

## *UNITED STATES V. FRIDAY* AND THE FUTURE OF NATIVE AMERICAN RELIGIOUS CHALLENGES TO THE BALD AND GOLDEN EAGLE PROTECTION ACT

### INTRODUCTION

For the Northern Arapaho Indian tribe on the Wind River Reservation in Wyoming, the Sun Dance is the most sacred of religious ceremonies.<sup>1</sup> Held annually “after the first thunder of the spring,”<sup>2</sup> and lasting anywhere from four to eight days, the Sun Dance portrays the continuity between death and rebirth and the interdependence of all natural things.<sup>3</sup> The eagle, which is considered a “sacred messenger to the spirit world,”<sup>4</sup> is an essential component of the Dance; without the tail of an eagle, along with several other religiously significant objects, the Sun Dance cannot occur.<sup>5</sup>

After he was prosecuted for killing a bald eagle for the Sun Dance, the Tenth Circuit Court of Appeals considered Northern Arapaho tribal member Winslow Friday’s religious challenge against the Bald and Golden Eagle Protection Act (BGEPA).<sup>6</sup> The court held that the BGEPA’s Native American religious exception is facially valid and the least restrictive means of furthering the government’s compelling interest in protecting eagles.<sup>7</sup> As a result, in Friday’s case, the court held that the BGEPA did not violate the Religious Freedom and Restoration Act of 1993 (RFRA).<sup>8</sup> Although the court noted that the permitting system could be more accommodating, because Friday never applied for a permit to take an eagle, the court did not extensively consider the restrictive nature of the system.<sup>9</sup>

This Comment examines the Tenth Circuit’s *United States v. Friday* opinion along with its underlying implications. Part I provides a brief historical analysis of the BGEPA and introduces relevant statutory provisions, including the exception that allows Native Americans to apply for eagle take permits. Part II analyzes the development of RFRA to provide

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1. Appellee’s Opening Brief at 1, *United States v. Friday*, 525 F.3d 938 (10th Cir. Jun 27, 2007) (No. 06-8093), 2007 WL 2437229.

2. *United States v. Friday*, 525 F.3d 938, 942 (10th Cir. 2008). According to the opinion in *Friday*, details about the Sun Dance are “guarded, and access by outsiders is limited . . . [without] the consent of the Northern Tribal elders.” *Id.*

3. See Sun Dance, <http://www.crystalinks.com/sundance.html> (last visited Mar. 9, 2009).

4. Antonio M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 774 (1995).

5. Appellee’s Opening Brief at 2, *Friday*, 525 F.3d 938 (No. 06-8093), 2007 WL 2437229.

6. *Friday*, 525 F.3d at 942.

7. See *id.* at 942, 960.

8. See *id.*

9. See *id.* at 960.

a better understanding of how RFRA affects Native American religious challenges to the BGEPA. Part III surveys relevant precedent in hopes of better understanding the opinion in *Friday*, and the avenues left open for future litigation. Part IV reviews the *Friday* opinion and discusses its relevant procedural history. Part V analyzes the *Friday* opinion in context with relevant precedent, discusses the implications of the *Friday* decision, and discusses the avenues left open for Native American religious challenges to the BGEPA after *Friday*.

## I. THE BALD AND GOLDEN EAGLE PROTECTION ACT<sup>10</sup>

### A. History

The bald eagle began receiving congressional attention in the 1930s as it became apparent that its populations were beginning to decline.<sup>11</sup> On June 8, 1940, Congress passed the Bald Eagle Protection Act; the enacting clause described the bald eagle “as the national symbol” and “no longer a mere bird of biological interest but a symbol of American ideals and freedom.”<sup>12</sup> In 1962, Congress extended protection to golden eagles in order to protect their dwindling populations and because they were often mistaken for young bald eagles.<sup>13</sup>

The BGEPA subjects violators to both criminal and civil penalties.<sup>14</sup> Under the BGEPA, if an individual “shall . . . take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import” any bald or golden eagle, “alive or dead, or any part, nest, or egg thereof . . . [the individual] shall be fined not more than \$5,000 or imprisoned not more than one year or both.”<sup>15</sup> A violator is subject to civil penalties of up to \$5,000 for every violation.<sup>16</sup> Because eagles are so important in Native American religion,<sup>17</sup> Congress created an exception allowing the issuance of permits for Native Americans wishing to take an eagle for religious purposes.<sup>18</sup>

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10. The Bald and Golden Eagle Protection Act, 16 U.S.C.A. § 668 (West 2008).

11. See 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, 705 (2000).

12. An Act for the Protection of the Bald Eagle, ch. 278, 54 Stat. 250 (1940) (codified at 16 U.S.C.A. § 668 (West 2008)).

13. Tina S. Boradiansky, *Conflicting Values: The Religious Killing of Federally Protected Wildlife*, 30 NAT. RESOURCES J. 709, 720 (1990).

14. 16 U.S.C.A. § 668(a)-(b).

15. *Id.* § 668(a).

16. *Id.* § 668(b).

17. De Meo, *supra* note 4, at 774 (noting that “Native Americans hold eagle feathers sacred and equate them to the cross or the Bible in western religions.”).

18. See 16 U.S.C.A. § 668(a); see also 50 C.F.R. § 22.22 (2008).

*B. The BGEPA Native American Religious Exception*<sup>19</sup>

The BGEPA accommodates Native Americans who need eagles in two ways. First, Native Americans can obtain eagles and eagle parts through the National Eagle and Wildlife Property Repository in Commerce City, Colorado.<sup>20</sup> Receiving an eagle from the repository takes up to two years and the eagles received are often in dire shape.<sup>21</sup> In addition, obtaining eagles through the repository does not fulfill the demands of many Native American tribes whose religious ceremonies require a “pure” eagle.<sup>22</sup>

Alternatively, the Director of the Interior or the Director of the United States Fish and Wildlife Service (FWS) may issue a permit authorizing a Native American to “take”<sup>23</sup> a bald or golden eagle for religious purposes.<sup>24</sup> Only members of federally recognized tribes may apply for a permit.<sup>25</sup> The application requires an individual to specify the species to be taken, the location of the take, the name of the tribe, and the religious ceremony for which the eagle is to be used.<sup>26</sup> In determining whether or not to grant a permit, the FWS must consider the direct and indirect effect that issuing the permit will have on eagle populations, and whether the applicant is “authorized to participate in bona fide tribal religious ceremonies.”<sup>27</sup>

The FWS has never issued an eagle take permit for a Native American in the Rocky Mountain and Plains region.<sup>28</sup> Nationwide, the FWS has issued a take permit to the Hopi tribe every year since 1986 to take golden eagles.<sup>29</sup> The FWS also periodically grants golden eagle take permits to the Navajo tribe and the Taos Pueblo tribe.<sup>30</sup> Overall, in the Southwest, the FWS has issued golden eagle take permits to tribes, never to an individual, seventy-five percent of the time.<sup>31</sup> The significance of

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19. See 50 C.F.R. § 22.22 (2008).

