No. 13-40326

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MCALLEN GRACE BRETHREN CHURCH, ET AL.,

Plaintiffs-Appellants,

v.

S.M.R. JEWELL, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION, CIVIL NO. 7:07-CV-60

BRIEF OF DEFENDANT-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

Although Plaintiff-Appellants have not requested oral argument, Defendant-Appellee would note that the Court has not previously addressed the issues presented in the briefing. Defendant-Appellee is therefore prepared to present oral argument if the Court would find it helpful to the resolution of this case.

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BRIEF OF DEFENDANT-APPELLEE

Defendant-Appellee, S.M.R. Jewell, Secretary of the United States Department of the Interior,[1] files this brief in response to that of Plaintiffs-Appellants McAllen Grace Brethren Church, *et al*.

[1] S.M.R. Jewell, who replaced Ken Salazar as Secretary of the Interior, is automatically substituted as the Defendant-Appellee in this matter. *See* Fed.R.Civ.P. 25(d)(1).

STATEMENT OF JURISDICTION

McAllen Grace Brethren Church, *et al.*, appeal from the summary judgment order entered by the district court (Hinojosa, J.) on February 21, 2013. (R. 1397).[2] The jurisdiction of the district court was invoked under the Administrative Procedures Act ("APA"), the Religious Freedom Restoration Act ("RFRA"), and the United States Constitution. (R. 402, 436). McAllen Grace Brethren Church, *et al.*, filed a notice of appeal on March 14, 2013 (R. 1351). The district court did not enter a separate judgment pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. However, judgment is deemed entered 150 days after February 21, 2013, which was July 21, 2013. Although McAllen Grace Brethren, *et al.*, filed their appeal before that date, Rule 4(a)(2) of the Federal Rules of Appellate Procedure provides that an appeal filed after a court's order but before entry of judgment is treated as filed "on the date of and after the entry" of judgment. Rule 4(a)(2) therefore vests this Court with jurisdiction under 28 U.S.C. § 1291.

[2] "R." refers to the record on appeal; the number following refers to the page.

STATEMENT OF THE ISSUE

Whether the Bald and Golden Eagle Protection Act's prohibition against possessing eagle feathers, and the exception to that prohibition for federally recognized tribes, satisfies the Religious Freedom Restoration Act by furthering a compelling governmental interest in the least restrictive manner.

STATEMENT OF THE CASE

A. Course of proceedings and disposition below

On March 16, 2007, McAllen Grace Brethren Church, Robert Soto, Michael Russell, Michael Cleveland, *et al.*, (hereinafter "Soto")[3] filed this action in the United States District Court for the Southern District of Texas against Attorney General Alberto Gonzalez and a number of other federal officials. (R. 13). This case remained stayed for several years during the pendency of a parallel criminal proceeding involving Cleveland. *See* Docket Minute Entries for July, 5, 2007, March 23, 2010, and March 8, 2012. After the district court lifted the stay, Soto amended the complaint. (R. 402). The amended complaint named the United States Secretary of the Department of the Interior (hereinafter

[3] Soto is the only Plaintiff-Appellant with the requisite injury in fact to establish standing in this case. The eagle feathers at issue here were owned and subsequently voluntarily abandoned by Soto, and he is the only party that filed a petition with the Department of the Interior for the return of those feathers. (R. 502, 507). Although Russell also signed an abandonment form, he did not file a petition for remission. (R. 490). The remaining Plaintiff-Appellants were not personally involved in actions giving rise to this suit and they can therefore only assert generalized grievances rather than the concrete and particularized injury that is required to establish standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992).

"Department") as the Defendant in the action. *Id.* The Department filed an Administrative Record supporting its actions, (R. 455), and the parties filed cross motions for summary judgment. (R. 1130, 1166).

On August 29, 2012, the district court ordered the parties to file amended cross-motions for summary judgment. *See* Docket Minute Entry on August 28, 2012. The parties filed amended motions per the district court's order. (R. 1275, 1312). At a hearing on December 21, 2012, the district court advised the parties that it required additional time to review the Administrative Record. *See* Docket Minute Entry for December 21, 2012. On February 21, 2013, the district court held a hearing at which the parties presented argument and the court granted the Department's motion for summary judgment and denied Soto's motion for summary judgment. *See* Docket Minute Entry for February 21, 2013; *see also* (R. 1371). On March 14, 2013, Soto filed a notice of appeal and then an amended notice of appeal on March 18, 2013. (R. 1351, 1353).

B. Statement of facts

The facts giving rise to this action began on March 11, 2006, when Special Agent Alejandro Rodriguez of the United States Fish and

Wildlife Service ("FWS") attended an American Indian powwow in McAllen, Texas. (R. 466). The powwow was held at the Palm View Library and Community Center in McAllen; it was advertised in a local newspaper and was open to the public. (R. 466-67). Agent Rodriguez approached a vending booth operated by Cleveland and his mother, where he observed on display several "dream catchers" bearing bird feathers. (R. 469). After making a preliminary determination that the feathers belonged to protected migratory birds, Agent Rodriguez confiscated eight feathers, six of which were later confirmed by laboratory analysis as belonging to bird species protected under the Migratory Bird Treaty Act ("MBTA"). *Id.*; *see also* (R. 1238).

At the powwow, Agent Rodriguez also encountered Soto and Russell, who were in possession of golden eagle feathers. (R. 466-73). Soto identified himself to Agent Rodriguez as a member of the Lipan Apache Tribe of Texas. (R. 468). Although Agent Rodriguez did not immediately seize the two loose golden eagle feathers worn by Soto, he informed Soto that his possession of eagle feathers would be further investigated. *Id*. Russell, on the other hand, readily admitted that he was not an American Indian. (R. 467). Agent Rodriguez issued Russell a

Notice of Violation under the Bald and Golden Eagle Protection Act ("Eagle Act") for the possession of eagle feathers without a permit. (R. 489). The golden eagle feathers in his possession were seized (44 feathers in a bustle). (R. 469, 559).

