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NATIVE AMERICAN USE OF EAGLE FEATHERS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

Adair Martin Smith

I. INTRODUCTION

The bald eagle is one of the greatest national symbols in the United States of America, and it has become synonymous with words like freedom, justice, and liberty. Accordingly, the United States government has outlawed the possession of both bald and golden eagle feathers in order to protect this treasured animal.\(^1\) One exception to this prohibition allows federally recognized Native American tribes to use eagle feathers for a bona fide religious purpose.\(^2\) Currently, there are 566 federally recognized tribes, comprising a total of 2 million members with an additional 5.2 million persons of Native American heritage who belong in tribes not recognized by the federal government.\(^3\) Consequently, there have been several lawsuits concerning the constitutionality of federal legislation barring non-recognized tribes from using eagle feathers for religious ceremonies.\(^4\)

The most recent case to decide this issue was *McAllen Grace Brethren Church v. Salazar*, in which appellants attended a Native American religious ceremony where the participants wore eagle feathers.\(^5\) The individuals were found to be in violation of the Bald and Golden Eagle Protection Act (Eagle Protection Act) for possessing eagle feathers without a permit, which could not be issued because appellants were members of a Native American tribe that is not federally recognized.\(^6\) Appellants sued, claiming that the confiscation of eagle feathers violated the Free Exercise Clause of the First Amendment.\(^7\) The Fifth Circuit ruled in the appellants favor, finding that the regulations imposed by the Eagle Protection Act and the Migratory Bird Treaty Act (MBTA) violate the Religious Freedom Restoration Act (RFRA) and therefore, appellants could not be forbidden to possess

\(^4\) United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008); United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011).
\(^5\) 764 F.3d at 468.
\(^6\) Id. at 468-69.
\(^7\) Id.
eagle feathers. The Fifth Circuit remanded this case to the district court and created a circuit split with the Ninth and Tenth Circuits, which have both held that the Eagle Protection Act and MBTA do not violate RFRA with respect to only allowing eagle feathers to be used in religious ceremonies of federally recognized tribes.

This Casenote examines the split circuit decisions in *McAllen* and two other cases, *United States v. Vasquez-Ramos* and *United States v. Wilgus*, on whether the prohibition of eagle feathers for non-federally recognized Native American tribes violates RFRA. Part II of the Casenote explains the background of the MBTA, Eagle Protection Act, relevant portions of RFRA, and the new standard for deciding RFRA cases, as discussed in *Burwell v. Hobby Lobby Stores, Inc.* Part II also looks at how other circuits have decided the constitutionality of only allowing federally recognized tribes the ability to possess eagle feathers for religious purposes. Part III reviews the Fifth Circuit's decision in *McAllen*, and Part IV analyzes the relevant case law and statutes. Finally, Part V concludes that the Fifth Circuit correctly decided that the MBTA and Eagle Protection Act's limit on non-federally recognized tribes possession of eagle feathers does not pass the "least restrictive means" test required by RFRA, and therefore, any regulation that facially rejects non-federally recognized tribes access to eagle feathers for religious use is unconstitutional under the Free Exercise Clause.

II. STATUTORY PROVISIONS AND RELATED CASE LAW

A. Federal Regulations Protecting Migratory Birds

At the beginning of the twentieth century, fueled by a rapidly urbanizing United States, the slaughtering and exploitation of game and non-game birds was both widespread and unchecked. This led to concern regarding the extinction of migratory birds and compelled conservationists to lobby for the enactment of international legislation to protect migratory species. In response, the United States and Great Britain enacted the Migratory Bird Treaty Act in 1916 in order to create a convention that would protect the migratory bird population from extinction. This treaty is a reflection of the United States' commitment to prohibit the pursuit, hunting, capturing, killing, or selling of migratory

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8. *Id.* at 480.
9. *Id.*
11. *Id.* at 5-6.
birds native to the United States and its territories.\textsuperscript{13} The treaty applies to both live and dead birds and grants full protection to any part of a migratory bird, including its nests, eggs, and feathers.\textsuperscript{14} Currently, there are over 800 bird species protected by the MBTA, and the treaty has expanded to create conventions with Canada, Mexico, Japan, and Russia to protect birds that migrate between these countries and the United States.\textsuperscript{15}

One exception to the MBTA is federal regulation 50 C.F.R. § 22.22, which is more commonly known as the eagle feather law.\textsuperscript{16} This law allows the U.S. Secretary for the Interior to issue permits allowing for "the taking, possession, and transportation . . . of lawfully acquired bald eagles or golden eagles, or their parts, nests, or eggs for Native American religious use."\textsuperscript{17} In determining whether a Native American tribe may obtain a permit, the government requires that the Native American tribe is federally recognized\textsuperscript{18} and that the eagle feather will be used in "bona fide tribal religious ceremonies."\textsuperscript{19} A tribe is considered federally recognized when it meets the following criteria:

