No. 09-20091

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A.A., by and through his parents and legal guardians, MICHELLE BETENBAUGH 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 OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND ANTI-DEFAMATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF THE *AMICI CURIAE*[1]

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has served as a party, as counsel, or as an amicus curiae in scores of church-state cases before the United States Supreme Court, this Court, and other federal and state courts nationwide.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to

[1] Under Fifth Circuit Rule 29.1 and Federal Rule of Appellate Procedure 29(a), all parties to this action have consented to the filing of this amicus brief.

the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents.

Amici believe that their combined wealth of experience in cases involving the First Amendment's religion clauses and federal and state statutory protections for religious freedom will allow them to offer special insights into the issues presented by this case, thus helping ensure that the proper line is drawn between religious-accommodation claims that appropriately insulate individual belief and religious practice from unreasonable burdens imposed by the state, and claims that improperly seek to use the public schools to impose religious belief on others.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the important question whether a public school can enforce its grooming code in a manner that places in jeopardy both the right of parents to make choices about their young child's religious upbringing and the right of that child to exercise his sincerely held religious beliefs. We agree with Appellees and the district court that the Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE § 110.003, requires the Needville School District to grant A.A.'s requested exemption. Because the requested exemption properly negotiates the channel between Establishment and Free Exercise Clause requirements and does not unreasonably encroach on the School District's legitimate authority to run the schools or on other parents' and students' religious-freedom rights, the

TRFRA's mandate here is entirely appropriate. Whatever else the Constitution may also require, the TRFRA alone suffices to compel the conclusion that A.A is entitled to the requested exemption. Nothing more need be decided to affirm the district court's decision.

Under the TRFRA, "a government agency may not substantially burden a person's free exercise of religion" unless it "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). In this case, there is no doubt that the Needville Independent School District's grooming policy substantially burdens both A.A.'s right to the free exercise of his faith and the right of A.A.'s parents to direct his religious upbringing. By refusing to grant A.A. an exemption from its policy against long hair for boys, the School District effectively forces him and his parents to sacrifice their deeply held religious beliefs, or else to forgo public education entirely. Punishing a kindergartner or denying him access to the public schools for the simple, non-disruptive act of wearing long hair in accordance with his family's sincere religious beliefs is irreconcilable with basic principles of religious liberty. The State of Texas and the district court have both properly forbade that intrusion on freedom of conscience. This Court should do no less.

Appellees have fully addressed Needville's TRFRA argument in their brief, and thus there is no need for us to belabor the matter here. But in deciding the issue, this Court should be mindful of the limitations that the TRFRA embodies—an issue that does not receive much attention in the parties' briefs or the district court's opinion. Public-school boards have broad authority to control student education and school administration; and in all events, the Establishment Clause prohibits religious accommodations that may "devolve into an 'unlawful fostering of religion'" (*Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–35 (1987)). Thus, the TRFRA appropriately requires a careful balancing of those concerns against the important religious-freedom interests that it seeks to promote, ensuring that any religious accommodation it mandates is either constitutionally required or within the "play in the joints" (*Locke v. Davey*, 540 U.S. 712, 718-19, 728–29 (2004)) between the two Religion Clauses of the First Amendment. To that end, this Court should consider the following constitutional limitations on permissible religious accommodations when applying the TRFRA to determine whether a student is entitled to a requested religious exemption from a generally applicable school policy:

First, a religious exemption is not required if it would significantly interfere with the educational mission of the school. As numerous courts have recognized, a public school district's interest in directing the education of students generally

takes precedence when conflicts arise between secular educational-policy choices, on the one hand, and students' religious exercise or parents' rights to direct the religious upbringing of their children, on the other. *See, e.g.*, *Cornerstone Christian Sch. v. Univ. Interscholastic League*, 563 F.3d 127, 136 (5th Cir. 2009) (parents' fundamental right "in raising and educating their children . . . is not absolute," and does not extend to dictating "particular components of [a child's] education"). But at least where there is no such conflict, an exemption may be necessary.