After the Special Agent researched the matter, he determined that the Lipan Apache Tribe of Texas is not a federally recognized tribe. (R. 470); *see also* (R. 1194). The Agent then set up a meeting with Soto to discuss his possession of eagle feathers. (R. 470, 565). On March 23, 2006, Soto, Russell, and their attorney, met with Agent Rodriguez at the office of Soto and Russell's attorney. (R. 470). Both Russell and Soto signed voluntary abandonments, abandoning the feathers that they possessed during the powwow. (R. 470-71, 490-91). Russell also agreed to pay the $500.00 fine associated with the previously issued Notice of Violation, which he paid on March 30, 2006. (R. 471, 560). In exchange, the criminal investigation was concluded without further charges being filed against Soto and Russell. (R. 470, 560).

The voluntary abandonment form signed by Russell and Soto provided them the right to file a petition for the remission of their property within 60 days. (R. 490-91). Soto availed himself of this process

by petitioning the Department of the Interior for the return of the feathers. (R. 507). His petition for remission was denied on February 23, 2007. (R. 559). In accordance with the regulations governing petitions for remissions, Soto then filed a Supplemental Petition for Remission on March 2, 2007, (R. 562), which was denied on December 8, 2011. (R. 750).[4] The Department denied Soto's supplemental petition for remission based upon the Eagle Act and the fact that Soto is not a member of a federally recognized tribe. *Id.*[5]

Unlike Soto and Russell, Cleveland faced criminal charges. Specifically, he was charged with the unlawful possession, sale, offer to sell, or transportation of migratory birds, their parts without a permit, in violation of the MBTA, 16 U.S.C. § 703. (R. 84-91). After a bench trial before United States Magistrate Judge Dorina Ramos, Cleveland was convicted and ordered to pay a $200 fine. *Id.* Cleveland appealed his

[4] Because Cleveland presented similar claims in his criminal case, the Department did not decide Soto's petition until after Cleveland's criminal case had been decided. (R. 750). The additional time also allowed the Department to consider the Tenth Circuit's decision in *U.S. v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011). (R. 752).

[5] To be clear, none of the named Plaintiffs-Appellants are members of federally recognized tribes. (R. 1194), Declaration of R. Lee Fleming, ¶¶ 3-6 (confirming that the Lipan Apache Tribe of Texas is not federally recognized); (R. 374) at ¶ 33 ("Plaintiffs are American Indians as defined under 62 FR 58782 who are not enrolled in federally recognized tribes"); (R. 1343) (confirming that Russell is not an enrolled member of any tribe).

conviction to the District Court Judge. *Id*. Doc. No. 62. The court affirmed his conviction on June 24, 2011. (R. 1238).[6]

C. Statutory and Regulatory Background

1. The Eagle Act

Recognizing that "the bald eagle is no longer a mere bird of biological interest but a symbol of the American ideals of freedom" and that "the bald eagle is now threatened with extinction," Congress enacted the Protection of the Bald Eagle Act of 1940, 54 Stat. 250 (preamble). That statute prohibits the taking, possession, sale, barter, purchase, transport, export, and import of bald eagles or any parts of bald eagles, except as permitted by the Secretary of the Interior. *See* 16 U.S.C. §§668(a), 668a, Stat. Add. i. Because young golden eagles are very difficult to distinguish from young bald eagles, Congress extended the statute's prohibition to golden eagles in the Bald and Golden Eagle

[6] Although the matter was litigated at the district court, Plaintiffs-Appellants have not raised any arguments concerning Cleveland's criminal conviction in their opening brief. Any arguments concerning Cleveland's conviction are therefore waived. *See Lockett v. E.P.A.*, 319 F.3d 678, 684 n. 16 (5th Cir. 2003). In addition, Plaintiff-Appellants have not identified Michael Cleveland as an interested party to this appeal. Nevertheless, even if Plaintiffs-Appellants had made arguments concerning Cleveland's conviction, they would have been barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

Protection Act of 1962, 76 Stat. 1246. *See United States v. Dion*, 476 U.S. 734, 736, 740-43 (1986).

The Eagle Act abrogated the treaty rights of numerous Indian tribes to hunt eagles on their land. *See id*. at 743-745. Recognizing that "feathers of the golden eagle are important in religious ceremonies of some tribes," H.R. Rep. No. 87-1450, at 2 (1962); *see also* S. Rep. No. 87-1986, at 3-4 (1962), Congress in 1962 authorized the Secretary of the Interior to permit the taking, possession, and transportation of eagles and eagle parts for certain specified purposes, including for "the religious purposes of Indian tribes." 16 U.S.C. § 668a (hereinafter "Indian tribes exception"); *Dion*, 476 U.S. at 740-43 (describing legislative history of 1962 amendment). The Secretary may issue such permits only if he determines that it is "compatible with the preservation of the bald eagle or the golden eagle." *Id.*

Under regulations implementing the Eagle Act's Indian tribes exception, only enrolled members of federally recognized Indian tribes with which the United States maintains a government-to-government relationship (hereinafter "tribal members") may apply for permits. 50 C.F.R. § 22.22(a) (referencing 25 U.S.C. § 479a-1), Stat. Add. iii. In

processing applications, the FWS considers "the direct or indirect effect which issuing such a permit would be likely to have upon the wild populations of bald or golden eagles." *Id.* § 22.22(c).

