Ohio Northern University Law Review

Volume 36 | Issue 1 Article 7

# A Permit to Practice Religion for Some But Not for Others: Howthe Federal Government Violates Religious Freedom When itGrants Eagle Feathers Only to Indian Tribe Members

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# A Permit to Practice Religion for Some But Not for Others: How the Federal Government Violates Religious Freedom When it Grants Eagle Feathers Only to Indian Tribe Members

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## INTRODUCTION

On June 27, 2008, the Ninth Circuit Court of Appeals issued a ruling on a controversy that has divided federal appellate courts for the past seven years: whether individuals, who are not members of Indian tribes, may possess eagle feathers for use in religious observances.[1] Mario Vasquez-Ramos and Luis Rodriguez-Martinez were leaders in their Native American churches[2] Although they say they are of tribal heritage, they are not members of any federally recognized Indian tribe.[3] Like many practitioners of Native American religion, Vasquez-Ramos and Rodriguez-Martinez use eagle feathers as part of their worship services. At ceremonial church gatherings, Vasquez-Ramos and Rodriguez-Martinez each received eagle feathers as gifts.[4] A federal statute makes possession of eagle feathers illegal, but allows Indian tribe members to possess eagle feathers for religious use.[5] However, the statute has no provision allowing non-members to possess eagle feathers for religious purposes.[6] So, Vasquez-Ramos and Rodriguez-Martinez were prosecuted.[7]

Vasquez-Ramos and Rodriguez-Martinez argued that the Bald and Golden Eagle Protection Act ("BGEPA") violated their freedom of religion.[8] The trial court disagreed, and the defendants entered a conditional plea of guilty and appealed to the Ninth Circuit.[9] The Ninth Circuit upheld their conviction, ruling that the government's interest in preserving the eagle population outweighed the defendants' religious freedom.[10]

Was the holding in *United States v. Vasquez-Ramos* wrong? This article argues that the federal government must allow people who are not members of Indian tribes, who wish to practice Native American religions, access to eagle

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* B.A., Oklahoma Wesleyan University, 2004; J.D., University of Tulsa, May 2008.

1. *See generally* United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008).

2. Matt Krasnowski, *Eagle Theft Pits Religious Practice against the Law*, SAN DIEGO UNION TRIBUNE, May 14, 2006, at A4.

3. *Vasquez-Ramos*, 531 F.3d at 990.

4. Krasnowski, *supra* note 2, at A4.

5. 16 U.S.C. § 668-668a (2009).

6. *See id.*

7. *Vasquez-Ramos*, 531 F.3d at 989.

8. *Id.*

9. *Id.* at 987.

10. *Id.* at 990-92.

parts. The use of eagle parts is central to many Native American religious ceremonies.[11] Some have likened the use of eagle feathers in Native American religions to the use of the cross in Christianity.[12] If the government denies eagle parts to anyone who wishes to practice Native American religions (whether or not the would-be practitioner is a tribe member), such a denial would violate the Religious Freedom Restoration Act ("RFRA").[13]

Part I of this paper examines the history and current state of religious freedom law in the United States as well as the government's scheme regulating the possession of eagle parts. Part II looks at three federal appellate court cases in which courts issued contradictory rulings on the right of non-members to possess eagle parts. Part III analyzes the points of disagreement among the cases, and it proposes that courts uniformly adopt a standard which ensures that any person who wishes to possess eagle parts for religious purposes be allowed to do so.

## I. BACKGROUND

Under current law, a state or federal government would violate the Free Exercise Clause of the First Amendment if the state banned religious practices because the practices were religious or displayed religious belief.[14] But, the Free Exercise Clause does not exempt a person from complying with a neutral law of general applicability that prohibits or requires conduct that the person's religion prohibits or requires.[15] The only instance in which the Free Exercise Clause would permit an exemption from a neutral, generally applicable law, is if the law implicated other constitutional rights, such as freedom of speech or the right of parents to control their children's education.[16] RFRA gives individuals greater protection from religious intrusion by the federal government, but RFRA does not apply to the states.[17] Under RFRA, the federal government may not impose a substantial burden on a person's religious exercise unless the government can show that applying the burden to the person

11. *See* 1 AMERICAN INDIANS 269-70 (Harvey Markowitz ed., Salem Press 1995); ARLENE HIRSCHFELDER & PAULETTE MOLIN, ENCYCLOPEDIA OF NATIVE AMERICAN RELIGIONS 9-10, 73 (1992).

12. Jack F. Trope, *Protecting Native American Religious Freedom: the Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. REV. L. & SOC. CHANGE 373, 384 (1993).

13. *See* 42 U.S.C. § 2000bb-2000bb-4 (2006).

14. Emp. Div. Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).

15. *Id.* at 877-81.

16. *Id.* at 881 (citing Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-36 (1925)).

17. *See generally* § 2000bb-2000bb-4 (defining government as "a branch, department, agency, instrumentality, and official . . . of the United States).

is the least restrictive means of furthering a compelling government interest.[18]

*A. Religious Freedom Law in the United States*

In order to understand this law more fully, as well as to understand RFRA, it is necessary to examine the history of religious freedom law. According to the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]"[19] *Cantwell v. Connecticut*[20] held that the Fourteenth Amendment makes this provision applicable to the states as well.[21]

For many years, the court analyzed Free Exercise cases under the rule announced in *Sherbert v. Verner*.[22] In *Sherbert*, the Supreme Court held that the "[g]overnment may neither compel affirmation of a repugnant [religious] belief, . . . nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities[.]"[23] If a government practice substantially infringes a First Amendment right, "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation[.]'"[24]

In *Sherbert*, Adell Sherbert, a Seventh-day Adventist, refused to work on Saturday, which was the Sabbath day of her denomination.[25] Her employer, a South Carolina textile mill operator, fired her.[26] Sherbert attempted to find work elsewhere, but she could not find a job that did not require her to work on Saturday.[27] Sherbert applied for unemployment compensation under the South Carolina Unemployment Compensation Act.[28] Under that Act, a claimant could receive compensation if she was "'able to work and . . . available for work.'"[29] The Act further stated that a claimant was not eligible for benefits if the claimant had "'failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer[.]'"[30] The

18. § 2000bb-1.
19. U.S. CONST. amend. I.
20. 310 U.S. 296 (1940).
21. *Id.* at 303.
22. Sherbert v. Verner, 374 U.S. 398 (1963).
23. *Id.* at 402 (citing Torcaso v. Watkins, 367 U.S. 488, 496; Fowler v. Rhode Island, 345 U.S. 67, 70 (1953)).
24. *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).
25. *Id.* at 399.
26. *Id.*
27. *Sherbert*, 374 U.S. at 399.
28. *Id.* at 399-400.
29. *Id.* at 400 n.3 (quoting S.C. CODE ANN. § 68-113-3 (1962)).
30. *Id.* (quoting § 68-114-3(a)).

