No. 09-20091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

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

Civil Action No. H-08-2934

BRIEF FOR DEFENDANT-APPELLANT NEEDVILLE INDEPENDENT SCHOOL DISTRICT

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TO THE HONORABLE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS:

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:

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Kenney Arocha

Defendant-Appellant:

Needville Independent School District

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Needville Independent School District believes that oral argument would be helpful in this case.

STATEMENT OF JURISDICTION

Appellant Needville Independent School District appeals a final judgment from the United States District Court for the Southern District of Texas, Houston Division. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

APPELLANT'S STATEMENT OF THE ISSUES

I. The Trial Court erred in holding that Plaintiffs' Freedom of Religious Exercise is violated by NISD's application of its dress and grooming code to student A.A.

II. The Trial Court erred in holding that Plaintiffs' Freedom of Speech is violated by NISD's application of its dress and grooming code to student A.A.

III. The Trial Court erred in holding that Plaintiffs' Parental Due Process rights are violated by NISD's application of its dress and grooming code to student A.A.

IV. The Trial Court erred in holding that NISD's dress and grooming code constituted a violation of the Texas Religious Freedom Restoration Act, Tex. Civ. Prac. & Rem. Code Ch. 110.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to counsel for Plaintiffs, via electronic means and via United States certified mail, return receipt, requested on this 27th day of April, 2009, as follows:

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CERTIFICATE OF COMPLIANCE

I hereby certify on this 27th day of April, 2009, that the accompanying brief of Defendant-Appellant Needville Independent School District complies with the type-volume limitation specified in Federal Rule of Appellate Procedure 32. Specifically, according to the word and line count of WordPerfect, which was used to prepare this brief, this brief contains 7313 words and 682 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 WordPerfect 12 in 14 point font Times New Roman.

_____

Kristen Zingaro Foster

NOW NEEDVILLE INDEPENDENT SCHOOL DISTRICT, Defendant-Appellant, herein, by and through its attorneys Roger D. Hepworth and Jeffrey L. Hoffman, files this, its Appellant's Brief.

STATEMENT OF THE CASE

On October 2, 2008, the Appellees , Michelle Betenbaugh and Kenney Arocha, individually and as next friends of A.A. (hereinafter "Plaintiffs") filed Plaintiffs' Original Complaint against Defendant Needville Independent School District (hereinafter "NISD") (ROA, p. 11) seeking Temporary Restraining Order and Preliminary and Permanent Injunction.[1] (ROA, p.196).

The District Court held a hearing on Plaintiffs' Motion for Temporary Restraining Order on October 3, 2008 (ROA, p.4), which was granted on October 3, 2008. Then, on October 22, 2008, NISD filed its answer to the Appellees' complaint. (ROA, p.874). The Court heard argument on Plaintiffs' Motion for Preliminary Injunction on October 17, 2008 and October 22, 2008. (ROA, p. 6). By agreement of the parties, the preliminary injunction hearing was consolidated with a trial on the merits. (ROA, p. 2337).

On January 20, 2009, the Trial Court entered its Memorandum and Order granting in part and denying in part Plaintiffs' Motion for Preliminary and Permanent

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[1] All references to the record on appeal will appear as (ROA, p.__).

Injunction, permanently enjoining NISD from applying its dress and grooming code to student Plaintiff A.A. (ROA, pp.978-1011). Final Judgment was entered by the Trial Court on February 4, 2009. (ROA, p. 8). On February 9, 2009, NISD filed its Notice of Appeal. (ROA, p. 1923).

STATEMENT OF THE FACTS

Student Plaintiff A.A. is a five year old child who recently moved into the boundaries of NISD. (ROA, p. 978). A.A. is the son of Plaintiffs Kenney Arocha and Michelle Betenbaugh. (ROA, p. 978). Although Arocha admits that his family denies any Native American heritage, he claims a Native American background. (ROA, pp. 2142, 2179-2182). Arocha is not a member of any tribe, but believes he may have ties to the Lipan Apaches, although his efforts to gain membership to this tribe have not been successful. (ROA, p. 2681). There has been no assertion that Michelle Betenbaugh claims any Native American heritage.

Prior to moving to NISD, A.A.'s parents sought an exemption from NISD's grooming code, but this was ruled premature. (ROA, p. 2742). A.A. enrolled in NISD on August 13, 2008 (ROA, p.461) and requested an exemption to NISD's grooming code policy which requires that boys' hair not cover the ears or touch the top of the standard collar in the back. (ROA, p.38-39). The grooming policy does not by its terms, expressly require that hair be "cut" to any specific length. (ROA, pp. 38-39).