Applications for permits to possess eagle parts are processed at the FWS's regional migratory bird permit offices and, if approved, are forwarded to the National Eagle Repository in Commerce City, Colorado. (R. 1018-19) (National Eagle Repository brochure); (R. 1016) (sample permit application). The Repository receives dead eagles and eagle parts and distributes them free of charge to qualified permit applicants on a first-come first-served basis. Because the demand for eagle parts exceeds the supply, applicants must wait for their requests to be filled. *See United States v. Friday*, 525 F.3d 938, 944 (10th Cir. 2008); *U.S. v. Wilgus*, 638 F.3d 1274, 1282-83 (10th Cir. 2011).[7]

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[7] The Department of Justice recently issued a Memorandum concerning the prosecution of cases involving the possession or use of eagle feathers or parts for tribal cultural and religious purposes. *See* http://www.justice.gov/ag/ef-policy.pdf (October 12, 2012). The new policy has no bearing on the instant case because it makes clear that it "is not intended to address or change how the Department of Justice handles cases involving those who are not members of federally recognized tribes." DOJ Eagle Feathers Policy at 4. In addition, the new DOJ Policy is consistent with the Department of the Interior's Morton Policy, which has been in place since 1975. *Id.* at p. 3; *see also* (R. 1095-1100) (Morton Policy). Even assuming for the sake of argument that the DOJ Policy were somehow relevant to this case, it was not in place at the time that the Department denied Soto's petition and it is therefore not before the Court.

2. The Migratory Bird Treaty Act

The MBTA was enacted in 1918 to implement a convention between the United States and Great Britain protecting migratory birds. The MBTA has since been amended to implement conventions which the United States has signed with Mexico, Japan, and the Soviet Union. By enacting the MBTA, Congress asserted regulatory authority over migratory birds which previously had been exercised only by the individual states. *See Missouri v. Holland*, 252 U.S. 416 (1920). The cornerstone of the protections afforded by the MBTA is found in § 703. 16 U.S.C. § 703(a) (prohibiting the harming, selling, and possession of migratory birds or their parts).

Section 704 of the MBTA authorizes the Department of the Interior to determine when, and to what extent, to permit takings of migratory birds. 16 U.S.C. § 704. The Department of the Interior has issued regulations for this purpose. 50 C.F.R. § 21.1 *et seq*.

3. RFRA

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., allows the government to enforce generally applicable laws, even when they have the effect of "substantially burden[ing] a person's

exercise of religion" if the government "demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a) and (b), Stat. Add. ii. Congress enacted RFRA following *Employment Division, Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court held that the Free Exercise Clause did not require Oregon to exempt from its criminal drug laws the sacramental ingestion of peyote by members of the Native American Church. *Id*. at 877-82. *Smith* held that the First Amendment allows the application of generally applicable laws to religious exercises even when the laws are not supported by a compelling governmental interest. *Id*. at 884-889. RFRA codifies, as a requirement of federal statutory law, the Free Exercise Clause standard that the Supreme Court applied before *Smith* in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *See* 42 U.S.C. § 2000bb(b)(1); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Under RFRA, the person contesting the government action must first prove that it substantially burdens a sincerely held religious belief. *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997). When the plaintiff has met that threshold, the government bears the burden on the compelling interest and narrow tailoring elements of RFRA. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3); *O Centro*, 546 U.S. at 428. The government, however, is not required to "refute every conceivable option" to prove that a law is narrowly tailored. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)). Once the government provides evidence that an exemption would impede the government's compelling interests, the plaintiff "must demonstrate what, if any, less restrictive means remain unexplored." *Hamilton*, 74 F.3d at 1556; *see also Wilgus*, 638 F.3d at 1290, n. 7 (noting that the government is generally only required to refute the alternatives presented by the challenging party).

RFRA provides a "workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). The test must "be applied in an appropriately balanced way, with particular sensitivity" to important governmental

interests, *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005), and "with regard to the relevant circumstances in each case," S. Rep. No. 103-111, at 9 (1993).

SUMMARY OF ARGUMENT

The district court correctly granted the Department's motion for summary judgment. Soto contends that the Department's denial of his petition for the return of his eagle feathers violated RFRA. However, according to longstanding Department regulations, only members of federally recognized tribes may possess eagle feathers and eagle parts. This policy furthers two compelling interests: (1) protecting eagles and (2) fostering the culture and religion of federally recognized Indian tribes. The Department's enforcement of the Eagle Act is the least restrictive means of furthering these two competing, compelling interests.[8]

Soto contends that the Department should allow all persons of American Indian heritage to possess eagle feathers irrespective of whether they are members of federally recognized tribes. As explained below, Soto's position -- that the number of persons entitled to possess

[8] For the purposes of this appeal, the Department does not contest Soto's assertion that the Eagle Act substantially burdens his religious beliefs. If this matter is remanded, the Department reserves the right to contest all of Soto's contentions.

eagle feathers should be increased by millions -- would undermine the compelling interests that the government is furthering via its eagle feather policy and should therefore be rejected. Courts have repeatedly, and recently, upheld the regulations that Soto challenges in this lawsuit. Further, the Administrative Record and supplemental documents fully support the Department's actions. For these reasons and the reasons discussed below, the Court should affirm the district court's grant of summary judgment.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002). The Department of the Interior's decision to deny Soto's petition for remission is reviewed under the standard set forth in the APA. In particular, judicial review of administrative actions is governed by section 706 of the APA, 5 U.S.C. § 706. *See U.S. v. Menendez*, 48 F.3d 1401, 1410 (5th Cir. 1995)(holding that "[e]xcept as otherwise provided by law, the APA judicial review provisions apply to all federal agency actions unless a statute precludes judicial review or agency action is committed by law to agency discretion").

