Fishkin, *supra* note 2 ("The Court has opened a door here—one that the Court in *Employment Division v. Smith* wisely concluded was better left closed."). But see Eugene Volokh, *Prof. Michael McConnell (Stanford) on the Hobby Lobby Arguments*, WASH. POST (Mar. 27, 2014),

extending its coverage to a for-profit entity,⁴ deeming the religious burden “substantial” despite breaks in the causal chain between the regulatory requirement and the plaintiff’s religious beliefs,⁵ insisting that the government’s compelling interests relate specifically to the case at hand,⁶ and suggesting that the government might be required to pay for less restrictive means of furthering its compelling interests.⁷ *Hobby Lobby* will be seen as an invitation to potential RFRA claimants.

Some of the RFRA claims that will undoubtedly follow *Hobby Lobby* will involve zero-sum games. Game theorists define a zero-sum game as “an endeavor in which the net result is zero. For every gain by one side, there is a counterbalancing loss by the other.”⁸ Some RFRA claims present zero-sum games in that alleviating one person’s religious burden necessarily increases someone else’s burden. Accommodating an employer’s religious preference for hiring certain kinds of people, for example, necessarily deprives other people of jobs.

How will *Hobby Lobby* affect RFRA cases involving zero-sum games? I explore this question using a paradigmatic example of a zero-sum RFRA claim: the Bald and Golden Eagle Protection Act (The “Eagle Act”). The Eagle Act criminalizes the taking and possession of eagles without a permit.⁹ Because eagles are required for some Native American religious ceremonies, Congress carved out an exemption from the Eagle Act for federally recognized Indian tribes.¹⁰ Such tribal preferences are upheld as political classifications based on the federal government’s unique government-to-government relationship with recognized tribes.¹¹ But eagles are a limited resource; there simply are not enough to satisfy

<http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/27/prof-michael-mcconnell-stanford-on-the-hobby-lobby-arguments/>, archived at <http://perma.cc/DLR4-YRTU> (“[I]f, as Justice Kagan suggested, a stringent interpretation of RFRA would bring religious objectors ‘out of the woodwork,’ we would have seen that after the Court’s stringent, unanimous ruling in *O Centro* eight years ago. But we haven’t.”).

4. *Hobby Lobby*, 134 S. Ct. at 2775.

5. *Id.* at 2777–79.

6. *Id.* at 2780.

7. *Id.* at 2781.

8. Martin E.P. Seligman et al., *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33, 46 (2001); see also Winton E. Williams, *Resolving the Creditor’s Dilemma: An Elementary Game-Theoretic Analysis of the Causes and Cures of Counterproductive Practices in the Collection of Consumer Debt*, 48 FLA. L. REV. 607, 632 (1996) (“In the zero-sum game, the winnings of one player are the losses of another, so that the algebraic sum of the payoffs to each player always equals zero.”).

9. 16 U.S.C. § 668(a) (2012).

10. Kathryn E. Kovacs, *Eagles, Indian Tribes, and the Free Exercise of Religion*, 47 LOY. L.A. L. REV. 53, 63 (2013).

11. *Id.* at 105–11.

the religious demand.¹² Thus, accommodating one person's religious exercise by permitting him to possess an eagle necessarily burdens someone else's religious exercise by denying her access to that eagle. People who are not members of recognized tribes, but who need eagles for their religious practices, have challenged the Eagle Act under RFRA. Those claims have not succeeded, in part because alleviating such a claimant's religious burden actually shifts the religious burden from the claimant to a tribal member.¹³ It's quintessentially a zero-sum game.

The Eagle Act example highlights a critical limitation of *Hobby Lobby*: it did not involve zero-sum circumstances. The government and law professors appearing as *amicus curiae* argued in *Hobby Lobby* that exempting the company from the contraception coverage requirement would impermissibly shift a burden onto the company's female employees.¹⁴ They saw the case as a zero-sum game. The majority of the Court disagreed, holding that, if Hobby Lobby's religious burden were alleviated, the burden on its female employees would be "precisely zero."¹⁵ According to the Court, *Hobby Lobby* was not a zero-sum game. Thus, *Hobby Lobby* did not open the door for RFRA challenges posing zero-sum games.

