



NATIVE AMERICAN RIGHTS FUND

July 11, 2022

Submitted via E-Mail

Honorable Ahmed Shaheed
Special Rapporteur on Freedom of Religion or Belief
c/o Office of the High Commissioner for Human Rights
United Nations at Geneva
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**Re: Submission from the Native American Rights Fund to the United Nations Special Rapporteur on Freedom of Religion of Belief: Indigenous Peoples and the Right to Freedom of Religion or Belief
Input for GA Report – SRFORB**

Dear Mr. Shaheed:

The Native American Rights Fund is pleased to provide the enclosed submission to the United Nations Special Rapporteur on Freedom of Religion of Belief regarding the obstacles Native Americans and Alaska Natives face to exercising their rights to freedom of religion and belief. This submission responds to the call for input on Indigenous people and the right to freedom of religion or belief to inform the Special Rapporteur's thematic report for the 77th session of the United Nations General Assembly.

Throughout the United States, Native Americans and Alaska Natives¹ face barriers to the exercise of their religious and spiritual practices and beliefs. This submission elaborates on the comments

¹ The Native American Rights Fund provides legal representation to Native Americans, Alaska Natives, and federally recognized Tribal Nations throughout the United States. While this submission focuses on Native Americans, Alaska Natives, and Tribal Nations, this does not diminish the fact that other Indigenous people throughout the United States, including in its Territories, face the same or similar barriers to the enjoyment and exercise of their rights to freedom of religion and belief.

provided by Daniel D. Lewerenz, Staff Attorney, Native American Rights Fund, to the Special Rapporteur on May 11, 2022, during the Special Rapporteur’s consultation in Washington, D.C. It addresses three areas where, in our experience, Natives Americans and Alaska Natives consistently face barriers to their exercise of religion: the protection of religiously, spiritually, and culturally significant places; incarcerated individuals’ ability to access and engage in religious, spiritual, and cultural practices; and students’ ability to wear religious symbols or regalia in school, especially at graduation ceremonies.

I. Destruction and Profaning of Sacred Places

As a result of the United States’ colonial legacy, many places that hold religious, spiritual, and cultural significance to Native Americans and Alaska Natives are located on lands now owned by the Federal Government, state and local governments, or private landowners.² These governments’ management of their lands, and their permitting of activities on private lands, implicates Native American and Alaska Native religious beliefs and practices when those activities are incompatible with the place’s religious, spiritual, or cultural significance.³ Often, these activities result in the profaning or even destruction of these places, sometimes making it impossible for Native American and Alaska Native religious practitioners to ever use the sites again or engage in the religious, spiritual, or cultural practices associated with those places.

The First Amendment of the United States Constitution and the Religions Freedom and Restoration Act (“RFRA”) prohibit the government from burdening an individual’s religious beliefs or exercise of religion without a compelling interest.⁴ Native Americans who invoke the First Amendment and the RFRA to prevent governmental action that would destroy or profane sacred places often find that their religious practices and beliefs are subordinate to governmental action. Likewise, Section 106 of the National Historic Preservation Act (“NHPA”) and the Indian Sacred Sites Executive Order require federal agencies to consult with Tribal Nations⁵ and consider the effects of land management decisions on places of traditional religious and cultural importance.⁶ These laws offer no substantive protections for such places and the Federal Government rarely upholds its obligations to engage in meaningful consultation with Indian tribes.

For example, in *Lyng v. Northwest Indian Cemetery Protective Association*, Native American religious practitioners were unable to rely on the First Amendment to prevent the construction of a road through federal lands that would have prevented from engaging in religious and spiritual

² See NAT’L PARK SERV., KEEPERS OF THE TREASURES: PROTECTING HISTORIC PROPERTIES AND CULTURAL TRADITIONS ON INDIAN LANDS 1 (1990) (“American Indian cultures are not expressed only on reservations The ancestral homelands of the Indian tribes cover the entire nation. Sacred and historic places critical to the continuation of cultural traditions are often not under tribal control, but rather are owned or managed by Federal, State, local governments, and other non-Indians.”).

