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April 17, 2019

*Sent via Email and U.S. Mail*

Superintendent Cliff Johnson  
Latta Public Schools  
13925 County Road 1560  
Ada, OK 74820  
supt@latta.k12.ok.us

Re: Tvli Birdshead's Right to Wear Religious and Cultural Items at Graduation

Superintendent Johnson:

The Native American Rights Fund ("NARF"), Oklahoma Indian Legal Services ("OILS"), and American Civil Liberties Union of Oklahoma ("ACLU-Oklahoma") are very concerned about the Latta Public Schools' denial of Tvli Birdshead's right to wear Native American religious and cultural items at his high school graduation. All three organizations provide legal representation to Native Americans in securing their individual rights. In particular, NARF and ACLU state affiliates have represented Native American high school students in law suits against public schools that abridge Native American First Amendment rights at high school graduation ceremonies by prohibiting the wearing of Native American items.

As you know, Mr. Birdshead, as a tribal citizen of the Chickasaw Nation and a descendent of the Choctaw Nation and Cheyenne and Arapaho Tribes, wishes to wear an eagle feather, beaded cap, and Chickasaw Nation Honor Cord during the graduation ceremony to be held May 21, 2019, but has been informed that this will not be allowed. Mr. Birdshead wishes to wear the feather for religious and spiritual reasons in order to honor his Native American heritage, and as a sign of his academic success in graduating high school. The Chickasaw Honor Cord is worn as a sign of his academic success in graduating high school, similar to that of the National Honor Society. As described below, there are sound legal and policy reasons why Mr. Birdshead should be allowed to wear these items.

First, the Latta Public School District should consider the important religious aspects of eagle feathers for Native Americans and the legal protections afforded to native religious

practices. Both bald and golden eagles (and their feathers), generally speaking, are highly revered and considered sacred within Native American traditions, culture, and religion. They are honored and handled with great care and shown the deepest respect. These feathers represent honesty, truth, majesty, strength, courage, wisdom, power, and freedom. Native Americans believe that as eagles roam the sky, they have a special connection with God and carry with them the peoples' prayers. See Antonia M. De Meo, *Access to Eagles and Eagle Parts; Environmental Protection v. Native American Free Exercise of Religion*, 22 Hastings Const. L.Q. 771, 774-75 (1995) (noting that "Native Americans hold eagle feathers sacred and equate them to the cross or the Bible in western religion.").

The religious significance of eagle feathers to Native Americans is recognized and embedded in federal law and policy. In 1962, Congress enacted the Bald and Golden Eagle Protection Act, which extended from the Bald Eagle Protection Act of 1940 the prohibition on the take, transport, sale, barter, trade, import and export, and possession of bald eagles to golden eagles as well. The government realized that the passage of this act would severely impinge on the religious practices of many Native Americans, for whom the use of eagle parts is essential to many ceremonies. In order to allow Native Americans to continue to include both bald and golden eagle parts in their religious ceremonies, the government provided for exemptions. The law also permits the traditional gifting of eagle feathers for Native Americans. On April 29, 1994, President Clinton signed an Executive Memorandum entitled "Policy Concerning Distribution of Eagle Feathers for Native American Religious Purposes." 59 Fed. Reg. 22953. That Executive Memorandum noted that "[e]agle feathers hold a sacred place in Native American culture and religious practices. Because of the feathers' significance to Native American heritage . . . this Administration has undertaken policy and procedural changes to facilitate the collection and distribution of scarce eagle bodies and parts for this purpose." *Id.* On October 12, 2012, the United States Department of Justice released an updated Policy on Tribal Member Use of Eagle Feathers, which states that "[f]rom time immemorial, many Native Americans have viewed eagle feathers and other bird parts as sacred elements of their religious and cultural traditions."<sup>1</sup>

Oklahoma's religious freedom statute likewise prohibits a government entity from curtailing a religiously motivated practice. Okla. Stat. Ann. tit. 51, § 251 *et seq.* (West); see also *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 701 F. Supp. 2d 863, 886 (S.D. Tex. 2009) *aff'd sub nom. A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (applying Texas' religious freedom law to enjoin enforcement of a school rule interfering with Native American student's religious practice of wearing unshorn hair). In applying the federal analogue to Oklahoma's religious freedom statute, the U.S. Supreme Court has made it clear that statutory protection of religious practice is expansive and that government interference with religious conduct is subject to the highest level of judicial scrutiny and will only be upheld for the most compelling reasons. *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015); *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2761 (2014). Moreover, such religious freedom statutes apply *to the person*, and broadly formulated, generalized fears about what could happen if others are given similar accommodations are insufficient. See *Holt*, 135 S. Ct. at 863; *Burwell v. Hobby Lobby*, 134 S.Ct. at 2779 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431(2006)). The Latta Public Schools should be cognizant of this powerful precedent when considering Mr. Birdshead's request.