RFRA provides a private right of action for claims against federal agency actions that are allegedly in violation of the legal standards set forth in the statute. *See* 42 U.S.C. §§ 2000bb-1(c) (stating that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government"). RFRA, however, does not establish any procedures for judicial review. Hence, RFRA's silence on the standards for judicial review of federal agency action dictates that APA principles apply. *See United States v. Carlo Bianchi*, 373 U.S. 709, 715 (1963) (noting that "in cases where Congress has simply provided for review [of federal agency actions], without setting forth the standards to be used or the procedures to be followed" review should be confined to the administrative record).[9]

Soto's challenge to the Department's denial of his petition is governed by the standard of review set out in the APA, which provides a reviewing court may set aside agency action only if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in

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[9] For example, although the Endangered Species Act provides a private right of action against federal agencies, 16 U.S.C. § 1540(g)(1), it does not contain an internal standard of judicial review. Thus, courts review agency compliance with the Endangered Species Act pursuant to the APA. *See generally In Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982) (citing *United States v. Carlo Bianchi*, 373 U.S. at 715).

accordance with law." 5 U.S.C. § 706(2)(A). Thus, to the extent that this case does not present a purely legal issue, any challenge to the facts underpinning the Department's denial of his petition is governed by the "arbitrary and capricious" standard of review set out in the APA. 5 U.S.C. § 706(2)(A); *see also Harris v. U.S.*, 19 F.3d 1090, 1096 (5th Cir. 1994). The Court's review under this standard is narrow, and the Court cannot substitute its judgment for that of the agency, particularly when the challenged decision "implicates substantial agency expertise." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376 (1989). An agency's conclusions must be upheld if the agency has considered the relevant factors and has articulated a rational connection between its factual judgments and its policy choice. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). In essence, the Court must decide only whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 904 (5th Cir. 1983) ("This standard of review is highly deferential"); *Sabine River Authority v. U.S. Dep't of Interior*, 951

F.2d 669, 678 (5th Cir. 1992) ("[u]nder this highly deferential standard of review, a reviewing court has the 'least latitude in finding grounds for reversal'") (quoting *North Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533, 1538 (11th Cir. 1990)).[10]

ARGUMENT

THE DISTRICT COURT CORRECTLY GRANTED THE SECRETARY OF THE INTERIOR'S MOTION FOR SUMMARY JUDGMENT, FINDING THAT THE DEPARTMENT'S POLICY IS THE LEAST RESTRICTIVE MEANS OF FURTHERING COMPELLING GOVERNMENTAL INTERESTS.

The district court correctly followed the extensive body of case law upholding the Indian tribes exception to the Eagle Act. Virtually every court to address the validity of the Eagle Act under RFRA has upheld it. The Ninth and Eleventh Circuits have upheld the Act and its implementing regulations against challenges, like the one presented here, brought by persons who are not members of federally recognized

[10] Even if the Court does not apply the APA standard of review in this case, the district court's decision should nevertheless be affirmed based upon the only competent summary judgment evidence in the record -- the Administrative Record and the Declarations filed and cited by the Department. Rather than referring the Court to evidence in the record as required, Fed.R.App.P. 28(a)(9)(A), Soto makes a series of factual assertions in his opening brief without supporting citations. These types of bald assertions are not competent evidence. *See Hugh Symons Group, plc v. Motorola, Inc.,* 292 F.3d 466, 468 (5th Cir. 2002) (noting that unsubstantiated assertions and unsupported speculation are not competent summary judgment evidence). Similarly, Soto refers to newspaper articles and internet sources throughout his brief, which are also not competent summary judgment evidence. *See* Fed.R.Civ.P. 56(c)(1)(A); *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005) (noting that newspaper articles are not competent summary judgment evidence); *Bing Shun Li v. Holder*, 400 Fed.Appx. 854, 2010 WL 4368469, *2 n. 4 (5th Cir. 2010) (discussing unreliability of information on Wikipedia).

tribes alleging that the possession ban violates RFRA. *See United States v. Vasquez-Ramos*, 531 F.3d 987 (9th Cir. 2008); *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003) (rejecting claims of members of a non-federally recognized tribe); *Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (per curiam); *see also United States v. Winddancer*, 435 F. Supp. 2d 687 (M.D. Tenn. 2006); *United States v. Lundquist*, 932 F. Supp. 1237 (D. Or. 1996); *Rupert v. Director, U.S. Fish & Wildlife Svc.,* 957 F.2d 32 (1st Cir. 1992) (holding denial of application to possess eagle feathers filed by non-member Native American did not violate Free Exercise Clause). Similarly, the Tenth Circuit recently upheld the Department of the Interior's implementation of the Eagle Act against a challenge similar to the one presented by Soto. *See United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011). This Court need go no further than this overwhelming weight of authority to hold, as a matter of law, that the Eagle Act, as implemented, satisfies RFRA. *See Antoine*, 318 F.3d at 921-22 (concluding the government should not be forced to re-litigate its compelling interest in protecting bald and golden eagles in response to each challenge to the Eagle Act).

Should the Court go beyond the case law and review the Administrative Record in this case, it demonstrates that the Department's enforcement of the Eagle Act is the least restrictive means of furthering 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 these interests. These issues are discussed in more detail below.

A. The Department of the Interior's Enforcement of the Eagle Act Furthers the Government's Compelling Interests.

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. In addition, the Eagle Act's ban against possessing eagle feathers and its federally recognized Indian tribes exception furthers the United States' compelling interest arising from its unique relationship with federally recognized tribes. Rather than being arbitrary and capricious, these compelling interests are rational,

long-held, and supported by the relevant case law and facts found in the Administrative Record.

