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National Cultural Heritage Law Moot Court Competition Best Brief 2017

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NATIONAL CULTURAL HERITAGE LAW MOOT COURT COMPETITION

BEST BRIEF 2017

Co-sponsored by the Lawyers' Committee for Cultural Preservation, the National Cultural Heritage Law Moot Court Competition is the only moot court competition in the world that focuses exclusively on cultural heritage law issues.

The Competition provides students with the opportunity to advocate in the nuanced landscape of cultural heritage, which addresses our past and our identity, and which has frequently become the subject of contentious legal debates and policies. This dynamic and growing legal field deals with the issues that arise as our society comes to appreciate the important symbolic, historical and emotional role that cultural heritage plays in our lives. It encompasses several disparate areas: protection of archaeological sites; preservation of historic structures and the built environment; preservation of and respect for both tangible and intangible indigenous cultural heritage; the international market in art works and antiquities; and recovery of stolen art works.

Topics covered by the Competition in past years include: the Foreign Sovereign Immunities Act and the Act of State Doctrine (2016); constitutional challenges to the Visual Artists Rights Act of 1990 (2015); statutory interpretation questions regarding the Convention on Cultural Property Implementation Act (2014); the Native American Graves Protection and Repatriation Act and the Takings Clause of the Fifth Amendment (2013); the constitutionality of the Theft of Major Artwork Act, which was passed under the Commerce Clause (2012); the Immunity from Seizure Act and the equitable defense of laches (2011); and the mens rea requirement and extraterritorial application of the Archaeological Resources Protection Act (2010).

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SUPREME COURT
OF THE UNITED STATES

Docket No. 16-1983

MICHAEL REDWING,

Petitioner

- v. -

THE UNITED STATES

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Brief for Petitioner
Michael Redwing

https://via.library.depaul.edu/jatip/vol27/iss2/3

QUESTIONS PRESENTED

1. Do similarly situated American Indian Groups deserve the same religious freedom protections if both groups can practice their religion with minimal harm to governmental interests?

2. Under NAGPRA, is a bald eagle feather that is being used for a religious ceremony sufficient to meet the "specific ceremonial object" definition stated in § 3002 of NAGPRA's statutory language?

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STATEMENT OF THE CASE

Statement of the Facts

Mr. Redwing is a member of the Niobrara Band ("Band"), a state recognized Indian group.[1] Mr. Redwing resides on the reservation of the DePaulia Indian Tribe ("Tribe"), a federally recognized Indian tribe. On November 16, 2014, Mr. Redwing discovered the remains of a bald eagle under a tree on his property. Mr. Redwing, an adherent of an American Indian religion that holds eagles sacred, took the eagle into his custody to protect it from scavengers and natural forces. Mr. Redwing immediately contacted the Tribe's Chair, and transported the eagle remains to the Tribe's headquarters to be used in their traditional religious ceremonies. The Band also performs traditional religious ceremonies that requires eagle parts. In recognition of his actions, and so his Band could carry out its religious ceremonies, the Chair gave Mr. Redwing three of the eagle's feathers.

On November 21, 2014, the U.S. Fish and Wildlife Service ("USFWS") discovered that Mr. Redwing possessed eagle feathers without a permit as required by the Bald and Golden Eagle Protection Act ("BGEPA"). Despite the fact that Mr. Redwing is a member of a state recognized band, he is not eligible to apply for a permit because he is not a member of a federally recognized tribe. The USFWS agents seized the feathers, and brought criminal charges against Mr. Redwing in December of 2014.

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[1] Citations to the National Cultural Heritage Law Moot Court Competition record are omitted. 2017 record available at https://law.depaul.edu/about/centers-and-institutes/center-for-art-museum-cultural-heritage-law/our-work/moot-court competeition/Documents/2017%20NCHLMCC%20Competition%20Problem.pdf

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Procedural History

In March 2015, Mr. Redwing was convicted on one count of knowingly possessing bald eagle feathers without a permit. The United States District Court for the Central District of DePaulia sentenced Mr. Redwing to one month in prison and ordered him to pay a $2,000 fine. Mr. Redwing appealed his conviction to the United States Court of Appeals for the Twelfth Circuit. He contended that the prohibition under BGEPA and its regulations violates his religious freedom under the Religious and Freedom Restoration Act ("RFRA"). Additionally, Mr. Redwing argued that the Native American Graves Protection and Repatriation Act ("NAGPRA"), not BGEPA, governs this case. The Twelfth Circuit Court affirmed the lower court's judgment that BGEPA and its regulation do not violate RFRA. The Twelfth Circuit Court also rejected the argument that NAGPRA governs this case.

