CA No. 06-50553

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	) CASE No. 05-50553
Plaintiff - Appellee,	) (DC# CR-03-0581-SJO)
v.	)
MARIO MANUEL VASQUEZ-RAMOS	)
Defendant - Appellant.	)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE S. JAMES OTERO
United States District Judge

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Plaintiff-Appellee,	
v.	
MARIO MANUEL VASQUEZ-RAMOS,	
Defendant-Appellant.	

I.

ISSUES PRESENTED

1. Whether the government continues to have a compelling interest in criminalizing appellant's possession of sacred bald eagle feathers now that it has officially removed the bald eagle from the list of threatened and endangered species?

2. Whether, even if the government is found to have a compelling interest in protecting the bald eagle, criminalizing appellants' possession of eagle feathers for his sincere religious use would constitute the least restrictive means of serving that interest?

II.

JOINDER

Pursuant to Rule 28(I) of the Federal Rules of Appellate Procedure, appellant Mario Manuel Vasquez-Ramos hereby gives notice that he joins and incorporates by reference all arguments made by co-appellant Luis Manuel Rodriguez Martinez.

III.

STATEMENT OF THE CASE

A. Statement of Jurisdiction

This appeal is from a conviction in this case based upon a conditional plea. On May 3, 2006, the district court held a hearing and denied appellant Vasquez-Ramos's motion to dismiss the Information under the Religious Freedom and Restoration Act ("RFRA") 42 U.S.C. § 2000bb et seq. Subsequently, on May 25, 2006 appellant Vasquez-Ramos conditionally pled guilty, reserving the right to appeal the denial of the motion to dismiss. On September 11, 2006, appellant Vasquez-Ramos was sentenced to a term of 6 months probation and ordered to pay a special assessment of $25.00. Appellant Vasquez-Ramos filed a timely notice of appeal on September 19, 2006.

The district court had jurisdiction pursuant to Title 18 U.S.C. § 3231. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

B. Nature of the Case, Course of the Proceedings, Disposition in the Court Below and Custody Status of the Appellant

On June 16, 2006, a two-count Information was filed against appellant Vasquez-Ramos, charging him with two misdemeanor violations of Title 16 U.S.C. § 668(a), the Bald and Golden Eagle Protection Act ("BGEPA"), for knowingly taking or possessing bald or golden eagles or any of their parts, including eagle feathers, and Title 16 U.S.C. § 703, the Migratory Bird Treaty Act ("MBTA"), for taking, possessing, importing, transporting, selling, purchased, bartering, or offering for sale, purchase or barter, any migratory bird, or the parts nests or eggs of such bird without a valid permit issued pursuant to the regulations.

Appellant Vasquez-Ramos was arraigned and plead not guilty. The case was assigned to United States District Court Judge S. James Otero, who presided over all proceedings in this case. Mr. Rodriguez-Martinez filed a motion to dismiss the Information under the RFRA and Supplemental Points and Authorities. The motions were joined by appellant Vasquez-Ramos whose conviction has similarly been appealed and Luis Manuel Rodiguez-Martinez is noted in the Statement of Related Cases. On May 3, 2006, the district court held a hearing and denied the motion. On May 25, 2006, appellant Vasquez-Ramos conditionally pled guilty to count one of the

Information. On September 11, 2006, appellant Vasquez-Ramos was sentenced. Appellant Vasquez-Ramos is out of custody and has completed his probation. Appellant Vasquez-Ramos currently stands convicted of a misdemeanor, however, any subsequent charge of possession of eagle parts in furtherance of his religion would be a felony. See, 16 U.S.C. § 668(a).

IV.

STATEMENT OF FACTS[1]

Appellant was of Native American Mexican Indian heritage and ancestry. He practiced a Native American religion and had done so since the age of nine. He participated with elders of the Coahuiltec First Nation as well as with elders of many other sibling First Nations. He was inducted as a Sharman and Native American Church leader. He has been an active member of the Native American Church Teokali Quelzalcoati since November, 1988. His belief and practice of the Native American Religion is sincere and long standing. He participated in and carried on the culture and religious traditions of his Native Americas. ER 19, 49.[2]

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[1] In the district court, the parties filed a Notice of Intent to accept the declarations of Bernadette Atencio, Brian Walton, Mr. Vasquez-Ramos, and Mr. Rodriguez-Martinez without cross examination at the hearing on Mr. Vasquez-Ramos' motion to dismiss. The district court accepted this Notice. ER 174.

[2] "ER" refers to the Appellant's Excerpts of Record.

There are many organic elements involved in carrying out appellants traditions - among them are migratory bird feathers and parts, various plants and animals and especially sun, earth, air, water and fire including stones and minerals. Eagle feathers, eagle parts and other migratory bird feathers are sacred in his Native American religion and the appellant has possessed them solely for "religious purposes and never possessed them for scientific, exhibition or commercial purposes. ER 44.

The eagle feathers are an integral part of appellants every day religious purposes of his existence in this present world he is a part of and the spirit world from which he comes and will return upon taking his last breath. Eagle feathers are a ceremonial rite as he holds them with great reverence to the teachings that his ancestors have experienced, passed on through the generations, and which he now instills in his soul and will his descendants to care for beyond himself. ER 55.

The appellant used eagle feathers to cleanse his soul on a daily basis. He sweeps his temple with the eagle feathers. He considers his temple to be his home, his vehicle, his body and his son's body. He advocates this same blessing to be a part of his workplace, however he is not the one responsible for the facility in most instances of his work history. ER 55.

