

CASE NO. 06-8093

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellant,)
)
v.)
)
WINSLOW FRIDAY,)
)
Defendant-Appellee.)

On Appeal from the United States District Court
for the District of Colorado
The Honorable William F. Downes
District Judge
D.C. No. 2:05-cr-00260-WFD

APPELLEE'S SUPPLEMENTAL ANSWER BRIEF

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Oral Argument is set for December 17, 2007.

DIGITAL SUBMISSION SENT VIA EMAIL

TABLE OF CONTENTS

	Page
CASES, STATUTES, AND OTHER AUTHORITIES CITED	iv
INTRODUCTION	1
The Permit	2
Standing	4
The Adequacy of the Record and Standard of Review	4
The Recovery of the Bald Eagle	6
The Religious Freedom Restoration Act	8
RFRA's Prima Facie Case	11
1. "Exercise of Religion": The Sun Dance	11
2. The Inadequacy of the National Eagle Repository	16
3. "Burden"	17
"Compelling Government Interest" and "Least Restrictive Means"	21
The Government's Quantitative Justification for the Permit Requirement	24
1. The Demographic Evidence	24
2. The Number of Pending Applications at the Repository	27

The Non-Empirical Justifications for the Permit Requirement	31
Less Restrictive Means of Protecting Eagles	35
CONCLUSION	39
CERTIFICATE OF COMPLIANCE	40
CERTIFICATE OF DIGITAL SUBMISSION	41
CERTIFICATE OF SERVICE	42

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Bowen v. Roy</i> , 476 U.S. 693, 707 (1986)	10
<i>City of Boerne v. Flores</i> , 521 U.S. 507, 534 (1997)	22
<i>Clark v. Jeter</i> , 486 U.S. 456, 461 (1988)	9
<i>Dang v. UNUM Life Ins. Co. of Am.</i> , 175 F.3d 1186, 1189 (10 th Cir. 1999)	6
<i>Employment Division v. Smith</i> , 494 U.S. 872 (1990)	9-11
<i>Goldman v. Weinberger</i> , 475 U.S. 503, 506-07 (1986)	10
<i>Gonzales v. O Centro</i> , 418 U.S. at 436	35
<i>Gonzales v. O Centro</i> , 546 U.S. 418 (2006)	32
<i>Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal</i> , 546 U.S. 418, 428 (2006)	11
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494, 498 n.5 (1977)	4

Navajo Nation v. United States Forest Service,
 479 F.3d 1024, 1033 (9th Cir. 2007),
 reh’g en banc granted by __F.3d__,
 2007 WL 3010747 (9th Cir. Oct 17, 2007) 10

O Centro v. Ashcroft,
 389 F.3d 973, 1026 (10th Cir. 2004) 32, 34, 35

O’Lone v. Estate of Shabazz,
 482 U.S. 342, 349 (1987) 10

Rohrbaugh v. Celotex Corp.,
 53 F.3d 1181, 1184 (10th Cir.1995) 20

Sherbert v. Verner 9, 11

United States v. Abeyta,
 632 F.Supp. 1301, 1304 (D.N.M. 1986) 28

United States v. Hardman,
 297 F.3d 1116, 1126-27 (10th Cir. 2002) 18-26, 30, 36

United States v. Sandoval,
 29 F.3d 537, 542 n. 6 (10th Cir. 1994) 5

Wisconsin v. Yoder,
 406 U.S. 205, 221 (1972) 9, 35

STATUTES

16 U.S.C. § 668a 1

42 U.S.C. § 2000bb 9

42 U.S.C. § 2000bb(a) 9

42 U.S.C. § 2000bb(a) & § 2(b) 9

42 U.S.C. § 2000bb(b) 10

42 U.S.C. § 2000bb-1(b) 22

42 U.S.C. § 2000cc-5(7)(A) 10

42 U.S.C.A. § 2000cc-5 11

Pub.L. No. 103-141, § 5, 107 Stat. 1488 at 1489 9

50 C.F.R. § 13.21(e)(2) 3

50 C.F.R. § 22.22 1

50 C.F.R. § 22.22(a) 3

50 C.F.R. § 22.22(c) 3

50 C.F.R. § 22.22(c)(2) 3

OTHER

U.S. Dept. Of Justice press release, "Electric Utility Sentenced for Killing Eagles and Hawks: Criminal Case Is First Of Its Kind Under Federal Wildlife Law" 38

U.S. Fish and Wilflife press release, "Bald Eagle Soars Off Endangered Species List" 8

Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Species, 71 Fed. Reg. 8238 6

George Dorsey, "The Arapaho Sun Dance," 2, 22 (Univ. Chicago
1903) 12-15

National Bald Eagle Management Guidelines, published by U.S.
Fish and Wildlife Services 7

Virginia Cole Trenholm, "The Arapahoes, Our People,"
307-08 (Univ. Okla. 1970) 15

INTRODUCTION

This is a supplemental answer brief. It is not intended to withdraw or back away from the position asserted in the principal brief. It offers instead an alternate ground on which to affirm the district court.

The alternate ground for affirmance is the government's unlawful continuance – in light of the bald eagle's recovery – of a restrictive permit system burdening the ability of enrolled tribal members from acquiring live, adult bald eagles for purposes of practicing their religion.