20. The National Eagle Repository is a government warehouse where dead eagles are collected. Some of the eagles at the repository are confiscated contraband, some are the victims of electrocution on power lines, some are roadkill. *United States v. Friday*, 525 F.3d 938, 944 (10th Cir. 2008).

21. *De Meo*, *supra* note 4, at 790-91.

22. *Friday*, 525 F.3d at 943. A pure eagle is one that has been taken with care. It cannot have died through poison, disease, or electrocution, and it cannot be roadkill. *Id.*

23. The term “take” includes to “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” 50 C.F.R. § 22.3 (2007).

24. 16 U.S.C.A. § 668(a). The permitting exception within the BGEPA abrogates previous treaties which allowed Native Americans to take bald and golden eagles. See *United States v. Dion*, 476 U.S. 734, 745 (1986).

25. See 50 C.F.R. § 22.22 (2008).

26. *Id.* § 22.22(a).

27. *Id.* § 22.22(c).

28. Appellee’s Opening Brief at 10, *United States v. Friday*, 525 F.3d 938 (10th Cir. June 27, 2007) (No. 06-8093), 2007 WL 2437229.

29. *Id.*

30. Brief of Appellant at 5, *United States v. Friday*, 525 F.3d 938 (No. 06-8093), 2007 WL 1300419.

31. Appellee’s Opening Brief at 32, *United States v. Friday*, 525 F.3d 938 (No. 06-8093).

this seemingly high rate is minimized by the fact that there have been only four applications to take a golden eagle, three of which were granted.<sup>32</sup> Furthermore, the FWS has never issued a permit to take a bald eagle and has never issued an individual Native American a permit to take either type of eagle.<sup>33</sup>

## II. THE RELIGIOUS FREEDOM AND RESTORATION ACT OF 1993<sup>34</sup>

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>35</sup> In *Sherbert v. Verner*, the Court held that any burden on an individual’s religion was subject to strict scrutiny and must be justified by a “compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.”<sup>36</sup> In the late 1980s, however, the Court began shifting away from strict scrutiny by providing more deference to the state interest in question.<sup>37</sup> In *Employment Division v. Smith*,<sup>38</sup> the Court seemingly changed its constitutional analysis of Free Exercise claims. In *Smith*, the Court stated that “the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.”<sup>39</sup> A neutral law of general applicability, therefore, was not subject to strict scrutiny, and did not require a compelling state interest in order to justify burdening an individual’s religion. In response to the decision in *Smith*, and to restore strict scrutiny, Congress enacted the Religious Freedom and Restoration Act of 1993 (RFRA).<sup>40</sup>

Less than four years after its enactment, the Supreme Court invalidated RFRA in *City of Boerne v. Flores*.<sup>41</sup> In *Flores*, the Court held that Congress lacked the authority to enact RFRA through the Fourteenth Amendment’s enforcement clause; RFRA, therefore, became inapplicable to actions against the *states*.<sup>42</sup> With regard to federal law, however, the Tenth Circuit recently held that “the separation of powers concerns expressed in *Flores* do not render RFRA unconstitutional as applied to

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32. *Id.* at 10.

33. Brief of Amicus Curiae of the Northern Arapaho Tribe in Support of Defendant-Appellee at 3-4, *United States v. Friday*, 525 F.3d 938 (No. 06-8093) (noting that permits have only been granted to tribal entities).

34. 42 U.S.C.A. § 2000bb (West 2008).

35. U.S. CONST. amend. I.

36. 374 U.S. 398, 403 (1963).

37. *United States v. Hardman*, 297 F.3d 1116, 1125 (10th Cir. 2002).

38. 494 U.S. 872, 879 (1990).

39. *Id.*

40. 42 U.S.C.A. § 2000bb. RFRA states that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . [unless] the burden to the person is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.” *Id.* § 2000bb-1.

41. 521 U.S. 507, 511 (1997).

42. *Hardman*, 297 F.3d at 1126.

the *federal* government.”<sup>43</sup> As a result, religious burdens imposed by the BGEPA, a federal law, must meet the strict scrutiny standard set forth in RFRA.

### III. POST-RFRA NATIVE AMERICAN RELIGIOUS CHALLENGES TO THE BGEPA

#### A. *United States v. Hugs*<sup>44</sup> and *Differentiating As-Applied from Facial Challenges*

In *United States v. Hugs* the court considered a Free Exercise challenge to the BGEPA using the standards set forth in RFRA.<sup>45</sup> In *Hugs*, two defendants were convicted of violating the BGEPA.<sup>46</sup> The defendants were prosecuted after they led an undercover game warden on a successful hunting expedition for bald and golden eagles on the Crow Indian Reservation.<sup>47</sup> The defendants were precluded from bringing an as-applied challenge to the statute because they failed to apply for a take permit.<sup>48</sup>

A party bringing an as-applied claim may challenge a law “only insofar as it has an adverse impact on his own rights.”<sup>49</sup> The claim is “evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations.”<sup>50</sup> Citing *Madsen v. Boise State University*,<sup>51</sup> the *Hugs* court held that an individual lacks standing to challenge a rule “to which he has not submitted himself by actually applying for the desired benefit.”<sup>52</sup> Because the defendants did not apply for a permit, therefore, the court only considered the defendant’s facial challenge to the BGEPA.<sup>53</sup>

A successful facial challenge invalidates a statute so that it may never be constitutionally applied.<sup>54</sup> A party making a facial challenge bears a heavier burden seeking to “vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question.”<sup>55</sup> Generally, in federal court a facial challenge requires “a

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43. *Kikumura v. Hurley*, 242 F.3d 950, 959 (10th Cir. 2001) (emphasis added).

44. 109 F.3d 1375, 1377 (9th Cir. 1997). The decision in *Hugs* occurred while the Supreme Court was considering the constitutionality of RFRA in *Flores*. Because the Supreme Court’s ruling in *Flores* only invalidated RFRA when applied to state matters, the court in *Hugs* correctly applied the RFRA strict scrutiny standard when considering a challenge to the BGEPA, a federal law. *Id.* at 1377-78.

