No. 19-40776

United States Court of Appeals for the Fifth Circuit

BELEN GONZALES, INDIVIDUALLY; PEDRO GONZALES, JR., INDIVIDUALLY; C.G., BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS; D.G.,
Plaintiffs-Appellees,

v.

MATHIS INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant.

On Appeal From United States District Court
for the Southern District of Texas
Case No. 2:18-CV-00043.

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

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

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3. C.G.;
4. D.G.

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Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Because this appeal concerns the straightforward application of settled precedent, Appellees respectfully submit that oral argument is not necessary.

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STANDARD OF REVIEW

"A district court's grant of preliminary injunction is reviewed for abuse of discretion." *Women's Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 418–19 (5th Cir. 2001). "Each of the four elements required to support a preliminary injunction, including substantial likelihood of success on the merits, presents a mixed question of fact and law." *Id.* at 419. "Findings of fact are reviewed only for clear error; legal conclusions are subject to *de novo* review." *Id.*; *see also Robinson v. Hunt Cty.*, 921 F.3d 440, 451 (5th Cir. 2017).

STATEMENT OF ISSUES

Did the District Court abuse its discretion in granting preliminary injunctions to enjoin the school district from excluding the boys, C.G. and D.G., from participating in extracurricular activities based on their religious practice of not cutting a strand of hair that they promised God they would not cut where the school district did not put on any evidence or make any arguments on the merits of the boys' Texas Religious Freedom Restoration Act claim and the school district waived its sovereign immunity from suit—the only defense it raised in response to the motion for preliminary injunction—by removing the case to federal court?

STATEMENT OF THE CASE

In this appeal of the District Court's order granting a preliminary injunction, Mathis Independent School District ("MISD" or "the school district") does not dispute Judge Nelva Gonzales Ramos's findings on the substantial likelihood of

success on the merits of the Gonzales family's claims under the Texas Religious Freedom Restoration Act ("TRFRA"). It does not challenge Judge Ramos's findings—based, in part, on the live testimony of three witnesses (including the boys themselves)—that C.G.'s and D.G.'s sincerely held religious beliefs were substantially burdened by the school district's hair grooming policy. Nor does it argue that a compelling government interest justifies substantially burdening these religious beliefs. Instead, recognizing its inability to defend its policy on the merits, the school district relies solely on a belatedly raised jurisdictional challenge: sovereign immunity from suit.

The school district, however, waived this immunity and consented to federal jurisdiction over the Gonzales family's claim as a matter of law. In February 2018, the school district removed the Gonzales family's TRFRA claim to federal court. Over the next year-and-a-half, the school district affirmatively litigated the merits of the TRFRA claim, deposing each of the Plaintiffs, requesting discovery, and ultimately seeking summary judgment on the merits. Only after the school district's chosen forum no longer appeared favorable—after its motion for summary judgment was denied and it faced a motion for preliminary injunction—did the school district assert sovereign immunity. The school district's "Heads I win on the merits, Tails you lose on sovereign immunity" litigation strategy mirrors the same inequitable tactics and unfair results this Court eschewed in *Meyers ex rel. Benzing v. Texas*,

410 F.3d 236 (5th Cir. 2005). Under *Meyers*, the school district's voluntary invocation of federal jurisdiction through removal constituted a waiver of sovereign immunity to suit as a matter of law.

In addition, the Texas legislature waived sovereign immunity in TRFRA itself. TRFRA provides an exception to its sixty-day pre-suit notice requirement under factual circumstances where, as Judge Ramos found here, (1) the exercise of governmental authority substantially and imminently burdens the person's free exercise of religion and (2) the person was not informed and did not otherwise have knowledge of the exercise of governmental authority in time to reasonably provide notice. The Gonzales family testified and submitted uncontroverted evidence showing they did not become aware of the school district's intention to exclude C.G. and D.G. from all UIL extracurricular activities until December 2017. Faced with the imminent action of the school district and the loss of invaluable experiences gained through extracurricular activities, the family did not have time to reasonably provide pre-suit notice and sought injunctive relief in court. Judge Ramos, after hearing the family's testimony and considering all the evidence in the record, properly found the boys fit within the exception to TRFRA's notice requirement.

The school district also contends—for the first time on appeal—that a preliminary injunction should not have been issued because there was an inadequate showing of irreparable harm. This argument was never presented to the District

Court, and therefore, is waived. Regardless, the school district does not challenge Judge Ramos's findings that the school district is substantially burdening the boys' sincerely held religious beliefs in violation of TRFRA, and violations of TRFRA give rise to irreparable harm as a matter of law.

STATEMENT OF RELEVANT 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." ROA.551. The Church recognizes "an exemplary value" in making such promises or vows out of "respect . . . and out of love for a faithful God." ROA.551. Catholicism regards personal promises as freely made, sacred commitments to God whereby a believer vows to fulfill "what has been promised and consecrated to Him." ROA.551.

For Catholics of Hispanic descent, this religious practice is often expressed in the making and keeping of *promesas*. ROA.557. A *promesa* involves petitioning God with a specific request and vowing to fulfill certain stipulations in return. ROA.563, 568. These sacred *promesas* may be "made with a saint, the Virgin Mary, or God." ROA.557. They serve to remind and strengthen the believer to rely on God in whatever situation the *promesa* was made. *See* ROA.582. "*Promesas* are specially important for people in cases of sickness when a doctor says '*que no tiene remedio*' (there is no medical cure)." ROA.567-568.

The specific vow "to perform a personal sacrifice or an act of charity to demonstrate gratitude for divine intervention and assistance" is called a *manda*. ROA.578-579. Because *mandas* are personal, they may take different forms including, not cutting one's hair for the rest of one's life. ROA.591. Failing to fulfill one's *manda* is often considered a sin, "a form of lying, something that is not permitted, especially to Almighty God." ROA.558.

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

The boys' parents, Pedro and Belen Gonzales, made a *promesa* to God requesting His protection and healing hand after enduring a precarious pregnancy with C.G. and learning soon after his birth that he had contracted bacterial meningitis. ROA.1053:8-1055:1, 978. Around this same time, they also learned Belen was pregnant with their second child, D.G. ROA.836 at ¶ 7, 856 at ¶ 7. Fearing they could not care for C.G. if Belen's pregnancy with D.G. was similarly dangerous, Pedro and Belen vowed to leave a lock of the boys' hair uncut if God strengthened C.G. to overcome his life-threatening sickness and enabled Belen to safely carry D.G. to term. ROA.1054:3-19, 1053:8-25. C.G. did survive his bacterial meningitis and Belen delivered D.G. safe and healthy. ROA.1055:2-7. Faithful to their vows, Pedro and Belen left uncut a single lock of hair on the back of the boys' heads as a symbol and sign of their faith. ROA.1055:13-15.

