PETITION

Before the Fish and Wildlife Service
United States Department of the Interior

To End the Criminal Ban on Religious Exercise with Eagle Feathers and to Protect Native American Religious Practices

Pastor Robert Soto
Lead Plaintiff, *McAllen Grace Brethren Church v. Jewell*

The Becket Fund for Religious Liberty
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I. Introduction

The Department of the Interior's policies and regulations on the religious use of federally protected bird feathers are unjust, unlawful, and should be changed.

Bird feathers play a key role in many Native Americans' religious practice. Feathers are used for smudging rituals, traditional religious dances, and as gifts on religiously significant occasions. Without feathers, many of these practices are impossible. Congress authorized the Department of the Interior (the Department) to permit eagle feather use for "the religious purposes of Indian tribes" in 1962, yet more than 50 years later the Department's regulations exclude millions of sincere Native American religious believers. And even Native Americans who *are* protected (because they are enrolled members of federally recognized tribes) are forced to rely on the "Morton Policy"—an informal memorandum that could be rescinded at any time.

The Department's regulations are so restrictive that they ban all kinds of sincere religious behavior. Today, nearly every bird species native to North America is federally protected.[1] So, a grandmother who bestows an eagle feather on her non-enrolled grandson to honor his college graduation turns both herself and her grandson into criminals. A Native American teenager adopted by a non-Native family breaks the law when he prays with a feather to reconnect with the spirits of his ancestors. And a member of a state-recognized tribe is subject to prosecution merely for possessing a single protected feather.

Enforcement of these regulations can have devastating consequences. In 2006, an undercover federal agent infiltrated a Texas powwow, detained Pastor Robert Soto, a Native American religious leader who was performing religious ceremonies while wearing eagle feathers, and confiscated his feathers—traumatizing the children who were attending the powwow and driving religious ceremonies underground for a decade. The federal government caused these wounds even though it was undisputed that Pastor Soto was an enrolled member of a state-recognized tribe who had never harmed a bird and had peacefully possessed his feathers for decades.[2]

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[1] U.S. Dep't of the Interior, Solicitor's Opinion M-37050, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017) at 34 ("Solicitor's Opinion M-37050"). For purposes of this Petition, "federally protected bird" refers to any bird that is protected under any federal wildlife law, including but not limited to the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, the Lacey Act, 16 U.S.C. § 3371 *et seq.*, and the Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

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

Fortunately, the Department is poised to remedy these sorts of problems. This Administration has laudably vowed to protect religious liberty for all.[3] It has also promised to end the constitutionally questionable practice of governing by informal agency guidance documents and to replace informal guidance with clear, fair, binding regulations.[4] Gun owners,[5] landlords,[6] and power companies[7] have already benefitted from the Administration's regulatory reforms. It is time for reform to protect Native Americans and respect their basic constitutional rights.

Effective reform in this area would do three things: First, it would broaden the Morton Policy to include all sincere religious believers who use federally protected feathers in their religious exercise—as both the Constitution and the Religious Freedom Restoration Act (RFRA) require. Second, it would officially promulgate this policy as a formal rule rather than rely on informal guidance, ending decades of legal limbo that has had disastrous consequences for many Native Americans. Third, it would empower Native American tribes to help combat the illegal commercialization of federally protected feathers. These basic and common-sense reforms would bring

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[3] *See, e.g.*, Memorandum from Attorney General Jeff Sessions to All Federal Departments and Agencies re Federal Law Protections for Religious Liberty (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download ("Dep't of Justice Religious Liberty Mem."). The memorandum reminded all federal agencies of their obligation to ensure that their regulations respect religious liberty for all. It also informed agencies involved in rulemaking that the Department of Justice "will not concur in any proposed action that does not comply with federal law protections for religious liberty as interpreted in this memorandum and appendix, and it will transmit any concerns it has about the proposed action to the agency or the Office of Management and Budget as appropriate." *Id.* at 7.

[4] Executive Order No. 13,777, 82 Fed. Reg. 12,285, Enforcing the Regulatory Reform Agenda (Feb. 24, 2017); *see also* Memorandum from U.S. Att'y Gen. re Prohibition on Improper Guidance Documents (Nov. 16, 2017), https://www.justice.gov/opa/ press-release/file/1012271/download.

[5] Press Release, Office of Public Affairs, U.S. Dep't of Justice, Attorney General Jeff Sessions Rescinds 25 Guidance Documents (Dec. 21, 2017), https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-25-guidance-documents (rescinding six guidance documents from the Bureau of Alcohol, Tobacco, Firearms and Explosives).

[6] *Id.* (rescinding guidance documents relating to the Americans with Disabilities Act and the Fair Housing Act).

[7] Solicitor's Opinion M-37050 (withdrawing prior interpretation of the MBTA as prohibiting "incidental take" of protected birds by, *inter alia*, power companies).

the Department's rules for federally protected birds into line with a similar religious freedom issue: the federal government's longstanding policy of allowing all sincere religious believers to use peyote.[8]

In light of these principles, we propose the following changes to the Department's regulations concerning federally protected birds:

Criminal Possession Ban: Federal law allows power companies and other large corporations to kill hundreds of eagles every year. But people like Pastor Soto, who is a member of a state-recognized tribe, are criminally banned from possessing even a single feather. Moreover, because the Morton Policy is an enforcement memorandum from the Department of Justice and not a regulation passed by the Department, even members of federally recognized tribes are not fully protected and could, in theory, be prosecuted for peacefully worshiping with their eagle feathers at any time. To fix both these problems, Petitioners propose that the Department promulgate the Morton Policy as a regulation, with one modification: that the policy apply to all sincere religious believers who use federally protected feathers in their religious exercise. No sincere religious believer should be banned from possessing feathers or risk criminal prosecution for simply possessing the feathers necessary to practice their faith.

Protect Sincere Religious Believers: The Department's regulations should protect only *sincere* religious exercise—not those who fake Native American religious practices for personal or commercial gain. Federal law protects only sincere religious practices,[9] and both caselaw and regulations from other federal agencies provide frameworks for sorting sincere religious claims from insincere ones without making constitutionally forbidden judgments about the underlying beliefs' truth or falsity.[10] The Department can employ those frameworks to do the same. Members of a state or

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[8] *See, e.g.*, Theodore Olson, U.S. Dep't of Justice, Office of Legal Counsel, Memorandum Opinion on Peyote Exemption for Native American Church, 5 Op. O.L.C. 403 (Dec. 22, 1981), https://www.justice.gov/file/22846/download ("OLC Peyote Mem.").

[9] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014).

[10] *See, e.g., A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 260-63 (5th Cir. 2010) (analyzing religious sincerity in state RFRA case); *see also* Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 Stan. L. Rev. Online 59, 59-60 (2014) ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity."); U.S. Dep't of Defense, Instruction 1300.06, Conscientious Objectors (Jul. 12, 2017) (Department of Defense guidelines for evaluating the sincerity of self-proclaimed conscientious objectors).

federally recognized Indian tribe, a Native American church, or other Native American religious organization should enjoy a presumption of sincerity; others should have the opportunity to demonstrate their sincerity in other ways.

National Eagle Repository: As the U.S. Court of Appeals for the Fifth Circuit has recognized—and as thousands of Native Americans know firsthand—the National Eagle Repository is grossly inefficient and has inexcusably long wait times. The Department should reform the Repository by increasing its funding and staffing, working more closely with tribes and other stakeholders to improve efficiency, and adopting policies that will expand the overall supply of feathers. This will enable the Repository to better serve all sincere religious believers who use eagle feathers in their religious exercise.

Combat commercialization and increase enforcement: Petitioners' proposal will allow the Department to focus its enforcement efforts on combatting the unlawful killing of eagles and other federally protected birds and stop the commercialization of bird parts and feathers. Native Americans are often the first to observe illegal activities that commercialize Native American religious practices. To that end, Petitioners propose that the Department engage in government-to-government consultations with federally recognized tribes on specific measures to help Native Americans detect and report suspected illegal commercial activities involving federally protected feathers.

Native Americans have worshiped with feathers since time immemorial. For many, denying them access to feathers is like denying a Christian the use of a Bible, rosary, or holy water, or forbidding Orthodox Jews from using a Torah scroll in worship. Yet federal law criminalizes their sincere religious practices. Petitioners propose a common-sense approach that would protect all religious believers, without harming a single bird. The Department should end decades of injustice and adopt a regulation that follows the Constitution and respects the fundamental rights of Native Americans.