(a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900 . . . (b) a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present . . . (c) the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present . . . (d) a copy of the group's present governing document including its membership criteria . . . (e) the petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity . . . (f) membership of the petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe . . . and (g) neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal

\textsuperscript{13} Id. § 703 (a)-(b)(1).
\textsuperscript{14} Id. § 703(a).
\textsuperscript{15} 50 C.F.R. § 10.13 (2013).
\textsuperscript{16} Id. § 22.22.
\textsuperscript{17} Id.
\textsuperscript{18} Id. § 22.22(a)(5).
\textsuperscript{19} Id. § 22.22(c)(2).
relationship.\textsuperscript{20}
In 1940, the Bald and Golden Eagle Protection Act was passed in order to specifically protect the bald eagle from extinction, since it is "a symbol of the American ideals of freedom."\textsuperscript{21} The Eagle Protection Act prohibits the taking, possession, selling, purchase, transport, export, or import of bald eagles, dead or alive, or any part, nest, or egg thereof of the eagles, except as permitted by the Secretary of the Interior.\textsuperscript{22} In 1962, it was expanded to include the golden eagle in order to protect the bald eagle, because the bald eagle is often killed after it is mistaken for the golden eagle.\textsuperscript{23} This expansion also allowed the U.S. Secretary of the Interior to authorize the taking of eagles or eagle parts for the "scientific or exhibition purposes of public museums, scientific societies, and zoological parks, or for the religious purposes of Indian tribes," provided that the grant of the permit is compatible with the preservation of bald and golden eagles.\textsuperscript{24}

Congress and the Department of the Interior created a permitting system and parts repository that regulates and distributes parts of eagles in a manner compatible with the goals of the MBTA and Eagle Protection Act.\textsuperscript{25} Permits authorizing the possession of whole and parts of eagles can be issued for "religious purposes of Indian tribes,"\textsuperscript{26} but only members of federally recognized tribes may apply for and receive permits.\textsuperscript{27} Once a Native American receives a permit from the Secretary, the permit is forwarded to the National Eagle Repository in Colorado (Repository).\textsuperscript{28} The Repository receives dead eagle parts and distributes them to qualified permit applicants on a first-come, first-serve basis.\textsuperscript{29} The Repository has an estimated waiting period of two years for a whole bird and six months to fill an order for loose eagle feathers.\textsuperscript{30}

\textsuperscript{20} 25 C.F.R. § 83.7 (2015).
\textsuperscript{21} McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 469 (5th Cir. 2014) (citing 54 Stat. 250 (1940)).
\textsuperscript{22} 16 U.S.C. § 668(a) (1972).
\textsuperscript{23} McAllen, 764 F.3d at 469, 473 (citing 76 Stat. 1246 (1962)).
\textsuperscript{24} 16 U.S.C. § 668a.
\textsuperscript{25} United States v. Vasquez-Ramos, 531 F.3d 987, 989 (9th Cir. 2008).
\textsuperscript{26} 16 U.S.C. § 668a.
\textsuperscript{27} 50 C.F.R. § 22.22.
\textsuperscript{28} McAllen, 764 F.3d at 470.
\textsuperscript{29} Id.
B. Religious Freedom Restoration Act

President Bill Clinton signed the Religious Freedom Restoration Act into law in 1993 as a congressional repudiation of the Supreme Court’s decision in Employment Division v. Smith.31 In Smith, the Court held “that the Free Exercise Clause did not require the state of Oregon to grant an exemption from its criminal drug laws for the religiously inspired use of peyote by two members of the Native American Church.”32 The Court based this decision on the idea that the “compelling government interest” test, i.e. strict scrutiny, normally used in religious matters does not apply to free exercise challenges dealing with a “neutral, facially nondiscriminatory law[] of general applicability.”33 Under strict scrutiny, the government must have a compelling governmental interest in creating legislation that affects religious matters and regulations must be narrowly tailored to the law to achieve that interest.34 The ruling in Smith lowered the level of scrutiny applied to the free exercise of religion to rational basis scrutiny, which essentially demolished three decades of precedent applying the strict scrutiny test to free exercise claims and “created a climate in which the free exercise of religion [was] jeopardized.”35

In response to Smith, Congress passed RFRA to restore the compelling governmental interest test.36 The Act provided that:

(a) In general. Government shall 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).

