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# Hope for the Hopi in a Post-*Hobby Lobby* World: The Supreme Court's Recent Interpretation of RFRA and Strengthening Native Americans' Religious-Based Land Rights Claims

SARA MOVAHED<sup>†</sup>

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Among the diverse array of Native American traditions, a unifying thread is the recognition that humans and our natural world are interdependent.<sup>1</sup> This recognition extends beyond a mere superficial connection. It embodies a rich, deeply held belief that the physical and spiritual realms can unite in “certain natural phenomena or locations.”<sup>2</sup> The fact that physical locations are of “vital significance” to Native Americans has often evaded the American legal system,<sup>3</sup> which operates on an understanding that “land, Mother Earth, can be divided into

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1. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 160 (1996) (quoting Christopher Vecsey, *Envision Ourselves Darkly, Imagine Ourselves Richly*, in *The American Indian And The Problem Of History* 120, 125 (Calvin Martin ed., 1987)) (“One of the most significant ways in which Indian tribal cultures are different from much of the larger American society can be seen in the ways that tribal cultures understand their relationships with the natural world . . . Indian stories espouse a ‘trifold declaration of dependence on the surrounding world: of the individual on the community, of the community on nature, and of nature on the ultimately powerful world of spirit.’”).

2. Sarah B. Gordon, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447, 1449 (1985).

3. *Id.* at 1451 (“The American legal system, however, has generally failed to recognize that physical locations within its own jurisdiction may be of vital significance to site-specific

parcels that can be owned by individual human beings.”<sup>4</sup> This integral tension between these sovereign entities<sup>5</sup> was at times settled by sword, but more often by treaty.<sup>6</sup> Through these treaties “a tribe conveyed land to the United States in exchange for promises by the federal government to recognize and protect the tribe’s right to continue to live as a separate people and to exercise self-government within the territory that it reserved to itself.”<sup>7</sup> Only against this historical backdrop can the implications of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* on Native American religious freedom claims be fully appreciated.<sup>8</sup>

In *Hobby Lobby*, the Supreme Court found the contraceptive health-insurance mandate of the Affordable Care Act of 2010 (“ACA”)<sup>9</sup> violated several closely held corporations’ religious exercise privileges under the Religious Freedom Restoration Act of 1993 (“RFRA”).<sup>10</sup> While the religious right and anti-abortion groups considered this a victory, and advocates for reproductive freedom and broad health care coverage deemed it a major set-back, Native American advocates were left uncertain of *Hobby Lobby*’s implications on their free exercise of religion claims.<sup>11</sup> Native Americans, in the context of RFRA and other federal laws, have long been advocating for land-use

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religions. It does not acknowledge that a sense of spiritual immediacy and of awe for places that have witnessed momentous spiritual events, similar to that felt by many Jews and Christians only in the ‘Holy Land,’ is felt by Native Americans for sites that may seem unremarkable or of mere natural beauty to non-Indian observers.”)

4. Suagee, *supra* note 1, at 154.

5. Russel Lawrence Barsh, *Felix S. Cohen’s Handbook of Federal Indian Law, 1982 Edition*, 57 WASH. L. REV. 799, 800 (1982) (“Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*”(quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941))).

6. Suagee, *supra* note 1, at 151–52.

7. *Id.*

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

9. Patient Protection and Affordable Care Act of 2010, 124 Stat. 119(2010).

10. Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* (1993) [hereinafter RFRA].

11. Winter King, *Could the Hobby Lobby Ruling Have Saved the San Francisco Peaks*, INDIAN COUNTRY TODAY (July 15, 2014), <http://indiancountrytodaymedianetwork.com/2014/07/15/could-hobby-lobby-ruling-have-saved-san-francisco-peaks>; *see also* Rob Capriccioso, *Supreme Court Used Indian Law to Prevent Birth Control for Women*, INDIAN COUNTRY TODAY (July 2, 2014), <http://indiancountrytodaymedianetwork.com/2014/07/02/supreme-court-used-indian-law-prevent-birth-control-women-155618?page=0%2C1>.

rights,<sup>12</sup> protections of their indigenous lands, and the use of animal effects in traditional ceremonies.<sup>13</sup>

This piece responds to a case study by Professor Justin B. Richland. In the context of two recent conflicts, Richland illustrates the tension between Hopi peoples' efforts to fulfill their religious obligations on the one hand, and U.S. federal laws and policies on the other.<sup>14</sup> What will the Supreme Court's upholding of *Hobby Lobby's* religious freedom mean for the ongoing litigation discussed in Richland's case study, and might prior litigation have been decided differently? Will Native Americans' suits challenging the legality of the federal government's infringements on their sacred grounds be more likely to succeed in a post-*Hobby Lobby* world, or does the Court's decision in *Hobby Lobby* cover a realm beyond (or beneath) indigenous peoples' rights? This piece argues *Hobby Lobby* has substantially altered the Court's understanding of RFRA claims, a recognition that has already resulted in more successful religious freedom suits by Native Americans.