That is certainly true of RFRA claims under the Eagle Act in which religion weighs on both sides of the scale. It should be true in any case that presents true zero-sum circumstances, even if the balance is between religious and secular burdens. If the government is involved in allocating a limited resource such that the religious burden eased is equal to the secular burden imposed, granting the requested religious accommodation simply shifts the burden to a third party. RFRA provides for easing religious burdens, not shifting those burdens onto others. Thus, even after *Hobby Lobby*, all such claims should fail.

II. HOBBY LOBBY

In *Employment Division v. Smith*, the Supreme Court departed from its prior strict-scrutiny test, holding that neutral laws of general applicability need not be supported by a compelling governmental interest to survive

12. *Id.* at 72, 74–76.

13. The Fifth Circuit recently relied on *Hobby Lobby* in holding that the United States did not meet its burden of proving that the Eagle Act satisfies RFRA, but that decision was interlocutory. *McAllen Grace Brethren Church v. Salazar*, No. 13-40326, 2014 WL 4099141 (5th Cir. Aug. 20, 2014) (remanding for further proceedings).

14. See *infra* text accompanying notes 27–33.

15. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

challenge under the Free Exercise Clause.¹⁶ Thus, the State of Oregon did not violate the First Amendment when it denied unemployment benefits to members of the Native American Church who were fired for engaging in an act that the State considered a crime: using peyote in a religious ceremony.¹⁷ Congress responded to that decision by enacting RFRA.¹⁸ RFRA reestablished, as a matter of statutory law, the pre-*Smith* Free Exercise Clause test, which Congress believed provided a “workable test for striking sensible balances between religious liberty and competing prior governmental interests.”¹⁹ RFRA provides that the government may not “substantially burden” a person’s free exercise of religion, “even if the burden results from a rule of general applicability,” except if the government proves “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.”²⁰ RFRA applies to all other federal laws unless Congress expressly provides otherwise.²¹

The plaintiffs in *Hobby Lobby* challenged a regulation issued under the Patient Protection and Affordable Care Act of 2010 that requires employers to provide health insurance coverage for contraception.²² *Hobby Lobby* asserted that providing coverage for four particular kinds of contraception would violate the tenets of its owners’ religion.²³ Its RFRA claim succeeded in the Tenth Circuit.²⁴ A similar claim by *Conestoga Wood Specialties* failed in the Third Circuit,²⁵ and the Supreme Court granted certiorari in both cases.²⁶

The government argued, among other things, that granting *Hobby Lobby* an exemption from the contraception coverage requirement would

16. 494 U.S. 872, 884–89 (1990).

17. *Id.* at 877–82.

18. *See* 42 U.S.C. § 2000bb(a)(4)–(5), (b)(1).

19. 42 U.S.C. § 2000bb(a)(5), (b)(1) (2012). The Supreme Court has interpreted RFRA, however, as providing “even broader protection for religious liberty than was available” pre-*Smith*. *Hobby Lobby*, 134 S. Ct. at 2761 n.3. Not only does RFRA require government actions that substantially burden religion to further a compelling government interest, but it also requires the government to further its interests using the least restrictive means. *Id.*

20. 42 U.S.C. § 2000bb-1.

21. 42 U.S.C. § 2000bb-3(a)–(b).

22. *Hobby Lobby*, 134 S. Ct. at 2762–63.

23. *Id.* at 2766.

24. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013).

25. *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dept. of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013).

