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

HAYDEN GRIFFITH,

Plaintiff,

v.

CANEY VALLEY PUBLIC SCHOOLS, *et al.*,

Defendants.

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

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."[1] 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."[2] 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

[1] *See* http://www.merriam-webster.com/dictionary/sentiment.

[2] *See* http://www.merriam-webster.com/dictionary/worship.

is motivated by a central part or central requirement of the person's sincere religious belief."[3] *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 motived by religious sentiment, the Court should find she has met the first element of her *prima facie* burden. To

[3] 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."[4] Similarly, the definition of "curtail" means "to reduce or limit."[5] And "motivate" means "to give (someone) a reason for doing something; to be a reason for (something)."[6] 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 or 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

[4] *See* http://www.merriam-webster.com/dictionary/inhibit.

[5] *See* http://www.merriam-webster.com/dictionary/curtail.

[6] *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 RFRAs, 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 by 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,

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