
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS MANUEL RODRIGUEZ-MARTINEZ, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented on appeal and in district court by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted

October __, 2008

By_____
MARILYN E. BEDNARSKI
Attorney at Law
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS MANUEL RODRIGUEZ-MARTINEZ, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether criminalizing Mr. Rodriguez-Martinez's possession of eagle feathers for the sincere practice of his religion violates the Religious Freedom and Restoration Act as interpreted by this Court in the O Centro case?

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Luis Manuel Rodriguez-Martinez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals affirming the denial of petitioner's motion to dismiss the information was published on June 27, 2008 as United States v. Vasquez-Ramos, 531 F.3d 987 (9th Cir. 2008)(hereinafter "Opinion.") A copy of the Opinion appears at Appendix A. The Opinion denied petitioner's request for panel rehearing and rehearing en banc, and withdrew an earlier opinion.

II.
JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on June 27, 2008. This petition is therefore timely. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

* * *

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Religious Freedom and Restoration Act

The Religious Freedom and Restoration Act (herein "RFRA"), Title 42 U.S.C. § 2000 states in relevant part:

(1) "Government should not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section. Subsection (b) provides that government action may substantially burden a person's exercise of religion if such action furthers "a compelling governmental interest;" and,

(2) Is the least restrictive means of furthering that interest."

The Bald and Golden Eagle Protection Act

Title 16 U.S.C. §668. *See,* Appendix B pursuant to USSC Rule 14(1)(I).

The Migratory Bird Treaty Act

Title 16 U.S.C. §§ 703-711. *See,* Appendix B pursuant to USSC Rule 14(1)(I).

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IV.

STATEMENT OF THE CASE

A. Jurisdiction in the Courts Below

The district court had jurisdiction pursuant to Title 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to Title 28 U.S.C. § 1291.

B. Facts Material to Consideration of the Questions Presented

1. Mr. Rodriguez-Martinez's Sincere Religious Belief and Brief Procedural History

In October 2003, the United States Fish and Wildlife Service (herein "FWS") and California agents executed a search warrant at Mr. Rodriguez-Martinez's home. They found bird feathers, some of which were identified by laboratory analysis to be from migratory birds, including bald eagles and hawks. Mr. Rodriguez-Martinez stored many of the feathers the agents found in ceremonial wicker baskets called Tahquatze. Many of the feathers found were attached to carefully beaded staffs, laden with beads in typical Huichol colors. Mr. Rodriguez-Martinez beads feathers himself. The Huichol use feathers in religious ceremonies.

Mr. Rodriguez-Martinez spoke to the agents during the search and explained that he was a religious man and that he possessed the feathers for religious purposes. He was very emotional during the search, crying when he realized they would take the feathers away.

Mr. Martinez-Rodriguez explained to the agents that he practiced a Native American Religion and that he had received the feathers in religious ceremonies. He explained further that he was associated with the Mexicayolt

religious group, a Native American Ceremonial Group in Arizona. He associates his tribal origins with the Huichol, a tribe which originates in Mexico. He uses the feathers in religious ceremonies.

On June 16, 2006, a two-count Information was filed against Mr. Rodriguez-Martinez, charging him with two misdemeanor violations of Title 16 U.S.C. § 668(a), the Bald and Golden Eagle Protection Act ("BGEPA"), for knowingly taking or possessing bald or golden eagles or any of their parts, including eagle feathers, and Title 16 U.S.C. § 703, the Migratory Bird Treaty Act ("MBTA"), for taking, possessing, importing, transporting, selling, purchased, bartering, or offering for sale, purchase or barter, any migratory bird, or the parts nests or eggs of such bird without a valid permit issued pursuant to the regulations.