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<sup>1</sup> <http://www.justice.gov/opa/pr/2012/October/12-ag-1234.html>.

In 2015, the former Oklahoma Attorney General, E. Scott Pruitt, noted that Oklahoma's religious freedom statute provides, at a minimum, even greater protections than the First Amendment, and at least the same protections as the federal Religious Freedom Restoration Act. *See* Attachment A, at 2. Moreover, the current Attorney General of Oklahoma, Mike Hunter, recently addressed the Oklahoma religious freedom statute as applied specifically to eagle feathers and Cherokee Nation beliefs and determined unequivocally that schools should not burden this fundamental religious practice. *See* Attachment B. The Attorney General states: "Based on my understanding of Cherokee spiritual practices, prohibiting students from wearing ceremonial eagle feathers on their graduation caps would substantially burden their free exercise of religion under [the Oklahoma Religious Freedom Act]." The Attorney General further determined that no compelling state interest (including "aesthetic uniformity" or a hypothetical "slippery slope") is served by a ban on sacred eagle feathers. He concludes that even if a compelling interest was present, a "complete ban" on eagle feathers is not essential, in part, because "other schools in the State and elsewhere permit the use of eagle feathers without any serious compromise to the order, seriousness, and celebration of a graduation ceremony." The Vian School District, located in Vian Oklahoma, has agreed to allow this religious practice and expression based on the Attorney General's advice. *See* Michael Overall, *School Agrees to Let Students Wear Eagle Feathers to Graduation After Oklahoma Attorney General Intervenes*, *Tulsa World* (Oct. 24, 2018). We encourage Latta Public Schools to adopt a similar policy so that Mr. Birdshad may exercise his religious rights consistent with Oklahoma law.

In considering Mr. Birdshad's request, it is crucially important to understand the ceremonial significance of the eagle feathers. Typically, an eagle feather is given only in times of great honor – for example, eagle feathers are given to mark great personal achievement. The gift of an eagle feather to a youth is an extraordinary honor and is typically given to recognize an important transition in his or her life. Many young people are given eagle feathers upon graduation from high school to signify achievement of this important educational journey and the honor the graduate brings to his or her family, community, and tribe. The Washington State Superintendent of Public Instruction, Randy Dorn, recently outlined the significance of eagle feathers in his letter calling upon all school districts to allow Native students to wear eagle feathers at graduation ceremonies. *See* Attachment C.

An eagle feather obviously has religious and spiritual significance to Native Americans, but what many people do not know is that in the graduation setting it is also a sign of academic success. Graduation from high school is an especially significant occasion for Native American students, considering that the Native American high school graduation rate is the lowest of any racial or ethnic group. Similarly, the poverty rate for American Indians under age 18 was 36.5% in 2012, as compared to 22.2% for the overall population.<sup>2</sup> Further, American Indian youth are more likely to suffer from addiction and substance abuse issues than the general population.<sup>3</sup> These modern challenges, combined with a history of cultural oppression and trauma, result in feelings of hopelessness for many Native American youth. Many Native students receive an eagle feather to recognize their academic success, great accomplishment of completing high school, and passage into adulthood. When an eagle feather is gifted, it is among the highest forms of recognition that may be bestowed upon a young person and can be seen as even more

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<sup>2</sup> Bureau of the Census, *Selected Population Profile in the United States: 2010-2012 American Community Survey 3-Year Estimates*, [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12\\_3YR/S0201/0100000US/popgroup~001|006](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_3YR/S0201/0100000US/popgroup~001|006).

<sup>3</sup> Colorado State University, College of Natural Sciences, *Comparing Rates of Substance Use Among AI Students to National Rates: 2009-2012*, available at [http://triethniccenter.colostate.edu/ai\\_epi1.htm](http://triethniccenter.colostate.edu/ai_epi1.htm).

important than the high school diploma. Thus, graduation is a significant step in any Native American students' life, and the eagle feather honors and celebrates that academic achievement.