To be precise, it is a challenge to the so-called "Indian-tribes" exception to the Bald and Golden Eagle Protection Act. Although the Act generally prohibits the "taking" of eagles, it authorizes the government to issue permits to federally recognized Indians to take live eagles for religious purposes. *See* 16 U.S.C. § 668a. The rules governing the permit, including the conditions to which the applicant must submit (*see below*) are set out at 50 C.F.R. § 22.22. By its terms, the regulation compels enrolled tribal members to apply for and await the receipt of a permit, issued at the discretion of the government, before they can take a live eagle for sacramental use.

The permitting requirement violates the Religious Freedom Restoration Act. It substantially burdens Mr. Friday's exercise of religion, and the government has not proven that its continued maintenance remains the least restrictive means of advancing its stated interest in protecting the bald eagle, in view of what even it describes as the "dramatic resurgence" of the bird.

For reasons explained in more detail below, this facial attack challenges only the imposition of the permit regime with respect to the taking of an adult, mature bald eagle. It does not disturb the rule requiring a permit to take an immature or fledgling eagle.

The Permit

In order to receive a live-take permit, a tribal member must send a written request to the Fish and Wildlife Service. The request must identify the type and number of eagles proposed to be taken; the area from which the applicant proposes to take the bird; the name of the applicant's tribe and the religious ceremony for which the eagle is required. The applicant must also attach a certification signed by an authorized tribal official

attesting that the applicant is an enrolled member of the tribe. 50 C.F.R. § 22.22(a).

After receiving the application, the Fish and Wildlife Service “will conduct an investigation,” and it “will only issue a permit” if “we determine that the taking . . . is compatible with the preservation of the bald and golden eagle.” *Id.* at § 22.22(c). The Service will also consider the “*bona fide[s]*” of the religious ceremony for which the bird is necessary, as well as whether the applicant “is authorized to participate” in it. *Id.* at § 22.22(c)(2).

In addition, there are certain conditions attached to the permit. The applicants must, if requested, submit “reports or inventories, including photographs, of eagle feathers or parts on hand.” 50 C.F.R. § 22.22(b)(2). They must also “consent[] to and shall allow entry by agents or employees of the Service upon premises where permitted activity is conducted at any reasonable hour.” 50 C.F.R. § 13.21(e)(2).

The Northern Arapaho Tribe, to which Mr. Friday belongs, consider their religious practices, in particular the Sun Dance, deeply private, and

are reluctant to disclose information about the ceremony to outsiders. *See* Aplee. Supp. App. at 104.¹

Standing

Mr. Friday is charged with violating the Eagle Act by “taking” a bald eagle without a lawful permit. Because his alternate ground for affirmance asserts the invalidity of the statutory and regulatory scheme under which he is being prosecuted, he is excused for failing to have applied for the permit in the first instance. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.5 (1977). The government does not disagree. *See* Opening Br. at 21 & n.4.

The Adequacy of the Record and Standard of Review

There can be no question about the adequacy of the record for purposes of reaching the alternate ground for affirmance. In the district court the government vigorously defended its maintenance of the permit system against the facial attack launched here. It had no choice. The defense made clear that “our challenge . . . is both to the face of . . . the

¹The Appellee’s Supplemental Appendix comprises the full transcript of the evidentiary hearing held in the district court. The government’s appendix contains only excerpts of the hearing.

Bald Eagle Protection Act as well as to its application by the Fish & Wildlife Service.” Aplee. Supp. App. at 14.

In response to this two-pronged attack, prosecutors presented the testimony of several witnesses, including an expert on statistics and demographics, as well as its own raptor biologists and game wardens, who constructed what the government boasts as a “record show[ing]” that the permit requirement advances at least two compelling interests. Opening Br. at 43; *see also* 44-45. The Opening Brief’s “Statement of Issue” is framed squarely in response to a facial attack: “Whether the Eagle Act’s permitting process violates the Religious Freedom Restoration Act.” *Id.* at 1. And an entire subsection of it is captioned to directly oppose the position this brief takes: “[T]he record shows that the Eagle Act’s permitting process is the least restrictive means of advancing the government’s compelling interests.” Opening Br. at 43.

Consequently, the government cannot deny “there is a record sufficient to permit conclusions of law.” *United States v. Sandoval*, 29 F.3d 537, 542 n. 6 (10th Cir. 1994). This court can affirm on the ground asserted here. *Id.*

It is unclear whether the district court reached the facial validity of the permit scheme, stating only that “some regulation of the taking of eagles is necessary.” Aplt. App. at 195. What is clear, however, is that the court did not need to address the challenge, because it dismissed Mr. Friday’s information on the strength of his as-applied challenge. The manner in which the government administers the permit program, ruled the court, violated RFRA. Even if the court did reach and reject Mr. Friday’s facial attack, no deference to its purely legal ruling is necessary. *Dang v. UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999).

The Recovery of the Bald Eagle

The “best available scientific” data reveal that “the bald eagle has made a dramatic resurgence.” See “Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Species,” 71 Fed. Reg. 8238, 8238 & 8249 (proposed Feb. 16, 2006) (“Proposed Rule”). “[O]ur National symbol has recovered.” *Id.* at 8249. As part of its successful effort to restore the bird to its former range, the government established five “recovery” regions in the lower 48 states. In each, “we have [] seen substantial increases in eagle

numbers.” *Id.* In the Pacific Recovery Region, which includes Wyoming, where Mr. Friday took the eagle, the recovery goals were satisfied in 1995, and since then “the number of nesting pairs . . . has continued to increase.” *Id.* at 8242. There is a “significant eagle population” in the “Greater Yellowstone area.” See “National Bald Eagle Management Guidelines” at 3.²

²This document, authored by the U.S. Fish and Wildlife Service, is available on-line. See “National Bald Eagle Management Guidelines,” www.fws.gov/migratorybirds/issues/BaldEagle/Mgmt.Guidelines.2006.pdf (visited November 8, 2007).