Second, a religious exemption is not required if it would significantly interfere with the administration of the school. *See, e.g.*, *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001) (state has an interest in the "health, safety, and order of public schools"). The TRFRA does not mandate exemptions from generally applicable school policies if those exemptions would substantially impede, for example, a school district's implementing essential administrative programs, ensuring campus safety, or maintaining discipline.

Third, a religious exemption is not required (and may well be constitutionally forbidden) if it would burden important rights or interests of third parties. Exemptions that burden third parties raise substantial Establishment Clause concerns because they may cross the line between permissible accommodation of religion and unconstitutional religious coercion or endorsement by school officials. *See, e.g.*, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (no one has the

“‘right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities’”) (quoting *Otten v. Baltimore & Ohio R.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953)).

Together, these considerations lead the *amici*—organizations that are vigilant about safeguarding against potential infringements of the religious liberty and church-state separation guaranteed by the First Amendment—to conclude that the requested religious exemption to Needville’s grooming policy is both statutorily required and constitutionally permissible.[2] As applied to A.A., Needville’s grooming policy pressures the Arocha family either to betray a central tenet of their religion or to forgo A.A.’s receiving a public education. The requested exemption would remove this substantial burden on A.A.’s religious exercise and on his parents’ rights to determine his religious upbringing, without unduly interfering with the school district’s management of the curriculum or administration of the school, or with the rights of third parties. For these reasons, the opinion of the district court should be affirmed.

[2] Because A.A. is clearly entitled to the requested exemption under the TRFRA, this Court need not decide, and we do not address, whether the Free Exercise Clause itself would also mandate the exemption.

ARGUMENT

The Religious Exemption Requested By A.A. Is Statutorily Required and, at a Minimum, Constitutionally Permissible.

A. Exemptions from school policies that substantially burden a student's ability to exercise his or her religious beliefs must be granted in certain circumstances.

The Supreme Court has recognized that the state has a "high responsibility for [the] education of its citizens." *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Public school districts shoulder much of that responsibility. Therefore, their school boards have broad authority to direct the education of students and broad discretion in administering the schools. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities."). But that authority has important constitutional limitations. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (schools are constrained by "constitutional safeguards").

Most notably, the Supreme Court has emphasized that "the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982); *see also, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (same). In particular, the First Amendment's Religion Clauses impose two complementary duties on governmental entities such as Needville. The Establishment Clause re-

quires that schools maintain neutrality with regard to religion: Public-school officials may not "coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Neither may they tailor "teaching and learning . . . to the principles or prohibitions of any religious sect or dogma" (*Epperson*, 393 U.S. at 106), or "restructure the . . . curriculum to conform with a particular religious viewpoint" (*Edwards*, 482 U.S. at 593). Nor may a school endorse or act with the purpose or effect of advancing either any particular faith or religion in general. *See, e.g.*, *id.* at 605–606; *Agostini v. Felton*, 521 U.S. 203, 222 (1997).[3] The Free Exercise Clause, in turn, limits the authority of states to impede individuals' expression of their sincerely held religious beliefs.[4] *See, e.g.*, *Emp. Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881–82 (1990). The Free Speech Clause also limits the authority of school districts by protecting students' rights to express themselves, even in school, so long as their doing so is non-

[3] The Supreme Court has vigilantly enforced these bedrock principles by invalidating, for example, a school district's policy permitting student-led prayer over the loudspeaker at football games (*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000)), a school system's practice of inviting members of the clergy to offer prayers at graduation ceremonies (*Lee*, 505 U.S. at 599), and a state's requirement that students recite the Lord's prayer (*Sch. Dist. v. Schemmp*, 374 U.S. 203 (1963)).

