IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-20091

A.A., by and through his parents and legal guardians, MICHELLE BETENBAUGH and KENNEY AROCHA; MICHELLE BETENBAUGH, individually; and KENNEY AROCHA, individually,
Plaintiffs-Appellees

v.

NEEDVILLE INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant

On Appeal From The United States District Court
For The Southern District Of Texas

BRIEF OF *AMICUS CURIAE* TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF APPELLANT NEEDVILLE INDEPENDENT SCHOOL DISTRICT

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The Texas Association of School Boards Legal Assistance Fund, as *amicus curiae,* respectfully submits this Brief, with the consent of all parties, in support of Appellant Needville Independent School District.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Nearly 800 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund ("TASB Legal Assistance Fund"), which advocates the interest of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA").

TASB is a non-profit corporation whose members are the approximately 1,043 public school boards in Texas. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools.[1]

TASA represents the State's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

CSA is comprised of attorneys who represent more than ninety percent of the public school districts in Texas.

The TASB Legal Assistance Fund's interest in the outcome of this appeal arises from its serious concern that the District Court's decision will unnecessarily burden Texas school districts. In its decision, the District Court impermissibly

[1] *See* TEX. EDUC. CODE § 11.151 (b) & (d).

invades the province of local school boards in determining how to maintain order in the public schools and embraces the substitution of the judgment of the federal judiciary over that of the local school board. The lower court's decision places school districts in the awkward position of being unable to craft reasonable accommodations to student religious beliefs in the enforcement of facially neutral dress and grooming policies. If that is to be the case, then Amicus seeks this Court's guidance or guidelines as to how districts may proceed in such situations.

ARGUMENT

The Texas Association of School Boards Legal Assistance Fund supports Needville Independent School District's ("NISD") position that the District Court incorrectly identified the grooming policy subject to review and applied the wrong legal standard in its analysis of Plaintiffs' claims. However, even assuming, *arguendo*, that the District Court was correct in these respects, it still erred in its legal analysis.

I. The District Court's unwillingness to accept the connectedness between the uniformity of male hair grooming and the maintenance of order impedes its legal analysis.

NISD has adopted a dress and grooming policy, like most other school districts in the state of Texas, to "teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority." (ROA at p. 38).[2] NISD's

[2] NISD will cite to the Record on Appeal by page number, *e.g.*, (ROA at p. ___).

dress code policy requires, in part, that "[b]oys' hair shall not cover any part of the ear or touch the top of the standard collar in the back." (ROA at p. 39). NISD's dress and grooming policy is generally applied and is facially neutral.

A.A. and his parents moved into NISD and requested an exemption to the policy for religious reasons so that A.A., a kindergarten student, would not have to cut his hair. NISD granted the parents' request for exemption but required A.A. to wear his long hair in a single braid behind his ears with the length of the braid tucked under the collar of his shirt. (ROA at p. 986). Plaintiffs disagreed with the requirements of the exemption, and A.A.'s father testified that there wasn't any regulation that he could think of on the grooming of his son's hair to which he would agree. (ROA at p. 2217).

It is this exemption to the NISD dress and grooming policy upon which the District Court based its decision. (ROA at p. 998). The District Court reviewed the exemption itself as well as the history of the exemption and determined that a strict scrutiny analysis applied because "the exemption policy is neither neutral nor generally applicable." (ROA at pp. 999-1001). Assuming that the District Court correctly concluded that it is the exemption and not the policy that should undergo review and that strict scrutiny applies, the District Court's legal analysis was, nevertheless, erroneous, in several material ways.

The District Court's strict scrutiny analysis of Plaintiffs' free exercise claim is seriously impeded by its unwillingness to connect the uniformity of male hair grooming with the compelling state interest of maintaining order in the public schools. It has long been held by this Court that "[t]he interest of the state in maintaining an effective and efficient school system is of paramount importance" and is a "compelling reason for the State infringement." *Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 703 (5th Cir. 1968), *cert denied*, 393 U.S. 856 (1968). In *Ferrell*, several male students were denied enrollment into school because of their "Beatle" style haircuts which violated the dress and grooming policy. *Id*. at 698. The students contended that the regulation was unlawful and denied them their constitutional rights. *Id*. This Court disagreed, and held that maintaining order in a school was a compelling state interest and "[t]hat which so interferes or hinders the state in providing the best education possible for its people, must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right." *Id*. at 703.

