IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
MCALLEN DIVISION

MCALLEN GRACE BRETHREN CHURCH, et al.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	Civil Action No. 7:07-cv-060
	§	
SALLY JEWELL, Secretary, U.S. Department of the Interior	§	
	§	
Defendant.	§	

Plaintiffs' Reply in Support of Motion for Entry of Preliminary Injunction, Supplemental Response[1] to Defendant's Motion to Dismiss, and Response to Defendant's Second Motion to Dismiss

[1] Defendant's reply in support of its first motion to dismiss (Dkt. 61) introduced several new alleged grounds for dismissal that were not contained in the motion itself and, therefore, could not have been addressed in Plaintiffs' response (Dkt. 58). Accordingly, Plaintiffs respond to these newly alleged grounds for dismissal together with their response to Defendant's second motion to dismiss (Dkt. 62).

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INTRODUCTION

The Department does not dispute that its regulations make Plaintiffs' religious practices illegal. It does not dispute that it has enforced those regulations against Plaintiffs by sending an undercover agent into their religious gathering, confiscating their feathers, and criminally prosecuting them. It does not dispute that attendance at Plaintiffs' religious ceremonies has since dropped by 40% and that many Plaintiffs have either gotten rid of their feathers or are afraid to use them. And it does not dispute that Plaintiffs are still barred from obtaining eagle feathers and are still subject to criminal prosecution "on a case-by-case basis." Dkt. 59-1 at 2 ¶ 6.

Instead, the Department claims that Plaintiffs have no cognizable injury because the Department has returned Plaintiff Robert Soto's feathers and "has no plans to investigate or initiate an enforcement action against Plaintiffs." *Id.* But that does not eliminate Plaintiffs' injuries. The return of Mr. Soto's feathers comes with conditions that still make it illegal for him to use those feathers for his religious practices. And the mere declaration that the Department "has no plans" to prosecute the Plaintiffs is cold comfort, when the Department expressly refuses to agree not to prosecute them while the case is pending, claims the legal right to prosecute them at any time, and resists a preliminary injunction on the ground that it "must maintain the discretion" to prosecute them in the future. Dkt. 59 at 13. Thus, Plaintiffs face both present restrictions on their religious practices and a credible threat of future prosecution. That establishes standing.

Lacking any valid basis for challenging Plaintiffs' standing, the Department offers two new arguments challenging the *timing* of their lawsuit—arguing that Plaintiffs filed suit both *too early*, by allegedly failing to exhaust administrative remedies, and *too late*, by allegedly failing to comply with the statute of limitations. But these arguments are meritless. Federal courts have "decline[d] . . . to read an exhaustion requirement into RFRA where the statute contains no such condition." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012). In any event, Mr. Soto has already exhausted administrative remedies in a five-year-long agency proceeding—demonstrating that any additional attempts at exhaustion by him or the other Plaintiffs would be futile. Plaintiffs also complied with the statute of limitations by filing suit shortly after the Department began enforcing its regulations against them.

Once the Department's jurisdictional arguments are swept aside, the Department has very little to say on the merits. It does not dispute that it allows up to two million federally recognized tribal members to possess as many eagle feathers as they want without a permit. Dkt. 57 at 21-25. It does not dispute that it allows eagle killing for a wide variety of non-religious reasons. *Id.* at 25-30. And it does not dispute that "[t]he Fifth Circuit held that the summary judgment record was insufficient to support the Department of the Interior's position as it related to *Soto* . . . ." Dkt. 59 at 7-8.

Instead, it argues that the Fifth Circuit's decision should be limited "to *Soto*," and should not protect the other Plaintiffs, because it is allegedly "*possible* for the

government to satisfy its burden under RFRA *with the correct evidence*." Dkt. 59 at 8 (emphasis added). But of course it is "possible" to satisfy strict scrutiny "with the correct evidence." The question is whether the Department has offered that evidence here. It has not. Indeed, the Department has offered no new evidence at all. Absent such evidence, the same factual record that "was insufficient to support the Department of the Interior's position as it related to *Soto*" (Dkt. 59 at 7-8) is insufficient as it relates to his coreligionists.

In sum, Plaintiffs face a very serious burden on their religious exercise. Their core religious practices are illegal. The Department has punished them for those practices in the past. And the Department claims that it has a compelling interest in punishing them for those practices in the future. If the Department would simply agree not to prosecute them during the pendency of this lawsuit, no preliminary injunction would be necessary. But the Department refuses. Given the strong language of the Fifth Circuit opinion in their favor, Plaintiffs are entitled to a very narrow injunction permitting them to practice their religion without prosecution while this case is pending.