[4] The fact that A.A. adheres to a minority rather than majority faith is of no consequence because the Free Exercise Clause protects religious beliefs from "contemporary society['s] . . . hydraulic insistence on conformity to majoritarian standards." *Yoder*, 406 U.S. at 217.

disruptive,[5] does not interfere with the efficient operation of the schools,[6] and does not create the risk of false attribution of the student's views to the school.[7]

In addition, school districts' authority is subject to statutory constraints, including the TRFRA. TEX. CIV. PRAC. & REM. CODE § 110.003(a), (b). Here, the TRFRA affords special statutory protections for religious freedom by limiting the extent to which governmental entities may burden religious exercise, even if the burdens are the result of neutral, generally applicable policies that are constitutionally permissible. The statute is triggered when, for example, a public official or entity "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs," "influences the adherent to act in a way that violates [those] beliefs," or "forces the adherent to choose between . . . enjoying some generally available, non-trivial benefit and . . . following

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[5] *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504, 513 (1969) (a school policy prohibiting students from wearing antiwar armbands violated the First Amendment, where the wearing of the armbands did not "materially and substantially disrupt the work and discipline of the school").

[6] *See Morse v. Frederick*, 551 U.S. 393 (2007) (a high-school principal could, consistent with the First Amendment, restrict student speech at a school-sanctioned event, where the principal reasonably believed that the speech conflicted with the school's anti-drug message).

[7] *See, e.g.*, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 279 (1988) (school teachers "do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities" when the student expression "interferes with the effectiveness of the school's pedagogical functions").

his religious beliefs." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (applying federal Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc, *et seq.*, which affords the same protections to inmates in federally funded facilities as the TRFRA grants in other contexts).

When policies impose burdens of those sorts on religious exercise, the TRFRA requires the state to demonstrate a compelling interest furthered by the policy in question. *See, e.g.*, *Barr v. City of Stinton*, No. 06-0074, 2009 WL 1712798, at *12 (Tex. June 19, 2009) (not yet released for publication) ("The government may regulate [religious exercise] in furtherance of a compelling interest."). And even where the state's interest is compelling, a religious exemption must still be granted if the challenged policy is not the "least restrictive means of furthering that interest." *Id.* at *3. In other words, the TRFRA subjects burdens on religious exercise to strict scrutiny, and in some instances mandates the granting of religious exemptions to even neutral, generally applicable policies when that test is not met.

B. Needville's refusal to grant the requested exemption violates the TRFRA.

There can be no doubt that Needville's grooming policy substantially burdens A.A.'s and his parents' religious freedom. The policy effectively requires A.A. to choose between practicing his faith by wearing his hair long and in braids, and thereby subjecting himself to punishment for violation of school rules, or cut-

ting (or totally hiding) his hair in order to remain in good standing at school. In placing A.A. in that untenable position, the policy also substantially interferes with his parents' ability to transmit their faith and its practice to their child while still complying with the state's compulsory-education laws. It thus "forces the adherent to choose between . . . enjoying some generally available, non-trivial benefit and . . . following his religious beliefs" (*Adkins*, 393 F.3d at 570), and it effectively criminalizes (whether through in-school punishment or under the truancy laws) the personal adherence to a religious tradition.[8]

Under the TRFRA, the substantial burden on A.A. and his parents outweighs any legitimate interest of the school in insisting on a rigid application of its grooming policy. Because A.A.'s requested exemption would not interfere substantially with the school's educational mission or administrative functioning, and would not impose burdens on the important rights or interests of other students and parents, the school district was statutorily required to grant the requested exemption.

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[8] Although Needville eventually offered to let A.A. wear his hair in a bun, or to tuck a single braid under his shirt (*see* Appellant's Br. at 3, 6), his religious exercise includes openly wearing the braids, in just the same way as, for example, the wearing of a yarmulke by an orthodox Jew is an exercise of the Jewish faith. As Appellees explain, many Native Americans wear their hair long and in braids in the belief that doing so openly is "an expression of their spirituality." ROA 2046: 20–22. And A.A.'s father wears his hair long and braided because "each braid has a deep [religious] meaning" that must be expressed by wearing the braids "in plain sight." ROA 2167: 20–22. A.A.'s parents transmitted these beliefs to A.A., in accordance with their right as parents to direct their son's religious upbringing, *see Lee*, 505 U.S. at 643; and A.A. in turn wears his hair long and in braids in order to adhere to the tenets of his family's faith. ROA 2149: 5–7; ROA 2154: 3–4.

