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## Texas Indian Holocaust and Survival: McAllen Grace Brethren Church v. Salazar

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**TEXAS INDIAN HOLOCAUST AND SURVIVAL:  
MCALLEN GRACE BRETHERN CHURCH V. SALAZAR**

**MILO COLTON\***

ABSTRACT

*When the first Europeans entered the land that would one day be called Texas, they found a place that contained more Indian tribes than any other would-be American state at the time.<sup>1</sup> At the turn of the twentieth century, the federal government documented that American Indians in Texas were nearly extinct, decreasing in number from 708 people in 1890<sup>2</sup> to 470 in 1900.<sup>3</sup> A century later, the U.S. census recorded an explosion in the American Indian population living in Texas at 215,599*

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1. JEAN LOUIS BERLANDIER, *THE INDIANS OF TEXAS IN 1830*, at 99 n.110, 100-02 (John C. Ewers ed., Patricia Reading Leclercq trans., Smithsonian Inst. Press 1969) (1834).

2. U.S. DEP'T OF THE INTERIOR, U.S. CENSUS OFFICE, *REPORT ON INDIANS TAXED AND NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS: 1890*, at 594 (1894) (reporting the population of self-supporting and taxed "civilized Indians" to be 704, with 4 "Indians in prison, not otherwise enumerated" as the first official count of American Indians) [hereinafter U.S. CENSUS OFFICE, *REPORT ON INDIANS TAXED AND NOT TAXED: 1890*].

3. U.S. DEP'T OF THE INTERIOR, U.S. CENSUS OFFICE, *CENSUS REPORTS VOL. I, TWELFTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1900: POPULATION PT. I*, at 483 (1901), <ftp://ftp.census.gov/library/publications/decennial/1900/volume-1/volume-1-p10.pdf> [hereinafter U.S. CENSUS OFFICE, *TWELFTH CENSUS: 1900*].

people.<sup>4</sup> By 2010, that population jumped to 315,264 people.<sup>5</sup>

*Part One of this Article chronicles the forces contributing to the demise, survival, and renaissance of the American Indian in Texas.<sup>6</sup> Part Two focuses on a recent federal case, McAllen Grace Brethren Church v. Salazar.<sup>7</sup> This case grew out of a 2006 incident involving the seizure of eagle feathers by a federal agent at a powwow in McAllen, Texas. It represents a high-water mark in the Texas Indians' struggle to retain their identity, culture, and religious practices.*

*The author served as counsel for the Indians for nearly eleven years of litigation before the feathers were returned and the Indians' rights to celebrate their culture and to practice their American Indian religion were confirmed and validated by the United States District Court for the Southern District of Texas, McAllen Division and the United States Court of Appeals for the Fifth Circuit.*

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4. U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING, TEXAS 1 (2001), <https://www.census.gov/prod/cen2000/dp1/2kh48.pdf> [<https://perma.cc/A7F2-8R6J>] [hereinafter U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, TEXAS].

5. TINA NORRIS ET AL., U.S. CENSUS BUREAU, C2010BR-10, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 7 (2012), <https://www.census.gov/history/pdf/c2010br-10.pdf> [<https://perma.cc/P5V5-24A2>] [hereinafter U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010].

6. The author is indebted to Professor Russell Thornton for his monumental classic, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492 (1987). His work is the primary source for the material and discussion contained in Part One. Portions of this Article previously appeared in Milo Lone-Eagle Colton, *Indian Policy in Texas*, in WILLIAM EARL MAXWELL ET AL., TEXAS POLITICS TODAY 38-40 (2010).

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

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## PART ONE

## I. TEXAS INDIAN HOLOCAUST AND SURVIVAL (1528-2000)

When Europeans first entered the vast territory that became the State of Texas in 1528,<sup>8</sup> they happened upon a land with more Indian tribes than any other would-be American state at that time.<sup>9</sup> These many Texas Indian tribes interacted among themselves and with other tribes spread across the southern United States.<sup>10</sup>

No one attempted a precise census of the tribes of Texas before the end of the nineteenth century,<sup>11</sup> but the accounts of explorers, historians, and anthropologists of the era provide clues to help modern researchers estimate the native populations of Texas.<sup>12</sup> For example, Henri Joutel,

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8. See Herbert Davenport & Joseph K. Wells, *The First Europeans in Texas, 1528-1536*, 22 SW. HIST. Q. 111, 111 (1918) (dating the shipwreck of Spaniard Alvar Nuñez Cabeza de Vaca on the Texas coast to 1528).

9. See John C. Ewers, *The Influence of Epidemics on the Indian Populations and Cultures of Texas*, 18 PLAINS ANTHROPOLOGY 104, 104 (1973) (“Nowhere else in the American West did tribes of so many cultures live in such close proximity in the historic period.”); see also DAVID LA VERE, *LIFE AMONG THE TEXAS INDIANS* 3 (1998) (estimating a population possibly in the millions).

10. See LA VERE, *supra* note 9, at 8-10 (explaining the long-distance trade networks and conflicts around 1500 A.D.); see Ewers, *supra* note 9 (“[B]uffalo-hunting nomads of the plains met not only horticultural tribes of the plains and woodlands, but also hunter-gatherers of the southwestern deserts and fishermen of the Gulf Coast.”)

11. See RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 128-29 (1987) (“Many tribes were gone before anything more than their names were recorded; others were surely gone before they were recorded.”) [hereinafter THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL*].

12. See *id.* at 127-30 (discussing the estimated native population in Texas); see also BERLANDIER, *supra* note 1, at 99-100, 104-48 (explaining nomadism and a multitude of languages inhibiting the collection of census information on American Indian tribes in Texas, and providing a partial census of the tribes Berlandier visited during his 1828-29 Texas expedition, including: 600 ‘Alabamas’ in 60-100 families; 100 ‘Belocsos’ in 25 families; 300 ‘Cado’ families; 5,500 ‘Choctaws’ in 1,300 families; “scarcely 600” Cherokees in 90-100 families; 150 ‘Delaware’ families; 110 ‘Kickapoo’ families; 150 ‘Nadacos’ in 30 families; and 300 ‘Shawnee’ families, to name a few); see also RUSSELL THORNTON ET AL., *THE CHEROKEES: A POPULATION HISTORY* 84 (1990) (“Six years later, in 1834, the Department of Nacogdoches was established, encompassing most of the area east of the Trinity River. One report for this same year gave 800 Cherokees in all of Texas. The Department of Nacogdoches reported at about this time that the Indian population in its area totaled 4,500, including 500 Cherokees, 500 Choctaws, 600 Creeks, 400 Shawnees, 800 Kickapoos, 100 Tejas, 300 Nacogdoches, 500 Coushattas, and 500 Caddos.”); see also JOSÉ FRANCISCO RUIZ, *THE JOSÉ FRANCISCO RUIZ PAPERS, VOL. 1: REPORT ON THE INDIAN TRIBES OF TEXAS IN 1828*, at 94-110 (Art Martínez de Vara ed., Alamo Press 2014) (1828) (observing 150

the eyewitness historian who documented Frenchman Rene-Robert Cavelier, Sieur de La Salle during his 1685 Texas expedition, mentioned more than fifty-one Texas Indian tribes in his journals of the expedition.<sup>13</sup> Estimates of the Texas Indian population in the late seventeenth century are between 42,000 and 50,000 Indians.<sup>14</sup> Scholars believe these numbers were much higher before European contact.<sup>15</sup>

By 1830, a substantial Indian presence remained in Texas.<sup>16</sup> The Arapaho and Cheyenne were in the northwest Panhandle region along the Red River.<sup>17</sup> The mighty Comanche, Kiowa, and Mescalero Apache ranged in the West-Central part of Texas, southward to the Big Bend

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tribes (families) of “Lipans of the South,” 80 to 100 families of “Lipans of the Plains,” 1,000 to 1,500 families of “Comanches,” and 250 families of “Chariticas” living the Department of Texas).

13. BERLANDIER, *supra* note 1, 100 n.111-12 (“With the aid of the [HANDBOOK OF AMERICAN INDIANS (Frederick Webb Hodge ed., 1907)] many of these tribes can be identified: Joutel’s Cenis were the Hasinai; his Choumenes the Jumanos, and his Tecamenes the Tacames, a [Coahuiltecan] tribe. His Konkone were the Tonkawa proper, and his Maghai (Mayeye) and Enepiahos (Ervipiames) were probably related Tonkawan tribes. Joutel’s Korenkake appear to have been the Karankawa, his Kouans the Kohani, a Karankawan subtribe, and his Kasayan (Kouyan) may have been either Karankawan or [Coahuiltecan]. The following probably were affiliates, or at least allies of the Karankawa: Hebahame (Ebahoma), Spricheats, Kapayes, Kiaboha, Arhua, Ahonerhopihiem, Omeaosse (Omenesosse), Ahehoen, Otermarhem (Ointemarhen), and Mercacouman. Of the several western tribes mentioned by Joutel, only the Chanens (Chanzas) can be identified with certainty. They were the Lipan Apache. Joutel’s Cappas were the Siouan-speaking Quapaw. His Assony were the Hasinai, Natsoches the Nanatsoho, Nachitos the Natchitoches, Cadodaquis the Caddo, and Cahainihoa the Cahinnio—all Caddoan-speaking tribes.”). Whatever names the various tribes were called, most of the tribes noted by Joutel had disappeared by the time Berlandier arrived in Texas in 1828. See Ewers, *supra* note 9, at 107 (attributing the decimation of Texas Indian populations from the sixteenth to nineteenth centuries largely to cholera, smallpox, and measles epidemics, and to a lesser extent, malaria, whooping cough, and influenza, as well as violent war, alcoholism, venereal disease, and malnutrition).

14. See Ewers, *supra* note 9, at 106-07 (analyzing previous historical recordings to determine estimated population totals between 1690 and 1890).

15. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 129.

16. See BERLANDIER, *supra* note 1, at 102 (noting thirty-six tribes for which Berlandier provides a detailed history).

17. See THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 129 (depicting a map of Texas with the location of the Arapahos and Cheyennes in the northwest panhandle region and along the Red River); see also *Indian Nations of Texas*, TEX. ST. LIBR. ARCHIVES COMM’N, <https://www.tsl.texas.gov/exhibits/indian/intro/page2.html> [<https://perma.cc/9USD-EA52>] (last updated June 22, 2017) (stating the Arapahos were located “to the north of Texas over a wide area encompassing much of present day Colorado, Nebraska, and the Dakotas, westward to the Rockies, and eastward into Kansas and Oklahoma” and the Cheyenne “dominated the plains between the Platte and Arkansas Rivers.”).

Region of the Rio Grande River.<sup>18</sup> The Lipan Apache and Carrizo, or Comecrudo, Indians lived further south along the Rio Grande River.<sup>19</sup> The Aranama, Bidai, Cocos, Karankawa, Kohani, and Nacisi were along the Gulf Coast.<sup>20</sup> The Tonkawa lived in South-Central Texas.<sup>21</sup> The Tawakoni and Waco lived in Central Texas.<sup>22</sup> The Tawehash lived in North-Central Texas on the Red River.<sup>23</sup> The Alabama, Anadarko, Biloxi, Caddo, Cherokee, Delaware, Eyeish, Hainai, Kichai, Kickapoo, Koasati, Nabedache, Quapaw, Shawnee, and Yowane lived in East Texas.<sup>24</sup> But only a fraction of the once-populous region remained.<sup>25</sup> By 1836, an estimated 14,500 Indians lived in Texas.<sup>26</sup>

#### A. *Disease, War, and Removal*

Without a doubt, disease most heavily impacted American Indian mortality throughout the Western Hemisphere.<sup>27</sup> Some research suggests American Indians in the first smallpox epidemic suffered an almost 75% mortality rate, and although this percentage may appear

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18. See THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 129 (depicting a map of Texas with the location of the Comanche, Kiowa, and Mescalero Apache in the West-Central region of Texas near Big Bend and the Rio Grande River); see also TEX. ST. LIBR. ARCHIVES COMM'N, *supra* note 17 (describing the locations of the three tribes in Central and West Texas).

19. BERLANDIER, *supra* note 1, at 128 n.178 (describing the migration pattern of the Lipan Apache over the years); *About Us*, CARRIZO/COMECRUDO TRIBE TEXAS, [http://www.carrizo.comecrudonation.com/about\\_us.html](http://www.carrizo.comecrudonation.com/about_us.html) [<https://perma.cc/HLV5-YWPG>].

20. JOHN R. SWANTON, THE INDIAN TRIBES OF NORTH AMERICA 308-27 (1953).

21. *Id.* at 326 (“In central Texas from Cibolo Creek on the southwest to within a few miles of Trinity River on the northeast.”).

22. *Id.* at 325-27.

23. *Tawehash Tribe*, ACCESS GENEALOGY, <https://www.accessgenealogy.com/native/tawehash-tribe.htm> [<https://perma.cc/E3HK-4FXR>] (last updated July 22, 2014).

24. See SWANTON, *supra* note 20 (describing the various tribes’ locations along the eastern border of Texas).

25. BERLANDIER, *supra* note 1, at 99 n.110 (“[By the early nineteenth century] the great majority of the Texas tribes had been so reduced by epidemics, wars, and/or the debilitating effects of both mission confinement and civilized vices as either to have lost their tribal identity or to persist only as small remnants of once larger tribes.”).

26. RANDOLPH B. CAMPBELL, GONE TO TEXAS 159 (2003) (estimating other populations at 30,000 Anglos, 5,000 Black slaves, and 3,470 Mexicans).

27. See HENRY F. DOBYNS, THEIR NUMBER BECAME THINNED: NATIVE AMERICAN POPULATION DYNAMICS IN EASTERN NORTH AMERICA 14 (1983) (estimating some tribes lost a majority their numbers to the “Old World” diseases spread through central Mexico and other areas of the Americas by the Europeans).

speculatively high, sixteenth century outbreaks in present-day Dominican Republic and Haiti exterminated whole tribes.<sup>28</sup> Many other epidemics, particularly cholera and measles, in addition to dysentery, malaria, influenza, plague, and whooping cough, had similarly tremendous impacts on Texas Indian mortality.<sup>29</sup> See Appendix Table One.<sup>30</sup>

One of the fascinating and convenient omissions<sup>31</sup> in many of the histories concerning the fabled Texas Rangers is that they were originally formed as death squads to exterminate native populations.<sup>32</sup> In 1823, Stephen F. Austin hired ten frontiersmen as the first “rangers” to kill and dispossess Indians of their homelands in southeast Texas—land he and other Anglos coveted and intended to colonize.<sup>33</sup>

On November 24, 1835, the Texas Legislature legally established the force officially known as the “Texas Rangers.”<sup>34</sup> During the Texas Revolution and the presidency of Sam Houston, the Texas Rangers did not have much of a role, serving mainly as scouts and couriers.<sup>35</sup> They also escorted refugees and livestock to safety.<sup>36</sup> After the Revolution, they similarly saw little action because of Sam Houston’s friendship with

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28. *Id.*; DONALD R. HOPKINS, PRINCES AND PEASANTS: SMALLPOX IN HISTORY 204 (1983); see also Michael Dorris, *Mr. Reagan and the Indians*, in PAPER TRAIL: ESSAYS 255-57 (1994) (“It is estimated by some demographers at the University of Texas that roughly nineteen out of twenty Indians on this continent died from such maladies as smallpox, tuberculosis, measles, and influenza passed on, for the most part inadvertently, by European explorers and settlers.”).

29. Ewers, *supra* note 9, at 107.

30. Ewers, *supra* note 9, at 108-09. Although this work underemphasizes the roles of venereal diseases and alcoholism, and omits the serious effects of scarlet fever, diphtheria, typhus, and syphilis, his record of the epidemics that killed many Indians is informative and instructive.

31. If not outright omissions, they are sanitized versions.

32. See Ben H. Procter, *Texas Rangers*, TEX. ST. HIST. ASS’N (June 15, 2010), <https://tshaonline.org/handbook/online/articles/met04> [<https://perma.cc/DGZ9-FVY3>] (last updated Feb. 8, 2018) (calling the endeavor a “punitive expedition”). From Maxwell/Crain/Santos. *Texas Politics Today 2009-2010*, 14E. © 2010 South-Western, a part of Cengage, Inc. Reproduced by permission. [www.cengage.com/permissions](http://www.cengage.com/permissions)

33. See generally WALTER PRESCOTT WEBB, THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE 20-21, 32 (2d ed. 1965) (stating the Rangers began as a defensive force, but quickly thereafter began an “aggressive campaign,” concluding, “[I]t is often difficult to draw the line between Rangers and regular soldiers and militia.”).

34. An Ordinance and Decree to Establish and Organize a Corps of Rangers (1835), at 20-21, reprinted in 1 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 924-25 (Austin, Gammel Book Co. 1898).

35. WEBB, *supra* note 33, at 25; Procter, *supra* note 32.

36. Procter, *supra* note 32.



the Indians.<sup>37</sup> He lived among the Cherokees prior to his entrance into Texas politics and grew to love and respect them.<sup>38</sup> As President of the Republic of Texas, Houston assumed the role of advocate and champion for a small band of Cherokees who settled in East Texas in 1819,<sup>39</sup> before the main body of their tribe was forcibly removed from its homeland in the southeastern United States to present-day Oklahoma around 1838 or 1839.<sup>40</sup>

These Texas Cherokees were under the leadership of their “Civil” or “Peace” Chief, called Chief Bowl or Duwali.<sup>41</sup> Nearly 800 Texas Cherokees comprised about 150 families.<sup>42</sup> They had an abundance of livestock, with “3,000 head of cattle and as many hogs” and “600 head of horses.”<sup>43</sup> Additionally, a large segment of the population was literate, especially because of a school for young men in the village.<sup>44</sup> Additionally, they “cultivated their fields and wove their own cotton into cloth and made it into clothing.”<sup>45</sup>

On February 23, 1836, then-General Sam Houston, John Forbes, and John Cameron, representing the provisional government of Texas, negotiated a treaty with the Cherokee.<sup>46</sup> Under the terms of the treaty, the Indians would receive 1.5 million acres (less than 1% of the total land

37. *Id.*

38. JACK GREGORY & RENNARD STRICKLAND, SAM HOUSTON WITH THE CHEROKEES, 1829-1833, at 3, 8 (Univ. of Okla. Press 1995) (1967).

39. Carol A. Lipscomb, *Cherokee Indians*, TEX. ST. HIST. ASS'N (June 12, 2010), <https://tshaonline.org/handbook/online/articles/bmc51> [<https://perma.cc/857L-QYNN>].

40. *Id.*; see Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830) (authorizing the removal of American Indians from their property).

41. DIANNA EVERETT, THE TEXAS CHEROKEES: A PEOPLE BETWEEN TWO FIRES, 1819-1840, at 10-11 (1990) [hereinafter EVERETT, THE TEXAS CHEROKEES]; Dianna Everett, *Bowl*, TEX. ST. HIST. ASS'N (June 12, 2010), <https://tshaonline.org/handbook/online/articles/fbo47> [<https://perma.cc/BSD9-R76N>] (recounting he was also known as Diwal'li, Chief Bowles, Colonel Bowles, and Bold Hunter, and “the Bowl” and explaining that he dedicated his life to avoiding conflict with the Whites, especially after the Cherokees’ arrival in Texas).

42. MARY WHATLEY CLARKE, CHIEF BOWLES AND THE TEXAS CHEROKEES 54 (1971).

43. *Id.* at 54-55.

44. José María Sánchez & Carlos E. Castañeda, *A Trip to Texas in 1828*, 29 SW. HIST. Q. 249, 286 (1926).

45. CLARKE, *supra* note 42, at 55.

46. Lipscomb, *supra* note 39; *Cherokee War*, TEX. ST. HIST. ASS'N (June 12, 2010), <https://tshaonline.org/handbook/online/articles/qdc01> [<https://perma.cc/WGP9-Q644>] [hereinafter TEX. ST. HIST. ASS'N., *Cherokee War*].

mass of present-day Texas)<sup>47</sup> between the Angelina and Sabine Rivers and northwest of the Old San Antonio Road in East Texas.<sup>48</sup>

On December 29, 1836, the Texas Senate tabled the treaty, and a year later, on December 16, 1837, amid Houston's calls for ratification, the Texas Senate declared the treaty null and void.<sup>49</sup> Undeterred, the now-elected President Houston made no efforts to remove the Indians and promised them that they could remain unmolested on the land they already occupied.<sup>50</sup>

On December 10, 1838, all that changed when Indian-fighter Mirabeau Buonaparte Lamar succeeded Houston as President of the Republic of Texas.<sup>51</sup> In Lamar's first major speech to the Texas Legislature, he requested authorization to recruit and finance eight companies of mounted volunteers and six companies of Texas Rangers scattered across Central and South Texas to wage an "exterminating" war against the Indians, "which will admit no compromise and have no termination except in their total extinction or total expulsion."<sup>52</sup>

In his speech justifying why the Republic of Texas must eliminate the Indians, Lamar downplayed the obvious land grab motives, spinning his words to accommodate long-established White prejudice against and hatred of the Indian. He stated, "The Indian warrior in his heartless and sanguinary vengeance recognizes no distinction of age or sex or condition. . . . The wife and the infant afford as rich a trophy to the scalping knife, as the warrior."<sup>53</sup>

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47. This represents 0.009% of the land in Texas. The total area of Texas is 261,232 square miles. *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU, <https://www.census.gov/geographies/reference-files/2010/geo/state-local-geo-guides-2010/texas.html> [<https://perma.cc/M2P6-WNQF>] (last updated June 25, 2018). A square mile equals 640 acres. NAT'L INST. OF STANDARDS & TECH., GENERAL TABLES OF UNITS OF MEASUREMENT, at C-9 (2012), <https://www.nist.gov/sites/default/files/documents/2017/04/28/AppC-12-hb44-final.pdf> [<https://perma.cc/3ABE-772Y>]. The total acreage of Texas is 167,188,480 acres.

48. Lipscomb, *supra* note 39; TEX. ST. HIST. ASS'N., *Cherokee War*, *supra* note 46.

49. TEX. ST. HIST. ASS'N., *Cherokee War*, *supra* note 46.

50. *Id.*

51. EVERETT, *THE TEXAS CHEROKEES*, *supra* note 41, at 100; CAMPBELL, *supra* note 26, at 169; Procter, *supra* note 32.

52. CAMPBELL, *supra* note 26, at 169; Procter, *supra* note 32; *see also* Act approved Dec. 21, 1838, 3d. Cong., R.S., 1839 Repub. Tex. Laws, reprinted in 2 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 15-20 (Austin, Gammel Book Co. 1898) (approving Lamar's request).

53. JOHN HOYT WILLIAMS, *SAM HOUSTON: THE LIFE AND TIMES OF THE LIBERATOR OF TEXAS, AN AUTHENTIC AMERICAN HERO* 190 (1994).

The killing of Manuel Flores at the hands of Texas Rangers in the spring of 1839 provided further support for Lamar's extermination policies.<sup>54</sup> Upon Flores's dead body were found documents which detailed an Indian-Mexican joint attack on the Texans.<sup>55</sup> Implicated in the documents were the Cherokees and Chief Bowl.<sup>56</sup> The Cherokees denied involvement in the plan, but Lamar, nonetheless, demanded their removal from Texas.<sup>57</sup> In response, the Cherokees formed a coalition with other tribes inhabiting East Texas to resist removal, including the Shawnee, Delaware, Kickapoo, Quapaw, Choctaw, Biloxi, Ioni, Alabama, Coushatta, Caddo, Tahocullake, and Mataquo.<sup>58</sup>

On July 15, 1839, Lamar unleashed a powerful force of Rangers and militia on the Cherokees.<sup>59</sup> The Cherokees fell back and were overwhelmed a few days later, losing about one-half of their men.<sup>60</sup> As Chief Bowl signaled retreat,

[He] was shot in the leg and his horse was wounded. The Chief climbed down from his horse and started to walk from the battlefield. He was shot in the back. The [83-year-old] Chief sat down, crossing his arms and legs facing the company of militia. The captain of the militia walked to where the Chief sat, placed a pistol to his head and killed him. Cavalry members took strips of skin from his arms as souvenirs.<sup>61</sup>

According to other accounts: "One 'ghoulish wretch' cut strips of skin from the old chief's back, saying he planned to make them into bridle reins. . . . [An] article in the Telegraph and Texas Register of September 1, 1841 claimed, 'Some rude chaps scalped the poor chief after his death.'"<sup>62</sup> "His body was left where it lay. No burial ever took place."<sup>63</sup>

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54. WEBB, *supra* note 33, at 48; HOYT WILLIAMS, *supra* note 53, at 190-91.

55. WEBB, *supra* note 33, at 49; HOYT WILLIAMS, *supra* note 53, at 191.

56. WEBB, *supra* note 33, at 49; HOYT WILLIAMS, *supra* note 53, at 191.

57. WEBB, *supra* note 33, at 53 ("[T]here is a lack of evidence that the Cherokees did more than listen with Indian politeness to the warlike proposals of the Mexican agents."); HOYT WILLIAMS, *supra* note 53, at 191 (stating Chief Bowl "vehemently denied" the allegation).

58. Pat L. Talley, *Funeral—156 Years after Death*, WORLD HIST. ARCHIVES, (July 16, 1995, 9:21 PM), <http://www.hartford-hwp.com/archives/41/005.html> [<https://perma.cc/2X6V-BZ57>].

59. HOYT WILLIAMS, *supra* note 53, at 192.

60. *Id.* at 191.

61. Talley, *supra* note 58.

62. CLARKE, *supra* note 42, at 110.

63. Talley, *supra* note 58.

Upon notice of the death of Chief Bowl, who died wearing a red silk Sam Houston allegedly gave to him, Houston angrily cried that the Cherokees “had never drawn one drop of white man’s blood” and that the Indian “was a better man than his murderers.”<sup>64</sup>

The surviving Cherokees and members of allied tribes fled north to Indian Territory (present-day Oklahoma) or south to Mexico, fighting and dying in numerous skirmishes with the pursuing Rangers and militia.<sup>65</sup> White settlers immediately moved onto the Indian lands, claiming Indian homes, implements and livestock as their own.<sup>66</sup> Only the mighty Comanche represented a genuine threat to the land-hungry Anglo invaders now.<sup>67</sup>

On March 19, 1840, President Lamar, with a promise of peace, lured Comanche Chief Muguara “with some thirty braves, a few women and children, and one lone white” into San Antonio for a parley.<sup>68</sup> At the Council House in San Antonio:

Colonel William Fisher had three companies of Rangers surround the building and, before long, firing broke out. Some Indians and whites had carried concealed weapons into the Council House, and within minutes, the fight spread, as Indians bolted for the doors and windows. When the powder smoke cleared, Muguara and thirty-four Indians lay dead, along with seven whites. Taken prisoner were twenty-seven women and children and two very old men. One woman was released and sent back to the Indian camp to warn that such would be the fate of all who dealt in bad faith with whites.<sup>69</sup> The other Indian women were parceled out [as slaves] ‘among the respectable families’ of Austin.

The results were predictable. After torturing some of their captives to death, the Comanches declared war, putting a thousand warriors in the field, all eager to punish the whites who had violated the sanctity of the

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64. CLARKE, *supra* note 42, at 3; HOYT WILLIAMS, *supra* note 53, at 192.

65. HOYT WILLIAMS, *supra* note 53, at 192-93.

66. *Id.* at 192.

