UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ALOYSIUS DREAMING BEAR, Plaintiff, v. BERLINE FLEMING, BONNIE ANDERSON, JOHN COPE, LANCE TLUSTOS, LISA LOCKHART, AND LAWRENCE JASKE, Defendants.	)	No. 10-5030

REPLY MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION

Every First Amendment case arises in a unique cultural, social, and historical context, and courts apply the First Amendment in light of the specific context in which the case arises. A recent example is *Salazar v. Buono*, ___ U.S. ___, 2010 U.S. Lexis 3674 (April 28, 2010), holding that a federal law that effectively keeps a cross atop Sunrise Rock in the Mohave National Preserve may be constitutional, in light of its unique historical context. "[T]he district court took insufficient account of the context in which the statute was enacted and the reasons for its passage. Private citizens put the cross on Sunrise Rock to commemorate American servicemen who had died in World War I. Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message." *Id.* at * 26.

Salazar illustrates the principle that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence v. Washington*, 418 U.S. 405, 410 (1974). Defendants' brief is utterly insensitive to the unique cultural, social, and historical context in which this case arises. Defendants make four arguments.

1. Defendants argue that Dreaming Bear claims the right to "wear whatever clothes he chooses" at graduation (doc. 21 p. 2), and that the First Amendment does not protect "vague and attenuated" messages, only "particularized" messages (doc. 21 p. 2-4)

The "particularized message" test on which defendants rely is no longer the law. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) liberalized it: "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' [citation omitted] would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."

After *Hurley*, "a narrow, succinctly articulable message is not a condition of constitutional protection." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 475 (8th Cir. 2010) (bracketing and quotation marks omitted). But Dreaming Bear easily meets even the old "particularized message" test on which defendants rely.

Dreaming Bear's affidavit, and his attached statement to the School Board, convey a particularized message rooted in his own historical, cultural, political, and religious

tradition. Professor Cook-Lynn's affidavit addresses the same issues. Dreaming Bear does not claim the right to "wear whatever clothes he chooses" at graduation. He claims the right to wear traditional Lakota clothing, meaning "his traditional ribbon shirt with beaded cuffs and armbands, his beaded moccasins and his medallion, his eagle fan, his feather and his beaded medicine bag." Doc. 7-1 p. 1-2.

The "particularized message" test—before it was liberalized in *Hurley*—was a way of determining whether conduct was "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974). The rule was: "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (bracketing and quotation omitted).

Examples of messages that meet these two criteria are burning a flag; wearing black armbands to protest American military involvement in a foreign war; and wearing American military uniforms to criticize American involvement in Vietnam. *Id.* These examples show that the message conveyed need not be intended by the actor, or understood by the viewers, in the same way in order for it to be protected by the First Amendment. Burning an American flag would be seen by some as a protest against government actions or policies. But many others would see it as an act of mindless nihilism; or as a rejection of the country

whose freedoms one enjoys; or as an expression of contempt for American patriotism.

Likewise, if Dreaming Bear is allowed to wear his traditional clothing at graduation, most will see it as he intends it: as his expression of pride in his people, their culture, and their traditions. Some may see it as a symbol that as a Lakota, he lives in and between two worlds: the non-Indian world symbolized by high school graduation at an off-reservation high school, and the Lakota traditional world. Others may see it as a form of protest. There is no symbol, and there is no expression, that mean the same to all observers. Yet symbolic and expressive actions are precisely what the free speech clause of the First Amendment protects.

The cases the defendants rely on demonstrate their insensitivity to the context in which this case arises. *Henery v. City of St. Charles*, 200 F.3d 1128 (8th Cir. 1999), held that a school could punish a candidate for student council who handed out condoms. Defendants cite one line from *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503, 507-8 (1969) that the case does not "relate to regulation of the . . . type of clothing," but that line is merely a statement of what was *not* at issue in the case. And it was a fairly narrow statement of it, because the question in *Tinker* was whether students had a First Amendment right to wear a black armband as a war protest.

