

THE RELIGIOUS FREEDOM RESTORATION ACT  
AND INDIAN LAW: FROM INDIVIDUAL ADVOCACY  
TO COLLECTIVE ACTION

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I. INTRODUCTION

In March 2006, federal agents raided a Native American powwow in Texas, confronted religious dancers, and confiscated 42 sacred eagle feathers. Pastor Robert Soto, a leader of the Lipan Apache Tribe of Texas and one of the dancers caught up in the raid, was threatened with a \$10,000 fine and two years in prison if he did not surrender his feathers. He spent the next ten years seeking the return of his sacred feathers and protection for his religious practices. Pastor Soto's pleas for the feathers' return went nowhere until he sued under the Religious Freedom Restoration Act ("RFRA").

RFRA is a 1993 statute enacted by supermajorities of both houses of Congress and signed into law by President Bill Clinton. The preamble of RFRA states that "governments should not substantially burden religious exercise without compelling justification."<sup>1</sup> RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after" RFRA was enacted.<sup>2</sup> Crucially, RFRA also includes a private right of action, which allows religious believers like Pastor Soto that have had their religious exercise

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1. 42 U.S.C. § 2000bb(a)(3).
2. 42 U.S.C. § 2000bb-3(a).

burdened by the government to sue for injunctive relief, attorney's fees, and money damages.<sup>3</sup>

RFRA has been intertwined with Native American religious liberty from its start. RFRA was a response to the crisis created by *Employment Division v. Smith*, a 1990 Supreme Court decision in which the Court cut back Free Exercise law while ruling against two Native American men who were fired from their jobs for using peyote in religious ceremonies.<sup>4</sup> Many Native American groups—including the Native American Church of North America, Americans for Indian Opportunity, the Association on American Indian Affairs, and the Native American Rights Fund—“wholeheartedly endorse[d]” RFRA.<sup>5</sup> Others, however, argued that RFRA did not go far enough to protect Native American religious liberty and asked Congress to also amend the American Indian Religious Freedom Act (“AIRFA”).<sup>6</sup>

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3. See *Tanzin v. Tanvir*, 141 S. Ct. 486, 493 (2020) (“RFRA’s express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities.”).

4. *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

5. *Religious Freedom Restoration Act of 1990: Hearing on H.R. 5377 Before the Subcomm. on Civ. and Const. Rts. of the H. Comm. on the Judiciary*, 101st Cong. 61 (1990) (statement of Coalition for the Free Exercise of Religion), <https://www.justice.gov/sites/default/files/jmd/legacy/2013/11/05/hear-150-1990.pdf> [<https://perma.cc/ZF93-ADY8>].

6. See *Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civ. And Const. Rts. of the H. Comm. on the Judiciary*, 102nd Cong. 422–23 (1992), <https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf> [<https://perma.cc/HJ5C-M7LR>] [hereinafter *RFRA 1991 Hearing*] (discussed in greater detail later in this memo). The 16 Native American and related groups who cosigned this testimony were (1) Americans for Indian Opportunity, (2) the Association on American Indian Affairs, (3) Consolidated Salish and Kootenai Tribes, (4) the Cultural Conservancy, (5) Hui Malama I Na Kupuna O Hawaii Nei, (6) Keepers of the Treasures: Cultural Council of American Indians, Alaska Natives and Native Hawaiians, (7) Kauffman and Associates, (8) the National Congress of American Indians, (9) the National Indian Education Association, (10) the Native American Church of North America, (11) the Native American Rights Fund, (12) the Native American Religious Freedom Project, (13) the Native American Task Force of the Church Council of Greater Seattle, (14) the Navajo Nation Corrections Project, (15) the Seventh Generation Fund, and (16) Ysleta Del Sur Pueblo. The other cosigners were (17) the Friends Committee on National Legislation, (18) the Church of the Brethren, (19) the Ecumenical Ministries of Oregon, (20) the Environmental Defense Fund, (21) Friends of the Earth, (22)

AIRFA was a Congressional resolution adopted in 1978 declaring that it was the “policy of the United States to protect” Native Americans’ right to “exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians,” including “use and possession of sacred objects.”<sup>7</sup> AIRFA instructed the President to have federal agencies consult with Native Americans and determine if any federal policies needed to be changed.<sup>8</sup> But AIRFA famously had “no teeth,”<sup>9</sup> a fact that the Supreme Court confirmed when it held in *Lyng v. Northwest Indian Cemetery Protective Association* that “[n]owhere in the [AIRFA] is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights.”<sup>10</sup>

Mindful of this history, a coalition of Native American groups that supported RFRA nevertheless argued that more needed to be done. According to this group, RFRA was “a reactive bill which relies primarily upon litigation as a check upon government power. But in federal Indian affairs, where numerous government policies so completely pervade Indian religious life, there is a need for *proactive* legislation to affirmatively change problematic federal procedures to accommodate and protect Native religions.”<sup>11</sup>

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the General Conference of Seventh-day Adventists, (23) the Hollywood Women’s Political Committee, (24) the National Conference of Christians and Jews, Inc.—Minnesota/Dakotas Region, (25) the Religious Action Center of the Union of American Hebrew Congregations, (26) the Society for Applied Anthropology, (27) the Washington Association of Churches, and (28) the National Council of Churches. *Id.* at 421.

7. American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified as amended at 42 U.S.C. § 1996), <https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg469.pdf> [<https://perma.cc/WYB7-PXQA>].

8. *Id.* at 470.

9. 124 Cong. Rec. 21,445 (1978) (statement of Rep. Mo Udall), <https://www.govinfo.gov/app/details/GPO-CRECB-1978-pt16/GPO-CRECB-1978-pt16-4-2> [<https://perma.cc/6PKZ-REXF>].

10. 485 U.S. 439, 455 (1988).

11. *RFRA 1991 Hearing*, *supra* note 6, at 425 (emphasis in original). The group urged Congress to go back to the original agenda of regulatory reform established in the wake of AIRFA and pass specific statutory protections for Native American religious freedom. *Id.* at 435–37. However, apart from 1994

Twenty years later, it is clear that RFRA has been a crucial tool for individual Native Americans. One study of RFRA plaintiffs in the Tenth Circuit found that Native Americans, who make up just 1% of the population in that circuit, filed 7% of the RFRA cases.<sup>12</sup> Pastor Soto's legal victory against the Department of the Interior is an example of this. But the question raised by Native American organizations in the 1990s still hangs in the air: can RFRA help Native Americans change the federal policies that "so completely pervade" their religious life?

Pastor Soto sought to do just that. After winning a preliminary victory in the Fifth Circuit, he negotiated a settlement that included the promise that the Department of the Interior would consider a petition for rulemaking to change the federal regulations regarding the religious use of eagle feathers. Pastor Soto submitted that petition in 2018,<sup>13</sup> and in 2022 the Department of the Interior announced that it was planning to issue a Notice of Proposed Rulemaking in response to Pastor Soto's petition.<sup>14</sup>

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amendments protecting the ceremonial use of peyote, this plea appears to have gone unheard. See American Indian Religious Freedom Act Amendments of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994) ("Peyote amendments"), <https://coast.noaa.gov/data/Documents/OceanLawSearch/Public%20Law%20103-344.pdf> [<https://perma.cc/3FWG-HDKA>].

12. Luke W. Goodrich & Rachel Morrison, *Sex, Drugs, and Eagle Feathers: An Empirical Study of Federal Religious Freedom Cases*, 48 SETON HALL L. REV. 353, 369, 373 (2018). Goodrich and Morrison excluded religious liberty cases brought by prison inmates and asylum seekers from their analysis and found that between 2012 and 2017, Native Americans litigated 7% of the RFRA claims in the Tenth Circuit, despite being only 1% of the population in the six states covered by that circuit (Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming). See *id.*; see also Admin. Off. of the U.S. Cts., *Geographic Boundaries of United States Courts of Appeals and United States District Courts*, U.S. CTS., [https://www.uscourts.gov/sites/default/files/u.s.\\_federal\\_courts\\_circuit\\_map\\_1.pdf](https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf), [<https://perma.cc/64N2-2ZBN>] (last visited Oct. 24, 2022).

13. BECKET FUND FOR RELIGIOUS LIBERTY, PETITION BEFORE THE FISH AND WILDLIFE SERVICE OF THE UNITED STATES DEPARTMENT OF INTERIOR: TO END THE CRIMINAL BAN ON RELIGIOUS EXERCISE WITH EAGLE FEATHERS AND TO PROTECT NATIVE AMERICAN RELIGIOUS PRACTICES (2018), <https://s3.amazonaws.com/becketnewsite/Becket-Eagle-Feather-Rulemaking-Petition-July-2018.pdf> [<https://perma.cc/VG8Z-THN7>].

14. Possession of Eagle Specimens for Religious Purposes, RIN 1018-BB88 (Advance Notice of Proposed Rulemaking, in Unified Agenda Spring 2022) (to be

In the four years that the Soto Petition has been pending, the Supreme Court has issued three opinions that strengthen Pastor Soto's request. *Little Sisters of the Poor v. Pennsylvania* established that RFRA authorizes—and, in some circumstances, requires—federal agencies to consider granting religious exemptions from general rules.<sup>15</sup> This is true even where, as here, the authorizing statute does not mention religious exemptions.<sup>16</sup> *Fulton v. City of Philadelphia* held that, when the government grants exemptions from its policies for secular reasons, it must also grant exceptions for religious ones.<sup>17</sup> *Ramirez v. Collier* emphasized that, when the government has allowed a religious practice in the past, it may not restrict that practice without clearly explaining why it must do so now.<sup>18</sup>

Taken together, these legal developments have strengthened RFRA as a tool to “affirmatively change” federal policies that burden Native American religious practice.<sup>19</sup> Pastor Soto's path—combining victory in the courtroom with administrative advocacy—holds great promise for the future of Native American religious freedom.

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codified at 50 C.F.R. 22), available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=1018-BB88>.

15. 140 S. Ct. 2367, 2382–84 (2020); see discussion *infra* Section IV.A.

16. *Little Sisters of the Poor*, 140 S. Ct. at 2380 (“[T]he same capacious grant of authority that empowers HRSA to make these determinations leaves its discretion equally unchecked in other areas, including the ability to identify and create [religious] exemptions from its own Guidelines.”).

17. 141 S. Ct. 1868, 1881–82 (2021); see discussion *infra* Section IV.B.

18. 142 S. Ct. 1264, 1279–80 (2022).

19. *RFRA 1991 Hearing*, *supra* note 6, at 425.

