

**Handout 6**  
*The Eagle Feather Case*

Read the following case excerpt, focusing on the court's analysis of whether the defendant's assertions constitute a compelling government interest and are the least restrictive means of serving that interest. Pay close attention to the reasoning for each prong of the RFRA test. In your small groups, complete the "Eagle Feather" section of *Handout 8*.

*McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014)

[Soto, a member of a Native American tribe, practiced a religion that uses eagle feathers in its worship. Soto filed an action on behalf of himself and other church members in federal district court against the Department of the Interior (Department) for confiscating eagle feathers under the Eagle Protection Act. Soto claimed that this confiscation violated his tribal group's First Amendment rights and RFRA protection of religious expression.]  
HAYES, Circuit Judge, delivered the opinion of the court:

The Department does not contest the plaintiff's assertion that the Eagle Protection Act substantially burdens their religious beliefs. Soto is involved in a ministry that uses eagle feathers in its worship practice, and his sincerity in practicing this religion is not in question. Furthermore, the eagle feather is sacred to the religious practices of many American Indians. Therefore, any scheme that limits the access of Soto, as a sincere adherent to an American Indian religion, to possession of eagle feathers has a substantial effect on the exercise of his religious beliefs.

We agree with [federal courts of appeals] that protecting bald eagles qualifies as a compelling interest because of its status as our national symbol, regardless of whether the eagle still qualifies as an endangered species. Furthermore, the Supreme Court has suggested that protecting migratory birds in general might qualify as a compelling interest.

Recent Supreme Court cases have reaffirmed that the burden on the government in demonstrating the least restrictive means test is a heavy burden. The Department must provide actual evidence, not just conjecture, demonstrating that the regulatory framework in question is, in fact, the least restrictive means. The Department presents two arguments for why excluding sincere adherents of American Indian religions such as Soto who are not members of federally recognized tribes from receiving permits advances the government's interest in preserving the eagle population: (1) allowing broader possession would undermine law enforcement's efforts to combat the illegal trade of eagle feathers and parts; and (2) broader permitting would create law enforcement problems because law enforcement does not have a means of verifying an individual's American Indian heritage.

The Department's argument lacks sufficient evidence to prove that the ban in its current form is the "least restrictive means." First, the evidence in the record simply does not support the assertion that expanding the permitting process would cause an increase in poaching. This is mere speculation on the part of the agents who provided testimony, and the Supreme Court has stated that mere speculation is not sufficient to satisfy a least restrictive means test. Second, the

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evidence in the record indicates that agents currently have to rely on anecdotal information and interviews with American Indians who possess feathers to determine the legal status of the feathers in question. This would not change if the permitting system was expanded, and therefore, the Department has failed to present specific evidence that the Plaintiffs' religious practice would jeopardize the preservation of the eagles.

Furthermore, the Department has not provided sufficient evidence to conclude that there are no other means of enforcement that would achieve the same goals. For example, the Department could require that individuals prove they obtained the feather legally, by producing a valid permit. The Plaintiffs have also suggested that they be allowed to collect feathers that have molted both in the wild and in zoos. The Department has not shown that this is not a viable alternative, and, importantly, it is its burden to do so.

We do not agree, therefore, with the district court that, on this record at this stage, the Department has met its burden in demonstrating that a possession ban on all but a select few American Indians is the least restrictive means of achieving any compelling interests. We reverse the district court's grant of summary judgment in favor of the Department and remand for proceedings consistent with this opinion.

JONES, Circuit Judge, concurring:

I concur in the carefully written panel opinion with one point of clarification. Soto is without dispute an Indian and a member and regular participant in the Lipan Apache Tribe, which, although not federally recognized, has long historical roots in Texas. The panel opinion discusses—and is also limited by—Soto's RFRA claim based on his and his tribe's status. No more should be read into the RFRA protection intended by this decision.

Both the conservation of eagles and the way of life of federally recognized Indian tribes are of signal national importance, as indicated by decades of federal law and regulations. If the government sustains its position that the supply of eagle feathers is limited and that increasing access by non-recognized tribe members, or even by non-Indians, to eagle feathers for sacred purposes will endanger the eagles and the federally recognized tribes, this case becomes very close. Broadening the universe of "believers" who seek eagle feathers might then seriously endanger the religious practices of real Native Americans. Soto's status does not eliminate the potential problems, which will be explored at trial, but cabins this case to Native American co-religionists