Piercing Politics: Religious Garb and Secularism in Public Schools

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FOREWORD

In August of 2001, I began my high school education at a secular private school with a student population predominated by Caucasian students. I was one of a few dozen Asian students and only one of a handful of Indian students. Coming from a small Midwestern town, my identity as “the Indian girl” did not bother me initially, but I soon felt an inability to maintain my Indian heritage and Hindu religion in a place where I was a forgotten minority.

In a desperate attempt to regain my sense of religious and cultural identity, my parents and I made a family decision. Generations of Hindu Indian women in my family adorned nose piercings to indicate their religious beliefs and as an indicator they reached a certain age of maturity. It also served as a symbol of cultural pride.¹ My parents stood by my side and held my hands on the day I had my nose pierced. The decision allowed me to reconnect with my religious and ethnic identity when I returned to campus and reminded me of how proud I was to be a Hindu.

Soon after returning to campus, a senior counselor noticed my nose piercing and reported me to the school administration for my violation of the school’s rigorous dress code that did not provide a religious apparel exemption. I was soon reprimanded by the school administration for disobeying school policy. With the support of my family, friends, and faculty, I reached a settlement with the administration that allowed me to keep my nose piercing, but not without a fight.

I now realize the school’s generosity in deciding to permit my nose piercing, as it was a private institution and free to regulate the way students dress. Over the years, I always find myself wondering whether the same issue would have arisen had I attended a public high school where students are protected by the First Amendment.

INTRODUCTION

On August 25, 2010, Ariana Iacono began her first day as a freshman at Clayton High School, a secondary public school in the Johnston County School District of North Carolina.² As a newly initiated member of the Church of Body Modification, Ariana was wearing a small stud in her nose.³ This was a decision carefully made by Ariana, her mother, and officials of the Church prior to Ariana’s matriculation into Clayton High.⁴

³ Iacono, No. 5:10-CV-416-H at 1-2.
⁴ Id.
Ariana was cited for violating the Johnston County School Board policies regarding student dress code. She argued that her nose piercing was prompted by a religious belief associated with the Church of Body Modification. After a series of discussions between Ariana, her mother Nikki Iacono, and Johnston County school officials, the school concluded that Ariana’s piercing did not satisfy the religious apparel exemption. Ultimately, the school issued a long-term suspension and recommended that Ariana attend an “alternative school.”

Represented by the American Civil Liberties Union (“ACLU”) of North Carolina, Ariana and her mother filed suit against Clayton High, the teachers who told Ariana to remove the stud, and various school officials, alleging that the school’s failure to grant Ariana an exemption violated the First Amendment, procedural and substantive Due Process guarantees of the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment. Further, the Iaconos asked the federal district court to enjoin the school from enforcing the dress code as applied to Ariana’s nose stud, and further allow Ariana to return to Clayton High School. On October 8, 2010, the District Court for the Eastern Division of North Carolina granted plaintiffs’ request for a preliminary injunction. The Iaconos and the School Board ultimately settled the case.

This Article examines the Iacono case and similar incidents of religion combating public school dress codes. In so doing, the discussion hopes to offer solutions not only for those students whose constitutional rights are violated by the limited nature of school policies, but to help schools prevent policy from infringing upon individual liberties. The central objectives of the discussion are to understand what happened in Iacono, where the majority of high schools fall on the issue of religious apparel in schools, what procedures exist to deal with the assertion of a religious apparel exemption from school dress codes, and what solutions may be enacted to prevent similarly problematic and unconstitutional situations in the future. This Article grapples with the question of where courts draw the line between secularism and free exercise in public schools. It ultimately adopts a proactive, non-legal strategy to address the issue. Public schools should include an express religious exemption with overt procedural guidelines in school dress codes to avoid constitutional violations of student rights, unnecessary litigation, and bad publicity.

5. Id. at 2.
6. See id. at 1-2.
7. Id.
8. Id.
9. Complaint at 5, Iacono, No. 5:10-CV-416-H.
10. Id. at 16.
11. Id.
Section II of this Article contains a deeper discussion of the Iacono case, including an examination of the pleadings, the press, and the parties involved. Section III widens the breadth of the potential constitutional arguments by augmenting the case law cited in the Iacono briefs and exploring other jurisprudence relating to Free Exercise issues in the context of religious garb in public settings. Section III delves into the possibility of asserting a violation of the Establishment Clause on the basis of the Lemon v. Kurtzner test.

After establishing the wide array of constitutional arguments available in a case like Ariana Iacono’s, both those used and excluded in Iacono, Section IV of the discussion presents a small survey of public school district board policies regarding student dress. The empirical findings presented in Section IV arise from a survey of the dress codes contained in school district board policy manuals retrieved from the largest school district of each state in the United States. Though limited in its scope, this research surveys the likelihood of a recurrence of the Iacono case to show the need for preventative solutions for dealing with conflict between school dress codes and a student’s right to freely exercise religious beliefs.

The Article then discusses how schools may curtail future instances like that involving Ariana Iacono. Section V proposes that all public school districts must adopt a comprehensive religious apparel exemption and enact express policies for application of the exemption. Further, this section outlines a model exemption for religious apparel. The Article will conclude by considering the stakes of not adopting dress code policies with comprehensive religious garb exemptions.

I. THE IACONO CASE

A. The Facts

In August 2009, Nikki Iacono joined the Church of Body Modification (“COBM”).\textsuperscript{13} Incorporated in Pennsylvania in July 2008, COBM is a religious organization with approximately 3,500 members in the United States.\textsuperscript{14} COBM’s mission statement sets forth as follows: “The Church’s mission is to educate, inspire, and to help lead our members along a path of spiritual body modification. As members of the Church of Body Modification, we aim to practice our body modification rituals with purpose, to unify our mind, body, and soul, and to connect with our higher power.”\textsuperscript{15} Members of COBM practice ancient and modern body modification rituals, which include piercing, scarring, tattooing, and suspensions under the belief that these rites are essential to spiritual growth.

\textsuperscript{13} Iacono, No. 5:10-CV-416-H at 1.
\textsuperscript{14} Id. See also Complaint at 5, Iacono, No. 5:10-CV-416-H.
by strengthening “the bond between mind, body, and soul.”\footnote{16} COBM minister Reverend Richard Ivey III elaborated on the Church’s practices in an interview: “Sometimes what you do to the body can strengthen the soul or bring the mind and soul into harmony with the body.”\footnote{17} Reverend Ivey explains that COBM members “don’t worship the god of body modification or anything like that.”\footnote{18} Rather, he teaches that spirituality is a personal and individual act.\footnote{19}

In the summer of 2010, Ariana spent time with her mother’s family in New York.\footnote{20} Around this time, Ariana began expressing her desire to join COBM.\footnote{21} Upon her return to North Carolina, with her mother by her side, Ariana became an official member of COBM.\footnote{22} Upon her induction into the church, Ariana pierced her nose with the sincere belief that the nose piercing must be worn at all times according to COBM doctrine.\footnote{23} Ariana began her freshman year at Johnston County High School that same month.\footnote{24}

On Ariana’s first day of school, Assistant Principal Andrea Andino informed Ariana that her nose piercing violated the school dress code, and that failure to remove the piercing would result in an in-school suspension.\footnote{25} The following day, Nikki arranged to meet with Principal Clint Eaves in order to explain the religious foundation of Ariana’s nose piercing.\footnote{26} At that time, Nikki offered Principal Eaves Reverend Ivey’s contact information and the link to the COBM website.\footnote{27} The Johnston County School District policy in question, Policy Code 4220, provides that “no jewelry shall be affixed to a student’s nose, tongue, lips, cheek, or eyebrow.”\footnote{28} The policy, however, exempts the apparel of certain students in situations where “compliance would impose a substantial burden on the exercise of a sincerely held religious belief.”\footnote{29} The exemption establishes the standard of review available to an administrator determining whether to

\begin{footnotesize}
\footnote{18} Tom Breen, Teen Girl’s Piercing a Religious Right?, HERALD SUN (Sept. 16, 2010), http://www.heraldsun.com/view/full_story/9551860/article-Teen-girl-s-piercing-a-religious-right-.
\footnote{19} Id.
\footnote{20} Affidavit of Nikki Iacono at 2, Iacono, No. 5:10-CV-416-H (Oct. 6, 2010).
\footnote{21} Id. See also Affidavit of Ariana Iacono at 2, Iacono, No. 5:10-CV-416-H (Oct. 6, 2010).
\footnote{22} Id.
\footnote{23} Id.
\footnote{24} Iacono, No. 5:10-CV-416-H at 1.
\footnote{25} Iacono, Affidavit of Nikki Iacono at 3.
\footnote{26} Id.
\footnote{27} Id.
\footnote{28} Iacono, No. 5:10-CV-416-H at 2; see also Johnston County Schools, Regulation Code: 4220-R Student Dress Code and Appearance, reprinted in Affidavit of Nikki Iacono at Ex. 3, Iacono, No. 5:10-CV-416-H (Oct. 6, 2010).
\footnote{29} Iacono, No. 5:10-CV-416-H at 2; see also Complaint at 6, Iacono, No. 5:10-CV-416-H.
\end{footnotesize}
issue an exemption. “In making determinations regarding exemptions to the School Dress Code and Appearance policy, the principal or designee shall not attempt to determine whether the religious beliefs are valid but only whether they are central to religious doctrine and sincerely held.”\(^{30}\) The exemption further provides that the administrator may request evidence from the student’s parents showing:

