No. 24-40700

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DARRYL GEORGE,

PLAINTIFF-APPELLANT,

v.

BARBERS HILL INDEPENDENT SCHOOL DISTRICT; LANCE MURPHY; RYAN RODRIQUEZ,

DEFENDANTS–APPELLEES.

On Appeal from the United States District Court
for the Southern District of Texas
Case No. 3:24-cv-12

BRIEF OF PROPOSED *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, ACLU FOUNDATION OF TEXAS, INC., AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA, AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI FOUNDATION, AND INTERCULTURAL DEVELOPMENT RESEARCH ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 5th Cir. R. 29.2, the undersigned counsel of record submit the following certificate of interested parties as described in 5th Cir. R. 28.2.1.

Amici curiae the American Civil Liberties Union Foundation, the American Civil Liberties Union Foundation of Louisiana, the American Civil Liberties Union of Mississippi Foundation, the American Civil Liberties Union Foundation of Texas, Inc., and IDRA state that they do not have a parent corporation and that no publicly held corporation owns 10 percent or more of their stock.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 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.

Person or Entity	Connection to Case
American Civil Liberties Union Foundation	Proposed-amicus curiae
ACLU Foundation of Texas, Inc.	Proposed-amicus curiae
American Civil Liberties Union of Mississippi Foundation	Proposed-amicus curiae
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STATEMENTS OF INTEREST[1]

The **American Civil Liberties Union ("ACLU")** is a nationwide, non-partisan, non-profit organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The **ACLU Foundation of Texas, Inc.**, the **ACLU Foundation of Louisiana**, and the **ACLU of Mississippi Foundation** are state-based affiliates of the ACLU. The ACLU and its affiliates are committed to protecting against sex-based discrimination and defending the rights of students of all races, genders, religions, and backgrounds. In support of these principles, the ACLU and its affiliates have appeared both as direct counsel and as *amicus curiae* in numerous cases concerning the rights of students. *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565 (1975); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180 (2021); *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022); *A.C. v. Magnolia Indep. Sch. Dist.*, No. 21-cv-03466 (S.D. Tex. Oct. 26, 2021) (challenge to a Texas school district's boys-only hair restriction). The proper resolution of this

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), proposed-*amici* certify that no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation of this brief or authored this brief in whole or in part. Appellant has consented to the filing of this brief, and Appellee opposed.

case is, therefore, a matter of significant importance to the ACLU, its affiliates, and their members.

IDRA (Intercultural Development Research Association) is an independent, nonprofit organization dedicated to achieving equal educational opportunity for every child through strong public schools. Since its founding in 1973, IDRA has worked with students, families, and school leaders to advocate for equal and equitable schools for all students, with a focus on advancing the civil rights of Black, Latino, and other historically marginalized students. IDRA seeks to create culturally sustaining schools that do not push students out of the classroom through exclusionary discipline, which disproportionately harms students of color.

INTRODUCTION

Barbers Hill Independent School District ("BHISD") is enforcing a provision of its dress and grooming code that forces boys, but not girls, to cut their hair. The provision ("Boys-Only Hair Restriction" or "Restriction") provides, in relevant part:

> Male students' hair will not extend, at any time, below the eyebrows, or below the ear lobes when let down. Male students' hair must not extend below the top of a t-shirt collar or be gathered or worn in a style that would allow the hair to extend below the top of a t-shirt collar, below the eyebrows, or below the ear lobes when let down.

George v. Abbott, No. 24-CV-12, 2024 WL 4468506, at *2 (S.D. Tex. Oct. 10, 2024). "The policy does not restrict the length of female students' hair." *Id.*

Because of this policy, Darryl George cannot go to school unless he cuts his locs, a protective hairstyle central to his identity and heritage. Because of the length of his hair, George was excluded from school and placed in in-school suspension ("ISS") and a Disciplinary Alternative Education Program for nearly his entire junior year, where he was denied access to the educators who assist him with dyslexia. On the first day of his senior year, George was again placed in ISS because of his locs. *Id.* George withdrew from BHISD on August 20, 2024, due to the Restriction's harmful impact on his mental health and educational opportunities. *Id.* George desires and intends to reenroll in BHISD, and he still resides in the district. *Id.* at *3.

George has challenged the Boys-Only Hair Restriction as a violation of his right to be free from sex discrimination under the Equal Protection Clause, Dkt. 54,

and moved for a preliminary injunction on this claim in August 2024. Dkt. 81. But the district court denied his request. It reasoned that, under heightened scrutiny and on the limited preliminary injunction record, BHISD "offered persuasive arguments for justifying" the sex-based Restriction, so George was unlikely to succeed on the merits. *George*, 2024 WL 4468506, at *5.