II. Legal Authority

Petitioners are Pastor Robert Soto, Vice-Chairman of the Lipan Apache Tribe of Texas, and the Becket Fund for Religious Liberty, a law firm dedicated to protecting the free expression of all faiths. Pastor Soto was the successful lead plaintiff in *McAllen Grace Brethren Church v. Jewell*, and he signed the settlement agreement in *McAllen* on behalf of himself and the religious organizations he leads.[11]

[11] Settlement Agreement, ECF No. 83-1, *McAllen Grace Brethren Church v. Jewell,* No. 7:07-cv-00060 (S.D. Tex. June 13, 2016) ("Settlement Agreement"), https://s3.amazonaws.com/becketpdf/Exhibit-1-Settlement-Agreement-file-stamped.pdf.

Petitioners submit this petition pursuant to paragraph 7 of the settlement agreement in *McAllen*, which states:

> [The Secretary of the United States Department of the Interior ("Secretary")] agrees to consider a petition under 43 C.F.R. § 14.2 from Plaintiffs to modify existing regulations or issue new regulations concerning the possession of eagle feathers by persons who are not members of federally recognized tribes. In considering the petition, the Secretary agrees to issue a notice in the Federal Register requesting public comment on the petition. The Secretary agrees to make a decision on the petition within two years from the date it is received.[12]

Petitioners also submit this petition for rulemaking pursuant to the Right to Petition Government Clause in the First Amendment to the United States Constitution,[13] the Administrative Procedure Act,[14] and the Filing of Petitions regulation.[15]

Petitioners seek a religious accommodation that will end the criminal ban on religious bird feather possession and allow all sincere practitioners of Native American religions to possess, lend, and use feathers from federally protected birds. The Department has the authority to promulgate such a rule under RFRA, the First Amendment to the U.S. Constitution, the Bald and Golden Eagle Protection Act (BAGEPA), the Migratory Bird Treaty Act (MBTA), and the Administrative Procedure Act (APA).

RFRA requires that "government should not substantially burden religious exercise without compelling justification."[16] 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.[17] As discussed in section IV below, at least two federal Courts of Appeals have held that the Department's current policy likely

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[12] Settlement Agreement at para. 7.

[13] U.S. Const. amend. I.

[14] 5 U.S.C. § 553(e)

[15] 43 C.F.R. § 14.2

[16] 42 U.S.C. § 2000bb(a)(3).

[17] 42 U.S.C. § 2000bb-3(a).

violates RFRA.[18] Thus, RFRA both requires the Department to change its policy and empowers it to do so.

The First Amendment to the U.S. Constitution prevents the government from establishing a religion by preferring one religious group over another. As discussed in section V below, the Department's current policy unconstitutionally prefers religions practiced by members of federally recognized tribes over other religions. The First Amendment both requires the Department to change its policy and empowers it to do so.

BAGEPA authorizes the Department to "permit the taking, possession, and transportation of" bald or golden eagles for eight different purposes, one of which is "the religious purposes of Indian tribes."[19] The Department first exercised its BAGEPA authority in 1963. The 1963 rule allowed all "individual Indians who are *authentic, bona fide practitioners of such religion*" to apply for permits to use eagle feathers.[20] In 1974 the Department started requiring permit applicants to attach a Certificate of Degree of Indian Blood from the Bureau of Indian Affairs, but still did not require that they be enrolled members of federally recognized tribes.[21] It was not until 1999 that the Department began requiring permit applicants to provide proof of enrollment in a federally recognized tribe.[22] In light of this history, it is clear that the Department has authority under BAGEPA to expand feather access beyond members of federally recognized tribes.[23]

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[18] *McAllen*, 764 F.3d at 468-69; *United States v. Hardman*, 297 F.3d 1116, 1134 (10th Cir. 2002).

[19] 16 U.S.C. § 668a.

[20] *McAllen*, 764 F.3d at 470 (italics in original) (citing 50 C.F.R. § 11.5 (1966)); 28 Fed. Reg. 976 (Feb. 1, 1963).

[21] *Id. McAllen* explained that "a Certificate of Degree of Indian Blood requires an individual to demonstrate a blood relationship to ancestors who were or are members of enrolled tribes," but "it does not grant membership to the tribe, nor does it require the individual actually be enrolled as a member of a federally recognized tribe to obtain the certificate." *Id.* at 470 n.5 (citing "BUREAU OF INDIAN AFFAIRS, OMB Control. No. 1076–0153, Certificate of Degree of Indian or Alaska Native Blood Instructions, *available at* http://www.bia.gov/idc/groups/public/documents/text/idc002653.pdf (last visited March 3, 2014)").

[22] *McAllen*, 764 F.3d at 470.

[23] With respect to sincere religious practitioners whose use of feathers falls outside of the "religious purposes of Indian Tribes," a religious accommodation is authorized by

The MBTA authorizes the Department to permit, "by regulations," the "take, capture, kill" or possession of migratory bird species protected by international treaty.[24] Under this authority, the Department allows zoos, veterinarians, and even members of the public seeking to free birds trapped in buildings to "possess" protected birds without a permit.[25] The Department has authority under the MBTA to allow sincere religious believers to possess federally protected birds, bird feathers, and other bird parts for religious use.

The APA requires the Department to follow notice and comment rulemaking procedures when enacting a rule that has the force of law. In 1975 the Department announced the "Morton Policy," which stated that the Department would not prosecute Native Americans for using eagle parts without a permit, so long as they did not kill birds or barter for the parts.[26] In 2012, the Department of Justice issued a memorandum reaffirming the Morton Policy while narrowing its scope to include only members of federally recognized tribes.[27] Although Native Americans have relied on the Morton Policy for more than 40 years, the Department has never promulgated it as a rule. The APA both empowers the Department to promulgate its longstanding policy as a rule and requires it to do so.

RFRA, both of its own force, *see supra*, and insofar as it "effectively amended" BAGEPA, "engraft[ing an] additional clause to" it providing that an application of the ban on feather possession "that places a substantial burden on a [sincere believer's] exercise of religion will not be allowed unless it is the least restrictive means to satisfy a compelling governmental interest." *In re Young*, 141 F.3d 854, 861 (8th Cir. 1998); *see also, e.g., Hankins v. Lyght*, 441 F.3d 96, 106-07 & n.6 (2d Cir. 2006) (in enacting RFRA Congress effected a "wholesale" amendment of all federal statutes "to include the RFRA standard").

[24] 16 U.S.C. § 703(a); *see also id.* § 704(a) (authorizing the Department to establish hunting seasons).

[25] 50 C.F.R. § 21.12.

[26] News Release, U.S. Dep't of the Interior, Morton Issues Policy Statement on Indian Use of Bird Feathers (Feb. 5, 1975), https://www.fws.gov/news/Historic/NewsReleases/1975/19750205.pdf ("Morton Policy").

[27] U.S. Dep't of Justice, Attorney Gen. Mem. re: Possession or Use of the Feathers or Other Parts of Federally Protected Birds for Tribal Cultural and Religious Purposes (Oct. 12, 2012), https://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf ("Dep't of Justice Mem."); Ass'n of Am. Indian Affairs, Religious Freedom and Eagle Feather Protection, https://www.indian-affairs.org/religious-freedom-and-eagle-feather-protection.html (last visited Mar. 1, 2018).

III. How the Government Regulates the Use of Eagle Feathers

Eagle feather use is central to many Native Americans' religion. Native Americans "use feathers for cleansing purposes during smudging rituals; . . . for prayer during traditional religious dances; and . . . give feathers as gifts on religiously significant occasions."[28] These religious practices span many tribes and have existed for centuries. For many Native Americans, denying them access to eagle feathers is much like denying a Christian the use of a Bible, rosary, or holy water.

Recognizing this, Congress specifically allowed the use of eagle feathers "for the religious purposes of Indian Tribes" when it passed BAGEPA in 1962. The Department passed regulations in 1963, updated in 1974 and 1999, that allow Native Americans to use eagle feathers. 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.[29]

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. This new policy, known as the "Morton Policy," was issued to "ease the minds of American Indians" who experienced "confusion and concern" as a result of the "Department's enforcement activities."[30] 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.[31]

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[28] Pls.' Mot. for Entry of Prelim. Inj. at 31, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-60 (S.D. Tex. Mar. 10, 2015), ECF No. 57.

[29] *See generally* 50 C.F.R. § 22.22.

[30] Morton Policy at 1.