45. *Id.* at 1377-78.

46. *Id.* at 1377.

47. *Id.*

48. *Id.* at 1378.

49. *See County Court of Ulster County v. Allen*, 442 U.S. 140, 154-55 (1979).

50. 16 C.J.S. *Constitutional Law* § 187 (2008).

51. 976 F.2d 1219, 1220-21 (9th Cir. 1992).

52. *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997).

53. *Id.*

54. *Constitutional Law*, *supra* note 50.

55. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999).

showing that no set of circumstances exist under which the statute would be valid.”<sup>56</sup>

In analyzing the statute’s facial validity in *Hugs*, the Ninth Circuit held that the government’s compelling interest in protecting bald and golden eagles justified the substantial burden imposed upon Native Americans by the BGEPA.<sup>57</sup> The court further held that the BGEPA’s permit exception was the least restrictive means of effectuating that interest.<sup>58</sup>

#### B. *United States v. Hardman*<sup>59</sup>

In *United States v. Hardman*, the Tenth Circuit consolidated three cases involving government prosecutions against Native Americans for violating the BGEPA.<sup>60</sup> Although the defendants failed to apply for a take permit, the Tenth Circuit held that the defendants had standing to challenge the statute because they were not members of a federally recognized tribe, and so it “would have been futile for these individuals to apply for permits.”<sup>61</sup> The court further held that the government’s compelling interest in protecting bald and golden eagles outweighed the substantial burden imposed on Native American religion.<sup>62</sup> However because the government failed to provide information supporting its proposition that “limiting permits . . . only to members of federally recognized tribes is the least restrictive means of advancing the government’s interests,” the court ruled in favor of the defendants.<sup>63</sup>

#### C. *United States v. Antoine*<sup>64</sup>

Similar to the situation in *Hardman*, in *United States v. Antoine*, the Ninth Circuit considered whether the BGEPA violated RFRA with regard to a Native American who was not a member of a federally recognized tribe.<sup>65</sup> Contrary to the holding in *Hardman*, however, the Ninth Circuit held that the BGEPA permitting system was the least restrictive means of achieving the government’s compelling interest.<sup>66</sup> Thus, the fact that the defendant was not a member of a federally recognized tribe was immaterial.

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56. *Constitutional Law*, *supra* note 50.

57. *See Hugs*, 109 F.3d at 1378.

58. *Id.*

59. 297 F.3d 1116 (10th Cir. 2002).

60. *Id.* at 1118.

61. *Id.* at 1121.

62. *See id.* at 1126-28 (stating that “the bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government’s interest in preserving the species remains compelling in either situation. What might change depending on the number of birds existing is the scope of a program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.”).

63. *Id.* at 1132.

64. 318 F.3d 919 (9th Cir. 2003).

65. *See id.* at 920.

66. *See id.* at 923.

The court explained that the long delays that Native Americans experience in obtaining eagle parts through the repository demonstrates the high demand that exists with regard to federally recognized tribal members.<sup>67</sup> Consequently, “if the government extended [permit] eligibility [to non-federally recognized Native Americans], every permit issued to a nonmember would be one fewer issued to a member.”<sup>68</sup> The court concluded, therefore, that the alternative suggested by the defendant, to allow non-federally recognized Native Americans to apply for permits, “can’t fairly be called ‘less restrictive’ [because] it places additional burdens on other believers.”<sup>69</sup>

#### IV. *UNITED STATES V. FRIDAY*<sup>70</sup>

##### A. *Facts*

Winslow Friday, a member of the Northern Arapaho Tribe of Wyoming, shot and killed a bald eagle for the Sun Dance.<sup>71</sup> Friday never contacted the eagle repository, nor did he apply for a take permit before he shot the eagle.<sup>72</sup> The government charged Friday with violating the BGEPA; Friday argued that enforcing the BGEPA impermissibly burdened his religion in violation of RFRA.<sup>73</sup>

##### B. *Procedural History*

The Tenth Circuit reversed the decision of the United States District Court for the District of Wyoming.<sup>74</sup> Citing *Hardman*, the District Court found that Friday had standing because it would have been futile for him to try and obtain an eagle through either the repository or the permitting system.<sup>75</sup> Because the Sun Dance calls for a “pure” eagle,<sup>76</sup> requiring Friday to use the National Eagle Repository was not an option.<sup>77</sup> Also, because the FWS issued so few take permits, the District Court held that the permit exception within the BGEPA was effectively futile and imposed a substantial burden upon Native American religion.<sup>78</sup> In addition, the court held that the BGEPA’s exception for Native American religion

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67. *See id.*

68. *Id.*

69. *Id.*

70. 525 F.3d 938 (10th Cir. 2008).

71. *Id.* at 942.

72. *Id.* at 945.

73. *Id.* at 946.

74. *Id.* at 960.

75. *United States v. Friday*, No. 05-CR-260-D, 2006 U.S. Dist. LEXIS 74970, at \*8 (D. Wyo. Oct. 13, 2006) (“Based upon the agency’s conduct in every other respect, it is clear that Defendant would not have been accommodated by applying for a take permit.”), *rev’d*, 525 F.3d 938 (10th Cir. 2008).

76. *See United States v. Friday*, 525 F.3d 938, 943 (10th Cir. 2008). The Sun Dance requires a “pure” eagle. The tail may not be reused, and the eagle must have been taken with care, it cannot have died through poison, disease, or electrocution, and it cannot be roadkill.

77. *See Friday*, 2006 U.S. Dist. LEXIS 74970, at \*10, *rev’d*, 525 F.3d 938 (10th Cir. 2008).

78. *Id.* at \*8, \*10, *rev’d*, 525 F.3d 938 (10th Cir. 2008).

was not the least restrictive means of furthering the government's compelling interest.<sup>79</sup>

The District Court held that the limited number of take permits granted by the FWS is evidence that the process is not the least restrictive means of effectuating its compelling interest.<sup>80</sup> Important to the court's decision was the fact that the bald eagle has experienced increased rates of recovery and that a greater cause of eagle mortality is electrocution.<sup>81</sup> Consequently, the District Court ruled in favor of Friday, holding that RFRA requires the BGEPA to make more accommodations for Native American religion.<sup>82</sup>

### C. Judge McConnell's Majority Opinion<sup>83</sup>

#### 1. Scope of Review

Because Friday did not apply for a permit to take an eagle, the court stated that he was precluded from raising arguments that his religion *might have* been unduly burdened.<sup>84</sup> In other words, on an as-applied basis, Friday was limited to challenging only those portions of the permitting system that actually affected him.<sup>85</sup> The court declared Friday could, however, attack the statute's facial validity without having applied for a permit.<sup>86</sup>

#### 2. Substantial Burden

The court began by analyzing the severity of the burden imposed upon Friday's religion.<sup>87</sup> This is seemingly separated into a two-part inquiry. First, the court stated that "a law that limits the Fridays' access to the eagle needed for the ceremony substantially burdens their ability to exercise their religion . . . ."<sup>88</sup> This portion of the analysis suggests that, had Friday applied for a permit, the court would have found that the permitting process imposed a substantial burden.

