Nos. 06-50553, 06-50694 (consolidated)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MARIO MANUEL VASQUEZ-RAMOS and LUIS MANUEL RODRIGUEZ-MARTINEZ, Defendants-Appellants.	(D.C. Case Nos. CR 05-0581-SJO, CR 05-0579-SJO)

Appellants' Joint Reply Brief

Appeal from the United States District Court
for the Central District of California

Honorable S. James Otero
United States District Judge

MARILYN E. BEDNARSKI
KAYE, McLANE & BEDNARSKI, LLP
128 North Fair Oaks Avenue
Pasadena, California 91103
Telephone: (626) 844-7660
Facsimile: (626) 844-7670
mbednarski_kmb@earthlink.net

Attorney for Appellant
Luis Manuel Rodriguez-Martinez

ROBINSON D. HARLEY, JR.
825 North Ross Street
Santa Ana, CA 92701
Telephone: (714) 972-8141
Facsimile: (714) 972-8107
robharley@earthlink.net

Attorney for Appellant
Mario Manuel Vasquez-Ramos

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Facsimile: (626) 844-7670
mbednarski_kmb@earthlink.net

Attorney for Appellant
Luis Manuel Rodriguez-Martinez

ROBINSON D. HARLEY, JR.
825 North Ross Street
Santa Ana, CA 92701
Telephone: (714) 972-8141
Facsimile: (714) 972-8107
robharley@earthlink.net

Attorney for Appellant
Mario Manuel Vasquez-Ramos

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I.

INTRODUCTION

As presently administered, the BGEPA and its regulations fail to accommodate the religious practices of the Appellants, whose religion is identical to those Native Americans eligible for permits under the BGEPA. The Appellants challenge only this disparate treatment, leaving all substantive provisions of the BGEPA which actually serve to protect live eagle populations completely intact.

The district court assumed, without due consideration of the evidence of substantially changed circumstances presented, that the government continues to have a compelling interest in protecting eagle populations, and that opening up the permit process to non-federally recognized tribal members would necessarily unduly burden the limited supply of eagle parts and feathers.

Today, however, as numerous government admissions in the Federal Register indicate, the bald eagle population is robust and capable of withstanding numerous and much more significant threats including loss of habitat, disease, and

environmental contamination. Approximately eight years have elapsed since the government has acknowledged this dramatic recovery and proposed delisting of the bald eagle from the Threatened Species List. Yet the government has done nothing to accommodate the religious practices of the Appellants, and further *interferes* by criminally prosecuting the expression of their earnest practice.

A close examination of the record reveals, however, that its interests are not compelling in this context and can be furthered by less restrictive means which includes the permitted possession of a few loose feathers by the Appellants.

II.
ARGUMENT

A. The Government No Longer Has a Compelling Interest In Protecting Eagles

1. The Government's Interest in Protecting Eagles Is Not "of the Highest Order"

The Appellee has failed to persuade that protecting eagle populations, *post*-delisting, is a significant enough interest to be "compelling" under the Religious Freedom Restoration Act, 42 U.S.C. § 2000 ("RFRA"). The RFRA and its legislative history does not define what is meant by "compelling government interest." See, e.g. S.Rep. No. 111, 103d Cong. 1st Sess. 9 (1993); H.R.Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993). In fact, "[n]owhere in the text of the Constitution, or its plain implications, is there any guide for determining what is a 'legitimate' state interest, [compelling or otherwise]." Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 181 (1972)(Rehnquist, J. dissenting.).

The Supreme Court *has* held, however, that an interest is only so compelling that it may abridge the Appellants' core constitutional right to free exercise of religion if it is "of the highest order," "overriding," or "unusually important." Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); McIntyre v. Ohio Elections Com., 514 U.S. 334, 347 (1995); Goldman v. Weinberger, 475 U.S. 503, 530 (1986)(O'Connor, J. dissenting). Previous examples of compelling interests therefore generally go to the very heart of the government's function, including maintaining the tax system, Hernandez v. Comm'r, 490 U.S. 680, 699 (1989), enforcing participation in the social security system, United States v. Lee, 455 U.S. 252, 258-59 (1982), and protecting children's welfare, Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944).

As the Supreme Court stated in Sherbert v. Verner, 374 U.S. 398 (1963) "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses [by religious adherents], endangering paramount interests, give occasion for permissible limitation [on the exercise of religion].' Id.at 406(citation omitted). In Wisconsin v. Yoder, 406 U.S. 205 (1972) the Court emphasized that the government's asserted interest must be truly paramount: "The essence of all that has been said and written on the subject is only those interests *of the highest order*...can overbalance legitimate claims to the free exercise of religion. Id.. at 215 (emphasis added.)