The sweep and blessing ensures a new day of guidance and direction. In his religion the appellant is lost without the eagle feathers. He aligns his soul and his

temple with the spirit world through the employment of the eagle feathers. The eagle is considered the medium between his soul, the grandfather fire and sun soul. The map and vision of the sky and this earth-heaven is the essence of the eagle. The appellant knows the eagle flies the highest, close to the sun, as he has seen and been taught to consider this importance through his religious ceremony. With the eagle and the sun he is one as he cares for the earth diligently and maintaining the progressive upliftment of his human existence through his daily ritual religious practice. The eagle feather is a sacred instrument of his religion. ER 55-56.

In ceremonial vigils of all night prayer, which appellant partakes in as frequently as every 7 days some years and as seldom as the change in the season other years, the eagle is a guide and a messenger throughout the fulfillment of each ceremony. The food is blessed with the wings of the eagle and respected in such a way that it embodies the main covenant with the Great Spirit and the Ancestors. ER 56.

In weekly vigils of ceremonial bathing known widely as sweat lodge the eagle feathers are also present. The eagle feathers are cleansed with the steam that is captured in the temazcalli (willow branch dome lodge). Through the fire's heating of lava rocks and subsequent placement of these rocks inside the lodge/temple before the sacred mother earth's altar and receiving of water to form the steam the eagle feathers are bathed with appellant, and united with their enlightenment, healing, and strength.

The appellant purified and ready to carry on his destiny and soul path as caretaker and hunter. ER 56-57.

In hunting ceremony of deer, eagle feathers must be used to maintain the sacred communication with the spirit and the deer (prey). There are specific songs and movements with the eagle feathers that have specific spiritual awareness and intuitive gifts with which expresses his gratitude to the Great Spirit for allowing birthing his existence and his life. He must pray with the eagle feather and send his prayers. ER 57.

In appellants dreams he is an eagle. With his religion the eagle feathers help him understand this and guide him through the process of prayer and communication with the Great Spirit. The appellant also dances and sings with the feathers in celebration of life on a weekly, if not daily basis, continuing over ten thousand years of traditional prayer ritual for the sake of his nation and the creation in general. ER 57.

The eagle feathers, most importantly, must be a part of birthing and marriage ceremonies. The feathers give a couple the understanding of companionship and religious direction. Just as the eagles remain with their partners for life, so shall he remain bonded to his wife. Holding the eagles feathers and praying with them ensures that we are reminded of their destiny as a couple and our responsibility to each other

as we maintain fidelity to one another although one is away searching or taking care of the necessities of life we are sure to follow the path of enlightenment and vision. The eagles remain the principle prophets in his religion. Appellant needs them for everyday guidance. ER 57-58.

With eagle feathers he is able to perform the duties that his religion asks of him. He fins that without eagle feathers he is away from his most sacred responsibilities. His life does not have the meaning and integrity it deserves without eagle feathers. ER 58.

Agents of the United States Fish and Wildlife Service (herein "FWS") and California agents executed a search warrant of appellants home on October 2002. The agents found numerous feathers some of which were found in subsequent laboratory analysis to be from migratory birds, including Bald Eagles and Hawks. ER 19. The migratory feathers which were seized by the government agents on October 11, 2002 from an altar inside his home were used in ceremonies including weddings, healings, enlightenment and festival celebrations. ER 44. Appellant specifically possessed all the eagle feathers, eagle parts and other migratory bird feathers found on October 11, 2002 under the authority of the Native American Church and those feathers were received by appellant as gifts at ceremonial gatherings of the Native American Church.

ER 45.

The appellant spoke to the agents during the search and explained that he was a religious man and that he possessed and used the feathers for religious purposes. ER 19. On October 16, 2002, the appellant was interviewed by two government agents and provided them with the information set forth in his declaration. He also told the agents he could get documentation from the Native American Church showing that he was a member of the church and that he was allowed to possess the feathers through the church. On October 18, 2002 Agent Mendelsohn received a letter confirming that appellant was a member of the Native American Church and was allowed to possess feathers under the religious umbrella of the Native American Church. ER 45.

V.

SUMMARY OF ARGUMENT

Under the current regulatory system, only members of federally recognized tribes are permitted to possess sacred bald eagle feathers. Appellant Vasquez-Ramos's tribe - the Coahuiltec - is not recognized by the United States government. He is a sincere practitioner of his religion since he was nine (9) years old. In fact, he is entrusted to conduct prayer ceremonies for his congregation. The sincerity of his religious beliefs, nor the centrality of eagle feathers to them, are not in doubt in this case.

The government contends that the arbitrary and largely political distinction between religious practitioners who happen to be members of federally recognized tribes and those who are not should trump Mr. Vasquez-Ramos's sincere practice of his religion in this country. This cannot be. The United States Congress, through the Religious Freedom and Restoration Act, (herein "RFRA"),has placed an extremely high burden on the government when it seeks to impede the free exercise of religion. Specifically, the government must demonstrate that it has a compelling government interest in the challenged regulation and that the regulation is the least restrictive means of serving that interest. In this case, the government can do neither.