The honor cord and beaded cap Mr. Birdshead wishes to wear carries similar significance. Given the gap in academic achievement for Native Americans, a growing number of tribes are recognizing the success of their young people by bestowing honor cords, stoles, and similar items. This practice both recognizes individual student success, and also highlights role models that inspire younger Native American students in their academic journey. A similar proposition is true for the gift of a beaded cap for a high school graduate: this is a unique, culturally-rooted tradition for Native American families that communicates and symbolizes pride in the success of a young family member. Given the high population of Native American students at Latta Public Schools, such recognition is crucially important for the entire Native American community and should be welcomed. Moreover, permitting select students to wear honor cords to show their academic success but denying Native American students from wearing their Tribal honor cords to demonstrate their academic success discriminates based on viewpoint and race and would unlawfully abridge their Constitutional rights.

Finally, in deciding how to press forward in this matter, we ask the Latta Public Schools to remember that "in our society and in our culture high school graduation is one of life's most significant occasions." *Lee v. Weisman*, 505 U.S. 577, 595 (1992). "Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person that role that it is his or her right and duty to assume in the community and all of its diverse parts." *Id.* In light of the significance that the eagle feather has to Native American students, especially at graduation, we urge you to permit Mr. Birdshead to express his religious and spiritual beliefs and show his academic success by wearing an eagle feather on his beaded cap with a Chickasaw honor cord in a manner that is permissible to him.

Thank you in advance for your consideration in this matter.

Sincerely,



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David Gover, Staff Attorney  
Joel Williams, Staff Attorney  
Mathew Campbell, Litigation Committee Member  
**Native American Rights Fund**



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Jill Webb, Legal Director  
**American Civil Liberties Union of Oklahoma**



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Stephanie Hudson, Executive Director  
**Oklahoma Indian Legal Services**

cc: Latta Public Schools Board of Education

**ATTACHMENT A**

**A**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

HAYDEN GRIFFITH,

Plaintiff,

v.

Case No. 15-CV-273-GKF-FHM

CANEY VALLEY PUBLIC SCHOOLS, *et al.*,

Defendants.

**BRIEF OF THE STATE OF OKLAHOMA AS *AMICUS CURIAE***

Oklahoma Attorney General E. Scott Pruitt respectfully appears in this action to address the important questions of interpretation of state law and the religious liberty interests of the people of Oklahoma that are at issue in this case. The Attorney General submits this brief in order to assist the Court in the proper interpretation of the Oklahoma Religious Freedom Act, Okla. Stat. tit. 51, § 251 *et seq.* (2015) (“ORFA”). The Attorney General expresses no view on the application of ORFA to the specific facts of this case and does not submit this brief in support of either party. Rather, the Attorney General advocates that the Court should modify its earlier interpretation of ORFA to the extent necessary to interpret and apply ORFA in a manner that gives full effect to its plain language.

**ARGUMENT AND AUTHORITIES**

Like many other states, Oklahoma enacted ORFA to extend to its people expansive protection of their religious freedom in a manner similar to that granted by Congress with the passage of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (“RFRA”). Congress enacted RFRA after the Supreme Court’s decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-82 (1990), a decision which substantially weakened the Free Exercise Clause by holding that neutral, generally applicable laws that incidentally burden the exercise of

religion usually do not violate the First Amendment. *See Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). In reaction to *Smith*, “Congress enacted RFRA in order to provide greater protection for religious exercise than is available under the First Amendment.” *Holt*, 135 S. Ct. at 859-60 (citing *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-2761 (2014)).

After the Supreme Court invalidated the federal RFRA as applied to the states, many states, including Oklahoma, passed their own statutes protecting religious liberty in an expansive manner similar to RFRA. *See A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 258-59 (5th Cir. 2010). At a minimum, thus, ORFA provides greater protections than the First Amendment and the same protections as the federal RFRA.

Moreover, a close analysis of the text of ORFA reveals important differences between ORFA and RFRA, and those differences confirm that ORFA provides *greater* protection for religious exercise than RFRA. Where these differences arise—such as ORFA’s adoption of a definition of “substantially burden”—this Court’s analysis of ORFA claims must focus on its statutory text rather than on case law interpreting different protections of religious freedom, especially First Amendment precedent, which is far less protective than ORFA. *See Fields v. City of Tulsa*, 2011 WL 5911241, \*3 (N.D. Okla. Nov. 28, 2011) (applying ORFA primarily pursuant to its text alone).

In “all cases involving statutory construction, [the] starting point must be the language employed by” the legislature, and “we assume that the legislative purpose is expressed by the ordinary meaning of the words used.” *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (citations and internal marks omitted). And “when the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Keating v. Edmondson*, 37 P.3d 882, 888 (Okla. 2001) (“A cardinal precept of statutory construction is that where a statute’s language is plain and unambiguous, and the meaning clear and unmistakable, no justification exists for the use of

interpretative devices to fabricate a different meaning.”). Therefore, when assessing whether a plaintiff has stated a viable ORFA claim, the Court should not raise the plaintiff’s *prima facie* burden beyond that which ORFA’s text requires by adding additional judicial requirements to ORFA’s definition of “exercise of religion” or “substantially burden.”