The government's asserted interest in protecting eagle populations is not compelling enough to satisfy these stringent standards. Even, otherwise commendable and important interests are not necessarily compelling. United States v. Abeyta, 632 F.Supp. 1301, 1307 (D. N.M. 1986). Requiring the government to demonstrate a compelling interest "is the most demanding test known to constitutional law." City of Boerne v. Flores, 521 U.S. 507, 534 (1997).

This Court must not therefore "water down" this standard. Here, protecting eagle populations is simply no longer an interest of the "highest order" and the challenged regulation creates a substantial burden on the free exercise of religion.

2. Antoine Anticipated That Delisting Could Constitute A Substantial Changed Circumstance Undermining the Government's Interest in Protecting Eagle Populations

The Appellee essentially ignores the delisting elephant in the room and argues that "[t]he Court in Antoine held that Hugs *resolved* the compelling interest issue," such that it need not be revisited by the Court in this case. Government's Answering Brief ("GAB") at p. 20(emphasis added.) Even a cursory analysis of the cases at issue, however, reveals that this argument is without merit.

As thoroughly set forth in the Appellant's Opening Brief, Hugs is largely irrelevant to this case now that the eagle has been delisted. Appellant's Opening Brief ("AOB") at p. 16. First, the defendant-appellant in Hugs apparently *conceded* the issue of compelling government interest and it is therefore unclear what if any evidence the Court received on that issue. United States v. Hugs, 109 F.3d 1375, 1378[1]. Second, Hugs was decided more than *ten years* ago, before the eagle was delisted or even the first *proposal* to delist. Third, and most importantly, the Court in Hugs based it's decision, in large part, on the fact that "District courts in this circuit have also found a compelling interest in protecting

[1] In fact, many of the cases cited by the Appellee, including Gibson v. Babbitt, 72 F.Supp. 2d 1356, 1360 (S.D. Fla. 1999); United States v. Lundquist, 932 F.Supp. 1237, 1241 (D. Ore. 1996); United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F.Supp. 269, 276-77 (D.Nev. 1986) similarly *assumed* the compelling government interest without evidentiary analysis.

eagles *as a threatened or endangered species*." Id. (emphasis added)(citations omitted)[2].

Post-delisting, a rigid adherence to the compelling interest finding in Hugs is not supported by Antoine itself. While the Appellee is correct that Hugs found support in the immutable legislative history of the Eagle Act, any reference to that portion of the Hugs opinion is conspicuously absent in the Antoine. GAB, at p. 20; Hugs at p. 1378. Rather, Antoine clearly narrows its holding by stating in Hugs "[w]e found that the government interest in 'protecting eagles *as a threatened or endangered species'* was compelling. United States v. Antoine, 318 F.3d 919, 921 (2003)(emphasis added.)

Possibly recognizing that Antoine's holding is implicitly limited only to protecting eagles *as a threatened or endangered species*, the Appellee overreaches to the holdings of other Circuits which have gone further, but have not been embraced by this Court. Specifically, the Appellee seeks to ignore the obvious import of delisting to this case, by citing to United States v. Hardman, 297 F.3d 1116, 1128 (10th Cir. 2002) where the 10th Circuit held "[t]he bald eagle would

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[2] Other courts have also required the government to introduce evidence that the animal protected is "endangered" or at least threatened. See, e.g. , Horen v. Commonwealth, 23 Va.App. 735, 479 S.E. 2d 553, 559-560 (1997)(finding that, because the state had not shown that owls were endangered, there was no compelling interest in their preservation); United States v. Jim, 888 F.Supp. 1058, 1064 (D.Ore 1995)(holding that criminal sanctions for killing eagles advanced a compelling state interest given proof that the eagles were threatened and that "there is no proposal to delist the bald eagle anywhere in the country."); United States v. Billie, 667 F.Supp. 1485 (S.D. Fla. 1987)(holding criminal sanctions for killing panthers advanced a compelling state interest given proof that the panthers were endangered); United States v. Abeyta, 632 F.Supp. 1301, 1308 (D.N.M. 1986)(holding that because the golden eagle was not endangered the government's conservation interest is not compelling).

remain our national symbol whether there were 100 eagles or 100,000 eagles. The government's interest in preserving the species remains compelling in either situation." GAB, at p. 21.