In *Domico v. Rapides Parish School*, a school employee dress code case, this Court held that "a hairstyle regulation is a reasonable means of furthering the school board's undeniable interest in teaching hygiene, instilling discipline, asserting authority and compelling uniformity." 675 F.2d 100, 102 (5th Cir. 1982). Plaintiffs in *Domico* were school employees who alleged that their civil rights were

violated when the school board announced that the student dress code prohibiting students from wearing beards applied to employees as well. *Id*. at 101. In support of the school board's regulation of employee dress and grooming, this Court stated:

> [T]his Circuit has established a bright line applicable to hairstyle cases: at the public college level, hairstyle regulations cannot, absent exceptional circumstances, be justified by the school's asserted educational and disciplinary needs, while in the public elementary and secondary schools, such regulations are ***always*** justified by the school's needs."

Id. at 102 (emphasis added).

In this case, NISD Superintendent Rhodes ("Rhodes") testified that many factors were taken into consideration when crafting the exemption to NISD's dress and grooming code—that they evaluated it "from a global aspect," that the exemption was created to instill discipline and maintain order and hygiene, and that "dress codes play a very direct relation to order." (ROA at pp. 1986, 1000, 2259). Rhodes also stated in his testimony that the purpose behind the exemption was "to protect [A.A.] and his beliefs, yet also…be as close to the dress code that's accepted by Needville Independent School District as possible." (ROA at p. 1987). Based on the record, Rhodes took many considerations into account when crafting the exemption to the NISD dress and grooming code, including furthering the five stated goals of the policy: to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority. (ROA at p. 38).

As stated above, the Fifth Circuit has held that such reasons are compelling state interests. *See Ferrell,* 392 F.2d at 703. Instead of reaching the conclusion that the proffered reasons for the exemption support a compelling state interest, the District Court found that "[a]ssuming that the policy's purpose is to promote uniformity, discipline, order and hygiene, it is under inclusive. As mentioned earlier, female students are allowed to wear their long hair exposed and in two braids without being viewed as a threat to the school's order and hygiene." (ROA at p. 1000). Such comparison between male and female grooming standards has long been rejected by the Fifth Circuit as well as the Texas Supreme Court. *See Ferrell v. Dallas Indep. Sch. Dist.*, 392 F.2d 697, 704 (5th Cir. 1968), *cert denied*, 393 U.S. 856 (1968); *Bastrop Indep. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 371 (Tex. 1997); *Barber v. Colorado Indep. Sch. Dist.*, 901 S.W.2d 447, 450 (Tex. 1995).

The District Court concludes its analysis of the exemption to NISD's dress and grooming code by stating:

> Even assuming that NISD's interest in maintaining order and hygiene among its students constituted a compelling government interest, the exemption policy is not the least restrictive means of pursuing those interests. A ***better policy*** would be to allow A.A. to wear his long hair in accordance with his religious beliefs, but to make him comply with the rest of the NISD dress code, as it is applied to other students.

(ROA at p. 1001) (emphasis added). As discussed in the case law above, maintaining order in a school district ***is*** a compelling state interest, and the

exemption to the dress and grooming code would ***not*** require that A.A. have his hair cut in order to comply. NISD provided A.A. with an alternate means to comply with the standard dress and grooming code which would allow him to maintain his hair length in accordance with his religious beliefs, as found by the court; however, A.A.'s father did not consider any regulation of A.A.'s hairstyle to be acceptable. (ROA at p. 2217). Even though hair ***length*** seemed most relevant to the religious beliefs articulated by A.A.'s father—A.A. himself did not testify—the District Court apparently concluded that Plaintiffs' interests in A.A.'s hair***style*** is more compelling than the school's interest in maintaining order. Indeed, the District Court believes that the "better policy" is to simply forego hair grooming requirements altogether. In so doing, the court effectively holds, contrary to this Court, that there is no connectedness at all between male hair grooming and order in the public schools.[3]

Surely, the law cannot place school districts in an "all or nothing" position, as the trial court suggests. Amicus invites the Court, indeed, would urge it to