## II. HOW THE GOVERNMENT REGULATES THE USE OF EAGLE FEATHERS

Before explaining how RFRA protects Pastor Soto and other Native Americans who worship with eagle feathers, it is important to understand the scope of the federal government's regulation of eagle feathers.<sup>20</sup>

Eagle feather use is central to many Native Americans' religion.<sup>21</sup> Recognizing this, Congress specifically allowed the use of eagle feathers "for the religious purposes of Indian Tribes" when it passed the Bald and Golden Eagle Protection Act ("BGEPA") in 1962.<sup>22</sup> The Department of the Interior ("Department") passed regulations in 1963, updated in 1974 and 1999, that allow Native Americans to use eagle feathers.<sup>23</sup> But to this day, the regulations require every Native American to apply to the Department for a permit in order to lawfully possess even a single feather.<sup>24</sup>

Perhaps because it was unworkable to issue permits to each of the millions of Native Americans who exercise their faith using federally protected bird feathers, in 1975 the Department announced that Native Americans could use eagle feathers freely, without a permit.<sup>25</sup> This 1975 policy, known as the "Morton Policy," was issued to "ease the minds of American Indians" who experienced

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20. The discussion that follows is based on briefs filed in litigation and the petition filed by Pastor Soto with the Department of the Interior in July 2018. See BECKET FUND FOR RELIGIOUS LIBERTY, *supra* note 13; see also END THE FEATHER BAN, <https://endthefeatherban.org/> (last visited Dec. 20, 2022).

21. See generally Plaintiff's Motion for Entry of Preliminary Injunction at 31, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-60 (S.D. Tex. Mar. 10, 2015), ECF No. 57, <https://becketpdf.s3.amazonaws.com/McAllen-PI-Motion-file-stamped.pdf> [<https://perma.cc/QXL2-T33T>] (describing Native American use of eagle feathers in religious exercise).

22. 16 U.S.C. § 668a; Pub. L. 87-884, Oct. 24, 1962, 76 Stat. 1246.

23. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 470 (5th Cir. 2014) (discussing regulatory history).

24. See 50 C.F.R. § 22.60 (2022).

25. Press Release, Secretary of the Interior Rogers C.B. Morton, Policy Statement on Indian Use of Bird Feathers (Feb. 5, 1975), <https://www.bia.gov/as-ia/opa/online-press-release/morton-issues-policy-statement-indian-use-bird-feathers> [<https://perma.cc/BB4H-CNHP>] [hereinafter 1975 Morton Policy].

“confusion and concern” as a result of the “Department’s enforcement activities.”<sup>26</sup> Under the Morton Policy, Native Americans could:

- Acquire naturally molted or fallen feathers from the wild;
- Give, loan, or exchange federally protected birds or bird parts with other members of federally protected tribes; and
- Possess, use, wear, carry, and transport federally protected birds or bird parts.<sup>27</sup>

As long as Native Americans were not killing, buying, or selling protected birds or bird parts, they were free to do all of these things “regardless of whether they [had] a U.S. Fish and Wildlife Service permit.”<sup>28</sup> However, the regulations requiring a permit were never amended to reflect the policy.

More than 30 years later, the cycle of enforcement followed by protests repeated itself: An increase in Department enforcement activity in 2009 led to outcry from Native Americans, and in 2012 the Department and the Department of Justice (“DOJ”) issued a memorandum reaffirming the substance of the Morton Policy.<sup>29</sup> This time, however, the Department made a significant change: While the 1975 policy applied broadly to “American Indians,” the 2012 memorandum only protected those Native Americans who are members of

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26. *Id.*

27. Memorandum from the Att’y Gen. on Use of Feathers of Fed. Protected Birds for Religious Purposes 3 (Oct. 12, 2012), <https://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf> [<https://perma.cc/STG9-N32K>] [hereinafter 2012 Morton Policy]; see also 1975 Morton Policy, *supra* note 25.

28. 2012 Morton Policy, *supra* note 27, at 3.

29. This pattern of increased enforcement against Native Americans, followed by non-enforceable policy statements promising future forbearance, has continued. See Dep’t of the Interior, Solicitor Op. M-37063 (Jan. 15, 2021), <https://www.doi.gov/sites/doi.gov/files/m-37063.pdf> [<https://perma.cc/48S3-RG9Z>] (citing the recent prosecution of several Native Americans for hunting protected birds as the impetus for moderating the Department’s views on the ongoing validity of Native American treaty rights).

federally recognized tribes.<sup>30</sup> Overnight and by the stroke of a pen, the many Native Americans who are not members of a federally recognized tribe lost the right to practice their faith by praying with eagle feathers.

This abrupt and unannounced change was only possible because the Morton Policy is a policy memorandum, not a Department regulation. The Morton Policy has never been published in the Code of Federal Regulations, nor has it been subject to notice and comment rulemaking. Yet to this day, it is the only federal document protecting the millions of Native Americans who lack permits to exercise their faith using eagle feathers. Until the Morton Policy is adopted as an official regulation, every change in administration will bring new uncertainty for Native Americans.

The Morton Policy is just part of the web of statutes, regulations, and policies that regulate eagle use in the United States. Congress authorized the Department to allow eagle feather use “for the religious purposes of Indian Tribes” in 1962.<sup>31</sup> But more than 50 years later, Native Americans face uncertainty and even criminal liability for exercising their faith using eagle feathers, while power companies enjoy open-ended permits that allow them to kill an undetermined number of eagles for decades at a time.

### A. Statutes

Two statutes are most relevant here: the Migratory Bird Treaty Act (“MBTA”) and the BGEPA. The first statute, MBTA, was enacted in 1918 to implement a convention between the United States and Great Britain.<sup>32</sup> It prohibits the harm, sale, or possession of migratory birds or their parts without a valid permit.<sup>33</sup>

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30. Compare 1975 Morton Policy, *supra* note 25, at 1 (“American Indians may possess . . . all federally protected birds . . .”), with 2012 Morton Policy, *supra* note 27, at 3 (limiting policy to “member[s] of a federally recognized tribe”).

31. See 16 U.S.C. § 668a.

32. 16 U.S.C. § 703(a).

33. *Id.*



MBTA currently covers over 1,000 bird species<sup>34</sup>—almost every native species in the United States.<sup>35</sup>

In light of MBTA's broad language, courts have concluded that "Congress intended to make the unlawful killing of even one bird an offense."<sup>36</sup> Felony violations require knowledge, but misdemeanor violations of MBTA are strict-liability offenses.<sup>37</sup> Moreover, MBTA forbids the possession of feathers of protected migratory birds, even if these feathers were naturally molted.<sup>38</sup> Misdemeanor violations are punishable by fines up to \$15,000, imprisonment up to six months, or both.<sup>39</sup> Felony violations are punishable by fines up to \$2,000, imprisonment up to two years, or both.<sup>40</sup>

Despite the blanket ban on possession of migratory bird parts, MBTA grants the Secretary of the Interior broad authority "to determine when, to what extent, if at all, and by what means" hunting or possessing protected birds is permitted.<sup>41</sup> The Secretary has exercised this authority by authorizing permits for the taking or possession of migratory birds for falconry, raptor propagation, scientific collecting, controlling depredating birds, taxidermy, waterfowl sale and disposal, and other reasons, such as rehabilitation, education, and salvage.<sup>42</sup> There are also extensive regulations allowing hunting.<sup>43</sup> However, there are no permits for the average person

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34. List of Migratory Birds, 50 C.F.R. § 10.13 (2022).

35. Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, AUDOBON (May 22, 2015), <https://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act> [<https://perma.cc/2N78-9LCZ>].

36. *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 529 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

37. *See, e.g., Nat. Res. Def. Council, Inc. v. U.S. Dep't of the Interior*, 478 F. Supp. 3d 469, 475 (S.D.N.Y. 2020) (discussing strict liability for misdemeanor offenses).

38. *The Feather Atlas: Feathers and the Law*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/lab/featheratlas/feathers-and-the-law.php> (last updated Feb. 28, 2020).

39. 16 U.S.C. § 707(a).

40. 16 U.S.C. § 707(b).

41. 16 U.S.C. § 704(a).

42. *See generally* 50 C.F.R. § 21 (2022).

43. *See generally* 50 C.F.R. § 20 (2022).

who might want to pick up a feather. Nor are there any religious-use permits for Native Americans and other religious believers who are not enrolled members of a federally recognized tribe. Thus, if a non-enrolled child picks up the feather of a dove, duck, or Canada goose for an art project, or if a non-enrolled Native American picks up the same feather for religious purposes, they are subject to criminal punishment.<sup>44</sup>

The second statute, BGEPA, was enacted in 1940 when “the bald eagle [was] threatened with extinction.”<sup>45</sup> It originally protected only the bald eagle and had no exception for Native American religious use.<sup>46</sup> In 1962, it was amended to protect golden eagles (which can be confused with bald eagles) and to make an exception “for the religious purposes of Indian tribes.”<sup>47</sup> BGEPA now prohibits the harm, sale, or possession of bald or golden eagles or any bald or golden eagle parts, except with a valid permit.<sup>48</sup> Violations are punishable by fines up to \$5,000, imprisonment up to one year, or both.<sup>49</sup> For a second violation, penalties double.<sup>50</sup>

BGEPA also gives the Department “broad authority” to make exceptions for the taking of eagles or eagle parts “for the purposes of public museums, scientific societies, zoos, Indian religious uses, wildlife protection, agricultural protection, and ‘other interests.’”<sup>51</sup> Permits are governed by an extensive system of regulations,

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44. For example, in 2006, Michael Cleveland was criminally convicted and fined \$500 after an undercover agent found him at a powwow with feathers from a dove, a duck, and a Canada goose. Admin. Transcript Record at 1–9, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-00060, (S.D. Tex. Apr. 9, 2012), ECF No. 30-7.

45. Bald and Golden Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668–668d).

46. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 469 (5th Cir. 2014).

47. 16 U.S.C. § 668a.

48. 16 U.S.C. § 668.

49. 16 U.S.C. § 668(a).

50. *Id.*

51. *McAllen*, 764 F.3d at 469.

which govern both Native American religious uses and non-religious uses.<sup>52</sup>

*B. Eagle Feather Permits for  
Native American Religious Use*

Under current regulations, permits for Native American religious use are available only to enrolled members of federally recognized tribes.<sup>53</sup> But for the first 37 years under the relevant statutes, there was no distinction between Native Americans who were members of federally recognized tribes and those who were not.<sup>54</sup>

The text of BGEPA, as enacted in 1962, does not distinguish between federally recognized tribe members and other Native Americans. It simply authorizes permits “*for the religious purposes of Indian tribes.*”<sup>55</sup> Similarly, the first regulations, promulgated in 1963, authorized permits for any “individual Indians who are *authentic, bona fide practitioners of such religion,*” without regard to their membership in a federally recognized tribe.<sup>56</sup> When the Department updated its regulations in 1974, it required applicants to attach a Certificate of Degree of Indian Blood, “but it did not specify that the individual had to be enrolled in a federally recognized tribe.”<sup>57</sup> And when the Department issued the Morton Policy in 1975, clarifying that it would not enforce the federal ban on possession of bird parts against Native Americans, the policy applied to all “American Indians,” without distinguishing between

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52. See 50 C.F.R. § 22.2 (2022).