That is not the law in *this* Circuit. In fact, the Antoine panel expressly considered Hardman, and still declined to adopt a presumption of compelling interest simply because the eagle is a national symbol. Rather the Court took the opposite position from Hardman, and recognized that the then proposal to delist "provided some support for Antoine's argument that the eagle-protection interest is weaker..." and that "changed circumstances may, in theory, transform a compelling interest into a less than compelling one..." Antoine, at p. 921.

3. Delisting the Eagle Represents A *Substantial* Change in Circumstances

Given the factual record made by the Appellants, the district court clearly erred in finding that there had been no *substantial* change in factual circumstances since Antoine[3]. 5/3/06 RT 41: 4, ER 96. The Appellee's brief does not persuade otherwise.

Black's Law Dictionary defines "substantial" as:

> Of real worth and importance, of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable; Something worthwhile as distinguished from something without value or merely nominal. Synonymous with material.

Black's Law Dictionary, Abridged Sixth Edition, 1991, p. 996.

As thoroughly set forth below, the eight year delisting process, which was based on the best scientific and commercial data available and open for a lengthy

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[3] The District Court appeared reluctant in its conclusion that it was bound by Antoine, suggesting that "this may require some additional appellate review." 5/3/06 RT 41: 10-11; ER 89.

period of public commentary, meets or exceeds each of these definitions. There appears to be, however, little guidance from the case law regarding what constitutes a "significant" change in relevant circumstances in this context. Comparing the deficiencies identified by this Court in the *proposal* which made it "insignificant" with the *final* decision to delist is therefore instructive.

As above, the Court in Antoine noted that two years after Hugs, the Fish and Wildlife Service issued a *proposal* to delist the eagle, however it found the "force of this evidence limited." Id. When in July 2007, however, the department of the interior announced its decision to "remov[e] the bald eagle in the lower 48 states from the list of endangered and threatened wildlife" those evidentiary limitations were erased.

In Antoine the Court's main concern was the fungible nature of the proposal. As the Court noted "the proposed rule is just that" and "the Service may well revise its analysis in light of the information it receives." Id. This cautious approach made sense - the Court did not want to render a decision based on the proposal only to have to reverse itself if the FWS ultimately changed its mind. In this case, however, the decision is final and the Court can be confident in its permanence[4].

Moreover, if the Court finds that the final decision to delist undermines the government's compelling interest, it does not raise the concern that the government be expected to "relitigate the issue with every increase in eagle population." Id. 921-922. The significant change in circumstances presented in this case is not triggered by a nominal increase in eagle populations, or even necessarily a discrete increase in eagle populations at all, but rather how the

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[4] Under the FWS definitions, the determination that the Bald Eagle is no longer threatened in the "foreseeable future" means in the next 30 years. 50 CFR 17 at 37358; Appellant's Joint Supplemental Excerpt of Record ("SER") at p. 129.

dramatic increase in eagle populations *combined with* all other relevant factors has led the *United States Government* to conclude that it can be removed from the protections of the Endangered Species List for the first time in 40 years. This unique confluence of events is unlikely ever to be repeated, let alone "plague our circuit law with inconsistency and uncertainty." Id.

Finally, the Circuit was concerned that the delisting proposal was "based on incomplete information." Id. The Department of the Interior's final delisting decision is prefaced, however, with the definitive statement that "[t]his determination is based on a thorough review *of all available information,* which indicates that the threat to this species have been eliminated or reduced to the point that the species has recovered and no longer meets the definition of threatened or endangered under the Act." 50 CFR 17 at 37346; SER 117.[5]

Despite its *own* self congratulatory hyperbole regarding eagle recovery in virtually every other forum, the Appellee speaks out of both sides of its mouth when it stubbornly argues that delisting is not "a *substantial* change in circumstances sufficient to justify a departure from Antoine." GAB at p. 31 (emphasis in original.) In an attempt to reconcile its two inconsistent positions the Appellee attempts to minimize the reality of the eagle's recovery by characterizing it as merely "technical," and inexplicably setting the bench mark for recovery in

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[5] In fact, the final rule provides an exhaustive account of efforts taken to get to this point: 1990 proposed rule to delist eagle from endangered to threatened status, 1994 proposed rule to delist eagle from endangered to threatened status, 1995 final rule to delist from eagle from endangered to threatened status, 1999 proposed rule to delist, February 16, 2006 reopening of public commentary period on original 1999 proposal to delist, May 16, 2006 extension of public comment period, December 12, 2006 request for public comment on specific issues, August 30, 2006 "90 day finding" rejecting petition adverse to delisting. 50 CFR 17 at 37346-37347; SER 117-118.