South Carolina Employment Security Commission denied Sherbert's claim, finding that she did not have "good cause" to fail to accept suitable available work.[31]

The Supreme Court held that the Commission's denial of her claim violated the First Amendment.[32] The Court wrote:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling [of the Employment Security Commission] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[33]

The Court held that to justify this infringement of Sherbert's religious freedom, the state would have to demonstrate a compelling interest, and that the state had not done so in this case.[34]

The next important Free Exercise case in the Supreme Court was *Wisconsin v. Yoder*.[35] *Yoder* dealt with the right of Amish parents to not send their children to public school beyond the eighth grade.[36] High school education was against Amish religious beliefs, and, in *Yoder*, the state prosecuted three Amish families for violating the state's compulsory attendance law.[37] Wisconsin law required that all children attend public or private school until age sixteen.[38]

*Yoder* held that:

> [A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal government in the exercise of its delegated powers . . . [b]ut to agree that religiously grounded conduct must often be subject to the broad police power of the state is not to deny that there are areas of conduct

31. *Id.* at 401.
32. *Sherbert*, 374 U.S. at 410.
33. *Id*. at 404.
34. *See id.* at 406-07
35. 406 U.S. 205 (1972).
36. *Id.* at 207-08.
37. *Id.* at 207-09.
38. *Id.* at 207 (citing WIS. STAT. ANN. § 118.15 (1969)).

> protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability.[39]

Following *Sherbert*, the Court held that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" and stated that "however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests."[40] The Court went on to say that the State's interest in universal education did *not* outweigh the Amish parents' religious freedom rights, nor did the State's interest outweigh the parents' right to determine the education of their children.[41] Therefore, the State could not force Amish parents to send their children to public school beyond the eighth grade.[42]

The next major case in the Supreme Court's Free Exercise jurisprudence came in *Employment Division, Department of Human Resources of Oregon v. Smith*.[43] In *Smith*, the Court substantially narrowed the scope of the Free Exercise Clause. The Court held that the "compelling interest" test in *Sherbert* does not apply to Free Exercise claims of exemption from neutral laws of general applicability.[44] *Smith* involved employees at a private drug rehabilitation center who were fired because they used peyote as part of a Native American religious ceremony.[45] The employees applied for unemployment compensation from the State Employment Division.[46] The Employment Division denied their request for benefits because they had been fired for work-related "misconduct."[47] The employees filed suit, alleging that the denial violated their rights under the Free Exercise Clause.[48]

The Court held that the *Sherbert* balancing test is not to be used where the government has enacted a generally applicable law.[49] The Court distinguished *Yoder* from *Smith*, reasoning that *Yoder* involved not only the Free Exercise Clause, "but the Free Exercise Clause in conjunction with other constitutional protections, such as . . . the right of parents . . . to direct the education of their

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39. *Id.* at 220 (citing *Sherbert*, 374 U.S. 398; Murdock v. Pennsylvania, 319 U.S. 105 (1943); *Cantwell*, 310 U.S. at 303-04).
40. *Yoder*, 406 U.S. at 215.
41. *Id.* at 232-34.
42. *See id.* at 233-35.
43. 494 U.S. 872 (1990).
44. *See id.* at 876-79.
45. *Id.* at 874.
46. *Id.*
47. *Id.*
48. *Smith*, 494 U.S. at 874.
49. *See id.* at 882-84.

children[.]"[50] Since Oregon law prohibited the use of peyote, the State could deny the claimants unemployment compensation.[51]

Commentators widely and vehemently criticized the decision in *Smith*. Jesse Choper, Dean of the law school at the University of California at Berkley, called *Smith* the "demise of the Free Exercise clause."[52] Congressman Stephen Solarz declared, "'the Supreme Court has virtually removed religious freedom from the Bill of Rights.'"[53] A Jewish Rabbi lamented that the decision was "'the most dangerous attack on our civil rights in this country since the Dred Scott decision in the 1850s declared that blacks were not fully human beings.'"[54]

In 1993, Congress, in response to the ruling in *Smith*, enacted RFRA.[55] Congress stated that the purposes of RFRA were "to restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]"[56]

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50. *Id.* at 881 (citing *Yoder*, 406 U.S. at 205).

51. *Id.* at 890.

52. Jesse H. Choper, Lecture at U.S. Law Week's Constitutional Law Conference (Sept. 14-15, 1990) (this can also be found in 59 U.S.L.W. 2272, 2774 (1990)).

53. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409-10 (1992) (quoting Religious Freedom Restoration Act of 1990: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong., 2d. Sess. 18 (1990) (statement of Rep. Stephen J. Solarz)).

54. *Id*. at 1410 (quoting Ed Briggs, *Rabbi Deplores Supreme Court Trend on Freedom of Worship*, WASH. POST, Oct. 26, 1991, at B6 (quoting Rabbi David N. Saperstein)).

55. § 2000bb-2000bb4.

56. *Id*. at § 2000bb(b)(1).

> Congress found that:
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> (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing government interests. *Id.* at § 2000bb(a). Additionally, Congress specified that: (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results form a rule of general applicability, except as provided in Subsection (b) [of this section]. (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering the compelling governmental interest. (c) Judicial relief. A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution. *Id*. at § 2000bb-1.