Among other things, it reveals the shallowness of a claim echoing repeatedly in the government’s brief, that Mr. Friday “shot and killed one of only two nesting bald eagles on the Wind River Reservation.” Opening Br. at 1-2. Though the claim recurs at least six more times in the opening brief (and a few more in the reply brief), the government never once explains what geographic relevance, if any, the Wind River Reservation carries. Presumably, Mr. Friday also shot one of the only two eagles nesting in the particular tree in which he found the birds, but that doesn’t make the tree any more relevant than the reservation. Fortunately, we need not guess as to what the relevant geographic area is. The government, as the above document describes, established five “recovery” regions in the continental United States, of which one, the Pacific, includes the Wind River Reservation. In each recovery region, by the way, the population of eagles is robust.

Besides, given its aridity, one would not expect to find significant populations of bald eagles on the Wind River Reservation. “Bald eagles generally nest near coastlines, rivers, large lakes or streams that support an adequate food supply.” National Bald Eagle Management Guidelines at 4.

The data supporting these conclusions, the government assures, are “comprehensive,” and “clearly demonstrate an increasing population trend.” Proposed Rule at 8244. There is as well a “tremendous distribution of bald eagles throughout the entire United States.” *Id.* at 8246. At the same time there is “no current or anticipated future overutilization of the bald eagle.” *Id.* at 8246. Eight months after Judge Downes dismissed Mr. Friday’s case, the government formally removed the bald eagle from the list of endangered species, doing so without relying on data beyond what was presented to the district court, which took judicial notice of the published proposal to delist the bird. Aplee. Supp. App. at 355; for delisting *see* government press release titled “Bald Eagle Soars Off Endangered Species List,” appended to Brief of Amicus Curiae The Northern Arapaho Tribe.

The Religious Freedom Restoration Act

By this point in the briefing, the RFRA standard is familiar. The federal government may not “substantially burden a person’s exercise of religion” unless it “demonstrates” that the burden: (1) furthers a

None of these are found on Wind River. *See* Aplee. Supp. App. at 418.

compelling government interest; and (2) is the least restrictive means of doing so. 42 U.S.C. § 2000bb. Less clear from the briefing is the intended breadth of the statute.

The passage of RFRA was prompted by a particular Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872 (1990). In crafting RFRA, Congress made a formal finding, inserted into the statute itself, that *Smith* “virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion.” 42 U.S.C. § 2000bb(a). It went on to declare its intent “to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* [citations omitted] and to guarantee its application in all cases where free exercise of religion is substantially burdened.” *Id.* at § 2000bb(b). Congress well knew that any government action reviewed under the compelling interest test receives the “most exacting scrutiny” from the courts. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988).

The initial version of RFRA, adopted in 1993, defined “exercise of religion” as “exercise of religion under the First Amendment to the Constitution.” Pub.L. No. 103-141, § 5, 107 Stat. 1488 at 1489. This

constitution-based definition was broadened seven years later, when Congress amended the statute to state that “exercise of religion” includes “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A).

The statutory amendment means that “RFRA now protects a broader range of religious conduct than the Supreme Court’s interpretation of ‘exercise of religion’ under the First Amendment.” *Navajo Nation v. United States Forest Service*, 479 F.3d 1024, 1033 (9th Cir. 2007), reh’g *en banc* granted by __F.3d__, 2007 WL 3010747 (9th Cir. Oct 17, 2007). The statute’s breadth is further illustrated by its application “in all cases” where the free exercise of religion is substantially burdened. 42 U.S.C. § 2000bb(b). Before *Smith*, the Supreme Court exempted entire categories of free exercise cases from the demands of the compelling interest test, including cases challenging (1) prison regulations, *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987); (2) welfare programs, *Bowen v. Roy*, 476 U.S. 693, 707 (1986); and (3) military regulations, *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986). *Smith* itself suggested the test did not apply

beyond the narrow context of *Sherbert*, a case involving a denial of state unemployment benefits. *Employment Division v. Smith*, 494 U.S. at 883.

By enacting RFRA, Congress converted the compelling interest test into a statutory mandate. Now, if the government substantially burdens religion there is no escape from the rigors of the compelling interest test.

RFRA's Prima Facie Case

Before Mr. Friday can compel the government to present proof sufficient to satisfy the compelling interest test, RFRA imposes a threshold requirement on him. He must show that the permit required by the challenged rule (1) substantially burdens (2) a sincere (3) religious exercise. *See Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 428 (2006).

He meets this threshold, not least because the statute protects him in “any exercise of religion, whether or not compelled by, or central to” his religious beliefs. 42 U.S.C.A. § 2000cc-5.

1. “Exercise of Religion”: The Sun Dance

For many tribes of Plains Indians through the end of the 19th Century, the Sun Dance was the major communal religious ceremony. Though

details of the event differed in various groups, certain elements were common to most tribal traditions. Generally, the annual ceremony was held in late spring or early summer, when different bands of the various tribes gathered following the dispersal that customarily took place in winter. George Dorsey, "The Arapaho Sun Dance," 2, 22 (Univ. Chicago 1903). Today the Northern Arapaho still perform the Sun Dance, a ritual of sacrifice and renewal that one elderly tribal member called "[our] highest form of worship." Aplee. Supp. App. at 113; *see also* 99-100.

