No. 09-4046

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

SAMUEL RAY WILGUS
Defendant-Appellee

_____

ORAL ARGUMENT IS REQUESTED

_____

On Appeal from the United States District Court
for the District of Utah (Hon. Dee Benson)

_____

REPLY BRIEF

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INTRODUCTION

The United States met its burden on remand of showing that the Eagle Act's prohibition against possessing eagle feathers satisfies the Religious Freedom Restoration Act ("RFRA") because no means of furthering the government's compelling interests are available that impose less of a burden on religious exercise. The record shows that the Eagle Act furthers the government's compelling interests in protecting eagles and fulfilling its unique relationship with federally recognized Indian tribes. The record also shows that allowing persons who are not members of federally recognized tribes ("non-members") to possess eagle feathers would defeat both of those interests. This Court should follow the other circuits that have upheld the Eagle Act against RFRA challenges like the one presented here, *United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. 2008); *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (*per curiam*), and reverse the district court.

ARGUMENT

I. The Eagle Act furthers the government's compelling interests.

In our opening brief, U.S. Br. 15-19, we explained that the Eagle Act's prohibition against possessing eagles and eagle parts furthers the government's compelling interest in protecting eagles by minimizing the black market for those

items and enhancing enforcement capabilities, thereby diminishing demand and the taking of eagles to fill that demand. We further explained, *id.* at 20-24, that the Eagle Act's ban against possessing eagle feathers and its Indian tribes exception further the United States' compelling interest arising from its unique relationship with federally recognized Indian tribes. Wilgus concedes that the Eagle Act furthers the government's compelling interests. Wilgus Br. 3.

We also explained in our opening brief, U.S. Br. 24-27, why the district court erred in holding that the United States' compelling interest is in fostering Native American religion generally: because the United States did not assert such an interest in this case; the Eagle Act is not designed to further that interest, and RFRA does not empower claimants to force the United States to further compelling interests it does not wish to advance; and any effort to promote Native American religion *per se* would run up against the Establishment Clause.

Wilgus does not respond to those points, but contends, Br. 9, that the district court was merely considering the possibility this Court left open in *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002) (*en banc*), that allowing more people to "participate in Native American religion could just as easily *foster* Native American culture and religion by exposing it to a wider array of persons." *Id.* at 1133. As we explained in our opening brief, however, this Court in *Hardman*

recognized that the government has a compelling interest arising from its relationship with federally recognized Indian tribes. *See* U.S. Br. 20-21 (discussing 297 F.3d at 1128, 1129, 1133 n.23, 1134). The Court left open the possibility that the government might also have an interest in fostering Native American religion generally, but it did not "express an opinion" on that point, leaving it to the government to show on remand "how the regulations serve its interests." 297 F.3d at 1133 n.23. Although the government never asserted an interest in "fostering Native American religions," the district court plainly believed that was the government's sole Indian-related interest in this case. *See* Add. 9; *see also id.* at 14, 15, 16 n.10, 38-39. The lower court's failure to acknowledge that the Eagle Act is expressly designed to promote the government's unique relationship with federally recognized tribes led to its flawed analysis on the least restrictive means element of the RFRA test, as we explain further below.

II. Wilgus has not stated a viable RFRA claim.

In our opening brief, U.S. Br. 27-29, we explained that the limited supply of eagles makes it inevitable that there will be some burden on religion and that, while RFRA requires the government to *minimize* that burden, it does not require the government to *shift* that burden from Wilgus onto federally recognized tribes.

See Antoine, 318 F.3d at 923; *see also Cutter v. Wilkinson*, 544 U.S. 709, 720, 722, 726 (2005). Wilgus does not respond to this argument.

III. The Eagle Act is the least restrictive means of furthering the government's compelling interests.

A. The record shows that the Eagle Act satisfies the least restrictive means element of RFRA.

In our opening brief, U.S. Br. 29-54, we showed that the government presented volumes of evidence in this case establishing that the Eagle Act carefully balances the compelling interest in protecting eagles with the compelling interest in fulfilling the government-to-government relationship with recognized tribes and achieves that balance using the means that are least restrictive of religious exercise.

1. We began, *id.* at 31-34, by highlighting the evidence that led the district court to find that eagle feathers are a "scarce resource" and that, given the biology of the species, even a small increase in eagle mortality could have a dramatic impact on eagle populations. Add. 22, 30; *see also* Add. 21. The district court also recognized that eagle populations are not evenly distributed and estimated that there are only nine nesting pairs in the State of Utah. Add. 30.