³ See H. HOFFMAN & M. MILLS, A THIRD WAY: DECOLONIZING THE LAWS OF INDIGENOUS CULTURAL PROTECTION 41-42 (2020) (“[M]any indigenous religions are place based, centering on a principle of stewardship toward a specific place, like a sacred mountain, river, lake, or geological feature. . . . Some indigenous religions do not center on a place, but rather on one or more sacred species, such as bison, whale, or salmon.” (footnote omitted))

⁴ U.S. Const. amend. I, cl. 1; 42 U.S.C. § 2000bb-1(b).

⁵ This submission uses the term Tribal Nation in reference to the 574 federally recognized Indian tribes that possess a government-to-government relationship with the United States. See 87 Fed. Reg. 4,636 (Jan. 28, 2022); Pub. L. No. 103-454, § 102(a) 108 Stat. 4791 (1994) (codified at 25 U.S.C. § 5130(2)).

⁶ 54 U.S.C. §§ 302706(b), 306108; Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (May 24, 1996).

ceremonies and practices be disturbing the sanctity and solitude of the landscape.⁷ The Supreme Court held that even if the construction of the road would destroy the practitioners' ability to practice their religion,⁸ the First Amendment did not require the government to satisfy their "religious needs and desires."⁹ Without any irony, the Court held that "[w]hatever rights the Indians have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."¹⁰

Native American and Alaska Native religious practitioners and Tribal Nations have largely turned away from the First Amendment to protect their religious practices from governmental action, relying instead on the RFRA. In *Employment Division, Department of Human Resources of Oregon v. Smith*, Alfred Smith and Galen Black, members of the Native American Church, were fired from their jobs because they consumed peyote as a sacrament during ceremony.¹¹ The State of Oregon subsequently denied them unemployment benefits because they were fired for "misconduct[.]" as the State classified peyote as a "controlled substance" and criminalized its consumption.¹² The Supreme Court of the United States held that the State did not violate Smith's and Black's First Amendment rights because the laws criminalizing the consumption of peyote were religiously neutral and generally applicable and, thus, only incidentally burdened their religious practices and beliefs.¹³ Largely in response to *Smith*,¹⁴ Congress enacted the RFRA which prohibits the government from burdening the exercise of religion without a compelling interest, "even if the burden results from a rule of general applicability[.]"¹⁵

Unfortunately, like the First Amendment, the RFRA has been a largely ineffective tool to protect Native American and Alaska Native religious practitioners' free exercise of religion. This is perhaps best illustrated by the United States Court of Appeals for the Ninth Circuit's recent decision in *Apache Stronghold v. United States*.¹⁶ Chí'chil Bildagoteel (or Oak Flat) is "a place of profound religious, spiritual, and cultural importance[.]"¹⁷ and an important feature in the broader "Western Apache landscape as a sacred site, as a course of supernatural power, and as a staple in their traditional lifeway."¹⁸

⁷ *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988).

⁸ The Supreme Court seemed to question the sincerity of the practitioners' religious beliefs and their claims that the road would burden their religious practices and beliefs. *See id.* at 451 ("To be sure, the Indians themselves were far from unanimous in opposing the G-O road, and it seems less than certain that construction of the road will be so disruptive that it will doom their religion.").

⁹ *Id.* at 542.

¹⁰ *Id.* at 453.

¹¹ *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 874 (1990).

¹² *Id.*

¹³ *Id.* at 876-90.

¹⁴ *See* Joel West Williams & Emily deLisle, *An "Unfulfilled, Hollow Promise": Lyng, Navajo Nation, and the Substantial Burden on Native American Religious Practice*, 48 *ECOLOGY L. Q.* 809, 820 (2021).

¹⁵ 42 U.S.C. § 2000bb-1(a).

¹⁶ *Apache Stronghold v. United States*, No. 21-15295, ___ F.4th ___, 2022 WL 2284927 (9th Cir. June 24, 2022).

¹⁷ Nenebah Nez, *National Register of Historic Places Registration Form: Chi'Chil Bildagoteel, Historic District, Traditional Cultural Property* 9 (Sept. 22, 2014), available at <https://www.resolutionmineeis.us/sites/default/files/references/nez-2016.pdf>.

