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 Environmental Assessment: Proposal to Permit Take Provided
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U.S. Fish & Wildlife Serv., *Ordering Eagle Parts and Feathers from the National Eagle Repository*, FWS Forms (Dec. 2013), <http://www.fws.gov/forms/3-200-15a.pdf> 16

U.S. Fish & Wildlife Serv., *Permit for Non-Purposeful Take of Eagles, Midwest Migratory Birds* (Nov. 8, 2012), <http://www.fws.gov/midwest/midwestbird/eaglepermits/baeatakepermit.html>..... 20

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U.S. Fish and Wildlife Serv., *News Release: Service Begins Process of Reviewing Eagle Management Objectives, Non-Purposeful Take Permits, Conserving the Nature of America* (June 20, 2014), <http://www.fws.gov/news/ShowNews.cfm?ID=BA0210E0-CF96-C6DF-E2C6D963C5650EDE> 24

U.S. Fish and Wildlife Serv., *Non-Purposeful Take Permit, Eagles in the Pacific Northwest* (Aug. 7 2014), http://www.fws.gov/pacific/eagle/permit_types/non_purposeful_take.html..... 21

U.S. Fish and Wildlife Serv., *Public Input Topics, Eagle Scoping: Public Input Process* (last visited Mar. 2, 2015), <http://eaglescoping.org/topics> 22

U.S. Fish and Wildlife Serv., *What You Should Know About a Federal Permit for Eagle Take Necessary to Protect an Interest in a Particular Locality*, FWS Forms (Dec. 2013), <http://www.fws.gov/forms/3-200-71.pdf> 17, 21, 22

U.S. Geological Survey, *Possession of Migratory Birds, Including Feathers, Nests, and Eggs*, Northern Prairie Wildlife Research Center (Feb. 1, 2013) 12, 13

U.S. Gov’t Accountability Office, GAO-02-49, *Indian Issues: Improvements Needed in Tribal Recognition Process* (2001)..... 10, 11

Other Authorities

Andrew Bell & Svend Brandt-Erichsen, *NEPA/BGEPA: Fish and Wildlife Service May Overhaul Rule Permitting Incidental Take of Eagles*, Newsletter (July 1, 2014), <http://www.martenlaw.com/newsletter/20140701-incidental-take-rule-overhaul> 24

Audubon, *Interior Dept. Rule Greenlights Eagle Slaughter at Wind Farms, Says Audubon CEO*, Press Room (Dec. 5, 2013), <http://www.audubon.org/press-release/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon> 23

Craig A. Faanes, Cleveland Vaughn, Jr., & Jonathan M. Andrew, *Birders and U.S. Federal Laws*, Northern Prairie Wildlife Research Center (1992) 12

Electa Draper, *Eagle bodies, parts for Indian rites are collected, sent from Colo. morgue*, Denver Post, Sept. 1, 2009..... 42

K. Shawn Smallwood, *Comparing bird and bat fatality-rate estimates among North American wind-energy projects*, 37 Wildlife Soc’y Bull. 19, (2013)..... 23

Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275 (2001)..... 11

Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol’y Rev. 271 (2001) 10, 11

Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003) 45, 46

Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 Akron L. Rev. 867 (2005)..... 11

INTRODUCTION

The American Indian plaintiffs in this case are in a troubling position. Their core religious beliefs require them to use eagle feathers for prayer and religious worship. But federal law makes it a crime for them to do so. The Fifth Circuit recently held that punishing the Plaintiffs for engaging in their religious worship would, based on the current factual record, violate the Religious Freedom Restoration Act (RFRA). *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014). Accordingly, Plaintiffs seek a narrow preliminary injunction that would prohibit the government from investigating or punishing them for their religious practices while this case is pending.

To obtain a preliminary injunction, Plaintiffs must establish: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). All four factors are satisfied here.

First, Plaintiffs are highly likely to succeed on the merits of their RFRA claim. Under RFRA, Plaintiffs first must show that the Defendant (the Secretary of the United States Department of Interior) has imposed a “substantial burden” on their exercise of religion. *See* 42 U.S.C. § 2000bb-1. Here, the Department prohibits the Plaintiffs from engaging in a core religious practice—possession of eagle feathers—on pain of civil and criminal penalties. As the Fifth Circuit noted, “The De-

partment does not contest . . . that [this] burdens [the Plaintiffs'] religious beliefs.” *McAllen*, 764 F.3d at 472.

Because the Department has substantially burdened the Plaintiffs' religious exercise, the burden shifts to the Department to “demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb-1. This is “an ‘exceptionally demanding’ test for the [government] to meet,” and the Fifth Circuit has already held that the Department, on the current record, has not met it. *McAllen*, 764 F.3d at 475, 479 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)). Specifically, the Department has not shown why it can allow the killing of eagles for a wide variety of non-religious reasons, and why it can allow two million members of federally recognized tribes to possess eagle feathers for religious reasons, but it cannot provide a narrow exception for the Plaintiffs.

Second, in the absence of a preliminary injunction, Plaintiffs would suffer an irreparable injury—namely, the loss of their free exercise of religion. The Department's belated decision to return the confiscated feathers (Dkt. 56), after losing at the Fifth Circuit, does not redress the Plaintiffs' injuries. Rather, the Department has warned that all of the Plaintiffs are still subject to civil and criminal penalties if they possess additional feathers or loan their feathers to family or tribal members—all of which they need to do to exercise their religion.

Third, the balance of hardships tips heavily in Plaintiffs' favor. As noted, Plaintiffs face the loss of core federal rights and the inability to practice their faith. The cost of an injunction to the Department, by contrast, is negligible. Plaintiffs merely seek the right to pick up eagle feathers from the wild, exchange eagle feathers at powwows, and borrow eagle feathers for religious ceremonies—all things that the Department already allows federally recognized tribal members to do. There is no reason why the Department can allow members of federally recognized tribal members to do these things on a massive scale, but must stop the Plaintiffs from doing them merely while this case is pending.

Finally, an injunction is in the public interest, because, simply put, "it is in the public's interest to enjoin the application of federal statutes that violate RFRA." *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 772 (S.D. Tex. 2013).

FACTUAL BACKGROUND

I. The Plaintiffs and their religious practices

The Plaintiffs are twelve American Indian individuals and four organizations that use eagle feathers in their traditional American Indian religious practices.¹ Plaintiff Robert Soto is the Vice Chairman of the Lipan Apache Tribe of Texas, which has been present in Texas and Northern Mexico for over 300 years and has enjoyed government-to-government relations with Spain, Mexico, the Republic of Texas, the State of Texas, and the United States. Declaration of Robert Soto, Ex. A

¹ American Indian religious practices vary widely. For the sake of simplicity, this Memorandum summarizes practices that are common across multiple tribes and are practiced by the Plaintiffs.

¶ 3. Mr. Soto is a direct descendant of Lipan Apache Chief Poca Ropa, who signed the Lipan Apache Peace Treaty with Mexico on August 17, 1822. *Id.*

Mr. Soto is also the pastor of Plaintiff McAllen Grace Brethren Church, which is a religious organization that engages in traditional American Indian religious practices. Ex. A ¶ 5. The Church has established several ministries designed to allow American Indians to worship in accordance with their traditional native culture using traditional cultural expressions. Ex. A ¶ 6-11. These include the Native American New Life Center and San Antonio Indian Fellowship—both of which are Plaintiffs in the case—as well as Son Tree Native Path and My Rock Native Fellowship. *Id.* Mr. Soto is also an officer of the Plaintiff South Texas Indian Dancers Association, which is an intertribal organization focused on preserving traditional American Indian music, dance, and spirituality. Ex. A ¶ 12-13.

Nine of the other Plaintiffs—Edith Clark, Bill Clark, Carrie Felps, Homer Hinojosa, Nancy Hollingworth, Lucian Oden, Xavier Sanchez, Veronica Russell, and Michael Russell—are members of one or more of the Plaintiff religious organizations.² Linda Cleveland and Michael Cleveland are not members of those organizations, but have attended religious events held by those organizations. Ex. F ¶ 8-9; Ex. A ¶ 31.

² Dkt. 28 at 3-4 ¶¶ 5-16; Declaration of Michael Russell, Ex. B ¶ 4; Declaration of Homer Hinojosa, Ex. C ¶ 4-6; Declaration of Carrie Felps, Ex. D ¶ 4-6; Declaration of John W. Clark, Ex. E ¶ 5; Declaration of Edith L. Clark, Ex. F ¶ 4. Although Bill Clark was listed as “William Clark” in the Amended Complaint, Dkt. 28 at 4 ¶ 12, his legal name is John Wilburn Clark. Ex. E ¶ 1.