In Plaintiffs' request for an exemption, Plaintiffs stated that A.A. has a sincerely held religious belief that his long hair should be cut only to mark major life events. (ROA, p. 984).[2] However, even today, Arocha cuts the hair on the sides of his head because he finds it hot. (ROA, p. 2218). On August 18, 2008 NISD's Superintendent denied the Plaintiffs' request as he believed that this was a question of personal hair style choice and not a question of a sincerely held religious belief based upon the information presented to him at that time. (ROA, p.2248). Plaintiffs appealed this decision to the NISD Board of Trustees. (ROA, p. 985). Prior to the hearing before the Board of Trustees, NISD pointed out that A.A. could comply with the existing grooming policy by having A.A. wear his hair in a bun so as not to cover his collar. (ROA, p. 985). Such a hairstyle is not uncommon among certain Southwestern Native American tribes according to Plaintiffs' own expert. (ROA, p. 2032). NISD's Superintendent and Plaintiffs agree that this arrangement would put A.A. in compliance with NISD's existing grooming code without requiring A.A. to cut his hair. (ROA, pp. 985, 2215). Plaintiffs rejected this offer with no explanation. (ROA, p. 2215).

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[2] AA never testified in this case. The only "evidence" of AA's sincerely held religious beliefs appear to be his father's testimony about his own beliefs.

On August 20, 2008 the NISD Board considered the Plaintiffs' request for an exemption. After hearing from Plaintiffs and the Superintendent, NISD adopted the Superintendent's recommendation that A.A. be permitted to comply with the grooming policy by keeping his hair uncut, but worn in a single braid behind the ears with the tail tucked under the collar of the shirt. (ROA, p. 986). Plaintiffs admit that A.A. at times wears his hair in a single braid or unbraided. (ROA, p. 2184). After NISD granted Plaintiffs' request for an exemption and possibly even after the filing of the lawsuit, Plaintiffs claim A.A. developed a belief requiring the wearing of his hair in two braids. (ROA, pp. 2184-2185). Plaintiffs take the position that NISD can not regulate A.A.'s hair style in any form, that the exemption granted by NISD did not accommodate Plaintiffs' new position as to the style of A.A.'s hair, and there is no regulation of A.A.'s hairstyle they would accept. (ROA, p. 2217).

There is question as to what policy Plaintiffs are attacking through this lawsuit and what policy the District Court addresses in its ruling and Order. Plaintiffs are clearly attacking the idea of regulation of A.A.'s hair style in general and testified as much during the course of this litigation. (ROA, p. 403). Moreover, it was NISD's grooming policy from which Plaintiffs requested an exemption. (ROA, p. 402). The District Court ignores the existence of the general policy applicable to A.A. and every other student at NISD and appears to have concluded that the exemption from that

policy is somehow coerced upon A.A. when, in fact, the exemption is merely an optional means for A.A. to otherwise comply with the general policy. (ROA, pp. 981, 985-986, 995-997).

There is also question as to what alleged religious belief is at issue. Plaintiffs' original claim was that A.A. had a sincerely held religious belief that his hair remain uncut. (ROA, pp. 982, 992). However, the general grooming policy did not actually require A.A. to cut his hair. (ROA, pp. 38-39). This issue was further addressed by NISD through its administrative grievance process and NISD's decision to grant an exemption to A.A. was based on the understanding that A.A.'s religious belief was that he could not cut his hair. (ROA, p. 984). Only after NISD granted A.A. an exemption and apparently after the filing of this lawsuit did Plaintiffs purport to subscribe to a religious belief that A.A.'s hair be worn only in two braids on the outside of his clothing. (ROA, pp. 980, 2184-2185). The District Court concluded only that A.A. has a sincerely held religious belief that his hair be worn long (ROA, p. 995) and that Plaintiff Arocha finds religious significance in the act of braiding his hair. (ROA, p. 980). The District Court did not find a sincerely held religious belief that A.A. wear his hair only in two braids, down, and on the outside of his shirt. However, the District Court's ruling enjoins NISD from regulating A.A.'s hair style

even though NISD's policy and exemption do not require A.A. to cut his hair in order to comply.

SUMMARY OF THE ARGUMENT

The District Court explicitly recognized that this is not really a Native American hair length case; it is a choice of hairstyle case. (ROA, p. 978). Defendant NISD has in place a generally applied and facially neutral grooming code that requires that boys wear their hair so that it does not cover their ears or touch the top of the standard shirt collar in the back. That policy does not require A.A. to cut his hair to be in compliance, nevertheless, Plaintiffs requested an exemption to this provision of the grooming code because of a religious belief that A.A.'s hair remain uncut. NISD offered A.A. the option of wearing his hair in a bun on top of his head as a solution that would not require the cutting of A.A.'s hair and would comply with the grooming code. Plaintiffs refused and asked NISD's Board for an exemption. By Plaintiffs' own admission the relief sought was granted. However, in attempting to grant the requested relief in a narrowly tailored way and remove any perceived burden on Plaintiffs' belief that A.A.'s hair remain uncut, NISD asked that A.A.'s hair be worn in a single braid to keep hair behind the ears and that the tail of this braid be tucked in so as not to cover the collar. Plaintiffs then allegedly developed new beliefs requiring two braids in A.A.'s hair and filed this lawsuit for injunctive

relief to prohibit NISD from applying its grooming code to A.A. Plaintiffs claim that the grooming code violates their freedom of exercise, freedom of speech[3] and parental due process rights as well as constitutes a violation of the Texas Religious Freedom Restoration Act.