#### I. HOBBY LOBBY HAS ENTIRELY RESTRUCTURED THE FREE EXERCISE FRAMEWORK

In *Hobby Lobby*, the Court held that federal regulations requiring "closely held" corporations to provide health insurance for certain contraceptives violate the Religious Freedom Restoration Act of 1993 ("RFRA"),<sup>15</sup> if providing such contraceptives contradict the "sincerely held" religious beliefs of the corporation.<sup>16</sup>

*Hobby Lobby* is the most recent step in a long conversation on religious freedom between the judicial, legislative, and executive branches. In 1990, the Supreme Court decided *Employment Div., Dep't of Human Res. of Oregon v. Smith*.<sup>17</sup> In *Employment Division*, the Court denied the First Amendment claims of two Native American men who were fired from their jobs and denied unemployment compensation because they admitted using peyote for religious purposes at

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

13. Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. COLO. L. REV. 989 (2005) (describing the various challenges to federal eagle protection acts brought by Native Americans, who use bald and golden eagle feathers for ceremonial purposes).

14. See J.B. Richland, *Paths in the Wilderness?: The Politics and Practices of Hopi Religious Freedom in Hopitutskwa*, 31 MD. J. INT' L. 217 (2017).

15. Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb et seq. (1993).

16. *Hobby Lobby*, 134 S. Ct. at 2759.

17. 494 U.S. 872 (1990) (superseded by statute).

a ceremony of the Native American Church.<sup>18</sup> In his opinion for the Court, Justice Scalia wrote that the strict scrutiny test need not be applied to all cases in which the free exercise of religion is implicated, as long as the law curtailing religious freedom is of general applicability.<sup>19</sup> The Court found strict scrutiny inapposite, despite the longstanding tradition of applying this heightened scrutiny standard to fundamental interests, and hesitated to deem infringements on the exercise of religion presumptively invalid.<sup>20</sup>

Three years later, RFRA was enacted as a response to the Supreme Court's decision in *Employment Division*,<sup>21</sup> as a means of providing "very broad protection for religious liberty"<sup>22</sup> and overruling the reduced protections for religious freedom caused by *Employment Division*.<sup>23</sup> RFRA prohibits the federal government from imposing a "substantial[] burden" on an individual's exercise of religion, "even if the burden results from a rule of general applicability,"<sup>24</sup> unless the government is able to demonstrate the burden furthers a "compelling governmental interest" and the burden is the "least restrictive means" of furthering that interest.<sup>25</sup>

In 1997, five years after Congress enacted RFRA, the Court in *City of Boerne v. Flores*<sup>26</sup> found RFRA unconstitutional with respect to states (but still intact against the federal government) because it was an overreach of Congress' authority to enforce the First Amendment through the Fourteenth Amendment.<sup>27</sup> In response, Congress enacted

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18. *Employment Division*, 494 U.S. at 874.

19. *See generally id.*

20. *Employment Division*, 494 U.S. at 889.

21. 494 U.S. 872 (1990).

22. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014).

23. *See e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 859–60 (2015); *see also Hobby Lobby*, 134 S. Ct. at 2760.

24. The specification that the standard applies even to rules of "general applicability" is a response to the Court's decision in *Employment Division* exempting rules of general applicability from strict scrutiny. *See Employment Division*, 494 U.S. at 879.

25. RFRA, *supra* note 10.

26. 521 U.S. 507 (1997).