67. *Id.*

68. *Id.* at 192-93.

69. “Bad faith” apparently meant not readily acquiescing in any and all White demands, no matter how unreasonable they might be. *See also* LA VERE, *supra* note 9, at 35 (explaining the Texans demanded the Comanches turn over all White captives, but the Comanches present at the Council House only possessed one, Matilda Lockhart. The Comanches requested trade goods for the ransom of White captives held in possession by other tribes. The Texans took this as a rebuff, brought in the Texas Rangers, and tried to take the Comanche chiefs hostage. Fighting ensued.).

Council House. No quarter was given. Victoria was ravaged, ranches put to the torch, farms destroyed, and travelers butchered. On August 8, the coastal town of Linnville was razed, the surviving townspeople watching the destruction in shocked silence from boats offshore.

At the Battle of Plum Creek, four days later, a Ranger force . . . defeated a Comanche war party, and veteran Indian fighter John Moore soon massacred a Comanche village on the Red Fork of the Colorado. . . . The Comanches reeled westward from the blows of the vengeful whites, but Lamar had started a war that would sputter on for years and keep the treasury empty.<sup>70</sup>

On February 16, 1852, in an effort to concentrate Indians into a small enclave, the Texas Legislature passed a bill authorizing the governor to negotiate with the federal government to set up Indian reservations for the remnants of those tribes still remaining in Texas, chiefly the Comanche, Mescalero Apaches, and Lipan Apaches.<sup>71</sup> On February 6, 1854, the War Department set aside 55,728 acres on the Brazos River for Texas Indian reservations.<sup>72</sup> According to Dr. Jonathan Hook, a Cherokee scholar and an authority on the Alabama-Coushatta Indians of Texas, about 1,200 Texas Indians, including “Caddos, Anadarkos, Ionies, Wacos, Kichais, Tawakonis and Tonkawas were assigned to the Brazos Reserve.”<sup>73</sup>

Hardened by years of White genocidal policies and actions against them, most Indians remained suspicious and fearful of Whites, and refused to come in to the reservations.<sup>74</sup> In 1859, the remaining Texas Indians that could be captured were forcibly rounded up and removed to

70. HOYT WILLIAMS, *supra* note 53, at 193.

71. Joint Resolution approved Feb. 16, 1852, 4th Leg., R.S., ch. 118, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 1019 (Austin, Gammel Book Co. 1898); W. E. S. Dickerson, *Indian Reservations*, TEX. ST. HIST. ASS'N (June 15, 2010), <https://tshaonline.org/handbook/online/articles/bpi01> [<https://perma.cc/67RQ-FT3D>].

72. Act approved Feb. 6, 1854, 5th Leg., R.S., ch. 41, *reprinted in* 3 H.P.N. Gammel, *The Laws of Texas 1822-1897*, at 1495-96 (Austin, Gammel Book Co. 1898); *The Indian Reserves of Texas*, in THE TEXAS ALMANAC FOR 1859, at 130-31 (1859); WEBB, *supra* note 33, at 162; Carrie J. Crouch, *Brazos Indian Reservations*, TEX. ST. HIST. ASS'N (June 15, 2010), <https://tshaonline.org/handbook/online/articles/bpb03> [<https://perma.cc/L5K7-CE9X>] (last updated Feb. 1, 2011).

73. JONATHAN B. HOOK, THE ALABAMA-COUSHATTA INDIANS 38 (1997).

74. *See, e.g., id.* (explaining that White Americans massacred Indians living in the area prior to their removal to the Brazos River Lower Reserve); *see also* Dickerson, *supra* note 71.

Indian Territory or New Mexico, and the reservation land in Texas reverted back to the state.<sup>75</sup>

On December 18, 1860, eighty Texas Rangers commanded by Captain Lawrence Sullivan “Sul” Ross with twenty men from the Second United States Cavalry set out in search of a Comanche Indian camp near the Pease River.<sup>76</sup> According to one account, the Rangers surreptitiously surrounded the village during a sandstorm at sunrise.<sup>77</sup> Before the camp awoke, Captain Sul gave orders to attack and the Rangers “were in among the tipis, hacking, hewing, and using the pistol with deadly, close-range accuracy.”<sup>78</sup> The Comanche warriors attempted to fend off the ambush while the women and children could escape on horses—which had,

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75. Dickerson, *supra* note 71. Today, there are only three very small federally recognized tribes with reservations in Texas, none of whom are native to Texas. They are the: (1) Alabama-Coushatta on a reservation of 7.15 square miles of land, or 4,576 acres, established in 1854 and located in Polk County, Texas with 522 members living on or near the reservation; (2) Kickapoo on a reservation of 0.19 square miles, or 121.6 acres, established in 1983 and located about eight miles south of Eagle Pass on the Rio Grande River with 721 members living on or near the reservation; and (3) Tigua on the Ysleta del Sur Pueblo established in 1682, now within the city limits of El Paso, Texas, with a population of 1,169 members living on or near the pueblo. See U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFF., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 74, 78, 90 (2014), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf> [<https://perma.cc/Y6V3-6QNG>] [hereinafter BUREAU OF INDIAN AFF., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT]; *Population, Housing Units, Area, and Density: 2010 - State—American Indian Area/Alaska Native Area/Alaska Native Regional Corporation, 2010 Census Summary File 1, GCT-PH1*, U.S. CENSUS BUREAU, [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_00\\_SF1\\_GCTPH1.ST03&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_00_SF1_GCTPH1.ST03&prodType=table) (set “Add/Remove Geographies” to “Texas”); Howard N. Martin, *Alabama-Coushatta Indians*, TEX. ST. HIST. ASS’N (June 9, 2010), <https://tshaonline.org/handbook/online/articles/bma19> [<https://perma.cc/M8WA-3754>] (last updated Sept. 12, 2018); M. Christopher Nunley, *Kickapoo Indians*, TEX. ST. HIST. ASS’N (June 15, 2010), <https://tshaonline.org/handbook/online/articles/bmk09> [<https://perma.cc/AQ7P-NFPS>]; *About Us, YSLETA DEL SUR PUEBLO*, <http://www.ysletadelsurpueblo.org/about-us> [<http://www.ysletadelsurpueblo.org/about-us>]. A square mile equals 640 acres. NAT’L INST. OF STANDARDS & TECH., *supra* note 47.

76. Ernest Thompson Seton & Julia M. Seton, *The Death of Nocona*, in *THE GOSPEL OF THE REDMAN: AN INDIAN BIBLE* 85 (Ernest Thompson Seton & Julia M. Seton eds., Seton Village 1966) (1936).

77. *Id.* (quoting C. L. DOUGLAS, *THE GENTLEMEN IN THE WHITE HATS: DRAMATIC EPISODES IN THE HISTORY OF THE TEXAS RANGERS* 62 (South-West Press 1934)).

78. *Id.* (quoting C. L. DOUGLAS, *THE GENTLEMEN IN THE WHITE HATS: DRAMATIC EPISODES IN THE HISTORY OF THE TEXAS RANGERS* 63 (South-West Press 1934)).

serendipitously, been prepared for a morning buffalo hunt.<sup>79</sup> However, as the account continues,

“The fight was over before it fairly started. . . .

Chief Peta Nocona himself was lucky enough to gain a pony’s back; and pulling a fifteen-year-old girl up behind him, he darted northward in an effort to dodge the cavalrymen. Trailing him, on another fast mustang, rode [Nocona’s wife, Cynthia Ann Parker], an infant in her arms. . . .”<sup>80</sup>

Cynthia Ann Parker, a White woman, had been taken by the Comanche in 1836 at the age of nine, in a raid on the farm of Silas M. Parker in Limestone County, Texas.<sup>81</sup> She grew up with the Comanche, married Chief Peta Nocona, and bore him three children—Quanah, Pecos, and Topsannah Parker,<sup>82</sup> the infant daughter referenced above in the account of her flight from the Rangers.<sup>83</sup> As the narrator of the attack continues:

“Take the squaw<sup>84</sup> . . . capture her!” shouted Captain Ross. “I’ll go after the Chief!”

Ross steadily gained ground, edging ahead of the lieutenant, and finally passed the fleeing woman. He glanced back only once—to see Kelleher grasp the nose strap of the [Cynthia Ann’s] pony and pull in the fugitives. Then he turned his sole attention to Peta Nocona. The Chief’s horse,

79. *Id.* (citing C. L. DOUGLAS, *THE GENTLEMEN IN THE WHITE HATS: DRAMATIC EPISODES IN THE HISTORY OF THE TEXAS RANGERS* 63 (South-West Press 1934)).

80. *Id.* at 102-03 (quoting C. L. DOUGLAS, *THE GENTLEMEN IN THE WHITE HATS: DRAMATIC EPISODES IN THE HISTORY OF THE TEXAS RANGERS* 63 (South-West Press 1934)).

81. C. L. DOUGLAS, *THE GENTLEMEN IN THE WHITE HATS: DRAMATIC EPISODES IN THE HISTORY OF THE TEXAS RANGERS* 66 (South-West Press 1934).

82. Margaret Schmidt Hacker, *Parker, Cynthia Ann*, *TEX. ST. HIST. ASS’N* (June 15, 2010), <https://tshaonline.org/handbook/online/articles/fpa18> [<https://perma.cc/F2FW-G4K7>] (last updated Sept. 24, 2018).

83. JAMES T. DESHIELDS, *CYNTHIA ANN PARKER: THE STORY OF HER CAPTURE* 16 (St. Louis, Woodward Printing & Book Mfg. Co. 1886). DOUGLAS, *supra* note 81, at 66-67.

84. To be true to the narrator, I reluctantly use his term here in describing the events. However, it should be noted that American Indians in the United States and Canada universally reject the use of the word “squaw” in reference to American Indian women for a number of reasons. *See, e.g.*, ME. INDIAN TRIBAL-STATE COMM’N, *PROPOSAL TO DROP “SQUAW” FROM PLACE NAMES IN MAINE: SUMMARY OF ISSUES AND VIEWS*. 2000, at 4 (2000), [https://digitalmaine.com/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1000&context=mitsc\\_docs](https://digitalmaine.com/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1000&context=mitsc_docs) [<https://perma.cc/32PS-XZ3Q>]. (“Most Native people believe that ‘squaw’ has a disparaging meaning, and many view it as a fighting word that delivers the message that Native women are promiscuous and objects of public vilification. Some older Native people find the word so derogatory, that they have not been able to talk about it.”).

weighted as it was, was tiring fast—and now Sul Ross was galloping only twenty yards behind. The Captain drew a pistol from his belt, raised it and swung down from the shoulder.

Crack! . . . The girl swayed, clutched once at Nocona's girdle, and toppled from the plunging horse, drilled neatly through the back. But she had caught the girdle, and it was tight about the chieftain's waist; she pulled Nocona with her as she fell.

But Nocona, catlike, had landed on his feet, and in the flash of a second had whipped the bow from over his shoulders and had strung an arrow with that great speed which only the Plains Indian can display.

Thus Ross, before he could swerve aside, was made target for two long-shafted arrows, the point of one embedding itself in the left shoulder of his charger.

The captain's horse, stabbed with pain, went wild, but Ross sawed on the bridle, quieted him somewhat and circled back to finish off Nocona. He found the Chief standing where he had left him, beside the dying girl, an arrow strung and ready. He loosed it as the Ranger galloped back to renew the attack, but the shaft went wide; and Ross, clinging to the pommel of this saddle with the left hand, let go another pistol shot. The ball struck Nocona in the right arm, breaking the bone.

"Then," said Captain Ross, telling the story later, "I shot the Chief twice through the body, whereupon he deliberately walked to a small tree, and leaning against it, began to sing a wild, weird song."

Ross dismounted and walked toward the Chief.

"Surrender?" he called, but Nocona shook his head, brandishing in one last defiant gesture the lance he held in his left hand.

A Mexican member of the Ranger company rode up and dismounted; he carried in the crook of his arm a long-barre[1]ed shotgun.

"Finish him!" ordered Captain Ross.

The Mexican raised the shotgun and pulled the trigger.

Nocona, still singing his wild, weird song—the Death Chant of the Comanche—stood straight as a lance . . . proud . . . erect . . . defiant.



And then he fell—an arrow in the dust.<sup>85</sup>

The Rangers took the back trail to Fort Belknap, exhibiting Cynthia Ann in the scattered settlements through which they passed. Weatherford saw her, and Fort Worth—where the townspeople turned out to look at a “queen” and view with something akin to awe the Indian scalps brought home by the expedition . . . grim trophies strung on a pole and displayed on Weatherford street.<sup>86</sup>

Cynthia Ann was taken to her White family near Birdville, Texas.<sup>87</sup> A house was built for her in the Piney Woods of East Texas, but she was miserable there.<sup>88</sup> According to one source, “despite her white blood she had become Indian.<sup>89</sup> Nocona’s people were her own and she grieved for the free life on the plains.”<sup>90</sup> Within four years after being returned to her White family, both Cynthia Ann and her baby daughter Topsannah died.<sup>91</sup>

Until the 1870s, skirmishes continued between the Indians and Whites, mostly on the Staked Plains (Llano Estacado) in the west and in the Texas Panhandle, where bands of Comanche, Cheyenne, Kiowa, and Arapaho—led by the likes of Quanah Parker, Lone Wolf, Satanta, Big

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85. DOUGLAS, *supra* note 81, at 63-65. Years later, Quanah Parker raised doubts about his father’s death at the Pease River Battle, “perhaps because of a Comanche belief that ill repute disturbs the peace of the dead.” See Robert H. Williams, *Peta Nocona*, TEX. ST. HIST. ASS’N (June 15, 2018), <https://tshaonline.org/handbook/online/articles/fpefn> [hereinafter Robert H. Williams, *Peta Nocona*]. Several accounts assert that he in fact died later in 1862 of an infected wound inflicted in a fight with Whites; see also T. R. FEHRENBACH, *LONE STAR: A HISTORY OF TEXAS AND THE TEXANS* 545 (American Legacy Press 1983) (1968) (“It is certain that the man Ross thought to be Peta was a Mexican slave named Joe, who tried to protect the women.”); CARL WALDMAN, *WHO WAS WHO IN NATIVE AMERICAN HISTORY: INDIANS AND NON-INDIANS FROM EARLY CONTACTS THROUGH 1900*, at 270 (1990). However, a preponderance of evidence, including eye-witness identification by a former Mexican slave of the chief who later became an interpreter for Sul Ross, supports the report that he was killed at Pease River on December 18, 1860. Robert H. Williams, *Peta Nocona*, *supra* note 85.

86. DOUGLAS, *supra* note 81, at 66-67.

87. *Id.* at 67.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

Tree, Woman's Heart, and Mamanti the Sky Walker—stubbornly pursued the buffalo and clung to their old ways of living.<sup>92</sup>

By the mid-1870s, with most of the buffalo gone and many unable to outrun the persistent pursuit of the Texas Rangers and the U.S. Cavalry, the Indian resistance was finally crushed.<sup>93</sup> The Comanche, Cheyenne, Kiowa, and Arapaho were rounded up and removed to Indian Territory.<sup>94</sup> In 1875, the Texas delegation to Congress passed a federal law to permanently ban Indian tribes in Texas.<sup>95</sup> By 1890, President Lamar's dream of a Texas without Indians had nearly become a reality.<sup>96</sup> In that year, the American Indian was declared all but extinct in Texas when the U.S. Census officially recorded that only 708 Indians remained in the state; meanwhile, the total population topped 2.2 million people.<sup>97</sup> Ten years later, the trend continued as the total Texas population of 3 million sharply contrasted the 470 Indians remaining in the state.<sup>98</sup>

## II. AMERICAN INDIAN RENAISSANCE IN TEXAS (2000-PRESENT)

During the first sixty years of the twentieth century, the state experienced a modest increase in its American Indian population from 470 to 5,750 people.<sup>99</sup> During that same period, the state's overall

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92. TEX. HIST. COMM'N, RED RIVER WAR OF 1874-1875: CLASH OF CULTURES IN THE TEXAS PANHANDLE 2 (2010), <http://www.thc.texas.gov/public/upload/publications/red-river-war.pdf> [<https://perma.cc/R5JN-JH9L>].

93. *Id.*

94. *Id.*

95. Act of Aug. 15, 1876, ch. 289, 19 Stat. 176, 195-196 (1876) (“[T]he Secretary of the Interior is hereby directed and required to prohibit the Kiowas, Comanches, Apaches, Kickapoos, Cheyennes, Arapahos, Wichitas, and bands affiliated with them, from crossing Red River from Fort Sill reservation into Texas, and rations shall only be issued to said Indians for only one week at a time, and then only to such of them as shall be present. And no arms or ammunition shall be issued, sold, or given to any of the Indians above named; and all arms and ammunition shall be taken from any Indian who may be proven to have committed any depredation on the whites or friendly Indians.”).

96. *Mirabeau B. Lamar: A Vision of Greatness*, TEX. ST. LIBR. & ARCHIVE COMM'N, <https://www.tsl.texas.gov/exhibits/presidents/lamar/mrprez.html> [<https://perma.cc/T2SD-U9CE>] (last updated Mar. 16, 2015).

97. U.S. CENSUS OFFICE, REPORT ON INDIANS TAXED AND NOT TAXED: 1890, *supra* note 2.

98. U.S. CENSUS OFFICE, TWELFTH CENSUS: 1900, *supra* note 3.

99. Compare U.S. CENSUS OFFICE, TWELFTH CENSUS: 1900, *supra* note 3, with U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1962, at 29 (1962), <https://www2.census.gov/library/publications/1962/compendia/statab/83ed/1962->

population grew to 9.5 million people.<sup>100</sup> See Appendix Table Two. Between 1960 and 2010, Texas saw an “explosion”<sup>101</sup> in its Indian population, as the U.S. census of 2010 ultimately recorded 315,264 American Indians living in the state.<sup>102</sup> The 2010 census represented a 670% increase in the Texas Indian population since the dawn of the twentieth century,<sup>103</sup> a 54% increase since 1960,<sup>104</sup> and an almost 4% increase since 1990,<sup>105</sup> giving Texas the fourth largest American Indian population in the nation.<sup>106</sup> In Texas, the American Indian population increased at a greater rate than the national American Indian population—which merely doubled between the 1990 and 2000 censuses.<sup>107</sup> Regardless, both nationally and in Texas, the American Indian population growth between the 1990 and 2000 censuses far exceeded the 13% national population growth.<sup>108</sup>

By focusing on one relatively stable sector of the American Indian population—those that are enrolled in federally recognized tribes—you may infer that a large chunk of this population’s increase is due to rising

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02.pdf [<https://perma.cc/4TZQ-LDL6>] [hereinafter BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1962].

100. *United States and Texas Populations 1850-2017*, TEX. ST. LIBR. & ARCHIVE COMM’N, <https://www.tsl.texas.gov/ref/abouttx/census.html> [<https://perma.cc/U48E-3TNH>] (last updated Aug. 21, 2018).

101. Carlos Guerra, *Is There an American Indian Population Explosion in Texas?*, SAN ANTONIO EXPRESS-NEWS, Aug. 26, 2001, at 1B.

102. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5.

103. U.S. CENSUS OFFICE, TWELFTH CENSUS: 1900, *supra* note 3.

104. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1962, *supra* note 99.

105. BARBARA EVERITT BRYANT ET AL., BUREAU OF THE CENSUS, 1990 CP-1-1A, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS: AMERICAN INDIAN AND ALASKA NATIVE AREAS 14 (1990), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-1a.pdf> [<https://perma.cc/RR8L-XHUQ>].

106. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5 (listing California: 723,225; Oklahoma: 482,760; and Arizona: 353,386).

107. STELLA U. OGUNWOLE, U.S. BUREAU OF THE CENSUS, C2KBR/01-15, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, at 5 (2002), <https://www.census.gov/prod/2002pubs/c2kbr01-15.pdf> [<https://perma.cc/5XCZ-HGNL>] (depicting an increase in the Texas Indian population from 65,877 in 1990 to 215,599 in 2000 compared to an increase in the national population from 1,959,234 in 1990 to 4,119,301 in 2000) [hereinafter U.S. BUREAU OF THE CENSUS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000].

108. *Id.*

American Indian birth rates and leveling American Indian mortality rates.<sup>109</sup> Birth rates alone, however, cannot explain the rapid increase in the enrolled population.<sup>110</sup> During the interval between the 1990 and 2000 censuses, a number of new tribes received federal recognition, which added more Indians to the total population.<sup>111</sup> Additionally, the opening of Indian casinos across Indian Country incentivized many non-enrolled Indians, who were eligible for enrollment in a federally recognized tribe, to seek enrollment for eligibility for the per capita distribution of casino profits.<sup>112</sup>

A. *A New Methodology for Counting American Indians by the U.S. Census*

Without a doubt, the most salient factor spurring the dramatic growth in the American Indian population is the evolution of the methodology for counting and defining the American Indian used by the U.S. Census Bureau.<sup>113</sup> According to Thornton, “In censuses before 1960, the enumeration of American Indians was made simply on the basis of

109. C. Matthew Snipp, *The Size and Distribution of the American Indian Population*, in CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 20 (Gary D. Sandefur et al. eds., 1996) [https://www.ncbi.nlm.nih.gov/books/NBK233103/pdf/Bookshelf\\_NBK233103.pdf](https://www.ncbi.nlm.nih.gov/books/NBK233103/pdf/Bookshelf_NBK233103.pdf) [<https://perma.cc/XPY8-FEPN>].

110. See Carolyn A. Liebler & Timothy Ortyl, *More than a Million New American Indians in 2000*, 51 DEMOGRAPHY 1101, 1105 (2014) (explaining that the definition of “American Indian” became more inclusive in 1997, possibly explaining the rapid increase in enrolled population within the census).

111. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365 (Oct. 21, 1993) (expanding the 1988 list to include nine categories of Alaska entities, thereby doubling the number of entities to over 500); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298-13,303 (Mar. 13, 2000) (recognizing 556 tribes).

112. FRANCISCA M. ANTMAN & BRIAN DUNCAN, AMERICAN INDIAN CASINOS AND THE RISE IN NATIVE AMERICAN SELF-IDENTIFICATION 2 (2015), [http://spot.colorado.edu/~antmanf/Antman&Duncan\\_NativeAmericanIdentity&Casinos.pdf](http://spot.colorado.edu/~antmanf/Antman&Duncan_NativeAmericanIdentity&Casinos.pdf) [<https://perma.cc/DV8Y-58TD>].

113. See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5 (explaining the 2010 census expanded the race question to “15 separate response categories and three areas where respondents could write in detailed information about their race,” a more refined approach from the 2000 census that allow individuals “to self-identify with more than one race”); see also U.S. BUREAU OF THE CENSUS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, *supra* note 107, at 2 (explaining the expansion of the self-identification method of the 2000 census from the categorical method in the 1990 census, and urging caution “when interpreting changes in the racial composition of the United States population over time” due to the ever-changing methodology).

enumerators' observation,"<sup>114</sup> who were, for the most part, White. With all the prejudices and baggage of their ancestors, these enumerators completed what disease, war, removal, and the policies of extermination and assimilation failed to do.<sup>115</sup> They simply defined the Indian out of existence by refusing to recognize that a person was American Indian.

Historically, the census categorized individuals who were part-White as their non-White race.<sup>116</sup> American Indians, however, were not identified as Indians until 1860.<sup>117</sup> For example, French and Indian mixed race individuals were considered White French Americans, and thus, White on the census.<sup>118</sup> Mestizos from Mexico were similarly considered White Spanish American or White Mexican American, and therefore, White on the census.<sup>119</sup> Indians that left the reservation or were born off the reservation were often classified as White non-Indians, as were non-enrolled Indians.<sup>120</sup> Mixed and full-blooded Indians from Canada, Mexico, or Central and South America, were also classified as White non-Indians, or as Black, Colored, and Mulatto if the enumerator

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114. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 216.

115. See generally Russell Thornton, *Native American Demographic and Tribal Survival into the Twenty-first Century*, 43 AM. STUD. 23, 33 (2005), <https://journals.ku.edu/amerstud/article/download/2951/2910> ("As a facet of colonialism, . . . cultural genocide . . . has been more determined and extensive than physical genocide.") [hereinafter Thornton, *Native American Demographic and Tribal Survival into the Twenty-first Century*].

116. See Anna Brown, *The Changing Categories the U.S. Has Used to Measure Race*, PEW RES. CTR. (June 12, 2015), <https://www.pewresearch.org/fact-tank/2015/06/12/the-changing-categories-the-u-s-has-used-to-measure-race/> [<https://perma.cc/HY3G-CZXR>] ("Throughout most of the history of the census, someone who was both white and another race was counted as the non-white race. . . . In 1930, for example, the "one-drop rule" included in enumerator instructions said that "a person of mixed White and Negro blood was to be returned as Negro, no matter how small the percentage of Negro blood." American Indians were not identified as such until 1860, when the racial category of "Indian" was added. Beginning in 1890, the census included a complete count of American Indians on tribal land and reservations.").

117. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 213 (stating also, "It was not until 1890 that the U.S. Bureau of the Census formally enumerated all of the Indians in the United States . . .").

118. See generally *id.* at 216-20 (explaining enumeration procedures for mixed race individuals).

119. See generally *id.*

120. *Indians and the Census 1790-2000*, NATIVE HERITAGE PROJECT (May 14, 2013), <https://nativeheritageproject.com/2013/05/14/indians-and-the-census-1790-2010/> [<https://perma.cc/V7L8-E89J>].

suspected that the individual counted had any amount of African ancestry.<sup>121</sup>

In 1960, self-reporting supplanted the census enumerators' discretion for determining race.<sup>122</sup> Under this method, the key determinant of whether a person was American Indian was the person's self-identification, within the categories established by the U.S. Census Bureau.<sup>123</sup> According to Thornton:

Since 1960 self-reporting has been used to classify respondents by race. . . . Persons of mixed white and Indian ancestry were designated as Indians if they were listed on tribal or agency rolls or were considered Indians in their community. . . . However, the 1960 census also classified persons of mixed American Indian and black descent as American Indian only if they were of predominantly Indian ancestry or were recognized as Indians in their community; mixed-bloods of other than white or black ancestry were designated according to the father's race . . . .

In the 1970 census, in contrast, persons of mixed Indian, white, or black ancestry reported the race with which they identified, and persons who were in doubt about their classification were designated as belonging to the race of the father . . . .

In the 1980 census, if they were in doubt, the race of the person's mother was used, but "if a single response could not be provided for the mother, then the first race reported by the person was used" . . . . Additionally in the 1980 census, persons were designated Indian if they "did not report themselves in one of the specific race categories but entered the name of an American Indian tribe or reported entries such as Canadian Indian, French-American Indian, or Spanish-American Indian" . . . .<sup>124</sup>

#### B. *A Changing Self-Image of Those with Indian Blood*

Demographer Jeffrey S. Passel, attributed the increase in the American Indian population in the late twentieth century to a change in self-

121. See generally Brown, *supra* note 116 (explaining the "one-drop rule").

122. U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970 PART 1, at 3 (1975). See Thornton, *Native American Demographic and Tribal Survival into the Twenty-first Century*, *supra* note 115, at 26 (explaining the impact of self-reporting on the census).

123. See generally THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 216-20 (explaining enumeration procedures for mixed race individuals).