1. that the objection to the requirements of the Student Dress Code and Appearance policy is grounded in religious tenets rather than mere personal preference;
2. that the religious beliefs are sincerely held and practiced; and
3. that compliance with the requirements of the Student Dress Code and Appearance policy truly will interfere with the exercise of those beliefs.\(^{31}\)

The procedural provisions further expand the powers of the administrator in making the determination regarding whether to issue an exemption.

Generally, the following kinds of information may be required by the principal or principal’s designee in making the determination: (a) a written statement by an authority on the religion explaining the religious belief and how it is affected by the Student Dress Code and Appearance policy; (b) a copy of, or citation to, a recognized religious text which is the basis of that belief; (c) identification of the religious group holding the belief if there is such a group; (d) any written descriptions or summaries that might be available, from texts or encyclopedias or religious publications, explaining the religious belief and how its exercise would be affected by compliance with a Student Dress Code and Appearance policy; and (e) examples of other circumstances in which the sincerity of the religious belief has been demonstrated.\(^{32}\)

Mr. Eaves informed Ariana that, pursuant to school policy, Ariana risked in-school suspension if she continued to wear the nose piercing.\(^{33}\) When Ariana refused to remove the piercing, one school official allegedly informed her that she “would be treated differently” if she belonged to the Hindu or Muslim faith.\(^{34}\) According to Nikki Iacono’s affidavit and the
plaintiffs’ complaint, Principal Eaves repeated this statement when he later contacted Nikki with more questions regarding COBM.\(^{35}\)

Following the meeting, Ariana was allowed to wear the nose piercing on school grounds until the school reached a conclusion as to whether to exempt Ariana from the dress code.\(^{36}\) On August 30, 2010, after school officials met with the Iaconos several times, Principal Eaves telephoned Nikki and informed her that there was no evidence illustrating the religious necessity of Ariana’s nose piercing and forbade her from further wearing her nose piercing to school.\(^{37}\) Following this determination, the school cited Ariana several times for violation of the dress code and eventually suspended her from campus for ten days.\(^{38}\)

The final order of suspension came on September 21, 2010. Principal Eaves suspended Ariana for ten days and further recommended that Ariana attend an alternative school.\(^{39}\) Ultimately, the matter came before the Johnston County School Board, which, following an appeals hearing, upheld Principal Eaves’s decision.\(^{40}\)

On October 6, 2010, Ariana and her mother filed suit against the various administrators who cited Ariana for her dress code violations as well as the Johnston County School Board itself.\(^{41}\) The Iaconos were represented by Jonathan D. Sasser of Ellis & Winters, LLP, alongside the American Civil Liberties Union of North Carolina Legal Foundation (“ACLU”).\(^{42}\) A review of the case docket reveals that the defendants never filed a formal answer to the plaintiffs’ complaint; however, the parties jointly continued the case for several months in an attempt to reach a settlement.\(^{43}\)

**B. Arguments in Plaintiffs’ Brief in Support of the Temporary Restraining Order**

The Iaconos’ complaint alleged violations of the Free Exercise Clause of the U.S. Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution.\(^{44}\) The complaint specifically alleged that the school district board’s actions violated Ariana’s right to freely exercise her religion, and that the school’s conduct infringed upon Nikki’s Fourteenth Amendment right to direct her

\(^{35}\) Affidavit of Nikki Iacono at 4, *Iacono*, No. 5:10-cv-00416-H.

\(^{36}\) *Id.*

\(^{37}\) *Id.* at 4-7.

\(^{38}\) *Id.* at 4-6.

\(^{39}\) Affidavit of Nikki Iacono at 7, *Iacono*, No. 5:10-cv-00416-H.

\(^{40}\) *Id.* at 8.

\(^{41}\) See Complaint, *Iacono*, No. 5:10-CV-416-H.

\(^{42}\) *Id.*

\(^{43}\) PACER was used to find the pleadings for this case. A copy of the Docket for Case No. 5:10-cv-00416 is on file with the author.

\(^{44}\) Complaint at 1, *Iacono*, No. 5:10-CV-416-H.
child’s religious and educational upbringing. The complaint also argued that the School Board misapplied its own policy regarding the issuance of religious exemptions to the dress code in violation of the procedural due process guarantees of the Fourteenth Amendment. Lastly, the plaintiffs set forth that defendants’ preference “for orthodox religions over a lesser-known but well-established unorthodox religion” violated Ariana’s right to equal protection of the law, as guaranteed by the Fourteenth Amendment. The bite of plaintiffs’ arguments, however, arises in the plaintiffs’ brief in support of plaintiff’s motion for a temporary restraining order and preliminary injunction. In order to understand thoroughly the many constitutional violations present in a case like Iacono, a dissection of the arguments posed by plaintiffs follows.

1. The Hybrid Rights Exception

The Iaconos’ brief first argued that the school’s refusal to exempt Ariana from the dress code violated Nikki’s Fourteenth Amendment right to direct her daughter’s educational and religious upbringing. As discussed in the brief, in Wisconsin v. Yoder, the Supreme Court invalidated a mandatory school attendance law as applied to Amish families who refused to send their children to school past the eighth grade. Notably, Yoder created the “hybrid-right” exception, providing that “when the interests of parenthood are combined with a Free Exercise claim,” there must be “more than merely a reasonable relation to some purpose within the competency of the State to sustain the validity of the State’s requirement under the First Amendment.” In deciding to exempt Amish parents from the Wisconsin law, the Court defended a longstanding “tradition of parental concern for the nurture and upbringing of their children.” In Iacono, by preventing Nikki from directing her child’s religious upbringing, her hybrid right had been infringed.

The plaintiffs next discussed Ariana’s right to Free Exercise as guaranteed by the First Amendment. The Iacono’s free exercise argument sets forth the First Amendment’s protection of the individual’s right to freely exercise her religious beliefs and begins with a discussion of Tinker v. Des Moines Independent County School District, where the Supreme

45. Id.
46. Id.
47. Id.
49. Pls’ Brief at 14, Iacono, No. 5:10-cv-00416-H.
51. Yoder, 406 U.S. at 233; see Pls’ Brief at 15, Iacono, No. 5:10-cv-00416-H.
52. Yoder, 406 U.S. at 232.
53. Id.
54. Pls’ Brief at 15, Iacono, No. 5:10-cv-00416-H.
Court ruled that the guarantees of the First Amendment must apply to public school students.\(^55\) In *Tinker*, school officials suspended students from a public high school for wearing black armbands to school in protest of the Vietnam War.\(^56\) In upholding the students’ First Amendment right to free speech, and thus the students’ right to wear the armbands, the Court notably stated that “First Amendment rights applied in light of the special characteristics of the school environment are available to teachers and students.”\(^57\) In its analysis, the Court found that there had been no “substantial disruption or material interference with school activities” caused by the students’ adornment of the armbands; rather, the students kept to themselves and merely wore the armbands to “exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.”\(^58\)

The *Tinker* Court referred to classrooms as a “marketplace of ideas,” contemplating that the future of the United States “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”\(^59\) Unfortunately, the *Iacono* brief discussed *Tinker* only briefly as the case does not involve religion; the comparison nevertheless has meaningful implications as *Tinker* deals with issues of individual expression in the public school classroom.\(^60\) Just as the students in *Tinker* fought to freely express their political beliefs by wearing armbands in the public school classroom, Ariana Iacono fought to freely express her religious beliefs by adorning a pierced nose in the same public school battleground.