The first Supreme Court case involving RFRA was *City of Boerne v. Flores*.[57] In *Flores*, the Court declared RFRA unconstitutional as applied to the states, by holding:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'[58]

The Court went on to say that RFRA "would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[59]

Although RFRA no longer applies to the states, it still applies to the federal government.[60] The most recent Supreme Court case applying RFRA was *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*.[61] *Gonzales* involved a Christian Spiritist religious sect, O Centro Espirita Beneficente Uniao Do Vegetal ("UDV").[62] Members of the UDV drank a tea called *hoasca* as a sacrament.[63] *Hoasca* contains DMT,[64] a hallucinogen that is classified in Schedule I of the Controlled Substances Act.[65] The Controlled Substances Act imposes a ban on all importation of Schedule I substances (except for certain regulated research projects),[66] and authorizes criminal sentences for anyone guilty of possessing such substances.[67] In *Gonzales*, United States Customs inspectors had intercepted a shipment of *hoasca* that was intended to be delivered to the UDV.[68] The inspectors seized the shipment and threatened to prosecute the UDV.[69] The UDV brought suit.[70]

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57. 521 U.S. 507 (1997).
58. *Id.* at 519 (quoting U.S. CONST. amend. XIV, § 5) (alteration in original).
59. *Id.* at 534.
60. *See* Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 424 n.1 (2006).
61. *Id.* at 418.
62. *Id.* at 425.
63. *Id.* at 423, 425.
64. *Id.* at 425.
65. *See* 21 U.S.C. § 812(c) (2006).
66. *See id.* §§ 823(a)(1), 960(a)(1).
67. *See id.* § 844(a).
68. *Gonzales*, 546 U.S. at 425.
69. *Id.*
70. *Id.* at 425.

The Supreme Court found in favor of the UDV.[71] The Court held that the government had to "demonstrate that 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."[72] The Court also held that the government failed to demonstrate a compelling interest in barring the UDV from using *hoasca*.[73] The Court noted that the Controlled Substances Act itself allowed the Attorney General to make certain exceptions to the Act "'if he finds it consistent with the public health and safety.'"[74] Furthermore, the Court observed that there had been a regulatory exception for use of peyote by the Native American Church.[75] Peyote, like *hoasca*, is a Schedule I substance.[76] In addition, Congress had allowed this exception for all Indians who were members of recognized tribes.[77] The Court reasoned that if Congress and the Executive Branch could make exceptions to the Controlled Substances Act for Indian tribes, then surely an exception could be made for UDV members, as there were only around 130 UDV members in the United States.[78] The government argued that there was a need for uniformity in enforcing the nation's drug laws, and that this need for uniformity precluded any exceptions allowed under RFRA.[79] But Chief Justice Roberts, writing for the Court, stated, "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."[80]

Thus the current state of religious freedom in the United States may be summarized as follows: The federal government may not substantially burden the free exercise of religion, even by means of a rule of general applicability, unless the rule burdening the free exercise of religion is the least restrictive means of advancing a compelling government interest. But, a state or local law will stand against any Free Exercise Clause challenge if the state or local law is a neutral law of general applicability, unless the state or local law implicates other constitutional rights.

71. *Id.* at 439.
72. *Id.* at 430-31 (citing § 2000bb-1(b)).
73. *Gonzales*, 546 U.S. at 433.
74. *Id.* at 432 (quoting 21 U.S.C. § 822(d) (2000)).
75. *Id.* at 433 (citing 21 C.F.R. § 1307.31 (2005)).
76. *Id.* at 433 (citing 21 C.F.R. § 1307.31)
77. *Id.* (citing 42 U.S.C. § 1996a(b)(1) (2000)).
78. *Gonzales*, 546 U.S. at 433.
79. *See id.* at 435.
80. *Id.* at 436.

*B. Laws Governing the Possession of Eagle Parts*

Federal law prohibits a person from possessing eagles or eagle parts without a permit from the federal government.[81] There are several purposes for which a person may obtain a permit. One such purpose is use in Native American religious observances.[82] However, only members of federally recognized Indian tribes may apply for permits to possess eagle parts for religious purposes.[83] There is currently no provision allowing a non-member to receive a permit to possess eagle parts for religious use.[84]

One important statute in this area is the Migratory Bird Treaty Act ("MBTA").[85] The MBTA makes it unlawful to:

> [P]ursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916, the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972 and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976.[86]

Bald and golden eagles are "migratory birds" for the purposes of the MBTA.[87]

A more significant statute in the government's scheme of regulating the use of eagle parts is the Bald and Golden Eagle Protection Act ("BGEPA").[88]

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81. *Bald & Golden Eagle Protection Act*, 16 U.S.C. § 668(a) (2009).
82. 50 C.F.R. § 22.22 (2007).
83. *Id.*
84. *See id.*
85. *Migratory Bird Treaty Act,* 16 U.S.C. § 703.
86. *Id.* § 703(a)
87. 50 C.F.R. § 10.13(I) (2009).
88. § 668.

The BGEPA prohibits the possession, taking, selling, purchasing, bartering, offering to sell, purchase, or barter, or transporting, exporting, or importing, of a bald or golden eagle, or any, part, nest, or egg of a bald or golden eagle, without a permit.[89] The Act provides a number of purposes for which the Secretary of the Interior may issue permits for the "taking, possession, and transportation" of bald and golden eagles and eagle parts, including "the religious purposes of Indian tribes."[90]

The U.S. Fish and Wildlife Service ("FWS") administers the granting and denying of permits.[91] In order to receive a permit, a person must prove that she is a member of a federally recognized Indian tribe.[92] In making its decision on whether to grant a permit, the FWS considers: "(1) The direct or indirect effect which issuing such permit would be likely to have upon the wild populations of bald or golden eagles; and (2) Whether the applicant is an Indian who is authorized to participate in bona fide tribal religious ceremonies."[93]

If the FWS grants a permit to an individual, the FWS then forwards the permit to the National Eagle Repository in Commerce City, Colorado, where government agents send dead eagles that they find.[94] The Repository distributes the eagles to qualified applicants "on a first-come[,] first-serve basis."[95] Many Indians have complained about the long wait that takes place between when an application is filed and when a permit holder actually receives an eagle part.[96] Because there are more applicants than eagles, it often takes six months for an applicant to receive a feather, and three-and-a-half years to receive a whole eagle.[97]

Thus, it is somewhat difficult for even a tribe member to obtain eagle parts for religious purposes. For a non-member who wants to use eagle parts in religious observances, the regulatory scheme essentially makes it impossible to obtain a permit to possess the eagle parts.

## II. CASES ON RIGHTS OF NON-MEMBERS TO POSSESS EAGLE PARTS FOR RELIGIOUS PURPOSES

Currently, the circuits are split on whether denying non-members the right

89. *Id.* at § 668(a).

90. 50 C.F.R. § 22.22.

91. *See* 50 C.F.R. §§ 2.2, 22.22.

92. *See id.* at § 22.22.

93. *Id.* § 22.22(c)(1)-(2).

