UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

CORPUS CHRISTI DIVISION

BELEN GONZALES, *et al.*, Plaintiffs, v. MATHIS INDEPENDENT SCHOOL DISTRICT, Defendant.	§ § § § § § § § § § § § §	CIVIL ACTION NO. 2:18-CV-00043

PLAINTIFFS' MOTION FOR ENTRY OF PRELIMINARY INJUNCTION

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PLAINTIFFS' MOTION FOR ENTRY OF PRELIMINARY INJUNCTION

Plaintiffs C.G. and D.G., by and with their parents Belen Gonzales and Pedro Gonzales, Jr. (collectively "Plaintiffs") file this Motion for Entry of Preliminary Injunction:

INTRODUCTION

Only a few months after his birth, C.G. contracted bacterial meningitis. With their first child's life in jeopardy, his parents—Pedro and Belen Gonzales—gathered their extended family in prayer about how they could help their baby boy. Pedro, remembering his own mother's *promesa* (a vow or ritual promise with God) on his behalf, suggested they make a *promesa* on C.G.'s behalf. Belen prayerfully agreed. They vowed to God that if He would bless their son with health and strength to overcome his illness, they would leave a lock of his hair uncut as an expression of their faith in and commitment to God, and their gratitude for His blessings and mercy in the recovery of their child. After making this *promesa*, C.G.'s health improved. In the almost

fifteen years since, C.G. has confronted numerous additional health challenges, but the Gonzales family has continued to overcome these challenges by placing their faith in God and honoring their commitment to Him by leaving a single lock of his hair on the back of his head uncut.

During C.G.'s illness, the Gonzales family learned they were expecting their second son, D.G. Due to the time required of Belen to care for C.G., and Pedro's frequent absences working as a truck driver, they feared they would not be able to handle another difficult pregnancy. Again, Pedro and Belen prayerfully decided to make a *promesa*, this time on D.G.'s behalf. They vowed to God that if He would bless their son with health and strength and a trouble-free pregnancy, they would similarly leave a lock of D.G.'s hair uncut. D.G. was brought to term without issue, and the Gonzales family welcomed a second, healthy baby boy into the world. As with C.G., the Gonzales family left a single lock of D.G.'s hair uncut since birth as an outward expression of their inner commitment to God and their gratitude for God's blessings. As the boys matured, Pedro and Belen allowed them to choose for themselves whether to continue to abide by this *promesa* with God. Both boys have chosen to maintain this *promesa* and have made it their own.

Since kindergarten, the Gonzales family has secured exemptions from the Mathis Independent School District's (MISD) grooming policy so that C.G. and D.G. could attend school without having to cut their hair in violation of their *promesa* with God. To protect the uncut lock of hair as respect for their *promesa* and to avoid drawing attention as much as possible, the boys adopted the practice of braiding the lock of hair and tucking it into the back of their shirts, making it virtually unnoticeable. Suddenly, however, after C.G. received his football helmet along with the rest of the middle school football team, the helmet was taken back and he was told that he could not participate on the team unless he cut his religious braid. The school district later called D.G. out of an after-school meeting for the school's science team to hand him a letter informing

him that he could no longer participate because of his religious braid. MISD took the position that although the boys could attend school, it would no longer allow them to participate in any extracurricular activities as part of the University Interscholastic League ("UIL")—which encompasses virtually all inter-school competitions and activities—unless and until the boys complied with the district's grooming policy and cut their religious braids.

In doing so, MISD has conditioned a generally available, valuable benefit and privilege on the boys ceasing sincere, lifelong religious conduct. The school district has singled-out the boys in front of their peers and labeled their religious conduct unacceptable behavior unbecoming of a representative of the school district. MISD exerts real and significant pressure on these children to modify their religious conduct and violate their religious beliefs by imposing consequences normally reserved as punishment, thereby substantially burdening the boys' free exercise of religion in violation of the Texas Religious Freedom and Restoration Act (TRFRA).

Preliminary injunctive relief is particularly warranted—as soon as possible—given the high likelihood of success on the merits. There can be no question about the sincerity of the religious practice at issue here, particularly in light of the long history of commitment to their *promesa*. Nor is there any genuine question that MISD substantially burdens religious practice by denying the boys the generally available privilege of participating in high school extracurricular activities, benefits that are far from trivial. MISD itself states that it desires that through extracurriculars "our students realize that they can determine the course of their own lives," and MISD believes that extracurriculars "can help our students grow into mature, responsible citizens that contribute to our society." Exh. 1-O (MISD Extra-Curricular Handbook 2019/2020) at 3. It is no hyperbole to note that high school activities, like football and the science team in which these boys wish to participate, offer invaluable lessons and memories that nothing could replace.

The boys' high likelihood of success on the merits is underscored by MISD's inability to articulate a compelling interest—despite multiple opportunities—to ban the boys from participating in extracurriculars unless they violate their *promesa* with God. The only interests MISD has suggested are (1) maintaining the community standards of discipline and conservative grooming in the students who represent the school district in interscholastic activities; and (2) an unjustified fear that providing an exemption for these students will open a Pandora's Box of exemption requests that will paralyze the school district. The Fifth Circuit and the United States Supreme Court, however, have rejected these same alleged interests as a matter of law in similar cases.

With each passing week that MISD denies the valuable benefit of participating in extracurricular activities due to their religious conduct, C.G. and D.G. suffer irreparable harm. These boys will never be able to re-create this freshman year of high school. Conversely, MISD will suffer no damage if required to cease denying this privilege, and public policy supports ensuring the free exercise of religion during the pendency of litigation. Therefore, this Court should enter a preliminary injunction enjoining MISD from prohibiting the boys' participation in extracurricular activities as soon as possible.

I. STATEMENT OF FACTS

A. *Promesas* can play an integral role in the Roman Catholic faith.

The Roman Catholic Church instructs that believers are often "called to make promises to God" "out of personal devotion". The Church recognizes "an exemplary value" in making such promises or vows out of "respect . . . and out of love for a faithful God":

> 2101 In many circumstances, the Christian is called to make promises to God. . . . Out of personal devotion, the Christian may also promise to God this action, that prayer, this alms-giving, that pilgrimage, and so forth. Fidelity to promises made to God is a sign of the respect owed to the divine majesty and out of love for a faithful God.

> 2102 A vow is a deliberate and free promise made to God concerning a possible and better good which must be fulfilled by reason of the virtue of religion. A vow is an act of devotion in which the Christian dedicates himself to God or promises him some good work. By fulfilling his vows he renders to God what has been promised and consecrated to Him. The Acts of the Apostles shows us St. Paul concerned to fulfill the vows he had made.
>
> 2103 The Church recognizes an exemplary value in the vows to practice the evangelical counsels.[1]

Thus, promises to God are embedded in the Catholic faith as freely made, sacred commitments to God whereby a believer vows to fulfill "what has been promised and consecrated to Him." *Id*.

For Catholics of Hispanic descent, this religious practice is often expressed in the making and keeping of *promesas*.[2] A *promesa* "has two basic elements: the petition of a favor and the *manda* or vow that is the fulfillment of stipulations accompanying the vow."[3] These sacred *promesas* may be "made with a saint, the Virgin Mary, or God." Exh. 1-B (*Celebrating Latino Folklore*) at 764. They may be made at home at the family altar or at a church or shrine of a patron saint.[4] The *promesa* serves to both remind and strengthen the promisor to rely on God in whatever situation it was made.[5] "*Promesas* are specially important for people in cases of sickness when a doctor says *'que no tiene remedio'* (there is no medical cure)."[6]

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1 Exh. 1-A, Catholic Church, "Part Three: Life in Christ: Him Only Shall You Serve," *Catechism of the Catholic Church*, 2nd ed. Vatican: Libreria Editrice Vaticana, 2012 (internal citations omitted).