All of the Plaintiffs engage in traditional American Indian religious practices, including the use of feathers from bald and golden eagles.³ Many tribes have long held eagles to be deeply sacred.⁴ Because of their majestic size and power of flight, eagles are believed to have a special closeness to the Creator, special spiritual attributes, and a special ability to carry prayers to God.⁵ Plaintiffs believe that all feathers and bird parts are sacred gifts from the Creator. And they believe that wearing, holding, and attaching bird parts to sacred objects is essential to communicate with the Creator.⁶ Thus, eagle feathers and other eagle parts play a central role in many of Plaintiffs' religious practices.⁷

One example is the process of smudging. Smudging is a cleansing ritual that takes place in a variety of settings, such as wedding ceremonies, naming ceremonies, sweat lodge ceremonies, healing ceremonies, rites of passage ceremonies, and funeral ceremonies.⁸ To engage in smudging, the Plaintiffs burn a mixture of sacred plants to generate a cleansing smoke. Ex. A ¶ 17. The burning is aided by waving an eagle feather or group of feathers over the flame. Ex. A ¶ 17. The smoke is then fanned on the participants using the eagle feathers, and the participants are brushed or touched by the eagle feathers. Ex. A ¶ 17. Eagle feathers are central to

³ Ex. A ¶ 15; Ex. B ¶ 5; Ex. C ¶ 7; Ex. D ¶ 7; Ex. E ¶ 6; Ex. F ¶ 5.

⁴ Ex. A ¶ 15; Ex. B ¶ 5; Ex. C ¶ 7; Ex. D ¶ 7; Ex. E ¶ 6; Ex. F ¶ 5.

⁵ Ex. A ¶ 15; Ex. B ¶ 5; Ex. C ¶ 7; Ex. D ¶ 7; Ex. E ¶ 6; Ex. F ¶ 5.

⁶ Ex. A ¶ 16; Ex. B ¶ 5; Ex. C ¶ 7; Ex. D ¶ 7; Ex. E ¶ 6; Ex. F ¶ 5.

⁷ Ex. A ¶ 16; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F ¶ 6.

⁸ Ex. A ¶ 17; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F ¶ 6.

the practice because they are believed to possess unique spiritual attributes of the Creator. Ex. A ¶ 17.

Eagle feathers are also a central element of traditional religious dances.⁹ For Plaintiffs, traditional dances are a form of prayer to the Creator. Ex. A ¶ 18. Wearing eagle feathers during the dance is essential for communicating the Plaintiffs' prayers to the Creator. Ex. A ¶ 19. The feathers are so central that if, in the course of a dance, one feather falls from a dancer's regalia, the entire event must come to a halt and a ceremony must be performed for the cleansing and restoration of the feather. Ex. A ¶ 18.

Eagle feathers are also given as religious gifts on deeply meaningful occasions—such as birth, coming of age, marriage, deployment for combat, or death.¹⁰ The feathers are believed to imbue the recipient with the divine qualities of the Creator, such as strength, courage, wisdom, power, and freedom. Ex. A ¶ 20.

Although no single religious analogy is exact, the centrality of eagle feathers in Plaintiffs' religious practices can be likened to several traditional Christian practices. For example, the belief that eagles are uniquely close to the Creator and that their feathers are endowed with unique spiritual attributes can be compared to the ancient Christian tradition of venerating relics—the bones or clothing of saints, who are believed to be uniquely close to God and possess unique spiritual attributes. Ex. A ¶ 17. The use of eagle feathers for communicating messages to the Creator, and

⁹ Ex. A ¶ 18; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F ¶ 6.

¹⁰ Ex. A ¶ 20; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F ¶ 6.

the central role that they play in the religion, can be compared to the Christian use of the rosary or Bible. *Id.* And the use of eagle feathers for spiritual cleansing can be compared to the use by many Christians of holy water for baptism. *Id.*

Because of their deep reverence for eagles, none of the Plaintiffs would ever harm or kill any eagle to obtain feathers or bird parts.¹¹ That would be a sacrilege. Instead, Plaintiffs desire to use eagle parts that they receive through religiously acceptable means.¹² These include eagle parts received from ancestors as gifts; found naturally in the wild; received from other tribal members as gifts; exchanged with other tribal members through trade; borrowed from other tribal members on loan; obtained from zoos or aviaries by permit; or obtained from the National Eagle Repository by permit.¹³

With the exception of zoos, aviaries, and the National Eagle Repository, Plaintiffs have received feathers through all of these means. Ex. A ¶ 21. For example, in 1971, Mr. Soto was given a matching pair of golden eagle wings from a tribal elder who wanted to honor him for his dancing. Ex. A ¶ 22. In the early 1990s, he was given ten golden eagle feathers after an elderly Pawnee woman's death. Ex. A ¶ 24. In 1999, Mr. Russell was given two bald eagle feathers by an American Indian dancer and soldier who was deployed to Iraq and Afghanistan. Ex. B ¶ 9. In 2000,

¹¹ Ex. A ¶ 21; Ex. B ¶ 7; Ex. C ¶ 9; Ex. D ¶ 9; Ex. E ¶ 8; Ex. F ¶ 7.

¹² Ex. A ¶ 21; Ex. B ¶ 7; Ex. C ¶ 9; Ex. D ¶ 9; Ex. E ¶ 8; Ex. F ¶ 7.

¹³ Ex. A ¶ 21; Ex. B ¶ 7; Ex. C ¶ 9; Ex. D ¶ 9.

he was loaned a golden eagle bustle from his brother-in-law, Mr. Soto. Ex. B ¶ 11; Ex. A ¶ 22, 41.

Under current federal regulations, as described below, it is illegal for Plaintiffs to practice their religion. They are criminally barred from ever possessing any eagle feathers or parts. And if they engage in their traditional religious practices, they are exposed to confiscation of their property, fines, and imprisonment.

II. The Government's regulation of Indian tribes

The federal government has a complex web of statutes and regulations separating American Indians into various categories (such as “federally recognized” and non-recognized tribes) for various purposes. There are multiple definitions of “Indian,” and the same individual can be defined as an Indian for some federal purposes but not others. Examples include:

- (1) The Indian Health Care Improvement Act, 25 U.S.C. § 1603(13) (“a member of a tribe, band, or other organized group of Indians,” or “a descendent, in the first or second degree, of any such member”);
- (2) The Indian Reorganization Act of 1934, 25 U.S.C. § 479 (“persons of one-half or more Indian blood”);
- (3) The Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e (“a member of an Indian tribe” or an individual that “is certified as an Indian artisan by an Indian tribe”);
- (4) Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 FR 58782-01 (“A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.”).

All of the individual Plaintiffs are defined as “American Indian” under the fourth definition (62 FR 58782-01), which is used “for all Federal reporting purpos-

es,” including to conduct the decennial census and “to monitor civil rights enforcement and program implementation.” 62 FR 58782-01, 58783, 58788. Several qualify as “Indians” under all four of these definitions. But none is an enrolled member of a “federally recognized tribe.”

Federal recognition establishes a government-to-government relationship between the tribe and the United States. 25 C.F.R. § 83.2. It also gives the tribe and its members access to “the protection, services, and benefits of the Federal government” (*id.*)—including “almost exclusive access to about \$4 billion in funding for health, education, and other social programs” See U.S. Gov’t Accountability Office, GAO-02-49, Indian Issues: Improvements Needed in Tribal Recognition Process 1 (2001), *available at* <http://www.gao.gov/new.items/d0249.pdf>. Another benefit of this quasi-government status is “exemption[] from state and local jurisdiction and the ability to establish casino gambling operations.” *Id.*

The process of gaining recognition has evolved significantly over time. Historically, Indian tribes gained recognition through treaties or “a course of dealing with the tribe as a political entity.” Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Pol’y Rev. 271, 272 (2001) (internal quotation omitted). On the flip side, a tribal group could remain unrecognized because of mere “historical accidents”: If a group never had important interactions with the federal government, never warred against the U.S., or reached agreements only with a colonial government or the British government, it could be unknown and overlooked. *Id.* at 274-75 (internal quotation omitted).

In 1871, treaties and diplomatic dealings were replaced with executive orders and legislation as the primary vehicles for recognition. After the Indian Reorganization Act of 1934, the Department of Interior started playing a greater role in determining recognition status. Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 Akron L. Rev. 867, 871-72 (2005). And in the mid-1900s, the U.S. unilaterally revoked recognition from many tribes “which it deemed sufficiently capable of self-government and thus no longer in need of federal supervision or benefits.” Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275, 303 (2001).

Today, the process of gaining federal recognition is difficult and convoluted. The controlling regulations establish seven “mandatory criteria” with 34 sub-factors or categories of evidence. 25 C.F.R. § 83.7. The Bureau of Indian Affairs has been criticized for failing to provide clear guidance on “how to interpret key aspects of the criteria.” GAO-02-49, *supra* at 2. It has also been criticized for applying the criteria unevenly. Myers, 12 Stan. L. & Pol’y Rev. at 279-80. And timeliness has been a problem, with the Bureau at times taking up to 15 years to resolve petitions. GAO-02-49, *supra* at 3.

III. The Government’s regulation of eagles and other birds

The government also has several statutes and regulations governing the taking and possession of birds and bird parts.