Wilgus points, Br. 8, to the district court's observation, Add. 31, that the removal of the bald eagle from the list of threatened species under the Endangered

Species Act makes it more difficult for the government to prove that the Eagle Act's possession ban is necessary to protect the species. The legal status of the bald eagle under the Endangered Species Act, however, has no bearing on the golden eagle. That species faces dwindling populations, and there is a significantly greater demand for golden eagles for religious use. *See* U.S. Br. 33. Moreover, the district court found that eagles are a limited resource, particularly in Utah, and that "a relatively small increase in the mortality of adult eagles, from whatever cause, could quickly erase the gains achieved by recent conservation measures." Add. 22. Even if the potential impacts on eagle populations were not so dramatic, this Court held in *United States v. Friday* that the government has a compelling interest "as regards small as well as large impacts on the eagle population" and that, even if "the viability of eagle populations" are not threatened, "the government would still have a compelling interest in ensuring that no more eagles are taken than necessary." 525 F.3d 938, 956 (10th Cir. 2008). Furthermore, as we explained in our opening brief, U.S. Br. 34, the delisting of the bald eagle under the Endangered Species Act is predicated in part on the continued protection of the species under the Eagle Act.

2. Our opening brief next, U.S. Br. 34-39, reviewed the evidence supporting the district court's findings that the demand for feathers already

exceeds the supply, Add. 9, 21; tribal members already have to wait substantial periods for feathers from the Repository, *id.* 21; currently eligible tribal members could overwhelm the permitting system, *id.* 19-20, 29; the number of tribal members practicing Native American religions, along with the number of applications, is increasing, *id.* 11, 25; and rebounding bald eagle populations have not eased the backlog at the Repository; *id.* 23-25. The evidence made it "clear" to the district court that "the Repository system is already vulnerable to any significant increase in demand." *Id.* 21.

Wilgus contends, Br. 3, that the United States took the trial court's "words out of context" and tried "to paint a distorted picture." In particular, he asserts that the trial court did not find that the number of tribal members practicing Native American religions is increasing, but rather that "the practice of traditional religio[n]s by Native Americans has increased since the 1960's." *Id.* We do not believe that our paraphrasing of the district court's statements was misleading and certainly did not intend for it to be. In support of the phrase Wilgus quotes, Add. 11-12, the district court cited the declaration of Dr. Bucko, who also testified: "While hard numbers are elusive at best, what is evident is that the actual numbers of persons, both Native and non-Native, engaging in some type of Native American or 'primal' religious practice is on the rise. Native people are

increasingly returning to their religious roots." Aplt. App. 98 ¶11. The evidence also shows and the district court found that the Repository is receiving an increasing number of applications from tribal members each year, Add. 25, which further demonstrates that we have not "distorted" the trial court's opinion.

Wilgus also takes issue, Br. 2, with the government's quotation of the district court's statement that "the Repository's resources would quickly be overwhelmed," U.S. Br. 9 (quoting Add. 19), and asserts that the court at page 19 was discussing Dr. Sherkat's testimony, which it found unpersuasive. We also cited page 29 of the district court opinion, however, where the court summarized the "state of the evidence" and held that: "The number of enrolled members of federally registered tribes eligible to receive feathers from the Repository might already be sufficient to overwhelm current (and reasonably foreseeable) resources if only they applied."

3. Our opening brief next, U.S. Br. 39-41, described the evidence that proved that the demand for eagle feathers from non-member practitioners of Native American religions is sizeable and growing. In addition, as the district court recognized, the evidence showed that "there may be a million practitioners of Afro-Caribbean religions in this country who require eagle feathers to perform their religious rituals," Add. 29; *see also id.* 37, and that "the number of

practitioners of these religions is increasing," *id.* 19, as is the "population of religious eclectics of all sorts" who need eagle feathers for religious purposes, *id.* 20.