this context at the eagle's "historical levels." Id. (emphasis added.) The Appellee's argument that it will have a compelling interest in protecting the eagle until it reaches the "250,000 to 500,000 bald eagles in the lower 48 states *prior to the arrival of Europeans in North American*" only demonstrates how far removed it has gotten from the previous *legitimate* compelling interest of protecting a once endangered species. Id. To have a compelling interest in protecting the eagle, it must demonstrate a *real* threat, not present a patently unattainable standard from the 15th century. See, Western Presbyterian Church v. Bd. of Zoning Adjustment, 849 F.Supp. 77, 79 (D.D.C. 1994)(under RFRA, zoning board may not restrict church's soup kitchen because of "unfounded, or irrational fears of certain residents.")

4. The BGEPA's Underinclusiveness Strongly Cuts Against a Finding of A Compelling Government Interest in Protecting Eagle Populations

The BGEPA is fatally underinclusive in that it restricts the Appellants sincere practice of religion while tolerating other much more significant threats to the eagle such as habitat reduction, power line mortality, and the "take" by private developers. Presumably, here if the purported interest in protecting eagle populations were compelling enough to justify abridging core constitutional rights, the government would have enacted regulations that substantially protect that interest from much more significant threats. As expressed in Republican Party of Minnesota v. White 536 US 765. 780 (2002) "[A] law cannot be regarded as protecting an interest of the highest order...when it leaves appreciable damage to that supposedly vital interest unprohibited." (quoting The Florida Star v. B.J.F. 491 U.S. 524, 541-42 (1989)(Scalia, J. Concurring). The following examples

illustrate the Appellee's untenable position that eagle populations can apparently withstand virtually every major threat they face, *except* for the simple possession of some of their feathers by the Appellants.

As set forth fully in the Appellants' Opening Brief federally subsidized wind turbines, and high-tension power lines remain a leading cause of eagle mortality in the wild. AOB, at p. 29. This fact, reveals the underlying hypocrisy of the government's obstinate stance with respect to the Appellants: on the one hand seemingly tolerating the real threats to *live eagles* posed by development and industrialization but claiming on the other the permit system absolutely cannot accommodate the Appellant's and the few loose feathers they possess.[6]

In fact the government has explicitly stated a policy under which it "believes working cooperatively with landowners to avoid or minimize adverse impacts on bald eagles is likely to achieve more positive enforcement. In addition, [it] [has] proposed a program that would allow [it] to authorize limited take associated with otherwise lawful activities under BGEPA." 50 CFR 17 at 37352; SER 123. The Appellee's briefing in this case reflects no such flexibility when the countervailing interests are religious as opposed to economic.

Under the Endangered Species Act, the government issued an average of 52 incidental "take" permits per year since 2002. 50 CFR 17 at 37363; SER 134. As above, the government has currently proposed a similar, and *more* lenient take permit structure under the BGEPA. The government "cautiously estimate[s] the

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[6] This case involves possession of feathers, and any other insinuation is irrelevant. The Appellee's reference to a shooting at the Santa Barbara zoo is a patently unfair attempt to inflame this Court's passions. See, GAB, at p. 13, n. 4. The insinuations were unfounded; there were *no* charges filed; the statute of limitations has run; the suspicions stemmed from an unsubstantiated confidential source, and forensic DNA testing failed to match any of the feathers in the Appellants' possession with those taken from the zoo.

number of eagle take permits would increase if the proposal is adopted from an average of 54 authorizations currently issued under the Act to *300* BGEPA permits, annually." Id. at 37364. The government concludes:

> "Like the Act, this BGEPA standard acknowledges that *limited take of eagles is not inconsistent with the protection of the species.* As suggested in our proposed rule, we believe the demand for permits, and the effects of issuing those permits, both individually and cumulatively, including minimization and mitigation measures, would not be significant enough to cause a decline in eagle populations from current levels."

Id. (emphasis added).[7]

The final delisting rule presents other examples of the underinclusiveness in the BGEPA. "Factor A" considered in the delisting process was the "Present or Threatened Destruction, Modification, or Curtailment of [the eagle's] Habitat or Range." 50 CFR 17 at 37351; SER 122. One commentator was concerned that the delisting criteria for this factor had not been met with respect to the Chesapeake Bay Recovery Region. Id. The government acknowledged that "habitat loss is likely to occur in this region in the foreseeable future through incremental land clearing. It is projected that between 1978 and 2020, the developed area of the Chesapeake Bay watershed will increase by 74 percent in Maryland and 80 percent in Virginia." Id. The government concluded however that there are "currently an estimated 1,093 breeding pairs in the Chesapeake Bay Recovery Region" and it did "not expect the bald eagle population in the Chesapeake Bay area to decline below the recover target of 300-400 nesting pairs in the foreseeable future." Id. at 37352. The government's apparent acceptance of

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[7] As the district court concluded in United States v. Friday, 2006 WL 3592952 (D.Wyo 2006) "since some depradating golden eagles are taken by ranches for non-religious purposes, it is plain that some birds *could* be made available for religious purposes."(emphasis in original.)

a potential decline in eagle populations of up to almost 700 pairs places their truculent stance with respect to the Appellants in harsh light[8].