Mr. Rodriguez-Martinez filed a motion to dismiss the Information under the Religious Freedom Restoration Act ("RFRA"), Title 42 U.S.C. § 2000. The RFRA requires that the government demonstrate a compelling interest in burdening a sincere practitioner's religious practice and that government action is the least restrictive means possible. Id. Mr. Rodriguez-Martinez argued that the government no longer has a compelling interest in protecting bald eagle populations now that the bald eagle is no longer an endangered species and that the arbitrary distinction between federally recognized and non-federally recognized tribal members was not the least restrictive means. This line drawn includes federally recognized tribe members in the permit system and excludes non-federally recognized tribe members - regardless of sincerity of religious belief. On May 3, 2006, the district court held a hearing and denied Mr. Rodriguez-Martinez's motion to dismiss the Information. The

Court of Appeals thereafter affirmed.

2. The Extraordinary Recovery of the Bald Eagle

Under the present permitting system, Mr. Rodriguez-Martinez cannot legally possess bald eagle feathers. The permitting system was set by regulation years ago when DDT and other human causes decimated the bald eagle population. Now that the bald eagle has been removed from the endangered species list, however, the government no longer has a compelling interest in protecting bald eagle populations under the RFRA. There has been an undisputed and profound recovery of bald eagle populations in the United States. Much of the record on this remarkable recovery was established by the government, specifically the Fish and Wildlife Service (hereinafter "FWS"), in the federal register.

The government first proposed to delist the bald eagle in 1999, Endangered and Threatened Wildlife and Plants; Proposed Rule to Remove the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 64 Fed. Reg. 36454 (proposed July 6, 1999), however, had still taken no action on this proposal at the time of Mr. Rodriguez-Martinez's district court motion's hearing in 2006. According to the government's own study at the time of that hearing, the bald eagle population in the lower 48 states had increased from approximately 487 active nests in 1963 to an estimated 7,066 breeding pair. 71 Fed. Reg. 8238, 8239. Compared to the 1974 numbers, nesting pairs had increased by 462 percent. Id. at 8240. Since the 1999, when the government originally determined the bald eagle was eligible for delisting, it acknowledged that recovery had

continued to progress at an "impressive rate." Id. at 8241.

Moreover, the government noted that historically the primary evil facing bald eagle populations was the use of the organic pesticide, DDT. Id. at 8245. The banning of DDT effectively stopped the declining trend. Id. Mortality from being shot by all hunters, including sincere religious practitioners, is not an issue for the bald eagle population. 71 Fed. Reg. at 8246. Other causes, such as persistent electrocution by power lines, are much more significant factors. Id. at 8248-8249. Prior to the hearing on the motion in this case, the government declared "the best scientific and commercial data available indicates that the bald eagle has recovered," and reopened the public comment period for removing the bald eagle from the List of Endangered and Threatened Wildlife. Endangered and Threatened Wildlife and Plants; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 71 Fed. Reg. 8238 (proposed rules February 16, 2006).

On June 28, 2007, Secretary of the Interior Dirk Kempthorne announced the removal of the bald eagle from the list of threatened and endangered species at a ceremony at the Jefferson Memorial in Washington, D.C. See, FWS News Release - Bald Eagle Soars Off Endangered Species List Secretary Kempthorne: The Eagle has Returned. Specifically the Secretary stated:

> "Today I am proud to announce: the eagle has returned . . . .In 1963, the lower 48 states were home to barely 400 nest pairs of eagles. Today, after decades of conservation effort, they are home to some 10,000 nesting pairs, a 25-fold increase in the last 40 years. Based on its dramatic recovery, it is my honor to announce the Department of the Interior's decision to remove the American Bald Eagle from the Endangered Species List."

Id.

The bald eagle is no longer listed as a threatened or endangered species.

3. The History of the Bald and Golden Eagle Protection Act (BGEPA)

A member of non-federally recognized tribes, such as Mr. Rodriguez-Martinez, was not officially prohibited - from legally possessing eagle feathers - until 1999. The BGEPA made a crime for any person to knowingly take or possess bald or golden eagles or any of their parts, including eagle feathers. See, Title 16 U.S.C. §668(a). The Bald and Golden Eagle Protection Act ("BGEPA") allows, however, the secretary of the interior to promulgate regulations which authorize taking possession of bald eagles and/or eagle parts when such possession is consistent with eagle preservation and the religious purpose of Native American religions. See, Title 16 U.S.C. § 668(a) and Title 50 C.F.R. §22.22.