The other cases cited by defendants likewise do not help them. *Littlefield v. Forney Indep. School District*, 108 F. Supp. 2d 681 (N. D. Texas 2000), upheld against First Amendment attack a public school's policy that students wear uniforms, when the policy

included an "opt-out" provision whereby students could apply for an exemption from the policy if they had "philosophical or religious" objections to it. *Id.* at 686. So the school district expressly allowed students with deeply held beliefs not to wear the clothing that other students had to wear. Under that approach, Dreaming Bear would be allowed to wear his traditional clothing at graduation.

Defendants cite *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381 (6th Cir. 2005), like *Littlefield*, upheld a school dress code against First Amendment challenge because the student admitted that there was no particular message she wished to convey—she just wanted the freedom to wear clothes that "look[] nice on [her]," that she "feels good in," and that "express her individuality." *Id.* at 386. Another case defendants cite, *Bar-Navon v. Brevard County School Board*, 290 Fed. Appx. 273, 2008 U.S. App. Lexis 17562 (11th Cir.), similarly upheld a school regulation, this time against wearing pierced jewelry other than earrings, where the student disclaimed any intention to make a religious or political statement, and where the school's prohibition sought to keep the students safe.

Defendants rely on cases that prohibit wearing gang symbols at school. *Bivens v. Albuquerque Public Schools*, 899 F. Supp. 556 (D. N. M. 1995), upheld a school regulation that prohibited the wearing of sagging pants in school, adopted by the school because it had problems with gangs and sagging pants were a gang symbol. Plaintiff, who was not a gang member, claimed that he had a constitutional right to wear sagging pants. The court rejected

his claim, finding that whatever message he was seeking to convey did not meet the *Texas v. Johnson* requirements that the message be "particularized" and that his message likely would be understood by those who view it. *Id.* at 560.

Another gang symbol case defendants cite is *Stephenson v. Davenport Community School District*, 110 F.3d 1303 (8th Cir. 1997), which held lawful a public school's refusal to permit its students to have tattoos, when tattoos were a gang symbol and the school had problems with gangs. Plaintiff had a tattoo as a "form of self-expression," apparently not intended to convey any message. *Id.* at 1307 n.4. This case is not about gang symbols. In fact, traditional Lakota practices are an alternative to the widely-reported existence of gangs on the Pine Ridge Reservation. *See* New York Times, December 14, 2009, "Gang Violence Grows on an Indian Reservation," reporting that "Pine Ridge leaders see their best long-term hope for fighting gangs in cultural revival." (Exhibit 1).

Defendants cite *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984), for the rule that a party seeking to show that his conduct is protected by the First Amendment must show that the conduct is "expressive." Dreaming Bear has no quarrel with this rule. Dreaming Bear has shown, through the affidavits on file, that the conduct he wishes to engage in is expressive. Defendants cite *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) for the rule that not all conduct is sufficiently expressive to be protected by the First Amendment, for example, walking down a street, or meeting one's friends at the mall. Dreaming Bear agrees. If defendants cannot see that the conduct Dreaming Bear wishes to

engage in is significantly expressive, they are blind.

Defendants cite *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 319 (2d Cir. 2003), which held that a woman van driver did not have a First Amendment right to wear pants, because this would not convey a particularized message, and the message would not be comprehensible to those viewing it. But *Zalewska* favors Dreaming Bear, because the court recognized: "Of course, there may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection." As an example, it cited *Doe ex rel. Doe v. Yunits*, 2000 Mass. Super. Lexis 491, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), ruling that "a male high school student's decision to wear traditionally female clothes to school as an expression of female gender identity was protected speech." *Zalewska,* 316 F.3d at 320.

2. Defendants argue that even if Dreaming Bear's desire to wear traditional clothing at graduation is protected by the First Amendment, defendants' actions have not "unfairly infringed" on his right to free speech (doc. 21 p. 5-8)

Defendants argue that even if Dreaming Bear has a First Amendment right to wear traditional clothing at graduation, they nonetheless may prohibit him from doing so. Defendants' first authority, *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), upheld the right of the City of New York to regulate the volume of ear-splitting sound at a rock concert in Central Park. Defendants cite the case for the principle that the government may impose reasonable restrictions on the time, place, and manner of protected speech. But this principle does not help the defendants. Dreaming Bear will only graduate from high school once, and.

he will only have the opportunity to receive his diploma wearing his traditional clothing once, so there is no other time, and no other place, where he can wear his traditional clothing as he graduates from high school.

