No. 09-20091

IN THE FIFTH CIRCUIT COURT OF APPEALS

A.A., by and through his parents and legal guardians, MICHELLE BETENBAUGH and KENNEY AROCHA; MICHELLE BETENBAUGH, individually, and KENNEY AROCHA, individually,
Plaintiff-Appellees
v.
NEEDVILLE INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant

Appeal from United States District Court
Southern District of Texas

APPELLEES' BRIEF

SINEAD O'CARROLL
PAUL SCHLAUD
REEVES & BRIGHTWELL LLP
221 W. 6th Street, Suite 1000
Austin, Texas 78701

LISA GRAYBILL
FLEMING TERRELL
ACLU FOUNDATION OF TEXAS
P.O. Box 12905
Austin, TX 78711

DANIEL MACH
PROGRAM ON FREEDOM OF
RELIGION AND BELIEF
ACLU FOUNDATION
915 15th St. NW
Washington, DC 20005

ATTORNEYS FOR APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

A. Parties

Plaintiffs-Appellees: A.A.
Michelle Betenbaugh
Kenney Arocha

Defendant-Appellant: Needville Independent School District

B. Attorneys

For Plaintiffs-Appellees:

Lisa Graybill
Fleming Terrell
ACLU of Texas
P. O. Box 12905
Austin, TX 78711

Daniel Mach
Program on Freedom of Religion & Belief
ACLU Foundation
915 15th St. NW
Washington, DC 20005

Sinead O'Carroll
Paul Schlaud
Reeves & Brightwell LLP
221 W. 6th St., Suite 1000
Austin, TX 78701

For Defendant-Appellant:

Roger D. Hepworth
Henslee Schwartz LLP
816 Congress Avenue
Austin, TX 78701-2443

Jeffrey L. Hoffman
Kristen Z. Foster
Henslee Schwartz LLP
3200 Southwest Freeway, Suite 1200
Houston, TX 77027

STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument would be helpful in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

I. Did the district court correctly hold that Needville Independent School District (NISD) violated the Texas Religious Freedom Restoration Act (TRFRA) by substantially burdening A.A.'s religious practice of wearing his hair in accordance with his sincerely held Native American religious beliefs, where NISD failed to show that its grooming policy and "exemption" were the least restrictive means of furthering a compelling governmental interest?

II. Did the district court correctly hold that NISD violated A.A.'s free exercise rights under the First Amendment?

III. Did the district court correctly hold that NISD violated A.A.'s free expression rights under the First Amendment?

IV. Did the district court correctly hold that NISD violated Kenny Arocha's and Michelle Betenbaugh's due process rights to direct the religious upbringing of their son?

STATEMENT OF FACTS

A. A.A. and His Father Wear Their Hair Long in Keeping with Their Sincerely Held Religious Beliefs.

At the time this dispute began, A.A. was a five-year old soon-to-be kindergarten student at Needville Elementary School. ROA 12-13.[1] He is Native American, and in keeping with his family's Native American religious beliefs and traditions, A.A.'s hair has never been cut. ROA 13. A.A. typically wears his thirteen-inch hair in two long braids. ROA 16. When people ask A.A. why he wears long hair, he tells them it is because he is Native American. ROA 2149: 5-7. When A.A.'s mother bought him a wig for Halloween, A.A. refused to wear it because he did not want to cover his braids. ROA 2153: 21-25; 2154:1-4. He said, "Why would I need that? I want my braids. I want people to see them. I want people to see that I'm Native American." ROA 2154: 3-4.

A.A.'s father, Kenny Arocha, also wears his hair in two long braids as a part of his Native American religious beliefs and traditions. ROA 15. He has not cut the length of his hair in the last eleven years. ROA 2150: 5. When Arocha was growing up, his grandfather and uncle told him he was a Native American. ROA 2141: 5-10.[2] They taught him Native American beliefs and gave him "tools" to

---

[1] All references to the record on appeal will appear as ROA ___.

[2] NISD plays fast and loose with the record throughout its brief. For example, NISD asserts that although "his family denies any Native American heritage," Arocha "claims a Native American background." Br. at 2. Undisputed facts in the record, however, establish that Arocha's

guide him through the day and help him better understand his purpose. ROA at 2141 8-10. Arocha began to "reconnect" to his Native American religion ten to eleven years ago at the encouragement of Michelle Betenbaugh, his wife and the mother of A.A. ROA 2147: 23-25; 2148: 1-2. Arocha now practices Native American religion and articulates his religious beliefs as follows: "What I like to do, I like to have reverence every day to understand that at every turn, no matter what it was, no matter what it is that we're doing, something somewhere had to give itself up for us and to understand that and pay close attention to that, in order to respect whatever it was that gave itself up for me." ROA 2143: 18-23.

Arocha's uncle wore his long hair braided. ROA 2181: 1-11. Arocha also wore his hair long as a young child and was forced to cut it when he began school, an experience that was "hard" and "unsettling" and caused him to "cry a lot." ROA 2149:18-23, 2149: 25. Arocha believes that his long hair is "a symbol, an outward extension of who we are and where we come from, our ancestry and where we are going in life. It is a constant reminder to us of who we are." ROA 2149: 10-15. Arocha will not cut his hair unless he is in mourning for a loved one. ROA 2150: 18-22, 2151: 5-8. Arocha refused to cut his hair even when an employer threatened to terminate him for failing to do so. ROA 2221: 8-13. And when he underwent brain surgery, Arocha worked with his doctors to avoid having

---

grandfather and uncle taught him—and DNA tests have confirmed—that he is Native American. ROA 2141, ROA 80-83.

his braids cut for the procedure. ROA 2231: 11-24. Arocha's braids have religious meaning for him. ROA 2151: 9-20. He believes that each braid has a deep meaning, and the practice of braiding helps connect him to who he is. ROA 2151: 11-15. He also believes that braids should be worn "in plain sight" and that "each braid has its own significance and . . . that's the way it should be presented." ROA 2167: 20-22.

Arocha's experience with his Native American identity, and the religious beliefs he and A.A. have about their hair, are shared by many other Native Americans. Dr. James Riding In, Plaintiffs' expert, testified that historically, many Native Americans were forced to conceal their beliefs in order to protect themselves from persecution. *See* ROA 92, 94. Throughout the late nineteenth and early twentieth centuries, for example, the United States government subjected Native Americans to a variety of harsh assimilationist policies. ROA 93-94. The government operated boarding schools that "sought to stamp out the traditional spirituality of the Indian people" and subjected Native American children to "forced haircuts," ROA 2011: 15-22, and the Bureau of Indian Affairs developed the Code of Indian offenses—regulations "that criminalized Indian spirituality." ROA 2012: 8-13.

As a result of this persecution and forced assimilation, Native Americans are not always aware of which tribe they come from, or even that they are Native

Americans at all. ROA 2014-16. Many are now going through the process of reclaiming their lost religion and culture, referred to as decolonialization. ROA 2014-16.

As a part of decolonialization, many Native Americans wear their hair long. ROA 2016: 17-20. While diversity exists among Native American tribes and individuals, some Native Americans, including Arocha and A.A., attach religious significance to both wearing hair long and only cutting hair for certain reasons, such as the death of a loved one. ROA 2016: 23-25. "They feel long hair is an expression of their spirituality." ROA 2046: 20-22. Many Native Americans have these beliefs due to the development of pan-Indianism that followed the disruption caused by the U.S. government's policies. ROA 2017: 19-20.

B. NISD Denied Plaintiffs' First Request for an Exemption From the Grooming Policy.

The NISD dress code contains the following grooming policy: "Boys' hair shall not cover any part of the ear or touch the top of the standard collar in back." ROA 39. The dress code's stated purpose is "to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority." ROA 38.

In November 2007, anticipating enrolling A.A. in NISD the following fall, Betenbaugh began communicating with NISD about her son's religious practice of wearing his hair long. She sent an email to Linda Sweeny, the secretary of NISD Superintendent Curtis Rhodes, about A.A.'s Native American heritage and hair

length. ROA 57. Betenbaugh received no response. In May 2008, she wrote a longer email to Needville Elementary School Principal Jeanna Sniffin. ROA 17, 56. Principal Sniffin responded, "Our dress code in Needville does not allow boy's hair to touch their ears or go below their collar. *Long hair is not allowed.*" ROA 56 (emphasis added). Betenbaugh then emailed Superintendent Rhodes directly, notifying him that A.A. wore his hair long in accordance with their religious beliefs and further explaining the precise manner in which A.A. wore his hair: "*We keep his hair clean and neatly braided.*" ROA 55-56 (emphasis added).

Superintendent Rhodes met with Plaintiffs on June 9, 2008 to discuss A.A.'s hair. ROA 18. During this meeting, Plaintiffs explained their Native American religious beliefs to Superintendent Rhodes and gave him case law[3] upholding the rights of Native Americans to wear long hair in schools. ROA 2157: 11-15, 2158: 10-22. Arocha also gave Rhodes the results of a DNA test that indicated that Arocha was of Native American descent. ROA 2159: 10-13; *see also* ROA 80-83. Rhodes told Plaintiffs during this meeting that the District would not allow exceptions to its dress code for any religious beliefs. ROA 18. He also advised Plaintiffs that while they could take the issue up with the NISD School Board, he already knew how it would go with the Board. ROA 18, 2160: 10-11.