NISD did not dispute that Plaintiffs have a sincerely held religious belief that A.A.'s hair remain uncut. NISD explicitly accommodated this belief in stating that A.A.'s hair need not be cut in order to comply with the grooming code. However, NISD was never, prior to this lawsuit, presented with any support or even the proposition that Plaintiffs have a sincerely held religious belief that A.A.'s hair be worn only in two braids in plain view. NISD disputes the sincerity of this belief, given its dubious timing, lack of objective support, and because of strong evidence of contrary actions by Plaintiffs prior to the filing of this lawsuit. NISD also disputes Plaintiffs' claims that NISD's grooming code or the exemption granted by NISD violates Plaintiffs' right to free religious exercise, free speech and parental due process. Moreover, NISD would argue that its grooming code and the exemption granted by NISD are not in violation of the Texas Religious Freedom Restoration Act in that any perceived burden on Plaintiffs' stated belief that A.A.'s hair remain uncut,

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[3] U.S. Const. amend. I.

was removed when NISD granted an exemption as specifically permitted under Tex. Civ. Prac. & Rem. Code §110.006.

ARGUMENT

I. STANDARD OF REVIEW

The district court's granting of an injunction is reviewed for an abuse of discretion.[4] However, a district court's determination of state law is reviewed *de novo* as are underlying questions of law determined by the district court.[5]

II. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS' FREEDOM OF RELIGIOUS EXERCISE IS VIOLATED BY NISD'S APPLICATION OF ITS GROOMING CODE

A. The Trial Court Erred Despite its Finding that Plaintiffs' Alleged Religious Beliefs Regarding Hair Braiding Were Formed After NISD's Granting of an Exemption to A.A.

Until the filing of this lawsuit, NISD believed that this was a Native American hair length case. Plaintiffs presented their religious belief to NISD as prohibiting the cutting of one's hair. (ROA, p.2209). The NISD grooming policy does not, by its express terms, require boys to cut their hair to a certain length. (ROA, pp. 38-39). NISD's grooming code requires that boys' hair not cover the top of a standard shirt collar in the back or the ears. (ROA, pp. 38-39). NISD pointed out that A.A. could

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4 *Women's Medical Center of Northwest Houston v. Bell*, 248 F.3d 411, 419 (5th Cir. 2001).

5 *Am. Intern. Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260 (5th Cir. 2003).

wear his hair in a bun. (ROA, p. 2215). Such a hairstyle is consistent with what is practiced among certain Native American tribes in the American Southwest according to Plaintiffs' own expert. (ROA, p. 2032). Plaintiffs refused this. Next, NISD specifically stated that A.A. would not have to cut his hair, but required that it be worn in a braid with the tail tucked in so as to not cover the back of the collar or the ears. (ROA, p.2216). NISD did this to remove any perceived burden to Plaintiffs' stated religious belief that A.A.'s hair remain uncut. (ROA, pp. 2255-2256). Plaintiffs contend there is no regulation of A.A.'s hair which they will find acceptable. (ROA, p. 2217). Consequently, Plaintiffs filed this lawsuit.

The newly claimed "belief" that hair must be worn in two braids is not supported by the evidence or the Court's findings. Defendant does not question the sincerity of Plaintiffs' beliefs regarding cutting of A.A.'s hair. (ROA, p. 989). However, the Court badly blurs this belief with Plaintiffs' new and unfounded statements that their beliefs require that A.A. wear his hair in two braids despite evidence to the contrary. First, Plaintiff Arocha stated during testimony that he and A.A. from "time to time" wear their hair in one braid or no braids. (ROA, p.2184). In addition, Defendants introduced photographic evidence of A.A. with his hair in one braid or unbraided which were proudly posted on Plaintiff Betenbaugh's website. (ROA, pp. 2189-2192). While Plaintiff Arocha testified that "each braid...has a deep

meaning," and that "the very act of braiding helps him feel connected to who he is," he never provided any religious basis for his claims. Nevertheless, the Court found only that Plaintiff Arocha finds religious significance in braiding his hair–not that this religious belief precludes A.A. from wearing his hair in a single braid. (ROA, p.980). Plaintiffs' counsel even concluded that Plaintiffs' free exercise claim was limited to the cutting of hair. (ROA, p. 2002). Additionally, Plaintiffs and the Court both recognize that this newly alleged belief did not "appear" until after A.A. was granted a grooming code exemption on August 20, 2008 and this new alleged belief was never presented to NISD prior to the filing of this lawsuit. (ROA, pp. 980, 2185). Plaintiff Arocha testified that there was nothing to which he could point as evidence of this alleged belief regarding the wearing of only two braids, but conceded that the photographs of him and A.A. wearing one braid and no braids was concrete evidence to the contrary. (ROA, p.2235).

Despite this testimony from Plaintiff Arocha, the evidence supporting Defendant's argument that Plaintiffs' sincerely held religious belief was limited to the cutting of A.A.'s hair, and the Court's finding that "Plaintiffs...have a sincerely held belief that their hair should be worn long," (ROA, p. 995) (a contention not disputed by NISD and not violated by either NISD's grooming policy or the exemption) the Court held that NISD's grooming code and the exemption–which the Court

mistakenly characterizes as a policy in and of itself– violates Plaintiffs' freedom of religious exercise. (ROA, p. 1003).