ARGUMENT

I. Defendant's jurisdictional arguments are meritless.

The Department challenges this Court's jurisdiction on five grounds: standing, mootness, ripeness, exhaustion, and the statute of limitations. None has merit.

A. Standing

First, the Department challenges the Plaintiffs' standing. It does not dispute that Plaintiffs' religious practices are illegal; that they have been punished for those

practices in the past; that they can be punished for those practices in the future; or that their practices have been significantly curtailed. Instead, it challenges the *timing of the declarations* establishing those injuries. Dkt. 61 at 2-3. According to the Department, Plaintiffs "should not be permitted to supply affidavits in support of their claimed injury at this stage of the litigation." *Id.* at 2.

But for the first eight years of litigation, the Department *conceded* Mr. Soto's standing. *Id.* at 2-3 (citing five concessions). And it is "well settled that once [a court] determine[s] that at least one plaintiff has standing, [it] need not consider whether the remaining plaintiffs have standing to maintain the suit." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014). Thus, there was never any reason to consider the remaining Plaintiffs' standing.

Now that the Department has challenged Mr. Soto's standing for the first time, it is appropriate to consider the standing of the remaining Plaintiffs. This is standard procedure when the defendant makes a "factual attack" on jurisdiction. *See Arena v. Graybar Elec. Co.*, 669 F.3d 214, 223 (5th Cir. 2012). Because a factual attack "may occur at any stage of the proceedings," and because "plaintiff bears the burden of proof that jurisdiction does in fact exist," the court has "a duty to consider newly submitted evidence" when jurisdictional questions are raised—including on appeal, and sometimes even after "entry of judgment." *Id.*; *see also* Dkt. 58 at 14 n.4 (collecting cases). The Department cites no authority to the contrary. Dkt. 61 at 2-3. The only case it cites involved an attempt to offer new standing affidavits after the

case had already been dismissed for lack of standing. *Id.* at 3 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 n.* (2009)). That is not the case here.

B. Mootness

The Department also claims that the case is moot because it "decided to return Soto's eagle feathers." Dkt. 59 at 6. The return of the feathers, the Department says, "is exactly the relief Soto requested in his petition for remission and in Plaintiffs' complaint." *Id.*

But that is a half-truth. Plaintiffs' complaint requested not only the return of the feathers, but also (1) a declaration that the laws restricting Plaintiffs' possession of feathers were unlawful as applied to them, and (2) an injunction prohibiting the Department from enforcing those laws against them. *See* Dkt. 58 at 5-6 (citing Dkt. 1 at 2, 30-32 ¶¶ 1-2, 5; Dkt. 28 at 1-2, 41-42 ¶¶ 1-2). Without this relief, Plaintiffs cannot obtain feathers from the National Repository and cannot use any feathers without facing criminal liability. *Id.* at 16. The mere return of Mr. Soto's feathers does not change that.

The Department's return of the feathers also comes with important strings attached: *only Mr. Soto* can use the feathers, and *only those particular feathers* can be used. Dkt. 57-7 at 4; *see also* Dkt 59-1 at 5 ("*These items* are hereby returned to Robert Soto for *his* personal use and possession.") (emphasis added). Thus, Mr. Soto is prohibited from loaning the feathers to members of his congregation or obtaining additional feathers—both of which are essential to his religious exercise. Indeed, because of the way that 36 of the feathers have been trimmed, the *only* way that

Mr. Soto can use those feathers is by loaning them to a coreligionist. Dkt. 58 at 22. Yet the Department prohibits this.

Finally, even assuming that the return of Mr. Soto's feathers redressed part of Plaintiffs' injury, the Department still bears the "formidable burden" under the doctrine of voluntary cessation to show that "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Dkt. 58 at 22-23 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). The Department does not even mention the doctrine of voluntary cessation, much less attempt to carry its burden.

C. Ripeness

Unable to establish mootness, the Department's reply brief introduces an entirely new argument—namely, that "Plaintiffs' claims are not ripe," because "the threat of an enforcement action is not immediate and concrete enough to establish an actual controversy." Dkt. 61 at 9. But tellingly, the Department never mentions the controlling legal standard, which Plaintiffs discussed at length. Dkt. 58 at 16-19 (discussing *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014)). The controlling standard, which the Supreme Court reaffirmed just last term, is that Plaintiffs have a ripe claim if they face a "credible threat of enforcement." *Susan B. Anthony List*, 134 S. Ct. at 2343. That standard is easily satisfied here, because Plaintiffs have faced not only "past enforcement," but *actual punishment* for conduct in which all Plaintiffs engage. *Id.* at 2345. We are aware of no case—and the Department has cited none—where a plaintiff has suffered *actual punishment* under a law and then

been denied standing to challenge future enforcement of the same law against the same conduct.