(b) Exception. Government may substantially burden a person’s exercise of religion only if it 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.37

Therefore, under RFRA, an individual must prove that his or her religious exercise is substantially burdened by the regulation at issue. If he does, the government may save the regulation by establishing that it:

32. Id. at 601 (citing Employment Division v. Smith, 494 U.S. 872 (1990)).
33. Id. (citing Smith, 494 U.S. at 888).
34. Id. at 608.
35. Id. at 602-03.
(1) furthers a compelling government interest; and (2) is the least restrictive means of accomplishing that compelling government interest.\textsuperscript{38} Since the passage of RFRA, there have been two major Supreme Court decisions analyzing the Act. First, the Court held in \textit{City of Boerne v. Flores} that RFRA is an exercise of Congress's power to enforce the Fourteenth Amendment and, accordingly, it is not applicable to states, but can be constitutionally applied to the federal government.\textsuperscript{39} Therefore, RFRA effectively provides a statutory claim to individuals whose religious exercise is burdened by the federal government.\textsuperscript{40} The second, and most recent, Supreme Court decision revisiting RFRA was \textit{Burwell v. Hobby Lobby Stores, Inc.} In 2012, the large crafts store Hobby Lobby sued the Department of Health and Human Services (HHS) pursuant to HHS regulations promulgated under the Patient Protection and Affordable Care Act (ACA).\textsuperscript{41} The ACA requires employers with fifty or more full-time employees to offer group health insurance coverage.\textsuperscript{42} This insurance mandate includes providing “preventative care and screenings” for women, which consists of “approved contraceptive methods, sterilization procedures, and patient education and counseling” that could stop the development of an already fertilized egg.\textsuperscript{43} While the HHS offers an exemption from the so-called “contraception mandate” for religious employers, it provides no exemption for profit-seeking corporations with religious principles.\textsuperscript{44} Hobby Lobby is owned and operated by the Green family, active practitioners of the Christian faith.\textsuperscript{45} Hobby Lobby has 500 stores, more than 13,000 employees, and is organized as a for-profit corporation.\textsuperscript{46} Despite its large size, Hobby Lobby remains under complete control of the Green family and the corporate statement of purpose commits the Greens to “[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles.”\textsuperscript{47} The Greens believe that “life begins at conception and that it would violate their religious beliefs to facilitate access to contraceptive drugs or devices

\textsuperscript{38} Id.
\textsuperscript{39} City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
\textsuperscript{40} Id.
\textsuperscript{41} Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2762 (2014).
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 2763.
\textsuperscript{45} Id. at 2765-66.
\textsuperscript{46} Hobby Lobby, 134 S. Ct. at 2765.
\textsuperscript{47} Id. at 2766.
that operate after that point." 48 Under this framework, the Greens and Hobby Lobby sued HHS, challenging the contraceptive mandate under RFRA and the Free Exercise Clause. 49 Hobby Lobby argued that the contraceptive mandate burdened its exercise of religion by forcing it to choose between either compromising its religious beliefs or paying a hefty fine. 50 The Court concluded that the Greens could bring suit, because RFRA "included corporations within [its] definition of persons" and a "corporation is simply a form of organization used by human beings to achieve desired ends." 51

Since RFRA applies to corporations, the Court next looked at whether the HHS contraceptive mandate substantially burdened the exercise of religion. 52 The Court found that because the Green family had a sincere religious belief that life begins at conception, the HHS mandate effectively required that the Greens engage in conduct that violated their religious beliefs or else suffer severe economic consequences amounting to $1.3 million per day. 53 While Hobby Lobby could incur lesser penalties by refusing to provide health insurance altogether, this would also disadvantage the corporation when trying to hire talented employees who value benefits like health insurance. 54 These added costs to Hobby Lobby under the mandate clearly were a substantial burden on the exercise of religion, so the Court then applied strict scrutiny and analyzed whether the mandate "(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest." 55 The Court found that the mandate did serve a compelling governmental interest of ensuring that all women have access to FDA-approved contraceptives; however, the "exceptionally demanding" least restrictive means standard was not satisfied. 56 The Court found that HHS had already established exceptions for nonprofit organizations with religious objections, a framework workable for corporations like Hobby Lobby. 57 Therefore, because there was a more viable accommodation available, the HHS contraceptive mandate was not the least restrictive means of

48. Id.
49. Id.
50. Id. Hobby Lobby reported that it would pay close to $475 million more in taxes every year for refusing to provide coverage for contraceptives, or $26 million annually if it dropped health-insurance benefits for all employees.
51. Hobby Lobby, 134 S. Ct. at 2767.
52. Id. at 2775.
53. Id. at 2775.
54. Id. at 2776-77.
55. Id. at 2779 (quoting 42 U.S.C. § 2000bb-1(b) (1993)).
56. Hobby Lobby, 134 S. Ct. at 2780.
57. Id. at 2782.
furthering the government’s compelling interest of promoting women’s health. Consequently, failure to satisfy the least restrictive means test resulted in the mandate being held unconstitutional.