[3] *Alabama v. Coushatta Tribes of Texas v. Big Sandy School Dist.*, 817 F. Supp. 1319 (E.D. Tex. 1993).

Superintendent Rhodes officially denied Plaintiffs' request for an exemption on June 16, 2008, stating, "[M]y decision is to uphold the dress code currently adopted by the Needville Independent School District in relation to your son's hair length." ROA 72 (emphasis added). While Rhodes gave Plaintiffs no reason for his decision, he was quoted in a newspaper article as saying, "I've got a lot of friends that are Native Americans . . . and they all cut their hair. We're not going to succumb to everything and just wash away our policies and procedures." ROA 126-27. He further stated, "If you want to think we're backwards . . . no one is asking you to move to Needville and have these opinions invoked on you." ROA 127-28. Plaintiffs then filed an appeal with the School Board, stating as their reason for requesting an exemption from the NISD dress code, "We as parents disagree with Mr. Rhodes' decision because our son's hair and its length are a sacred part of the belief system we practice." ROA 70-71.

On July 16, 2008, the School Board met to address Plaintiffs' exemption request. ROA 18. Arocha and Betenbaugh spoke at the meeting, and many members of the community voiced their opinion that the Board should deny Plaintiffs' exemption request. ROA 9-10. For example, one community member stated: "I really hope that you decide to keep the dress code the way it is now, I don't think the wishes of the entire community, that our beliefs, should be superseded by someone else's." ROA 20. Superintendent Rhodes then advised the

School Board that Plaintiffs' request should be denied as premature because they did not yet reside in the district and had not yet enrolled A.A. in NISD. ROA 20. Rhodes made this recommendation despite having previously considered and acted upon Plaintiffs' dress code exemption request. Rhodes later conceded there is no official policy requiring a child to live in NISD before a dress code exemption request can be decided. ROA 2266: 2-11. The School Board adopted Rhodes's recommendation and denied Plaintiffs' request as premature. ROA 21.

C. NISD Denied Plaintiffs' Second Request for an Exemption From the Grooming Policy.

Plaintiffs expedited their efforts to move to Needville. On August 8, 2008, Plaintiffs filed a second request for an exemption, this time on NISD's newly created religious "exemption form." ROA 58-60. On the form Plaintiffs stated:

> A.A. has a sincerely held religious belief—as do many Native Americans—that his long hair is not only a symbol of his ancestry and heritage, but also a sacred symbol of this his life and experience in the world, and that it should be cut only to mark major life events such as the death of a loved one. A.A. has learned these religious beliefs from his father, who shares the same ancestry, heritage, and beliefs.

ROA 58 (emphasis added).

On August 13, 2008, A.A. was effectively enrolled in the District, and on August 18, 2008, Superintendent Rhodes denied Plaintiffs' second exemption request. ROA 47-48. On August 19, 2008, Plaintiffs again appealed Rhodes's decision to the School Board. ROA 41-45. The appeal notice stated that A.A.'s

hair is a "*sacred symbol of his religion*," that A.A.'s hair has never been cut, and that A.A., like his father, typically wears his long hair in braids. ROA 42, 43 (emphasis added). It also detailed Arocha's practices and basis for belief and stated that he was in the process of applying for tribal membership.[4] ROA 43.

Also on August 19, 2008, with the beginning of the school year just days away, counsel for NISD sent Plaintiffs' attorneys a letter confirming the parties' agreement that, because they were continuing to try to reach a resolution as expeditiously as possible, NISD would "not discipline [A.A.] until the soonest of the following occurs, the student receives an injunction to prevent his compliance from the dress code or September 22, whichever occurs first." ROA 136. The District first raised the issue of A.A. wearing his braids pinned to the top of his head around this time, and incorrectly stated in this letter, "As a part of this agreement, the parents agree to braid the student's hair and affix it to the top of this head."[5] ROA 136. Plaintiffs promptly pointed out that they had made no such agreement. ROA 139.

---

[4] Despite NISD's claim that Arocha's efforts to gain membership in the Lipan Apache tribe were unsuccessful, Br. at 2, Arocha and A.A. have recently been admitted to that tribe.

[5] This was the first time NISD suggested that pinning his braids to the top of his head would bring A.A. into compliance with the grooming policy, a position wholly inconsistent with NISD's earlier statements that A.A.'s long hair itself violated the grooming policy. *See* ROA 56, 72. That NISD both presented this option as a temporary compromise until Plaintiffs' exemption request could be resolved and granted A.A. an "exemption" to the grooming policy the next day only underscores that NISD did not believe at that time that having A.A. wear his hair up actually brought A.A. into compliance with the grooming policy and/or was a reasonable solution to the parties' dispute.

On August 20, 2008, Plaintiffs met with Superintendent Rhodes before the School Board heard their appeal to see if the parties could resolve their dispute. ROA 23. The parties were unable to reach an agreement, and the second School Board meeting to address Plaintiffs' exemption request was held. *See* ROA 141-163. Rhodes stated that he had some questions about the sincerity of Plaintiffs' beliefs, but that if the Board accepted their sincerity, he recommended that the Board grant A.A. an "exemption" from the dress code, but with the proviso that A.A. would be required to wear his hair in a single braid inside the back of his shirt. ROA 158-59.[6]

Even though he later testified that he constructed some version of this "exemption" before his meeting with Plaintiffs, ROA 2285: 7-17, and despite the fact that Arocha and A.A. both had worn their hair in two braids outside their shirts every time they met with him, ROA 2239: 12-20, Rhodes made this recommendation to the Board without first discussing with Plaintiffs whether concealing A.A.'s braids would be consistent with their exercise of religion. ROA 2285: 24-2286: 11.

Rhodes later conceded that his main consideration in creating this "exemption" was to impose Needville community standards on A.A., ROA 2288:

[6] NISD attempts to minimize the burden associated with its "exemption" by stating throughout its brief that it requires A.A. to wear a single braid with "the tail tucked under the collar of the shirt." Br. at 4. The undisputed evidence is that A.A.'s hair is thick and his braids are thirteen inches long. ROA 13. Thus, neither "tail" nor "tuck" accurately describe the "exemption's" application to A.A.

4-2289: 5, and have A.A.'s hair "resemble the rest of the student body in Needville . . . ," ROA 185: 1-2, and not the five goals stated in the dress code. ROA 1986:8-9 (referring to the goals stated in the dress code: to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority). Rhodes further conceded that allowing A.A. to wear his hair in two braids outside his shirt is no less hygienic or safe than wearing his hair pinned to the top of his head or in a single braid down the back of his shirt. ROA 2287: 17-21. NISD does not prohibit female students from wearing braids, require female students to wear only one braid, or require female students to keep long hair underneath clothing. ROA 2274: 12-20.[7]

Following the presentations, the School Board adopted an "exemption" with Superintendent Rhodes's proposed modification. When announcing this decision, Board member Kim Janke further commented, "Although I disagree with the law presented in this case and understand and support why Mr. Rhodes made the decision that he made, I move that the Board grant the Level Three grievance . . . ." ROA 160-61. The Board acknowledged that it was not granting the exemption sought by Plaintiffs, but that it had "modified the relief you have requested." ROA 162.

[7] Rhodes also conceded that NISD's dress code has changed over the years, and allowed boys to have hair to the bottom of the ear in the past. ROA 2259: 7-15.

D. A.A. Wore His Hair to School in Two Braids Outside His Shirt and Was Placed in In-School Suspension.

A.A. began kindergarten on August 25, 2008. Consistent with his religious beliefs, A.A. wore his hair in two braids outside his shirt. Plaintiffs rejected NISD's "exemption" "[b]ecause part of our belief is that they need to be in full sight," ROA 2243: 9-10, and "[p]art of the reason we do it is to show pride in ourselves and our culture, our heritage and ancestry. To shove it down our shirt, to hide it almost places some shame on it like we should be ashamed of who we are or how we believe." ROA 2171: 4-7. Arocha testified that it is uncomfortable to have his hair underneath his shirt, even just for a few minutes, ROA 2170: 13-15, and that he believed that physical discomfort and shame caused by the "exemption" would cause A.A. to want to cut his hair and negatively affect Arocha's ability to teach A.A. his religion. ROA 2171: 14-17.

Disregarding its previous agreement to refrain from disciplining A.A. until September 22, 2008, NISD informed Plaintiffs on the first day of school that A.A. would need to comply with the "exemption" by September 2, 2008, or "discipline would be imposed." ROA 176. A.A. continued to wear his hair in two braids outside his shirt, and on September 3, 2008, A.A. was placed in In-School Suspension (ISS) for failure to wear his hair in a single braid inside the back of his shirt. ROA 27, 2172: 19-21. In ISS, A.A. was completely deprived of the opportunity to socialize with other children. ROA 27. A.A. was given no

opportunity for physical exercise or play until September 18, 2008, when, in response to a letter from Plaintiffs' counsel, NISD began permitting A.A. to spend thirty minutes alone on the playground each day as required by law. ROA 27. Being in ISS was difficult for A.A.—he was not as happy as when he was in his regular class, and he would often cry when Betenbaugh was putting him to bed at night. ROA 2173: 12-18.