Beyond that, the Department refuses to "disavow[] enforcement" in the future. *Id.* In fact, it claims that the Fifth Circuit's decision does not apply to anyone but Soto (Dkt. 59 at 7-8); it claims full legal authority to punish Plaintiffs as a means of furthering its allegedly compelling interests (*id.* at 8); and it opposes a preliminary injunction precisely because it "must maintain the discretion" to "pursue an enforcement action" against the Plaintiffs "on a case-by-case basis" in the future. Dkt. 59-1 at 2 ¶ 6.

The only case that the Department cites in support of its ripeness argument (Dkt. 61 at 8) is *Shields v. Norton*, 289 F.3d 832 (5th Cir. 2002). But *Shields* actually supports the Plaintiffs. There, a private individual sought to strike down the Endangered Species Act as applied to his practice of pumping water from an aquifer. *Id.* at 833-34. But he had never been threatened with any enforcement, much less punished. *Id.* at 836. Instead, he tried to base standing on an old newspaper article and two letters sent by the Sierra Club threatening legal action against *other entities*. *Id.* at 836-37. Because no legal action had ever been threatened against him, and because the threats against other entities proved "hollow[ ]," the Court held that the case was not ripe. *Id.* Nevertheless, the Court noted that a threat "to sue the [plaintiff] individually," or a change in plaintiff's behavior "in response to these 'threats,'" could give rise to standing. *Id.* Here, of course, the Plaintiffs have not only

been threatened individually and changed their behavior in response, but have actually been punished for conduct in which all Plaintiffs engage.

Still more instructive is *Contender Farms, L.L.P. v. U.S. Dep't of Agriculture*, 779 F.3d 258 (5th Cir. 2015). There, the plaintiffs were farm owners who wanted to challenge a federal regulation punishing the practice of "soring," which involves the use of chemical agents to affect a horse's gait. *Id.* at 262. Although the plaintiffs denied that they ever engaged in "soring," they claimed that attempts to detect soring yield "a large number of 'false positives.'" *Id.* at 268. Thus, they were still at risk of being falsely accused and punished. Relying on *Susan B. Anthony List*, the Fifth Circuit held that the claim was ripe, because "it appears from this litigation that [the government] has every intention of requiring" private parties to adhere to its regulations, and because the plaintiffs would "encounter these risks [of false positives] because they intend to participate in [horse trading] events in the future." *Id.* at 267-68. Here, obviously, the risk to the Plaintiffs is much greater, because they actually engage in the illegal practice and have already been punished.

D. Exhaustion

In another new argument in its reply brief, the Department claims that this Court lacks jurisdiction because Plaintiffs failed to exhaust administrative remedies before bringing suit. Dkt. 61. It identifies two "administrative remedies" that it believes the Plaintiffs should have exhausted: (1) applying for a "special purpose" permit under the Migratory Bird Treaty Act, and (2) petitioning the Department of the Interior "to amend or repeal the Eagle Act regulations." *Id.* at 5-6. Neither is relevant.

The first supposed "remedy"—applying for a permit under the Migratory Bird Treaty Act (MBTA)—is an obvious attempt at misdirection. The MBTA expressly "does not apply to the bald eagle (Haliaeetus leucocephalus) or the golden eagle (Aquila chrysaetos)." 50 C.F.R. § 21.2. Thus, Plaintiffs can *never* obtain a permit for eagle feathers under the MBTA or any of its regulations. For the Department to pretend otherwise is misleading.

Even assuming that Plaintiffs applied under the MBTA for *non-eagle* feathers, such an application would be futile. As with eagle feathers, the Department draws a sharp distinction between federally recognized and non-recognized tribes. The Department plainly states that "[p]roof of enrollment in a federally recognized (BIA) tribe is required for . . . possession of [non-eagle] migratory bird feathers and parts." U.S. Fish and Wildlife Serv., *Non-Eagle Feather Repositories*: *Requesting Non-Eagle Feathers* 1 (2013), http://www.fws.gov/southwest/NAL/docs/Non-eagleRequestfactsheet.pdf.[2] And the Department offers *no evidence* that *any* member of a non-recognized tribe has *ever* been granted a permit for religious use of non-eagle feathers, nor have Plaintiffs been able find such evidence.