94. Amie Jamieson, Chapter, *Will Bald Eagles Remain Compelling Enough to Validate the Bald and Golden Eagle Protection Act After ESA Delisting? The Ninth Circuit's Analysis in* United States v. Antoine, 34 ENVTL. L. 929, 938 (2004).

95. United States v. Hardman, 297 F.3d 1116, 1123 (10th Cir. 2002).

96. Jamieson, *supra* note 94, at 938.

97. *Id.*; Jeff Hinkle, *Standing on Ceremony*, AMERICAN INDIAN REPORT, Mar. 2002, at 24.

to possess eagle parts for religious use violates RFRA. In the past nine years, three different appellate courts have handed down decisions on the issue. In *United States v. Hardman*,[98] the Tenth Circuit held that denying eagle parts to non-members violates RFRA.[99] The Ninth Circuit, in *United States v. Antoine*[100] and *United States v. Vasquez-Ramos*,[101] and the Eleventh Circuit, in *Gibson v. Babbitt*,[102] held that such a denial does not violate RFRA.[103]

### *A. United States v. Hardman*

In *Hardman*, the Tenth Circuit ruled in favor of three men – Raymond Hardman, Samuel Wilgus, and Joseluis Saenz – who were not tribe members, but used eagle feathers for religious purposes.[104] Hardman and Wilgus were not of Native American descent at all.[105] Saenz was a descendant of the Chiricahua Apache, which is not a federally recognized Indian tribe.[106]

Hardman had practiced Native American religion for several years, and he kept eagle feathers for that purpose.[107] At one point, he had contacted the Utah Division of Wildlife Resources and asked about obtaining a permit to possess the feathers.[108] The Division of Wildlife Resources told him that he could not obtain a permit, because he was not a member of a federally recognized Indian tribe.[109] In 1996, a Ute tribal officer came to Hardman's home and demanded that Hardman surrender the eagle feathers.[110] Hardman surrendered the feathers.[111] Six months later, federal authorities charged Hardman with violating the MBTA, but not the BGEPA.[112] The court found Hardman guilty of violating the MBTA.[113] The court ordered him to pay a fine, and placed him on probation for two years.[114] Hardman appealed to the Tenth Circuit.[115]

Wilgus also possessed eagle feathers that he used to practice Native

98. *Hardman*, 297 F.3d at 1116.
99. *Id.* at 1120.
100. 318 F.3d 919 (9th Cir. 2003).
101. 531 F.3d 987 (9th Cir. 2008).
102. 223 F.3d 1256 (11th Cir. 2000).
103. *Vasquez-Ramos*, 531 F.3d at 989; *Antoine*, 318 F.3d at 924; *Gibson*, 223 F.3d at 1258.
104. *See generally Hardman*, 297 F.3d 1116.
105. *Id.* at 1118-19.
106. *Id.* at 1119.
107. *Id.* at 1118.
108. *Id.*
109. *Hardman*, 297 F.3d at 1118.
110. *Id.*
111. *Id.*
112. *Id.* at 1118-19.
113. *Id.* at 1119.
114. *Hardman*, 297 F.3d at 1119.
115. *Id.*

American religion.[116] When he was a passenger in a speeding pick-up truck, a highway patrol officer pulled the truck over and arrested the driver for driving with a suspended license.[117] When the officer searched the truck, the officer found 137 bald and golden eagle feathers.[118] Wilgus' wife later surrendered four more bald and golden eagle feathers.[119] Wilgus had no permit, and could not have obtained one, since he was not a tribe member.[120] The federal government charged Wilgus with violating the BGEPA.[121] The court imposed a fine and twelve months probation.[122] Wilgus appealed to the Tenth Circuit.[123]

Saenz, who was of Native American descent but not a member of a recognized tribe, also used eagle feathers as part of his religious observances.[124] State officials found the eagle feathers in his home when they were executing a search warrant in an unrelated case.[125] State officials contacted FWS and learned that Saenz did not have a permit to possess eagle feathers.[126] The officials then seized the feathers and sent them to the FWS office in Albuquerque, New Mexico.[127] The federal government criminally prosecuted Saenz for violating BGEPA, but the court dismissed the charges.[128] Saenz then filed a motion in federal court for the return of the feathers.[129] Saenz relied on BGEPA, RFRA, the Free Exercise Clause, and the Equal Protection Clause.[130] The court ordered the return of the feathers.[131] The court also refused to rule on the constitutional grounds, and based its ruling entirely on the BGEPA and RFRA.[132] The government appealed.[133]

On appeal, the Tenth Circuit consolidated the Hardman, Wilgus, and Saenz cases because of the legal and factual similarities between them.[134] The court held that the regulations regarding permits under the BGEPA

116. *Id.*
117. *Id.*
118. *Id.*
119. *Hardman*, 297 F.3d at 1119.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Hardman*, 297 F.3d at 1119.
125. *Id.* at 1119-20.
126. *Id.* at 1120.
127. *Id.*
128. *Id.*
129. *Hardman*, 297 F.3d at 1120.
130. *Id.*
131. *Id.*
132. *Id.* at 1136.
133. *Id.* at 1120.
134. *Hardman*, 297 F.3d at 1118.

substantially burdened the claimants' religious beliefs.[135] So, under the RFRA, in order for the Government to prevail, it had to show that the denial of permits to non-members was the least restrictive means of advancing a compelling interest.[136] The court held that there was a compelling government interest in preserving eagle populations.[137] The court cited *Missouri v. Holland*,[138] which said that protecting migratory birds was "a national interest of very nearly the first magnitude[.]"[139] The court also held that the Government had a compelling interest in preserving Native American culture and religion.[140] The question, then, was whether the regulatory scheme in the MBTA and the BGEPA was the least restrictive means of advancing that interest.[141]

With respect to Hardman and Wilgus, the government had the burden of building a record that the BGEPA regulatory scheme was the least restrictive means of advancing a compelling interest.[142] Since Hardman and Wilgus had not raised their RFRA claims at the trial level, the government had not had the opportunity to build such a record.[143] So, the court of appeals remanded the case to the district court to allow the government to do so.[144] On remand, the district court ruled that Hardman and Wilgus had a right to possess eagle feathers. The court found that the government failed to prove that denying eagle feathers to non-members who practiced Native American religion, was the least restrictive means of furthering a compelling government interest.[145]