53. See 50 C.F.R. § 22.60 (“We will issue a permit only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under 25 U.S.C. 479a–1. . .”).

54. *McAllen*, 764 F.3d at 470.

55. 16 U.S.C. § 668a (emphasis added).

56. *McAllen*, 764 F.3d at 470 (emphasis in opinion).

57. *Id.* (citing 50 C.F.R. § 22.22 (1974)).

members of federally recognized tribes and all other Native Americans.<sup>58</sup>

It was not until 1999—37 years after enactment of the statute—that the Department promulgated the first eagle-permitting regulations that distinguished between federally recognized and non-recognized tribes.<sup>59</sup> The regulations now require applicants for a permit to “attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a–1.”<sup>60</sup>

Under current regulations, there are four ways that members of federally recognized tribes can legally obtain eagles or eagle parts.<sup>61</sup> The first is to obtain dead eagles or eagle parts from the National Eagle Repository. The Repository is a large warehouse maintained by the Fish and Wildlife Service in Colorado where the government collects, freezes, and distributes dead eagles and eagle parts.<sup>62</sup> To obtain eagle parts from the Repository, members of federally recognized tribes fill out a permit application providing their contact information, what eagle parts they want, and proof of their membership in a federally recognized tribe.<sup>63</sup> According to a Department

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58. 1975 Morton Policy, *supra* note 25. The 2012 Department of Justice Memorandum implies that the 1975 Morton policy applied only to members of federally recognized tribes. 2012 Morton Policy, *supra* note 27, at 2. But the text of the 1975 Morton Policy makes no such distinction. 1975 Morton Policy, *supra* note 25.

59. *McAllen*, 764 F.3d at 470.

60. 50 C.F.R. § 22.60(a)(5) (2022).

61. In addition to these four long-established ways of possessing eagle feathers, the Department recently concluded that neither MBTA nor the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544, abrogated “reserved hunting and fishing rights” established under treaties between the United States and federally recognized tribes, thus opening another potential path to possessing eagle parts and feathers for members of federally recognized tribes. Solicitor’s Op. M-37063, *supra* note 29. *But see id.* at section II.B (discussing the ongoing validity of the “conservation necessity” test as a limit on treaty rights).

62. *National Eagle and Wildlife Property Repository*, U.S. FISH & WILDLIFE SERV., <https://fws.gov/law-enforcement/national-eagle-and-wildlife-property-repository> [<https://perma.cc/45C6-LX2W>] (last visited Nov. 4, 2022).

63. U.S. FISH & WILDLIFE SERV., PERMIT APPLICATION/ORDER FORM 3-200-15A: EAGLE PARTS FOR NATIVE AMERICAN RELIGIOUS PURPOSES 1 (2021), <https://www.fws.gov/sites/default/files/documents/3-200-15a.pdf> [<https://perma.cc/U835-R534>].

document, the September to December 2022 wait times for 20 miscellaneous golden eagle feathers is three months, for 10 quality feathers is two years, and for a whole immature golden eagle is nine years.<sup>64</sup> Waiting times for bald eagle parts are less—between one year for a whole bird and two months for a pair of wings.<sup>65</sup>

If eagle parts from the Repository do not satisfy an individual's religious needs, that person may apply for a permit to “take” a live eagle.<sup>66</sup> A “take” permit allows someone to hunt or kill an eagle.<sup>67</sup> Applicants must explain to the regional Migratory Bird Permit Office why they need to take a live eagle and how many eagles of what species they wish to take.<sup>68</sup> The Fish and Wildlife Service will grant the permit only if the taking is compatible with the preservation of eagles, only if the taking is for a “bona fide” religious use, and only if “special circumstances” demonstrate that the religious use cannot be satisfied through the National Eagle Repository.<sup>69</sup> This “take” permit option is “used infrequently, and is not widely known.”<sup>70</sup> It is used primarily by the Hopi and a handful of other tribes largely located in the Southwest, where golden eagles are plentiful.<sup>71</sup> From 1987 to 2016, the Department allowed the Hopi to take up to 40 golden eagle nestlings each year.<sup>72</sup>

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64. *Current Wait Times for September - December 2022*, Document available on *Eagle Repository Documents & Forms*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/library/collections/eagle-repository-documents-forms> [<https://perma.cc/3ENW-RWFU>] (July 11, 2022).

65. *Id.*

66. 50 C.F.R. § 22.60 (2022).

67. 50 C.F.R. § 22.6 (2022) (“Take means pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb.”).

68. *United States v. Friday*, 525 F.3d 938, 944 (10th Cir. 2008).

69. *Id.* at 944–45 (citing 50 C.F.R. § 22.22(c)).

70. *Id.* at 945.

71. U.S. FISH & WILDLIFE SERV., *EAGLE RULE REVISION: PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT*, 2016, at 128 tbl.3-17, [https://eagleruleprocess.org/files/PEIS\\_Permits\\_to\\_Incidentally\\_Take\\_Eagles.pdf](https://eagleruleprocess.org/files/PEIS_Permits_to_Incidentally_Take_Eagles.pdf) [<https://perma.cc/9PCL-GA7R>].

72. *Id.*

The third way that federally recognized tribes can obtain eagles and eagle parts is by obtaining a permit to operate a Native American eagle aviary.<sup>73</sup> These aviaries allow certain tribes to keep non-releasable eagles in captivity and use them for religious purposes. As of 2016, there were eight tribal aviaries that together housed more than 100 eagles.<sup>74</sup>

Finally, in addition to the Repository, live “take” permits, and eagle aviaries, the Attorney General in 2012 clarified that, under a version of the 1975 Morton Policy, the federal government will not prosecute members of federally recognized tribes for possession of federally protected birds or bird parts, including eagles.<sup>75</sup> Thus, as previously discussed, members of federally recognized tribes can acquire naturally molted or fallen feathers from the wild; can give, loan, or exchange federally protected birds or bird parts with other members of federally protected tribes; and can possess, use, wear, carry, and transport federally protected birds or bird parts.<sup>76</sup> As long as members of federally recognized tribes are not killing, buying, or selling protected birds or bird parts, they are free to do all of these things “regardless of whether they have a U.S. Fish and Wildlife Service permit.”<sup>77</sup>

None of these options are available to Native Americans who are not members of federally recognized tribes or to other religious believers who exercise their faith using eagle feathers. They cannot obtain dead eagles or eagle parts from the Repository. They cannot obtain a live “take” permit. They cannot maintain an aviary or obtain feathers from an existing aviary. And they cannot possess eagle parts found in the wild, given as gifts, or loaned or exchanged with members of other

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73. 3-200-78: *Native American Tribal Eagle Aviary*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/service/3-200-78-native-american-tribal-eagle-aviary> [<https://perma.cc/N2HL-XAFN>].

74. EAGLE RULE REVISION: PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT, 2016, *supra* note 71, at 128 tbl.3-16.

75. 2012 Morton Policy, *supra* note 27, at 3.

76. *Id.*

77. *Id.*

tribes. They are completely prohibited from possessing even a single feather.

The 2012 policy restricts the religious practices of federally recognized tribe members in ways that are less obvious but still harmful. Tribe members are free to use federally protected feathers (including eagle feathers) themselves, but if they give or even lend a feather to someone who is not a member of a federally recognized tribe, they are breaking the law. Grandparents may not bestow a feather on a non-member grandchild who is graduating from college. Tribal leaders may not bestow a feather on a Member of Congress as part of a government-to-government meeting. Even for those it is supposed to protect, the 2012 policy takes the decision about appropriate religious use out of the hands of Native Americans and puts it in the hands of the federal government.

Nor does the 2012 policy provide meaningful protection to the millions of federally recognized tribe members who rely on it. The 2012 policy closes by emphasizing that it “is not intended to . . . create any rights, substantive or procedural, that are enforceable at law by any party in any matter, civil or criminal,” and that it does not “place any limitations on otherwise lawful litigative prerogatives of the Department of Justice.”<sup>78</sup> If the DOJ rescinds the 2012 memorandum tomorrow, every federally recognized tribe member who uses eagle feathers without a permit could be prosecuted.

### *C. “Take” Permits for Non-Religious Uses*

While many Native American believers are forever banned from possessing eagle feathers, the Department allows others to possess and even kill eagles for scientific, agricultural, and commercial purposes under so-called “take” permits.

The number of take permits issued for these purposes dwarfs the number of permits issued for Native

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78. *Id.* at 4–5.

American religious purposes. According to records the Department provided to the Becket Fund for Religious Liberty under the Freedom of Information Act (“FOIA”), between 2007 and 2017 the Department issued 337 take permits for non-religious purposes.<sup>79</sup> Three take permits were issued to allow energy companies to kill eagles;<sup>80</sup> 30 more such applications are pending.<sup>81</sup> During the same 10-year period, the number of take permits issued for Native American religious purposes was seven.<sup>82</sup>

### *1. Museums, Scientific Societies, and Zoos*

If museums, scientists, or zoos want to possess eagles or eagle parts, they must submit an application explaining the need for the permit and the number and type of eagles to be taken.<sup>83</sup> If the Department determines that the permit “is compatible with the preservation of the bald eagle and golden eagle,” it can grant the permit.<sup>84</sup> To take one well-known example, the Southeast Raptor Center at Auburn University rehabilitates eagles injured in the wild and also trains the eagles that traditionally fly over the stadium before every Auburn University home football game.<sup>85</sup>

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79. Letter Regarding FOIA Request from E. Daniel Patterson III, U.S. Fish & Wildlife Serv., to Derringer Dick, Strategic Research Associate, Becket Fund for Religious Liberty, at attach. A (Sept. 6, 2017), [https://s3.amazonaws.com/becketnewsite/Patterson-Letter\\_with-attachments.pdf](https://s3.amazonaws.com/becketnewsite/Patterson-Letter_with-attachments.pdf) [<https://perma.cc/L4J8-4G7R>] [hereinafter Patterson Letter].

80. Email Regarding FOIA Request from January Johnson, Government Information Specialist, to Derringer Dick, Strategic Research Associate, Becket Fund for Religious Liberty (Sep. 21, 2017) [<https://perma.cc/PH9L-KNJZ>] (energy company permits).