Because Friday did not apply for a permit, however, the court only considered whether "it substantially burdens Mr. Friday's religion to

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79. See *id.* at \*14, *rev'd*, 525 F.3d 938 (10th Cir. 2008).

80. *Id.* at \*14.

81. *Id.* at \*14.

82. *Id.* at \*15 ("Although the Government professes respect and accommodation of the religious practices of Native Americans, its actions show callous indifference to such practices. It is clear to this Court that the Government has no intention of accommodating the religious beliefs of Native Americans except on its own terms and in its own good time.").

83. *United States v. Friday*, 525 F.3d 938, 942 (10th Cir. 2008).

84. *Id.* at 950-51 (stating, "[t]hese include his claims that the process might have taken too long, that he might have been wrongfully denied a permit even if he was entitled to one, or that the FWS might have imposed conditions on the permit that are religiously objectionable").

85. See *id.* at 951.

86. *Id.* Friday is not precluded, for example, from arguing that the permitting process "contains so many obstacles that it would effectively have been futile for him to apply for a permit."

87. See *id.* at 947.

88. *Id.* The court refers to the Friday family entity.

require him to obtain a permit in advance of taking an eagle.”<sup>89</sup> In taking this path the court only considered the burdens imposed by the statute facially. The court noted that many religious activities, like building a church, require some form of advance authorization from the government.<sup>90</sup> Because Friday did not set forth sufficient evidence that his “religious tenets [were] inconsistent with using an application process,” the court found that requiring Friday to apply for a permit did not pose a substantial burden upon his religion.<sup>91</sup> Nonetheless, the court did not rest its decision on the lack of a substantial burden because it concluded that the permit process was a reasonable accommodation and narrowly tailored to achieve the government’s compelling interest.<sup>92</sup>

### 3. Facial Challenges<sup>93</sup>

#### a. Futility

The court first considered Friday’s facial challenge to the BGEPA.<sup>94</sup> Because this was a facial challenge, Friday was entitled to raise the claim regardless of whether or not he applied for a permit.<sup>95</sup> The District Court, citing *Hardman*, found that the application process was futile and, therefore, not the least restrictive means of achieving the government’s compelling interest.<sup>96</sup> The Tenth Circuit disagreed, concluding that the record lacked sufficient evidence showing that the permit application process was futile.<sup>97</sup> Unlike *Hardman*, in which it was “legally futile” for the defendants to apply for a permit because they were not members of a federally recognized tribe, the court held that Friday, a member of a federally recognized tribe, could, in theory, have received a permit.<sup>98</sup>

The court cited testimony that the Hopi tribe had applied, and received, a take permit for golden eagles, and the “the record reveals no reason to believe that an application to take a single eagle annually for the Sun Dance . . . would have been treated any less favorably.”<sup>99</sup> Al-

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89. *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008).

90. *Id.*

91. *Id.* at 948.

92. *Id.*

93. *Id.* at 951. “A facial challenge is one that contends the statute is impermissible in all, or at least the ‘vast majority[,] of its intended applications.’” (quoting *Doctor John’s, Inc. v. City of Roy*, 465 F.3d 1150, 1157 n. 5 (10th Cir. 2006)).

94. *Friday*, 525 F.3d at 953.

95. *Id.*

96. *Friday*, 2006 U.S. Dist. LEXIS 74970, at \*14-15, *rev’d* 525 F.3d 938 (10th Cir. 2008). Judge McConnell noted that the District Court acknowledged that the issue decided in *Hardman* was different than the case at bar. In *Hardman* the defendants “were not members of a federally recognized tribe . . . . In other words, it was legally futile for them to apply because they were legally ineligible.” *Friday*, 525 F.3d at 953.

97. *Friday*, 525 F.3d at 954-55. “Although there is evidence in the record that one permit application was denied, there is no evidence that this denial was improper, and no evidence regarding other permit applications.” *Id.*

98. *Id.* at 953.

99. *Id.* at 954.

though the FWS may not readily issue permits, the Tenth Circuit held that the evidence in the record did not demonstrate that the process was futile.<sup>100</sup>

#### b. Governmental Interest in Requiring Permits

Next, Friday argued that the permitting system does not advance the government's compelling interest in protecting eagles because allowing Native American religious takings does not harm eagle populations.<sup>101</sup> The court disagreed stating that the permitting system was facially valid.<sup>102</sup> This is because it allows the government to track the amount of legally taken eagles, gives the government discretion over what eagles can be taken, and allows the government to allocate takings in a manner that protects eagle populations as a whole.<sup>103</sup>

### 4. As-Applied Challenges

#### a. The Sacred Nature of the Sun Dance

The court first addressed Friday's argument that 50 C.F.R. § 13.21(e)(2)<sup>104</sup> violates the sacred nature of the Sun Dance.<sup>105</sup> Judge McConnell noted that if this provision was construed to allow FWS agents to attend the Sun Dance, this "condition would violate the sacred nature of the ritual."<sup>106</sup> However, because Friday testified that he did not know about the permitting system until after he killed the eagle, the provision "could not have influenced Mr. Friday's decision not to apply for a permit."<sup>107</sup> As a result, the court stated that the provision did not affect Friday's case.<sup>108</sup>

#### b. Lack of Outreach

The court then considered the as-applied challenges to the permitting process that affected Friday, given that he did not apply for a permit.<sup>109</sup> First, Friday argued that the permit program lacked any type of

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100. *Id.* at 955.

101. *See id.* at 955. Friday conceded that the government had a compelling interest in protecting bald and golden eagles. *Id.* at 956. Instead, Friday argued that the permitting system was facially impermissible because it did not advance the government's compelling interest. *Id.* at 955.

102. *Id.* at 956.

