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Validity and Application of the Religious Freedom Restoration Act in the Tenth Circuit after City of Boerne v. Flores

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VALIDITY AND APPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT IN THE TENTH CIRCUIT AFTER *CITY OF BOERNE V. FLORES*

INTRODUCTION

During this survey period, September 2000 to August 2001, the Tenth Circuit grappled to define a standard for evaluating alleged violations of the First Amendment's protection of the free exercise of religion. The Tenth Circuit exhibited little difficulty in concluding that the Supreme Court's 1997 landmark case, *City of Boerne v. Flores*[1] invalidated the highly controversial Religious Freedom Restoration Act ("RFRA" or the "Act")[2] only as it applied to state actions.[3] In this regard, the court aligned itself with the Eighth and Ninth Circuits in holding that claims alleging federal government violations of the Free Exercise Clause should be held to the highest constitutional standard when brought under RFRA.

The Tenth Circuit was less certain, however, of exactly how to apply the RFRA standard. On August 8, 2001, three different Tenth Circuit panels released opinions involving challenges to the same federal regulation but arriving at very different conclusions.[4] Cognizant of the inconsistencies among the results in these cases, the court vacated all three decisions and ordered an *en banc* re-hearing to bring about consistency within the circuit.[5] The *en banc* hearing was held on January 15, 2002.

The regulation at issue in all three cases was an exception[6] to two federal laws that prohibit the possession and transportation of eagles and eagle parts, the Bald and Golden Eagle Protection Act[7] ("BGEPA") and the Migratory Bird Treaty Act[8] ("MBTA"). The exception allows members of federally recognized Indian tribes to possess eagle feathers for Indian religious purposes after obtaining a permit from the U.S. Fish and

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1. 521 U.S. 507 (1997).
2. 42 U.S.C §§ 2000bb-1 to -4 (2001).
3. *See* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001).
4. Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. 17702 LEXIS (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.
5. United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam).
6. *See generally* Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.
7. 16 U.S.C. § 668 (2001).
8. 16 U.S.C. § 703 (2001).

Wildlife Service.[9] In each of these cases, the federal government had seized eagle feathers from individuals, who did not qualify for permits because they were not enrolled in federally recognized tribes.[10] All three individuals claimed eagle feathers were necessary for their religious practices and challenged the permitting regulation as unconstitutionally burdening their First Amendment free exercise rights.[11] In one case, the court invalidated the regulation.[12] In the other two cases, the court upheld it.[13]

Several factors contributed to the mixed results. One factor, which is the central focus of this article, was whether courts must apply RFRA's strict scrutiny standard to all free exercise claims or whether they should apply the less rigorous *Employment Division v. Smith*[14] standard, if none of the parties invoke RFRA.

These cases also raised important questions concerning the government's unique relationship with federally recognized Indian tribes,[15] specifically, whether case law involving Indian trust and treaty rights mandates application of rational basis review to laws and regulations designed to benefit tribes and tribal members.[16] Some members of the court

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9. *See* 50 C.F.R. § 22.22 (2002).

10. *See Saenz*, 2001 U.S. App. LEXIS 17698, at *2-3; *Hardman*, 2001 U.S. App. LEXIS 17702, at *2-3; *Wilgus*, 2001 U.S. App. LEXIS, at *2-4.

11. *See Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698 at *3-4; *Hardman*, No. 99-4210, 2001 U.S. App. LEXIS 17702 at *2-3; *Wilgus*, No. 00-4015, 2001 U.S. App. LEXIS at *2-4.

12. *See Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at *38.

13. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *71; *Wilgus*, , 2001 U.S. App. LEXIS, at *34.

14. Employment Div. v. Smith, 494 U.S. 872 (1990).

15. On rehearing, several tribes submitted amicus curiae briefs. Brief of Amici Curiae Ute Indian Tribe of the Uintah and Ouray Reservation, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Hopi Tribe, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Jicarilla Apache Nation, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Christian Legal Society, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210).

16. Indeed, a compelling argument can be made that these cases should be decided in the context of Indian law, which is a "distinct field, with its own doctrines and traditions," independent of broader legal, social and political concerns. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (Rennard Strickland et al. eds., 1982) (describing the development of the Federal Indian Trust Doctrine and its application as a limit on Congressional authority over Indians). *Cf.* John Celichowski, *A Rough and Narrow Path: Preserving Native American Religious Liberty in the* Smith *Era*, 25 AM. INDIAN L. REV. 1 (2001) (surveying Indian First Amendment/Free Exercise claims before and after Employment Div. v. Smith, 494 U.S. 872 (1990)); Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 808 (1995) (asserting Indian religious claims should be analyzed under the Federal Indian Trust Doctrine because the Free Exercise Clause and the American Indian Religious Freedom Act "fail to offer Native Americans effective religious protection"); Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 701 (2000) (arguing "a valid trust doctrine argument remains to be made for Native American religious freedom" against federal limitations on Indian use of eagle feathers and parts for religious purposes). *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of*

questioned whether the government had a compelling interest in conserving eagles and called for more fact finding on the issue.[17] Although each of these issues merits in-depth discussion and analysis, they are discussed here only to the extent that they influenced or were implicated in the various panels' decisions on first hearing.

Part I of this article traces the jurisprudential history of what at least one commentator has dubbed the "holy war" that has been raging since the early 1960s over the appropriate standard for evaluating free exercise claims.[18] At the center of the debate is RFRA, which has drawn fire for both its substantive content and the manner of its birth.[19] At stake is the delicate balance between the First Amendment's protection of the individual's religious freedom under the Free Exercise Clause and its protection of the national interest in maintaining separation of church and state under the Establishment Clause.[20] Also at issue is the scope of Congress's legislative powers when they collide with the judiciary's long-established authority to interpret the Constitution.[21] By placing RFRA in the context of U.S. Supreme Court decisions that preceded and followed the statute's enactment, it becomes apparent why some have vilified RFRA as an "unconstitutional grab for power" by Congress,[22] while others remain

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States' Rights, Color-Blind Justice and Mainstream Values, 86 MINN. L. REV. 267, 340-61 (2001) (criticizing the Supreme Court's use of Indian cases as a "crucible" to further a broader agenda under which state interests prevail, rights of racial minorities fail and mainstream values are protected, while undermining the "political relationship between the United States and self-governing tribes").

17. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *71

18. Robert Hoff, *Losing Our Religion: The Constitutionality of the Religious Freedom Restoration Act Pursuant to Section 5 of the Fourteenth Amendment*, 64 BROOK. L. REV. 377, 377 (1998).

19. *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). In an early critique of RFRA, Eisgruber and Lawrence argue the Act is substantively unconstitutional because it "privileges" rather than "protects" religious practices and impermissibly favors religion over equally important secular concerns. *Id.* at 447-61. They claim RFRA's "constitutional vices" are directly associated with the Act's "origin as an attempt by Congress to undo the Supreme Court's constitutional judgment." *Id.* at 444. They also expressed concern that Congress had exceeded its powers under section 5 of the Fourteenth Amendment, foreshadowing a similar conclusion the Supreme Court would reach later in *City of Boerne*. *Id.* at 460-69; *see City of Boerne*, 521 U.S. 507, 516-36 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

20. *Compare* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2-8 (1998) (arguing RFRA violates the Establishment Clause), *with* Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 632-34 (1998) (arguing the protection RFRA affords free exercise is not incompatible with the Establishment Clause).

21. *See* Chemerinsky, *supra* note 20, at 604, 606 (arguing that the Constitution sets the "floor" for protected personal liberties which Congress may expand under its section 5 powers under the Fourteenth Amendment). For the opposing view, *see* Hamilton, *supra* note 20 (arguing RFRA violates Article V); Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998) (arguing RFRA violates Article V).

22. Hamilton, *supra* note 20, at 5.

steadfast in their belief that RFRA was a legitimate expansion of rights[23] that correctly imposed "the highest standard of constitutional protection from one of the most important freedoms guaranteed by the Constitution."[24]

Part II describes four Tenth Circuit decisions rendered during the survey period which involved religious freedom claims, the first of which established the continued viability of RFRA as applied to federal government actions and the three other cases that illustrate the differing perspectives within the court as to the constitutionality of the eagle feather permitting regulation. Finally, Part III summarizes the questions the Tenth Circuit identified for discussion in its order for rehearing *en banc*.

I. BACKGROUND

A. *In the Beginning, There Was* Sherbert v. Verner[25] *and* Wisconsin v. Yoder[26]

The Brennan Court's 1963 decision in *Sherbert* was the first shot in the war of constitutional standards, because it "marked the first time that the Supreme Court applied the compelling interest test to a Free Exercise Clause challenge to a generally applicable law."[27] In *Sherbert*, a Seventh-day Adventist claimed South Carolina violated her First Amendment right to free exercise of her religion by denying her request for unemployment benefits.[28] The woman's employer had fired her for refusing to work on Saturday, which was the Sabbath Day of her faith.[29] Because the claimant would not accept Saturday work, she was unable to find another job and filed an unemployment benefits claim.[30] The state denied her request for benefits based on a statutory provision that disqualified any claimant who "failed, without good cause . . . to accept available suitable work."[31] The South Carolina Supreme Court upheld the state's decision, reasoning that the statutory disqualification placed no restriction upon the claimant's religious freedom nor did it "prevent her in the exercise of

23. *See* Chemerinsky, *supra* note 20, at 629-34.
24. Hoff, *supra* note 18, at 380.
25. 374 U.S. 398 (1963).
26. 406 U.S. 205 (1972).
27. *See* Hoff, *supra* note 18, at 380. The Court has made the Free Exercise Clause of the First Amendment applicable to states by incorporation into the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (citing Employment Div. v. Smith, 494 U.S. 872, 86-87 (1990)).
28. *See Sherbert*, 374 U.S. at 399-401.
29. *Id.* at 399.
30. *Id.* at 399-400.
31. *Id.* at 401 (quoting S.C. Code § 68-114(3)(a)(ii)).

her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[32]

The U.S. Supreme Court, however, reversed the state court's decision and ruled for the claimant.[33] The Court held that to withstand the claimant's constitutional challenge, South Carolina's decision to deny unemployment benefits:

> must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion may be justified by a 'compelling state interest' in the regulation of a subject within the State's constitutional power to regulate.[34]

Though the Court found the consequences of denying the claimant unemployment benefits to religious practices and principles "only an indirect result" of legislation that was "within the state's general competence to enact," it held that where the "purpose or effect of a law" impedes a religion or discriminates between religions, such a law "is constitutionally invalid."[35] Here, the government forced the plaintiff to choose between "following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work," which the Court held was "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[36]

The Court then found South Carolina failed to show "some compelling state interest" that would justify the "substantial infringement" of the plaintiff's First Amendment right.[37] In so doing, the Supreme Court also noted "no showing merely of a rational relationship to some colorable state interest would suffice," and "only the gravest abuses, endangering a paramount [state] interest" would permit a limitation on an individual's free exercise of religion.[38]

In 1972, the Supreme Court decided *Wisconsin v. Yoder*,[39] which further clarified the "compelling interest" standard by stating a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[40] The issue in *Yoder* was whether the

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32. *Id.* at 401 (citing Sherbert v. Verner, 125 S.E.2d 737, 746 (S.C. 1962) *overruled by* Sherbert v. Verner, 374 U.S. 398 (1963) (internal quotations omitted)).