[31] Dep't of Justice Mem. at 3; Morton Policy at 2.

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."[32]

More than thirty years later, the cycle 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 issued a memorandum reaffirming the Morton Policy. 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 federally recognized tribes. 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.

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. 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 and the Bald and Golden Eagle Protection Act. The Migratory Bird Treaty Act was enacted in 1916 to implement a convention between the United States and Great Britain.[33] It prohibits the harm, sale, or possession of migratory birds or their parts without a

[32] Dep't of Justice Mem. at 3.

[33] 16 U.S.C. § 703(a).

valid permit.[34] The Act currently covers over 1,000 bird species[35]—almost every native species in the United States.[36]

In light of the MBTA's broad language, courts have concluded that "Congress intended to make the unlawful killing of even one bird an offense."[37] Felony violations require knowledge, but misdemeanor violations of the Migratory Bird Treaty Act "are strict-liability offenses": "if an action falls within the scope of the MBTA's prohibitions, it is a criminal violation, regardless of whether the violator acted with intent."[38] Moreover, the Act forbids "the possession of feathers of protected migratory birds, even if these feathers were naturally molted."[39] Misdemeanor violations are punishable by fines up to $15,000, imprisonment up to six months, or both.[40] Felony violations are punishable by fines up to $2,000, imprisonment up to two years, or both.[41]

Despite the blanket ban on possession of migratory bird parts, the Department is authorized to grant 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,

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[34] *Id.*

[35] U.S. Fish & Wildlife Serv., *Migratory Bird Treaty Act Protected Species (10.13 List)* (Dec. 2, 2013), https://www.fws.gov/birds/management/managed-species/migratory-bird-treaty-act-protected-species.php; *see also* Press Release, U.S. Fish & Wildlife Serv., Official Number of Protected Migratory Bird Species Climbs to More than 1,000 (March 1, 2010), https://www.fws.gov/midwest/news/184.html.

[36] Jesse Greenspan, *The History and Evolution of the Migratory Bird Treaty Act*, Audobon.org: News, May 22, 2015, http://www.audubon.org/news/the-history-and-evolution-migratory-bird-treaty-act.

[37] Solicitor's Opinion M-37050 at 13 (quoting *United States v. Corbin Farm Serv.*, 444 F. Supp. 510, 529 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978)).

[38] *Id.* at 12-13.

[39] U.S. Fish & Wildlife Serv., Forensics Laboratory, *A Brief Introduction to U.S. Wildlife Laws*, https://www.fws.gov/lab/wildlife_laws.php (last updated Feb. 2, 2010).

[40] 16 U.S.C. § 707(a).

[41] 16 U.S.C. § 707(b).

education, and salvage.[42] There are also extensive regulations allowing hunting.[43] However, there are no permits for the average person 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 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.[44]

The Bald Eagle Protection Act was enacted in 1940 when "the bald eagle [was] threatened with extinction."[45] It originally protected only the bald eagle and had no exception for Native American religious use.[46] 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."[47] The Act now prohibits the harm, sale, or possession of bald or golden eagles or any bald or golden eagle parts, except with a valid permit.[48] Violations are punishable by fines up to $5,000, imprisonment up to one year, or both.[49] For a second violation, penalties double.[50]

The Act 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

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[42] *See generally* 50 C.F.R. Part 21.

[43] *See generally* 50 C.F.R. Part 20.

[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 Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d).

[46] *McAllen*, 764 F.3d at 469.

[47] 16 U.S.C. § 668a.

[48] 16 U.S.C. § 668.

[49] 16 U.S.C. § 668(a).

[50] *Id.*

'other interests.'"[51] Permits are governed by an extensive system of regulations, which govern both Native American religious uses and non-religious uses.[52]

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. 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.[53]

The text of the Bald and Golden Eagle Protection Act, 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*."[54] 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 federally recognized status.[55] 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."[56] 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 members of federally recognized tribes and all other Native Americans.[57]

It was not until 1999—thirty-seven years after enactment of the statute—that the Department promulgated the first eagle-permitting regulations that distinguished between federally recognized and non-recognized tribes.[58] The regulations now

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

[52] See 50 C.F.R. Part 22.

[53] *McAllen*, 764 F.3d at 470.

[54] 16 U.S.C. § 668a (emphasis added).

[55] *McAllen*, 764 F.3d at 470.

[56] *Id.* (citing 50 C.F.R. § 22.22 (1974)).

[57] Morton Policy at 1-2. The 2012 DOJ Memorandum implies that the Morton policy applied only to members of federally recognized tribes. Dep't of Justice Mem. at 2. But the text of the Morton Policy makes no such distinction. Morton Policy at 1-2.

[58] *McAllen*, 764 F.3d at 470.

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."[59]

Under current regulations, there are four different ways that members of federally recognized tribes can legally obtain eagles or eagle parts. 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 Commerce City, Colorado, where the government collects, freezes, and distributes dead eagles and eagle parts.[60] 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.[61] Requests are filled free-of-charge on a first-come, first-served basis. Current wait times for adult bald or golden eagles are approximately three months for 20 miscellaneous feathers, six months for 10 quality loose feathers, one year for a pair of wings, two years for wings and a tail, or two years for a whole bird.[62] Waiting times for immature golden eagles are approximately double.[63]

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**.[64] The applicant must explain to the regional Migratory Bird Permit Office why he needs to take a live eagle and how many eagles of what species he wishes to take. 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

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[59] 50 C.F.R. § 22.22(a)(5).

[60] *See generally* U.S. Fish & Wildlife Serv., Mountain Prairie Region, *National Eagle Repository* (Aug. 10, 2016), http://www.fws.gov/eaglerepository/index.php.

[61] U.S. Fish & Wildlife Serv., FWS Forms, *Ordering Eagle Parts and Feathers from the National Eagle Repository* (Jan. 2014), http://www.fws.gov/forms/3-200-15a.pdf.

[62] *Id.*

[63] *Id.*

[64] 50 C.F.R. § 22.22.

Repository.[65] The permit process is "used infrequently, and is not widely known."[66] It is used primarily by the Hopi, who have been collecting live eagles for centuries.[67] From 2002 to 2007, the Department allowed the Hopi to take an average of 24 golden eagles per year—all from the Southwest region, where golden eagles are plentiful.[68]

The third way that federally recognized tribes can obtain eagles and eagle parts is by operating a **Native American Eagle Aviary**.[69] These aviaries allow certain tribes to keep non-releasable eagles in captivity and use them for religious purposes. There are currently seven tribal aviaries in the Fish and Wildlife Service's Southwest Region: two in New Mexico, three in Oklahoma, and two in Arizona.[70]

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.[71] 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.[72] As long as members of federally recognized tribes are not killing, buying, or selling

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[65] *United States v. Friday*, 525 F.3d 938, 944-45 (10th Cir. 2008) (citing 50 C.F.R. § 22.22(c)).

[66] *Id.*

[67] Rowan Gould, U.S. Fish & Wildlife Serv., *Final Environmental Assessment: Proposal to Permit Take Provided Under the Bald and Golden Eagle Protection Act* 65 (Apr. 2009), https://www.fws.gov/alaska/eaglepermit/pdf/environmental_assessment.pdf.

[68] *Id.*

[69] *See generally* U.S. Fish & Wildlife Serv., FWS Forms, What You Should Know About a Federal Native American Eagle Aviary Permit (Feb. 2014), http://www.fws.gov/forms/3-200-78.pdf.

[70] U.S. Fish & Wildlife Serv., Eagle Aviaries: Tribal Eagle Aviaries, Working with Tribes: Southwest Region (last updated Jan 1, 2018), http://www.fws.gov/southwest/NAL/aviaries.html.

[71] Dep't of Justice Mem. at 3.

[72] *Id.*

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."[73]

None of these options are available to Native Americans who are not members of federally recognized tribes, or 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 tribes. They are forever 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."[74] The Department of Justice has already declared its intent to rescind all guidance documents that go beyond the text of the laws they purport to interpret.[75] If the Department of Justice rescinds the 2012 memorandum tomorrow, every federally recognized tribe member who uses eagle feathers without a permit could be prosecuted.

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[73] *Id.*

[74] *Id.*

[75] *See* Memorandum from U.S. Att'y Gen. re Prohibition on Improper Guidance Documents (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download.