On September 4, 2008, Betenbaugh wrote a letter to Superintendent Rhodes expressly notifying him that NISD's "exemption" substantially burdened A.A.'s free exercise of religion in violation of TRFRA. ROA at 188. She explained again that A.A. "keeps his uncut hair in two long braids as part of his religion and expression of his cultural heritage and identity . . . . I repeatedly asked for an exemption from your dress code so [A.A.] could continue this practice." ROA at 188. She further stated that forcing A.A. to wear a thirteen-inch braid of thick wavy hair down his shirt "is degrading, extremely uncomfortable especially in our very hot climate, and impractical. It serves no purpose other than to make him ashamed and/or resentful of his own and our family's heritage and beliefs." ROA at 188. NISD refused to take any action in response to the letter and kept A.A. in ISS. ROA 190-92.

E. A.A. and His Family Filed Suit Against NISD Seeking a Permanent Injunction Allowing A.A. to Wear His Hair in Two Braids Outside His Shirt.

After almost nine months of trying unsuccessfully to reach an agreement with NISD that would allow A.A. to wear his hair in accordance with their religious beliefs, A.A. and his family were forced to file suit against NISD. Plaintiffs' complaint alleged that NISD's refusal to allow A.A. to attend school with his hair in two braids outside his shirt violated the TRFRA, the Free Exercise and Free Expression Clauses of the First Amendment to the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. ROA 1-34. They sought declaratory and injunctive relief, praying specifically that A.A. be allowed to attend school "with his hair in two long braids, one on either side of the head, worn outside his clothing." ROA 33.

The district court held a temporary restraining order hearing on October 3, 2008. After hearing testimony and the arguments of counsel, *see* ROA 383-449, the district court granted a temporary restraining order requiring that A.A. be returned to the general student population. ROA 448-49.

The district court held an extensive evidentiary hearing on October 17 and 22, 2008 to determine whether to enter a preliminary injunction. *See* ROA 1969-2331. At the close of this hearing, the parties agreed to consolidate the trial on the

merits with the preliminary injunction hearing. ROA 2331: 2-11. On January 20, 2009, the district court granted Plaintiffs' motion and permanently enjoined NISD from disciplining A.A. for wearing his hair in two braids outside his shirt. *See* ROA 979-1011. It is from this order that NISD now appeals.

SUMMARY OF ARGUMENT

This appeal is not about a school district's clear right to adopt general grooming policies. Rather, it asks whether that right gives school boards and administrators license to substantially burden and interfere with the sincerely held religious beliefs of students (and their parents) without demonstrating that their interference is narrowly tailored to support a compelling governmental interest.

NISD recognized that A.A. and Arocha have a sincerely held Native American religious belief regarding their hair length that required an exemption from NISD's grooming policy. Nevertheless, NISD insisted that A.A. wear his long, thick hair pinned to the top of this head or in a single braid inside his shirt, instead of allowing A.A. to wear his hair in two braids outside his shirt,[8] as Plaintiffs requested from their earliest communications with the District (and as A.A. and his father wore their hair in every meeting with the District).[9]

---

[8] NISD argues throughout its brief that Plaintiffs contend NISD cannot regulate A.A.'s hairstyle in any form and that A.A. must be able to wear his hair in any manner he pleases. Br. at 4, 13. This is not true. Plaintiffs only request that A.A. be allowed to wear his hair in two braids, down and outside his shirt.

[9] NISD disingenuously tells this Court that until October 3, 2008, "NISD believed this was a Native American hair length case." Br. at 8. The truth is that throughout the administrative

After an evidentiary hearing, at which it was able to hear and evaluate testimony from several witnesses, the district court correctly held that by forcing A.A. to cut his hair, wear it pinned to the top of this head, or wear it in a single braid inside his shirt, NISD violated TRFRA, the First Amendment Free Exercise and Free Expression Clauses, and the Due Process Clause of the Fourteenth Amendment.

This case can begin and end with the TRFRA claim. The district court correctly found that Arocha and A.A. have a sincerely held religious belief that their hair be worn long—a finding unchallenged by NISD—and that this belief was burdened by NISD's grooming policy and purported "exemption." As required by TRFRA, the district court evaluated NISD's regulations to determine whether they were the least restrictive means of promoting a compelling governmental interest. Unsurprisingly, the district court concluded that NISD's policies could not survive strict scrutiny under TRFRA.

In addition to the TRFRA claim, the district court also based its decision on constitutional grounds, including the Free Exercise Clause, the Free Expression Clause, and the fundamental parental right under the Fourteenth Amendment to guide the religious upbringing of children. Because TRFRA provides a wholly

---

process, Plaintiffs sought an exemption from the grooming policy so that A.A. could continue his practice of wearing his hair long, in two braids, outside his shirt. *See* ROA 43, 55. And on September 3, 2008, NISD unquestionably knew that this was not a hair length case when they confined A.A. to ISS for refusing to hide his braids inside his shirt.

adequate, non-constitutional basis to affirm the judgment below, this Court need not resolve any of these constitutional issues. Nevertheless, the district court correctly concluded, based on the extensive record before it, that Plaintiffs established each of their constitutional claims. Each of these holdings is a separate and independent ground on which the district court's grant of a permanent injunction can be affirmed.

ARGUMENT

I. Standard of Review

NISD correctly states that this Court reviews the grant of a permanent injunction for abuse of discretion, and that in doing so, underlying questions of law are reviewed de novo. Br. at 8. Questions of fact, however, are reviewed only for clear error. *See Peaches Entm't Corp. v. Entm't Repertoire Assocs., Inc.*, 62 F.3d 690, 693 (5th Cir. 1995). Under the clear error standard, "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985); *U.S. v. Brown*, 561 F.3d 420, 432 (5th Cir. 2009); *see also* FED. R. CIV. P. 52(a)(6) (a reviewing court "must give due regard to the trial court's opportunity to judge the witnesses' credibility").

A central issue in this case—the sincerity of Plaintiffs' religious beliefs that their hair be worn long—is a question of fact that must be affirmed as long as the district court's finding is plausible in light of the record as a whole. *See U.S. v. Seeger*, 380 U.S. 163, 185 (1965) ("This is the threshold question of sincerity [of religious belief] which must be resolved in every case. It is, of course, a question of fact . . . ."). While the remaining issues are primarily questions of law or mixed questions of law and fact, this Court still must remain faithful to the substantial evidence standard set forth in Rule 52(a) and accept the district court's determinations of preliminary facts or questions of credibility if they are supported by the record.

II. The District Court Correctly Held That NISD's Refusal to Allow A.A. to Wear His Hair in Two Braids Outside His Shirt Violates His Freedom of Religion.

A. Freedom of Religious Practice Is a Fundamental Right Guaranteed by TRFRA and the First Amendment.

Religious freedom is a hallmark of the American tradition of liberty. The Free Exercise Clause of the First Amendment "specifically and firmly fixed the right to free exercise of religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The values encompassed by the Free Exercise Clause "have been zealously protected . . . even at the expense of other interests of admittedly high social importance." *Id.* The right to freely exercise one's religion is of such importance that "only those interests of the highest order and those not otherwise

served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Free exercise rights extend to minority religions. The First Amendment prevents governmental exclusion and expulsion of religious minorities: "[I]t was historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Free Exercise Clause protects actions motivated by sincere religious feeling from "contemporary society['s] . . . hydraulic insistence on conformity to majoritarian standards." *Yoder*, 406 U.S. at 217. "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic . . . is not to be condemned because it is different." *Id.* at 223-24. The Free Exercise Clause "protects against governmental hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 534.

Moreover, the Free Exercise Clause does not offer its protections only to those with written creeds or those whose belief is completely congruent with their faith's orthodoxy. In part to protect minority religions, courts have repeatedly cautioned that it is harmful to have "courts presume to determine the place of a particular belief in a religion." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir.

2004). "Judges are ill-suited to resolve issues of theology in myriad faiths." *Id.* As the district court explained:

> Courts should not undertake to dissect religious beliefs because the believer admits he is struggling with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. . . . When a plaintiff draws a line, it is not for the Court to say it is an unreasonable one. [I]ntra-faith differences [are] not "uncommon" and . . . the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clause.

ROA 993 (discussing and quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981) (internal quotation and citation omitted)). Religious belief is protected even when it is not "found in a tenet or dogma or an established religious sect," *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 831, 835 (1989), and even when others of the same faith find an objected to practice to be "scripturally acceptable," *Thomas*, 450 U.S. at 715.

B. TRFRA Guarantees A.A. the Right to Wear His Hair in Two Braids Outside His Shirt.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court reduced—without eliminating—the number of contexts in which strict scrutiny would apply for free exercise claims. Congress and many state legislatures responded by passing laws, such as TRFRA, to restore the strict scrutiny test. NISD cannot avoid liability

under TRFRA's demanding standards, and TRFRA provides a sufficient basis to affirm the district court.