1. *A religious exemption for A.A. would not significantly interfere with the school district's interest in directing the education of its students.*

Nothing about A.A.'s requested religious exemption from Needville's grooming policy would interfere with the school district's right to direct the education of its students. Quite the contrary: A.A. asks for no change to the curriculum, the school schedule, or anything else. He seeks only to depart modestly, and non-diruptively, from the school's grooming code for boys.

In balancing the interests of students in exercising their faiths against the interest of public school districts in educating students, courts have uniformly concluded that choices regarding what and how to teach are "uniquely committed to the discretion of local school authorities." *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998); *see also*, *e.g.*, *Leebaert v. Harrington*, 332 F.3d 134, 142 (2d Cir. 2003) (fundamental right to control the upbringing of one's child does not include "the right to tell public schools what to teach or what not to teach"). Moreover, the Supreme Court has made clear that this discretion is broad, and extends, for example, to the teaching of "fundamental values . . . essential to a democratic society, . . . includ[ing] tolerance of divergent political [values] and religious views." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

For that reason, the public schools are not required, for example, to rewrite their curriculum to shield students from ideas that may conflict with the students'

religious views, so long as the curriculum itself is secular and is designed to promote secular pedagogical interests; nor are schools required to design and implement individualized, alternative curricula for students with religious objections to the official curriculum.[9] Indeed, not only is there no right of parents or students to insist on a curriculum tailored to their religious beliefs, but a public school district

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[9] As the Sixth Circuit recognized, governmental actions that "merely require or result in exposure to attitudes and outlooks at odds with perspectives prompted by religion" do not amount to constitutionally cognizable burdens on the exercise of religion. *Mozert v. Hawkins County Bd. of Educ*., 827 F.2d 1058, 1068 (6th Cir. 1987) (internal quotation marks omitted); *see id*. at 680 (the Free Exercise Clause "does not afford an individual the right to dictate the conduct of [a school district's] internal procedures," such as setting school curriculum); *see also, e.g*., *Parker v. Hurley*, 514 F.3d 87, 100 (1st Cir. 2008) (exposure to religiously objectionable materials did not impermissibly coerce or compel students to modify their religious beliefs), *cert. denied*, 129 S. Ct. 56 (2008); *Wright v. Houston Indep. Sch. Dist*., 366 F. Supp. 1208, 1212–13 (S.D. Tex. 1972) (exposure to evolution did not inhibit students' free exercise of religion), *aff'd per curiam* 486 F.2d 137 (5th Cir. 1973). Thus, for example, schools are not required under the Free Exercise Clause to grant religious exemptions from assigned readings that promote respect towards homosexual couples, *Parker*, 514 F.3d at 102, from attending an AIDS-awareness assembly, *Brown v. Hot, Sexy & Safer Prods., Inc*., 68 F.3d 525, 539 (1st Cir. 1995), from participating in a school district's reading program, *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 683 (7th Cir. 1994), from reading texts chosen by the school district, *Mozert*, 827 F.2d at 1063–65, or from taking a mandatory health class, *Leebaert*, 332 F.3d at 142.

Whether or to what extent the TRFRA might afford curricular opt-out rights unavailable under the Free Exercise Clause is a question not presented here—and one that may implicate complicated issues regarding the interplay of the First Amendment's religion clauses and the space between them for permissible religious accommodation by the state. This case deals only with the application of a school's dress code for boys' hair, and hence does not touch on the curriculum or program of in-class instruction that the school district has seen fit to implement.

that did so tailor its educational program would run afoul of the Establishment Clause. *See, e.g.*, *Epperson*, 393 U.S. at 106 (Establishment Clause prohibits the state from tailoring "teaching and learning" to the principles of any given religion).[10] The TRFRA does not and cannot alter those straightforward constitutional rules; and hence, there is no need to worry that applying the TRFRA in cases such as this one would strip school boards, administrators, or teachers of their lawful authority to set the curriculum and operate the schools.

In fact, the exemption that A.A. requests here would in no way interfere with any important educational interests. The Arochas do not ask for any change in lessons or course materials—or even seek to exempt A.A. from any aspect of the curriculum. *Cf.* n.9, *supra*. The requested exemption thus does not interfere in the slightest with Needville's core mission to educate students, nor does it limit the school district's authority to determine how best to pursue that mission.