B. The Trial Court Erred in Finding That NISD's Grooming Code or the Exemption Granted A.A. Constitutes a Substantial Burden on Plaintiffs' Religious Beliefs that A.A.'s Hair Remain Uncut

To support a finding that NISD's grooming code violates Plaintiffs' freedom of religious exercise, a Court must find that the grooming code substantially burdens Plaintiffs' belief. The Court applied the standard from *Adkins v. Kaspar*[6], a Religious Land Use and Institutionalized Persons Act case which determined that "substantial burden" was created if a regulation "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs."[7] Utilizing this standard, the Court erred in determining that NISD's grooming code and the exemption granted by NISD constitute a substantial burden on Plaintiffs' freedom of religious exercise.

The Trial Court found that Plaintiffs' sincerely held religious belief was that A.A.'s hair should remain uncut. (ROA, p. 995). The Trial Court ignores the fact that NISD's grooming policy would allow A.A. to wear his hair uncut and affixed on his head in full compliance with the NISD grooming code. (ROA, p. 985). This

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6 *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004).

7 *Id.*

arrangement does nothing to burden Plaintiffs' religious belief that A.A.'s hair remain uncut.

The Trial Court also ignores the fact that NISD granted A.A. an exemption to the policy explicitly stating that A.A.'s hair need not be cut in order to comply with the grooming code, which Plaintiff Arocha admits granted the relief requested. (ROA, p. 2210). Rather, the Court somehow reaches the conclusion that in granting an exemption that specifically allowed A.A. to keep his hair uncut in accordance with his religious belief as defined by the Court, NISD substantially burdened Plaintiffs' belief to keep A.A.'s hair uncut. (ROA, p. 996-997). Clearly the requirement that A.A.'s hair be kept in a single braid as opposed to two braids is not a burden. The only "burden" identified by Plaintiff or the District Court is the requirement that his hair be tucked into his shirt collar. (ROA, p. 997). The District Court erred in looking first to the exemption as NISD's policy–which it is clearly not–and then in concluding, without support, that an exemption that does not require A.A. to cut his hair, somehow substantially burdens A.A.'s belief that he not cut his hair. (ROA, p. 996-997). The Court focuses on its supposition that it is "likely" that A.A. might be subject to teasing should he wear his hair in a braid that is tucked in his shirt. (ROA, p. 997). However, there is no evidence in the record to even remotely support the District Court's musing. The District Court erred in refusing to consider that A.A.

could comply in other ways with the general grooming code that did not require the tucking of A.A.'s braid into his collar–which Plaintiff refused. (ROA, pp. 985, 2215). In fact, the District Court ignored Plaintiff Arocha's testimony that he could not think of any alternatives that Plaintiffs would accept, other than allowing A.A. to wear his hair in any manner in which he pleases. (ROA, p. 2217). Instead, the District Court concludes that the exemption granted A.A. was "physically burdensome" and that it "forces him to choose between the generally available benefit of attending Needville public schools, or, on the other hand, following his religious beliefs." (ROA, p. 997).[8] Furthermore, the only physical burden identified by the Plaintiffs, the supposed discomfort of having to tuck his braid into his shirt collar, could easily have been eliminated by the wearing of a T-shirt or, if that was deemed too burdensome, by having the District Court limit its holding to just that portion of the exemption. The Trial Court erred in ignoring the fact that none of the options presented to A.A. would require him to cut his hair. The Trial Court further errs in concluding that the exemption, which the Court again refers to as "the policy" (ROA, p. 997) denies A.A. a benefit that is otherwise allowed. The evidence clearly establishes that no boy at

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[8] The Court's surmise that AA would be induced to cut his hair due to the burden of the exemption fails to acknowledge the reality that AA is only five years old and not really in a position to dictate when he gets a haircut. Furthermore, the Court's consideration of what may happen over the next 11 years fails to acknowledge that AA can readdress these issues annually as part of his reapplication.

NISD is permitted to wear his hair covering his ears or over the back of the standard shirt collar. (ROA, p. 981). The District Court, nevertheless, concludes that because girls' hair is permitted to cover the back of the standard shirt collar, that A.A. is being burdened by being prevented from acting in a way that is otherwise allowed. (ROA, p. 997). This Court, in *Karr v. Schmidt*, upheld a school grooming code that required boys and not girls to wear their hair off of their ears and not covering the back of a standard shirt collar that was challenged, in part, on an equal protection basis.[9] The fact that NISD's grooming code carries an additional requirement for boys' hair does not render it unconstitutional based on equal protection, nor was equal protection raised by Plaintiffs in their Complaint. (ROA, p. 11). As such, NISD's attempt to require A.A. to wear his hair in such a way that would not cover his shirt collar is not an impermissible attempt to prevent him from acting in a way that is otherwise permitted.

C. The Trial Court Applied the Incorrect Standard to A.A.'s Free Exercise Claim

i. Strict scrutiny is not the proper standard as NISD's grooming code is facially neutral and generally applicable.

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[9] *See Karr v. Schmidt*, 460 F.2d 609, 616-17 (5th Cir. 1972).