1. The government has a compelling interest in protecting eagles.

The government has a compelling interest in protecting the bald eagle (as our national symbol), and the golden eagle, as its survival and the survival of the bald eagle are intimately intertwined. With regard to the government's interest in protecting eagles, Soto correctly points out that, in 2007, the bald eagle was removed from the list of threatened species under the Endangered Species Act. *See* Appellants' Brief ("Aplt. Br.") at 25. However, "the removal of the bald eagle from the list of species protected under the Endangered Species Act does not render this interest a nullity." *Wilgus*, 638 F.3d at 1285; *see also U.S. v. Vasquez-Ramos*, 531 F.3d at 987 (post-eagle delisting decision). Indeed, the eagle remains a scarce, sensitive wildlife resource. (R. 978, 1212). Moreover, the *Hardman* court correctly observed that, because the eagle is our national symbol, "whether there [are] 100 eagles or 100,000 eagles," the government's interest in protecting them remains compelling. 297 F.3d at 1128. Thus, the government has a compelling

interest in protecting eagles -- as both a scarce wildlife resource and our national symbol -- even though the eagle is no longer a listed species.

The Eagle Act's prohibition against possessing eagles and eagle parts -- except by members of federally recognized tribes -- furthers the government's interest in protecting eagles by minimizing the black market for those items and enhancing the FWS's enforcement capabilities. *See Andrus v. Allard*, 444 U.S. 51, 52-53 (1979) (Eagle Act is "designed to prevent the destruction of certain species of birds"). First, a possession ban serves a forensic evidentiary function. A number of criminal statutes prohibit the possession of certain items where it is difficult to prove the underlying illegal act once the item is reduced to possession. That concern applies to eagles as well, since "it is ordinarily impossible for an inspection to determine whether an eagle feather or other eagle part has come from a bird that died naturally or as a result of illegal hunting." *See Hardman*, 297 F.3d at 1141 (Hartz, J., concurring); *see also* (R. 821), Affidavit of Lucinda D. Schroeder at ¶ 8. (explaining that it is usually not possible to accurately and readily determine whether particular eagle parts are of legal origin); *see also* (R. 846), Affidavit of Prof. James Fraser at ¶ 9 (rejecting the argument

that it would be acceptable for persons to obtain molted eagle feathers); (R. 1200), Declaration of Ed Espinoza, at ¶ 3.

Second, a possession ban minimizes the market for the fruits of an illegal act and thus minimizes the incentive to commit the act. As one court explained, "possession of a good is related to the market for that good, and Congress may regulate possession as a necessary and proper means of controlling its supply or demand"; thus, "the federal government may elect to prohibit the possession of eagle feathers as a practical means of drying up the market for them, and thus protecting against the killing of eagles." *United States v. Patton*, 451 F.3d 615, 626 (10th Cir. 2006) (citing *Andrus*, 444 U.S. at 58).

The Administrative Record demonstrates that, given the difficulty of catching people in the act of killing eagles and law enforcement's inability to determine the origin of eagle parts, a possession ban diminishes the market for illegally taken birds and thus reduces the number of illegal takes. Agent Schroeder explained that "without a possession prohibition, once a bird was dead and reduced to someone's possession, it would be 'home free.' This creates a market for birds and their parts that does not exist where possession itself is prohibited." (R.

821) at ¶9. She further stated that, "if there was no prohibition against the possession of eagles and eagle feathers, the death rate of eagles would sky-rocket as poachers sought to supply the resulting increase in the black market." *Id.*; *see also* (R. 1201-03), Declaration of Agent Preston Fant at ¶¶ 6,7. Hence, the Eagle Act's possession ban furthers the government's compelling interest in protecting eagles by making it more difficult for a person to participate in the illegal trade of eagle feathers and parts.

2. The government has a compelling interest in fulfilling its unique responsibilities to federally recognized tribes.

The government also has a compelling interest in fostering the culture and religion of federally recognized Indian tribes. The United States recognizes and maintains relationships with federally recognized tribes as sovereign political entities. (R. 1206), Declaration of Dion K. Killsback, ¶ 9. "This recognition is the basis for the special legal and political relationship, including the government-to-government relationship, established between the United States and federally recognized tribes, pursuant to which the United States supports, protects, and promotes tribal governmental authority. . . ." *Id.* This

interest is consistent with the Supreme Court's longstanding interpretation of the federal government's relationship with recognized tribes.

In *Morton v. Mancari*, 417 U.S. 535, 537-39 (1974), the Supreme Court rejected an equal protection attack on a provision of the 1934 Indian Reorganization Act that gave Native Americans preference for employment in the Bureau of Indian Affairs. The Court began by noting that Congress has "plenary power" to legislate concerning the tribes. *Morton*, 417 U.S. at 551-52. The Court found that, as a consequence of the forcible seizure of Indian lands by the United States, "the United States assumed the duty of furnishing ... protection [to the Native Americans], and with it the authority to do all that was required to perform that obligation." *Id.* at 552 (quoting *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 715 (1943)). Pursuant to this obligation to the tribes, Congress was empowered to "single out for special treatment a constituency of tribal Indians." *Id.* "The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554. Thus, the preference was "political rather than racial, in nature." *Id.* at 553 n. 24.