26. *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (Mem.); *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013) (Mem.).

harm its female employees by denying them the right to receive such services without cost.²⁷ RFRA, the government said, “cannot properly be interpreted to require relief that would impose burdens on private third parties.”²⁸ Indeed, the government suggested in a footnote that a religious accommodation might impose such a burden on third parties that it violates the Establishment Clause.²⁹

A group of law professors filed an amicus brief elaborating on that argument. “[S]hifting the costs of accommodating a religion from those who practice it to . . . identifiable and discrete third parties in the for-profit workplace,” they explained, violates the Establishment Clause.³⁰ Thus, when the Court upheld RFRA’s progeny, the Religious Land Use and Institutionalized Persons Act, in *Cutter v. Wilkinson*, it remarked that “courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.”³¹ Some religious accommodations impose no burdens on third parties; others distribute the burdens “among a large and indeterminate class.”³² Exempting Hobby Lobby from the contraception coverage requirement, in contrast, would “impose significant burdens on an identifiable group of persons,” namely Hobby Lobby’s female employees and their dependents who do not share the company’s religious beliefs, “by requiring them to pay for or forgo contraceptives that Hobby Lobby’s health plan would otherwise cover.”³³

Hobby Lobby won. Justice Alito wrote for a five-member majority. The Court first held that closely held, for-profit corporations are “persons” who may bring a claim under RFRA, at least where they are “owned and controlled by members of a single family.”³⁴ Second, the Court held that the regulation at issue substantially burdened Hobby Lobby’s exercise of religion because it forced the company to choose either to violate its religious beliefs or face severe economic consequences.³⁵ Third, the Court assumed that the regulation at issue furthers a compelling governmental

27. Brief for the Petitioners at 38, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 10, 2014).

28. *Id.* at 41.

29. *Id.* at 39 n.9 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708–11 (1985)); see also Reply Brief for the Petitioners at 3, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Mar. 12, 2014).

30. Brief for Amici Curiae Church-State Scholars Frederick Mark Gedicks et al. at 3–4, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 27, 2014).

31. 544 U.S. 709, 720 (2005) (citing *Caldor*, 472 U.S. 703).

32. Brief for Amici Curiae Church-State Scholars, *supra* note 30, at 20.

33. *Id.* at 22.

34. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774–75 (2014).

35. *Id.* at 2775–76.

interest in “guaranteeing cost-free access to the four challenged contraceptive methods.”³⁶ Fourth and finally, the Court held that, since the Department of Health and Human Services (HHS) had already established an accommodation for religious nonprofits that object to the contraception coverage requirement, that accommodation had to be made available to Hobby Lobby as well.³⁷

The Court rejected the third-party burden argument, concluding that exempting Hobby Lobby from the contraception coverage requirement would impose no burden at all on its female employees and their dependents who do not share the company’s religious beliefs. Hobby Lobby’s female employees could obtain contraception coverage without cost through the process HHS had already set up for nonprofit religious organizations.³⁸

III. THE ZERO-SUM GAME

A. Burden-Shifting Claims

In a zero-sum game, “everything gained by one player must have been lost by the other.”³⁹ Some claims for religious accommodations set up zero-sum games; they concern “not only the relationship between the state and the objector, but also a variety of conflicts and relationships between

36. *Id.* at 2780.

37. *Id.* at 2782–83. The least restrictive means analysis in *Hobby Lobby* is similar to the Court’s analysis in *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006). The Court there held that, because the government had long exempted Native American religious use of peyote from the strictures of the Controlled Substances Act, it had to extend the same accommodation to members of an Amazonian religious sect who use a hallucinogenic tea for religious purposes. *Id.* at 423. See also *Hobby Lobby*, 134 S. Ct. at 2786 (Kennedy, J., concurring) (“RFRA is inconsistent with the insistence of an agency such as HHS on distinguishing between different religious believers—burdening one while accommodating the other—when it may treat both equally by offering both of them the same accommodation.”).

38. *Hobby Lobby*, 134 S. Ct. at 2782–83; see also *id.* at 2781 n.37 (“[O]ur decision in these cases need not result in any detrimental effect on any third party.”). Several days later, the Court issued an injunction pending appeal in *Wheaton College’s* RFRA suit challenging the form HHS required it to submit to participate in the exemption process for nonprofit religious institutions. The College believed that submitting the form would violate its religious beliefs. When it enjoined HHS from requiring *Wheaton College* to file that form, the majority emphasized that its order would not prevent the college’s employees and students from obtaining cost-free contraception. *Wheaton College v. Burwell*, No. 13A1284 (U.S. July 3, 2014) (order on application for injunction). Thus, like *Hobby Lobby*, the majority did not see *Wheaton College* as presenting a zero-sum game.