103. *See id.* at 955. As Judge McConnell stated, "[e]ven if unregulated religious takings would not be numerous enough to threaten the viability of eagle populations, the government would still have a compelling interest in ensuring that no more eagles are taken than necessary, and that takings occur in places and ways that minimize the impact." *Id.* at 956.

104. The provision states "by accepting a permit, the permittee . . . shall allow entry by agents . . . upon premises where the permitted activity is conducted."

105. *Id.* at 951-52.

106. *Id.*

107. *Id.*

108. *Id.* Judge McConnell noted, "[s]hould the FWS insist on an inspection that would violate tribal religious beliefs, an affected person or tribe could bring an as-applied claim under RFRA specifically targeted to the religiously offensive condition." *Id.*

109. *Id.* at 956-57.

outreach.<sup>110</sup> As a result, very few Native Americans knew that the permit program existed; and thus, Friday argued that the permit application process was not the least restrictive means of furthering the government's interest.<sup>111</sup> The court dismissed this claim, stating that the permit process is published in 16 U.S.C. § 668.<sup>112</sup> Further, the court held that the government did not violate Friday's Free Exercise rights simply because he was unaware of the existence of an available accommodation.<sup>113</sup>

Eliminating another potential challenge to the BGEPA, the court ruled that the government's trust obligation to Native Americans did not require the government to engage in affirmative outreach.<sup>114</sup> The court stated that in Friday's case there was no legal trust obligation<sup>115</sup> because the BGEPA does not create any type of fiduciary relationship, and because the case did not involve Native American property held in trust by the government.<sup>116</sup>

### c. Electrocutation

Finally, the court addressed Friday's argument that the government could preserve the eagle in a less restrictive manner by prosecuting the electric companies whose power lines electrocute eagles.<sup>117</sup> The Court responded to this argument by stating that the government *does* prosecute electric companies whose power lines kill eagles.<sup>118</sup>

The court concluded by stating that the government attempts to accommodate the Native American religion while still accomplishing its compelling interest.<sup>119</sup> Although the permit process might be "improperly restrictive, burdensome, unresponsive or slow," the court stated that Friday could not challenge these shortcomings because he failed to apply for a permit.<sup>120</sup>

## V. ANALYSIS

In the following analysis of the *Friday* opinion, section A provides a detailed synopsis of the aforementioned precedent in combination with

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110. *Id.*

111. *Id.* at 957.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See Perkins, supra* note 11, at 704 (arguing that the Federal Indian Trust Doctrine might provide a means of attacking the constitutionality of the BGEPA).

116. *United States v. Friday*, 525 F.3d 938, 957-58 (10th Cir. 2008).

117. *Id.* at 958 ("Mr. Friday is correct that when strict scrutiny is applicable the government is generally not permitted to punish religious damage to its compelling interest while letting equally serious secular damage go unpunished.").

118. *Id.* at 958-59 ("In the one recorded case on the subject, a Colorado district court agreed with the government, and refused to dismiss criminal charges under the Eagle Act and the Migratory Bird Treaty Act against a rural electric company whose wires had killed 38 eagles, without proof of intent or even of negligence.").

119. *Id.* at 960.

120. *Id.*

*Friday* in order to better understand the state of the law as it applies to Native American RFRA challenges against the BGEPA. Section B describes the avenues left open for future litigants challenging the statute on both an as-applied basis and challenging the statute's facial validity. Although *Friday* implies that future challenges are going to be successful only on an as-applied basis, section B also suggests that the court in *Friday* may have imposed a futility standard that was too strict and not in accordance with relevant precedent. As such, future litigants are provided with an additional means of challenging the facial validity of the statute.

### A. Native American Religious Challenges to the BGEPA: Synopsis

#### 1. Substantial Burden

Since the enactment of RFRA, case law suggests that the BGEPA does impose a substantial burden upon Native American religious practices.<sup>121</sup> In *Friday*, the court did not find that the permitting system, in itself, posed a substantial burden;<sup>122</sup> it did, however, find that the permit process would impose a burden on a Native American who actually applies for a permit.<sup>123</sup>

#### 2. Compelling Governmental Interest<sup>124</sup>

All courts found, and defendants generally do not challenge, that the government has a compelling interest in protecting bald and golden eagles.<sup>125</sup> A minority of courts held that the government does not possess a compelling interest in protecting golden eagles and other birds that are not endangered.<sup>126</sup> Yet, no court held that the government does not possess a compelling interest in protecting bald eagles, regardless of whether

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121. *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997) ("We do not question that the BGEPA imposed a substantial burden on the practice of such religions by restricting the ability of adherents to obtain and possess eagles and eagle parts."); *see also* *United States v. Antoine*, 318 F.3d 919, 921 (9th Cir. 2003) (holding "that BGEPA imposed a substantial burden"); *United States v. Hardman*, 297 F.3d 1116, 1126-27 (10th Cir. 2002) ("Any scheme that limits their access to eagle feathers therefore must be seen as having a substantial effect on the exercise of religious belief.").

122. Thus, if a Native American does not apply for a permit, that person cannot claim that the permitting system imposes a substantial burden upon his or her religion.

123. *See supra* text accompanying notes 88-90.

124. "Whether something qualifies as a compelling interest is a question of law." *Hardman*, 297 F.3d at 1127.

125. *See Hugs*, 109 F.3d at 1378 ("The Hugs do not deny that protection of bald and golden eagles serves a compelling government interest."); *Antoine*, 318 F.3d at 924 ("The government has a compelling interest in eagle protection that justifies limiting supply to eagles that pass through the repository, even though religious demand exceeds supply as a result."); *Hardman*, 297 F.3d at 1128.