A. Statutes

Two statutes are most relevant here: The Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The Migratory Bird Treaty Act was enacted in 1916 to implement a convention between the United States and Great Britain. 16 U.S.C. § 703(a). It prohibits the harm, sale, or possession of migratory birds or their parts without a valid permit. *Id.* The Act currently covers over 800 species—83% of all native bird species found in the United States. U.S. Geological Survey, *Possession of Migratory Birds, Including Feathers, Nests, and Eggs*, Northern Prairie Wildlife Research Center (Feb. 1, 2013), <http://www.npwrc.usgs.gov/about/faqs/birds/feathers.htm>. The Endangered Species Act covers another 9%, and both acts cover another 5%—meaning that 97% of all native bird species are currently protected by federal law. Craig A. Faanes, Cleveland Vaughn, Jr., & Jonathan M. Andrew, *Birders and U.S. Federal Laws*, Northern Prairie Wildlife Research Center (1992), <http://www.npwrc.usgs.gov/resource/birds/birdlaws/index.htm>.

The Department warns that the Migratory Bird Treaty Act “is a ‘strict-liability’ law, meaning that . . . if you are found in possession of a protected species or its parts or products, you are automatically in violation of the law.” U.S. Geological Survey, *supra*. It also warns that “[p]enalties upon conviction can be severe,” and “legal defense costs are clearly not worth the risk.” *Id.* Misdemeanor violations are punishable by fines up to \$15,000, imprisonment up to six months, or both. 16 U.S.C. § 707(a). Felony violations are punishable by fines up to \$2,000, imprisonment up to two years, or both. 16 U.S.C. § 707(b).

Despite the blanket ban on possession of migratory bird parts, the Department is authorized to grant permits for the taking or possession of migratory birds for falconry, raptor propagation, scientific collecting, controlling depredating birds, taxidermy, waterfowl sale and disposal, and other “special purposes,” such as rehabilitation, education, and salvage. *See generally* 50 C.F.R. Part 21. There are also extensive regulations allowing hunting. *See generally* 50 C.F.R. Part 20. However, there are no permits for the average person who might want to pick up a feather. Nor are there any religious-use permits for American Indians who are not members of a federally recognized tribe. Thus, if a child picks up the feather of a dove, duck, or Canada goose for an art project, or if an American Indian picks up the same feather for religious purposes, they are subject to criminal punishment. (As explained below, Plaintiff Michael Cleveland was criminally convicted and fined \$200 after an undercover agent found him at a powwow with feathers from a dove, a duck, and a Canada goose. Dkt. 30-7 at 1.)

The Bald Eagle Protection Act was enacted in 1940 when “the bald eagle [was] threatened with extinction.” Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940) (codified as amended at 16 U.S.C. §§ 668-668d). It originally protected only the bald eagle and had no exception for Native American religious use. *McAllen*, 764 F.3d at 469. In 1962, it was amended to protect golden eagles (which can be confused with bald eagles), and to make an exception “for the religious purposes of Indian tribes.” 16 U.S.C. § 668a. The Act now prohibits the harm, sale, or possession of bald or golden eagles or any bald or golden eagle parts, except with a valid per-

mit. 16 U.S.C. § 668.¹⁴ Violations are punishable by fines up to \$5,000, imprisonment up to one year, or both. 16 U.S.C. § 668(a). For a second violation, penalties double. *Id.*

The Act also gives the Department “broad authority” to make exceptions for the taking of eagles or eagle parts “for the purposes of public museums, scientific societies, zoos, Indian religious uses, wildlife protection, agricultural protection, and ‘other interests.’” *McAllen*, 764 F.3d at 469 (quoting 16 U.S.C. § 668(a)). Permits are governed by an extensive system of regulations, which govern both American Indian religious uses and non-religious uses. *See* 50 C.F.R. Part 22.

B. Permits for American Indian religious use

Under current regulations, permits for American Indian religious use are available only to enrolled members of federally recognized tribes. But for the first 37 years under the relevant statutes, there was no distinction between federally recognized and non-recognized tribes. *McAllen*, 764 F.3d at 470.

The text of the Bald and Golden Eagle Protection Act, as enacted in 1962, does not distinguish between federally recognized and non-recognized tribes. It simply authorizes permits “*for the religious purposes of Indian tribes.*” 16 U.S.C. § 668(a) (emphasis added). Similarly, the first regulations, promulgated in 1966, authorized permits for any “individual Indians who are *authentic, bona fide practitioners of such religion,*” without regard to their federally recognized status.

¹⁴ There is an exception for bald eagle feathers lawfully acquired before 1940, and for golden eagle feathers lawfully acquired before 1962. 50 C.F.R. § 22.2.

McAllen, 764 F.3d at 470 (quoting 50 C.F.R. § 11.5 (1966)) (emphasis in *McAllen*). When the Department updated its regulations in 1974, it required applicants to attach a Certificate of Degree of Indian Blood, “but it did not specify that the individual had to be enrolled in a federally recognized tribe.” *Id.* (citing 50 C.F.R. § 22.22 (1974)). And when the Department issued the “Morton Policy” in 1975, clarifying that it would not enforce the federal ban on possession of bird parts against American Indians, the policy applied to all “American Indians,” without distinguishing between federally recognized and non-recognized tribes. Mem. from the Attorney General on Eagle Feathers Policy 8-9 (Oct. 12, 2012), available at <http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf>.¹⁵

It was not until 1999—thirty-seven years after enactment of the statute—that the Department promulgated the first eagle-permitting regulations that distinguished between federally recognized and non-recognized tribes. *McAllen*, 764 F.3d at 470. The regulations now require applicants for a permit to “attach a certification of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. 479a–1, 108 Stat. 4791 (1994).” 50 C.F.R. § 22.22(a)(5).

Under current regulations, there are four different ways that members of federally recognized tribes can legally obtain eagles or eagle parts. The first is to obtain dead eagles or eagle parts from the **National Eagle Repository**. The Re-

¹⁵ The Attorney General’s 2012 memo suggests that the Morton Policy was limited to federally recognized tribes. *Id.* at 2. But the text of the Morton Policy makes no such distinction. *Id.* at 8-9.

pository is a large warehouse maintained by the Fish and Wildlife Service in Commerce City, Colorado, where the government collects, freezes, and distributes dead eagles and eagle parts. *See generally* U.S. Fish & Wildlife Serv., *National Eagle Repository*, Mountain Prairie Region (Mar. 5, 2015), <http://www.fws.gov/eaglerepository/index.php>. To obtain eagle parts from the Repository, members of federally recognized tribes fill out a permit application providing their contact information, what eagle parts they want, and proof of their membership in a federally recognized tribe. U.S. Fish & Wildlife Service, *Ordering Eagle Parts and Feathers from the National Eagle Repository*, FWS Forms (Dec. 2013), <http://www.fws.gov/forms/3-200-15a.pdf>. Requests are filled free-of-charge on a first-come, first-served basis. Current wait times for adult bald or golden eagles are approximately three months for 20 miscellaneous feathers, six months for 10 quality loose feathers, one year for a pair of wings, two years for wings and a tail, or two years for a whole bird. *Id.* Waiting times for immature golden eagles are approximately double. *Id.*

If eagle parts from the Repository do not satisfy an individual's religious needs, that person may apply for a **permit to "take" a live eagle**. 16 U.S.C. § 668a; 50 C.F.R. § 22.22. The applicant must explain to the regional Migratory Bird Permit Office why he needs to take a live eagle and how many eagles of what species he wishes to take. The Fish and Wildlife Service will grant the permit only if the taking is compatible with the preservation of eagles; only if the taking is for a "bona fide" religious use; and only if "special circumstances" demonstrate that the religious use cannot be satisfied through the National Eagle Repository. *United*

States v. Friday, 525 F.3d 938, 944-45 (10th Cir. 2008). The permit process is “used infrequently, and is not widely known.” *Id.* It is used primarily by the Hopi, who have been collecting live eagles for centuries. Rowan Gould, Dep’t of the Interior, U.S. Fish and Wildlife Serv., Final Environmental Assessment: Proposal to Permit Take Provided Under the Bald and Golden Eagle Protection Act 65 (2009), *available at* http://www.fws.gov/migratorybirds/CurrentBirdIssues/Management/BaldEagle/FEA_EagleTakePermit_Final.pdf. From 2002 to 2007, the Department allowed the Hopi to take an average of 24 golden eagles per year—all from the Southwest region, where golden eagles are plentiful. *Id.*

The third way that federally recognized tribes can obtain eagles and eagle parts is by operating a **Native American Eagle Aviary**. *See generally* U.S. Fish and Wildlife Serv., *What You Should Know About a Federal Native American Eagle Aviary Permit (Eagle Aviary)*, FWS Forms (Dec. 2013), <http://www.fws.gov/forms/3-200-78.pdf>. These aviaries allow certain tribes to keep non-releasable eagles in captivity and use them for religious purposes. There are currently seven tribal aviaries in the Fish and Wildlife Service’s Southwest Region: two in New Mexico, three in Oklahoma, and two in Arizona. U.S. Fish and Wildlife Serv., *Eagle Aviaries: Tribal Eagle Aviaries*, Working with Tribes: Southwest Region (last updated Oct. 2, 2014), <http://www.fws.gov/southwest/NAL/aviaries.html>.