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135. *Id.* at 1131.
136. *Id.* at 1126.
137. *Id.* at 1129.
138. 252 U.S. 416 (1920).
139. *Id.* at 435.
140. *Hardman*, 297 F.3d at 1129.
141. *Id.* at 1130.
142. *Id.* at 1131.
143. *Id.*
144. *Id.*
145. United States v. Wilgus, 606 F. Supp. 2d 1308 (D. Utah 2009). The district court found in favor of Hardman and Wilgus, ruling that non-members may possess eagle feathers for use in Native American religious ceremonies. The court held that the federal regulation that denies eagle feathers to non-members, is not the least restrictive means of furthering either the interest in protecting eagles, or the interest in preserving Native American cultures and religions. *Id*. at 1334-35. Concerning the protection of eagles, the eagle population had recovered to the extent that the government had recently delisted the bald eagle from the Endangered Species Act. Delisting made it harder for the government to prove that denying eagle feathers to non-members who practice Native American religion is the least restrictive means of preserving eagles. *Id*. at 1325-27. As for the protection of Native American cultures and religions, the government had submitted data purporting to show that if non-members were allowed to apply for eagle feathers the number of applications would be so great that tribe members' access to eagle feathers would be hindered. The court found the government's data unpersuasive for several reasons. First, the government derived its estimate of the number of practitioners of Native American religions from very small sample sizes, and small sample sizes are generally unreliable. Second, the government's expert witness, Darren Sherkat, projected that there were 30,590 tribe members who practiced Native American religions. But, in 2004, the National Eagle Repository

In Saenz's case, on the other hand, the parties had argued the RFRA issue in the district court, and the government had an opportunity to develop a factual record.[146] The court of appeals did not remand Saenz's case.[147] Instead, the court affirmed the district court's holding, ordering the government to return the feathers to Saenz.[148] The court of appeals agreed with the district court that the regulatory scheme, as applied to Saenz, violated RFRA, because there was no evidence that the regulatory scheme was the least restrictive means of furthering a compelling government interest.[149]

The court found that the government had not met its burden to show that the denial of permits to non-members would preserve the eagle population.[150] The government had made two arguments.[151] First, the government asserted that increasing the number of eligible permit applicants would deplete eagle populations.[152] Second, the government argued that the greater number of permit applicants would increase the wait for eagle parts, and therefore increase poaching, because (the government argued) people would poach eagle parts rather than endure a longer wait.[153]

The court rejected both arguments.[154] As to the first argument, the government had offered no statistics as to how many non-members hold eagle feathers as sacred.[155] Thus, it was not clear how many more applications for permits there would be.[156] Furthermore, the government had offered no evidence that increasing the number of eagle permit applications would place more pressure on existing eagle populations.[157] As to the second argument, the

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received only 1,822 requests for eagle parts. This indicated that the government was not able to accurately predict how many people would apply for eagle parts, if non-members were allowed to apply. Third, Dr. Sherkat, in his testimony, exhibited a "remarkable" misunderstanding of a prior court case involving eagle feathers; Dr. Sherkat's judgment was so poor that it cast doubt on the credibility of all of his conclusions. *Id*. at 1328-29. Fourth, another government expert witness admitted, "'specific hard numbers do not exist' because 'no one has studied this question using a reliable statistical methodology,'" and that, "hard numbers are elusive at best." *Id*. at 1328. So the government had not met its burden of showing that its eagle protection scheme was the least restrictive means of furthering a compelling government interest. Therefore, the court held that prosecuting Hardman and Wilgus violated RFRA, and that non-members must be allowed to apply for a permit to possess eagle parts for the practice of Native American religions. *Id*. at 1334-35.

146. *Hardman*, 297 F.3d at 1131.
147. *Id.* at 1118.
148. *Id.* at 1120.
149. *Id*. at 1132.
150. *Hardman*, 297 F.3d at 1132.
151. *Id.*
152. *Id.*
153. *Id*. at 1132-33.
154. *See id.*
155. *Hardman*, 297 F.3d at 1132.
156. *Id.*
157. *Id.*

court said that the government offered no evidence that there were enough non-members who hold eagle feathers as sacred to show that allowing these people to apply for permits would result in a longer waiting period for parts.[158] Even if there would be a longer waiting period for parts, the court said that there was no evidence that a longer waiting period would increase poaching.[159] The court also opined that allowing non-members access to eagle parts might *decrease* poaching.[160] Prior to this ruling, non-members had no legal right to possess eagle parts.[161] If they were allowed to possess eagle parts, they might be *less* tempted to poach eagles.[162]

Nor was there sufficient evidence, in the court's view, that restricting access to eagle parts to tribe members would advance the government's interest in preserving Native American culture.[163] The court again pointed out that the government had not shown any evidence that there were large numbers of people who were not tribe members, but used eagle parts in practicing Native American religions.[164] Therefore, there was no evidence that allowing non-members to apply for eagle parts would increase the length of the waiting period to the point of endangering Native American culture.[165] The court also speculated that "[a]llowing a wider variety of people to participate in Native American religion could just as easily *foster* Native American culture and religion by exposing it to a wider array of persons."[166]

Having decided the case entirely on statutory grounds under RFRA, the court found it unnecessary to consider the constitutional questions.[167] So, the court did not address whether the regulatory scheme violated the Free Exercise Clause or the Equal Protection Clause.[168]

### *B. United States v. Antoine*

Leonard Fridall Terry Antoine was a member of the Salish Indian Tribe in British Columbia.[169] The Salish Tribe is recognized in Canada, but not in the United States.[170] Antoine brought eagle feathers and parts from Canada into

158. *Id.*
159. *Id.*
160. *Hardman*, 297 F.3d at 1132-33.
161. *See id.* at 1133.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Hardman*, 297 F.3d at 1133.
166. *Id.* (emphasis added)
167. *Id.* at 1135-36.
168. *Id.* at 1136.
169. *Antoine*, 318 F.3d at 920.
170. *See id.*

the United States, and exchanged the eagle parts for money and goods.[171] Federal prosecutors charged him with violating BGEPA.[172] He was sentenced to two years in prison, and he appealed to the Ninth Circuit.[173]

The Ninth Circuit saw things differently than the Tenth Circuit. Judge Kozinski, writing for the Ninth Circuit, believed that if non-members were allowed to apply for eagle permits, tribe members would face longer delays in obtaining eagle parts.[174] Such delays would place additional burdens on the religious faith of tribe members. Judge Kozinski wrote:

> [I]n this case, the burden on religion is inescapable; the only question is whom to burden and how much. . . . The government must decide whether to distribute eagles narrowly and thus burden non-members, or distribute them broadly and exacerbate the extreme delays already faced by members. . . . Antoine isn't asking the government to pursue its eagle-protection goal without burdening religion at all; he wants it to burden other people's religion more and his religion less. This is not a viable RFRA claim; an alternative can't fairly be called 'less restrictive' if it places additional burdens on other believers.[175]

However, the court offered no evidence to support its assertion that allowing non-members to possess eagle feathers would result in a longer waiting period for tribe members. But the court assumed that it would and ruled that to burden Antoine's religion less would burden tribe members' religion more.[176] So, the court ruled against Antoine.[177]

### *C. Gibson v. Babbit*

In *Gibson*, the Eleventh Circuit also held that the government may deny the right to possess eagle feathers to non-members.[178] Harvey "Fire Bird" Gibson applied to the FWS for a permit to possess eagle feathers.[179] FWS denied his application because he was not a member of a federally recognized tribe.[180] Gibson was, however, of Native American descent.[181] Gibson brought

171. *Id.*
172. *Id.*
173. *Id.*
174. *See Antoine*, 318 F.3d at 923.
175. *Id.*
176. *Id.*
177. *Id.* at 923-24.
178. *Gibson*, 223 F.3d at 1258-59 [hereinafter Gibson II].
179. *Id.* at 1257.
180. *Id.*
181. *Gibson*, 72 F. Supp. 2d 1356, 1357 (1999), *aff'd*, 223 F.3d 1256 (11th Cir. 2000) [hereinafter Gibson I].

suit in federal district court, and the court held for the government.[182] Gibson appealed.[183]

The Eleventh Circuit found that the refusal to allow non-members permits to possess eagle feathers did place a "substantial burden" on Gibson's religion.[184] Therefore, the government needed to demonstrate that the regulatory scheme was the least restrictive means of furthering a compelling government interest.[185] The court found that the government had met its burden of proof.[186]

The government argued that three compelling interests justified the BGEPA: (1) the preservation of endangered eagle species; (2) the preservation of Native religions; and (3) the fulfillment of the United States' treaty obligations to Indian tribes.[187] The court found that fulfilling treaty obligations to Indian tribes was a compelling government interest, and that the permit regulatory scheme was the least restrictive means in furthering that interest.[188] Having decided this, the court found that it was unnecessary to rule whether preserving the eagle population or preserving Native American religions were compelling interests.[189]

At trial, the district court found:

> The right of Indians to hunt and fish in specified areas was a common provision in many treaties. This right, however, was abrogated with BGEPA's enactment. By re-establishing access to resources of religious and cultural import to federally recognized Indian tribes, the United States is demonstrating its fidelity to the rule of law among nations.[190]

Thus, the application of the "religious purposes" exemption only to tribe members *was* in furtherance of the fulfillment of treaty obligations to Native Americans, which was a compelling government interest.[191] The Eleventh Circuit agreed and held that the regulatory scheme was the least restrictive means of furthering that interest because of the long delays that tribe members faced in obtaining eagle parts.[192] The appellate court noted that "the record

182. *Id.* at 1362.
183. *Gibson II*, 223 F.3d at 1258.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Gibson II*, 223 F.3d at 1258.
189. *Id.*
190. *Gibson I*, 72 F. Supp. 2d at 1360-61.
191. *Id.* at 1360.
192. *Gibson II*, 223 F.3d at 1258.

indicates, and the district court found, that there is a sizable pool of individuals who are similarly situated to Gibson."[193] So, if the government had to allow non-members to possess eagle feathers for religious purposes, more individuals would apply. Consequently, the waiting period for tribe members who wanted to possess eagle parts would increase, "thereby vitiating the governments [sic] efforts to fulfill its treaty obligations to federally recognized Indian tribes."[194]

In *Hardman*, the government also argued that allowing only tribe members to possess eagle feathers was the least restrictive means of furthering the compelling interest of fulfilling treaty obligations to tribes.[195] But, the Tenth Circuit in *Hardman*, in contrast to the Eleventh Circuit in *Gibson*, held that "[t]his argument lacks merit."[196] The Tenth Circuit observed that the BGEPA abrogated Indians' rights to hunt, not their right to practice their religion.[197] The exception in the BGEPA was "for the religious purposes of Indian tribes."[198] So, the government could not show that the fulfillment of treaty obligations was a compelling interest that justified limiting the exception to tribe members.[199]

## III. DENYING EAGLE PARTS TO INDIVIDUALS WHO ARE NOT MEMBERS OF FEDERALLY RECOGNIZED TRIBES VIOLATES THE RFRA.

This section examines the areas of disagreement among the three federal appellate cases applying the RFRA to the right of non-members to possess eagle parts and shows why *Hardman* was correct, and *Gibson* and *Antoine* were wrong.

All three cases agree on the following holdings: Denying eagle parts to non-members substantially burdens these individuals' exercise of religion.[200] Therefore, the regulatory scheme must be the least restrictive means of furthering a compelling governmental interest, if the regulatory scheme is to be upheld.[201] In these cases, the government met its burden of proving that it had a compelling interest.[202]

All three cases disagree on the following issues: What is the

193. *Id*.

194. *Id*.

195. *See Hardman*, 297 F.3d at 1127-29.

196. *Id.* at 1129 n.19.

197. *Id.*

198. § 668a.

199. *See Hardman*, 297 F.3d at 1129 n.19.

200. *Antoine,* 318 F.3d at 923; *Hardman,* 297 F.3d at 1126; *Gibson II,* 223 F.3d at 1258.

201. *Antoine*, 318 F.3d 920-21, 923 (citing § 2000bb-1(a)-(b) (2000)); *Hardman*, 297 F.3d at 1126-27 (citing § 2000bb-1(a)-(b)); *Gibson II*, 223 F.3d at 1258 (citing § 2000bb-1).