When the boys reached sixth grade, their parents gave them the freedom to choose whether to cut their single lock of hair or to adopt the *promesa* as their own. ROA.979. Both C.G. and D.G. made the personal commitment to adopt the *promesa* as their own and continue to abide by it to this day. ROA.979, 1056:11-1057:5, 1076:10-20, 1080:7-17. The *promesa* is an important anchor in the boys' faith and they believe breaking the *promesa* by cutting their lock of hair would disappoint God who has protected them. ROA.1076:21-1077:13, 1080:18-23.

C. The school district maintains a hair grooming policy and granted religious exemptions to the boys to allow school attendance from kindergarten to the seventh grade.

Mathis Independent School District is an independent school district based in Mathis, Texas, a city in San Patricio County, Texas. ROA.517. The school district includes Mathis Elementary School, Mathis Intermediate School, Mathis Middle School, and Mathis High School. ROA.517. The school district's Student Handbook contains a code of conduct with 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." ROA.700. The school district has stated that the basis for the grooming policy is to maintain the conservative community standards of good grooming and hygiene. ROA.763:21-25, 778:8-11. The school district also maintains an Extracurricular Handbook that governs participation in extracurriculars and incorporates the same grooming policy from the

school's code of conduct. ROA.799. According to the school district, its grooming policy is required to participate in extracurricular activities in order to ensure students are good representatives of community standards. ROA.799, 811:14-17.

When the boys started kindergarten, the school district granted C.G. and D.G. religious exemptions from its grooming policy to attend school. ROA.837-838 at ¶¶ 16-17, 603:9-15. At the district's request, Belen provided the Mathis Elementary School principal and the district's superintendent with a letter verifying the boys' *promesa* from Monsignor Gustavo Barrera, the priest with whom Pedro had consulted in making the *promesa*. ROA.837 at ¶ 16, 844. Subsequently, the district allowed the boys to enroll and participate in all school activities without restriction. ROA.838 at ¶ 17, 858 at ¶ 17. The school district re-questioned the boys about their *promesa* every time they graduated to the next school within the district, and every time the district gave them a religious exemption. ROA.838-839 at ¶ 20.

In August 2016, the district escalated its questioning of the boys' *promesa* when they started at Mathis Middle School. ROA.838-839 at ¶ 20. This time the school district questioned the veracity of the original letter provided by Monsignor Barrera and instructed the Gonzales family to provide additional verification of the boys' *promesa*. ROA.838-839 at ¶ 20. In response, the Gonzales family provided a letter from a second priest, Reverend Thomas L. Goodwin, who had baptized the boys and given them their first communion. ROA.839 at ¶ 21, 846. After receiving

Reverend Goodwin's letter, the district continued to allow the boys a religious exemption from its grooming policy to attend school. ROA.839 at ¶ 21.

D. Starting in seventh grade, the school district deprived the boys of the invaluable opportunities and benefits extracurriculars provide, causing them emotional pain and negatively impacting their future prospects.

Beginning in August 2017, the school district's football coach told C.G. that he would not be able to play on the team unless he cut his braid. ROA.938-939 at ¶¶ 3-4. C.G.'s parents filed a Level One Grievance regarding his participation in football with the school district on August 18, 2017, and the district responded on September 19, 2017, affirming its decision to exclude C.G. from football. ROA.848, 839-840 at ¶¶ 24-25. Over the next several months, Pedro and Belen continued to challenge the school district's refusal to allow C.G. to participate in football, but the school district would not grant an exemption to its grooming policy. ROA.850, 839-840 at ¶¶ 24-25.

Based on the school district's correspondence, the Gonzales family believed that the district's restriction was limited to football and based on the football-specific requirements of C.G.'s coach. ROA.940 at ¶¶ 9-11. But then in December 2017, while attending an after-school meeting for the science team, D.G. was called to the office where he was handed a letter from school district informing 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." ROA.852, 840 at ¶ 26, 940 at ¶ 10. Additionally, C.G. was prevented from playing in the Fall band concert, which initially resulted in a failing grade. ROA.941 at ¶ 12.

Based on these actions taken by the school district in December 2017, the Gonzales family realized that the district intended to ban the boys from all UIL activities because of their religious braids and that it would not make accommodation for their religious conduct. ROA.941 at ¶ 13.

E. After the Gonzales family filed suit in state court, the school district removed the case to federal court and moved for summary judgment.

On January 9, 2018, in order to avoid an imminent and continuing substantial burden on the boys' free exercise of religion, the family filed suit seeking injunctive relief from the school district's actions in barring the boys' participation in all UIL extracurricular activities based on its grooming standards. ROA.941 at ¶13, 17-31. The boys' request for a temporary injunction was set for hearing on January 12, 2018. ROA.29-32. That same day, the school district filed a notice of removal and a motion to dismiss the suit, but not based on sovereign immunity from suit. ROA.10-13, 35-52. The school district removed the suit pursuant to 28 U.S.C. § 1446, and the District Court denied the school's motion to dismiss on May 30, 2018. ROA.143-162. In June, the school district then participated in eight depositions, including of C.G., D.G., their parents, and several members on the

school district's board, and submitted several discovery requests, including requests for admission, document production, and interrogatories. *See, e.g.*, ROA.163-186. On August 13, 2018, the school district then filed a motion for summary judgment seeking adjudication of the merits of all of the claims brought by Plaintiffs without raising sovereign immunity as a defense or suggesting the court lacked jurisdiction. ROA.163-186. The District Court granted summary judgment to the school district on the claims that had been brought under the First Amendment related to the free exercise of religion and freedom of expression. ROA.471-472. The District Court denied the motion for summary judgment, however, as to the boys' TRFRA claims and the parent's claims under the Fourteenth Amendment related to parental rights. ROA.464-470, 474.

F. The District Court granted preliminary injunctions enjoining the school district from excluding the boys from participation in extracurricular activities based on their religious practice.

C.G. and D.G. requested injunctive relief from the District Court on August 26, 2019, a few weeks after starting their freshman year at Mathis High School. ROA.503-858. The school district did not file a response brief but instead filed a motion to strike the motion for preliminary injunction. ROA.875-879. The only discussion in that brief of the immunity the school district now asserts was a single sentence stating: "Defendant MISD is immune from Plaintiffs' TRFRA cause of action." ROA.877.

At the hearing on September 5, 2019, the boys and their mother Belen testified regarding the sincerity of their religious practice of not cutting the boys' braids as well as the burden imposed by the school district requiring that they cut their braids to participate in extracurriculars. ROA.1028-1090. The school district did not present any testimony, any evidence, or any argument at all regarding the sincerity of religious motivation, the burden imposed by the school district, any compelling government interest alleged to justify the burden imposed, or any basis for concluding that the restriction was the least restrictive means available. ROA.1028-1090. The only defense the school district asserted was immunity to suit on the grounds that pre-suit notice should have been provided by certified mail return receipt requested but was sent by facsimile instead. ROA.1033-1040, 1073-1075.

The District Court issued an order enjoining "MISD from excluding D.G.—based on his continued growth of a braid of hair running down his back and tucked in his shirt in violation of the MISD hair grooming policy—from any extracurricular activities identified in the Extra-Curricular Handbook." ROA.904.