First, given the dramatic increase in bald eagle populations, the government can no longer argue that it has a compelling interest in protecting bald eagle populations in general. This Court previously acknowledged in United States v. Antoine, 318 F.3d 919 (9th Cir. 2002) that a significant increase in eagle population could ultimately undermine the government's asserted interest in protecting them. With the government's June 28, 2007 official decision[3] removing the bald eagle from the list of

[3] On June 28, 2007, Secretary of the Interior Dirk Kempthorne announced the removal of the bald eagle from the list of threatened endangered species at a ceremony at the Jefferson Memorial in Washington, D.C.. The removal of the bald eagle from the Federal list of Endangered and Threatened Wildlife and Plants will become effective 30 days after publication in the Federal Register.

threatened and endangered species, the significant change in relevant circumstances anticipated in Antoine has occurred.

Second, in addition to the significant change in relevant facts brought by the de-listing of the bald eagle, the Supreme Court decision in Gonzales v. O Centro Espiritia Beneficiente Uniao do Vegetal, 546 U.S. 418, 126 S.Ct. 1211 (2006) constitutes another significant change in the application of the RFRA since Antoine. The burden is now on the government to show why it has a compelling interest in precluding Mr. Vasquez-Ramos *individually* from possessing bald eagle feathers and why the existing law is not amenable to a discrete exception accommodating his specific religious practice.

Finally, even if Mr. Vasquez-Ramos fails to convince this Court that the government can not meet its burden of establishing a compelling interest, it cannot demonstrate that criminalizing Mr. Vasquez-Ramos's possession of sacred feathers is the least restrictive means of serving that interest. Given that the present regulatory scheme already permits numerous exceptions for various non-religious purposes, and is riddled with inconsistency and inefficiency, the government cannot show that Mr. Vasquez-Ramos's mere possession of bald eagle feathers will have any impact on the bald eagle population the government purports to protect.

VI.

ARGUMENT

A. Criminalizing Appellant Vasquez-Ramos's Possession of Bald Eagle Feathers Violates the RFRA Because the Government Has No Compelling Interest and It Is Not Employing the Least Restrictive Means

1. The Standard of Review

The denial of a motion to dismiss based on a violation of constitutional rights is reviewed *de novo*. United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1047 (9th Cir. 2004); United States v. Gastelum-Almeida, 298 F.3d 1167, 1174 (9th Cir. 2002); United States v. Ziskin, 360 F.3d 934, 942-43 (9th Cir. 2003); United States v. Hinojosa-Perez, 206 F.3d 832, 835 (9th Cir. 2000).

The district court's decision whether to dismiss an information based on its interpretation of a federal statute is also reviewed *de novo*. United States v. Gorman, 314 F.3d 1105, 1110 (9th Cir. 2002); United States v. Boren, 278 F.3d 911, 913 (9th Cir. 2002); United States v. Gomez-Rodriguez, 96 F.3d 1262, 1264 (9th Cir. 1996)(en banc).

The district court's findings of fact with regard to a motion to dismiss are reviewed for clear error. Hinojosa-Perez, 206 F.3d at 835; United States v. Lazarevich,

147 F.3d 1061, 1065 (9th Cir. 1998).

2. Relevant Statutes

a. The Bald and Golden Eagle Protection Act (herein BGEPA)

It is a crime for any person to knowingly take or possesses bald or golden eagles or any of their parts, including eagle feathers. See, 16 U.S.C. §668(a). The BGEPA allows, however, the secretary of the interior to promulgate regulations which authorize taking possession of bald eagles and/or eagle parts when such possession is consistent with eagle preservation and the religious purpose of Native American religions. See, 16 U.S.C. § 668(a) and 50 C.F.R. §22.22.

C.F.R.§ 22.22 is the regulation which sets forth the Indian tribe exception. This exception requires that, for a person to legally possess eagle parts, he or she must: (1) be a member of a federally recognized Indian tribe, and (2) use the eagle parts for tribal religious ceremonies. See, 50 C.F.R. § 22.22

To apply for a permit under the "Indian tribes" exception the applicant must provide the Fish and Wildlife Service (herein "FWS") various information including a certification of enrollment in a federally recognized tribe.[4]

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[4] An applicant under the "Indian tribes" exception must provide the Fish and Wildlife Service (FWS): (1) the species and number of eagles or feathers proposed to be taken or acquired by gift or inheritance; (2) the state and local area where the

The "member of a federally recognized Indian tribe" condition, however, was not originally part of the regulation. In 1963, the Secretary first issued regulations establishing a permit program under the "Indian tribes" exception. As originally issued, the regulations provided that permits could be issued "to those individual Indians who are authentic, bona fide practitioners of such religion." See, 50 C.F.R. § 11.5 (1964). In 1974, the Secretary revised the regulations, requiring that applicants "attach a certification from the Bureau of Indian affairs that the applicant is an Indian." See, 50 C.F.R. §22.22(a)(5), (6) (1975).

Not until 1981, eighteen years after the regulations were first enacted, was the requirement that an applicant be a member of a federally-recognized Indian tribe clearly articulated. In 1981, after a member of an Indian tribe that was not federally recognized requested a permit for eagle feathers, the Deputy Solicitor of the Interior issued a memorandum which stated that only federally recognized Indian tribes constituted "Indian tribes" under the BGEPA. Id. at 3-4; Aplt. App. at 189. It was only

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taking is proposed to be done, or from whom acquired; (3) the name of the tribe with which the applicant is associated; (4) the name of the tribal religious ceremony(ies) for which the feathers are required; and (5) the applicant must attach "a certification of enrollment in an Indian tribe that is federally recognized under the federally recognized tribal list act of 1994." 25 U.S.C. 479a-1; 108 Stat. 4791 (1994); 50 C.F.R. § 22.22 (2001).

in 1999 that the regulatory language was changed to clearly reflect the requirement that an applicant must be a member of a federally recognized Indian tribe. See, 50 C.F.R. § 22.22 (1999).