33. *Id.* at 402.

34. *Sherbert*, 374 U.S. at 403 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

35. *Id.* at 403-04 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

36. *Id.* at 404.

37. *Id.* at 406.

38. *Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

39. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

40. *Yoder*, 406 U.S. at 220.

State of Wisconsin, under its compulsory school-attendance statute, could impose criminal penalties on Amish parents who refused to send their children to school past the eighth grade.[41] The Court said no, notwithstanding Wisconsin's argument that the requirement for school attendance to age 16 applied "uniformly to all citizens of the State and [did] not, on its face, discriminate against religions or a particular religion" and was "motivated by legitimate secular concerns."[42]

B. *Court Redraws the Borders in* Employment Division v. Smith[43]

Almost three decades after *Sherbert*, the fortress of compelling interest surrounding free exercise came tumbling down in 1990 with the Court's decision in *Smith*. The question in *Smith* was whether the Free Exercise Clause permitted the State of Oregon to deny unemployment benefits to Native Americans who were dismissed from their jobs for using peyote during religious ceremonies.[44] The Court said yes.[45]

Writing for the majority, Justice Scalia went to great lengths to distinguish the circumstances in *Smith* from *Sherbert* and its progeny.[46] Here, the Court distinguished between religious beliefs and "performance of (or abstention from) physical acts," particularly acts that violate criminal laws.[47] The Court also attempted to distance *Smith* from previous decisions by noting it had applied the *Sherbert* balancing test to invalidate generally applicable laws only when they involved the Free Exercise Clause "in conjunction with other constitutional protections, such as freedom of speech and of the press."[48] *Yoder*, for example, was rationalized as presenting a "hybrid situation" in which "the interests of parenthood [were] combined with a free exercise claim."[49] The Supreme

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41. *See id.* at 207.

42. *Id.* at 220.

43. 494 U.S. 872 (1990) (O'Connor, J., concurring in the judgment; Blackmun, J., with whom Brennan, J., and Marshall, J., join, dissenting).

44. *See Smith*, 494 U.S. at 874.

45. *See id.* at 890.

46. *See* Getches, *supra* note 16, at 341-42 (analyzing *Smith* as an example in which the Court used an Indian case as a "crucible" for promoting states' rights in ruling "states should not be burdened with proving a compelling interest to enforce its laws every time someone claims to have violated the law in the name of religion"). Getches suggests the unusual facts of this case, which were "unlikely to be replicated in mainstream religious cases," provided the Court with a "vehicle for changing First Amendment law and giving governments more latitude to regulate religious practices that are contrary to mainstream norms." *Id.* Thus, even if the Court is not pursuing a specifically anti-Indian agenda, its application of traditional First Amendment principles rather than established Indian law doctrine effectively erodes and diminishes Indian rights. *See id* at 342.

47. *See Smith*, 494 U.S. at 877-78.

48. *See id.* at 881.

49. *See id.* at 882 n.1. *But see* Hoff, *supra* note 18, at 382-386 (agreeing with the conclusion Congress would reach in its finding that compelling interest was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). Hoff points to many of the same cases the Court cited in *Smith* as evidence of the *Sherbert* test's effectiveness in rendering some laws invalid and others valid. *Id. See also Smith*, 494 U.S. at 902

Court went on to attack *Sherbert* directly by arguing its applicability had been limited to "denial of unemployment compensation" cases, offhandedly dismissing cases that evidenced the contrary as only "purport[ing] to apply" the *Sherbert* test.[50] The Court further narrowed applicability of *Sherbert* even in the unemployment benefits context to those situations in which "the State has in place a system of individual exemptions, [which] it may not refuse to extend . . . to cases of 'religious hardship' without compelling reason."[51]

In finally rejecting the compelling interest test, the Supreme Court asserted that to do otherwise would "subvert its rigor in the other fields where it is applied."[52] The Supreme Court also raised the specter of "anarchy" under the compelling interest test's presumption of invalidity extended to every regulation of conduct that may be challenged given the broad diversity of religious beliefs that could be burdened.[53]

The significance of the majority opinion was not lost on other members of the Supreme Court. Justice O'Connor, who applied the *Sherbert* compelling interest test to arrive at the same result as the majority, vigorously disagreed with Justice Scalia's analysis of precedent and the majority's decision to reduce the standard of scrutiny.[54] The three dissenting justices concurred with Justice O'Connor's reasoning when she wrote:

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.[55]

Smith's effects in Free Exercise Clause cases "were immediately felt."[56] A firestorm of controversy ensued, provoking vehement criticism by "impassioned commentators"[57] and "high-profile hearings [on Capitol Hill] on *Smith's* 'evisceration' of free exercise rights."[58]

(O'Connor, J., dissenting) (arguing post-*Sherbert* precedent has demonstrated "the courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests").

50. *See Smith*, 494 U.S. at 883.

51. *See id.* at 884.

52. *Id.* at 888.

53. *See id.*

54. *Id.* at 901.

55. *Id.*

56. *See* Hoff, *supra* note 18, at 388-91 (arguing the new standard of scrutiny "virtually eliminated any protection previously provided by the Free Exercise Clause").

57. *Id.* at 378. *See also* Getches, *supra* note 16, at 341 n.323 (citing, e.g., John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 72 (1991) (arguing that "minority religious claims will be held hostage to majoritarian politics")); Roald Mykkeltvedt, Employment Div. v. Smith*: Creating Anxiety by*

C. *Congress Enters the Fray with RFRA*[59]

Congress's response to *Smith* was unambiguous. In passing the Religious Freedom Restoration Act of 1993, Congress clearly set its sight on the Supreme Court's decision in *Smith* as "virtually eliminat[ing] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ,"[60] because neutral laws could burden religious exercise "as surely as laws intended to interfere with religious exercise."[61] Furthermore, Congress stated RFRA's purpose was to:

> restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[62]

RFRA received almost unanimous Congressional support with all members of the House of Representatives and all but three members of the Senate voting for the Act.[63]

Specifically, RFRA prohibits government from substantially burdening the exercise of religion "even if the burden results from a rule of general applicability. . . ."[64] The Act also allows individuals whose religious freedom has been burdened in violation of RFRA to "assert that violation as a claim or defense in a judicial proceeding and obtain relief against a government."[65] The government may substantially burden free exercise only when the government demonstrates that such a burden furthers "a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[66] RFRA is retroactive and far-reaching in scope, applying to all federal and state statutory and judge-made law.[67] In addition, RFRA expansively defines

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Relieving Tension, 58 TENN. L. REV. 603, 631 (1991) (concluding "the degree to which various sects will be free to exercise their religions will be determined by their political power and not by the application of legal principles by a disinterested judiciary").

58. Blatnik, *supra* note 21, at 1411 (citing Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of* City of Boerne v. Flores, 39 WM. & MARY L. REV. 689, 689 (1998)).

59. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2001).

60. 42 U.S.C. § 2000bb(a)(4).

61. *Id.* at § 2000bb(a)(2).

62. *Id.* at § 2000bb(b).

63. Hoff, *supra* note 18, at 392 n.97.

64. 42 U.S.C. § 2000bb-1(a).

65. *Id.* at § 2000bb-1(c).

66. *Id.* at § 2000bb-1(b).

67. *See id.* at § 2000bb-3(a) (stating "[t]his Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act enacted Nov. 16, 1993"). This language was in the 1993 Act, but reference to "and State law" has been deleted by amendment. *Id.*

"religious exercise" to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" including "[t]he use, building, or conversion of real property for the purpose of religious exercise. . . ."[68]

Subsequently, parties raised RFRA claims in contexts from AIDS and abortion to zoning.[69] For example, courts applied RFRA to invalidate a school district policy that prohibited students from bringing ceremonial knives to school;[70] portions of the federal Bankruptcy Code that allowed the government to recover funds that a debtor had tithed to a church;[71] and a grooming regulation that required Rastafarian correctional officers to cut off their dreadlocks.[72] RFRA claims, however, failed to invalidate the Food and Drug Administration's refusal to mandate labeling of genetically modified foods;[73] a zoning regulation that limited locations in which churches could operate food banks and homeless shelters;[74] and drug possession and trafficking charges against a "Church of Marijuana" member.[75]

D. *The Court Strikes Back with* City of Boerne[76]

The Supreme Court's reaction to RFRA was "[as] decisive as Congress's reaction to *Smith* . . . ."[77] In *City of Boerne*, Justice Kennedy led the majority in striking down RFRA – at least as the Act applies to state and local governments – holding the Act "intruded into an area reserved by the Constitution to the States."[78] At issue was a local ordinance and historic preservation plan under which the City of Boerne denied a Catholic church's application for a permit to enlarge its building.[79]

An argument more prominent than one based on federalism came from the majority's assertion that Congress had invaded the judiciary's turf, thereby violating separation of powers principles.[80] Indeed, the Supreme Court's opening round relied on the *M'Culloch v. Maryland's*

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68. *Id.* at § 2000cc-5(7). *See* § 2000bb-2(4) of RFRA (providing the term "'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title").

69. *See generally* Mary L. Topliff, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996) (listing almost 200 topics in which RFRA protections have been sought).

70. *See* Cheema v. Thompson, 67 F.3d 883, 894 (9th Cir. 1995).

71. *See* United States v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1420 (8th Cir. 1996).

72. *See* Francis v. Keane, 888 F. Supp. 568, 580 (S.D.N.Y. 1995).

73. *See* Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 181 (D.D.C. 2000).

74. *See* Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554, 1561 (M.D. Fla. 1995).

75. *See* United States v. Meyers, 906 F. Supp. 1494, 1509 (D. Wyo. 1995).

76. City of Boerne v. Flores, 521 U.S. 507 (1997).

77. Hoff, *supra* note 18, at 380.

78. *City of Boerne*, 521 U.S. at 527.