Mr. Redwing filed a petition for writ of certiorari before the United States Supreme Court. This Court granted petition on November 18, 2016.

OPINIONS BELOW

The opinion of the United States District Court for the Central District of DePaulia is reported at No. 16 X 145. The opinion of the United States Court of Appeals for the Twelfth Circuit is reported at No. 16-1983.

JURISDICTION

This Court has appellate jurisdiction to review the decision of the United States Court of Appeals for the Twelfth Circuit. U.S. Const. art. III, § 2. This action arises under the Religious Freedom Restoration Act and the Native American Graves Protection and Repatriation Act. 42 U.S.C. §§2000bb-bb4, 25 U.S.C. §§3001, *et seq.*

STANDARD OF REVIEW

The standard of review is de novo because the law, not the facts, is in dispute. *See Highmark, Inc. v. Allcare Health Mgmt. System, Inc.*, 134 S. Ct. 1744, 1748 (2014).

SUMMARY OF THE ARGUMENT

Mr. Redwing, as an American Indian, holds sincere religious beliefs that eagles are sacred. The government has burdened Mr. Redwing's free exercise of religion without sufficient legal justification. While the government has a compelling interest in protecting endangered bald eagles, the government does not have a compelling interest in promoting relations with federally recognized tribes at the expense of similarly situated American Indian groups. The restrictions placed on Mr. Redwing's free exercise of religion is one the government created almost thirty years after BGEPA was enacted. This interpretation of BGEPA that excludes American Indians that practice sincere religious beliefs is not a compelling interest under RFRA.

Here, the government has failed to prove that it employed the least restrictive means in protecting eagle populations because an outright ban on possession of eagle parts is not necessary to accomplish this interest. Furthermore, Mr. Redwing was not engaged in any activities that would jeopardize bald eagle populations. Therefore, the government has not employed the least restrictive means that would justify violation of Mr. Redwing's religious freedom. Even if this Court finds a compelling interest in fulfilling responsibilities to federally recognized tribes, the government has failed to show that increased wait times are a sufficient justification to limit the least restrictive means analysis.

Mr. Redwing's rights were separately violated when the specific sacred objects were removed from American Indian land in violation of NAGPRA. Respondent may argue that because bald eagle feathers are fungible, they do not qualify as sacred objects. However, bald eagle feathers are specific sacred objects under NAGPRA because the Congressional Record reveals that "sacred objects" need not be irreplaceable. Furthermore, even if this Court disagrees that Congressional intent is clear in this instance, this Court has previously held that when faced with two possible constructions of a statute, the statute should be liberally construed in favor of American Indians.

ARGUMENT

I. BGEPA AND ITS REGULATIONS VIOLATE RFRA BECAUSE ALTHOUGH THERE IS A COMPELLING GOVERNMENT INTEREST IN PROTECTING BALD AND GOLDEN EAGLE POPULATIONS, THE REGULATIONS ARE NOT THE LEAST RESTRICTIVE MEANS OF DOING SO.

The government cannot create laws which needlessly prohibit the free exercise of religion. U.S. Const. amend. I. Congress, in passing RFRA, carefully carved out limited circumstances in which the government can burden individuals' exercise of religion. 42 U.S.C. § 2000bb-1(a)-(b). The government may impose this burden only if it "demonstrates that application of the burden to the person 1) is in furtherance of a compelling government interest; and 2) is the least restrictive means of furthering that compelling government interest." *Id.*

Mr. Redwing has sincere religious beliefs that bald eagles and their remains are sacred and play an important role in his religious ceremonies. Thus, USFWS substantially burdened Mr. Redwing's free exercise of religion when it confiscated the bald

eagle feathers. USFWS confiscated the feathers based on authority granted by BGEPA, under which one may not "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import . . . any bald eagle . . . alive or dead, or any [eagle] part . . ." 16 U.S.C. § 668(a) (alteration in original). In recognition of the fact that this law does burden free exercise of religion, regulations under BGEPA were promulgated to include a religious exception. 50 C.F.R. § 22.22. This exception to the blanket ban grants permits for possession of eagle parts "only to members of Indian entities recognized and eligible to receive services from the United States Bureau of Indian Affairs listed under [the publication of list of recognized tribes] engaged in religious activities who satisfy all the issuance criteria of this section." *Id.* (alteration in original). Despite his sincere religious beliefs and his membership in a state recognized band, Mr. Redwing is not eligible to apply for a permit under this exception.