124. *Id.*

perception.<sup>125</sup> After a dramatic increase in the American Indian population following the 1970 census, Passel connected the increase to “a shift in racial self-identification, whereby many individuals designated as white in earlier censuses and records chose to classify themselves as Indian in 1970.”<sup>126</sup> Passel linked this “shift,” called “pan-Indianism,” to the other racial-awakenings of the Civil Rights Movement of the 1960s.<sup>127</sup> On the increasingly public Indian identity, Thornton observed, “It is important to mention, too, that only recently in the United States have patterns of prejudice and discrimination toward American Indians lessened. . . . One does not now see signs proclaiming ‘No Indians or Dogs Allowed,’ as I did when growing up in Oklahoma!”<sup>128</sup>

As such, recognizing the intensity of the discrimination against Indians during the first half of the twentieth century is paramount. In Texas, Indians had long discerned that “[it] was better to be beat up as a Mexican, than killed as an Indian.”<sup>129</sup> The roots of this sentiment date at least as far back as President Lamar’s declaration of war against the Indians, and

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125. Jeffrey S. Passel, *Provisional Evaluation of the 1970 Census Count of American Indians*, 13 DEMOGRAPHY 397, 402-04, 407 (1976).

126. *Id.*

127. *Id.* at 402-04. *But see* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 244-47 (Univ. of Okla. Press 1989) (1969) (“Ever since Indians began to be shunted to reservations it has been assumed by both Indians and whites that the eventual destiny of the Indian people was to silently merge into the mainstream of American society and disappear. . . . Indians had been brainwashed into accepting the demise of their tribe as God’s natural plan for Indians. . . . Since 1966 there has been an increasing awareness of tribalism sweeping the Indian power structure. No longer does Indian country begin at the Mississippi. Now it extends from coast to coast. . . . The awakening of the tribes is just beginning. Anthropologists love to talk knowingly about this movement and call it pan-Indianism. . . . But pan-Indianism exists primarily in the mind of the beholder, as do all anthropological theories. Pan-Indianism implies that a man forgets his tribal background and fervently merges with other Indians to form “Indianism.” Rubbish. Younger Indians are beginning to understand the extent to which the Indian community is being expanded and to many of them it is an affirmation of tribalism over individualism. . . . The mechanized concepts of image, relevancy, feasibility, and efficiency are now being seen as gimmicks by which white America fools itself into believing it has created a culture. In reality, it has used these plastic devices to avoid the necessity of having a real culture. Tribal existence is fast becoming the most important value in life. Consideration of other ideas takes second place to tribalism.”)

128. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 222.

129. John Davidson, *Coahuiltecans*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2001, at 9C. Ironically, being Mexican is to be from a mixed race of people that universally shares American Indian blood, along with admixtures from European ancestors and, in some cases, African bloodlines from slaves that also mixed with the native populations.

probably much further.<sup>130</sup> It was not until the late 1990s, long after Lamar's death, that the Texas legislature finally took legal steps to repudiate this policy.<sup>131</sup>

Under federal law, Indians in Texas and across the nation were relegated to a strikingly inferior position within the dominant White Anglo-Saxon American society.<sup>132</sup> Indians could not vote in federal elections until 1924.<sup>133</sup> Ignoring the law, many states persistently resisted expanding the franchise to Indians, as well as Black people, well

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130. WEBB, *supra* note 33, at 31; LA VERE, *supra* note 9, at 26 (writing on the Anglo American settlers, "Many of these settlers came from the states of the lower South and brought with them old prejudices against Indians.").

131. TEX. CONST. art. VI, § 7, *amended by* Tex. H.R.J. Res. 62, 76th Leg., R.S. (1999) (deleting from the governor's powers as commander-in-chief of the state military forces "and to protect the frontier from hostile incursions by Indians or other predatory bands").

132. *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.") (emphasis original); *see also* Joseph William Singer, *Lone Wolf, or How to Take Property by Calling It a "Mere Change in the Form of Investment"*, 38 TULSA L. REV. 37, 37-39 (2002) ("[J]ust as *Dred Scott* ruled that African-Americans were beyond the protection of the Constitution, *Lone Wolf* appeared to rule that all questions regarding federal power over Indians and Indian nations were 'political questions' unreviewable by courts. Under this scheme, Congress has 'plenary power' over Indians and Indian affairs; the Court interpreted plenary power to mean absolute power—an interpretation that would be applicable to no other class of persons. As it did in *Dred Scott*, this meant that Indians had no constitutional rights whatsoever[.] . . . [This] idea . . . has been partially repudiated by the Supreme Court, as has the holding of *Dred Scott*. . . . Although the Court has granted tribes constitutional protection against the uncompensated taking of some, but not all, tribal property rights, it has never otherwise struck down an act of Congress affecting Indian affairs no matter how deeply it cut into reserved tribal rights previously protected under federal law and solemn treaties." Speaking on the unrepudiated holdings of *Lone Wolf*, "Congress may abrogate an Indian treaty without consent of the tribe[.]" and that "the Supreme Court continues to state, as recently as 1980, that the action complained of in *Lone Wolf* [the forced divestment of land owned by the tribes into private ownership] was not a taking or deprivation of property rights, but rather it was 'a mere change in the form of investment' of the property.").

133. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401 (2018)) (admitting American Indians born in the U.S. to full citizenship, which in turn, granted them the ability to vote through the Fifteenth Amendment of the United States Constitution).



into the 1950s and 1960s, until the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965.<sup>134</sup>

Even so, there is still active voter suppression in America.<sup>135</sup> In fact, on April 24, 2017, North Dakota Governor Doug Burgum signed H.B. 1369 into law, which requires a “current residential street address” to vote in North Dakota.<sup>136</sup> The requirement disproportionately suppresses the franchise of American Indians because reservations often lack street

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134. Before 1924, several states, including Colorado, Montana, Nebraska, Oregon, South Dakota, and Wyoming, required voters to be citizens. Before the Indian Citizenship Act of 1924, reservation Indians were considered non-citizens, as well as non-reservation Indians who could not prove, to the satisfaction of the courts, that they had abandoned their tribal relations. See Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 180-94 (1991) (providing an understanding of the evolution of state disenfranchisement of Indians). See generally AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (Vine Deloria, Jr. ed., 1985) (providing an overview of American Indian political relations, federal policies, and rights); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS: 1880-1920, at 211-38 (1984) (detailing the contentious history of American Indian citizenship). Other states, including California, Minnesota, North Dakota, Oklahoma, and Wisconsin, required that voters be “civilized.” In 1917, the Minnesota Supreme Court defined “civilized” as “Tribal Indians” who were not “taking up [their] abode outside the reservation and there pursuing the customs and habits of civilization.” *Opsahl v. Johnson*, 163 N.W. 988, 991 (Minn. 1917). Still other states, including Arizona, Idaho, Nevada, New Mexico, Utah, and Washington, barred “Indians not taxed” from the polls. In 1928, the Arizona Supreme Court in *Porter v. Hall*, 271 P. 411, 416 (Ariz. 1928), went so far as to equate “federal guardianship” of Indians as synonymous with “persons with disability” as further grounds to disenfranchise American Indians. The court did not reverse itself until 1948 in the case of *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948). In 1956, the Utah Supreme Court held in *Allen v. Merrill*, 305 P.2d 490 (Utah 1956) that Indians living on reservations within Utah were not residents of the state. In 1957, the U.S. Supreme Court vacated the decision. Until 1965 in Texas, literacy tests, poll taxes, and voter intimidation and harassment were the primary instruments of those in power to keep American Indians, as well as Blacks, Hispanics, and poor people away from the voting booth. Today, American Indian and minority votes are systematically diluted through gerrymandering, at-large elections, and discriminatory voter identification laws. See generally David P. Van Knapp, Annotation, *Diluting Effect of Minorities’ Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R. Fed. 29 (1978) (collecting and analyzing federal cases dealing with whether gerrymandering or districting schemes violated the Equal Protection Clause of the Fourteenth Amendment); Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1444-48 (2002) (explaining that at-large voting systems maintain inequalities in elections); *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/legislation/New%20Voting%20Restrictions.pdf> [<https://perma.cc/WC8X-L5N7>] (last updated Jan. 7, 2019) (listing various voting restrictions implemented by states since the 2010 election).

135. BRENNAN CTR. FOR JUST., *supra* note 134 (listing various voting restrictions implemented by states since the 2010 election).

136. H.B. 1369, 2017 Leg., 65th Gen. Assemb., Reg. Sess. (N.D. 2017).

addresses.<sup>137</sup> On October 9, 2019, the U.S. Supreme Court denied the application to vacate the stay entered by the Eight Circuit,<sup>138</sup> upholding the discriminatory law.

In addition, except for the most menial jobs, it was perfectly legal to shut out Indians from the job market. Long before and decades after Prohibition, federal and state alcohol laws discriminated against Indians more so than with any other minorities. Such laws flat out prohibited the sale of alcoholic beverages to American Indians.<sup>139</sup> Thus, to survive the

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137. *Brakebill, et al. v. Jaeger (ND Voter ID Law)*, NATIVE AM. RTS. FUND, <https://www.narf.org/cases/nd-voter-id/> [<https://perma.cc/N3TU-TT42>]; Cecily Hilleary, *Native Americans Decry Supreme Court Ruling on Voter ID in North Dakota*, VOICE AM. (Oct. 15, 2018, 5:33 PM), <https://www.voanews.com/a/native-americans-decry-supreme-court-ruling-on-voter-id-in-north-dakota/4614355.html> [<https://perma.cc/7DB6-RAN4>].

138. *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018), *request denied*, 139 S. Ct. 10 (2018) (Ginsberg & Kagan, JJ., dissenting).

139. *See* Act of June 15, 1938, ch. 435, 52 Stat. 696 (1938) (amending Act of July 23, 1892, ch. 234, 27 Stat. 260 (1892)) (“Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian who is a ward of the Government under charge of any Indian superintendent or agent, or to any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished for the first offense by imprisonment for not more than one year, and by a fine of not more than \$500, and for the second offense and each offense thereafter by imprisonment for not more than five years, and by a fine of not more than \$2,000: *Provided, however,* That the person convicted shall be committed until fine and costs are paid: *And provided further,* That first offenses under this section may be prosecuted by information, but no person convicted of a first offense under this section shall be sentenced to imprisonment in a penitentiary or required to perform hard labor. It shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this section shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section 1014 of the Revised Statutes [18 U.S.C. § 591] as amended. And all persons so arrested shall, unless discharged upon

White man's malicious discrimination and acquire the basic attributes of a normal human existence, including the right to work, travel, reside where one desires, marry and raise a family without government interference, and yes, even the right to drink the "spirited beverages," many American Indians in Texas and across the nation shape-shifted.<sup>140</sup> That is to say, they took on forms that were less frightening and threatening to the dominant White majority. They bowed to the old census takers' description of themselves by passing themselves off as members of the White dominant majority, or if they were too dark in complexion, by passing themselves off as Spanish American, Mexican American, or African American—anything but Indian.<sup>141</sup>

For many American Indian people, this meant relinquishing their culture altogether and totally embracing the White man's culture. They dressed in White man's clothes, spoke English only, attended White schools, learned White professions, converted to Christianity, and married Whites or persons similarly situated. They continued the lie by informing their children and grandchildren that they, too, were White only or of some other race or ethnicity other than American Indian. Yet, there were those keepers of the fire that stubbornly clung to their old traditions.<sup>142</sup> In public, they, too, could appear as non-Indian, but in private, they were Indian to the core, still practicing the sacred

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examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense.").

140. Part of American Indian culture has many stories and beliefs about shape-shifters. Both shamans and animals possessed this special power.

141. U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, FOURTEENTH CENSUS TAKEN IN THE YEAR 1920 VOL. II POPULATIONS 1920: GENERAL REPORT AND ANALYTICAL TABLES 17 (1922) ("The returns for Indians are subject to some degree of uncertainty because of the practice of treating Indians as all persons having any trace of Indian blood. Such persons in some cases [cannot] be distinguished by their appearance from pure-blooded white persons, and as a result some of them have doubtless been reported as white at one census and as Indian at another . . .") [hereinafter U.S. BUREAU OF THE CENSUS, FOURTEENTH CENSUS TAKEN IN THE YEAR 1920]. In North Carolina, Cherokees that escaped removal to Oklahoma often passed themselves off as "Black Dutch."

142. See generally DELORIA, *supra* note 127, at 16 ("The best characterization of tribes is that they stubbornly hold on to what they feel is important to them and discard what they feel is irrelevant to their current needs. Traditions die hard and innovation comes hard. Indians have survived for thousands of years in all kinds of conditions. They do not fly from fad to fad seeking novelty. That is what makes them Indian.")

ceremonies and native ways of healing and even speaking the ancient tongue.<sup>143</sup>

In San Antonio, Texas, the American Indian renaissance began in earnest with the Coahuiltecans, a tribe once believed extinct.<sup>144</sup> One day in 1965, startled White Texans awoke to find that the Coahuiltecans had “never died out. . . . [They] still [had their] spirituality and beliefs. . . . [In] private [many had] practiced Indian ceremonies and traditions” for generations.<sup>145</sup> Moreover, they were loaded for bear. Indian bones became the issue that caused the Coahuiltecan people to resurface and publicly claim their heritage when the archdiocese of the Catholic Church in San Antonio permitted the excavation of an Indian cemetery at Mission San Juan Capistrano by archaeologists.<sup>146</sup>

American Indians, in a futile attempt to prevent the exploitation of what archaeologists called a “gold mine” of Indian bones, protested.<sup>147</sup> San Antonio journalist John Davidson recounted, “Every university was trying to get their hands on them. They could be farmed out to get grant money. The archbishop let the University of Texas dig up piles of Indian remains.”<sup>148</sup> In the end, 150 bundles of bones were unearthed, representing at most, that many individuals; however, the Catholic

143. See, e.g., S. K. ADAM, *EXTINCTION OR SURVIVAL?: THE REMARKABLE STORY OF THE TIGUA, AN URBAN AMERICAN INDIAN TRIBE* 58-61 (2009) (“Tigua (indeed, all Pueblo peoples’) beliefs and practices are composed of highly guarded secret rituals. . . . The tradition of secrecy became embedded within Puebloan religious practice from the earliest days of Spanish persecution. While ostensibly practicing Catholicism, the Tigua developed a religious system that combines Native and Western religious thought, operates smoothly, and appears (at least to outside observation) to be consistent.” Quoting Tigua tribal members, “We tricked the Spanish into thinking that we had accepted Christianity, by practicing in front of the churches, while at the same time having our own religion going on without them knowing. Back then we started the whole way of worshipping their saints, who are our saints now, and it was done so that they didn’t know.”).

144. See Davidson, *supra* note 129, at 1H (“The American Indians who built the missions in San Antonio have been considered extinct for generations. Now descendants say their people never died out; they went underground to survive.”); see also, e.g., SWANTON, *supra* note 20, at 309-12 (“The Coahuiltecan tribes were spread over the eastern part of Coahuila, México, and almost all of Texas west of San Antonio River and Cibolo Creek.” “Today none of these Indians are known to survive in Texas.”); see also CAMPBELL, *supra* note 26, at 17-19, 60 (“[T]he Coahuiltecans would be the only group genuinely accepting of missionary efforts by the Spanish.”).

145. Davidson, *supra* note 129, at 1H, 5H (suggesting for years, Coahuiltecans were denied their right to enter the cemetery where their ancestors were buried, and every Día de los Muertos, they would pray and practice their beliefs from across the street).

146. *Id.* at 5H.

147. *Id.*

148. *Id.*

Church “violated a sacred trust,” as the disinterred skeletons belonged to Indians who were baptized Catholic and buried in the church cemetery.<sup>149</sup> For decades, pain, resentment, and anger burned in the hearts of these lineal descendants of those long dead Mission Indians.<sup>150</sup> Davidson continued,

Indians believe that when you disturb a person’s remains, you interfere with their existence in the afterworld. Archeologists, however, justify their work by saying that it is the only way to learn about a lost culture. Central to this thinking is the presumption that a culture is lost, and that there are no ancestors. This, of course, is the thinking of the victor in a cultural war.<sup>151</sup>

In 1990, the passage of the Native American Graves Protection and Repatriation Act (NAGPRA) brought about a big change in the operation.<sup>152</sup> Under NAGPRA, the federal government recognized lineal descendants of American Indian tribes and required that institutions receiving federal funds return the remains of Indians and funerary objects to their descendants.<sup>153</sup> Yielding to federal law, the archdiocese joined a petition to compel the University of Texas at San Antonio (UTSA) to return the bones disinterred at San Juan.<sup>154</sup>

UTSA actively resisted for several years and did not relinquish the bones until 1999.<sup>155</sup> The Coahuiltecas held a ceremony at the mission, and Archbishop Patrick Flores performed a Catholic Mass.<sup>156</sup> Archbishop Flores apologized to the American Indian community for allowing the graves to be disturbed, and he announced the archdiocese

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149. *Id.*

150. REASSESSING CULTURAL EXTINCTION: CHANGE AND SURVIVAL AT MISSION SAN JUAN CAPISTRANO, TEXAS 88 (Alston V. Thoms ed., 2001), [https://www.researchgate.net/profile/Alston\\_Thoms/publication/276847975\\_Reassessing\\_Cultural\\_Extinction\\_Change\\_and\\_Survival\\_at\\_Mission\\_San\\_Juan\\_Capistrano\\_Texas/links/555a576008ae980ca6117ae7/Reassessing-Cultural-Extinction-Change-and-Survival-at-Mission-San-Juan-Capistrano-Texas.pdf](https://www.researchgate.net/profile/Alston_Thoms/publication/276847975_Reassessing_Cultural_Extinction_Change_and_Survival_at_Mission_San_Juan_Capistrano_Texas/links/555a576008ae980ca6117ae7/Reassessing-Cultural-Extinction-Change-and-Survival-at-Mission-San-Juan-Capistrano-Texas.pdf).

151. Davidson, *supra* note 129, at 5H.

152. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. § 3001 (2018)).

153. *Id.* (defining “museum” as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items.”).

154. Davidson, *supra* note 129, at 5H.

155. *Id.*

156. *Id.*

was in the process of returning to Tap Pilam, a band of Coahuiltecs, hundreds of funerary objects.<sup>157</sup>

The Coahuiltecs had several other successes during their struggle with UTSA.<sup>158</sup> In February 1994, the Catholic Church asked Tap Pilam to participate in the burial of thirty-seven American Indians who had been dug up in the 1930s when the downtown post office was built.<sup>159</sup> In 1994, they took burial records to the city and to the Daughters of the Republic of Texas which showed that the small stone-paved street in front of the Alamo covered an Indian cemetery.<sup>160</sup> The mayor at the time said he was more concerned with traffic flow than graves, but the street was closed and it remains so.<sup>161</sup> The American Indians of Texas, concerned about another Coahuiltec burial ground, were also among the groups that stopped construction at the Applewhite Reservoir.<sup>162</sup>

Today, a debate rages on the criteria for determining whether a person shall be defined as an American Indian.<sup>163</sup> For example, Senator Elizabeth Warren embroiled herself in this debate by releasing the results of a DNA test to claim a distant American Indian heritage, amid taunts from President Donald Trump.<sup>164</sup> Sociologist James L. Simmons observed six ways to define American Indians in the United States.<sup>165</sup>

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*; see, e.g., Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §3001 (2018)) (defining “burial site” as any “natural or prepared physical location, whether originally below, on or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited”).

163. Davidson, *supra* note 129, at 5H.

164. Alex Horton, *Elizabeth Warren Angers Prominent Native Americans with Politically Fraught DNA Test*, WASH. POST (Oct. 16, 2018, 3:38 PM), [https://www.washingtonpost.com/nation/2018/10/16/elizabeth-warren-angers-prominent-native-americans-with-politically-fraught-dna-test/?utm\\_term=.832c10a82d8e](https://www.washingtonpost.com/nation/2018/10/16/elizabeth-warren-angers-prominent-native-americans-with-politically-fraught-dna-test/?utm_term=.832c10a82d8e) [<https://perma.cc/9TMS-EL3C>].

165. James L. Simmons, *One Little, Two Little, Three Little Indians: Counting American Indians in Urban Society*, 36 HUMAN ORG. 76, 76, 78 (1977) (“[B]eing counted and recognized as an ‘American Indian’ in an urban milieu is a matter of the social permission and validation of non-Indian controlled institutions, rather than a matter of Indian individual, family, or community choice. In contrast, an Indian reservation, by its social and legal definitions, is a place for Indian land, Indian people, institutions of Indian people (i.e., Indian culture), and Indian oriented institutions such as the Bureau of Indian Affairs and other governmental organizations.”).

These definitions serve different purposes, and, depending on which one is used, can dramatically decrease or increase the American Indian population.<sup>166</sup> They are:

1. **Legal Definition:** A law made by a political entity describes who is Indian according to specific criteria.<sup>167</sup> The political entity may be federal, state, local or tribal.<sup>168</sup> A more detailed discussion of this way of determining who is Indian will be discussed in detail in Part Two.
2. **Self-declaration:** A person self-identifies as American Indian. The U.S. Census Bureau relies on this definition, which makes it possible to classify and count American Indians with the same precision and honesty that it employs for counting other minorities.<sup>169</sup> Thornton stated it best, “Allowing self-definition and the differences it encompasses is simply to allow American Indians to be American Indians, something done all too infrequently in the short history of the United States.”<sup>170</sup> See Appendix Table Three and Table Four. Because of the census’ definition of Indian, these tables provide the most accurate picture of the American Indian population in Texas from the 2000 decennial census. The importance of this method for identifying Indians will receive more detailed discussion in Part Two of this article.
3. **Community Recognition:** The individual is recognized as American Indian by other American Indians.<sup>171</sup>
4. **Recognition by non-Indians:** People outside the Indian community treat the individual as an Indian, using any criteria that the non-Indians wish to employ. It may be due to self-declaration

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166. See generally *id.* at 78 (believing “[no] method is more accurate or objective than any other[.]”).

167. See, e.g., *id.* (“enrollment in a recognized tribe”).

168. *Id.*

169. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5, at 2.

170. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 224. *But see* DELORIA, *supra* note 127, at 2-3 (“During my three years as Executive Director of the National Congress of American Indians it was a rare day when some white didn’t visit my office and proudly proclaim that he or she was of Indian descent.”).

171. Simmons, *supra* note 165, at 78.

of the American Indian. It may be through descent from an enrolled member of a tribe or through secondary evidence, such as birth certificates, death certificates, historical records, the census, family Bibles, adoption records, name changes, or other legal documents, indicating that the individual is American Indian or progeny thereof, or other criteria.<sup>172</sup>

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172. See generally DELORIA, *supra* note 127, at 2 (“The more we try to be ourselves the more we are forced to defend what we have never been. The American public feels most comfortable with the mythical Indians of stereotype-land who were always THERE. These Indians are fierce, they wear feathers and grunt. Most of us don’t fit this idealized figure since we grunt only when overeating, which is seldom.”); see, e.g., ADAM, *supra* note 143, at 117-18 (“In April 1967, the Tigua went to Austin to prove their identity. ‘Unacknowledged Indians often have to ‘play Indian’ to gain access to valuable state and federal resources. For unacknowledged tribes, their ‘Indianness’ is not a given and must be constructed to meet the expectations of the dominant culture.’ This fact was not lost on the Tigua, who, even after winning recognition, had to continue ‘playing Indian’ at the statehouse every year. Tribal member Jesus, in particular, loathed the experience: ‘Those white people in Austin . . . only see an Indian when they are wearing feathers and acting like a savage.’ Conceding that ‘you have to play along sometimes to get what you need.’ Jesus, nonetheless, expresses his displeasure that the Tigua were forced to prove themselves. ‘Why should we have to? We’ve been here over three hundred years. How much more ‘proof’ do you need?’ In order to prove the Tigua authentic to the gathered state legislators, [El Paso attorney Tom] Diamond assembled a panel of experts, such as anthropologists Nicholas Houser and Bernard Fontana, who presented scholarly reports. Additionally, Isleta governor Andy Abieta and National Congress of American Indians (NCAI) executive Georgeann Robinson provided Indian validation as a complement to the expert testimony. Tigua leaders Jose Granillo, Miguel Pedraza, Trinidad Granillo, and others came ready to play Indian for the legislators, bringing Indian food and wearing traditional outfits, including headbands, feathers, and ocher paint. During the hearing, Tigua members chanted and [performed] several dances to the beat of the Tigua drum and gourd rattles . . .’ The Tigua’s performance, coupled with Abieta’s and the NCAI’s confirmation of their Indianness, had clearly met the expectations of the Texas legislators as to the group’s ‘authenticity.’ In addition, the Tigua (fortunately for them) possessed stereotypically Indian phenotypic characteristics, which many whites require when determining whether someone is a real Indian. After seeing the evidence, members of the Texas state government agreed to assume responsibility for the group.”) (quoting MARK E. MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGEMENT PROCESS 224, 228, 229 (2004)); see also Emory Sekaquaptewa, *Hopi Indian Ceremonies*, in SEEING WITH A NATIVE EYE 41 (Walter Holden Capps ed., 1976) (“It is my belief that those Indians who have retained their own cultural values to the highest degree are not concerned with convincing anyone that they are Indians. Those who, for various reasons have not been able to retain their cultural values are quite concerned with convincing their audience that they are Indians. It is manifested through an aggressive attitude and an intense effort to prove to the world that “I am Indian.” As a result, we have come recently to see a development of pan-Indianism. . . . [The non-Indian] has put together various characteristics of Indians across the country and has produced a new image, which is a stereotype Indian. . . . [A]nd not an accurate reflection of our empirical reality. . . . In terms of bringing awareness of the Indian to the non-Indian, it serves well. Once the non-Indian becomes aware of the existence of Indians



5. **Biological Criteria:** The traditional method was a specified percentage of Indian blood (called a blood quantum),<sup>173</sup> but with the advent of publicly available genetic testing, there are now those who may claim American Indian ancestry through DNA analysis.<sup>174</sup> In Vermont, the Western Mohegans lobbied their legislature to recognize a DNA test for a tribal status determination because they lacked adequate genealogical documentation.<sup>175</sup>
6. **Cultural Criteria:** A person behaves in a fashion to demonstrate their Indian heritage through participation in Indian cultural practices, traditions, and ceremonies, such as powwows, sweats, rites, or religious services like those in the Native American Church that involve the use of peyote.<sup>176</sup>

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and the richness of their cultures, then he is ready to become interested in a specific tribe of Indians. If this is what is happening, then it is a good thing.”)

173. Simmons, *supra* note 165, at 78; *see, e.g.*, ADAM, *supra* note 143, at 82, 114, 125 (“The most overt example of a continuing government program of genocide . . . is the fact that blood quantum standards remain as the true measuring stick used by the government as part of its recognition criteria, despite the fact that government officials know that culture is transmitted through learning and is not innate. The Tigua are an example of a federally recognized Indian community who, unless changes are made, will be legally extinct within a handful of generations.” “Tribes normally set their own membership criteria, yet to [receive federal recognition] the Tigua agreed to limit eligibility to receive federal services to individual members who could demonstrate at least one-eighth blood quantum[.]” Quoting a young female Tigua in 1993, “Someday we’re going to run out of blood. My blood quantum is one-eighth. The government says that after one-eighth, you are no longer a member of the tribe. Everybody my age is one-eighth, and we are the ones next in line to run the tribal government. After us, who is going to do it? The government has made us history. We helped them slash our own throat!”).