The Government has the current legal ability to promulgate regulations for the issuance of permits to *non*-federally recognized tribal members to *possess* deceased bald eagle parts. 16 U.S.C. § 668(a) authorizes the Secretary of the Interior to issue permits "for the religious of Indian tribes," in addition to several less compelling reasons, including the protection "of agricultural or other interests[4] in any particular locality." Id. Despite its ability to do so, the government has not issued any regulations authorizing permits for sincere practitioners of Native-American religions who are tribal members of *non*-federally recognized tribes.

b. The Migratory Bird Treaty Act

Mr. Vasquez-Ramos is also charged with violating the Migratory Bird Treaty Act (herein "MBTA"). The MBTA implements various treaties and conventions

[4] In fact, the government has on occasion issued permits to *take* ("pursue, shoot, shoot at, poison ,wound kill, capture, trap, collect, molest or disturb" 16 U.S.C. § 668(c)) *live* bald eagles for commercial interests, and will at least consider such permits. See e.g. Notice of the Issuance of a Permit for the Incidental Take of Bald Eagles by a Water Reclamation Project, 68 Fed. Reg. 349999 (June 1, 2003); Notice of an Application to Take Bald Eagles for a Residential Development. 66 Fed. Reg. 18493 (April 9, 2001)

between the U.S. and Canada, Japan, Mexico, and the former Soviet Union for the protection of migratory birds. Under the Act, it is illegal for anyone to take, possess, import, export, transport, sell purchase, barter, or offer for sale, purchase, or barter, any migratory bird, or the parts, nests, or eggs of such a bird except under the terms of a valid permit issued pursuant to the regulations. 16 U.S.C. §§ 703-711.

As authorized by the MBTA, the U.S. Fish and Wildlife Service issues permits to qualified applicants for the following types of activities: falconry, propagation, scientific collection, special purposes (rehabilitation, educational, migratory game bird propagation, and salvage), depredation, taxidermy, and waterfowl sale and disposal. 50 C.F.R. § 13. Unlike the BGEPA, the MBTA has no enumerated exception for Native American religious use. However, in United States v. Eagleboy, 200 F.3d 1137 (8th Cir. 1999), the 8th Circuit stated "...the United States has adopted a policy under which members of federally-recognized Indian tribes may possess migratory bird parts, while non-members may not and may be prosecuted for such possession." Id. The 8th Circuit referenced a policy "promulgated by the Secretary of the Interior in 1975 and speaks of not enforcing the MBTA against 'Indians'. The Department of the Interior has defined 'Indian' under the policy as including only a member of a federally-recognized tribe." Id. at fn. 2.

c. The Religious Freedom and Restoration Act

The Religious Freedom and Restoration Act (herein "RFRA") codifies Mr. Vasquez-Ramos's right to freedom of religion and sets forth the very substantial burden the government must meet to impede that right. The RFRA plainly defines its purpose as:

> "To restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963)... and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise was substantially burdened by government."

To that end, RFRA states:

> (1) "Government should not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. Subsection (b) provides that government action may substantially burden a person's exercise of religion if such action furthers "a compelling governmental interest;" and,
> (2) Is the least restrictive means of furthering that interest."

Under RFRA, the moving party must first prove that the government action has substantially burdened a sincerely-held religious belief. If the moving party meets that standard, the burden shifts to the government to prove that recognition of an exception

from the statute would impede the government's compelling interests and that the statute furthers those interests by the least restrictive means. United States v. Meyers, 95 F.3d. 1475 (10th Cir. 1996)

3. The Government's Decision to De-list the Bald Eagle from the Endangered and Threatened Species List Has Created A Substantial Change In Relevant Circumstances

The Government no longer has a compelling interest in protecting eagle populations. The United States Supreme Court has described the compelling interest test as the most challenging to meet in constitutional law. City of Borne v. Flores, 521 U.S. 507, 534 (1997). Commendable and important interests are not necessarily compelling. United States v. Abeyta, 632 F.Supp. 1301, 1307 (D. N.M. 1986). While the government presumably has some interest in conserving eagle populations, it does not have an interest in protecting those populations against unrealistic threats. Because the FWS' decision to de-list the bald eagle constitutes a significant change in relevant circumstances, prior cases where this Court found the government had a compelling interest in this area are no longer persuasive.

This Court first addressed the issue in United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997). But now, ten years later, protecting bald eagles is no longer a

compelling government interest. In Hugs, argued in February 1997, the defendant-appellant did not challenge the government's asserted interest in protecting bald and golden eagles, and it is unclear what evidence, if any, this Court considered. Some six years later, in United States v. Antoine, 318 F.3d 919 (9th Cir. 2002) this Court was deferential to Hugs for fear that the government be expected to "...relitigate the issue with every increase in eagle population." Antoine at 922. The Court recognized in Antoine, however, that the government's then *proposal* to delist the bald eagle provided "support for Antoine's argument that the eagle-protection interest is weaker than when Hugs was decided" and that "in theory" time could transform a once-valid application of a statute into an invalid one if an appellant adduced "evidence sufficient to convince us that a *substantial* change in relevant circumstances has occurred." Id. (emphasis in original).