79. *Id.* at 511-12.

80. *See id.* at 516.

pronouncement that the "Federal Government is one of enumerated powers,"[81] immediately followed by *Marbury v. Madison's* declaration that the legislature's defined and limited powers may not be mistaken, or forgotten.[82] These premises form the basis for "judicial authority to determine the constitutionality of laws[] in cases and controversies."[83] While acknowledging Congress's authority to enact legislation enforcing the constitutional right to the free exercise of religion pursuant to section 5 of the Fourteenth Amendment, the Supreme Court noted, "[a]s broad as the congressional enforcement power is, it is not unlimited."[84]

Here, the Court found Congress exceeded its limits by enacting legislation that lacked "congruence between the means used and the ends . . . " because RFRA's legislative record lacked evidence of "modern instances of generally applicable laws passed because of religious bigotry."[85] Furthermore, the Court considered RFRA "so out of proportion to [the] supposed remedial or preventative objec[tive] . . . that it . . . appear[ed] instead, to attempt a substantive change in constitutional protections."[86] The Court specifically objected to RFRA's "[s]weeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[87] In a rebuke of Congress, Justice Kennedy asserted the judiciary's authority to define the parameters of constitutional rights:

> Our national experience teaches that the Constitution is best preserved when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.[88]

Despite Justice Kennedy's clearly expressed hostility toward Congress's enactment of RFRA, the extent to which the Court invalidated the

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81. *Id.* at 516 (citing M'Culloch v. Maryland, 4 Wheat. 316, 405 (1819)).
82. *Id.* (citing Marbury v. Madison, 1 Cranch 137, 176 (1803)).
83. *Id.*
84. *City of Boerne,* 521 U.S. at 518 (citing Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).
85. *Id.* at 530.
86. *Id.* at 532.
87. *Id.*
88. *Id.* at 535-36.

Act remains cloudy in that the opinion repeatedly refers to RFRA's impact on *state* laws.[89] In one such instance, the Court also makes clear that it reduces the standard of review two notches below "compelling interest" to minimal scrutiny: "Even [assuming that a interpretation of RFRA would] in effect . . . mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of *state* law with the attendant likelihood of invalidation."[90]

E. *Post*-City of Boerne *Fallout*

RFRA opponents elevated the significance of *City of Boerne's* separation of powers argument to posit the Supreme Court effectively invalidated RFRA in its entirety as applied to both state and federal law.[91] Therefore, some courts and commentators viewed RFRA as dead.[92] But those who read *City of Boerne* more narrowly – like the Tenth Circuit[93] – concluded that RFRA still applies to federal government actions.[94]

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89. *See, e.g., id.* at 533-34 ("The stringent test RFRA demands of *state* laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." Requiring a "*state* [to] demonstrate a compelling interest and show that [it has adopted] the least restrictive means of [achieving that]" interest is the most demanding test known to constitutional law. (emphasis added)).

90. *City of Boerne*, 521 U.S. at 534 (emphasis added).

91. *See* Hamilton, *supra* note 20, at 1 ("[T]he message of *Boerne* is that RFRA is unconstitutional under any scenario, whether it is applied to state or federal law."). *Cf.* Blatnik, *supra* note 21, at 1412-13 (asserting that the Court left "unanswered" RFRA's constitutionality in its application to federal law, but arguing the Act is unconstitutional in its entirety for reasons other than those set forth in *City of Boerne*).

92. *See, e.g.*, Blatnik, *supra* note 21, at 1412 n.11 (citing cases in the Sixth Circuit, Seventh Circuit, several district courts and bankruptcy courts which have rejected RFRA claims based on the assumption that such claims are moot as a result of *City of Boerne*); Chemerinsky, *supra* note 20, at 634 (implying RFRA's demise by suggesting Congress could "reenact the law" by showing that neutral laws of general applicability do seriously burden religious freedom); Hoff, *supra* note 18, at 380 (stating the Court "struck down the statute" with no distinction between its applicability to state versus federal law).

93. *See* Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001) (Holloway, J., concurring and dissenting; Ebel, J., concurring) ("This court agrees . . . with both the Eighth and Ninth Circuits in their conclusion that [*City of Boerne*] does not determine the constitutionality of RFRA as applied to the federal government.") (citing Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-33 (9th Cir. 1999); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-59 (8th Cir. 1998)).

94. *See also*, Blatnik, *supra* note 21, at 1413 n.12 (citing cases in the Fifth Circuit, Sixth Circuit and several district courts asserting *City of Boerne* did not reach the issue of federal laws).

II. TENTH CIRCUIT DECISIONS

A. *Kikumura v. Hurley*[95]

1. Facts

Yu Kikumura was a federal prisoner, who had emigrated from Japan.[96] Upon entering prison, he listed Buddhism as his religious affiliation to support his request for a special diet.[97] Kikumura later became acquainted with a Methodist minister, who had served as a missionary in Japan and was familiar with Kikumura's spiritual culture.[98] Kikumura accepted the minister's offer to make pastoral visits.[99] However, prison officials denied the minister's requests to visit Kikumura based on a prison regulation that required (1) requests for pastoral visits be initiated by the inmate; and (2) the member of the clergy be of the same faith as that professed by the inmate.[100] Kikumura's administrative appeal was denied.[101] Kikumura then filed a claim in the United States District Court for the District of Colorado, asserting prison officials had violated his religious beliefs under the First Amendment, as well as his right to equal protection under the Fifth Amendment Due Process Clause.[102] In addition to damages and permanent injunctive relief, Kikumura sought a preliminary injunction and a temporary restraining order to compel prison officials to grant the request.[103] The district court denied both the preliminary injunction and the temporary restraining order.[104] Kikumura appealed.[105] Because denial of a temporary restraining order was not reviewable, only the preliminary injunction was subject to appeal.[106]

2. Tenth Circuit Opinion

In the Tenth Circuit, a preliminary injunction must be granted if the movant demonstrates:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the

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95. 242 F.3d 950 (10th Cir. 2001).
96. *Kikumura*, 242 F.3d. at 953.
97. *Id.* at 954.
98. *Id.* at 961.
99. *Id.* at 953.
100. *Id.* at 954.
101. *Id.*
102. *Kikumura*, 242 F.3d at 954.
103. *Id.*
104. *Id.* at 955.
105. *Id.*
106. *Id.* at 955 n.2.

> other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.[107]

However, when a preliminary injunction would disturb the status quo, the movant must satisfy a heightened burden of showing that the four factors "weigh heavily and compellingly in his favor."[108] In reviewing Kikumura's request for a preliminary injunction, the court applied the heightened burden requirement.[109]

a. RFRA Claim

The court's major conclusion is its most controversial in light of the national debate over RFRA's applicability to federal government actions in the post-*City of Boerne* era. Specifically, this Tenth Circuit panel was unanimous in finding the district court erred when it concluded the Supreme Court in *City of Boerne* had declared RFRA unconstitutional in its entirety and, therefore, Kikumura's RFRA claim had no likelihood of success.[110] Rather, the Tenth Circuit, aligning itself with the Eighth and Ninth Circuits,[111] held *City of Boerne* invalidated RFRA only as it applied to state, but not federal government action.[112] Therefore, the court ordered the district court to allow Kikumura the opportunity to provide evidentiary support for his RFRA claim on remand.[113]

In reaching its conclusion, the panel implicitly overruled an earlier unpublished Tenth Circuit case, which was among those the defendants had used to support their argument that *City of Boerne* had rendered RFRA unconstitutional in its application to the federal government.[114] The Tenth Circuit here asserted the "only issue" before the Supreme Court in *City of Boerne* was "Congress's remedial powers to enforce the Fourteenth Amendment against *state and local* authorities."[115] "Because Congress's ability to make laws applicable to the federal government" does not depend on its Fourteenth Amendment, section 5 enforcement power, the court reasoned, "the [*City of Boerne*] decision does not de-

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107. *Id.* at 955. *See also* Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1283 (10th Cir. 1996).

108. *Kikumura*, 242 F.3d at 955.

109. *Id.*

110. *Id.* at 958.

111. *Compare* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-33 (9th Cir. 1999), *and* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-59 (8th Cir. 1998) (interpreting *City of Boerne* as invalidating RFRA only as applied to state actions), *with* Flagner v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001), Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 180 (D.D.C. 2000), Combs v. Corrections Corp. of America, 977 F. Supp. 799, 801 (D.W.D. La. 1997), *and In re* Gates Cmty. Chapel of Rochester, Inc., 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997) (interpreting *City of Boerne* as invalidating RFRA as applied to both state and federal actions).

112. *Kikumura*, 242 F.3d at 958.

113. *Id.* at 961.

114. *Id.* at 958.

115. *Id.* (emphasis added).

termine the constitutionality of RFRA as applied to the federal government."[116] The court concluded, "[t]hus, the separation of powers concerns expressed in *City of Boerne* do not render RFRA unconstitutional as applied to the federal government."[117]

The Tenth Circuit acknowledged that the Supreme Court in *City of Boerne* did "mention" separation of powers concerns.[118] However, it found in the context of the entire [*City of Boerne*] opinion that the Supreme Court raised these concerns only to the extent that RFRA could not be considered remedial or preventative under the limits the Fourteenth Amendment imposes on Congress's enforcement power vis-à-vis the states.[119] By contrast, Congress's power to apply RFRA to the federal government comes from Article I, which allows Congress to establish standards for suits against the federal government that are more protective than the Constitution requires.[120]

After determining that the unconstitutional portions of RFRA that applied to state government could be severed and did not alter RFRA's structure or applicability to the federal government, the court found federal officials, such as the prison officials here, within the class of defendants subject to RFRA requirements.[121]

The panel, however, lacked unanimity in the application of RFRA.[122] At issue was the provision that "[g]overnment shall not substantially burden a person's exercise of religion . . ." without compelling justification.[123] The majority held this requirement is a question of law for which a plaintiff establishes a prima facie RFRA claim by proving, with evidentiary support, a substantial burden on a sincere exercise of religion.[124]

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116. *Id.*

117. *Id.* at 959.

118. *Kikumura*, 242 F.3d at 959.

119. *Id.*

120. *Id.*

121. *Id.* at 960.