2 *See* Exh. 1-B, *Celebrating Latino Folklore: An Encyclopedia of Cultural Traditions*, at 764 (María Herrera-Sobek, ed., 2012) (explaining that *promesas* are a "sacred ritual most likely emanate[ing] from a combination of Indigenous and Catholic practices as the two religions blended together").

3 Exh. 1-C, Eduardo C. Fernández, *Mexican-American Catholics* 183 (Paulist Press 2007); *see also* Exh. 1-D, Sr. Rosa Maria Icaza, C.C.V.I., *Faith Expressions of the Hispanics in the Southwest* 39–40 (3d. Ed. 2003) (herein "*Faith Expressions*").

4 *See* Exh. 1-E, Victor García & Laura Gonzalez. "Juramentos and Mandas: Traditional Catholic Practices and Substance Abuse in Mexican Communities of Southeastern Pennsylvania." *NAPA Bull.*, 9–10 (May 2009) (herein "Juramentos and Mandas").

5 *See id.* at 7–13 (discussing studies on the significance of *juramentos*, a specific type of *promesa* made by individuals suffering from substance abuse, in overcoming addiction).

6 Exh. 1-D (*Faith Expressions*) at 39–40.

The second part of a *promesa* is the *manda*—the specific vow "to perform a personal sacrifice or an act of charity to demonstrate gratitude for divine intervention and assistance." *Id.* at 9. Because *mandas* are personal, they take different forms including, "giv[ing] up a certain food or beverage, mak[ing] a gift to the church, visit[ing] or organiz[ing] a pilgrimage to the shrine of the saint who was instrumental in the miracle,"[7] "going on one's knees, *de rodillas* up to the altar of a chosen church or shrine,"[8] or not cutting one's hair for the rest of one's life.[9] Failing to fulfill one's vow in the *promesa* is often considered a sin, "a form of lying, something that is not permitted, especially to Almighty God."[10]

A. C.G. and D.G. adopted and continue to carry out the religious *promesa* made on their behalf since infancy.

C.G. and D.G.'s parents, Pedro and Belen Gonzales, are members of the Roman Catholic Church and both grew up in religious homes in Texas. Pedro Decl. at 3; Belen Decl. at 3. They met at Mathis High School, married young, and together now raise their three boys. Pedro Decl. at 4; Belen Decl. at 4. With their firstborn son, C.G., Belen struggled through a precarious pregnancy that ended in an emergency C-Section. Belen Decl. at 5. C.G. arrived premature and with a number of health complications that involved frequent, often weekly, visits to the hospital. *Id.* Newly married—and now new parents—both Pedro and Belen relied on their faith to sustain them. Pedro Decl. at 5; Belen Decl. at 5.

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7 Exh. 1-E (Juramentos and Mandas) at 10.

8 Exh. 1-D (*Faith Expressions*) at 39–40; *see also* Exh. 1-E (Juramentos and Mandas) at 9.

9 Exh. 1-F, Wade Clark Roof, *Contemporary American Religion*, Latino Traditions at 386 (Macmillan Reference USA 2000).

10 Exh. 1-B (*Celebrating Latino Folklore*) at 765 ("Requesting divine intervention from the powers above is a very sacred and religious matter. It is obligatory to fulfill *la manda* or risk punishment from God for making a promise but not fulfilling it.").

C.G.'s health continued to deteriorate, and at about six months old, he became critically ill and was admitted to the hospital. Pedro Decl. at 6; Belen Decl. at 6. The Gonzales family soon learned that C.G. was suffering from bacterial meningitis, and his recovery was uncertain. Pedro Decl. at 6; Belen Decl. at 6. Fearing for C.G.'s life, Pedro and Belen gathered their extended family in prayer about how they could help their baby boy. Around this same time, they also learned Belen was pregnant with their second child, D.G. Pedro Decl. at 7; Belen Decl. at 7. Belen feared that if her pregnancy with D.G. was as difficult as C.G.'s had been, she would be unable to care for C.G. in the way his poor health demanded. Belen Decl. at 7. Pedro worked long hours as a truck driver and was often away for extended periods. *Id.*; Pedro Decl. at 7. Believing that if they put C.G. and Belen's pregnancy with D.G. into God's hands that he would faithfully watch over him and their family, Pedro suggested they make a family *promesa* to God. Pedro Decl. at 8; Belen Decl. at 8.

Pedro was raised in a Catholic home, and when his mother was pregnant with him, she struggled with complications, similar to Belen's pregnancy with C.G. Pedro Decl. at 9. Consequently, Pedro's mother made a *promesa* to the Lady of San Juan del Valle[11] in San Juan, Texas and promised that if Pedro was born well, she would carry him on her knees from the

[11] "The shrine of ***La Virgen de San Juan del Valle***, in San Juan, Texas, is one of the most popular centers of pilgrimage in the country." Exh. 1-D (*Faith Expressions*) at 39. The devotion to Our Lady of San Juan del Valle originated in San Juan de Los Lagos, Mexico, a town founded near Guadalajara, Mexico. *See* Exh. 1-G, Basilica of Our Lady of San Juan del Valle National Shrine, *History—Basilica of Our Lady of San Juan Del Valle-National Shrine*, brochure, *available at* https://www.olsjbasilica.org/about-us/history, at 2. In 1623, so the story goes, an acrobat traveling with his wife and children stopped in San Juan de Los Lagos to give a performance. *Id.* While practicing their act, the youngest daughter lost her balance and was killed. *Id.* The caretaker of the church begged the parents to place the image of the Virgin Mary from the church in San Juan de Los Lagos over their daughter's body and prayed for the Virgin's intercession. *Id.* The child was brought back to life, and people throughout Mexico as well as the United States have venerated Our Lady, under the title of "La Virgen de San Juan." *Id.* In 1949, Reverend Jose Maria Azpiazu, O.M.I., pastor of the St. John Baptist in San Juan, Texas commissioned an artist in Guadalajara, Mexico to make a reproduction of the statue venerated in San Juan de Los Lagos. *Id.* He placed the statue in the San Juan chapel. *Id.* "[M]igrant workers, especially from Texas have a deep devotion to ***La Virgen de San Juan***, and her shrine is generally visited at the beginning and end of the migrant seasons." Exh. 1-D (*Faith Expressions*) at 39. It averages more than one million visitors a year. Exh. 1-G (*History—Our Lady of San Juan del Valle*) at 2.

basilica's parking lot to the altar. *Id*. Pedro overcame his health issues, and his mother fulfilled her *promesa*. *Id*. Afterwards and throughout her life, she made additional *promesas* as a part of her expression of faith and religious belief. *Id*.

After prayerful consideration, Pedro and Belen chose to make their own *promesa* with God. Pedro Decl. at 10; Belen Decl. at 9. Instead of carrying the children on their knees to the altar, because C.G. was born with long, thick hair, if God would bless their boys with health and strength, they vowed not to cut a strand of hair on the back of their boys' heads as an expression of their faith in and gratitude for God's protection over their children. Pedro Decl. at 10; Belen Decl. at 9.[12] In making the *promesa*, Pedro and his father met with Monsignor Gustavo Barrera, the Pastor at Our Lady of Sorrows Catholic Church in McAllen, Texas. Pedro Decl. at 11.