While the district court was correct to identify heightened scrutiny as the standard applicable to BHISD's facial sex-based classification, *id.* at *4, it erred in concluding BHISD was likely to succeed in proving that there is an exceedingly persuasive justification for the Boys-Only Hair Restriction. BHISD cannot meet either step of intermediate scrutiny under the Equal Protection Clause. First, the interests BHISD articulates are not legitimate for purposes of this analysis because they either are based on impermissible sex stereotypes or are not related to the particular sex-based classification being challenged. Second, even assuming they were legitimate, BHISD failed to show the Restriction is substantially and directly related to those interests.

BHISD's Boys-Only Hair Restriction has derailed George's high school education, just as similar restrictions across this Circuit harm many students who wear long hair for religious, cultural, and other reasons. Given their discriminatory nature and the harms they impose, the courts, state legislature, and peer school districts have made clear that such policies cannot stand. Boys-only hair-length

restrictions like BHISD's have routinely been struck down by courts in this Circuit, and other Circuits similarly reject sex-specific provisions of school appearance codes. The Texas legislature enacted a law that prohibits school dress or grooming policies that discriminate against protective hairstyles. And school districts across Texas are abandoning their own versions of policies, putting BHISD alongside increasingly fewer peers.

For the reasons that follow, the district court erred in concluding George was unlikely to succeed on the merits of his sex-discrimination claim, and this Court should reverse the district court's denial of George's request for a preliminary injunction.

I. The District Court Correctly Held That Intermediate Scrutiny Is the Standard of Review for the Boys-Only Hair Restriction.

The parties agree that the Restriction explicitly and only applies to boys. *George*, 2024 WL 4468506, at *4. Therefore, it is a facial sex-based classification. The district court correctly recognized that heightened scrutiny applies to all sex-based classifications. *Id.*

Heightened scrutiny applies to all government-drawn sex classifications, including in the context of public education. *See Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017) ("Heightened scrutiny . . . attends all gender-based classifications."); *see also, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (striking down male-only admissions policy at Virginia Military Institute ("VMI"));

Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982) (striking down female-only admissions policy at Mississippi University for Women's ("MUW") Nursing School); *Ayton v. Holder*, 686 F.3d 331, 338 (5th Cir. 2012) (it is "heightened scrutiny that governs gender discrimination claims"); *McKee v. City of Rockwall, Tex.*, 877 F.2d 409, 422 (5th Cir. 1989) ("If an action is gender-based, then it is subject to heightened scrutiny . . . .").

Many courts within this circuit have applied heightened scrutiny when assessing sex-specific hair-length regulations imposed by schools—and concluded that these restrictions likely (or outright) fail to survive such scrutiny. *See, e.g.*, *Arnold v. Barbers Hill Ind. Sch. Dist.*, 479 F. Supp. 3d 511, 520–21 (S.D. Tex. 2020); *Gray v. Needville Indep. Sch. Dist.*, 601 F. Supp. 3d 188, 189 (S.D. Tex. 2022), *appeal dismissed*, No. 22-20229, 2022 WL 3593770 (5th Cir. May 11, 2022); TRO, *A.C. v. Magnolia Indep. Sch. Dist.*, No. 21-cv-03466 (S.D. Tex. Oct. 26, 2021), 2021 WL 11716732; *Sturgis v. Copiah Cnty. Sch. Dist.*, No. 10-CV-455, 2011 WL 4351355, at *2–4 (S.D. Miss. Sept. 15, 2011); *cf.* Order, *MT & KC v. Tatum Indep. Sch. Dist.*, No. 21-cv-00364 (E.D. Tex. Oct. 13, 2023), ECF No. 119 (applying heightened scrutiny but holding policy survives).

Other circuits have also recognized that sex-based school dress and grooming codes merit—and fail—intermediate scrutiny. *See, e.g.*, *Doe through Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1260 n.4 (10th Cir. 2024) (rejecting "a

deferential approach to school dress codes" because "the Supreme Court has already modeled what deference courts owe to a school's sex-based classification: intermediate scrutiny"); *Peltier*, 37 F.4th 104, 124–25 (4th Cir. 2022) (en banc) (striking down dress-code provision requiring girl students to wear skirts under heightened scrutiny), *cert. denied*, 143 S. Ct. 2657 (2023); *Hayden ex rel. A.H. v. Greensburg Comm'y Sch. Corp.*, 743 F.3d 569, 571, 581–82 (7th Cir. 2014) (same for boys-only hair-length regulation).

Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972), on which BHISD relied at the district court to argue rational basis applies, is not to the contrary. BHISD's insistence that *Karr* distinguishes "school hair-length regulations" from all other sex-based classifications—Dkt. 84 at 12 n.1; Dkt. 85 at 8 n.1; Dkt. 25 at 8; Dkt. 44 at 8-9; Dkt. 56 at 8, 9 n.2—ignores subsequent binding Supreme Court precedent.

Karr predates nearly all of the Supreme Court's equal protection case law regarding sex discrimination, as well as the entirety of its jurisprudence establishing that all government-drawn sex-based classifications are subject to heightened scrutiny. *See* 460 F.2d at 616 (holding rational basis applied because the "classification is not based on the 'suspect' criterion of race or wealth which would require application of the 'rigorous' standard of equal protection scrutiny"). *Karr* also failed to address *Reed v. Reed*, 404 U.S. 71 (1971)—the first Supreme Court decision to apply intermediate scrutiny to a sex-based classification—decided five months

earlier. *See Karr*, 460 F.2d at 622 (Wisdom, J., dissenting) ("*Reed* and all its forebears make clear that the majority today has not addressed itself to the question before us . . . .").

Karr also preceded the Supreme Court decision in *Craig v. Boren*, 429 U.S. 190 (1976), that first made explicit that all government-drawn sex-based classifications are subject to heightened scrutiny. Since *Craig*, there has been an unbroken line of Supreme Court precedent establishing that heightened scrutiny now attends "*all* gender-based classifications." *Morales-Santana*, 582 U.S. at 57 (emphasis added); *Virginia*, 518 U.S. at 533; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *Hogan*, 458 U.S. at 723. The district court acknowledged this binding precedent in determining that heightened scrutiny applies to BHISD's Restriction. *See George v. Abbott*, No. 24-CV-12, 2024 WL 3687103, at *5 (S.D. Tex. Aug. 6, 2024) [hereinafter *George I*].

Interpreting *Karr* to mean that certain school policies are exempt from the standards of constitutional review that apply to all other sex-based classifications would be fundamentally inconsistent with the Equal Protection Clause. Public schools' policies, irrespective of topic, are not less subject to the Constitution than other government actions; indeed, discrimination in public schools has given rise to seminal equal protection decisions. *E.g.*, *McLaurin v Oklahoma State Regents for Higher Ed.*, 339 U.S. 637 (1950); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483

(1954). There is simply no exception from the Constitution for schools' hair-length policies. *See George I*, 2024 WL 3687103, at *5.

The district court correctly applied intermediate scrutiny to the Boys-Only Hair Restriction.

II. The District Court Erred in Holding That the Boys-Only Hair Restriction Likely Survives Intermediate Scrutiny.

To survive heightened scrutiny, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Virginia*, 518 U.S. at 531 (quoting *Hogan*, 458 U.S. at 731); *see Smith v. Bingham*, 914 F.2d 740, 741 (5th Cir. 1990) (same). A "defendant 'must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Peltier*, 37 F.4th at 124 (quoting *Virginia*, 518 U.S. at 533). This "'burden of justification' is a 'demanding' one, and 'rests entirely on the State.'" *Id.* (quoting *Virginia*, 518 U.S. at 533). The district court erred in concluding that BHISD was likely to satisfy this standard.

A. BHISD Has Not Established a Legitimate Important Governmental Objective for the Boys-Only Hair Restriction.

BHISD proffers three governmental interests for its Boys-Only Hair Restriction: "(1) community expectations, (2) student discipline and achievement,

and (3) career readiness." *George*, 2024 WL 4468506, at *4 (cleaned up).[2] None passes muster under heightened scrutiny.

Two objectives—community expectations and career readiness—are themselves based on sex stereotypes, which are illegitimate in equal protection analyses. The third objective of student-discipline/achievement is pegged to the BHISD dress and grooming code *as a whole*, rather than—as required—to the particular sex-based classification being challenged.

1. Objectives That Are Based on—and Assume the Validity of—Sex Stereotypes Are Illegitimate for Purposes of the Equal Protection Clause.

Any justification proffered in a heightened-scrutiny analysis "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533; *see also J.E.B.*, 511 U.S. at 138 (rejecting "the very stereotype the law condemns" as a justification for a state's sex-based policy). Accordingly, "[c]are must be taken in ascertaining whether the

[2] Notably, BHISD did not articulate its justifications until partway through litigation. "For most of this litigation, the District has failed to provide any reason for the sex-based distinctions in its dress code." *George*, 2024 WL 4468506, at *4 (cleaned up). To receive any weight in intermediate-scrutiny analyses, "[t]he justification must be genuine, not hypothesized *or invented* post hoc *in response to litigation*." *Virginia*, 518 U.S. at 516 (emphasis added). To the extent BHISD's delay in asserting these justifications indicates they were invented *post hoc*, they should not be considered. *See Arnold*, 479 F. Supp. 3d at 521 n.4 ("BHISD is bound by the justifications that actually led it to create the hair-length policy and may not craft justifications during the course of this litigation just to stymie [plaintiff].").

statutory objective itself reflects archaic and stereotypic notions." *Hogan*, 458 U.S. at 725. BHISD's purported objectives of community expectations and career readiness violate that core principle.