C. 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 American religious purposes. According to records the Department provided to Becket under FOIA, in the past ten years the Department has issued 337 take permits for non-religious purposes.[76] Three take permits were issued to allow energy companies to kill eagles; thirty more such applications are pending.[77] During the same ten-year period, the number of take permits issued for Native American religious purposes was seven.[78]

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.[79] If the Department determines that the permit "is compatible with the preservation of the bald eagle and golden eagle," it can grant the permit.[80] 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.[81]

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[76] Letter from E. Daniel Patterson III, U.S. Fish & Wildlife Serv., to Derringer Dick, Becket, re FWS-2017-00858 (Sept. 6, 2017) ("Patterson Letter"), Attach. A, https://s3.amazonaws.com/becketnewsite/Patterson-Letter_with-attachments.pdf.

[77] FOIA Supplemental Information, U.S. Fish & Wildlife Serv., https://s3.amazonaws.com/becketnewsite/FOIA-Supplemental-Information.pdf (energy company permits); Telephone call from January Johnson, Pamela Mozina, and Jerry Thompson, U.S. Fish & Wildlife Serv., to Derringer Dick, Becket, re FOIA requests (Sept. 14, 2017) (stating number of pending applications).

[78] Patterson Letter, Attach. B.

[79] 50 C.F.R. § 22.21(a)(3).

[80] 50 C.F.R. § 22.21(c).

[81] Janet McCoy, "Nova, 'War Eagle VII,' will not fly before games during the 2017 Auburn football season," AUNow (June 26, 2017), http://www.oanow.com/sports/

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."[82] This includes situations where eagles may be disturbing livestock or domestic animals, damaging private property, or interfering with airport flight zones. 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.[83] 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."[84]

3. Falconry.

Golden eagles can also be taken from specified depredation areas for purposes of falconry—that is, to be trained as hunting birds.[85] One falconry association estimates that there are around 4,000 falconers in the U.S. today.[86] 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.[87]

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college/auburn/football/nova-war-eagle-vii-will-not-fly-before-games-during/article_5233521a-5a7f-11e7-924f-7b1e1172cd14.html.

[82] 50 C.F.R. § 22.23.

[83] 50 C.F.R. § 22.23(a).

[84] 50 C.F.R. § 22.23(c).

[85] 50 C.F.R. § 21.29.

[86] "History," The Modern Apprentice: Falconry, Ecology, Education, http://www.themodernapprentice.com/history.htm.

[87] 50 C.F.R. § 21.29(c)(2)(iv) (may possess up to three golden eagles at a time); *id.* at (e)(1)(v) (may take up to two golden eagles each year; must be taken from a livestock depredation area). As of 2014, falconry permits 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. 59,447 (Oct. 8, 2008).

4. Incidental Taking.

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

One Department official summarized the "top 'human caused threats to birds'" as follows:

- Cats, which kill an estimated 2.4 billion birds per year;
- Collisions with building glass, which kills an estimated 303.5 million birds per year;
- Collisions with vehicles, which kill an estimated 200 million birds per year;
- Poisons, which kill an estimated 72 million birds per year;
- Collisions with electrical lines, which kill an estimated 25 million birds per year;
- Collisions with communications towers, which kill an estimated 6.5 million birds per year;
- Electrocutions, which kill an estimated 5.4 million birds per year;
- Oil pits, which kill an estimated 750 thousand birds per year; and
- Collisions with wind turbines, which kill an estimated 174 thousand birds per year.[88]

Indeed, after reviewing the large number of common human activities that unintentionally cause the death of protected birds each year, the Department recently concluded that the MBTA does not actually prohibit unintentional or "incidental" bird takes.[89]

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[88] Solicitor's Opinion M-37050 at 34 (citing U.S. Fish and Wildlife Service, Threats to Birds: Migratory Birds Mortality—Questions and Answers, https://www.fws.gov/birds/bird-enthusiasts/threats-to-birds.php (last updated May 25, 2016)).

[89] Solicitor's Opinion M-37050 at 1; 34-35 ("Interpreting the MBTA to apply strict criminal liability to any instance where a migratory bird is killed as a result of these "human-caused threats" would . . . turn every American who owns a cat, drives a car, or owns a home—that is to say, the vast majority of Americans—into a potential

For unintentional *eagle* takings, however, the Department continues to issue what it calls "incidental take" permits under BAGEPA.[90] These permits cover "a broad spectrum of public and private interests," such as "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, etc."[91]

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.[92]

The Department admits 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.[93] However, the available evidence suggests that the number is large—for golden eagles alone, the Department estimates that there are "considerably" more than 2,000 human-caused eagle deaths each year.[94] The Department has acknowledged that "[t]he greatest human-caused risks to eagle safety appear to be electrocution by electrical distribution lines and collisions

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criminal. Such an interpretation would lead to absurd results, which are to be avoided.").

[90] 50 C.F.R. § 22.26; U.S. Fish & Wildlife Serv., FWS Forms, *Permit Application Form, Eagle Take—Associated With But Not the Purpose of an Activity (Incidental take)* (Dec. 2016), http://www.fws.gov/forms/3-200-71.pdf.

[91] U.S. Fish & Wildlife Serv., Bald Eagle, *Questions and Answers on New Regulations to "Take" Eagles,* (Apr. 20, 2015), https://www.fws.gov/midwest/eagle/protect/fnlpermitregs_qas.html.

[92] 50 C.F.R. § 22.26(e)-(f).

[93] U.S. Fish & Wildlife Serv., Bald Eagle, *Questions and Answers on New Regulations to "Take" Eagles*, https://www.fws.gov/midwest/eagle/protect/fnlpermitregs_qas.html; Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 27,934, 27,937 (May 6, 2016).

[94] 81 Fed. Reg. at 27,937.

with various anthropogenic structures."[95] In one study cited by the Department, examining human-caused eagle deaths from the early 1960s to 1995, "electrocution was reported as the second greatest cause of mortality in golden eagles and the third greatest cause for bald eagles."[96] In another study, involving a "small area in central Montana," collisions with power lines killed 21 golden eagles and one bald eagle in 2000-01.[97] These deaths are often caused by "[i]mproperly constructed power lines,"[98] and can be mitigated by proper power pole retrofitting.[99]

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.[100] Another study of a single wind farm east of San Francisco found that the farm killed 28 to 34 golden eagles per year.[101]

The Department's incidental take permits have become controversial. 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."[102] But in 2013, to accommodate "renewable energy and other projects designed to operate for decades," the Department authorized

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[95] Gould, *supra* at 72. The Department's 2016 status report on U.S. eagle populations bears this out: based on a study of satellite-tagged golden eagles from 1997-2013, the Department concluded that electrocutions and collisions combined were the largest causes of anthropogenic (i.e., human-related) golden eagle death. Brian A. Millsap, et al., U.S.F.W.S., *Bald and Golden Eagles: Population Demographics and Estimation of Sustainable Take in the United States, 2016 Update* (April 26, 2016), Tbl. 8, https://www.fws.gov/migratorybirds/pdf/management/EagleRuleRevisions-StatusReport.pdf.

[96] Gould, *supra* at 61-62.

[97] Gould, *supra* at 62.

[98] *Id.* at 61.

[99] *Id.* at 43.

[100] K. Shawn Smallwood, *Comparing bird and bat fatality-rate estimates among North American wind-energy projects*, 37 Wildlife Soc'y Bull. 19 (2013), http://onlinelibrary.wiley.com/doi/10.1002/wsb.260/abstract.

[101] Gould, *supra* at 62.

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

incidental permits of up to 30 years.[103] Many conservation groups strenuously objected and accused the Department of favoritism towards the wind energy industry.[104] The Audubon Society called the new regulations "outrageous," stating that "Interior wrote the wind industry a blank check."[105] 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 Act."[106] Three days after the lawsuit was filed, the Department announced that it would conduct an environmental analysis.[107] In 2016, the Department completed its analysis and issued new regulations once again authorizing 30-year permits for incidental takes.[108] 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."[109] The

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

[104] Dina Cappiello, "*Wind Farms Get Pass on Eagle Deaths*," The Associated Press, May 14, 2013, https://web.archive.org/web/20130630052253/http://bigstory.ap.org/article/ap-impact-wind-farms-gets-pass-eagle-deaths.

[105] Press Release, Interior Dep't Rule Greenlights Eagle Slaughter at Wind Farms, Says Audubon CEO, Audubon (Dec. 5, 2013), http://www.audubon.org/press-release/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon.

[106] Compl. for Declaratory & Injunctive Relief at 2, *Shearwater v. Ashe*, No. 14-cv-02830 (N.D. Cal. June 19, 2014), ECF No. 1.