These regulations drew a line, including certain persons and excluding others. The regulation found in Title C.F.R.§ 22.22 sets forth the Indian tribe exception. This exception requires that, for a person to legally possess eagle parts, he or she must: (1) be a member of a federally recognized Indian tribe, and (2) use the eagle parts for tribal religious ceremonies. See, Title 50 C.F.R. § 22.22. To apply for a permit under the "Indian tribes" exception the applicant must provide the FWS various information including a certification of enrollment in a federally recognized tribe.[1]

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[1]An applicant under the "Indian tribes" exception must provide the FWS: (1) the species and number of eagles or feathers proposed to be taken or acquired by gift or inheritance; (2) the state and local area where the taking is proposed to be done, or from whom acquired; (3) the name of the tribe with which the applicant is associated;

The "member of a federally recognized Indian tribe" condition was not originally part of the regulation. In 1963, the Secretary issued regulations establishing a permit program under the "Indian tribes" exception. These original regulations provided that permits could be issued "to those individual Indians who are authentic, bona fide practitioners of such religion." See, Title 50 C.F.R. § 11.5 (1964). In 1974, the Secretary revised the regulations, requiring that applicants "attach a certification from the Bureau of Indian Affairs that the applicant is an Indian." See, Title 50 C.F.R. §22.22(a)(5), (6) (1975).

In 1981, eighteen years after the regulations were first enacted, the requirement that an applicant be a member of a *federally-recognized* Indian tribe was clearly articulated. In 1981, a member of an Indian tribe that was not federally recognized requested, and was denied, a permit for eagle feathers. At that time, the Deputy Solicitor of the Interior issued a memorandum which stated that only federally recognized Indian tribes constituted "Indian tribes" under the BGEPA. In 1999, the regulatory language was changed to clearly reflect the requirement that an applicant must be a member of a federally recognized Indian tribe. See, Title 50 C.F.R. § 22.22 (1999).

The Government has the current legal ability to promulgate regulations for the issuance of permits to *non*-federally recognized tribal members to *possess* deceased bald eagle parts. Title16 U.S.C. § 668(a) authorizes the

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(4) the name of the tribal religious ceremony(ies) for which the feathers are required; and (5) the applicant must attach "a certification of enrollment in an Indian tribe that is federally recognized under the federally recognized tribal list act of 1994." Title 25 U.S.C. §479a-1; 108 Stat. 4791 (1994); Title 50 C.F.R. § 22.22 (2001).

Secretary of the Interior to issue permits "for the religious of Indian tribes," in addition to several less compelling reasons, including the protection "of agricultural or other interests[2] in any particular locality." Id. Despite its ability to do so, the government has not issued any regulations authorizing permits for sincere practitioners of Native American religions who are tribal members of *non*-federally recognized tribes.

4. The National Eagle Repository

Mr. Rodriguez-Martinez's non-federally recognized tribal status excludes him from the repository distribution system; he cannot meet the permit prerequisite, and cannot legally obtain feathers or bird parts from the wild. As shown below, the arbitrary distinction between members of federally recognized tribes and members of non-federally recognized tribes is not the least restrictive means of furthering a compelling government interest under the RFRA.

The National Eagle Repository serves as the main collection point for all salvaged bald and golden eagle carcasses, parts and feathers. It is responsible for the receipt, evaluation, storage and distribution of dead bald and golden eagles, and parts thereof, to enrolled Native Americans of federally

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[2]In contrast to its inflexibility with respect to religious practitioners who seek feathers, the government has been more receptive to commercial interests. The government has issued permits to *take* ("pursue, shoot, shoot at, poison ,wound kill, capture, trap, collect, molest or disturb" 16 U.S.C. § 668©) *live* bald eagles for commercial interests, and will at least consider such permits. See e.g. Notice of the Issuance of a Permit for the Incidental Take of Bald Eagles by a Water Reclamation Project, 68 Fed. Reg. 349999 (June 1, 2003); Notice of an Application to Take Bald Eagles for a Residential Development. 66 Fed. Reg. 18493 (April 9, 2001)

recognized tribes throughout the U.S. for use in their religious ceremonies. Eagles and eagle parts distributed by the Repository come from various sources throughout the United` States. These include federal and state wildlife biologists, USFWS agents, state game wardens, federally licensed wildlife rehabilitators, zoos and other federal land management agencies.