81. Telephone call from January Johnson, Pamela Mozina, and Jerry Thompson, U.S. Fish & Wildlife Serv., to Derringer Dick, Strategic Research Associate, Becket Fund for Religious Liberty, re FOIA requests (Sept. 14, 2017) (stating number of pending applications).

82. Patterson Letter, *supra* note 79, at attach. B.

83. 50 C.F.R. § 22.50(a)(3) (2022).

84. 50 C.F.R. § 22.50(c) (2022).

85. John Shryock, *Auburn officially retires Nova, its 20-year-old golden eagle*, NEWS4 (Nov. 22, 2019, 1:06 PM), <https://www.wtv.com/content/news/Auburn-officially-retires-Nova-its-20-year-old-golden-eagle-565337151.html> [<https://perma.cc/48FV-R6X4>]



## *2. Protection of Human Health, Agriculture, Wildlife, and Other Interests*

Eagles can also be removed or killed to protect human health, agriculture, wildlife, or “other interests.”<sup>86</sup> This includes situations where eagles may be disturbing livestock or domestic animals, damaging private property, or interfering with airport flight zones.<sup>87</sup> To obtain a permit to take these “depredating” eagles, a permit applicant must explain the kind and amount of damage that the eagles are causing, the number and type of eagles to be taken, and the way that the eagles will be removed or killed.<sup>88</sup> The Department can grant the permit if it is “compatible with the preservation of the bald or golden eagle,” if the eagles “have in fact become seriously injurious,” and if the taking is “the only way to abate or prevent the damage.”<sup>89</sup>

## *3. Falconry*

Golden eagles can also be taken from specified depredation areas for purposes of falconry—that is, to be trained as hunting birds.<sup>90</sup> One falconry association estimates that there are around 4,000 falconers in the U.S. today.<sup>91</sup> The Department allows every master falconer to keep up to three golden eagles at a time and to capture up to two golden eagles from the wild each year—all for sport.<sup>92</sup>

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86. 50 C.F.R. § 22.100 (2022).

87. 3-200-16: *Eagle Depredation*, U.S. FISH & WILDLIFE SERVS., <https://www.fws.gov/service/3-200-16-eagle-depredation> [<https://perma.cc/BQL4-28SB>].

88. 50 C.F.R. § 22.100(a) (2022).

89. 50 C.F.R. § 22.100(c) (2022).

90. 50 C.F.R. § 21.82 (2022).

91. *Falconry: History*, THE MODERN APPRENTICE: FALCONRY, ECOLOGY, EDUCATION, <https://www.themodernapprentice.com/history.htm> [<https://perma.cc/89L8-MXF5>] (last visited Nov. 6, 2022).

92. 50 C.F.R. § 21.82(c)(2)(iv) (2022) (may possess up to three golden eagles at a time); *id.* § 21.82(e)(1)(v) (2022) (may take up to two golden eagles each year; must be taken from a livestock depredation area). As of 2014, falconry permits

#### 4. *Incidental Taking*

All permits described above are for the intentional taking of eagles. But many more eagles and other protected birds are taken *unintentionally*.

The Department has listed the “top threats to birds” as follows:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kill an estimated 599 million birds per year;
- Collisions with vehicles, which kill an estimated 214.5 million birds per year;
- Poisons, which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25.5 million birds per year;
- Collisions with communications towers, which kill an estimated 6.6 million birds per year;
- Electrocutions, which kill an estimated 5.6 million birds per year; and
- Collisions with wind turbines, which kill an estimated 234,000 birds per year.<sup>93</sup>

For unintentional eagle takings, the Department issues what it calls “incidental take” permits under BGEPA.<sup>94</sup> These permits cover “a broad spectrum of public and private interests,” such as “utility

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are issued by states, territories, and Tribes, but the Department continues to set the maximum number of eagles that falconers may take and possess. Migratory Bird Permits; Changes in the Regulations Governing Falconry, 73 Fed. Reg. 59,448 (Oct. 8, 2008) (codified at 50 C.F.R. pts. 21, 22).

93. *Threats to Birds*, U.S. FISH AND WILDLIFE SERV., <https://www.fws.gov/library/collections/threats-birds> [<https://perma.cc/9AT9-D5XN>] (last visited Nov. 7, 2022).

94. 50 C.F.R. § 22.80(d)(3)(ii) (2022); *see also*, U.S. FISH & WILDLIFE SERV., FEDERAL FISH AND WILDLIFE PERMIT APPLICATION FORM 3-200-71: EAGLE TAKE-ASSOCIATED WITH BUT NOT THE PURPOSE OF AN ACTIVITY (INCIDENTAL TAKE) 1 (2020), <https://www.fws.gov/sites/default/files/documents/3-200-71App.pdf> [<https://perma.cc/F75X-HPLP>].

infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery” such as forestry, mining, and oil and natural gas drilling and refining, and “recreational use.”<sup>95</sup>

Before issuing an “incidental take” permit, the Department must determine that the taking is “compatible with the preservation of bald eagles and golden eagles,” is “necessary to protect a legitimate interest,” is unintentional, is unavoidable despite mitigation measures, and will not preclude the issuance of higher-priority eagle permits.<sup>96</sup>

The Department has admitted that it does not know for certain how many eagles are taken each year due to “utility infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery [such as forestry, mining, and oil and natural gas drilling and refining], recreational use” and other human-caused factors.<sup>97</sup> However, the available evidence suggests that the number is large: for golden eagles alone, the Department has estimated that there are “considerably” more than 2,000 human-caused eagle deaths each year.<sup>98</sup> Based on a study of satellite-tagged golden eagles from 1997 to 2013, the Department concluded that electrocutions and collisions combined were the largest causes of anthropogenic (i.e., human-related) golden

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95. U.S. FISH & WILDLIFE SERV., FREQUENTLY ASKED QUESTIONS ABOUT A FEDERAL PERMIT FOR EAGLE TAKE—ASSOCIATED WITH BUT NOT THE PURPOSE OF AN ACTIVITY 1, <https://www.fws.gov/sites/default/files/documents/3-200-71FAQ.pdf> [<https://perma.cc/BXF5-4E9Q>].

96. 50 C.F.R. § 22.80(e)–(f) (2022).

97. See FREQUENTLY ASKED QUESTIONS, *supra* note 95, at 1; Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 27,934, 27,937 (May 6, 2016) (codified at 50 C.F.R. pts. 13, 22) (estimating based on population growth of golden eagles that sustainable take is 2,000 individuals, but “available information suggests ongoing levels of human-caused mortality likely exceed this value, perhaps considerably”).

98. Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 27,937 (May 6, 2016).

eagle death.<sup>99</sup> Wind turbines also frequently kill eagles. One peer-reviewed study estimated that in 2012 alone, wind turbines killed 573,000 birds, including 83,000 raptors.<sup>100</sup>

The Department's incidental take permits have been controversial at times. Incidental take permits were originally limited to a maximum of five years. Any longer duration, the Department said, could render the permit "incompatible with the preservation of the bald eagle or the golden eagle."<sup>101</sup> But in 2013, to accommodate "renewable energy and other projects designed to operate for decades," the Department authorized incidental permits of up to 30 years.<sup>102</sup> Many conservation groups strenuously objected and accused the Department of favoritism towards the wind energy industry.<sup>103</sup> The Audubon Society called the new regulations "outrageous," stating that "Interior wrote the wind industry a blank check."<sup>104</sup> The American Bird Conservancy sued the Department in federal court, arguing that the Department's failure to conduct any environmental analysis of the new regulation was a "flagrant violation of the National Environmental Policy

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99. BRIAN A. MILLSAP, ET AL., U.S. FISH & WILDLIFE SERV., BALD AND GOLDEN EAGLES: POPULATION DEMOGRAPHICS AND ESTIMATION OF SUSTAINABLE TAKE IN THE UNITED STATES, 2016 UPDATE 14 tbl.8 (April 26, 2016), <https://www.fws.gov/media/population-demographics-and-estimation-sustainable-take-united-states-2016-update> [<https://perma.cc/WU8M-ZN8L>].

100. K. Shawn Smallwood, *Comparing bird and bat fatality-rate estimates among North American wind-energy projects*, 37 WILDLIFE SOC'Y BULL. 19, 26 (2013).

101. Eagle Permits; Take Necessary To Protect Interests in Particular Localities, 74 Fed. Reg. 46,836, 46,856 (Sept. 11, 2009) (codified at 50 C.F.R. pts. 13, 22).

102. Eagle Permits; Changes in the Regulations Governing Eagle Permitting, 78 Fed. Reg. 73,704, 73,721 (Dec. 9, 2013) (codified at 50 C.F.R. pts. 13, 22).

103. Dina Cappiello, *Wind Farms Get Pass on Eagle Deaths*, ASSOCIATED PRESS (May 14, 2013), <https://apnews.com/article/9897e846a5444120bf673332c1b97aac> [<https://perma.cc/69Z9-SMQ9>].

104. *Press Room, Interior Dept. Rule Greenlights Eagle Slaughter at Wind Farms, Says Audubon CEO*, AUDUBON (Dec. 5, 2013), <https://www.audubon.org/news/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon-ceo> [<https://perma.cc/B3H2-9U4N>].

Act.”<sup>105</sup> Four days after the lawsuit was filed, the Department announced that it would conduct an environmental analysis.<sup>106</sup> In 2016, the Department completed its analysis and issued new regulations once again authorizing 30-year permits for incidental takes.<sup>107</sup> The 2016 regulations included a detailed explanation of how the Department intended to evaluate wind energy projects; according to the Department, this special emphasis “reflect[ed] Administration priorities for expanded wind energy development.”<sup>108</sup> By 2018, the Department had already issued three take permits to energy companies; as of that year, 30 more applications were pending.<sup>109</sup> And in February 2022, the Department concluded that it could safely issue incidental take permits allowing energy companies and other human activities to kill up to 15,832 bald eagles without affecting its conservation goals.<sup>110</sup>

While the Department has loosened restrictions on wind energy companies taking (i.e., killing) eagles, it has imposed more and more restrictions on Native Americans for using eagle feathers. In 1975, all Native Americans could use federally protected bird feathers in their religious exercise. Today, only a subset of Native Americans may practice their faith using feathers; all others are banned from possessing even a single feather. Even those Native Americans who qualify face legal uncertainty because their protection is based on a policy that the DOJ asserts it is free to disregard at any time.

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105. Complaint for Declaratory & Injunctive Relief at 2, *Shearwater v. Ashe*, No. 14-CV-02830 (N.D. Cal. 2015), ECF No. 1 (filed June 19, 2014).

106. *Eagle Permits; Notice of Intent To Prepare an Environmental Assessment or an Environmental Impact Statement*, 79 Fed. Reg. 35,564 (June 23, 2014).