27. RFRA, was applied against the states under Section 5 of the Fourteenth Amendment, interpreting the court's First Amendment doctrine. Because it was enacted at a time when the Court's limited *Employment Division* interpretation of free exercise was operational, RFRA's "stringent test" was deemed in excess of the *Employment Division* understanding of the First Amendment. *See Hobby Lobby*, 134 S. Ct. at 2761–62; *see also City of Boerne v. Flores*, 521 U.S. 507, 534–35 (1997) ("Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”),<sup>28</sup> not relying on its powers under the Fourteenth Amendment, instead relying on its Commerce and Spending Clause powers.<sup>29</sup> RLUIPA became the state equivalent of RFRA, but applied to a narrower set of government actions: state and local regulations of inmates and land use.<sup>30</sup> Most importantly, RLUIPA amended RFRA, omitting its reference to the First Amendment, in effect transforming RFRA into a pure statutory protection, arguably in excess of the Constitutional floor set by the First Amendment.<sup>31</sup>

The Petitioner corporations in *Hobby Lobby* argued that their statutory right to exercise their religion freely, as enshrined under RFRA, was substantially burdened by the ACA mandate to provide health-insurance coverage for certain contraceptives.<sup>32</sup> In determining whether closely held corporations were required to comply with the ACA’s contraceptive insurance requirement, *Hobby Lobby* affirmed RFRA’s twin safeguards. Namely, if a governmental regulation substantially burdens an individual’s exercise of religion, the individual (or closely held corporation) is exempted from compliance unless the regulation: “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>33</sup>

To discern how the Court’s *Hobby Lobby* decision might affect suits stemming from the tension between Native Americans’ religious freedom and federal regulations, the three components of the RFRA protection—when a government (A) substantially burdens the exercise of religion, it must have a (B) compelling interest; and (C) act in the least restrictive means possible—are illustrated through the facts of the *Hobby Lobby* case itself.<sup>34</sup>

The *Hobby Lobby* Court had “little trouble” deciding that the contraceptive mandate imposed on the corporations substantially burdens

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If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative motive.”).

28. 114 Stat. 803; 42 U.S.C. § 2000cc *et seq.*

29. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761–62 (2014).

30. *Id.*

31. *Id.*

32. *Id.* at 2759.

33. *Id.* at 2759–61.

34. See *infra* I.A. (substantial burden); *infra* I.B. (compelling governmental interest); and *infra* I.C. (least restrictive means).

the corporations' right to freely exercise their religion.<sup>35</sup> If the corporations disregarded the regulation and instead provided health insurance plans that did not cover the contested contraceptive, they would be "taxed \$100 per day for each affected individual," which could amount to daily costs of \$1.3 million, \$90,000, and \$40,000 for each of the three Petitioner companies, figures the Court deemed "surely substantial."<sup>36</sup> While the substantiality of \$1.3 million in daily taxes is difficult to deny, establishing that this tax is a substantial burden on the *exercise of religion* is more difficult. In addressing this aspect of the substantial burden test, the Court cited the corporations' "sincere religious belief that life begins at conception," which would be contravened if they were to provide health insurance plans that cover methods of birth control that could "result in the destruction of an embryo."<sup>37</sup> In contrast, the government reasoned that the connection between (i) the requirement to provide health insurance that would cover the contraceptives at issue, and (ii) the mere possibility that employees may choose to take advantage of such contraceptives that might ultimately result in the destruction of an embryo, is attenuated.<sup>38</sup> The majority responded that "the question that RFRA presents [is] (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*)," not "a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)."<sup>39</sup>

The compelling interest test requires a court to find that the governmental interest would actually be satisfied if the law in question were applied to the complaining party.<sup>40</sup> The governmental interest articulated by the Court is the interest in "guaranteeing cost-free access to the four challenged contraceptive methods."<sup>41</sup> Despite finding this interest sufficiently compelling, the Court cautioned that the interests of "public health" and "gender equality," first expressed by the gov-

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35. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 (2014).

36. *Id.* at 2775–76.

37. *Id.* at 2775.

38. *Id.* at 2778.

39. *Id.*

40. *Id.* at 2779 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 419–20 (2006)).

41. *Id.* at 2780.

ernment, were too broad for the “more focused” inquiry RFRA requires.<sup>42</sup>

The Court deemed the least restrictive means test “exceptionally demanding;” a hurdle the government bears the burden of jumping.<sup>43</sup> The Court contemplated that the government, as a less restrictive means of bringing about its compelling interest—guaranteeing cost-free access to the challenged contraceptives—could assume the burden of paying for the contraceptives for the women who are not able to obtain them under their insurance policies.<sup>44</sup> Finding this to be a solution that would obviously impose a lesser restriction on the corporations’ ability to freely exercise their religion, the Court invalidated the ACA contraceptives mandate as applied against the closely held corporations in question.<sup>45</sup>

## II. RFRA-BASED RELIGIOUS EXERCISE CLAIMS BY NATIVE AMERICANS POST-HOBBY LOBBY

Since *Hobby Lobby* was decided on June 30, 2014, several claims have been brought by Native Americans challenging governmental restrictions on their religious freedom. The outcomes have been more favorable for the petitioning Native Americans, a trend likely to continue.