### **I. The ORFA Burden Shifting Analysis.**

Similar to the federal RFRA, ORFA declares that “[n]o governmental entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability,” unless the government “demonstrates that application of the burden to the person is . . . [e]ssential to further a compelling governmental interest . . . and [is] [t]he least restrictive means of” doing so. Okla. Stat. tit. 51, § 253. Thus, an ORFA plaintiff must “make an initial *prima facie* showing of ‘substantial burden’ before any burden of persuasion shifts to the state.” *Steele v. Guilfoyle*, 76 P.3d 99, 102 (Okla. Civ. App. 2003).

Interpreting and applying language in the Texas Religious Freedom Restoration Act (“TRFRA”) that is nearly identical to ORFA, the Texas Supreme Court articulated the following burden shifting approach, which the Fifth Circuit Court of Appeals has used with approval:

[A] plaintiff must demonstrate (1) that the government’s regulations burden the plaintiff’s free exercise of religion and (2) that the burden is substantial. If the plaintiff manages that showing, the government can still prevail if it establishes that (3) its regulations further a compelling governmental interest and (4) that the regulations are the least restrictive means of furthering that interest.

*Betenbaugh*, 611 F.3d at 248 (citing *Barr v. City of Sinton*, 295 S.W.3d 287 (Tex. 2009)).

### **II. Plaintiff’s Prima Facie Burden.**

To establish an OFRA claim, a plaintiff first must first show that a governmental action implicates her “exercise of religion.” Upon making that showing, a plaintiff must then establish that the exercise of her religion has been “substantially burdened.” *Steele*, 73 P.3d at 102; *Betenbaugh*, 611

F.3d at 248. A faithful examination of these elements requires construction of the plain meaning of ORFA’s definitions of “exercise of religion” and “substantially burden.”

#### A. “Exercise of Religion”

ORFA defines “[e]xercise of religion” to mean “the exercise of religion under Article 1, Section 2, of the Constitution of the State of Oklahoma, the Oklahoma Religious Freedom Act, and the First Amendment to the Constitution of the United States . . . .” Okla. Stat. tit. 51, § 252(2).

The Oklahoma Constitution provides for the protection of the free exercise of religion in very robust terms: “Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship . . . .” OKLA. CONST. Art. I, § 2. “Sentiment” means “an attitude, thought, or judgment prompted by feeling; a specific view or notion.”<sup>1</sup> Thus, an “exercise of religion” protected by ORFA includes any action or inaction “prompted” by “religious sentiment,” which is to say prompted by a religious “attitude, thought, or judgment.” Similarly, “Worship” means “the act of showing respect and love for a god . . . ; the act of worshipping God or a god.”<sup>2</sup> Thus, an “exercise of religion” protected by ORFA includes any “act of showing respect and love for a god.” This is consistent with ORFA’s statutory definition of “substantially burden,” which refers to burdens on “religiously motivated practice[s].” Okla. Stat. tit. 51, § 252(7). And under the federal RFRA, “the ‘exercise of religion’ involves ‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons.’” *Hobby Lobby*, 134 S. Ct. at 2770.

When weighing a putative “exercise of religion,” courts are rightfully reticent to do what the Oklahoma Court of Civil Appeals did in *Steele* by speculating as to whether “the act or refusal to act

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<sup>1</sup> See <http://www.merriam-webster.com/dictionary/sentiment>.

<sup>2</sup> See <http://www.merriam-webster.com/dictionary/worship>.

is motivated by a central part or central requirement of the person's sincere religious belief."<sup>3</sup> *Betenbaugh*, 611 F.3d at 259-60 (citation omitted); *see also Hobby Lobby*, 134 S. Ct. at 2762. "Not only is such a determination unnecessary, it is impossible for the judiciary." *Betenbaugh*, 611 F.3d at 260 (citation omitted). "It is not the court's place to question where a plaintiff 'draws lines' in his religious practice." *Betenbaugh*, 701 F. Supp. 2d at 876 (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981)). Yet, the Defendants' suggested test for ORFA claims would require this Court to delve into divining whether a plaintiff's asserted religiously motivated practice is a "central part" or "central requirement" of her beliefs. Mot. to Dismiss Doc. No. 32 at 13. Nothing in the plain text of ORFA requires or justifies limiting protected free exercise of religion to only those acts or omissions that are central tenets or fundamental to the faith. Nor should a court judicially amend ORFA by engrafting such requirements not explicitly provided for in the plain text. *See Keating*, 37 P.3d at 888. To do so limits the protection of religious liberty that ORFA sought to establish, as well as any careful balancing the people of Oklahoma struck in enacting that law. Moreover, this "centrality" test was originally articulated in a decision that has since been questioned, if not disavowed, by the Tenth Circuit. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 662-63 (10th Cir. 2006) (discussing *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) on which *Steele* relied in raising a plaintiff's *prima facie* burden beyond ORFA's text).