After making this *promesa*, C.G.'s health improved, and D.G. was carried to term without complication and born a healthy baby boy. Pedro Decl. at 12; Belen Decl. at 10. Since that time, C.G. has confronted numerous additional health challenges, including asthma, sleep apnea, and dyslexia. Belen Decl. at 11. The Gonzales family, however, has continued to overcome these challenges by continuing to keep their *promesa* as an expression of their sincerely held faith and trust in God's provision. *Id.*; Pedro Decl. at 12.[13]

Once the boys reached sixth grade, Pedro and Belen sat them down to explain the history of the *promesa*, why they had made it, and importantly, to make clear that it was now the boys' decision whether to keep the *promesa* for themselves individually. Pedro Decl. at 13; Belen Decl. at 12. In the privacy of their own room, the boys discussed the *promesa* between themselves and, independent from their parents, decided to adopt the *promesa* as their own affirmation of faith and

[12] *See also* Exh. 1-H (B. Gonzales Dep.) at 12:17-19 (explaining decision to keep a long strand of hair uncut).

[13] *See also* Exh. 1-I **(**P. Gonzales Dep.) at 35:23-24 (Q: "And it's never been trimmed at all?" / A: "No, sir.").

heritage. Pedro Decl. at 14; Belen Decl. at 13.[14] Since then, the boys have continued to maintain the single religious braid down their backs in fulfillment of their *promesa*. *Id*. Cutting their braids would sever their solemn commitment to God and in their view result in divine punishment. Exh. 1-J (C.G. Dep.) at 21:15-16 (breaking a promise will disappoint Jesus).

B. MISD maintains a hair grooming policy consistent with conservative community standards for aesthetic homogeneity.

Mathis Independent School District (MISD) is an independent school district based in Mathis, Texas, a city in San Patricio County, Texas. MISD includes Mathis Elementary School, Mathis Intermediate School, Mathis Middle School, and Mathis High School. All students who attend school in MISD must adhere to the rules and regulations contained within its Student Handbook. This code of conduct includes a grooming policy, which requires that all males' hair "must be cut as not to touch the eyebrows in front or extend beyond the top of the collar of a standard shirt in back." Exh. 1-L (Student Handbook) at 47. MISD has stated that the basis for the grooming policy is to maintain the conservative community standards of good grooming and hygiene. Exh. 1-M (Superintendent Hernandez Dep.) at 42:21-25; *see also* Exh. 1-N (Ricardo Cortez, Jr. Dep.) at 23:8-11 ("To me, it's just been a community standard, the way it's been—it's always been.").

MISD also maintains a handbook governing participation in extracurricular activities.[15] This handbook contains additional requirements for student participation in MISD extracurricular

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[14] Exh. 1-J (C.G. Dep.) at 16:13-16 (stating the *promesa* is part of his Catholic faith); Exh. 1-K (D.G. Dep.) at 16:7-21 (stating the braid represents his faith in God).

[15] The Extracurricular Handbook defines extracurricular activity as including any of the following: "Any University Interscholastic League (UIL), School District, or campus-sponsored or related public performances, events, contests, demonstrations, displays, club activities, athletics, whether on- or off-campus; any elected offices and honors (such as student counsel and homecoming queen); all co-curricular activities, which are those held in conjunction with a credit-bearing class, but that may take place outside of school and outside of the school day (such as band and choir); all national organizations (such as National Honor Society or Future Farmers of

activities, such as maintaining an average of 70 percent or better in all academic courses, maintaining a 95 percent school attendance rate, and complying with University Interscholastic League rules, including those related to random steroid testing, if applicable. The MISD extracurricular handbook, however, also incorporates the same grooming policy from the school's Student Handbook. Exh. 1-O (Extracurricular Handbook) at 12. MISD has maintained that the grooming policy is required to participate in extracurricular activities because the school wants to ensure students are good representatives of community standards. Exh. 1-P (Angie Trejo Dep.) at 28:14-17 ("When we send our students out [in the community] and represent Mathis ISD we hold our students to a higher level of what we expect from them."); *see also* Exh. 1-O (Extracurricular Handbook) at 12 ("[Students'] appearance should at all times reflect class and pride in yourself and in our extra-curricular programs.").

The University Interscholastic League (UIL) was created by The University of Texas at Austin to provide leadership and guidance to public school debate and athletic teachers.[16] It is the largest organization of its kind in the world, and it creates rules for and administers almost all athletic, musical, and academic contests for public primary and secondary schools in the state of Texas.[17] "It is the mission of the University Interscholastic League to continue a focus on the educational aspects of contests and on the positive benefits to Texas public school students."[18]

America); and any activity held in conjunction with another activity that is considered to be an extracurricular activity (such as a meeting, practice, or fundraiser)." Exh. 1-O (Extracurricular Handbook) at 3.

[16] Exh. 1-Q, 110th Edition of the Constitution and Contest Rules of the University Interscholastic League (2019/2020), pp. 17 (Introduction).

[17] *Id.*

[18] *Id.*; *see also id.* at 9 (Message from the Chair of the Legislative Counsel) ("As someone who has witnessed countless student competitions on the court, the field, the stage and in the stands—I know how vital the UIL experience is to the advancement of our young people. Healthy competition provides numerous opportunities for self-expression and growth while also laying the foundation of fundamental skills such as teamwork, leadership and the importance of perseverance. I believe the classroom atmosphere is only enhanced when students can engage in the activities that they truly enjoy."); *id.* at 10 (Message from the President of The University of Texas at Austin) ("Through extra-curricular competition—whether academic, artistic, or athletic—you immerse

UIL activities include such varied competitions as Art, Band (Concert Performance), Chess Puzzle, Choir (Concert Performance), Computer Science, Congress, Creative Writing, Debate, Film, Football, Golf, Latino History Essay Competition, Mathematics, Marching Band, Mariachi Festival, Science, Social Studies, Spelling, Storytelling, Tennis, and Track and Field.[19] Although UIL has established eligibility requirements for participation, it does not maintain a grooming policy from which the boys require an exemption to participate.[20]

MISD expressly promotes student involvement in its extracurricular activities because they "promote self-discipline, responsibility, leadership, teamwork, self-confidence, commitment, and student wellness . . . enhance and enrich curricular educational offerings . . . offer participants the opportunity to be leaders and role models on campus and in the community . . . [and] enable participants to represent the School District in a positive manner." Exh. 1-O (Extracurricular Handbook) at 3.

C. MISD has granted religious exemptions to the boys to allow school attendance since kindergarten.

In 2009, before the boys attended kindergarten, Belen Gonzales sought a religious exemption from the MISD grooming policy for her boys. Belen Decl. at 15.[21] At the school's request, Belen provided the Mathis Elementary School principal and MISD superintendent with a

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yourself in experiences that instill the principles of teamwork and fair play, you develop respect for both yourself and your opponent, and you earn the satisfaction of setting goals for yourself and working hard toward achieving them. . . . My advice is to enjoy and experience each to its fullest—including the wonderful moments and memories your UIL competition will provide."); *id.* at 11 (Statement of Purpose) (describing the many opportunities the UIL believes are afforded students through participation in its activities); *id.* at Section 2, p. 19 (Objectives of the UIL) ("The objectives of the UIL are: (a) to enhance students' educational experience; (b) to prepare them for citizenship by providing interschool competition among the public elementary and secondary schools of Texas . . . .").

[19] *Id.* at Section 380, pp. 53–54.

[20] *See id.* at Section 400, p. 54.

[21] *See also* Exh. 1-H (B. Gonzales Dep.) at 18:9-15 (describing her effort to inform MISD of the boys' situation when first starting pre-kindergarten and kindergarten).

letter verifying the boys' *promesa* from Monsignor Gustavo Barrera, the priest with whom Pedro had consulted in making the *promesa*. *Id*. at 16; Pedro Decl. at 16; Exh. 2-A (Msgr. Barrera August 24, 2009 Letter). [22] Subsequently, MISD allowed the boys to enroll and participate in all school activities without restriction. To protect their religious braids and to avoid drawing undue attention, the boys adopted the practice of tucking their religious braids into the back of their shirts, making them barely noticeable. Belen Decl. at 18; Pedro Decl. at 18.