The Court erred in applying strict scrutiny to Plaintiffs' claim of free exercise by concluding that Plaintiffs are not challenging NISD's grooming code and by attempting to regard a narrowly tailored exemption as NISD's policy. (ROA, p. 998). A neutral law of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.[10] Rather, such a law is subject to a rational basis standard.[11] The evidence is clear that NISD's grooming code is facially neutral and generally applicable. (ROA, pp. 38-39, 422, 426). As such, the proper standard in determining whether NISD's grooming code violates the right to free exercise is rational basis and not strict scrutiny.[12]

The Court is simply mistaken in stating that Plaintiffs are not challenging NISD's grooming code. If they are not challenging NISD's dress code then the dress code's requirement that boys wear their hair above the collar would remain in effect and prohibit A.A. from wearing his hair in two long braids outside his collar. The evidence is clear that Plaintiffs asked for an exemption to NISD's grooming code and that no options offered to Plaintiffs were found acceptable. (ROA, p. 2217). Counsel

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10 *Employment Division v. Smith*, 494 U.S.872, 879 (1990).

11 *Id.*

12 *Id.*

for Plaintiffs stated explicitly that they were challenging NISD's grooming code. (ROA, p. 403). As such, it is clear that the NISD grooming code is the rule being challenged and, as it is facially neutral and generally applicable, a rational basis test should be applied.

Instead, the Court ignores NISD's actual grooming code policy and errs in concluding that the exemption offered to Plaintiff by NISD's Board is the policy, and as such, strict scrutiny applies. (ROA, p. 998). While there is no question that the exemption offered by NISD in order to accommodate A.A.'s needs applies only to A.A. and not the rest of the NISD student body, this does not render this exemption an NISD policy. In coming to this conclusion, neither the Plaintiffs nor the Court cite any case law or evidence, and ignore the other methods of compliance available to A.A. other than the ironically deemed "exemption policy." (ROA, pp. 985, 2215). The Court further errs by then concluding that in attempting to accommodate A.A.'s belief that his hair remain uncut and have A.A. comply with the grooming code, NISD unwittingly created a new policy that automatically subjected NISD to strict scrutiny because it took A.A. into account specifically. The inanity of this is underscored by the fact that, following the Court's logic, had NISD refused to grant an exemption to A.A., NISD would only have to establish a rational basis for its grooming code, but because it attempted to accommodate A.A.'s request for an

exemption, NISD must now face strict scrutiny. If the district court's conclusion that the exemption is the policy is allowed to stand, the public's interest in encouraging settlement between parties will be greatly injured.[13]

ii. No hybrid claim was established; thus the Trial Court erred in concluding that NISD needed "more than a reasonable relationship" between its grooming code and its stated goals.

The Court further erred in concluding that "more than a reasonable relationship" was the appropriate standard of review as Plaintiffs set forth a hybrid claim. (ROA, p. 1003). The Court held that Plaintiffs established that "the exemption policy" violated A.A.'s freedom of exercise as well as his right to free expression and Plaintiffs' parental due process rights and as such, a hybrid claim was presented. (ROA, p. 1003). First, NISD would assert, as argued above, that the Court erred in analyzing A.A.'s claims in terms of the exemption granted by NISD and not NISD's actual grooming policy from which Plaintiffs sought an exemption based on their sincerely held belief that A.A.'s hair remain uncut. The exemption granted A.A. per Plaintiffs' request is not the NISD policy. (ROA, pp. 38-39). In addition, as NISD argues below, no free speech or parental due process rights are violated by either

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[13] *See, e.g., W.J. Perryman & Co. v. Penn. Mut. Fire Ins. Co.*, 324 F.2d 791, 793 (5th Cir.1963).

NISD's grooming code or the exemption granted by NISD. Therefore, the Court erred in finding that a hybrid claim had been presented warranting an analysis as to whether NISD's grooming code bears "more than a reasonable relationship"[14] to NISD's goals. (ROA, p. 1003).

iii. The Trial Court erred in finding that NISD's grooming code does not bear "more than a reasonable relationship" to NISD's stated goals of teaching hygiene, instilling discipline, preventing disruption, avoiding safety hazards and asserting authority.

Even assuming that the Trial Court had applied the proper standard in determining whether NISD's grooming code bears "more than a reasonable relationship"[15] the Trial Court erred in applying this standard to the exemption granted to A.A. as opposed to NISD's grooming code. (ROA, p. 1003). The Trial Court further erred in concluding that the exemption does not have more than a reasonable relationship to NISD's stated goals of teaching hygiene, instilling discipline, preventing disruption, avoiding safety hazards and asserting authority. (ROA, pp. 38, 1003). The Court contradicts itself in reaching this conclusion while simultaneously finding that "while the exemption policy might be one means of achieving NISD's goals, it is certainly not the most effective." (ROA, p. 1003). As

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14 *See Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1217 (5th Cir. 1991).