Absent evidence that a plaintiff's beliefs are "purely secular," motivated by "strictly political or philosophical concerns," or are "obviously shams and absurdities...devoid of religious sincerity," the Court should accept a plaintiff's assertions regarding her religious beliefs and practices. *Betenbaugh*, 701 F. Supp. 2d at 876 (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). Thus, when a plaintiff alleges that a government action will affect an act or practice prompted or motivated by religious sentiment, the Court should find she has met the first element of her *prima facie* burden. To

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<sup>3</sup> As this Court recognized, *Steele* is not binding precedent but merely persuasive authority. Order, Doc. 25 at 9 n.3 (citing Okla. Stat. tit. 20, § 30.5; Oklahoma Supreme Court Rule 1.200(d)(2)).

do otherwise would unjustifiably elevate her burden of proof beyond that which ORFA plainly requires and would weaken the protection for the free exercise of religion for all Oklahomans.

### **B. “Substantially Burden”**

Next, a plaintiff must establish that her exercise of religion is “substantially burden[ed].” Okla. Stat. tit. 51, § 253(A). Unlike the federal RFRA, ORFA defines the phrase “substantially burden,” and it does so plainly, simply, and broadly. The phrase “substantially burden” means “to inhibit or curtail religiously motivated practice.” *Id.* § 252(7). The plain meaning of “inhibit” is “to keep (someone) from doing what he or she wants to do.”<sup>4</sup> Similarly, the definition of “curtail” means “to reduce or limit.”<sup>5</sup> And “motivate” means “to give (someone) a reason for doing something; to be a reason for (something).”<sup>6</sup> These plain terms create a broad and powerful protection for the free exercise of religion in Oklahoma. ORFA imposes no other requirements for establishing that a governmental burden on free exercise is substantial. Nor should the Court. Therefore, any authorities addressing the phrase “substantially burden” that alter or deviate from ORFA’s expansive definition in a manner that provides less protection for the exercise of religion are not relevant to an ORFA analysis and should be ignored.

Contrary to prior decisions of this Court, *Fields*, 2011 WL 5911241 at \*3, the Defendants urge this Court to rely on aspects of the *Steele* case that are far less protective of religious exercise than the plain text of ORFA. Mot. to Dismiss, Doc. 32 at 12-13. As explained above and below, *Steele* is far less protective of religious exercise, because it adds elements to ORFA’s definition of “exercise of religion” and “substantially burden” that are not found in ORFA’s text. The problem with *Steele*’s and Defendants’ approach “is the one that inheres in most incorrect interpretations of

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<sup>4</sup> See <http://www.merriam-webster.com/dictionary/inhibit>.

<sup>5</sup> See <http://www.merriam-webster.com/dictionary/curtail>.

<sup>6</sup> See <http://www.merriam-webster.com/dictionary/motivate>.

statutes: It asks [the Court] to add words to the law to produce what is thought to be a desirable result. That is [the Legislature’s] province.” *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (reversing the Tenth Circuit’s interpretation of Title VII because it impermissibly added a knowledge requirement to the text that Congress did not see fit to add). Regardless of the ultimate result, this Court should be careful not to import standards that are divorced from the text of ORFA and that would have the effect of judicially modifying ORFA. Defendants err on this score for at least two reasons.

First, the Defendants and the court in *Steele* err in relying upon and suggesting the use of the legal standards espoused in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450-51 (1988), which refused to protect the free exercise of religion from governmental actions that have an “incidental effect that makes it more difficult to practice religion.” Mot. to Dismiss, Doc. 32 at 13. *Lyng* is a Free Exercise Clause case, and is thus “irrelevant to this inquiry because [it] do[es] not use the ‘substantial burden’ test of the ORFA.” *Fields*, 2011 WL 5911241 at \*3 & n.4; see also *Holt*, 135 S. Ct. at 862 (warning against “improperly import[ing] a strand of reasoning from cases involving prisoner’s First Amendment rights” into RFRA cases). Indeed, like other RFRA, the Legislature enacted ORFA specifically to protect Oklahomans from substantial burdens on the exercise of religion even if the governmental burden is unintentional and only incident to “a rule of general applicability.” Okla. Stat. tit. 51, § 253(A). Further, like RFRA, the Legislature also plainly intended ORFA’s definition of “substantially burden” to encompass incidental effects of neutral governmental policies that simply “make[] it more difficult to practice religion.” See *id.* at § 252(7). And in contrast to the broad language of ORFA that protects any governmental policy that so much as “inhibits” or “curtails” religious practice, *Lyng* turned on the narrow and inapposite word “prohibit” found in the First Amendment. See *Lyng*, 485 U.S. at 450-51. Thus, ORFA’s protections are broader than even RFRA precedent, which considers whether the governmental burden