[3] It is in this context that the District Court's failure to give consideration to A.A.'s tender years and the evidence that he was confusingly thought to be a girl is particularly disturbing. A.A.'s teacher testified that, while in the boys' restroom, A.A. was mistaken for a girl and the boys in the restroom ran out to inform the teacher. (ROA at p. 2119). A.A.'s teacher also testified that on a field trip one of the moms pulled A.A. out of line with the boys and put him in line with the girls. *Id*. The District Court gave such evidence short shrift, ROA at p. 23, 26, apparently unwilling to at least conceptualize the difficulties inherent in maintaining order amongst kindergarten students, even under the best of circumstances.

fashion guidelines for religious accommodations if school districts cannot establish such accommodations themselves based on their own practiced judgment.

II. The District Court cannot and should not substitute its judgment for that of the Needville Independent School District Board of Trustees as to the effectiveness of the exemption requirements imposed on A.A. by NISD or rely on what the Court believes is "most effective."

On at least two occasions in its decision, the District Court clearly imposes its judgment over that of the NISD School Board. The first time is, as noted, ***supra***, under its strict scrutiny analysis of the exemption to NISD's dress and grooming code: "A ***better policy*** would be…" (ROA at p. 1001) (emphasis added). The second is under the court's hybrid claim analysis, "while one could imagine the exemption policy might be one means of achieving NISD's goals, it is certainly not the ***most*** effective." (ROA at p. 1003) (emphasis added).

As support for superimposing its judgment for that of the NISD Board, the District Court relies on *Chalifoux v. New Caney ISD*. 976 F. Supp. 659 (S.D. Tex. 1997). *Chalifoux* involved a First Amendment challenge by students who wanted to wear rosaries as a necklace on the outside of their clothing. *Id*. The school district prohibited the students from doing so because the school had determined that the rosaries were "gang related apparel." *Id*. In finding that the prohibition on wearing rosaries violated plaintiffs' First Amendment rights, Judge Hittner stated: "while this Court will not endeavor to make a comprehensive list, surely there are a number of more effective means available to NCISD, other than a blanket ban on

wearing rosaries, to control gang activity and ensure the safety of its schools." *See Id*. at 671. While the decision in *Chalifoux* was well-grounded, based on the lack of any substantive evidence linking rosary beads (with a crucifix) and gang violence, there was also no Fifth Circuit precedent for any court-imposed standard of effectiveness in balancing student First Amendment interests with the maintenance of order in the public schools. This power has been reserved for school boards.

In direct contradiction to the position of any "effectiveness" standard, this Court, relying on both its own precedent and that of the United States Supreme Court, specifically stated in *Littlefield v. Forney ISD* that "federal courts should defer to school boards to decide, within constitutional bounds, what constitutes appropriate behavior and dress in public schools." *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 286-287 (5th Cir. 2001); *See also Canady v. Bossier Parish Sch. Bd.*, 240 F.3d at 441, 444 (5th Cir. 2001) ("It is not the job of federal courts to determine the most effective way to educate our nation's youth."); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" citing *Bethel Sch. Dist. v. Frasier*, 478 U.S. 675, 683 (1986). The District Court erred when it superimposed its judgment over the NISD School Board by applying what the court considered to be the "better policy" for

maintaining order in the NISD schools, and the "most effective" means for NISD to achieve its goals.

III. The District Court's free speech analysis is fundamentally flawed.

This Court has held that there is no constitutionally protected right to wear one's hair in a public school in the length and style that suits the wearer and that it is "doubtful that the wearing of long hair has sufficient communicative content to entitle it to the protection of the First Amendment." *Karr v. Schmidt*, 460 F.2d 609, 613 (5th Cir. 1972) (en banc), *cert denied*, 409 U.S. 989 (1972). However, even assuming, *arguendo*, that the religious element assigned to A.A.'s hairstyle overcomes this hurdle, facially, the District Court erred in its application of the *Spence/Johnson* test for determining the efficacy of a free speech claim based on conduct alone.[4]