15 *Id.*

a result, the District Court impermissibly seeks to substitute its views and choices of relative efficacy for those officials to whom the choices are committed by law.[16] (ROA, p. 866). The Trial Court errs in attempting to hold NISD to a higher standard than the law requires, i.e., that NISD's exemption must be the most effective means of achieving NISD's goals. This is simply not the standard under the law.[17] NISD's exemption must bear only "more than a reasonable relation to some purpose within the competency of the state" in order to pass scrutiny.[18] The Trial Court itself concluded that NISD's exemption was "one means of achieving NISD's goals," (ROA, p. 1003) and NISD's stated goals are within the state's interest.[19] Moreover, Defendant's expert as well as Superintendent Rhodes and Assistant Superintendent Briscoe all provided testimony about how NISD's goals of teaching hygiene, instilling discipline, preventing disruption, avoiding safety hazards and asserting authority are furthered by NISD's grooming policy and exemption. (ROA, pp. 428-

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16 TEX. CONST., art. VII, §§ 1, 8.; TEX. EDUC. CODE §11.151(b); *see also Williams v. Austin Indep. Sch. Dist.*, 796 F.Supp. 251, 255 (W.D. Tex. 1992).

17 *See Wisconsin v. Yoder*, 406 U.S. 205 (1972); *see also Cornerstone Christian Schools v. University Interscholastic League,* No. 08-50429, 2009 WL 724531, at *9, n.8 (5th Cir. March 20, 2009).

18 *Id.*

19 *Karr v. Schmidt*, 460 F.2d 609, 617 (5th Cir. 1972).

430, 2058-2064, 2255-2256, 2258-2260). As such, even under the "more than reasonable relationship standard," NISD's exemption passes muster.

III. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS' FREEDOM OF SPEECH IS VIOLATED BY NISD'S APPLICATION OF ITS GROOMING CODE

A. The Trial Court Erred in Refusing to Apply *Karr* and Holding that *Canady* Overruled *Karr* with Regard to Hair Style.

A public school student's freedom to choose a hair style is not afforded First Amendment protection based on this Court's holding in *Karr v. Schmidt.*[20] (ROA, pp. 304-306, 857-861, 1004). The District Court erred in concluding that *Karr* has been overturned by this Court's decision in *Canady v. Bossier Parish School Board.*[21] While *Canady* declined to apply *Karr* with respect to clothing, *Canady* does not speak to *Karr's* ruling as it pertains to hair style.[22] District courts within the Fifth Circuit, even after *Canady*, continue to rely on this Court's holding in *Karr* in reviewing school grooming codes.[23] This Court's conclusion in *Karr* that hairstyle

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20 *Karr v. Schmidt*, 460 F.2d 609, 616-17 (5th Cir. 1972).

21 *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001).

22 *Id.*

23 *See Fenceroy v. Morehouse Parish School Board*, No. Civ.A. 05-0480, 2006 WL 39255, at *3 (W.D. La. Jan. 6, 2006).

choices do not have clearly understood communicative meaning is as true today as it was in 1972.[24]

B. The Trial Court Erred in Finding that A.A.'s Wearing of Two Braids on the Outside of His Shirt and Not Off His Collar is Symbolic Speech

Plaintiffs' claims that A.A.'s hair style constitutes symbolic speech must be analyzed using the *Spence/Johnson* test.[25] To satisfy this test, Plaintiffs must establish that 1) the conduct intends to convey a particularized message and 2) that there is a great likelihood that the message will be understood by those who view it.[26] While Plaintiff Arocha testified that it was his intention for two braids to convey Native American culture, the evidence is clear in establishing that there is not a great likelihood that this message will be understood by those who view it. The Plaintiffs' expert testified that the wearing of long hair and braids is not generally recognized as an expression of Indian heritage. (ROA, pp. 2038-2039). In addition, Plaintiff Arocha testified that people ask A.A. why he has long hair and A.A. must tell them it is because he is Native American. (ROA, p. 2149). These viewers' reactions establish that there is not a great likelihood that those viewing A.A.'s hair style

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24 *Karr v. Schmidt*, 460 F.2d 609, 616-17 (5th Cir. 1972).

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

26 *Id.*

generally view it as an expression of Native American heritage. Plaintiff Arocha also testified that people have mistaken A.A. for a girl because of his hair. (ROA, pp. 2185-2186). A.A.'s teacher testified that A.A. had been mistaken for a girl by both other NISD students and parents during the course of the school year. (ROA, pp. 2118-2119). In addition, Defendant entered into evidence photographs of readily recognizable cultural figures Willie Nelson and Snoop Dogg who regularly wear their hair long and in two braids and are not Native American and do not claim any such heritage. (ROA, pp. 916, 2038). The record is devoid of any support for the Court's conclusion that "[m]ember [sic] of the NISD community are likely to understand the meaning of A.A.'s long hair worn in braids." (ROA, p.1006). In fact, the evidence is directly to the contrary.