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[2] *See also* U.S. Fish and Wildlife Serv., *Permits*, Migratory Bird Program, http://www.fws.gov/migratorybirds/mbpermits.html (last updated Jan. 8, 2013) (stating that "*federally enrolled Native Americans* [can have] access to non-eagle migratory birds (e.g., hawks, falcons) for religious and cultural purposes") (emphasis added); Mem. from the Attorney General on Eagle Feathers Policy 3-4 (Oct. 12, 2012), *available at* http://www.justice.gov/sites/default/files/ag/legacy/2012/10/22/ef-policy.pdf. (DOJ policy allowing "a member of a federally recognized tribe" to possess "federally protected birds" does not apply to "those who are not members of federally recognized tribes").

The Department's other supposed "remedy"—"petition[ing] the Department of the Interior to amend or repeal the Eagle Act regulations"—is no better. Dkt. 61 at 5. First, there is no exhaustion requirement under RFRA, and federal courts have "decline[d] . . . to read an exhaustion requirement into RFRA where the statute contains no such condition." *Oklevueha*, 676 F.3d at 838. In *Oklevueha*, for example, the Ninth Circuit refused to impose an exhaustion requirement even though the plaintiffs could have petitioned for an exemption under federal drug laws. *Id.* Similarly, in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), and *Hobby Lobby Stores, Inc., v. Burwell*, 134 S. Ct. 2751 (2014), plaintiffs sued the Drug Enforcement Agency and Department of Health and Human Services respectively. Although both agencies allow interested persons to "petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. § 553(e), neither case required the plaintiffs to petition the agency before suing under RFRA.[3]

Second, even assuming there is an exhaustion requirement, Plaintiffs have satisfied it. On July 4, 2006, Mr. Soto filed a petition with the Department requesting not only the return of his feathers but also a change in Department "policy." Dkt. 30-5 at 10. The Department treated that petition not merely as a request for the return of eagle feathers, but as a challenge to "the Service's requirement that a person must be a member of a federally recognized Indian Tribe to obtain a permit

[3] Prisoner claims under RFRA are subject to a separate statutory exhaustion requirement imposed by the Prison Litigation Reform Act. 42 U.S.C. § 1997e(a). But there is no statutory exhaustion requirement here.

to possess golden eagle feathers for religious purposes . . . .” Dkt. 30-18 at 1-2; *see also id.* at 6 (“Rev. Soto claims that the Service’s limitation of [eagle] permits to enrolled tribal members of federally recognized Tribes is arbitrary and capricious and violates RFRA . . . .”). The Department rejected Soto’s RFRA arguments after a lengthy legal analysis. *Id.* at 3-9. That is more than enough to satisfy the supposed exhaustion requirement. *Cf. Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (plaintiff’s requests for action constituted a rulemaking petition, where the agency did not “specif[y] any formalities for a rulemaking petition,” and “the correspondence from agency officials to [plaintiff] demonstrate[d] that the agency understood the [plaintiff’s] requests to be petitions”).

Third, any further petitions would obviously be futile. The Department requires petitioners to “identify the rule” to be changed and to provide “reasons in support of the petition.” 43 C.F.R. § 14.2. If Plaintiffs were to file another petition, they would simply identify the same rule they have been challenging for the past nine years and offer the same “reasons in support”—namely, that the rule violates RFRA. And the Department has already provided its response: It has rejected this argument in Mr. Soto’s first petition, in this Court, in the Fifth Circuit, and in a dozen other cases for over a decade. It still maintains the legality of its regulations and claims that it has a compelling interest in enforcing them. The idea that the

Department would suddenly change its regulations if only the Plaintiffs would file another petition is absurd.[4]

E. Statute of Limitations

In addition to the new arguments raised in its reply brief, the Department also filed a second motion to dismiss based on the statute of limitations. Dkt. 62. According to this argument, because Plaintiffs are "attempting to make a facial challenge to the regulations," they should have filed suit "when the agency publishe[d] the regulation in the Federal Register"—*i.e.*, eight years earlier. *Id.* at 4-6. Apparently, the Department sees no contradiction in arguing that Plaintiffs filed suit *too early* when they had already been criminally prosecuted, fined, and deprived of their property, Dkt. 61 at 7-9, while simultaneously arguing that Plaintiffs filed *too late* because they should have filed suit several years earlier. In any event, the Department's argument is baseless.