The District Court requested additional briefing as to C.G. to more fully address the previously unbriefed issue raised by the school at the hearing regarding the timeliness of C.G.'s TRFRA claim. ROA.893-894. After considering the Gonzales family's additional briefing and evidence, ROA.931-950, the District Court found the statutory exception to the notice requirement applied because the

Plaintiffs faced imminent harm since it was "uncontroverted" that "[i]t was not until December 1, 2017, that MISD applied any adverse decision to the extracurricular activities of D.G. . . . And only after that was the decision extended to prohibit C.G. from participating in a band concert affecting his grade." ROA.975. Additionally, the District Court ruled that the school district waived immunity to suit by voluntarily removing the suit to federal court and invoking the District Court's jurisdiction. ROA.977.

SUMMARY OF THE ARGUMENT

The District Court appropriately granted preliminary injunctions to enjoin the school district from excluding the boys, C.G. and D.G., from participating in extracurricular activities based on their religious practice of not cutting a strand of hair that they promised God they would not cut. Based on the arguments and evidence presented, the District Court properly determined that the boys had a substantial likelihood of success on the merits of their claim that the school district violated TRFRA. The evidence and argument showed that the school district substantially burdened the boys' free exercise of religion and the school district did not even attempt to demonstrate the burden was in furtherance of a compelling government interest or was the least restrictive means of furthering that compelling government interest. The District Court also properly determined that all of the other factors weighed in favor of a preliminary injunction: violation of TRFRA gives rise

to irreparable harm as a matter of law, the school district did not put on any evidence or point to any countervailing harm that it would suffer if it was not allowed to exclude the boys from extracurriculars, and the public interest favors the protection of religious liberty.

On appeal, the school district does not challenge several aspects of the District Court's determination about the likelihood of success on the merits. In particular, the school district does not dispute that the boys' decision to not cut a lock of their hair is sincerely motivated by religious belief nor does it contest that conditioning the generally available privilege of participation in extracurricular activities on the boys violating their *promesa* substantially burdens their free exercise of religion under TRFRA. Neither does the school district attempt to justify the imposition of this substantial burden by asserting that its policy vindicates some compelling government interest or that the restriction imposed on the boys is the least restrictive means of achieving that interest.

Rather, on appeal the school district contends it was error for the District Court to determine there is a substantial likelihood of success on the merits on the grounds that there was no statutory waiver of immunity to suit since pre-suit notice of the TRFRA claim was provided by facsimile rather than certified mail. But the school district waived its sovereign immunity from suit, the only defense it raised in response to the motion for preliminary injunction.

The District Court properly found there was a substantial likelihood of success on the merits of the TRFRA claim because there are two independent ways that sovereign immunity to suit was waived here. First, it is uncontested that the school district removed this case to federal court and affirmatively litigated this case. The Fifth Circuit has explained in no uncertain terms that such conduct waives sovereign immunity to suit. Second, the District Court did not clearly err in making findings of fact that demonstrate an exception to the requirement for pre-suit notice by certified mail applies because the family faced imminent action by the school district and did not have time to reasonably provide pre-suit notice.

The school district does not contend on appeal that the District Court erred in determining the balance of harms weighs in favor of the boys or that the public interest is served by vindicating religious liberty. Rather, the only other argument the school district makes on appeal is to contend—even though the argument was not made in response to the motion for preliminary injunction—that the boys did not show they would experience an irreparable injury absent an injunction. Because a violation of TRFRA gives rise to an irreparable injury as a matter of law, the school district's arguments that extracurricular activities themselves do not give rise to constitutional rights are entirely misplaced. Moreover, ample evidence was presented establishing the irreparable harm the boys would experience if the school

district continued to exclude them from participation in extracurriculars based on their religious practice.

ARGUMENT

A. The District Court properly determined the boys have a substantial likelihood of success on the merits of their TRFRA claim. The school district waived its sovereign immunity from suit, the only defense it raised in response to the motion for preliminary injunction.

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. 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).

Here, the school district's requirement that the boys violate their *promesa* to participate in extracurricular activities substantially burdens their free exercise of religion. The school district, however, did not even articulate a compelling interest

in not exempting the boys from its grooming policy to allow participation in extracurricular activities nor did the school district even argue that excluding the boys from extracurriculars is the least restrictive means. The only defense the school district raised in response to the motion for preliminary injunction was to argue that sovereign immunity to suit was not waived. But the school district only raised this argument deep into the litigation, after it plainly had waived any such argument by removing the case to federal court and litigating the merits of the case until the school district determined the forum was not as favorable as it had hoped. As a result, the District Court correctly concluded that the boys established a likelihood of success on the merits of their TRFRA claims.

1. The boys' decision not to cut a lock of their hair is substantially motivated by sincere religious belief.

The District Court correctly concluded that the boys' "braids are worn pursuant to a sincere religious belief" and the school district does not challenge that finding on appeal. ROA.900, 979.

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 actions" of plaintiffs, with the inquiry being "what the [plaintiff] claimed was important to him." *Id.* at 791 (citations omitted).

Here, the District Court found that "the witnesses testified credibly that the braids are worn pursuant to a sincere religious belief." ROA.900, 979. More specifically, the District Court explained that "[t]he witnesses, Belen Gonzales, C.G., and D.G., gave compelling testimony that they made and observe a promesa—a prayerful promise that is a devotion to God in appreciation for His healing hand." ROA.899, 978. The District Court relied on credible testimony that "their promesa has been, and continues to be, a sacred promise and an outward sign of their religious belief" and that "[t]hey believe that God would be disappointed in them and could

withdraw his healing protection if they were to break the promesa by cutting the long strands of hair." ROA.899, 978-979. The District Court noted that "both children adopted the promesa as their own sacred promise and continue to affirm it to this day." ROA.900, 979.

The District Court also considered evidence that "[t]he promesas, since the childrens' births, have been sanctioned by Catholic priests, who provided verification to MISD to support Plaintiffs' religious exemption to enroll in school while maintaining their braids." ROA.899, 979. And based on their "long held promesa and the religious exemption MISD granted" each year since the boys were in pre-kindergarten and kindergarten, the boys were "permitted to attend school and participate in extracurricular activities." ROA..899-900, 979.

While the school district does not challenge sincerity on appeal, the school district continues to disparage the boys' religious practice as not central to or even part of Catholicism. Appellant's Br. at 10; ROA.183 ("[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."). Even setting aside the long history of *promesas* in Catholicism that the school district ignores, this argument has no bearing on the case since "[s]incere religious belief cannot be subjected to a judicial sorting of the heretical from the mainstream." *A.A.*, 611 F.3d at 261. TRFRA does not differentiate between sincere religious beliefs. It

equally protects the sincere religious beliefs of C.G. and D.G.—regardless of whether they are compelled by Catholicism—as it does a sincere Sikh or Hasidic Jew who does not cut his hair for religious reasons.