122. In a concurring opinion, Judge Ebel expressed disagreement with the majority only with respect to whether Kikumura's allegations, even if supported by evidence, would establish a "substantial burden" absent a more far-ranging inquiry into matters such as whether the defendants would grant Kikumura pastoral visits by other Christian ministers whose counseling would be substantially similar to that by the minister Kikumura requested. *See id.* at 966. Judge Ebel explained that, "[b]ecause this is an intrinsically fact-based question, and there has been no opportunity for the parties to develop these facts, I believe it is inappropriate for us to rule on the issue as a matter of law at this time. . . . Since we are remanding anyway for a balancing analysis, I would also remand to the district court for it to determine whether there is a substantial burden in the first instance, without prejudging the issue." *Id.* at 966-67.

123. *Kikumura*, 242 F.3d at 961-62.

124. *Id.* at 960-61 (citing 42 U.S.C. § 2000bb-1(a); Werner v. McCotter, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (noting that a plaintiff's religious belief must be sincerely held)). *But see supra* note 122.

The court found, and the defendants did not challenge, that Kikumura was sincere in his beliefs.[125] The court also found Kikumura's request for pastoral visits were "protected activities"[126] within the expansive definition of "exercise of religion" Congress adopted in passing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[127] When the district court considered Kikumura's claim, RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."[128] However, Congress had since amended RFRA to incorporate the RLUIPA definition of "religious exercise" as defined in 42 U.S.C. § 2000cc5,[129] which provides that religious exercise includes "any exercise, whether or not compelled by, or central to, a system of religious belief." Thus, the Tenth Circuit noted Kikumura's expressed desire to study Christianity and practice Christian prayer under the tutelage of a clergyman with missionary experience in Japan satisfied the new RFRA definition of protected "exercise of religion" even though such pastoral visits were not required by Kikumura's religious beliefs.[130]

The court, however, found insufficient evidence on record to support Kikumura's claim that denial of the pastoral visits constituted a "substantial burden" on his exercise of religion as required for showing a substantial likelihood of success on his RFRA claim.[131] The majority (with Judge Ebel dissenting on this point only) did conclude, if Kikumura could provide evidentiary support sufficient to prove the allegations related to his "substantial burden" argument, "he will have satisfied his prima facie burden."[132] The burden will then shift to the defendants to prove "application of the burden" to Kikumura is the "least restrictive means" of furthering a "compelling governmental interest."[133]

b. First Amendment Free Exercise Claim

In reviving Kikumura's RFRA claim, the Tenth Circuit effectively breathed new life into RFRA as applied to the federal government within the Tenth Circuit. The majority (with Judge Holloway dissenting), however, refused to revive Kikumura's First Amendment claim by agreeing with the district court that he had not demonstrated a substantial likeli-

125. *Kikumura*, 242 F.3d at 961.

126. *Id.* at 960-61.

127. *See id.* at 960; Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (hereinafter, "RLUIPA").

128. Religious Freedom Restoration Act 42 U.S.C. § 2000bb-2(4) (1999).

129. *Kikumura*, 242 F.3d at 960; 42 U.S.C. § 2000b-2(4).

130. *Kikumura*, 242 F.3d at 960-61.

131. *Id.* at 961.

132. *Id. But see supra* note 122.

133. *Kikumura*, 242 F.3d at 961-62; 42 U.S.C. § 2000bb-(1)(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.")

hood of success on the merits of his First Amendment claim.[134] The court based its decision partly on the deference given prison officials when evaluating prisoners' constitutional claims[135] and, more significantly, based on the Supreme Court precedent under *Turner v. Safley*.[136]

Under *Turner*, a prison regulation may not be "arbitrary or irrational" as evidenced by a valid, rational connection between a legitimate, government interest and the regulation.[137] The court must also consider whether readily available, alternative means exist for the inmate to exercise the asserted constitutional right, as well as the extent to which accommodating the inmate's right might affect guards, other inmates and prison resource allocation.[138] Here the court found the prison regulation that allowed pastoral visits only when the prisoner initiates the request was sufficiently related to the prison's goals of allowing pastoral visits while limiting the overall number of visits and preventing abuses of the system.[139] Thus, as a matter of law, the regulation was not "arbitrary or irrational,"[140] particularly given the deference courts must give prison regulations that attempt to balance prisoner rights with legitimate penological concerns.[141] Kikumura had to demonstrate that no "obvious, easy alternatives" to pastoral visitation existed.[142] The court ruled that he failed this test, suggesting that correspondence would be a possible alternative to pastoral visitation.[143] Accordingly, the majority held the district court did not commit a legal error or abuse its discretion in concluding Kikumura failed to show a substantial likelihood of success on his First Amendment claim.[144]

c. Dissent

In dissent, Judge Holloway disagreed with the majority's analysis of Kikumura's First Amendment claim.[145] Specifically, Judge Holloway argued limitations on the number and frequency of pastoral visits would be an obvious alternative to the "unjustified" use of an inmate's religious identification to "restrict to that *one* faith those from whom pastoral vis-

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134. *Kikumura*, 242 F.3d at 956. *But see infra* Part c (summarizing Judge Holloway's dissent).

135. *Kikumura*, 242 F.3d at 956 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (holding that courts cannot substitute their judgment on matters of institutional administration for prison officials' determinations, even when First Amendment claims are made)).

136. *Id.* at 956 (citing Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests")).

137. *Turner*, 482 U.S. at 89, 90.

138. *Id.* at 90-91.

139. *Kikumura*, 242 F.3d at 957.

140. *Id.*

141. *Id.*

142. *Id.* at 957-58 (citing *Turner*, 482 U.S at 90).

143. *Id.* (citing *Turner*, 482 U.S. at 90).

144. *Id.* at 958.

145. *Kikumura*, 242 F.3d at 964.

its or counseling is permitted" and to ban "*all* other pastoral visitors."[146] For that reason, Judge Holloway found the prison's regulation too broad and not reasonably related to any legitimate penological interest.[147] Accordingly, he disagreed with the majority's conclusion that Kikumura had not demonstrated a substantial likelihood of success on his First Amendment claim.[148] However, he agreed with the majority that, on remand, the district court should provide Kikumura the opportunity to prove his allegation that the requested clergyman was well suited to provide him religious assistance.[149] In agreeing with the majority that Kikumura should be allowed to provide evidentiary support for his RFRA claim, Judge Holloway stated the defendants also should be allowed to present any showing they may have on security issues they claim were involved.[150]

B. *The "Indian Tribal Use" Exception Cases*

On August 8, 2001, just five months after *Kikumura*, the Tenth Circuit simultaneously issued three opinions in cases involving individuals charged with violating federal laws prohibiting the possession of eagle feathers — *Saenz v. Department of the Interior, United States v. Hardman and United States v. Wilgus*.[151] In all three cases, the court found the individuals were practitioners of Native American religions that purportedly required the use of items with eagle feathers.[152]

The federal laws at issue were the Bald and Golden Eagle Protection Act ("BEGPA")[153] and the Migratory Bird Treaty Act ("MBTA").[154] Both acts prohibit, *inter alia*, the possession and transportation of eagles and eagle parts unless permitted to do so under the so-called "Indian tribal use" provisions of the federal "Eagle Permits" regulation.[155] The exception requires applicants to provide the U.S. Fish and Wildlife Service (the "FWS") with "certification of enrollment in an Indian tribe that is

146. *Id.*
147. *Id.*
148. *Id.* at 965.
149. *Id.*
150. *Id.* at 966.
151. *See* Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. 17702 LEXIS (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.
152. *Saenz*, 2001 U.S. App. LEXIS 17698, at *12; *Hardman*, 2001 U.S. App. 17702, at *2; *Wilgus*, 2001 U.S. App. LEXIS 17700, at *4.
153. 16 U.S.C. § 668 (2001).
154. 16 U.S.C. § 703 (2001).
155. *Id.*; 16 U.S.C § 668; 50 C.F.R. § 22.22 (2002).

federally recognized"[156] and that the applicant be "an Indian who is authorized to participate in bona fide tribal religious ceremonies."[157]

1. *Saenz v. Department of the Interior*[158]

a. Facts

The Chiricahua tribe of Apache Indians was recognized as a tribe by the federal government until 1886, when the Chiricahua reservation was dissolved in the wake of warfare between the Apache and the United States.[159] Joseluis Saenz was a descendent of the Chiricahua, whose religious practices required the use of eagle feathers.[160] In 1996, pursuant to the BGEPA,[161] New Mexico state officials seized and sent to the FWS eagle feathers from Saenz's home because he did not have a permit authorizing him to possess them.[162] The BGEPA authorized the Secretary of the Interior (the "Secretary") to permit the taking, possession and transportation of eagles and eagle parts under specified circumstances, including "for the religious practices of Indian tribes."[163] After failing to get the items back through administrative proceedings, Saenz sought their return by filing a motion in district court for return of his property.[164] Saenz argued he had a right to possess eagle feathers under BGEPA, asserting claims under RFRA, the Free Exercise Clause, and the Equal Protection Clause.[165] The district court granted Saenz's motion based "solely on the BGEPA and RFRA" without reaching the constitutional issues.[166] The government appealed.

b. Tenth Circuit Opinion

On appeal, the government stipulated Saenz was a Chiricahua Indian and sincere practitioner of the Chiricahua Apache Indian religion.[167] Even though the government also agreed that the BGEPA substantially burdened Saenz's religious beliefs, it argued "restricting eagle permits to members of federally-recognized Indian tribes is the least restrictive means of furthering the government's compelling interests . . . in eagle

156. The definition of "tribe" and significance of federal recognition is a highly complex and sensitive issue beyond the scope of this article. *See generally* COHEN, *supra*, note 16 at 3-27 (discussing "tribe" and "Indian" as an ethnological classifications and as a legal-political designations, and the significance of these distinctions in different legal contexts).

157. 50 C.F.R. § 22.22.

158. No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 8, 2001).

159. *Id.* at *2.

160. *Id.*

161. 16 U.S.C. § 668 (2001).

162. *Saenz*, 2001 U.S. App. LEXIS 17698, at *2-3.

163. *Id.* at *4 (quoting 16 U.S.C. § 668a).

164. *Id.* at *3.

165. *Id.*

166. *Id.* at *9.