Here, Soto fails to recognize that the government's compelling interest in fostering the culture and religion of tribes is based on the political relationship with federally recognized tribes rather than a racial or ethnic preference. Soto argues that the Department is not fostering the culture and religion of American Indians because the government is allegedly denying a majority of American Indians the right to practice their religion. *See* Aplt. Br. at 27. In making this argument, Soto relies on the broad U.S. Census definition of American Indians, which is an ethnic and racial classification rather than a political distinction. The fact that the vast majority of persons who self-identify as American Indian or Native American may not possess eagle parts in no way interferes with the Act's politically rooted compelling interest of fostering the culture and religion of federal recognized tribes.

The Eagle Act creates an exception based on "the religious purposes of Indian tribes," 16 U.S.C. § 668a, rather than an exception based on an individual's racial or ethnic classification. Indeed, *Morton* itself characterized Congress' power over Indian affairs in terms of the tribes: "Resolution of the instant issue turns on ... the plenary power of Congress, based on a history of treaties and the assumption of a

'guardian-ward' status, to legislate on behalf of *federally recognized Indian tribes*." *Id.* at 551 (emphasis added). Thus, as the *Wilgus* court explained, "by adopting the federally-recognized tribes version of the compelling governmental interest in this case, we situate ourselves in the very heartland of federal power, as recognized by the Supreme Court in its *Morton* line of cases." 638 F.3d at 1287. Accordingly, the government's interest in preserving the culture and religion of tribes with whom the government has a unique political relationship is a compelling interest.

B. The Department of the Interior's Enforcement of the Eagle Act is the Least Restrictive Means of Furthering the Government's Compelling Interests.

The government's task here is to balance its interest in protecting eagles with its interest in accommodating recognized tribes in the manner that imposes the least burden on religious exercise. An absolute prohibition on possessing eagle feathers furthers the government's interest in protecting eagles, but it undermines the government's interest in accommodating the needs of recognized tribes to possess feathers. The federally recognized tribes exception "sets those interests in equipoise." *Rupert*, 957 F.2d at 35. No means of "furthering" the

government's compelling interests is available that is less restrictive of religious practices. Lifting the Eagle Act's possession ban for non-members as Soto suggests would not further either of the government's compelling interests, but would instead undermine them and is therefore not required under RFRA.

1. Eagles are a limited and overtaxed resource.

Eagle feathers and parts are a scarce resource and, given the biology of the species, even a small increase in eagle mortality could have a dramatic impact on eagle populations. (R. 978) Affidavit of Karen Steenhof; (R. 1212), Declaration of Jody Gustitus Millar, ¶ 11. Nevertheless, Soto argues 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. Aplt. Br. at 25. The legal status of the bald eagle under the Endangered Species Act, however, does not control the analysis.

First, the bald eagle delisting has little impact on the golden eagle. The golden eagle population is not as healthy as the bald eagle population, and there is a significantly greater demand for golden

eagles for religious use. (R. 978) Steenhof Affidavit; (R. 868), Affidavit of Kevin Ellis, ¶ 7 (noting that golden eagle feathers are more sought after); *see also* (R. 1216-17) Declaration of Brian Millsap at ¶¶ 7, 10 (noting that the FWS will not allow takes of golden eagles because the population cannot withstand additional unmitigated mortality); (R. 1221) Atencio 2012 Declaration at ¶ 10 (noting greater demand for golden eagle parts). Second, a relatively small increase in the mortality of adult eagles, from whatever cause, could quickly erase the gains achieved by recent conservation measures. (R. 970-71) Millar Affidavit, ¶¶ 9-14; *see also* (R. 1211-13) Millar Declaration, ¶¶ 10-14. "Without the BGEPA and MBTA protections, the status of the bald eagle could again deteriorate significantly through death or injury of bald eagles due to hunting or other man-made threats." (R. 1210-11), Millar Decl. at ¶ 9; *see also* (R. 971) at ¶ 14.

Additionally, even if the potential impacts on eagle populations were not so dramatic, in *United States v. Friday,* the Court held 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, 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. *See* 16 U.S.C. § 1533(a)(1)(D), (c)(2) (requiring Secretary to consider the adequacy of "existing regulatory mechanisms" when determining whether to list or delist a species as threatened or endangered); 72 Fed. Reg. 37,353, 37,362-66, 37,367. Consequently, the eagles' removal from the list of threatened species does not eliminate the government's compelling interest in protecting the eagle as Soto contends.[11]

Soto also mistakenly asserts that allowing persons of American Indian ancestry either to collect the alleged "millions" of feathers that are available through the eagles' natural molting process or to keep live eagles, would not undermine the government's compelling interest in protecting eagles. Apt. Br. 24-25. Soto's suggestion is unworkable

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[11] In his brief, Soto also points out that the FWS has issued a permit to the Northern Arapaho Tribe of Wyoming, which allowed them to take two bald eagles. Aplt. Br. at 23. This fact, however, does not support his case. The take permit was issued only after a biological study of the specific bald eagle population in question had been conducted. (R. 1217), Millsap Declaration at ¶ 9. The FWS is unlikely to issue a similar permit authorizing the taking of golden eagles because of the population's more precarious biological status. *Id.* at ¶ 10.

because it would permit persons who claim American Indian ancestry to avoid prosecution for illegally taking eagles by claiming any feathers in their possession were naturally molted or from eagles in captivity. (R. 821, 2101-03); *infra* at 21-24. As a result, allowing non-tribal members to possess eagle feathers -- whether from molting or any other source -- would undermine law enforcement's efforts to combat the illegal trade of eagle feathers and parts.