39. David Crump, *Game Theory, Legislation, and the Multiple Meanings of Equality*, 38 HARV. J. ON LEGIS. 331, 361 (2001).

the religious objectors and other rights holders.”⁴⁰ For example, giving employees an absolute right not to work on their Sabbath imposes costs on employers and other employees.⁴¹ A sales tax exemption for religious newspapers and magazines increases the sales tax burden on secular newspapers and magazines.⁴² Exempting an employer from paying Social Security taxes for its employees disadvantages those employees.⁴³ Relieving religious nonprofits from the obligation to pay their employees minimum wage when working in for-profit activities “would give it a competitive advantage over secular businesses competing in the same markets, and ‘exert a general downward pressure on wages’ paid to employees in such businesses.”⁴⁴ In each of these pre-RFRA First Amendment cases, the Supreme Court found the burden-shifting unacceptable.⁴⁵

As Michael McConnell points out, however, there is nothing wrong in principle with shifting burdens.⁴⁶ “[T]he government shifts economic burdens all the time,” and “[r]eligious accommodations often impose burdens on third parties.”⁴⁷ To animate Establishment Clause concerns, the burden a religious accommodation imposes on third parties must be “substantial” or “significant.”⁴⁸ It is not sufficient for a preexisting burden to be marginally increased. For example, when religious pacifists were

40. Kara Loewentheil, *When Free Exercise Is a Burden: Protecting “Third Parties” in Religious Accommodation Law*, 62 *DRAKE L. REV.* 433, 437 (2014).

41. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985).

42. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15, 18 n.8 (1989).

43. *United States v. Lee*, 455 U.S. 252, 261 (1982).

44. Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 *HARV. C.R.-C.L. L. REV.* 343, 359 (2014) (discussing and quoting *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 302 (1985)).

45. See Gedicks, *supra* note 44, at 357–59 (referring to burden-shifting as a “negative externality”).

46. Volokh, *supra* note 3.

47. *Id.*; Loewentheil, *supra* note 40, at 465 (“[T]here are always effects on other parties. The question is which effects we should take into consideration.”); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *GEO. WASH. L. REV.* 685, 704 (1992) (“[L]egislatures adjust the benefits and burdens of economic life among the citizens” and “should have as much latitude to protect the exercise of religion that [they have] to protect other important values in life.”).

48. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985); see also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (“[I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.”); cf. McConnell, *supra* note 47, at 703 (suggesting that proper analysis focuses not on the “absolute magnitude” of the burden, but rather the proportionality between the burden alleviated and the burden imposed).

exempted from the draft, the risk that secular pacifists would be drafted increased, but that was acceptable to the Supreme Court.⁴⁹ Similarly, if the third-party burden is “widely distributed among a large and indeterminate class,” such as when churches are exempted from property taxes thus increasing the tax burden on other property owners, that may be permissible.⁵⁰

B. *The Eagle Act*

RFRA claims under the Eagle Act provide a paradigmatic example of the zero-sum game. The Eagle Act prohibits, among other things, the taking, possession, and sale of eagles and eagle parts, except as permitted by the Secretary of the Interior.⁵¹ So long as the Secretary finds it compatible with the preservation of the species, she may permit the taking, possession, and transportation of eagles for “scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or . . . for the protection of wildlife or of agricultural or other interests in any particular locality.”⁵²

The original Eagle Act protected only bald eagles. When Congress extended the Act to protect the golden eagle in 1962, it recognized that eagles hold religious significance for many Indian tribes.⁵³ Accordingly, it authorized the Secretary to issue permits “for the religious purposes of Indian tribes.”⁵⁴ The Department of the Interior interprets that provision as applying to federally recognized Indian tribes, consistent with the federal