### A *McAllen Grace Brethren Church v. Salazar*

Just two months after the *Hobby Lobby* decision was released, the Fifth Circuit decided *McAllen Grace Brethren Church v. Salazar*.<sup>46</sup> *McAllen* addressed the availability of RFRA as a defense to a violation of the Migratory Bird Treaty Act (MBTA) and the Bald and Golden Eagle Protection Act (“Eagle Protection Act”) for Native Americans of non-federally recognized tribes.<sup>47</sup> In *McAllen*, Appellants were apprehended by a Fish and Wildlife Services agent at a Native American religious ceremony for selling dreamcatchers that contained bird feathers.<sup>48</sup> Only one of the Appellants, Soto, is a Native American.<sup>49</sup> He is a

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42. *Id.* at 2779.

43. *Id.*

44. *Id.*

45. *Id.* at 2784–85.

46. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

47. *Id.*

48. *Id.* at 468.

49. *Id.*

member of the Lipan Apache Tribe, which is not federally recognized.<sup>50</sup> Soto filed a petition for the return of his feathers, which was denied because he was not a member of a federally recognized tribe, a necessary condition to obtaining a permit for possession of eagle feathers under the Eagle Protection Act.<sup>51</sup> The court ultimately denied the government's summary judgment motion, recognizing that the government failed to meet its high burden under RFRA, particularly in light of the *Hobby Lobby* decision, but remanded for further fact-finding.<sup>52</sup>

The *McAllen* court analyzed the three prongs of the RFRA analysis—did the prohibition on using eagle feathers (1) substantially burden the Appellants' ability to exercise their religion, was the restriction (2) imposed pursuant to a compelling government interest, and (3) the least restrictive means of achieving that interest—through a post-*Hobby Lobby* lens.<sup>53</sup>

The government did not contest the fact that the Eagle Protection Act substantially burdened Soto's free exercise of his religious beliefs given that Soto was "involved in a ministry that uses eagle feathers in its worship practice."<sup>54</sup> Despite this not being a contested question, the court recognized that the eagle feather is sacred to many Native Americans.<sup>55</sup>

The court then applied the second prong, clarifying that a compelling governmental interest must be of the "highest order" and cannot be mere "general statements of interest."<sup>56</sup> The court considered the two interests alleged by the government in turn: "(1) protecting eagles and (2) fulfilling the government's 'unique responsibility' to federally recognized tribes."<sup>57</sup> The court deemed the interest in protecting bald eagles compelling, looking to Ninth and Tenth Circuit precedent as

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50. *Id.*

51. *Id.* at 469.

52. *Id.*

53. *Id.* at 471.

54. *Id.* at 472.

55. *Id.* And, therefore, the court held "any scheme that limits the access that Soto, as a sincere adherent to an American Indian religion, has to possession of eagle feathers has a substantial effect on the exercise of his religious beliefs." *Id.* This broadened understanding of an acceptable religious belief is likely informed by the recognition in *Hobby Lobby* that a court is not to pass judgment on the *reasonableness* of the belief in question, only on the sincerity of the believer.

56. *Id.*

57. *Id.* at 473.

support for this finding.<sup>58</sup> The second interest, that of fulfilling the government's responsibility to federally recognized tribes, was one the court struggled to accept.<sup>59</sup> The interest was implicated on a theory that, because Soto is a member of a non-federally recognized tribe, the government would somehow be shirking its responsibilities to federally recognized tribes if it were to grant Soto permission to use eagle feathers in his religious practice.<sup>60</sup> The court found the government failed to meet its burden of establishing this as a compelling interest, but remanded in part on this issue.<sup>61</sup>

With respect to the third RFRA prong, the *McAllen* court looked to *Hobby Lobby* for its application of the least restrictive means test.<sup>62</sup> The *McAllen* court considered *Hobby Lobby* a "reaffirm[ation] that the burden on the government in demonstrating the least restrictive means test is a heavy burden."<sup>63</sup> The government argued that "excluding sincere adherents of American Indian religions such as Soto who are not members of federally recognized tribes" from obtaining permits "advances the government's interest in preserving the eagle population."<sup>64</sup> It claimed: "(1) allowing broader possession would undermine law enforcement's efforts to combat the illegal trade of eagle feathers and parts; and (2) broader permitting would create law enforcement problems because law enforcement does not have a means of verifying an individual's American Indian heritage."<sup>65</sup> The court, however, found the government had not met its burden of establishing that excluding members of non-federally recognized tribes from obtaining permits is the least restrictive means.<sup>66</sup> It then instructed the district court to "consider the authorities cited in light of the Supreme Court's recent holding in *Hobby Lobby* and its *exacting* standard."<sup>67</sup>