Finally, in addition to the Repository, live “take” permits, and eagle aviaries, the Attorney General in 2012 clarified that **the federal government will not prosecute** members of federally recognized tribes for possession of federally pro-

tected birds or bird parts, including eagles. Mem. from the Attorney General on Eagle Feathers Policy (Oct. 12 2012), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf>. Thus, members of federally recognized tribes can acquire naturally molted or fallen feathers from the wild; can give, loan, or exchange federally protected birds or bird parts with other members of federally protected tribes; and can possess, use, wear, carry, and transport federally protected birds or bird parts. *Id.* at 3. As long as members of federally recognized tribes are not killing, buying, or selling protected birds or bird parts, they are free to do all of these things “regardless of whether they have a U.S. Fish and Wildlife Service permit.” *Id.*

None of these options are available to Plaintiffs. They cannot obtain dead eagles or eagle parts from the Repository. They cannot obtain a live “take” permit. They cannot maintain an aviary or obtain feathers from an existing aviary. And they cannot possess eagle parts found in the wild, given as gifts, or loaned or exchanged with members of other tribes. They are forever prohibited from possessing even a single feather.

C. Permits for non-religious uses

In addition to allowing members of federally recognized tribes to obtain eagles and eagle parts, the Department issues eagle permits for an extensive range of non-religious uses, including for “public museums, scientific societies, zoos, . . . wild-life protection, agricultural protection, and ‘other interests.’” *McAllen*, 764 F.3d at 469 (quoting 16 U.S.C. § 668a).

1. Museums, scientific societies, and zoos. If museums, scientists, or zoos want to possess eagles or eagle parts, they must submit an application explaining the need for the permit and the number and type of eagles to be taken. 50 C.F.R. § 22.21(a)(3). If the Department determines that the permit “is compatible with the preservation of the bald eagle and golden eagle,” it can grant the permit. 50 C.F.R. § 22.21(c). From 2002 to 2007, the Department issued approximately 50 new scientific and exhibition permits—35 for bald eagles and 15 for golden eagles.

2. Protection of human health, agriculture, wildlife, and other interests. Eagles can also be removed or killed to protect human health, agriculture, wildlife, or “other interests.” 50 C.F.R. § 22.23. This includes situations where eagles may be disturbing livestock or domestic animals, damaging private property, or interfering with airport flight zones. To obtain a permit for these purposes—called a “depredation” permit—a permit applicant must explain the kind and amount of damage that the eagles are causing, the number and type of eagles to be taken, and the way that the eagles will be removed or killed. 50 C.F.R. § 22.23(a). The Department can grant the permit if it is “compatible with the preservation of the bald or golden eagle,” if the eagles “have in fact become seriously injurious,” and if the taking is “the only way to abate or prevent the damage.” 50 C.F.R. § 22.23(c). From 2002 to 2007, the Department authorized approximately 195 eagle depredation permits—125 for golden eagles and 70 for bald eagles. Gould, *supra* at 66. This was more than all takings permits for Native American religious uses combined. *Id.*; see also U.S. Fish and Wildlife Serv., *Depredation Permit*, Pacific Region Migratory

Birds & Habitat Programs (June 15, 2014), <http://www.fws.gov/pacific/migratorybirds/Permits/dprd.html>.

3. Falconry. Golden eagles can also be taken from specified depredation areas for purposes of falconry—that is, to be trained as hunting birds. 50 C.F.R. § 21.29. From 2002 to 2007, the Department authorized approximately 30 falconry permits.

4. Non-Purposeful Taking. All of the permits described above are for the *intentional* taking of eagles. But many more eagles are taken *unintentionally*. For these takings, the Department issues what it calls “non-purposeful take” permits. U.S. Fish & Wildlife Service, *Permit for Non-Purposeful Take of Eagles*, Midwest Migratory Birds (Nov. 8, 2012), <http://www.fws.gov/midwest/midwestbird/eaglepermits/baeatakepermit.html>; *see generally* 50 C.F.R. § 22.26. These permits cover “a broad spectrum of public and private interests,” such as “utility infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery [such as forestry, mining, and oil and natural gas drilling and refining], recreational use, etc.” U.S. Fish and Wildlife Service, *What You Should Know About a Federal Permit for Eagle Take Necessary to Protect an Interest in a Particular Locality*, FWS Forms, 1 (Dec. 2013), <http://www.fws.gov/forms/3-200-71.pdf>.

There are two types of non-purposeful take permits: “standard” and “programmatic.” “Standard” permits are for activities that harm an identifiable number of eagles in a specific timeframe and location. U.S. Fish and Wildlife Service, *Non-*

Purposeful Take Permit, Eagles in the Pacific Northwest (Aug. 7 2014), http://www.fws.gov/pacific/eagle/permit_types/non_purposeful_take.html. An example of this would be a one-time construction project. “Programmatic” permits are for activities that cause an “unknown” number of “recurring” eagle takes that can occur at various locations and times. *Id.* An example of this would be an electric utility company with thousands of miles of power lines that can electrocute eagles at any time, or a windfarm with multiple turbines that can strike eagles at any time.

Before issuing a “standard” or “programmatic” permit, the Department must determine that the taking is “compatible with the preservation of bald eagles and golden eagles,” is “necessary to protect a legitimate interest,” is unintentional, is unavoidable despite mitigation measures, and will not preclude the issuance of higher-priority eagle permits. 50 C.F.R. § 22.26(f).

The Department has not, to our knowledge, published comprehensive data on the number of eagles killed under standard or programmatic permits. (This may be because the regulations are fairly new; they were promulgated in 2009, a couple years after bald eagles were removed from the endangered species list.) Thus, we do not know how many eagles are taken each year due to “utility infrastructure development and maintenance, road construction, operation of airports, commercial or residential construction, resource recovery [such as forestry, mining, and oil and natural gas drilling and refining], recreational use, etc.” U.S. Fish and Wildlife Service, *What You Should Know About a Federal Permit for Eagle Take Necessary to Protect an Interest in a Particular Locality*, *supra* at 1.

However, the available evidence suggests that the number is large. The Department has acknowledged that “[t]he greatest human-caused risks to eagle safety appear to be electrocution by electrical distribution lines and collisions with various anthropogenic structures.” Gould, *supra* at 72. In one study cited by the Department, examining human-caused eagle deaths from the early 1960s to 1995, “electrocution was reported as the second greatest cause of mortality in golden eagles and the third greatest cause for bald eagles.” *Id.* at 61-62. In another study, involving a “small area in central Montana,” collisions with power lines killed 21 golden eagles and one bald eagle in 2000-01. *Id.* These deaths are often caused by “[i]mproperly constructed power lines,” *id.* at 61, and can be mitigated by proper power pole retrofitting, U.S. Fish and Wildlife Service, *Public Input Topics*, Eagle Scoping: Public Input Process (last visited Mar. 2, 2015), <http://eaglescoping.org/topics>.

Wind turbines also frequently kill eagles. A recent peer-reviewed study estimated that in 2012 alone, wind turbines killed 573,000 birds, including 83,000 raptors. K. Shawn Smallwood, *Comparing bird and bat fatality-rate estimates among North American wind-energy projects*, 37 *Wildlife Soc’y Bull.* 19, (2013), available at <http://onlinelibrary.wiley.com/doi/10.1002/wsb.260/abstract>. Another study of a single wind farm east of San Francisco found that the farm killed 28 to 34 golden eagles per year. Gould, *supra* at 62.

The Department’s programmatic permits have become controversial. Programmatic permits were originally limited to a maximum of five years. Any longer duration, the Department said, could render the permit “incompatible with the

preservation of the bald eagle or the golden eagle.” 74 FR 46836-01, 46856 (Sept. 11, 2009). But in 2013, to accommodate “renewable energy and other projects designed to operate for decades,” the Department authorized programmatic permits of up to 30 years. 78 FR 73704, 73721 (Dec. 9, 2013). Many conservation groups strenuously objected. The Audubon Society called the new regulations “outrageous,” stating that “Interior wrote the wind industry a blank check.”¹⁶ The American Bird Conservancy sued the Department in federal court, arguing that the Department’s failure to conduct any environmental analysis of the new regulation was a “flagrant violation of the National Environmental Policy Act.” Compl. for Declaratory and Injunctive Relief at 2, *Shearwater v. Ashe*, No. 14-02830 (N.D. Cal. June 19, 2014), available at <http://www.abcbirds.org/PDFs/EagleRuleComplaintFiled.pdf>. Three days after the lawsuit was filed, the Department announced that it would conduct an environmental analysis.¹⁷ As of July 1, 2014, the Department had received at least 13 programmatic permit applications under the new rules.¹⁸

¹⁶ Audubon, *Interior Dept. Rule Greenlights Eagle Slaughter at Wind Farms, Says Audubon CEO*, Press Room (Dec. 5, 2013), <http://www.audubon.org/press-release/interior-dept-rule-greenlights-eagle-slaughter-wind-farms-says-audubon>.