49. Gedicks, *supra* note 44, at 363–64 (internal citations omitted).

50. Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51, 56 (2014). Some cases also present a “baseline” problem. Hobby Lobby argued that exempting it from the contraception coverage requirement would not cause its female employees any legally cognizable harm, because “nobody is lawfully entitled to a ‘benefit’ from a regulatory scheme that violates RFRA.” Brief for Respondents at 54, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Feb. 10, 2014). A group of Constitutional Law professors filed an amicus brief elaborating on that argument: “Where a religious accommodation would allegedly burden third party rights *that were created by the statute that burdens religious exercise*, we might ask which came first – the burden on religion, or the rights that the accommodation allegedly burdens?” Brief of Constitutional Law Scholars at 18, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 28, 2014); *see also* Brief of National Association of Evangelicals at 7, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Jan. 27, 2014); Volokh, *supra* note 3; Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, THE VOLOKH CONSPIRACY (Dec. 4, 2013, 5:11 PM), <http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/>, archived at <http://perma.cc/PQ33-9TC6>. Eagle Act cases present no such baseline problem.

51. 16 U.S.C. § 668(a).

52. 16 U.S.C. § 668a.

53. H.R. REP. NO. 87-1450, at 2 (1962); S. REP. NO. 87-1986, at 3–4 (1962).

54. 16 U.S.C. § 668a.

government's unique government-to-government relationship with and fiduciary obligations to those tribes,⁵⁵ and the courts have upheld the "Indian tribes" exception as a permissible political classification.⁵⁶ The courts have recognized that the Eagle Act requires the government to balance its compelling interest in protecting eagles against its compelling interest in fulfilling the needs of recognized tribes and have held that it does so using the means that are least restrictive of religion.⁵⁷

Under the "Indian tribes" exception, the Secretary issues permits authorizing members of federally recognized Indian tribes to take eagles.⁵⁸ She also issues tribal members permits to possess eagles. Because the government has a policy of not prosecuting tribal members for possession of eagles or eagle parts, however, they actually don't need possession permits. Applications for such permits are treated as requests to obtain eagles or eagle parts from the National Eagle Repository, which receives dead eagles from around the country and distributes them to tribal members "on a first-come, first-served basis."⁵⁹

The religious demand for eagles is significant. Some people who practice Native American religions consider the eagle a messenger to the spirit world. Religious traditions involve either taking a live eagle or simply gathering molted feathers, then using the feathers and other parts for religious ceremonies like the annual Sun Dance, graduations, weddings, and funerals.⁶⁰ The number of tribal members is growing, and the proportion of tribal members who practice Native American religions may be increasing as well.⁶¹ In addition, millions of other people claim some Native American ancestry.⁶² There's no way to know how many of those people practice Native American religions, but the Tenth Circuit thought it safe to assume that the proportion is "non-trivial."⁶³ Add to that the unknown number of people who have no Native American ancestry, but practice Native American religions, and the roughly one million people who practice Santeria, which also requires eagles for religious rituals.⁶⁴

55. Kovacs, *supra* note 10, at 107–8.

56. *E.g.*, *Rupert v. U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34–35 (1st Cir. 1992).

57. *Id.*; *United States v. Wilgus*, 638 F.3d 1274, 1295 (10th Cir. 2011).

58. Kovacs, *supra* note 10, at 88–89.

59. *Id.* at 66.

60. *Id.* at 73–74.

61. *Id.* at 76–77.

62. *Id.* at 77.

63. *United States v. Wilgus*, 638 F.3d 1274, 1292 (10th Cir. 2011).

64. Kovacs, *supra* note 10, at 77.

There are not enough eagles to satisfy that significant religious demand. Although the Fish and Wildlife Service removed the bald eagle from the list of threatened species in 2007, bald eagle populations are still at risk, and golden eagles, which are in higher demand, may be even more vulnerable.⁶⁵ The Repository has a significant wait list that continues to grow, and the black market is thriving.⁶⁶ “[T]he imbalance between the supply and demand for eagles leaves the species vulnerable and tribal religious needs unsatisfied.”⁶⁷