B. The Government Does Not Have A Compelling Interest In Fulfilling Its Treaty Obligations With Federally Recognized Tribes In This Context

The Appellee claims that the government's compelling interest also includes "fulfilling its treaty obligations with federally recognized tribes." GAB, at p. 21(citations omitted). It is that interest which purportedly justifies moving members of federally recognized tribes "to the front of the line" to access these sacred feathers, without regard for religious sincerity, but rather tribal membership. While there is some support for the proposition that the federal government has a general duty to protect federally-recognized tribes as "domestic dependent nations," Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831), neither the Appellee nor the case law articulate that duty in any detail necessary to satisfy the stringent requirements of the RFRA[9].

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[8] See also 50 CFR 17 at 37359; SER 130 stating "In the future, available habitat will almost certainly limit the population of bald eagles in the lower 48 states. Furthermore, we acknowledge that habitat loss will likely eventually result in slow declines of bald eagle populations in some areas."

[9] See, e.g. Bd. Of County Com'rs of Creek County v. Seber, 318 U.S. 705, 715 (1943)("In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people need protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.")

The Appellee specifically relies on Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2002) which held that the government had a compelling interest in fulfilling its treaty obligations with federally recognized Indian tribes. In Gibson, the Eleventh Circuit adopted the conclusion of the district court that that the BGEPA was meant to be a substitute for tribes' abrogated hunting treaty rights. Id. (citing Gibson v. Babbitt, 72 F.Supp.2d 1356, 1360-61 (S.D.Fla. 1999)). The district court had reasoned that, "by providing bald and golden eagle parts to federally recognized Indian Tribes, the United States, albeit in a substituted fashion, is fulfilling a pre-existing treat obligation to the tribes." 72 F.Supp.2d at 1360. This argument is without merit.

There is no support for the proposition that the BGEPA's "Indian tribes" exception is to serve as a statutory substitute for certain abrogated hunting rights. See, GAB at p. 5. While in United States v. Dion, 476 U.S. 734, 743-45 (1986), the Court held that the BGEPA abrogated Native American treaty rights to hunt eagles, that does not mean that the "Indian tribes" exception to the BGEPA was meant to replace those rights. The plain language of the exception is for "the religious purposes of Indian tribes," it makes no mention of hunting.

Nowhere in Dion does the court ever opine that members of federally recognized tribes should be given priority over individuals such as the Appellants in accessing eagle feathers for religious purposes, rather the Court specifically stated it was *not* considering any religious freedom issues. Id. at 736 n. 3. This is further supported by the analysis of the BGEPA's legislative history presented in Dion, which demonstrated that Congress was concerned with placing an unreasonable hardship on religious ceremony, not on treaty hunting rights. Id. at 740-44.

Other than citing to the above cases, the Appellee has introduced no evidence to establish what the government's "trust and treaty" obligations actually are, or why they necessarily include providing federally-recognized tribes with eagle feathers. At its core, this is a case that pits the religious rights of the individual against *the United States* government, not any federally recognized tribal government. The Appellee has failed to prove that the government has a compelling interest in fulfilling trust and treaty obligations in this context.

C. Restricting Access to Sacred Eagle Feathers to Only Members of Federally Recognized Tribes is Not the Least Restrictive Means of Serving the Government's Interests

1. This Court Must Make An Individualized Determination under the RFRA

Contrary to the Appellee's arguments, the case law demonstrates that this Court must consider whether the BGEPA can withstand an *individualized* exception for the Appellants. GAB, at p. 36. As this Court stated in Callahan v. Woods, 736 F.2d 1269, 1272-73 (9th Cir. 1984) "if the compelling goal can be accomplished despite the exemption of *a particular individual*, then a regulation which denies an exemption is not the least restrictive means of furthering the state interest."(emphasis added.); United States v. Jim, 888 F. Supp. 1058, 1065 (D.Or. 1995)("Thus, the issue is whether the government has a compelling interest *in preventing Jim from killing 12 eagles per year*, as needed for his religious exercise.)(emphasis added); O Centro Espirita Beneficente, 546 U.S. 418 (2006), 126 S.Ct 1211, 1221("Strict scrutiny at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim")(quoting

Employment Division v. Smith 494 U.S. 872, 899 (1990))(O'Connor, J., concurring in judgment)); Kikumura v. Hurley, 242 F.3d 950, 962 (10th Cir. 2001)("Under the RFRA, a court does not consider the...regulation in its general application, but rather considers whether there is a compelling government reason, advanced in the last restrictive means, to apply the...regulation to the individual claimant.")