¹⁸ *Id.* at 8.

Despite its profound cultural and religious significance to the Apache, in 2014, Congress directed the United States Forest Service to transfer Chí'chil Bıldagoteel to an international mining company to develop a copper deposit underneath the landscape.¹⁹ Apache religious practitioners challenged the transfer, arguing that it violated the RFRA because the proposed mine would entirely destroy Chí'chil Bıldagoteel and literally prevent them from practicing fundamental aspects of their religion.²⁰ The Ninth Circuit held that this did not violate the RFRA because the transfer and development of the mine would not substantially burden the Apache's religious practices and beliefs.²¹ According to the court, a substantial burden exists only when the government coerces an individual to act contrary to their beliefs by threat of fine, sanction, or punishment.²² In the court's view, entirely destroying Chí'chil Bıldagoteel and thereby making it impossible for the Apache to practice their religion was not a substantial burden.²³

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties.²⁴ A historic property is "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object."²⁵ The regulations implementing Section 106 establish a process through which federal agencies identify historic properties,²⁶ evaluate potential adverse effects,²⁷ and develop and consider alternatives and modifications to the undertaking to avoid, minimize, or mitigate any adverse effects.²⁸ Section 106 is "designed to encourage the preservation of [historic properties]."²⁹

In 1992, Congress enacted two significant amendments to the NHPA. First, it recognized that historic properties included places "of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization[.]"³⁰ Second, it required federal agencies, in carrying out their Section 106 responsibilities, to "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [historic] propert[ies]"³¹ "that may be affected by the undertaking."³² Federal agencies are required to consult with Tribal Nations and Native Hawaiian organizations throughout the Section 106 process.³³

¹⁹ *Apache Stronghold*, 2022 WL 2284927, at *3.

²⁰ *Id.* at *6.

²¹ *Id.* at *9-10

²² *Id.*; *contra Comanche Nation v. United States*, No. CIV-080849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008) (construction of buildings on military base that would disrupt viewshed integral to religious practice would substantially burden religious exercise).

²³ *Apache Stronghold*, 2022 WL 2284927, at *23 (Berzon, J., dissenting) ("The majority's flawed test leads to an absurd result: blocking the Apaches' access to and eventually destroying a sacred site where they have performed religious ceremonies for centuries does not burden their religious exercise.").

²⁴ 54 U.S.C. § 306108.

²⁵ *Id.* § 300308.

²⁶ 36 C.F.R. § 800.4(b).

²⁷ *Id.* § 800.5(a).

²⁸ *Id.* § 800.6(a).

²⁹ *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006).

³⁰ 54 U.S.C. § 302706(a).

³¹ *Id.* § 302706(b).

³² 36 C.F.R. § 800.2(c)(2)(ii).

³³ *Id.* § 800.2(c)(2)(ii)(A) ("The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious

Section 106, however, is an inadequate legal tool to adequately protect places of traditional religious and cultural significance. First, Section 106 does not require federal agencies to protect historic properties.³⁴ It is simply a planning tool that requires federal agencies “to consider the effects of their programs[.]” on historic properties.³⁵ Second, federal agencies often fail to consult with Tribal Nations entirely, or to the degree contemplated by the regulations or sufficient from the standpoint of the Tribal Nations.³⁶ Moreover, courts rarely hold federal agencies accountable when Tribal Nations assert that they have not engaged in meaningful consultation.³⁷ Even when federal agencies meaningfully consult with Tribal Nations, they are under no obligation to protect the places identified as important to them.

Section 106 is only as meaningful as the consultation agencies are willing to provide.³⁸ Without meaningful consultation, places of traditional religious and cultural importance are not protected or even considered in decision-making processes. The Native American Rights Fund represents Tribal Nations engaged in Section 106 processes for large-scale and highly controversial resource development projects and has seen how challenging it is for Tribal Nations to hold federal agencies accountable for substandard consultation and to ensure that places of traditional religious and cultural importance are considered and protected.