The Fifth Circuit's decision in *McAllen* is a significant step toward protecting religious freedom of Native Americans, particularly because it recognized the sincerity of Soto's beliefs despite the fact that he did not belong to a federally recognized tribe. Presumably, if the court is willing to extend RFRA protection to a Native American

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58. *Id.*

59. *Id.* at 474.

60. *Id.* at 474.

61. *Id.* at 475.

62. *Id.*

63. *Id.*

64. *Id.* at 476.

65. *Id.*

66. *Id.* at 477–78.

67. *Id.* at 478 (emphasis added).

who does not belong to a federally recognized tribe, it would have even less trouble doing the same in cases involving members of federally recognized tribes.<sup>68</sup>

### B. *Arapaho Tribe v. Ashe*

In *N. Arapaho Tribe v. Ashe*,<sup>69</sup> the U.S. District Court for the District of Wyoming determined that the government's restriction on the Northern Arapaho Tribe's use of bald eagles in a religious Sun Dance ceremony did not survive the strict reading of RFRA articulated in *Hobby Lobby*.<sup>70</sup> It determined it would be "clearly erroneous and result in manifest injustice if this Court ignored the Supreme Court's holdings in *Hobby Lobby*," and felt it had to depart from an earlier decision upholding the ban.<sup>71</sup> "[I]n light of *Hobby Lobby*," the court stated, "the decision to limit Plaintiffs' permit to areas outside of the Wind River Reservation is not justified by a compelling interest."<sup>72</sup> The *N. Arapaho Tribe* court also made mention of the Fifth Circuit's decision to depart from prior precedent in *McAllen*.<sup>73</sup> The court considered it "significant[]" that "the Fifth Circuit noted that *Hobby Lobby* may well change the Tenth Circuit's [pre-*Hobby Lobby*] compelling interest analysis."<sup>74</sup> This interpretation indicates an uncertainty in both the lower and appellate courts on the scope of *Hobby Lobby*, but a desire to err on the side of applying heightened scrutiny test to uphold Native Americans' exercise of religious freedom claims.

### C. *Applying Hobby Lobby to Navajo Nation v. U.S. Forest Services*

Quite possibly, the Ninth Circuit's decision in *Navajo Nation v. U.S. Forest Services* would have come out differently if it were decided after the Supreme Court's decision in *Hobby Lobby*.<sup>75</sup> In that case, Hopi, along with several other tribes, sued the federal government for permitting a private ski resort to spray artificial snow (created from treated wastewater) on *Nuvatukya'ovi* or Mt. Humphreys, a sacred

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68. Particularly because the court recognizes that "Congress has the ability to protect the country's relationship with federally recognized tribes," and may even have a responsibility to do so. *Id.* at 473.

69. 92 F. Supp. 3d 1160 (D. Wyo. 2015).

70. See *N. Arapaho Tribe v. Ashe*, 92 F. Supp. 3d at 1187.

71. *Id.* at 1181.

72. *Id.*

73. *Id.* at 1187.

74. *Id.*

75. 535 F.3d 1058 (9th Cir. 2008).

mountain.<sup>76</sup> The Ninth Circuit held that the Hopi's RFRA rights were not violated because the "desecration" of the indigenous groups' holy mountain did not impose a "substantial burden" on their exercise of religion.<sup>77</sup>

In analysis, the court limited the substantial burden inquiry under RFRA to what it had been in the Supreme Court's pre-*Smith* Free Exercise Clause precedent. The court opined "[b]ecause Congress expressly restored pre-*Smith* cases in RFRA, we cannot conclude RFRA's 'substantial burden' standard expands beyond the pre-*Smith* cases to cover government actions never recognized by the Supreme Court to constitute a substantial burden on religious exercise."<sup>78</sup> While this may have been the prevailing understanding of RFRA's scope at the time *Navajo Nation* was decided, it certainly has not survived post-*Hobby Lobby*. In fact, the Court in *Hobby Lobby* expressly affirmed that "RFRA, by imposing a least-restrictive-means test, went beyond what was required by our pre-*Smith* decisions."<sup>79</sup> Thus, the *Navajo Nation* court's assertion that "the dissent cannot point to a single Supreme Court case where the Court found a substantial burden on the free exercise of religion outside the *Sherbert/Yoder* framework" is now incorrect.<sup>80</sup>