TRFRA provides that "a government agency may not substantially burden a person's free exercise of religion" unless "the government agency demonstrates that the application of the burden to the person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003(a), (b). Under TRFRA, the plaintiff must first show that the government is substantially burdening his free exercise of religion. *Balawajder v. Tex. Dep't of Criminal Justice Institutional Div.*, 217 S.W.3d 20, 26 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Once the plaintiff does so, the burden shifts to the government to establish that the challenged practice is the least restrictive means of furthering a compelling governmental interest. *Id.* Applying this analysis, the district court correctly held that NISD violated TRFRA by refusing to allow A.A. to wear his hair in braids outside his shirt.

1. Plaintiffs' Free Exercise of Religion Includes Wearing Their Hair Long.

TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief . . . , it is not necessary to determine that the act or refusal to act is motivated by a central part or

central requirement of the person's sincere religious belief." TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1).

After a trial on the merits, the district court found that "Plaintiffs . . . have a sincerely held belief that *their hair should be worn long*." ROA 995 (emphasis added).[10] This finding is wholly supported by the record. Arocha is Native American, and he believes that his hair is a "symbol, an outward extension of who we are and where we come from, our ancestry and where we're going in life." ROA 2149:10-15. In keeping with this belief, Arocha has not cut his hair in at least eleven years. ROA 2150:1-5. Arocha and Betenbaugh have raised A.A. in a Native American religious tradition, ROA 2149: 8-15; 2144:7-22, and taught him the religious significance of wearing braids, ROA 2153:12-14. A.A.'s hair has never been cut, and he has worn it long and in plain view his entire life, typically in two braids. ROA 2153: 14-18. Plaintiffs informed NISD that A.A.'s hair is a "sacred symbol of his religion." ROA 42.

The record is also clear that Plaintiffs' beliefs include the practice of wearing braids "in plain sight." ROA 2243: 9-10. The district court found that Arocha "finds religious significance in braiding his long hair." ROA 980. Arocha testified that he attached religious meaning to his braids—that each braid has a

[10] Taking argument out of context, NISD incorrectly asserts that Plaintiffs' counsel argued below "that Plaintiffs' free exercise claim was limited to the cutting of hair." Br. at 10. NISD neglects to inform this Court that at the end of that colloquy, Plaintiffs' counsel directly stated that because NISD's "exemption" would "hide the length of A.A.'s hair, which is a symbol of his religious beliefs, . . . it is also violative of his free-exercise rights." ROA 2003:22-25.

deep meaning and connects him to who he is, and that his beliefs require them to be presented, not pinned up or concealed. ROA 2151: 9-20, 2167: 9-10. Further, with respect to the sincerity of Plaintiffs' belief relating to braids, the evidence below established that A.A. refused to wear a Halloween wig because he did not want to conceal his braids. ROA 2154:1-4. Even more compelling was A.A.'s willingness to endure NISD's month-long ISS punishment rather than comply with NISD's proposals that he wear his hair affixed to the top of his head or inside his shirt. A.A. insisted on wearing his hair long, in plain view, in two braids, even if that meant that he was completely isolated from his classmates for a month, a punishment that made him so sad that he would cry going to bed at night. ROA 2173: 12-18.

The district court's findings regarding the sincerity of Plaintiffs' religious beliefs are consistent with prior decisions of this and other courts recognizing the well-established, centuries-old religious practice of Native American men wearing their hair long. Describing the custom as one with "strong religious implications," this Court explained: "Hair is only supposed to be cut as a sign of grieving for the recently dead, and shorn locks are often placed with the deceased so that they may be carried into the afterlife." *Diaz v. Collins*, 114 F.3d 69, 72 n.18 (5th Cir. 1997); *see also Warsoldier v. Woodward*, 418 F.3d 989, 992 (9th Cir. 2005) (acknowledging that a tenet of the Cahuilla Tribes' religious faith is that hair must

only be cut upon the death of a relative); *Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975) (holding that Native American practice of wearing long braided hair warrants constitutional protection).

Significantly, NISD does not contest on appeal the district court's finding that Plaintiffs have a sincerely held religious belief that their hair should be "worn long"—a finding of fact fatal to NISD's appeal. Br. at 10. Instead, NISD attempts to rewrite the district court's finding as a finding that A.A.'s religious belief only requires his hair to remain uncut. But NISD cannot simply revise the district court's fact finding to suit its defense. Because NISD does not even challenge, let alone point to evidence establishing that the district court's finding that Plaintiffs have a sincerely held religious belief that their hair should be worn long was clear error, it must be affirmed. *See Brown*, 561 F.3d at 433.

NISD does challenge the sincerity of Plaintiffs' belief in the religious significance of their braids and wearing their hair in plain sight. Feigning ignorance of this belief and referring to the Plaintiffs' timing as "dubious," NISD attempts to distort the record. Br. at 7. NISD was on notice about the nature of Plaintiffs' beliefs and practices before NISD proposed its "exemption" and before this lawsuit was filed. Betenbaugh's May 29, 2008, email to Superintendent Rhodes requesting an exemption from the dress code because of A.A.'s religious beliefs expressly stated, "We keep his hair clean and neatly braided." ROA 55.

And both Arocha and A.A. wore their hair in two braids outside their shirts at every meeting with school officials.[11] ROA 2239: 12-20.

Plaintiffs did elaborate in greater detail the religious significance of wearing their hair in plain view and in braids after NISD proposed that A.A. wear his hair pinned to the top of this head or in a single braid down the back of shirt. These proposals were first made on or around August 19, 2008, and August 20, 2008, respectively. Prior to that point, Plaintiffs had no reason to expect that the District would try to impose novel restrictions on A.A's practice of wearing his hair long.[12] ROA 2239:12-2240: 7. NISD's grooming policy does not require anyone to wear hair pinned to the top of his/her head or down the back of his/her shirt. These ad hoc regulations were created out of whole cloth in response to A.A.'s request. Once they were finally communicated to Plaintiffs, they were promptly rejected on religious grounds. The only "dubious timing" involved NISD's repeated last-

[11] Although some photographs demonstrated that on occasion A.A. has worn his hair other than in two braids, the evidence showed that his practice was to wear it in two braids and further that Plaintiffs attach religious significance to braids and wearing them in plain sight. ROA 55, 2151:9-2153: 9, 2239: 12-19, 2243: 9-10, 2176: 20-22. *See Thomas*, 450 U.S. at 715 (explaining that when a plaintiff draws a line "it is not for the Court to say it is an unreasonable one").

[12] NISD suggests that Plaintiffs' beliefs about braiding only arose after NISD granted the "exemption." Br. at 4, 9-10. Again, NISD misreads the testimony and ignores all the contrary evidence in the record. *See* ROA 2151: 21-2153: 3. Arocha's testimony is simply a candid reflection that in the face of government interference with his efforts to guide his son in the practice of their faith, his own faith and understanding has deepened. ROA 2185: 2-5. Moreover, even on its face, NISD discusses only beliefs relating to *two braids*; NISD offers no record support, because there is none, for the idea that requiring A.A. to wear his hair pinned to his head or concealed in his shirt is in any way consistent with the religious practice of wearing hair long in plain view that Plaintiffs invoked throughout the administrative process and trial below. *See* ROA 55, 2003: 22-25.

minute shifting of policy throughout the administrative process. Indeed, due to its own conduct, NISD should be estopped from challenging any sincerity of belief based on timing of Plaintiffs' explanations.

This Court has embraced the view that all "specific practices of a religion fall within the definition of religious exercise under RLUIPA"[13] and expressly rejected the idea that government officials—even chaplains—get to decide "the measure of religious devotion that prisoners may enjoy or the discrete way that they may practice their religion." *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 333 (5th Cir. 2009) (citing *Greene v. Solano County Jail*, 513 F.3d 982, 987-88 (9th Cir. 2008), and rejecting relevance of chaplain's testimony that in his understanding "it is not a basic tenet of the Christian faith that services must be held in particular locations"); *see also Newby v. Quarterman*, No. 06-11233, 2009 WL 1158854 at *4 (5th Cir. Apr. 30, 2009) (rejecting chaplain's affidavit that "Buddhism does not rely heavily on services requiring worshipers to congregate" as irrelevant).[14] Because the testimony below strongly demonstrated that wearing braided hair in full view was a specific religious practice followed by A.A. and his

[13] The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, is a federal counterpart of TRFRA, and state and federal courts have looked to it for guidance interpreting TRFRA. *See Smithback v. Texas*, No. 3-05-CV-0578-BD, 2007 WL 241376, at *2 (N.D. Tex. Jan. 29, 2007), *aff'd sub nom. Smithback v. Crain*, No. 07-10274, 2009 WL 552227 (5th Cir. March 5, 2009); *Balawajder*, 217 S.W.3d at 26.

[14] "While unpublished opinions are not binding precedent, they may be persuasive on the legal issues . . . ." *Yanfen Wang v. Holder*, __ F.3d __, 2009 WL 1519805, at *6 n.5 (5th Cir. Jun. 2, 2009).

father, it deserves the same protection as Plaintiffs' religious practice of not cutting hair.