167. *Id* at *13.

conservation and fulfilling its treaty obligations to Indian tribes under RFRA."[168] The Tenth Circuit, like the court below, analyzed Saenz's request for return of the eagle feathers under RFRA without specifically addressing his constitutional claims under the Free Exercise and Equal Protection clauses.[169] However, in an opinion written by Judge Kelly, the Tenth Circuit ruled in Saenz's favor and declared the regulation unconstitutional.[170]

The court first rejected the government's assertion that Saenz lacked standing to challenge the permit process because "he failed to actually apply for a permit."[171] The court reasoned that the regulation restricts permits to members of federally-recognized Indian tribes and contains no provision for discretionary waivers.[172] Therefore, it would have been "futile" for Saenz to apply for a permit notwithstanding "credible proof that he is Indian and uses eagle feathers as an essential part of the exercise of an Indian religion."[173] "The law recognizes . . . that a plaintiff need not make costly futile gestures simply to establish standing, particularly when the First Amendment is implicated."[174]

Using the test set forth in *Kikumura*, the court found Saenz had established a prima facie free exercise claim under RFRA by showing the government had "(1) substantially burdened (2) a sincerely-held (3) religious belief."[175] The burden then shifted to the government to "demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner," as required by 42 U.S.C. § 2000bb-1(b)(1).[176]

With respect to the government's asserted interest in fulfilling trust and treaty obligations, the Tenth Circuit agreed with the district court below that trust and treaty obligations generally encompass "a duty to tribal government and a need to acknowledge tribal sovereignty."[177] However, it then argued, the central issue in this case was "the rights of an individual, not as against tribal governments, but as against the United

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168. *Saenz*, 2001 U.S. App. LEXIS 17698, at *12-13.

169. *Id.* at *13.

170. J. McKay and J. Murphy also sat on this panel.

171. *Id.* at *14. *But see* United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (holding defendant Indians' failure to apply for a permit precluded their challenge to the *manner* in which the BGEPA was applied, but preserving their facial challenge of the statute and the "Indian tribal use" exception under RFRA). *Hugs* is discussed more fully *infra* Part II.C.

172. *Saenz*, 2001 U.S. App. LEXIS 17698, at *15.

173. *Id.*

174. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 172 F.3d 397, 406 (6th Cir. 1999).

175. *Saenz*, 2001 U.S. App. LEXIS 17698, at *15 (citing Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001).

176. *Id.* at *16.

177. *Id.* at *21-22.

States."[178] The court also looked to legislative history as an indication that Congress intended to balance the "conservation purposes of the statute" against the "special cultural and religious interests of Indians."[179] Thus, the government failed to prove a compelling interest in fulfilling trust and treaty obligations with respect to the BGEPA.[180]

Significantly, the Tenth Circuit questioned the district court's finding that the government had a compelling interest in eagle conservation.[181] However, the court declined to decide on this issue as "unnecessary" to its disposition of this case, because of its conclusion the government was not furthering its interest – even if it were compelling – by the "least restrictive means," pursuant to 42 U.S.C. § 2000bb-1(b)(2).[182]

The government argued restricting permits to members of federally-recognized Indian tribes satisfied the "least restrictive means" test for four reasons.[183]

The first reason was "allowing all persons of Indian heritage to possess eagle feathers, without regard to membership in a recognized tribe, would undermine the United States's obligations to recognized tribes."[184] Because the court had already ruled the government failed to prove its treaty interests in the context of this case were compelling, this reason could not be used to justify the permit system.[185]

The government's second argument was that its interest in protecting eagles would be harmed because "significantly increasing the number of persons authorized by law to possess eagle parts and feathers . . .

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178. *Id.* Additionally, the Tenth Circuit specifically declined to follow the Eleventh Circuit, which had held that the government had a compelling interest in fulfilling its treaty obligations based on an analysis that the BGEPA was "meant to be a substitute for tribes' abrogated hunting treaty rights." *Id.* at *19 (citing Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000)). Although the Supreme Court has held the BGEPA abrogated Native American hunting rights, the purpose of the "Indian tribes" exception was for "religious" not "hunting" purposes in consideration of the Indians' "special cultural and religious interests." *See* United States v. Dion, 476 U.S. 734, 743-45 (1986).

179. *Saenz*, 2001 U.S. App. LEXIS 17698, at *20-21.

180. *Id.* at *22.

181. *Id.* at *22-23. Though the court acknowledged case law "seems to support this proposition," it contended the government's "alleged" interest in eagle conservation "existed without evidentiary analysis," noting the golden eagle was not endangered and the FWS had proposed the bald eagle be removed from the endangered species list. *Id.* at *22-23, *23 n.8 (citing *Gibson v. Babbitt*, 72 F. Supp. 2d. 1356, 1360 (S.D. Fla. 1999), *aff'd*, 223 F.3d 1256 (11th Cir. 2000); United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997); United States v. Lundquist, 932 F. Supp. 1237, 1241 (D. Ore. 1996); United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F. Supp. 269, 276-77 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987)). *See also* Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32, 35 (1st Cir. 1992) (finding the government has a "legitimate governmental interest" in "protecting a dwindling and precious eagle population").

182. *Saenz*, 2001 U.S. App. LEXIS 17698, at *23.

183. *Id.* at *25, *31.

184. *Id.* at *25.

185. *Id.* at *26.

would likely lead to increased numbers of illegal kills and increased reliance on a black market for eagle parts."[186] The court shot down this argument for lack of proof that illegal killings would increase or that a black market for eagle parts even existed.[187] Arguably, the court stated, "opening up the permit process to all Native Americans . . . would decrease the number of illegal eagle kills and black market transactions . . . [because] a Native American who is not a member of a federally-recognized tribe has no method . . . of obtaining eagles for religious ceremonies other than through the black market."[188]

The government also asserted equal protection concerns.[189] Specifically, opening up the permit process to all Native Americans would rely on an "impermissible racial classification."[190] The government based its argument on the Supreme Court's landmark decision in *Morton v. Mancari*[191] that found membership in a federally-recognized tribe was "political in nature rather than racial in nature."[192] The *Saenz* court distinguished the context for the *Morton* ruling as "solely concerned with tribal sovereignty" from Saenz's case as "dealing with an individual's free exercise rights."[193] The court went on to note that even the government admitted "there may be occasions when it is defensible for the government to rely on ancestry in determining a person's status as an Indian."[194] In concluding "this is one of those occasions," the court pointed to certain federal educational and employment programs as examples that allow for a broader definition of "Indian" that includes Native Americans who are not members of federally-recognized tribes.[195] The court also noted "federal policy toward recognition of Indian tribes has been by no means consistent with 'real' ethnological principles."[196] Congress has frequently consolidated distinct tribes for recognition purposes, divided tribes into more than one separately recognized group, terminated some tribes' federal recognition (e.g., the Chiricahua Indians) and

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186. *Id.* at *25.

187. *Id.* at *29.

188. *Saenz*, 2001 U.S. App. LEXIS 17698, at *31. By contrast, the Eleventh Circuit, in upholding the validity of the "Indian tribal use" exception, emphasized that opening up the permit process would increase the burden on the religious practices of members of federally recognized tribes. *See* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000); discussion *infra* Part III, C.

189. *Saenz*, 2001 U.S. App. LEXIS 17698, at *31.

190. *Id.* at *32.

191. 417 U.S. 535 (1974).

192. *Id.* (citing *Morton*, 417 U.S. at 553 n.24 (holding that a BIA employment preference applies to applicants who are members of federally recognized tribes, not as a discrete racial group, but as members of quasi-sovereign tribal entities)). *See also* COHEN, *supra* note 16, at 3-27.

193. *Saenz*, 2001 U.S. App. LEXIS 17698, at *32-33.

194. *Id.* at *33.

195. *Id.* at *33-34.

196. *Id.* at *35-36 (quoting Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 156 (1995)).

restored federal recognition for others.[197] On the one hand, the government made federal recognition impossible for the Chiricahua tribe, while on the other hand, it "wants to use that same lack of recognition to infringe upon Mr. Saenz's religious freedom. We refuse to base Mr. Saenz's free exercise rights on such tenuous ground."[198]

The court was especially unsympathetic to the government's final argument that expanding the permit program to encompass all Indians would make it "administratively unfeasible."[199] The court noted, the BGEPA permit system exception had operated for at least eleven years after the Secretary first issued the "Indian tribal use" exception and possibly for as many as eighteen before the government imposed the "federally-recognized" requirement.[200] The court, again, pointed to other federal programs for Native Americans that do not require participants belong to federally recognized tribes as additional evidence that the government is able to allocate limited resources among a broader pool of applicants.[201]

The court's bottom line was membership in a federally-recognized tribe "bears no relationship whatsoever to whether or not an individual practitioner is of Indian heritage by birth, sincerely holds and practices traditional Indian religious beliefs, is dependent on eagle feathers for the expression of those beliefs, and is substantially burdened when prohibited from possessing eagle parts."[202]

2. *United States v. Hardman*[203]

a. Facts

Raymond Hardman had practiced a Native American religion for many years.[204] He lived in Neola, Utah, within the boundaries of the Uintah and Ouray Ute Reservation.[205] Although his ex-wife and children were enrolled members of the federally recognized S'Kallum Tribe, Hardman himself was not of Native American descent.[206] In 1993, in the course of a religious ritual, a Hopi tribal religious leader gave Hardman a bundle of prayer feathers, including golden eagle feathers, to keep in his truck which he had used to transport the body of his son's godfather to religious services in Arizona.[207] After Hardman returned to his home, he

197. *Id.* at *35-36.
198. *Id.* at *37.
199. *Saenz*, 2001 U.S. App. LEXIS 17698, at *37-38.
200. *Id.* at *5 n.2, *38.
201. *Id.* at *38.
202. *Id.* at *38-39.
203. No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001).
204. *Hardman*, 2001 U.S. App. LEXIS 17702, at *2.
205. *Id.*
206. *Id.*
207. *Id.*

"contacted the Utah Division of Wildlife Resources in order to obtain a permit to possess the feathers," but was told he could not apply because he was not a member of a federally recognized tribe.[208]

In 1996, Hardman's estranged wife told Ute tribal officials Hardman possessed golden eagle feathers without a permit.[209] Subsequently, Hardman surrendered the feathers, under protest, to a Ute tribal fish and game officer, who was cross-commissioned as a federal law enforcement agent.[210] On March 10, 1997, Hardman was issued a violation notice for possessing golden eagle feathers without a permit pursuant to the Migratory Bird Treaty Act ("MBTA").[211] Almost two years later, a magistrate judge convicted Hardman of violating the MBTA and imposed a small fine.[212] A district court affirmed Hardman's conviction, and he appealed to the Tenth Circuit.[213]

b. Tenth Circuit Opinion

As in *Saenz*,[214] the government argued Hardman had no standing because he never actually applied for a permit.[215] However, the Tenth Circuit held Hardman's "good faith effort to do so" was sufficient to establish standing.[216]

Once again, as in *Saenz*, the tougher question was what standard to apply to the regulatory requirement that permits could only be issued to members of federally recognized tribes.[217] Hardman raised Free Exercise Clause and Establishment Clause challenges to the permit criteria in the MBTA and its implementing regulation which states: "(1) that the person be an actual practitioner of a bona fide Native American religion requiring the use of migratory bird feathers, and (2) that the person be a member of a certain political classification, i.e., a member of a federally recognized tribe."[218] Hardman argued both qualifications should be subject to and would fail strict scrutiny.[219]

i. Free Exercise Claim: Revisiting RFRA and *Smith*

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208. *Id.*
209. *Id.* at *2-3.
210. *Hardman*, 2001 U.S. App. LEXIS 17702, at *3.
211. *Id.*; 16 U.S.C. § 703 (2001).
212. *Hardman*, 2001 U.S. App. LEXIS 17702, at *3.
213. *Id.*
214. 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001).
215. *Hardman*, 2001 U.S. App. LEXIS 17702, at *4.
216. *Id.*
217. *Id.* at *6-7; *see also* Saenz v. Dep't of Interior, no. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001).
218. *Id.* (citing 50 C.F.R. § 22.22 (2002)).
219. *Id.* at *7.