MISD has reopened the issue of the boys' hair on at least three subsequent occasions. Belen Decl. at 19. A couple of years after receiving the exemption, the Mathis Elementary School's assistant principal was promoted to principal, and requested a meeting with Pedro and Belen Gonzales. *Id*. Despite having had the letter from Monsignor Berrera in the boys' permanent records for years, and having been assistant principal at the time the boys received their exemption, the new principal sought to verify the letter at that time, and called Monsignor Barrera with the parents present. *Id.* Although concerned by the fact that the school was only then reaching out to him to verify his letter, Monsignor Barrera verified his letter and the Gonzales's *promesa*. *Id.*

Every time the boys graduated to the next school within MISD, the boys were questioned anew regarding their hair and their religious exemption. In August 2014, they boys were questioned when they started Mathis Intermediate School. *Id.* at 20. Then, in August 2016, the boys were separated from their peers on the first day of school at Mathis Middle School and spent the majority of the day in the principal's office because of their religious braids. *Id*. Belen and Pedro were notified and demanded an immediate meeting with the new MISD superintendent, Benny Hernandez. *Id.* At that meeting, Superintendent Hernandez questioned the veracity of the

[22] *See also* Exh. 1-H (B. Gonzales Dep.) at 18:13-15 ("[The school] told me to bring proper documentation stating, and that's what I did.").

original letter provided by Monsignor Barrera and requested that the Gonzales family submit additional verification. *Id*. In response, the Gonzales family provided a letter from a second priest, Reverend Thomas L. Goodwin, who had baptized the children and from whom the boys received their first communion. *See* Exh. 2-B (Rev. Thomas August 17, 2016 Letter). MISD continued to allow the boys a religious exemption to attend school. Belen Decl. at 21.

D. MISD refuses to allow the boys' to participate in extracurricular activities unless they disavow their *promesa*.

MISD raised its quibble with C.G.'s and D.G.'s hair again in the spring of 2017 as the boys were finishing their sixth grade year. The football coach told C.G. that he would not be able to play on the team the following year unless he cut his braid. Belen Decl. at 22. In August 2017 when the boys were entering seventh grade, C.G. went to football practice and gathered with the other players to receive their school-issued equipment from the coach. *Id.* With all the players present, the coach then announced that anyone with hair longer than two inches would not be able to play, and subsequently singled-out C.G. and told him that he could not receive his equipment unless and until he cut his braid. *Id.*; *see also* Exh. 1-J (C.G. Dep.) at 38:19–21 (coach threatening to "cut . . . [C.G's] hair with scissors here . . ."). C.G. was devastated and broke down in tears when driving home from school that day with his mom. Belen Decl. at 23. C.G. wanted to keep his *promesa* but felt torn by his coach's ultimatum: either cut his braid—disavowing his *promesa*—or be cut from the team. *Id.* After deep reflection, C.G. ultimately did decide to keep his *promesa*. *Id.*

After MISD banned C.G. from the football team, Pedro and Belen subsequently filed a grievance with the school district. *Id.* at 24. Over the next several months, the boys' parents continued to request that MISD grant a religious exemption and provide the basis for conditioning the boys' participation in extracurricular activities on their violating their religious *promesa*. *Id.*

MISD, however, continued to deny C.G. a religious exemption from its grooming policy. *See* Exh. 2-C, MISD First Denial September 7, 2017 Letter; Exh. 2-D, MISD Second Denial November 7, 2017 Letter. Then in December, while attending an after school meeting for the science team, D.G. was called to the office where he was handed a letter from MISD. Belen Decl. at 26. MISD's letter informed D.G. and his parents for the first time that "[D.G.] will not be allowed to participate in UIL extracurricular activities due to the fact of not following MISD Extracurricular handbook grooming and dress standards." Exh. 2-E, MISD December 1, 2017 Letter. D.G. was forced to return to the classroom and inform his teacher and classmates that he could not join the team because of his braid. Belen Decl. at 26. Since then, D.G. has not been allowed to participate in the school's science team or art competition, nor join any off-campus trips with Student Council or the computer programming clubs. *Id.* at 27; Exh. 1-K (D.G. Dep.) at 10:16-18; 25:8-13. This past spring, D.G. applied for and was accepted into the National Honors Society, but his application process was complicated by his inability to demonstrate involvement in extracurricular activities. Belen Decl. at 27.

E. MISD's refusal to allow the boys to participate in extracurricular activities unless they disavow their *promesa* has kept them from enjoying the numerous benefits of extracurriculars, has caused them serious emotional pain, and stands to negatively impact their future prospects.

C.G. and D.G. started their first year at Mathis High School on July 31, 2019. *Id*. at 28. MISD continues to ban C.G. from participating fully on the football team. C.G. is able to practice certain drills with the football team, but only to the extent the practice runs during school hours and does not involve wearing a helmet or pads, for instance when running laps or lifting weights. *Id*. at 29. The team's first game was on August 16, 2019 and games will continue through November 8th. *Id.*; *see also* Exh. 2-F (2019 Mathis Pirate Varsity Football Schedule). C.G. was unable to play in the game but continues to show up for drills and weight training. Belen Decl. at

29. Except for C.G.'s braid, he is otherwise eligible to be on the team—he has submitted all required paperwork for the 2019 season and completed a physical. *Id.* As for D.G., the school has not yet released the schedules for the various clubs, but as in previous years, D.G. hopes to participate in a number of activities, including trying out for the science team, participating in MISD's art club, as well as serving on Student Council. *Id.* at 30.

Since August 2017, C.G. and D.G. have missed invaluable opportunities and benefits offered through MISD's extracurricular programs. MISD's refusal to grant a religious exemption continues to cause the boys to feel excluded as though they are "other" from their peers, and at times, has elicited bullying from the other students. *Id.* at 31. MISD's denial of extracurricular participation also raises concerns with respect to the boys' ability to pursue their future goals. *Id.* C.G. has expressed interest in pursuing welding, the military, boxing, or other professional sports and worries that his inability to participate in MISD's athletics will negatively affect his prospects. *Id.* D.G. plans to attend college and potentially pursue video-game programming or computer design technology and is similarly anxious that his preclusion from MISD's extracurriculars will damage his competitiveness in college applications. *Id.*

II. LEGAL STANDARD

Plaintiffs seek a narrow preliminary injunction enjoining MISD from prohibiting their participation in extracurricular activities based on its grooming policy. To obtain a preliminary injunction, Plaintiffs must establish: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011); *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008).

III. ARGUMENT

A. The boys have a substantial likelihood of success on the merits of their TRFRA claim. MISD substantially burdens the boys' religious exercise conditioning extracurricular participation on severing their religious braids, and the Fifth Circuit has rejected the asserted interest in aesthetic homogeneity as a justification.

TRFRA prevents the state and local Texas governments from substantially burdening a person's free exercise of religion unless doing so furthers a compelling governmental interest in the least restrictive manner. Tex. Civ. Prac. & Rem. Code Ch. 110. The factors in proving a claim under TRFRA are: "(1) whether the government's regulations burden the plaintiff's free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental interest; and (4) whether the regulations are the least restrictive means of furthering that interest." *Merced v. Kasson*, 577 F.3d 578, 588 (5th Cir. 2009). TRFRA places the burden of proving a substantial burden on the claimant, but the government must prove a compelling state interest. *Barr v. City of Sinton*, 295 S.W.3d 287, 307 (Tex. 2009).