202. *Antoine*, 318 F.3d at 921 (citing United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997)); *Hardman*, 297 F.3d at 1128-29; *Gibson II*, 223 F.3d at 1258.

compelling governmental interest?[203] Furthermore, is the regulatory scheme, which denies eagle parts to individuals who are not tribe members, the least restrictive means of furthering a compelling governmental interest?[204]

### *A. What is the Compelling Governmental Interest?*

In *Hardman*, the court believed that the government had a compelling interest in protecting eagles and in preserving Native American culture, but did not accept the argument that the government had a compelling interest in fulfilling treaty obligations to Native American tribes.[205] In *Gibson*, the court held that the government had a compelling interest in fulfilling treaty obligations to Indian tribes, but refused to address whether there was a compelling interest in protecting eagles or preserving Native American culture.[206] *Antoine* held that there was a compelling governmental interest in protecting eagles but did not address whether there was a compelling interest in preserving Native culture or in fulfilling treaty obligations.[207]

*Hardman* was clearly correct in its holding that the government did not have a compelling interest in fulfilling treaty obligations to Indian tribes. First, the Supreme Court has held that the BGEPA abrogated Native American treaty rights to hunt bald and golden eagles.[208] In *Gibson*, the appellate court never mentioned that the BGEPA abrogated these treaty rights.[209] In *Hardman*, the government argued that the exception to the BGEPA, granting tribe members the right to possess eagle feathers for religious purposes, replaced the treaty rights.[210] The court did not agree: the court noted that the treaty rights gave Indians the right to hunt bald and golden eagles, not to use them for religious purposes.[211] The court was correct. If a treaty gives Indians the right to hunt eagles, a rule that allows Indians to possess eagles for religious purposes does not replace the treaty. A rule that allows Indians to engage in one type of activity with respect to eagles does not replace a treaty that allowed Indians to engage in another type of activity with respect to eagles. The only similarity between the rule and the treaty was the species of bird involved. A regulatory scheme cannot be said to "replace" a treaty obligation if the regulatory scheme grants different rights than the treaty obligation.

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203. *See Antoine*, 318 F.3d at 921; *Hardman*, 297 F.3d at 1128-29; *Gibson II*, 223 F.3d at 1258.
204. *See Antoine*, 318 F.3d at 923-24; *Hardman*, 297 F.3d at 1132; *Gibson II*, 223 F.3d at 1258.
205. *See Hardman*, 297 F.3d at 1127-29.
206. *Gibson II*, 223 F.3d at 1258.
207. *Antoine*, 318 F.3d 924.
208. *Hardman*, 297 F.3d at 1129 n.19 (citing United States v. Dion, 476 U.S. 734, 745 (1986)).
209. *See Gibson II*, 223 F.3d 1256.
210. *Hardman*, 297 F.3d at 1129 n.19; *see also* § 668a; 50 C.F.R. § 22.22.
211. *See Hardman*, 297 F.3d at 1129 n.19.

A further problem with *Gibson* is that not all federally recognized Indian tribes have made treaties with the federal government.[212] Moreover, not all of the treaties between Indian tribes and the government create a right to use eagle parts.[213] But, the exception to the BGEPA applies to members of *all* federally recognized tribes.[214] A regulatory exception, that grants all Indian tribes the right to use eagle parts, cannot be said to replace treaty obligations to Indian tribes if some of those tribes have not signed treaties creating a right to use eagle parts. It is futile for the government to claim that an exception that applies to all Indian tribes is in furtherance of fulfilling treaty obligations to those tribes, when some of those tribes have not signed treaties protecting the right that the exception is designed to protect.

### *B. Is the Regulatory Scheme, Which Denies Eagle Parts to Individuals Who Are Not Tribe members, the Least Restrictive Means of Furthering a Compelling Governmental Interest?*

*Hardman* held that the regulatory scheme was not the least restrictive means of protecting the eagle population or preserving Native American culture.[215] *Antoine* held that the regulatory scheme was the least restrictive means of protecting the eagle population,[216] and *Gibson* held that the regulatory scheme was the least restrictive means of fulfilling treaty obligations to Indian tribes.[217]

*Hardman*'s reasoning was better. The government argued that the regulations served a compelling interest in protecting eagles, because increasing the number of permit applicants would endanger the eagle population and would increase the wait for parts, thereby increasing poaching.[218] *Hardman* pointed out that the government had offered no data on how many people are not tribe members, but hold eagle feathers as sacred.[219] The government had presented an estimate of the number of people who are of Native American ancestry but were not members of federally recognized tribes.[220] The Court responded:

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212. Kevin J. Worthen, *Eagle Feathers and Equality: Lessons on Religious Exceptions from the Native American Experience*, 76 U. COLO. L. REV. 989, 996 (2005).

213. *Id.*

214. 50 C.F.R. § 22.22.

215. *See Hardman*, 297 F.3d at 1132-33.

216. *See Antoine*, 318 F.3d at 923-24.

217. *See Gibson II*, 223 F.3d at 1258.

218. *Hardman*, 297 F.3d at 1132.

219. *Id.*

220. *Id.*

> [T]he data provided are largely irrelevant. The relevant comparison is between members of federally recognized tribes *who hold the eagle feather as sacred* and other persons *who hold a sincere religious belief that the eagle feather is sacred*. The government's estimation process is akin to attempting to extrapolate the number of practicing Catholics in the country by identifying the number of Irish Americans. We will not engage in such extrapolation here.[221]

Since the government gave no evidence regarding how many new applicants there would be if the government expanded the applicant pool to include non-members, and gave no evidence that allowing these non-members to possess eagle parts for religious purposes would endanger the eagle population. For the same reason, there was also no evidence that allowing non-members access to eagle feathers would increase the wait for eagle parts. Moreover, even if allowing non-members to apply for eagle parts *would* increase the length of the waiting period, there was no evidence that an increased waiting period would lead to increased poaching.[222]

The government also asserted that it had a compelling interest in preserving Native culture because an increased wait for parts would threaten Native American culture.[223] The court found this argument similarly dubious for the same reason that the court doubted the government's argument about protecting the eagle population.[224] Since the government did not even hazard a guess regarding how many non-members hold eagle feathers as sacred, it "failed to show that broader eligibility would result in an increased wait substantial enough to endanger Native American cultures."[225]

*Antoine*'s reasoning is inferior to *Hardman* in this respect. In *Antoine*, the court stated: "Although the record contains no data on the number of nonmembers who would seek permits if eligible, the consequences of extending eligibility are predictable from the nature of the repository program."[226] The court went on to say that the expansion of the religious exception to include non-members would "burden" the religious practices of tribe members because tribe members would face a longer waiting period for eagle parts.[227] The court made this prediction even though it had *no* data to support its claim. If the court had "no data on the number of nonmembers who would seek permits if