¹⁷ U.S. Fish and Wildlife Service, *News Release: Service Begins Process of Reviewing Eagle Management Objectives, Non-Purposeful Take Permits*, Conserving the Nature of America (June 20, 2014), <http://www.fws.gov/news/ShowNews.cfm?ID=BA0210E0-CF96-C6DF-E2C6D963C5650EDE>.

¹⁸ Andrew Bell & Svend Brandt-Erichsen, *NEPA/BGEPA: Fish and Wildlife Service May Overhaul Rule Permitting Incidental Take of Eagles*, Newsletter (July 1, 2014), <http://www.martenlaw.com/newsletter/20140701-incidental-take-rule-overhaul>.

IV. The Government's enforcement against the Plaintiffs

The Department has actively enforced its regulations against the Plaintiffs. On March 11, 2006, several of the Plaintiffs organized and attended an American Indian religious ceremony called a powwow.¹⁹ A powwow is a sacred gathering involving drumming, dancing, and traditional dress. Ex. A ¶ 25; Ex. B ¶ 8. Another name for a powwow is “the circle.” Ex. A ¶ 25. The circle is considered a sacred space—much like a church building—and there are numerous protocols governing behavior in the circle. *Id.* The entire grounds of the circle are considered sacred, but there is also an inner circle where no one is permitted without an invitation. *Id.* Within the circle, the Plaintiffs' most important religious ceremonies take place. *Id.*

At the powwow, Plaintiff Robert Soto participated in traditional religious dances while wearing a ceremonial headdress with two sacred golden eagle feathers. Ex. A ¶ 24. Plaintiff Michael Russell, who is Mr. Soto's brother-in-law, also participated in traditional religious dances while wearing sacred eagle feathers, including a ceremonial bustle with 36 golden eagle feathers loaned to him by Mr. Soto, two roach golden eagle feathers, and two golden eagle scout feathers. Ex. B ¶ 11-12. Plaintiff Michael Cleveland attended the powwow with several “dream catchers” made from dove, duck, and goose feathers found near his home. Ex. A ¶ 31; Ex. F ¶ 8-9; Dkt. 30-1 at 5.

Alejandro Rodriguez, a Special Agent of the U.S. Fish and Wildlife Service, also attended the powwow. Dkt. 30-1. He had seen an announcement for the pow-

¹⁹ Ex. A ¶ 25; Ex. B ¶ 12; Ex. C ¶ 13; Ex. D ¶ 11; Ex. E ¶ 10; Ex. F ¶ 8.

wow in a local newspaper, and the announcement included a picture of about 20 members of the South Texas Indian Dancers in traditional religious dress. *Id.* at 3, 11. Because Special Agent Rodriguez believed that two of the dancers appeared to be wearing golden eagle feathers, he decided to attend the powwow “in a covert capacity.” *Id.* at 3. This was called “OPERATION POW WOW.” *Id.* at 2; Dkt. 30-4 at 1.

When he arrived at the powwow, he approached Mr. Russell, one of the traditional Indian dancers. Dkt. 30-1 at 3; Ex. B ¶ 13. He complimented Russell on his regalia and asked about the feather bustle he was wearing on his back. Dkt. 30-1 at 3; Ex. B ¶ 13. After Mr. Russell acknowledged that it was made of eagle feathers, the special agent revealed his credentials, led Russell away for further questioning, and confiscated the feathers. Dkt. 30-1 at 3-4; Ex. B ¶ 14-15.

Next, the special agent approached Mr. Soto, showed him his credentials, and ordered him to remove the two eagle feathers that he was wearing on his head. Dkt. 30-1 at 4; Ex. A ¶ 29; Ex. B ¶ 15. Because Mr. Soto produced his membership card from the Lipan Apache Tribe of Texas, and the agent did not know whether the Lipan Apache Tribe of Texas was a federally recognized tribe or not, the agent did not immediately seize those feathers. Dkt. 30-1 at 4-5; Ex. A ¶ 30.

Next, the agent approached Plaintiff Michael Cleveland, who was present at a vending booth. Dkt. 30-1 at 5; Ex. A ¶ 31. Having spotted the “dream catchers,” which appeared to include feathers from protected songbirds or waterfowl, the agent seized eight of those feathers and sent them to the FWS Forensic Laboratory. Dkt.

30-1 at 5, 8; Ex. A ¶ 31. (The Laboratory later identified six of the eight feathers as belonging to doves, ducks, and Canada geese—all federally protected, and all common in South Texas. Dkt. 30-7 at 6. The other two feathers were not identified. *Id.*)

After leaving the powwow, the special agent confirmed that the Lipan Apache Tribe of Texas was not a federally recognized tribe. Dkt. 30-1 at 6; Ex. A ¶ 32. He then called for a meeting with Mr. Soto and Mr. Russell. Dkt. 30-1 at 6; Ex. A ¶ 32. Under threat of civil and potential criminal liability, Mr. Soto and Mr. Russell signed forms abandoning their feathers, and Mr. Russell agreed to pay a \$500 fine. Ex. A ¶ 32; Ex. B ¶ 17; Dkt. 30-1 at 7. Mr. Cleveland was later criminally prosecuted, convicted, and ordered to pay a \$200 fine. Dkt. 30-17 at 2-3.

The undercover raid, seizure of property, fines, and criminal prosecution have had a severe chilling effect on the Plaintiffs' exercise of religion. Before the raid, McAllen Grace Brethren Church averaged approximately 40-50 weekly attendees and was growing. Ex. A ¶ 37. Immediately after the raid, attendance dropped by 40% and has remained at 15-20 attendees ever since. *Id.* Several individuals specifically told Pastor Soto that they are afraid to come to his religious services because of the eagle feather issue. *Id.* Because of the drop in attendance, the church has been unable to pay Mr. Soto a regular salary or adequately fund its ministries. *Id.*

After the raid, some members of the Plaintiffs' church got rid of their eagle feathers or stopped using them for their religious ceremonies. Ex. A ¶ 38; Ex. F ¶ 12-13. Some stopped dancing or were intimidated into using imitation feathers in violation of their religious beliefs. Ex. B ¶ 18-19; Ex. C ¶ 17; Ex. F ¶ 12-13; Ex. E

¶ 11. Some declined to accept eagle feathers as gifts, which they otherwise would have accepted as part of their religious practices. Ex. A ¶ 42; Ex. B ¶ 20. Some began treating visitors with suspicion and holding their religious ceremonies in secret—in part because the Department’s raid was based on a tip from a Fish and Wildlife Service employee who posed as a participant in Plaintiffs’ religious services. Ex. A ¶ 35-36, 39; Dkt. 30-1 at 3. On the whole, the Plaintiffs still intend to use eagle feathers in their religious practices, but they are afraid of what the government will do to them. Ex. A ¶ 40, 42; Ex. B ¶ 22; Ex. C ¶ 18; Ex. F ¶ 11-15; Ex. E ¶ 12.

V. Agency Proceeding

Shortly after the powwow, on May 9, June 16, and July 4, 2006, Mr. Soto through counsel sent letters to the Department objecting to the Department’s actions. Dkt. 30-13 at 6-7; Dkt. 30-5. In addition to requesting the return of the confiscated feathers, Mr. Soto asked the Department “to affirm that it shall be the policy of the United States” to allow the “use and possession of sacred objects (such as eagle feathers)” by “*all* American Indians, including . . . those American Indians not enrolled in federally recognized tribes.” Dkt. 30-5 at 10. The letter argued that the Department’s policy of discriminating between federally recognized and non-recognized tribes violated Mr. Soto’s “inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian.” *Id.*

On February 23, 2007, the Department sent a letter to Mr. Soto deeming his July 4 letter to be a “Petition for Remission of Forfeiture,” and denying his petition on the ground that it was not sent within 60 days of the forfeiture. Dkt. 30-12. Mr.

Soto then submitted a Supplemental Petition for Remission, pointing out that the Department had overlooked his first letter of May 9, 2006, which had been sent well within the 60-day deadline. Dkt. 30-13. The Department did not respond to this supplemental petition or address Mr. Soto's arguments on the merits until December 8, 2011—almost five years after he filed the petition, and over three-and-a-half years after the filing of this lawsuit. Dkt. 30-18.

VI. Lawsuit

In the meantime, on March 16, 2007, the twelve individual Plaintiffs and four religious organizations filed this lawsuit. Dkt. 1. In the Original Complaint, the Plaintiffs sought not only a return of the confiscated feathers, *id.* at 35 ¶ 6, but also a declaration that the Department's regulations violate RFRA and the Constitution, *id.* at 33 ¶ 1, and an injunction forbidding the Department from enforcing the regulations against them, *id.* at 34 ¶ 5.