The Repository receives a copy of a "Permit Application and Shipping Request" after it has been submitted to and approved by the Migratory Bird Permit Office. The request may be for a whole carcass or parts of bald and golden eagles. No more than one whole eagle or parts equivalent may be requested at one time and applicants maybe only have one pending request at one time.

Several options are provided to order eagle feathers. Approximately 95% of the orders received by the Repository are for whole eagles. Whole bird orders are filled in approximately 3 - 3 ½ years. A standard higher quality loose feather order contains 2 tails and 8 wing feathers or 10 feathers per order and is filled in 6 months. 20 miscellaneous feathers of varied species, size, type, and of a slightly lower quality can be filled in 90 days.

V.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Certiorari is necessary in this case because the Opinion below implicates the important issue of religious freedom guaranteed under the First Amendment. Mr. Rodriguez-Martinez cannot get a permit; thus to possess an eagle feather - as important to his religion as a cross to a priest or the Torah to a rabbi - he must do so in violation of the BGEPA.

The Opinion ignored the proven and dramatic recovery of the bald eagle. The Opinion burdens Mr. Rodriguez-Martinez's sincere religious practice. Criminalizing Mr. Rodriguez-Martinez's possession of sacred feathers, solely because his tribe is not recognized by the federal government, is simply not supported by a compelling government interest nor is it the least restrictive means available.

The Opinion is also contrary to United States Supreme Court precedent. The Opinion misapprehends the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000 and this Court's interpretation of that statute in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal 546 U.S. 418 (2006), and has effectively *permanently* prohibited Mr. Rodriguez-Martinez from possessing feathers essential to the practice of his religion - no matter how the eagle has and will continue to recover in the future.

There is no question that Mr. Rodriguez-Martinez's religious belief is sincere and his feathers are central to those beliefs. See, United States v. Vasquez-Ramos, 531 F.3d 987, 990 (9th Cir. 2008). Mr. Rodriguez-Martinez received the feathers during Native American religious ceremonies and used them for religious worship. He could not obtain the necessary permits, however, because his tribe, the Huichol, originates in Mexico and is not recognized by the federal government. The effect of the Opinion, if it stands, will be that the arbitrary and largely political distinction between members of federally recognized tribes and those who are not, is elevated over Mr. Rodriguez-Martinez's sincere practice of his Native American religion. This is incorrect and unconstitutionally burdens the free exercise of his religion.

Given the dramatic increase in bald eagle populations, there is simply

no longer factual support for the Opinion's conclusion that there exists a compelling interest in protecting the bird in general. The Opinion, however, completely severs the logical tie between the government interest in protecting the eagle and the bird's population. While the government may have earlier justified a compelling interest based upon a factual showing of a severely dwindled eagle population, those are no longer the facts. The bird has so dramatically recovered in the last four decades that scientific evidence supported its delisting– a dramatic event which was extensively publicized. Despite this undisputed factual record, and scientific conclusions, the Opinion appears to have indefinitely conferred protection on the eagle "as our national symbol." The Opinion relies upon the assertion of a generalized interest, without regard for the actual biological need to protect the bird, let alone the debilitating burden on Mr. Rodriguez-Martinez's religious practice.

The Opinion is contrary to this Court's decision in Gonzales v. O Centro Espiritia Beneficiente Uniao do Vegetal, 546 U.S. 418 (2006) which decried reliance on "generalized" government interest. O Centro clearly places the burden on the government to show why it has a compelling interest in precluding the individual's religious practice and why the rule is not amenable to a discrete exception. Applied here, the Opinion, contrary to O Centro, did not require the government to show why it had a compelling interest in precluding Mr. Rodriguez-Martinez *individually* from possessing bald eagle feathers and why the existing law is not amenable to a discrete exception –the issuance of a permit to him– accommodating *his* possession. The government did not and could not meet that burden.