174. Jessica Bardill, *Tribal Enrollment and Genetic Testing*, AM. INDIAN & ALASKA NATIVE GENETICS RES. CTR., <http://genetics.ncai.org/tribal-enrollment-and-genetic-testing.cfm> [<https://perma.cc/ME3T-HL23>].

175. Eric Beckenhauer, Note, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161, 184-86 (2003).

176. Simmons, *supra* note 165, at 78. Interestingly, Quanah Parker is credited with founding the Native American Church and the Peyote movement. Reportedly on his deathbed while visiting Texas following the deaths of his mother and sister, he requested his White grandmother, Cynthia Ann’s mother, bring him a medicine man as he was unable to tolerate White foods. She did not know any medicine men, but she sent for a Mara’akame, the Mexican term for an herbal curer, who dosed him with peyote flesh and healed him. *Quanah Parker, Medicine Man and Chief*, OKLEVUEHA NATIVE AM. CHURCH, <https://nativeamericanchurches.org/quanah-parker-medicine-man-and-chief/> [<https://perma.cc/RK5R-4YHA>].

PART TWO: *MCALLEN GRACE BRETHERN CHURCH V. SALAZAR*I. AN AMERICAN HISTORY OF INHIBITING THE PRACTICE  
OF AMERICAN INDIAN RELIGION

The history of discrimination against American Indian religion and culture in the United States is long and sad. In 1883, the U.S. Department of the Interior's Commissioner of Indian Affairs, Hiram Price, declared that "the old heathenish dances" associated with American Indian powwows and other religious practices were "a great hindrance to the civilization of the Indians."<sup>177</sup> In 1884, he promulgated a *Court of Indian Offenses*, declaring all dances and feasts associated with Indian powwows and other religious ceremonies "Indian offenses."<sup>178</sup> The *Court* specifically targeted American Indian religious leaders, ruling:

The usual practices of so-called "medicine-men" shall be considered "Indian offenses" . . . , and whenever it shall be proven . . . that the influence or practice of a so-called "medicine-man" operates as a hindrance to the civilization of a tribe . . . to prevent the Indians from abandoning their heathenish rites and customs, he shall be adjudged guilty of an Indian offense . . . [and] confined in . . . prison . . . until such time as he shall produce evidence . . . that he will forever abandon all practices styled Indian offenses . . . .<sup>179</sup>

With the *Court of Indian Offenses*, the government effectively outlawed American Indian religion.<sup>180</sup> Indians caught participating in powwows, potlatches, sun dances, sweat lodge and tipi ceremonies, or wearing feathers of their sacred birds were denied federal rations,

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177. M. TELLER & HIRAM PRICE, U.S. DEP'T OF THE INTERIOR, U.S. OFFICE OF INDIAN AFF., RULES GOVERNING THE COURT OF INDIAN OFFENSES 1 (1883), <https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf> [<https://perma.cc/Q69E-N37P>].

178. *Id.* at 3 (listing "[t]he 'sun-dance,' the 'scalp-dance,' the 'war-dance,' and all other so-called feasts").

179. *Id.* at 4.

180. *See id.* at 3-4 (banning rituals, certain types of marriages, "medicine-men," funereal procedures, and intoxication); *see also* DELORIA, *supra* note 127, at 106-07 ("From 1860 to 1880, tribes were confined to reservations, . . . Indian religious life was forbidden. . . . Soon the only social activity permitted on reservations was the church service. Signs of any other activity would call for a cavalry troop storming in to rescue civilization from some non-existent threat.").

arrested, and imprisoned.<sup>181</sup> Thus, Professor Robert Clinton<sup>182</sup> drew a parallel between Indian reservations and concentration camps, “the federal government’s message to tribal Indians was crystal clear—abandon your traditional culture . . . *or starve*.”<sup>183</sup>

By the late nineteenth century, the federal government, in an attempt to “civilize” American Indians, regularly kidnapped Indian children to educate them.<sup>184</sup> In 1892, Captain Richard Pratt, the founder of the first Indian boarding school in Carlisle, Pennsylvania stated the objective of removing Indian children from their families and educating them in boarding schools hundreds of miles from their homes was to make certain “that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”<sup>185</sup> In 1933, the war on Indian religions briefly

181. See generally TELLER & PRICE, *supra* note 177, at 3-4 (punishing offenders by withholding rations for up to thirty days or to a length of time at the discretion of an agent or a court, or by imprisonment up to ninety days).

182. Robert N. Clinton is an author of MONROE E. PRICE ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* (LexisNexis 4th ed. 2005). He served as the Foundation Professor of Law at the Sandra Day O’Connor College of Law at Arizona State University (ASU) and was an affiliated faculty member of the ASU American Indian Studies Program. He serves as chief justice of the Winnebago Supreme Court and the Hopi Court of Appeals, a licensed justice of the Salt River Pima Maricopa Community Court of Appeals, a justice of the Hualapai Court of Appeals, and as judge pro tem for the San Manuel Band of Serrano Mission Indians Tribal Court. For twenty years, he served as an associate justice of the Cheyenne River Sioux Tribal Court of Appeals and the Colorado River Indian Tribes Court of Appeals; and temporary judge or arbitrator for other tribes, as well as having acted as an expert witness or consultant in Indian law. *Basic Bio*, OFF. ROBERT N. CLINTON, <http://robert-clinton.com/> [<https://perma.cc/V4HL-HR6D>].

183. *Code of Indian Offenses*, OFF. ROBERT N. CLINTON, [http://robert-clinton.com/?page\\_id=289](http://robert-clinton.com/?page_id=289) [<https://perma.cc/FB2E-7TUP>] (emphasis original).

184. JOEL SPRING, *DECULTURALIZATION AND THE STRUGGLE FOR EQUALITY* 14-15, 31-36 (6th ed. 2010) (tracing the practice to the seventeenth century but taking off in earnest in the late nineteenth century with the rise of “boarding schools.” Quoting then-Commissioner for the U.S. Bureau of Education William T. Harris, the education policy regarding American Indians was “to obtain control of the Indian at an early age, and to seclude him as much as possible from the tribal influences.” Quoting then-Commissioner of Indian Affairs Thomas J. Morgan, “Children should be taken at as early an age as possible, before camp life has made an indelible stamp upon them.”).

185. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, in *AMERICANIZING THE AMERICAN INDIANS*, at 260-71 (Francis Paul Prucha ed., 1973); SPRING, *supra* note 184, at 33. See generally *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*35-39 (10th Cir. Aug. 8, 2001), *vacated by and reh’g en banc*, *United States v. Hardman*, 260 F.3d 1199 (2001) (“For approximately sixty years (1871-1928), the federal government conducted an official policy of ‘assimilation’ towards Native Americans, which resulted in a ‘systematic attempt to eradicate Indian heritage and tribalism.’ . . . The 1950s saw an official policy of ‘termination,’ in which the federal government sought to end the ‘trust relationship’ between the federal government and Indian tribes, and Congress voted to ‘terminate’ numerous tribes. . . . An ‘important practical effect

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of termination was to remove the sovereignty of terminated tribes. Although the termination acts did not expressly extinguish the governmental authority of such tribes, most were not able to exercise their governmental powers after the loss of their land base.' . . . Overall, 'federal policy toward the recognition of Indian tribes has been by no means consistent with "real" ethnological principles: Congress has frequently consolidated previously distinct groups into a single tribe for recognition purposes, or has divided an individual tribe into two or more groups, recognizing each in turn as a "different" Indian "nation." Congress has also occasionally "terminated" tribes' federal recognition, in some cases only to "restore" it thereafter . . .'. . . Mr. Saenz's tribe, the Chiricahua Indians, was once a federally-recognized tribe with its own reservation. That status was revoked, however, when the federal government dissolved the Chiricahua reservation in 1886 after the outbreak of warfare between the Apache and the United States. . . . It has largely been the federal government's policies toward the Indian tribes over the years that have determined which tribes have survived and which tribes have not. On the one hand, historical government policy toward the Chiricahua tribe may have made it impossible for that tribe to obtain federal recognition today, while on the other hand, the government now wants to use that same lack of recognition to infringe on Mr. Saenz's religious freedom. We refuse to base Mr. Saenz's free exercise rights on such tenuous ground. Congress has explicitly declared a policy 'to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.' Against this background, we do not believe that Mr. Saenz's free exercise rights should be conditioned on his 'political' status—whether or not he is a member of a federally-recognized tribe. . . . Finally, the government alleges that allowing Mr. Saenz and others like him to obtain eagle permits will result in a permit system that is administratively unfeasible. . . . [W]e cannot ignore the fact that the government operated the permit system for eighteen years without requiring an applicant to be a member of a federally-recognized tribe. The government operates programs for Native Americans under the [Indian Reorganization Act] and [Indian Health Care Improvement Act] that do not require participants to be members of federally-recognized tribes. Presumably, the government has found a way to allocate the limited resources in those programs (scholarship funds and grants) among the programs' applicants. The government will have to do the same here. As the district court stated, '[T]he federal government may find it difficult, time-consuming or bothersome to identify authentic Indian tribes ethnologically rather than simply politically, but the present test will never provide for the individual free exercise of religion precisely because of cases like the present one and because whether or not a particular tribe has been formally recognized for political purposes bears no relationship whatsoever to whether or not an individual practitioner is of Indian heritage by birth, sincerely holds and practices traditional Indian religious beliefs, is dependent on eagle feathers for the expression of those beliefs, and is substantially burdened when prohibited from possessing eagle parts.'" (first quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 127-43 (The Michie Co. 1982) (1942); then quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 152-75 (The Michie Co. 1982) (1942); then quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 175 (The Michie Co. 1982) (1942); then quoting Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 156 (1995); then quoting American Indian Religious Freedom Act, 42 U.S.C. § 1996 [(2018)]).

abated when John Collier, Franklin Roosevelt's Commissioner of Indian Affairs, eliminated the bans on Indian dances and other customary practices.<sup>186</sup>

In 1940, however, the war on Indian religions took on a new dimension when Congress passed "An Act for the Protection of the Bald Eagle," which empowered the Secretary of the Interior to enforce a prohibition on taking, selling, possessing, and transporting bald eagles (dead or alive) and bald eagle parts, nests, and eggs.<sup>187</sup> These regulations directly impacted Indian peoples who considered the eagle sacred and who used eagle feathers for religious purposes. Congress was clearly cognizant of this effect on Indian religion as evidenced in testimony during hearings on a 1962 Amendment to include the golden eagle in the Act's protection.<sup>188</sup> As with most federal legislation impacting Indians, there was no testimony from any Indians.<sup>189</sup> The Amendment passed, creating the Bald and Golden Eagle Protection Act (BGEPA).<sup>190</sup> Under the

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186. Compare JOHN COLLIER, COMM'R OF INDIAN AFF., U.S. DEP'T OF THE INTERIOR, CIRCULAR NO. 2970: INDIAN RELIGIOUS FREEDOM AND INDIAN CULTURE (Jan. 3, 1934) ("No interference with Indian religious life or ceremonial expression will hereafter be tolerated. . . . The Indian arts and crafts are to be prized, nourished, and honored."), with CHARLES H. BURKE, COMM'R OF INDIAN AFF., U.S. DEP'T OF THE INTERIOR, A MESSAGE TO ALL INDIANS (Feb. 24, 1923) ("I feel that something must be done to stop the neglect of stock, crops, gardens, and home interests caused by these dances or by celebrations, pow-wows, and gatherings of any kind that take the time of the Indians for many days. . . . you should not do evil or foolish things or take so much time for these occasions. No good comes from your 'give-away' custom at dances and it should be stopped. It is not right to torture your bodies or to handle poisonous snakes in your ceremonies. All such extreme things are wrong and should be put aside and forgotten."); Ojibwa, *Indians 201: Indians, Eagles, and the Law*, DAILY KOS (June 7, 2012, 10:45 AM), <https://www.dailykos.com/stories/2012/06/07/1098233/-Indians-201-Indians-Eagles-and-the-Law> [https://perma.cc/Z67T-H24U].

187. An Act for the Protection of the Bald Eagle, ch. 278, 54 Stat. 250-51 (1940), amended by Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (adding protection of golden eagles) (codified as amended at Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (2018)).

188. 108 CONG. REC. 22,272-73 (1962) ("The golden eagle is important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them. . . . The mythology of almost every tribe is replete with eagle beings[']. . . . There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites.") (quoting HANDBOOK OF AMERICAN INDIANS, PART 1, at 409-10 (Frederick Webb Hodge ed., 1907)).

189. 108 CONG. REC. 22,269-73 (1962).

190. Act of Oct. 24, 1962, Pub. L. No. 87-884, 76 Stat. 1246 (1962) (codified as amended at Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (2018)).

BGEPA, the use of eagle feathers is a federal offense.<sup>191</sup> Federal officials used the BGEPA to persecute individual spiritual leaders and traditional practitioners.<sup>192</sup>

The BGEPA allows the government to permit Indians to possess and use eagle feathers and parts for Indian religious practices and ceremonies.<sup>193</sup> But nowhere in the statute does it limit this permission to Indians enrolled in federally recognized tribes, it only mentions “Indian tribes.”<sup>194</sup> After passage of the law, the government instituted a permit system that operated for more than twenty years without any regulation requiring an applicant to be a member of a federally recognized tribe.<sup>195</sup> However, the government used its discretion to deny permits to *any* Indian not enrolled in a federally recognized tribe.<sup>196</sup> For those enrolled in federally recognized tribes, fewer than 2% ever received permits from the government for their feathers.<sup>197</sup> It also should be noted that the government extended its permit system to cover the 1,026 other species of birds listed on the Migratory Bird Treaty Act

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191. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2018) (mirroring the 1940 act, “take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import,” with a criminal penalty of a maximum fine of \$5,000 and/or a maximum prison sentence of a year, and a maximum civil penalty of \$5,000 per violation).

192. See Ojibwa, *supra* note 186 (detailing arrests of Indians under the BGEPA).

193. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2018).

194. *Id.*

195. Compare Possession and Use for Religious Purposes, 31 Fed. Reg. 16,011, 16,012 (Dec. 15, 1966) (codified at 50 C.F.R. § 11.5 (1966)), <http://cdn.loc.gov/service/ll/fedreg/fr031/fr031242/fr031242.pdf> [<https://perma.cc/L946-WCEP>] (providing that the Secretary of the Interior may issue “to those individual Indians who are authentic, bona fide practitioners of such religion.”), with Permits for Indian Religious Purposes, 39 Fed. Reg. 1183, 1184 (Jan. 4, 1974), <http://cdn.loc.gov/service/ll/fedreg/fr039/fr039003/fr039003.pdf> [<https://perma.cc/9ZUZ-63CH>] (“Each [permit] application must contain: . . . certification from the Bureau of Indian Affairs that the applicant is an Indian.”) and What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999) (“Your application for . . . any permits under this section must also contain . . . a certificate of enrollment in an Indian tribe that is federally recognized under the Federally Recognized Tribal List Act of 1994, 25 U.S.C. § 479a-1 (1994).”).

196. See, e.g., *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*12-13, \*25 (10th Cir. Aug. 8, 2001), *vacated by and reh’g en banc*, *United States v. Hardman*, 260 F.3d 1199 (2001) (failing to be persuaded by the government’s argument that restricting permits to members of federally recognized tribes was the least restrictive means of forwarding the compelling interests of eagle conservation and federal treaty fulfillment).

197. DaShanne Stokes, *Eagle Feathers and the Imperialist Conquest of State-Recognized Tribes*, INDIAN COUNTRY TODAY (Aug. 13, 2008), <http://www.dashannestokes.com/eagle-feathers-and-imperial-conquest-state-recognized-tribes.html> [<https://perma.cc/W8HL-X9NX>].

(MBTA).<sup>198</sup> This further limited the use of bird feathers by Indian people.<sup>199</sup> Only a few hundred permits were issued for non-eagle feathers.

In 1999, during a federal lawsuit deciding whether an American Indian not enrolled in a federally recognized tribe could possess eagle feathers,<sup>200</sup> the government issued regulations, stating *only* members of federally recognized tribes could possess and use eagle feathers and parts for religious practices and ceremonies,<sup>201</sup> thereby officially shutting off access to feathers for a large number of American Indians in the United States.<sup>202</sup>

## II. SUMMARY OF THE CASE: A CIVIL ACTION

An essential component in the survival and renaissance of Indian culture in Texas and the nation is the courts. The case at hand represents

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198. Migratory Bird Permits, 39 Fed. Reg. 1178-1183 (Jan. 4, 1974) (codified at 50 C.F.R. § 21.11 (2019)); *see also* Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2018) (implementing the conventions between the United States and Great Britain (on behalf of Canada), Mexico, Japan, and Russia, to protect migratory birds); List of Migratory Birds, 50 C.F.R. § 10.13 (2019) (listing protected migratory bird species); *see also* Marshall A. Bowen, Comment, *Avian Jurisprudence and the Protection of Migratory Birds in North America*, 49 ST. MARY'S L.J. 837, 847 (2018) (counting 1,026 species covered by the MBTA).

199. Migratory Bird Permits, 39 Fed. Reg. 1178-1183 (Jan. 4, 1974) (codified at 50 C.F.R. pt. 21 (2013)).

200. *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*15 (10th Cir. Aug. 8, 2001), *vacated by and reh'g en banc*, United States v. Hardman, 260 F.3d 1199 (2001) (stating the plaintiff produced credible evidence of his Indian heritage, but the permit application would have proven futile as he was not a member of a federally recognized tribe).

201. What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999).

202. *See U.S. Federally Non-Recognized Tribes*, MANATAKA AM. INDIAN COUNCIL (May 2015), <https://www.manataka.org/page237.html> [<https://perma.cc/E3SB-M5P9>] (last updated June 18, 2008) [hereinafter MANATAKA AM. INDIAN COUNCIL, *U.S. Federally Non-Recognized Tribes*] (noting as of 2008, 226 tribes were not recognized federally, defined as those formal entities which: 1) applied for federal recognition and the petition has not yet been approved; 2) were previously recognized and recognition was rescinded; or 3) applied for federal recognition and the petition was rejected); *State Recognized Tribes*, 500 NATIONS, [https://www.500nations.com/tribes/Tribes\\_States.asp](https://www.500nations.com/tribes/Tribes_States.asp) [<https://perma.cc/U3KP-W3TG>] (last updated Jan. 1, 2017) (listing eighty tribes that have state recognition, but not federal recognition). *Compare* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863-34,868 (July 23, 2018) (recognizing 573 tribes), *with* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298-13,303 (Mar. 13, 2000) (indicating that only seventeen tribes gained federal recognition over the span of eighteen years).

one of the significant battles recently fought and won by our Indian people.<sup>203</sup> On March 11, 2006, a federal agent raided a Lipan Apache powwow in McAllen, Texas,<sup>204</sup> marking the beginning of a legal battle persisting for nearly eleven years. As a result of the raid, a federal agent confiscated fifty golden eagle feathers protected by the BGEPA and eight waterfowl and songbird feathers allegedly protected by the MBTA.<sup>205</sup>

Three citations were issued to three Indians: Pastor Robert Soto,<sup>206</sup> Michael Russell,<sup>207</sup> and Michael Todd Cleveland.<sup>208</sup> Soto and Russell were cited for violating both the BGEPA and the MBTA,<sup>209</sup> whereas Cleveland was only cited for violating the latter.<sup>210</sup> As previously noted, members of federally recognized Indian tribes may be issued permits to use feathers to engage in bona fide tribal religious activities.<sup>211</sup> However, none of the Indians cited were enrolled in federally recognized tribes.<sup>212</sup> There were two criminal trials for Cleveland, one in magistrate court and the other in district court.<sup>213</sup> Both the magistrate and district court judges ruled against Cleveland because his non-eagle feathers were

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

204. Amended Plaintiffs' Original Complaint for Declaratory Relief at 9, McAllen Grace Brethren Church v. Salazar, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

205. DEP'T OF THE INTERIOR, U.S. FISH & WILDLIFE SERV., OFFICE OF LAW ENF'T, REPORT OF INVESTIGATION, REPORT # 2006201750R001, at 7 (Apr. 20, 2006). The parties dispute the exact number of feathers seized by the agent.

206. In a declaration for this case, Pastor Robert Soto stated that he was ordained and is the founder of McAllen Grace Brethren Church, which ministers primarily to American Indians. He also served as Vice Chairman of the Lipan Apache Tribe of Texas.

207. In a declaration for this case, Michael Russell stated that he was of Creek and Shawnee descent. He also was married to the sister of Pastor Soto. She and their two sons were members of the Lipan Apache Tribe of Texas.

208. Michael Cleveland was of Cherokee heritage. His mother testified at his trial that both were counted on the 2000 U.S. decennial census as Cherokees.

209. McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 468 (5th Cir. 2014).

210. *Id.*

211. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2018); What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (2019) (requiring a certificate enrollment in a federally recognized tribe signed by a tribal official authorized to certify tribal members).

212. McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 471 (5th Cir. 2014). The Lipan Apache tribe is not federally recognized but is recognized by the Texas Senate, and maintains a "government to government" relationship with the State of Texas and the United States government. *Id.* at 473-74.

213. *Id.* at 469.



attached to dream catchers he sold as a vendor at the powwow.<sup>214</sup>

A civil action was filed on behalf of Soto, Russell, Cleveland, and other attendees of the powwow in the Southern District of Texas, and later appealed to the Fifth Circuit, styled *McAllen Grace Brethren Church v. Salazar*.<sup>215</sup> For the Indians, the overarching issue was whether an American Indian, not enrolled in a federally recognized tribe, could practice an American Indian religion that used eagle feathers as a central and essential element to the religion in light of the government's seizure.<sup>216</sup> In defense of their actions, the government asserted two compelling interests: (1) to protect eagles (even though it permitted members of federally recognized tribes to kill eagles); and (2) to protect Indian culture by limiting Indian religion to only a minority of Indians—members of federally recognized tribes.<sup>217</sup>

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214. Amended Plaintiffs' Original Complaint for Declaratory Relief at 10, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009) (indicating Mr. Cleveland was fined \$200). Memorandum in Support of Defendant's Motion to Suppress at 3, *United States v. Cleveland*, Violation No. ST34 W0889336 (S.D. Tex. Sept. 1, 2006) (claiming that among the feathers seized were two pheasant feathers, one farm turkey feather, and one all white duck feather, all affixed to a single dream catcher, none from birds protected by the MBTA).

215. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 469 (5th Cir. 2014).

216. Brief of Appellants at 10, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326); Amended Plaintiffs' Original Complaint for Declaratory Relief at 7, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009) ("The Plaintiffs believe that feathers and bird parts worn, held, and attached to sacred objects are essential and necessary to communicate with, invoke, and give thanks to the Creator and the spirits of their ancestors during religious ceremonies, celebrations, services, and events. . . . Plaintiffs consider each feather and bird part of all birds sacred and a gift from the Creator."); Exhibit A at 2, Memorandum in Support of Defendant's Motion to Suppress, *United States v. Cleveland*, Violation No. ST34 W0889336 (S.D. Tex. Sept. 1, 2006) ("After the confiscation of his sacred eagle feathers at the McAllen Powwow Rev. Soto told a local television reporter, 'It would be like someone telling me I can't worship God; like someone taking the Bible and saying it's illegal; like I can't pray, or carry a cross. In many ways, we've been stripped of who we are as native people.' . . . An eagle feather is so revered that, if one falls from a dancer's regalia at a powwow, the powwow will come to a halt.").

217. Brief of Defendant-Appellee at 20-27, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326); *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 469, 473-74, 478 (5th Cir. 2014); see, e.g., Laura Zuckerman, *Wyoming Tribe Gains Rights to Kill Bald Eagles*, REUTERS (Mar. 14, 2012, 9:40 PM), <https://www.reuters.com/article/us-usa-eagles-tribe/wyoming-tribe-gains-right-to-kill-bald-eagles-idUSBRE82E03520120315> [<https://perma.cc/S3GN-6MES>] ("The Fish and Wildlife Service, which oversees conservation of eagles has granted very few so-called 'take' permits allowing Native Americans to kill golden eagles for religious purposes. . . . The permit allowing a tribal take of bald eagles is believed to be the first of its kind.").

The Indian plaintiffs retorted that on the contrary, the government was suffocating Indian culture by preventing many American Indians—those not enrolled in federally recognized tribes—from practicing their Indian religion.<sup>218</sup> Moreover, the Indians said that they posed absolutely no threat to eagles or any other species listed on the MBTA because they preferred to use naturally shed, or molted, feathers and did not seek to kill or harm eagles or other bird species protected by the MBTA.<sup>219</sup> Ultimately, the U.S. District Court for the Southern District of Texas, McAllen Division, ruled in favor of the government’s motion for summary judgment.<sup>220</sup>

On August 20, 2014, the Fifth Circuit Court of Appeals, in its *de novo* review of the district court’s decision, reversed and remanded the case for proceedings consistent with its opinion, noting that it “cannot definitively conclude that Congress intended to protect only federally recognized tribe members’ religious rights” and that “[t]his case involves eagle feathers, rather than carcasses. It is not necessary for an eagle to die in order to obtain its feathers.”<sup>221</sup>

Shortly after this decision, two preeminent law firms joined the Civil Rights Legal Defense and Educational Fund (CRLDEF) as co-counsel in this case. The first firm was The Becket Fund for Religious Liberty, whose lead attorney was Luke Goodrich. The Becket Fund has been described as “God’s ACLU.”<sup>222</sup> Among its many victories in the U.S. Supreme Court, one of the Becket Fund’s biggest cases was *Burwell v. Hobby Lobby Stores, Inc.*<sup>223</sup> *Hobby Lobby* was cited eighteen times in the *McAllen Grace Brethren Church* opinion.<sup>224</sup> The second firm was

218. Brief of Appellants at 10, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

219. *Id.* at 23-27.

220. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 468-69 (5th Cir. 2014).

221. *Id.* at 476.

222. Tunku Varadarajan, Opinion, ‘*God’s ACLU*’ Seeks Freedom for the Faithful, WALL STREET J. (July 28, 2017, 3:36 PM), <https://www.wsj.com/articles/gods-aclu-seeks-freedom-for-the-faithful-1501270613> [<https://perma.cc/N2PW-7VKZ>].

223. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_\_, 134 S. Ct. 2751 (2014) (allowing for-profit companies the ability to deny employee health insurance coverage for contraception where it violates the religious beliefs of the company owners).

224. *See generally* *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 479 (5th Cir. 2014) (speaking on the cases relied on by both parties, “[T]hese cases were decided before the Supreme Court’s holding in *Hobby Lobby* clarified how heavy the burden is on the Department to demonstrate that the regulatory framework is the least restrictive means.”). It is important to note

Baker Botts, whose lead attorney was Michael Bennett. Baker Botts is an international mega law firm with over 700 attorneys and a long string of Supreme Court victories. These firms and their lawyers played a key role in the outcome of our case, and the Indians and the author are especially grateful for their help.

On March 10, 2015, the government returned the eagle feathers seized from Pastor Soto and Mr. Russell.<sup>225</sup> However, the federal government still had not repealed the law that criminalized the possession of the feathers by individuals not enrolled in federally recognized tribes.<sup>226</sup> So, we filed a motion for injunctive relief to prohibit the government from “investigating or punishing” the tribes during the pendency of the case.<sup>227</sup> On June 3, 2016, the parties signed a settlement agreement, resulting in the federal government granting lifetime permits to more than 400 Indians not enrolled in federally recognized tribes to possess and to use bald and golden eagles, including carcasses and parts for “Indian religious purposes”—in other words, granting our Indians the same status as members of federally recognized tribes.<sup>228</sup> The U.S. Fish and Wildlife Service (USFWS) National Eagle and Wildlife Property Repository also agreed to provide eagle carcasses and parts to all those receiving permits. On February 17, 2017, the district court granted the parties’ agreed motion to dismiss and the case was officially closed.