BHISD's asserted "community" expectations are reasons to scrutinize sex-based classifications, not excuse them. Indeed, to the extent that community expectations are a proxy for majoritarian preferences, heightened-scrutiny jurisprudence developed squarely to counter such majoritarian goals that disadvantage historically vulnerable groups. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152–53 n.4 (1938).

The Boys-Only Hair Restriction entrenches precisely the kind of preference that preserves historic discrimination. The belief that boys should wear short hair (and only girls wear long hair) is a sex stereotype reflecting the archaic concept that gender should or does determine appearance, including hairstyle. A traditional sex-based expectation, even if embraced by the community, cannot support a government-drawn sex classification. To allow otherwise would sanction the exact kind of "archaic and stereotypic notions" of sex that the Supreme Court has rejected as insufficient objectives under intermediate scrutiny. *Hogan*, 458 U.S. at 725. Even the district court did not seem to credit the community-expectations interest, as it cited cases regarding only the latter two interests asserted by BHISD. *See George*, 2024 WL 4468506, at *4.

The Supreme Court has repeatedly established that purported community values or expectations based on stereotypes or discrimination cannot justify discrimination. *See, e.g.*, *Virginia*, 518 U.S. at 542 (VMI's male-only admissions policy violates the Equal Protection Clause even assuming "that most women would not choose VMI"); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) ("[T]he electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, . . . and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic."). For example, it has recognized that community preferences rooted in stereotypes—such as the preferences of parents, including a majority of parents—cannot justify discrimination by schools against others' children (or their own). *See, e.g.*, *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 491 (1972) (race-based preferences of parents "cannot . . . be accepted as a reason for" maintaining segregated schools); *cf. Arnold v. Carpenter*, 459 F.2d 939, 943 (7th Cir. 1972) (rejecting argument that student participation in adoption of the code justified its imposition).

This understanding extends to sex-specific provisions of school appearance codes. In *Peltier*, the Fourth Circuit observed "that the agreement of some parents to the sex-based classification of the [girls-only] skirts requirement is irrelevant to our Equal Protection analysis" because "[n]o parent can nullify the constitutional

rights of other parents' children." 37 F.4th at 125; *see also Hayden*, 743 F.3d at 581 (doubting "community standards" as viable government interest for boys-only hair-length regulation); TRO, *Magnolia Indep. Sch. Dist.*, 2021 WL 11716732 (granting TRO to enjoin school district's sex-based hair-length rule as likely equal protection violation after district invoked "community values" as a justification).

BHISD's additional objective of "career readiness" is simply "community expectations" repackaged, as it attempts to justify the Restriction by pointing to certain community employers' expectations. But just as the community-expectations rationale fails because it relies on "overbroad generalizations about . . . males and females," *Virginia*, 518 U.S. at 533, so too does the career-readiness rationale. BHISD may not rely on stereotypes to which certain employers subscribe about male hair length to further perpetuate that stereotype in schools. Otherwise, schools could justify imposing on their students any requirement an employer may have in the name of career readiness. For example, this approach could justify the absurd result that schools could compel girls to wear makeup simply to prepare them for future careers. *Compare George*, 2024 WL 4468506, at *5 (relying on *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1112 (9th Cir. 2006)) *and Jespersen*, 444 F.3d at 1107 (allowing employer policy for "females" requiring "face powder, blush and mascara" to "be worn and applied neatly in complimentary colors" and "[l]ip color [to] be worn at all times") *with Peltier*, 37 F.4th at 125 n.13 (distinguishing

Jespersen as "rely[ing] heavily on precedent from the 1970s affirming the validity of dress codes based on 'traditional' notions of appropriate gender norms" and applying *Virginia*).

Indeed, a proffered justification that sex discrimination exists in the workplace demands examination—not forgiveness—of allegedly preparatory sex discrimination in schools. *Hogan* is instructive. There, the Supreme Court rejected MUW's asserted justification ("compensat[ion] for discrimination against women" in the nursing field) because "MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy." *Hogan*, 458 U.S. at 727, 729–30. Similarly, BHISD's Restriction lends credibility to potential discriminatory employer preferences by perpetuating versions thereof in school. Eliminating sex discrimination in education requires that schools *not* reinforce sex stereotypes that may exist in the workplace. *Cf.* 34 C.F.R. § 106.7 (promulgated in 1980, amended in 2020) ("The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.").