The brief then narrowed its scope to exclusively Free Exercise cases. The plaintiffs relied upon *Employment Division, Department of Human Resources of Oregon v. Smith*, in which the Court confronted a challenge to the Employment Division of Oregon’s decision to deny terminated employees unemployment compensation after finding that those employees used peyote during the course of a sacred ceremony at the Native American Church.\(^61\) In *Smith*, the Employment Division denied unemployment benefits to employees belonging to the Native American Church on the basis that an Oregon controlled substance statute criminalized the use and


\(^{56}\) *Tinker*, 393 U.S. at 504.

\(^{57}\) *Id.* at 506.

\(^{58}\) *Id.* at 514.

\(^{59}\) *Id.* at 512.

\(^{60}\) Pls’ Brief at 15, *Iacono*, No. 5:10-cv00416-H; see *Tinker*, 393 U.S. 503.

\(^{61}\) Emp’t Div., Dep’t of Human Res. of Or. v. Smith, 494 U.S. 872, 874 (1990); Pls’ Brief at 15-16, *Iacono*, No. 5:10-cv00416-H.
possession of peyote. The employees in question, however, argued that the statute prohibited religious use of peyote in violation of the Free Exercise Clause. The Smith Court stated that it would uphold generally those laws imposing burdens on the free exercise of religious beliefs, so long as the law in question did not single out a religious belief for uniquely unfavorable treatment. The Court, however, also carved a narrow exception to its general rule:

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press...or the right of parents to direct the education of their children.

The Smith Court concluded that, in a case involving a hybrid-right, like that illustrated in Yoder, a heightened scrutiny standard shall apply.

The Iacono brief suggested that, based on district court precedent for the Eastern District of North Carolina, heightened scrutiny means strict scrutiny. In Hicks v. Halifax County Board of Education—the case cited by plaintiffs in asserting the strict scrutiny standard—a district court considered a custodial great-grandmother’s challenge to a school board’s refusal to exempt, on religious grounds, her great-grandson from a mandatory school uniform policy. Mrs. Hicks challenged the board’s refusal on the grounds that she believed that her grandson’s adherence to the uniform policy would demonstrate an allegiance to the anti-Christ. In applying Smith and Yoder, the Court found that Mrs. Hicks asserted a valid hybrid right claim, thus triggering the heightened scrutiny standard of review.

In interpreting the heightened scrutiny standard, the Hicks court states: Whatever the hybrid-rights exception may mean in other contexts, the Smith Court’s decision to distinguish, rather than overrule, Yoder suggests its belief that a statute or policy that implicates the particular combination of rights at issue in that case, free exercise and the parental right to direct the religious upbringing of her children, necessitates that application of heightened scrutiny.

The court then briefly discusses a split among the circuit courts regarding the burden of proof applicable to a plaintiff seeking to assert the hybrid

63. *Id.* at 874-76.
64. *Id.* at 893.
65. *Id.* at 881.
66. *Id.*
68. *Hicks*, 93 F.Supp.2d at 653.
69. *Id.*
70. *Id.* at 663.
71. *Id.* at 661.
rights exception. The brief specifically notes the Sixth Circuit’s absolute refusal to apply or construe claims of hybrid rights, while the Tenth and Ninth Circuits require plaintiffs to demonstrate “colorable claims of constitutional violations.” In holding that the grandmother had asserted a viable hybrid rights claim, the Hicks Court determined that the school policy in question was subject to strict scrutiny, imposing the burden of proof upon the government to show that the law in question is narrowly tailored to promote a compelling government interest.

Following its assertion of strict scrutiny as the relevant standard, the Iacono brief illustrates how, from one set of facts, a defendant can simultaneously violate two independent constitutional rights: (1) Ariana’s First Amendment right to freely exercise her religion by wearing a nose piercing to school; and (2) Nikki’s Fourteenth Amendment right to direct Ariana’s religious and educational upbringing. The brief centrally asserts the infringement of Ariana’s Free Exercise right, making the argument that “the Dress Code not only restricts, but prohibits, the practice of her [Ariana’s] religion.”

2. Procedural Due Process

Plaintiffs next argued that the school’s dress code exemption policy and subsequent application of the policy violated Ariana’s right to procedural due process under the Fourteenth Amendment. The Johnston County School Board policy provides that an administrator, when determining whether to permit an exemption to the dress code, may not determine whether the religious beliefs are valid; however, the administrator may make a conclusion as to whether those religious beliefs are “central to the religious doctrine.” The Iaconos argued that the exemption prompts school administrators to engage in an unconstitutional inquiry into the centrality of a practice to a religion. Questions about

72. Id. at 659.
73. Hicks, 93 F.Supp.2d at 660; See Kissingier v. Bd. of Trustees, 5 F.3d 177, 180 (6th Cir. 1993) (“We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights.”); Swanson v. Guthrie Indep. Sch. Dist. No. 1-L, 135 F.3d 694, 699 -700 (10th Cir. 1998) (“It is difficult to delineate the exact contours of the hybrid-rights theory discussed in Smith…we believe that simply raising such acclaim is not a talisman that automatically leads to application of the compelled interest test. We must examine the claimed infringements on the party’s claimed rights to determine whether the claimed rights or the claimed infringements are genuine…we believe that at least requires a colorable showing of infringement of recognized and specific constitutional rights rather than the mere invocation of a general right.”); Thomas v. Anchorage Equal Rights Comm’n, 165 F.3d 692, 705-06 (9th Cir. 1999) (requiring that the plaintiff asserting the hybrid rights exception make out a colorable claim that a companion right has been infringed).
74. See Hicks, 93 F. Supp. 2d at 663.
75. Pls’ Brief at 17, Iacono, No. 5:10-cv00416-H; see Tinker, 393 U.S. 503.
76. Id. at 18.
77. Id.; Johnston County Schools, supra note 28.
78. Pls’ Brief at 18-19, Iacono, No. 5:10-cv00416-H.
whether a certain belief is “central to the religious doctrine” necessarily involves an evaluation of a religion’s legitimacy and consequently fails to adequately safeguard Ariana’s right to procedural due process under the Fourteenth Amendment.

Plaintiffs relied upon *Thomas v. Review Board of Indiana Employment Security Division* to make this assertion. There, a Jehovah’s Witness quit his position at Blaw-Knox when he was relocated from the roll foundry to a department where he was to work in the production of war materials. 79 The Supreme Court of Indiana upheld the administrative determination to deny the employee unemployment compensation on the basis that the employee’s decision to quit was on the basis of “‘personal philosophical choice,’ rather than religious belief.” 80

On review, the Supreme Court noted that the resolution of what is a religious belief or practice “is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” 81 Chief Justice Burger therein explained why it is not the proper role of the courts to decide whether an individual’s beliefs constitute correct interpretations of his religion: “Intrafaith differences...are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses.” 82 The Court overruled the Indiana Supreme Court and held that the employee’s rights had, indeed, been violated. 83

The plaintiffs also discussed *Dettmer v. Landon*, which echoes the sentiment of the *Thomas* opinion. 84 In *Dettmer*, the Fourth Circuit of U.S. Court of Appeals upheld a district court’s determination that the Church of Wicca does, in fact, constitute a religion warranting First Amendment protection. 85

Going beyond the violations caused by the language of the exemption, the plaintiffs then discussed the negative facts of the *Iacono* case, and specifically enumerated those facts surrounding the administrative determination of whether to allow a religious apparel exemption for Ariana’s nose piercing. 86 The school board allegedly failed to follow its own procedures by, firstly, engaging in a determination of whether COBM was actually a valid religion, and secondly, by adjudicating the issue in an allegedly biased hearing, in which the officials refused to consider evidence

80. *Id.* at 713.
81. *Id.* at 714.
82. *Id.* at 715.
83. *Id.* at 720.
84. See *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986).
85. *Id.* at 932.
86. Pls’ Brief at 20, *Iacono*, No. 5:10-cv00416-H.
provided by the Iaconos relating to COBM.  