Further, Soto incorrectly argues that the exception for members of federally recognized tribes is not the least restrictive means of furthering the government's compelling interest in protecting eagles, and that the exception should be expanded to all persons of American Indian ancestry. But, the limited exception for members of federally recognized tribes is necessary to accommodate the competing compelling interests discussed below. Further, the challenges associated with the enforcement of the Eagle Act would only increase with an expansion of the exception from members of federally recognized tribes to all persons of American Indian ancestry. (R. 821-22) at ¶¶ 8-10; *Wilgus*, 638 at 1292 (noting that "one of the few tools FWS has at its disposal to distinguish between lawful and unlawful possession is the

distinction between members and non-members of federally-recognized tribes"). In addition, creating an exception for persons of American Indian ancestry (*i.e.*, persons who self-identify as American Indians) would lead to a new set of enforcement problems related to the inability of law enforcement to verify a person's American Indian heritage. *C.f., Wilgus*, 638 at 1293 (in rejecting a proposed exception for persons practicing Native American religions, noting that FWS agents would unfairly be cast in the role of "religion cop", which would undermine enforcement). Consequently, Soto's proposal -- that all persons who self-identify as American Indian or self-declare American Indian ancestry should be allowed to possess eagle feathers -- would undermine the government's compelling interest in protecting eagles.

2. Lifting the possession ban for non-members would defeat the government's compelling interest in accommodating the needs of federally recognized tribes.

Soto argues that the Department should allow all persons who fall within the Census Bureau's definition of American Indians to possess eagle feathers. Aplt. Br. at 31-32. This would greatly increase the number of persons who are eligible to apply for eagle feathers, which would overwhelm the Repository. Adding a significant number of

applications to the Repository would lengthen wait times exponentially, thereby defeating both the government's compelling interest in protecting the religious practices of federally recognized tribes by giving tribal members some access to the raw materials necessary for their traditional worship. As the Eleventh Circuit concluded in *Gibson*, if the possession ban were lifted for non-members, "the limited supply of bald and golden eagle parts will be distributed to a wider population and the delays will increase in providing eagle parts to members of federally recognized Indian Tribes, thereby vitiating the government[']s efforts to fulfill its . . . obligations to federally recognized Indian tribes." 223 F.3d at 1258.

Soto's proffered alternative scheme would greatly increase the number of persons eligible to obtain eagle feathers. Aplt. Br. at 31-32. Using Soto's own figures, the number would increase from 1.6 million (those people enrolled in a federally recognized tribe) to 8.7 million (those persons who self-identified as having Native American ancestry). Aplt. Br. at 20-21. Similarly, the government estimates that there are approximately 2 million members of federally recognized tribes and, according to the 2010 Census, 5.2 million persons of American Indian

and Alaska Native heritage. (R. 1225-26), Declaration of Steven Payson, ¶¶ 5-6. If millions of additional people were eligible to obtain feathers from the Repository, the Repository would certainly receive more applications, and, given the limited supply, the delay in filling requests would necessarily increase. *See Gibson*, 223 F.3d at 1258; *Antoine*, 318 F.3d at 923 ("If the government extended eligibility, every permit issued to a nonmember would be one fewer issued to a member. This is the inescapable result of a demand that exceeds a fixed supply.").

The Repository already cannot meet the current demand; the number of tribal members waiting for feathers and the length of time they must wait continue to increase. (R. 1034-39) Atencio 2003 Decl. and (R. 1221-22), Atencio 2012 Decl. at ¶¶ 8, 14 (describing growing wait times of up to four years); (R. 1228), Declaration of Jerry Thompson. There are approximately 1,500 applications pending for loose eagle feathers and 6,000 pending requests for whole eagle carcasses. (R. 1221-22), Atencio 2012 Decl. at ¶¶ 9, 14. Thus, any additional increase in the number of eligible applicants, and certainly a multi-million person increase, would create a corresponding increase in the number of people waiting and the time they must wait. (R. 1034-39),

(R. 1219), (R. 1228); *see also* (R. 1203), Fant Declaration at ¶ 7. The dramatically increased wait times would undermine the government's compelling interest in fostering the culture and religion of federally recognized tribal members.

In addition, allowing non-members to obtain feathers from the Repository -- or to bypass the Repository altogether by collecting molted feathers -- would increase the black market. The illegal trade of eagle feathers and parts is already flourishing and lucrative, among both tribal members and non-members. (R. 863-866) Affidavit of Kevin Ellis, at ¶¶ 4-5. Part of the black market is driven by powwow dance contests, in which both tribal members and non-members compete for prize money. *Id.* at ¶ 5a.; *see also Wilgus*, 638 F.3d at 1283. In general, black market prices are rising because of an uptick in demand and a dwindling supply. (R. 867-68) at ¶ 7. Whole golden eagles sell for up to $1,200 each, and immature golden eagle central tail feathers command up to $200 each. *Id.* Without a prohibition on the possession of eagle feathers by non-members, after someone illegal takes an eagle and reduces it to possession, it would be exceedingly difficult for law enforcement to prevent those feathers and parts from entering the black

market. (R. 821) at ¶9; *see also* (R. 846), Affidavit of Prof. James Fraser at ¶ 9 (allowing persons to possess molted feathers would hamper law enforcement efforts to decrease the black market). This enforcement problem would likely cause the black market for birds and their parts to expand. *Id*. As a result, Soto's suggestion that the problem of an overwhelmed Repository could be solved by simply allowing non-members to bypass the Repository altogether is untenable.

C. The Decisions Cited by Soto Do Not Support His Case.

In his opening brief, Soto relies on cases in support of his arguments that are neither controlling nor instructive. First, Soto cites *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist*., 611 F.3d 248 (2010). *See* Aplt. Br. at 14. The *Betenbaugh* decision involved a challenge under the Texas Religious Freedom Restoration Act (TRFRA) to the Needville Independent School District's ("School District") grooming policy. The policy required a Lipan Apache child to wear his long hair in a bun on top of his head or in a braid tucked into his shirt. *Id*. at 253. Although the *Betenbaugh* Court's application of the TRFRA addressed many of the same legal concepts at issue in a RFRA case and

it involved a member of the Lipan Apache Tribe, the final holding of *Betenbaugh* is inapposite.