In our opening brief, U.S. Br. 41-46, we proceeded to demonstrate that lifting the Eagle Act's possession ban for non-members would defeat the government's compelling interest in accommodating the needs of recognized tribes. The record shows and the district court found that increasing the number of persons eligible to obtain feathers from the Repository "would inevitably increase wait times at the Repository," Add. 16, and could "completely overwhelm[] supply," *id.* 20; *see also id.* 32. That would vitiate the government's effort to fulfill its relationship with recognized tribes and cause particular problems for theocratic tribes.[1/]

[1/] Wilgus asserts, Br. 7, that "he was adopted into a Paiute family" and hence should receive the same treatment as a tribal member. When this case was previously before this Court, however, Wilgus stated in his opening brief that he "is not an enrolled member of the Paiute Indian tribe of Utah nor any other federally recognized Indian tribe," that he "can not establish that he has any Native American Indian ancestry," and that "Paiute tribal law does not recognize the adoption of non-Indians as members of the tribe." Appellant's Opening Brief at 3, *United States v. Wilgus*, No. 00-4015 (10th Cir. Sept. 25, 2000); *see also* Aplt. App. 21 (affidavit of tribal chairperson), 23 (stipulated findings of fact), 26 (order of Nov. 4, 1999); *cf. Montana v. United States*, 450 U.S. 544, 564 (1981) ("Indian tribes retain their inherent power to determine tribal membership."). Therefore, Wilgus is not entitled to the benefits of tribal membership.

Finally, we showed, U.S. Br. 46-54, that allowing non-members to possess eagle feathers would defeat the government's compelling interest in protecting eagles. *See United States v. Oliver*, 255 F.3d 588, 589 (8th Cir. 2001). We described the evidence that increasing delays at the Repository would increase poaching and explained why allowing non-members to possess feathers, but not obtain them from the Repository would affect eagles no less.[2/] We also showed that lifting the Eagle Act's possession ban would increase an already flourishing black market, which in turn would cause more illegal killing.

6. Wilgus contends that the government "simply failed to marshal[] sufficient persuasive evidence on the least restrictive means issue" and suggests that the government's evidence was too indefinite to satisfy RFRA. Wilgus Br. 4, 6. As we explained in our opening brief, however, U.S. Br. 43-44, 48, this Court in *United States v. Friday* rejected a similar call for the government to estimate "the precise impacts of uncertain future events." 525 F.3d 938, 955 (10th Cir. 2008). The Court's holding in *Friday* that RFRA did not require the government to determine how many eagles would be killed for religious purposes if the Eagle Act's permit requirement were lifted dictates that RFRA also does not require the

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[2/] Wilgus's statement, Br. 14, that the Indian tribes exception allows feathers to be transferred to "non-federally recognized tribal members" is incorrect. 50 C.F.R. § 22.22(b)(1); Aplt. App. 132.

government to "quantify" the potential impacts of allowing non-members to possess eagle feathers: the number of potential new permit applicants, the corresponding increase in waiting times at the Repository, the increase in black market activity and prices, or the number of additional eagles that would be taken illegally. Here, the government met its burden under RFRA by proving that all of these things would rise if the Eagle Act's possession ban were compromised. And it did so though expert testimony that was not only similar to the evidence the Court found sufficient to meet the government's burden in *Friday*, but included testimony from some of the same experts.

Although the government was not obligated to quantify the potential impacts of allowing non-members to possess eagle feathers, it attempted to do so in part through the testimony of Dr. Sherkat. Not surprisingly, Wilgus puts much stock, Br. 2, 4, 6, 10, in the district court's rejection of some of Dr. Sherkat's opinions. As we noted in our opening brief, however, U.S. Br. 11 n.4, the government presented ample evidence in addition to Dr. Sherkat's testimony: approximately 22 declarations (which were accepted as direct testimony) and 382 pages of oral testimony discussing, among other things, the status and trends of eagle populations, the existing demand for eagle possession permits, the potential increase in demand for permits if non-members were allowed to apply, and the

potential impacts of the defendants' proposed alternative regulatory schemes. The government's good-faith, but unsuccessful effort to quantify "the precise impacts of uncertain future events," *Friday*, 525 F.3d at 955, does not detract from the weight of the evidence discussed above.[3/]

B. The district court's proposed alternative is flawed.

1. As explained in our opening brief and reiterated in Part I above, the flaw in the district court's analysis stems from its misunderstanding of the compelling interest Congress sought to further in the Eagle Act's Indian tribes exception. The district court, believing that the government's interest is in promoting Native American religion *per se*, held that opening the Repository to all

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[3/] Wilgus also states, Br. 2, that the government did not appeal "discounting Sherk[a]t evidence based on 2000 census information." Wilgus is correct that we did not appeal the district court's decision to discount Dr. Sherkat's testimony. To the extent that Wilgus is suggesting that this Court cannot consider any information generated by the Census Bureau, however, he is incorrect. In our opening brief, for example, we noted that, although there are only 2 million members of federally recognized tribes, the Census Bureau estimates that almost 5 million Americans claim some Native American ancestry. U.S. Br. 40 n.10. That fact is subject to judicial notice. *See Fong Yue Ting v. United States*, 149 U.S. 698, 734 (1893) ("We must take judicial notice of that which is disclosed by the census"); *Citizens Financial Group, Inc. v. Citizens Nat. Bank of Evans City*, 383 F.3d 110, 127 n.2 (3d Cir. 2004); *United States v. Phillips*, 287 F.3d 1053, 1055 n.1 (11th Cir. 2002); *see also Pueblo of Sandia v. United States*, 50 F.3d 856, 862 n.6 (10th Cir. 1995).