3. **Substantive Due Process and Equal Protection**

In a single paragraph, the Iacono brief summarily asserted that by infringing on a mother’s right to direct her child’s religious and educational upbringing, the school board violated Nikki Iacono’s right to substantive due process, citing *Washington v. Glucksburg.*  

Plaintiff also alleged that the defendants violated Ariana’s right to equal protection of the laws on the basis that the defendants demonstrated a preference for more orthodox religions when a school official supposedly told Nikki Iacono that Ariana’s nose piercing “would be treated differently if she were Muslim or Hindu.”

**C. The Temporary Restraining Order and Settlement**

In determining whether to issue the temporary restraining order, the district court weighed four separate factors: “(1) the likelihood of irreparable harm to the plaintiff if the relief is denied; (2) the likelihood of harm to the defendant if the relief is granted; (3) the likelihood that the plaintiff will succeed on the merits of its claim; and (4) the public interest.” In finding that the balance of hardships overwhelmingly favored plaintiffs, the Court cited the quintessential First Amendment language from *Elrod v. Burns*: “The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury.”

The pithy opinion notes that the issuance of a temporary restraining order would not subject defendants to comparable harm and further predicts that plaintiffs would likely succeed on the merits, especially with regard to the Free Exercise and hybrid rights claim.

The court concluded that the “public generally has an interest in preventing violation of First Amendment rights.” The opinion ended there, and though the nature of an order granting a temporary restraining order is one of brevity, the reader could not help but feel some disappointment with the court’s brevity. A discussion specifying the public’s interests in protecting First Amendment rights or why those interests demand protection by the courts would have provided schools, administrators, and students guidance as how to reconcile the issue of religious apparel and related exemptions in public schools.

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87. *Id.* at 20-21.

88. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (recognizing the parental right to direct the upbringing of children as a fundamental right subject to the protections of due process); see Pls’ Brief at 23, Iacono, No. 5:10-cv00416-H.

89. Affidavit of Nikki Iacono at 9, Iacono, No. 5:10-CV-416-H.


93. *Id.*
Nearly eight months after the plaintiffs first filed their complaint, the parties settled and the agreement is memorialized in the Iacono consent order. In the consent order, defendants continue to deny all of the plaintiffs’ allegations; however, the parties agree that revisions to the school dress code were in order. The revisions provide for better protections against future constitutional violation. Further, the defendants agreed to redact all disciplinary actions relating to the nose piercing issue from Ariana’s record, and agreed to pay $15,000.00 in attorney fees and costs to the ACLU, with the understanding that such payment shall not “be construed as an admission of liability or wrongdoing on the part of any party, and neither the parties nor their representatives shall make any representations to the contrary.” In exchange, plaintiffs agreed to execute a release of all claims and dismiss voluntarily with prejudice all claims relating to the action.

II. AUGMENTING THE IACONO ARGUMENTS

What arguments influenced the district court’s decision to grant the temporary restraining order enjoining the defendants from further suspending Ariana? In the brief supporting its motion for a temporary restraining order, the plaintiffs offered a mass of Supreme Court precedent, but what other jurisprudence could the plaintiffs have asserted in support of its motion? This section delves into a varied line of case law relating to religious garb in state appellate and supreme courts and the federal circuit courts in an attempt to find a fresh perspective on how to attack a historical issue.

A. Religious Garb Jurisprudence

The issue of how to accommodate religious garb arises in various public arenas, such as courtrooms, public school athletics, and the classroom. Despite the differences in the ways these issues may come up, an examination of the religious garb cases demonstrate key factors which inform constitutional questions related to accommodating religious dress. The legal boundaries surrounding the freedom to exercise religious beliefs through adorning religious apparel depend on a variety of factors: the individual and his or her role, the venue, and the values and interests

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94. Consent Order at 2, Iacono, No. 5:10-CV-416-H.
95. Id. at 1-4. See discussion infra Section IV b.
96. Consent Order at 2, Iacono, No. 5:10-CV-416-H.
97. Id. at 3.
98. Id.
99. Id.
100. In an attempt to gauge only those widely-read cases on this issue, this section does not include a discussion of federal district court cases relating to religious garb.
101. Only one case at the federal appellate level has dealt with the issue of religious garb in a school setting. See Menora v. Ill. High Sch. Ass’n, 683 F.2d 1030, 1031 (7th Cir. 1982).
protected by the venue. Rules regulating the attire of an attorney in a courthouse, which protect interests of fairness and justice, may not mirror those of Ariana Iacono—a student in a public school, an institution which aims to educate students in an inclusive environment.

In Menora v. Illinois High School Association, the Illinois High School Association, a private association with a membership comprised mostly of public high schools, enacted a generally applicable, facially neutral rule prohibiting basketball players from wearing hats or other types of headgear while competing.\(^\text{102}\) The rule was designed to promote players-safety during games.\(^\text{103}\) Although the defendant association was a private organization, the court nonetheless treated the association as a public entity because the majority of defendant’s membership was comprised of Illinois public high schools.\(^\text{104}\) The District Court invalidated the association’s prohibitory rule, reasoning that the policy violated the Free Exercise Clause.\(^\text{105}\) On appeal, the Seventh Circuit upheld the general rule, but remanded the case to the district court with instructions to allow the Jewish students the opportunity to design a secured head covering that complied with Jewish law, while still honoring the Association’s safety concerns.\(^\text{106}\)

In writing for the majority, Judge Richard Posner found that “Free exercise of religion does not mean costless exercise of religion, but the state may not make the exercise of religion unreasonably costly.”\(^\text{107}\) Despite this allowance, Judge Posner still reasoned that the association policy did not constitute an undue burden on the Jewish student’s right to free exercise because the policy was designed in the interests of safety while playing sports.\(^\text{108}\) Menora is the only appellate court opinion which discusses a student’s right to freely exercise her religious beliefs.

While Menora and Iacono both discuss the right to exercise religious beliefs in a school setting, key differences make Menora an imperfect comparator to Iacono. In Menora, the basketball players attended public schools, but the institution actually regulating the headgear at sporting events was a private organization. In contrast, Iacono addressed a right to wear religious garb while attending a public school classroom. This may make a student like Ariana’s right to free exercise more compelling. Further, provisions regulating headgear at a sporting event arguably serve a compelling state purpose: protecting players from potential injury. There is no apparent analogous safety concern at issue with a teenager adorning a nose piercing in school.

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102. Id.
103. Id.
104. Id.
105. Id. at 1032.
106. Id. at 1035-36.
107. Id. at 1033.
108. Id. at 1034.
Other cases confirm that questions on the constitutionality of restrictions on religious garb are highly fact-specific—hinging almost entirely upon the individual’s role and the setting where she seeks to assert the right. In La Rocca v. Lane, the New York Court of Appeals upheld a trial court’s order prohibiting Roman Catholic priest and lawyer Vincent La Rocca from wearing his collar while serving as a Legal Aid Society attorney in a criminal trial.\textsuperscript{109} The court held that regulating the priest-attorney’s attire was “reasonably related to the preservation of order and decorum in the courtroom, the protection of parties and witnesses, and generally to the furtherance of the administration of justice.”\textsuperscript{110} The interest in a fair trial outweighed the priest-attorney’s right to exercise his religion freely.\textsuperscript{111}

Despite the ruling against him in La Rocca v. Lane, Mr. La Rocca represented another defendant, Anna Rodriguez, on behalf of the Legal Aid Society, while wearing his Roman Catholic collar during trial.\textsuperscript{112} The trial judge, Justice Hugh F. McShane, permitted La Rocca to wear his collar at the jury trial, and reasoned that a prohibition would “substantially burden his free exercise to religion and that the state’s interest in securing a fair trial free from prejudice could adequately be protected through a voir dire of the members of the jury panel.”\textsuperscript{113} Justice McShane also noted that his decision also rested upon La Rocca’s Fourteenth Amendment right to equal protection. He stated that prohibiting La Rocca from wearing his collar would “result in his being treated differently from other attorneys admitted to the bar and thus deprive him of his right to seek his livelihood as a lawyer.”\textsuperscript{114} The District Attorney then obtained an order from an Associate Justice of the Appellate Division that stayed enforcement of Justice McShane’s order.\textsuperscript{115} Primarily relying upon the decision against La Rocca in La Rocca v. Lane, the Appellate Division upheld the order granting the District Attorney’s motion to prohibit La Rocca from wearing the collar in front of the grand jury.\textsuperscript{116}