After a pair of lengthy stays to allow the criminal prosecution of Mr. Cleveland to run its course (Order of 7/5/07; Dkt. 21), Plaintiffs filed their First Amended Complaint on March 27, 2012. Dkt. 28. As in their Original Complaint, the Plaintiffs requested not merely the return of the confiscated feathers, but a judgment declaring the Department's regulations unlawful, *id.* at 1–2, 41–42, and “an order compelling a moratorium on the search and seizure of feathers and bird parts during powwows.” *Id.*

Before any discovery had occurred, the parties filed cross motions for summary judgment. Dkt. 32, 33, 35, 37. On February 21, 2013, this Court granted the Department's motion. Dkt. 43.

On August 20, 2014, the Fifth Circuit reversed. *McAllen*, 764 F.3d 465. It held “that the Department did not provide sufficient evidence that the policy of limiting permits for the possession of eagle feathers to members of federally-recognized tribes survives the scrutiny required by RFRA.” *Id.* at 468. It therefore reversed and remanded for further proceedings. *Id.*

Following remand, on January 29, 2014, this Court held a status conference, at which the Department stated its intention to seek a “remand” of Plaintiffs’ case to the Department for further administrative proceedings. Instead of filing a motion for remand, however, the Department on February 17, 2015 informed the Plaintiffs via email for the first time that it “has decided to return Mr. Robert Soto’s eagle feathers.” Ex. G-1. Two hours later, the Department filed a motion to dismiss the case as moot. Dkt. 56.

In response to the Department’s offer to return the feathers, the Plaintiffs sent two requests to the Department for clarification. Ex. G-1. First, the Plaintiffs asked whether the Department was planning to change the regulations that make it illegal for the Plaintiffs to possess eagle feathers. *Id.* at 3. The Department replied that it “has not changed its regulations.” *Id.*

Second, given that the regulations still make it illegal for the Plaintiffs to possess eagle feathers, the Plaintiffs asked the Department to agree in writing that it would not enforce the regulations against any of the Plaintiffs “when they use and possess Mr. Soto’s sacred feathers, and any other sacred feathers that may come into their possession through traditional religious means, for their religious practic-

es.” *Id.* at 2. The Department refused. Instead, it stated that it has “no intention of returning the feathers only to pursue some action against Rev. Soto,” and that Mr. Soto would be “authorized to possess these particular eagle feathers.” *Id.* at 1. But the Department also made clear that if Mr. Soto possesses any other eagle feathers, or if other Plaintiffs borrow his feathers or possess additional feathers, they are all subject to enforcement “on a case-by-case basis consistent with controlling statutory and case law.” *Id.*

LEGAL STANDARDS

Plaintiffs seek a narrow preliminary injunction prohibiting the government from investigating or punishing them for possessing eagle feathers for religious purposes while their suit is pending. To obtain a preliminary injunction, Plaintiffs must establish: “(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.” *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

ARGUMENT

I. The Plaintiffs have established a substantial likelihood of success on the merits of their RFRA claim.

The Plaintiffs have a strong likelihood of success under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et. seq.* It is undisputed that the ban on their possession of eagle feathers imposes a “substantial burden” on their

exercise of religion. *McAllen*, 764 F.3d at 472. Under RFRA, that means that the Department bears the burden of satisfying strict scrutiny. *Id.* And the Fifth Circuit has already held that, on the current record, “the Department has not carried its burden” of satisfying strict scrutiny. *Id.* at 480.

A. The Department has imposed a substantial burden on the Plaintiffs.

RFRA is designed “to provide very broad protection for religious liberty.” *Hobby Lobby*, 134 S. Ct. at 2760. It provides that the “[g]overnment shall not substantially burden a person’s exercise of religion” unless the government “demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb–1(a)-(b). Based on this language, RFRA claims proceed in two parts. First, the plaintiff must show that the government has “substantially burden[ed]” his sincere religious exercise. *McAllen*, 764 F.3d at 472. Second, if the plaintiff does so, the burden shifts to the government to satisfy strict scrutiny. *Id.*

To establish a “substantial burden” under RFRA, Plaintiffs must first identify a sincere exercise of religion; then they must show that the government has substantially burdened that exercise of religion. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 259-60, 263-64 (5th Cir. 2010). Here, both showings are easy. In fact, the Department “does not contest the Plaintiffs’ assertion that the Eagle Protection Act substantially burdens their religious beliefs.” *McAllen*, 764 F.3d at 472.

The Plaintiffs exercise religion by using eagle feathers in a variety of their core religious ceremonies. They use feathers for cleansing purposes during smudging rituals; they use feathers for prayer during traditional religious dances; and they give feathers as gifts on religiously significant occasions. Ex. A ¶ 17-18; Ex. B ¶ 6; Ex. C ¶ 8; Ex. D ¶ 8; Ex. E ¶ 7; Ex. F ¶ 6. American Indians have been engaging in these same religious practices for thousands of years. And it is difficult to overstate their religious significance. Denying the Plaintiffs the ability to use eagle feathers is much like denying a Christian the use of a Bible, rosary, or holy water. Ex. A ¶ 19.

Nor is there any doubt that the Department has imposed a “substantial burden” on Plaintiffs’ use of eagle feathers. This is an objective inquiry that focuses not on the nature of the belief being violated, but on the nature of the government penalty imposed by the government. *Hobby Lobby*, 134 S. Ct. at 2777-79. And “at a minimum, the government’s *ban* of conduct sincerely motivated by religious belief substantially burdens an adherent’s free exercise of that religion.” *A.A. ex rel. Be-tenbaugh*, 611 F.3d 248, 264 (5th Cir. 2010) (quoting *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009)) (emphasis in *Merced*). Here, the government *criminally bans* the Plaintiffs from possessing eagle feathers from any source.

The government has also shown that it will enforce its ban. It sent an undercover agent into Plaintiffs’ religious gathering to look for violations. It charged Mr. Soto with a civil violation and confiscated his feathers. It confiscated feathers from Mr. Russell and fined him \$500. And it confiscated feathers that Mr. Cleveland

found on nature walks and criminally prosecuted him, convicted him, and fined him \$200. All of these were first-time violations. If Plaintiffs are caught again, they face escalating penalties, including up to \$10,000 in fines and two years' imprisonment per violation. 16 U.S.C. § 668(a).

In light of these serious civil and criminal penalties, Plaintiffs have “significantly modif[ied] [their] religious behavior” and are currently “violat[ing] [their] religious beliefs.” *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (defining “substantial burden” under a parallel law). They now conduct many of their religious ceremonies in secret. They have refrained from accepting feathers from family members as gifts; they have refrained from picking up feathers they find in the wild; they have refrained from accepting feathers from other tribal members at powwows; and they have refrained from borrowing feathers for religious ceremonies. They are unable to engage in religious practices that they have engaged in before. By any measure, they have suffered a “substantial burden.” *See McAllen*, 764 F.3d at 472 (“[A]ny scheme that limits the access that Soto . . . has to possession of eagle feathers has a substantial effect on the exercise of his religious beliefs.”)

The Department may attempt to argue that there is no longer any substantial burden because it has agreed to return the 42 feathers it confiscated in 2006. Dkt. 56 at 3-4. But that is merely a litigation tactic to avoid a ruling on the merits. And it does not eliminate the burden. First, the Department has warned Mr. Soto that he can possess only “these particular eagle feathers.” Ex. G-1 at 1. If he receives any other feathers as gifts, picks up any other feathers from the wild, or ex-

changes any other feathers at powwows—all of which he must be able to do to practice of his religion (Ex. A ¶ 42, 21)—he is again subject to civil or criminal penalties. The Department has also warned that the other Plaintiffs are subject to prosecution if they ever receive feathers as gifts, pick up feathers from the wild, exchange feathers at powwows, or borrow Mr. Soto’s feathers during a religious ceremony (Ex. G-1 at 1)—all of which they have done in the past and need to do in the future to exercise their religion. *See, e.g.*, Ex. B ¶ 11. Indeed, some of the feathers that the Department is returning can *only* be used by Plaintiffs other than Mr. Soto (Ex. A ¶ 41)—yet the Department forbids this. In short, all of the Plaintiffs still face civil or criminal penalties if they exercise their religion.

B. The Department cannot demonstrate that banning Plaintiffs’ possession of eagle feathers furthers a compelling interest.

Because the Department has imposed a substantial burden on the Plaintiffs’ exercise of religion, the Department must “demonstrate[] that application of the burden to the [Plaintiffs]—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” 42 U.S.C. § 2000bb–1(a)-(b). The Fifth Circuit has already held that the Department, on the current record, “has not carried its burden.” *Id.* at 480.