In the Arapaho tradition, each Sun Dance has a sponsor, usually the main dancer, who bears the expenses of the ceremony. *Id.* at 138, 172-74. The event ordinarily involves about a week or more of activity consisting of an early private period, during which preparations are made and instruction and prayer take place, followed by the public phase of dancing. *Id.* at 60-66, 86; Dorsey, *supra*, at 33-36, 85-89. The sponsor is expected to obtain an adult eagle. "That's a protocol that's been handed down from generation to generation, and it's been with us from the beginning of time." Aplee. Supp. App. at 139. The Arapaho tribe celebrates a single Sun Dance each year, for which a single eagle is sacrificed. *Id.* at 56.

Construction of the Sun Dance lodge is accompanied by complex rituals in which a cottonwood tree is cut for use as a center pole, with the dance enclosure or lodge erected around it. Dorsey, *supra*, at 80-81. Dancers fast and abstain from drinking during the three or four days of dancing. As songs are chanted by drummers near the lodge entrance, each participant moves rhythmically back and forth from the periphery of the lodge to the center pole. The intricately painted dancers continuously blow on eagle-bone whistles, fixing their eyes on the top of the center pole, where the tail fan of the eagle is affixed. *Id.* at 130; Aplee. Supp. App. at 34; 108-14. Periods of rest alternate with intervals of dancing. At the end of the Sun Dance, purification rites are held and the participants may drink water and break their fast. The lodge is then abandoned, its components remaining briefly as a reminder of the ceremony before returning to the elements. Dorsey, *supra*, at 157.

The Sun Dance is performed in compliance with a vow, generally made in the winter. The vow is in the nature of a pledge, that the speaker will erect the lodge and perform the ceremony properly if the Creator will grant him his wish in regard to some particular matter. *Id.* at 5. The

annual ritual reaffirms tribal membership and cultural identity and ensures good fortune for another year. *See* Aplee. Supp. App. at 102. Not participating in the ceremony in some fashion is almost unimaginable for many Arapaho. Asked "[w]hat would happen if you didn't participate?," one elderly Arapaho said "I really wouldn't know . . . nobody wouldn't." *Id.* at 24.

The eagle plays a major role in the Sun Dance. Its tail fan, as indicated, is mounted at the top of the center pole, representing its nest. Dorsey, *supra*, at 114. Its feathers are attached to the lodge, and small whistles are fashioned from its wing bones. Aplee. Supp. App. at 29-34. Endowed by the Creator with special powers, the bird serves as a means of communication, carrying the wishes and prayers of the Arapaho to the Creator, and so it must be handled "with great care and dignity." *Id.* at 104-05, 107. The eagle "flies high and [] it can see long ways." Aplee. Supp. App. at 104.

As Mr. Friday and other tribal members testified (albeit reluctantly), the Sun Dance cannot be performed without the sacrifice of a whole bird, whose death and "parting," as the process of separating the required parts

of the bird is called, is invested with ritual and meaning. Aplee. Supp. App. at 87, 120, 204-05. "There's a ceremony . . . that goes along with the sacrifice," said a revered tribal member. *Id.* at 66. Several Arapaho stressed the importance of taking an eagle from the wild. The feathers of the sacrificed bird "should be clean. They shouldn't come from anything that's spoiled or contaminated or ruined." Aplee. Supp. App. at 161; *see also id.* at 35-37, 65-66.

The government has a long history of suppressing the Sun Dance. Virginia Cole Trenholm, "The Arapahoes, Our People," 307-08 (Univ. Okla. 1970). Historically, dancers underwent ritualistic tortures during the ceremony, like piercing and flesh cutting, rites the Plains Indians believed made them invulnerable in war. Dorsey, *supra*, at 179. Indian agents who arrived in the second half of the 19th Century banned these sacraments and at times prohibited the ceremony completely. Trenholm, *supra*, at 307-09.

Mr. Friday testified that one day he spotted an eagle and took it, motivated both by his personal obligation to dance in the ceremony as well as his familial obligation to assist a cousin-brother sponsoring that year's dance. Aplee. Supp. App. at 196-97. He gave the bird's tail fan to his

cousin-brother to mount at the top of the center pole, and he himself wore one of its wings, several plumes, and a whistle made from a wing bone as he danced during the ceremony. *Id.* at 198.

The district court found that “the un rebutted evidence” showed Mr. Friday’s “Native American religious beliefs are sincerely held and his taking of the eagle was for religious purposes.” *Aplt. App.* at 192 n.2.³

2. The Inadequacy of the National Eagle Repository

Eagle carcasses received from the National Eagle Repository are generally unacceptable for use in the Sun Dance. The Repository is the government warehouse near Denver where dead eagles from across the country are collected, processed, and distributed to a long queue of enrolled tribal members. Deaths occur by means of electrocution on power lines, disease, and collisions with cars or trucks. *Aplt. App.* at 188-89.

³The Northern Arapaho Tribe has expressed concern over this brief’s reliance on scholarly materials, written by outsiders, describing the Sun Dance. It is a valid concern. But given the importance of conveying to this court the nature of the Sun Dance, and given as well the reluctance of tribal members to divulge details of the ceremony, the use of outside sources, on balance, is appropriate, at least in the eyes of Mr. Friday’s appellate counsel. Admittedly, those too are the eyes of an outsider.