Mr. Redwing and other members of state recognized American Indian groups should not be excluded from the religious exception under BGEPA and its regulations because they do not meet RFRA's standard to justify burdening Mr. Redwing's free exercise of religion. The government has suggested two compelling reasons to justify burdening religion under BGEPA: 1) protecting bald and golden eagle populations; and 2) protecting the interests of federally recognized American Indian tribes. While the government certainly has a compelling interest in protecting eagle populations, it does not have a compelling interest in valuing the religious freedom of one group at the expense of other similar groups. Furthermore, the government has failed to consider other less restrictive means of protecting eagle populations. Additionally, even if the government does have a compelling interest in favoring the religious freedom of federally recognized tribes, BGEPA's limited religious exception is not the least restrictive means of accomplishing this interest.

A. The Government Does Not Have a Compelling Interest in Furthering Relationships with Federally Recognized American Indian Tribes.

Circuit courts have disagreed on whether the government has a compelling interest in furthering relationships with federally recognized tribes. *Compare United States v. Wilgus*, 638 F.3d 1274, 1277 (10th Cir. 2011) (holding that the government has this compelling interest because the United States has a special obligation to federally recognized tribes); *with McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 468 (5th Cir. 2014) (holding that the government does not have this compelling interest because Congress did not intend to only protect the religious interests of federally recognized tribes). The conclusion that the government has a special obligation to federally recognized tribes is, however, unfounded. Without a justification for special treatment, this court should adopt the approach taken by the Fifth Circuit Court in *McAllen Grace*.

The facts of *McAllen Grac*e are strikingly similar to the instant case. In 2006, a group of individuals including Robert Soto, a member of a state recognized American Indian tribe, attended a religious ceremony while in possession of eagle feathers. *McAllen Grace*, 764 F.3d at 468. USFWS attended the religious ceremony and confiscated the feathers because the individuals did not have permits to possess the feathers. *Id.* The *McAllen Grace* court stated that the only compelling interest is protecting eagle populations. *Id.* at 473. The court dismissed the compelling interest of only protecting federally recognized tribes, because there is no justification for denying other American Indian groups similar accommodations. *Id.* at 474.
The reasoning of the *McAllen Grace* court should be applied here, because it also focused on the unjustifiable distinction between state and federally recognized tribes. Although Mr. Redwing is not a part of a federally recognized tribe, he is a part of the state

recognized Niobrara Band, which requires the use of eagle parts for religious ceremonies. Thus, the government should not be allowed to deny a religious exception to Mr. Redwing, a member of a state recognized band, when it affords accommodations for federally recognized tribes.

The *McAllen Grace* court, in reaching its conclusion, drew comparisons to religious exceptions concerning bans on controlled substances. *McAllen Grace*, 764 F.3d at 474. For example, the court referenced the practice of a Christian spiritualist sect, which in sincere adherence to their religion ingests hoasca. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 425 (2005). Hoasca is a hallucinogen listed as a Schedule I substance under the Controlled Substances Act. *Id.* at 423. Although the use of hoasca is otherwise banned, the government failed to show a compelling reason to ban its use for sacramental purposes. *Id.* at 439. RFRA was enacted in response to a similar case where practitioners of American Indian faith ingested peyote, another hallucinogenic drug often used for religious purposes. *Id.* at 424. The *Gonzales* Court reasoned that because the Controlled Substances Act carved an exemption for peyote when used for religious purposes, the Act should also create a similar exception for hoasca. *Id.* at 433.

The same reasoning for extending the exception to the use of controlled substances for religious purposes should be applied to the possession of eagle parts. In *Gonzales*, this Court highlighted that the government failed to show why a religious exemption should be allowed for peyote but not hoasca. Here, the government similarly failed to show why an exemption should exist for federally recognized tribes, but not state recognized bands. Further, when creating exemptions for peyote use, there were no distinctions made between the practitioners of the religions. Similar to peyote, worship of and use of bald eagle feathers is a common feature across many American Indian

groups, not just federally recognized ones. It is unclear, then, why certain religious practices would be prohibited only to state recognized American Indian groups when this distinction was not made for peyote use.