The district court further erred in accepting BHISD's argument that community expectations and career readiness "constitute important governmental interests as a matter of law in the school setting." *George*, 2024 WL 4468506, at *4.

None of the opinions BHISD cited actually asserted such interests. Dkt. 124 at 11 (citing cases asserting only interests in improving education and reducing disciplinary problems). The district court relied only on First Amendment challenges that apply a different test to government interests. In First Amendment challenges to content-neutral regulations, "important or substantial government interests" include only those that are "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). But in heightened-scrutiny analyses under the Equal Protection Clause, important governmental interests must "not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. Because the test in First Amendment cases does not consider whether governmental justifications reinforce sex stereotypes in deciding whether they are important, these cases cannot establish what constitutes "important governmental interests as a matter of law in the school setting," *George*, 2024 WL 4468506, at *4, as BHISD contends, for equal protection purposes.

2. Justifications Must Relate Directly to the Sex-Based Classification Being Challenged.

BHISD's third proffered objective—student discipline and achievement—is not specific to the Boys-Only Hair Restriction, as is required by intermediate scrutiny. Instead, because this objective relates to BHISD's dress and grooming code *as a whole*, it is not a constitutionally adequate justification "for the *sex-based*

classification being challenged." *Peltier*, 37 F.4th at 125 (thus rejecting argument that "the dress code as a whole is intended to 'help to instill discipline and keep order'"); *see also Virginia*, 518 U.S. at 524 ("The defender of the challenged action must show at least that the *classification* serves important governmental objectives.") (cleaned up, emphasis added).

By BHISD's own terms, its achievement and discipline objectives apply to its entire "dress and grooming code," rather than to the Restriction at issue here. *See, e.g.*, Dkt. 84 at 11 ("The District views the *dress and grooming code, including the hair-length restrictions for male students*, as one of many standards that helps ensure the success of all students . . . .") (citing Poole Aff. at ¶ 7, emphasis added); *id.* at 14 ("Requiring students to follow rules outlined in the *District's dress and grooming code* – or face consequences for disobedience – helps instill discipline and the necessary boundaries for students . . . .") (citing Poole Aff. at ¶ 7, emphasis added); Dkt. 85 at 7, 10 (same, respectively).

The district court erred in accepting these justifications, as they are not particular to the Boys-Only Hair Restriction. This flawed approach would allow the government to maintain an unconstitutional sex-based policy as long as it is part of a broader program that has legitimate justifications at a significantly higher level of generality. For instance, per the district court's logic, a school district could adopt a tutoring policy providing free SAT tutoring to boys, but not girls, with an asserted

justification of promoting educational achievement—so long as the policy overall was aimed at promoting educational achievement. This cannot satisfy intermediate-scrutiny review.

B. The Boys-Only Hair Restriction Is Not Substantially and Directly Related to BHISD's Purported Interests.

To survive intermediate scrutiny, the government must show that "the gender-based classification is substantially and directly related to its . . . objective." *Hogan*, 458 U.S. at 730. Even if BHISD had shown that its sex-based "classification serves important governmental objectives," *Virginia*, 518 U.S. at 533 (cleaned up), the Boys-Only Hair Restriction is not substantially and directly related to those interests. The district court erred in concluding otherwise.

1. Student Discipline and Achievement

The Restriction is not substantially and directly related to BHISD's proffered interest in student discipline and achievement. BHISD's purported objective here relates only to forcing compliance with *some* appearance-related policy—but is not served by the Restriction's application *only to boy students*. BHISD's appeal to student achievement is based solely on consistency, and its appeal to student discipline is based solely on the value of following rules—each of which would be

satisfied by sex-neutral policies. BHISD has provided no explanation for how forcing boys, but not girls, to cut their hair specifically furthers these interests.[3]

Indeed, by BHISD's logic, girl students would also benefit from the alleged consistency and disciplinary benefits that flow from hair-length restrictions. Analogous cases examining similar boys-only hair-length restrictions have found them to lack the required relationship to the asserted goals, largely because any purported benefit of a hair regulation would apply equally to boy and girl students. For instance, in *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970), the Seventh Circuit observed that "defendants have offered no reasons why [the] health and safety objectives" allegedly justifying a boys-only hair-length restriction for gym and biology classes "are not equally applicable to high school girls." *Id.* at 1266. Similarly, in *Hayden*, the Seventh Circuit reasoned that a boys-only hair-length