“prevents” religious practice. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1305 (10th Cir. 2010). To the extent that cases like *Lyng* or *Steele* suggest or endorse an interpretation of ORFA inconsistent with its text, they should not be followed.

*Second*, the Defendants argue that, in order for an exercise of religion to be substantially burdened, the inhibited practice must be “required” by the religion, or the governmental inhibition must cause some form of religious detriment. Mot. to Dismiss Doc. 32 at 11-14. ORFA’s text plainly forecloses imposing any such additional requirements. ORFA considers exercise substantially burdened so long as the inhibited or curtailed practice at issue is “religiously motivated,” regardless if the practice is religiously *required* and regardless if there is any religious “detriment.” And “a burden on a person’s religious exercise is not insubstantial simply because he could always choose to do something else.” *Barr*, 295 S.W.3d at 302. ORFA in no way excuses, justifies, or minimizes a governmental burden on free exercise simply because a plaintiff may have other options for religious exercise, as Defendants contend. Mot. to Dismiss, Doc. No. 32 at 14. The question is “not whether the [plaintiff] is able to engage in other forms of religious exercise,” *Holt*, 135 S. Ct. at 862, but whether the religiously motivated practice at issue has been substantially burdened. For example, a student may not believe that his religion *requires* him to pray before a meal, but ORFA would certainly protect him from a school policy that would prohibit him from praying before eating his lunch at the school cafeteria, even if he is free to pray after school. In short, so long as the practice in question is religiously motivated and is at all inhibited or curtailed, it has been “substantially burden[ed]” according to ORFA.

### **III. *The Defendants’ Burden.***

“To say that a person’s right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct.” *Barr*, 295 S.W.3d at 305 (quoting *Smith*, 494 U.S. at 894 (O’Connor, J., concurring in the judgment)) (internal quotation marks omitted). A

governmental entity may substantially burden a person's free exercise of religion under ORFA if, but only if, the government demonstrates with clear and convincing evidence that the burden is (1) "Essential to further a compelling governmental interest; and" (2) "The least restrictive means of furthering that compelling governmental interest." Okla. Stat. tit. 51, §§ 252(1), 253(B).

**A. "Essential to Further a Compelling Governmental Interest"**

In contrast with the "substantial burden" analysis, the strict scrutiny standard under ORFA is worded nearly identically to RFRA and the federal Constitutional standard. Consequently, federal precedent is more probative in this area. Even so, the ORFA standard is likely more strict than other strict scrutiny standards because, unlike most articulations, ORFA requires the burden to be "essential" to the compelling governmental interest.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 521, 534 (1997). Compelling governmental interests are interests of the "highest order and not otherwise served." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). "[I]n this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (citation and internal marks omitted). "A court must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exemption." *Betenbaugh*, 611 F.3d at 268 (quoting *Yoder*, 406 U.S. at 213). The government "cannot rely on 'general platitudes,' but 'must show by specific evidence that [the adherent's] religious practices jeopardize its stated interests.'" *Id.*

Whether a purported interest is compelling is context-dependent: An interest may be compelling in one setting (like the prison in *Steele*) and not compelling in another setting (like a high school graduation). See *Betenbaugh*, 611 F.3d at 269-71 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005)). Thus, for example, a school's bare desire for uniformity at all times is likely not a compelling

governmental interest. *See Betenbaugh*, 611 F.3d at 271 (holding “concern for aesthetic homogeneity . . . is insufficiently compelling to overtake the sincere exercise of religious belief.”); *Betenbaugh*, 701 F. Supp. 2d at 879-80 (“Having [the student] ‘resemble the rest of the student body at Needville’ is certainly not a compelling government interest.”). Nor does the risk that granting one religious exemption to a generally applicable rule will create a “slippery slope,” leading to other exceptions, necessarily constitute a compelling interest. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006). Indeed, even enforcement of federal drug laws and compliance with international treaties do not categorically constitute compelling interests. *Id.* at 430-38.