Cases that have held that there is a compelling interest in furthering relations with federally recognized tribes did so without proper reasoning. Courts have resisted expansion of religious exceptions to all American Indians generally. *See United States v. Wilgus*, 638 F.3d 1274, 1277 (10th Cir. 2011). In *United States v. Wilgus*, Samuel Ray Wilgus followed the American Indian faith, but is not American Indian by birth, nor is he member of a state or federally recognized tribe. *Id.* Wilgus was in possession of eagle feathers without a permit. *Id.* The court held the religious exception to possess eagle feathers under BGEPA should not be extended to all adherents of American Indian religions because doing so would overly expand the scope of the exception. *Id.* at 1277. As a policy matter, if any individual could claim religious freedom when in possession of eagle parts, that would severely undermine the effectiveness of trying to protect the eagle species. The *Wilgus* Court held that there was a compelling interest in protecting federally recognized tribes rather than making this broad expansion, but did not consider the possibility of a smaller expansion to state recognized tribes. *Id.* Here, however, Mr. Redwing's Indian American heritage is not in dispute, and he is a member of a state recognized band. Allowing Mr. Redwing to possess eagle feathers for religious purposes would not undermine the goal of the statutes to protect eagles, as it would if an exception were created for all adherents of American Indian religions. The only extension that should be made here is to state recognized tribes, not to all practitioners of American Indian religions.

The distinction favoring federally recognized tribes should not be observed today purely because it has been observed in the past. Other courts have recognized that there is a compelling

interest in protected federally recognized tribes without providing proper reasoning for doing so. *See Gibson v. Babbit*, 223 F.3d 1256,1258 (11th Cir. 2000); *Wilgus*, 638 F.3d at 1277. But as noted in the dissent to the lower court's opinion: "The restriction of BGEPA's exception for 'the religious practice of Indian tribes' to members of only federally recognized tribes does not stem from the text of BGEPA itself, but . . . how the government chooses to interpret BGEPA." The requirement that individuals seek permits, and the demonstration that they are a part of a federally recognized tribe, came over thirty years after Congress amended BGEPA. *McAllen Grace*, 764 F.3d at 470, 474. These distinctions were arbitrarily made in the regulations and should not be observed without proper justification.

B. BGEPA and Its Regulations Are Not the Least Restrictive Means of Accomplishing Either of the Government's Proposed Compelling Interests.

In addition to establishing that BGEPA and its regulations serve a compelling interest, the government must also show that BGEPA and its regulations serve that interest by the least restrictive means possible. 42 U.S.C. § 2000bb(a)(2). The test for the least restrictive means to accomplish a compelling interest follows a strict scrutiny standard and is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). To meet this standard, the government must prove it accomplished one of its compelling interests by citing specific evidence to support their assertion that no other less restrictive means is viable. *See Gonzales*, 546 U.S. at 430; *see also McAllen Grace*, 764 F.3d at 476-80. Additionally, the least restrictive means test does not consider the regulatory scheme in the abstract, but rather "through application of the challenged law 'to the person' -- the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales* 546 U.S. at 430-31. The government has not met this high standard for the

interest of protecting bald and golden eagle populations, nor for the interest of furthering relationships with federally recognized tribes.

i. BGEPA and its regulations are not the least restrictive means of protecting bald and golden eagle populations.

BGEPA and its regulations are not the least restrictive means of protecting bald and golden eagle populations because the government failed to consider all viable alternatives. In order to satisfy its burden of showing that it employed the least restrictive means, the government must perform an extensive analysis of other possible means of accomplishing its interests. *See Hobby Lobby*, 134 S. Ct. at 2780-84. The government has not done so here, but rather has refused to consider less restrictive alternatives based on reasoning which this Court rejected in *Hobby Lobby*. The government must consider all other possible means, even those that would require the government to expend additional resources or establish new methods of enforcement. *Id.* at 2781.

In *Hobby Lobby*, this Court held that United States Department of Health and Human Services ("HHS") could provide health insurance coverage for contraceptives to Hobby Lobby's female employees by a less restrictive means than forcing Hobby Lobby to provide coverage itself. *Id.* In its analysis, this Court suggested that less restrictive means included HHS covering the cost of the insurance to the employees. *Id.* This Court also rejected the assertion that RFRA cannot require the creation of new programs. *Id.* at 2780-81. Therefore, in the instant case, the government must consider all possible means of accomplishing its interest of protecting bald and golden eagle populations, even if such means would necessitate additional funds or the creation of new programs.