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[4] *Cf.*:

- *Fisher v. Tex.*, 169 F.3d 295, 303 (5th Cir. 1999) (exhaustion would be futile when the government "has recently decided the same legal question adversely to the petitioner");
- *Crawford v. Pittman*, 708 F.2d 1028, 1033 n.17 (5th Cir. 1983) (exhaustion "would be futile because of the [government's] settled policy of refusing special education programs in excess of 180 days");
- *Qwest Commc'ns Int'l, Inc. v. FCC*, 398 F.3d 1222, 1231 n.4 (10th Cir. 2005) (exhaustion would be futile where "the agency has repeatedly iterated its position and given no indication that it is willing to reconsider its action");
- *Brown v. Sec'y of Health & Human Servs.*, 46 F.3d 102, 114-15 (1st Cir. 1995) (exhaustion "would likely be futile" where "the [agency] appears to have taken a firm stand, litigating th[e] issue in several fora").

First, it misunderstands the nature of Plaintiffs' injuries. Because the statute of limitations begins to run when the plaintiff "knows or has reason to know of [her] injury," the "first step" in applying the statute of limitations "is understanding the nature of the injury." *Albright v. City of New Orleans*, No. 99-30504, 2000 WL 1701759, at *4 (5th Cir. Nov. 1, 2000) (internal quotes and citation omitted). Here, Plaintiffs are suffering multiple injuries:

- Plaintiffs are currently unable to obtain feathers from the National Eagle Repository (Dkt. 58 at 15-16);
- Soto and Russell are currently barred from using the feathers that have been returned to them (*id.* at 21-22);
- All of the Plaintiffs face a credible threat of enforcement if they engage in their religious practices (*id.* at 17-19);
- All of the Plaintiffs are suffering a chilling effect on their religious practices (*id.* at 19-20);
- Plaintiffs' have lost 40% of their church attendance (*id.* at 20);
- Plaintiffs have been unable to fully fund their religious ministries (*id.*); and
- Soto has lost his salary (*id.*).

These injuries arise not from "the issuance of the regulations in the Federal Register," Dkt. 62 at 2, but from the enforcement of the regulations in 2006 and their continued enforcement today. Thus, the filing of this lawsuit in 2007 was well within the six-year statute of limitations.

The statute-of-limitations argument also mischaracterizes the nature of Plaintiffs' claims. Plaintiffs have not, as the Department says, "pivoted . . . to a facial challenge." Dkt. 62 at 8. They are also asserting, and have always asserted, an

as-applied challenge. *See* Amended Complaint, Dkt. 28 at 1-2 (regulations are unlawful "as applied to Plaintiffs"); *id.* at 5 ¶ 18 (same); *id.* at 8 ¶ 30 (same); Proposed Order, Dkt. 57-8 at 1 (seeking relief only for "Plaintiffs or those acting in concert with them"). They are challenging the way that the regulations were applied to them during the undercover raid and confiscation of their feathers in 2006, and the way that the regulations are still being applied to them today. And even assuming Plaintiffs were only challenging the application of the regulations *prospectively*, they do not have to wait for the Department to "take [another] enforcement action against [them]." Dkt. 62 at 7. Rather, they can bring an as-applied challenge based on a credible threat of enforcement. That is what the plaintiffs did in *Hobby Lobby*, 134 S. Ct. at 2785 (striking down contraceptive mandate "as applied," even though plaintiffs had never been punished), and that is what plaintiffs have done in many other RFRA and First Amendment cases. *See, e.g.*, *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009) (enjoining city ordinances as applied, even though plaintiff had never been punished); *Steffel v. Thompson*, 415 U.S. 452, 475 (1974) (holding that plaintiffs can challenge a statute "as applied," when there is a "genuine threat of enforcement").

Finally, the Department is simply wrong that a facial challenge accrues *only* "when the agency publishes the regulation in the Federal Register." Dkt. 62 at 4 (quoting *Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997)). As the Fifth Circuit has made clear, "an agency's application of a rule to a party creates a new, six-year cause of action to challenge to the agen-

cy's constitutional or statutory authority." *Dunn-McCampbell*, 112 F.3d at 1287. That is what occurred here.

II. Plaintiffs have established a likelihood of success on the merits.

Turning to the merits, Plaintiffs have a strong likelihood of success on their RFRA and constitutional claims. The Department's arguments to the contrary are unavailing.