Even if a governmental entity can articulate an interest that is compelling, it must demonstrate with clear and convincing evidence that the burden it is placing on religious exercise is *essential* to further that specific interest. *Cf. U.S. v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (restriction must be “actually necessary” to achieve the compelling interest). The Court must look “beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants.” *Gonzalez*, 546 U.S. at 431. In other words, “the Government [must] demonstrate that the compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened.” *Hobby Lobby*, 134 S. Ct. at 2779 (internal marks and citation omitted). Thus, for example, while a school might have a generalized compelling interest in preventing undue disruption, it must prove to the court that disruption will indeed likely occur absent the specific burden it is placing on religious exercise of the plaintiff. *See Betenbaugh*, 611 F.3d at 269.

#### **B. “The Least Restrictive Means”**

Even if a defendant can prove that enforcement of its policy is essential to furthering a compelling interest, it also must prove by clear and convincing evidence that it is employing the least

restrictive means of furthering that interest. Okla. Stat. tit. 51, § 253(B)(2). “The least-restrictive-means standard is exceptionally demanding.” *Hobby Lobby*, 134 S. Ct. at 2780. It requires the governmental entity to “demonstrate that no alternative forms of regulation” would achieve the compelling interest without substantially burdening religious exercise. *Sherbert*, 374 U.S. at 407.

The practices of other similar governmental entities, or of the same entity in different, but similar circumstances, can be relevant to this analysis. If other governmental entities are able to pursue the same governmental interest without the challenged policy and without substantial detriment to the compelling interest, there may in fact be no need for the restriction. *See Holt*, 135 S. Ct. at 866 (“While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.” (citation omitted)); *Hobby Lobby*, 134 S. Ct. at 2782. Thus, for example, it would be relevant if other schools have permitted Native American students to affix eagle feathers to the top of the graduation caps, and those religious practices have not seriously impaired a compelling governmental interest. *See* Lenzy Krehbiel-Burton, *Native Verdigris Seniors to Wear Eagle Feathers at Graduation*, CHEROKEE PHOENIX (May 11, 2015), <http://www.cherokeephoenix.org/Article/index/9249>.

### CONCLUSION

The Attorney General of Oklahoma respectfully requests that this Court carefully interpret and apply the standards of the Oklahoma Religious Freedom Act according to the plain text of the statute, and modify any earlier interpretation accordingly.

Date: November 18, 2015

Respectfully Submitted,

/s/ Mithun Mansinghani

**E. Scott Pruitt**

*Attorney General*

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MIKE HUNTER  
ATTORNEY GENERAL

October 23, 2018

Vian Public Schools Board of Education  
P.O. Box 434  
Vian, OK 74962

Dear Members of the Vian School Board:

It has come to my attention that Cherokee tribal members who are students in your school are seeking to wear ceremonial eagle feathers on their graduation caps during their high school graduation. As chief law enforcement officer of this State, it is my duty both to protect the rights of Oklahoma citizens as provided for by law and to advise other governmental entities in the State on appropriate compliance with the law. It is my view that the Oklahoma Religious Freedom Act (ORFA) generally requires public schools to permit Cherokee students to engage in the spiritual practice of wearing eagle feathers to important events, such as graduations, even if this requires a religious exemption to an otherwise generally applicable rule. Accordingly, I urge the Board to adopt or revise its policies to permit these religious practices at graduation.

Under ORFA, no governmental entity may “substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability” unless the government “demonstrates that application of the burden to the person is: (1) Essential to further a compelling governmental interest and; (2) The least restrictive means of furthering that compelling governmental interest.” 51 O.S.2011 § 253.

The “exercise of religion” has been defined broadly, and need not form a central part of the person’s faith, so long as it is a practice motivated by religion. *See* 51 O.S.2011 § 252(7); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2762, 2770 (2014); *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 259-60 (5th Cir. 2010). Similarly, the term “substantially burden” has been broadly defined as any government regulation that will “inhibit or curtail religiously motivated practice,” regardless of whether the religion absolutely requires the practice. 51 O.S.2011 § 252(7); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Barr v. City of Sinton*, 295 S.W.3d 287, 302 (Tex. 2009). Based on my understanding of Cherokee spiritual practices, prohibiting students from wearing ceremonial eagle feathers on their graduation caps would substantially burden their free exercise of religion under ORFA.