107. *Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests*, 81 Fed. Reg. 91,494 (Dec. 16, 2016) (codified at 50 C.F.R. pts. 13, 22).

108. *Id.* at 91,501.

109. Email Regarding FOIA Request from January Johnson, *supra* note 80 (energy company permits; dates reflect take year, not issue year); telephone call from January Johnson, *supra* note 81 (pending applications).

110. *Notice, Eagle Permits; Updated Bald Eagle Population Estimates and Take Limits*, 87 Fed. Reg. 5493, 5495 (Feb. 1, 2022).

### III. HOW FEDERAL FEATHER REGULATIONS VIOLATE RFRA

No American may possess federally protected bird feathers without the Department's permission; in most cases, simple possession is evidence of a federal crime. The Department has repeatedly conceded in litigation that this represents a substantial burden on the religious practices of Native Americans and others who exercise their faith using eagle feathers. The Department's justifications—conservation and preserving Native American culture—are fatally undermined by the broad religious exemption for federally recognized tribe members and the decades-long kill permits issued to power companies. Thus, the Department's current policies violate RFRA.

There is a better way. For more than 40 years, the DOJ and the Food and Drug Administration ("FDA") have allowed all members of the Native American Church to use peyote as part of their religious practices, even though the use of peyote is generally banned under the Controlled Substances Act.<sup>111</sup> Courts have generally agreed that this exemption applies to all sincere religious believers, regardless of their tribal status.<sup>112</sup> The DOJ

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111. 21 C.F.R. § 1307.31 (2022) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church.")

112. *See, e.g.*, *State v. Mooney*, 98 P.3d 420, 426–27 (Utah 2004) ("Because the text of the exemption is devoid of any reference to tribal status, we find no support for an interpretation limiting the exemption to tribal members."); *United States v. Boyll*, 968 F.2d 21, 1992 WL 138485, at \*3–4 (10th Cir. 1992) (dismissing the government's appeal and quoting the district court's holding that limiting the peyote exemption to members of federally recognized tribes would violate the First and Fourteenth Amendments). *But see* *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991) (limiting the exemption on the basis of the record in that case, which indicated that the Native American Church of North America limited its membership to members of federally recognized tribes). On Native American Church membership requirements, see also *United States v. Boyll*, 774 F. Supp. 1333, 1336–37 (D.N.M. 1991) ("Although one branch of the Native American Church, the Native American Church of North America, is known to restrict membership to Native Americans, most other branches of the Native American Church do not."); *O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271,

and the FDA have adopted a broad religious exemption because the DOJ Office of Legal Counsel concluded that limiting the peyote religious exemption to members of a particular tribe or church would violate the Establishment Clause.<sup>113</sup> In 2006, the Supreme Court went further and ordered the government to create a religious exemption for hoasca, another controlled substance used for religious purposes.<sup>114</sup> The Supreme Court did this because it found that the policy restricting some religious believers' access to hoasca—while allowing other believers to access peyote—violated RFRA.<sup>115</sup> Together these exemptions have been in place for decades. The Department should follow this example, comply with RFRA and the Constitution, and promulgate a regulation that protects every individual who uses federally protected bird feathers as a sincere exercise of religion.

As discussed above, RFRA was adopted in response to a Supreme Court decision restricting the religious freedom of two Native Americans who followed the Peyote Way,<sup>116</sup> and Native Americans have benefitted

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1278 (D.N.M. 2002) (noting that the national NAC limits membership but some local congregations do not).

113. *Peyote Exemption for Native American Church*, 5 Op. O.L.C. 403 (1981) (“OLC Peyote Memo”). In 1994, Congress passed a law protecting federally recognized tribe members' religious peyote use, to override *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and conflicting state laws. American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996a(b)(1), (c)(1)–(2); see generally H.R. Rep. 103-675, at 4–5 (1994), as reprinted in 1994 U.S.C.C.A.N. 2404, 2406–07 (“AIRFA Amendments”) (noting that legislation was needed to address the patchwork of conflicting state laws). The Drug Enforcement Agency (“DEA”) regulation extending a religious exemption to all members of the Native American Church, and the OLC Peyote Memo explaining that failing to extend the religious peyote exemption to non-Indians would violate the Establishment Clause, remain in force. See, e.g., Mooney, 98 P.3d at 425–26 (holding that both the AIRFA Amendments and the DEA regulation are incorporated into state-controlled substances law, and that it would violate due process to prosecute members of the NAC who are not members of a federally recognized tribe).

114. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

115. *Id.* at 436–37.

116. *Smith*, 494 U.S. at 890.

from RFRA's protection in numerous cases.<sup>117</sup> RFRA is designed "to provide very broad protection for religious liberty,"<sup>118</sup> and it subjects government actions that burden religious practices to "exacting" scrutiny.<sup>119</sup>

Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion" unless 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."<sup>120</sup> RFRA analysis has two parts. The first question is whether the government has "substantially burden[ed]" sincere religious exercise.<sup>121</sup> If the answer is yes, then the second question is whether the government can satisfy strict scrutiny.<sup>122</sup>

Unless expressly exempted by statute, RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise."<sup>123</sup> In *Little Sisters of the Poor*, the Supreme Court held that an agency granted broad discretion to regulate under a statute could create religious exemptions even though the statute itself was silent about them.<sup>124</sup> The Court reviewed the history of RFRA litigation over the agency's regulations and the numerous public comments that raised RFRA during the agency's rulemaking and held that, "[i]f the Departments did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to

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117. See Goodrich & Morrison, *supra* note 12, at 385–88; see also Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 560 (2005) (discussing the application of RFRA's sister law, the Religious Land Use and Institutionalized Persons Act, to Native American inmates).

118. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

119. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 478 (5th Cir. 2014).

120. 42 U.S.C. § 2000bb-1(a)–(b).

121. *McAllen*, 764 F.3d at 472.

122. *Id.*

123. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (quoting 42 U.S.C. §2000bb-3(a)).

124. *Id.* at 2381–82.



claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.”<sup>125</sup>

So too here: although MBTA does not include an express exemption for religious exercise, the Department’s broad statutory authority includes the authority to create religious exemptions.<sup>126</sup> Moreover, in light of Pastor Soto’s lawsuit, the comments submitted in support of his petition, and the Fifth Circuit’s holding that the Department’s current regulations violate RFRA, the Department would “fail[] to consider an important aspect of the problem” if they did not consider how RFRA applies to their regulations.<sup>127</sup>

The Department has admitted that its eagle feather ban is a substantial burden on Native American religious practices. Since the rule imposes a substantial burden on religious exercise, it must satisfy strict scrutiny in order to comply with RFRA. The most recent court of appeals to consider the issue, the Fifth Circuit, has held that the Department cannot meet this standard. Those courts that have upheld the Department’s regulations have largely done so on the ground that the federally run Eagle Repository would be overtaxed if more people were allowed to practice their faith. But concerns about the Repository cannot justify the criminal ban on possessing any feathers, because the Repository is not the only source of federally protected bird feathers in the United States. In short, the Department’s criminal ban on eagle feather possession cannot be upheld purely on its own terms, and it must change.

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125. *Id.* at 2384.

126. 16 U.S.C. § 704(a) (“[T]he Secretary of the Interior is authorized and directed . . . to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird . . .”).

127. *Id.*

*A. The Current Rule Imposes a Substantial Burden on Practitioners of Native American Faiths*

The Department has long admitted that the criminal ban on possessing eagle feathers is a substantial burden on sincere religious believers, including Native Americans who are not covered by the revised Morton Policy.<sup>128</sup> This is correct. The substantial burden inquiry is objective and focuses not on the nature of the belief being violated, but on the nature of the penalty imposed by the government.<sup>129</sup> “[A]t a minimum, the government’s *ban* of conduct sincerely motivated by religious belief substantially burdens an adherent’s free exercise of that religion.”<sup>130</sup> Here, the Department *criminally bans* many Native Americans from possessing eagle feathers from any source—an unmistakable substantial burden. It is thus unsurprising that the Department itself has repeatedly agreed in litigation that the ban on eagle feather possession is a substantial burden on the religious beliefs of Native Americans and others who exercise their faith using eagle feathers.<sup>131</sup>

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128. See, e.g., *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014) (noting that, in a trial involving American Indians who were arrested during a powwow and charged with illegally possessing eagle feathers, the government “[did] not contest the . . . assertion that the Eagle Protection Act substantially burden[ed] [the plaintiffs’] religious beliefs”).

129. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 722–27 (2014).

130. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) (quoting *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009)) (emphasis in original); see also Notice, Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668, 49,669 (Oct. 26, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-10-26/pdf/2017-23269.pdf> (“In general, a government action that bans an aspect of an adherent’s religious observance . . . will qualify as a substantial burden on the exercise of religion.”).

131. *Gibson v. Babbitt*, 223 F.3d 1256, 1258 (11th Cir. 2000) (“The district court found, and the parties do not dispute, that the regulation restricting the exemption to members of a federally recognized Indian tribe constitutes a substantial burden on Gibson’s free exercise of his religion.”); *United States v. Wilgus*, 638 F.3d 1274, 1280 (10th Cir. 2011) (noting “that there was no dispute ‘that claimants’ beliefs are sincerely held or that the regulations represent a substantial burden upon claimants’ religious beliefs”) (quoting *U.S. v. Hardman*, 297 F.3d 1116, 1126 (10th Cir. 2002)); *McAllen*, 764 F.3d at 472 (“The Department does not contest the Plaintiffs’ assertion that the Eagle Protection Act substantially burdens their religious beliefs.”).

Many Native Americans require feathers for a variety of their core religious practices, including smudging rituals, traditional religious dances, and as gifts on religiously significant occasions.<sup>132</sup> Native Americans have been engaging in these same religious practices for thousands of years. It is difficult to overstate their religious significance. For some Native Americans, losing the ability to use eagle feathers in particular is much like denying a Christian the use of a Bible, a rosary, or holy water.<sup>133</sup>

The ban on the use of eagle feathers has disastrous consequences for many Native Americans' religion and culture. Without being able to use eagle feathers in their ceremonies, several religious practices are impossible. Pastor Soto, one of the plaintiffs in *McAllen*, was unable to practice his smudging ritual without feathers.<sup>134</sup> He could not practice his dances.<sup>135</sup> He could not communicate with his Creator.<sup>136</sup> Without authentic feathers, Pastor Soto "felt like [he] was living a lie."<sup>137</sup> The burden on his faith was a heavy one.