A. RFRA

Under RFRA, the Department bears the "exceptionally demanding" burden of satisfying strict scrutiny. *McAllen*, 764 F.3d at 475 (internal quotes and citation omitted). And on the current record, the Fifth Circuit already held that the Department "has not carried its burden." *Id.* at 480. Beyond that, Plaintiffs have offered additional evidence, not offered at the summary judgment stage, on the extensive use of eagle feathers by federally recognized tribes. Dkt. 57 at 21-25. They have offered additional evidence, not offered at the summary judgment stage, on the wide variety of eagle killing permitted for non-religious reasons. *Id.* at 25-30. And they have offered additional less-restrictive alternatives, not offered at the summary judgment stage, that would allow the Department to achieve its goals. *Id.* at 47-50.

The Department does not respond to any of this. It does not dispute Plaintiffs' evidence or offer any new evidence of its own. Nor does it dispute that "[t]he Fifth Circuit held that the summary judgment record was insufficient to support the Department of Interior's position . . . ." Dkt. 59 at 7. Instead, it claims that the Fifth Circuit's opinion is limited to "members of the Lipan Apache Tribe," and that mem-

bers of other tribes "[cannot] rely on the Fifth Circuit's decision to argue that they are likely to succeed on the merits." *Id.*

This argument fails for several reasons. First, nothing in the logic of the Fifth Circuit's opinion is limited to members of the Lipan Apache Tribe. The Department has imposed the same substantial burden on *each* of the Plaintiffs, whether Lipan Apache or not. Thus, the Department bears the same burden of satisfying strict scrutiny with respect to *each* of the Plaintiffs, whether Lipan Apache or not. Given that the Department has failed to carry that burden with respect to Pastor Soto, there is no reason to think that it has carried that burden with respect to the members of his congregation.

Second, even assuming that the Department could theoretically satisfy strict scrutiny with respect to some Plaintiffs but not others, it cannot do so without introducing actual evidence that this is so. On strict scrutiny, RFRA places the burdens of proof and production squarely on the Department. *See O Centro*, 546 U.S. at 425 (quoting 42 U.S.C. §§ 2000bb–1(b) and 2000bb–2(3)). Thus, the Department must produce evidence showing that its interests with respect to the remaining Plaintiffs are stronger than its interests with respect to Mr. Soto. But the Department hasn't even offered an *argument* on this point, much less any evidence.

Third, the Department's position is based on a misreading of Judge Jones's concurrence. That concurrence does *not* draw a distinction between Lipan Apaches and all other Native Americans; it draws a distinction between Native Americans and "non-Indians"—suggesting that granting feathers to "non-Indians" might, de-

pending on the actual evidence, endanger the religious practices of "real Native Americans." *McAllen*, 764 F.3d at 480. But Judge Jones expressly states that the logic of the decision extends "to [Soto's] Native American co-religionists," which obviously includes his Native American congregants. *Id.*

Finally, this whole argument is beside the point, because multiple plaintiffs *are* members of the Lipan Apache Tribe, including Mr. Soto, Mr. Hinojosa, Ms. Russell, and several members of the Plaintiff religious organizations. So even under the Department's theory of the case, multiple Plaintiffs have demonstrated a likelihood of success.

Next, the Department argues that "Plaintiffs mischaracterize the Fifth Circuit's holding" by asserting that it applies to all of the Plaintiffs. Dkt. 59 at 7. According to the Department, the Fifth Circuit's holding applies only "to *Soto*"; the other Plaintiffs are not covered, because "*it is possible* for the government to satisfy its burden under RFRA *with the correct evidence*." *Id.* at 8 (emphasis added). But of course "it is possible" to satisfy strict scrutiny "with the correct evidence." The question is whether the Department has offered that evidence here, and whether the evidence shows that the Department has a stronger interest with respect to the other Plaintiffs than with respect to Mr. Soto. It does not. Again, the Department has not even argued that point, much less provided any evidence. Thus, it "has not carried its burden." *McAllen*, 764 F.3d at 480.

B. First Amendment and Equal Protection

Plaintiffs also have a likelihood of success on their First Amendment and Equal Protection claims. By allowing some tribes to exercise their religion but not

others, the Department has violated "[t]he clearest command of the Establishment Clause," which is "that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); Dkt. 57 at 42-45.