Strict scrutiny under RFRA is “a severe form of the ‘narrowly tailored’ test,” and is “an ‘exceptionally demanding’ test for the [government] to meet.” *McAllen*, 764 F.3d at 475 (quoting *Hobby Lobby*, 134 S. Ct. at 2780). It requires a “focused” inquiry. *Hobby Lobby*, 134 S. Ct. at 2779. It is not enough for the government to identify “broadly formulated interests” that might be furthered by applying the law

to all citizens in general. *Id.* Rather, the government must “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.” *Id.* (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) (quoting 42 U.S.C. § 2000bb-1(b))). Thus, the court must “loo[k] beyond broadly formulated interests’ and . . . ‘scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants.’” *Id.* (quoting *O Centro*, 546 U.S. at 431). The focus is on “the marginal interest in enforcing the [law]” against the Plaintiffs. *Id.*

That “focused” inquiry is particularly important here, where the Plaintiffs at this stage are seeking very narrow, preliminary injunctive relief. They are simply asking to be allowed to receive eagle feathers as gifts, pick up eagle feathers from the wild, exchange eagle feathers at powwows, and borrow eagle feathers for religious ceremonies. This is something that the Department already allows members of federally recognized tribes to do without a permit. Mem. from the Attorney General on Eagle Feathers Policy (Oct. 12, 2012), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf>. And it is something that the Department is now allowing one of the Plaintiffs—Mr. Soto—to do, if only on a very narrow basis. Dkt. 56. Given that the Plaintiffs are now seeking even narrower relief than is raised in their complaint and was at issue in the Fifth Circuit, the Department cannot come close to satisfying strict scrutiny.

Here, the government has offered only two reasons why Plaintiffs should be subject to punishment for their religious use of eagle feathers: (1) the government's interest in protecting eagles; and (2) the government's responsibilities to federally recognized tribes. *McAllen*, 764 F.3d at 473. Although these are important interests in the abstract, they are not furthered by punishing the Plaintiffs, nor do they satisfy RFRA's "focused" test.

1. *Protecting eagles.* The Department claims that a ban on possession of feathers is necessary to combat the black market trade in eagle feathers. The basic idea is that there is a significant unmet demand for eagle feathers; that the demand is met on the black market by poaching of eagles; and that by making it illegal to possess feathers, the Department can better police the black market and suppress demand. *McAllen*, 764 F.3d at 476.

But as the Fifth Circuit has already held, this argument fails for several reasons. First, it is based on "mere speculation." *Id.* "[T]he evidence in the record simply does not support the assertion that expanding the permitting process would cause an increase in poaching." *Id.* If anything, the Department's regulations may actually fuel the black market "precisely because sincere adherents to American Indian religious cannot otherwise obtain eagle feathers." *Id.* at 477.

More importantly, the Department has undermined its own speculative theory by creating broad exceptions to the ban on possession. *Id.* at 476-77. As the Fifth Circuit noted, "Where a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the

law, as applied, furthers the compelling interest.” *Id.* at 472 (citing *Hobby Lobby*, 134 S.Ct. at 2781–82; *Tagore v. U.S.*, 735 F.3d 324, 331 (5th Cir. 2013)). Here, the Department allows up to two million federally recognized tribal members to possess as many eagle feathers as they want—regardless of where the feathers come from and regardless of whether they have a permit. They are simply prohibited from buying, selling, or killing eagles. This is precisely the same treatment that the Plaintiffs are requesting. And the Department has not even attempted to explain why exempting two million federally recognized tribal members is consistent with the preservation of eagles, but exempting the Plaintiffs is not.

Similarly, the Department “fails to account for the fact that there are a multitude of non-religious exceptions to the statute.” *McAllen*, 764 F.3d at 474-75 (citing 16 U.S.C. § 668a; *Merced*, 577 F.3d at 594). Under the Migratory Bird Treaty Act, the Department allows the possession or killing of migratory birds for (1) falconry, (2) raptor propagation, (3) scientific collecting, (4) take of depredating birds, (5) taxidermy, (6) waterfowl sale and disposal, and (7) other “special purposes,” such as rehabilitation, education, and salvage. *See generally* 50 C.F.R. Part 21. Under the Bald and Golden Eagle Protection Act, it allows the possession or killing of eagles for (8) museums, (9) scientific societies, (10) zoos, (11) protection of human health, (12) protection of agriculture, (13) protection of wildlife, (14) protection of “other interests,” (15) falconry, (16) utility infrastructure development and maintenance, (17) road construction, (18) operation of airports, (19) commercial or residential construction, (20) and resource development. It even allows programmatic per-

mits for utility companies and wind farms to kill an unknown number of eagles at unknown times and places. In all, hundreds of eagles, if not thousands, are taken for non-religious reasons every year.

The Department has not even attempted to explain why allowing all of these non-religious killings is consistent with its interest in protecting eagles, while allowing Plaintiffs to merely possess feathers—without ever killing a single eagle—is not. As the Fifth Circuit held: “The fact that exceptions exist to the possession ban calls into doubt the Department’s claims that someone in Soto’s position should find his religious practices hindered simply to further a goal that history demonstrates is achievable even when there are exceptions in place.” *McAllen*, 764 F.3d at 477 (citing *O Centro*, 546 U.S. at 433).

2. *Fulfilling responsibilities to federally recognized tribes.* Nor has the Department shown that punishing the Plaintiffs furthers a compelling interest in protecting federally recognized tribes. In the Fifth Circuit, the Department claimed that opening the repository to non-recognized tribal members would “tax the repository,” which would “make it more difficult for members of federally recognized tribes to obtain eagle feathers.” *McAllen*, 764 F.3d at 478. But the Fifth Circuit rejected this argument for multiple reasons.

First, it held that “we cannot definitively conclude that Congress intended to protect only federally recognized tribe members’ religious rights,” because the exemption in the Bald and Golden Eagle Protection Act was not limited to federally recognized tribes. *Id.* at 473. Second, it noted that the Supreme Court “has not em-

braced the concept that [the government’s relationship with federally recognized tribes] alone can justify granting religious exceptions for them while denying other religious groups the same, or similar, accommodations.” *Id.* at 474. The Department must explain “what about that ‘unique’ relationship justifies” its policy, and it has not done so here. *Id.* Third, the Court held that the Department “has failed to present evidence at the summary judgment phase that an individual like Soto . . . would somehow cause harm to the relationship between federal tribes and the government if he were allowed access to eagle feathers.” *Id.* Finally, it held that any increase in repository wait times was a problem “of the government’s own making . . . because the repository that it established and runs is inefficient.” *Id.* at 479.

For purposes of this motion, however, Plaintiffs are not even seeking permission to access the Repository. They are merely seeking permission to receive feathers as gifts, pick up feathers from the wild, exchange feathers at powwows, and borrow feathers for religious ceremonies. None of these actions would have any effect on the Repository; thus, the Department’s alleged interest is not even implicated.

C. The Department cannot demonstrate that banning Plaintiffs’ possession of eagle feathers is the least restrictive means.

Even if the Department could demonstrate that banning Plaintiffs’ possession of eagle feathers furthered a compelling interest—and it cannot—the Department has still failed to prove that its regulations are the “least restrictive means” of furthering its interests. 42 U.S.C. § 2000bb–1(b). Under this test, “[i]f a less restrictive alternative would serve the Government’s purpose, the [government] must use

that alternative.” *Merced*, 577 F.3d at 595 (internal quotation omitted). This is “a severe form of the ‘narrowly tailored’ test,” and it is “an ‘exceptionally demanding’ test for the [government] to meet.” *McAllen*, 764 F.3d at 475 (quoting *Hobby Lobby*, 134 S. Ct. at 2780).

Here, there are many less restrictive alternatives. And the Fifth Circuit has already held that “the government has not satisfactorily proved at this stage that there are not other less restrictive alternatives that could achieve the statute’s preservation goals without burdening the practice of American Indian religions by American Indians.” *McAllen*, 764 F.3d at 477.

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

- It could allow the Plaintiffs to collect feathers that have molted in the wild. *Id.* at 477.
- It could allow the Plaintiffs to collect feathers that have molted in zoos and aviaries. *Id.*
- It could require zoos and aviaries to preserve feathers for religious use.
- It could increase the number of eagle aviaries, including by granting permits to non-recognized tribes. *Id.* at 479.
- It could salvage eagle parts from existing permittees. Currently, when eagles are killed by wind farms, power lines, farmers, ranchers, and others, the carcasses are often left to rot. The Department could create incentives—whether negative (punishment) or positive (financial reward)—for permittees to salvage eagle parts for religious uses.
- It could allow increased taking of eagles from regions where they are plentiful, such as Alaska—where populations “have remained robust,”

and “[s]ome areas are so saturated with bald eagles that some adults cannot find nest sites.”²⁰

Second, the Department could *target buying, selling, and killing*, rather than mere possession. This is what the Department already does for members of federally recognized tribes: It prosecutes only buying, selling, and killing—not possession. Mem. from the Attorney General on Eagle Feathers Policy (Oct. 12, 2012), *available at* <http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf>. It could do the same for other American Indians. And if that were not enough, it could increase the penalties for buying, selling, and killing, and increase the resources devoted to detecting it.