Now that the bald eagle has cleared the *proposal* phase and has been officially de-listed, the time is ripe for this Court to give teeth to the RFRA as a means to redress significant burdens placed on religious exercise, carefully consider the scientific data available, and act upon the substantial change which has occurred. Given the substantial increase in the eagle population since the passage of the BGEPA in 1962 – including those increases in population since this Court last considered the continuing

viability of the claimed interest in United States v. Antoine – protecting bald eagle populations is simply no longer a compelling interest and fails to overrule Mr. Rodriguez-Martinez's right to practice his religion. In fact, just since the 1999 proposal to delist, upon which the findings in Antoine where based, the bald eagle population in lower 48 states increased from 5, 748 breeding pairs to an estimated minimum of 7,066 at the time of Mr. Rodriguez-Martinez's motions hearing in the district court and a high of 9,789 breeding pairs today. See, FWS Proposal to Reopen Public Comment; FWS News Release July 28, 2007; ER 104. These numbers come from FWS' own studies. The government presented no evidence in the record in this case to refute these staggering increases. Because the government can not meet its burden of establishing a compelling interest, the BGEPA is invalid as applied to Mr. Rodriguez-Martinez. His religious freedom is burdened, and the district court erred by not dismissing the Information against him.

The case of United States v. Antoine, 318 F.3d 919 (2003), is instructive. In Antoine this Court recognized that a compelling interest in conserving bald eagles may weaken as their population increases. 318 F.3d 919, 921 (9th Cir. 2002). The defendant in Antoine based his argument on the July 6, 1999 Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened

Wildlife. This Court, however, found the force of this evidence limited, as the proposal was not finalized and the Court concluded that the FWS may "revise its analysis in light of information it receives." Id. Now, any concerns that the FWS may ultimately "change its mind" on the issue of de-listing have been completely alleviated by the FWS' decision to formally de-list the bald eagle.

a. After O Centro The Government Cannot Demonstrate A Compelling Interest with Respect to Mr. Rodriguez-Martinez

Even if this Court does find a compelling interest in protecting bald and golden eagles *in general*, the government has failed to demonstrate a compelling interest in prohibiting an exception allowing appellant Vasquez-Ramos to possess the sacred bald eagle parts. The United States Supreme Court's opinion in Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal, et al. was issued after both Hugs and Antoine and constitutes a significant shift in the legal terrain surrounding the appropriate application of the RFRA since those cases were decided. See e.g. Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonazales, 474 F.Supp.2d 1133, 1143 (N.D. Cal. 2007)(holding that res judicata's preclusive force was extinguished by the intervening change in law brought by O Centro which "shifted the

legal terrain" surrounding the plaintiffs' claim under the RFRA).

In Gonzalez v. O Centro Espirita Beneficente Uniao Do Vegetal, et al., 546 U.S. 418, 126 S.Ct. 1211 (2006), the government argued that because it had a compelling interest in the uniform application of the Controlled Substances Act, no exception to a ban on the controlled substance DMT could be made to accommodate the respondent church - the UDV. The Court rejected this argument, holding rather that the "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." 126 S.Ct. at 1213. The Court specifically embraced the approach taken in Sherbert v. Verner, 374 U.S. 398, where the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular claimants." Id.

Thus, in O Centro, the mere fact that the government had determined that DMT should be listed under Schedule I "did not provide a categorical answer that relieves the Government of their obligation to shoulder its RFRA burden." 126 S.Ct. at 1214. See, Navajo Nation v. U.S. Forest Service, 479 F.3d 1024, 1043 (9th Cir. 2007)(citing O Centro for proposition that "[T]he Supreme Court has recently emphasized that, even

with respect to governmental interests of the highest order, a 'categorical' or general assertion of a compelling interest is not sufficient.") Additionally, the court found persuasive that the Controlled Substance Act had built in provisions which allowed for the waiver of certain requirements if "consistent with the public health" and that its provisions applied equally to other substances such as mescaline and peyote, which were subject to exception for Native American religious use. Id. Specifically, the court held that "[i]f such use is permitted in the face of the general congressional findings for hundreds of thousands of Native Americans practicing their faith, those same findings alone cannot preclude consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs." Id. Finally, the Court rejected the Government's "slippery slope" concerns that "if I make an exception for you, I'll have to make one for everybody, so no exceptions," holding that the RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." Id. at 1215. Any other understanding of the RFRA would effectively nullify the statute, since, if the burden of proof could be satisfied by citing agency findings, without additional evidence, RFRA challenges would rarely succeed.

An analysis of this case under the RFRA is remarkably similar to O Centro. In this case, as in O Centro, Mr. Vasquez-Ramo's ability to exercise his religion should

should not be wholly dependent on the government's decision to limit access to bald eagle feathers to an arbitrary group. Just as with the Controlled Substance Act, the fact that the BGEPA has specific exceptions, including those for the religious use of thousands of members of federally recognized tribes, strongly supports a finding that the general protection of bald and golden eagles is amenable to an exception for appellant Vasquez-Ramos. See, O Centro, 126 S. Ct. At 1222 (concluding that the RFRA contemplates "judicially crafted exceptions" to federal laws); Multi Denominational Ministry, 474 F.Supp.2d at 1145 (stating that in O Centro the Supreme Court "endorsed a case-by-case consideration of religious exemptions to generally applicable rules.")(citations omitted.)

The government cannot meet its burden to establish that if appellant Vasquez-Ramos is allowed to possess the sacred parts of the bald eagle, the government will be unable to protect the bald eagle populations in the United States .