The Texas Supreme Court has stated that because TRFRA and its federal cousins—RFRA and RLUIPA—"'were animated in their common history, language and purpose by the same spirit of religious freedom,' Texas courts 'consider decisions applying the federal statutes germane in applying the Texas statute.'" *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 259 (5th Cir. 2010) (quoting *Barr*, 295 S.W.3d at 296).[23]

Here, MISD's requirement that the boys violate their *promesa* to participate in extracurricular activities substantially burdens their free exercise of religion. MISD, however, has not articulated a compelling interest in not exempting the boys from its grooming policy to allow

[23] TRFRA also expressly provides that "[i]n determining whether an interest is a compelling interest under Section 110.003, a court shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution." Tex. Civ. Prac. & Rem. Code § 110.001(b).

participation in extracurricular activities. As a result, the boys have established a high likelihood of success on the merits of their TRFRA claims.

1. **C.G. and D.G.'s decision not to cut a lock of their hair is substantially motivated by sincere religious belief in their *promesa* with God.**

MISD's grooming policy directly and substantially burdens C.G. and D.G.'s free exercise of religion under TRFRA. TRFRA defines "free exercise of religion" as "an act or refusal to act that is substantially motivated by sincere religious belief." Tex. Civ. Prac. & Rem. Code § 110.001(a)(1). "In examining a putative religious belief under TRFRA, '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.' Not only is such a determination unnecessary, it is impossible for the judiciary." *A.A.*, 611 F.3d at 259–60 (citing Tex. Civ. Prac. & Rem. Code § 110.001(a)(1)). In TRFRA cases, "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Barr*, 295 S.W.3d at 300 (citing *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886–87, (1990)).

When determining the sincerity of religious belief, courts must limit themselves "to almost exclusively a credibility assessment." *Moussazadeh v. Tex. Dept. of Crim. Justice*, 703 F.3d 781, 792 (5th Cir. 2012) (citations omitted). "To examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which [courts] are forbidden to tread." *Id.* In undertaking this inquiry, courts "have looked to the words and action" of plaintiffs, with the inquiry being "what the [plaintiff] claimed was important to him." *Id.* at 791 (citations omitted).

Based on the record before the Court, there can be little dispute as to the sincerity of C.G. and D.G.'s religious belief that cutting their religious braid would be a violation of their commitment to God. Both C.G. and D.G. have been unwavering in maintaining their *promesa* since their respective births, neither having cut their locks of hair in their lifetimes. Pedro Decl. at

19; Belen Decl. at 32. They have sought and received an exemption from MISD's grooming policy since they were in kindergarten, going so far as to solicit and provide letters from the priests in parishes where they have attended to support the sincerity of their beliefs. *Id.* The boys have also testified themselves as to their belief that cutting their hair in violation of their *promesa* would constitute a sin and have religious consequences. Exh. 1-J (C.G. Dep.) at 21:15-16 (breaking a promise will disappoint Jesus).

2. **By conditioning the generally available privilege of participation in extracurricular activities on C.G. and D.G. violating their *promesa*, a sincerely held religious belief, MISD substantially burdens the boys' free exercise of religion under TRFRA.**

Under TRFRA, a burden on the free exercise of religion is substantial if it is "real vs. merely perceived, and significant vs. trivial"—two limitations that "leave a broad range of things covered." *Barr*, 295 S.W.3d at 301. "The focus of the inquiry is on 'the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression,' as 'measured . . . from the person's perspective, not from the government's. *A.A.*, 611 F.3d at 264 (quoting *Barr*, 295 S.W.3d at 308). A "government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Barr*, 295 S.W.3d at 301 (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). "This inquiry is case-by-case and fact-specific and must take into account individual circumstances." *A.A.*, 611 F.3d at 264 (quotation marks and citations omitted).

Here, MISD has refused to provide C.G. and D.G. an exemption to its grooming policy for participation in extracurricular activities. Exh. 2-C (MISD First Denial September 7, 2017 Letter); Exh. 2-D (MISD Second Denial November 7, 2017 Letter). Compliance with this policy would require the boys to cut their religious braids in violation of their *promesa*, which they have

maintained for the entirety of their lives to date. Pedro Decl. at 19; Belen Decl. at 32. As C.G. and D.G. have testified, in their view violation of this commitment to God would be a sin and would have grave religious consequences for them and their family. Pedro Decl. at 15; Belen Decl. at 14. This choice between the privilege of participation in extracurricular activities and violation of their *promesa* with God applies real pressure on C.G. and D.G. to modify their sincerely held religious behavior and violate their religious belief. This is especially true where, as here, the boys have been so publicly excluded from participation in these extracurricular programs, requiring them to affirmatively explain this exclusion to their peers and the faculty. Belen Decl. at 22, 26.

There can be little doubt that the exclusion of a Sikh or Hasidic Jew from student counsel, football, or the math team unless and until they cut their hair would be considered a substantial burden on their free exercise of religion. TRFRA does not differentiate between sincere religious beliefs. It equally protects the sincere religious beliefs of C.G. and D.G., as it does a sincere Sikh or Hasidic Jew. For this reason, in the case that MISD has conceded is the "most seemingly relevant case precedent" (D.E. 20 at 19), the Fifth Circuit held that a Native American who had a sincerely held religious belief that "his long hair is not only an expression of his ancestry and heritage, but also a sacred symbol of his life and experience in this world" could not be required to wear his hair in "a single 'tightly woven' braid tucked behind [his] shirt or a bun on top of his head." *A.A.*, 611 F.3d at 256-257, 263. MISD's refusal to provide an exemption to the boys here appears to be rooted in a disregard for the sincerity and value of C.G. and D.G.'s religious beliefs—even disparaging their religious practice as not central to Catholicism—rather than considering whether MISD's policy substantially burdens their beliefs. *See, e.g.*, D.E. 20 at 21 ("[N]o one recognizes that C.G. and D.G. are Catholic because of their braids. . . . Moreover, Plaintiffs

established the braids are part of a personal belief, not the Catholic faith."). But this argument is just as unpersuasive as was the argument in *A.A.* that "other Native Americans do not do as A.A. does." 611 F.3d at 261. "Sincere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream," *id.*, and there can be no real dispute on the record before this Court as to the sincerity of C.G. and D.G.'s *promesa* with God.

MISD's refusal to provide an exemption has caused the boys emotional distress and deep feelings of persecution due to the message being conveyed by Texas government officials that they are unacceptable representatives of the school district due to their sincere religious conduct. As with the plaintiff in *A.A.*, the boys have recognized that they are being treated differently because of their *promesa*. Given that they understand their hair as an outward expression of their inner commitment and faith in God, the obvious lesson is that they are being treated differently and excluded from participation with their peers because of their faith and their *promesa* with God. "This recognition risks feelings of shame and resentment, a risk that, while real now, will continue to grow." *A.A.*, 611 F.3d at 266. As this Court recognized in its order on MISD's motion for summary judgment, that burden is real and significant; it is thus substantial. D.E. 25 at 10–11.

MISD's sole response has been to argue that because extracurricular benefits are not a "right" but a "privilege," conditioning the availability of extracurricular activities on the boys' violating their sincere religious beliefs cannot constitute a substantial burden under TRFRA. The United States Supreme Court, as well as the Fifth Circuit, however, have recognized that a government action or regulation imposes a significant burden where it "forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs." *Adkins*, 393 F.3d at 570 (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board of the Indiana Employment Security Division*,

450 U.S. 707 (1981)); *see also Moussazadeh*, 703 F.3d at 793 ("[C]onditioning receipt of 'an important benefit' upon religiously proscribed conduct, or denying a benefit because of 'conduct mandated by religious belief,' would impose a substantial burden on religion.") (quoting *Thomas*, 450 U.S. at 717–18). "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert*, 374 US at 404.