These unique circumstances led the Ninth Circuit to reason that the RFRA claim of a person who practices a Native American religion, but is not a member of a federally recognized Indian tribe, would necessarily fail because it would shift the religious burden, not lessen it. Leonard Antoine was caught selling and bartering dead eagles he had brought from Canada into the United States.⁶⁸ The federal government charged him with violating the Eagle Act.⁶⁹ He moved to dismiss the charges, claiming that the Eagle Act’s prohibitions on the possession and sale of eagles substantially burdened his exercise of religion in violation of RFRA.⁷⁰ The district court denied that motion, and the court of appeals affirmed his conviction. Judge Kozinski, writing for the court, reasoned that, since the religious demand for eagles exceeds the supply, “every permit issued to a nonmember would be one fewer issued to a member. . . . [T]he burden on religion is inescapable; the only question is whom to burden and how much.”⁷¹ In other words, it’s a zero-sum game. Antoine did not seek to alleviate the overall burden on religion; rather, he sought to shift his religious burden to someone else. Thus, the Ninth Circuit held that he did not present “a viable RFRA claim” because “an alternative can’t fairly be called ‘less restrictive’ if it places additional burdens on other believers.”⁷²

The Ninth Circuit stood its ground after the Supreme Court decided in *Gonzales v. O Centro Espírita Beneficente União do Vegetal* that RFRA required the government to exempt from the Controlled Substances Act an

65. *Id.* at 75.

66. *Id.* at 76–79.

67. *Id.* at 79.

68. *United States v. Antoine*, 318 F.3d 919, 920 (9th Cir. 2003).

69. *Id.*

70. *Id.*

71. *Id.* at 923. Among the Fifth Circuit’s mistakes in its recent decision in *McAllen Grace Brethren Church v. Salazar* was thinking it necessary for the government to show that the National Eagle Repository would be “overwhelmed” if non-tribal members were allowed to obtain feathers. No. 13-40326, 2014 WL 4099141 at *10 (Aug. 20, 2014). Every single feather given to a non-member is one fewer feather given to a tribal member.

72. *Antoine*, 318 F.3d at 923.

Amazonian religious sect's importation of a hallucinogenic tea.⁷³ Like *Antoine*, *United States v. Vasquez-Ramos* concerned Eagle Act convictions of individuals who are not members of federally recognized Indian tribes, but practice Native American religions.⁷⁴ The defendants argued that *O Centro* undermined the holding in *Antoine*, but the court of appeals disagreed. Granting the religious exemption from the Controlled Substances Act in *O Centro*, the court reasoned, "did not have any effect on other people's religion."⁷⁵ It did not present a zero-sum game. In Eagle Act cases, in contrast, alleviating the defendants' burden would merely shift that burden to tribal members. Such a "redistribution of burdens," the court held, "does not raise a valid RFRA claim."⁷⁶

That reasoning holds true after *Hobby Lobby*. Whether one agrees or not, the Supreme Court held that exempting Hobby Lobby from the contraception coverage requirement would not burden the company's female employees because an alternative was available that would ease the company's religious burden yet still provide its employees with free contraception coverage. Like *O Centro*, *Hobby Lobby* did not concern a zero-sum game. RFRA claims in the Eagle Act context, however, necessarily set up a zero-sum game, because alleviating one person's religious burden shifts an equal religious burden to someone else. The requested accommodation, therefore, is not "less restrictive" of religion within the meaning of RFRA.⁷⁷

73. 546 U.S. 418 (2006).

74. 531 F.3d 987 (9th Cir. 2008).

75. *Id.* at 992.