But the Department's current policy burdens members of federally recognized tribes as well. Under the 2012 version of the Morton Policy, members of federally recognized tribes may possess federally protected bird feathers, but they may not give or even lend them to anyone who is not a member of their tribe.<sup>138</sup> If they do give or lend an eagle feather, both they and the person who receives the feather are guilty of breaking the law, and the giver could face fines of up to \$5,000 and one year in jail.<sup>139</sup> Family members may not

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132. Plaintiffs Motion for Entry of Preliminary Injunction, *supra* note 21, at Ex. A ¶¶ 17–18, ECF No. 57-1; Ex. B ¶ 6, ECF No. 57-2; Ex. C ¶ 8, ECF No. 57-3; Ex. E ¶ 7, ECF No. 57-5; Ex. F ¶ 6, ECF No. 57-6.

133. *Id.* at Ex. A ¶ 19.

134. *Id.* at Ex. A ¶ 17.

135. *Id.* at Ex. A ¶ 18.

136. *Id.* at Ex. A ¶ 16.

137. *Id.* at Ex. A ¶ 38.

138. 2012 Morton Policy, *supra* note 27, at 3.

139. 16 U.S.C. § 668(a)–(b) (civil and criminal penalties for violating the terms of a permit issued under BGEPA).

give feathers to non-enrolled children or grandchildren who graduate from high school. Elders may not give feathers to government officials in an exercise of government-to-government diplomacy and religious outreach. Native American religious leaders may not exercise their own judgment about what their faith requires them to do; under the current rules, federal bureaucrats retain ultimate control. Thus, even members of federally recognized tribes are significantly burdened by the current rules.

*B. Banning Religious Believers' Possession of Feathers  
Does Not Further a Compelling Interest*

Because the Department's feather ban is a substantial burden on the free exercise of people who exercise their faith using eagle feathers, RFRA requires the burden to be both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."<sup>140</sup> In *McAllen*, the Fifth Circuit held that the Department's eagle feather ban fails to meet this standard.<sup>141</sup> That is correct.

Strict scrutiny under RFRA is "a severe form of the 'narrowly tailored' test" and is an "exceptionally demanding" test for the [government] to meet.<sup>142</sup> It requires a "focused" inquiry.<sup>143</sup> It is not enough that "broadly formulated interests" might be furthered by applying the law to all citizens in general.<sup>144</sup> Rather, the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being

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140. 42 U.S.C. § 2000bb-1(a)–(b).

141. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 480 (5th Cir. 2014).

142. *Id.* at 475 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

143. *Hobby Lobby*, 573 U.S. at 726.

144. *Id.*

substantially burdened.”<sup>145</sup> Thus, in order to comply with RFRA, the Department must “‘look beyond broadly formulated interests’ and . . . ‘scrutinize the asserted harm of granting specific exemptions to particular religious claimants.’”<sup>146</sup>

In litigation, the Department has asserted two interests to justify its eagle feather possession ban: protecting eagles, and protecting its relationship with federally recognized tribes.<sup>147</sup> As a threshold matter, the Department’s own past policy of allowing all Native Americans to possess eagle feathers without a permit<sup>148</sup> means courts should not simply “defer” to the Department’s assertions in this area.<sup>149</sup> The Department has been able to pursue its interests while protecting religious believers in the past; it bears the burden of explaining, with evidence, why it can no longer do so.

### *1. Protecting Eagles*

The Department has argued that “if there was no prohibition on possession, poaching would increase in order to satisfy a black market in eagles and eagle feathers.”<sup>150</sup> However, the court in *McAllen* rejected this argument, dismissing it as “mere speculation” and pointing out that it was also possible “that the black market exists precisely *because* sincere adherents to American Indian religions cannot otherwise obtain eagle feathers.”<sup>151</sup>

More importantly, the broad exceptions to the ban on possession suggest that the possession ban is not actually necessary. *Fulton* held that “[t]he creation of a

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145. *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006)).

146. *Id.* at 726–27.

147. *McAllen*, 764 F.3d at 473.

148. *See supra* text accompanying notes 25–30.

149. *Ramirez v. Collier*, 142 S. Ct. 1264, 1279–80 (2022) (finding no “basis for deference, given that Texas has ‘historically and routinely allowed prison chaplains to audibly pray’ with the condemned during executions”).

150. *McAllen*, 764 F.3d at 476.

151. *Id.* at 476–77 (emphasis added).

system of exceptions . . . undermines the [government's] contention that its . . . policies can brook no departures.”<sup>152</sup> In *Fulton*, Philadelphia refused to make an exception to its non-discrimination policy for a Catholic foster-care agency, but retained discretion to grant exemptions for other foster-care agencies.<sup>153</sup> The Supreme Court held that the city's discretionary exemption system undermined the city's assertion that it could not permit a religious exemption.<sup>154</sup> Because the “[c]ity offers no compelling reason why it has a particular interest in denying an exception to [the Catholic agency] while making them available to others,” its rule did not pass strict scrutiny.<sup>155</sup>

Here, the Department allows up to two million federally recognized tribe members to possess as many eagle feathers as they want—regardless of where the feathers come from and regardless of whether they have a permit. They are simply prohibited from buying, selling, or killing eagles. This is precisely the same treatment that the Soto Petition requests for all sincere religious believers. For the current rule to be valid, the Department must have a reason why exempting enrolled members of federally recognized tribes is consistent with the preservation of eagles but exempting other sincere religious believers is not.

Similarly, the current system provides “a multitude of non-religious exceptions to the statute.”<sup>156</sup> Under the MBTA, the Department allows the possession or killing of migratory birds for (1) falconry, (2) raptor propagation, (3) scientific collecting, (4) take of depredating birds, (5)

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152. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

153. *Id.* at 1878.

154. *Id.* at 1882; see also *McAllen*, 764 F.3d at 472–73 (“Where 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.”) (first citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729–31 (2014); and then citing *Tagore v. United States*, 735 F.3d 324, 331 (5th Cir. 2013)).

155. *Fulton*, 141 S. Ct. at 1882.

156. *McAllen*, 764 F.3d at 474–75 (first citing 16 U.S.C. § 668a; and then citing *Merced v. Kasson*, 577 F.3d 578, 594 (5th Cir. 2009)).

taxidermy, (6) waterfowl sale and disposal, and (7) other “special purposes,” such as rehabilitation, education, and salvage.<sup>157</sup> Under BGEPA, it allows the possession or killing of eagles for (8) museums, (9) scientific societies, (10) zoos, (11) protection of human health, (12) protection of agriculture, (13) protection of wildlife, (14) protection of “other interests,” (15) utility infrastructure development and maintenance, (16) road construction, (17) operation of airports, (18) commercial or residential construction, and (19) resource development.<sup>158</sup> It even allows open-ended permits for utility companies and wind farms to kill an unknown number of eagles at unknown times and places. In all, thousands of eagles are taken for non-religious reasons every year.

It is implausible that allowing all these non-religious killings is consistent with the compelling interest in protecting eagles while allowing other sincere religious believers to merely possess feathers—without ever killing a single eagle—is not. As the Fifth Circuit pointed out, “[t]he fact that exceptions exist to the possession ban calls into doubt the Department’s claims that [a sincere religious believer] should find his religious practices hindered simply to further a goal that history demonstrates is achievable even when there are exceptions in place.”<sup>159</sup> Because banning sincere religious believers from possessing their own feathers does not actually help the government protect eagles, this interest falls short of justifying the rule’s burdens.

## 2. *Fulfilling Responsibilities to Federally Recognized Tribes*

The second interest the Department has asserted in litigation is the unique relationship between the federal government and federally recognized tribes.<sup>160</sup> This is

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157. 50 C.F.R. §§ 21.63–.95.

158. 50 C.F.R. §§ 22.50–.122.

159. *McAllen*, 764 F.3d at 477 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006)).

160. *Id.* at 473.

undoubtedly an important interest, but the Department's argument fails because it does not further this interest to punish other religious believers for using feathers they already possess.<sup>161</sup> Allowing sincere religious believers to receive feathers as gifts, pick up feathers from the wild, exchange feathers at powwows, and borrow feathers for religious ceremonies does not affect the federal government's relationship with federally recognized tribes in any way. It simply increases religious freedom for all.

It is perhaps unsurprising, then, that in federal appellate courts the Department has never successfully defended the criminal ban on eagle feather possession on its own terms. Indeed, in the federal courts of appeal, the Department's arguments have *only* been successful when the Department has succeeded in changing the subject from its criminal ban to the National Eagle Feather Repository.<sup>162</sup>

The Department has argued that opening the Repository to non-recognized tribe members would "tax the repository," which would "make it more difficult for members of federally recognized tribes to obtain eagle

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161. Thus, for example, during Prohibition, the Volstead Act included a broad exemption for all "sacramental purposes," and permitted a "rabbi, minister of the gospel, priest, or an officer duly authorized for the purpose of any church or congregation" to purchase wine "for sacramental purposes or like religious rites." National Prohibition (Volstead) Act, Pub. L. No. 66, Ch. 85, 41 Stat. 305, 308, 311 (1919). The government did not single out some denominations for preferential treatment.

162. Compare *Gibson v. Babbitt*, 223 F.3d 1256, 1257–59 (11th Cir. 2000) (relying on the scarcity of eagle parts at the Repository to justify excluding sincere religious believers from the Repository permit system), *United States v. Antoine*, 318 F.3d 919, 923–24 (9th Cir. 2003) (upholding permit restrictions on the basis that expanding access to the Repository would make it more difficult for federally recognized tribes to obtain eagle parts), *United States v. Vasquez-Ramos*, 531 F.3d 987, 992–93 (9th Cir. 2008) (allowing the government to rely on the shortage of eagle parts even if it could remedy this shortage), and *United States v. Wilgus*, 638 F.3d 1274, 1293 (10th Cir. 2011) (accepting that expanding Repository access to other tribes could burden federally recognized tribes), *with U.S. v. Hardman*, 297 F.3d 1116, 1132–33 (10th Cir. 2002) (finding that increasing permit eligibility would not necessarily "place increased pressure on eagle populations" or "threaten[] Native American culture"), and *McAllen*, 764 F.3d at 479 (concluding that the government could not rely on the shortage of eagle feathers when its own inefficiency caused the shortage).



feathers.”<sup>163</sup> And it is true that the Repository already has long wait times—currently the wait time for a whole immature golden eagle is nine years.<sup>164</sup> But this argument fails for two reasons. First, as the Fifth Circuit concluded in *McAllen*, “[t]he Department cannot infringe on [religious believers’] rights by creating and maintaining an inefficient system and then blaming those inefficiencies for its inability to accommodate [those believers].”<sup>165</sup>

And second, as discussed above, talking about the Repository is changing the subject. Sincere religious believers have many other ways of receiving eagle feathers—as gifts, as inheritances, found molted in the wild, or borrowed during religious ceremonies. Concerns about the Repository cannot justify banning the use of feathers received outside of the Repository system.