Hobby Lobby is a paramount decision because of how it changed RFRA jurisprudence. It was the Supreme Court’s first application of RFRA to a federal law and was ground-breaking because “never before . . . had the Court exempted a private, for-profit business from the obligation to obey a generally applicable law.” Applying RFRA to for-profit businesses, which constitute about ninety percent of employers in the United States, greatly “expand[ed] the universe of potential religious claimants and affected employees.” Furthermore, the decision significantly expanded the strict scrutiny test. Before Hobby Lobby, one study reports that between 1980 and 1990, federal appellate courts rejected eighty-seven percent of free exercise exemption claims. Applying religious exercise to for-profit corporations demonstrates that “the RFRA strict scrutiny deployed in Hobby Lobby is clearly not the deferential version of strict scrutiny that inhabits the pre-[Hobby Lobby] free exercise cases.” Indeed, “scrutiny is now truly ‘strict’: the government is required to prove that important federal laws providing critical benefits and protections . . . must satisfy a rigorous constitutional test whenever they are applied to objecting believers.” This demonstrates how the Court has converted RFRA “from the statutory restoration of an evenhanded balancing test into a doctrinal revolution that has vested in federal judges the authority to craft a wholly new and demanding religious exemption jurisprudence.” In short, Hobby Lobby greatly “expanded the strength and reach of RFRA, by enabling religious exemptions on the basis of alternatives that are practically unavailable to implement even compelling government interests, and by requiring genuinely strict judicial scrutiny of religiously burdensome government actions.”

58. See id.
59. Id. at 2785.
62. See id. at 164, 166 (“But if RFRA’s strict scrutiny test was so hard to satisfy in the case of the Mandate, why should it be so easy to satisfy in every other case the Justices could imagine?”).
63. Id. at 165.
64. Id. at 166
65. Id. at 167.
66. Gedicks, supra note 61, at 168.
67. Id. at 176.
C. Possession of Eagle Feathers under RFRA

1. Ninth Circuit

In *United States v. Vasquez-Ramos*, the Ninth Circuit held that the MBTA’s permit requirements and Eagle Protection Act did not violate RFRA because these regulations were the least restrictive means of achieving the compelling government interest of protecting the bald eagle population. Here, law enforcement officers, investigating the killing of bald eagles in captivity at the Santa Barbara Zoo, obtained search warrants and found eagle parts and feathers at the defendants’ residence. The defendants claimed to have received the feathers during Native American religious ceremonies. They could not obtain permits to legally possess the feathers because they were not members of a federally recognized Native American tribe. Defendants were charged with violating the MBTA and Eagle Protection Act for illegally possessing feathers and talons of bald and golden eagles without a permit. The defendants moved to dismiss, claiming the federal law prohibiting their possession of eagle feathers violated RFRA. The defendant’s argued that preserving the eagle population was no longer a “compelling governmental interest” because the bald eagle was taken off the Endangered Species List in 2007, demonstrating that the bald eagle population had sufficiently recovered. The court rejected this argument, finding that Congress passed the Eagle Protection Act recognizing that “the bald eagle is [not] a mere bird of biological interest but a symbol of the American ideals of freedom,” and therefore, the government has a continued interest in preserving the species, regardless of their endangered status.

The court found that while the permit requirement to possess eagle feathers substantially burdened the defendants’ religious beliefs, the permit requirement also passed the RFRA analysis. In reaching this decision, the Ninth Circuit primarily relied on its decision in *United...*
States v. Antoine, holding that "because there is a fixed supply of eagles that exceeds demand from religious adherents, the burden on religion is inescapable." Therefore, even if the government created an exemption to the permit requirements for all Native American tribes, such an exemption would still be burdensome to members of federally recognized tribes in the exercise of their religious practice, because there would be a more limited supply of eagle feathers. In light of this, any policy would cause a burden on the exercise of religion, which made the permit requirement "least restrictive" while still protecting the bald eagle as America's national symbol.

2. Tenth Circuit

Three years after Vasquez, the Tenth Circuit considered the same issue in United States v. Wilgus, and found that the Eagle Protection Act was the least restrictive means of serving the government's interest in protecting the bald eagle. In this case, Defendant Samuel Ray Wilgus was arrested for possessing 141 bald and golden eagle feathers in violation of the Eagle Protection Act. Wilgus was a follower of a Native American religion, but not a member of a federally recognized tribe, so he was unable to obtain eagle feathers legally. Therefore, he sued under RFRA, arguing that the government's prohibition of eagle feathers on non-recognized tribes substantially burdened his right to practice his religion.

The court found that the Eagle Protection Act advanced two compelling governmental interests: (1) protection of bald and golden eagles; and (2) preservation of Native American culture and religion. While the first interest was straightforward and clearly compelling, the second interest was a bit more complex. Ultimately, the court found that the second interest was also compelling for several reasons, including the "government's historical obligation to respect Native American sovereignty and to protect Native American culture."