The present regulatory scheme already permits numerous exceptions

for various non-religious purposes, and is riddled with inconsistency and inefficiency. The Opinion simply fails to persuade that Mr. Rodriguez-Martinez's possession of bald eagle feathers will have any impact on the bald eagle which it purports to protect. This Court should grant certiorari and vacate the Opinion which uses the eagle's status as a symbol of American ideals to justify trampling those very freedoms asserted by Mr. Rodriguez-Martinez.

VI.

ARGUMENT

CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION FOUND A COMPELLING INTEREST IN PROTECTING BALD EAGLES BASED ON AN ASSERTION OF GENERALIZED INTEREST – THE BIRD AS A SYMBOL – NOT SCIENTIFIC DATA AND BECAUSE IT FAILS TO CONSIDER THAT THE REPOSITORY SYSTEM IS CAPABLE OF A DISCRETE EXCEPTION FOR MR. RODRIGUEZ-MARTINEZ AND THEREFORE IT IS NOT THE LEAST RESTRICTIVE MEANS AVAILABLE

A. The Opinion's Conclusion That There is A Compelling Interest in Protecting Bald Eagle Populations Per Se is Inconsistent with the RFRA as Interpreted by this Court in O Centro.

The Opinion purports to simply follow the earlier Ninth Circuit case of United States v. Antoine, 318 F.3d 919, (9th Cir. 2003), which addressed precisely the issue presented here. In fact, however, the Opinion significantly *departs* from the Antoine Court's analysis and logical underpinnings. Specifically, the Antoine court adhered to the strict scrutiny required by the RFRA and later this Court in O Centro, by reasonably recognizing that a compelling interest in conserving bald eagles may weaken as their population increases. Id. at 921.

The Antoine panel based its decision on a record that predated the one in this case by several years. At that time, the FWS had proposed delisting the eagle because of the scientific evidence that indicated the bird had rebounded. July 6, 1999 Proposed Rule to Remove the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife. The Ninth Circuit, however, found the force of this evidence limited at that time, as the proposal was not finalized and the Court concluded that the Fish and Wildlife Services may "revise its analysis in light of information it receives." Id.

Even thought the agency action had not become final as it has now, the evidence from the scientists was persuasive, and the Ninth Circuit in Antoine was clear that the government's 1999 *proposal* to delist the bald eagle did in fact provide "support for Antoine's argument that the eagle-protection interest is weaker than when Hugs[3] was decided" and that "in theory" time could transform a once-valid application of a statute into an invalid one if an appellant adduced "evidence sufficient to convince us that a *substantial* change in relevant circumstances has occurred." Id. (emphasis in original).

The Antoine opinion invited reexamination of the issue once the FWS made a final decision. Recognizing the concerns and directives in Antoine, Mr. Rodriguez-Martinez presented undisputed, objective data, published by government itself by the FWS in the federal register. This data demonstrates that the dramatic recovery in bald eagle populations represents the necessary

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[3]United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997), argued in February 1997, is the first Ninth Circuit case to find a compelling interest in protecting bald eagle populations, however, the defendant-appellant in Hugs did not challenge the government's asserted interest in protecting bald and golden eagles, and it is unclear what evidence, if any, the panel considered.

"substantial change in relevant circumstances." Antoine 318 F.3d at 918, fn.1 (emphasis omitted.)

The record in the present case was much more compelling. The agency action was final. The bird was delisted. The data demonstrated the eagle population was significantly greater than the 1999 record in Antoine. Still, despite this objective, undisputed, published evidence - the Opinion below essentially found there was no showing of a substantial change that would cause the Ninth Circuit to revisit the issue raised in Antoine.