La Rocca also filed suit in federal court, arguing that the order violated his First, Ninth, and Fourteenth Amendment rights.\textsuperscript{117} The federal district court dismissed La Rocca’s claims, stating that the state’s interest in a fair and impartial trial trumped La Rocca’s right to freely exercise religion when acting as counsel.\textsuperscript{118} The Second Circuit declined to discuss

\textsuperscript{109} La Rocca v. Lane, 37 N.Y.2d 575, 577-78 (1975).
\textsuperscript{110} Id. at 582.
\textsuperscript{111} Id. at 584, cert. denied, 424 U.S. 968 (1976).
\textsuperscript{112} La Rocca v. Gold, 662 F.2d 144, 146 (2d Cir. 1981).
\textsuperscript{113} Id. at 147.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 146; see La Rocca v. Lane, 37 N.Y.2d at 575.
\textsuperscript{117} La Rocca, 662 F.2d at 147-48.
\textsuperscript{118} Id. at 147.
the First Amendment issue, stating that the matter had been litigated thoroughly and fairly by the New York state courts. In rejecting La Rocca’s equal protection claim, the Second Circuit noted “a lawyer, unlike a witness or party, does not speak for himself but for his client.”

Unlike her attorney, a party to an action does retain the freedom to freely exercise religious beliefs by wearing religious garb in the courtroom. In *Close-It Enterprises, Inc. v. Weinberger*, a New York case heard in the interim between *La Rocca v. Lane* and *La Rocca v. Gold*, a trial judge ordered that the defendant, Mayor Weinberger remove a Jewish skullcap before the jury entered the courtroom, even though Weinberger had been present for jury selection while wearing the same skullcap. When forced to decide between being present for his own trial and wearing his religious garb, Weinberger excluded himself for the remainder of the trial proceedings. In reversing the trial court’s verdict against Weinberger and ordering a new trial, the Appellate Court harshly reviewed the lower court’s proceedings, noting that the trial was more akin to an “inquest,” and that “the defendant’s right to the free exercise of religion, under the circumstances presented, was not outweighed by the right of all parties to a fair trial.” The *Close-It Enterprises* Court further stated that the defendant “should not have been placed in the situation of having to choose between protecting his legal interests or violating an essential element of his faith.” *Close-It Enterprises*, when read alongside Father La Rocca’s challenges to free exercise, illustrates how religious garb cases turn on the context of the request. While parties in both cases attempted to wear religious garb in the courtroom, the nature of the individual’s role in the courtroom proved definitive.

*Goldman v. Weinberger* arguably illustrates the closest the United States Supreme Court has come to addressing the question of when dress code policies which ban religious garb violate the Constitution. There, Captain S. Simcha Golden, an Orthodox Jew, ordained rabbi, and Air Force captain, served as a psychologist at March Air Force Base. At all times, he wore a yarmulke in accordance with Jewish religious tradition. Pursuant to comprehensive Air Force regulations regarding the service uniform and headgear, Goldman was ordered to stop wearing his religious garb.

119. *Id.* at 148.
120. *Id.* at 149.
122. *Id.* at 686. Part of La Rocca’s claims in *La Rocca v. Gold* relied upon the *Close-It Enterprises* opinion, an argument that the *Gold* Court rejected because of the vast differences between one’s role as an attorney and one’s role as a defendant. *La Rocca v. Gold*, 662 F.2d at 150.
123. *Id.*
125. *Id.* at 686.
127. *Id.* at 504.
128. *Id.*
yarmulke.\textsuperscript{129} Goldman sought an injunction, which the District Court granted.\textsuperscript{130} He argued that the Air Force was required, pursuant to the Free Exercise Clause of the First Amendment, to make an exception to the dress code unless such an exception created “a ‘clear danger’ of undermining discipline and esprit de corps.”\textsuperscript{131} The Federal Circuit reversed the decision.\textsuperscript{132} In a 5-4 decision, the Supreme Court affirmed the Federal Circuit’s reversal, finding that air force regulations did not violate the Free Exercise Clause because the regulations reasonably and evenhandedly regulated dress in the interest of the military’s perceived need for uniformity and discipline.\textsuperscript{133} The precedential value of this case is not yet clear as the Court engaged in a deferential review of military regulations, which does not apply to laws of civilian society.\textsuperscript{134}

While many courts have yet to confront the issue of religious apparel worn by students at school, many judiciaries have struggled with the question of a public school teacher’s right to freely exercise religion during the course of her daily employment. The standards have evolved in a substantial line of cases trying to reconcile the tension between “the teacher’s freedom to exercise religion versus the freedom of students from an established religion in public schools.”\textsuperscript{135} In cases where public school teachers adorn religious garb, courts are forced to weigh the individual’s right to freely exercise religion against the community’s right to be free from the establishment of religion. Unlike a student, a teacher in the public school classroom plays a role similar to that of an attorney advocating in the courtroom in that both practice in impartiality and fairness.

Two typical scenarios arise: either the individual teacher asserts a violation of his or her right to freely exercise religion or taxpayers bring suit in objection to the employment of public school teachers adorning religious garb in the classroom.\textsuperscript{136} In \textit{Hysong v. School District of Gallitzin Borough}, a taxpayer objected to religious sisters of an order of the Catholic Church teaching non-religious subjects in public schools.\textsuperscript{137} The Supreme Court of Pennsylvania, declining to issue an injunction prohibiting the sisters from wearing religious garb in the classroom, found that the exclusion of an individual from public employment by reason of religion

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    \item \textsuperscript{129} Id. at 505.
    \item \textsuperscript{130} Id. at 506.
    \item \textsuperscript{131} Id. at 509.
    \item \textsuperscript{132} Id. at 504.
    \item \textsuperscript{133} Id. at 510.
    \item \textsuperscript{134} Id. at 507. ("In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.")
    \item \textsuperscript{136} Id.
    \item \textsuperscript{137} 30 A. 482 (Pa. 1894).
\end{itemize}
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causes “a palpable violation of the spirit of the constitution.” The court further reasoned that “there can be, in a democracy, no higher penalty imposed upon one holding to a particular religious belief than perpetual exclusion from public station because of it.”

The taxpayer’s objection in Hysong reflected a growing anti-Catholic sentiment in Pennsylvania, which prompted the state legislature to pass an anti-garb statute in 1895. A few decades later, the North Dakota Supreme Court considered Gerhardt v. Heid, in which taxpayers again objected to the public employment of Catholic sisters adorning their religious habits in the classroom. In finding that the sisters did not adorn the habits for the purpose of impressing their religious beliefs upon the students and that the school was not a sectarian institution, the Gerhardt Court observed that it was outside the responsibility of the courts to determine the appropriateness of wearing religious garb while teaching in the classroom. Rather, courts were limited to making a determination only as to “whether what has been done infringes on and violates the provisions of the Constitution.”

In Rawlings v. Butler, the Kentucky Supreme Court followed Gerhardt and rejected a taxpayer’s argument that a public school’s employment of Catholic sisters constituted public funding to the Catholic Church in violation of the Establishment Clause. The Rawlings court noted that despite the religious nature of the sister’s apparel, “these facts do not deprive them of their right to teach in public schools, so long as they do not inject religion or the dogma of their church.” “[T]he garb does not teach. It is the woman within who teaches.”

The United States Supreme Court has not yet addressed the specific issue of religious garb in the school setting, except to deny certiorari in Cooper v. Eugene School District. In Cooper, an elementary school teacher at an Oregon public school converted to Sikhism, and in observance of the Sikh religion, wore white clothes and a white turban while teaching class. The school superintendent suspended the teacher, and the Superintendent of Public Instruction, pursuant to an Oregon statute prohibiting public school teachers from wearing religious dress while on

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138. Id. at 483.
139. Id.
140. Jones, supra note 135, at 413.
142. Id. at 135.
143. 290 S.W.2d 801 (Ky. 1956).
144. Id. at 804.
145. Id.
147. Cooper, 723 P.2d at 300.
the job, revoked her teaching certificate. While the Oregon Court of Appeals affirmed the school superintendent’s decision to suspend the teacher, the court invalidated the order to revoke her teaching certificate, holding that revocation was an excessive penalty under the First Amendment.