For example, in *Sherbert*, the case that sets out the very standard that TRFRA sought to put in place,[24] the Supreme Court held that a statute could not be "saved from constitutional infirmity on the ground that unemployment compensation benefits are not [a petitioner's] 'right' but merely a 'privilege.'" *Id.* at 404. The "imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to 'produce a result which the State could not command directly.'" *Id.* at 405 (citation omitted). "Likewise to condition the availability of benefits upon [an individual's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406.

The text of TRFRA itself evinces the Texas Legislature's recognition of this insidious form of penalty on the free exercise of religion. TRFRA expressly applies to the "granting or refusing to grant a government benefit to an individual." Tex. Civ. Prac. & Rem. Code § 110.002(b). In doing so, TRFRA makes clear that the government conditioning privileges or benefits on the

[24] "Congress directly responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA), . . . which restored the *Sherbert* balancing test by requiring any governmental regulation that substantially burdened the free exercise of religion to employ the least restrictive means of advancing a compelling governmental interest. . . . The Supreme Court struck RFRA down as applied to the states, however, because it exceeded Congress's enforcement power under section 5 of the Fourteenth Amendment. . . . Texas, among other states, likewise responded to *Smith* by enacting TRFRA, which provides the same protections to religious free exercise envisioned by the framers of its federal counterpart, RFRA." *Merced v. Kasson*, 577 F.3d 578, 587 (5th Cir. 2009) (citations omitted).

violation of sincerely held religious beliefs constitutes a significant burden on the free exercise of religion.

MISD has conceded on numerous occasions that participation in extracurricular activities is a "privilege." *See* Exh. 1-M (Superintendent Hernandez Dep.) at 41: 20-25 ("Extracurricular is a privilege. . . .").[25] And that full participation in extracurricular activities yields many benefits.[26] In fact, the MISD Extracurricular Handbook that incorporates the grooming policy at issue in this case promotes a number of these benefits to its students and the public under the heading, "Why are Extracurricular Activities Important?" Exh. 1-O (Extracurricular Handbook) at 3. These include: (1) "They promote self-discipline, responsibility, leadership, teamwork, self-confidence, commitment, and student wellness"; (2) "They enhance and enrich curricular educational offerings"; (3) "They offer participants the opportunity to be leaders and role models on campus and in the community"; and (4) "They enable participants to represent the School District in a positive manner." *Id.*[27] This is not surprising, considering that MISD spent over $1 million of

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[25] *See also* Exh. 1-O (Extracurricular Handbook), Preface, Pg. 3 ("**It is a privilege, not a right, to participate in extra-curricular activities.**") (emphasis in original); Exh. 1-M (Superintendent Hernandez Dep.) at 41: 20-25 ("Extracurricular is a privilege. It's not a right. The law says I have to educate you. It doesn't say I have to let you play football, volleyball, basketball, or anything. . . ."); Exh. 1-N (Ricardo Cortez, Jr. Dep.) at 39:3-8 ("Q. Okay. Do you think extracurricular activities are an important part of a kid's education? / . . . A. I do, but I also know that they're a privilege."); Exh. 1-P (Angie Trejo Dep.) at 10: 16-18 ("Q. Okay. And so your opinion is is that it is a privilege? / A. Correct.").

[26] *See, e.g.*, Exh. 1-N (Ricardo, Cortez, Jr. Dep.) at 38:19-24 ("Q. Okay. Why does a school district -- in your opinion, why does a school district have extracurricular activities? / A. I think that's -- that extracurricular activities can -- I think that they can enhance a kid in the long run."); Exh. 1-R (Randy Tiemann Dep.) at 63:3–64:2 (discussion of extracurricular activities furnishing students opportunities to further their education).

[27] *See also id.* ("**It is a privilege, not a right, to participate in extra-curricular activities.** We believe that a properly controlled well organized academic, athletic, vocational, and technology programs meet the needs for self-expression, mental alertness, and physical growth. We endeavor to maintain a program that is sound in purpose and will further each student's educational maturity. It is our desire that through competition, our students realize that they can determine the course of their own lives. We believe that through our program we can help our students grow into mature, responsible citizens that contribute to our society. **The primary objective of our program is to develop a sense of responsibility and accountability in all of our students.**") (emphasis in original).

taxpayer money on its extracurricular programs last year, and is budgeted to do the same this year. Exh. 1-S (MISD Budget Information).

These privileges and benefits of participation in extracurricular activities are generally available to MISD students. Although students must adhere to MISD rules and regulations, and may be punished with suspension or exclusion from these activities upon failure to do so, MISD actively promotes and encourages student participation.[28] As for C.G. and D.G., MISD has identified no grounds for withholding the privilege of full participation in extracurricular activities other than the lock of uncut hair they wear as part of their *promesa* with God. Exh. 2-C (MISD First Denial September 7, 2017 Letter); Exh. 2-D (MISD Second Denial November 7, 2017 Letter). In fact, MISD Superintendent Hernandez testified that the boys are otherwise well groomed and well dressed, and would be good representatives of the school district if they were to cut their hair. *See* Exh. 1-M (Superintendent Hernandez Dep.) at 50:11–51:12, 51:22–52:1. The boys are prepared to participate in these extracurricular activities as soon as they are allowed, and are currently participating to the full extent allowed by MISD. Pedro Decl. at 20; Belen Decl. at 29, 33.

By refusing to provide C.G. and D.G. an exemption from its grooming policy to participate in extracurricular activities—as it has for attending school, MISD has forced the boys to choose between enjoying these generally available, valuable benefits and their sincerely held religious beliefs. Because the boys will not conform their religious conduct to MISD's grooming policies, they have been denied the benefits of full participation with their peers in football, track and field,

[28] *See, e.g.*, Exh. 1-O (Extracurricular Handbook), What is Expected of Extracurricular Activity Participants?, at 4–5 ("**We want to ensure that each one of our students has an opportunity to be successful.** Not all students will have the same level of talent, but every individual can be praised for his/her work and effort. Every student can feel good about himself/herself and their role on the team. Mathis ISD sponsors/coaches will work to ensure that all our students enjoy participating. When it's time to work, we will work very hard, but we are also going to find time for our students to have fun.") (emphasis in original).

baseball, science team, math team, art competition, student counsel, marching band, and every other extracurricular activity with a UIL component. In addition to the many directly valuable benefits promoted by the school that have been—and continue to be—denied to the boys as a result of their exclusion, because participation in extracurricular activities looms large in college admissions and employment prospects, MISD's refusal also complicates and jeopardizes the boys' post-MISD academic and career goals. As recognized by the Supreme Court, Fifth Circuit, and Texas Legislature, MISD's conditioning of these benefits on the violation of the boys' *promesa* with God effectively penalizes and substantially burdens their free exercise of religion.

3. **MISD cannot demonstrate that it has a compelling interest that would justify requiring the boys to cut their religious braid to avoid being excluded from extracurricular activities.**

Because MISD has imposed a substantial burden on the boys' exercise of religion, MISD bears the burden of proving that "application of the burden to the person" in this particular instance "is in furtherance of a compelling government interest." Tex. Civ. Prac. & Rem. Code § 110.003(b)(1); *see also Barr*, 295 S.W.3d at 307 ("Although TRFRA places the burden of proving a substantial burden on the claimant, it places the burden of proving a compelling state interest on the government."). Given that the Fifth Circuit has previously ruled that the very same aesthetic concerns based on community standards for hair length that have been asserted here by MISD are "insufficiently compelling to overtake the sincere exercise of religious belief", MISD will not be able bear its burden here. *A.A.*, 611 F.3d at 271.

"The government's interest is compelling when the balance weighs in its favor—that is, when the government's interest justifies the substantial burden on religious exercise. Because religious exercise is a fundamental right, that justification can be found only in 'interests of the highest order,' to quote the Supreme Court in *Yoder*, and to quote *Sherbert*, only to avoid ' "the gravest abuses, endangering paramount interest[s]" '." *Barr*, 295 S.W.3d at 306 (citation omitted).