“Most of the time,” admitted the Director of the Repository, the eagles are “very decomposed.” Aplee. Supp. App. at 228.⁴

The district court found that “there is a significant waiting period for obtaining bald eagles . . . from the Repository” and that the tribal members’ stated need for “clean” eagles as “appropriate Sun Dance offering[s] to God” stemmed from sincerely held religious beliefs. *See* Aplt. App. at 192-94.

3. “Burden”

The restriction on taking live, adult eagles burdens the Arapaho people and Mr. Friday particularly in a concrete fashion. It forces them to seek the approval of the government before they can perform their most important religious ceremony. That ceremony is not just ritual. Engaging in its ancient customs and practices is part of what it means to be an Arapaho person. If the Arapaho people can’t perform the ceremony as their tradition defines it, their lives, at least as a distinct tribal people, will cease to exist.

⁴The Repository’s yield of damaged, spoiled, and burned eagle parts, to say nothing of the delay in obtaining them, is described in some detail in Mr. Friday’s first brief. Aplee’s Br. at 5-10.

And because the Sun Dance requires the sacrifice of a “clean” bird, salvaged parts from the Repository are too contaminated – both physically and spiritually – for sacramental use, and the time necessary to obtain those deficient parts is too lengthy. The district court was correct when it ruled: “There can be no real dispute that the [permit system] substantially burdens Defendant’s exercise of religion.” *Aplt. App.* at 192.

Indeed, the district court was bound by an earlier *en banc* decision of this court, which had settled the matter four years earlier in a case challenging the exclusion of non-tribal members from access to the National Eagle Repository. “Any scheme that limits [practitioners’] access to eagle feathers,” held *United States v. Hardman*, “must be seen as having a substantial effect on the exercise of religious belief.” 297 F.3d 1116, 1126-27 (10th Cir. 2002).

This panel is similarly bound. The permit system challenged here likewise amounts to a “scheme that limits access” to a sacred object, and that sacred object is no less necessary to “the exercise of [a] religious belief.” The permit requirement thus amounts to a burden on the

Arapahos' exercise of religion, just as the restriction in *Hardman* represented one to the claimants there.

The government's principal brief makes two errors in challenging the district court's conclusion that the regulatory scheme substantially burdens Arapaho tribal members.

First, it relies on RFRA's original, pre-amendment definition of "exercise of religion," which was tied to the scope of the First Amendment. Hence, citing two pre-amendment cases, including a First Amendment case, the government would force tribal members to prove that the challenged burden – the restrictive permit system – *categorically* "prohibit[s] tribal members from killing eagles for religious purposes," or "mandate[s] that they engage in conduct prohibited by their faith." Opening Br. at 29.

Neither of these extremes is consistent with the amended definition of "exercise of religion," which protects a broader range of religious conduct than the Supreme Court's interpretation of "exercise of religion" under the First Amendment. As amended, RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious

belief.” Under this definition, that is to say, government-imposed burdens falling short of flat-out bars on religiously motivated conduct, as well as those amounting to something less than coercion, can and do violate the statute.

In its second mistake, the government dismisses as *dicta* the language in *Hardman* quoted above – that “any scheme” limiting the faithful’s access to eagle feathers constitutes a substantial burden. This is so, says the government, because in *Hardman* it did not contest the claimants’ prima facie case. Opening Br. at 29, n.6. The government confuses a quantity of evidence with the definition of *dicta*.

A proposition can never be *dicta* if it was “essential to determination of the case in hand.” *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir.1995) (quotation omitted). This is true whether the opposing party contested the issue or not. What matters is simply the necessity of the point of law to the ultimate holding of the case. And in *Hardman* the “substantial burden” holding was, as it is here, a threshold requirement before the government could be forced to assume the burden of demonstrating a compelling interest, advanced in the least restrictive

manner. In *Hardman*, said the court, the government met the compelling-interest portion of the test, but it flunked the least-restrictive-means test. These issues, however, would never have been reached had the *Hardman* court not first established the “substantial-ness” of the challenged burden.⁵

“Compelling Government Interest” and “Least Restrictive Means”

Moving past the *prima facie* case to the merits of Mr. Friday’s RFRA defense, the government must now justify its permit system under strict scrutiny. It offers two compelling interests: protecting eagle populations and preserving Native American religion. Mr. Friday challenges neither. What he challenges—in view of the bald eagle’s recovery—is whether the continued maintenance of a permit system to take adult eagles for religious purposes remains the least restrictive means of furthering these two interests.

⁵ *Hardman*, a procedurally complex case, is discussed in more detail below. It actually involved three similar-but-not-identically-situated claimants, all of them asserting the use of eagle feathers for religious purposes. They shared one common trait: none of them were enrolled tribal members and thus all three were prohibited from possessing eagle feathers. As a result, they lacked the ability to submit requests for feathers to the National Eagle Repository.

The government faces a high burden. RFRA requires it to “demonstrate[]”, 42 U.S.C. § 2000bb-1(b), that continuing the permit requirement in the wake of the bird’s return satisfies strict scrutiny, “the most demanding test known to constitutional law,” *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Again, *Hardman* bears critically on the issue.

There a Chiricahua Apache Indian (but not a member of a federally recognized tribe) and two non-Indians challenged the statutory and regulatory scheme that prevented them from possessing eagle feathers. The centerpiece of that scheme was a restriction limiting access to the National Eagle Repository to Indians whose names appear on the enrollment lists of federally recognized tribes (hence they are called “enrolled” tribal members). The government defended the restriction, claiming its interest in protecting eagles justified limiting the Repository to only enrolled tribal members.

