No. 08-6467

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

1. Introduction

Mr. Rodriguez-Martinez is not a threat to the more than ten-thousand nesting pairs of bald eagles currently residing in the lower forty-eight states *nor* the relationship between the United States government and any tribal nations. He is not asking for a permit to take live eagles from the wild. He is merely seeking the right to lawfully possess the eagle parts he obtained in religious ceremonies from legitimate sources.[1] To resolve this case in his favor, he does not need to argue entitlement to eagle parts acquired by the Repository. Therefore, the government's arguments concerning the possible impact on eagle populations and on the ability of recognized tribes to obtain eagle parts for religious purposes from the Repository are misplaced. If Mr. Rodriguez-Martinez is able to lawfully possess his sacred feathers, the impact on both eagle populations and federally recognized tribal members seeking access to eagle parts will be negligible, if not nonexistent.

The burden is on the government in this case to show how any exception beyond the ones already recognized in the statute would be unworkable. It has not done so. The following are examples of this workability. It may be possible for a possessor of eagle parts, such as Mr. Rodriguez-Martinez, to

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[1]The government's insinuation that Mr. Rodriguez-Martinez was involved in a shooting at the Santa Barbara Zoo was not charged nor proven and represents a transparent attempt to inflame this Court. *See*, Brief of the United States in Opposition, at p. 6, ¶2. In fact, the government conducted extensively DNA testing of the eagle parts possessed by Mr. Rodriguez-Martinez and of the eagle remains from the Santa Barbara zoo and the DNA did not match. The government never challenged Mr. Rodriguez-Martinez's declaration, filed with his Motion to Dismiss in district court, stating that he was gifted the eagle parts by tribal elders.

provide convincing proof that the parts came from a legitimate source. A tribal religious leader who obtains eagle feathers from the Repository can readily establish the propriety of possessing those feathers. Or a possessor may convincingly prove that he obtained eagle feathers from a source that acquired the feathers from the Repository or from eagles that died before the effective date of the statutory protection for eagles. The protection of eagles does not justify prohibiting such possession.

A ban on possession of eagle parts is not the least restrictive means of furthering the compelling interest in protecting eagles if it is feasible to allow Mr. Rodriguez-Martinez to present convincing proof of the legitimate source of the parts he possesses. Under the government's analysis, the statutes make no accommodation for such a situation..

The government's secondary argument regarding "trust and treaty obligations to Indian tribes and in preserving Native American culture" is equally unpersuasive. Because the government is also unable to prove that it cannot properly serve those interests without seizing privately possessed eagle parts (regardless of whether the possessor can establish a proper source) and distributing them to recognized tribes, it has failed to satisfy RFRA's least-restrictive-means requirement

This Court should grant Certiorari in the absence of a direct split in the holdings in the circuits for two reasons. First, this is undoubtably a case of national import where the bald eagle and free exercise of religion have been placed squarely at odds by statute. Secondly, there is a significant split in the Ninth and Tenth Circuits' analysis of the issue under the RFRA. The Tenth Circuit in *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002)(en banc) engaged in a detailed factual and logical scrutiny of the government's

justifications for burdening religion. The Ninth Circuit in *United States v. Antoine*, 318 F.3d 919, (9th Cir. 2003) and the case at bar, has been unwilling, however, to perform the level of analysis demanded by the importance of the religious freedoms at stake and this Court's holding in *Gonzales v. O Centro Espiritia Beneficiente Uniao do Vegetal*, 546 U.S. 418 (2006). *See*, *Antoine* 318 F.3d at 923 ("We do not believe RFRA requires the government to make the showing the Tenth Circuit [in *Hardman*] demands of it.")

2. Criminalizing Mr. Rodriguez-Martinez's Possession of Legitimately Obtained Eagle Parts Is Not the Least Restrictive Means of Protecting Eagle Populations

It cannot be disputed that, in general, the BGEPA and MBTA surely advance the interest in protecting eagle populations.[2] Similarly, allowing only a specified number of people to apply for permits to possess eagle feathers may also advance the government's interest. What is disputed is how those permits are distributed. Mr. Rodriguez-Martinez is not a member of a federally recognized tribe and is therefore foreclosed from applying for a permit that may be used as a defense to criminal prosecution for possession of eagle feathers, while an identically situated individual may apply for a permit if he is a member of a federally recognized tribe. While the government's interest in preserving eagles may be impacted by the total number of people who are allowed to acquire eagle feathers, the interest in protecting live eagles has very little to do with to whom permits are distributed.

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[2]It must be noted, however, that these important pieces of legislation are two of our nation's oldest conservation statutes. Congress enacted these statutes against the background of the Migratory Bird Treaties. The Migratory Bird Treaty was initially signed by the United States and Great Britain (on behalf of Canada) in 1916. After almost 100 years of change in eagle populations they should be amendable to some review.

In sum, expanding the permit process to include non-Native American adherents who possessed eagle parts from legitimate sources would have no negative effect on bird populations. As long as the total number of permits available stayed constant such an expansion would at worst create a longer wait list for parts.[3] This argument is addressed in the next section.