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[3] In an analogous earlier challenge, BHISD officials failed to elucidate *any* connection between the Restriction and its purported interest in educational achievement. These officials included Superintendent Poole, on whose testimony BHISD relied here. *Arnold*, 479 F. Supp. 3d at 523 ("Dr. Poole . . . was unable to identify any peer-reviewed research linking the hair-length policy to BHISD's educational goals."). "When questioned specifically about the connection between the hair-length policy and BHISD's educational goals," a BHISD principal "provided no support for such a connection and at times denied one." *Id*. In fact, he "testified that a male Native American Barbers Hill High School student was granted an exemption from the hair-length policy with no apparent effect on BHISD's educational goals." *Id.* at 522. The "BHISD Career & Technical Education Instructor" also "conceded that a male student could wear uncut locs let down without interfering with BHISD's goals." *Id.* Even "BHISD's counsel admitted that the hair-length policy 'seems arbitrary.'" *Id.* at 524 (cleaned up).

restriction for certain sports lacked a substantial relationship where the interests asserted applied equally to girls playing the same sport. 743 F.3d at 580 ("Girls playing interscholastic basketball have the same need as boys do to keep their hair out of their eyes, to subordinate individuality to team unity, and to project a positive image. Why, then, must only members of the boys team wear their hair short?"). What matters "for purposes of" George's "equal protection claim, is that the [asserted] interests . . . are not unique to male" students, "and yet, so far as the record reveals, those interests are articulated and pursued solely with respect to . . . boys . . . ." *Id.* at 582.

It is eminently possible to instill discipline and structure without discriminating based on a suspect characteristic. *See Virginia*, 518 U.S. at 520, 545–46 (VMI's asserted goals, including "physical and mental discipline" and military readiness, were "not substantially advanced by women's categorical exclusion" from the school). For instance, as the *Crews* court reasoned—and as is appropriate to consider under heightened scrutiny—BHISD's "objectives could be achieved through narrower rules directed specifically at the problems created by long hair," if any. *Crews*, 432 F.2d at 1266 (school district's "health and safety objectives" would be equally served if "long-haired boys could be made to wear shower caps" and "hairnets [as] worn by girls," which "prevent[s] injury"); *see also Hayden*, 743 F.3d at 581 (noting "girls with longer hair must do something to keep their hair out of

their eyes while playing basketball" but, "stating the obvious, boys with longer hair could do the same," such as "us[ing] head and hair bands"). Here, to the extent that BHISD can prove *any* problems associated with long hair that undermine its asserted interests, *see Arnold*, 479 F. Supp. 3d at 522–24 (casting doubt on such a possibility), such problems could be similarly addressed by imposing narrower regulations equally on all students, regardless of sex.

2. Community Expectations and Career Readiness

Even if BHISD could establish community expectations or career readiness are legitimate important government interests, the district has not met its burden to show the Restriction is substantially related to those interests. BHISD presented no argument below that its Restriction is related to "community expectations," nor identified which "community" has the expectations the Restriction meets. Dkt. 84 at 13–19. Indeed, Texas lawmakers' decision to enact the CROWN Act, Tex. Educ. Code § 25.902(b), in direct response to BHISD's discrimination against male

students with locs,[4] shows that the Boys-Only Hair Restriction is in fact contrary to Texas's expectations.[5]

BHISD has also not produced evidence that its Restriction here is substantially related to career preparation. BHISD points to "chemical plants and refineries, fire and police departments, and all branches of the U.S. military" as "some of the largest employers of District students in the area" that have males-only hair-length rules, such that the Restriction familiarizes students with "rules they very well may encounter in a professional setting . . . ." Dkt. 84 at 17 (quoting Poole Decl. at ¶ 8). But even if it were reasonable to assume that BHISD's boy students often end up working for these employers,[6] BHISD offers no proof that (other than the military)

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[4] *See, e.g.*, Second Reading and Record Vote on HB 567 before the Texas House, 88th Leg., R.S. at 10:20 (Apr. 12, 2023), https://senate.texas.gov/videoplayer.php?vid=19160&lang=en (statement by House sponsor: "students like De'andre Arnold . . . faced in-school suspension and was barred from walking at his high school graduation *because he would not cut his locs*" and "HB 567 will prevent this kind of discrimination") (emphasis added); Hearing on HB 567 before the Texas Senate Committee on State Affairs, 88th Leg., R.S. at 10:20 (May 8, 2023), https://senate.texas.gov/videoplayer.php?vid=19160&lang=en (same statement by Senate sponsor).

[5] There is a pending case at the First Court of Appeals regarding Appellant's rights under the CROWN Act against BHISD. *See George v. Barbers Hill Ind. Sch. Dist.*, No. 01-24-00789-CV (Tex. Ct. App.).