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[10] Accordingly, courts have upheld, for example, a school's refusal to grant a mother's request to read the Bible to her son's kindergarten class, *see Busch v. Marple Newton Sch. Dist.*, 567 F.3d 89 (3d Cir. 2009), as well as a school's refusal to grant a requested accommodation of students' religious beliefs in the form of a requirement that all theories regarding human origins be given equal time in biology class, *see Wright*, 366 F. Supp. at 1211. Had the schools done otherwise, they would have faced substantial risks of liability under the Establishment Clause. *See, generally, e.g.*, *Mozert*, 827 F.3d at 1064 (a school district may not, consistent with the Estab-lishment Clause, adjust its curriculum "with the purpose or primary effect of ad-vancing or inhibiting religion").

2. *A religious exemption for A.A. would not significantly interfere with the administrative functioning of the school.*

A.A.'s request for an exemption also would not significantly interfere with the administrative functioning of the school. As the Supreme Court has made clear, schools "need to maintain an environment in which learning can take place." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). Courts have therefore recognized that states have important interests in effective and efficient administration of the public schools. *See, e.g.*, *id.* at 339 (emphasizing schools' "substantial interest . . . in maintaining discipline in the classroom and on school grounds").[11] Under statutory schemes like the TRFRA, however, the interest of a school district in efficient and effective administration cannot justify refusing to provide exemptions for religious beliefs where affording an accommodation would have no significant effect on the running of the school.

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[11] Thus, the First Amendment would not require exemptions from school policies when they would significantly interfere with essential administrative initiatives, such as health related programs (*see, e.g.*, *Boone v. Boozman*, 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) ("the right to free exercise of religion and parental rights [is] subordinated to society's interest in protecting against the spread of disease" through a compulsory vaccination program for school children)); campus safety (*see, e.g.*, *Morse*, 551 U.S. at 393 (Alito, J., concurring) ("[D]ue to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence.")); or discipline (*Jensen v. Reeves*, 45 F. Supp. 2d 1265, 1268 (D. Utah 1999) (free-exercise rights in combination with parents' due-process rights do not outweigh the school's important interests in disciplining students who, for instance, punched, kicked, pushed, used nasty language towards, and otherwise harassed other students), *aff'd*, 3 F. App'x 905 (10th Cir. 2001)).

In *Cheema v. Thompson*, for example, the Ninth Circuit considered whether the federal Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, required a school district to grant an exemption from a rule banning weapons in school, where the Khalsa Sihk religion required some students to carry ceremonial knives at all times. 67 F.3d 883, 885 (9th Cir. 1995), *overruled on other grounds by City of Boerne*, 521 U.S. at 507 (holding that RFRA exceeded Congress's enforcement powers under § 5 of the Fourteenth Amendment, and thus was unconstitutional as enforced against states). Although safety concerns in the public schools are paramount, the court nonetheless held that the defendant school district was required to provide an accommodation permitting students to carry dull knives sewn in place under their clothes because an outright ban on weapons was not the "least restrictive means" to ensure student safety. *Id.* at 887. Similarly, the United States District Court for the Southern District of Texas held that a school was required to grant Catholic students an exemption from a dress code that prohibited gang-related apparel, including rosaries (which were being used as gang symbols). *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 671 (S.D. Tex. 1997). The court pointed out that "a number of more effective means [were] available to [the school district], other than a blanket ban on wearing rosaries, to control gang activity and ensure the safety of its schools." *Id.* The court also noted that the school's interest in ensuring safety was not particu-

larly strong where the record revealed "only three instances of alleged gang members wearing rosaries as gang identifiers, with only one of those incidents occurring on campus." *Id.*