4. The Application of the BGEPA and MBTA to appellant Vasquez-Ramos is Not the Least Restrictive Means of Furthering a Compelling Government Interest[5]

[5] Even if this Court concludes that the government does have a compelling interest in protecting the bald eagle, the increased bald eagle population certainly affects this Court's analysis of whether the regulations in question are narrowly tailored as the least restrictive means of achieving that interest.

a. The Government is Not Using the Least Restrictive Means of Protecting Eagle Populations

Even assuming the government's interest in protecting eagle populations is compelling, its actions are not the least restrictive means of accomplishing its objectives. When the government substantially burdens the free exercise of religion, its actions must be the least restrictive means to achieving a compelling interest. Title 42 U.S.C. § 2000bb-1(b)(2)(1994). Because criminalizing appellant Vasquez-Ramos' possession of bald eagle feathers is not the least restrictive means of serving its purported interest, it also fails to satisfy this prong of the RFRA.

A far less restrictive law would allow for a discrete exemption to accommodate appellant Vasquez-Ramos' religious practice. If a goal can be accomplished despite the exemption of the individual, then a regulation which denies an exemption is not the least restrictive means. Callahan v. Wood, 736 F.2d 1269, 1272-73 (9th Cir. 1984). In this case, the goal of protecting threatened eagles in the lower forty-eight states is not affected or interfered with, by exempting appellant Vasquez-Ramos. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court permitted an exception for Amish children from a compulsory school attendance law. The Court recognized that the State had a "paramount" interest in education, but held that "despite its admitted validity in

the generality of cases, we must searchingly examine the interests that the States seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*." 406 U.S. 205 at 213, 221 (emphasis added). The Court explained that the State needed to "show with more particularity how its admittedly strong interest...would be adversely affected by granting an exemption *to the Amish*." Id. at 236.

Under the current permitting system, the Secretary serves a gate-keeping function regarding how eagles that are *already dead* will be distributed. See, Declaration of Bernadette Atencio, at ¶4; ER 87. Therefore, any change in the supply or demand for Repository eagles and eagle parts has no direct effect on live eagle populations. Therefore, allowing appellant Vasquez-Ramos access to repository feathers, along with allowing such access to federally recognized tribal members, would have no direct effect on the number of eagles in the wild.

Nor will allowing appellant Vasquez-Ramos to keep his feathers lead to increased illegal killings (as it is known that religious persons do not kill bald eagles for their feathers[6]) or increased black market demand for eagle feathers. The

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[6] It should also be noted that although parts from eagles are necessary elements of Native American Religions, these religions generally do not permit killing eagles. See, Antonia M. Demeo, Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion, 22

government cannot meets its burden by reliance on speculation of potential harms[7]. Furthermore, any such argument would ignore criminal prohibitions against unlawfully killing eagles and trafficking in their parts, which are still in place. 16 U.S.C. § 668b (1994). The goal of protecting eagle populations may still be accomplished without unnecessarily prohibiting appellant Vasquez-Ramos from possessing eagle feathers for religious purposes. Additionally, the FWS has already proposed an intensive monitoring program which would recognize and address any illegal shootings before they posed a risk to eagle populations. See, FWS News Release; ER 105-106.

HASTINGS CONST. L.Q. 771, 775; See also, Bruce E. Beans, Eagle's Plume: Preserving the Life and Habitat of America's Bald Eagle, 173 (quoting Larry Aitken, administrator of a tribal college in Minnesota, as saying "You might steal from your mother or brother, but you wouldn't kill an eagle. It would be like killing God, or a messenger from God."). Most practitioners who use eagles or eagle parts in their ceremonies obtain the parts from dead eagles, DeMeo at 778, and object to killing eagles for use in religious ceremonies. See, United States v. Jim, 888 F.Supp. 1058, 1060 (D. Or. 1995) (finding that the defendant believed that he needed to kill golden eagles, even in light of testimony from another practitioner of Native American religion claiming that killing eagles is contradictory to Native American religions beliefs).

[7] See, Thomas v. Review Board of Indian Employment Security Division, 450 U.S. 707, 719 (1981)(rejecting the state government's reasons for refusing religious exemption, citing the lack of evidence in the record); Wisconsin v. Yoeder, 406 U.S. 205, 224-29 (1972)(rejecting the States's argument bemoaning the dangers of a religious exception as speculative and unsupported in the record); Sherbert v. Verner, 374 U.S. 398, 407 (1963)(stating that "there is no substantial proof to warrant such fears" advanced by the State").

Any fears the Repository system can't accommodate appellant Vasquez-Ramos also ignores the present realities of situation. Currently, the demand for eagle feathers by federally recognized tribal members alone severely outstrips the Repository's supply, leading to delays of 3 - 3 ½ years for whole eagle requests. See, Declaration of Bernadette Atencio, at ¶8; ER 23. This doesn't even take into account the number of non-recognized tribal members who demand eagle parts who currently have no access to even apply for a lawful permit. Despite this excess of demand, illegal killings have a negligible impact on eagle populations[8].

The total demand for eagle parts by practitioners of the Native American religion will not change if the permit process is opened to Mr. Rodriguez-Martinez. All that will change, assuming a constant supply, is that he will be allowed to access the repository eagles for the first time, and two federally recognized tribal members may have to wait longer to get their Repository eagles[9].

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[8] Even when illegal shootings were relatively common, before the BGEPA, they were never responsible for population decimation in the bald and golden eagle populations. See, Declaration of Brian Walton, at ¶16; ER 126.