2. NISD's Policies Substantially Burdened A.A.'s Free Exercise of Religion.

Government action creates a "substantial burden" on the free exercise of religion if it "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins*, 393 F.3d at 570.[15] The effect of a government regulation is "significant" when it "influences him to act in a way that violates his religious beliefs" or "forces an adherent to chose between, on one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Id.*

The district court correctly found that NISD's grooming policy and purported "exemption" significantly burden A.A.'s sincerely held religious belief that his hair should be worn long: "The policy will deny A.A. the opportunity to express a religious practice that is very dear to him and his father." ROA 997 (citing *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 667 (S.D. Tex. 1997)); *see also Diaz*, 114 F.3d at 72-73 (holding that prison grooming regulations, "given the strong significance of long hair in Native American belief, legitimately may be deemed to work a substantial hardship upon Diaz's practice of his faith"). Indeed, Superintendent Rhodes testified that under either option proposed by the

[15] NISD does not contest the applicability of the *Adkins* test to Plaintiffs' TRFRA claims.

District—braids pinned to the top of his head or one braid down the back of shirt—A.A.'s hair would not be in "plain sight." ROA 2256: 20-23. Because NISD is directly refusing to permit A.A. to exercise his religious practice of wearing his long braided hair in plain view, "these alternative accommodations do not alter 'the fact that the rituals which [plaintiff] claims are important to *him*—without apparent contradiction—are now completely forbidden.'" *Newby*, 2009 WL 1158854, at *4 (quoting *Sossamon*, 560 F.3d at 333).

But even if NISD were correct that the religious practice at issue was as narrow as leaving hair uncut, NISD's proposed "exemption" still places a substantial burden on A.A.'s free exercise of religion. In its role as factfinder, the district court found that forcing A.A. to wear his thirteen-inch braid "stuffed down the back of his shirt" will cause him "profound discomfort," and that "[b]y imposing a physically burdensome restriction on A.A. . . . the School Board's exemption policy will influence him to cut his hair in violation of his religious beliefs." ROA 996-97. These findings are fully supported by the record. *See* ROA 2170: 13-15; 2171: 14-17. Indeed, NISD comes close to conceding the correctness of this crucial part of the court's holding by suggesting that the district court could have cured the burden by striking the tucking-into-the-shirt requirement of the "exemption." Br. at 13.

Unable to show that the district court clearly erred in concluding that wearing his hair inside his shirt would cause A.A. discomfort and be physically and emotionally burdensome, NISD accuses the district court of failing to recognize in its burden analysis that "none of the options presented to A.A. would require him to cut his hair." Br. at 13. In NISD's view, so long as cutting is not technically required, it may impose as many burdens as it wants on having long hair. NISD's "exemption" has the same feel as the prison officials' insistence in *Warsoldier* that they were not making the Native American prisoner cut his hair. As a later panel summarized:

> The prison argued that the regulation did not burden Warsoldier's religious practice, substantially or otherwise, because he was not actually forced to cut his hair. Rather, the prison allowed him a "choice" between two options: he could either 1) cut his hair, or 2) [lose privileges]. *Id.* We rejected this false choice . . . .

Greene, 513 F.3d at 987-88 (discussing *Warsoldier*, 418 F.3d at 992-96 (internal quotation omitted)). The principle that impermissible burdens can be indirect as well as direct applies equally to this case.

NISD also tries to avoid the district court's substantial burden finding by arguing that no other boys are permitted have long hair, and thus, there is no burden in requiring A.A. to cut his hair because he is seeking a benefit not otherwise allowed. Br. at 14. Again, NISD ignores the law and cites none in support of its position. This Circuit has repeatedly held that whenever some

individuals, even under very different circumstances, are permitted to engage in certain conduct, the State cannot avoid a finding of substantial burden by claiming a religious adherent is seeking something that is not generally allowed. *See, e.g.*, *Garner v. Morales*, No. 07-41015, 2009 WL 577755, at *4 (5th Cir. Mar. 6, 2009) (noting that for medical reasons, some inmates were allowed to grow short beards); *Sossamon*, 560 F.3d at 333-34 (rejecting argument that plaintiff was seeking "benefit . . . not otherwise allowed," because even though *no one* else was allowed to use the chapel for worship, prisoners were allowed to use the chapel for secular purposes, thus undermining the security interests asserted by the state); *see also Mayfield v. Tex. Dep't of Criminal Justice*, 529 F.3d 599, 616 (5th Cir. 2008) ("*Adkins* does not allow prison regulators to undermine a policy's substantial burden by comparing a 'religious exercise,' not previously disallowed, to another disallowed behavior.").

The district court correctly recognized that half of Needville's school population—the female half—is permitted to wear long hair without having to pin it to the top of their heads or stuff it down their shirts. ROA 997. NISD's argument that gender-differentiated grooming rules do not violate the Equal Protection Clause under *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), is irrelevant to the religious burden analysis. Long hair is allowed for all girls, and when it is allowed, it is allowed without the restrictions NISD seeks to impose on

A.A. This bears directly on the existence of a burden (as well as the lack of compelling governmental interests).

3. NISD Failed to Prove a Compelling Governmental Interest and a Narrowly Tailored Approach.

After Plaintiffs established that NISD's grooming policy and purported "exemption" burdened A.A.'s free exercise of religion, NISD was required to establish that its regulations were the least restrictive means of furthering of a compelling governmental interest. *See* TEX. CIV. PRAC. & REM. CODE § 110.000(b). NISD's failure to carry this burden was total, and on appeal NISD does not even address strict scrutiny directly.

"Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The demanding nature of this test is well demonstrated by the U.S. Supreme Court's most recent case involving the compelling interest test in the religious exercise context. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). In *O Centro*, the government asserted uniform enforcement of the Controlled Substances Act as justification for preventing the importation of a banned hallucinogenic substance, described by the Court as "exceptionally dangerous," that church members wanted to ceremonially ingest. *Id.* at 420. The Court found the government's generally asserted interests

inadequate: "We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety by enforcing the Controlled Substance Act, but under RFRA *invocation of such general interests, standing alone, is not enough.*" *Id.* at 438 (emphasis added).

Specifically, the Court explained that general interests, even those as important as those behind the Controlled Substance Act, are not adequate, and that a showing must be made with respect to the individual at issue:

> RFRA, and the strict scrutiny test it adopted, contemplate an inquiry more focused than the government's categorical approach. RFRA requires the Government to 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.

Id. at 430-31. Courts must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the assertion of harm of granting specific exemptions to particular religious claimants." *Id.* at 431. TRFRA similarly requires that the "*application of the burden to the person*: 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE § 110.003(b) (emphasis added). NISD comes nowhere close to meeting this test.

a. NISD did not demonstrate any compelling governmental interest supporting the application of its policies to A.A.

The NISD grooming policy purports to be supported by five goals: to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority. ROA 38. Plaintiffs do not challenge these interests, or the grooming policy itself, in the context of students without religious beliefs mandating long hair. But in the context of a Native American kindergarten student for whom long hair has religious significance, none of these generic interests even approaches the compelling nature required. *See, e.g.*, *Balawajder*, 217 S.W.3d at 31 ("[W]e note that evidence of a general interest in health and safety is not sufficient evidence that a prison regulation furthers compelling governmental interests.").

A small town kindergarten classroom is about as far from the international drug war of *O Centro* or a prison as one can get. In the prison context, only fears of weapons and safety have been found compelling enough to force Native Americans to cut their hair. For example, in *Longoria v. Dretke*, 507 F.3d 898, 903-04 (5th Cir. 2007), the Court concluded that a Native American prisoner had adequately stated a claim that "growing his hair is a religious exercise," and that the "grooming policy substantially burdened his religious exercise," but denied plaintiffs' claims by relying on the legislative mandate that courts defer to prison

safety concerns. Here, no interests remotely approaching the safety concerns presented in the prison context are implicated.

NISD is on even weaker ground when it comes to the "exemption." During the evidentiary hearing, Superintendent Rhodes conceded that when considering Plaintiffs' exemption request, his main consideration was to "try to have his hair resemble the rest of the student body in Needville . . .," ROA 1985: 1-2, not to serve the goals of the grooming policy. ROA 1986:8-9 ("And it wasn't looking at the five targets you're speaking about . . . ."). Rhodes further testified that the purpose of the dress code and "exemption" was to impose community standards on students generally and A.A. specifically. ROA 2288: 4-2289: 6.

If the federal government's legislative mandate to enforce the Controlled Substances Act fails the compelling interest test, NISD's desire to have all students look the same surely fails. *See O Centro*, 546 U.S. at 438. But even if conformity with community standards were a compelling governmental interest, it would not validate NISD's "exemption." NISD conceded that neither of the offered accommodations—wearing hair pinned to the top of the head or in a single braid inside the shirt—is in keeping with community standards. ROA 2293: 12-18, 2294: 2.[16]

[16] The additional regulations that NISD seeks to enforce with respect to A.A.'s hair are so without government justification that Plaintiffs further submit that on this record they would not even satisfy rational basis review. *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (holding that

b. Nor did NISD establish that its policies concerning A.A.'s hair were the least restrictive means of furthering its stated interests.

With respect to the grooming policy generally, nothing in the record supports any conclusion that forcing A.A. to cut his hair or wear it pinned to the top of his head are the least restrictive ways to serve NISD's generally asserted interests. Hygiene can be and is taught by schools regardless of hair length. While grooming codes may reduce disruption, the most effective way to avoid disruption, as the district court found, is to discipline the disruptive, and there is no evidence that A.A.'s long hair caused any meaningful disruption. ROA 986-87; 2126: 15-18. The record undermines any purported safety rationale for the grooming policies, given that girls and boys play on the same playground equipment and girls are allowed to wear long hair however they please, even without religious motivation. ROA 2276: 1-6. Thus, the district court correctly concluded that NISD did not carry its burden.