In response, the Department claims that this argument was "abandoned," because it was not raised "in [Plaintiffs'] original appeal to th[e] [Fifth Circuit]." Dkt. 59 at 9 (quoting *Eason v. Thaler*, 73 F.3d 1322, 1329 (5th Cir. 1996)). Not so. In their Fifth Circuit briefs, Plaintiffs repeatedly argued that discrimination between federally recognized and non-recognized tribes violated the "First Amendment." Br. of Appellants at iv, 1, 2, 3, 14, 28, 42, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326). It does not matter whether Plaintiffs labeled this claim as arising under the "Free Exercise Clause," the "Establishment Clause," or the "Equal Protection Clause"; federal courts hold that all three clauses prohibit discrimination among religions. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (McConnell, J.) (collecting cases). The argument was preserved because Plaintiffs specifically argued in their opening brief that discrimination among religions is unconstitutional. *Cf. Consol. Companies, Inc. v. Lexington Ins. Co.*, 616 F.3d 422, 428 n.6 (5th Cir. 2010) (appellant "attacks the same legal conclusion" "regardless of which manifestation [it] explicitly challenges in its brief"); *United States v. Adams*, 314 F. App'x 633, 637 n.5 (5th Cir. 2009) (rejecting waiver argument).

The Department also argues that it is not discriminating "based on religion," but instead "based on the unique political relationship between the government and

Indian tribes." Dkt. 59 at 9. But the government made the same sort of argument in *Larson*, claiming that it was not discriminating based on religion, but on the "secular criteria" of how organizations raised their funds. 456 U.S. at 246 n.23. The Supreme Court rejected that argument, concluding that the law "effectively distinguishe[d] between 'well-established churches' . . . and 'churches which are new and lacking in a constituency.'" *Id.* The same is true here: well-established tribes are permitted to practice their religion; less well-established tribes are not. That does not mean that the government is prohibited from ever drawing lines between federally recognized and non-recognized tribes; of course it can. But it cannot dole out *the right to practice religion* along tribal lines; that is a quintessential violation of the First Amendment.

III. Plaintiffs have satisfied the other preliminary injunction factors.

Plaintiffs have also satisfied the other preliminary injunction factors: (a) they are suffering irreparable injury; (b) the balance of hardships tips in their favor; and (c) an injunction is in the public interest.

A. Irreparable injury

Plaintiffs are presently suffering significant, irreparable harm—namely, the loss of their free exercise of religion. Their core religious practices have been declared illegal. Their religious gathering was raided by an undercover agent. Their religious property was confiscated. They are forbidden from fully using the religious property that was returned to them. They have suffered a 40% loss in attendance, a significant loss in their budget, and a loss in their ability to fund their religious ministries. They are using their religious property in secret or not using it at all.

See generally Dkt. 57-1 at 14-17. Every court to address this sort of situation has held that the loss of First Amendment or RFRA rights, even for a short period of time, constitutes irreparable harm. Dkt. 57 at 53-54 (collecting cases).

The Department offers two arguments in response. First, it claims that "fear of prosecution is not irreparable harm." Dkt. 59 at 11. In support, it cites three abstention cases. But all three cases involved attempts to use a civil lawsuit to interfere with ongoing state or federal criminal proceedings. *See Younger v. Harris*, 401 U.S. 37 (1971) (attempt to enjoin state prosecution); *Deaver v. Seymour*, 822 F.2d 66 (D.C. Cir. 1987) (attempt to enjoin a federal prosecutor); *Ali v. United States*, 2012 WL 4103867 (W.D.N.Y. 2012) (attempt to challenge a federal indictment). Here, the criminal proceedings against Plaintiffs are already complete. By contrast, numerous cases have found irreparable harm and granted injunctive relief where, as here, a criminal statute chills activities protected by the First Amendment or RFRA. In *Susan B. Anthony List*, for example, the Supreme Court treated the "threat of criminal prosecution" as "a substantial hardship" supporting judicial intervention—not a reason for denying it. 134 S. Ct. at 2346-47. And in *O Centro*, both the Supreme Court and Tenth Circuit applied RFRA to enjoin the threatened enforcement of federal drug laws. 546 U.S. 418, *aff'g O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1008 (10th Cir. 2004) (en banc majority) ("[T]he violation

of one's right to the free exercise of religion necessarily constitutes irreparable harm.").[5]

Alternatively, the Department argues that Plaintiffs' claim of irreparable injury "strains credulity" due to "Plaintiffs' delay in seeking injunctive relief." Dkt. 59 at 12-13. But Plaintiffs had good reason for not seeking a preliminary injunction eight years ago: Their likelihood of success on the merits was not yet clearly established. As this Court has noted, waiting to file "a motion for a preliminary injunction [until] after an adjudication . . . which establishes a reasonable likelihood of success . . . is excusable. Such delay does not evidence lack of irreparable injury . . ." *Amicus, Inc. v. Post-Tension of Tex., Inc.*, 686 F. Supp. 583, 589 (S.D. Tex. 1987). Here, once the Fifth Circuit established that the Plaintiffs have a reasonable likelihood of success on the merits, the Plaintiffs moved for injunctive relief.