The Opinion ignores the analysis and precedent in Antoine, and ignores the substantial change in facts since the record in Antoine. For example, just since the 1999 proposal to delist, upon which the findings in Antoine where based, the bald eagle population in lower 48 states increased 23% from 5,748 breeding pairs to an estimated minimum of 7,066 at the time of Mr. Rodriguez-Martinez's motions hearing in the district court and increased 70.3% since the 1999 count; to a high of 9,789 breeding pairs when the Ninth Circuit heard oral argument last October. See, FWS Proposal to Reopen Public Comment; FWS News Release July 28, 2007. The government presented no evidence in the record in this case to refute these staggering increases and the Opinion appears to have adopted them as well. See, Vasquez-Ramos 531 F.3d at 991 ("In July 2007, the Department of the Interior removed the bald eagle from the Endangered Species List.")(citation omitted.)

The Opinion ignored the government's (FWS) own contemporary scientific findings which conclusively establish the recovery of the bird. Instead, it inexplicably turned to the more than 60 year old legislative history of the BGEPA wherein Congress recognized that "the bald eagle is [not] a

mere bird of biological interest but a symbol of the American ideals of freedom." Id. at 991. Moreover, the Opinion appeared to adopt the Tenth Circuit's conclusion that "[T]he bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government's interest in preserving the species remains compelling in either situation." Id. (citing United States v. Hardman, 297 F.3d 1116, 1128 (10th Cir. 2002)(en banc).

Thus, while the Opinion attempts to affirm the denial of the motion to dismiss by genuflecting to earlier circuit precedent in Antoine, the reality is that it substituted the conflicting compelling interest analysis used by the Tenth Circuit in Hardman for Antoine's suggested analysis. See, Hardman 297 F.3d at 1128 (holding that government will have a compelling interest in protecting the bald eagle regardless of population increases.) The impact of the Opinion is that regardless of *any* current or future substantial change in eagle populations the government *will always* have a compelling interest in protecting them - even from unrealistic or completely nonexistent threats.

In contrast to the Tenth Circuit's per se compelling interest analysis from Hardman, the "substantial change" approach endorsed by Antoine, is better reasoned and more consistent with relevant United States Supreme Court precedent interpreting the RFRA. By tying the compelling interest analysis to the legislative history and the bird's status as a "national symbol" the Opinion avoided grappling with the undisputed scientific data and the final agency action delisting the bird. Just as the Opinion's quoted language suggests, the number of breeding pairs could conceivably increase ten fold to 100,000 and Mr. Rodriguez-Martinez's religious beliefs would still be subjugated by the Ninth Circuit to a symbolic ideal wholly disconnected from

concrete scientific data.

This generalized assertion of interest is precisely what this Court forbade in O Centro. O Centro was issued after Antoine and constitutes a significant shift in legal terrain since Hugs, Antoine and Hardman. O Centro fundamentally affects the application of the RFRA to an individual's religious practice. See e.g. Multi Denominational Ministry of Cannabis and Rastafari, Inc. v. Gonzales, 474 F.Supp.2d 1133, 1143 (N.D. Cal. 2007)(holding that res judicata's preclusive force was extinguished by the intervening change in law brought by O Centro which "shifted the legal terrain" surrounding the plaintiffs' claim under the RFRA).

In O Centro the government argued that because it had a compelling interest in the uniform application of the Controlled Substances Act, no exception to a ban on the controlled substance Dimethyltryptamine (herein "DMT") could be made to accommodate the respondent church - the Uniao do Vegetal (herein "UDV.") This Court rejected this argument, holding rather that the "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." 126 S.Ct. at 1213. This Court specifically embraced the approach taken in Sherbert v. Verner, 374 U.S. 398, where the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular claimants." Id.

Thus, in O Centro, the mere fact that the government had determined that DMT should be listed under Schedule I "did not provide a categorical

answer that relieves the Government of their obligation to shoulder its RFRA burden." 125 S.Ct. at 1214. See, Navajo Nation v. U.S. Forest Service, 479 F.3d 1024, 1043 (9th Cir. 2007)(citing O Centro for proposition that "[T]he Supreme Court has recently emphasized that, even with respect to governmental interests of the highest order, a 'categorical' or general assertion of a compelling interest is not sufficient.")