persons who practice Native American religions would be a means of furthering that interest that would be less restrictive of religion than the Eagle Act's ban on possessing eagle feathers. As we explained in our opening brief, however, U.S. Br. 54-55, the government's interest here is in fulfilling its fiduciary relationship with federally recognized Indian tribes, and the trial court's "alternative" would defeat that interest, as well as the interest in protecting eagles.

2. We further explained in our opening brief, U.S. Br. 55-56, that the district court's "alternative" is flawed in that it omits practitioners of Afro-Caribbean religions on the erroneous premise that they are not "identically situated" to Wilgus. Add. 38. Wilgus counters, Br. 11, that practitioners of Afro-Caribbean religions are not "identically situated" to Wilgus because they do not "have Native American beliefs." That distinction, however, is not material here. Practitioners of both Native American and Afro-Caribbean religions share the only characteristics that are relevant in this case: a need for eagle feathers for their religious practices and an inability to obtain them legally. *Cf. Christian Heritage Academy v. Oklahoma Secondary School Activities Ass'n*, 483 F.3d 1025, 1032 (10th Cir. 2007) (finding schools "similarly situated . . . in all material respects" for purposes of Equal Protection Clause claim); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997) (holding courts should compare "relevant"

circumstances in determining whether employees are "similarly situated" for purposes of Title VII claim).

Wilgus further asserts that considering practitioners of Afro-Caribbean religions would exceed this Court's instructions in *Hardman*. Wilgus Br. 11-12 (quoting Add. 37 (quoting 297 F.3d at 1135)). To the contrary, this Court did not instruct the trial court to ignore the fact that one million Americans who practice Santeria need eagle feathers as much as Mr. Wilgus does. Rather, the Court identified the relevant comparison as being between tribal members and non-members. *Hardman*, 297 F.3d at 1135 (identifying the "question at the heart of this case" as why a non-member cannot apply for a permit, while an "identically situated" person can, "if she is a member of a federally recognized tribe").[4/]

3. In our opening brief, U.S. Br. 56-58, we explained that the district court's proposed exemption from the Eagle Act's possession ban for practitioners of Native American religions is not a viable alternative under RFRA because it would create classifications based on religious sect and require the Fish and

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[4/] On appeal, Wilgus also asserts, Br. 5, that testimony relating to Afro-Caribbean religions is irrelevant. In the trial court, however, Wilgus did not object to the testimony of Dr. Martinez, the government's expert on Afro-Caribbean religions, *see* Aplt. App. 457, and thus did not preserve any objection to the admission of this evidence for appeal. *See United States v. Lamy*, 521 F.3d 1257, 1265 (10th Cir. 2008).

Wildlife Service to determine which individuals practice "Native American religions." We also pointed out, U.S. Br. 58-61, that RFRA does not require the government to affirmatively accommodate the asserted religious needs of non-members by opening the Repository to them, and it does not require the government to lead eagles to the brink of extinction before it is entitled to protect them. Indeed, because Mr. Wilgus testified that he did not want feathers from the Repository, Aplt. App. 274, 172 ¶20, the district court's proposed "alternative" of allowing non-members access to the Repository is not even relevant in this case. *See* U.S. Br. 54 n.11. Mr. Wilgus does not respond to those points.

C. Wilgus's criticisms of the current scheme are unfounded.

On appeal, Wilgus asserts that the government "could do a better job of educating the public about the existence [of the] Repository and what to do in the event that feathers/carcasses are found," thereby increasing the supply of feathers at the Repository. Wilgus Br. 6; *see also id.* 9, 13. The district court found, however, that the Repository staff has already done just that -- successfully. *See* Add. 24-25; *see also* U.S. Br. 38-39. In any event, the government has no legal obligation to "engage in affirmative outreach" or "increase the supply of available carcasses." U.S. Br. 59 (quoting *Friday*, 525 F.3d at 956-57; *Vasquez-Ramos*, 531 F.3d at 993).