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the Indians did not use *Hobby Lobby* in their appeal, but they were thankful for the role it played in the Fifth Circuit’s opinion.

225. Robert Soto, *Eagle Feather Case - Update*, MANATAKA AM. INDIAN COUNCIL, <https://www.manataka.org/page755.html> [<https://perma.cc/5VPJ-2HSK>] (“The return of our eagle feathers came with five restrictions and at first I wanted to say no. But after talking to both Luke and Milo, I decided to take the feathers back with all their restrictions. By the way, the restrictions are that I could never give them away, lend them to anyone; no one could ever borrow them, when I die, I could not pass them on to anyone and if I was ever caught with any other eagle feather than the fifty they returned, I was subject to being arrested. Not much of religious liberty because I got the feathers and nothing has changed except I, a member of a state acknowledged tribe, for the first time in history, had gotten all our [feathers] back.”).

226. Plaintiffs’ Motion for Entry of Preliminary Injunction at 1, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-60 (S.D. Tex. Mar. 10, 2015).

227. *Id.* at 1, 45-47.

228. Settlement Agreement at 3-4, *McAllen Grace Brethren Church v. Jewell*, No. 7:07-cv-60 (S.D. Tex. June 13, 2016).

### III. FACTUAL BACKGROUND

On an early Saturday afternoon on March 11, 2006, USFWS Special Agent Alejandro Rodriguez, acting without probable cause and without a search warrant, raided an American Indian religious service,<sup>229</sup> frightening and upsetting American Indian women and children and humiliating respected American Indian elders.<sup>230</sup> His raid targeted the Nde Daa Way South Powwow<sup>231</sup> held at the Lark Community Center in McAllen, Texas to seize sacred feathers used by powwow participants in the observance of their traditional religion.<sup>232</sup>

In less than an hour, Agent Rodriguez seized more than fifty feathers from three Indians: Lipan Apache Holy Man, Pastor Robert Soto; his brother-in-law, Michael Russell of Creek and Shawnee ancestry; and a Cherokee artist, Michael Todd Cleveland.<sup>233</sup> Although all the confiscated feathers were allegedly from species listed on the BGEPA and the MBTA, they were exempt for American Indian possession and use in religious observances.<sup>234</sup>

The Indians claimed that the agent's raid on their religious ceremony violated their rights to the free exercise of religion under the Religious Freedom Restoration Act of 1993 (RFRA) and the First Amendment of the U.S. Constitution.<sup>235</sup> The Indians also asserted that commercial vendors, who provided objects to American Indians that are necessary for

229. Letter from Janet Spaulding, Senior Attorney for the U.S. Department of the Interior, to Milo Lone-Eagle Colton and Marisa Y. [Garza], Attorneys for the Indians (Dec. 8, 2011) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (“... [T]he parties had stipulated that the powwow was a religious service. . . . I will accept that Mr. Soto and Mr. Russell were exercising their religious beliefs in the use of the golden eagle feathers they wore during the powwow. . . . I find that although Rev. Soto is a sincere religious practitioner of Native American religion, the federal government's compelling interest in limiting the right to legally possess eagle feathers for religious purposes to members of federally recognized tribes prevents any mitigation of the seizure of the golden eagle feathers involved in this matter.”).

230. Amended Plaintiffs' Original Complaint for Declaratory Relief at 9, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

231. Nde Daa is Apache for “The People.” The Way South Powwow held in March is the Lipan Apache's annual Springtime Gathering.

232. Amended Plaintiffs' Original Complaint for Declaratory Relief at 9, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

233. *Id.*

234. *Id.*

235. *Id.* at 9-10 (citing *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)).

religious observances, practice, and ceremonies, were exempt from the MBTA and the BGEPA.<sup>236</sup>

On November 2, 2006, a one-day criminal bench trial was held in the McAllen federal district court, with Magistrate Judge Dorina Ramos presiding.<sup>237</sup> At the conclusion of the trial, Judge Ramos found the defendant Michael Todd Cleveland—charged solely with a violation of the MBTA—guilty, but Judge Ramos reduced Cleveland's fine from \$500 to \$200.<sup>238</sup>

On November 11, 2006, Cleveland filed a notice for a new hearing in the district court.<sup>239</sup> At the second trial, CRLDEF attorneys introduced the following facts in the original complaint for declaratory relief:

According to the first of two Reports of Investigation prepared by the agent, dated 04/20/2006, Report #: 2006201750R001, Case Title "OPERATION POWWOW[.]" SUBJECTS OF THE REPORT: MICHAEL CLEVELAND, MICHAEL V. RUSSELL, AND ROBERT SOTO, the agent stated:

In the Fall of 2005, [he] received a call from a Service refuge employee, who is a Native American, to report that he had been to an area pow-wow and had observed a male subject wearing a bustle made of golden eagle feathers. According to the refuge employee, he knew the individual was not a Native American. The refuge employee did not know the subject's name, but he promised to call [the agent] back if he received other information in regard to the subject's identity.

The agent did not divulge the identity of his tipster, nor did he indicate how he verified that his tipster was indeed a Native American. Nor did the agent indicate which specific powwow of the many powwows held in the area of [S]outh Texas his tipster had observed the male wearing the Golden Eagle bustle. At any of the many area powwows, it is common for male traditional dancers to wear eagle feather bustles and eagle feather roach head dresses. Further, the agent did not indicate whether the tipster ever called him back concerning the identity of the male allegedly "not a Native American."

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236. *Id.* at 10.

237. *Id.*

238. *Id.*

239. *Id.*

Months after the tip, on March 8, 2006, the agent noticed a picture in a local newspaper (The Town Crier, Vol. 42[,] No. 10) announcing an upcoming powwow on March 11, 2006, in [McAllen], Texas. In a picture of The South Texas Indian Dancers that is remarkable for its lack of clarity and detail, the agent indicates that he “observed at least two subjects wearing what appeared to be immature golden eagle feathers.” Although, under the Fourth Amendment, the agent was required to submit his tipster’s information to a detached and neutral magistrate for a proper determination on the issuance of a search warrant to be executed at the powwow, he did not do this. In *Johnson v. United States*, 333 U.S. 10 (1948), the court stated that inferences leading to the issuance of a search warrant must be drawn by a neutral and detached magistrate, not by the officer engaged in the [often-competitive] enterprise of ferreting out crime. The agent decided to draw his own inferences and decided to conduct an illegal search and seizure at the powwow before he attended the sacred event. According to *Katz v. United States*, 389 U.S. 347 (1967), the Fourth Amendment protects people, not places. The court in *Katz* stated that the prohibition against unreasonable searches and seizures is not limited to homes, offices, buildings, or other enclosed places. It applies even in public places where a person has a “reasonable and justifiable expectation of privacy.” Therefore, participants of the powwow had a reasonable and justifiable expectation of privacy in their possessions and in the sacred ceremony they attended. However, the agent reported:

On March 11, 2006, . . . [.] in a covert capacity, [he] attended the pow-wow . . . [.] As the agent walked into the hallway of the center he immediately recognized a subject from the newspaper photo with a bustle made of large white and brown feathers standing at the entrance to the pavilion. The agent approached the subject (later identified as Michael [V]. RUSSELL by his state-issued driver’s license) and commented to him that he [the agent] liked the costume he [RUSSELL] was wearing. RUSSELL thanked the agent for the compliment and proceeded to explain what it was made of. The agent then asked RUSSELL what a small beaded-leather pouch that he was wearing around his neck was for. RUSSELL stated it was a small medicine bag and it was used by Native Americans to keep medicinal items. The agent then asked RUSSELL about the bustle he was wearing on his back. RUSSELL said it was made of eagle feathers and it was given to him by an Apache. The agent asked RUSSELL if he was a Native American and

RUSSELL stated 'No'.<sup>240</sup> The [agent] asked RUSSELL if he [the agent] could touch the feathers and RUSSELL stated 'No' and turned away from [the agent].<sup>241</sup>

At this point the agent showed RUSSELL his credentials and identified himself as a federal agent with the United States Fish and Wildlife Service (USFWS). The agent asked RUSSELL to follow him to an isolated area of the large hallway outside the pavilion where the [powwow] was being held.

Once there [in the hallway,]<sup>242</sup> the agent asked RUSSELL to remove the bustle from his back so the agent could inspect the feathers. RUSSELL was also wearing four more feathers on his costume that appeared to be eagle feathers and the agent asked him to remove these as well. The agent identified all the feathers as immature golden eagle (*Aquila chryaetos*).<sup>243</sup>

At this point, Rev. Soto approached the agent and asked him what the problem was. The agent told Rev. Soto that he was investigating the illegal possession of feathers by those attending the powwow.

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240. Mr. Russell was, in fact, of Creek and Shawnee ancestry, and he claimed in a declaration for the lawsuit his American Indian identification pursuant to Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-58,790 (Oct. 30, 1997). Like many Indians, he resented the term "Native American" as applicable to the First People in the Americas, prior to the arrival of the Europeans. Federal law supports his position. According to the Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-58,790 (Oct. 30, 1997), at Supplementary Information, Section D, OMB's Decisions, Subsection (8), the Office of Management and Budget accepts the following recommendation concerning changing the term "American Indian" to "Native American," it states: "The term American Indian should not be changed to Native American."

241. Among many Indians, it is considered a tremendous breach of ethics to touch the feathers worn by an Indian without the wearer's permission. Many believe that the touching of the feathers by another could diminish the "medicine" or spiritual powers of the feathers.

242. The entire community center area where participants were present is included in the religious ceremony called a powwow. The Fourth Amendment protects people, not places. The "hallway" area later referenced is a very large room with chairs through which participants must pass as they come from the dressing room where they have already begun their religious experience. Many participants perform sacred ceremonies such as a "smudge" to bless themselves and their feathers in this "hallway" area.

243. The agent's ability to identify the feathers is suspect. If questioned at trial, Mr. Russell would not have supported the agent's identification of all the feathers as immature golden eagle feathers.

Rev. Soto informed the agent that he was interrupting an American Indian religious service, and that he should leave the powwow. The agent said he did not have to leave, whereupon Rev. Soto asked to see the agent's credentials. The agent refused to show them to him. Rev. Soto persisted and asked again to see the agent's credentials and again the agent refused to produce them. After four requests by Rev. Soto for the agent to produce his credentials, the agent finally showed them to him.

Rev. Soto then identified himself, and informed the agent that the bustle worn by Mr. Russell belonged to Rev. Soto, an enrolled member of the Lipan Apache Band of Texas. According to the agent's report:

... [T]he agent asked RUSSELL where he had gotten the feathers and RUSSELL stated that his brother-in-law, Robert SOTO, had lent him the feathers ... [.] The agent asked RUSSELL for identification and RUSSELL stated that his wallet was in the dressing room. The agent told RUSSELL to go get it.

While [the agent] was waiting for RUSSELL he recognized the second subject, who was talking to a female at an information table, as one of the two persons with what appeared to be eagle feathers in the newspaper photo. The agent [claimed that he] called the subject and the agent identified himself with his credentials as a federal agent with the USFWS. The subject, later identified as Robert SOTO, asked to see the agent's credentials ... [.] The agent asked SOTO to remove two large white and brown feathers that SOTO was wearing on top of his head. SOTO removed them and handed them to the agent. The agent also identified these two feathers as immature golden eagle. At this point the agent asked SOTO if he was a Native American and SOTO answered 'Yes.' The agent asked SOTO if he was 'carded' and SOTO again answered 'Yes' and that his card was in his wallet in the dressing room. SOTO was told to go and get the card.

While the agent was talking to SOTO, RUSSELL returned from the dressing room with his Texas driver license. After SOTO left to retrieve his identification, the agent wrote down RUSSELL's personal information and advised RUSSELL he was going to seize the feathers and the agent would be



contacting RUSSELL in the next few days to advise him of what was going to happen.

SOTO returned from the dressing room and handed the agent a plastic credit-card sized identification . . . [.] The card, issued by the Lipan Apache Band of Texas, Inc., had SOTO's picture on it along with a membership number and name and address. The agent wrote down all the information and advised SOTO that he [the agent] would not be seizing the feathers from him but would be investigating the matter further. . . .

After the agent finished the contact with RUSSELL and SOTO he returned to [the] pavilion where the pow-wow was being held. The agent observed several people seated in stands watching people from the audience participate in a cake-walk while several males banged on large drums. The agent observed several vendors selling jewelry, arts, and crafts.

The agent claimed that he noticed an American Indian artist whom the agent [misidentified] as:

One vendor, Michael Cleveland, had several [dream catchers] for sale containing various feathers, some of which appeared to be songbird and waterfowl [which species the agent was unwilling or unable to identify in his report or in the transmission paperwork of the feathers to the USFWS Forensics Laboratory as protected by the Migratory Bird Treaty Act or any other Act].

According to Commander Edith Clark, a Cherokee Indian, who had custody and control of the booth that was decorated by Linda Cleveland, the vendor of record, with her son Michael Cleveland's [dream catchers], Commander Clark was the only person at the booth when the agent first approached it and made assertions that the feathers adorning the [dream catchers] could be illegal.

At the one-day bench trial before U.S. Magistrate Judge Dorina Ramos, the agent admitted that someone other than Michael Cleveland or his mother Linda Cleveland was at the booth when he first approached it. He described her [Commander Edith Clark] as a "white Caucasian lady probably in her early 60s manning the booth." When he asked Commander Edith Clark about the [dream catchers] and the feathers adorning them,

Commander Clark told him he needed to visit with Linda Cleveland, the vendor of record, who was on break at the time.

After the passage of several minutes, Linda Cleveland appeared at the booth with her son Michael Cleveland.

Without asking or establishing whether Linda Cleveland or Michael Cleveland were American Indians, the agent commenced his interrogation of Michael Cleveland about the feathers adorning the [dream catchers] at Linda Cleveland's booth.

At trial and in [pretrial] motions, the American Indian status of Linda Cleveland and her son was not contested by the government when Linda Cleveland testified that she was a Cherokee Indian who identified as such on the 2000 [U.S.] decennial census and the biological mother of Michael Cleveland. Mrs. Cleveland also testified that she was the vendor of record at the powwow and that her son's [dream catchers] were not for sale and that they were hung at her booth for decoration [and] to give it ambience.

At this point, Rev. Soto and Anita Anaya, a fellow Tribal Council Member and Secretary to the Lipan Apache Tribe of Texas, approached the agent. She and Rev. Soto told the agent that he was disrupting an American Indian religious service in violation of the American Indians' freedom of religion and he needed to cease and desist his harassing and molesting of American Indian powwow participants and leave the powwow.

According to the agent's Report of Investigation:

While the agent was discussing the possession of these feathers with CLEVELAND, SOTO and Anita Anaya came over to speak to the agent. Anaya claimed she was the secretary of the Lipan Apache and asked the agent what he was doing there. The agent advised Anaya that he was conducting a federal investigation into the illegal possession of protected migratory bird parts.

Anaya asked the agent if she could ask him to leave. The agent advised Anaya again that he was conducting a federal investigation and since the location was a public place and open to the public he was lawfully there. Furthermore, the agent reminded Anaya that the [powwow] had been advertised

in the local paper<sup>244</sup> and was open to the public. The agent gave Anaya a business card and told her to call him if she had any further questions. Anaya kept insisting that [the agent] leave the premises, and the agent advised her that if she kept interfering with a federal investigation she could be arrested. At this point Anaya decided to leave.

After the interrogations were finished, the agent decided that the feathers should be tested to determine whether they were illegal or not. In front of witnesses at the booth, the agent then seized four feathers from one of Mr. Cleveland's [dream catchers], explaining that the feathers would be sent to the USFWS laboratory for testing to determine the feathers' birds or origin. Even in the context of a [non-search], merely observing a contraband object does not give law enforcement the authority to seize it. The seizable nature of an object must also be "plain." If the law enforcement official must conduct a search to determine whether it is contraband or otherwise seizable, the object is not in "plain view." *Arizona v. Hicks*, 480 U.S. 321[] (1987). If the agent had to send the feathers to the USFWS laboratory and wait for a determination on their status before issuing a citation, then the "seizable nature" of the feathers was not "plain" when he seized them, and in fact the USFWS lab determined that two of the seized feathers were not identifiable.

At trial, Commander Edith Clark stated that she saw the agent seize three feathers; Robert Soto saw the agent seize one feather; and Linda Cleveland saw the agent seize four feathers.

The four feathers that Mr. Cleveland claimed were seized by the agent included: two pheasant feathers, about two inches in diameter, and somewhat round in shape; one farm turkey feather, darkish brown in color with golden or tarnish stripes at the tip and about three inches long; and one duck feather, all white in color and fluffy looking, about 2 to 2 and ½ inches long.

According to the agent's Report of Investigation, the number of feathers that he seized was double what Mr. Cleveland claimed was seized. The agent's Report of Investigation stated:

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244. As are hundreds of religious services of the many Christian denominations throughout Texas.

The agent continued visiting with CLEVELAND and seized eight loose feathers that were attached to the [dream catchers].

According to the Morphology Examination Report and the trial testimony of Pepper Trail, Senior Forensic Scientist for the National Fish and Wildlife Forensics Laboratory, of the eight feathers (alleged to have been taken from suspect Michael Cleveland and submitted by the agent for examination), one was White-winged Dove (*Zenaida asiatica*), one was White-tipped Dove (*Leptoptila verreauxi*), two were Black-bellied Whistling Duck (*Dendrocygna*), two were Canada Goose (*Branta Canadensis*), and two were unidentified waterfowl (*Anatidae*). Pepper Trail also made the incredible assertion at trial that his method of examining feathers with the naked eye for purposes of identification was 100 percent accurate, perfect beyond even the known limitations of DNA analysis.<sup>245</sup>

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245. Transcript of Bench Trial at 64-66, United States v. Cleveland, No. 7:06-MJ-04806 (S.D. Tex. Nov. 2, 2006) (cross-examination of Pepper Trail).

- Q Okay. If I were to ask you which is more reliable, morphology-based analysis or DNA analysis, what would be your answer?
- A My answer is they're both completely reliable when they're applied appropriately.
- Q Okay. But you wouldn't give me a number in terms of reliability?
- A *I believe that my identifications are a hundred percent reliable based on morphology*, and if I am not able to make a completely reliable identification to species, I back to the group that I can make a hundred percent accurate identification, as in the case of the waterfowl in this instance. [emphasis added].
- Q Okay. And you did indicate there were two feathers you could not identify.
- A To species, correct.
- Q Okay. To species.
- A No; I couldn't identify them to species, so two feathers probably from the same species, but I was only able to get them to the group of waterfowl.
- Q And they're listed as—
- A They're—
- Q They're the unidentified—
- A Right.
- Q —waterfowl.
- A Right.
- Q Okay. By "unidentified," they're not subject to the Migratory Bird Treaty Act under your analysis.
- A Correct.

The agent's report goes on to state:

. . . CLEVELAND claimed he had found the feathers on daily nature walks he takes around his residence. He was advised that the sale of protected species, and their parts, was illegal and the agent would contact him later. . . .

The agent contacted SOTO after verifying that the Lipan Apache was not a federally recognized tribe, to set [up] a meeting at the agent's office to discuss the possession by SOTO of the two golden eagle feathers. SOTO and the agent agreed to meet on March 16, 2006, at 10:30 A.M.

Based on their confrontation with the agent, Rev. Robert Soto and his brother-in-law Michael Russell feared they were facing a possible fine of up to \$500 for each feather confiscated by the agent, as well as jail time,<sup>246</sup>

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Q Okay. With DNA analysis would it have been possible to—

A It could have been attempted, as I explained, if the tissue—if there had been tissue present on those feathers, which would have had to have been determined by the analysts in question, it might have been possible to identify the species.

Q Okay. Have you heard of PCR testing?

A Yes.

Q RFLP testing?

A Uh-huh.

Q What is PCR testing?

A PCR stands for polymerase chain reaction, and it's a technique whereby small bits of DNA are—they call it "amplified." They're broken by enzymes into small bits and then recombined sort of in a soup of nucleotides so that long chains are built up.

Q Okay.

A It's a way of producing a large amount of DNA from a small sample.

Q Have you seen any figures concerning reliability of polymerase chain reaction analysis?

A I couldn't give you a specific figure, but I know that it's a standard technique. It's considered to be highly reliable.

Q Would it be 99.53 percent?

Mr. Schammel [Counsel for the Government]: Objection. The witness already stated he does not know.

The Court: Sustained.

246. See Soto, *supra* note 225 ("[W]e were facing up to fifteen years in prison and a fine of about \$250,000, or five thousand dollars for each feather taken."); see also DEP'T OF THE INTERIOR, U.S. FISH & WILDLIFE SERV., OFFICE OF LAW ENF'T, REPORT OF INVESTIGATION, REPORT # 2006201750R001, at 7 (Apr. 20, 2006) (detailing alleged violations of the BGEPA, the MBTA, and 50 C.F.R. §21.11 and 22.11).

so they contacted local [McAllen] attorney Arturo Cisneros concerning their predicament.

On March 15, 2006, Mr. Arturo Cisneros contacted the agent regarding SOTO's case. Mr. Cisneros wanted to know how SOTO and RUSSELL could take care of this matter. The agent told Mr. Cisneros if RUSSELL forfeited \$500 to the government [in response to the issuance of a violation notice], and both of them agreed to sign an abandonment form for the eagle feathers, the investigation would be concluded. Mr. Cisneros stated he was going to contact SOTO and would get back to the agent.

Mr. Cisneros notified the agent on March 20, 2006, that RUSSELL and SOTO had agreed . . . to the government's proposal. It was agreed that all the parties would meet on March 23, 2006, at Cisneros'[s] law office. Mr. Cisneros asked the agent if he [the agent] could bring the feathers seized from RUSSELL at the [powwow] so they could be 'blessed' before being abandoned to the government. The agent agreed.

On March 23, 2006, the agent met with Mr. Cisneros, RUSSELL, and SOTO at Cisneros'[s] law office. Also present were approximately 18 members of the Lipan Apache tribe.

Before the arrival of the Indians, the agent strategically placed a file folder, a notebook with a yellow legal pad, a blue envelope, and a videotape boldly labeled in large black ink "3-11-06" [the date of the powwow when feathers were seized] on the desk in the room where the feathers were to be surrendered. At the [pretrial] hearing of Defendant's Motion to Compel, the agent conceded that the [videotape] contained no evidence of the feathers seized by the agent from Rev. Soto, Mr. Russell, and Mr. Cleveland. In fact, the videotape was blank, leaving a reasonable person to infer that the tape was merely a prop to compel surrender of the feathers.

After the Indians arrived, they held a somber Surrender Ceremony with several Indians breaking down and weeping. Rev. Soto prayed to the Creator to watch over the feathers and protect their medicine. Then he smudged the feathers and bid them farewell.

According to the agent's report:

They held a sage burning and chanting ceremony to ‘bless’ the feathers in Cisneros’[s] conference room. RUSSELL was issued a violation notice . . . for \$500 . . . and both RUSSELL and SOTO signed abandonment forms for the feathers.

According to Rev. Soto, the agent then made a chilling remark. The agent said, “This matter is not over yet. I have a list of all the powwows in Texas, and I will be at those powwows taking away feathers.”

According to a second considerably abbreviated Report of Investigation with substantive omissions that were contained in the first report, dated August 2, 2006, Report #: 2006201750R003, Case Title “OPERATION POWWOW[,]” SUBJECTS OF THE REPORT: SOTO, Robert, RUSSELL, Michael, and CLEVELAND, Michael, the agent re-wrote his Report of Investigation focusing primarily on Defendant Michael Cleveland, stating:

In May of 2006 the agent contacted CLEVELAND by phone to let him know that the feathers [confiscated from Cleveland’s dream catchers] had been positively identified belonging to several migratory species that by law could not be sold without a permit.<sup>247</sup> CLEVELAND stated that he was only selling the dream catchers and not the feathers and therefore not in violation of any law . . . [.] Later that day the agent drove to CLEVELAND’s residence . . . [.] He met with CLEVELAND and issued a violation notice . . . for \$500.<sup>248</sup>

On May 4, 2006, unhappy with the outcome, Pastor Soto contacted Executive Director Marisa Garza<sup>249</sup> of CRLDEF about legal action to

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247. See Transcript of Bench Trial at 16, United States v. Cleveland, No. 7:06-MJ-04806 (S.D. Tex. Nov. 2, 2006) (cross-examination of Jeff Haskins, Chief of the Migratory Bird Office for the USFWS, Region 2, Southwest Region (which includes Texas)). Haskins testifies: “I asked my permit staff to review all the permits that have been issued for Indian religious use of [non-eagles]. And we have issued, I believe, 182 permits. I don’t believe that any of those permits were issued to non-enrolled tribal members.”

248. DEP’T OF THE INTERIOR, U.S. FISH & WILDLIFE SERV., OFFICE OF LAW ENF’T, REPORT OF INVESTIGATION, REPORT # 2006201750R003, at 2 (Aug. 2, 2006). Amended Plaintiffs’ Original Complaint for Declaratory Relief at 10-22, McAllen Grace Brethren Church v. Salazar, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009) [some internal citations omitted, some corrections made to aid the reader].

249. Marisa Garza received a B.A. from St. Mary’s University and a J.D. from the University of Notre Dame. She was a member of the Lipan Apache Tribe of Texas and has served as the tribe’s general counsel. She was a legal aid attorney for Indian tribes in New Mexico. She

seek return of his confiscated feathers. On May 6, 2006, Ms. Garza and I met with Pastor Soto and agreed to represent him as well as the other Indians who had their feathers seized. The rest of the year was spent preparing Pastor Soto's case while defending Michael Cleveland against his criminal charge.

#### IV. THE CIVIL COMPLAINT

On March 12, 2007, the civil complaint was ready for filing. The case boiled down to the overarching issue of whether an American Indian, not enrolled in a federally recognized tribe, can practice an American Indian religion, using and possessing eagle feathers that are central and essential to the religion.<sup>250</sup> In the complaint, the Indians were prepared to argue the case on the following legal grounds:

**COUNTS ONE AND TWO: Violations of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA)**

*A. The government's actions substantially burden the free exercise of American Indian religion in violation of the Free Exercise Clause and the RFRA.*

The Framers of the Constitution, recognizing the free exercise of religion as an inalienable right, secured its protection in the First Amendment to the U.S. Constitution.<sup>251</sup> The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion.<sup>252</sup>

Congress passed the RFRA in 1993 to prevent the government from substantially burdening the free exercise of religion unless it had a compelling governmental interest accomplished by the least restrictive means.<sup>253</sup> The Indians asserted that the government's ban on the possession and use of eagle feathers by American Indians not enrolled in

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has taught classes in criminal justice at St. Mary's University and Northwest Vista Community College.

250. Brief of Appellants at 10, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

251. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(a)(1) (2018).