Here, the record before the District Court left no genuine question that C.G. and D.G. will not cut their braids because of the sincerity of their *promesa* with God.

2. The school district substantially burdened the boys' free exercise of religion by conditioning participation in extracurricular activities on the boys violating sincerely held religious beliefs.

The District Court correctly ruled that "[e]xcluding [the boys] from participation in extracurricular activities because [they] refuse[] to cut [their] hair and break [their] promesa places a substantial burden on [their] religious expression." ROA.902, 981.

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 301). 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).

The United States Supreme Court, as well as the Fifth Circuit, 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.

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

Here, the evidence showed that the school district refused to provide C.G. and D.G. an exemption to its grooming policy for participation in extracurricular activities. ROA.848, 850. 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. ROA.858 at ¶ 19, 841-842 at ¶ 32. As C.G. and D.G. 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. ROA.857 at ¶ 15, 837 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. ROA.1077:19-1078:4.

In ruling that the school district imposed a substantial burden, the District Court relied on testimony "that being denied participation in extracurricular activities significantly saddened the children" and that "[t]hey feel excluded and ostracized." ROA.900, 979-980. The District Court also relied on testimony from

the boys' mother "about her concerns that extracurricular activities are stepping stones for the children realizing who they can and want to be" and her "worries that continued exclusion will deny her children [] accomplishments necessary for presenting effective college application resumes." ROA.900-901, 980-981.

The District Court ruled that the school district placed a substantial burden on the boys' religious expression by depriving them of "the real and significant benefits of high school extracurricular life" unless they cut their hair and break their promesa. ROA.902, 981. In doing so, the District Court relied on the school district's "own representation of the benefits of extra-curricular activities" in the MISD Extra-Curricular Handbook. ROA.901, 980. The Handbook promotes a number of these benefits to its students and the public under the heading, "Why are Extracurricular Activities Important?" ROA.787-803. 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." ROA.790. The Handbook further provides:

> **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.**

ROA.790 (emphasis in original).

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—the school district forced the boys to choose between enjoying these generally available, valuable benefits and their sincerely held religious beliefs.

3. The school district presented no evidence or argument that the burden on the boys' exercise of religion was justified by a compelling government interest or that the restriction is the least restrictive means available.

Because the school district has imposed a substantial burden on the boys' exercise of religion, the school district 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" and "application of the burden to the person . . . is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem. Code § 110.003(b); *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."). But the school district "chose not to offer any evidence on these defensive issues." ROA.902, 982.

> 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). The school district was required to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Barr*, 295 S.W.3d at 306.

The school district was required to prove that it has an interest of the highest order in refusing to allow the boys—who are already granted an exemption to attend school—also to be allowed to participate in extracurricular activities, that an exemption would cause such harm that the burden on the boys' religious practice is justified. But in response to the motion for preliminary injunction, the school district

chose not to assert any compelling government interest nor did it assert that excluding the boys from extracurriculars unless they cut their braids was the least restrictive means. It is not surprising that the school district did not even argue that it could meet this prong of the test given that the boys already tuck their religious braid into their shirts, making the braids hardly noticeable. ROA.858 at ¶ 18, 838 at ¶ 18.

4. The District Court correctly concluded that sovereign immunity was waived by the school district removing this case to federal court and by the terms of TRFRA because pre-suit notice is not required where an exercise of government authority that substantially burdens the free exercise of religion is imminent and the person is not informed and did not otherwise have knowledge of the school district's exercise of its authority in time to reasonably provide pre-suit notice.

The school district's lone argument that C.G. and D.G. are not substantially likely to succeed on the merits of their TRFRA claims is an alleged sovereign immunity to suit. Specifically, the school district argues that it is immune from suit because the Gonzales family did not provide adequate pre-suit notice pursuant to Texas Civil Practice and Remedies Code ("TCPR") Section 110.006(a). As this Court held in *Morgan v. Plano Independent School District*, the result of failure to comply with the pre-suit notice requirement is the school district's immunity from

suit is not waived.[1] But, as Judge Ramos correctly held, immunity to suit was waived here for two independent reasons. First, the school district waived any potential immunity from suit by removing this case to federal court, thereby voluntarily invoking federal jurisdiction over the TRFRA claim. Second, TRFRA itself waives immunity from suit in the instant case because the Gonzales family fits within the exception to TRFRA's notice requirement in TCPR Section 110.006(b).

a. Under *Meyers*, the school district waived immunity to suit when it voluntarily submitted to this Court's jurisdiction by removing this case to federal court.

When the school district removed this case and voluntarily submitted to federal jurisdiction, it waived its immunity to suit under *Meyers*, the voluntary invocation doctrine, and the waiver-by-removal rule.[2] In *Meyers*, disabled plaintiffs brought a class action lawsuit against the State of Texas and the Texas Department of Transportation under the American with Disabilities Act. *Id.* at 239. After an initial removal to federal court and subsequent remand, Texas again removed the case—expressly stating that it did not intend to defend and removed for the sole

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[1] 724 F.3d 579, 588 (5th Cir. 2013) ("Because it is undisputed that the Morgan's demand letter did not comply with the jurisdictional pre-suit notice requirements, PISD's governmental immunity is not waived."); *see also id.* at 584 ("In construing TRFRA, the question for this court is whether the pre-suit notice requirement is jurisdictional—that is, a condition of the TRFRA's waiver of immunity from suit—or not.").

[2] 410 F.3d at 255 ("[U]nder the principles of federal law we have discussed, when Texas removed this case to federal court it voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit in federal court.") (citing *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002)).

purpose of asserting sovereign immunity—and then moved to dismiss on the grounds of sovereign immunity. *Id.* at 239, 244 n.7. The district court held that Texas enjoyed immunity from suit under the Eleventh Amendment and dismissed the plaintiff's claims for lack of subject-matter jurisdiction. *Id.* This Court, however, reversed, holding that Texas voluntarily invoked the jurisdiction of the federal courts and waived its immunity from suit by removing the case. *Id.* at 255.

In doing so, this Court recognized that it would be unfair to allow the state—or the school district—to seek out this forum and pursue a favorable ruling on the merits, but to permit it nonetheless to retain the sovereign immunity defense as a way to escape an unfavorable ruling on the merits.[3] To avoid even the potential for generating this unfair result, this Court—following Supreme Court precedent—created a bright-line rule that voluntary removal constitutes a waiver of immunity to suit in all cases. *Id.* at 249 ("[T]he voluntary invocation principle ***applies generally in all cases*** for the sake of consistency, in order to prevent and ward off all actual and potential unfairness whether egregious or seemingly innocuous." (emphasis

[3] *Lapides*, 535 U.S. at 619 ("It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand."); *Meyers*, 410 F.3d at 250 ("The voluntary invocation principle and the waiver-by-removal rule as explained by *Lapides* evolved not merely to quantify and compare *actual* unfair advantages but to eliminate the *potential* of unfairness by the enforcement of clear jurisdictional rules having genuine preventative effect.") (citing *Lapides*, 535 U.S. at 619).

added)).[4] It does not matter if the state has not waived immunity in state courts or if the case also involves federal-law claims.[5]

This Court has since routinely recognized the voluntary invocation doctrine and the general applicability of "waiver-by-removal." *See, e.g.*, *Anderson v. Jackson State Univ.*, 675 Fed. Appx. 461, 463 (5th Cir. 2017); *Carty v. State Office of Risk Mgmt.*, 733 F.3d 550, 554 (5th Cir. 2013).