Similarly, the Sacred Sites Executive Order is insufficient to protect sacred sites. First, the Executive Order does not provide substantive protections. Instead, it directs federal agencies, “to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.”³⁹ And the Executive Order “has no force and effect on its own[.]”⁴⁰

and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.”).

³⁴ SARA C. BRONIN & J. PETER BYRNE, *HISTORIC PRESERVATION LAW* 107 (2012) (“The [NHPA] does not require agencies to preserve any properties[.]”).

³⁵ *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).

³⁶ See, e.g., *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104 (S.D. Cal. 2010) (challenging the Bureau of Land Management’s (“BLM”) inadequate Section 106 consultation efforts); see generally Gov’t Accountability Office, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* (Mar. 2019), available at <https://www.gao.gov/assets/gao-19-22.pdf>.

³⁷ See, e.g., *Bartell Ranch LLC v. McCullough*, 558 F. Supp. 3d 974 (D. Nev. 2021) (BLM justified in its decision not to consult with Tribal Nation); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 608-10 (9th Cir. 2010) (finding a single letter and two telephone messages satisfied the BLM’s consultation requirement because it has engaged in consultation with the tribe for an earlier project and there was no evidence that the tribe would have provided new information had it been consulted); *San Juan Citizens Alliance v. Norton*, 586 F. Supp. 2d 1270, 1293-94 (D.N.M. 2008) (documenting a litany of contacts without addressing the substance of consultation, while also stating that the Tribe’s decision to sue the BLM “suggests that its concerns have been or are being addressed”).

³⁸ See 36 C.F.R. § 800.1(a) (“The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”).

³⁹ Exec. Order No. 13,007, § 1, 61 Fed. Reg. at 26,771.

⁴⁰ *Te-Moak Tribe of W. Shoshone of Nev.*, 565 Fed. App’x 665, 667 (9th Cir. 2014).

The First Amendment and the RFRA do not provide adequate protections to Native Americans from governmental action that would destroy sacred places. Likewise, Section 106 and the Sacred Sites Executive Order often fail to provide Tribal Nations a meaningful role in federal decision making and offer no substantive protections.

II. Restrictions on Native Religious Practice in Prisons

Native Americans and Alaska Natives are incarcerated at a disproportionately higher rate to their overall share of the United States population.⁴¹ Under the United States Constitution, federal statutes including the American Indian Religious Freedom Act of 1978 (“AIRFA”),⁴² and some state laws including state RFRA analogues, incarcerated Native Americans’ and Alaska Natives’ religious practices should be protected. Yet, prison administrators often curtail Indigenous religious practice citing dubious security concerns. For example, tobacco is widely used for medicinal, spiritual, and ceremonial purposes in Native American culture. Although tobacco is banned in the majority of federal and state prisons, many permit the use of ceremonial tobacco in some forms.⁴³ Other prisons have refused to accommodate tobacco use citing health concerns. Unfortunately, access to ceremonial tobacco is not guaranteed and Native Americans’ religious rights must sometimes be vindicated through litigation.⁴⁴ Courts are split on the enforcement of prisons’ restrictions.⁴⁵

Incarcerated Native Americans are also often unable to access sweat lodges—an important aspect in many Native American religious traditions. For some, the sweat lodge “is the anchor and the livelihood of a family to prayer.”⁴⁶ In prison, sweat lodges provide an important cultural and religious connection as well as acting as a venue for group therapy. Sweat lodges have been proven to contribute to the rehabilitation of incarcerated Native Americans.⁴⁷ Unfortunately, this

⁴¹ Leah Wang, *The U.S. Criminal Justice System Disproportionately Hurts Native People: The Data, Visualized*, PRISON POLICY INITIATIVE (OCT. 8, 2021), <https://www.prisonpolicy.org/blog/2021/10/08/indigenouspeoplesday/#:~:text=Native%20people%20made%20up%202.1,community%20supervision%20in%20mid%2D2018.>

⁴² 42 U.S.C. § 1996.