[9] Mr. Rodriguez-Martinez merely possessed loose feathers and wings. The Government concedes that 95% of the requests to the Federal Repository system are for *whole birds*. Requests for the type and quantity of feathers possessed by Mr. Rodriguez-Martinez are usually filled by the Repository System in as little as 90 days. See, Declaration Bernadette Atencio at ¶¶ 8, 14; ER 88.

In the alternative, the government could easily make an exception in appellant Vasquez-Ramos's case to its policy of collecting eagle feathers. The government's seizure of feathers of unknown dates and origins does not appear to directly further any interest with respect to live eagles whatsoever. Appellant Vasquez-Ramos did not kill any eagles. The government's seizure of his religious objects will not bring any eagles back to life. This Court could discretely hold that appellant Vasquez-Ramos may legally retain possession of the eagle feathers at issue in this case for ceremonial use, but deny him access to the Repository system.

b. Creating an Exception for appellant Vasquez-Ramos will Not Effect the Government's Trust and Treaty Obligations Nor Relations With Tribal Governments

Under O Centro, the salient question is what effect creating an exception for appellant Vasquez-Ramos may have on the government's treaty obligations. There is simply no relationship between fulfilling treaty obligations and prohibiting the possession of eagle feathers for bona fide religious purposes. If the government were sincerely attempting to fulfill treaty obligations through its current regulatory scheme, it would limit the possession of eagle feathers for religious purposes to tribes with treaty guarantees of such feathers. However, that is not what the current regulatory

scheme does.

Indeed, none of the federally recognized tribes have treaties that single out, and guarantee religious purpose hunting. Treaties simply preserved Indian freedoms to do what Indians traditionally did - hunt and fish. See e.g., Treaty with the Yakamas, 12 Stat. 951, 953 (1859). Furthermore, not all of the federally recognized tribes have treaties with the United States. See, Confederated Tribes of Chehalias Indian Reservation v. Washington, 96 F.3d 334 (9th Cir. 1996)(noting that no treaty was ever concluded with the Chehalis); 65 Fed. Reg. 13, 298 (2000)(listing the Confederated Tribes of the Chehalis Indian Reservation as being a federally recognized tribe). Moreover, under the Bureau of Indian Affairs' mandatory criteria for Federal acknowledgment, 25 C.F.R. § 83.7(a) (2000), there is no requirement that indigenous groups demonstrate they have a treaty with the United States as a prerequisite for gaining federal recognition.

Conversely, there are also many Indian tribes that have treaties with the United States government, but that are not currently federally recognized. For example, the Wynadot Nation of Kansas is not a federally recognized tribe, even though it has several treaties with the United States government. Compare, Vine Deloria Jr. & Raymond J. DeMallie, Documents of American Indian Diplomacy 185-97 (1999)(citing

several treaties between the Wynadot tribe and the United States between 1805-1855) with (Indian Entities Recognized and Eligible to Receive Services from the United States, 65 Fed. Reg. 13, 298 (2000), which does not list the Wynadot Nation of Kansas as a federally recognized tribe.) Thus, if the purpose of the BGEPA's exception is to lessen burdens on treaty rights, the Secretary's regulations arbitrarily exclude many treaty tribes simply because they are "unrecognized."

As an alternative to an exception, appellant Vasquez-Ramos could be denied access to the Repository system but simply left alone in the private exercise of his religion with the feathers at issue in this case. See, Sherbert v. Verner, 374 U.S. 398, 407 (1963)("the government must demonstrate that no alternative forms of regulation would [accomplish the governmental interests] without infringing First Amendment rights."); Callahan v. Woods, 736 F.2d 1269, 1272-73 (9th Cir. 1984)("if the compelling state 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.")

Simply exempting appellant Vasquez-Ramos would also not create any additional problem of administrability. The Secretary is already engaged in a complex process of parsing out tribal and religious beliefs during the evaluation of permit

applications. In fact, the current regulations require applicant to list the name of the ceremony for which they desire eagle feathers. 50 C.F.R. § 22.22(a)(2003). In addition to answering questions about their religious beliefs during the permit process, the applicant must also agree to allow government agents to monitor the permitted activity by granting them reasonable entry into the premises where the eagle will be used. 50. C.F.R. § 13.21 (e)(2)(2003). Therefore, the government already makes intrusive qualitative judgments regarding religious belief.

Any concern that a bright line must be drawn between federally recognized and non-federally recognized tribal members to ease administrability is also unpersuasive. It is the *lack* of the permit that is criminalized, so even an enrolled member of a federally recognized tribe can be prosecuted for possession of bald or golden eagle feathers without a permit. A system open to non-recognized tribal members would be no more difficult to apply, but would allow individuals like appellant Vasquez-Ramos the free exercise of their religion. As the Court concluded in Gonzalez, it would be surprising to find that the need for uniformity would preclude the recognition of exceptions in this case, where the statute in question already has many exceptions, and the very reason Congress enacted the RFRA was to respond to a decision denying a claimed right to a sacrament.

c. The Government's Failure to Diligently Recover and Salvage Eagle Corpses

The facts in the record below support a different finding than that in Antoine. In Antoine, this Court held, that the exclusionary provision of the permit system did not violate the RFRA because any attempt to amend the current system would necessarily further burden Native Americans whose religious practices are now protected by the BGEPA and the regulations. Antoine, 318 F.3d at 924-925. This Court surmised that a more inclusive system could never be "less restrictive" because it necessarily places additional burdens on other believers and therefore no "viable RFRA claim" existed. Id. at 923[10]. This rationale was also adopted by the district court in this case which paraphrased Antoine as holding "...the government must decide whether to distribute eagles narrowly and thus burden no members or distribute them broadly and exacerbate the extreme delays already faced by recognized tribes."