The claimants, however, pointing to some of the same data concerning the recovery of the bald eagle that was presented here, argued that the restriction no longer advanced the government’s stated interest in protecting the species, given the increased population of the bird. The *en*

banc court disagreed, holding that preserving “our national symbol” remains compelling “whether there [are] 100 eagles or 100,000 eagles.” *United States v. Hardman*, 297 F.3d 1128. But the court went on to add a critical point: “What might change depending on *the number of birds* existing is the *scope of the program* that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.” *Id.* (emphasis added).

Focused on the scope of the program and the extent to which it was narrowly tailored in light of the eagle’s resurgence, the court held that the government failed to demonstrate that barring un-enrolled Indians from access to the Repository was the least restrictive means of protecting the bird. *Id.* at 1132. Specifically, the court refused to presume, in the absence of an affirmative showing, that increasing the number of eligible applicants at the Repository would place increased pressure on eagle populations. The result, said the court, might simply be a longer wait for those with authorized permits. *Id.* The court also held that the government had not

shown that “broader eligibility would result in an increased wait substantial enough to endanger Native American cultures.” *Id.* at 1133.⁶

These two holdings reflect how seriously *Hardman* took its observation that the scope of allowable restrictions on the religious use of eagles is intimately connected to the status of the species. As eagles become more numerous, restrictions must become less burdensome.

The Government’s Quantitative Justification for the Permit Requirement

The government justified maintaining the permit requirement on two quantitative grounds.

1. The Demographic Evidence

First, it presented the testimony of an expert on statistics and demographics, whose testimony was offered “to prove that if there was unfettered access to permits, [] the impact on the population of eagles would be substantial and perhaps unsustainable.” *Aplee*, Supp. App. at 342. He testified that a staggeringly high number of tribal members

⁶With respect to the two non-Indian seekers of eagle feathers, the court remanded their cases to the district court because they had not raised RFRA there, depriving the government the opportunity to build a record sufficient to justify their inability to possess eagle feathers. *United States v. Hardman*, 297 F.3d at 1131.

“potentially want to take an eagle,” totaling more than 42,000. *Id.* at 343. This putative “demand” for live eagles, he said, flowed from census data showing 1.9 million tribal members in the United States, of whom 2.2 percent, according to a random survey of tribal members, “hold the Native American religious faith.” *Id.* at 338. Multiplying 2.2 percent by 1.9 million yielded the expert’s 42,300 figure.

“That annual demand is significant,” says the government in its brief, “when compared to the estimated population of bald eagles of only 7,700 nesting pairs in the lower 48 states.” Opening Br. at 48. The best that can be said of this evidence is that it is weak.

For one thing, it is wrong to assume that all 42,000 practitioners of Native religion revere the eagle and employ its parts in their religious ceremonies. “[N]ot all Native American tribes believe that the eagle feather is sacred.” *United States v. Hardman*, 297 F.3d at 1127 n.17. Many tribal members, it stands to reason, thus do not require whole, live, bald eagles to discharge their religious obligations.

To think otherwise is like assuming the world’s 2 billion Christians all value equally the Catholic Communion and thus represent a “demand”

for 2 billion wafers; or that the world's 12-16 million Jews are all kosher.

But as *Hardman* noted, the category "Native American" religion is hardly a monolith:

We acknowledge that Native American religions are rich in variety, and that lumping any particular belief system under the term "Native American" religion is somewhat akin to lumping all the sects of Judaism, Christianity, and Islam together under the term "Western" religions. We acknowledge that not all Native American tribes believe that the eagle feather is sacred. [One witness], a member of the Mescalero Apache, testified . . . that turkey feathers are sacred to the Pueblo, water birds to some of the Oklahoma tribes, caribou to others, etc.

Id. The point is only that we do not know how many tribal members "potentially want to take an eagle," because prosecutors offered no meaningful evidence on the point.

Second, of whatever number of tribal members smaller than 42,000 that actually revere the eagle, there is a still smaller number obligated and empowered to take a live eagle, depending on the various religious and social customs governing each of the 562 recognized tribes. *See, e.g.,* Aplee. Supp. App. at 139. Consider again the actual ceremony at the Arapaho Sun Dance, where only one live eagle is sacrificed each year. Though members

of the tribe individually and collectively view the eagle as sacred, and though participation in the annual ceremony is nearly universal, each individual member does not take his or her own bird.

In short, the government's survey data do not reveal how many tribal members in the United States regard the eagle as the Arapaho do, nor how many reliably could be expected to take adult bald eagles. Nonetheless the government insists on seeing 42,000 tribal members as potential killers of bald eagles. The fear is exaggerated, a description of the evidence for which strict scrutiny has no tolerance.

2. The Number of Pending Applications at the Repository

The second piece of quantitative evidence on which the government relies is also flawed. It arises from the testimony of the Director of the National Eagle Repository, who said the Repository has approximately 4,000 pending permit requests for whole eagles, and that in just one year, 2005, it received 2,000 such applications. Aplee. Supp. App. at 242-43. The government's brief suggests these permit holders would get out of line, as it were, and take live eagles rather than wait for the Repository to fill their orders, if the permit requirement were eliminated. That "would have a

significant impact on eagle populations,” says the government. *See* Opening Br. at 48 (quoting a biologist asked to comment on the take of nearly 4,000 eagles).