76. *Id.*

77. The Department of the Interior's recent decision to grant Eagle Act take permits for wind farms doesn't change the calculus. Power-generation facilities have long caused eagle mortality. The Department of the Interior is trying to shift its response to this problem from ad hoc prosecutions to a uniform permitting system and recently granted the first Eagle Act take permit for a wind farm in Northern California. Phil Taylor, *Obama Admin Approves First Eagle-Kill Permit for Wind Farm*, E&E NEWS (June 26, 2014), http://www.windaction.org/posts/40713-obama-admin-approves-first-eagle-kill-permit-for-wind-farm#.U-ppY_ldU50, archived at <http://perma.cc/CUN7-KHDA>. Granting such permits does not undermine what the courts have held is a compelling interest in protecting eagles, but rather "confirms . . . the strength of the government's interest in the eagle." *United States v. Friday*, 525 F.3d 938, 956, 959 (10th Cir. 2008). Nor do these permits indicate that the government has a means of pursuing its compelling interests that is less restrictive of religion. The Department of the Interior can only grant as many take permits as the eagle population can accommodate biologically. 16 U.S.C. § 668a. If it gives a power company the right to take an eagle, that eagle should be turned in to the Repository and distributed to a tribal member. 74 Fed. Reg. 46,850, 46,853 (Sept. 11, 2009). If instead the Department of the Interior has to give a non-member the right to take an eagle, that eagle won't go to a tribal member. It's a zero-sum game. RFRA requires the government to ease religious burdens, not transfer them from person to person.

The Eagle Act provides a stark example of a zero-sum game, because what is shifted from the claimant to the third party is the religious burden itself. Religion weighs on both sides of the scale, and there's a one-to-one relationship between the burden lifted from the claimant and the burden imposed on the third party. In other contexts, easing one person's religious burden increases someone else's secular burden. In many of those cases, one might dispute whether that third-party burden is sufficiently weighty to defeat the requested religious accommodation.⁷⁸ Some of those cases, however, present true zero-sum circumstances, like the Eagle Act, in which the government is involved in allocating a limited resource such that the religious burden eased is equal to the secular burden imposed. Granting the requested religious accommodation simply shifts the burden to a third party.

In the anti-discrimination context, for example, religious exemptions can present a clear zero-sum game in situations where either the religious employer has to hire the covered individual or it's exempted from that requirement, and someone else gets the job. As in the Eagle Act cases, in that type of anti-discrimination RFRA case, granting the requested religious accommodation shifts a burden from the claimant to a third party. Whether the third party's burden is a religious burden or a secular burden is of no consequence, because the Establishment Clause prohibits the government from drawing that distinction.⁷⁹ Thus, the Ninth Circuit's reasoning applies in any case presenting a true zero-sum game, and such RFRA claims should fail, even after *Hobby Lobby*.⁸⁰

IV. CONCLUSION

Hobby Lobby opened the courthouse door wider for RFRA claims. There will be more claims for religious exemptions from laws of general applicability, and consequently more cases requiring the courts to decide when alleviating one person's religious burden imposes too much of a burden on others. In the Eagle Act context, however, the courts do not

78. If a less restrictive alternative were not available, *Hobby Lobby* would fall into this category.

79. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) ("the 'First Amendment mandates governmental neutrality . . . between religion and nonreligion'" (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

80. *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), should not compel a different result. The Court there held that Title VII's exemption for religious organizations does not violate the Establishment Clause, even though it imposes burdens on third parties. *Id.* at 337 n.15. In other words, the government was permitted to alleviate the religious burden Title VII imposed. The Court in *Amos* did not hold that RFRA permits a claimant to shift his religious burden onto third parties. *See Gedicks, supra* note 44, at 368–71.

have to perform that balancing act. Congress carved out an exemption from the Eagle Act for federally recognized Indian tribes. The courts have upheld that exemption as a political accommodation for groups with which the United States has a government-to-government relationship and to which it owes certain fiduciary duties. Providing an exemption to people who are not members of federally recognized Indian tribes would not simply alleviate their religious burden; instead, it would shift their religious burden to tribal members. RFRA requires the government to pursue its compelling interests using the means that are least restrictive of religious exercise; it does not require the government to shift those burdens from person to person. Thus, even after *Hobby Lobby*, challenges to the Eagle Act under RFRA should continue to fail. Likewise, in other sorts of RFRA cases that present true zero-sum games, such as requests for religious exemptions from some provisions of the anti-discrimination laws, the Ninth Circuit's Eagle Act jurisprudence provides the correct answer: the RFRA claim should fail. RFRA does not entitle claimants to shift their burdens onto others.