*McAllen*, the most recent decision to consider this interest and one of the few decisions to analyze it in depth, rejected it for two reasons: first, because the Fifth Circuit could not “definitively conclude that Congress intended to protect only federally recognized tribe members’ religious rights,”<sup>166</sup> and second, because “the Supreme Court[] has not embraced the concept that [the government’s relationship with federally recognized tribes] alone can justify granting religious exceptions for them while denying other religious groups the same, or similar, accommodations.”<sup>167</sup> On the contrary, the Supreme Court has stated that in general, “congressional findings that support one exception will support similar exceptions.”<sup>168</sup>

Thus, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, the Supreme Court relied in part on the longstanding exemption for the sacramental use of

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163. *McAllen*, 764 F.3d at 478.

164. *Current Wait Times for September - December 2022*, *supra* note 64.

165. *McAllen*, 764 F.3d at 479.

166. *Id.* at 473.

167. *Id.* at 474 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–32 (2006)).

168. *Id.* (citing *O Centro*, 546 U.S. at 434).

peyote to support a similar exemption for hoasca, a tea used sacramentally by a small religious group with origins in the Brazilian rainforest.<sup>169</sup> The Supreme Court rejected the government's "unique relationship" argument in that case, finding that the federal government's interest in protecting federally recognized tribes' "unique *political* status" was not furthered by crafting a religious exemption that extended to them and no one else—and that the exemption for tribes undermined the other compelling interests in that case.<sup>170</sup> So too here: the Morton Policy demonstrates that a well-crafted religious exemption does not undermine the government's interest in protecting eagles. And federally recognized tribes' unique political status does not, standing alone, justify criminalizing the religious practices of other Americans.

*C. Banning Sincere Religious Believers  
from Using Feathers Is Not the Least Restrictive Means  
of Pursuing the Department's Interests*

Even if banning sincere religious believers from using federally protected feathers furthered a compelling interest, the rule still would not comply with RFRA unless it were the "least restrictive means" of furthering that interest.<sup>171</sup> Under this test, "[i]f a less restrictive alternative would serve the Government's purpose, the [government] must use that alternative."<sup>172</sup> The Supreme Court has called this "a severe form of the 'narrowly tailored' test," and it is "an 'exceptionally

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169. 546 U.S. at 425, 433–34.

170. *Id.* at 433–34 (emphasis added). This discussion in *O Centro* helps explain why the separate line of cases involving treaty abrogation, including *United States v. Dion*, does not control the analysis. 476 U.S. 734, 744 (1986). Under RFRA, the key is whether the existing religious accommodation (whether created by treaty rights or otherwise) undermines the government's asserted interests in the same way as the newly requested accommodation. Here, it undoubtedly does.

171. 42 U.S.C. § 2000bb-1(b).

172. *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009) (citation omitted).

demanding’ test for the [government] to meet.”<sup>173</sup> And under this “demanding” standard, the Court has held that the government *must* consider measures short of a “categorical ban.”<sup>174</sup>

Here, the Department could employ numerous less-restrictive alternatives to further its interests. First, the Department could lift the categorical ban on feather possession and allow sincere religious believers to possess feathers legally. This would allow Native Americans like Pastor Soto, who received eagle feathers as a gift from a relative decades ago, to engage in their religious practices without fear. And it would not undermine either of the Department’s asserted interests in any way.

Second, the Department could *increase the supply* of usable feathers:

- It could allow sincere religious believers to collect feathers that have molted in the wild.<sup>175</sup>
- It could allow sincere religious believers to collect feathers that have molted in zoos and aviaries.<sup>176</sup>
- It could require zoos and aviaries to preserve feathers for religious use.
- It could increase the number of eagle aviaries, including by expanding the aviary

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173. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)).

174. *Ramirez v. Collier*, 142 S. Ct. 1264, 1279 (2022). *Ramirez* was decided in 2022. Two years earlier, the Supreme Court rebuked the Department of Homeland Security for “failing to consider important aspects of the problem” when it ended the Deferred Action for Childhood Arrivals program completely, without considering whether it was appropriate to withdraw benefits while maintaining its decision not to prosecute certain undocumented workers. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912 (2020). In both cases, the Supreme Court faulted government decisionmakers for failing to consider measures short of a complete ban.

175. *McAllen*, 764 F.3d at 477.

176. *Id.*

program beyond federally recognized tribes.<sup>177</sup>

- It could salvage eagle parts from existing permittees. Currently, when eagles are killed by wind farms, power lines, farmers, ranchers, and others, the carcasses are often left to rot. The Department could create incentives—whether negative (punishment) or positive (financial reward)—for permittees to salvage eagle parts for religious uses.<sup>178</sup>
- It could allow increased taking of eagles from regions where they are plentiful, such as Alaska—where populations have remained robust, and “[s]ome areas are so saturated with bald eagles that some adults cannot find nest sites.”<sup>179</sup>

Third, the Department could *target buying, selling, and killing*, rather than mere possession. This is what the Department already does for members of federally recognized tribes: it prosecutes only buying, selling, and killing—not possession.<sup>180</sup> It could do the same for other sincere religious believers. And if that were not enough, it could increase the penalties for buying, selling, and killing, and increase the resources devoted to detecting it.

Fourth, the Department could *shift the allocation* of legal feathers. Right now, hundreds of eagles, if not thousands, are killed for non-religious reasons every year. Eagle take permits are available for museums, scientific societies, zoos, farmers, ranchers, airports, construction companies, mining companies, forestry companies, utility companies, and wind farms, among

177. *Id.* at 479.

178. In 2019, the Department changed its regulations to allow federally recognized tribes to keep most eagle remains found on tribal land. *Handling and Distribution of Bald and Golden Eagles and Parts*, Policy 720 FW 6, 6.7(B)(2), U.S. FISH & WILDLIFE SERV. (Feb. 19, 2019, amended July 26, 2019) (supersedes 720 FW 6 (Sept. 15, 2015)), [https://www.fws.gov/policy/720fw6.html#\\_Working\\_with\\_Tribes](https://www.fws.gov/policy/720fw6.html#_Working_with_Tribes) [<https://perma.cc/ML92-SMT3>].

179. *Bald Eagle in Alaska*, ENV'T ALASKA, <http://environmentalaska.us/bald-eagles.html> [<https://perma.cc/AB62-78UF>] (last visited Nov. 12, 2022).

180. 2012 Morton Policy, *supra* note 27, at 3.

many others. If religious believers' possession of eagle feathers somehow threatens eagle populations—even though they would never kill a single eagle—the Department could reduce the number of permits granted for non-religious reasons, thus reducing the supposed pressure on eagle populations.

Finally, the Department could *run the National Eagle Repository more efficiently*. As the Fifth Circuit noted, the shortage of eagle feathers is a problem “of the government’s own making,” because “the repository that it established and runs is inefficient.”<sup>181</sup> For example, the Department could increase the Repository’s staff and budget. In 2009, one reporter wrote that a “two-person staff” filled orders for all two million members of federally recognized tribes, and “[a]bout 6,000 orders [we]re waiting to be filled.”<sup>182</sup> The Department could use fees from take permits to increase the Repository budget, and it could increase the supply of feathers available through the Repository by requiring recipients of take permits to promptly send eagle carcasses and parts to the Repository.

Alternatively, the Department could reduce unnecessary demand on the Repository by charging a small processing fee based on the scarcity of various eagle parts. Currently, there is no fee for accessing the repository, and there is no reason for tribe members to ask for anything less than the maximum number of feathers allowed per order. Thus, there are long wait times for eagle parts. And there is reason to believe that some (perhaps many) tribe members request eagle parts when they do not need them and that others request more than they need. In 2014, for example, the Repository acknowledged that it had been filling a “high number of back-to-back reorders received from some [prison] inmates,” and that it should “more clearly advise

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181. *McAllen*, 764 F.3d at 479.

182. Electa Draper, *Eagle bodies, parts for Indian rites are collected, sent from Colo. morgue*, DENVER POST, (Sept. 1, 2009, 3:40 PM), [http://www.denverpost.com/recommended/ci\\_13242945](http://www.denverpost.com/recommended/ci_13242945) [<https://perma.cc/Z6RN-XCUX>].

applicants that they are not required to order the maximum amount of feathers allowed per order.”<sup>183</sup> Imposing a small processing fee would ensure less wasteful distribution. The Department could also involve Native Americans in the management of the Repository.

Under RFRA’s least restrictive means test, the Department bears the “heavy burden” of providing “specific evidence” that “these means would not achieve the government’s goals.”<sup>184</sup> When the Fifth Circuit ordered the Department to carry this burden in 2014, the Department chose to settle. That settlement gives over 400 Native Americans who are not members of federally recognized tribes access to eagle feathers on the same terms as the 2012 Morton Policy.<sup>185</sup> The Soto Settlement is a less-restrictive alternative than the Department’s blanket ban, and the Department bears the burden of showing why it cannot follow this path.

#### IV. HOW THE SUPREME COURT’S 2020–2022 DECISIONS HAVE STRENGTHENED PASTOR SOTO’S CASE

Pastor Soto filed his petition in 2018. In 2020, 2021, and 2022, the Supreme Court issued three decisions that significantly strengthened Pastor Soto’s case.<sup>186</sup> After

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183. Letter from Stephen Oberholtzer, Special Agent in Charge, U.S. Fish and Wildlife Serv. to Tribal Leader, <https://tinyurl.com/2nvm4u4u>.

184. *McAllen*, 764 F.3d at 475, 478, 479.

185. Settlement Agreement at 3–6, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-00060 (S.D. Tex. June 13, 2016), ECF No. 83-1.

186. Other Supreme Court decisions issued between 2018 and 2022 are relevant to other aspects of Pastor Soto’s legal arguments. *Department of Homeland Security v. Regents* held that a federal agency “failed to consider important aspects of the problem” when it revoked an entire immigration program on which hundreds of thousands of people had relied, instead of considering whether it could end benefits without ending forbearance. 140 S. Ct. 1891, 1912 (2020). This is relevant to Pastor Soto’s argument that, even if the Department continues to limit access to the National Eagle Feather Repository to members of federally recognized tribes, it can and should end the ban on possessing eagle feathers for religious worship. *Kennedy v. Bremerton School District* ended the “endorsement test” in Establishment Clause cases, making it clear that historical practice, not the appearance of endorsement, is the touchstone for evaluating whether the government had crossed the line from facilitating free exercise to establishing a religious faith. 142 S. Ct. 2407, 2428

the 2020 case *Little Sisters of the Poor v. Pennsylvania*, it is clear that the Department has both the authority and the obligation to consider lifting the feather ban. After the 2021 case *Fulton v. City of Philadelphia*, it is also clear that the numerous secular exemptions to the feather ban—for example, permitting up to 15,832 bald eagles to be taken “incidentally” by wind farms and other human activities<sup>187</sup>—mean that the Department’s feather ban is unlikely to survive strict scrutiny in its current form. And after the 2022 case *Ramirez v. Collier*, it is clear that the Department must consider less-restrictive alternatives short of its current total ban. Because of their importance, each of these cases is discussed in detail below.