However, the holding of Antoine considered the much broader question of the effect of opening the entire Federal Repository system to *every* non-tribal member who applied. Under Gonzalez, however, the correct inquiry is what effect there would be

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[10] This Court acknowledged that the record in Antoine contained no data on the number of nonmembers who would seek permits if eligible, but assumed that the consequences of extending eligibility was predictable from the nature of the repository system. Antoine, 318 F.3d at 923.

on the repository system if it is opened up to the appellant Vasquez-Ramos *alone*. Moreover, the holding in Antoine was directly predicated on the incorrect premise, to wit, the "inescapable result of a demand [for eagle parts] that exceeds a fixed supply." Antoine, 318 F.3d 919, 923. The facts presented in the record below compel a different conclusion.

No evidence was presented to the Court in Antoine regarding how increased diligence of the government in the salvage and recovery of eagle carcasses could remedy the problem of a demand which outstrips supply. On the contrary, here the record shows even a minimal increase in collection efforts by the Federal Repository could offset the increase in Repository demand caused by the inclusion of appellant Vasquez-Ramos

Apparently, the government's efforts to increase the number of eagles being salvaged and sent to the Repository consists of the production of a brochure and video sent to FWS field staff, and absorbing shipping costs incurred. Declaration of Atensio at ¶13, ER 90[11]. This has led to the current system, where the Repository receives

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[11] The fact that the video was produced with the intent of "providing sensitivity to field staff and stressing the importance and significance of this resource to Native Americans" informs this Court of an apparent lack of motivation recognized by the Repository itself on the part of the FWS field staff to collect and salvage parts and carcasses.

merely 1 of every 30 eagles which die each year. See, Declaration of Brian Walton at ¶10, ER 125.

While the government has conducted some outreach to their field staff, they have apparently conducted no outreach with respect to the public at large, including those who are involved in the study of these animals and their habits, and millions of lay people who frequent eagle habitats recreationally. See, Walton Declaration at ¶11; ER 125. Additionally, it is a federal crime for anyone without a permit to temporarily retrieve an eagle carcass, even for the purpose of transferring it to a FWS field office or the Repository system. Id.; ER 125. This law serves as a significant deterrent to lay people who might otherwise collect and alert the government to carcasses encountered. Id.; ER 125.

The U.S. Fish and Wildlife Service reports tens of thousands of avian deaths per year related to due collisions with high-tension power lines. While electrocution and "wire strikes" remain a leading cause of mortality among eagles, outreach by the Repository system to power company officials and technicians remains similarly non-existent. See, Walton Declaration at ¶12; ER 125. In a 2001 study conducted by the National Wind Coordinating Committee, a group that studies wind energy, there are over 15,000 operational wind turbines in the U.S. These turbines were responsible for

approximately 33,000 bird fatalities per year for all species, including approximately 488 raptor fatalities per year[12]. See, National Wind Coordinating Committee, Avian Collisions with Wind Turbines: A Summary of Existing Studies and Comparisons to Other Sources of Avian Collision Mortality in the United States, August 2001.

Many of the studies into avian death have been conducted at Altamont Pass, where more than 5,000 turbines exist. Id. During a one-time search of turbines at Altamont, scientists found 20 carcasses, including 15 raptors. Id. Many of the fatalities at Altamont have been golden eagles, and annual golden eagle mortality at this can facility has been estimated to range from 25 to 39. Id. The government however apparently does little to collect the carcasses which they know will inevitably accumulate each year. See, Walton Declaration at ¶12; ER 125.

Additionally, the entire state of Alaska apparently remains an untapped resource. Roughly one half of all bald eagles in North America reside in the state of Alaska which boasts a bald eagle populations of between 50,000 to 70,000 birds. It is not uncommon for eagle carcasses to be found simply strewn along Alaskan rivers, never to be recovered by the Repository system. See, Walton Declaration at ¶13; ER

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[12] The fact that these turbines which kill hundreds of eagles each year are often subsidized by the federal government must also be considered when analyzing if prosecuting appellant Vasquez-Ramos is the least restrictive means for the government to protect eagle populations.

126. Finally, eagles "molt" or shed and regrow all of their 60 feathers each year. There is at least one Native American organization which is permitted to keep some eagles in captivity so their molted feathers may be recovered for religious use. See, Walton Declaration at ¶14; ER 126. Despite the expanding resources of many Native American nations due to profitable casino operation, the government has apparently never explored the expansion of this program as a substantial potential source of eagle feathers. In contrast to the record in Antoine, here appellant Vasquez-Ramos showed the government effort to collect bald eagle feathers falls far short of its capabilities.

V.

CONCLUSION

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

Dated: August 17, 2007

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for appellant Mario Manuel Vasquez-Ramos states, pursuant to Ninth Circuit Court Rule 28-2 states that United States v. Luis Manuel Rodiguez-Martinez, CA 06-50694 is a related case.

Dated: August 17, 2007

Respectfully submitted,

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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 8,216 words.

DATED: August 17, 2007

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PROOF OF SERVICE

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 years and not a party to the within action. My business address is 825 North Ross, Santa Ana, CA 92701. On the 21st day of August 2007, I served the foregoing documents described as follows:

APPELLANT'S OPENING BRIEF

On the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

XX By mail, I am readily familiar with the firm's practice and processing correspondence. Under that practice, it would be deposited with the U.S. Mail service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed this 21st day of August 2007, at Santa Ana, California.

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