Moreover, the Department does not even attempt to show that the alleged delay caused it any prejudice. Absent a showing of prejudice, delay is not a sufficient reason for denying a preliminary injunction. *See, e.g.*, *Kroupa v. Nielsen*, 731 F.3d 813, 821 (8th Cir. 2013) ("delay was not a sufficient basis to deny preliminary injunctive relief" when there was "no showing from defendants they were prejudiced

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[5] *See also La. Debating & Literary Ass'n v. City of New Orleans*, 42 F.3d 1483, 1491 (5th Cir. 1995) ("[T]he period between the threat of enforcement and the onset of formal enforcement proceedings may be an appropriate time for a litigant to bring its First Amendment challenges in federal court.") (quoting *Telco Commc'ns, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989); *Deaver*, 822 F.2d at 69 ("[T]he Supreme Court has upheld federal injunctions to restrain state criminal proceedings . . . where the threatened prosecution chilled exercise of First Amendment rights.") (collecting cases).

by the delay"); *Candle Factory, Inc. v. Trade Associates Grp., Ltd.*, 23 F. App'x 134, 139 (4th Cir. 2001) (delay did not undermine a claim of irreparable harm where "the reasons for [plaintiffs'] delay are partially explained, and, importantly, [defendant] does not contend that the delay resulted in any prejudice to its interests").

B. Balance of hardships

The balance of hardships also tips overwhelmingly in Plaintiffs' favor. Dkt. 57 at 54. Absent a preliminary injunction, Plaintiffs lose core federal rights, while an injunction costs the Department nothing. The only cost that the Department even purports to identify is an alleged interference with its "ability to investigate the illegal killing of, and commerce in, eagles." Dkt. 59 at 14. But that is simply false. Plaintiffs do not seek an injunction protecting "killing" or "commerce"; they seek protection only for *possession*. That leaves the Department free to prosecute all types of killing or commerce.

The Department also claims that Plaintiffs are seeking a "highly-disfavored mandatory injunction that goes beyond simply maintaining the status quo." Dkt. 59 at 2, 4-5. But the Department offers no legal basis for characterizing Plaintiffs' requested injunction in that way. Rather, Plaintiffs seek a "prohibitory" injunction that would stop the Department from pursuing enforcement action against them. Such an injunction would also restore the true "status quo"—*i.e.*, the "last peaceable uncontested status existing between the parties." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Fed. Practice & Procedure* § 2948 (2d ed. 1995). That is what the Tenth Circuit said in *O Centro*, where plaintiffs sought to enjoin enforcement of federal drugs laws under RFRA: "The gravamen of the church's claim is to

stop the government from enforcing the [Controlled Substances Act] against it and infringing on the use of its sacrament. Read in this light, the overall tone and intent of the order remains prohibitory . . . .” 389 F.3d at 1006, *aff'd*, 546 U.S. 418 (2006). The court also explained that there were “two plausible status quos,” one of which was “[plaintiffs] practicing [their] religion through its importation and use of [a prohibited drug] at religious ceremonies.” *Id.* at 1006-07. Thus, Plaintiffs' request for an injunction here is no less favored than the injunction unanimously upheld by the Supreme Court in *O Centro*.

C. Public interest

Finally, the Department claims that the public interest favors “the United States' ability to enforce the federal criminal statutes enacted by Congress,” particularly “statutes protecting natural resources.” Dkt. 59 at 13. This argument directly contradicts the Department's claim that it “has no plans” to enforce its regulations against Plaintiffs. In any event, the public interest favors enforcement of criminal statutes only when such enforcement complies with RFRA. Where enforcement would violate RFRA, as the Fifth Circuit found is likely here, then “there is a strong public interest in the free exercise of religion even where that interest may conflict with [other statutes].” *O Centro*, 389 F.3d at 1010, *aff'd*, 546 U.S. 418 (2006).

CONCLUSION

The Department's motions to dismiss should be denied, and Plaintiffs' motion for a preliminary injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2015, the foregoing memorandum was served on all counsel of record via the Court's electronic case filing (ECF) system.

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