126. *United States v. Abeyta*, 632 F.Supp. 1301, 1307 (D.N.M. 1986) ("The golden eagle is not an endangered species. The uncontradicted testimony at trial established that some eagles could be taken without harmful impact on the remaining population. The government's conservation interests therefore are not compelling and cannot warrant a constriction of Indian religious liberty."); *see also* *Horen v. Commonwealth*, 479 S.E.2d 553, 559 (Va. Ct. App. 1997) ("However, the Commonwealth has not established that application of Code § 29.1-521(A)(10) to the Horens furthers any compelling state interest.").

or not it is listed on the endangered species list.<sup>127</sup> Whether or not the bald eagle is listed as endangered, however, could affect what constitutes the least restrictive means of protecting eagles: “[w]hat might change depending on the number of birds existing is the scope of a program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.”<sup>128</sup> In *Friday*, the court found that the government did possess a compelling interest in protecting bald and golden eagles.<sup>129</sup>

### 3. Least Restrictive Means<sup>130</sup>

The least restrictive means aspect of the strict scrutiny test provides future litigants with the greatest opportunity for successfully challenging the BGEPA. To fulfill its burden, the government must prove that “no alternative forms of regulation would combat such abuses without infringing First Amendment rights.”<sup>131</sup>

With regard to Native American challenges against the BGEPA, the least restrictive means portion of the analysis has received differing treatment. In *Hugs*, the court found the permitting system necessary to ensure that eagles are used only for religious purposes; as such, the court held that the system was the least restrictive means available to protect eagles.<sup>132</sup> Importantly, because the defendants never applied for a permit, the court held that they were “precluded from challenging any deficiencies in the manner in which the permit system operates.”<sup>133</sup>

In *Hardman*, the Tenth Circuit held that the government “failed to show that limiting permits for eagle feathers only to members of federally recognized tribes is the least restrictive means of advancing the government’s interests.”<sup>134</sup> In other words, the government did not sufficiently prove that the BGEPA’s limitation, which restricts granting permits to members of *federally* recognized tribes, was the least restrictive means of effectuating its compelling interest.

In *Antoine*, contrary to the Tenth Circuit’s opinion in *Hardman*, the court held that restricting permits to federally recognized tribal members was the least restrictive means of effectuating the government’s inter-

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127. *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (“The bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles. The government’s interest in preserving the species remains compelling in either situation.”).

128. *Id.*

129. *United States v. Friday*, 525 F.3d 938, 955 (10th Cir. 2008).

130. In *Wisconsin v. Yoder*, the Supreme Court defined least restrictive means in the realm of Free Exercise. 406 U.S. 205, 215 (1972). “[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Id.*

131. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

132. *United States v. Hugs*, 109 F.3d 1375, 1378 (9th Cir. 1997).

133. *Id.* at 1379. In other words, the court did not consider the validity of the permitting system on an as-applied basis.

134. *United States v. Hardman*, 297 F.3d 1116, 1132 (10th Cir. 2002).

est.<sup>135</sup> Important to the court's rationale was the fact that federally recognized tribal members experienced long delays in obtaining eagles from the repository.<sup>136</sup> As such, providing more Native Americans with access to eagles would only increase delays and would not be less restrictive.<sup>137</sup>

To summarize, the circuits are split as to whether the BGEPA's federally recognized tribe limitation is the least restrictive means for the government to further its compelling interest. With regard to the rest of the permitting system, the circuit courts held that the system is conducted in the least restrictive manner and is *facially* valid.

### *B. Future Litigation: Avenues Left Open After Friday*

Although the *Friday* decision likely yields some positive implications for Native Americans,<sup>138</sup> future litigation may offer additional redress. The following sections explore ways in which a future litigant might bring successful as-applied and facial attacks against the BGEPA. An individual bringing a facial challenge bears a much greater burden than an individual bringing an as-applied challenge.<sup>139</sup> As such, a future litigant who actually applies for a permit is more likely to successfully challenge the BGEPA.

#### 1. As-Applied Challenges I: Applying for a Permit

If a Native American is prosecuted for violating the BGEPA after having applied for a take permit, the individual will make a strong as-applied challenge against the statute. In this type of scenario the individual will argue that the permitting system is not the least restrictive means for the government to protect eagles. Courts have not considered the issue extensively because an individual has never faced prosecution after having applied for a permit. The courts evaluating the permitting system, therefore, only considered its facial validity.

Because the bald eagle no longer faces the risk of extinction,<sup>140</sup> granting permits no longer affects the preservation of bald eagles to the extent it would have in the past.<sup>141</sup> Evidence regarding the restrictive

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135. *Id.* at 922-23.

136. *Id.* at 923.

137. *Id.*

138. The *Friday* opinion might, for example, notify Native Americans that they can apply for an eagle take permit; the opinion might also notify the FWS that the permitting system is very restrictive and result in an increased amount of permits granted.

139. *Constitutional Law*, *supra* note 50 ("An 'as applied' challenge is a claim that the operation of a statute is unconstitutional in a particular case, while a facial challenge indicates that the statute may rarely or never be constitutionally applied.").

140. Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 72 C.F.R. 37346-01, 37346 (2007).

141. *But see* United States v. Antoine, 318 F.3d 919 (9th Cir. 2003) ("changed circumstances may, in theory, transform a compelling interest into a less than compelling one, or render a well-tailored statute misproportioned. Nonetheless, the government cannot reasonably be expected to relitigate the issue with every increase in the eagle population").

nature of the permitting system adds support to an as-applied challenge. For example, although the FWS has issued permits to take golden eagles, there has *never* been a permit issued to take a bald eagle.<sup>142</sup> In addition, the FWS has only granted permits to tribal entities, but never to individual tribal members.<sup>143</sup>

This hypothetical as-applied scenario would look something like this: an individual Native American applies for a permit to take a bald eagle for a sincere Native American religious ceremony; after the FWS denies the permit application, the individual still takes the eagle for a religious ceremony and is prosecuted for violating the BGEPA; the Native American then brings an as-applied challenge against the BGEPA. Under RFRA, the individual will likely not have any trouble asserting that the permit denial or undue delay posed a substantial burden.<sup>144</sup> Likewise, the government will have no trouble asserting that it has a compelling interest in protecting bald eagles.<sup>145</sup>

The threshold matter, then, becomes whether or not the restrictive nature of the permitting process is narrowly tailored and the least restrictive means for the government to protect eagles. To meet this requirement, the government must prove that “no alternative forms of regulation would combat such abuses without infringing first Amendment rights.”<sup>146</sup> Because “[t]he bald eagle population in the lower 48 States has increased from approximately 487 active nests in 1963, to an estimated minimum 9,789 breeding pairs today,” the FWS promulgated a final rule to remove the bald eagle from the endangered species list.<sup>147</sup> Citing *Hardman*, “[w]hat might change depending on the number of birds existing is the scope of a program that we would accept as being narrowly tailored as the least restrictive means of achieving its interest.”<sup>148</sup> Following this logic, and given the fact that the FWS has *never* issued a take permit for a bald eagle, this individual makes a very strong as-applied argument that the permitting system is not conducted in the least restrictive manner.

In issuing a permit, the FWS considers “[t]he direct or indirect effect which issuing such permit would be likely to have upon the wild

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142. Brief of Amicus Curiae of the Northern Arapaho Tribe in Support of Defendant-Appellee at \*1, *United States v. Friday*, 525 F.3d 938, No. 06-8093 (10th Cir. July 2, 2007), 2007 WL 2437228.