The school district does not dispute that it removed the Gonzales family's TRFRA claim to federal court. On February 12, 2018, the school district filed its Notice of Removal, voluntarily invoking this Court's jurisdiction. *See generally* ROA.10-13. Under *Meyers*, the school district's removal without more is sufficient to waive the school district's immunity from suit. 410 F.3d at 244 n.7 ("The act of removal without more is sufficient to waive the state's immunity.").

The school district's actions in this case, however, go far beyond the ***potential*** unfairness of Texas's actions in *Meyers* and are an example of the very strategic

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[4] "[W]e believe that *Lapides*'s interpretation of the voluntary invocation principle, as including the waiver-by-removal rule, applies generally to any private suit which a state removes to federal court." *Meyers*, 410 F.3d at 242.

[5] "Significantly [ ] neither court indicated that it would reach a different result if the state had not waived immunity in state courts or if the case had also involved federal-law claims." *Id.* at 248–49 (analyzing *Omosegbon v. Wells*, 335 F.3d 668 (7th Cir. 2003) and *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914 (9th Cir. 2003)); *Meyers*, 410 F.3d at 250 ("For all of these reasons, we are not persuaded by Texas's argument that *Lapides* must be read as limiting the ambit of the voluntary invocation principle to cases involving state-law claims with respect to which the state has waived immunity in its own courts.").

behavior and ***actual*** unfairness this Court sought to eliminate in *Meyers*.[6] After removal, the school district ***expressly admitted*** that the federal court possesses jurisdiction. ROA.134 at ¶ 4 ("DEFENDANT'S RESPONSE: Plaintiff's amended complaint states that [t]his Court has . . . supplemental jurisdiction . . . over Plaintiffs' cause of action under TRFRA. . . . Defendant agrees.") (internal citations and quotations omitted). The school district proceeded to take depositions of the Gonzales family, including the minor plaintiffs, and to seek summary judgment on the merits of the TRFRA claim. *See* ROA.163-186, 446-455. The school district did not raise sovereign immunity from suit to challenge the jurisdiction of the court until ***over one-and-a-half years*** after it removed the case to federal court,[7] and after Judge Ramos denied its motion for summary judgment and the Gonzales family

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[6] *See Meyers*, 410 F.3d at 249 ("[T]he waiver by litigation conduct principles are based on the 'judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages.") (quoting *Lapides*, 533 U.S. at 620); *cf. id.* at 245–46 ("'In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.'") (quoting *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring)).

[7] In its March 14, 2018, motion to dismiss, the school district argued in a single sentence that the Gonzales family's TRFRA claim should be dismissed for failure to plead that the pre-suit notice requirement had been met: "Moreover, Plaintiffs failed to plead that they met the statutory notice requirement." ROA..95. The school district, however, did not raise sovereign immunity from suit or seek to dismiss the claim on that ground. *See generally* ROA..81-102.

sought a preliminary injunction based on the school district's violation of TRFRA.[8] *See* ROA.456-474, 503-544.

Accordingly, the school district cannot now evade federal jurisdiction in an attempt to avoid adjudication of the TRFRA claim on the merits by asserting the immunity it voluntarily relinquished.[9] *See Meyers*, 410 F.3d at 249. Permitting the school district "to both invoke federal jurisdiction and claim immunity from federal suit in the same case . . . [would] generate seriously unfair results." *See id.*

i. There exists no sovereign immunity from suit separate from "Eleventh Amendment" immunity.

In an attempt to avoid *Meyers* and the consequences of its removal, the school district now argues—without citation—that because it "is not a state its governmental immunity is not waived simply because they are in federal court." Appellant's Br. at 22. In so doing, the school district adopts an argument made by Texas that this Court expressly rejected in *Meyers*: that it has an immunity other

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[8] Even if the school district had not removed the TRFRA claim, the school district's conduct in litigating this claim on the merits past the responsive pleading phase is sufficient to find a waiver of immunity from suit. *See Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) ("[T]he state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense."). There is no need for the Court to reach this issue here, however, because the "act of removal without more is sufficient to waive the state's immunity. The state's 'actual preference or desire' and 'benign motive' are not relevant to a waiver by removal." *Meyers*, 410 F.3d at 244 n.7 (quoting *Lapides*, 535 U.S. at 620–21).

[9] It should be noted that the school district has appealed Judge Ramos's orders granting preliminary injunction, and not a denial of a motion to dismiss for lack of jurisdiction. Appellant's Br. at 7. As of the issuance of these orders, the school district had not sought dismissal for lack of jurisdiction based on sovereign immunity from suit.

than "Eleventh Amendment immunity" that is not waived by removal. 410 F.3d at 250–55.

In *Meyers*, this Court rejected Texas's argument that "after a state waives its Eleventh Amendment forum immunity by removing a case to federal court, [it] may still assert its basic or inherent immunity in the same case to have the plaintiffs' suit dismissed, if the state has not waived its immunity from suit for such a claim in state court." *Id.* at 250. This Court explained, "[T]he [Supreme] Court maintained that the term 'Eleventh Amendment immunity' is a misnomer because the states ***have no other sovereign immunity from suit*** than that which they brought intact into the union." *Id.* at 251–52 (emphasis added) (quoting *Alden v. Maine*, 527 U.S. 706, 712-14 (1999)). In other words, "there is no such thing as an Eleventh Amendment immunity separate and apart from state sovereign immunity[;] [ ] a state's sovereign immunity from suit is now and always has been inherent within its sovereignty, and [ ] the Eleventh Amendment did not create new immunity but merely overruled the Supreme Court's erroneous decision in *Chisholm v. Georgia*." *Meyers*, 410 F.3d at 251 (citing *Alden v. Maine*, 527 U.S. 706, 713–27 (1999)).

Even though this argument was explicitly rejected, twice in its brief, the school district points to Section 110.008 of TRFRA[10] for the proposition that the

[10] Tex. Civ. Prac. & Rem. Code Ann. § 110.008(b) (West 2019).