Restrictions on the time, place, and manner of expression of protected speech must be "narrowly tailored to serve a significant governmental interest." *Id.* at 791. Defendants claim that the cap-and-gown requirement "furthers important government interests." In support of their argument, they cite three cases—*Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), *Brandt v. Board of Education*, 480 F.3d 460 (7th Cir. 2007), and *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001)—that uphold school dress code rules. (*Blau* involves a middle school, *Brandt* eighth-graders, and only *Canady* a high school.) All these cases demonstrate is that public school students do not have a general constitutional right to be free from a school dress code.

But that is not the issue here. Dreaming Bear seeks to make an expressive statement of his pride in his Lakota culture and people, in the context of the historical devaluation of native people and their culture by non-Indians, including non-Indian educators. Many cases recognize that a constitutional right exists to make an expressive statement in school:

- *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (students may not be required to salute the flag).
- *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (black armbands permissible despite school policy

against them).

- *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District*, 817 F. Supp. 1319 (E.D. Tex. 1993) (Native American students have the right to wear long hair).
- *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S. D. Tex. 1997) (Catholic students have the right to wear rosaries outside their clothing on school premises).
- *Doe ex rel. Doe v. Yunits*, 2000 Mass. Super. Lexis 491, 2000 WL 33162199 (Mass. Super. Oct. 11, 2000), (male high school student has the right to wear traditionally female clothes to school to express his female gender identity).
- *Lowry v. Watson Chapel School District*, 540 F.3d 752 (8th Cir. 2008) (right to wear black armbands to protest school policy).
- *A.A. v. Needville Independent School District*, 2009 U.S. Dist. Lexis 125690 (S.D. Tex.) (Native American students have the right to wear long hair).

Other cases cited above, and in plaintiff's initial brief, recognize that the First Amendment may require administrators to allow expressive statements by students; the question is usually whether, in the particular context in which the question arises, the First Amendment requires the school to allow the particular expression the student seeks to make.

No case says that the First Amendment ends where the school property line begins.

Defendants may not infringe on Dreaming Bear's First Amendment right to wear traditional Lakota clothing at graduation, because they have not, and cannot, show that their regulation furthers important governmental interests. They claim that requiring Dreaming Bear to wear cap and gown when he receives his diploma will "bridge socio-economic gaps between families within the school district, focusing attention on learning, increasing school unity and pride . . . improving children's [at 19, Dreaming Bear is hardly a "child"] self-respect and self-esteem, helping to eliminate stereotypes and producing a cost savings for families." Doc. 21 p. 6. But their claim does not pass the laugh test. All this will be accomplished by prohibiting Dreaming Bear from wearing his traditional clothing when he receives his diploma?

As the final part of their argument, defendants assert that Dreaming Bear has "alternative channels for the communication of the information" because he can express his pride in his heritage, his people, and himself at other times during graduation. Doc. 21 p. 7. This is *not* an independent ground which by itself can even possibly justify suppression of Dreaming Bear's First Amendment rights. Rather, it is the final part of a three-part test, the second part of which is that the restriction is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided [1] the restrictions are justified without reference to

the content of the regulated speech, [2] that they are narrowly tailored to serve a significant governmental interest, *and* [3] that they leave open ample alternative channels for communication of the information") (emphasis added, bracketing and numbers added, internal quotation omitted). So in the absence of a significant governmental interest in preventing Dreaming Bear from wearing traditional clothing—which as previously argued does not exist—whether there is an alternative forum is irrelevant.

If the court reaches the "alternative forum" issue, it should find that there is no alternative forum for Dreaming Bear to express what he wants to express— to "say" what he wants to "say"—other than when he receives his diploma. His message is conveyed by wearing traditional Lakota clothing *as he graduates*.