[107] Eagle Permits; Notice of Intent To Prepare an Environmental Assessment or an Environmental Impact Statement, 79 Fed. Reg. 35,564 (June 23, 2014); *see also* U.S. Fish & Wildlife Serv., Conserving the Nature of America, *News Release: Service Begins Process of Reviewing Eagle Management Objectives, Non-Purposeful Take Permits* (June 20, 2014), http://www.fws.gov/news/ShowNews.cfm?ID=BA0210E0-CF96-C6DF-E2C6D963C5650EDE.

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

[109] *Id.* at 91,501.

Department has already issued three take permits to energy companies; thirty more applications are pending.[110]

While the Department has loosened restrictions on wind energy companies, it has imposed more and more restrictions on Native Americans. 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 forever banned from possessing even a single feather. Even those Native Americans who qualify face legal uncertainty, since their protection is based on a policy that the Department of Justice asserts it is free to disregard at any time.

IV. How Federal Feather Regulations Violate the Law

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. Moreover, by allowing some but not all religious believers to practice their faith, the Department has also violated the Establishment, Free Exercise, and Due Process Clauses of the U.S. Constitution. Finally, the Department has violated the Administrative Procedure Act by creating a limited religious exemption relied on by millions yet still contained in a single policy memo.

There is a better way. For more than 40 years, the Department of Justice and the Food and Drug Administration 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.[111] Courts have generally agreed that this exemption applies to all sincere religious believers, regardless of

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[110] FOIA Supplemental Information, U.S. Fish & Wildlife Serv., https://s3.amazonaws.com/becketnewsite/FOIA-Supplemental-Information.pdf (energy company permits); Telephone call from January Johnson, Pamela Mozina, and Jerry Thompson, U.S. Fish & Wildlife Serv., to Derringer Dick, Becket, re FOIA requests (Sept. 14, 2017) (pending applications).

[111] 21 C.F.R. § 1307.31 ("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.").

their tribal status.[112] The DOJ 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.[113] In 2009, the Supreme Court went further and ordered the government to create a religious exemption for hoasca, another controlled substance used for religious purposes. 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. Together these exemptions have been in place for decades. The Department should follow this example, comply with RFRA and the

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[112] *See, e.g., State v. Mooney*, 2004 UT 49, ¶¶ 21-22, 98 P.3d 420, 426–27 ("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) (table) (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 Beneficiente Uniao Do Vegetal v. Ashcroft,* 282 F. Supp. 2d 1271, 1278 (D.N.M. 2002) (noting that the national NAC limits membership but some local congregations do not).

[113] OLC Peyote Mem., 5 Op. O.L.C. 403. In 1994, Congress passed a law protecting federally recognized tribe members' religious peyote use, to override *Employment Div., Dep't of Human Res. 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.A. § 1996a(b)(1), (c)(1)-(2); *see generally* H.R. Rep. 103-675, 1994 U.S.C.C.A.N. 2404, 2406-07 (1994) ("AIRFA Amendments") (noting that legislation was needed to address the patchwork of conflicting state laws). The 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).

Constitution, and promulgate a regulation that protects every individual who uses federally protected bird feathers as a sincere exercise of religion.

A. The Federal Eagle Feather Regulations Violate the Religious Freedom Restoration Act

The Department's rules and policies violate RFRA.[114] RFRA was adopted in response to a Supreme Court decision restricting the religious freedom of two Native Americans who followed the Peyote Way,[115] and Native Americans have benefitted from RFRA's protection in numerous cases.[116] RFRA is designed "to provide very broad protection for religious liberty,"[117] and it subjects government actions that burden religious practices to "exacting" scrutiny.[118]

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."[119] RFRA analysis has two parts. The first question is whether the government has "substantially burden[ed]" sincere religious exercise.[120] If the answer is yes, then the second question is whether the government can satisfy strict scrutiny.[121]

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

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[114] 42 U.S.C. §2000bb *et seq.*

[115] *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

[116] *See, e.g.,* 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).

[117] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

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

[119] 42 U.S.C. § 2000bb-1(a)–(b).

[120] *McAllen* 764 F.3d at 472.

[121] *Id.*

Department's regulations have 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 has never been upheld purely on its own terms, and it must change.

1. 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 Morton Policy.[122] 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.[123] "[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."[124] Here, the Department *criminally bans* many Native Americans from possessing eagle feathers from any source—an unmistakable substantial burden. It is thus not surprising 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.[125]

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[122] *See, e.g., McAllen*, 764 F.3d at 472 (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").

[123] *Hobby Lobby*, 134 S. Ct. at 2777–79.

[124] *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 *Merced*); *see also* Dep't of Justice Religious Liberty Mem. at 4 ("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.").

[125] *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 at 1126 (10th Cir. 2002));

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.[126] 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.[127]

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.[128] He could not practice his dances.[129] He could not communicate with his Creator.[130] Without authentic feathers, Pastor Soto "felt like [he] was living a lie."[131] 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. 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.[132] Family members may not give feathers to non-enrolled children or grandchildren who

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McAllen, 764 F.3d at 472 ("The Department does not contest the Plaintiffs' assertion that the Eagle Protection Act substantially burdens their religious beliefs.").

[126] Pls.' Mot. for Entry of Prelim. Inj. 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; *McAllen Grace Brethren Church v. Jewell,* No. 7:07-cv-00060, (S.D. Tex. Mar. 10, 2015).

[127] *Id.* Ex. A ¶ 19.

[128] *Id.* ¶ 17.

[129] *Id.* ¶ 18.

[130] *Id.* ¶ 16.

[131] *Id.* ¶ 38.

[132] 16 U.S.C. § 668(a), (b) (civil and criminal penalties for violating the terms of a permit issued under BAGEPA).

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.

2. 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."[133] In *McAllen*, the Fifth Circuit held that the Department's eagle feather ban fails to meet this standard.[134] 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."[135] It requires a "focused" inquiry.[136] It is not enough that "broadly formulated interests" might be furthered by applying the law to all citizens in general.[137] 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 substantially burdened."[138] 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.'"[139]

In litigation, the Department has asserted two interests to justify its eagle feather possession ban: protecting eagles, and protecting its relationship with federally

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[133] 42 U.S.C. §2000bb-1(a)-(b).

[134] *McAllen*, 764 F.3d at 480.

[135] *Id.* at 475 (quoting *Hobby Lobby*, 134 S. Ct. at 2780).

[136] *Hobby Lobby,* 134 S. Ct. at 2779.

[137] *Id.*

[138] *Id*. (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (quoting 42 U.S.C. §2000bb-1(b))).

[139] *Id*.

recognized tribes.[140] A "focused" inquiry reveals that neither of these broad interests is actually furthered by preventing sincere religious believers from exercising their faith using eagle feathers.

a. 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."[141] 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."[142]

More importantly, the broad exceptions to the ban on possession suggest that the possession ban is not actually necessary. "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."[143] 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 this 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."[144] Under the Migratory Bird Treaty Act, 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) taxidermy, (6) waterfowl sale and disposal, and (7) other "special purposes," such as rehabilitation, education, and

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[140] *McAllen*, 764 F.3d at 473.

[141] *Id.* at 476.

[142] *Id.* at 476–77 (emphasis added).

[143] *Id.* at 472 (citing *Hobby Lobby*, 134 S. Ct. at 2781–82; *Tagore v. U.S.*, 735 F.3d 324, 331 (5th Cir. 2013)).

[144] *McAllen*, 764 F.3d at 474–75 (citing 16 U.S.C. §668a; *Merced*, 577 F.3d at 594).

salvage.[145] Under the Bald and Golden Eagle Protection Act, 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.[146] 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 of 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."[147] 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.

b. 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.[148] But simply as a logical matter, it does not further this interest to punish other religious believers for using feathers they already possess. During Prohibition, Episcopalians did not have a protected religious liberty interest in keeping Catholics from using wine for communion.[149] Allowing sincere religious believers to receive feathers as gifts, pick up feathers from the wild, exchange feathers at powwows, and borrow

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[145] *See generally* 50 C.F.R. Part 21.

[146] *See generally* 50 C.F.R. Part 22.

[147] *McAllen*, 764 F.3d at 477 (citing *O Centro*, 546 U.S. at 433).

[148] *McAllen*, 764 F.3d at 473.

[149] Indeed, 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).

feathers for religious ceremonies does not affect the religious freedom of federally recognized tribes in any way. It simply increases religious freedom for all.