Here, applying the analysis required by *Hobby Lobby* would reveal several other less restrictive means of protecting eagle populations. The possibilities include additional permitting to certify that the eagle parts were legally obtained and not the result of illegal poaching or black market transactions. The government may not refuse to consider these means simply because these options may require additional enforcement efforts, additional costs, or the creation of new permitting programs. *Hobby Lobby*, 134 S. Ct. at 2781. In order to reject these options as a reasonable method of enforcement, the government would have to show that they are impossible or financially unviable. *See id.* at 2784. Here, the government has failed to meet its burden to show that BGEPA and its regulations are the least restrictive means of protecting eagle populations.

Furthermore, in instances where the government extends a religious exception to a general ban to one religious group, but not others, it has a burden to show why an expansion to the exception would not be tenable. *See Gonzales*, 546 U.S. at 433. In fulfilling this burden, the government cannot simply reference abstract justifications, but rather must cite to specific evidence to justify limiting religious exceptions. *Id* (this Court in *Gonzales* held that general references to research on the dangers of Schedule I substances was not sufficiently specific to justify denying a religious exception for hoasca).

In order to show that the religious exception to only federally recognized tribes in BGEPA and its regulations is the least restrictive means, the government must cite to specific evidence as to why an expansion of the exception to state recognized tribes would not be viable. Following the logic of this Court in *Gonzales*, reference to general information about danger to eagle populations is not sufficient. The government has the burden to prove that an exception that includes state recognized tribes would prevent it from protecting eagle populations, but the

government has failed to provide such specific evidence. Just as the government in *Gonzales* failed to show specific additional harm to the general population by allowing a religious exception for hoasca use, the government here has failed to show that an exception for state recognized tribes would prevent it from protecting eagle populations.

Finally, courts have interpreted RFRA to require consideration of the law as applied to the particular claimant appearing before the court. *See Korte v. Sebelius*, 735 F.3d 654, 685 (7th Cir. 2013). This Court must consider the specific religious practices of the claimant that have been burdened and whether that burden is necessary to accomplish government interests. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). In *Holt*, this Court upheld a prisoner's right to maintain a beard despite the government's objections that beards could be used to hide contraband. *Id.* at 867. This Court focused on the fact that the prisoner requested to grow a 1/2-inch beard, and held that such a beard could not possibly be used to smuggle contraband into prisons and therefore did not inhibit the government's interest. *Id.* at 863-64.

Here, this Court should consider whether Mr. Redwing's possession of bald eagle feathers specifically impedes the government's ability to protect eagle populations. When considered as specifically applied to Mr. Redwing, BGEPA and its regulations are not the least restrictive means of protecting eagle populations. Mr. Redwing did not participate in any activities BGEPA and its regulations are designed to prevent. He did not hunt or poach the eagle in question, nor did he participate in illegal sale or purchase of eagle parts. Therefore, application of BGEPA and its regulations to Mr. Redwing is not the least restrictive means of accomplishing the interest of protecting eagle populations because doing so would not aid prevention of hunting, poaching, or illegal sale or purchase of eagle parts.

ii. BGEPA and its regulations are not the least restrictive means of maintaining relationships with federally recognized tribes.

Even if this Court should find that there is a compelling interest in protecting the ability of members of federally recognized tribes to practice their religion, BGEPA and its regulations are not the least restrictive means of accomplishing this interest. The government has not shown how an increase in waiting time for eagle parts by members of federally recognized tribes eliminates its ability to pursue this interest. Nor has the government shown that an increase in waiting time is adequate justification to exclude an option from the least restrictive means analysis, a strict scrutiny standard. Furthermore, the government has not sufficiently shown that the inclusion of state recognized tribes in its permitting scheme for legal acquisition of eagle parts would result in a substantial increase in waiting time for eagle parts from the repository.