Wilgus also proposes on appeal that the government implement "an amnesty program so that citizens who possess feathers and/or parts could help increase availability without fear of prosecution." Wilgus Br. 6. Putting aside the fact that Wilgus did not present this argument in the trial court, he has failed to demonstrate that anyone would take advantage of such an "amnesty program," much less a sufficient number of people to supply feathers to the many practitioners of Native American religions who want them.

Wilgus' assertion, Br. 9, that distributing feathers to high school graduates is for a "non-religious" purpose is incorrect. *See* Aplt. App. 95 ¶4; 272 ("something like graduation would be a sacred ceremony because of its religious context"). Moreover, feathers for graduates are distributed through the normal application process, *id.* 339, 379, 392-93, 395, which requires the applicant to certify that the feathers are needed for religious purposes, *id.* 129, 134, 191. Likewise, contrary to Wilgus's assertion, Br. 13, many people who attend pow-wows "in their mind are there for cultural and religious reasons, for spiritual reasons." Aplt. App. 351.

Finally, Wilgus suggests on appeal that the government could improve its enforcement by verifying that tribal members who possess feathers "actually practice tribal religions." Wilgus Br. 7. The application form for obtaining

feathers from the Repository requires applicants to affirm that the request is "for religious purposes." Aplt. App. 129; *see also id.* 191. And when the feathers are delivered, the recipient must certify his understanding that the feathers "may be used only for religious purposes." *Id.* 134. As explained in our opening brief, U.S. Br. 57-58, the Fish and Wildlife Service also used to require permit applicants to identify the ceremony for which the feathers were required and include the certification of a tribal leader that the applicant was authorized to participate in that ceremony, but the Service abandoned those requirements when they were held to violate RFRA. In any event, Wilgus has not shown that questioning the veracity of tribal members' religious needs would increase the feather supply sufficiently to accommodate non-member practitioners of Native American religions.

D. Wilgus's contention that he is being singled out is unfounded and irrelevant.

Wilgus contends that, because the Solicitor General decided not to pursue an appeal against Mr. Hardman, "the United States is selectively singling out Mr. Wilgus." Br. 4; *see also id.* 12. To the contrary, the government has pursued numerous individuals and businesses around the country for eagle-related crimes

in just the past few months.[5/] Moreover, the facts of this case differ in significant respects from Hardman's case. Most notably, Mr. Hardman was caught with only a handful of feathers. *See Hardman*, 297 F.3d at 1118. Mr. Wilgus, on the other hand, had 141 feathers, *id.* at 1119, many more than he needed for his own religious use. *See* Aplt. App. 294.[6/]

Even if his assertion were factually correct, Wilgus does not explain how the government's prosecutorial discretion relates to the RFRA issue before this Court. He also does not come close to making out a selective prosecution claim. *See United States v. Davis*, 339 F.3d 1223, 1228 n.3 (10th Cir. 2003) ("In order to prevail on this defense, a defendant must prove 'first, that he has been singled out

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[5/] For example, in July 2009, the Fish and Wildlife Service announced that PacifiCorp pled guilty to unlawfully killing golden eagles and other migratory birds by electrocution on power lines and was ordered to pay a fine of over $10.5 million. *See* http://www.fws.gov/news/newsreleases/showNews.cfm?newsId=750629CF-E286-4B51-379292C1D9377C41; *see also*, *e.g.*, http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=FD471CA2-AC4E-EDF9-FF7919AB50D1FFD3; http://www.justice.gov/opa/pr/2009/August/09-enrd-893.html.

[6/] In his appeal brief, Br. 2, Wilgus asserts that the government "mischaracterizes" his testimony and that he had testified that "an eagle fan has over 137 feathers." He acknowledges, however, *id.*, that he also testified that it would "certainly" be "possible for a practitioner of a Native American religion to conduct a prayer ceremony with as few as one feather." Aplt. App. 294. In addition, at trial, he said that a fan contains only "several feathers" and that "people in higher position[s] have eagle fans." *Id.*

for prosecution while others similarly situated generally have not been proceeded against for the type of conduct forming the basis of the charge against him; and second, that the Government's selection of him for prosecution was invidious or in bad faith and was based on impermissible considerations such as race, religion, or the desire to prevent the exercise of constitutional rights.'" (quoting *United States v. Salazar*, 720 F.2d 1482, 1487 (10th Cir. 1983))); *see also Rice v. Cayetano*, 528 U.S. 495, 519-20 (2000) (classification based on membership in a federally recognized tribe is political, not racial).

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed and this case remanded.

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