In reversing the appellate court, the Oregon Supreme Court held that the state statute was a minimal restriction, designed to ensure religious neutrality in public schools. In its analysis, the Cooper court discussed the Oregon statute, questioning the constitutionality of sustaining a law “simply on grounds that it does not interfere with the free exercise of religion because it regulates conduct rather than religious beliefs or verbal expression of opinion and worship.” The court noted that by allowing restrictions on free exercise through the regulation of conduct, such statutes “could equally ban wearing religious dress while teaching in private schools, or for that matter in public generally, without infringing the free exercise of religion,” thus denying “the importance of dress and other external symbols of individual and communal commitment to one’s faith.” In order for a judicial body to uphold such a law, a law regulating conduct by restricting religious dress “must be justified by a determination that religious dress necessarily contravenes the wearer’s role or function at the time and place beyond any realistic means of accommodation.” The court in Cooper ultimately found that regulating a teacher’s religious dress may be permissible to avoid “the appearance of sectarian influence, favoritism, or official approval in the public school.”

B. Inverting the Establishment Clause: Using the Lemon Test in Iacono

While the Oregon Supreme Court in Cooper found that the Oregon statute prohibiting public teachers from wearing religious garb in the classroom helped school districts “to maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teacher, approves and shares the religious commitment of one group and perhaps finds that of others less worthy,” a secular school environment is not the only goal at stake—particularly for students who, unlike teachers, do not serve as ambassadors for schools. Consequently, school districts struggle to balance the requirement of

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148. Id.
149. Id. at 300-01.
150. Id. at 313.
151. Id. at 307.
152. Id.
153. Id.
154. Id. at 308.
155. Id.
secular education with the rights of all individuals to freely express and practice their religious beliefs.

School districts have yet to achieve this balance. Some districts employ religious apparel exemptions that exempt religious headgear but make no provisions for other forms of religious apparel, like nose piercings or clothing.156 Other school districts leave the determination of what constitutes religious apparel to the discretion of a school administrator, like in Iacono, where the lesser-known nature of the Church of Body Modification resulted in the school’s refusal to issue Ariana Iacono a religious apparel exemption.157 These policies risk the appearance of schools favoring one religion over another, which potentially violate the Free Exercise Clause, and the Establishment Clause.

Because the Iacano brief already discusses how dress code policies without religious garb exceptions potentially violate the Free Exercise clause of the First Amendment, this section will discuss how such policies also potentially violate the Establishment Clause.158 The Establishment Clause guarantees that no law shall be made “respecting an establishment of religion,”159 an amendment designed for the express purpose of building “a wall of separation between church and State.”160 The Establishment Clause provides that neither the federal government nor the individual states may set up churches, pass laws aiding one or all religions, or demonstrate a preference for one religion over another.161 The Supreme Court identifies three central arenas in which Establishment Clause issues commonly arise: “sponsorship, financial support, and active involvement of

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156. In a survey the author conducted looking at school district policies on religious garb across the nation, the author found that fifteen public school districts employed a specific exemption for religious headgear, four of which elected against provisions for a general religious apparel exemption beyond headgear. See Priti Nemani, Empirical Research Findings (unpublished research) (on file with author) [hereinafter Empirical Research Findings]. The survey looked at the highest populated school district in each of the fifty states, as discovered in state-by-state profiles on the National Center for Educational Statistics, located at http://nces.ed.gov/. This data may have changed since the 2010 Census. The study retrieved the district’s school board policies and procedures manuals, each of which was available online for public viewing and excerpted each district’s policy on dress code and student grooming. The search was first made for whether there was any policy regarding exemptions from the school dress code, and if present, whether those exemptions contained a reference to religious apparel. Some school districts containing specific procedures for execution of the dress code. Any mistakes in the research remain fully my own. The full set of empirical findings are on file with the author and are available readily available for review.

157. Id.

158. See supra Part II (b).


the sovereign in religious activity.”\textsuperscript{162} In cases where a student challenges a ban on religious garb at a public school, the issue necessarily involves a state’s active involvement in the religious activity of its students. Thus, both religious clauses of the First Amendment are potentially implicated in a situation like Iacono.\textsuperscript{163} In one fell swoop, the Johnston County School Board appeared to offend an individual student’s right to free exercise while simultaneously breaking the long-standing constitutional guarantee that the government shall make no law respecting the establishment of religion.

In Lemon v. Kurtzner, the Supreme Court confronted an Establishment Clause challenge to a Rhode Island statute that provided state aid to assist church-affiliated educational institutions.\textsuperscript{164} In striking down the state law, the Court observed the difficulty in recognizing laws that respect the establishment of religion, stating that “a law may be one ‘respecting’ the forbidden objective while falling short of its total realization.”\textsuperscript{165} The test in Lemon summarizes a history of jurisprudence in a seemingly clear, tripartite analysis: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”\textsuperscript{166}

Would the facts of Iacono fail the Establishment Clause under the Lemon test?\textsuperscript{167} In Iacono, the Johnston County Public School District sought to advance a primarily secular goal in ensuring the religious freedom of its students by providing a religious apparel exemption to its dress code. Johnston County Board of Education Policy 4220 states that, while giving due respect to the individual’s right to exercise personal choice in questions of dress or appearance, “students are expected to adhere to standards of cleanliness and dress that are compatible with the requirement of a good school environment.”\textsuperscript{168} Further, the policy provides


\textsuperscript{163} See Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673 (1979-80). Professor Choper proposes a single principle in an attempt to solve the conflict between the clauses by arguing that “the Establishment Clause should forbid only governmental action whose purpose is solely religious and that is likely to impair religious freedom by coercing, compromising, or influencing religious beliefs.” Id. at 675. Although succinct and applicable in several situations, this principle, in requiring that the primary effect of governmental action be religious in nature to violate the establishment clause, does not recognize the judicial weight afforded to the second and third prongs of Lemon and further fails to encompass those situations where governmental action is not explicit in nature, such as situations in which administrators in public schools are forced to rely on personal knowledge of religions and their beliefs in making religious apparel determinations.

\textsuperscript{164} Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

\textsuperscript{165} Id.

\textsuperscript{166} Lemon, 403 U.S. at 612-13 (internal citations omitted).

\textsuperscript{167} For the purposes of analyzing school dress codes under Lemon, this section will use the facts of Iacono as the pattern for analysis.

\textsuperscript{168} Ex. 2 to Aff. Of Nikki Iacono, Policy Code: 4220 Student Dress Code and Appearance,
that if a student’s mode of dress or appearance “is so unusual, inappropriate or lacking in cleanliness that it clearly disrupts class or learning activities,” the school may take regulatory action. Promoting adequate hygiene and maintaining an educational classroom environment are, without question, secular purposes in enacting school dress and grooming policies. In the context of a state providing aid to parochial schools for “secular activities,” even the Lemon Court agrees that “a state always has a legitimate concern for maintaining minimum standards in all schools it allows to operate.” Accordingly, the purpose of the school district in enacting a dress code policy is also secular in purpose.

The second prong of the Lemon test requires that the statute in question neither advance nor inhibit religion. A religious apparel exemption with language prompting the administrator to make a determination of whether a religious belief is “central to a religious doctrine” potentially advances better known religions while inhibiting lesser-known religions. A headscarf is easily identifiable as a symbol belonging to the Islamic faith. Likewise, a cross is widely known to be a symbol of Christianity. In contrast, it requires some unguided navigation from the unknowing school administrator, at his or her discretion, to determine whether a nose piercing is central to a member of the Church of Body Modification. Some board policies on student dress provide for a religious apparel exemption only in the section prohibiting hats in the school, which ultimately protects only Sikh, Jewish, and Muslim students. What of the Hindu females wearing nose piercings? What of the members of the Church of Body Modification bearing tattoos? In effect, these policies protect the practices of those belonging to widely known, orthodox religions while forcing students of lesser known faiths to go through the exhaustive and uncomfortable process of proving their beliefs merit respect and accommodation.

The last prong of the Lemon test asks whether a statute promotes or prejudices certain religions through “an excessive government

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Iacono, No. 5:10-cv-00416-H (E.D. N.C. Oct. 6, 2010).