Third, the Department could *shift the allocation* of legal feathers. Right now, hundreds of eagles, if not thousands, are killed for non-religious reasons every year. These include permits for museums, scientific societies, zoos, farmers, ranchers, airports, construction companies, mining companies, forestry companies, utility companies, and wind farms, among many others. If Plaintiffs’ possession of eagle feathers somehow threatens eagle populations—even though Plaintiffs would never kill a single eagle—the Department could reduce the number of permits granted for non-religious reasons, thus reducing the supposed pressure on eagle populations.

Finally, the Department could *run the National Eagle Repository more efficiently*. As the Fifth Circuit noted, the shortage of eagle feathers is a problem “of the

²⁰ See U.S. Fish and Wildlife Service, *Fact Sheet: Natural History, Ecology, and History of Recovery* (June 2007), <http://www.fws.gov/midwest/eagle/recovery/biologue.html>; Environment Alaska, *Bald Eagle in Alaska*, <http://environmentalaska.us/bald-eagles.html>.

government's own making," because "the repository that it established and runs is inefficient." *McAllen*, 764 F.3d at 479. For example, the Department could increase the Repository's staff and budget. As of 2009, a "two-person staff" filled orders for all two million members of federally recognized tribes, and "[a]bout 6,000 orders [we]re waiting to be filled." Electa Draper, *Eagle bodies, parts for Indian rites are collected, sent from Colo. morgue*, Denver Post, Sept. 1, 2009, available at http://www.denverpost.com/recommended/ci_13242945.

Alternatively, the Department could reduce unnecessary demand on the repository by charging a small processing fee based on the scarcity of various eagle parts. Currently, there is no fee for accessing the repository, and there is no reason for tribal members to ask for anything less than the maximum amount of feathers allowed per order. Thus, there are long wait times for eagle parts. And there is reason to believe that some (perhaps many) tribal members request eagle parts when they don't need them, and that others request more than they need. In 2014, for example, the Repository acknowledged that it had been filling a "high number of back-to-back reorders received from [prison] inmates," and that it should "more clearly advise applicants that they are not required to order the maximum amount of feathers allowed per order." Letter from Stephen Oberholtzer to Tribal Leader 2, <http://www.fws.gov/le/eagle/factsheets/Repository%20Changes%20Letter%204-9-2014%20SO.pdf>. Imposing a small processing fee would ensure less wasteful distribution. The Department could also involve American Indians in the management of

the Repository, such as by allocating permits to tribes instead of individuals, or by giving tribes management input or authority over the Repository.

Under RFRA's least restrictive means test, the Department bears the "heavy burden" of providing "specific evidence" that "these means would not achieve the government's goals." *McAllen*, 764 F.3d at 475, 478, 479. It has not even attempted to provide such evidence. Thus, the Department "has failed to carry its burden." *Id.* at 479.

II. The Plaintiffs have established a substantial likelihood of success on the merits of their First Amendment and Equal Protection claims.

The Department's discrimination between federally recognized and non-recognized tribes also violates the First Amendment and the Equal Protection Clause. Dkt. 25 at 28-33 ¶¶ 45-62. In *Lukumi*, the Supreme Court said that prohibiting animal killing for one religious purpose (Santería sacrifice) while allowing it for another religious purpose (kosher slaughter) created "differential treatment of two religions," which could constitute "an independent constitutional violation." *Lukumi*, 508 U.S. at 536. Similarly, in *Larson v. Valente*, the Court held that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); see also *Croft v. Perry*, 624 F.3d 157, 165-66 (5th Cir. 2010). Here, the Department's regulations impermissibly discriminate between federally recognized and non-recognized tribes.

Larson invalidated a Minnesota law that imposed disclosure requirements on charitable organizations, but exempted religious organizations that "received more

than half of their total contributions from members or affiliated organizations.” 456 U.S. at 231-32. The law thus made “explicit and deliberate distinctions” between “well-established churches” with strong financial support and less well-established churches that relied on outside donations. *Id.* at 246 n.23; *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (explaining that the law in *Larson* “discriminated against religions . . . that depend heavily on soliciting donations from the general public”). This “explicit and deliberate distinction[] between different religious organizations” violated the Establishment Clause. *Larson*, 456 U.S. at 246 n.23, 255.

Like the law struck down in *Larson*, the Department’s regulations establishes two tiers of religious adherents: well-established groups (federally recognized tribes), which are exempt, and less well-established groups (non-recognized tribes), which are not. Indeed, here, the Department allows up to two million federally recognized tribal members to possess as many eagle feathers as they want—regardless of where the feathers come from and regardless of whether they have a permit—but refuses to allow Plaintiffs to do the same.

The government cannot rank in different tiers the rights of people with identical religious practices. *See Weaver*, 534 F.3d at 1257 (“[W]hen the state passes laws that facially regulate religious issues, it must treat individual religions and religious institutions without discrimination or preference.”); *see also Tenaflly Eruv Ass’n, Inc. v. Borough of Tenaflly*, 309 F.3d 144, 167 (3d Cir. 2002) (law non-neutral where the government “granted exemptions from the ordinance’s unyielding lan-

guage for various secular and religious” groups, but rejected exemption for plaintiffs).

In fact, this sort of permitting scheme—allowing one group to exercise their religion but not another—was exactly what the Founders had in mind when enacting the Establishment Clause. During the founding era, a fundamental element of an establishment of religion was government restriction of religious worship by particular denominations. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2159-69 (2003). The English establishment restricted worship by Puritans, Baptists, Presbyterians, and especially Catholics. *Id.* at 2160-61. Massachusetts enacted similar provisions, limiting “preaching to authorized persons and authorized churches.” *Id.* at 2162. In Virginia, two dissenting ministers were punished for “baptizing children without a license.” *Id.* at 2164. And Baptists were often punished for preaching without a license. *Id.* at 2165.

Here, the Department has established a similarly troubling licensing scheme. Just as some ministers in Virginia and Massachusetts could get licenses to preach and others could not, now some members of American Indian tribes can get licenses to possess eagle feathers and others cannot. This is a quintessential violation of the First Amendment. *Cf. id.* at 2160, 2162.

In addition to violating the First Amendment, the Department’s discrimination between federally recognized and non-recognized tribes also violates the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has twice

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

Here the Department has discriminated on the basis of both ancestry and religion. By allowing only federally recognized tribes to possess eagle feathers, the Department makes Plaintiffs ineligible to possess eagle feathers solely because of their tribal ancestry. And because different tribes have different religious practices, the Department’s regulations favor some religious groups over others.

III. The Plaintiffs have satisfied the other preliminary injunction factors.

Not only have the Plaintiffs established a substantial likelihood of success on the merits, but the three remaining preliminary injunction factors weigh heavily in their favor.

A. The Plaintiffs would suffer irreparable injury in the absence of an injunction.

First, absent an injunction, the Plaintiffs would suffer irreparable harm—namely, loss of their free exercise of religion. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). “The same is true for violations of RFRA; showing a likelihood of success on the merits shows irreparable

injury.” *E. Tex. Baptist Univ.*, 988 F. Supp. 2d at 771 (citing *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff’d*, *O Centro*, 546 U.S. at 439 (“[The plaintiff] would certainly suffer an irreparable harm” if “it is likely to succeed on the merits of its RFRA claim.”)). Here, due to the threat of civil and criminal penalties, the Plaintiffs are unable to engage in core religious worship. That is a quintessential irreparable injury.

B. The balance of hardships tips in favor of the Plaintiffs.

Second, the balance of hardships tips overwhelming in favor of the Plaintiffs. Under this factor, the question is whether “the threatened injury [to the plaintiff] outweighs any damage that the injunction might cause the defendant.” *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) (citation omitted). Here, the threatened injury to the Plaintiffs is weighty—the loss of federal rights and the inability to practice their faith. And the cost of a preliminary injunction to the Department is nil. The Plaintiffs merely seek to receive eagle feathers as gifts, pick up eagle feathers from the wild, exchange eagle feathers at powwows, and borrow eagle feathers for religious ceremonies—something that the Department already allows federally recognized tribal members to do, and something that the Department has effectively admitted is harmless by agreeing to return the confiscated feathers. There is no reason to allow Mr. Soto to possess 42 eagle feathers, but to threaten him and every other Plaintiff with civil and criminal penalties if they possess others during the pendency of this action.

C. An injunction is in the public interest.

Finally, issuing a preliminary injunction is in the public interest. In a RFRA

case, “there is a strong public interest in the free exercise of religion even where that interest may conflict with” another statutory scheme. *O Centro Espirita v. Ashcroft*, 389 F.3d 973, 1010 (10th Cir. 2004) (en banc), *aff’d* 546 U.S. 418 (2006). Simply put, “it is in the public’s interest to enjoin the application of federal statutes that violate RFRA.” *E. Tex. Baptist Univ.*, 988 F. Supp. 2d at 772.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for a Preliminary Injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2015, the foregoing memorandum was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ Eric C. Rassbach _____

Eric C. Rassbach