In adopting TRFRA, "Texas applied the compelling interest standard to free exercise claims—the 'most demanding test known to constitutional law'—for a reason." *A.A.*, 611 F.3d at 267 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). Thus, "under TRFRA, when it is a student's free exercise of religion at stake, a school's invocation of general interests, standing alone, is not enough—a showing must be made with respect to the 'particular practice' at issue." *Id.* at 268 (quoting *Barr*, 295 S.W. 3d at 306). MISD must "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." *Barr*, 295 S.W.3d at 306. And the Court must "look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* (quoting *O Centro*, 546 U.S. at 431). Here, that means MISD must prove that it has an interest of the highest order in refusing to allow the boys to participate in extracurricular activities unless they cut their religious braid, that the harm of granting a religious exemption to these boys who already attend school to allow them also to participate in extracurricular activities would cause such harm that the burden on the boys' religious practice is justified.

Here, MISD has failed to put forward a compelling interest that could justify substantially burdening the boys' exercise of religion. MISD has only purported to identify two such interests: (1) the district's community values that boys and girls should sport disciplined, conservatively-groomed gender-appropriate appearances; and (2) concerns that granting an exemption here would push the district down a slippery slope, opening a Pandora's box of hyperbolic and nonsensical

exemption requests that would paralyze the public school system. Neither of these interests justifies burdening the boys' exercise of religion here, though. [29]

First, MISD's general interest in vindicating community values with respect to students' appearances by refusing an exemption to the hair grooming policy for the boys is not an "interest[] of the highest order" or a policy designed "to avoid the gravest abuses". *Barr*, 295 S.W.3d at 306 (quoting *Yoder* and *Sherbert*). As this Court previously acknowledged in its order on MISD's motion for summary judgment, the interest MISD seeks to vindicate is no different from the "concern for aesthetic homogeneity" for hair length in *A.A.* that the Fifth Circuit made clear was "insufficiently compelling to overtake the sincere exercise of religious belief." D.E. 25 at 15 (quoting *A.A.*, 611 F.3d at 271).

MISD has a long history of accommodating the boys' religious practice to allow them to attend school despite not complying with the district's hair grooming policy. It is telling that it has not been necessary to require the boys to comply with the hair grooming policy to attend school to vindicate the district's community values with respect to disciplined, conservatively-groomed gender-appropriate appearances. Yet MISD insists that no similar exemption can be granted to allow the boys' participation in extra-curricular activities, even though the very same hair grooming policy is at issue.

MISD argues that it is entitled to burden the boys' religious practice in the context of extracurricular activities on the ground that extracurricular participation is merely a privilege, not

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[29] This is unsurprising considering that many courts, including the Fifth Circuit, have have ruled in favor of prisoners who grew long hair or beards as part of their religious conduct. *See, e.g.*, Findings of Fact and Conclusions of Law, *Goodman v. Davis*, No. 2:12-CV-00166 Dkt. No. 322 (S.D. Tex. Jan. 24, 2019) (Gonzales Ramos, J.) (long hair); *Ware v. Louisiana Dep't of Corr.*, 866 F.3d 263 (5th Cir. 2017) (dreadlocks); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (long hair); *Ali v. Stephens*, 833 F.3d 776 (5th Cir. 2016) (fist-length beard); *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013) (quarter-inch beard); *Ali v. Quarterman*, 434 F. App'x 322 (5th Cir. 2011) (fist-length beard); *Holt v. Hobbs*, 135 S.Ct. 853 (2015) (quarter-inch beard); *Nance v. Miser*, 700 F. App'x 629 (9th Cir. 2017) (fist-length beard); *Couch v. Jabe*, 679 F.3d 197 (4th Cir. 2012) (one-eighth inch beard).

a right, unlike school attendance. But this argument relates to whether a substantial burden is being placed on the boys' exercise of religion (*i.e.*, is denial of extracurricular participation denial of a non-trivial benefit?). This has nothing to do with whether there exists a compelling interest that could justify imposing such a burden. MISD's asserted distinction between a right and privilege is a distinction without a difference when it comes to whether there exists a compelling interest.

MISD also suggests that it has a greater interest in requiring uniformity in the extracurricular context because of its interest in *portraying* a disciplined, conservatively-groomed image of its students when interacting with other schools. But this asserted interest is even less compelling. The district all but admits that it seeks to avoid apparent embarrassment in having these two boys serve as student representatives because they deviate from the district's desired aesthetic homogeneity. MISD's attempt to keep this accommodation in the closet, like the actions of the school district in *A.A.*, teaches each of the boys here "the obvious lesson . . . that he is being treated differently because of his religion" which "risks feelings a shame and resentment." *A.A.*, 611 F.3d at 266. Certainly, MISD's desire not to have a Sikh, Hasidic Jew, or C.G. and D.G. represent its school district is no compelling interest that would justify burdening their exercise of sincerely held religious beliefs.

Second, MISD's hyperbolic concern that exemptions should not be granted here because they will invite additional exemption requests that will ultimately undermine the policy is exactly the kind of slippery-slope argument that the Supreme Court rejected in the RFRA context in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 435–36 (2006). When asked about possible accommodations for the boys' religious practice, the MISD superintendent expressed reluctance to making *any* exceptions because of the precedent it could set: "Again, I

would have to think about it. There's a lot involved when you're dealing with education, because the minute you allow one exemption, then it opens the door. . . ." Exh. 1-M (Superintendent Hernandez Dep.) at 44:14-22. But the Supreme Court rejected such an argument for uniformity that "rests not so much on the particular statutory program at issue as on slippery-slope concerns that could be invoked in response to any RFRA claim for an exemption to a generally applicable law. The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make on for everybody, so no exceptions. But RFRA operates by mandating consideration under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *Gonzales v. O Centro,* 546 U.S. at 435–36.

4. **MISD cannot demonstrate that mandating the boys cut their religious braid to avoid being excluded from extracurricular activities is the least restrictive means necessary to further its interest.**

Because MISD has not identified a compelling interest that could justify a substantial burden on the boy's religious practice, the Court need not even consider whether the district's approach is the least restrictive means necessary to further that interest. But even assuming that MISD somehow showed a compelling interest, MISD has never even attempted to provide an explanation as to why there is no alternative to mandating that the boys must *cut* their religious braid to avoid being excluded from extracurricular activities. Even though MISD only asserts aesthetic uniformity based on community standards as its reason for not granting an accommodation, MISD has never explained why other less restrictive approaches are insufficient to vindicate the district's interest. But TRFRA requires MISD to show that "application of the burden to the person . . . is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003(b)(2). It is inconceivable that MISD could meet this prong of the test given that the boys already tuck their religious braid into their shirts, making the braids hardly noticeable. Pedro Decl. at 18; Belen Decl. at 18.

It is notable that the school district in *A.A.* offered to allow the plaintiff in that case to wear his hair as "a single 'tightly woven' braid tucked behind [his] shirt" as the boys do here presumably because the district recognized this would prevent his hair from standing out. *A.A.*, 611 F.3d at 257. In that case, the Fifth Circuit found the district's proposal was too restrictive because the religious practice at issue involved wearing hair "visibly long". *Id.* at 265. Here, the district bears the heavy burden of showing that rendering the religious braids nearly unnoticeable by tucking them into the boys' shirts is inadequate to meet the district's interest and that instead its interests cannot be vindicated short of requiring the boys cut the lock of hair they have devoted to God in their *promesa*.