Because the *Hobby Lobby* Court understands RFRA as an extension of religious freedom beyond that under the pre-*Smith* line of cases, the substantial burden test applied in *Navajo Nation* is no longer accurate.<sup>81</sup> Under the outdated pre-*Smith* standard, the *Navajo Nation* court assessed the severity of the burden of having reclaimed wastewater sprayed onto the holy mountain.<sup>82</sup> It determined the "only effect" to be on the Native Americans' "subjective, emotional religious experience."<sup>83</sup> Despite recognizing that the spraying "will spiritually desecrate a sacred mountain and will decrease the spiritual fulfillment they get from practicing their religion on the mountain," the court deemed the "diminishment of spiritual fulfillment" an insubstantial burden on the free exercise of religion.<sup>84</sup>

Under *Hobby Lobby*, such disregard for the emotional impact of

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76. *Navajo Nation*, 535 F.3d at 1062–63.

77. *Id.* at 1063–64.

78. *Id.* at 1075.

79. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 n.18 (2014).

80. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1075 (9th Cir. 2008).

81. *Hobby Lobby*, 134 S. Ct. at 2768 n.18 (2014).

82. *Id.* at 1070.

83. *Id.*

84. *Navajo Nation*, 535 F.3d at 1070.

an action is improper.<sup>85</sup> The *Hobby Lobby* Court acknowledged that it is not the role of the court to assess “whether the religious belief asserted in a RFRA case is *reasonable*,” which is a question “the federal courts have no business addressing.”<sup>86</sup> Instead, the court may only determine whether the governmental imposition in question places a “substantial burden on the ability of the objecting parties to [act] in accordance with *their religious beliefs*.”<sup>87</sup> The *Hobby Lobby* Court rejected the government’s position that the effect of the government action on the parties’ ability to freely exercise their religion was “simply too attenuated.”<sup>88</sup> There the action in question would merely require the corporations to fund health-insurance plans for four contraceptives that, if used, *might* operate after the fertilization of an egg, because the corporations believe the destruction of an embryo is “morally wrong.”<sup>89</sup> Certainly, in comparison with the attenuated substantial burden accepted in *Hobby Lobby*, the burden on the Hopi, who “collect plants, water, and other materials from the Peaks for medicinal bundles and tribal healing ceremonies,” is substantial.<sup>90</sup> In dissent, Judge Fletcher caustically remarks, “The majority holds that spraying 1.5 million gallons per day of treated sewage effluent on the most sacred mountain of southwestern Indian tribes does not ‘substantially burden’ their ‘exercise of religion’ in violation of RFRA.”<sup>91</sup> Perhaps his concern that “the majority has effectively read American Indians out of RFRA” will be assuaged by the revised understanding of RFRA in a post-*Hobby Lobby* world.<sup>92</sup>

### III. CONCLUSION

While advocates have rightfully criticized the Supreme Court’s decision in *Hobby Lobby* for many reasons, one beacon of light in its questionable impact is its application to Native American religious freedom claims. The Court articulated an understanding of RFRA that recognizes the subjectivity and uniqueness of religious beliefs. This understanding is crucial to Native American religious freedom claims,

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85. *Hobby Lobby*, 134 S. Ct. at 2770 (“[T]he exercise of religion involves not only belief and profession but the performance of (or abstention from) physical acts that are engaged in for religious reasons.”) (internal quotation marks omitted).

86. *Id.* at 2778 (emphasis added).

87. *Id.*

88. *Id.* at 2777.

89. *Id.*

90. *Navajo Nation*, 535 F.3d at 1064.

91. *Id.* at 1113–14 (Fletcher, J., dissenting).

92. *Id.*

which often consider spiritual fulfillment a fundamental component of the free exercise of religion. Moving forward, will *Hobby Lobby* continue to carry as much weight when applied to these claims? Most likely, as already evinced by several successful post-*Hobby Lobby* Native American RFRA claims, courts will recognize its relevance in this context and protect the religious freedom of Native Americans. If not, it would be time to question a precedent that would recognize broad-sweeping religious freedom for for-profit corporations, but not for Native Americans.