3. Criminalizing Mr. Rodriguez-Martinez's Possession of Legitimately Obtained Eagle Parts Is Not Furthering a Compelling Interest in Honoring Trust and Treaty Obligations and Preserving Native American Culture

A. The Government Has Not Demonstrated A Compelling Interest In Honoring Trust and Treaty Obligations and Preserving Native American Culture

The government's arguments regarding treaty obligations and special accommodation for Native Americans are irrelevant in the RFRA context. Gov. Brief in Opp. at p. 14-16. The appropriate focus under RFRA, is not whether the government may set up a different system for Native Americans. Rather, it is whether the government is appropriately burdening Mr. Rodriguez-Martinez's exercise of religion. The government's recitation of their plenary power to legislate with respect to Native American Tribes does not, in the context of a RFRA challenge, relieve the government of its burden to prove that the statute and regulations constitute the least restrictive means of achieving its goals.

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[3] In fact, expanding the permit system may *increase* eagle populations. While the wait might increase for members of federally recognized tribes, it would provide a legal course of action for sincere practitioners, such as Mr. Rodriguez-Martinez, who are not members of federally recognized tribes and who currently have no right to possess eagle parts for religious purposes - even as gifts from legitimate sources. People with no opportunity to receive eagle feathers might be more likely to poach than those who must simply wait.

It is clear that the BGEPA abrogated prior treaties granting Native Americans hunting rights with respect to bald and golden eagles. The government argues that the regulations at issue here replace the prior treaty obligations. It does not follow from the BGEPA's abrogation of certain treaty rights that the "Indian tribes" exception was meant to replace those rights. The government has not shown that fulfillment of treaty obligations is a compelling interest. It has failed to even show that the statutory protections for eagles (apart from the exception for religious purposes) were motivated by trust obligations. In fact, the Migratory Bird Treaty initially listed only the economic benefits of protecting the birds as its purposes, and only later included sport, aesthetic, scientific, and cultural purposes. *See*, *Larry Martin Corcoran & Elinor Colbourn*, Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties, 77 Denv. U.L.Rev. 359, 362 (1999); *see also Missouri v. Holland*, 252 U.S. 416, 435 (1920)(describing the need to protect birds as food sources and to consume insect pests).

In sum, the government's attenuated trust and treaty obligations in this context are simply not "interests of the highest order" such that they can trump Mr. Rodriguez-Martinez's claim to the free exercise of his religion. *See, Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

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B. Criminalizing Mr. Rodriguez-Martinez's Possession of Legitimately Obtained Eagle Parts Is Not The Least Restrictive Means of Furthering an Interest In Honoring Trust and Treaty Obligations and Preserving Native American Culture

The government has failed to persuade how the permitting scheme is the least restrictive means of preserving Native American cultures and fulfilling treaty and trust obligations. The only evidence offered by the government that Native American culture would be endangered by expanding the permitting process to include Mr. Rodriguez-Martinez is the fact that there is currently a wait for parts. Even assuming *arguendo* that the correct analysis includes individuals similarly situated to Mr. Rodriguez-Martinez[4] the record fails to support that there are substantial numbers of individuals like him who are not members of federally recognized tribes, but who are sincere practitioners who possess legitimately obtained eagle parts and could be expected to apply for permits. Thus, the government has failed to show that broader eligibility would result in an increased wait substantial enough to endanger Native American cultures. The government gives no consideration to any offsetting increase in available parts from any recovery of bald and golden eagle population[5].

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[4]The petitioner maintains that the correct analysis is case specific and 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." *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-2(3))(emphasis added.) In any case, the government's argument in this regard is essentially the same as that previously rejected by this Court, - "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Id.* at 434.

[5]The government's response that Repository delays have *increased* as eagle populations have increased is likely more a reflection on the well documented general inefficiency of the Repository system.

Moreover, the government offers no evidence on the threshold question of whether allowing sincere practitioners who are not members of federally recognized tribes to possess eagle feathers, in addition to those who are members, truly threatens Native American culture. Allowing a wider variety of people to participate in Native American religion could foster Native American culture and religion by exposing it to a wider array of persons.

With its argument regarding trust and treaty "obligations" the government attempts to have it both ways. On the one hand it is "obligated" to these treaties to the extent that it trumps an individual's sacrosanct right to the free exercise of his religion. On the other hand, however, the government argues that it is not obligated to do *anything* specifically with respect to the collection of bald eagle parts and Repository system. *See*, Gov. Brief in Op. at p. 17 ("RFRA does not require the government to make the practice of religion easier.") Essentially, the government argues that these illusory "obligations" exempt it from the very oversight and scrutiny the RFRA was designed to provide.