Texas Legislature intended that the sovereign immunity waived by TRFRA and at issue here be separate and apart from "Eleventh Amendment" immunity. *See* Appellant's Br. at 22, 27. The intent of Texas and its legislature, however, is irrelevant to whether the school district's removal amounted to waiver of sovereign immunity because federal, and not state, law governs the waiver of sovereign immunity from suit in federal court.[11] Moreover, given that Texas argued to this Court that Eleventh Amendment immunity is distinct from sovereign immunity, it is not surprising that Texas incorporated this mistaken notion into TRFRA when it was passed in 1999.[12] But this Court rejected Texas's differentiation between "Eleventh Amendment" immunity and a separate inherent sovereign immunity from suit in 2005.[13]

The school district's reliance on the *San Antonio Indep. Sch. Dist. v. McKinney*, 936 S.W.2d 279 (Tex. 1996) for the proposition that the school district

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[11] *See Meyers*, 410 F.3d at 246–47 ("[T]he question of whether a particular form of state action amounts to waiver is a federal question that should be decided under a federal rule.") (citing *Lapides*, 535 U.S. at 622–23); *Carty*, 733 F.3d at 554 ("As both the Supreme Court and this court have recognized, 'the question of whether a particular form of state action amounts to waiver [of immunity from suit] is a federal question that should be decided under a federal rule.'") (quoting *Meyers*, 410 F.3d at 246–47) (alteration in original).

[12] *See Barr*, 295 S.W.3d at 296 (citing Act of May 30, 1999, 76th Leg., R.S., ch. 399, 1999 Tex. Gen. Laws 2511).

[13] *See Meyers*, 410 F.3d at 236, 252 ("Texas's argument and theory, which depend totally upon there being an 'Eleventh Amendment forum immunity' separate from each state's sovereign immunity from suit, find no basis in *Alden* or the current view of the Supreme Court's majority.").

has sovereign immunity but not Eleventh Amendment immunity is similarly misplaced. *See* Appellant's Br. at 23–24. Again, federal law, which governs this issue holds that there is no sovereign immunity from suit separate from "Eleventh Amendment" immunity.[14] As a result, if the school district has no Eleventh Amendment immunity as it asserts, then it has no sovereign immunity from suit, and there is jurisdiction over this claim. But if the school district has sovereign immunity from suit, it waived that immunity—its only immunity from suit—when it voluntarily invoked federal jurisdiction by removal, and there is jurisdiction over this claim.[15] Either way, Judge Ramos correctly held that C.G. and D.G. were substantially likely to succeed on the merits of their TRFRA claim because there is jurisdiction over this claim.[16]

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[14] *Meyers*, 410 F3.d at 246–47, 251–52.

[15] *See Meyers*, 410 F.3d at 255 ("Texas waived its immunity from suit by removal of this case to federal court.").

[16] Though we do not understand the school district to be arguing that C.G. and D.G. are not substantially likely to win on the merits because of sovereign immunity from liability, the school district quotes the following from *Meyers* without further explanation: "[T]he Constitution permits and protects a state's right to relinquish its immunity from suit while retaining its immunity from liability, or vice versa, but that it does not require a state to do so." Appellant's Br. at 22 (quoting *Meyers*, 410 F.3d at 255). Sovereign immunity from liability is governed by state law. *Carty*, 733 F.3d at 554–55 ("This court has held that the question of waiver of immunity from liability is governed by state law."). Under Texas law, it is not jurisdictional but an affirmative defense that cannot be raised as a jurisdictional plea. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003) ("Unlike immunity from suit, immunity from liability does not affect a court's jurisdiction to hear a case and cannot be raised in a plea to the jurisdiction."). Here, this argument was waived because the school district did not present it to the District Court in response to the motion for preliminary injunction. *See Anderson*, 675 Fed. Appx. at 463 ("'The general rule of this court is that arguments not raised before the district court are waived and will not be considered on

ii. The school district's "governmental immunity" is a derivative extension of Texas's sovereign immunity from suit.

The fact that the school district is not a state and, therefore, does not have "sovereign immunity" but "governmental immunity" does not alter this analysis. Governmental immunity is not an immunity separate and distinct from sovereign immunity. *See Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429–30 (Tex. 2016) ("Political subdivisions of the state—such as counties, municipalities, and school districts—share in the state's inherent immunity.").[17] Instead, governmental immunity is a derivative extension of the state's sovereign immunity that "protects political subdivisions performing governmental functions

appeal.'") (quoting *Celanese Corp. v. Martin K. Eby Constr. Co.*, 620 F.3d 529, 531 (5th Cir. 2010)). Regardless, the school district waived the affirmative defense of sovereign immunity from liability by not timely raising it. *See Ingraham v. United States*, 808 F.2d 1075, 1078 (5th Cir. 1987) (holding that failure to timely raise an affirmative defense constitutes a waiver of that defense); *Carty*, 733 F.3d at 555 ("Under established Texas law, sovereign immunity from liability is treated as an affirmative defense to liability: 'it must be pleaded or else it is waived.'") (citation omitted); *see also* ROA.951-956, 1016-1024. The Gonzales family's motion to strike the school district's untimely raised affirmative defenses—without leave of court—remains pending before the District Court. *Cf. United States ex rel. Matthews v. Healthsouth Corp.*, 332 F.3d 293, 296 (5th Cir. 2003) ("[F]ailing to request leave from the court when leave is required makes a pleading more than technically deficient.").

[17] *See also Wasson*, 489 S.W.3d at 433 ("[A] city is not a freestanding sovereign with its own inherent immunity."); *Rosenberg Development Corporation v. Imperial Performing Arts Inc.*, 571 S.W.3d 738, 746 (Tex. 2019) ("Political subdivisions of the state—such as counties, cities, and school districts—are not sovereign entities, but under the governmental-immunity doctrine, they share the state's immunity when performing governmental functions as the state's agent.").

as the state's agent." *See Rosenberg Development Corporation v. Imperial Performing Arts Inc.*, 571 S.W.3d 738, 741 (Tex. 2019).[18]

Because the school district is not a sovereign distinct from the state, it only has such powers and privileges the state (*i.e.*, the sovereign) expressly or impliedly confers upon it. *See Wasson*, 489 S.W.3d at 430 ("But '[t]hey represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them.'" (alteration in original) (quoting *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946)). As a result, the school district's governmental immunity "extends only as far as the state's but no further." *Id.*[19] It is for this reason that courts often utilize these terms interchangeably.[20]

The school district, however, maintains that its derivative sovereign immunity (*i.e.*, governmental immunity) somehow survives removal even though the

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[18] *See also City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011) ("When performing governmental functions, political subdivisions derive governmental immunity from the state's sovereign immunity.").

[19] *See also Rosenberg*, 571 S.W.3d at 746–47 ("Because governmental immunity extends as far as the state's [immunity] but no further, no immunity exists for acts performed in a proprietary, non-governmental capacity." (alteration in original) (quotations omitted)).

[20] *See, e.g.*, *Rosenberg*, 571 S.W.3d at 746 n.56 ("Though the terms are often used interchangeably, sovereign immunity and governmental immunity protect distinct entities."); *Lubbock County Water Control & Imp. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 n.4 (Tex. 2014) ("'Sovereign immunity' protects the State and state-level governmental entities, while 'governmental immunity' protects political subdivisions of the State such as counties, cities, and districts . . . . The two doctrines are otherwise the same, and courts often use the terms interchangeably." (citations omitted))

sovereign immunity of the state (*i.e.*, the sovereign from which it derives its immunity) would have been waived. The school district provides no reasoning or authority for this bald assertion. This is unsurprising, for if true, the derivative immunity of the school district would impermissibly extend further than the sovereign's.