252. U.S. CONST. amend. I.

253. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb-1 (2018)).



federally recognized tribes and therefore without a permit, offended their senses and their sincerely held American Indian religious beliefs, because they considered eagle feathers essential and central to the practice of their American Indian religious beliefs.<sup>254</sup> As such, they asserted that the government's action violated the Free Exercise Clause of the First Amendment and the RFRA.<sup>255</sup>

In 2010, in the case of *A.A. ex rel. Betenbaugh v. Needville Independent School District*, the Fifth Circuit agreed with the U.S. District Court of the Southern District of Texas and held that a local government regulation that "offend[ed] the sincere religious belief" of a member of the Lipan Apache Tribe of Texas, a state recognized tribe, was invalid under Texas law.<sup>256</sup>

In this particular case, a five-year-old boy and his parents were planning to move to Needville, Texas, a small town located forty-five miles southwest of downtown Houston.<sup>257</sup> The father and the boy were Lipan Apache.<sup>258</sup> In keeping with their American Indian religious beliefs, the boy had never cut his hair.<sup>259</sup> His parents wanted assurance that the boy could continue to wear his hair long at school, so they contacted the school district in Needville concerning its dress code.<sup>260</sup>

The school district had a grooming policy, which, among other things, provided that "[b]oys' hair shall not cover any part of the ear or touch the top of the standard collar in back."<sup>261</sup> The policy's stated design was "to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority."<sup>262</sup> The parents challenged the school district's dress code as it applied to their son.<sup>263</sup>

Although the school district agreed that the boy had a sincere religious belief in leaving his hair uncut, it argued that the evidence demonstrated

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254. Brief of Appellants at 3, 10, 14, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

255. *Id.* at 14.

256. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 254.

261. *Id.* at 253.

262. *Id.*

263. *Id.* at 257.

that there was no sincere belief in wearing his hair visibly long.<sup>264</sup> Thus, the school could require him to wear his uncut hair in ways that best conform his appearance to that of male students who cut their hair to meet dress code requirements.<sup>265</sup> According to the school district, even though some Americans Indians keep their hair long and in braids as a tenet of their sincere religious beliefs, “other Native Americans fasten their long hair in buns or otherwise obscure their hair so that it is not visibly long.”<sup>266</sup> If those Native Americans can comply with their religious beliefs in that way, the District assert[ed] that [the Lipan Apache boy] can, too[,]”<sup>267</sup> such as in a bun on top of his head or in a braid tucked inside his shirt.<sup>268</sup> In deciding the case, the court turned to the Texas Religious Freedom Restoration Act (TRFRA), which evolved in parallel to the RFRA.<sup>269</sup>

Congress enacted the RFRA in 1993 in response to the Supreme Court’s decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which held that the Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct.<sup>270</sup> The RFRA expressly adopted the compelling interest test as set forth in a pair of Supreme Court cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*.<sup>271</sup> The RFRA prohibits the government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden (1) is in furtherance of a compelling governmental interest; and (2) is the least

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264. *Id.* at 260.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 257.

269. *Id.* at 272-73; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.003(a)-(b) (West 2019) (stating “a government agency may not substantially burden a person’s free exercise of religion,” unless the government can demonstrate a compelling interest and uses the least restrictive means to further the interest).

270. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb(a)(4) (2018)); *Employment Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 874, 890 (1990) (upholding Oregon’s inclusion of “religiously inspired peyote use within . . . its general criminal prohibition on that drug,” and allowing such use to result in the termination of employment and the subsequent denial of unemployment benefits).

271. 42 U.S.C. § 2000bb(b)(1) (2018); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 213, 221 (1972).

restrictive means of furthering that compelling governmental interest.<sup>272</sup> The RFRA originally applied to both federal and state governments, “but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds.”<sup>273</sup>

In *City of Boerne v. Flores*, the Supreme Court invalidated the RFRA as applied to the states and their subdivisions, finding that Congress exceeded its remedial power under the Fourteenth Amendment to delineate the scope of constitutional violations.<sup>274</sup> Even though *Flores* held that RFRA no longer applied to states and their subdivisions, it still applied to the federal government.<sup>275</sup> Unhappy with the results of *City of Boerne*, Texas passed the TRFRA to mirror the RFRA by adopting the language of RFRA and applying it to the State of Texas and its subdivisions (including school districts).<sup>276</sup> Judge Patrick Higginbotham called the TRFRA “a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution.”<sup>277</sup>

In *A.A. ex rel. Betenbaugh*, the court wrote that to succeed on a RFRA-type claim, plaintiffs who demonstrate a sincere belief must also demonstrate that the government’s regulations substantially burden the plaintiff’s free exercise of that belief.<sup>278</sup> If the plaintiff manages that showing, the burden shifts to the government to establish that its regulations further a compelling governmental interest and that the regulations are the least restrictive means of furthering that interest.<sup>279</sup>

The Court went on to state that a burden is substantial if it is “‘real vs. merely perceived, and significant vs. trivial’—two limitations that ‘leave a broad range of things covered.’”<sup>280</sup> Thus, the court’s inquiry is narrowed to “‘the degree to which a person’s religious conduct is curtailed and the resulting impact on his religious expression,’ as

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272. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2018).

273. *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005).

274. *City of Boerne v. Flores*, 521 U.S. 507, 532-36 (1997).

275. *Id.* at 536.

276. TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.003 (West 2019) (giving “weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment”).

277. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F. 3d 248, 258 (2010).

278. *Id.* at 263-64.

279. *Id.* at 266.

280. *Id.* at 264 (quoting *Barr v. City of Simon*, 295 S.W.3d 287, 301 (Tex. 2009)).

‘measured . . . from the person’s perspective, not from the government’s.’”<sup>281</sup> The Court also noted “. . . that ‘at a minimum, the government’s *ban* of conduct sincerely motivated by religious belief substantially burdens an adherent’s free exercise of that religion.’”<sup>282</sup> When conduct is subject to an outright ban, ‘alternative accommodations do not alter “the fact that the rituals which [the adherent] claims are important to *him*—without apparent contradiction—are now completely forbidden.’”<sup>283</sup>

The Indian plaintiffs in *McAllen Grace Brethren Church* asserted that the government’s total ban on their possession and use of eagle feathers, a critical element of their religious beliefs and practices, substantially burdened the exercise of their beliefs.<sup>284</sup> In 1962, Congress recognized this burden as inherent in the BGEPA, and they provided a remedy that allowed American Indian tribes to practice their religions and beliefs through a permit system for the taking, possession, and transportation of eagle feathers and parts for religious purposes.<sup>285</sup> Nowhere in the statute does it limit the exception to only members of federally recognized Indian tribes.<sup>286</sup> This limitation was engineered by the U.S. Department of Interior,<sup>287</sup> which has a storied history of discrimination against American Indian religious beliefs and practices.<sup>288</sup> According to the Tenth Circuit Court of Appeals:

Not until 1981, eighteen years after the regulations were first enacted, was the requirement that an applicant be a member of a [federally recognized] Indian tribe clearly articulated. In 1981, after a member of an Indian tribe that was not federally recognized requested a permit for eagle feathers, the

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281. *Id.* at 264 (quoting *Barr v. City of Simon*, 295 S.W.3d 287, 301 (Tex. 2009)).

282. *Id.* (quoting *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009)).

283. *Id.* (quoting *Newby v. Quarterman*, 325 F. App’x 345, 351 (5th Cir. 2009) (unpublished) (quoting *Sossaman v. Lone Star State of Texas*, 560 F.3d 316, 333 (5th Cir. 2009) (emphasis original))).

284. Brief of Appellants at 19, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

285. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2018); 108 CONG. REC. 22,269-73 (1962).

286. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2018).

287. What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999) (adding the “federally recognized” language).

288. See, e.g., TELLER & PRICE, *supra* note 177, at 3-4 (criminalizing and punishing Indian religious practices); BURKE, *supra* note 186 (advocating that Indians generally stop engaging in religious practices).

Deputy Solicitor of the Interior issued a memorandum which stated that only [federally recognized] Indian tribes constituted “Indian tribes” under the BGEPA. . . . It was only in 1999 that the regulatory language was changed to clearly reflect the requirement that an applicant must be a member of a [federally recognized] Indian tribe.<sup>289</sup>

Even if the restriction cannot be construed as completely prohibitive, the “substantial burden” standard is satisfied where religious conduct is curtailed and “impacts religious expression to a ‘significant’ and ‘real’ degree.”<sup>290</sup> Here, the government’s regulation<sup>291</sup> evolved to the point that many American Indians—specifically, those not enrolled in federally recognized tribes<sup>292</sup>—were excluded from the right to freely exercise an American Indian religion that uses feathers and parts of birds listed on the BGEPA and the MBTA, which are essential and central to the practice of their American Indian religion<sup>293</sup> (especially where the Bureau of Indian Affairs has been slow to even recognize tribes).<sup>294</sup>

According to the 2010 U.S. Census, 5,220,579 individuals identified

289. *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*5 (10th Cir. Aug. 8, 2001), *vacated by and reh’g en banc*, United States v. Hardman, 260 F.3d 1199 (2001); *see also* What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999) (requiring enrollment in a federally recognized tribe to be issued a permit for the taking, possession, and use of eagle feathers).

290. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 (5th Cir. 2010) (quoting *Barr v. City of Simon*, 295 S.W.3d 287, 301 (Tex. 2009)).

291. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2018); Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703 (2018); What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999); Migratory Bird Permits, 50 C.F.R. § 21.11 (2013).

292. MANATAKA AM. INDIAN COUNCIL, *U.S. Federally Non-Recognized Tribes*, *supra* note 202; 500 NATIONS, *supra* note 202.

293. 108 CONG. REC. 22,272-73 (1962) (“The golden eagle is important in enabling many Indian tribes, particularly those in the Southwest, to continue ancient customs and ceremonies that are of deep religious or emotional significance to them. . . .” The mythology of almost every tribe is replete with eagle beings[‘] . . . There are frequent reports of the continued veneration of eagles and of the use of eagle feathers in religious ceremonies of tribal rites.”) (quoting HANDBOOK OF AMERICAN INDIANS, PART 1, at 409-10 (Frederick Webb Hodge ed., 1907)).

294. Gabriel Furshong, *Some “Unrecognized” Tribes Still Waiting After 130 Years*, YES! MAG. (Dec. 19, 2016), <https://www.yesmagazine.org/people-power/some-unrecognized-tribes-still-waiting-after-130-years-20161219> (noting that when the recognition process was established in 1978, eighty-seven tribes petitioned and two-thirds of the fifty-one determinations given were denials).

as American Indian.<sup>295</sup> In 2014, the Bureau of Indian Affairs published the American Indian Population Labor Force Report, indicating 1,969,167 Indians were enrolled in federally recognized tribes, according to figures from the 2010 census.<sup>296</sup> Thus, if all Indians enrolled in federally recognized tribes were counted on the 2010 census (which is highly unlikely), over 62% of all Indians counted were not enrolled in federally recognized tribes, and thus, not eligible for eagle feathers under the government's regulations.

In yet another estimate of the American Indian population in the United States referred to in a 2000 Tenth Circuit opinion, the Court noted there were "8.7 million Americans who identif[ied] themselves as having Native American ancestry" on the 1990 census.<sup>297</sup> Under this count, over three-fourths of all Indians were not enrolled in federally recognized tribes and ineligible for feathers under the government's regulation.<sup>298</sup>

In an effort to appear supportive of the Indian permit exception in the BGEPA, the USFWS made a token effort to collect eagle bodies, feathers, and bird parts for American Indian rituals through the creation of a National Eagle Repository at the Rocky Mountain Arsenal National Wildlife Refuge in Denver, Colorado,<sup>299</sup> and also experimented with a repository for non-eagle species listed on the MBTA.<sup>300</sup> As the federal government is solely authorized to recover eagle carcasses, the Repository houses and processes about 2,000 golden and bald eagles annually with a two-person staff and a backlog of 6,000 orders.<sup>301</sup> By

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295. U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5.

296. BUREAU OF INDIAN AFF., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, *supra* note 75, at 10.

297. *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*29 n.9 (10th Cir. Aug. 8, 2001), *vacated by and reh'g en banc*, *United States v. Hardman*, 260 F.3d 1199 (2001); Standards for the Classification of Federal Data on Race and Ethnicity, 60 Fed. Reg. 44,674, 44,679 (1995).

298. *See* What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(c)(2) (1999); Migratory Bird Permits, 50 C.F.R. § 21.11 (2013).

299. Electa Draper, *Eagle Bodies, Parts for Indian Rites are Collected, Sent from Colo. Morgue*, DENV. POST (Aug. 31, 2009, 3:40 PM) <https://www.denverpost.com/2009/08/31/eagle-bodies-parts-for-indian-rites-are-collected-sent-from-colo-morgue/> [<https://perma.cc/VF5G-NBYF>] (last updated May 6, 2016, 9:38 PM).

300. *Id.*

301. *Id.* (explaining it may take four years to fill an order for a whole bird after receiving the permit and it typically takes six months to obtain ten high-quality feathers).

any reasonable measure, the National Eagle Repository is an abject failure.<sup>302</sup>

According to the Division of Migratory Bird Management, only 1.1% of all the members of federally recognized tribes have eagle permits.<sup>303</sup> This means that nearly 99% of the Indians the government claims it is protecting with its regulations—that is, members of federally recognized tribes—have not applied for, nor received eagle permits from the government.<sup>304</sup> Even more revealing, in *United States v. Cleveland*, Jeff Haskins, Chief of the Migratory Bird Office for the USFWS, indicated that his office issued only 182 permits to Indians enrolled in federally recognized tribes for non-eagle feathers of birds listed on the MBTA.<sup>305</sup>

Congress explicitly declared a policy “to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”<sup>306</sup> Clearly, this policy has not been implemented in good faith by the government when it comes to American Indian possession and use of feathers of protected species of birds.<sup>307</sup> A more reasonable conclusion is the government’s regulations are designed to deny American Indians access to the feathers of birds listed on the MBTA and the BGEPA, which substantially burdens their free exercise of religion through the

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302. See *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 478-79 (5th Cir. 2014) (“[I]t appears that this argued harm [an increased difficulty for Indians in federally recognized tribes to access the Repository brought on by the added tax on the Repository by the inclusion of Indians not enrolled in federally recognized tribes, thereby “hindering the ability of the federal government to fulfill its responsibilities to federally recognized tribes”] is one of the government’s own making: the alleged harm to members of federally recognized tribes is caused by the system the government has created because the [R]epository that it established and runs is inefficient.”); see also Stokes, *supra* note 197 (evidencing the Repository’s failure by the low amount of federally recognized tribes that have eagle permits).

303. Stokes, *supra* note 197.

304. *Id.* (hypothesizing that expanding the permit system to, at the very least, state recognized tribes would not be contrary to the government’s objectives of protecting the eagles and upholding trust obligations to tribes).

305. Transcript of Bench Trial at 16, *United States v. Cleveland*, No. 7:06-MJ-04806 (S.D. Tex. Nov. 2, 2006).

306. American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2018).

307. See *id.* (outlining the protection and preservation of traditional American Indian religions).

underutilized and inaccessible permit system and the inadequacy of the Repository to meet demand.

*B. The government's interest in protecting eagle populations is not compelling under RFRA or the First Amendment, nor is it achieved by the least restrictive means.*

The government asserted two compelling interests for its regulation: (1) protecting eagles and (2) fostering the culture and religion of federally recognized tribes.<sup>308</sup> The government then asserted that limiting the possession of eagle feathers to federally recognized tribes was the least restrictive means of furthering the compelling governmental interests.<sup>309</sup>

Bald eagle populations made significant recoveries after the BGEPA secured their protection.<sup>310</sup> In 2006, the nesting population of bald eagles increased twenty-fold from 1963.<sup>311</sup> Moreover, in 2007, the government removed the bald eagle in the lower 48 states from the List of Endangered and Threatened Wildlife.<sup>312</sup> On March 9, 2012, the USFWS even issued a permit to allow the Northern Arapaho Tribe of Wyoming to kill bald eagles for religious purposes.<sup>313</sup> The Indians in *McAllen Grace Brethren Church* considered the preservation of protected

308. Brief of Defendant-Appellee at 20-27, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

309. *Id.* at 27-28.

310. See *The Bald Eagle's Road to Recovery*, U.S. FISH & WILDLIFE SERV., [https://www.fws.gov/pacific/ecoservices/documents/road\\_recovery.pdf](https://www.fws.gov/pacific/ecoservices/documents/road_recovery.pdf) [<https://perma.cc/2PCB-FPLQ>] (road-mapping the recovery of bald eagles after the enactment of protective federal policies and laws).

311. See *Chart and Table of Bald Eagle Breeding Pairs in Lower 48 States*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/midwest/eagle/population/chtotfprs.html> [<https://perma.cc/4SVJ-YDLK>] (last updated Aug. 29, 2018) (noting 463 bald eagle nesting pairs in 1963 and 9,789 in 2006) [hereinafter U.S. FISH & WILDLIFE SERV., *Chart and Table of Bald Eagle Breeding Pairs in Lower 48 States*].

312. Endangered and Threatened Wildlife and Plants: Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 70 Fed. Reg. 37,346, 37,372 (July 9, 2007).

313. *Bald Eagle Take Permit Issued for Religious Purposes*, U.S. FISH & WILDLIFE SERV. (Mar. 15, 2012), <https://www.fws.gov/news/blog/index.cfm/2012/3/15/bald-eagle-take-permit-issued-for-religious-purposes> [<https://perma.cc/W3V5-9UTD>] [hereinafter U.S. FISH & WILDLIFE SERV., *Bald Eagle Take Permit Issued for Religious Purposes*]; *History*, N. ARAPAHO TRIBE, <http://northernarapaho.com/wp/history/> [<https://perma.cc/5CVB-W469>] (“The Northern Arapaho are a federally recognized tribe.”).



bird species paramount.<sup>314</sup> Throughout the litigation, they stated they have no desire to harm or kill any birds listed on either the MBTA or the BGEPA, nor are they seeking permission to do so.<sup>315</sup> It is not necessary for them.<sup>316</sup>

There are an estimated 30,000 bald eagles in Alaska, 14,000 nesting pairs of bald eagles in the contiguous 48 states, and 20,000 to 30,000 golden eagles in the United States.<sup>317</sup> Each eagle has approximately 7,000 total feathers, a portion of which they may shed in patches through a natural process called “molting.”<sup>318</sup> Feathers grow back to replace the molted ones.<sup>319</sup> Under the current government regulations, American Indians cannot pick up a single feather shed by eagles from off the ground without a government permit—a permit the government denies to many Indian people who do not enjoy federal recognition.<sup>320</sup> Because of the regulation and the burdensome permit requirements, eagle feathers that could be used in American Indian religious practices remain uncollected and on the ground each year subject to destruction by humans, the elements of nature, and other sources. Moreover, eagle populations in zoos and aviaries regularly shed feathers.<sup>321</sup> These feathers are then sent

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314. Brief of Appellants at 24, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

315. *Id.*

316. *Id.*

317. *Bald Eagle Demographics*, AM. EAGLE FOUND., <https://www.eagles.org/what-we-do/educate/learn-about-eagles/bald-eagle-demographics/#toggle-id-5> [<https://perma.cc/W2DR-DHZ3>] (noting studies of the American bald eagle population largely ended when they were removed from the Threatened and Endangered Species list); *Golden Eagle Demographics & Population*, AM. EAGLE FOUND., <https://www.eagles.org/what-we-do/educate/learn-about-eagles/golden-eagle-demographics/#toggle-id-2> [<https://perma.cc/TQ3J-LYP3>].

318. *See generally Bald Eagle Feathers*, AM. BALD EAGLE INFO. (2017), <http://www.baldeagleinfo.com/eagle/feathers.html> [<https://perma.cc/C7U7-TY9C>] (describing eagle feathers and the molting process).

319. *Id.*

320. *See Stokes, supra* note 197 (noting sixty-two state recognized tribes without federal status and urging Congress to expand the current eagle feather permit system); MANATAKA AM. INDIAN COUNCIL, *U.S. Federally Non-Recognized Tribes, supra* note 202 (noting as of 2008, 226 tribes were not recognized federally); 500 NATIONS, *supra* note 202 (listing eighty tribes with state, but not federal, recognition); *see also* What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999); Migratory Bird Permits, 50 C.F.R. § 21.11 (2013).

321. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 476-77, 479 (5th Cir. 2014).

to the ineffectual federal Repository.<sup>322</sup>

In addition, many eagles die from natural causes, such as old age or illness. Others are victims of road kill, pollution, electrocution, wind farms, illegal poaching by non-Indians, and other causes, wherein feathers and body parts could be used for American Indian religious practices and ceremonies.<sup>323</sup> Most of these birds are never recovered by the government or any other agency for a wide range of reasons—mostly because it is illegal for individuals and entities, other than USFWS agents, zoos, and aviaries, to collect and ship them.<sup>324</sup>

Because of (1) the bald and golden eagle population recovery,<sup>325</sup> (2) the government's removal of the bald eagle from the List of Endangered and Threatened Wildlife,<sup>326</sup> (3) the government's recent permitting of the killing of bald eagles by the members of the Northern Arapaho Tribe of Wyoming,<sup>327</sup> and (4) the government's ineffectiveness

322. See, e.g., *I Found a Dead Eagle*, U.S. FISH & WILDLIFE SERV., [https://www.fws.gov/pacific/eagle/all\\_about\\_eagles/dead\\_eagle.html](https://www.fws.gov/pacific/eagle/all_about_eagles/dead_eagle.html) [<https://perma.cc/F8Y2-YLDN>] (last updated July 16, 2014) (“If directed by an expert, all eagle carcasses, feathers, and parts must be shipped to the National Eagle Repository.”).

323. See generally U.S. DEP’T OF THE INTERIOR, U.S. FISH & WILDLIFE SERV., DRAFT ENVIRONMENTAL ASSESSMENT: PROPOSED ISSUANCE OF A BALD EAGLE INCIDENTAL TAKE PERMIT FOR THE OSAGE WIND PROJECT, OSAGE COUNTY, OKLAHOMA 5.43-5.49 (2018), [https://www.fws.gov/southwest/migratorybirds/docs/OsageWindProjectDEA\\_May2018\(4\).pdf](https://www.fws.gov/southwest/migratorybirds/docs/OsageWindProjectDEA_May2018(4).pdf) [<https://perma.cc/93ZL-NBF2>] (detailing the cumulative effects of poaching, electrocution, poisoning, collisions, disease, and habitat loss on bald eagle and migratory bird populations, as well as the effect on American Indian cultural and religious values).

324. See Draper, *supra* note 299 (explaining eagles may not be taken or killed, nor may loose feathers be collected, by anyone other than the federal government); Meryl Fisher, *Navajo Zoo Receives Permit to Provide Protected Eagle Feathers*, CRONKITE NEWS (Apr. 30, 2015), <http://cronkitenewsonline.com/2015/04/navajo-zoo-provides-protected-eagle-feathers/index.html> [<https://perma.cc/S3KM-TU6C>] (describing the multiple outlets people turn to in order to access costly eagle feathers).

325. See U.S. FISH & WILDLIFE SERV., *Chart and Table of Bald Eagle Breeding Pairs in Lower 48 States*, *supra* note 311 (displaying the rebound of the bald eagle nesting population since the passage of the BGEPA).

326. Endangered and Threatened Wildlife and Plants: Removing the Bald Eagle in the Lower 48 States from the List of Endangered and Threatened Wildlife, 70 Fed. Reg. 37,346, 37,372 (July 9, 2007).

327. U.S. FISH & WILDLIFE SERV., *Bald Eagle Take Permit Issued for Religious Purposes*, *supra* note 313.

in providing permitted feathers and eagle body parts to almost all American Indians,<sup>328</sup> the government has no compelling interest in denying feathers and body parts of birds listed on the MBTA and the BGEPA for religious purposes to any American Indian.

The Indians challenged the government's claim that the regulation was the least restrictive means of furthering the asserted compelling interests.<sup>329</sup> The Indians proposed measures that were even less restrictive than the government's regulation.<sup>330</sup> These measures would provide greater supplies of feathers to our Indian people and more

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328. Appellee's Opening Brief at 5-10, *United States v. Friday*, No. 06-8093, 2007 WL 2437229 (10th Cir. 2007) ("Northern [Arapahos] who had attempted to go through the Repository process described various experiences. Tribal member Daniel Caldwell had first applied for an eagle from the Repository in 1998. He eventually received an eagle in 2002. According to Caldwell, 'the entire carcass was spoiled. I wasn't able to use any of the . . . feathers or anything on him.' Caldwell . . . contacted the Repository again, explaining that the bird was 'spoiled,' and submitted a 'Request for Additional Materials.' The results were equally unsatisfactory. . . . He wasn't able to use the parts or feathers from either shipment for ceremonial purposes due to their condition. . . . Caldwell did not make a vow to participate in the Sundance, because he did not have any acceptable eagle parts. . . . [Harvey] Spoonhunter applied for an immature golden eagle in 1997. In 2001, he was finally contacted by the Repository, and was told they could not obtain an immature golden eagle, but offered a bald eagle, to which he agreed. The head of the bird he received was 'decaying or deteriorating, and there was . . . blood on the head of the bald eagle.' He contacted the Repository, who sent him a separate head of a bald eagle. This one 'was also stained. It had kind of a . . . yellow color to it . . . .' This part was no more acceptable for ceremonial purposes. As a result, he was not able to complete his Sundance vow. ' . . . [W]e make these vows for the people that are sick, our loved ones or the ones that have passed on; and if it ain't there and if you don't get the right parts you've asked for, your—your vow is not complete. There is a link missing there, and I didn't feel right that my vow is not complete yet.' Mr. Spoonhunter made another request for a replacement eagle, but was told he'd already received one eagle and he wouldn't be able to get another. He then asked the Repository to keep him on the list for an immature golden eagle. He hasn't heard from them since. William C'Hair . . . applied for the wings and tail of an eagle . . . He described the fulfillment of his order as receiving parts from a duck or a goose. Nathan Friday . . . applied for an eagle from the Repository in 2001. As of 2006, he had yet to hear any word. . . . Nelson White Eagle . . . the 'Keeper of the Sacred Pipe' for the tribe . . . [received] an eagle from the Repository on behalf of a person who was incarcerated at the time. . . . ' . . . when I opened the box, you know, boy it really . . . was spoiled.' '[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.'") [internal citations omitted].

329. Brief of Appellants at 25-27, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

330. *Id.*

effectively manage our bird populations.<sup>331</sup> The measures would allow American Indians (1) to collect and gather feathers shed by living birds without government harassment and intervention, as eagles need not be harmed, killed or threatened in any way, and (2) to serve as stewards of their sacred bird populations, along with the government, by developing their own aviaries.<sup>332</sup>

American Indian eagle aviaries and sanctuaries are viable operations, serving Indians wishing to acquire eagle feathers.<sup>333</sup> In recent years, the government issued permits<sup>334</sup> to a handful of Indians to keep live eagles in aviaries run by tribes,<sup>335</sup> including the Zuni<sup>336</sup> and Jemez Pueblos in New Mexico,<sup>337</sup> Iowa Tribe of Oklahoma,<sup>338</sup> Comanche Nation of

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331. *Id.*; Stokes, *supra* note 197 (believing that more permits would not adversely reduce the eagle population).

332. *Id.*

333. *Id.*

334. *See, e.g., Native American Tribal Eagle Aviary*, U.S. DEP'T INTERIOR, <https://www.fws.gov/forms/3-200-78.pdf> [<https://perma.cc/7E2X-77NG>] (last updated Apr. 2018) (Fish and Wildlife Permit Application Form).

335. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 479 (5th Cir. 2014).

336. *Tribal Eagle Aviaries*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/southwest/NAL/aviaries.html> [<https://perma.cc/5FA3-XWRB>] (last updated Oct. 3, 2018) [hereinafter U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*] (explaining the Pueblo of Zuni was the first tribe to propose and build a sanctuary); *Zuni Eagle Sanctuary*, ZUNI SPIRITS (2004), <http://www.zunispirits.com/2006/zunitopics/zunieaglesanctuary.html> [<https://perma.cc/HA2X-7S7S>] (noting that the Zuni sanctuary houses twenty-one bald and golden eagles as of 2004).

337. U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (explaining there are two satellite aviaries, housing one golden eagle each, for which two tribe members are caretakers).

338. U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (detailing the Iowa Tribe aviary, staffed by an aviary manager and six workers, houses twenty-nine bald eagles and eight golden eagles); *Grey Snow Eagle House*, IOWA NATION, <http://eagles.iowanation.org/> [<https://perma.cc/WD8U-9PRP>] (detailing the Grey Snow Eagle House has rehabilitated and released twenty-six eagles); *We are Hiring! Full Time Position Available!*, IOWA NATION (Oct. 8, 2018), <http://eagles.iowanation.org/news/we-are-hiring-full-time-position-available/> [<https://perma.cc/6ZZE-9FHJ>] (explaining that the facility operates through funds from the U.S. Fish & Wildlife Service and the Iowa Tribe of Oklahoma, conducting four distinct programs: rehabilitation, American Indian religious use, education, and research).

Oklahoma,<sup>339</sup> Citizen Potawatomi Nation of Oklahoma,<sup>340</sup> Navajo Nation in Arizona,<sup>341</sup> and San Carlos Apache Nation in Arizona.<sup>342</sup>

Prior to the 1940 enactment of the legislation that ultimately became the BGEPA, nearly every family at the Zuni Pueblo had its own eagle.<sup>343</sup> These eagles were treated as members of the household.<sup>344</sup> According to one source: “The longest lifespan I’ve heard of for any eagle was one that died at 56 after being cared for by succeeding generations of a Zuni family.”<sup>345</sup> It is believed that “Zuni traditional eagle husbandry made that longevity possible.”<sup>346</sup> The Indians in this case believe this practice

339. U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (stating the Comanche of Oklahoma house eight bald eagles and nine golden eagles); *Queni Puha: Eagle Spirit*, SIA, <http://comancheeagle.org/eagleSpirit.html> [<https://perma.cc/2ZUB-QW26>] (listing their goals in providing educational programs on avian species, preserving culture, disseminating feathers and parts to federally recognized tribes, and training individuals on the legality of acquisition and possession of feathers and parts).

340. U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (noting the Citizen Potawatomi Nation aviary houses fourteen bald eagles and one golden eagle); *Eagle Aviary*, CITIZEN POTAWATOMI NATION, <http://www.potawatomi.org/culture/eagle-aviary/> [<https://perma.cc/TT6B-EWJX>] (explaining “aviary construction was funded in part by a \$200,000 USFWS Tribal Wildlife Grant” and that the aviary rehabilitates eagles and distributes naturally molted feathers to its tribal members); *see also* JOHN BARRETT, CITIZEN POTAWATOMI NATION, *CARING FOR EAGLE FEATHERS*, <http://www.potawatomi.org/wp-content/uploads/Caring-for-Eagle-Feathers.pdf> [<https://perma.cc/U9J9-3BVW>] (illuminating how the Citizen Potawatomi Nation uses feathers in their religious practices and traditions).

341. *Compare* U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (explaining the aviary housed four golden eagles and received a \$200,000 Tribal Wildlife Grant to house an additional twenty eagles), *with Eagle Sanctuary and Education Center*, NAVAJO NATION ZOO & EAGLE SANCTUARY, <https://www.navajozoo.org/eagle-sanctuary/> [<https://perma.cc/8XSH-4BEZ>] (showing the Navajo Zoo currently houses ten golden eagles).

342. U.S. FISH & WILDLIFE SERV., *Tribal Eagle Aviaries*, *supra* note 336 (noting the San Carlos Apaches have been given a Tribal Wildlife Grant of \$200,000 and the Southwest Region of the USFWS is working with the tribe to acquire a permit to acquire and house non-releasable eagles upon construction).

343. *See generally* Stephanie Woodward, *Zuni Sanctuary for Injured Eagles Bestows Blessings on Birds and Caregivers*, INDIAN COUNTRY TODAY (Oct. 15, 2012), <https://newsmaven.io/indiancountrytoday/archive/zuni-sanctuary-for-injured-eagles-bestows-blessings-on-birds-and-caregivers-LsAvdYLuJEa1Tdk26U-kDw/> [<https://perma.cc/XG2W-SXT7>] (describing the history of Zuni tribal members raising eagles within the pueblo).

344. *Id.*

345. *Id.*

346. *Id.*; *see also* *Tribe: Bald Eagle Permit a Victory for Tradition*, BILLINGS GAZETTE (Mar. 17, 2012), [https://billingsgazette.com/news/state-and-regional/wyoming/tribe-bald-eagle-permit-a-victory-for-tradition/article\\_9f8671c8-36e7-5c49-b501-b122da3a8601.html](https://billingsgazette.com/news/state-and-regional/wyoming/tribe-bald-eagle-permit-a-victory-for-tradition/article_9f8671c8-36e7-5c49-b501-b122da3a8601.html) [<https://perma.cc/C8KN-V28N>](quoting a Zuni tribe member in saying ceremonial practices were key to the endurance of American Indian culture).

should be expanded, encouraged, and supported by the government for other tribes and Indian communities, as well.<sup>347</sup>

Because of the veneration Indians have for their winged brothers and sisters, they would serve as ideal guardians of these species listed on the MBTA and the BGEPA.<sup>348</sup> This alternative solution would ameliorate the tax on federal repositories by allowing tribes direct access to molted feathers from live birds,<sup>349</sup> and more easily ensure the proper respect for the animal, in contrast to the clinical handling of the birds at the Repository by non-Indians.<sup>350</sup> Thus, not only are these alternatives viable, as the government failed to establish otherwise, but they will lessen the burden on the exercise of American Indian religion should they be allowed.

**COUNT THREE: Violation of the Equal Protection Clause of the Fourteenth Amendment**

A. *The government's asserted compelling interest in preserving American Indian culture and religion for federally recognized Indians is contradicted by its regulation prohibiting the use of bird parts for religious purposes by non-federally recognized American Indians.*

As to their religious use of feathers and birds parts of species listed on the MBTA and the BGEPA, the Indians in this case—defined as American Indians under the Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, but who are not enrolled in federally recognized tribes—are similarly situated to American Indians who are defined as such under the same federal regulation and enrolled in federally recognized tribes.<sup>351</sup>

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347. See *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 478 (5th Cir. 2014) (explaining that the government had not met its burden in asserting that expanding the permitting system would prohibitively tax the repository system).

348. See Woodward, *supra* note 343 (describing that tribal aviaries acted as a necessary gap-filler to rehabilitate disabled, but healthy birds because zoos, rehabilitators, and master falconers were generally disinterested).

349. *Id.*; Fisher, *supra* note 324.

350. Draper, *supra* note 299.

351. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-58,790 (Oct. 30, 1997); see also Amended Plaintiffs' Original Complaint for Declaratory Relief at 26-27, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

The Indians contended that the government's prohibition on the use of feathers and parts of birds listed on the BGEPA and the MBTA contradicted the government's so-called "compelling interest" in preserving American Indian culture.<sup>352</sup> How can American Indian culture and religion be preserved when the government denies that culture and religion to many American Indians on the arbitrary basis of federal recognition?<sup>353</sup> Instead, the Tenth Circuit's position in *In re Saenz* represented a more reasonable approach.<sup>354</sup> In the *Saenz* case, the government asserted that an expanded permit system open to all American Indians who sincerely practice Native American religions implicated equal protection concerns, because, they claimed, that when they disregarded membership in a federally recognized tribe, they relied impermissibly on racial classifications.<sup>355</sup> However, the government stipulated to the idea that reliance on ancestry may be defensible in determining Indian status.<sup>356</sup> Despite this, their basis for the justification was that such a distinction is an independent and neutral criteria.<sup>357</sup> Ultimately, the Court rejected this, and emphasized the legislature's goals in enacting the American Indian Religious Freedom Act, and observed that free exercise rights should not be conditioned on "political" criteria, that is, being a member of a federally recognized tribe.<sup>358</sup>

In fact, the government in *Saenz* attempted to use this designation of

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352. Brief of Appellants at 27, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

353. *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*36 (10th Cir. Aug. 8, 2001), *vacated by and reh'g en banc*, *United States v. Hardman*, 260 F.3d 1199 (2001) ("It has largely been the federal government's policies toward the Indian tribes over the years that have determined which tribes have survived and which tribes have not."); *see also* Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 156 (1995) ("[F]ederal policy toward the recognition of Indian tribes has been by no means consistent with 'real' ethnological principles . . .").

354. *See id.* at \*36-37 ("Mr. Saenz's tribe, the Chiricahua Indians, was once a [federally recognized] tribe with its own reservation. That status was revoked, however, when the federal government dissolved the Chiricahua reservation in 1886 after the outbreak of warfare between the Apache and the United States. . . . [T]he government now wants to use that same lack of recognition to infringe on Mr. Saenz's religious freedom. We refuse to base Mr. Saenz's free exercise rights on such tenuous ground.").

355. *In re Saenz*, 2001 U.S. App. LEXIS 17698, at \*31-35.

356. *Id.* at \*34.

357. *Id.* at \*34-35.

358. *Id.* at \*36-37.

political status by analogizing to *Morton v. Mancari*.<sup>359</sup> The Saenz court distinguished *Mancari* by restating the issue which dealt specifically with an individual's right to freely exercise their religious beliefs.<sup>360</sup> Nevertheless, this "political" Indian identity erodes equal protection concerns generally and evades strict scrutiny because government preference is not directed towards "racial" Indians.<sup>361</sup> So, this begs the questions: Who is American Indian to the federal government and when?

*B. The government's definition of American Indian violates RFRA and the First Amendment when it enforces the BGEPA and the MBTA concerning the use of eagle feathers considered essential and central to the practice of the American Indian religion.*

The federal government has used and continues to use several different definitions for American Indian.<sup>362</sup> Ultimately, Congress is the primary definer of the term "Indian" "for purposes relating to legislation."<sup>363</sup> Only one definition excludes American Indians *not* enrolled in federally recognized tribes.<sup>364</sup> The following five—though there are

359. *Id.* at \*32-33. See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding a hiring and promotion preference for Indians in jobs with the Bureau of Indian Affairs).

360. *In re Saenz*, 2001 U.S. App. LEXIS 17698, at \*32-33.

361. Ford, *supra* note 353, at 154-55; see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (invoking strict scrutiny when the federal government imposes racial classifications).

362. See, e.g., Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997); Indian Arts and Crafts Act of 1990, Pub. L. 101-644, § 104, 104 Stat. 4662, 4663 (1990) (codified at 18 U.S.C. § 1159(c)(1) (2018)); Indian Healthcare Improvement Act, 25 U.S.C. § 1603(13)(A)-(D) (2018); Indian Reorganization Act of 1934, Pub. L. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 5129 (2018)); DON PHILPOTT, UNDERSTANDING THE DEPARTMENT OF THE INTERIOR 121 (2016); *Frequently Asked Questions*, U.S. BUREAU INDIAN AFF., <https://www.bia.gov/frequently-asked-questions> [<https://perma.cc/67YP-QZ9G>] [hereinafter U.S. BUREAU INDIAN AFF., *Frequently Asked Questions*].

363. DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 30 (2d ed. 2007).

364. Compare Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-58,790 (Off. of Mgmt. & Budget, Oct. 30, 1997); Indian Arts and Crafts Act of 1990, Pub. L. 101-644, § 104, 104 Stat. 4662, 4663 (1990) (codified at 18 U.S.C. § 1159(c)(1) (2018)); Indian Healthcare Improvement Act, 25 U.S.C. § 1603(13)(A)-(D) (2018), and Indian Reorganization Act of 1934, Pub. L. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 5129 (2018)), with PHILPOTT, *supra* note 362, and U.S. BUREAU INDIAN AFF., *Frequently Asked Questions*, *supra* note 362.



more<sup>365</sup>—definitions, which are used at varying times by the government, are submitted.

1. *An American Indian is defined as “A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.”*<sup>366</sup>

This definition of American Indian was mandated to “be used by the Bureau of the Census in the 2000 decennial census.”<sup>367</sup> Other federal programs were directed to adopt this definition “as soon as possible, but not later than January 1, 2003, for use in household surveys, administrative forms and records, and other data collections.”<sup>368</sup> The *Federal Register* in 1997 stated:

The racial and ethnic categories set forth in the standards should not be interpreted as being primarily biological or genetic in reference. Race and ethnicity may be thought of in terms of social and cultural characteristics as well as ancestry. . . . Respect for individual dignity should guide the processes and methods for collecting data on race and ethnicity; ideally, respondent self-identification should be facilitated to the greatest extent possible, recognizing that in some data collection systems observer identification is more practical.<sup>369</sup>

It also states: “The principle objective of the review has been to enhance the accuracy of the demographic information collected by the Federal Government. . . . The second element . . . [is] to monitor civil rights enforcement and program implementation.”<sup>370</sup> The U.S. Office of Management and Budget decided to use the term “American Indian” instead of “Native American,”<sup>371</sup> and to classify Central and South

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365. WILKINS, *supra* note 363, at 26-32 (explaining there are six broad categories of definitions—including blood quantum, federal recognition, residence on or near a reservation, and lineal descendency—and that over thirty definitions have been promulgated by the federal government to determine eligibility for services).

366. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,789 (Oct. 30, 1997).

367. *Id.* at 58,782.

368. *Id.*

369. *Id.*

370. *Id.* at 58,783.

371. *Id.* at 58,786.

American Indians as American Indian and include them in them in the definition “American Indian or Alaska Native.”<sup>372</sup>

2. *An American Indian is defined as “a member of any federally or State recognized tribe,” or an individual “certified as an Indian artisan by an Indian tribe.”*<sup>373</sup>

The government uses this definition in the prohibition against the misrepresentation of goods as being produced by Indians within the United States.<sup>374</sup>

3. *An American Indian is defined as “any person who . . . irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendent, in the first or second degree, of any such member, or . . . is an Eskimo or Aleut or other Alaska Native, or . . . is considered by the Secretary of the Interior to be an Indian for any purpose, or . . . is determined to be an Indian under regulations promulgated by the secretary.”*<sup>375</sup>

This definition is used for American Indians eligible for federal health services, as well as scholarship and grant programs.<sup>376</sup> “Groups terminated” mean those no longer federally recognized.<sup>377</sup> This definition does encompass a discussion of federal recognition because 25

372. *Id.* at 58,787.

373. Indian Arts and Crafts Act of 1990, Pub. L. 101-644, § 104, 104 Stat. 4662, 4663 (1990) (codified at 18 U.S.C. § 1159(c)(1) (2018)).

374. *See* 18 U.S.C. § 1159(a) (2018) (“It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.”).

375. Indian Healthcare Improvement Act, 25 U.S.C. §§ 1603(13)(A)-(D) (2018).

376. *See* Indian Healthcare Improvement Act, 25 U.S.C. §§ 1612-16q, 1621-1623, 1631-1638g, 1651-1660h, 1665-1667e (2018) (providing scholarships and grants in health professions, as well as various health services and facilities, to Indians).

377. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02, at 163 (Nell Jessup Newton ed., 2012) (“Congressional legislation in the 1950s and early 1960s terminated the federal government’s relations with approximately 110 tribes. . . . It is clear that termination does not end a tribe’s existence. Rather, it ends the special federal-tribal relationship in most, but not all, respects for the terminated tribes.”).

U.S.C. § 1603(13)(C) defers to the Secretary of Interior's consideration of who is Indian for any purpose<sup>378</sup> and § 1603(13)(D) follows the Secretary's determinations of who is Indian under regulations promulgated by them.<sup>379</sup> However, the two latter sections are not additive to §§ 1603(13)(A)-(B), employing the language "or."<sup>380</sup>

4. *An American Indian "shall include all persons of Indian descent who are members of any recognized tribe now under Federal jurisdiction, and all persons who are descendants . . . residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."*<sup>381</sup>

This definition is used for those Indians eligible for tuition loans for vocational and trade schools.<sup>382</sup>

5. *An American Indian is defined only as an enrolled member of a federally recognized tribe.*<sup>383</sup>

This definition is used in the enforcement of the BGEPA<sup>384</sup> and the MBTA.<sup>385</sup>

The Indians in *McAllen Grace Brethren Church* asserted that, when it comes to the free exercise of religion, the broadest definition of American Indian shall be used in order to protect all those who wish to engage in the exercise of their American Indian religion without interference.<sup>386</sup> Thus, Definition 1, in which the objective is to "enhance the accuracy of the demographic information collected by the Federal Government," and "to monitor the civil rights enforcement and program implementation,"

378. Indian Healthcare Improvement Act, 25 U.S.C. § 1603(13)(C) (2018).

379. Indian Healthcare Improvement Act, 25 U.S.C. § 1603(13)(D) (2018).

380. Indian Healthcare Improvement Act, 25 U.S.C. §§ 1603(13)(A)-(D) (2018).

381. Indian Reorganization Act of 1934, Pub. L. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 5129 (2018)).

382. Indian Reorganization Act of 1934, 25 U.S.C. § 5115 (2018).

383. PHILPOTT, *supra* note 362; U.S. BUREAU INDIAN AFF., *Frequently Asked Questions*, *supra* note 362.

384. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668a (2018); What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999).

385. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (2018); Migratory Bird Permits, 50 C.F.R. § 21.11 (2013).

386. Brief of Appellants at 31, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

should be used when determining the Indians' rights to the feathers seized in this case.<sup>387</sup>

### C. Discussion of Indian Definitions

Federal law is inconsistent in its recognition of American Indians. Under one federal law, the Indians in this case were counted as an American Indian,<sup>388</sup> whereas, another federal law—specifically the law invoked by Special Agent Rodriguez who seized the plaintiffs' feathers—denied them such recognition.<sup>389</sup>

#### 1. The U.S. Decennial Census Definition of American Indian

In the first instance, the 1960 census (and censuses thereafter) recognized and counted American Indians, irrespective of enrollment in federally recognized tribes, through the use of self-identification.<sup>390</sup> According to the 2000 census:

The term “American Indian and Alaska Native” refers to people having origins in any of the original peoples of North and South America (including Central America), and who maintain tribal affiliation or community attachment. It includes people who reported “American Indian and Alaska Native” or wrote in their principal or enrolled tribe.<sup>391</sup>

The 2000 census also allowed a person to choose more than one race.<sup>392</sup> As a consequence of this provision, the Texas American Indian population grew from 65,877 in the 1990 U.S. Census to 215,599 in the 2000 U.S. Census.<sup>393</sup> At the same time, the United States American

387. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,783 (Oct. 30, 1997).

388. *Id.* at 58,789.

389. What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999).

390. U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, A REPORT OF THE EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, CENSUS OF POPULATION: 1960, VOL. I: CHARACTERISTICS OF THE POPULATION, PART 1: UNITED STATES SUMMARY, at xiv (1964) [hereinafter U.S. BUREAU OF THE CENSUS, EIGHTEENTH DECENNIAL CENSUS: 1960]; Simmons, *supra* note 165, at 78.

391. U.S. BUREAU OF THE CENSUS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, *supra* note 107, at 2.

392. *Id.*

393. *Id.* at 5.

Indian population more than doubled from 1,959,234 in the 1990 census to 4,119,301 in the 2000 census.<sup>394</sup>

Over 62% of those recognized and enumerated as American Indians in the 2010 U.S. Census were not enrolled in federally recognized tribes.<sup>395</sup> They were from tribes the federal government terminated or doesn't recognize;<sup>396</sup> or they were the children, grandchildren, and great-grandchildren of enrolled tribal members, but they did not meet the sufficient blood quantum;<sup>397</sup> or they were the progeny of parents that did not meet the appropriate gender requirements for their children's admission into their respective tribes. Others made up a large number of the lost generation of American Indians adopted out during the 1940s to the 1970s, when extreme poverty in Indian Country combined with high-handed government practices allowed the federal government to forcefully remove Indian children from their biological parents and give them to non-Indians to raise as their own.<sup>398</sup> And still, there are other American Indians from Canada and Central and South America who now reside in the United States who can never establish a legal claim as a member of a federally recognized tribe because their ancestral homeland is outside the United States.<sup>399</sup> Their only option to be recognized and

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394. In Texas, 118,362 persons indicated that they were "American Indian and Alaska Native alone" and 97,237 persons indicated that they were "Native American and Alaskan Native in combination" with other races. *Id.*

395. Compare BUREAU OF INDIAN AFF., 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, *supra* note 75, at 10 (indicating 1,969,167 Indians were enrolled in federally recognized tribes in the 2010 census), with U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5 (indicating a total Indian population of 5,220,579 in 2010).

396. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02, at 163 (Nell Jessup Newton ed., 2012); See MANATAKA AM. INDIAN COUNCIL, *U.S. Federally Non-Recognized Tribes*, *supra* note 202 (noting 226 tribes as of 2008 that are not federally recognized); 500 NATIONS, *supra* note 202 (listing eighty tribes with state, but not federal, recognition).

397. WILKINS, *supra* note 363, at 28-30 ("one-fourth being the most widely accepted fraction").

398. See generally Indian Child Welfare Act of 1978, Pub. L. 95-608, 92 Stat. 3069 (1978) (codified as amended at 21 U.S.C. §§ 1901-1963 (2018)) (establishing due process to combat the forced removal of Indian children from their homes); B. J. JONES ET AL., THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 1-16 (2d ed. 2012) (detailing the history of the removal of Indian children from their homes).

399. Cf. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,787 (Oct. 30, 1997) (including Central and South Americans as American Indians). See Wolfley, *supra* note 134, at 172 (stating that Indians born in foreign

counted as an American Indian by the federal government was through the census.<sup>400</sup>

2. *A Definition of American Indian as Enrolled in a Federally Recognized Tribe*

Under this definition, the federal government asserts that one is an American Indian entitled to worship with eagle feathers only if one is enrolled in a federally recognized tribe and if that person has applied for a permit to possess and use the feathers.<sup>401</sup> The wordings of the laws—the BGEPA and the MBTA—originally made no mention of federal recognition.<sup>402</sup> Instead, the laws simply say, “Indian tribes.”<sup>403</sup> The overly narrow federal recognition definition of the American Indian arbitrarily and capriciously excluded many American Indian religious practitioners from free exercise.

To illustrate, one year, a person of full-blood Indian ancestry might be enrolled in a federally recognized tribe. The next year that tribe may no longer have federal recognition, making that full-blood Indian a non-Indian in the federal government’s eyes. Later on, federal recognition could be reinstated. This happened time and again in the 1950s and the early 1960s, when the federal government terminated 110 federally recognized tribes.<sup>404</sup>

Being an enrolled member of a federally recognized tribe often requires a validated genealogy to an ancestor on a specified tribal roll established by the federal government, as well as a blood quantum

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countries did not become eligible for citizenship until the adoption of the Nationality Act of 1940); see also Nationality Act of 1940, Pub. L. 76-853, 54 Stat. 1137 (1940) (defining persons eligible for citizenship or naturalization).

400. See generally U.S. BUREAU OF THE CENSUS, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000, *supra* note 107, at 2 (indicating the census uses self-identification).

401. What are the Requirements Concerning Permits for Indian Religious Purposes?, 50 C.F.R. § 22.22(a)(5) (1999). See MANATAKA AM. INDIAN COUNCIL, *U.S. Federally Non-Recognized Tribes*, *supra* note 202 (noting 226 tribes were not federally recognized).

402. Possession and Use for Religious Purposes, 31 Fed. Reg. 16,011, 16,012 (Dec. 15, 1966) (codified at 50 C.F.R. § 11.5 (1966)), <http://cdn.loc.gov/service/ll/fedreg/fr031/fr031242/fr031242.pdf> [<https://perma.cc/L946-WCEP>] (mentioning permits may issue “Indians who are authentic, bona fide practitioners of such religion.”).

403. Bald and Golden Eagle Protection Act, 16 U.S.C. § 668 (2018); Migratory Bird Treaty Act of 1918, 16 U.S.C. § 703 (2018).

404. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.02, at 163 (Nell Jessup Newton ed., 2012).

requirement of “Indianness.”<sup>405</sup> In addition, a vote by the tribal government may be required in which the tribal government agrees to accept the individual into its tribe.<sup>406</sup>

When it comes to the blood quantum requirement, tribes vary widely in the degree of tribal blood required for enrollment in the tribe.<sup>407</sup> One tribe may have a requirement as high as one-half degree of tribal blood born to an enrolled member of the tribe, as with the Duckwater Shoshone Tribe,<sup>408</sup> whereas another tribe may have a requirement so low as to be any amount of Indian blood—no matter how small—with a pedigree to an ancestor on a federal roll, as with the Cherokee Nation of Oklahoma,<sup>409</sup> or it may be a quantum anywhere between the extremes (such as one-quarter, one-eighth, one-sixteenth, one-thirty-second and so on).<sup>410</sup>

Historically, tribes have been known to disenroll segments of their respective populations for political purposes.<sup>411</sup> In 2003 at the Isleta Pueblo, tribal leaders decided to raise the blood quantum to a rigid one-half blood quantum requirement for tribal membership.<sup>412</sup> They

405. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.03, at 170-83 (Nell Jessup Newton ed., 2012).

406. See THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 190-92 (“Most tribes have membership committees to determine eligibility and resolve disputes.”). At the Winnebago reservation, the author witnessed the tribal council vote to not admit those who met all the requirements for enrollment but had been adopted out to non-Indians. One of the arguments to reject their application came from an elder on the council who said, “If their parents didn’t want them, then we don’t want them either.” This was an especially vexing development in light of the efforts of so many tribal members that pushed for the passage of Indian Child Welfare Act of 1978.

407. See *id.* at 190 (“Although some require as much as one-half, no tribe requires more; and several tribes, particularly in California and Oklahoma, require a minimum of one-eighth or one-sixteenth.”).

408. *Id.* at 191-92.

409. *Citizenship*, CHEROKEE NATION, <http://webtest2.cherokee.org/Services/Tribal-Citizenship/Citizenship> [<https://perma.cc/KMH7-6BHJ>].

410. THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL, *supra* note 11, at 190; see also Roy Cook, *Heart of Colonialism Bleeds Blood Quantum*, AM. INDIAN SOURCE, <http://www.americanindiansource.com/bloodquantum.html> [<https://perma.cc/PPK5-F2XW>].

411. See, e.g., Louis Sahagun, *Pechanga Band Ousts Scores of Tribal Members*, L.A. TIMES (Mar. 20, 2004), <https://www.latimes.com/archives/la-xpm-2004-mar-20-me-pechanga20-story.html> [<https://perma.cc/AL2C-JUTH>] (explaining 100 Pechanga Band of Luiseno Mission Indians, representing 10% of the tribe, were disenrolled, preventing them from receiving monthly casino revenue payments of \$10,000); Cook, *supra* note 410.