The extensive analysis proscribed in *Hobby Lobby* must also be applied in considering the least restrictive means of fulfilling the government's responsibilities to federally recognized tribes. *See* 134 S. Ct. at 2780-84. The government has also failed to satisfy this demanding standard for this interest. Under the *Hobby Lobby* analysis, increased wait times should not be a justification for the government to disregard a less restrictive means of accomplishing its interest. This Court in *Hobby Lobby* rejected arguments that a new program for contraception coverage should not be considered because it would force female employees to take additional steps to access contraceptives. *Id.* at 2782. Just as this Court in *Hobby Lobby* required HHS to consider alternatives which may inconvenience individual employees, here USFWS must consider alternatives which may increase wait times for members of federally recognized tribes.

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Prior to *Hobby Lobby*, cases such as *Gibson* and *Wilgus* held that BGEPA and its regulations were the least restrictive means of fulfilling obligations to federally recognized tribes. *See Gibson*, 223 F.3d at 1258; *Wilgus*, 638 F.3d at 1277. Neither of these cases, however, undergoes the thorough analysis undertaken in *Hobby Lobby*. Under the stricter standard proscribed by this Court in *Hobby Lobby*, the reasoning used by the *Gibson* and *Wilgus* courts would not pass muster because both courts considered increased wait times to be sufficient justification to exclude a less restrictive means. Because *Hobby Lobby* rejected this type of justification, these cases would likely have been decided differently on the issue of least restrictive means had they occurred following *Hobby Lobby*.

Additionally, the government here makes a factual assertion that the expansion of the religious use exceptions to members of other American Indian groups would severely increase wait times for members of federally recognized tribes to receive eagle parts. The government does not, however, provide ample evidence to support this assertion as required under RFRA. While this Court should respect the opinions of experts in USFWS, this Court should not simply defer to those opinions without sufficient evidence. *See Holt*, 135 S. Ct. at 864. Absent additional evidence, this Court should not accept the assertion that the expansion of the religious exception would significantly increase wait times.

Moreover, the government has not provided sufficient data to prove the assertion that wait times will significantly increase based on population estimates. According to 2010 census data, there are approximately 5.2 million persons of American Indian or Alaskan Native decent in the United States, of which approximately 2 million belong to federally recognized tribes. *McAllen Grace*, 764 F.3d at 478. Among the federally recognized tribes are some of the largest tribes, such as the Cherokee, the

Navajo, and the Sioux, each with membership in the hundreds of thousands. UNITED STATES CENSUS BUREAU, *ACS Demographic and Housing Estimates*, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP05&src=pt (last visited Jan. 8, 2017). By contrast, only a small number of states recognize tribes separately from the federal recognition system. Alexa Koenig, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and States Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79 (2008). Therefore, this Court has reason to doubt whether the evidence would bear out the government's assertion that an expansion of permitting to include state recognized tribes would have a significant impact on wait times for eagle parts. Based on this lack of evidence and its failure to support the government's assertion, this Court should find that a limitation of a religious exception to only members of federally recognized tribes is not the least restrictive means of fulfilling obligations to those tribes.

II. NAGPRA PROTECTS THE REMOVAL OF SACRED OBJECTS, WHICH INCLUDES REMOVAL OF BALD EAGLE FEATHERS USED FOR CEREMONIAL PURPOSES, FROM AMERICAN INDIAN LANDS.

NAGPRA grants ownership rights to American Indians when certain objects are discovered on American Indian land. 25 U.S.C.A. § 3002 (1990). According to its statutory language, "[t]he ownership or control of Native American Cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 . . . shall be in the Indian tribe . . . on whose tribal lands such objects or remains were discovered." *Id.* The statute covers unassociated funerary objects, objects of cultural patrimony, and sacred objects. *Id.* NAGPRA defines "sacred object" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of

traditional Native American religions by their present day adherents." 25 U.S.C.A. § 3001 (1990). NAGPRA's statutory language, however, is silent as to what constitutes a *specific* ceremonial object.

The lower court noted that animals constitute "goods" and that any unit of goods is fungible. By that reasoning, the lower court concluded that dead bald eagle feathers are fungible goods, and fungible goods cannot be specific under § 3001's definition of "sacred objects." While Mr. Redwing does not contest the assertion that dead bald eagles likely constitute fungible goods, the lower court erred by declaring that fungible goods such as bald eagle feathers are categorically excluded from § 3001's definition of "sacred objects." Thus, the feathers confiscated from Mr. Redwing were protected under NAGPRA as sacred objects.