MISD has wrongly suggested that it already generously has accommodated the boys' religious practice by allowing them to attend school. *See* Exh. 1-M (Superintendent Hernandez Dep.) at 43:19-24 ("Q. Okay. So for three years these kids have been going to school with their hair past their hair collar? / A. Correct. / Q. You've been okay with that? / A. No, sir."). But that is irrelevant to the questions posed to the Court here. The boys are being denied the opportunity to participate in extracurricular activities because of their religious practice based on a sincerely held religious beliefs. That means that even if MISD could establish a compelling interest (which is not possible as explained above), MISD would have to show that its all-or-nothing requirement that the boys must cut their religious braid to participate in extracurriculars is the least restrictive means necessary to further MISD's objective. The Court would have to find, for example, that the boys tucking their braid into their shirts to render them virtually unnoticeable as they have done for years does not adequately vindicate MISD's interest and that instead MISD's requirement that the boys must cut their religious braids, breaking their *promesa*, is the least restrictive means of furthering MISD's interest.

Any claim that MISD's policy employs the least restrictive means is completely undermined by the Texas Association of School Boards ("TASB"), which has published a legal memorandum specifically addressing the question, "Can schools restrict hair styles and hats?" with the following answer: "Yes, but districts must accommodate requests for exceptions based on a student or parent's sincerely held religious belief." STUDENT DRESS AND APPEARANCE, TASB SCHOOL LAW RESOURCE at 4, *available at* https://www.tasb.org/services/legal-services/tasb-school-law-esource/students/documents/student_dress_and_appearance.aspx (last updated December 2018). The fact that TASB requires accommodation, many schools grant accommodation, and MISD has no argument that it must take another approach, makes clear that MISD cannot satisfy strict scrutiny. *See Holt v. Hobbs*, 135 S.Ct. at 866 (when "many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course").

B. Absent an injunction, Plaintiffs will suffer irreparable harm due to the continuing substantial burden on their free exercise of religion.

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) ("[A]ny First Amendment infringement that occurs with each passing day is irreparable."); 11A Fed. Prac. & Proc. Civ. (Wright and Miller) § 2948.1 (3d ed.) ("When an alleged deprivation of a constitutional right is involved, such as . . . freedom of religion, most courts hold that no further showing of irreparable injury is necessary."). The same is true for violations of RFRA, and by extension TRFRA; showing a likelihood of success on the merits shows irreparable injury. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 995 (10th Cir. 2004), *aff'd*, *O Centro*,

546 U.S. at 439 ("[The plaintiff] would certainly suffer an irreparable harm" if "it is likely to succeed on the merits of its RFRA claim.")). In recognition of the irreparable nature of this harm, TRFRA specifically entitles a plaintiff to "injunctive relief to prevent the threatened violation or continued violation" of the Act. Tex. Civ. Prac. & Rem. Code § 110.005(a)(2).

C. The balance of hardships tips overwhelmingly in favor of Plaintiffs who continue to suffer a substantial burden on their exercise of religion. MISD will not experience any harm from extending a limited exemption to its grooming policy here.

Under this factor, the question is whether "the threatened injury [to the plaintiff] outweighs any damage that the injunction might cause the defendant." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) (citation omitted). Here, Plaintiffs' threatened injury is weighty—a substantial burden of their religious freedoms. The boys are being denied the opportunity to participate in extracurricular activities, a generally available government benefit that MISD concedes is a significant privilege, for their refusal to sever their lifelong *promesa* with God. MISD, on the other hand, would lose nothing by allowing these students—who are currently provided an exemption from the same grooming policy to attend school—from fully participating in extracurricular activities with their peers while maintaining a single lock of uncut hair. Moreover, the fact that the boys largely conceal their religious braids by tucking them into their shirts even further diminishes any suggestion that MISD would be harmed by not being allowed to strictly enforce its grooming policy against the boys.

D. The public interest would be well-served by protecting religious liberty here.

Issuing a preliminary injunction is firmly in the public interest. In a TRFRA case, as in a RFRA case, "there is a strong public interest in the free exercise of religion even where that interest may conflict with" another statutory scheme. *O Centro*, 389 F.3d at 1010. Issuing a preliminary injunction is appropriate in light of the Texas Legislature's "implicit [T]RFRA determination that

the harm prevented and public interest served by protecting a citizen's free exercise of religion must be given controlling weight, barring the government's proof, by specific evidence, that its interests are more compelling." *Id.* Here, the MISD has failed to do so. As a result, "by issuing the injunction, the public's interest in the protection of religious freedoms would be furthered." *Id.*

E. No bond should be required because Plaintiffs allege infringement of fundamental rights and MISD will not suffer any monetary harm due to an injunction.

Rule 65(c) provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any part found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). The amount of security required pursuant to Rule 65(c), however, "is a matter for the discretion of the trial court," and the Fifth Circuit has ruled that district courts "may elect to require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (citing *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 3030 (5th Cir. 1978)). In doing so, the Fifth Circuit has held it appropriate for district courts to "dispense with the security requirement if the grant of an injunction carries no risk of monetary loss to the defendant." *Janvey v. Alguire*, No. 3:09-CV-724-N, 2010 WL 11619267, at *9 (N.D. Tex. June 10, 2010) (citing *Steward v. West*, 449 F.2d 324, 235 (5th Cir. 1971)) (waiving the security bond for entry of preliminary injunction due to "Defendants' failure to demonstrate a specific monetary harm that will befall them if the injunction issues").

Courts routinely waive bonds where, as here, plaintiff alleges the infringement of a fundamental constitutional right or seeks to preserve their rights to the free exercise of religion. *See Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 695–96 (N.D. Tex. 2016) (waiving the bond requirement for entry of a preliminary injunction in a violation of RFRA because the "Court

[found] no evidence that Defendants will suffer any financial loss requiring Plaintiffs to post security"); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right."); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 129 (D. Mass. 2003) (holding that "the public interest is served when public high school students seek to preserve their rights to free expression and free exercise of religion" and that requiring security bonds in such cases "might deter others from exercising their constitutional rights").

The Court should exercise its discretion and elect to require no security bond from C.G. and D.G. MISD will suffer no financial loss or damages in allowing C.G. and D.G. to participate in extracurricular activities without severing their religious braids. Additionally, requiring these high school students to post a bond to preserve their free exercise of religion would be against the public interest and might deter others from seeking to exercise and vindicate their religious rights.

CONCLUSION

C.G. and D.G. can never be given back this freshman year of high school. Unless injunctive relief is granted, they will miss out on quintessential high school experiences that form enduring memories and have the power to shape the rest of their lives. They have a strong likelihood of success on the merits because they are being denied participation in extracurricular activities, something normally reserved only as punishment, simply because they seek to adhere to their *promesa* to God based on their sincere religious belief demonstrated since infancy. MISD's only asserted justifications, an interest in aesthetic homogeneity and a concern that exemptions will beget requests for additional exemptions, have been explicitly rejected by the courts in similar circumstances. And the fact that the boys render their braids hardly noticeable by tucking them into their shirts makes clear that MISD's condition that they sever their religious braids to

participate is inexplicable and hardly the least restrictive means for furthering the district's interests.

The boys will continue to suffer irreparable harm absent injunctive relief. The balance of harms tips heavily in favor of the boys and injunctive relief will vindicate the public interest in protecting religious liberty. The Court should grant Plaintiffs' Motion for Preliminary Injunction and not require that a bond be posted.

Corpus Christi, Texas
DATED: August 26, 2019

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I certify that on August 26, 2019, I conferred with counsel for MISD via email pursuant to Local Rule 7.1. Counsel cannot agree about the disposition of the motion.

/s/ *Jamie A. Aycock*
Jamie A. Aycock

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2019, the foregoing memorandum was served on all counsel of record via the Court's electronic case filing (ECF) system.

/s/ *Jamie A. Aycock*
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