143. *Id.* at \*3-\*4.

144. See *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008) (“[A] law that limits . . . access to the eagle needed for the ceremony substantially burdens their ability to exercise their religion by sponsoring and taking part in the Sun Dance.”).

145. See *United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002) (“[T]he bald eagle would remain our national symbol whether there were 100 eagles or 100,000 eagles, the government’s interest in preserving the species remains compelling in either situation.”).

146. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963).

147. *Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife*, 72 C.F.R. 37346-01, 37346 (2007).

148. *Hardman*, 297 F.3d at 1128.

populations of bald or golden eagles.”<sup>149</sup> Because the bald eagle is no longer endangered, this consideration lends support to the hypothetical individual’s argument that denying *all* take permits is overly restrictive. It would be much less restrictive if the FWS were to grant the occasional take permit for religious purposes; further, the FWS can still meet its criteria requiring consideration of a take permit’s effect upon eagle populations.<sup>150</sup>

In sum, this person presents a strong argument that the permitting system is unconstitutional because the bald eagle is no longer endangered and the individual in question applied, but did not receive a take permit. On an as-applied basis, this hypothetical scenario suggests that the permitting scheme is not the least restrictive means available for the government to effectuate its compelling interest.

## 2. As-Applied Challenges II: The Sacred Nature of the Sun Dance

Another potential as-applied challenge is mentioned by the court in *Friday*. Under 50 C.F.R. §13.21(e)(2), an individual who receives a take permit is required to “allow entry by agents . . . upon premises where the permitted activity is conducted.”<sup>151</sup> In *Friday*, the court states that if this provision allows FWS agents to attend a religious ceremony like the Sun Dance, and “should the FWS insist on an inspection that would violate tribal religious beliefs, an affected person or tribe could bring an as-applied claim under RFRA specifically targeted at the religiously offensive condition.”<sup>152</sup> The Court never considers this issue in *Friday* because *Friday* was unaware that the permit system even existed, and therefore, this provision could not have affected his decision to not apply for a permit.<sup>153</sup>

## 3. Facial Challenges I: A Second Look at Futility

In *Friday*, the Court differentiated the futility faced by the defendants in *Hardman* from the alleged futility faced by *Friday*.<sup>154</sup> In *Hardman*, according to the court in *Friday*, it was “legally futile” for the defendants to apply for a permit because they were not members of a federally recognized tribe, and therefore, ineligible to receive permits.<sup>155</sup> In *Hardman*, the court cites *Jackson-Bey v. Hanslmaier*<sup>156</sup> and *International Brotherhood of Teamsters v. United States*<sup>157</sup> to support its futility

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149. 50 C.F.R. § 22.22(c)(1) (2009).

150. *Id.*

151. *Id.* § 13.21(e)(2).

152. *United States v. Friday*, 525 F.3d 938, 952 (10th Cir. 2008).

153. *Id.*

154. *Id.* at 953.

155. *Id.*

156. 115 F.3d 1091 (2d Cir. 1997).

157. 431 U.S. 324 (1977).

argument.<sup>158</sup> The following section suggests that the court in *Friday* imposed a futility standard that was too strict and not in accordance with this precedent.

In *Jackson-Bey*, a prison inmate filed suit against several prison officials alleging that they violated the Free Exercise Clause by precluding him from wearing certain religious garments to a funeral while he was incarcerated.<sup>159</sup> Because the inmate never applied for the benefit of wearing his religious garments, the prison officials argued that the inmate lacked standing.<sup>160</sup> The Second Circuit stated that the “threshold requirement for standing may be excused only where a plaintiff makes a substantial showing that application for the benefit would have been futile.”<sup>161</sup> Because the prisoner failed to show that his religion would not have been accommodated had he applied for the benefit, the court held that the registration process was not futile and that the prisoner lacked standing.<sup>162</sup>

Although denying the plaintiff standing, the opinion does not suggest a claimant must show that an application process is strictly impossible for a finding of futility. Instead, the opinion suggests that a claimant must only “make a substantial showing” that applying would have been futile.<sup>163</sup> The “substantial showing” language in *Jackson-Bey* suggests that the Tenth Circuit’s interpretation requiring an application process to be “legally futile” reaches too far.

The Supreme Court’s opinion in *International Brotherhood* provides further support for the argument that the futility standard adopted in *Friday* was too strict. In *International Brotherhood* the Supreme Court analyzed futility in the realm of employment discrimination.<sup>164</sup> Although the employees never applied for the job in which the alleged discrimination occurred, the Court held that the “employee’s failure to apply for a job is not an inexorable bar to an award . . . . Individual non-applicants must be given an opportunity to undertake their difficult task of proving that they should be treated as applicants . . . .”<sup>165</sup> The Court held that the government provided ample evidence of discrimination which made clear that it would have been futile for the employees to

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158. *United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002).

159. *Jackson-Bey*, 115 F.3d at 1093.

160. *Id.*

161. *Id.* at 1096.

162. *See id.* at 1097-98.

163. *See id.* at 1096.

164. *Int. Bd. of Teamsters v. United States*, 431 U.S. 324, 328 (1977).

165. *Id.* at 364.

have applied.<sup>166</sup> As a result, the Court allowed the employees to challenge the employment practices without ever applying for the job.<sup>167</sup>

The rationales in *Hardman*, *Jackson-Bey*, and *International Brotherhood* all suggest that the Court in *Friday* imposed a futility standard that was too strict and not in accordance with precedent. In *Friday*, the court differentiated *Hardman* by stating it would have been “legally futile” for the defendants in *Hardman* to apply for a permit because they were not members of a federally recognized tribe, whereas Friday was not legally precluded from receiving a permit.<sup>168</sup> In other words, the court equated futility with impossibility; the aforementioned precedent, however, suggests otherwise. Although it was legally futile for the defendants in *Hardman* to apply for a permit, the opinion never suggests that strict impossibility is a prerequisite.<sup>169</sup>

A precedent-based definition of futility does not require an individual to show that obtaining a permit would have been legally impossible, as argued by the court in *Friday*; rather, an individual must only make a “substantial showing” of futility. Given this analysis, the evidence in *Friday* that the FWS has never granted a bald eagle take permit<sup>170</sup> might bear some weight. Although refuted by the Court in *Friday*,<sup>171</sup> this evidence provides adequate support that the FWS would not have accommodated Friday’s religious needs had he applied for a take permit. The application process was, therefore, futile.