Cases from this Court and others under RLUIPA demonstrate how far short NISD's attempted showing of a narrowly tailored policy falls. In *Sossamon*, a Catholic prisoner complained that he was denied access to a Christian chapel. 560 F.3d at 321. The Court concluded that the plaintiff could not be denied access to a

---

state constitutional amendment did not "bear a rational relationship to a legitimate governmental purpose").

Christian chapel, even though *no prisoners* were given access to this chapel for any religious purpose, and even where the prison presented evidence that additional accommodations would impose burdens on the staff and be costly because of security concerns. *Id.* at 333-34. The Court noted that it could not see "why many of the security concerns voiced by Texas cannot be met by using less restrictive means, even taking account of costs." *Id.* at 335. Other cases are in accord. *See Newby*, 2009 WL 1158854, at *5 (where application of volunteer policy meant that Buddhists were unable to engage in communal worship, Court concluded that compelling security interests asserted by state could be met by numerous less restrictive means); *Garner*, 2009 WL 577755, at *4 (in context of whether disallowance of beard and wearing of a Kufi burdened religious exercise, Court remanded and ordered appointment of counsel on RLUIPA claims); *Mayfield*, 529 F.3d at 613-15 (holding that a reasonable factfinder could conclude that refusal to allow personal possession of runestones burdened prisoner's religious exercise, and government had not shown its approach was the least restrictive alternative available).

The ability of similar institutions to achieve similar objectives without the same blanket policies is evidence that the policy is not narrowly tailored as required by strict scrutiny. As the court in *Warsoldier* explained: "The failure of a defendant to explain why another institution with the same compelling interests

was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." 418 F.3d at 1000; *see also, e.g., Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (same); *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33, 42 (3d Cir. 2007) (same). Many school districts in Texas permit boys to wear long hair,[17] presumably all permit girls to do so, and much more narrowly, other school districts have permitted Native American boys to wear their hair long without the additional restrictions NISD imposed. *See Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. at 1338 (E.D. Tex. 1993). The record in this case conclusively establishes that NISD's stated goals were not undermined by A.A.'s religious practice. ROA 2126: 15-18, 2127: 9-11.

4. NISD's "Exemption" Did Not Cure the Burden on A.A.'s Free Exercise of Religion.

Perhaps recognizing that it did not show that NISD's grooming policy and purported "exemption" further a compelling governmental interest and are the least restrictive means of furthering that interest, NISD additionally argues that the district court failed to consider NISD's proposed remedies. NISD argues that under section 110.006 of the Texas Civil Practice and Remedies Code, a

[17] Indeed, publicly available school grooming policies from other Texas school districts demonstrate that many schools are able to promote "grooming and hygiene, prevent disruption, and minimize safety hazards" without banning long hair for boys. *See, e.g.*, McKinney ISD Student Dress Code at http://www.mckinneyisd.net/Campuses/06_07dresscode.htm. Even Katy ISD, the former school district of NISD's expert, does not ban the wearing of long hair by boys. *See* Katy ISD Dress Code at http://www.katyisd.org/parents/Pages/DressCode.aspx.

governmental entity may avoid TRFRA liability by adopting a remedy. Br. at 29. NISD contends that its offer to allow A.A. to wear his hair pinned to the top of his head or in a single braid down the back of his shirt brings it within this provision. *Id.* NISD, however, overlooks the fact that Betenbaugh sent a letter to the District giving it notice under TRFRA that NISD's "exemption"—which required A.A. to wear his hair in a single braid inside his shirt—itself placed a substantial burden on A.A.'s free exercise of religion, writing "[h]e keeps his hair in two long braids as a part of his religion and expression of his cultural heritage and identity." ROA 188. She further explained that wearing his hair inside his shirt would be extremely uncomfortable and make A.A. ashamed or resentful of his beliefs. ROA 188. In response, NISD indicated that it would make no accommodation. ROA 191. Because NISD did not adopt any remedy designed to remove the substantial burden its "exemption" placed on A.A.'s free exercise of religion, is not entitled to the protection of section 110.006.

Moreover, even if the purported "exemption" were a remedy, NISD's argument fails because the "exemption" did not "cure" the substantial burden on A.A.'s free exercise of religion. Section 110.006(e), which NISD seeks to invoke as a shield to the TRFRA suit, provides: "A person with respect to whom a substantial burden on the person's free exercise of religion *has been cured* by a remedy implemented under this section may not bring an action . . . ." TEX. CIV.

PRAC. & REM. CODE § 110.006(e) (emphasis added). The record directly refutes NISD's argument that the substantial burden on A.A. was in any way cured. As the district court correctly found, A.A. has a sincerely held belief that his hair should be worn long. ROA 995. Requiring A.A. to wear his hair on top of his head or down the back of his shirt unquestionably burdens this belief.

C. The Free Exercise Clause Also Guarantees A.A. the Right to Wear His Hair in Two Braids Outside His Shirt.

Because this Court follows the well-established canon that courts should avoid addressing constitutional questions whenever possible, it need go no further than TRFRA—a state law, non-constitutional basis sufficient to support the judgment below. *See U.S. v. Lipscomb*, 299 F.3d 303, 359 (5th Cir. 2002) (noting that court should not decide questions of a constitutional nature "unless absolutely necessary to decide the case"). Nevertheless, Plaintiffs' constitutional claims are also meritorious and each provides the Court with a separate and independent ground on which it can affirm the district court.

A free exercise claim, like a TRFRA claim, requires the plaintiff to show that he has a sincerely held religious belief that is burdened by the government regulation in question. *See Yoder*, 406 U.S. at 214-15. The key question then is the correct level of scrutiny to apply to the challenged government regulation. *See id.* Because, as discussed below, the district court correctly held that NISD's grooming policy and "exemption" are subject to strict scrutiny, the same analysis

that applies to Plaintiffs' TRFRA claim requires the Court to affirm the district court's holding that A.A.'s free exercise rights are violated by NISD's policies regarding his hair.

Under *Smith*, neutral and generally applicable laws are subject to rational basis review even when they incidentally burden the free exercise of religion. 494 U.S. at 879. NISD's grooming code exemption policy, as well as the purported "exemption" in this case, however, fit into the three post-*Smith* categories still subject to strict scrutiny. First, regulatory systems that make individualized assessments, as well as not generally applicable government actions, must justify burdens on free exercise with compelling governmental interests. *Id.* at 884. Second, government action that burdens free exercise and that is *not* neutral is subject to strict scrutiny. *Lukumi*, 508 U.S. at 531-32. Third, hybrid claims involving free exercise combined with substantial parental rights or free expression claims are subject to a version of strict scrutiny. *Smith*, 494 U.S. at 881-82. While only one of these categories need be met to trigger strict scrutiny, all three are satisfied here.

1. Individualized Governmental Assessments and Not Generally Applicable Government Action Are Subject to Strict Scrutiny.

Smith was careful to not overrule an earlier line of authority that applied strict scrutiny "in a context that lent itself to individualized governmental

assessment of the reasons for the relevant conduct." 494 U.S. at 884. As the Court explained, a system that grants individualized exemptions requires application of the compelling governmental interest test: "[O]ur decisions . . . stand for the proposition that where the state has in place a system of individualized exemptions, it may not refuse to extend that system to cases of religious hardship without a compelling reason." *Id.*; *see also Boerne*, 521 U.S. at 514 (explaining that *Smith* does not apply to a "system of individualized exemptions"). As a district court in the Fifth Circuit has held, "the *Smith* court left some gaps in which strict scrutiny . . . survived as the proper standard for review for laws that substantially burden religious exercise. One such exception to *Smith*'s rule of general applicability and neutrality was the evaluation of a law characterized by 'individualized assessments.'" *Castle Hills Baptist Church v. City of Castle Hills*, No. SA-01-CA-1149-RF, 2004 WL 546792, at *14 (W.D. Tex. March 17, 2004) (applying strict scrutiny to church's request for zoning permit).

Under *Smith*, the district court properly applied strict scrutiny to the decision NISD made under its individualized religious exemption policy. NISD's exemption policy involved not the application of a neutral policy, but individualized determinations by Superintendent Rhodes and the School Board based on A.A.'s particular circumstances. Because NISD follows an individualized exemption policy, it is subject to strict scrutiny under *Smith*. This

would be true whether NISD refused to grant A.A. any exemption, or as is the case here, when it granted A.A. a purported "exemption" that did not cure the burden on his free exercise of religion. The very fact that NISD has an individualized exemption policy takes this case out of *Smith* and requires that strict scrutiny be applied.

Moreover, the "exemption" adopted by the District is not generally applicable. NISD concedes that the exemption "applies only to A.A. and not the rest of the NISD student body." Br. at 16. This concession takes NISD's action out of the protection of *Smith* and its rational basis standard. NISD attempted to regulate A.A.'s religious practice by forcing him to wear his hair pinned to the top of his head or in a single braid inside his shirt, regulations found nowhere in the neutral and generally applicable grooming policy. On such a record, there can be no dispute that "the only conduct subject to [the exemption] is the religious exercise [of Plaintiffs]."[18] *Lukumi*, 508 U.S. at 535.