The District Court relied on its understanding of the *Spence/Johnson* test to determine whether there were sufficient communicative elements to warrant free speech protection for A.A., *i.e.*, "whether the conduct intends to convey a particularized message and the likelihood that the message will be understood by those who view it." (ROA at p. 1005). As to the first prong of the *Spence/Johnson* test, the court had no legitimate basis for finding that A.A. himself intended to convey any message at all other than perhaps, that he, like many boys his age,

would simply like to look like his father—hardly a message worthy of First Amendment protection. A.A. never testified, and the court could not have concluded that a child of kindergarten age had the intent required to convey a "particularized message" to his peers and others around him, absent examination of the child.[5]

Moreover the second prong of the *Spence/Johnson* test requires not simply the likelihood that the message will be understood by those who view it, but that the "***likelihood was great*** that the message would be understood by those who viewed it." *Johnson*, 491 U.S. 397, 404. It is difficult to see how that standard can be met in this case, especially since the hairstyles of Native Americans are quite varied, and A.A. is, after all, only 5 or 6 years of age, and in a kindergarten setting.

Indeed, Plaintiffs' own expert testified at the hearing that "[i]t's not necessarily generally recognized by everyone if you wear long hair or you wear

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[4] *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) citing *Spence v. Washington*, 418 U.S. 405, 409 (1974).

[5] State law controls in establishing the age of mental or emotional capacity (*see* FED. R. EVID. 601), and under Texas law, by way of example, one must be at least 10 years of age to be subject to the juvenile justice process or create civil liability for willful or malicious misconduct (*see* TEX. FAM. CODE, §§ 51.02 (2) and 41.001(2)), and at least 12 years of age to be entitled to state a preference as to which parent they wish to live with in a custody dispute. (*See* TEX. FAM. CODE § 153.008). At a minimum, the trial judge should have examined A.A. to determine his capacity. (*See* FED. R. EVID. 601, pointing to state law to determine the competency of a witness; *See also* TEX. R. EVID. 601).

It is also noteworthy that all of the opinions upon which the District Court relies involving the exercise of religious rights of students dealt with children who had the requisite capacity, based on age, under Texas law. *See, e.g., Alabama and Coushatta Tribes of Texas v. Big Sandy Indep.*

your hair in braids that means you're of Indian heritage." (ROA at p. 2039). In today's society, there is not a great likelihood that long hair worn loose or in braid(s) will convey any type of message other than personal preference. *See, e.g.*, (ROA at pp. 916, 2038).

The importance of a correct application of *Spence/Johnson* in the school setting cannot be overstated, given the myriad ways in which students may express themselves. The District Court's failure to apply the *Spence/Johnson* test, literally, as well as its failure to apply both prongs of the test with the tender age of the actor, and the actor's audience, in mind, render its analysis of Plaintiffs' free expression claim erroneous.[6]

Conclusion

For the reasons stated herein, *amicus curiae* TASB Legal Assistance Fund respectfully requests that this Court reverse the decision of the District Court, or at a minimum, remand the case for further consideration in light of appropriate legal standards and analysis.

Sch. Dist., 817 F. Supp. 1319 (E.D. Tex. 1993); *Chailfoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997).

[6] And, in turn, Plaintiffs' hybrid claim fails as well. Even assuming, *arguendo*, that a hybrid claim is viable in this circuit—which a close reading of *Employment Division v. Smith*, 494 U.S. 872 (1990) juxtaposed with *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1217 (5th Cir. 1991), makes questionable—there is no religion-"plus" here, and no "more than a reasonable relationship" standard to apply, in any event. (ROA at p. 1003). The District Court's conclusion that the exemption crafted by NISD which permitted A.A. to keep his hair long would somehow coerce or compel him to cut his hair, see ROA at p. 1009, is perplexing to say the least,

a minimum, remand the case for further consideration in light of appropriate legal standards and analysis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 4th day of May, 2009, a true and correct copy of the foregoing was served on all counsel of record in both paper and electronic form by placing the same in the United States mail, certified, return receipt requested, with proper postage affixed and addressed as follows:

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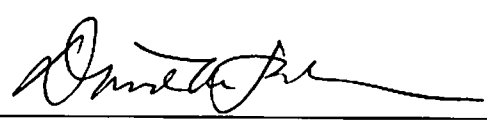

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(B) and Local Rule 32.3, the undersigned certifies:

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