Additionally, this Court found persuasive that the Controlled Substance Act had built in provisions which allowed for the waiver of certain requirements if "consistent with the public health" and that its provisions applied equally to other substances such as mescaline and peyote, which were subject to exception for Native American religious use. Id. Specifically, this Court held that "[i]f such use is permitted in the face of the general congressional findings for hundreds of thousands of Native Americans practicing their faith, those same findings alone cannot preclude consideration of a similar exception for the 130 or so American members of the UDV who want to practice theirs." Id. Finally, this Court rejected the Government's "slippery slope" concerns that "if I make an exception for you, I'll have to make one for everybody, so no exceptions," holding that the RFRA operates by mandating consideration, under the compelling interest test, of exceptions to "rules of general applicability." Id. at 1215. Any other understanding of the RFRA would effectively nullify the statute, since, if the burden of proof could be satisfied by citing agency findings, without additional evidence, RFRA challenges would rarely succeed.

In this case, as in O Centro, Mr. Rodriguez-Martinez's ability to exercise his religion should not be wholly dependent on the government's

decision to limit access to bald eagle feathers to an arbitrary group (its own list of federally recognized tribes) based on a generalized interest. Just as with the Controlled Substance Act in O Centro, the BGEPA has specific exceptions, including those for the religious use of thousands of members of federally recognized tribes. The statute already allows exceptions. This reality strongly supports a finding that the general protection of bald and golden eagles is amenable to an exception for Mr. Rodriguez-Martinez and that the BGEPA is presently not administered in the least restrictive means possible under the RFRA. See, O Centro, 126 S. Ct. At 1222 (concluding that the RFRA contemplates "judicially crafted exceptions" to federal laws); Multi Denominational Ministry, 474 F.Supp.2d at 1145 (stating that in O Centro the Supreme Court "endorsed a case-by-case consideration of religious exemptions to generally applicable rules.")(citations omitted.)

This Court should adopt the approach suggested in Antoine. It is both sensitive to the fact that the government should not be expected to ". . . re-litigate the issue with every increase in eagle population," Antoine 318 F.3d at 922, and that sincere religious beliefs should not be held hostage indefinitely when substantial changes in relevant circumstances have occurred such as in this case. Such a substantial change was established in this record. It was so substantial that this important bird was taken off the list. In light of the clear record, the Ninth Circuit's Opinion holding that "such 'transformation' has not occurred" is clearly erroneous and must be vacated and the conviction reversed.

* * *

B. The Repository System is Capable of Including Mr. Rodriguez-

Martinez and Therefore is Not the Least Restrictive Means

The government's remedy for the obvious religious burden that ensued from criminalizing possession of eagle feathers - known religious symbols - was to create a permit system that is now antiquated and proven inadequate. The Ninth Circuit Opinion ignores the evidence in the record of the Repository's inadequate collection efforts, a reality noted in other courts such as United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986), and proven by the facts before it in this case. The Opinion incorrectly concluded that "there is a fixed supply of eagle feathers" and from there made another erroneous jump to the conclusion that therefore "the burden on religion is inescapable.'" Vasquez-Ramos, 318 F.3d at 992 (quoting in part Antoine, 318 F.3d at 923). In fact, Mr. Rodriguez-Martinez demonstrated below that such difficult choices need not be made. In fact, the supply of eagle feathers is *limited*, not fixed, and could be vastly increased if the government made an effort commensurate with the import of the religious freedoms at stake.

As a threshold matter, it should be noted that the permit process operated for eleven years without the requirement that the applicant be a member of a federally-recognized tribe. See, 50 C.F.R. §22.22(a)(5), (6) (1975)(In 1974, the Secretary revised the 1963 regulations, requiring that applicants "attach a certification from the Bureau of Indian Affairs that the applicant is an Indian.") If under that system, there was so much demand from individuals similarly situated to Mr. Rodriguez-Martinez that permit system was "overwhelmed," the government presumably would have offered evidence to that effect. It did not do so.