[6] Per publicly available documents from BHISD's website, BHISD graduates tend to enter academic and professional environments that do *not* impose these requirements. "An appellate court may take judicial notice of facts, even if such facts were not noticed by the trial court." *Harris v. Bd. of Sup'rs of La. State Univ. & Agr. & Mech. Coll. ex rel. LSU Health Sci. Ctr. Shreveport*, 409 F. Appx. 725, 727 n. 2 (5th Cir. 2010) (taking judicial notice of facts on university's website). More than

they actually have similar hair-length policies beyond referencing unsubstantiated allegations from the superintendent. Dkt. 84 at 11 (citing Poole Aff. at ¶ 8); Dkt. 85 at 4, 7 (same). This is insufficient to meet BHISD's burden under the searching standard of intermediate scrutiny.

The district court also erred in accepting BHISD's citation to multi-decade-old Title VII cases—which did not consider constitutional questions—as evidence the Restriction is "substantially related to advancing . . . career preparation." *George*, 2024 WL 4468506, at *5 (citing *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975), and *Jespersen*, 444 F.3d at 1112). That a Georgia newspaper and a Nevada casino had sex-based appearance rules fifty and nineteen years ago, respectively, provides no support for finding, in 2025, that Texas students will be better prepared for employment if boys are forced to cut their hair. *See Hayden*, 743 F.3d at 582 (rejecting school district's boys-only hair-length restriction

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50% of BHISD graduates attend four- and two-year colleges that this Court has held may not impose such policies. Barbers Hill High School, 2024–25 School Profile at 1, https://perma.cc/UR6P-XLKV; *Lansdale v. Tyler Junior Coll.*, 470 F.2d 659 (5th Cir. 1972). BHISD also says that it "offers career and technical education programs" for a much wider range of industries than what Dr. Poole enumerated, "in Agriculture, Food, and Natural Resources; Arts, A/V Technology, and Communications; Architecture and Construction; Business Marketing and Finance; Education and Training; Health Science; Science, Technology, Engineering, and Math (STEM); [and] Human Services, Manufacturing." Barbers Hill High School, 2024–2025 Academic Planning & Course Information at 61, https://perma.cc/92ZY-Z53D. Despite bearing the burden of proof, BHISD has placed no evidence in the record that these targeted employment sectors enforce a policy like the Restriction.

because, even if these considerations were legitimate, "it is not obvious that any and all hair worn over the ears, collar, or eyebrows would be out of the mainstream among males in the [town] community at large").

The military is the only potential employer for which BHISD concretely cites males-only hair-length restrictions. Dkt. 84 at 14–15, Dkt. 85 at 11–12. But even as to the military, BHISD fails to show a substantial relationship between career readiness and its Boys-Only Hair Restriction. BHISD applies its Restriction to *all* its boy students, the majority of whom do not join the military, *see* n.6 *supra*, and offers no evidence that forced compliance with military hair standards in school will make even those who do join materially more prepared for military life. The lack of substantial relationship is also confirmed by the fact that BHISD's policy does not impose hair standards for girl students that mirror those the military requires of women servicemembers. *See, e.g.*, *Grooming Standards*, MyNavy HR, https://www.mynavyhr.navy.mil/References/US-Navy-Uniforms/Uniform-Regulations/Chapter-2/2201-Personal-Appearance/#2201.1 (imposing, *inter alia*, hair-length maximums on women in terms of "length" and "bulk"). And if the Boys-Only Hair Restriction was substantially related to career readiness for the military, presumably girl students would also need to be prepared for military careers. *See*

Dkt. 84 at 11 (declaring "all branches of the U.S. military" are among the "the largest employers of District *students*") (emphasis added).[7]

BHISD's Boys-Only Hair Restriction does not substantially nor directly advance any important, legitimate government objective.

III. The Boys-Only Hair Restriction Belongs to a Pattern of School Dress and Grooming Codes That Wreak Substantial Harm Across This Circuit.

Beyond constituting unconstitutional sex discrimination, boys-only hair-length rules like BHISD's cause substantial harm to George and other students. For instance, in February 2019, a student and his family had recently moved to Hico ISD, near Fort Worth, and did not have money to pay for a haircut. A teacher then humiliated the student by cutting his hair during class to force compliance with the district's boys-only hair-length rule. *See* Lindsay Lowe, *Texas Mom Outraged After Teacher Cut Her Son's Hair for Dress Code Violation*, Today Style (Feb. 28, 2019), https://perma.cc/W9Y2-L45C.