The Tenth Circuit next analyzed whether the Eagle Protection Act was the least restrictive means under strict scrutiny and refuted the

77. Id. at 992.
78. Id.
79. Id.
80. 638 F.3d 1274, 1296 (10th Cir. 2011).
81. Id. at 1277.
82. Id.
83. Id.
84. Id. at 1285.
85. Wilgus, 638 F.3d at 1285.
86. Id. at 1286.
alternative schemes offered by the challenger. The defendant offered two alternative means that were less restrictive than the current regulation. The first was opening the Repository to all sincere practitioners of Native American religion, and the second was to allow tribal members who lawfully possess eagle feathers to give the eagle feathers and parts as gifts to non-tribal members who practice a Native American religion.

The court held that the current regulation allowing only federally recognized Native American tribes to possess eagle feathers was the least restrictive means. First, the majority found that the removal of the eagle from the endangered species list did not necessarily translate into an equivalent increase in the number of eagle parts available for the Repository. Second, the court found that the demand for eagle feathers and parts by tribal members for religious use already exceeded the supply available through the Repository. If the government expanded its regulations to include all Native American tribes, this could dramatically impact members of federally recognized tribes who already face long wait times for eagle parts. Therefore, the defendant’s alternative means would harm the very population that the Eagle Protection Act was designed to help. Third, the defendant’s suggestion would cause greater enforcement problems than the current regulation. Currently, if a Fish and Wildlife Services (FWS) agent catches an individual in possession of eagle feathers, the agent simply needs to determine if that individual is a member of a federally recognized tribe to determine if any laws have been violated. Under the proposed regulatory scheme, an FWS agent must determine if an individual is a sincere follower of a Native American religion, forcing the agent to decide if the individual is being truthful or simply using religion as a smokescreen to sell eagle parts on the black market. In comparison, the current regulation protecting only members of federally recognized tribes ensures that those tribes, which share a unique and constitutionally-protected relationship with the federal government, will

87. Id. at 1288.
88. Id. at 1290.
89. Id.
90. Wilgus, 638 F.3d at 1295.
91. Id. at 1291.
92. Id. In 2004, the Repository received 1,822 requests for eagles and eagle parts, but only received 1,647 eagles that same year. See id. at 1282.
93. Id. at 1293.
94. Id.
95. Wilgus, 638 F.3d at 1293.
96. Id.
97. Id.
receive as much of a very scarce resource (eagle feathers and parts) as possible." 98

III. FIFTH CIRCUIT RULING IN
MCALEN GRACE BRETHREN CHURCH V. SALAZAR

In McAllen, appellants received eagle feathers at a Native American religious ceremony known as a powwow. 99 An FWS agent in attendance at the powwow issued a notice of violation under the Eagle Protection Act for possession of eagle feathers without a permit and seized the feathers. 100 One of the appellants, Robert Soto, petitioned for the return of his eagle feathers, but this request was denied because Soto was not a member of a federally recognized tribe. 101 Appellants sued the Department of Interior, arguing that the confiscation of the eagle feathers violated the Free Exercise Clause of the First Amendment. 102

All parties agreed that the Eagle Protection Act substantially burdened Appellants’ religious beliefs and Soto’s sincerity in practicing his religion. 103 The court found that “RFRA required the government to explain how applying the statutory burden to the person whose sincere exercise of religion is being seriously impaired furthers the compelling governmental interests” and that “the interests need to be closely tailored to the law.” 104 As stated earlier, this traditional RFRA standard was expanded in Hobby Lobby, in which the Supreme Court found that “[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest.” 105 Against this backdrop, the Fifth Circuit considered the following compelling interests: (1) protection of bald and golden eagles; and (2) fulfilling the government’s “unique responsibility” to federally recognized tribes. 106

The Fifth Circuit ruled that the Appellee failed to demonstrate how its regulatory scheme was the “least restrictive means” and remanded the case for further proceedings in the district court. 107 Although it ultimately disagreed with the Ninth and Tenth Circuits, the Fifth Circuit did conclude that protecting bald and golden eagles was a compelling