Moreover, substantial evidence was presented by Mr. Rodriguez-Martinez that the permit process was amenable to inclusion of similar

individuals and therefore is not administered using the least restrictive means. The Opinion erred in its conclusion that there was a limited supply of eagle feathers, seemingly equating "limited" with "fixed." In fact, the record showed that the supply varies and there is a realistic potential to substantially increase the supply. Specifically, that supply could be increased by improved collection efforts, improved public information, and decriminalization of good faith transportation of eagle feathers by lay persons seeking to turn in found birds to the authorities. The inadequate collection efforts were established in the district court through undisputed and stipulated testimony that only one in thirty bald eagles that naturally die in the lower forty-eight states are actually collected and that the significant number of eagles killed by power facilities, wire-strikes, and electrocutions rarely are collected or make it to the repository.[4]

Here again, however, the Opinion refused to consider concrete evidence and instead embraced generalization and speculation by stating that "[B]ecause the government is not obligated to increase the supply of available carcasses, Defendants cannot be heard to complain that their right under RFRA are violated by government's refusal to expand its collection and distribution practices." Vasquez-Ramos, 522 F.3d at 993. The Opinion almost seems to suggest that these eagle parts are manufactured and distributed by a benevolent government agency.

In fact, they are of course found naturally in the wild as they have been for thousands of years. It is the *government's* own actions that restrict Mr.

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[4]It is also supported by the logical conclusion that the bird population in the forth-eight states had nearly doubled since the 1994 Executive Mandate to improve collection efforts.

Rodriguez-Martinez's access to feathers exchanged through religious ceremonies or found in the wild. By creating the permitting system, the government has injected itself into Indian religious practice. It follows that the government should do its best to make these sacred feathers religious symbols lawfully available.

Mr. Rodriguez-Martinez is not asserting the government has affirmative obligation with respect to collecting eagle feathers. If, however, the government exclusively assigns itself the task of collecting feathers, and does so in an inefficient and offensive manner, it should not criminally prosecute the free exercise of this man's religion unless found absolutely necessary under the RFRA. Surely if the government rounded up all the available crucifixes and then distributed them back to practicing Christians in such an inefficient and offensive manner, this Court would hold the government to no less scrutiny or give short shrift to the RFRA's requirement that the government establish it is truly using the least restrictive means possible before concluding that a man must be a criminal to practice his religion.

VII.

CONCLUSION

Mr. Rodriguez-Martinez does not seek to undermine any of the substantive portions of the BGEPA which allows for regulations that serve to protect live eagle populations. He only challenges the specific regulations (i.e. making him ineligible for a permit) which fail to accommodate his religious practices, despite that such practices are identical to those federally recognized Native Americans who are eligible for permits under the regulations.

The evidence regarding the dramatic recovery of the bald eagle population is dramatic and undisputed. Scientists agree that the populations will continue to increase. As numerous government admissions in the Federal Register indicate, the bald eagle population is robust and capable of withstanding numerous and much more significant threats including loss of habitat, disease, and environmental contamination. Eight years have elapsed since the government has acknowledged this dramatic recovery and proposed delisting of the bald eagle from the Threatened Species List. The agency action is final and the bird is delisted. Still, the government has done nothing to accommodate the religious practices of Mr. Rodriguez-Martinez, and further *interferes* by criminally prosecuting the expression of his earnest practice.

The Opinion inexplicably abandons the reasonable approach suggested in its own Ninth Circuit precedent in Antoine and demanded by this Court's decision in O Centro - where the government's interest in protecting eagles is necessarily tied to their population - and issued a short shrift Per Curiam opinion, the logical effect of which is that the government will *always* have a compelling interest *per se*. To effectively *permanently* deny Mr. Rodriguez-Martinez access to the tools of his religious practice is contrary to O Centro and is repugnant to the principles of the RFRA. For these reasons, Mr. Rodriguez-Martinez respectfully requests Certiorari.

Respectfully submitted,

October __, 2008

By_____
MARILYN E. BEDNARSKI
Attorney at Law
Kaye, McLane, & Bednarski, LLP

APPENDIX A

APPENDIX B

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LUIS MANUEL RODRIGUEZ-MARTINEZ, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT

CERTIFICATE OF SERVICE

I certify that on the date below, a copy of Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were express mailed for overnight delivery, postage-prepaid, to counsel for Respondent, the Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue N.W., Washington, D.C. 20530.

September __, 2008 Respectfully submitted,

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