Such policies force students to shed their identities at the schoolhouse gate (and beyond). A robust body of historical, sociological, and legal evidence demonstrates that particular hair lengths have uniquely meaningful associations for

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[7] If BHISD modified its sex-based appearance code to require both boy and girl students mirror the military standards, it would not necessarily survive heightened scrutiny. Indeed, such a provision would implicate the constitutional problems discussed *supra* in Section II.A.1.

certain racial, cultural, and religious identities, which students enjoy the right to express in school. For example, in a previous case against BHISD, the district court concluded that a student's locs were "sufficiently communicative" of his heritage to warrant constitutional protection. *Arnold*, 479 F. Supp. at 528. In reaching this conclusion, the court credited expert testimony describing his locs as "a long-recognized expression both of African-American identity and West Indian identity" and establishing that "West Indian cultural traditions prohibit cutting or trimming of locs." *Id.* at 516.

Federal courts, including this Court, have also recognized that long hair is a sacred expression of traditional spirituality and identity for Native American people. In *A.A. ex rel. Bentenbaugh v. Needville ISD*, this Court relied upon expert testimony regarding the United States' "assimilationist policies" designed to "stamp out traditional spirituality," including by subjecting children to "forced haircuts." 611 F.3d 248, 260, n.33 (5th Cir. 2010). And in *Alabama and Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*, the court found "compelling" expert testimony explaining that southeastern Tribes "wore their hair long as a symbol of moral and spiritual strength" and that cutting hair "was a complicated and significant procedure" reserved only "as a sign of mourning a close family member . . . ." 817 F. Supp. 1319, 1333, 1324-25 (E.D. Tex. 1993). For these and other reasons, the school policies at issue in these cases were enjoined.

Boys-only hair-length rules also frequently prevent students from expressing themselves *outside* of school—in their communities, families, places of worship, and homes. For instance, BHISD's Boys-Only Hair Restriction insists that boys' "hair will not extend, *at any time*, below the eyebrows, or below the ear lobes *when let down*." *George*, 2024 WL 4468506, at *2 (emphasis added). Because this Restriction applies to boys' *objective* hair length, no matter how it is styled, it leaves no way for George and other students to express their identities outside of school if they also attend school.

The discriminatory impacts of these policies fall particularly hard on Black, Latino, and Indigenous students, both because they commonly maintain culturally and religiously significant long hairstyles and because students of color are disproportionately targeted for school discipline. Decades of research indicates that public schools in America disproportionately discipline Black students. Chloe Kempf et al., *Dressed to Express: How Dress Codes Discriminate Against Texas Students and Must be Changed*, ACLU of Texas at 25 (Feb. 2024), https://perma.cc/JU6C-5C2N (collecting sources). And recent research examining the disciplinary records of fifty school districts across Texas indicates that Black students in those districts face a hugely disproportionate amount of disciplinary action specifically for violations of dress and grooming codes. *Id.* at 29. Black students received 31% of the documented disciplinary instances for such violations

but only comprised 12.1% of the surveyed student population, whereas white students made up 25.1% of the student population but only 12.7% of disciplinary instances. *Id.*

This disproportionate discipline can have devastating consequences. When students like George are removed from classrooms and placed in suspension or alternative school, they miss crucial hours of classroom instruction and suffer increased risks of negative educational outcomes, drop-outs, and incarceration through the school-to-prison pipeline. *Id.* at 39.

For example, Magnolia ISD, near Houston, pushed three students out of school and suspended many others due to its boys-only hair-length policy. TRO, *Magnolia Indep. Sch. Dist.*, 2021 WL 11716732. One of those penalized students, A.C., is Latino and, like many other men in his family, wore long hair his entire life. While the district allowed A.C.'s sister to attend school every day wearing long hair, it suspended A.C. and kept him out of school for over a month simply because of his gender and hair length. Magnolia ISD eventually changed its dress code to be gender-neutral after litigation, but not before disrupting A.C.'s and many other students' education and extracurricular activities for multiple months. ACLU of Texas, *Magnolia ISD Eliminates Discriminatory Policy that Punishes Students for Wearing Long Hair* (Dec. 14, 2021), https://perma.cc/J3UV-9MYY. Similarly, Mathis ISD, near Corpus Christi, tried to force two Catholic boys who wore long

hair as a promise to God, or "promesa," to cut their hair. Those students eventually sued Mathis ISD and won, but the district's discriminatory rule disrupted their education, nonetheless. Catholic News Agency, *Court Approves Religious Accommodation for Texas Students with Long Hair* (Sept. 9, 2019), https://perma.cc/H676-DEA3.

The ACLU of Texas has tracked the number of Texas school districts with similar policies since early 2020. Kempf et al., *supra*, at 25. As of the 2022–2023 school year, the majority of districts that previously maintained such discriminatory policies have since abandoned them. *Id.* at 15. By maintaining its Boys-Only Hair Restriction, BHISD belongs to an ever-shrinking minority of Texas school districts.

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The Court should reverse the district court's denial of George's request for a preliminary injunction.

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Respectfully submitted,

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