There is more to the story. Of those 4,000 pending requests (each one, according to the government, representing a potential live take of an eagle), fully 75 percent of them are for a category quite different from the one at issue in this challenge; those 3,000 applications are for immature or fledgling golden eagles, not adult bald eagles. *Aplee. Supp. App.* at 233-34. With respect to the remaining 1,000 requests, the next most common category is the adult golden eagle, again not the bald. *Id.* at 234. And though the government did not specify how many such requests exist, we can be certain that the overwhelming majority of pending applications relate to golden eagles, a bird never placed on the list of endangered or threatened species. *See United States v. Abeyta*, 632 F.Supp. 1301, 1304 (D.N.M. 1986).

As for the third most numerous category of requests at the Repository, it too is not the adult bald. Third place is held by the immature bald eagle. *Aplee. Supp. App.* at 234. Only then do we arrive at the

category of bird at issue here, the adult bald. *Id.* Of all requests for whole eagles, in other words, requests for the adult bald eagle is the least numerous.

What's more, the government did not present evidence as to how many requests for adult bald eagles, specifically, are currently pending, nor how long those requests have been on file. There is nothing in the record, then, to exclude the very real possibility that there are few requests on file at the Repository to take adult bald eagles and that those requests are less than current. Strict scrutiny demands more.

There is also the question whether it is fair to assume, as the government does, that all Repository applicants would be equally motivated to take eagles from the wild. The government did not show how many applicants at the Repository can be expected to take live eagles if the regulations change. Nor did it present evidence as to whether some of those applicants would "share" a single eagle, which is effectively what the Arapaho tribe does at its annual Sun Dance. Nor, finally, did the government establish with hard data what the religious "demand" for

eagles is nationwide, much less why the now-recovered eagle population could not sustain that level of taking.

In sum, the government, which bore the burden of proof, did not present any evidence to warrant the assumptions lying at the heart of its “4000-pending-applications-at-the-Repository” defense of the permitting system.

Still, even though we know nothing about how long the requests have been pending, the three thousand applications for fledgling golden eagles at the Repository is a significant number. The golden eagle, though never endangered or threatened, was given statutory protection because immature goldens are difficult to distinguish from immature balds. *See United States v. Hardman*, 297 U.S. at 1122. Protecting goldens was thus a means of enhancing the protection of balds. In view of the possible confusion between the two types of fledglings, the number of requests at the Repository for immature golden eagles – a (very) rough proxy for potential demand – cannot be completely ignored.

It is for this reason that Mr. Friday limits his facial challenge to the rule requiring a permit only with respect to taking *adult* bald eagles. The

possible confusion between immature balds and goldens might well justify a permit to take *immature* eagles. But it cannot justify a permit to take *adult* eagles, especially the adult bald eagle, which is the only category of restriction challenged here. There is no evidence that adult bald eagles are confused with adult golden eagles.

The Non-Empirical Justifications for the Permit Requirement

The government also justifies its maintenance of the permit system by pointing to the testimony of several witnesses. One raptor biologist “explained” that a permitting scheme “can reduce the impact of takes on eagle populations.” Opening Br. at 44. “Eliminating” the process, reasons the government, “would vitiate [its] ability to protect eagles.” *Id.*

The first statement is undoubtedly true – a permitting regime can indeed reduce takes. It’s the second statement that is problematic, for it overlooks something important. The balancing of interests mandated by RFRA in this case rests ultimately on a quantification assessment: how many religious “takes” will occur and can the population of adult bald eagles sustain it? Despite bearing the burden of proof, the government apparently has not undertaken the task of quantifying the critical variable

(the number of religious takes), and so it did not present the data to the district court. True, the government's ability to protect eagles *might* be "vitiating" if the permitting system were eliminated, but "under RFRA, mere possibilities, based on limited evidence supplemented by speculation, are insufficient to counterbalance the certain burden on religious practice caused by a flat prohibition on [the unpermitted taking of eagles]." *O Centro v. Ashcroft*, 389 F.3d 973, 1026 (10th Cir. 2004) (McConnell, J., concurring), *aff'd by Gonzales v. O Centro*, 546 U.S. 418 (2006).

The government's reliance on the testimony of still another biologist is similarly flawed. That scientist cautioned that without the permit requirement "[w]e would have no way of assessing, in a predictive way, what the impact of that harvest was on eagle populations, which would potentially increase the probability or the possibility of reaching that point of catastrophic declines without us ever knowing we were getting close." Opening Br. at 44, quoting Aplee. Supp. App. at 300.

Again, the testimony rests on possible effects, not demonstrated effects. What is missing, still, is any quantitative study establishing that the "harvest" of religious takes occurring outside a permitted system

would be too large to sustain the current population of adult bald eagles, a study that would have to begin with data the government lacks: the number of religious takes that can be expected to occur in the absence of a permit requirement.

In addition, the claim that un-permitted takes for Native religious purposes might blind the government to a sudden decline in the eagle population is undermined by the government's own press release touting the delisting of the bird. There the government boasts of the monitoring plan in place to guard against the very danger it now posits:

Upon delisting, the [Fish and Wildlife] Service will continue to work with state wildlife agencies to monitor eagles for at least five years, as required by the Endangered Species Act. If at any time it appears that the bald eagle again needs the Act's protection, the Service can propose to relist the species.

"Bald Eagle Soars Off Endangered Species List," appended to Brief of Amicus Curiae. In view of its commendable intent to continue auditing eagle populations, perhaps the government is overstating the risk of a sudden and unobserved drop in eagle numbers.