[18] NISD argues that even though it made an individualized assessment and deviated from its generally applicable grooming policy, its "exemption" including its detailed requirements that apply only to A.A.'s religious practice should be subject to rational basis review under Smith, otherwise the policy favoring settlement will be undermined. Br. at 16 -17. NISD's argument turns *Smith* on its head. As soon as a government actor departs from a neutral, generally applicable law, and begins making government policy about a specific religious practice, only strict scrutiny can protect religious freedom.

2. Strict Scrutiny Applies When the Government Action Is *Not* Neutral.

Non-neutral government action that burdens the free exercise of religion is "invalid unless it is justified by a compelling governmental interest and is narrowly tailored to advance that interest." *Id.* at 533. In *Lukumi*, for example, the Court was confronted with facially neutral laws banning ritual animal killing. *Id.* at 525. The context and effect of the law, however, made clear that interference with the central practice of Santeria worship was the object of the ordinance. *Id.* at 534. Holding that the government regulation in question was subject to strict scrutiny, the Court expressly rejected the notion that its inquiry must end with the text of the regulation. *Id.* Courts must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Id.* A non-neutral, improper purpose can be inferred when government action "proscribes more religious conduct than is necessary to achieve their stated ends." *Id.* at 538. Lack of neutrality can be inferred from "gratuitous restrictions on religious conduct." *Id.* at 538-39.

The evidence supports a finding that NISD, in developing its purported "exemption" for A.A., improperly sought to suppress his religious practice. Superintendent Rhodes openly demonstrated his hostility toward Plaintiffs' religious beliefs. Shortly after the first School Board meeting at which Plaintiffs' request for an exemption was considered, he was quoted as saying, "I've got a lot

of friends that are Native Americans . . . and they all cut their hair. We're not going to succumb to everything and just wash away our policies and procedures," ROA 126-27, and, "If you want to think we're backwards . . . no one is asking you to move to Needville and have these opinions invoked on you." ROA 127-28.

The "exemption" also unquestionably visits gratuitous restrictions on religious conduct. There is no reason that A.A. should have to wear his hair inside his shirt (or in one braid instead of two). Superintendent Rhodes conceded that allowing A.A. to wear his hair in two braids outside his shirt is no less hygienic or safe than wearing in a single braid down the back of his shirt. ROA 2287: 17-21. And NISD conceded that a single braid worn inside A.A.'s shirt is no more in keeping with the community standards than allowing him to wear his hair in two braids outside his shirt. ROA 2293: 12-18, 2294: 2-8. Accordingly, the Court must look beyond any facial neutrality of the "exemption" and apply strict scrutiny to NISD's "exemption." *See Mayfield*, 529 F.3d at 610 (reversing summary judgment because there were questions about whether the state was acting with neutrality in the application of its otherwise facially neutral policy to Odinist religious exercises).[19]

[19] Tellingly, when a Muslim student applied for an exemption from the NISD dress code to allow her to wear a headscarf, the District granted her request without any modifications or conditions, even though Superintendent Rhodes conceded that by wearing a headscarf, she like A.A., would look different from the other students and would not be dressed in manner consistent with community standards. ROA 2290: 10-2291-14.

3. Heightened Scrutiny Applies to Hybrid Claims.

The district court concluded that more than rational basis scrutiny would also apply under the exception recognized by *Smith* for hybrid rights. ROA 1002-1003. *Smith*, in reliance on *Yoder*, preserved the rule that even neutral and generally applicable laws are subject to more than rational basis review if the religiously motivated conduct involved other constitutional rights "such as freedom of speech and the rights of parents to direct the education of their children." ROA 1002 (citing *Smith*, 494 U.S. at 880-81). The district court concluded that the *Smith* hybrid-claim standard is still operative, citing *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1209 (5th Cir. 1991); *Chalifoux*, 976 F. Supp. at 671; and *Alabama and Coushatta*, 817 F. Supp. at 1332. ROA 1003; *see also generally Netherland v. City of Zachary, La.*, No. 07-409-JJB, 2009 WL 1476827 (M.D. La. May 27, 2009) (applying heightened scrutiny under *Smith* to a hybrid rights claim where plaintiff alleged infringement on free exercise and free expression grounds).

Although the district court properly recognized some uncertainty about the hybrid rule as developed in other circuits,[20] the Court need not decide the issue in this case. NISD does not argue that the hybrid test is incorrect if free expression and parental due process rights are violated. Because, as discussed below, Plaintiffs have stated substantial claims for both, heightened scrutiny applies.

[20] *See* ROA 1003 n.7 (collecting cases).

III. The District Court Correctly Held that the NISD's Refusal to Allow A.A. to Wear His Hair in Two Long Braids Outside His Shirt Violates A.A.'s Free Expression Rights.

Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (finding students' right to wear armbands in protest of Vietnam War was "akin to pure speech" and entitled to First Amendment protection). A.A.'s long braids, which constitute symbolic expression of his Native American religion and heritage, are entitled to First Amendment protection, and NISD did not provide sufficient grounds to justify silencing this expression.

A. A.A.'s Long Braids are Intended and Likely to Be Understood as an Expression of His Native American Religion, Heritage, and Identity.

The Supreme Court has held that conduct amounts to expression protected by the First Amendment if the actor has an "intent to convey a particularized message" and the "likelihood [is] great that the message [will] be understood by those who view[] it.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Fifth Circuit applies the *Spence/Johnson* test to evaluate students' use of their appearance as a form of expression. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001) (stating that students' "choice to wear clothing as a symbol of an opinion or cause is undoubtedly protected under the First Amendment if the message is likely to be

understood by those intended to view it" (citing *Johnson*, 491 U.S. at 404 and *Spence*, 418 U.S. at 410-11)). In applying this *Spence/Johnson* test, this Court "look[s] to the particular activity, combined with the factual context and environment in which it was undertaken." *Canady*, 240 F.3d at 440. Student attire can "function[] as pure speech" and can "symbolize ethnic heritage, religious beliefs, and political and social views." *Id.* Likewise, a student's hair may convey a protected message. *Id.* at 440 n.1.

NISD's continued reliance on *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972), to argue that a student's hair can never convey a constitutionally protected message is wrong. In *Karr*, unlike in this case, the plaintiff brought suit "not because his hair conveys a message but 'because I like my hair long.'" *Id.* at 614. In that context, the Court expressed doubt that the wearing of long hair had sufficient communicative content to entitle it to First Amendment protection. *Id.* at 613. The Court, however, revisited and rejected this view in *Canady*. *See Canady*, 240 F.3d at 440 n.1. In reviewing *Karr*, the *Canady* Court noted that if "hair style never warrants First Amendment protection . . . then every choice of clothing, regardless of the intent of the wearer to communicate a particularized message, would not qualify as protected speech." *Id.* The *Canady* Court rejected the *Karr* per se rule that student hair length regulations are constitutionally valid "in favor of the

contemporary test for assessing expressive conduct outlined in *Spence* and *Johnson*." *Id.*

Applying the *Spence/Johnson* test, the district court correctly found that "A.A.'s braids convey a particularized message of his Native American heritage and religion." ROA 1005. Arocha testified that he wears his hair long "as a symbol, an outward extension of who we are and where we come from, our ancestry and where we are going in life." ROA 2149: 10-15. The evidence demonstrates that A.A. assigns similar meaning to his braids. When people ask him why he as long hair, he tells them it is because he is a Native American. ROA 2149: 5-7. The district court's holding is also fully consistent with holdings of other district courts in this Circuit that students engage in "a form of religious expression protected under the First Amendment" when they wear religious symbols intended to "communicate their . . . faith to others." *Chalifoux*, 976 F. Supp. at 665 (finding great likelihood observers would understand, from rosaries students' wore, that students were Christian); *see also Alabama and Coushatta*, 817 F. Supp. at 1333-34 (noting that "wearing of long hair by Native American students is a protected expressive activity" because "[l]ong hair in Native American culture and tradition is rife with symbolic meaning").

The district court also correctly found that members of the NISD community are likely to understand the meaning of A.A.'s long hair worn in braids. ROA

1006; *cf. Canady*, 240 F.3d at 440 (stating that the *Spence/Johnson* test applies "to the particular activity combined with *the factual context and environment in which it was undertaken*" (emphasis added)). As Dr. Riding In testified, a predominant image of Native Americans in pop culture is the sight of Native Americans wearing their hair in long braids. ROA 2048: 15-25. In fact, there are prints hanging on the wall at Needville Elementary School depicting Native Americans wearing their hair in braids and books at the school library showing Native Americans wearing long hair. ROA 840, 2178: 7-22. In light of these images, as well as the publicity surrounding NISD's refusal to allow A.A. to wear his hair in two braids outside his shirt, teachers and students in NISD likely will understand that A.A.'s braids convey a message about his Native American heritage.[21]

B. NISD's Policies Regarding A.A.'s Hair Place a Greater Restriction on A.A.'s Free Expression than Is Essential to the Furtherance of NISD's Stated Interests.