98. Id. at 1295.
100. Id.
101. Id. at 469.
102. Id.
103. Id. at 472.
104. McAllen, 764 F.3d at 472.
105. Id.
106. Id. at 473.
107. Id. at 480.
interest regardless of whether the eagle is endangered because they are an important national symbol.108 The court also found that the government’s interest in protecting the country’s relationship with federally recognized tribes was compelling considering the United States long history with Native American tribes.109 For example, “[t]he Supreme Court has long held that Congress’s constitutional authority to ‘regulate Commerce . . . with Indian Tribes includes an obligation to protect the interests of federally recognized tribes.”110 However, the Fifth Circuit parted with the Tenth Circuit in finding that the government’s response to protecting Native American tribes has not been uniform and Congress has never defined “Native American tribes” or “Indian tribes” as only including federally recognized tribes.111 Consequently, the court did not find that “Congress intended to protect only federally recognized tribe members’ religious rights.”112 In Soto’s case, he was a member of the Lipan Apache Tribe that, while not federally recognized, has existed for 300 years and possesses a “government to government” relationship with Texas and the United States.113 The United States government failed to present any evidence that an individual like Soto—someone whose religious beliefs are undoubtedly sincere and whose tribe has a long-standing relationship with both the state and federal government—would cause harm to the relationship between Native American tribes and the government if he were allowed to possess eagle feathers.114

The Fifth Circuit next looked closer at the “least restrictive means” test in relation to the government’s interest in protecting eagles. The court found that the “least restrictive means” test was a “heavy burden” and an “exceptionally demanding test” to meet.115 The Fifth Circuit refuted all the Appellee’s arguments, finding that: (1) no evidence supported the assertion that expanding the permitting process would cause an increase in poaching, especially since an eagle does not have to die in order to obtain feathers; (2) evidence suggested that expanding the permitting process would not burden FWS agents, because these agents already have to rely on anecdotal information when interviewing Native Americans who possess feathers; (3) while it was possible that the current permitting system has kept the black market smaller, it is equally

108. Id. at 473.
109. McAllen, 764 F.3d at 473.
110. Id.
111. Id.
112. Id.
113. Id.
114. McAllen, 764 F.3d at 474.
115. Id. at 475.
possible that the black market exists solely because Native Americans who are not in federally recognized tribes cannot otherwise obtain eagle feathers; and (4) there was no specific evidence showing how permitting individuals whose sincerity is not questioned to acquire permits would jeopardize the Appellee’s compelling interests. 116

Because of this, the Fifth Circuit found that the Department of Interior had not demonstrated that the current regulatory framework was the least restrictive means of achieving its goals and remanded the case to the district court to consider “the authorities cited in light of the Supreme Court’s recent holding in Hobby Lobby and its exacting standard.” 117 The Fifth Circuit distinguished its opinion from the Ninth and Tenth Circuit opinions because it was conducting the RFRA analysis with the new standard, as promulgated in Hobby Lobby, while the other Circuits relied on past precedent. 118

IV. DISCUSSION: THE RECENT HOBBY LOBBY DECISION EXPANDED RFRA SO THAT THE FIFTH CIRCUIT’S REASONING IN MCALENN IS CONTROLLING

A. Eagle Feather Claims Under RFRA Post-Hobby Lobby

The Supreme Court’s decision in Hobby Lobby expanded RFRA so the traditional, narrower free exercise standard used by the Ninth and Tenth Circuits is no longer controlling precedent. Instead, the Fifth Circuit’s reasoning in McAllen is more in line with the Hobby Lobby analysis, which suggests that if there is an alternative way to achieve a compelling governmental interest, this constitutes a basis for failure to satisfy the least restrictive means test. 119 Hobby Lobby, in essence, suggests that it is extremely difficult for the government to satisfy strict scrutiny in most cases involving governmental laws or benefits if the regulation at issue interferes with an individual’s right to religious exercise. 120 When examining the MIBTA and Eagle Protection Act under this new RFRA framework, provisions that limit the availability of permits to only federally recognized tribes fail to survive this new strict scrutiny standard.

All three circuits are in agreement that the current requirements to obtain a permit to possess eagle feathers substantially burden an individual’s religious beliefs because there is only a fixed supply of

116. Id. at 476-78.
117. Id. at 478.
118. Id. at 479.
120. See id.
feathers far exceeding demand. Since the Native American tribes have proven that the MBTA and Eagle Protection Act substantially interfere with their right to free exercise, the burden shifts to the defendant to demonstrate that the current eagle protection legislation is the least restrictive means of achieving this compelling governmental interest.

When analyzing the MBTA and Eagle Protection Act under strict scrutiny, there are three compelling governmental interests: (1) to protect bald and golden eagles, (2) to preserve Native American culture and religion, and (3) to protect the United States’ relationship with Native American tribes. Protecting bald and golden eagles is a compelling interest because eagles previously have been endangered and have a history of needing protection from poachers. Also, eagles are symbolic creatures that represent the United States, giving them an elevated status deemed worthy of protection. Next, protection of Native American culture, religion, and relations are compelling interests because of the tortured history the United States shares with the Native Americans. Early American settlers drove Native Americans out of their homes and urbanized their land, eventually giving rise to the Indian Wars. Then, in the 1830s, President Jackson signed the Indian Removal Act, a policy relocating Native Americans from their homelands in the southern states to the west in order to open Native American lands for non-native settlements, resulting in the Trail of Tears. Even today, the Native American culture disproportionately suffers from issues of racism, unemployment, drug addiction, alcoholism, and gangs, which many scholars trace back to their exploitation by the American government.