The *Betenbaugh* decision turned on the fact that the School District failed to demonstrate that a compelling governmental interest required it to implement its grooming policy. *Id.* at 266. This Court noted that the School District made "only cursory attempts" to demonstrate that it had a compelling interest that justified its policy. *Id.* at 268. Similarly, the School District "failed to put forth a single case in which the school's interest . . ." had been found to be compelling in the context of a religious exercise challenge. *Id.* at 269. In making its decision, this Court repeatedly emphasized that "context matters" because the analysis in a TRFRA case is a fact-specific inquiry. *Id.* at 269-70.

The *Betenbaugh* decision is easily distinguishable from the case at bar. Unlike the School District's "cursory" attempt to demonstrate the existence of a compelling interest supporting its policy, here the Department has extensively detailed the compelling governmental interests supporting its eagle feather regulations. Further, the Administrative Record provides a factual basis for the articulated

compelling interests. In addition, contrary to the school district's inability to present the Court with a "single case" supporting its position, the Department has cited numerous cases that are directly on point. Finally, the facts at issue here are very different from those dealt with in *Betenbaugh*, which forecloses any meaningful comparison to this case in light of the fact-specific inquiry required under RFRA. For these reasons, the *Betenbaugh* decision is distinguishable from this case and the Court should not rely upon it.

Soto also repeatedly refers to a case that is no longer good law. Specifically, Soto cites a case that he refers to as "*In the Matter of Joseluis Saenz, v. Dept. of Interior*, No. 00-2166 (10th Circuit)." Aplt. Br. at 14, n. 20.[12] The Tenth Circuit vacated this unpublished decision when it granted rehearing en banc for three similar cases -- involving Wilgus, Hardman, and Saenz. *See U.S. v. Hardman*, 260 F.3d 1199 (10th Cir. 2001). As a vacated decision, *Saenz* should not be cited as authority.

Although Soto does not cite the *Hardman* decision, the Tenth Circuit ruled in Mr. Saenz's favor in *Hardman*. *U.S. v. Hardman*, 297

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[12] This unpublished Tenth Circuit decision can be found at *Saenz v. Department of Interior*, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. 2001). *See also Saenz v. Department of Interior*, No. 00-2166, 2001 WL 892631 (10th Cir. 2001).

F.3d 1116, 1131-32 (10th Cir. 2002). In particular, the *Hardman* Court found that the government had failed to satisfy its burden of demonstrating that the Department's Eagle Act regulations furthered a compelling interest. *Id*. The Tenth Circuit remanded Hardman and Wilgus' cases for further development of the record. *Id*. at 1135. With regard to Saenz, the *Hardman* court characterized the record as "poorly developed" and "devoid of hard evidence indicating that the current regulations are narrowly tailored to advance the government's interests." 297 F.3d at 1131-32. That is not this case. The Administrative Record in this case provides ample evidence supporting the Department's asserted compelling interests and demonstrating that the Eagle Act regulations are the least restrictive means of furthering those interests.

The Tenth Circuit's remand in *Hardman* led to its recent *Wilgus* decision, which is particularly instructive here. Based on a record almost identical to the one before the Court in this case, the *Wilgus* court held that the current regulatory scheme, which allows only members of federally recognized tribes to possess eagle parts, is the least restrictive means of furthering the government's competing

compelling interests in protecting eagles and fostering the culture and religion of federally recognized tribes. 638 F.3d at 1296. In making its decision, the *Wilgus* court found that opening the Repository to non-members would undermine the government's interest in fulfilling its trust responsibilities to the tribes by increasing the time that members of federally recognized tribes would have to wait to receive eagle parts from the Repository, and it could increase enforcement problems. *Id.* at 1293. The Tenth Circuit further held that the Department's Eagle Act policy is the least restrictive means of furthering both of the government's compelling interests in that it protects eagles and "does its best to guarantee that those tribes, which share a unique and constitutionally-protected relationship with the federal government, will receive as much of a very scarce resource (eagle feathers and parts) as possible." *Id.* at 1295.

The Tenth Circuit's decision in *Wilgus*, unlike the decisions in *Saenz* and *Hardman*, is directly on point here in light of the Administrative Record supporting the Department's actions. Consequently, the Court should follow *Wilgus* -- and join the Ninth, Tenth, and Eleventh Circuits -- in affirming the legality of the

Department's Eagle Act regulations and affirm the district court's order.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jimmy A. Rodriguez, Assistant United States Attorney, hereby certify that on July 29, 2013, an electronic copy of Appellee's Brief was served by notice of electronic filing via this Court's ECF system upon counsel for Appellant.

Upon notification that the electronically-filed brief has been accepted as sufficient, and upon the Clerk's request, seven paper copies of this brief will be submitted to the Clerk. *See* 5th Cir. R. 25.2.1; 5th Cir. R. 31.1; 5th Cir. ECF filing standard E(1).

s/Jimmy A. Rodriguez
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,307 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook, 14 point font for text and 12 point font for footnotes.

3. This brief complies with the privacy redaction requirement of 5th Cir. R. 25.2.13 because it has been redacted of any personal data identifiers.

4. This brief complies with the electronic submission of 5th Cir. R.25.2.1, because it is an exact copy of the paper document.

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s/Jimmy A. Rodriguez
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Date: July 29, 2013