It is perhaps not surprising, 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 appeals, 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.[150]

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 feathers."[151] And it is true that the Repository already has long wait times—up to six months for ten "quality" feathers and a year for feathers from an immature golden eagle.[152] 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]."[153] 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

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[150] *Compare Gibson v. Babbitt*, 223 F.3d 1256 (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 (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 (9th Cir. 2008) (allowing the government to rely on the shortage of eagle parts even if it could remedy this shortage); *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011) (accepting that expanding Repository access to other tribes could burden federally recognized tribes) *with United States v. Hardman*, 297 F.3d 1116, 1132-1133 (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).

[151] *McAllen*, 764 F.3d at 478.

[152] Fish & Wildlife Serv., *Ordering Eagle Parts and Feathers from the National Eagle Repository*, https://www.fws.gov/eaglerepository/FAQs/Eagle%20Q&A.pdf (last accessed March 1, 2018).

[153] *McAllen*, 764 F.3d at 479.

borrowed during religious ceremonies. Concerns about the Repository cannot justify banning the use of feathers received outside of the Repository system.

Moreover, standing alone, the Department's general interest in fulfilling its responsibilities to federally recognized tribes cannot justify the criminal ban on eagle feather possession. *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,"[154] 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."[155] On the contrary, the Supreme Court has stated that in general, "congressional findings that support one exception will support similar exceptions."[156]

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 peyote to support a similar exemption for hoasca, a tea used sacramentally by a small religious group with origins in the Brazilian rainforest.[157] 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.[158] So too here: the Morton Policy demonstrates that a well-crafted religious exemption does not fatally 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.

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[154] *Id.* at 473.

[155] *Id.* at 474 (citing *O Centro*, 546 U.S. at 430–32).

[156] *Id.* (citing *O Centro*, 546 U.S. at 434).

[157] 546 U.S. at 425, 433-34.

[158] *Id.* at 433-34 (emphasis added).

3. 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.[159] Under this test, "[i]f a less restrictive alternative would serve the Government's purpose, the [government] must use that alternative."[160] Least restrictive means "analysis requires the government to show that it cannot accommodate the religious adherent while achieving its interest through a viable alternative, which may include, in certain circumstances, expenditure of additional funds, modification of existing exemptions, or creation of a new program."[161] The Supreme Court has called this "a severe form of the 'narrowly tailored' test," and it is "an 'exceptionally demanding' test for the [government] to meet."[162]

Here, the Department could employ numerous less restrictive alternatives to further its interests. First, the Department could *increase the supply* of usable feathers:

- It could allow sincere religious believers to collect feathers that have molted in the wild.[163]
- It could allow sincere religious believers to collect feathers that have molted in zoos and aviaries.[164]
- 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 program beyond federally recognized tribes.[165]

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[159] 42 U.S.C § 2000bb-1(b).

[160] *Merced*, 577 F.3d at 595 (citation omitted).

[161] Dep't of Justice Religious Liberty Mem. at 5.

[162] *McAllen*, 764 F.3d at 475 (quoting *Hobby Lobby*, 134 S. Ct. at 2780).

[163] *Id.* at 477.

[164] *Id.*

[165] *Id.* at 479.

- 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.

- 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."[166]

Second, 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.[167] 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.

Third, 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 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."[168] For example, the Department could increase the Repository's staff and budget. As of 2009, a "two-person staff" filled orders for all two million members of

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[166] *See* U.S. Fish & Wildlife Serv., *Fact Sheet: Natural History, Ecology, and History of Recovery* (June 2007), http://www.fws.gov/midwest/eagle/recovery/biologue.html; Environment Alaska, *Bald Eagle in Alaska*, http://environmentalaska.us/bald-eagles.html (last accessed March 3, 2018).

[167] Mem. from the Att'y Gen. on Eagle Feathers Policy (Oct. 12, 2012), http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf.

[168] *McAllen*, 764 F.3d at 479.

federally recognized tribes, and "[a]bout 6,000 orders [we]re waiting to be filled."[169] 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 don't 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 [prison] inmates," and that it should "more clearly advise applicants that they are not required to order the maximum amount of feathers allowed per order."[170] 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."[171] 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.[172] This petition simply seeks to give all sincere religious believers the same access the Department has already given to many others.

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[169] Electa Draper, *Eagle bodies, parts for Indian rites are collected, sent from Colo. morgue*, Denver Post, Sept. 1, 2009, http://www.denverpost.com/recommended/ci_13242945.

[170] Letter from Stephen Oberholtzer, Special Agent in Charge, U.S. Fish and Wildlife Serv., to Tribal Leader, https://www.fws.gov/le/eagle/factsheets/Repository%20Changes%20Letter%204-9-2014%20SO.pdf.

[171] *McAllen*, 764 F.3d at 475, 478, 479.

[172] Settlement Agreement, ECF No. 83-1; *McAllen Grace Brethren Church v. Jewell,* No. 7:07-cv-00060 (S.D. Tex. June 13, 2016) ("Settlement Agreement").

B. The Current Rule Violates the Religion Clauses and the Fifth Amendment of the Constitution

In addition to violating RFRA, the Department's current rule violates the Establishment Clause, Free Exercise Clause, and Fifth Amendment Due Process Clause of the Constitution. By granting preferential treatment to secular groups and the religious practices of federally recognized tribes—to the detriment of other religious believers—the government runs afoul of several constitutional principles. Expanding the religious accommodations to allow broader access to federally protected bird feathers is necessary to remedy these constitutional violations.

1. The Current Rule Violates the Establishment Clause

The current rule violates the Establishment Clause by favoring some members of Native American faiths over other sincere religious believers. As the Department of Justice pointed out in its recent memorandum on religious freedom in federal law, "the Free Exercise Clause and the Establishment Clause prohibit government from officially preferring one religious group to another. This principle of denominational neutrality means, for example, that government cannot selectively impose regulatory burdens on some denominations but not others."[173] Under this principle, the Department cannot allow federally recognized tribe members to exercise their faith using bird feathers while banning all other religious groups from engaging in exactly the same religious practice, any more than the Volstead Act could have constitutionally allowed Catholics to use sacramental wine while banning Jews and Lutherans.

In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court said that prohibiting animal killing for one religious purpose (Santería sacrifice) while allowing it for another religious purpose (kosher slaughter) created "differential treatment of two religions," which could constitute "an independent constitutional violation."[174] Similarly, in *Larson v. Valente*, the Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[175] Here, the policy impermissibly discriminates between federally recognized tribes and other religious groups. And the Department's

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[173] Dep't of Justice Religious Liberty Mem. at 3.

[174] *Church of Lukumi Babalu Aye, Inc. v Hialeah,* 508 U.S. 520, 536 (1993).

[175] *Larson v. Valente*, 456 U.S. 228, 244 (1982).

recently-initiated rulemaking to issue Repository permits to tribes, not individuals, only makes the Department's Establishment Clause violation worse.[176]

Larson invalidated a Minnesota law that imposed disclosure requirements on charitable organizations, but exempted religious organizations that "received more than half of their total contributions from members or affiliated organizations."[177] The law thus made "explicit and deliberate distinctions" between "well-established churches" with strong financial support and less well-established churches that relied on outside donations.[178] This "explicit and deliberate distinction[] between different religious organizations" violated the Establishment Clause.[179]

Like the law struck down in *Larson*, the current regulations establish two tiers of religious adherents: well-established groups (federally recognized tribes), which are exempt, and less well-established groups (non-federally recognized tribes and other religious groups), which are not. Indeed, here, the regulations allow up to two million federally recognized tribe members to possess as many federally protected feathers as they want—regardless of where the feathers come from and regardless of whether they have a permit—but refuse to allow other sincere religious believers to do the same.

The government cannot rank in different tiers the rights of people with identical religious practices.[180] In fact, this sort of permitting scheme—allowing one group to exercise their religion but not another—was exactly what the Founders had in mind when enacting the Establishment Clause. During the founding era, a fundamental element of an establishment of religion was government restriction of religious

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[176] Letter from Steve Oberholtzer, Special Agent in Charge, U.S. Fish and Wildlife Serv., https://www.fws.gov/le/eagle/factsheets/Repository%20Changes%20Letter%204-9-2014%20SO.pdf (requesting government-to-government consultations regarding changes to the National Eagle Feather Repository permitting system).

[177] *Larson*, 456 U.S. at 231-32.