Adding further support to Friday’s futility argument is the fact that the bald eagle was still listed as threatened on the Endangered Species List when Friday killed the eagle.<sup>172</sup> Thus, even had the FWS granted Friday a take permit under the BGEPA, the Endangered Species Act (ESA) would still have prevented Friday from legally taking the eagle.<sup>173</sup> In its reply brief, the United States argued that 50 C.F.R. § 17.32 authorizes the Secretary to issue a permit allowing an individual to take a species protected by the ESA.<sup>174</sup> If Friday’s religious taking fit within one

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166. See *id.* at 365-66. The Court further noted that the employees needed to provide evidence that they *would have* applied for the job *but for* the alleged discrimination. *Id.* at 371.

167. See *id.* at 371.

168. *United States v. Friday*, 525 F.3d 938, 953 (10th Cir. 2008).

169. See *United States v. Hardman*, 297 F.3d 1116, 1121 (10th Cir. 2002).

170. Appellee’s Opening Brief at 31, *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (No. 06-8093).

171. *Friday*, 525 F.3d at 955 (“It is simply not clear that [Mr. Friday] would not have received a permit if he had applied, and therefore it is not clear that he would not have been accommodated by not applying for one.”) (internal quotation marks omitted) (alteration in original).

172. See *id.* at 945; Removing the Bald Eagle in the Lower 48 States From the List of Endangered and Threatened Wildlife, 50 C.F.R. pt. 17 (2007).

173. This argument is never addressed by the court in *Friday* because Friday never expressly made the argument. See Reply Brief of Appellant at 13-14, *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (No. 06-8093).

174. *Id.* This provision only allows the issuance of a permit “for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or

of the categories listed in 50 C.F.R. § 17.32, the Secretary would have been authorized to issue a take permit for the bald eagle.<sup>175</sup> If Friday's taking did not fit within 50 C.F.R. § 17.32, however, then it actually was "legally futile" for him to apply for a permit.<sup>176</sup> The mere presence of the eagle on the Endangered Species List at the time of the taking should have, at a minimum, added support to Friday's futility argument.

#### 4. Facial Challenges II: Requiring Permission to Take an Eagle Imposes a Substantial Burden

The *Friday* opinion suggests another way in which a future litigant may bring a successful facial challenge. The court states, "[I]n theory a claimant's beliefs might forbid him from asking the government for permission to take the eagle, perhaps because such a request would fail to treat the eagle as 'a gift of the Creator.'" <sup>177</sup> The court seemingly suggests that an individual could challenge the mere fact that the BGEPA requires an individual to ask permission to take an eagle. The court never considers this issue in *Friday*, however, because Friday never made the argument.<sup>178</sup>

During trial, Nelson White Eagle, a member of the Northern Arapaho tribe, testified concerning using the repository to obtain eagles: "[i]t's like you, the non-Indian. You know, you don't have a repository for the Bible, . . . and our Bible is from . . . the mother earth alone."<sup>179</sup> Although Friday never made the argument expressly, Nelson White Eagle's testimony suggests that the Northern Arapaho tribe considers using the repository to obtain an eagle as analogous to forcing a non-Indian to use a repository to obtain a Bible.<sup>180</sup> Following this logic, even having to ask permission to take an eagle imposes a substantial burden upon Native American religion.<sup>181</sup>

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zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act." 50 C.F.R. § 17.32 (2009).

175. 50 C.F.R. § 17.32 (2009).

176. This is because even if he had been granted a take permit under the BGEPA, he would still have been precluded from taking the eagle under the ESA.

177. *United States v. Friday*, 525 F.3d 938, 947 (10th Cir. 2008).

178. *Id.* at 947.

179. Appellee's Opening Brief at 9, *United States v. Friday*, 525 F.3d 938 (10th Cir. 2008) (No. 06-8093).

180. *Id.*

181. Importantly, this argument applies only to the substantial burden portion of the RFRA analysis. The court in *Friday* suggested this potential argument as a way that Friday could have demonstrated a substantial burden without having applied for a permit. However, as previously noted, as the eagle continues successful recovery, the least restrictive means requirements may change, and this argument provides a way for an individual to demonstrate a substantial burden without actually applying for a permit.

### 5. Facial Challenges III: The Federally-Recognized Tribe Requirement<sup>182</sup>

As previously mentioned, there is a circuit split with regard to whether the BGEPA's permitting system, which limits available permits to members of federally recognized tribes, is the least restrictive means of effectuating the government's interests.<sup>183</sup> Here, a future challenge involves a sincere practitioner of a Native American religion, who is not a member of a federally recognized tribe, foregoing the permit application process.<sup>184</sup> Unless the government provides evidence that limiting permits to federally recognized tribal members is the least restrictive way to protect eagles, the individual might bring a successful challenge to the facial validity of this portion of the BGEPA permitting scheme.

#### CONCLUSION

Judge McConnell's opinion in *United States v. Friday* closed many avenues for future litigants seeking to challenge the constitutionality of the BGEPA. The greatest chance of success will arise when a Native American applies to take an eagle for a religious ceremony and is denied or experiences undue delay. If prosecuted, the individual will make a strong case that the permitting system within the BGEPA is not the least restrictive way for the government to ensure the protection of eagles. In addition to future as-applied challenges to the BGEPA, future litigants may successfully challenge the statute's facial validity. One might argue, for example, that the futility standard imposed in *Friday* was too strict, or that having to ask permission to practice religion is burdensome, or that the BGEPA's sole application to federally recognized tribes is overly restrictive.

The bald eagle has made great strides in its recovery as a species and is no longer in danger of extinction, and yet the FWS has never granted a Native American a permit to take a bald eagle. As such, a future litigant bringing an as-applied challenge will make a strong case that the BGEPA permitting exception for Native American religion is not conducted in the least restrictive manner. For if the FWS does not intend to grant bald eagle take permits, why have the exception at all?

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182. 50 C.F.R. § 22.22 (2009).

183. Compare *United States v. Hardman*, 297 F.3d 1116, 1132 (10th Cir. 2002) (holding that the government "failed to show that limiting permits for eagle feathers only to members of federally recognized tribes is the least restrictive means of advancing the government's interests."), with *United States v. Antoine*, 318 F.3d 919, 923 (9th Cir. 2003) (holding, "[w]e do not believe that RFRA requires the government to make the showing that the Tenth Circuit demands of it").

184. *United States v. Friday*, 525 F.3d 938, 953 (10th Cir. 2008).

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