As demonstrated below, any government interest in protecting eagle populations or fulfilling tribal treaty obligations would not be undermined by including *the Appellants* in the BGEPA permit process, and it is therefore not the least restrictive means under the RFRA.

2. The BGEPA is Not the Least Restrictive Means of Protecting Eagle Populations

Even if the Court finds the government continues to have a compelling interest in protecting eagle populations, the dramatic recovery of the eagle which prompted the delisting is also relevant to whether the scope of the BGEPA continues to be the least restrictive means of achieving that interest.

The objective scientific evidence presented in this case demonstrates a sustained and substantial increase in eagle populations which will not be effected by inclusion of the Appellants in the permit process. There were only 487 breeding pairs of bald eagles in the United States in 1963 when the BGEPA was first passed. See, 50 CFR 17, at p. 37346; SER 117. Despite that alarmingly low number, the government *still* determined that the population could withstand permits issued "to those individual Indians who are authentic, bona fide practitioners of such religion." See, 50 CFR § 11.5 (1964). Therefore in 1963, when the eagle populations were at their most vulnerable point, the government

created a permit system open to all sincere practitioners of native american ancestry, with *no* requirement that they be a member of a federally recognized tribe.

In 2003, when Antoine was decided, the most recent bald eagle estimates came from the 1999 Proposal to delist which reported a minimum of 5,748 breeding pairs. That number increased to 7,066 when the Appellants' motions hearing was held in this case in 2006. Today, the government's own estimate is that there are more than 9,789 breeding pairs. 50 CFR 17, at p. 37346; SER 117. The government believes "this is a *conservative* estimate based on the results of our pilot studies for the post delisting monitoring plan." Id. at 37350; See also Declaration of Brian Walton at ¶9, ER 31 (stating "due to the nature of the methodology, any current census certainly underestimates the actual population size of the bald eagle in the lower 48 states).[10] See also, Demonstrative Timeline Including Relevant Dates, SER 144.

In light of the Appellee's own evidence of dramatic eagle recovery, the record contains no hard evidence to support that the current regulations excluding the Appellants are narrowly tailored to advance the Appellee's interests, and it does not eliminate the viability of other less restrictive means of achieving these interests.

Finally, the Appellee's argument that "if anything, the decision to delist the bald eagle under the Endangered Species Act strengthens the government's interest in protecting the eagle under the Eagle Act" is misplaced. GAB, at p. 33. As above, the Appellants are not challenging any of the substantive provisions of

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[10] The government cites an example from Minnesota which estimates that their known nest survey, which is similar to those conducted by each of the States and used to produce data for the delisting, "may only count two-thirds of the breeding pairs in the State." Id.

the BGEPA which actually protect eagles in the wild. The Appellants only discretely challenge the portion of 50 CRF § 22.22 which restricts the permit process to federally recognized tribes. If the Appellants prevail, eagles will receive *no* less protection under the BGEPA, and the *un*permitted possession of their feathers will continue to be criminalized.[11]

3. The BGEPA Is Not the Least Restrictive Means of Fulfilling Treaty Obligations In this Context

As fully set forth above, the government has no compelling interest in preferring the religious practices of one Indian tribe over another on the basis of treaty obligations in this context. Even if the government had established a treaty obligation supporting this preference however, it has failed to prove that this interest would be undermined if the Appellants are allowed to also practice their religion. The Appellee's argument is that "broadening the distribution of eagles to include non-tribal members such as defendants would increase the delays and thus the religious burdens on tribal members." GAB, at p. 24, n. 7.