⁴³ Pub. Health Law Ctr., *Tobacco Behind Bars: Policy Options for the Adult Correctional Population* 8 (2012), available at <https://publichealthlawcenter.org/sites/default/files/resources/phlc-policybrief-tobaccobehindbars-adultcorrections-2012.pdf>.

⁴⁴ See *Knows His Gun v. Montana*, 866 F. Supp. 2d 1235 (Mont. 2012) (court found two Native American inmates had sufficiently plead case that the prison had inappropriately confiscated their ceremonial pipes.).

⁴⁵ *Compare Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 752 (2014), with *Adams v. Mosley*, No. 2:05cv352-MHT, 2008 WL 4369246, at *12 (M.D. Ala. Sept. 25, 2008); see Ken Bradley, *In South Dakota Prisons, Indian Inmates Get to Smoke—For Religious Reasons*, REUTERS (Feb. 20, 2013), <http://tmsnrt.rs/21LhiU3>; Gabriel S. Galanda, *Native American Prisoners Obtain Religious Freedom*, KING COUNTY BAR ASS’N (July 2012), <http://bit.ly/1Qz3yAV>; see also *Cryer v. Mass. Dep’t of Corr.*, 763 F. Supp. 2d 237, 243-48 (D. Mass. 2011) (suggesting a total ban on tobacco might have imposed a substantial burden on the Native American plaintiff and that the ban might not be the least restrictive means of furthering the prison’s interest in security).

⁴⁶ *Weber*, 750 F.3d at 746.

⁴⁷ See, e.g., Harvard Pluralism Project, *Sweat Lodges in American Prisons* (2005), available at <https://www.prisonlegalnews.org/news/2010/jan/15/sweat-lodges-in-american-prisons-2005/>.

important religious practice has, again, been curtailed due to alleged safety concerns,⁴⁸ and courts have allowed prisons to ban sweat lodges.⁴⁹

The practice of smudging is used to purify and cleanse. A smudging ceremony includes the production of smoke—which some prisons have banned. Courts have generally upheld indoor bans because smoke poses a safety hazard and can trigger fire alarms.⁵⁰ Smudging ceremonies can, however, be safely accommodated outside.⁵¹ Unfortunately, incarcerated Native Americans have still had to go to court to vindicate their right to smudge, even outdoors.⁵²

For some Native Americans and Alaska Natives, having long hair signifies a strong cultural identity and is part of their religious practice. A Native American's hair may be an extension of their dreams, prayers, and history. Prisons often subject Native Americans to short hair standards, allegedly to maintain safety standards, citing “the public's safety in the event of escapes and alteration of appearances.”⁵³ Courts have disagreed with the necessity for such standards because prisons have alternate, less restrictive, options to maintain safety. Problematic bans persist; as of January 2016, ten state prisons do not allow for religious exemptions for their long hair bans.⁵⁴ The lack of uniformity among states causes the unequal treatment of Native American inmates. The Supreme Court of the United States, however, failed to create a national standard when it remanded *Knight v. Thompson*⁵⁵ to the United States Court of Appeals for the Eleventh Circuit

⁴⁸ *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) (“[N]o reasonable jurist, affording due deference to prison officials, can dispute that serious safety and security concerns arise when inmates at a maximum security prison are provided ready access to (1) burning embers and hot coals, (2) blunt instruments such as split wood and large scalding rocks, (3) sharper objects such as shovels and deer antlers, and (4) an enclosed area inaccessible to outside view.”)

⁴⁹ *Id.*; *Hyde v. Fisher*, 203 P.3d 712, 728-29 (Idaho App. 2009) (court held that the complete restriction of a sweat lodge was “the least restrict means of serving the compelling governmental interest of security and safety”)