[178] *Id.* at 246 n.23; *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (explaining that the law in *Larson* "discriminated against religions . . . that depend heavily on soliciting donations from the general public")

[179] *Larson*, 456 U.S. at 246 n.23, 255.

[180] *See Weaver*, 534 F.3d at 1257; *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002) (holding that a law was non-neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and religious" groups, but rejected exemption for plaintiffs).

worship by particular denominations.[181] The English establishment restricted worship by Puritans, Baptists, Presbyterians, and especially Catholics.[182] Massachusetts enacted similar provisions, limiting "preaching to authorized persons and authorized churches."[183] In Virginia, two dissenting ministers were punished for "baptizing children without a license."[184] And Baptists were often punished for preaching without a license.[185]

Here, the Department has established a similarly troubling licensing scheme. Just as some ministers in Virginia and Massachusetts could get licenses to preach and others could not, now followers of some Native American religions can get licenses to possess eagle feathers and followers of other Native American religions cannot. This is a quintessential violation of the First Amendment.[186] The Department's proposal to issue Repository permits to tribes only makes the Establishment Clause violation worse, because it expressly favors some religious groups (those associated with federally recognized tribes) over others.

It is no answer to say that the current rule is justified by the unique government-to-government relationship between federally recognized tribes and the federal government.[187] As a threshold matter, and as discussed above, that special relationship does not justify banning other sincere religious believers from ever possessing a single eagle feather. Moreover, the Department of Justice has long held that "the special treatment of Indians under our law does not stem from the unique features of Indian religion or culture," and that "[w]ith respect to these matters,

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[181] *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2159-69 (2003).

[182] *Id*. at 2160-61.

[183] *Id*. at 2162.

[184] *Id*. at 2164.

[185] *Id*. at 2165.

[186] *Cf. id.* at 2160, 2162.

[187] *See, e.g., Rupert v. Dir., U.S. Fish & Wildlife Serv*., 957 F.2d 32, 35 (1st Cir. 1992) (relying on the unique status of federally recognized tribes to apply rational basis scrutiny). *Rupert* concluded that "[a]ny diminution of the exemption would adversely affect the [interest in protecting American Indian culture], but any extension of it would adversely affect the [interest in protecting eagle feathers]." *Id.* But as already discussed, there are many ways to lift the ban that will not adversely affect either interest.

Indians stand on no different footing than do other minorities in our pluralistic society." Instead, "the special treatment of Indians is grounded in their unique status as political entities, formerly sovereign nations preexisting the Constitution, which still retain a measure of inherent sovereignty over their peoples unless divested by federal statute or by necessary implication of their dependent status."[188] As a result, "Indian religion cannot be treated differently than other religions similarly situated without violation of the Establishment Clause."[189]

2. The Current Rule Violates the Free Exercise Clause

Given the Department's exemptions for secular uses of federally protected feathers, the ban on possession by religious believers who are not members of federally recognized tribes also violates the Free Exercise Clause of the First Amendment. The Supreme Court has repeatedly emphasized that the "Free Exercise Clause protect[s] religious observers against unequal treatment" by government actors.[190] When "the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny."[191]

Here, given the many exemptions to BAGEPA and the MBTA that the Department provides for non-religious reasons, the Constitution requires that the government extend exemptions to religious practitioners as well. In *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, the Supreme Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship

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[188] OLC Peyote Mem., 5 Op. O.L.C. at 420 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

[189] OLC Peyote Mem., 5 Op. O.L.C. at 420 & n.31 (noting that "[t]he Department of Justice has expressed similar views in another context") (citing Statement of Larry L. Simms on S.J. Res. 102 before the Senate Select Committee on Indian Affairs, February 27, 1978 (noting that congressional preference for Indian over non-Indian religions could raise Establishment Clause problems)).

[190] *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Lukumi*, 508 U.S. at 533 (alteration in *Lukumi*, internal quotation marks omitted)).

[191] *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

without compelling reason."[192] As explained in Part IV of this Petition, the Department's interests fail to satisfy strict scrutiny. Accordingly, the ban on possession of eagle feathers is unconstitutional as applied to sincere religious practitioners who require feathers to practice their faith.

3. The Current Rule Violates the Fifth Amendment

In addition to violating the First Amendment, the Department's discrimination between federally recognized tribes and other religious adherents also violates the Due Process Clause of the Fifth Amendment, which requires the federal government to provide equal protection of the law to all Americans.[193]

The Supreme Court has twice identified religion as a suspect class for purposes of equal protection analysis.[194] And the Department's rules facially discriminate on the basis of religion. Only some religious practices using federally protected feathers—those carried out by federally recognized tribes—are legal; all others are banned. Because different Native American religious groups have different religious practices, the Department's regulations favor some religious groups over others. And because religion "so seldom provide[s] a relevant basis for disparate treatment," a rule that treats similar religious practices differently must "withstand strict scrutiny."[195] As discussed above, the Department's current rule cannot do so.

It is again no answer to say that the Department's current rule is justified by the unique relationship between federally recognized tribes and the U.S. government. While the Supreme Court has held that hiring preferences for enrolled tribe members who work for the Bureau of Indian Affairs (BIA) survive equal protection analysis, that is because of the *political* relationship between federally recognized tribes and

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[192] 508 U.S. at 537 (quoting *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990)).

[193] *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (noting that the Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment").

[194] *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992). More recently, in *Sonnier v. Quarterman*, the Fifth Circuit stated that suspect classes include "those based upon race, ancestry, or religion." 476 F.3d 349, 368 n.17 (5th Cir. 2007) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976)).

[195] *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2208 (2016).

the BIA.[196] Because the "lives and activities" of federally recognized tribe members "are governed by the BIA in a unique fashion," these hiring preferences are more akin to the residency requirements for U.S. Senators than they are to impermissible preferences based on race or religion.[197] The politically unique relationship between federally recognized tribes and the U.S. government does not justify granting them a religious accommodation while denying it to others who engage in similar religious practices.[198]

C. The Morton Policy Leaves Millions of Religious Believers in Legal Jeopardy and Violates the APA

In a sad irony, neither the 2012 Morton Policy nor its 1975 predecessor actually provides federally recognized tribe members with the protection they need to practice their faith in freedom. This was dramatically underscored in 2009, when "tribal members practicing their traditional cultures and religions . . . were arrested or otherwise affected by some law enforcement stings."[199] Native American organizations, led by the National Congress of American Indians, formed a working group with federal agencies.[200] And after three years of negotiation, the result was a Department of Justice enforcement memorandum that dramatically reduced the number of Native Americans able to use federally protected bird feathers, while still giving the federal government the right to prosecute any Native American for feather use at any time.[201]

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[196] *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

[197] *Id.*

[198] The Department's recent proposal to give federally recognized tribes authority over the Repository's permitting process would only make the Department's equal protection violation worse.

[199] Association on American Indian Affairs, *Religious Freedom and Eagle Feather Protection*, https://www.indian-affairs.org/religious-freedom-and-eagle-feather-protection.html.

[200] *Id.*

[201] Dep't of Justice Mem. at 3-5 (requiring federal prosecutors to consult with senior Department of Justice officials prior to prosecuting members of federally recognized tribes for eagle feather use and noting that the Morton Policy "does not, and may not be relied upon to create any rights").

The Morton Policy should have been recognized as a rule subject to the notice and comment procedures set out in the APA.[202] The APA requires agency rules to go through rulemaking procedures in order to become binding regulations. This ensures that policies which have the force of law are properly formulated and can be relied on by people whose rights and duties are affected. It also prevents federal agencies from arbitrarily disregarding their own rules.

Failure to promulgate the Morton Policy as a rule leaves millions of federally recognized tribe members in jeopardy. Every time they use federally protected bird feathers to practice their religion they risk civil and criminal penalties because the Department might ignore the Morton Policy. Believers should not have to practice their religion under threat of arbitrary enforcement action. The APA forbids this kind of abuse and requires rules intended to be binding to go through notice and comment rulemaking.

Federally recognized tribes who desire to use feathers are bound by the policy. It "tell[s] regulated parties what they must do or may not do in order to avoid liability."[203] But unless the policy is promulgated as a rule, the Department may claim it is not bound in return. This one-sided regulation is contrary to the APA. Further, the publication's express purpose to relieve "uncertainty and concern regarding enforcement of federal bird protection laws"[204] is undermined if the Department in reality "retains the discretion and the authority to change its position—even abruptly—in any specific case."[205]

The 2012 Morton Policy states that members of federally recognized tribes "will not be subject to prosecution" for certain actions in relation to federally protected bird parts. But the document states that it "may not be relied upon to create any rights."[206] So the Morton Policy offers protection with one hand and threatens to strip it away at any time with the other. A policy on which millions of believers depend for legal

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[202] 5 U.S.C. § 553.