While the government contends that "the petitioner is poorly situated to challenge the operation of the Repository," Gov. Brief. in Opp. at p. 18, fn.3, this Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "[i]t is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." 508 U.S. 520, 547 (1993) (internal quotation marks and ellipsis omitted); *accord O Centro*, 546 U.S. at 433. The well documented inefficiencies of the Repository system, therefore, are highly relevant to the least restrictive means analysis. The government's policies in this area are riddled with inconsistency and

hypocrisy which reveal they are not the least restrictive means .[6]

Even if the government does have a compelling interest here, there is simply no relationship between fulfilling treaty obligations and prohibiting the possession of eagle feathers for bona fide religious purposes. If the government were sincerely attempting to fulfill treaty obligations through its current regulatory scheme, it would limit the possession of eagle feathers for religious purposes to tribes with treaty guarantees of such feathers. That is not what the current regulatory scheme does.

Indeed, none of the federally recognized tribes have treaties that single out and guarantee religious purpose hunting. Treaties simply preserved Native American freedoms to do what they traditionally did - hunt and fish. *See e.g.*, Treaty with the Yakamas, 12 Stat. 951, 953 (1859). Furthermore, not all of the federally recognized tribes have treaties with the United States. *See, Confederated Tribes of Chehalias Indian Reservation v. Washington*, 96 F.3d 334 (9th Cir. 1996)(noting that no treaty was ever concluded with the Chehalis); 65 Fed. Reg. 13, 298 (2000)(listing the Confederated Tribes of the Chehalis Indian Reservation as being a federally recognized tribe). Moreover, under the Bureau of Indian Affairs' mandatory criteria for Federal acknowledgment, 25 C.F.R. § 83.7(a) (2000), there is no requirement that indigenous groups demonstrate they have a treaty with the United States as a

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[6]For example, the Government has on occasion issued permits to take bald eagles for commercial interests, and at least considers such applications, which have no relationship whatever with its treaty obligations. *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. 34999 (June 11, 2003); Notice of an Application to Take Bald Eagles for a Residential Development. 66 Fed.Reg. 18493 (April 9, 2001).

prerequisite for gaining federal recognition.

Conversely, there are also many Indian tribes that have treaties with the United States government, but that are not currently federally recognized. For example, the Wynadot Nation of Kansas is not a federally recognized tribe, even though it has several treaties with the United States government. *Compare,* Vine Deloria Jr. & Raymond J. DeMallie, Documents of American Indian Diplomacy 185-97 (1999)(citing several treaties between the Wynadot tribe and the United States between 1805-1855) *with* (Indian Entities Recognized and Eligible to Receive Services from the United States, 65 Fed. Reg. 13, 298 (2000), which does not list the Wynadot Nation of Kansas as a federally recognized tribe.) Thus, if the purpose of the BGEPA's exception is to lessen burdens on treaty rights, the Secretary's regulations arbitrarily exclude many treaty tribes simply because they are "unrecognized."[7]

The government has offered no evidence regarding the relationship between any specific trust obligations to federally recognized Native American tribes and the burden on Mr. Rodriguez-Martinez. Nor has the government shown precisely how restricting personal, individual permits for religious purposes to members of federally recognized tribes is connected to the government's sovereign-to-sovereign relationships with tribes. *See, e.g. United*

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[7] Additionally, it should be noted that not all Native Americans (federally recognized or not) even consider the bald eagle to be sacred. As the court in *United States v. Hardman* 297 F.3d at 1127, fn. 17. found: "We acknowledge that Native American religions are rich in variety, and that lumping any particular belief system under the term "Native American" religion is somewhat akin to lumping all the sects of Judaism, Christianity, and Islam together under the term "Western" religions....[T]urkey feathers are sacred to the Pueblo, water birds to some of the Oklahoma tribes, caribou to others, etc."

States v. Kagama, 118 U.S. 375, 381-85 (1886) (describing the government's interest in protecting Native American culture as guaranteeing that the weakened Native American nations could survive).

The government has not shown that broader permit eligibility would damage the government's ability to fulfill its trust obligations. The government has thus failed to demonstrate how the permitting process advances its compelling interests.

* * *

CONCLUSION

It is fundamental to our notion of liberty that this Court intervene when government action unnecessarily burdens the free exercise of religion. A substantial change has occurred in the sixty-eight years since the BGEPA was enacted. The 2008 de-listing of the bald eagle validated the un-controverted scientific data proving the bird's tremendous rebound. Indeed, it is rare in this century to have any animal removed from the endangered species list. The government's argument, in large part inflated with "piecemeal" quotes about the importance of eagles in our history, does little to persuade that the burden placed on Mr. Rodriguez-Martinez's religion is necessary. Of course, the bird is an important symbol, but hunting is not the issue it was two-hundred years ago and DDT is not the issue it was sixty years ago. Not only is the eagles' world (population, habitat, and human behavior) different, but Supreme Court authority dramatically changed with *O Centro* which clearly stated the test under the RFRA must focus on whether an *individual* exemption can be created to strike the balance between religious freedom and government interest. The petition should be granted.

Respectfully submitted,

January 7, 2009

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CERTIFICATE OF SERVICE

I certify that on the date below, a copy of Reply to Brief in Opposition to Petition for Writ of Certiorari was express mailed for overnight delivery, postage-prepaid, to counsel for Respondent, the Solicitor General of the United States, Department of Justice, 950 Pennsylvania Avenue NW, Washington, D.C. 20530.

January 7, 2009 Respectfully submitted,

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