221. *Id*. (emphasis added).
222. *Id.* at 1132-33.
223. *Hardman*, 297 F.3d at 1128.
224. *Id.* at 1133
225. *Id.*
226. *Antoine*, 318 F.3d at 923.
227. *See id.*

eligible,"[228] how could the court possibly have known that allowing non-members to seek permits would increase the waiting period? The court then reasoned that since allowing non-members to apply for eagle feathers would burden the religious practices of tribe members, allowing non-members to apply for eagle feathers would *not* be a "less restrictive" alternative than prohibiting non-members from applying for eagle feathers.[229] As Professor Kevin Worthen points out, this reasoning is seriously flawed:

> Although the Ninth Circuit is surely correct that it is difficult to determine in a judicial proceeding "the relative burdens a policy inflicts on religious adherents," RFRA arguably imposes just such a duty on the courts, at least in zero-sum situations. Not every burden on a religion triggers RFRA protection. It is only when the burden is "substantial" that the statute comes into play. Thus, if a particular government action substantially burdens one religious practice, while incidentally, though not substantially, burdening another, and if adoption of a second alternative could decrease the harm to the first religion below the substantial burden threshold, without increasing it above that threshold for the other religion, RFRA would seem to require that the government adopt the second alternative in order to minimize the impact on one religion, though it comes at the expense of the other.[230]

In this way, *Antoine*'s reasoning fails. The court asserted that allowing non-members to apply for eagle permits would lengthen the waiting period for tribe members and thus burden tribe members' religious practices.[231] But, the court provided no data whatsoever to support this assertion. The court even admits that it has no data on the number of non-members who would apply for permits if they were eligible.[232] Thus, in making its decision, the court relied on a belief for which the court considered no evidence.[233]

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228. *Id.*

229. *Id.*

230. Worthen, *supra* note 212, at 1000 (quoting *Antoine*, 318 F.3d at 924).

231. *See Antoine*, 318 F.3d at 923.

232. *Id.*

233. On June 27, 2008, the Ninth Circuit upheld the continuing vitality of *Antoine*. In *Vasquez-Ramos*, the defendants (non-members who had possessed eagle parts without a permit) argued that the court should overrule *Antoine* because the Interior Department had removed the bald eagle from the Endangered Species List in 2007, and because the Supreme Court's ruling in *O Centro* was irreconcilable with *Antoine*. *Vazquez-Ramos*, 531 F.3d at 992. The Ninth Circuit disagreed, and held that even though the bald eagle was no longer on the Endangered Species List, the government still had a compelling interest in preserving the eagle population. *Id.* at 991. The court held that granting permits only to tribe members was still the least restrictive means of preserving eagles, because granting permits to non-members would increase the waiting period for tribe members, thereby burdening tribe members' religion. *Id.* at 993. The Ninth Circuit held that

Moreover, even if granting permits to non-members would increase the waiting period for tribe members and burden tribe members' religion, it does not necessarily follow that there would be anything statutorily wrong with such a burden. As Professor Worthen observes, a burden violates RFRA only if the burden is "substantial."[234] So, if not allowing non-members to apply for permits would place a substantial burden on their religion, while allowing non-members to apply for permits would place an insubstantial burden on tribe members' religion, then RFRA would require the government to allow non-members to apply for permits for eagle parts for religious purposes. But, the court did not come to this conclusion.

## IV. CONCLUSION

*Verner* and *Yoder* make clear that a law that substantially burdens the free exercise of religion can be constitutional only if a compelling government interest justifies the law.[235] In passing the RFRA, Congress ensured that even a neutral, generally applicable law that substantially burdens religious exercise will pass muster only if the law is the least restrictive means of furthering a compelling government interest.[236] Even though the RFRA no longer applies to state governments, the Supreme Court explicitly declared that the RFRA still applies to the federal government.[237] Because the MBTA,[238] BGEPA,[239] and the regulatory exceptions for Indian tribe members[240] are federal laws, the RFRA prohibits the application of these statutes and regulations in a manner that, without compelling justification, substantially burdens exercise of religion.[241]

While *Hardman* correctly applies RFRA to the government's eagle protection scheme, *Gibson* and *Antoine* do not. *Hardman* correctly holds that denying eagle feathers to non-members is not the least restrictive means of

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*Antoine* did not violate *O Centro* because in *O Centro*, allowing UDV members to smoke *hoasca* did not burden anyone else's religion, whereas granting eagle permits to non-members would burden Indian tribe members' religion. *Vasquez-Ramos*, 531 F.3d at 991-92. The Ninth Circuit's reasoning in *Vasquez-Ramos* suffers from the same deficiency as its reasoning in *Antoine*: nowhere in its opinion does the court give any data as to the number of non-members who would apply for permits if they were eligible. Thus, the court cannot possibly know that allowing non-members to receive eagle permits would increase the waiting period for members, and if so, by how much. The court has no data to support its assertion that giving eagle permits to non-members would burden the religion of Indian tribe members.

234. Worthen, *supra* note 212, at 1000 (quoting § 2000bb-1(a)).
235. *See Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 215.
236. § 2000bb-1(a)-(b).
237. *O Centro*, 546 U.S. at 424 n.1.
238. 16 U.S.C. § 703.
239. § 668-668a.
240. 50 C.F.R. § 22.22.
241. *See* § 2000bb-1(a)-(b).

advancing a compelling government interest.[242] *Antoine* simply accepts the government's argument that allowing only tribe members to possess eagle feathers is the least restrictive means of protecting the eagle population.[243] *Antoine* accepts this argument even though the government offered no data supporting its conclusion.[244] *Gibson* asserts that limiting the possession of eagle feathers to tribe members serves the government's compelling interest in fulfilling treaty obligations to tribes.[245] *Gibson* makes this ruling even though many of the tribe members who benefit from the regulatory exception are members of tribes to which the government has no treaty obligations.[246] Moreover, the treaty obligations the government identifies in this case protected hunting rights, not religious freedom.[247]

The courts should adopt the holding in *Hardman* because to do so would result in uniformity among the circuits in applying RFRA to the possession of eagle parts. Most importantly, to adopt *Hardman* would follow the clear mandate of Congress and the Supreme Court to guarantee religious freedom for worshipers of all faiths.

242. *Hardman*, 297 F.3d at 1134-35.
243. *Antoine*, 318 F.3d at 922-23 (citing *Gibson*, 223 F.3d at 1258).
244. *Id.* at 923.
245. *Gibson II*, 223 F.3d at 1258.
246. Worthen, *supra* note 212, at 996.
247. *Hardman*, 297 F.3d at 1129 n.19.