Finally, the government cites testimony from a game warden, who said that ending the permit requirement would “seriously hamper our enforcement abilities.” Opening Br. at 44, quoting Aplee. Supp. App. at 365. He was referring to the possible diversion of lawfully obtained eagle parts into the black market. “[I]f there were an exception for a Native American to kill an eagle for religious purposes, once that eagle is dead and the parts are removed, I can’t tell a feather from his eagle from a feather from when it’s been illegally taken by a non-member.” See Aplee. Supp. App. at 365-66. But the risk of black-market diversions already exists, in the form of possible diversions not only from the National Eagle Repository but also from a permitted take of a live eagle.

Plus, this argument – that judicially-created exemptions in the Eagle Act will compromise the Act’s comprehensiveness and rigor – is of a piece with the slippery-slope argument rejected by the Supreme Court in *O Centro*. There the Court characterized the government’s refusal to allow a sacramental-use exception to the Controlled Substance Act for a proscribed hallucinogen as “echo[ing] 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." *Gonzales v. O Centro*, 418 U.S. at 436.

In sum, none of the government witnesses can compensate for the weaknesses evident in the empirical case for maintaining the permit requirement. In a different context, perhaps, their sweeping claims might have been sufficient. But "[w]here fundamental claims of religious freedom are at stake," the Supreme Court has said, "we cannot accept such [] sweeping claim[s]." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). "[W]e must *searchingly examine* the interests that the State seeks to promote." *Id.* (emphasis added). The "searching examination" here can no more be satisfied by "sweeping claim[s]" than it was in *Yoder*. See *O Centro v. Ashcroft* 389 F.3d at 1021 (McConnell, J., concurring).

Less Restrictive Means of Protecting Eagles

There is another problem in the government's defense of the challenged restriction. It failed to establish, as RFRA requires, that there is no other way of furthering its interest in protecting eagles that would have less impact on religious exercise. *Wisconsin v. Yoder*, 406 U.S. at 215.

A similar failure proved fatal to the government in *Hardman*, where prosecutors defended the statutory scheme allowing enrolled tribal members to possess eagle parts but denied access to other Native practitioners. *Hardman* said the government could not prevail without introducing evidence showing why alternative, less restrictive approaches would not adequately serve its stated interests. *United States v. Hardman*, 297 F.3d at 1132. “[W]e must first determine where along [the continuum of policy alternatives] the government's present solution lies, and where other, less restrictive means would lie.” *Id.* at 1135.

The record here points to a less restrictive, more religiously-protective way of preserving eagles: preventing what the Chief of the government’s Migratory Bird Management Program said were the “thousands of raptors,” including many bald eagles, that “die every year on electric power lines.” Aplee. Supp. App. at 301. Large raptors, their enormous wings capable of closing a circuit between two energized points, are uniquely susceptible to being killed on power lines. *Id.* at 302. Electrocution is “a very major cause of [eagle] mortality,” said the

government's top raptor biologist, *id.* at 301, adding "there remains much work to be done" to fix the problem, *id.* at 313.

Reflecting this sentiment, the district court found that "a more significant cause of eagle mortality [than Indian religious exercise] is electrocution." *Aplt. App.* at 195.

While government witnesses could not give a precise number of eagles that die nationwide each year on power lines, it is safe to assume that the number exceeds those killed at the annual Northern Arapaho Sun Dance: 1.⁷

What is more, these deaths are preventable. Transmission lines can be insulated or equipped with so-called raptor guards, or circuit breaks can be added to ground wires "so that they will no longer kill raptors." *Aplee. Supp. App.* at 354. Installing the devices may not be cheap, but it is effective. *Id.*

It is also required by law. The Justice Department itself recognizes that "[e]lectric poles and equipment pose a serious threat to eagles," and so

⁷Although government witnesses could not or would not say how many eagles are electrocuted every year, a Google search, performed November 9, 2007, readily produced reliable estimates of the number, both nationwide and in Wyoming.

it has taken the position that deaths caused by electrocutions on poorly protected power lines are subject to criminal liability.⁸

The government's top raptor biologist agreed that electrocuted eagles are "taken" within the meaning of the various statutes protecting migratory birds. Aplee. Supp. App. at 302. Yet he could name only one criminal prosecution of a utility anywhere in the country for unlawfully taking an eagle, and that was nearly 10 years ago. *Id.* at 313. Another witness could recall none, though he extolled the virtues of the "self-report[ing]" voluntarily undertaken by some utility companies "every time a raptor of any kind is electrocuted." *Id.* at 353.

In the end, in spite of the high rate of eagle mortality on the nation's power grid, the government presented no evidence explaining why mere enforcement of existing laws against utility companies would not adequately serve its interest in protecting eagles. It was incumbent on the government to do just that. RFRA, it would seem, demands that the

⁸See U.S. Department of Justice press release dated, Aug, 12, 1999, titled: "Electric Utility Sentenced for Killing Eagles and Hawks: Criminal Case Is First Of Its Kind Under Federal Wildlife Law," available on-line: conductors.http://www.usdoj.gov/opa/pr/1999/August/353enr.htm (visited November 9, 2007).

government bring an end to avoidable, non-religious threats to its interests before it substantially burdens religiously-motivated threats.

CONCLUSION

For the reasons stated above, and in addition to those set forth in the underlying brief, this court should affirm the district court's ruling.

STATEMENT CONCERNING ORAL ARGUMENT

Oral argument is set for December 17, 2007.

Respectfully submitted,

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