As a threshold matter, it should be noted that the permit process operated for eighteen years without the requirement that the applicant be a member of a federally-recognized tribe. If under that system, there was so much demand from

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[11] The overwhelming scientific evidence suggests that the eagle's recovery is the result of the ban of DDT and not the minimal number of prosecutions under the BGEPA related to bald eagles. In 2006, only 324 cases under the BGEPA were investigated, and only a portion of those involved bald eagles. 50 CFR 17, at 37366; SER 137. The government admits that "these numbers are still relatively low compared to the bald eagle population in the lower 48 states of 9,789 breeding pairs, particularly given that many of these circumstances did not involve taking of live birds from the wild." Id.

individuals similarly situated to the Appellants that permit system was "overwhelmed", the Appellant presumably would have offered evidence to that effect from that period. They have not done so.

Moreover, substantial evidence was presented by the Appellants in the district court that the permit process was amenable to their inclusion. The district court erred in its conclusion that there was a limited supply of eagle feathers, seemingly equating "limited" with "fixed." In fact the record showed that the supply varies and there is a realistic potential to increase the supply substantially. See, 5/3/06 RT 40: 15, ER 88 (referencing that there was a thick [sic, likely "fixed"] supply of eagles and eagle parts and overwhelming demand.) Rather, the record showed that there is not a fixed supply but that in fact supply could be increased by improved collection efforts[12], improved public information, and decriminalization of good faith transportation of eagle feathers by lay persons in an effort to turn them over to the authorities. The inadequate collection efforts were established in the declaration of Expert Brian Walton[13]. Walton Declaration at ¶¶ 10-14, ER 31-33 (stating that only 1 in 30 bald eagles that naturally die in the lower 48 states are actually collected and that the significant number of eagles killed by power facilities, wirestrikes, and electrocutions rarely are collected or make it to the repository.)

The substantial inadequacies of the Repository system are well documented in the case law. As the district court in Friday stated:

> It is not the permitting process itself that he Court finds objectionable. Rather, it is the biased and protracted nature of the process that cannot be

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[12] The Appellee apparently admits that the Repository has a "very limited staff." GAB, at p. 39.

[13] It is also supported by the logical conclusion that the bird population in the 48 states had nearly doubled since the 1994 Executive Mandate to improve collection efforts.

> condoned as an acceptable implementation of the BGEPA. To show deference to the agency's implementation of the permitting process is to honor hypocrisy in the process. Although the government professes respect and accommodation of the religious practices of Native Americans, its actions show callous indifference to such practices. It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and its in its own good time.

United States v. Friday, 2006 WL 3592952 at *5. (D. Wyo 2006); See also United States v. Abeyta, 632 F. Supp. 130, 1307 (D.N.M. 1986)("...the federal administrative apparatus erected to accommodate Indian religious needs is utterly offensive and ultimately ineffectual. The application process is cumbersome, intrusive, and demonstrates a palpable insensitivity to Indian religious beliefs.")

The district court seemed to wrongly infer from the fact that the "wait time" (i.e., time it took for repository to fill the order) in the record from the government expert Bernadette Atencio grew from 2 years in to 3 ½ years in 2005 supported a factual conclusion that the demand was overwhelming Atencio Decl. at 12-14; ER 25. The district court apparently lumped together wait time for whole birds, with individual feathers. In fact, Ms. Atencio's wait time number seemed to be only for whole birds, not individual bird feathers which she also said could be filled in an average of 90 days. Ms. Atencio said that 95% of requests (which is the basis of a wait time figure) were for whole birds. Atencio at ¶14; ER 25. This increased wait time from 2 to 3/12 years appears to have no applicability to individual feathers, which were what the Appellants possessed. Individual feathers are apparently so abundant that the Repository does not maintain records on loose feathers received, and only since 2001 keeps statistics on number of requests for loose feathers. Atencio Decl. at ¶15; ER 25-26. Morever, the fact that loose feathers are stored in "bins" suggests a large number in supply. Atencio Decl. at 6; ER 23.

There was no record to support that there was an overwhelming demand for loose feathers such as Appellants possessed. Rather, Ms. Atencio's declaration

also established that orders are filled weekly sending out 25 orders on average Atencio Decl. at ¶14; ER 25 . This figure suggests that the orders could be filled faster, thus reducing wait time, if there was a larger staff, or if the loose feather orders were "filled" by providing 10 rather than 20 miscellaneous feathers now included in a loose feather order. Id. at ¶9; ER 24.

Thus, the record does not support that the demand for individual feathers is "overwhelming." Even at the present levels which reflect the supply given under-achieving collection efforts, and non-use of private citizens by virtue of the criminal penalties attendant to private collection[14], the wait for loose feathers was 90 days or less.