Thus, under the law, in order for the Board to prohibit such use of eagle feathers, it must be to further a “compelling” governmental interest and must be the “least restrictive means” of implementing that compelling interest. While context may dictate what is compelling, as a general matter, “compelling” interests are those of the highest order, meant to prevent the gravest of outcomes and to advance paramount state concerns. This likely does not include a mere desire for aesthetic uniformity or to avoid a hypothetical “slippery slope” if a religious exemption is granted. *See, e.g., Betenbaugh*, 611 F.3d at 271.

Prohibition of a religious practice must also be the least restrictive means of advancing that compelling interest, meaning that if alternative policies are available that meet compelling school needs *and* provide greater religious freedom, the school must choose those less restrictive alternatives. For example, permitting religious exemptions for adorning graduation caps (just as adornments signifying academic honors are often permitted) may still be part of a policy that would nonetheless prohibit other adornments that are distracting or offensive to the solemnity of the graduation ceremony. Good evidence that alternative policies are available include the fact that other schools in the State and elsewhere permit the use of eagle feathers without any serious compromise to the order, seriousness, and celebration of a graduation ceremony. For these reasons, I do not view a complete ban on eagle feathers as the only means essential to meeting the school's compelling needs.<sup>1</sup>

I hope this letter helps inform the Board's future decision making regarding the use of spiritual eagle feathers by Cherokee students during graduation ceremonies. I urge the Board to permit such use, consistent with the requirements of Oklahoma law. Please do not hesitate to contact my Office if you have any questions or concerns.

Thank you,

A handwritten signature in black ink that reads "Mike Hunter". The signature is written in a cursive, slightly slanted style.

Mike Hunter  
Attorney General of Oklahoma

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<sup>1</sup> Although a federal court dismissed student claims for a right to wear an eagle feather in *Griffith v. Caney Valley Public Schools*, No. 4:15-cv-273 (N.D.O.K 2016), that Court did not address claims under ORFA and instead permitted such claims to be filed at a later date in state court.



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## SUPERINTENDENT OF PUBLIC INSTRUCTION

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**Randy I. Dorn** Old Capitol Building · PO BOX 47200 · Olympia, WA 98504-7200 · <http://www.k12.wa.us>

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January 29, 2016

Dear Colleagues,

Across the state, spring brings great excitement about commencement ceremonies. In preparation I want to take this opportunity to address a topic of great interest to our community—tribal students wearing items of cultural significance such as eagle feathers during graduation ceremonies.

During the last few decades, many, if not most, high schools have faced the issue of whether or not to permit Native students to wear eagle feathers during graduation ceremonies. Given the tribal reverence for eagles and the high honor represented by graduation, most schools recognize that commencement ceremonies are an appropriate setting for Native students to wear an eagle feather with dignity. These schools recognize that allowing Native students to wear eagle feathers is not only good policy, but also the right thing to do.

Since time immemorial, many tribal nations have viewed eagles and their feathers as sacred elements of their cultural traditions. As a part of those traditions, eagle feathers may represent honesty, truth, strength, courage, and wisdom. As such, eagle feathers are given only in times of great honor. Many tribes present their young people with eagle feathers upon graduation from high school to signify the achievement of this important educational journey and the honor the graduate brings to his or her family, community, and tribal nation. For many Native students, receiving an eagle feather in recognition of graduation is as significant as earning the diploma or akin to an honor society stole.

Some districts have adopted policies allowing Native graduates to have this distinct honor. These policies range from specifically accommodating Native students, to permitting student organizations that represent certain cultural groups to approve and/or distribute eagle feathers for Native students. However, on occasion whether or not to permit Native students to wear an eagle feather during graduation still becomes an issue, usually because many school districts have strict dress codes about attire for commencement ceremonies so as to avoid any disruption to the ceremony.

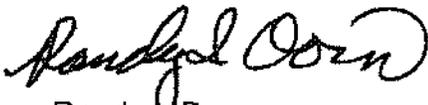
In my experience assisting school district staff resolving matters relating to Native students wearing eagle feathers during graduation ceremonies, I observe that we often came to the realization that the eagle feather is a symbol of such high honor in the tribal community, it should not be viewed as a violation of the graduation ceremony dress codes.

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Federally recognized tribes Washington state operate as sovereign nations. The Office of Superintendent of Public Instruction (OSPI) is committed to fostering the vital government-to-government relationships with tribes. OSPI fully supports policies that recognize the tribal student's ability to honor unique tribal cultures. I am calling on school districts to review current policies and search for inclusive ways Native students can honor their tribal traditions.

Thank you for supporting our state's efforts to ensure educational equity and to foster inclusive educational activities for all students and communities.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy I. Dorn". The signature is written in a cursive, flowing style.

Randy I. Dorn  
State Superintendent  
of Public Instruction