⁵⁰ *See, e.g., Chance v. Tex. Dep't of Crim. Justice*, 730 F.3d 404, 417 (5th Cir. 2013) (waiting for a fire alarm to be set off prior to banning indoor sweat lodges' ignores common sense); *Hodgson v. Fabian*, 378 F. App'x 592, 593-94 (8th Cir. 2010) (per curiam) (“Assuming that the prison's policy regarding smudging and incense burning imposed a substantial burden, we find that the prison's safety and security concerns were sufficient to ban these activities”); *Cubero v. Burton*, No. 96-1494, 1996 WL 508624, at *1-2 (7th Cir. Sept. 3, 1996) (unpublished decision considering claims that prison officials interfered with inmates' First Amendment right to practice their Native American religion by denying them religious materials, permission to “smudge” in their rooms, and temporarily closing sweat lodge at prison); *Smith v. Beauclair*, No. CV-03-222-C-EJL, 2006 WL 2348073, at *9 (D. Idaho Aug. 11, 2006) (accommodation to smoking and burning tobacco in an inmate's cell is not appropriate because it has substantial health effects on other inmates),

⁵¹ *See Chance*, 730 F.3d at 417 (“Because [the prison] still permits Smudging outdoors and has offered uncontroverted evidence demonstrating the reasonableness of its determination to ban indoor Smudging, we conclude that its Smudging policy is the least restrictive means of achieving its compelling interests.”); *Hyde*, 203 P.3d at 729-30.

⁵² *Hyde*, 203 P.3d at 712; *see Indian Prison Resuming Native American Services*, THE GOSHEN NEWS (Apr. 30, 2014), available at https://www.goshennews.com/news/indiana-prison-resuming-native-american-services/article_bc13802f-540b-5e6c-b321-a5fb71c47747.html.

⁵³ *Lathan v. Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007).

⁵⁴ Native Am. Rights Fund, *Legal Protections for Native Spiritual Practices in Prison* (Mar. 2016), available at https://narf.org/nill/documents/2016_protections_prisoners.pdf (Alabama, Florida, Georgia, Idaho, Indiana, Louisiana, Mississippi, South Carolina, Texas, and Virginia). Since 2016, Texas's ban on long hair in their prison system has been overturned in court. *See Goodman v. Davis*, No. 2:12-cv-166 (S.D. Tex. 2019) (findings of fact & conclusions of law) (dkt. No. 322).

⁵⁵ *Knight v. Thompson*, 574 U.S. 1133 (2015).

following *Holt v. Hobbs*.⁵⁶ Some states will also not allow inmates to have possession of their deceased relatives' hair—another religious practice among some Native Americans.⁵⁷

Native American and Alaska Native religious practice often includes the use of animal parts including hides, teeth, claws, and feathers. Prisons, however, decide on a case-by-case basis whether an inmate may possess animal parts. Following litigation, some inmates have vindicated their right to possess smaller animal parts, including eagle feathers⁵⁸—the importance of which is recognized by federal law.⁵⁹ Talons and animal claws, however, are usually contraband in state and federal prisons for security reasons.⁶⁰

Prisons ongoing oppression of incarcerated Native American's and Alaska Natives' ability to practice their religion is a problem compounded by the lack of access to legal counsel. It is challenging for inmates to obtain representation in order to vindicate the rights they do have.⁶¹

III. Restrictions Native Religious Practice in Schools

Native Americans and Alaska Natives also face challenges to free exercise of their religion in the educational context. As previously stated, for some Native American and Alaska Native students, having long hair signifies a moral and spiritual strength.⁶² Schools across the United States, however, may enforce dress codes that restrict the way students are permitted to wear their hair or dress. While some schools create exceptions to accommodate Native American and Alaska Native students, others have disciplined them for failing to meet their policy requirements of having short hair. Native American and Alaska Native students have had to resort to the court system to resolve issues with discriminatory hair restrictions.⁶³

One Texas school district required male students to maintain short hair.⁶⁴ Eighty-nine students in the district were members of the Alabama and Coshatta Tribes of Texas.⁶⁵ When Native students refused to comply with the policy, they were removed from the classroom and placed in in-school detention or banned from attending school until they cut their hair.⁶⁶ Following a lawsuit, the

⁵⁶ *Holt v. Hobbs*, 574 U.S. 352 (2014) (upholding the least-restrictive means standard, but not applying a country wide standard on what constitutes the least-restrictive means of religious exemptions for hair length policies.)