169. Id.
170. Lemon, 403 U.S. at 614.
171. Id.
175. Empirical Research Findings, supra note 157. The author’s empirical research discusses how, in some schools, board policies provide for a religious apparel exemption only by exempting religious headgear in general prohibitions against hats, bandanas, etc.
176. A brief return to the opinion in Thomas reminds us from the pen of Chief Justice Burger that the “judicial process is singularly ill equipped” to determine questions of “intrafaith differences,” or the degree of one’s religious conviction, “in relation to the Religion Clauses.” 450 U.S. 707, 715-16.
entanglement with religion.” The Court notes that the entanglement analysis requires “close scrutiny of the degree of entanglement involved in the relationship” in order to further prevent “as far as possible, the intrusion of either [church or state] into the precincts of the other.”

Does allowing a school administrator to make determinations of the centrality of one’s beliefs constitute permissive entanglement between the state, through the discretion of a school administrator, and the religious identity of a student? The Lemon Court notes that, often, those statutes that attempt to ensure that school officials “play a strictly nonideological role” potentially create those precise dangerous “entanglements between church and state” that the statutes were designed to avoid. Although the Court speaks in the context of funding to parochial schools, the underlying issue is a fear of the government favoring one religion over another. When public school officials make unguided determinations regarding religious apparel exemptions, the state becomes necessarily entangled with religion. In Iacono, school administrators were prompted to scrutinize the legitimacy of Ariana Iacono’s faith, while allegedly stating that had Ariana belonged to a better-known religion, like Islam or Hinduism, her religious garb would not be quite as problematic.

Although a challenge under the Lemon test on the basis of religious garb might offend some, the analysis raises the real possibility of the macro consequences of the absence of an appropriate reconciliation between secularism in public schools and religious rights to expression. School dress code policies without comprehensive religious garb exemptions may violate the Establishment clause as well as the Free Exercise clause. School administrators, as will be discussed in the next Section, are abandoned to make determinations regarding religion, questions that even our highest courts have declined to answer.

III. INVESTIGATING THE PROBLEM AND FINDING A SOLUTION

A. The Widespread Nature of the Iacono “Problem”

Many of the United States’ largest school districts do not provide any form of religious apparel exemption in their school dress code policies. Out of a survey of school board policies publicly posted by each state’s largest school district, twenty-three of fifty schools failed to include any

177. Lemon, 403 U.S. at 612-13 (internal citations omitted).
178. Id. at 614.
180. See Complaint, Iacono, No. 5:10-CV-416-H (alleging that such statements were made by the school administrators, though such facts were not admitted by school officials).
181. See Thomas, 450 U.S. at 715. (“The judicial process is singularly ill equipped to resolve such [interfaith] differences in relation to the Religion Clauses.”)
182. See Empirical Research Findings, supra note 156.
type of religious apparel exemption.\textsuperscript{183} On the other hand, twenty-one school districts do provide an express exemption for religious apparel.\textsuperscript{184} However, only five provide administrators with any guidance on how to make a determination regarding a religious apparel exemption.\textsuperscript{185} Fifteen school districts expressly provide for a religious head covering exception to school district prohibitions on hats, bandanas, and similar apparel; and four school districts use a religious headgear exception as the only means of providing a religious apparel exemption.\textsuperscript{186}

What does this data reveal? On one hand, nearly half of the surveyed school districts expressly provide that religious apparel warrants an exemption from school district dress policy, which is a welcome finding.\textsuperscript{187} Conversely, a slight majority of schools have failed to include such provisions in their policies.\textsuperscript{188} Only two of the fifty school districts that have attempted to provide a religious exemption have left the determination of whether to actually issue an exemption at the principal’s discretion, and have failed to indicate the standard for such an evaluation.\textsuperscript{189} Of the twenty-one schools employing a religious apparel exemption, only nine classified the exemption by stating that the garb be worn in observance of “bona fide,” “sincerely held,” or “strongly held” religious beliefs.\textsuperscript{190}

One promising strategy found in the school district policies is the use of the “bona fide” or “sincerely held” language.\textsuperscript{191} Such language may have been adopted as a subtle suggestion that the proper determination of whether to issue a religious apparel exemption parallels the type of analysis used where the Equal Employment Opportunity Commission and the federal courts have determined claims of religious-based employment discrimination.\textsuperscript{192} Title VII of the United States Code provides that it is “an unlawful employment practice...for an employer to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” (emphasis added).\textsuperscript{193} To establish a prima facie Title VII claim of religious-based employment discrimination, the employee must demonstrate that he or she held a “bona fide . . . religious belief.”\textsuperscript{194} To determine whether such a belief is bona fide, the court or agency applies a two part test: whether the

\textsuperscript{183} Id.  
\textsuperscript{184} Id.  
\textsuperscript{185} See Empirical Research Findings, supra note 157.  
\textsuperscript{186} See id.  
\textsuperscript{187} See id.  
\textsuperscript{188} See id.  
\textsuperscript{189} See id.  
\textsuperscript{190} See id.  
\textsuperscript{191} See id.  
\textsuperscript{193} Id.  
\textsuperscript{194} Vetter v. Farmland Indus., Inc., 120 F.3d 749, 751 (8th Cir. 1997).
belief is “religious within the plaintiff’s own scheme of things,” and whether it is “sincerely held.”

Use of “bona fide” or “sincerely held” commendably guides the administrator toward administrative and federal case law, something many other religious apparel policies have failed to do. Yet, even where the policy wisely adopts Title VII religious accommodation language, the administrator is expected either to become well-versed in legal research or to employ counsel. Notwithstanding the practical concerns with expecting administrators to resort to legal research to make such a determination, those schools classifying that religious exemptions be made for “bona fide” and “sincerely held” religious beliefs are a step ahead of those with an undefined religious apparel exemption or without an exemption at all.

The sampling of school districts demonstrate that, even following the highly publicized and expensive Iacono case, school districts have not adequately addressed policies about dress code, and the accommodation of religious garb. How then can schools protect themselves from expensive litigation and, more importantly, protect the rights of students of all faiths?

B. Fronting the Procedural Due Process Claim: Redrafting Board of Education Policies on Student Attire

In light of Iacono, public school boards should redraft their dress code policies to avoid potential constitutional challenges. Perhaps surprisingly, the Johnston County School Board policy at issue in Iacono is only exceptional because it provides more guidance as to how school administrators should address issues of religious garb than any of the policies surveyed in the study.

In order to prevent conflicts between school policy and religious garb, school boards should specifically examine applicable dress code policies for the following: (1) whether a religious apparel exemption is explicitly included; and (2) whether an expressed set of procedures are in place and openly available to parents, students, and school officials. If no procedures are in place, the board should enact explicit measures for determinations regarding religious apparel exemptions. If procedures are in place, the board should ensure that the procedures in no way force an administrator to determine whether a religious belief is valid or whether the act in question is required by the student’s religion.

Further, such dress code regulations should include reiterate the Supreme Court’s holding in Thomas that the orthodoxy of a religion should be of no consequence in the public school arena. The Consent Order in

196. See Empirical Research Findings, supra note 156. Nearly half of the school districts failed to provide any guidance for a school administrator’s inquiry regarding a religious apparel exemption.
197. Thomas, 450 U.S. at 714 (“Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”)
Iacono revises the problematic version of the dress code, as aforementioned, under which Ariana was suspended, and does so in a manner that exemplifies the specificity and broadness of language required to align public policy with constitutional requirements. The counts of the Consent Order mandating the revision provides the following:

i. The sentence currently reading ‘In making determinations regarding exemptions to the Student Dress Code and Appearance policy, the principal or designee shall not attempt to determine whether the religious beliefs are valid but only whether they are central to religious doctrine and sincerely held’ shall be revised to read, ‘In making determinations regarding exemptions to the Student Dress Code and Appearance policy, the principal or designee shall not attempt to determine whether the religious beliefs are valid but only whether they are sincerely held.’

ii. The sentence currently reading, ‘Generally, the following kinds of information may be required by the principal or principal’s designee in making the determination. . .shall be revised to read, ‘Generally, the following kinds of information may be required by the principal or principal’s designee in making the determination: (a) a written statement by an authority on the religion explaining the religious belief and how it is affected by the Student Dress Code and Appearance policy; (b) a copy of, or citation to, a recognized religious text which is the basis of that belief, if the religion uses a religious text; (c) identification of the religious group holding the belief, if there is such a group; (d) any written descriptions or summaries that might be available, from texts or encyclopedias or religious publications, explaining the religious belief and how its exercise would be affected by compliance with a Student Dress Code and Appearance policy; and/or (e) examples of other circumstances in which the sincerity of the religious belief has been demonstrated.’