A. A Strict Textualist Interpretation of the Word "Specific" Under § 3001 Does Not Resolve Ambiguity.

Courts are "the final authorities on issues of statutory construction." *Aluminum Co. of Am. v. Bonneville Power Admin*, 903 F.2d 585, 590 (9th Cir. 1989). To interpret the meaning of "specific ceremonial objects" under NAGPRA, this Court should begin with the language of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *See also Kingdomware Technologies, Inc.* v. *United States*, 136 U.S. 1969, 1977 (2016). While a textualist interpretation is often an effective canon of statutory interpretation, courts may not be able to resolve ambiguity caused by multiple competing definitions using this method alone. Here, a textualist approach cannot resolve the ambiguity in § 3001 because there are multiple valid interpretations of the word "specific."

The lower court erred by relying simply on the dictionary meaning of the word "specific" as excluding fungible goods.

Based on this dictionary definition, the lower court erroneously reasoned that for an item to be specific, it must be unique or irreplaceable. While this construction may be one valid interpretation, Merriam-Webster's Dictionary provides a competing definition of the word "specific." Merriam-Webster also defines specific as "free from ambiguity." MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/specific (last visited on Jan. 13, 2017). Ultimately, this distinction is important because it will control whether this Court considers fungible goods to be specific. To provide an illustration, one can hold a specific blank sheet of paper, even though blank paper is fungible. Despite the fact that the sheets of paper are indistinguishable from one another, each has a unique physical existence. Therefore, the lower court's reliance on a single dictionary definition of the word "specific" was improper. In order to properly interpret the word "specific," this Court should turn to extra-textual evidence to resolve the ambiguity.

B. Legislative History Demonstrates that Congress Intended "Sacred Objects" to Include Fungible Goods such as Bald Eagle Feathers.

This Court has held that "where resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language, and then to the legislative history if the statutory language is unclear." *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *see also In re New Investments, Inc.*, 840 F.3d 1137, 1139-40 (9th Cir. 2016) ("[i]f the statutory text is ambiguous, we employ other tools such as legislative history to construe the meaning of the ambiguous terms.") In *Blum*, the parties disputed differing interpretations of the phrase "reasonable attorney's fees" under a federal statute. 465 U.S. at 888. The Court in *Blum* referred to the statute's Senate report as a benchmark to interpret "reasonable attorney's fees." *Id.* at 897.

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As such, this Court should turn to NAGPRA's legislative history to properly interpret the term "specific ceremonial object." NAGPRA's congressional record provides clarity on Congress' intent regarding the general purposes of the statute as well as the scope of sacred objects. Congress explicitly left out key language that would create a requirement for sacred objects to be unique or irreplaceable.

i. The congressional record shows that Congress purposefully left out the word "irreplaceable" from NAGPRA's definition of sacred object.

NAGPRA's congressional record reveals that Congress excluded the word "irreplaceable" in the definition of "cultural objects" due to American Indian objections. 136 Cong. Rec. H10985-01 (1990). This concern was raised by the Antique Tribal Art Dealers Association ("ATADA"), which argued the definition of "sacred object" was so broad as to be unworkable. *Id.* ATADA suggested that the definition should stipulate that the object need be "irreplaceable" and "necessary for the continued practice of tribal religions." *Id.* ATADA's suggestions, however, were not implemented. *Id.* The congressional record noted that a sacred object need not be irreplaceable. *Id.* By doing so, Congress sustained American Indians' objections that courts should not determine what is intrinsically necessary for practice of a religion. *Id.* If Congress had included the word "irreplaceable," then fungible goods would not constitute sacred objects because fungible goods are by their nature replaceable. Thus, by its omission of the word "irreplaceable," Congress intended not to exclude fungible goods. Therefore, bald eagle feathers should not be categorically excluded from NAGPRA's protections simply because they are fungible.

ii. This Court should construe bald eagle feathers as "sacred objects" because the overall goal of NAGPRA is rooted in protecting American Indian rights and traditions.

According to this Court, American Indian law must be read "in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 1011, 1020 (1978). Here, the congressional record reveals that NAGPRA is "necessary to ensure the repatriation of hundreds of sacred objects to Native American communities to reverse several hundreds of years of abuses of a people, their lands and their very roots." 136 Cong. Rec. H10985-01 (1990). Further, NAGPRA is aimed at building pride among American Indians and understanding among other ethnic groups. *Id.* Congress narrowed the scope of what constitutes a sacred object; stating it does not include "every basket, every pot and every blanket ever made by Indian hands." *Id.* While drawing this limitation, Congress intended to afford American Indians with proper treatment in regards to human remains and religious items.