⁵⁷ *Chance*, 730 F.3d at 419 (issue remanded to district court which was settled by parties leaving the policy in place)

⁵⁸ See Am. Civil Liberties Union, *ACLU Secures Religious Freedom for American Indians at Wyoming Prison* (July 30, 2008), available at <http://bit.ly/24GPjUq> (discussing a settlement involving the Wyoming State Penitentiary that allows Native American inmates to keep four eagle feathers within their cells and additional feathers in storage).

⁵⁹ 16 U.S.C. § 668a

⁶⁰ *Haight v. Thompson*, No. 5:11-CV-00118, 2013 WL 1092969, at *24 (W.D. Ky. Mar. 15, 2013) (“Animal claws and talons hold a sacred significance for many Native Americans. However, the potential for use as weapons makes them generally inappropriate for possession in a correctional setting.”).

⁶¹ Anne. Grunseit et al., *Taking Justice Into Custody: The Legal Needs of Prisoners* (2008), available at [http://www.lawfoundation.net.au/ljf/site/articleIDs/1B8B9E6A87260D55CA25753E000D1763/\\$file/JI2_taking_justice_into_custody_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/1B8B9E6A87260D55CA25753E000D1763/$file/JI2_taking_justice_into_custody_web.pdf).

⁶² *Ala. & Coshatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1325 (E.D. Tex. 1993).

⁶³ *A.A. v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010).

⁶⁴ *Ala. & Coshatta Tribes*, 817 F. Supp. at 1319.

⁶⁵ *Id.*

⁶⁶ *Id.*

United States District Court for the Eastern District Court of Texas held that this policy violated students' constitutional right to the free exercise of religion.⁶⁷

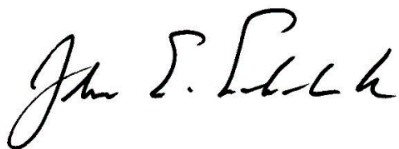
Many Native American consider eagles to be spiritually significant, merging a connection between God and the Earth.⁶⁸ Although federal law makes it illegal to possess eagle feathers, the Bald and Golden Eagle Protection Act of 1962 provides an exception for members of federally recognized Tribal Nations to own eagle feathers for religious purposes.⁶⁹ Native American and Alaska Native students often wear eagle feathers during graduation to signify and honor the major life accomplishment of receiving a degree.⁷⁰ While many schools approve Native American students' requests to wear eagle feathers at graduation, some do not, often citing graduation dress codes.⁷¹

NARF often writes letters to school districts before graduations to inform them of the religious importance of eagle feathers for Native American and Alaska Native students and the legal protections which exist, including the First Amendment, the RFRA, and state RFRA statutes. Despite being educated on this issue, school districts regularly continue to enforce their strict bans on Native regalia and eagle feathers. The lack of clear federal and state protections for Native American students to wear eagle feathers has resulted in their religious practice being denied at one of the most important moments of students' lives.

IV. Conclusion

Despite the United States' avowed commitment to protecting freedom of religion, Native Americans, Alaska Natives, and Tribal Nations continue to face obstacles to the enjoyment and exercise of their religions and beliefs. These barriers are rooted in the United States' deep colonial legacy and its historic and contemporary policies aimed at assimilating Indigenous peoples by destroying their religions, cultures, and languages. Without broad legal and social changes, barriers will persist. Should you have any further questions or wish to follow up on any of this testimony, please do not hesitate to reach out to the Native American Rights Fund.

Respectfully,



John E. Echohawk
Executive Director
NATIVE AMERICAN RIGHTS FUND

⁶⁷ *Id.*

⁶⁸ *Wearing Eagle Feathers and Regalia at Graduation*, NATIVE AM. RIGHTS FUND, available at <https://www.narf.org/cases/graduation/>.

⁶⁹ 59 Fed. Reg. 22,953 (Apr. 29, 1994).

⁷⁰ NATIVE AM. RIGHTS FUND, *supra* note 68.

⁷¹ *Griffith v. Caney Valley Pub. Schs.*, 157 F. Supp. 3d 1159 (N.D. Okla. 2016).



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