Judge Tacha, writing for the majority,[220] first addressed the question of whether to apply the RFRA standard of review even though Hardman had not raised RFRA.[221] The court acknowledged that Congress intended to overturn the Supreme Court's interpretation of the Free Exercise Clause as set forth in *Smith*, and also acknowledged that, under its own decision in *Kikumura*, RFRA created a "valid *statutory* 'standard for suits against the federal government.'"[222] The court then concluded "a RFRA claim for relief from federal burdening of religion is clearly distinct from a First Amendment claim for identical relief," labeling the latter a "*constitutional* free exercise claim" subject to the *Smith* standard.[223] Although the Tenth Circuit had previously applied the RFRA standard to a First Amendment claim, "even when it was not raised by the parties,"[224] it declined to do so here.[225]

In applying the *Smith* standard, the court posited two questions: (1) "does a generally applicable law containing an accommodation for a specific religious group . . . violate the *Smith* requirement of neutrality"; and (2) if "non-neutral, does the fact that the accommodation is for a Native American religion trump the generic rule, thereby requiring only the application of a rational basis test, rather than strict scrutiny?"[226]

With respect to the first question, the court responded in the affirmative.[227] Thus, the court found that, although the MBTA without the exemption is "clearly neutral"[228] with the secular purpose of protecting eagles, "its attendant regulations for practitioners of Native American religions" rendered it in violation of the *Smith* neutrality standard.[229] However, the court stated its holding was not "dispositive of the neutrality analysis in this case..." because Harding's religion did not prevent him from complying with the permitting regulations.[230] Rather, his nonmembership in a federally recognized Indian tribe, a "political classification render[ed] him . . . in violation of the statute."[231] Because the court had "no difficulty" finding neutrality forbids "religious accommodations contingent on membership in a particular political subdivision," it held

220. Also on this panel were J. Henry, concurring, and J. McKay, dissenting. *Id.* at *2.

221. *Hardman*, 2001 U.S. App. LEXIS 17702, at *7.

222. *Id.* at *8-9 (emphasis added) (citing Employment Div. v. Smith, 494 U.S. 872 (1990) and Kikumura v. Hurley, 242 F.3d 950 (2001), and mentioning City of Boerne v. Flores, 521 U.S. 507 (1997)).

223. *Id.* at *9 (emphasis added).

224. *Id.* at *10 (citing Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995)).

225. *Id.* (refusing to "transform [Hardman's] constitutional claim into a statutory one").

226. *Id.* at *12.

227. *Hardman*, 2001 U.S. App. LEXIS 17702, at *12.

228. *Id.* at *13 n.3.

229. *Id.* at *35-36.

230. *Id.* at *36.

231. *Id.*

both qualifying requirements of the permitting process violated *Smith's* neutrality prong.[232]

With respect to the second question, the Tenth Circuit responded in the negative.[233] The court specifically rejected the rationale adopted by the First Circuit in upholding the same regulation pursuant to an Establishment Clause challenge.[234] In *Rupert v. Director, United States Fish & Wildlife Service*,[235] the First Circuit held that "where the government has treated Native Americans differently from others in a manner that arguably creates a religious classification," the First Amendment is not violated because of "Congress's historical obligation to respect Native American sovereignty and to protect Native American culture."[236] The Tenth Circuit found the First Circuit's analysis inapplicable to Hardman's free exercise claim, because the First Amendment's "two religion clauses protect different values, and because they require different things from the government."[237] *Rupert* concerned the government's inability to "maintain strict non-entanglement with religion when it was exercising its trust duties toward Native American tribes."[238] By contrast, in analyzing Hardman's situation, the Tenth Circuit found the Free Exercise Clause is concerned with "protecting individual religious freedom" so that the "Free Exercise Clause cannot be trumped by the guardian-ward relationship between the government and Native American tribes."[239] Thus, the court concluded First Amendment strict scrutiny applied and required the regulation be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[240]

Contrary to the *Saenz* panel, this Tenth Circuit panel found that the United States had compelling interests sufficient to save the regulation.[241] The court distinguished the MBTA from the Bald and Golden Eagle Protection Act ("BGEPA")[242] in that the former implements treaty agreements between the United States and Mexico, which the court found created a compelling governmental interest in "enforcing its treaty obligations . . ."[243] Although this panel found the government's interest in protecting Native American culture and religion was inapplicable to the analysis that lead to its use of the strict scrutiny test, it noted that this interest – the same interest the *Saenz* panel found uncompelling – also

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232. *Id.* at *37.
233. *Hardman*, 2001 U.S. App. LEXIS 17702, at *12.
234. *Id.* at *40-41.
235. 957 F.2d 32 (1st Cir. 1992).
236. *Hardman*, 2001 U.S. App. LEXIS 17702, at *40 (quoting *Rupert*, 957 F.2d at 34-35).
237. *Id.* at *48.
238. *Id.* at *49.
239. *Id.*
240. *Id.* at *49-50 (citing Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 531-32, 546 (1993)).
241. *Id.* at *55.
242. 16 U.S.C. § 668a (2001).
243. *Hardman*, 2001 U.S. App. LEXIS 17702, at *50-52.

was sufficiently compelling to justify the burden on Hardman's free exercise of his religion.[244]

ii. Establishment Clause Claim

Because the court had already determined the permitting process survived strict scrutiny in its free exercise analysis, it concluded it did not need to decide whether the regulation should be subject to the rational basis or strict scrutiny review in the Establishment Clause context.[245] However, in dicta, the court noted that, where a denominational preference exists, strict scrutiny applies,[246] but also acknowledged the "unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment."[247] The court also stated the government could not apply "conventional separatist understandings of the establishment clause" to that relationship.[248]

c. Dissent

Judge McKay, who also sat on the *Saenz* panel, dissented.[249] He disagreed with the majority's characterization of RFRA "as a statutory cause of action separate from a constitutional claim."[250] Rather, McKay wrote that RFRA is a "required statutory supplement to those constitutional claims."[251] In this regard, RFRA strict scrutiny applies to all free exercise challenges to federal government actions even if not raised by any of the parties.[252]

Judge McKay acknowledged that the First, Ninth and Eleventh Circuits had held that the Indian tribal use regulation survived strict scrutiny, but declined to follow their precedent.[253] Despite his belief that the federal government, as a matter of law, has a compelling interest in accommodating Native Americans' religious practices, Judge McKay wrote, "it is not at all obvious to me that this interest leads to the conclu-

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244. *Id.* at *54-55. Significantly, in light of the holding in *Saenz*, this panel stated it did not reach "more specific questions which may arise later under 50 C.F.R. § 22.22 such as whether a bona fide Native American who is not a member of a federally recognized tribe may constitutionally be excluded from the exemption." *Id.* at *55 n.21.

245. *Id.* at *58.

246. *Id.* at *56 (citing Larson v. Valente, 456 U.S. 228 (1982)).

247. *Id.* (quoting Peyote Way Church of God, Inc., v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1999)).

248. *Id.*

249. *Hardman*, 2001 U.S. App. LEXIS 17702, at *63.

250. *Id.* at *68.

251. *Id.*

252. *Id.*

253. *Id.* (citing Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997); Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992)).

sion that the government may draw distinctions between adherents to the same religion and practices."[254]

Judge McKay's dissent also echoed the *Saenz* panel in questioning whether sufficient evidence existed to support the government's claim of a compelling interest in protecting eagles.[255] He rejected the majority's finding that the government had a compelling interest in fulfilling its treaty obligations under the MBTA.[256] Though the treaty authorizes the government to enact regulations for distributing eagle parts, Judge McKay argued, such regulations "must comply with the Constitution."[257]

He concluded that the record was not adequately developed to determine whether the government's interest in protecting eagles was compelling, and if so, whether it was sufficiently compelling to "require discrimination among adherents to the same religion."[258] Judge McKay stated additional fact finding on this issue was needed to determine whether the regulatory scheme satisfied "either the narrowly tailored or the least restrictive means tests" for achieving any government interest "so compelling as to justify the denial of free exercise of religion."[259]

3. *United States v. Wilgus*[260]

a. Facts

Samuel Ray Wilgus, Jr., like Hardman, was a non-Indian who was a "bona fide adherent of a Native American religion.[261] Possession of eagle feathers was central to his beliefs and practices."[262] In June 1998, a Utah Highway Patrol officer stopped a pick-up truck in which Wilgus was a passenger and discovered a box containing 137 feathers from bald and golden eagles.[263] Wilgus admitted he possessed the feathers and others subsequently seized from his home by the Utah Division of Wildlife Resources.[264] Wilgus was charged with violating the BGEPA because he did not have a permit.[265] He entered a conditional guilty plea, which permitted him to challenge the district court's denial of his motion to dismiss the indictment in which he asserted violations of the First Amendment's religion clauses.[266]

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254. *Id.* at *68-69.
255. *Hardman*, 2001 U.S. App. LEXIS 17702, at *69.
256. *Id.* at *70.
257. *Id.*
258. *Id.* at *71.
259. *Id.*
260. No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001).
261. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *4.
262. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *3.
263. *Id.* at *2-3.
264. *Id.* at *3.
265. *Id.* at *4.
266. *Id.* at *5.

b. Tenth Circuit Opinion

Judge Ebel,[267] writing for the majority, raised the threshold issue of whether RFRA always applies in free exercise cases even when, as here, it is not raised on appeal.[268] After acknowledging the split among the circuits on this question, the court declined to apply RFRA – notwithstanding a finding that the regulation substantially burdened Wilgus's religious freedom – based on the rule that "an appellant must raise the issues upon which he seeks [the] court's review."[269] Where Judge McKay's dissent in *Hardman* found RFRA "by its own language . . . applies 'in all cases where free exercise of religion is substantially burdened,'"[270] the *Wilgus* majority argued that "[h]ad Congress desired . . . courts to apply RFRA in all free exercise cases . . . it would have written RFRA unambiguously to achieve that purpose."[271]

i. Free Exercise Claim

Like the *Hardman* majority, the majority in *Wilgus* applied the *Smith* standard, but reached a different conclusion.[272] In this instance, the court relied largely on *Church of the Lukumi Babalu, Aye, Inc. v. City of Hialeah*, for guidance to determine whether the BGEPA is neutral and generally applicable.[273] "Neutrality," the court noted, is a "subjective inquiry into the purpose or object of a law," while "general applicability" is an objective inquiry as to its scope.[274]

Because the BGEPA's purpose was protecting eagles, the court held it was neutral despite its exceptions for Indian religious and other purposes such as scientific exhibitions, which do "not change the [BGEPA's] purpose."[275] Even if the Indian tribal use exception was examined separately, the court found the law would not violate the neutrality principle because the object and purpose is to permit members of federally recognized tribes to use eagle feathers in their worship, not to prohibit non-Indians from doing so.[276] The court asserted that a fundamental difference exists between laws having the purpose to accommodate religious practices and those that prohibit or burden religion.[277] By analogy,

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267. Also on this panel were J. McWilliams, concurring, and J. Baldock, dissenting. *Id.* at *2.