This Court's ruling in *Meyers* underscores that governmental immunity is to be treated the same as sovereign immunity for purposes of waiver-by-removal. In *Meyers*, defendants included the Texas Department of Transportation in addition to the State of Texas. 410 F.3d at 239. Even though the Texas Supreme Court had previously held that the Texas Department of Transportation possessed governmental immunity,[21] *Meyers* did not distinguish between defendants depending on whether they held sovereign or governmental immunity. *Id.* at 256. Instead, this Court held that all parties waived immunity from suit, including the Texas Department of Transportation. *Id*.

Additionally, in *Morgan*, this Court—construing both TRFRA and TCPR Section 311.034—held that TRFRA's use of the phrase "sovereign immunity" must include the related concept of "governmental immunity;" if not, the school district

[21] *Texas Dep't of Transp. v. Jones*, 8 S.W.3d 636, 639 (Tex. 1999) ("The Department based its plea to the jurisdiction on its immunity from suit. Because governmental immunity from suit defeats a trial court's subject matter jurisdiction, the court of appeals erred in affirming the denial of the Department's plea . . . .").

would have no immunity from TRFRA claims ***at all***. *Morgan*, 724 F.3d at 587 (citing *Travis Central Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011).

Therefore, the school district has failed to set forth any valid reason that the principles explained by *Meyers* do not apply to the present case. *See Meyers*, 410 F.3d at 252. Even if the Gonzales family did not provide adequate pre-suit notice and the school district retained its immunity to suit, the school district waived any such retained immunity through its removal and litigation conduct, as a matter of law.

b. TRFRA expressly waives the school district's sovereign immunity from suit because C.G. and D.G. fall within the exception to TRFRA's notice provision.

TRFRA expressly provides that the school district has no immunity here: "[S]overeign immunity to suit and from liability is waived and abolished to the extent of liability created by Section 110.005" and subject to the notice provisions of Section 110.006. Tex. Civ. Prac. & Rem. Code §§ 110.008(a) (waiver) and 110.005(a) (remedies). The only exception to that waiver occurs where a litigant is required to but does not provide pre-suit notice pursuant to TCPR § 110.006(a).

TRFRA, however, provides an express exception to the notice requirement for parties threatened with an imminent, substantial burden to their free exercise of religion. As the school district stated in its brief to this Court: "The Legislature left open an opportunity to bring suit without the notice letter 'to bring an action for

declaratory or injunctive relief and associated attorney's fees, court costs, and other reasonable expenses, if the governmental exercise that threatens to substantially burden the person's free exercise **is imminent** and the person was not informed and did **not otherwise have knowledge of the government exercise in time to reasonably provide the notice.**'" Appellant's Br. at 25 (quoting https://capitol.texas.gov/tlodocs/76R/analysis/html/SB00138H.htm); *see also* Tex. Civ. Prac & Rem. Code § 110.006(b).

Judge Ramos properly held that the Gonzales family's filing of this action falls within the exception to Section 110.006(a)'s pre-suit notice requirement. This holding was based on findings that (1) the school district's exercise of governmental authority that would substantially burden C.G.'s and D.G.'s free exercise of religion (*i.e.*, the school district's exclusion of the boys' from participation in UIL extracurricular activities) was imminent; and (2) that the Gonzales family was not informed and did not otherwise have knowledge of the school district's exercise in time to reasonably provide the notice required in Section 110.006(a). *See* ROA.902-903, 973-976, 982.

The District Court's factual findings are reviewed for clear error, while the legal conclusions are reviewed de novo. *See Moore v. Brown*, 868 F.3d 398, 403 (5th Cir. 2017). "Under the clearly erroneous standard, this court upholds findings by the district court that are plausible in light of the record as a whole." *Id.* The

District Court did not clearly err in its findings, and properly held that C.G.'s and D.G.'s TRFRA claim falls within the express exception to TRFRA's pre-suit notice requirement.

i. The school district's exercise of authority substantially burdening C.G.'s and D.G.'s free exercise of religion was imminent.

The school district argues that the exception does not apply because there is no evidence that an action by the school district was imminent. *See* Appellant's Br. at 18. It bases this argument on this Court's ruling in *Morgan*. *Id*. In *Morgan*, plaintiff alleged that his free exercise of religion was substantially burdened when he was prohibited from distributing his religious message at a holiday party in 2003. 724 F.3d at 580–82. The Morgans, however, did not file for injunctive relief until immediately before the next year's party in 2004. *Id.* at 581.

Here, unlike in *Morgan*, the exercise of governmental authority at issue was not prohibition of an activity at a discrete event but a continual, ongoing exclusion from participation in extracurricular activities based on the school district's grooming policy. *See supra* Statement of Relevant Facts, D. As discussed above, the school district did not dispute the District Court's holding that its exclusion based on the grooming policies substantially burdened the boys sincerely held religious beliefs, and it does not dispute its intention to continue to exclude them from participation before this Court. ROA.870-873, 1028-1090; *see generally*

Appellant's Br. Each day the school district's exclusionary policy remained in force, the boys' free exercise was substantially burdened and the boys knew that the next day would be the same without court intervention. Such a continual, ongoing exercise of governmental authority that substantially burdens the free exercise of religion is imminent.

Additionally, the District Court found that "MISD intended to immediately bar C.G. from extracurricular activities with academic consequences (prohibiting him from participating in a band concert, which initially resulted in a failing grade)." ROA.973-974, 931-950. The District Court did not clearly err because this finding is more than plausible on the undisputed record before it. *See* ROA.931-950.

ii. The District Court did not clearly err in finding that the Gonzales family was not informed and did not otherwise have knowledge of the school district's exercise of its authority in time to reasonably provide pre-suit notice.

The school district also argues that this action does not fit within TRFRA's exception to pre-suit notice because the Gonzales family had time to provide that notice "since this was an ongoing policy." Appellant's Br. at 19. The District Court, however, did not clearly err in finding that the Gonzales family did not have knowledge of the exercise of the school district's governmental authority that was imposing imminent harm in time to reasonably provide pre-suit notice because such

a finding is plausible based on the record before the District Court. *See* ROA.973-976.

Although C.G. and D.G. were aware of the school's grooming policy, they received waivers from the school district to attend school in the district since kindergarten and were not put on notice that the exemption would not apply to extracurricular activities. As a result, in August 2017, C.G. was surprised when his football coach publicly informed him in front of his peers that he would not be allowed to participate in football that year unless he severed his braid. *See* ROA.938-939, ¶ 3-4. On August 18, 2017, C.G.'s family filed a Level One Grievance regarding his participation in football with the school district. *See* ROA.939, ¶ 5. Throughout the grievance process, the school district led the family to believe that its position was limited to enforcing the school's grooming policy in the context of football. *See* ROA.940 at ¶ 9, 972-976.