412. Cook, *supra* note 410.

informed tribal members already enrolled in the tribe who did not meet the new one-half blood quantum requirement that they would be disenrolled.<sup>413</sup> In 2004, at the Redding Rancheria, the tribal council went ahead and disenrolled a quarter of its membership.<sup>414</sup> In both the Isleta Pueblo and Redding Rancheria cases, the disenrollment of tribal members was related to the distribution of casino profits.<sup>415</sup>

Then, there are those cases in which an applicant for tribal membership met all the requirements of membership, including blood quantum and demonstrating ancestry traced to the appropriate documented roll, was not permitted membership in the tribe for a very different political reason—although this could be tied to the scarcity of resources available for already enrolled members. For example, in *Santa Clara Pueblo v. Martinez*,<sup>416</sup> the United States Supreme Court upheld the ordinance of a tribe that denied membership to the children of female tribal members who married outside the tribe.<sup>417</sup> Plaintiff Julia Martinez was a full-blooded member of the Santa Clara Pueblo, residing on the Santa Clara Reservation in northern New Mexico,<sup>418</sup> who married a full-blood Navajo Indian with whom she had several children.<sup>419</sup> Even though she was a full-blooded member of the tribe, and even though her children grew up on her reservation and were living there at the time of the lawsuit, the Court held the tribe maintained a right to deny her children membership because their father was not Santa Clara.<sup>420</sup>

Finally, there are American Indians who decline to participate in the

413. *Id.*

414. Michael Martinez, *Revisionist History in the Cards*, WASH. POST (Dec. 19, 2004), [https://www.washingtonpost.com/archive/politics/2004/12/19/revisionist-history-in-the-cards/bedd91b4-a8ca-4a9c-aa68-f8efd64ca558/?noredirect=on&utm\\_term=.6a91081a1891](https://www.washingtonpost.com/archive/politics/2004/12/19/revisionist-history-in-the-cards/bedd91b4-a8ca-4a9c-aa68-f8efd64ca558/?noredirect=on&utm_term=.6a91081a1891) [<https://perma.cc/NB9P-FY7X>] (ejecting 76 of 295 members).

415. Cook, *supra* note 410; Martinez, *supra* note 414.

416. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

417. *Id.* at 52-53, 72.

418. *Id.* at 52.

419. *Id.*; see also Elizabeth Prine Pauls & Laura Thompson, *Southwest Indian*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Southwest-Indian> [<https://perma.cc/QRJ5-2WFY>] (last updated Jan. 5, 2018) (explaining Santa Clara Indians are patrilineal, whereas Navajos are matrilineal).

420. See *Santa Clara Pueblo*, 436 U.S. at 72 (expressing the Court's opinion that until Congress makes clear if 25 U.S.C. § 1302—the statute prohibiting Indian tribes from violating constitutional rights in exercising the powers of self-government—can be used to obtain “declaratory or injunctive relief against tribe or its officers,” the Courts will not interfere).



enrollment process to become a member of a federally recognized tribe because of a belief that the Creator makes American Indians, not the federal government. As American Indian activist Leonard Peltier commented: “This is not our way. We never determined who our people were through numbers and lists. These are the rules of our colonizers, imposed for the benefit of our colonizers at our expense. They are meant to divide and weaken us. I will not comply with them.”<sup>421</sup>

**COUNT FOUR: Improper Application of the MBTA and the BGEPA**

Implicit in the government’s actions was the assumption that the Indians in this case—defined as American Indians under the Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, but who were not enrolled in federally recognized tribe—were not exempted from criminal action when they used feathers and parts of protected species of birds for religious purposes.<sup>422</sup> In contrast, American Indians enrolled in federally recognized tribes are exempt from criminal prosecution for using feathers and parts of protected species of birds for religious purposes.<sup>423</sup>

**COUNT FIVE: Violation of the Fourth Amendment**

There was no fair probability that contraband evidence of a crime would be found at the March 11 powwow in McAllen, because the Indians in this case were in lawful possession feathers of protected species of birds listed on the MBTA and the BGEPA.<sup>424</sup>

**COUNT SIX: Violation of the Fifth Amendment**

The seizure of feathers and other items deprived the Indians of their rights to ownership and possession of religious objects used in the observance of their traditional American Indian religion, which constituted a violation of the Due Process Clause of the Fifth Amendment.<sup>425</sup>

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421. See WARD CHURCHILL, *INDIANS ARE US? CULTURE AND GENOCIDE IN NATIVE NORTH AMERICA* 106 (1994) (quoting a statement by Leonard Peltier to Paulette D’Auteuil Robideau at Leavenworth Federal Prison, June 1991).

422. Amended Plaintiffs’ Original Complaint for Declaratory Relief at 27, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

423. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782, 58,782-58,790 (Oct. 30, 1997).

424. Amended Plaintiffs’ Original Complaint for Declaratory Relief at 28, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

425. *Id.* at 29.

**COUNT SEVEN: Administrative Procedure Act**

The government's conduct constituted agency action that was: (a) arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law; (b) contrary to the Indians' constitutional and statutory rights; (c) in excess of statutory jurisdiction and authority; and (d) without observance of procedures required by law. The Indians argued that the government's action should be set aside, and declaratory and injunctive relief should be provided under the Administrative Procedure Act.<sup>426</sup>

**COUNT EIGHT: Violation of International Law**

The MBTA, a series of agreements with Canada, Great Britain, Mexico, Japan, and the former Soviet Union signed between 1916 and 1976,<sup>427</sup> permits indigenous people not enrolled in tribes recognized by their respective national governments to possess feathers and bird parts of protected species of birds for religious purposes.<sup>428</sup> Indigenous people, including members of the South Texas Indian Dancers Association, traveled between and among signatory nations, bringing with them their regalia and religious objects adorned with feathers and bird parts of protected species, so that they could practice their traditional religion and faith while in other countries as guests of their respective native populations.<sup>429</sup>

The doctrine of comity, as established under international law and recognized in the United States, encourages deference to foreign legal and political judgments to foster international cooperation and encourage reciprocity between the United States and other countries.<sup>430</sup> Federal agencies regularly invoke the doctrine of comity as a guide for decisions that touch on foreign interests.<sup>431</sup> "Where fairly possible, a United States

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426. *Id.*; see also Administrative Procedure Act, 5 U.S.C. §§ 701-706 (2018).

427. *The Migratory Bird Treaty Act, Explained*, NAT'L AUDUBON SOC'Y (Jan. 26, 2018), <https://www.audubon.org/news/the-migratory-bird-treaty-act-explained> [<https://perma.cc/7RAA-E8CD>].

428. Amended Plaintiffs' Original Complaint for Declaratory Relief at 30, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

429. *Id.*

430. *Comity*, BLACK'S LAW DICTIONARY (10th ed. 2014); Amended Plaintiffs' Original Complaint for Declaratory Relief at 30, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009) (citing *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991)).

431. *Comity of Nations*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/comity\\_of\\_nations](https://www.law.cornell.edu/wex/comity_of_nations) [<https://perma.cc/XNQ2-6LQ6>]; Amended Plaintiffs' Original Complaint for Declaratory Relief at 30, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

statute should be construed so as not to conflict with international law or an international agreement of the United States.”<sup>432</sup>

The United States ratified the United Nations International Covenant on Civil and Political Rights (ICCPR). Article 18.1 of the ICCPR insures the freedom of everyone to “have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.”<sup>433</sup> The United States has also endorsed the Universal Declaration of Human Rights, which protects the rights of individuals not only to believe as they wish, but also to “manifest” that belief through practice, including “ceremonial acts” and “participation in rituals.”<sup>434</sup> Finally, the United States Congress has passed the International Religious Freedom Act of 1998,<sup>435</sup> which establishes as United States policy the promotion of freedom of religion and cooperation with foreign governments “that affirm and protect religious freedom, in order to develop multilateral . . . initiatives to . . . promote religious freedom abroad.”<sup>436</sup>

These laws make clear that it is not only fairly possible for the United States to defer to other nations permitting the religious use of feathers and bird parts of protected species of birds by its indigenous people, but that domestic and international law, in fact, require such deference.<sup>437</sup> Under these circumstances, the government’s interpretation of the MBTA forbidding the religious use of protected species of birds and bird parts by Indians in the United States clearly violated the doctrine of

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432. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 114 (AM. LAW INST. 1987); *see also* Amended Plaintiffs’ Original Complaint for Declaratory Relief at 30, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

433. International Covenant on Civil and Political Rights art. 18, Dec. 19, 1966, 999 U.N.T.S. 171. However, in the ratification of the ICCPR, the United States declared this provision and other protective rights to be non-self-executing.

434. U.N. Human Rights Comm., General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights, at 2, U.N. Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993).

435. International Religious Freedom Act of 1998, Pub. L. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401-6481 (2018)).

436. International Religious Freedom Act of 1998, Pub. L. 105-292, § 2(b)(4), 112 Stat. 2787, 2788 (1998) (codified at 22 U.S.C. § 6401(b)(1)(D) (2018)).

437. Amended Plaintiffs’ Original Complaint for Declaratory Relief at 31, *McAllen Grace Brethren Church v. Salazar*, No. 7:07-cv-60 (S.D. Tex. Mar. 1, 2009).

comity, treaties which the United States endorsed, and domestic law.<sup>438</sup>

In the end, the Indians leaned most heavily on the arguments in the first three counts.<sup>439</sup>

#### CONCLUSION

Since 1884, when the government banned American Indian religions, Indian people have struggled to save their culture and religious practices. Today, many of our Indian elders remember a time when we held our powwows and other religious ceremonies in secret, all the while fearing the wrath of the federal government. We also recall that weekend in 1989, when Pastor Soto announced, “We are not holding our powwows and ceremonies in secret anymore. We are celebrating our culture out in the open.”<sup>440</sup> Everyone knew that it was just a matter of time before the fist of the federal government came down hard on our Indian community.

Fortunately, we had a few years to watch, wait, and gird ourselves for the coming battle. There would be a number of government raids, searches, and seizures of eagle feathers before the first Indian not enrolled in a federally recognized tribe won a fight in court for his seized powwow feathers.<sup>441</sup> That Indian would be Joseluis Saenz, descended from the Chiricahua band of Apache Indians.<sup>442</sup>

In June 1996, federal agents entered the home of Mr. Saenz in New Mexico, seizing his eagle feathers.<sup>443</sup> In July and August, Mr. Saenz wrote letters to the government requesting the return of the feathers.<sup>444</sup> The government denied his request because: (1) he did not have a permit from the Department of Interior for the feathers, and (2) he could not receive such a permit because he was not enrolled in a federally

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438. *Id.*

439. Brief of Appellants at 14-39, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014) (No. 13-40326).

440. See Chris Repka, *McAllen Project*, YOUTUBE (Sept. 16, 2015), [https://www.youtube.com/watch?v=3CBluVR1\\_38&frags=pl%2Cwn](https://www.youtube.com/watch?v=3CBluVR1_38&frags=pl%2Cwn).

441. *In re Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at \*1-2 (10th Cir. Aug. 8, 2001), *vacated by and reh'g en banc*, *United States v. Hardman*, 260 F.3d 1199 (10th Cir. 2001).

442. *Id.* at \*2.

443. *Id.* at \*2-3.

444. *Id.* at \*3.

recognized tribe.<sup>445</sup> In March 1997, the government filed criminal charges against Saenz for violating the BGEPA.<sup>446</sup>

In 2000, both the U.S. District Court in New Mexico and the Tenth Circuit Court of Appeals broke new ground when they held for the first time in the history of the federal courts that an American Indian, Joseluis Saenz—who did not meet the requirements for enrollment in a federally recognized tribe—should be permitted to possess and use eagle feathers in American Indian religious ceremonies, including powwows.<sup>447</sup>

In 2010, in the case of *A.A. ex rel. Betenbaugh v. Needville Independent School District*, the Fifth Circuit agreed with the District Court for the Southern District of Texas and held that a local government regulation that “offends a sincere religious belief” of an American Indian boy who wishes to wear his hair long was invalid under Texas law.<sup>448</sup> Under the Religious Freedom Restoration Act (RFRA), laws evolved in states, like Texas, where the majority of American Indians not enrolled in federally recognized tribes had the same right to practice their American Indian religion as those enrolled in federally recognized tribes.<sup>449</sup>

Today, these rights not only belong to all Indian boys wishing to wear their hair long at school,<sup>450</sup> but also to members of the Native American Church who ingest sacramental peyote, which is essential and central to their religious observances and ceremonies.<sup>451</sup>

Today, Indians throughout Texas pray that the courts will continue to render decisions, keeping in mind that recent cases and law have begun to open the door for our Indian people to be Indian again and to practice their religious beliefs without the repressive measures of the government.

445. *Id.* at \*7 (providing the regulation and its four requirements an applicant must meet under the “Indian Tribes” exception to keep feathers).

446. *United States v. Hardman*, 297 F.3d 1116, 1120 (10th Cir. 2002).

447. *In re Saenz*, 2001 U.S. App. LEXIS 17698 (allowing Joseluis Saenz to keep his eagle feathers and other related religious items).

448. *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 253 (5th Cir. 2010).

449. *See generally id.*

450. *Id.*

451. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 423 439 (2006) (allowing “[a] religious sect with origins in the Amazon Rainforest” to “receiv[e] communion by drinking a sacramental tea, brewed from plants unique to the region” and containing hallucinogens by finding “the *uniform* application of the Controlled Substances Act” was not a compelling government interest under an RFRA analysis).

## APPENDIX

**TABLE ONE: EPIDEMICS AMONG TEXAS INDIANS (1528-1892)<sup>452</sup>**

DATE	EPIDEMIC	TRIBE/AREA
1528	Cholera (?)	Karankawan
1674-75	Smallpox	Coahuiltecan
1688-89	Smallpox	La Salle's Fort
1691	?	Caddo
1706	Smallpox	Coahuiltecan
1718	?	Caddo
1739	Smallpox and measles	San Antonio missions
Before 1746	Smallpox and measles	Tonkawa and Atakapan
1750	Smallpox	San Xavier missions; Tonkawan and Atakapan
1751	?	San Antonio missions
1753	Malaria and dysentery	San Xavier missions; Tonkawan and Atakapan
1759	Smallpox	East Texas
1763	?	San Antonio missions
1763-64	Smallpox	San Lorenzo de la Santa Cruz Mission; Lipan-Apache
1766	Smallpox and measles	Karankawan
1777-78	Cholera or plague	Caddo, Wichita, Tonkawan, or Atakapan
1778	Smallpox	Texas
1801-02	Smallpox	Texas
1803	Measles	Caddo
1816	Smallpox	Caddo, Wichita, Comanche, Kiowa, Kiowa-Apache
1839-40	Smallpox	Kiowa, Kiowa-Apache, Comanche

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452. Ewers, *supra* note 9, at 108-109.

1849	Cholera	Kiowa, Kiowa-Apache, Apache, Cheyenne, Comanche
1861-62	Smallpox	Kiowa, Kiowa-Apache, Comanche, Cheyenne, and Arapaho
1864	Smallpox	Wichita, Caddo
1867	Cholera	Wichita, Caddo
1877	Measles and fever	Kiowa, Kiowa-Apache, Cheyenne, Arapaho
1882	Whooping cough and malarial fever	Kiowa, Kiowa-Apache, Comanche, Wichita
1889-90	Influenza	Cheyenne, Arapaho
1892	Measles, influenza, and whooping cough	Comanche, Wichita, and Caddo

**TABLE TWO: AMERICAN INDIAN POPULATION GROWTH IN TEXAS  
(1890-2000)<sup>453</sup> COMPARED TO ALL RACES<sup>454</sup>  
(BASED ON THE U.S. CENSUS)**

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453. U.S. CENSUS OFFICE, REPORT ON INDIANS TAXED AND NOT TAXED: 1890, *supra* note 2; U.S. CENSUS OFFICE, TWELFTH CENSUS: 1900, *supra* note 3; U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910 VOL. I POPULATION 1910: GENERAL REPORT AND ANALYSIS 141 (1913); U.S. BUREAU OF THE CENSUS, FOURTEENTH CENSUS TAKEN IN THE YEAR 1920, *supra* note 141, at 31; U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, POPULATION VOL. II: GENERAL REPORT, STATISTICS BY SUBJECTS 35 (1933); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION, VOL. II: CHARACTERISTICS OF THE POPULATION, PT. 1: UNITED STATES SUMMARY AND ALABAMA-DISTRICT OF COLUMBIA, at 19 (1943); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION, VOL. II: CHARACTERISTICS OF THE POPULATION, PT. 6: PENNSYLVANIA-TEXAS, at 762 (1943); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, A REPORT OF THE SEVENTEENTH DECENNIAL CENSUS OF THE UNITED STATES, CENSUS OF POPULATION: 1950, VOL. II: CHARACTERISTICS OF THE POPULATION, PT. 1: UNITED STATES SUMMARY 88 (1953); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, A REPORT OF THE SEVENTEENTH DECENNIAL CENSUS OF THE UNITED STATES, CENSUS OF POPULATION: 1950, VOL. II: CHARACTERISTICS OF THE POPULATION, PART 43: TEXAS 63 (1953); U.S. BUREAU OF THE CENSUS, EIGHTEENTH DECENNIAL CENSUS: 1960, *supra* note 390, at 144; U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, A REPORT OF THE EIGHTEENTH DECENNIAL CENSUS OF THE UNITED STATES, CENSUS OF POPULATION: 1960, VOL. I: CHARACTERISTICS OF THE POPULATION, PART 45: TEXAS 64 (1964); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, VOL. I: CHARACTERISTICS OF THE POPULATION, PT. 1, UNITED STATES SUMMARY 262 (1973); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, VOL. I: CHARACTERISTICS OF THE POPULATION, PT. 45, TEXAS 103 (1973); U.S. DEP'T OF COM, U.S. BUREAU OF THE CENSUS, PC80-1-B1, 1980 CENSUS OF POPULATION VOL. I: CHARACTERISTICS OF THE POPULATION; PT. 1: UNITED STATES SUMMARY 22 (1983), [https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u\\_bw.pdf](https://www2.census.gov/prod2/decennial/documents/1980/1980censusofpopu8011u_bw.pdf) [<https://perma.cc/R77K-GBZ2>]; U.S. DEP'T OF COM, U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION VOL. I: CHARACTERISTICS OF THE POPULATION; PT. 45: TEXAS 21 (1982); U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, 1990 CP-1-1, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: UNITED STATES 3 (1992), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-1.pdf> [<https://perma.cc/E8SF-NJNU>]; U.S. DEP'T OF COMMERCE, U.S. BUREAU OF THE CENSUS, 1990 CP-1-45, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: TEXAS 29 (1992), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-45-1.pdf> [<https://perma.cc/B7AG-8F6R>]; U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, TEXAS, *supra* note 4; U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, *supra* note 5.

454. RICHARD L. FORSTALL, U.S. BUREAU OF THE CENSUS, PB96-119060, POPULATION OF THE STATES AND COUNTIES OF THE UNITED STATES: 1790-1990, at 2-3 (1996), <https://www.census.gov/population/www/censusdata/PopulationofStatesandCountiesoftheUnitedStates1790-1990.pdf> [<https://perma.cc/8UZL-XL7Z>]; MARC J. PERRY ET AL., C2KBR/01-2, POPULATION CHANGE AND DISTRIBUTION: 1990-2000, at 2 (2001), <https://www.census.gov/>



YEAR	AMERICAN INDIANS		ALL RACES	
	U.S.A.	TEXAS	U.S.A.	TEXAS
1890	248,253	708	62,979,766	2,235,527
1900	237,196	470	76,212,168	3,048,710
1910	265,683	702	92,228,496	3,896,542
1920	244,437	2,109	106,021,537	4,663,228
1930	332,397	1,001	123,202,624	5,824,715
1940	333,969	1,103	132,164,569	6,414,824
1950	343,410	2,736	151,325,798	7,711,194
1960	523,591	5,750	179,323,175	9,579,677
1970	792,730	17,957	203,211,926	11,196,730
1980	1,364,033	39,375	226,545,805	14,229,191
1990	1,959,234	65,877	248,709,873	16,986,510
2000	4,119,301	215,599	281,421,906	20,851,820
2010	5,220,579	315,264	308,745,538	25,145,561

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prod/2001pubs/c2kbr01-2.pdf [https://perma.cc/8UV7-Z5AQ]; U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, CPH-2-1, UNITED STATES SUMMARY: 2010, POPULATION AND HOUSING COUNTS 3 (2012), <https://www2.census.gov/library/publications/decennial/2010/cph-2/cph-2-1.pdf> [https://perma.cc/X9LG-5W6Q].

**TABLE THREE: FIFTEEN LARGEST AMERICAN INDIAN TRIBES  
IN TEXAS, 2000 CENSUS<sup>455</sup>  
(POPULATIONS 1,000 OR MORE)**

<b>NAME OF TRIBE</b>	<b>TOTAL PERSONS</b>
1. Cherokee	45,151
2. Choctaw	18,780
3. Apache	6,454
4. Chickasaw	4,428
5. Creek	3,559
6. Comanche	3,339
7. Sioux	3,214
8. Blackfeet	2,857
9. Navajo	2,799
10. Pueblo	2,301
11. Chippewa	1,664
12. Iroquois	1,651
13. Potawatami	1,438
14. Seminole	1,310
15. Coshatta	1,165

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455. These are the persons that identified themselves as American Indian alone or in any combination. The total persons in Texas indicating American Indian alone or in any combination for the 2000 Census was 215,599.

**TABLE FOUR: ALL AMERICAN INDIAN  
AND ALASKA NATIVES IN TEXAS  
2000 CENSUS**

	<b>NAME OF TRIBE</b>	<b>TOTAL PERSONS</b>
1.	Abenaki Nation of Missiquoi	50
2.	Algonquian	125
3.	Apache	6,454
4.	Arapaho	194
5.	Arikara	29
6.	Assiniboine	52
7.	Assiniboine-Sioux	20
8.	Bannock	2
9.	Blackfeet	2,857
10.	Botherton	9
11.	Burt Lake Band	1
12.	Caddo	454
13.	Cahuilla	172
14.	California Tribes	30
15.	Canadian and Latin American	17,267
16.	Catawba Indian Nation	58
17.	Chehalis	13
18.	Chemakuan	4
19.	Chemehuevi	21
20.	Cherokee	45,151
21.	Cherokee Shawnee	57
22.	Cheyenne	592
23.	Cheyenne-Arapaho	161
24.	Chickahominy	24
25.	Chickasaw	4,428
26.	Chinook	26

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27.	Chippewa	1,664
28.	Rocky Boy's Chippewa Cree	78
29.	Chitimacha Tribe of Louisiana	140
30.	Choctaw	18,780
31.	Choctaw-Apache Community of Ebarb	50
32.	Chumash	77
33.	Coeur D'Alene	3
34.	Coharie	9
35.	Colorado River Indian	10
36.	Colville	42
37.	Comanche	3,339
38.	Coos	12
39.	Coquille	1
40.	Costanoan	44
41.	Coushatta	1,164
42.	Cowlitz	17
43.	Cree	229
44.	Creek	3,559
45.	Croatan	10
46.	Crow	277
47.	Cupeno	2
48.	Delaware	792
49.	Diegueno	31
50.	Eastern Tribes	335
51.	Three Affiliated Tribes of North Dakota (Fort Berthold)	19
52.	Shoshone-Bannock Tribes of Fort Hall Reservation	24
53.	Gabrieleno	5
54.	Grand Ronde	9

55.	Gros Ventres	30
56.	Haliwa-Saponi	48
57.	Hidatsa	24
58.	Hoopa	15
59.	United Houma Nation	197
60.	Iowa	70
61.	Iroquois	1,651
62.	Juaneno (Acjachemem)	26
63.	Kalispel Indian Community	4
64.	Karuk Tribe of California	32
65.	Kaw	130
66.	Kickapoo	795
67.	Kiowa	809
68.	Klamath	20
69.	Konkow	2
70.	Kootenai	7
71.	Lassik	1
72.	Long Island	14
73.	Luiseno	57
74.	Lumbee	482
75.	Lummi	29
76.	Maidu	30
77.	Makah	24
78.	Maliseet	21
79.	Mandan	63
80.	Mattaponi	6
81.	Menominee	87
82.	Miami	233
83.	Miccosukee	2
84.	Micmac	79
85.	Mission Indians	13

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86.	Me-Wuk	66
87.	Modoc	28
88.	Mohegan	35
89.	Monocan	88
90.	Nanticoke	15
91.	Nanticoke Lenni-Lenape	3
92.	Narragansett	38
93.	Navajo	2,799
94.	Nez Perce	95
95.	Nipmuc	31
96.	Nomlaki	2
97.	Northwest Tribes	76
98.	Omaha	63
99.	Oneida Tribe of Wisconsin	22
100.	Oregon Athabascan	2
101.	Osage	1,150
102.	Otoe-Missouria	94
103.	Ottawa	307
104.	Paiute	155
105.	Pamunkey Indian Tribe	4
106.	Passamaquoddy	50
107.	Pawnee	232
108.	Penobscot	95
109.	Peoria	87
110.	Pequot	37
111.	Pima	122
112.	Piscataway	12
113.	Pit River	33
114.	Pomo	43
115.	Ponca	208
116.	Potawatomi	1,436

117.	Powhatan	87
118.	Pueblo	2,301
119.	Puget Sound Salish	101
120.	Quapaw	101
121.	Quinalt	14
122.	Rappahannock Indian Tribe	3
123.	Sac and Fox	260
124.	Salinan	5
125.	Salish	68
126.	Salish and Kootenai	27
127.	Schaghticoke	5
128.	Seminole	1,310
129.	Serrano	4
130.	Shasta	20
131.	Shawnee	531
132.	Shinnecock	31
133.	Shoshone	242
134.	Te-Moak Tribes of Western Shoshone Indians of Nevada	11
135.	Paiute-Shoshone	31
136.	Confederated Tribes of the Siletz Reservation	18
137.	Sioux	3,214
138.	Spokane	20
139.	Stockbridge-Munsee Comm. of Mohican Indians of Wisc.	99
140.	Tohono O'Odham	170
141.	Tolowa	3
142.	Tonkawa	25
143.	Tygh	1
144.	Umatilla	9

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145.	Umpqua	7
146.	Ute	181
147.	Wailaki	14
148.	Walla-Walla	3
149.	Wampanoag	56
150.	Warm Springs	10
151.	Wascopum	6
152.	Washoe	13
153.	Wichita	67
154.	Winnebago	142
155.	Wintun	39
156.	Wiyot	6
157.	Yakama	43
158.	Yaqui	457
159.	Yavapai Apache	21
160.	Yokuts	53
161.	Yuchi	48
162.	Yuman	86
163.	Yurok	29
164.	American Indian, Tribe not Specified	14,509
165.	Alaskan Athabascan	206
166.	Tlingit-Haida	183
167.	Tsimshian	23
168.	Southeast Alaska	1
169.	Eskimo Tribes	129
170.	Greenland Eskimo	1
171.	Inuit	37
172.	Inupiat Eskimo	96
173.	Siberian Eskimo	1
174.	Cupiks Eskimo	1



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176.	Aleut	129
177.	Alutiq Aleut	1
178.	Bristol Bay Aleut	3
179.	Chugach Aleut	5
180.	Eyak	3
181.	Koniag Aleut	8
182.	Unangan Aleut	38