268. *Wilgus*, 2001 U.S. App. LEXIS 17700, *6-7.

269. *Id.* at *9 (citing Hernandez v. Starbuck, 69 F.3d 1089, 1093 (10th Cir. 1995)).

270. United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 at *67 (10th Cir. Aug. 8, 2001) (quoting 42 U.S.C. 2000bb(b)(1)).

271. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *10-11.

272. *Id.* at *12-15.

273. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *12-15 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 533 (1993)).

274. *Id.* at *14.

275. *Id.* at *15-16 (citing 16 U.S.C. § 668a).

276. *Id.* at *16.

277. *Id.* at *16-17. When a generally applicable statute incidentally burdens religion, recent Supreme Court decisions suggest legislative attempts to relieve such government-imposed burdens

Judge Ebel explained that if he permits his daughter to drive his car, his purpose is not to prohibit his son from driving the car "even if that is the practical effect."[278] Though exceptions made for certain religious groups may support a conclusion that a "covert purpose of a legislative scheme is to discriminate . . . 'adverse impact will not always lead to a finding of impermissible targeting.'"[279]

Although the Supreme Court had defined a neutral law as one that neither burdened nor benefited religious conduct, here, the Tenth Circuit applied a narrower definition that looked only to whether the regulation at issue burdened religious practice.[280] The court employed a textual analysis comparing the word "prohibiting" in the Free Exercise Clause with the "more general word 'respecting'" in the Establishment Clause.[281] Thus, in applying the narrower view of neutrality, the court concluded that the BGEPA is neutral because the purpose of the law's exceptions is to "benefit members of federally recognized Indian tribes . . . and not to burden anyone."[282] The court buttressed its conclusion that the BGEPA was neutral by asserting the Indian tribal use exception was designed to benefit a political group rather than a racial or religious group, citing several examples in which federal law has recognized Indians' special status as a permissible political classification.[283]

The court also found the BGEPA satisfied the "objective half of the *Smith* analysis."[284] The court argued general applicability does not mean "universal applicability."[285] "Rather, 'general' should be given its customary meaning of 'widespread,' 'predominant' or 'prevalent,' admit[ting] the possibility of some minor exceptions or deviations."[286] Because the BGEPA's proscription against possessing eagle feathers is a

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on free exercise are "permissible accommodations" that do not offend the Establishment Clause. *See* Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & L. 185, 191 (1996).

278. *Id.* at *17.

279. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *18-19 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535). *Wilgus* notes that a city's general prohibition against ritual animal slaughter constituted "an impermissible attempt to target" a specific church's religious practices). *Id.* at *18 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535).

280. *Id.* at *19-22 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532).

281. *Id.* at *22.

282. *Id.* at *24.

283. *Id.* at *25-28. (quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) ("[T]he peculiar semi-sovereign and constitutionally recognized status of Indians justifies special treatment . . ."); Morton v. Mancari, 417 U.S. 535, 552 (1974) ("Literally every piece of legislation dealing with Indian tribes . . . single out for special treatment a constituency of tribal Indians."); United States v. Antelope, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications . . .").

284. *Id.* at *28.

285. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *30.

286. *Id.*

prohibition imposed on "almost all of society," the court found it fits squarely within its definition of generally applicable.[287]

By applying the *Smith* standard to find the BGEPA both neutral and generally applicable rather than RFRA's more rigorous compelling interest test, the court avoided the necessity of evaluating the strength of the government's interests. The court also dismissed what it referred to as the "'*Sherbert* exception,'" arguing that its mandate to apply strict scrutiny to individual exemptions in the post-*Smith* era applies only to unemployment compensation cases.[288] Thus, the BGEPA "falls within the *Smith* safe harbor" and does not offend the Free Exercise Clause, "despite its incidental effect on Wilgus's religious practice."[289]

ii. Establishment Clause Claim

Wilgus also argued the BGEPA violated the Establishment Clause by creating "impermissible denominational and racial preferences" by permitting members of federally recognized Indian tribes to possess eagle feathers but denying him that privilege.[290] The court, again, looked to precedent recognizing the unique relationship between the federal government and Indian tribes. It determined that the government need only show that the special treatment the BGEPA bestows on Native Americans is "rationally related to the government's extraordinary duty to Indians."[291] Here, in contrast to *Saenz*, the court concluded that the "Indian tribal use" exception to the BGEPA was "rationally related to the government's unique obligation to preserve Indian tribes' heritage and culture."[292]

c. Dissent

In his dissenting opinion, Judge Baldock disagreed with the majority's application of *Smith*.[293] He argued that the majority unjustifiably ignored RFRA's "heightened legislative standard," against which Congress "undoubtedly intended courts to measure laws such as the BGEPA."[294] Like Judge McKay in his *Hardman* dissent, Judge Baldock found "RFRA's plain language and tone" unambiguous in its intent that RFRA applies "'in all cases where free exercise of religion is substan-

287. *Id.* at *31.

288. *Id.* at *31 n.16 (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990)).

289. *Id.* at *32.

290. *Id.* at *32.

291. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *33-34 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (explaining the Court "has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'").

292. *Id* at *34.

293. *Id.*

294. *Id.* at *35.

tially burdened.'"[295] Because the BGEPA's substantial burden on Wilgus's exercise of his religious beliefs was undisputed, RFRA should apply.[296]

With respect to the majority's argument that the court need not apply RFRA because Wilgus failed to raise it as an affirmative defense, Judge Baldock argued that the district court's error in concluding that the United States Supreme Court had held RFRA unconstitutional was among the "exceptional circumstances" in which an appellate court could and should raise the issue to correct the defect – particularly in a criminal case in which the defendant's substantial rights are affected.[297] In fact, Judge Baldock suggested that Wilgus might have thought he was precluded from asserting his RFRA claim on appeal based on the district court's erroneous conclusion that RFRA was unconstitutional.[298]

Judge Baldock stopped short of concluding the BGEPA failed to meet constitutional muster under RFRA. Rather, he argued more facts were needed to determine, for example, the effect of the recent reclassification of bald eagles from endangered to threatened and the number of non-Indians who practice Native American religions that require eagle feathers.[299]

Judge Baldock also stated that the majority's discussion of Wilgus's Establishment Clause claim was unnecessary and premature.[300] He reasoned that if the BGEPA survived RFRA's strict scrutiny, "it will pass any level of scrutiny applicable to Establishment Clause challenges."[301] Alternatively, if the BGEPA failed strict scrutiny, Wilgus's conviction would fall and his Establishment Clause challenge would be moot.[302]

C. *Analysis*

Two other circuits have ruled that the Indian tribal use exception withstands strict scrutiny review under RFRA, even when challenged by ethnologically Indian practitioners of religious ceremonies that require the use of eagle feathers.[303]

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295. *Id.* at *38 (citing 42 U.S.C. 2000bb(b)(1)); *see also Hardman*, 2001 U.S. App. LEXIS 17702, at *61.

296. *See id.* at *38.

297. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *39-40.

298. *See id.* at *40 n.4.

299. *Id.* at *41.

300. *Id.* at *42 n.5.

301. *Id.*

302. *Id.* at *42 n.5.

303. *See* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (per curiam); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (per curiam). In *Hugs*, the Ninth Circuit analyzed the challenged regulation under RFRA, even though *City of Boerne* was then pending before the Supreme Court. *Hugs*, 109 F.3d at 1378 n.1. The court reasoned that because it found the regulation survived strict scrutiny under RFRA, it would also survive a less stringent test if the court invalidated RFRA. *Id.*

In *United States v. Hugs*, the Ninth Circuit held the BGEPA and permit system "provide the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes."[304] In this case, two Native Americans were convicted of taking, attempting to take and purchasing eagles without a permit in violation of the BGEPA as a result of an undercover operation conducted by a state game warden on the Crow Reservation.[305] Though the defendants admitted they trapped, shot at and killed eagles, they claimed they did so to obtain eagle feathers and parts for religious use and that the BEGPA infringed on their free exercise of religion.[306] The court was not asked to evaluate the government's interest in protecting eagles, because the defendants stipulated the interest was compelling.[307] However, the court found the BGEPA's legislative history reflected "the importance of protecting eagles because of their religious significance to Native Americans."[308] It specifically rejected the United States District Court for the District of New Mexico's holding that the BGEPA was unconstitutional because the government had failed to establish a compelling interest in eagle conservation, since the golden eagle was not endangered and "the permit system was 'utterly offensive and ultimately ineffectual.'"[309] The court then determined the information required to obtain a permit was "the minimum necessary to assure that eagles and eagle parts will be used for religious purposes," and, therefore, satisfied RFRA's least restrictive means requirement.[310] In *Hugs*, the Ninth Circuit was asked to invalidate the permit system as facially unconstitutional without regard to the distinction between Indians who are members of federally recognized tribes and those who are not.[311]

In *Gibson v. Babbitt*, [312] however, this distinction was central to Eleventh Circuit's analysis. Here, a Native American challenged the eagle feather permitting system under the First Amendment and RFRA after the FWS denied his request for a permit because he was not enrolled in a federally recognized tribe.[313] In a per curiam decision, the *Gibson* court first analyzed the BGEPA under RFRA and found the govern-

304. *Hugs*, 109 F.3d at 1378.