[203] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014).

[204] Dep't of Justice Mem. at 2.

[205] *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

[206] Dep't of Justice Mem. at 3-5.

protection should not leave "the agency and its decisionmakers free to exercise discretion" over whether to follow the policy at all.[207]

The Morton Policy should have been published as a regulation. The APA requirements apply when "a document expresses a change in substantive law or policy . . . which the agency intends to make binding, or administers with binding effect."[208] An agency creates a rule if it "intends to bind itself to a particular legal position."[209] The Department should have accepted in 1975 and again in 2012 that it was "bind[ing] itself to a particular legal position" by promising not to prosecute Native Americans.

Here, the content, purpose and history of the Morton Policy demonstrate that it should be properly promulgated as a rule under the APA. The Department failed to conduct the required notice and comment procedures in 1975 and 2012, and the current version of the Morton Policy could be rescinded at any time. As a result, millions of Native American believers must practice their faith under the shadow of prosecution. The Department should protect these religious believers by enacting Petitioners' proposals as a rule under the APA.

V. Proposed Rule

Criminal Possession Ban: Federal law allows power companies and other large corporations to kill hundreds of eagles every year. But people like Pastor Soto, who is a member of a state-recognized tribe, are criminally banned from possessing even a single feather. Moreover, because the Morton Policy is an enforcement memorandum from the Department of Justice and not a regulation passed by the Department, even members of federally recognized tribes are not fully protected and could, in theory, be prosecuted for peacefully worshiping with their eagle feathers at any time. To fix both these problems, Petitioners propose that the Department promulgate the Morton Policy as a regulation, with one modification: that the policy apply to all sincere religious believers who use federally protected feathers in their religious exercise. No sincere religious believer should be banned from possessing feathers or risk criminal prosecution for simply possessing the feathers necessary to practice their faith.

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[207] *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (citing *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) and *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam)).

[208] *Gen. Elect. Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002).

[209] *Syncor Int'l Corp.*, 127 F.3d at 94 (citing *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994)).

Protect Sincere Religious Believers: The Department's regulations should protect only *sincere* religious exercise—not those who fake Native American religious practices for personal or commercial gain. Federal law protects only sincere religious practices,[210] and both caselaw and regulations from other federal agencies provide frameworks for sorting sincere religious claims from insincere ones without making constitutionally forbidden judgments about the underlying beliefs' truth or falsity.[211] The Department can employ those frameworks to do the same. Members of a state or federally recognized Indian tribe, a Native American church, or other Native American religious organization should enjoy a presumption of sincerity; others should have the opportunity to demonstrate their sincerity in other ways.

National Eagle Repository: As the U.S. Court of Appeals for the Fifth Circuit has recognized—and as thousands of Native Americans know firsthand—the National Eagle Repository is grossly inefficient and has inexcusably long wait times. The Department should reform the Repository by increasing its funding and staffing, working more closely with tribes and other stakeholders to improve efficiency, and adopting policies that will expand the overall supply of feathers. This will enable the Repository to better serve all sincere religious believers who use eagle feathers in their religious exercise.

Combat commercialization and increase enforcement: Petitioners' proposal will allow the Department to focus its enforcement efforts on combatting the unlawful killing of eagles and other federally protected birds and stop the commercialization of bird parts and feathers. Native Americans are often the first to observe illegal activities that commercialize Native American religious practices. To that end, Petitioners propose that the Department engage in government-to-government consultations with federally recognized tribes on specific measures to help Native Americans detect and report suspected illegal commercial activities involving federally protected feathers.

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[210] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 n.28 (2014).

[211] *See, e.g., A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 260-63 (5th Cir. 2010) (discussing religious sincerity); Ben Adams & Cynthia Barmore, *Questioning Sincerity: The Role of the Courts After* Hobby Lobby, 67 Stan. L. Rev. Online 59, 59-60 (2014) ("There is a long tradition of courts competently scrutinizing asserted religious beliefs for sincerity without delving into their validity or verity."); *see also* U.S. Dep't of Defense, Instruction 1300.06, Conscientious Objectors (Jul. 12, 2017) (Department of Defense guidelines for evaluating the sincerity of self-proclaimed conscientious objectors).

Accordingly, Petitioners propose that the Department insert a new part under subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below.[212]

> **Exemption for Possession of Federally Protected Birds, Bird Feathers, or Other Bird Parts for Religious Purposes.**
>
> (a) Sincere religious believers who exercise their faith using federally protected birds, bird feathers, or other bird parts do not require a permit to engage in the following types of conduct:
>
> (1) Possessing, using, wearing, or carrying federally protected birds, bird feathers, or other bird parts;
>
> (2) Traveling domestically with federally protected birds, bird feathers, or other bird parts, or, if sincere religious believers obtain and comply with necessary permits pertaining to international travel, traveling internationally with such items;
>
> (3) Acquiring from the wild, without compensation of any kind, naturally molted or fallen feathers of federally protected birds, without molesting or disturbing such birds or their nests;
>
> (4) Giving or loaning federally protected birds or the feathers or other parts of such birds to other sincere religious believers, or exchanging federally protected birds or the feathers or other parts of such birds with other sincere religious believers, without compensation of any kind;
>
> (5) Providing the feathers or other parts of federally protected birds to craftspersons to be fashioned into objects for eventual use in religious or cultural activities. Although no compensation may be provided and no charge made for such feathers or other bird parts, craftspersons may be compensated for their labor in crafting such objects.

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[212] Sections (a)-(c) codify the Morton Policy and expand it to cover all sincere religious believers who exercise their religion using federally protected birds, feathers, or other bird parts. Section (d), Applications to the National Eagle Repository, is modeled on paragraph 3 of the *McAllen* settlement and allows all sincere religious believers who worship using eagle feathers to apply for feathers from the National Eagle Repository. Settlement Agreement at para. 3. Section (e), Presumption of Sincere Religious Belief, is consistent with federal court decisions on sincerity like *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 260-63 (5th Cir. 2010).

(b) Sincere religious believers who exercise their faith using federally protected birds, bird feathers, or other bird parts are covered by this Part regardless of whether they have a U.S. Fish and Wildlife Service permit.

(c) For purposes of this Part, the term "federally protected bird" refers to any bird that is protected under any federal wildlife law, including but not limited to the Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 *et seq.*, the Migratory Bird Treaty Act, 16 U.S.C. § 703 *et seq.*, the Lacey Act, 16 U.S.C. § 3371 *et seq.*, and the Endangered Species Act, 16 U.S.C. § 1531 *et seq*.

(d) Applications to the National Eagle Repository.

Notwithstanding any provision in 50 C.F.R. § 22.22 describing who is eligible to obtain a permit pursuant to that section, sincere religious believers who exercise their faith using federally protected birds, bird feathers, or other bird parts are eligible to apply for and receive permits for religious use of eagle feathers and eagle parts, and to receive eagle feathers and eagle parts from the National Eagle Repository, without regard to whether they are members of a federally recognized tribe as required under 50 C.F.R. § 22.22(a)(5). In applying for a permit, sincere religious believers must comply with all the requirements set forth in the applicable regulations (other than 50 C.F.R. § 22.22(a)(5)).

(e) Presumption of Sincere Religious Belief.

For purposes of this Part, members of a state or federally recognized Indian tribe, a Native American church, or other Native American religious association are presumed to be sincere religious believers. Other religious believers shall have the opportunity to establish their sincerity in other ways.

* * * *

Petitioners' proposed rule would bring the Department's practice into compliance with RFRA and the U.S. Constitution. It would provide federally recognized tribe members and other sincere religious believers with enduring protection. And it would free the Department to use its resources in other ways—such as combatting commercialization and developing new ways to mitigate eagle deaths caused by power companies.

VI. Conclusion

More than half a century ago, Congress authorized the Department to act to protect the religious liberty of Native Americans who exercise their faith using eagle feathers. Over fifty years later, Native Americans and other sincere religious believers are still waiting for a regulation that fully protects their rights. The Department should formally promulgate the Morton Policy as a regulation, open the Repository to all sincere religious believers, and end the unjust criminal ban on their exercising their faith using feathers. More than fifty years is too long to wait for religious freedom.