The revisions delete sections that prompt administrators to make determinations of the validity of a religion or the degree to which a specific practice is required by a religion. Further, the procedural deletions also acknowledge that some religions lack textual basis for certain practices.

In the Empirical Research, discussed in Section IV(a), one type of notable religious apparel exemptions used the phrases “bona fide” or “sincerely held” in describing those beliefs that would be exempt from the dress code policies. Here, Johnston County uses the phrase “sincerely held,” which helps ensure proper enforcement of the policy and exemptions. Schools might consider using the exact language from Title VII religious-based employment discrimination cases and, perhaps, state as follows:

In making determinations on whether to issue an exemption to the district dress code policy, an administrator shall not attempt to determine whether those beliefs are valid. ‘Boards . . . are not free to reject beliefs because

198. Consent Order at 1-2, Iacono, No. 5:10-CV-416-H.
199. Id. (italics and emphasis added).
they consider them incomprehensible.\textsuperscript{200} Rather, the administrator shall only attempt to determine whether the religious belief is bona fide. To determine whether a religious belief is bona fide, the administrator shall determine: whether the ‘beliefs professed are... sincerely held and whether they are, in [his or her] own scheme of things, religious.’\textsuperscript{201} Such language provides a trigger, indicating that, when in doubt, the administrator should turn to the school district’s legal counsel for assistance as to what may or may not qualify as ‘bona fide.’

To their credit, the Johnston County School Board did attempt to provide a set of procedures for dealing with situations like \textit{Iacono}, a practice not employed by many school boards.\textsuperscript{202} The \textit{Iacono} case reveals that a school board’s failure to provide religious apparel exemptions or failure to provide a poorly drafted and overly restrictive exemption put student’s rights at stake. Both instances place a student’s right to exercise her religion at the mercy of school administrators, who may have unspoken biases against lesser-known or unpopular religions, which creates the very situation that the Constitution is designed to prevent.

CONCLUSION

In 2004, in an alleged attempt to ensure state religious neutrality, the French legislature notoriously banned “the wearing of symbols or clothing by which students \textit{conspicuously manifest} a religious appearance in public schools.”\textsuperscript{203} This decision stirred much debate around the world about the tension between religious freedom and secularism.\textsuperscript{204} While the French government assert that they view the “headscarf” ban as an effort to keep religion out of the classroom, many criticize it as an implicit regulation of gender-based religious garb.\textsuperscript{205} The ban, in effect, functions to exclude from the classroom only the symbols of certain religious minorities, such as a Sikh boy who wears a \textit{dastar} on his head,\textsuperscript{206} a Muslim girl who wraps her \textit{hijaab} around her hair,\textsuperscript{207} a Jewish boy who places his \textit{yarmulke} on his crown,\textsuperscript{208} or a Hindu girl who adorns a \textit{naath} on her nose.\textsuperscript{209}

\begin{thebibliography}{9}
\bibitem{200} Seeger, 380 U.S. at 185 (1965).
\bibitem{201} Id.
\bibitem{202} See Empirical Research Findings, \textit{supra} note 156.
\bibitem{204} See Beller, \textit{supra} note 203, at 581.
\bibitem{205} Id.
\bibitem{207} \textit{ENCYCLOPEDIA OF ISLAM AND THE MUSLIM WORLD} 721 (MacMillan Reference 2003).
\bibitem{208} See Wendy Elliman, \textit{A guide to head coverings}, JEWISH INDEPENDENT (July 7, 2006), http://www.jewishindependent.ca/archives/July06/archives06July07-06.html.
\bibitem{209} Iyengar, \textit{supra} note 1.
\end{thebibliography}
While the twin notions of religious freedom and secularism, in theory, should function fluidly and in conjunction, the reality is that these two principles do not always work in harmony. What, then, does it mean to provide citizens with the freedom to exercise religion? Is it the right to have a classroom without any religious symbols? Is the right to be taught in a classroom where the only religious symbols are quiet Christian crosses dangling on simple silver chains?

The idea of banning religious symbols from the public classroom is nothing short of extreme; yet, such a ban, in theory, is one logical solution to the jagged terrain of regulating religious garb in the United States. Such a ban would have protected Ariana Iacono from the tumultuous and lengthy examination by school officials into her religious beliefs, but it would have also prevented her from wearing her nose piercing. Of course, such a prohibition offends the principles of religious freedom upon which this country was founded.

How then can the United States find a solution to teaching our children to embrace individual identity while proudly belonging to a national community? Public school districts should adopt a dress code policy which accommodates the rights of religious minorities, whether administrators view those beliefs as legitimate or not. The American character of religious freedom—which balances the right to freely exercise religion and the right to be free from government entanglement with religion—is at stake.

Protecting the American ideal of religious freedom has become increasingly important following the widespread discrimination faced by those perceived to belong to certain religious minorities since the start of the twenty-first century. In the first five months after September 11, 2001, Muslims, Sikhs, and others Americans of South Asian or Middle Eastern descent reported more than 1,000 incidents of hate violence reported in the United States. One hundred people reported physical assault or property damage, including eleven deaths; while a majority reported verbal harassment in the form of death threats, bomb threats, airport profiling, intimidation by law enforcement, and harassment in public, at work, and in schools. Muslim and Arab Americans are not the only minorities that faced blatant and painful discrimination after September 11. Two days after

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210. Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575 (2002). The one thousand figure “in all likelihood vastly underestimates that violence. Between September 11, 2001, and January 31, 2002, in six jurisdictions in the state of California alone, the state attorney general reported 294 incidents directed against Arab Americans, Muslim Americans, Afghan Americans, Sikhs, South Asians, and others mistakenly identified as part of these communities. See id. at 1575-76 n.1.

211. See id. at 1575-76 n.1. CAIR reports that there were eighty nine reports of physical assault or property damage; 11 deaths; 166 incidents of discrimination in the work place; 191 incidents of airport profiling, 224 incidents of intimidation by the Federal Bureau of Investigations (FBI), the police, or Immigration and Naturalization Service (INS); 74 incidents of discrimination in schools; 315 reports of hate mail; 56 death threats; 16 bomb threats; and 372 incidents of public harassment. Id.
the attacks, Sikh high school junior Arjun Singh found harassing notes in his locker, heard his peers call him “an Afghani and a terrorist,” and feared that someone would attack or kill him.\textsuperscript{212} He alerted school officials about the harassment, but no one came to his aid.\textsuperscript{213} Like Arjun, Sikh seventh grader Kabir Singh fought off his classmates who dared each other to touch his turban.\textsuperscript{214} In February 2003, after being hit twice on the head, Kabir was severely injured and restricted to bed rest for weeks.\textsuperscript{215} It took the New Jersey Division on Civil Rights three years to find “probable cause” that Kabir’s school failed to exercise adequate means to protect him from bias-based harassment.\textsuperscript{216}

A school policy clearly cannot stop a classmate from targeting a Sikh boy who wears a \textit{dastar} on his head,\textsuperscript{217} a Muslim girl who wraps her \textit{hijaab} around her hair,\textsuperscript{218} a Jewish boy who places his \textit{yarmulke} on his crown,\textsuperscript{219} or a Hindu girl who adorns a \textit{naath} on her nose.\textsuperscript{220} Yet, fairly implemented school policies challenge problematic ideas about race, religion, and “legitimate” beliefs in the classroom, which, in turn, shape perceptions of who belongs and who does not. Unfortunately, these changes will not occur overnight, but religion-friendly dress code policies that honor \textit{all} faiths can take us one step in the right direction.

\textsuperscript{213} \textit{Id.}
\textsuperscript{214} \textit{Id.}
\textsuperscript{215} \textit{Id.}
\textsuperscript{216} \textit{Id.}
\textsuperscript{217} \textit{Sikh Coalition}, \textit{supra} note 206.
\textsuperscript{218} \textit{Encyclopedia of Islam and the Muslim World}, \textit{supra} note 207.
\textsuperscript{219} \textit{See} Elliman, \textit{supra} note 208.
\textsuperscript{220} Iyengar, \textit{supra} note 1.