The "alternative forum" argument, as defendants make it, proves far too much: it would require the students in *Barnette* to salute the flag at school, because they could express their beliefs elsewhere; it would prohibit the students in *Tinker* and *Lowry* from wearing black armbands at school, because they could do so after school; it would disallow the Native American students in *Alabama and Coushatta Tribes of Texas* and *A.A. v. Needville Independent School District* from wearing long hair at school, because they could express their pride in themselves and their heritage in other ways; it would disallow the Catholic students in *Chalifoux* from wearing rosaries outside their clothing on school premises, because they could wear their rosaries under their clothing, or outside their clothing after school; and it would bar *Doe* from expressing his gender identity through

clothing because he could express his gender identity in other ways, and he could wear whatever clothing he chose to wear after school.

3. Defendants argue that the free exercise of religion clause of the First Amendment does not protect Dreaming Bear (doc. 21 p. 8)

Dreaming Bear's Complaint does not rely on the free exercise of religion clause of the First Amendment. But this case, like several of the cases cited by Dreaming Bear, indeed does have religious overtones. There is no one definition of "religion." "In construing the protections under the Establishment Clause and the Free Exercise Clause, courts have interpreted the term *religion* quite broadly to include a wide variety of theistic and nontheistic beliefs." *Black's Law Dictionary* (9th ed. 2009) at 1405. And the Lakota have never drawn a rigid line between "culture" and "religion."

Chalifoux, which held that Catholic students are entitled to wear rosaries outside their clothing at school, was a free speech case as well as a free exercise case. The Native American student hair cases, *Alabama and Coushatta Tribes of Texas* and *A.A. v. Needville Independent School District*, were free speech cases as well as free exercise cases. The First Amendment protects the overlap between secular and religious belief. *Wiggins v. Sargent*, 753 F.2d 663, 666-67 (8th Cir. 1985) ("a belief can be both secular and religious. The categories are not mutually exclusive. The first amendment presumably protects the area where the two overlap") (footnotes omitted).

4. Defendants' argument with respect to the Fourteen Amendment (doc. 21 p. 9)

Defendants say the Fourteenth Amendment does not apply. The case they cite seems to address what has been called "substantive due process." Dreaming Bear does not advance such a theory. Rather, Dreaming Bear cites the Fourteenth Amendment because only through the Fourteenth Amendment's incorporation of the First Amendment does the First Amendment apply to state officials such as the defendants in this case. The complaint makes this clear: paragraph 9 alleges that defendants' requirement that Dreaming Bear wear a cap and gown over his traditional clothing "violates the First Amendment as applied to the states by the Fourteenth Amendment."

Conclusion

Only the politically powerless need the First Amendment, because government will never trample the expression of those who control government. The role of the courts is to enforce the First Amendment, so that it remains alive and vital, not merely a historical relic to which we pay lip service every Law Day.

Dr. Jaske's affidavit states: "Receiving a diploma in cap and gown; sitting as a class in cap and gown (at least for part of the program) symbolizes the unity of the school graduating class; their journey together through years of learning at the school." Doc. 21-1. But "[r]ecognizing [that] the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in that symbol." *Texas v. Johnson*, 491 U.S. 397, 401 (1989), quoting *Johnson v. Texas*, 755 S.W.2d 92, 97 (Tex.

Crim. App. 1988).

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances that permit an exception, they do not now occur to us." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Plaintiff has requested a preliminary and permanent injunction restraining defendants from prohibiting him and other students from wearing traditional clothing at graduation on May 22, 2010, and for a permanent injunction restraining defendants from prohibiting other Lakota students from wearing traditional clothing at future graduations. The only element of the four-part test for injunctive relief that defendants contest is the first: whether Dreaming Bear is likely to succeed on the merits. So if the Court finds that Dreaming Bear is likely to succeed on the merits, the Court should issue the requested injunction.

Dated: May 12, 2010

Respectfully submitted,

/s/ James D. Leach

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Certificate of Service

I certify that on this 12th day of May, 2010, I filed this document electronically, thereby causing automatic electronic service to be made on counsel for defendants.

/s/ James D. Leach

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