### A. *Little Sisters of the Poor v. Pennsylvania*

In the 2020 case *Little Sisters of the Poor v. Pennsylvania*, the Supreme Court considered whether, in the absence of a statutory religious exemption, federal agencies may create one.<sup>188</sup> In that case, the authorizing statute was silent regarding religious exemptions.<sup>189</sup> The agency passed a rule that included a narrow religious exemption that covered some religious objectors but not others.<sup>190</sup> The excluded religious organizations used RFRA to challenge the agency’s regulations in court, and also filed comments with the agency urging it to amend its regulations to comply with RFRA.<sup>191</sup> In response, the agency passed a new rule adopting a broader religious exemption that fully alleviated the burden on the RFRA plaintiffs’ religious exercise.<sup>192</sup> A group of states sued the

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(2022). And *Tanzin v. Tanwir* held that, when federal officials violate RFRA, litigants can “obtain money damages against federal officials in their individual capacities.” 141 S. Ct. 486, 493 (2020).

187. See Eagle Permits; Updated Bald Eagle Population Estimates and Take Limits, 87 Fed. Reg. 5493, 5495 (Feb. 1, 2022).

188. 140 S. Ct. 2367, 2372–73 (2020).

189. *Id.* at 2380.

190. *Id.* at 2373–75.

191. *Id.* at 2375–77.

192. *Id.* at 2377–78.

agency, arguing that the agency lacked authority to create a religious exemption.<sup>193</sup>

The Court held that it was proper for the agency to create a religious exemption, even though the statute was silent about accommodating religious believers.<sup>194</sup> The Court also held that, in light of the RFRA litigation and the comments submitted during the agency's rulemaking, if the agency "did not look to RFRA's requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem."<sup>195</sup> *Little Sisters* thus reaffirmed that RFRA gives federal agencies authority to create religious exemptions—and that, once RFRA has been raised in litigation and comments, the agency must "look to RFRA's requirements" when "formulating" its rules.<sup>196</sup>

In light of *Little Sisters*, the Department of the Interior—the federal agency responsible for regulating access to bald and golden eagle feathers—has authority to create religious exemptions from its regulations, even when the authorizing statute is silent about religious accommodations. This is important because MBTA, one of the core statutes forbidding eagle feather possession, does not include a religious exemption.<sup>197</sup> *Little Sisters*

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193. *Id.* at 2378–79.

194. *Id.* at 2380–84.

195. *Id.* at 2384.

196. *Id.*

197. 16 U.S.C. § 703(a); see discussion *supra* Section II.A. The Department evidently believes that it has the authority to relieve the burden that the MBTA imposes on the free exercise of religion, because it has allowed Native American religious believers to possess eagle feathers for religious purposes for decades, notwithstanding the lack of a religious exemption in the statute. *Little Sisters* confirms that the Department's view is correct.

The Bald and Golden Eagle Protection Act (BGEPA), by contrast, includes an exception allowing the "taking" and possession of eagles "for the religious purposes of Indian tribes." 16 U.S.C. § 668a. In *United States v. Dion*, the Supreme Court considered this exemption. 476 U.S. 734, 744 (1986). *Dion* involved a Native American defendant prosecuted for killing eagles without the permit required under BGEPA. *Id.* at 735–36. The Supreme Court held that BGEPA abrogated his treaty-based hunting rights, and that he could be prosecuted for hunting for eagles without a permit. *Id.* at 744–45. However,



also establishes that, now that Pastor Soto has raised the issue of eagle feather access through his lawsuit and petition, the Department would violate the Administrative Procedure Act if it failed to consider how RFRA applies to its eagle feather regulations. Thus, not only *may* the Department consider whether RFRA requires a religious exemption; it *must*.

### B. *Fulton v. City of Philadelphia*

The Supreme Court’s case law on strict scrutiny—the analysis that applies in RFRA lawsuits once the religious believer has established that that her sincere religious practice has been substantially burdened—has also developed in important ways since 2018. In the 2021 case *Fulton v. City of Philadelphia*, the Supreme Court held that, where an agency retains discretion to grant exemptions to a general rule, it “may not refuse to extend that [exemption] system to cases of ‘religious hardship’ without compelling reason.”<sup>198</sup> This is true even when the agency has “no intention” of granting a religious exemption, only a secular one.<sup>199</sup> The Court also held that, when meeting strict scrutiny, “[t]he question . . . is

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because the defendant in *Dion* did not make any religious liberty arguments at the Supreme Court, the Court expressly declined to consider whether its narrow interpretation of the statute violated his religious liberty. *Id.* at 746.

*Little Sisters* teaches that the statutory religious exemption in BGEPA, while instructive, is not the only legal protection at issue. *See* 140 S. Ct. at 2381. Now that it has been made aware of the burden created by its feather possession ban through litigation and public comments, the Department has an independent obligation to ensure that its regulations respect RFRA, and it does not need a statutory authorization (beyond RFRA itself) to do so. As in *Little Sisters*, so too here: “[i]f the Departments did not look to RFRA’s requirements or discuss RFRA at all when formulating their solution, they would certainly be susceptible to claims that the rules were arbitrary and capricious for failing to consider an important aspect of the problem.” *Id.* at 2384.

198. 141 S. Ct. 1868, 1878 (2021). *Fulton* was decided under the Free Exercise Clause, but the strict scrutiny analysis is the same. *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (b)(1) (stating that one of the “purposes” of RFRA is “to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972),” both Free Exercise cases).

199. *Id.*

not whether the [government] has a compelling interest in enforcing its . . . policies generally, but whether it has such an interest in denying an exception” to the particular religious believers seeking an accommodation.<sup>200</sup> Thus, a rule that is riddled with exemptions that apply to secular activities will rarely be able to pass strict scrutiny.

As discussed above, the laws forbidding feather possession include a grab bag of exemptions for secular purposes like maintaining zoos, establishing aviaries, protecting livestock, and engaging in recreational falconry.<sup>201</sup> Like the exemption in *Fulton*, these exemptions are discretionary: the Department may grant permits if it determines that they are “compatible with the preservation of the bald eagle and golden eagle.”<sup>202</sup> These discretionary exemptions defeat any argument that the Department’s rules brook no exceptions. Given the number and nature of other exemptions, the Department will have an extremely difficult time satisfying strict scrutiny after *Fulton*.

### C. Ramirez v. Collier

Finally, in the 2022 case *Ramirez v. Collier*, the Supreme Court held that the government could not meet strict scrutiny when it failed to explain why it had discontinued a past practice of religious accommodation.<sup>203</sup> The petitioner in *Ramirez* was a death row inmate who sought to have his spiritual advisor lay hands on him and pray over him during his execution.<sup>204</sup> For many years, the state of Texas had allowed audible prayer in the execution room, consistent with hundreds of years of historical practice and the

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200. *Id.* at 1881.

201. See discussion *supra* III.B.1.

202. 50 C.F.R. § 22.50(c) (2022).

203. 142 S. Ct. 1264 (2022).

204. *Id.* at 1273–74.

current policies of the Federal Bureau of Prisons.<sup>205</sup> Texas changed its rules and was later sued by an inmate who sought to have his Baptist pastor lay hands on him and pray during his execution.<sup>206</sup> Texas asserted that its new policy, which required “absolute silence” in the execution room, was the only “feasible” option, and asked the Court to defer to its judgment.<sup>207</sup>

The Supreme Court declined.<sup>208</sup> The Court held that Texas had failed to carry its burden to establish that there was no less-restrictive alternative to its current policy of “absolute silence”—and that its own prior practice of allowing audible prayer was compelling evidence that a less-restrictive alternative existed.<sup>209</sup>

With regard to the no-touch policy, the Court credited the prison’s concern with preventing disruptions.<sup>210</sup> Nevertheless, the Court held that Texas failed to explain why measures short of a complete ban would not suffice.<sup>211</sup> The Court rebuked Texas for relying on “speculative” concerns about the hypothetical future behavior of other people who were not part of the case.<sup>212</sup>

Here, the Department allowed Native Americans who were not members of federally recognized tribes to possess eagle feathers for decades, until it abruptly changed course in 2012.<sup>213</sup> This is compelling evidence that returning to this policy is an acceptable, less-restrictive alternative to its current policy, where Native Americans who are not enrolled in federally recognized tribes are forever banned from possessing even a single feather. Similarly, the Department’s legitimate concerns

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205. *Id.* at 1278–79 (first citing Brief for United States as Amicus Curiae 2–3, 24–25; and then citing Brief for Becket Fund for Religious Liberty as *Amicus Curiae* 3–15).

206. *Id.* at 1273.

207. *Id.* at 1279.

208. *Id.* at 1278–81.

209. *Id.*

210. *Id.* at 1280.

211. *Id.* at 1280–81.

212. *Id.* at 1280.

213. 1975 Morton Policy, *supra* note 25; 2012 Morton Policy, *supra* note 27, at 3; *see also* discussion *supra* II.

about issues like poaching and diversion—and its own failure to run the National Eagle Repository efficiently—are inadequate to justify a total ban on feather possession. Instead, under *Ramirez*, the Department must attend to the particular petitioner before it and fully explore policy options short of a total ban.

Taken together, these three new decisions reinforce the case that Pastor Soto made in his original petition: the feather ban is illegal under RFRA, and it must end.

## V. CONCLUSION

When RFRA was passed in 1993, Native American groups asked whether it would be capable of protecting their religious freedom when they engaged with the Department on the regulations that affect so much of Native American life. Thirty years on, it appears that the answer is yes. Through a targeted combination of litigation and administrative advocacy, RFRA can help Native American communities work to change rules and policies that burden their religious practices. *Little Sisters* makes it clear that agencies have an obligation to consider the impact of their rules on religious liberty once the potential for conflict has been brought to their attention. *Fulton* underscores the fact that, where the government has retained discretion to create exemptions for secular purposes, it must have a compelling reason not to extend the same exemptions to religious believers. And *Ramirez* teaches that the government is not entitled to deference when its own past policies permitted the very religious exercise that it now refuses to accommodate. Taken together, these three recent Supreme Court decisions further strengthen the case for granting the Soto Petition and ending the feather ban, today.