D. Creating an Exception So That the Appellants Can Legally Practice their Religion Is Not Constitutionally Suspect

The Appellee is wrong when it claims that that if the exemption were expanded to include the Appellants, it would necessitate "impermissible" classifications based on "religious sect" or "race," which would be "constitutionally suspect." GAB, at p. 26. As thoroughly set forth below, the government *routinely* makes distinctions of this kind. Moreover, Morton v. Mancari, 417 U.S. 535 (1974) which is heavily relied upon by the Appellee is distinguishable in context, as it was concerned with issues of tribal sovereignty and furthering "Indian self-government" where as the instant case is dealing with individuals' right to their religion.

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[14] The district court registered its own surprise, even as a highly trained legal expert, it did not know it was a crime to collect a fallen dead bird even if the intention was to deliver it to authorities. 5/3/06 RT 21.

In fact, there are *many* occasions where the government permissibly makes determinations based on ancestry, and this could easily be one of those occasions. As the district court in Gibson stated, "Congress is very aware of its trust obligations to Native Americans and, in fulfillment of this obligation, often confers benefits on Indians irrespective of their membership in a federally recognized tribe. Gibson, 72 F.Supp. 2d at 1358.

The definition of "Indian" contained within the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 476 et seq., for example, "shall...include all other persons of one-half or more Indian blood." 25 U.S.C. § 479. Native Americans meeting this definition are eligible for tuition loans for vocational and trade schools, § 471, and receive federal service employment preferences. § 472. Scholarship and grant programs for Native Americans under the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1603 et seq., broadly define the term "Indian" to include "any individual who...irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 [i.e. no longer recognized]..." § 1603(c). If Congress may include Native Americans who are not members of federally-recognized tribes within the scope of educational and federal programs, surely it may do the same when it comes to the sincere practitioners of their traditional religions.

Congress has explicitly declared a policy "to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian...including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. The Indian Religious Freedom Act, 42 U.S.C. § 1996. Against this backdrop, the Appellants' free exercise rights should

not be conditioned on whether or not they are members of a federally recognized tribe.

If the government can operate programs for Native Americans under the IRA and the IHICIA that do not require participants to be members of federally-recognized tribes, presumably it can make a similar exception here. In other contexts the government has found a way to allocate similarly limited resources in those programs - scholarship funds and grants - among the programs' applicants. The government can do the same here. This is the only way to ensure sincere individual practitioners such as the Appellants receive the protection they are afforded under the RFRA.

III.

CONCLUSION

For the reasons argued, the district court's denial of Appellants' motion to dismiss should be reversed and remanded for further proceedings.

DATED: November 15, 2007

Respectfully submitted,

By _____
MARILYN E. BEDNARSKI
Attorney for Appellant

DATED: November 15, 2007

Respectfully submitted,

By _____
for ROBINSON D. HARLEY, JR.
Attorney for Appellant

Certificate of Compliance with Circuit Rule 32-1

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I hereby certify that: the foregoing brief uses 14 point Times New Roman spaced type; text is double spaced and footnotes are single spaced. This brief complies with the type-volume limitations of Fed. R. App. 32(a)(7)(B) as it is 6,591 words.

DATED: November 15, 2007 By: 

MARILYN E. BEDNARSKI
Attorney for Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 128 North Fair Oaks Avenue, Pasadena, CA 91103.

On November 16, 2007 I served the foregoing document described as APPELLANTS' JOINT REPLY BRIEF on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows and depositing said envelopes with the United States Postal Service at Los Angeles, California:

Robert J. Lundman Acting Assistant Attorney General PHB Mailroom 2121 601 D Street, NW Washington, DC 20004	Robinson D. Harley, Jr. 825 North Ross Street Santa Ana, CA 92701 Attorney for Appellant: Mario M. Vasques-Ramos

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on the 16th day of November, 2007 at Los Angeles, California.

DATED: November 16, 2007

V. Aguilar

Veronica Aguilar

CASE NO. 06-50545

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA; Plaintiff-Appellee, vs. CAMILO CORTEZ; Defendant-Appellant.	No. 06-50545 D.C. No. CR-06-284-SJO [Central Dist. of California]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
HON. S. JAMES OTERO, JUDGE, PRESIDING

APPELLANT'S REPLY BRIEF

W. C. Melcher, Esq. [CA S.B. 45620]
Email: lilbuckaroo@roadrunner.com
William Paul Melcher, Esq. [CA S.B. 172136]
Email: WPMelcher01@yahoo.com
MELCHER, MELCHER & MELCHER
Trillium Towers Center
6320 Canoga Avenue, Suite 1500
Woodland Hills, California 91367
(818) 596-2307

Attorneys for Appellant,
CAMILO CORTEZ