In light of this mistreatment of the Native American people by the United States government, there is clearly a compelling interest to preserve a congenial relationship with the Native Americans, as well as to celebrate and empower the group to practice its culture and religion.

Since there is a clear, compelling governmental interest in regards to the MBTA and Eagle Protection Act, courts must next consider whether the federal legislation at issue is the least restrictive means of achieving

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121. United States v. Vasquez-Ramos, 531 F.3d 987, 992 (9th Cir. 2008); United States v. Wilgus, 638 F.3d 1274, 1295 (10th Cir. 2011).
124. Id.
these compelling governmental interests. This is a hard burden to meet in light of *Hobby Lobby*, because if there is any alternative to the statute, the federal legislation fails strict scrutiny. Here, the Tenth Circuit offered two viable alternatives to the MBTA and Eagle Protection Act: (1) allowing tribal members who lawfully possess the feathers to give them to non-tribal members who practice Native American religion or (2) opening the Repository to all sincere practitioners of the Native American religion.

Both options are feasible and demonstrate there is an alternative to strictly prohibiting non-federally recognized tribes from possessing eagle feathers. The first alternative would allow non-federally recognized tribal members to possess eagle feathers if the lawful owner gave them the feathers. While this would allow more individuals to possess eagle feathers, it would likely not be an expansive change because there is currently a shortage of feathers, so tribal members who legally own eagle feathers are unlikely to give their feathers to individuals not in their family or tribe. Thus, this alternative achieves the goal of protecting eagles, but still does not maintain relations with Native American tribes, because non-federally recognized tribes are unlikely to receive many feathers using this solution.

The second option is another workable alternative and even more likely to achieve the governmental interests of both protecting bald and golden eagles while also maintaining relations with Native American tribes. This alternative suggests allowing only sincere practitioners of a Native American faith to apply for permits. This is a better solution because it allows for more individuals to apply for eagle permits, while continuing to limit the number of individuals who are allowed to obtain eagle feathers and parts to sincere practitioners of the faith.

To determine if an individual is a sincere believer of a Native American religion, the Repository may require that certain thresholds be met, including requirements that the individual is part of a tribe vetted by the United States government. For example, Mr. Soto’s tribe in *McAllen* was over 300 years old and had a “government to government” relationship with Texas and the United States. Under the new strict scrutiny standard employed under *Hobby Lobby*, tribes with an established and sincere relationship with the United States should be able to apply for permit-status in order to receive eagle feathers and parts. To decrease the number of permit applications, the Repository could require that an individual practice the religion for a number of years or receive a letter of recommendation from the leader in his

127. United States v. Wilgus, 638 F.3d 1274, 1290 (10th Cir. 2011).
congregation before being eligible to apply for a permit. While these proposed amendments will increase the number of applications to the Repository and could make it difficult for FWS agents when they inspect powwows for illegal feather possession, these setbacks are far less burdensome than preventing an individual from practicing his or her faith. It is borderline discriminatory to reject an individual with a sincere religious belief from exercising freedom of religion simply because the federal government refuses to recognize his or her religion. Furthermore, eagle feathers and parts are not an arbitrary part of Native American religion; they are an essential and vital component. Native Americans consider the eagle as a “sacred messenger to the spirit world,” serving essentially as a link between the spiritual and physical worlds. The eagle is used in religious ceremonies throughout the year, including naming, marriage, burial, and healing ceremonies. One scholar argues that the United States’ Western view of religion rarely fits within the practices of the Native American tribes, which believe that “religion is inseparable from relationships and rituals.” This lack of understanding is demonstrated by the United States’ long history of seeking to eliminate ‘heathenish practices’ from tribal life and many religious rituals.” What the Native Americans have endured in regards to the obstacles in obtaining eagle feathers and parts arguably classifies as religious persecution that few other religious practitioners have suffered in the United States. Therefore, the distinction between federally and non-federally recognized tribes should be replaced with a consideration of the individual. Courts should instead consider whether the individual is a sincere follower of a Native American faith instead of focusing on if an individual is part of a federally recognized tribe.

These amendments demonstrate there is an alternative form of regulation. Pursuant to *Hobby Lobby*, when an alternative form of regulation exists, the debated law cannot be considered the least restrictive means of achieving a compelling state interest. Since two viable alternatives exist to achieve the compelling state interests of protecting eagles and maintaining relations with Native Americans, the MBTA and Eagle Protection Act provisions distinguishing between federally and non-federally recognized Native American tribes fail to pass strict scrutiny under RFRA and therefore are unconstitutional as applied in the Ninth and Tenth Circuits.