Here, A.A.'s requested exemption is far less intrusive on the administration of Needville's schools than were the polices at issue in *Cheema* and *Chalifoux*. *Cf. Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (to be constitutionally permissible, a statutory religious "accommodation must be measured so that it does not override other significant interests"). Needville broadly claims that its grooming policy is supported by the goals of "teaching hygiene, instilling discipline, preventing disruption, avoiding safety hazards, and asserting authority." Appellant's Br. at 19. But Needville has presented no substantial evidence that these interests are even advanced by the grooming policy, much less that they are compelling or that the policy is narrowly tailored to achieve them; Needville simply argues that its policy is one means of furthering these purported interests. *Id.* Indeed, the school district made no showing whatsoever of any genuine health or safety concern relating to long hair. Nor could it: Needville permits girls to wear their hair long and in exposed braids, so any claim that long, braided hair is *per se* dangerous or unhygienic is facially inconsistent with the grooming policy itself—thus supporting the inference that the school district's argument is merely a pretext, and that the real moti-

vation for denying A.A.'s request is rank religious animus.[12] In any event, concerns such as those regarding hygiene could be satisfied by less restrictive alternatives, such as requiring *all* students to keep their hair clean and tidy. That fact alone compels the conclusion that the grooming policy, as applied, violates the TRFRA.

3. A religious exemption for A.A. does not impose burdens on important rights or interests of third parties.

Finally, granting A.A.'s requested exemption also creates no Establishment Clause problems because it imposes no burdens on the rights or interests of third parties.

The Supreme Court has made clear that an accommodation that substantially burdens third parties cannot withstand constitutional scrutiny. *See, e.g.*, *Cutter*, 544 U.S. at 720 (noting that "courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries"). In fact, the Supreme Court has held that "[t]he First Amendment . . . gives no one the right to insist that in pursuit of [his] own interests others must conform their conduct to his own religious necessities." *Estate of Thornton*, 472 U.S. at 710 (internal quotation marks omitted). Thus, a state has the greatest latitude to accommodate religious practice

[12] Although Needville stated in the district court that A.A.'s long hair caused disruption because he was confused for a girl (once by a student and once by a parent), those isolated incidents do not reveal any measure of significant disruption—and certainly no more than would result from, say, a girl's being confused for a boy if, consistent with the grooming policy, the girl chose to wear short hair.

where, as in the case of the TRFRA, any accommodation would merely lift substantial, government-imposed burdens, without imposing burdens on third parties. *Cf., e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985) (recognizing a significant difference between "merely protecting every student's right to engage in voluntary prayer" and a legislative attempt to mandate prayer in public schools).

Permitting A.A. to express his faith by wearing his hair in braids will not adversely affect other students, teachers, or school administrators in any meaningful way. The proposed exemption neither demands nor requests that others change their hairstyle—or anything else. Nor are there any special costs or other burdens that anyone else must bear. Any physical discomfort or other possible burden associated with A.A.'s wearing long, braided hair falls solely on A.A. or his parents. And there is no infringement of others' religious beliefs in granting the exemption. The exemption is therefore similar to those that have routinely been deemed constitutionally permissible, and in some instances required, by the Supreme Court and by courts within this circuit—including, for example, exemptions allowing Catholic students to wear a rosary (*Chalifoux*, 976 F. Supp. at 663), or to take an excused religious holiday (*Church of God (Worldwide, Tex. Region) v. Amarillo Indep. Sch. Dist.*, 511 F. Supp. 613, 617-18 (N.D. Tex. 1981), *aff'd*, 670 F.2d 46 (5th Cir. 1982) (per curiam)), as well as constitutionally mandated exemptions from participating in a flag-salute ceremony (*W. Va. State Bd. of Educ. v. Barnette*,

319 U.S. 624, 630 (1943) (noting that "[t]he freedom asserted by these [students] does not bring them into collision with rights asserted by any other individual")).

In short, granting the requested exemption would have little, if any, impact on others. But allowing the school to refuse to grant the exemption would have a profoundly deleterious effect on A.A.'s ability to comply with a central tenet of his family's religion. Accordingly, the TRFRA appropriately mandates that the exemption be granted, and there is no constitutional bar to that statutory requirement.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify on this 25th day of June, 2009, that the accompanying brief of Amici Curiae 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 5,114 words and 438 lines, excluding the table of contents, the table of authorities, certificate of interested parties, certificate of compliance, and certificate of service. 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.

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