C. The Trial Court Erred in Finding that NISD's Grooming Policy or its Exemption Requires Incidental Restrictions on A.A.'s Freedom of Expression that are More Than Necessary to Promote or Facilitate an Important Governmental Interest

Even if this Court upholds the District Court's finding that A.A.'s wearing of his hair in the style of his choice to school is protected symbolic speech, the District Court erred in concluding that NISD's grooming code or its exemption imposed restrictions on A.A. that are more than necessary to promote or facilitate NISD's interest in promoting order, discipline, safety, uniformity and hygiene. In reaching

this conclusion, the District Court asserts that NISD failed to demonstrate that the restrictions imposed are necessary to further NISD's goals.(ROA, p. 1008). However, NISD provided evidence as to how regulation of dress and hair style promotes these goals through the testimony of Assistant Superintendent Briscoe, Superintendent Rhodes and Dr. Merrill, its expert. (ROA, pp. 428-430, 2058-2064, 2258-2260). Further, the Court found that the exemption granted A.A. by NISD "might be one means of achieving NISD's goals" which contradicts the District Court's conclusion that NISD's goals are not furthered by the application of its grooming code. (ROA, p. 1003).

IV. THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS' PARENTAL DUE PROCESS RIGHTS ARE VIOLATED BY NISD'S APPLICATION OF ITS GROOMING CODE

The District Court erred in reaching the conclusion that NISD's regulation of how A.A. wears his hair during school hours and functions interferes with Plaintiffs' due process right to raise A.A. in accordance with their religious beliefs. (ROA, p. 1009). The District Court admits that a parent's right to control a child's upbringing and education is neither absolute nor unqualified,[27] but nevertheless concludes that although NISD does not require A.A. to cut his hair through its grooming code or exemption, the likelihood is that A.A. "will choose to do so." (ROA, p. 1009). This

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[27] *See, e.g. Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

is not founded in evidence and is purely speculative. The District Court further errs in finding that NISD's policy would act as "direct coercion and compulsion" for A.A. to cut his hair as there is no evidence to support this conclusion. (ROA, p. 1009). In fact, Superintendent Rhodes testified that NISD offered options and the exemption to accommodate A.A. while keeping him as close to NISD's policy so as to avoid distractions in school and was not trying to be punitive to A.A. (ROA, pp. 2255-2256). Plaintiff Arocha admitted that if A.A. were required to wear his hair up during school A.A. could still wear his hair down and in two braids at all other times and that this would not interfere with parental rights. (ROA, p. 2219). This is precisely what NISD's policy and offered exemption for A.A. do–require him to comply with the grooming code during school hours and events, but not require any permanent change or alteration in his hair so that A.A. can leave his hair uncut and may wear it in any fashion he chooses outside of school hours.[28] As such, it is clear that NISD's policy and the exemption do not infringe upon Plaintiffs' parental due process rights.

V. THE TRIAL COURT ERRED IN HOLDING THAT NISD'S GROOMING CODE CONSTITUTES A VIOLATION OF THE TEXAS RELIGIOUS FREEDOM RESTORATION ACT FOUND IN THE TEX. CIV. PRAC. & REM. CODE CH. 110.

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[28] *Cf. Alabama & Coushatta Tribes of Tex. v. Trustees of the Big Sandy Indep. Sch. Dist.*, 817 F.Supp. 1319 (E.D. Tex. 1993).

A. NISD's Grooming Policy Does Not Substantially Burden A.A.'s Free Exercise of Religion.

The Texas Civil Practice & Remedies Code §110.001 et seq. prohibits a governmental entity from imposing a "substantial burden" upon a person's free exercise of religion, except in furtherance of a compelling state interest and using the least restrictive means available.[29]

NISD's grooming policy does not require A.A. to cut his hair. (ROA, pp. 38-39). As a result, the grooming policy can not burden A.A.'s sincerely held religious belief that his hair remain uncut. A.A. is able to comply with NISD's grooming code in a myriad of ways that would not burden his belief. Specifically, Assistant Superintendent Briscoe testified that A.A.'s wearing his uncut hair on the top of his head would be in compliance with the NISD grooming code. (ROA, p. 435). Plaintiff Arocha also testified that prior to filing this lawsuit, NISD offered to allow A.A. to wear his hair uncut and in a bun in compliance with NISD's grooming code. (ROA, p. 2167). NISD's Superintendent further testified that if A.A. wore his hair in braids worn off of the collar, that this would be in compliance with NISD's grooming code and would not require the cutting of A.A.'s hair. (ROA, p. 2256). A.A. can wear his hair in braids, as long as they do not cover the top of his shirt collar in the back and

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[29] TEX. CIV. PRAC. & REM. CODE, §110.003.

comply with NISD's grooming code. There is nothing about NISD's grooming policy that burden's A.A.'s religious belief that he not cut his hair. As such, the District Court could not have concluded that the NISD grooming code substantially burden's A.A.'s religious belief that his hair remain uncut, even had the analysis been undertaken.

B. NISD's Exemption Does Not Substantially Burden A.A.'s Free Exercise of Religion.

In finding that the exemption "substantially burdens" A.A.'s religious belief, the Court refers back to its conclusions regarding Plaintiffs' freedom of religious exercise claims. (ROA, p. 1002). As set forth above in Section II, B, the District Court found that this belief is that A.A.'s hair should remain uncut. (ROA, p. 995). The Court ignores the fact that NISD granted A.A. an exemption explicitly stating that his hair need not be cut in order to comply with the grooming code, which Plaintiff Arocha admits granted the relief requested. (ROA, p. 2210). Rather, the Court somehow reaches the conclusion that in granting an exemption that clarifies how A.A. may comply with the grooming code without cutting his hair NISD substantially burdens Plaintiffs' belief to keep A.A.'s hair uncut. (ROA, pp. 996-997).