130. *Id.* at 74.
131. *Id.* at 73.
132. *Id.*
B. The Necessity for a New Test to Determine How a Tribe Becomes Federally Recognized

In addition to *Hobby Lobby* making the current eagle protection legislation unconstitutional, the federal government’s requirements for a tribe to gain federal recognition are also too burdensome and require change. Considering our nation’s troubled history with Native Americans, giving federal recognition to established tribes with sincere religious beliefs is a matter of public policy. The Native American community has long suffered under the hand of the United States government, from the Trail of Tears to arbitrary confinement on reservations. Must the government further the Native American people’s suffering by taking away important instruments necessary for the practice of their religion, a practice equivalent to the taking of a Christian’s Bible or a Muslim’s Quran?

The Ninth and Tenth Circuits correctly found that allowing all Native American tribes access to eagle feathers would place additional burdens on members of already federally recognized tribes in the exercise of their religion, because of increased demand for eagle feathers and therefore, a more limited supply. In light of this valid concern, it would be overly burdensome to expand federally recognized status to all Native American tribes. Thus, the federal government should expand the current standard under 25 C.F.R. § 83.7, which contains the mandatory criteria to become a federally recognized tribe.

Currently, a Native American tribe only becomes federally recognized when it meets certain criteria, including: (1) the tribe has been in existence since 1900, (2) the tribe acts and is perceived as a distinct community, (3) the tribe maintains political influence or authority, (4) the tribe must provide copies of the its membership criteria, (5) the tribe’s current membership must consist of individuals who descend from a historical Indian tribe, (6) the tribe’s membership must be composed of persons who are not currently part of a federally acknowledged tribe, and (7) the tribe has not terminated or forbidden a federal relationship in the past. These criteria are too strict. For example, the Lipan Apache Tribe, which has been in existence for 300 years and is recognized by Texas, historians, and sociologists, has been rejected multiple times since first applying for federal recognition status in 2009.

133. United States v. Vasquez-Ramos, 531 F.3d 987, 992 (9th Cir. 2008); United States v. Wilgus, 638 F.3d 1274, 1295 (10th Cir. 2011).

134. 25 C.F.R. § 83.7.

The government instead should adopt a “sincere beliefs” test. This test would be a subjective test that considers a variety of factors, including: (1) how long the individual applying for an eagle feather permit has been a practitioner of a Native American faith, (2) the regularity in which the individual attends religious ceremonies, (3) how many individuals are members of this faith, and (4) whether the tribe or religion has been around at least fifty years. This proposed standard is indicative of a sincere religious belief, because the number of members a religion has indicates legitimacy, and active participation shows sincerity of the individual. The fifty-year requirement ensures that the faith is both established and recognized in the community and that there have been at least two generations of practitioners of the faith in existence to further show legitimacy. This new standard would act as a safeguard so that only established faiths and true practitioners are given permits to request eagle feathers and parts.

The sincerity and fifty-year requirements will keep the number of Repository permit applications at a manageable level, while also being more inclusive and allowing Native Americans to enjoy religious freedoms that other religions take for granted and are given liberally. The current treatment of established tribes who have been around for hundreds of years, like the Lipan Apache Tribe, is discriminatory in comparison to the way other, more popularized religions are treated in the United States. In light of these concerns of past discriminatory behavior by the federal government, it is imperative that the tribal federal recognition standard be modified to allow tribes with sincere religious beliefs and established ties to our nation access to any available apparatus—including eagle feathers—that is necessary to their exercise of religion.

V. CONCLUSION

While justice was eventually granted for Robert Soto nine years after his feathers were wrongfully confiscated, there are hundreds of sincere believers who simply desire to practice their faith by using eagle feathers in powwows and cannot do so because their tribe is not federally recognized. While the interests of protecting the bald and golden eagle are compelling, the strict standard that Native American tribes must satisfy to obtain federal recognition in order to comply with the MBTA and Eagle Protection Act is overly burdensome and inhibits many Native Americans from the right to freely practice religion under the Free Exercise Clause.
Therefore, the Fifth Circuit was correct in its analysis of the MBTA and Eagle Protection Act under the new RFRA standard as promulgated in *Hobby Lobby*. The Supreme Court expanded the RFRA standard, making the government’s burden to satisfy strict scrutiny almost impossible. Since there are clear alternatives to completely denying non-federally recognized tribes the right to possess eagle feathers and parts, this provision of the MBTA and Eagle Protection Act violates RFRA and therefore is unconstitutional. In conclusion, all circuits must adopt the Fifth Circuit’s interpretative approach of the eagle protection legislation and the United States government must take action to reform the current regulatory scheme and create a system that is less cumbersome for non-federally recognized Native American tribes to apply for eagle feather permits for religious use.