Congress, in drafting NAGPRA, seemed to suggest that there are two categories of American Indian objects: one of cultural or religious significance, and one of common goods such as pottery and baskets. Bald eagle feathers have deep cultural and religious significance to American Indians. *See United States v. Dion*, 476 U.S. 734 (1986) ("[t]he golden eagle is important in enabling many Indian tribes . . . to continue ancient customs that are of deep religious or emotional significance to them.") Thus, given the choice between these two categories, eagle feathers certainly fall into the first category because these feathers are much more like other ceremonial objects than common household goods. Therefore, Congress likely intended to protect objects such as eagle feathers under NAGPRA.

C. The Supreme Court Has Held Numerous Times that when Faced with Two Possible Constructions of a Statute, the Statute Must Be Liberally Construed in Favor of American Indians.

Even if this Court disagrees that the congressional record resolves § 3001's ambiguity, a well-rooted principle should guide this Court. This Court has articulated that when presented with two possible constructions of a statute concerning American Indian relations, the statute must be liberally construed in favor of the American Indians. *See South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Alaska Pacific Fisheries v. U.S.*, 248 U.S. 78, 79 (1918).

In *Yakima v. Confederated Tribes and Bands of Yakima Nation*, The County of Yakima, Washington sought to impose an ad valorem tax on land located within the gibson Indian Reservation. 502 U.S. 251, 253 (1992). This Court grappled with the issue of whether "taxation of land" should include the taxation of proceeds from the sale of the land. *Id.* at 268. Justice Scalia, delivering the opinion for the majority, held that when "faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence." *Id.* at 269. This Court thus reinforced the long-standing principle that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*

In an earlier decision, this Court cemented the principle of interpretation to the benefit of American Indians. *See Wilson v. Omaha Indian Tribe*, 422 U.S. 653, 666 (1973). The petitioners, Omaha Indian Tribe, argued that the word "Indians" is to include an American Indian Tribe. *Id.* at 654. Respondents, on the other

hand, argued that Congress intended to differentiate American Indian Tribes from individual American Indians. *Id.* at 665. This Court held in favor of the Omaha Tribe, stating "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Id.* at 654, 666.

In *Bryant v. Itasca County*, this Court dealt with two possible interpretations of whether a statute granted states the authority to impose taxes on American Indians who live on reservations. 426 U.S. 373, 373 (1976). This Court considered the statute in question, Public Law 280, to be "admittedly ambiguous." *Id.* at 392. This Court held in favor of Minnesota Chippewa Tribe, restating the "eminently sound and vital canon" that laws should be liberally construed in favor of American Indians. *Id.*

This Court is faced with two possible interpretations of NAGPRA, a statute that Congress undoubtedly passed for the benefit of Indian tribes. Here, the phrase "specific ceremonial objects" is similarly ambiguous to other statutes this Court has interpreted to the benefit of American Indians. This Court should continue to observe this principle given this country's historical and recent mistreatment of American Indians. Given the challenged state of American Indian religion and way of life, this Court should consider such measures that allow American Indian cultures to flourish instead of depriving them of their religious and cultural rights. Therefore, this Court should preserve the "eminently sound and vital cannon" that laws such as the NAGPRA should be liberally construed in favor of American Indians.

CONCLUSION

USFWS substantially burdened Mr. Redwing's religious freedom based on a faulty interpretation of BGEPA. The government has failed to show a compelling reason that would justify burdening Mr. Redwing's free exercise of religion but not a similarly situated groups. The government has also not employed the least restrictive means of protecting eagle populations because extending the religious exception to state recognized American Indian groups would not harm eagle populations. Furthermore, the government has also not employed the least restrictive means of engendering relations with federally recognized tribes because increased wait times are not a sufficient justification to limit the least restrictive means analysis.

Additionally, NAGPRA should govern this case. This Court should examine legislative history because there are two competing dictionary definitions of the word "specific." NAPGRA's congressional record highlights that Congress intentionally excluded the word "irreplaceable" from the definition of "specific ceremonial object." Furthermore, this Court established a principle of statutory interpretation that American Indian laws should be construed liberally in favor of the American Indians in cases such as this where there are competing interpretations. Accordingly, this Court should REVERSE the lower court's decision.

Date: January 17, 2017

Respectfully Submitted,

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