The exemption granted by NISD requires that A.A. wear his hair in a single braid with the tail tucked into the collar so as not to cover the collar. (ROA, p. 2216).

NISD's requirement that A.A. wear his hair in a single braid does not require A.A. to cut his hair. Nor does NISD's requiring that the tail of the braid be tucked into A.A.'s collar require or even suggest that A.A. cut his hair. A.A.'s leaving his hair uncut is the only religious belief that the District Court has identified. (ROA, p. 995). Nothing set forth by NISD in its exemption requires that A.A. abandon this belief or even hints that cutting of A.A.'s hair is required. As such, the exemption does not impose a significant burden on A.A.'s religious exercise.

The District Court, in pure speculation, supposes that it is "likely" that A.A. might be subject to teasing should he wear his hair in a braid tucked in his shirt. (ROA, p. 997). How a single braid would subject A.A. to more teasing than two braids is unexplained. How keeping his braid tucked into his collar rather than wearing it out is more likely to engender teasing is simply illogical. The District Court erred in refusing to acknowledge or consider the fact that A.A. has other options for complying with the grooming code that did not require the tucking of A.A.'s braid into his collar–options which Plaintiff refused. (ROA, pp. 985, 2215). In fact, the District Court ignored Plaintiff Arocha's testimony that there were no alternatives to complete freedom from regulation that Plaintiffs would accept. (ROA, p. 2217).

The District Court erred in reaching the conclusion that the exemption granted A.A. was "physically burdensome" and that it "forces him to choose between the generally available benefit of attending Needville public schools, or, on the other hand, following his religious beliefs." (ROA, p. 997). None of the options presented to A.A. would require him to cut his hair. The determination that the tucking in of the braid was, somehow, a substantial burden on A.A.'s free religious exercise because it might be physically uncomfortable does not consider A.A.'s other options for complying that do not require that his braid be tucked into his shirt collar. (ROA, p. 997). Even if the Court follows the logic of the District Court, any burden on A.A.'s free exercise would be limited only to the tucking in of the tail and this can be avoided all together in a number of ways. (ROA, pp. 746, 938, 2215).

C. The Trial Court Erred in Failing to Consider NISD's Proposed Remedies

Although NISD asserts that it adopted a remedy that was narrowly tailored to address any perceived burden to A.A.'s religious belief that his hair remain uncut, the District Court never addressed this remedy under the TRFRA and did not consider its merits. (ROA, pp. 746-747). Under §110.006 of the Texas Civil Practice & Remedies Code, a governmental entity such as NISD may escape TRFRA liability by adopting a remedy designed to "reasonably remove" the substantial burden on the

person's free exercise of religion.[30] The remedy must be narrowly tailored to remove the particular burden for which the remedy is implemented, but need not be the least restrictive means of furthering the governmental interest.[31] Prior to filing this lawsuit, NISD offered to allow A.A. to wear his hair uncut and in a bun in compliance with NISD's grooming code. (ROA, p. 2167). These proposed remedies, including the exemption, are narrowly tailored to address Plaintiffs' specific concerns as to the cutting of A.A.'s hair and even the District Court conceded that it "might be one means of achieving NISD's goals." (ROA, p. 1003). In addition, the record reflects testimony as to how regulation of A.A.'s hair style would forward NISD's stated goals, which are within the state's interest.[32] (ROA, pp. 428-430, 2058-2064, 2258-2260).

CONCLUSION AND PRAYER

Texas law is clear that the determination of educational policies are state matters that should be handled at the local level when not otherwise specified.[33]

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30 TEX. CIV. PRAC. & REM. CODE §110.006(c), (d), and (e).

31 *Id.*

32 *Karr v. Schmidt*, 460 F.2d 609, 616-17 (5th Cir. 1972); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 102 (5th Cir. 1982).

33 TEX. EDUC. CODE §11.151(B); *See also Williams v. Austin Indep. Sch. Dist.*, 796 F.Supp. 251, 255 (W.D. Tex. 1992).

(ROA, p. 866). In substituting its own judgment as to what constitutes the best way of achieving educational objectives for that of the locally elected school board, the District Court essentially hijacked NISD's legislatively afforded powers and duties thereby squelching its ability to regulate its population. (ROA, p. 867). In doing so, it overstepped its bounds.

Defendant NISD asks that the Court reverse the Trial Court's decision granting Plaintiffs a permanent injunction from NISD's application of its grooming code and/or exemption to Plaintiff A.A. In addition, NISD asks that this Court reverse the Trial Court's finding that NISD's grooming code and the exemption constitutes a violation of Plaintiff's Constitutional rights or the Texas Religious Freedom Restoration Act as the Court erred in not considering NISD's proposed remedy and holding NISD to a higher standard than the law requires.

Respectfully submitted,
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