As the District Court found, "Belen Gonzales' testimony is uncontroverted that, prior to December 1, 2017, she believed that only C.G.'s participation in football was at issue." ROA.975. It was not until after December 1, 2017 that the family learned that the school district intended to apply the decision to all extracurricular activities of both boys. ROA.940 at ¶ 10. It was only at that time that school district removed D.G. from the science team, and shortly after, informed

the family that C.G.'s braid would prevent him from participating in any activities outside of school hours, including the fall band concert. ROA. 940-941 at ¶¶ 10-12.

The school district's actions led the Gonzales family to seek immediate redress in court to avoid this imminent and continuing substantial burden on C.G.'s and D.G.'s free exercise of religion. ROA.941 at ¶ 13. On January 9, 2018, C.G. and D.G. filed suit seeking injunctive relief from the school district's exclusion of their participation in extracurricular activities based on its grooming policies. *See* ROA.941 at ¶ 13.

The school district submitted no evidence to contradict this testimony. Instead, it now points to one line of testimony from Ms. Gonzales taken out of context as an alleged admission contradicting the District Court's findings. *See* Appellant's Br. at 17. During re-cross examination, Ms. Gonzales testified that issues were raised with D.G. "in the December month" and that "after . . . getting with our attorney and the holidays and stuff getting out of the way, that's when everything was addressed." ROA.1073:19-22. The very next question was, "And so you knew ***at the time*** when you filed this grievance that both your children were going to be denied extracurricular activities, right?" ROA.1073:23-25 (emphasis added).

Given the clear testimony by Ms. Gonzales, which was consistent with D.G.'s testimony, and the context in which the question was asked, there can be no doubt

that Ms. Gonzales simply understood the question to refer to the December time period about which she had just testified. *See, e.g.*, ROA.940 at ¶¶ 9-10, 1059:10-17, 1059:23-1060:23, 1072:1-8, 1073:19-20, 1077:19-1078:1. This was when she learned for the first time that D.G. was being denied the opportunity to participate in extracurricular activities and the restriction on C.G. extended beyond football alone.

On this record, there can be no question that it was plausible for Judge Ramos to find the Gonzales family lacked knowledge of the school district's exercise of governmental authority in enough time to allow Plaintiffs to reasonably provide notice, thus falling within the exception of Section 110.006(b). *See* ROA.976.

B. The boys would suffer irreparable harm absent an injunction due to the continuing substantial burden on their free exercise of religion.

The school district did not raise its challenge to the adequacy of the Plaintiffs' showing on the irreparable harm prong before the District Court. Parties "waive an argument when 'they fail[ ] to argue or brief it to the district court and instead only make general reference to it." *City of Hearne, Texas v. Johnson*, 929 F.3d 298, 300 (5th Cir. 2019). The school district noted that Plaintiffs had "not sought a preliminary injunction hearing" earlier in the case and argued only that "the only irreparable injury that has arisen between the time of filing and today is new counsel has joined Plaintiffs' team." ROA.877. But the school district did not dispute that a violation of TRFRA would give rise to irreparable harm as a matter of law nor did

it argue the evidence of ongoing harm experienced by the boys due to their exclusion from extracurriculars did not constitute irreparable harm.

Even if the school district had not waived its argument as to irreparable harm, however, the District Court's finding that the boys would experience irreparable harm absent injunctive relief is well-supported by the record below and should be affirmed.

Yet the school district contends—without citing any legal support—that "[t]o grant a preliminary injunction, the district court must find missing specific activities will cause Plaintiffs' an actual irreparable injury." Appellant's Br. at 29. In the school district estimation, the order was faulty because "the district court's only specifically listed activity that either child will miss is C.G. missing football," which the school district says is not an irreparable injury. *Id.* The school district further argues that what it contends is a "generic" statement in the order that the boys "cannot participate in extra-curricular activities" is not adequate for pointing to irreparable harm to issue a preliminary injunction. *Id.*

First, the school district mischaracterizes the District Court's order as only being only about football. The order makes clear that absent an injunction the boys would experience ongoing irreparable harm because the school district substantially burdens their free exercise of religion by excluding them from extracurriculars due to their religious practice without justification. ROA.900-903, 978-982. The

District Court called specific attention to the fact that "C.G. has *already* been denied the opportunity to participate in football." ROA.903, 982 (emphasis added). But the District Court also relied on testimony by D.G. that "he has been interested in science and math clubs in the past and would like to participate in computer programming, designing, and technology activities, as they are directly relevant to his future career goals." ROA.901-902. The District Court then explained more generally that "[i]f an injunction is not entered" that the boys would "lose three-quarters of [their] high school freshman year's opportunity for participation" in any extracurricular activities during what is "a formative time for students to integrate into the life of the school and the time cannot be regained." ROA.903, 982.

Second, the order need not have provided any detail at all on the basis for concluding the boys would suffer irreparable harm absent injunctive relief. The record provides more than sufficient grounds for this Court to affirm the District Court's judgment. In considering an appeal of an order granting a preliminary injunction, this Court has noted that "it is an elementary proposition, and the supporting cases too numerous to cite, that this court may affirm the district court's judgment on any grounds supported by the record." *Texas v. United States*, 809 F.3d 134, 178 (5th Cir. 2015) (citation omitted). This includes any supported ground "not reached by the district court." *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012).

Here, as detailed above, overwhelming evidence in the record establishes a substantial likelihood of success on the merits of the TRFRA claim, which in turn demonstrates that the boys would suffer irreparable injury absent injunctive relief. "'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).

Accordingly, this Court should affirm the District Court's conclusion that the boys would suffer irreparable harm absent an injunction due to the continuing substantial burden on their free exercise of religion.

CONCLUSION

The school district does not challenge that it is substantially burdening C.G.'s and D.G.'s sincerely held religious beliefs by excluding them from extracurricular activities unless and until they sever their religious braids in violation of TRFRA nor does it assert any compelling interest as a justification. Instead, it asks this Court to overturn the District Court's grant of preliminary injunctions to allow it to continue its unlawful exclusion of these boys based on untimely-raised sovereign immunity from suit. But the school district waived sovereign immunity from suit as a matter of law when it voluntarily invoked federal jurisdiction through removal. In addition, as the District Court found, sovereign immunity from suit was waived under TRFRA because the exercise of governmental authority substantially burdening the boys' free exercise of religion was imminent and they were not informed or otherwise have knowledge in time to reasonably provide pre-suit notice. Therefore, the District Court did not abuse its discretion by granting the preliminary injunctions at issue, and the Gonzales family respectfully requests this Court affirm.

Corpus Christi, Texas
DATED: November 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2019, a true and correct copy of the foregoing document was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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Counsel also certifies that on November 20, 2019, the foregoing instrument was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System.

Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned and is free of viruses.

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Dated: November 20, 2019