305. *Id.* at 1377.

306. *Id.*

307. *See id.*

308. *Id*; *see also* United States v. Dion, 476 U.S. 734, 740-44 (1986) (discussing the legislative history of the BGEPA and the exception for Indian religious use of eagle feathers and eagle parts).

309. *Hugs*, 109 F.3d at 1379 (citing United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986)).

310. *Id.* at 1378.

311. *See id.* at 1379; *see also* De Meo, *supra* note 16, at 796-97; Perkins, *supra* note 16, at 703 (arguing the permitting system is unconstitutional because it is an unduly burdensome infringement on Indian religious practices).

312. 223 F.3d 1256, 1258 (11th Cir. 2000) (per curiam) (explaining that the issue on appeal narrows to permit applicants who are members of federally recognized Indian tribes).

313. *Gibson*, 223 F.3d at 1257.

ment had a compelling interest in "fulfilling its treaty obligations with federally recognized Indian tribes."[314] In so doing, the court declined to address the government's other asserted interests in protecting eagles and preserving Native American religions.[315] The court found the demand for eagle parts by members of federally recognized tribes exceeded the supply.[316] Therefore, extending permits to other Indians would increase the already prolonged delays "in providing eagle parts to members of federally recognized Indian tribes, thereby vitiating the government's efforts to fulfill its treaty obligations."[317] The court then concluded the permitting system was the least restrictive means to achieve the government's compelling interest in fulfilling its obligations to federally recognized tribes.[318] By the same test, the court also determined the regulation did not violate the First Amendment.[319]

Notwithstanding the factual differences among the Ninth, Tenth and Eleventh Circuits' challenges to the Indian tribal use exception to the BGEPA and the MBTA, these cases represent the collision of several important issues that surely will remain controversial regardless of how the Tenth Circuit rules on rehearing.

Even if one agrees with the commentators and jurisdictions that have construed *City of Boerne* as invalidating RFRA as applied to federal actions,[320] the critical issue is whether the regulation should be analyzed as "legislation that singles out Indians for particular and special treatment"[321] under *Morton* or as a Free Exercise challenge under *Smith*.[322] If viewed as favoring benefits for members of federally registered tribes, *Morton* suggests the Indian tribal use exception would be constitutional as long as the court finds "the preference is reasonable and rationally designed to further Indian self-government."[323]

Under *Smith*, however, the starting point is determining whether the requirement is neutral and generally applicable[324] – a point on which the Tenth Circuit was split in its initial decisions in *Hardman* and *Wilgus*.[325] If the court finds the Indian tribal use exception is not neutral and gener-

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314. *Id.* at 1258.
315. *Id.*
316. *Id.*
317. *Id.*
318. *Gibson*, 223 F.3d. at 1258.
319. *Id.* at 1258-59.
320. *See* Hamilton, *supra* note 20; Blatnik, *supra* note 21; Flagner v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 678 (2001).
321. Morton v. Mancari, 417 U.S. 535, 554-55 (1974).
322. *See* Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990).
323. *Morton*, 417 U.S. at 555.
324. *See Smith*, 494 U.S. at 879-81.
325. *See* United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001), *vacated by* 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam).

ally applicable, as did the *Hardman* majority, it must subject the regulation to strict scrutiny.[326] The regulation might survive heightened scrutiny if viewed as a burden the non-Indian majority has imposed on itself to relieve the burden the BGEPA and MBTA would otherwise impose on a political minority's religious freedom. Alternatively, the regulation would be less likely to pass constitutional muster if found to favor one individual's religious practice over another.

If the regulation is subject to strict scrutiny under *Smith* or RFRA, the question becomes whether the court will find any of the government's asserted interests sufficiently compelling to satisfy the first prong of the test. From a civil liberties perspective, these cases may turn on whether the government's interest is characterized as protecting the unique status of federally recognized Indian tribes as a political classification, protecting individual's religious practice without regard to denomination, protecting a religious minority or, as in the *Hardman* case, fulfilling the United States' treaty obligations to Mexico under the MBTA.[327]

If the court extends permit eligibility to all Indians, it must also overcome an equal protection argument that would create a constitutionally suspect class based on race. If the court extends permit eligibility to all individuals who engage in Indian religious practices, it could encounter Establishment Clause problems.[328] Furthermore, any expansion of the permitting system might also provide additional fodder for those who argue eagle conservation is less than compelling.[329]

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326. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *36.

327. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *54-55. In this regard, future claims may turn on whether the government is seeking to enforce the MBTA, which implicates international treaty obligations, or the BGEPA, which does not. *See also* United States v. Hardman, 260 F.3d 1199, 1200 (10th Cir. 2001) ("Are there any relevant differences between the MBTA and the BGEPA such that we should analyze their effect on religious exercise separately?").

328. *But see* Corrada, *supra* note 277, at 252-81. Corrada asserts that under the "burden lifting" model advanced by Justice Scalia, most accommodations of religion would be constitutionally valid. *Id.* at 265. The ultimate test of a legislative accommodation under this model, which Corrada views as being consistent with *Smith*, would be whether the exemption "alleviate[s] a government-imposed burden on religion." *Id.* Thus, an argument can be made that the Establishment Clause is not a constitutional obstacle to extending eligibility for permits to all practitioners of Indian religions (or even any religion that might require the use of eagle parts) to the extent that the BGEPA and MBTA are viewed as laws by which the government has burdened such practitioners' religion and the permitting system is characterized as an accommodation to lift that burden. At the same time, Corrada describes other accommodation models that are less tolerant of religious accommodations. *Id.* In particular, strict application of the three-pronged test first articulated in Lemon v. Kurtzman "would serve to invalidate virtually any statutory religious exemption from generally applicable laws." *Id.* at 253, 272 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971) declaring a government accommodation of religious freedom violates the Establishment Clause unless it (1) serves a "secular legislative purpose;" (2) has a "principal or primary effect . . . that neither advances nor inhibits religion;" and (3) does not foster an "excessive government entanglement" with religion.).

329. Environmental organizations were notably absent from the list of amici who submitted briefs when the Tenth Circuit considered this issue on January 15, 2002. *See supra* note 15.

III. CONCLUSION

In *Kikumura*, the court unequivocally established that RFRA lives in the Tenth Circuit for federal claims, a fact acknowledged in the three subsequent cases.[330] However, RFRA's vitality remained questionable. Implicit in *Kikumura* is the notion that RFRA could sustain a plaintiff's asserted free exercise claim as a statutory matter, even if the challenged federal law or regulation satisfied rational basis review under the *Smith* First Amendment test.[331]

Kikumura, however, did not reach the issue of whether RFRA was strong enough to carry a religious freedom claim when it was not specifically asserted or when it bumps up against an Establishment Clause claim.[332] These questions and others did surface in the three Indian tribal use exception cases in which opinions were issued, vacated and ordered for rehearing en banc as directed by *United States v. Hardman*.[333]

Clearly cognizant of the conflicts among the jurists over fundamental questions of law, the court set forth more than twenty questions for rehearing.[334] The first is whether RFRA or the less onerous First Amendment standard set forth in *Smith* applies to Free Exercise Clause cases.[335] Specifically, should claims arising from burdens on religious freedom be subject to RFRA's statutory strict scrutiny analysis, as urged by Judges McKay and Baldock, in lieu of the courts' traditional First Amendment analysis, even when parties have not raised RFRA below or on appeal?[336] Additionally, what difference, if any, exists between RFRA's least restrictive means requirement and the First Amendment analysis' narrow tailoring requirement for laws that are not neutral and/or generally applicable? A related issue is the precedent of *Werner*, in which the Tenth Circuit applied the RFRA despite its absence in the pleadings, after *City of Boerne*.[337]

The remaining enumerated issues specifically focused on the applicable standard for a Free Exercise Clause analysis of the MBTA and BGEPA, but may provide clues as to how the Tenth Circuit might analyze other cases implicating the Free Exercise and Establishment Clauses.[338] Do the BGEPA and MBTA fall within *Smith's* "safe harbor"

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330. *See generally* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001).

331. *See id.*

332. *See id.*

333. 260 F.3d 1199 (10th Cir. 2001) (per curiam).

334. *Hardman*, 260 F.3d at 1200-02.

335. *Id.* at 1200.

336. *Id.*

337. *See id.*; Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995).

338. *See Hardman*, 260 F.3d at 1200. This article approaches the serendipitous occurrence of three factually similar, though not identical, situations as a potential opportunity for the court to illuminate and advance the understanding of the interplay between the Establishment and Free Exercise clauses in a way that might have utility beyond its application to the Indian tribal use exception to the BGEPA and MBTA. *See* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001).

as laws that are neutral and generally applicable?[339] If so, should the court extend to free exercise cases the rational relationship standard other circuits have applied in the Establishment Clause context when analyzing laws based on the unique relationship between the federal government and Indian tribes?[340] If the Acts are not neutral, not generally applicable nor establish "a system of individualized exemptions," will they survive strict scrutiny?[341] What level and type of scrutiny should the court give to Establishment Clause challenges – rational basis, strict scrutiny, the *Lemon v. Kurtzman* test, or one of its modern variants?[342]

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At the same time, the difficulties the Tenth Circuit encountered which led to inconsistent results from the first hearings could indicate such expectations are unrealistic. *See generally* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989) (supporting his thesis that "the search for a comprehensive theory of unconstitutional conditions is ultimately futile" by noting the "baselines" against which the constitutionality of religious benefits and deprivations may be measured "may not even remain constant within one constitutional protection").

339. *Id.*

340. *Id.*; *see* Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (applying the rational basis test to Establishment Clause cases).

341. *Hardman*, 260 F.3d at 1200; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (requiring application of First Amendment strict scrutiny to non-neutral laws that are not generally applicable); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring the government to demonstrate a compelling interest to support laws that create systems of individualized exemptions); *cf.* Employment Div. v. Smith, 494 U.S. 872, 883-85 (1990) (holding the *Sherbert* test inapplicable to free exercise challenges of governmental actions that substantially burden a religious practice).

342. *Hardman*, 260 F.3d at 1200-01; *see* Morton v. Mancari, 417 U.S. 535 (1974); *see also* Rupert v. United States Fish and Wildlife Serv., 957 F.2d 32 (1st Cir. 1992); Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (applying rational basis scrutiny to Establishment Clause cases); *cf.* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (analyzing "whether the government entanglement with religion is excessive"); Corrada, *supra* note 277.