On appeal, NISD challenges only the district court's ultimate conclusion that NISD's grooming code and "exemption" impose restrictions on A.A. that are greater than necessary to promote or facilitate NISD's interest in promoting order,

[21] NISD's references to Willie Nelson and Snoop Dogg as non-Native Americans who regularly wear their hair long and in braids, Br. at 22, does not change this analysis. Because they involve entirely different factual circumstances, Willie Nelson's and Snoop Dogg's hairstyle choices are irrelevant to A.A.'s free expression claim. *See Canady*, 240 F.3d at 440. The fact that some non-Native Americans wear two long braids does not change the fact that two long braids communicate a particular cultural message when worn by Native Americans. *See Chalifoux*, 976 F. Supp. at 659 (finding plaintiffs' crucifixes understandable symbols of religious faith despite contention that other students wore crucifixes to communicate a different message—gang membership).

discipline, safety, uniformity, and hygiene. NISD does not challenge the district court's holding that *U.S. v. O'Brien*, 391 U.S. 367 (1968), provides the correct level of scrutiny to be applied to NISD's policies regarding A.A.'s hair. *See* Br. at 22-23. Under the *O'Brien* test, which this Circuit applies in cases involving viewpoint- and content-neutral restrictions on expressive student conduct,[22] a restriction on expression survives only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest that is (3) unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

NISD's purported "exemption" fails the third *O'Brien* prong. While the grooming policy itself might not be related to the suppression of free expression, the "exemption," which requires A.A. to wear his hair inside his shirt, most certainly is. The "exemption" was expressly designed to prevent A.A. from displaying his braids and communicating his Native American religion and heritage. Indeed, Superintendent Rhodes conceded that the sole purpose of the

[22] Arguably, NISD's policies regarding A.A.'s hair should be analyzed under the *Tinker* test for restrictions on conduct that is "akin to pure speech." *Tinker*, 393 U.S. at 505; *see also Chalifoux*, 976 F. Supp. at 666; *Alabama and Coushatta*, 817 F. Supp. at 1333-34. Under the *Tinker* test, NISD may restrict A.A.'s expression only if it can show that his long braids "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 508 (internal quotation marks omitted). There is no evidence in the record establishing that A.A.'s braids will cause any such interference. *See* ROA 2126: 15-18, 2127: 9-11.

"exemption" was to impose community standards on A.A., ROA 2289, 2-5, and "have his hair resemble the rest of the student body in Needville." ROA 1985:1-2.

NISD's grooming policy and "exemption" also fail the fourth *O'Brien* prong because the incidental restrictions they place on A.A.'s freedom of expression is more than necessary to promote the school's stated interests—hygiene, discipline, order, safety, and authority. *See* ROA 1008. Superintendent Rhodes conceded that allowing A.A. to wear his hair in two braids outside his shirt is no less hygienic or safe than wearing his hair pinned to the top of his head or in a single braid down the back of his shirt. ROA 2287: 17-21. The record shows that there were no reported discipline problems involving A.A. when he was in his regular class. The record also shows that allowing A.A. to be in his regular class while wearing his hair in two long braids outside his shirt did not interfere with his teacher's ability to teach. ROA 2126: 15-18. While A.A.'s hair occasionally fell into his eyes, his teacher just asked him to tuck it behind his ears—the same suggestion that she sometimes makes to girls wearing pigtails. ROA 2127: 9-11. Turning to the stated interest in having A.A. conform to community standards, NISD conceded that neither requiring A.A. to wear his hair on top of his head or in a single braid inside his shirt is not consistent with the community standards. 2293: 12-18, 2294: 2-8.

Finally, NISD's argument that it presented evidence that its policies with respect to A.A.'s hair promote its stated goals in no way undercuts the district

court's finding. The *O'Brien* test is not whether NISD's policies merely promote its stated goals, but whether the policies are "no greater than is essential" to promote its goals. NISD does not even argue on appeal that its evidence establishes that its policies are "no greater than is essential" to promote its stated goals. *See* Br. at 22-23.

IV. The District Court Correctly Held that NISD's Policies Violate Plaintiffs Betenbaugh's and Arocha's Due Process Rights to Direct the Education and Religious Upbringing of Their Son.

In *Yoder*, the Supreme Court recognized "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." 406 U.S. at 232. While this right is not absolute or unqualified, a due process claim exists where the government regulation results in "coercion in the form of a direct interference with their religious beliefs" or "compulsion in the form of punishment for their beliefs." *See Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008). In cases involving purely secular interests of parents to direct their children's upbringing and education, this Court has sometimes applied rational-basis review to the state regulation. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 290-91 (5th Cir. 2001). In cases like this one where the government policy implicates the parents' fundamental religious practices under the First Amendment, more than "a reasonable relation to some purpose within the competency of the [s]tate" is required to sustain the policy. *See*

Yoder, 406 U.S. at 233.

Here, the district court correctly applied this law and held that NISD's policies violate Plaintiffs Arocha's and Betenbaugh's right to direct A.A.'s religious upbringing. ROA 1009. The court found that NISD's policies would impose a substantial burden on A.A.'s religious practice and physical comfort and increase the likelihood that he would cut his hair in contravention of his family's religion. *Id.* Applying the heightened scrutiny applicable when a parent's due process right is combined with a free exercise claim, the district court further held that NISD's "exemption" did not have more than a reasonable relation to some purpose within the competency of the state. *Id.*

On appeal, NISD does not challenge Plaintiffs Arocha's and Betenbaugh's Fourteenth Amendment right to direct A.A.'s religious upbringing, or the district court's application of heightened scrutiny to NISD's policies regarding A.A.'s hair. Rather, NISD argues that no evidence supports the district court's findings that NISD's policies constitute "direct coercion and compulsion" that will likely cause A.A. to cut his hair. *See* Br. at 23, 24 (citing ROA 1009). Again, NISD is wrong. Arocha testified that it is "uncomfortable to have a braid underneath his shirt, even if caught there for just a few minutes," ROA 2170: 13-15, and that forcing A.A. to wear his braid inside his shirt "places some shame on it like we should be ashamed of who we are or how we believe." ROA 2171: 4-7. He further testified that he

believed that the physical discomfort and shame caused by NISD's "exemption" would cause A.A. to want to cut his hair and undermine his ability to teach A.A. his religion. ROA 2171: 12-17. Because there is ample evidence supporting the district court's findings, they must be affirmed. *See Brown*, 561 F.3d at 433.

CONCLUSION

The district court's grant of a permanent injunction is solidly grounded in the facts and the law. Appellees request that this Court affirm the district court and grant them such other and further relief to which they may show themselves entitled.

Dated: June 16, 2009

Respectfully submitted,

SINEAD O'CARROLL
State Bar No. 24013253
PAUL SCHLAUD
State Bar No. 24013469
REEVES & BRIGHTWELL LLP
221 W. 6th Street, Suite 1000
Austin, TX 78701
Phone: 512-334-4500
Fax: 512-334-4492

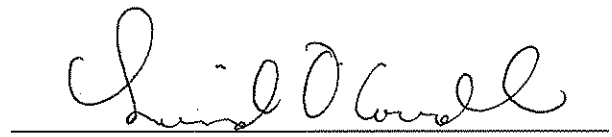
LISA GRAYBILL
State Bar No. 24054454
FLEMING TERRELL
State Bar No. 24063031
ACLU FOUNDATION OF TEXAS
P.O. Box 12905
Austin, TX 78711
Phone: 512-478-7300, ext. 116 and 128
Fax: 512-478-7303

DANIEL MACH
DC Bar No. 461652
PROGRAM ON FREEDOM OF
RELIGION AND BELIEF
ACLU FOUNDATION
915 15th St. NW
Washington, DC 20005
Phone: 202-548-6604
Fax: 202-546-0738

ATTORNEYS FOR APPELLEES

CERTIFICATE OF COMPLIANCE

I hereby certify on this 16th day of June 2009, that the accompanying brief of Plaintiffs-Appellees complies with the type-volume limitation specified in Federal Rule of Appellate Procedure 32. Specifically, according to the word and line count of Word, which was used to prepare this brief, this brief contains 13,713 words and 1,139 lines, excluding the table of contents, the table of citations, statement with regard to oral argument, certificates of counsel and the attached record excerpts. In addition, this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32 and the type style requirements because it has been prepared in a proportionally spaced typeface using Word in 14 point font Times New Roman.



Sinead O'Carroll

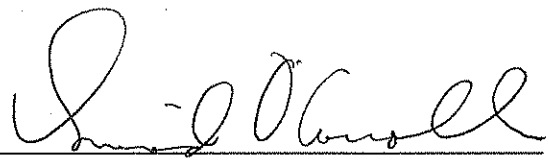
CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2009, the foregoing document was served by Federal Express on the following:

Roger D. Hepworth
Henslee Schwartz LLP
816 Congress Avenue
Austin TX 78701-2443

Jeffrey L. Hoffman
Kristen Z. Foster
Henslee Schwartz LLP
3200 Southwest Freeway, Suite 1200
Houston TX 77027

David M. Feldman
J. LeAnne Bram Lundy
Feldman Rogers Morris & Grover LLP
5718 Westheimer Suite 1200
Houston TX 77057



Sinead O'Carroll