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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 14-0453

In the Supreme Court of Texas

COTI MATTHEWS, ON BEHALF OF HER MINOR CHILD M.M, ET AL.,
Petitioners,

v.

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for Review from the Court of Appeals for the
Ninth Judicial District, Beaumont, Texas, No. 09-13-00251-CV

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(CONTINUED)

Page

INDEX OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

Other Authorities

STATEMENT OF THE CASE

Nature of the Case:	A group of middle school and high school cheerleaders brought a civil rights suit against their school district. They alleged that the district had violated their constitutional rights by declaring their private speech to be government speech—and accordingly banning them from including their own religious messages on banners they had created to cheer on their school football teams.
Trial Court:	The Honorable Steven R. Thomas 356th Judicial District Court, Hardin County.
Trial Court Disposition:	Plea to the jurisdiction denied; declaratory relief granted, stating that the cheerleaders may continue to display religious messages on their banners; and summary judgment granted to the extent consistent with the Court's order.
Parties in the Court of Appeals:	*Appellees:* Coti Matthews, on behalf of her minor child, M.M; Rachel Dean, on behalf of her minor child, R.D.; Charles & Christy Lawrence, on behalf of their minor child, A.L.; Tonya Moffett, on behalf of her minor child, K.M; Beth Richardson, on behalf of her minor child, R.R.; Shyloa Seaman, on behalf of her minor child, A.G.; and Misty Short, on behalf of her minor child, S.S. *Appellant:* Kountze Independent School District. *Amici in Support of Appellees:* The State of Texas; U.S. Senator John Cornyn; and U.S. Senator Ted Cruz.

	Amici in Support of Appellant: American Civil Liberties Union; Americans United for Separation of Church and State; Anti-Defamation League; Interfaith Alliance Foundation; Muslim Advocates; Union for Reform Judaism; Hadassah, The Women's Zionist Organization of America, Inc.; Sikh Coalition; Hindu American Foundation; American Jewish Committee; Randal Jennings; Missy Jennings; Ashton Jennings; and Whitney Jennings.
Court of Appeals:	Ninth District Court of Appeals, Beaumont.
Panel:	Opinion by Kreger, J., joined by McKeithen, C.J., and Horton, J.
Citation:	*Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2014 WL 1857797 (Tex. App.—Beaumont May 8, 2014, pet. filed) (Tab C).
Court of Appeals Disposition:	Reversed and rendered in part; affirmed and remanded in part; without oral argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction because the court of appeals below committed an error of law, and this case presents an issue of substantial practical and jurisprudential importance to the State: the constitutional rights of its citizens to engage in free speech and religious expression. *See* TEX. GOV'T CODE § 22.001(a)(6).

This Court also has jurisdiction because the ruling below conflicts with the decisions of other appellate courts regarding the proper application of the mootness doctrine—including, for example, *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6 (Tex. App.—Austin 2008, no pet.); *Bexar Metropolitan Water Dist. v. City of Bulverde*, 234 S.W.3d 126 (Tex. App.—Austin 2007, no pet.); and *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507 (Tex. App.—Austin 1993, writ denied). *See* TEX. GOV'T CODE § 22.001(a)(2).

ISSUES PRESENTED

1. Did the court of appeals err when it held that this case was moot, even though the parties continue to dispute whether banners created by cheerleaders are the *private* speech of the cheerleaders, and not the *government* speech of their school district?

2. Did the court of appeals err when it mooted the case based on the school district's voluntary cessation of unconstitutional conduct, even though it is not "absolutely clear" that the district will not once again violate the cheerleaders' constitutional rights?

INTRODUCTION

This dispute over the fundamental constitutional right to freedom of speech and religious expression is anything but moot.

For over two decades, cheerleaders in the Kountze Independent School District have prepared run-through banners to cheer on their school football teams. Over the years, the messages on the banners have changed—as each generation of cheerleaders passed through the school, they brought with them their own ideas—but the school's approach to the cheerleaders and their banners has not. KISD has always allowed the cheerleaders the freedom to select their own messages.

This tradition continued without any controversy until 2012, when the cheerleaders decided to include religious messages on their run-through banners to provide encouragement and positive support to the student-athletes.

This should have been no problem, because the banners are the *private* speech of the cheerleaders—not the *government* speech of the school.

But the Freedom From Religion Foundation nonetheless threatened suit under the Establishment Clause, claiming that the cheerleaders' speech was actually unconstitutional government speech. And KISD agreed—so it banned the cheerleaders from including any religious messages on their banners.

The cheerleaders filed suit, alleging that KISD was violating their constitutional rights by treating their private speech as its own government speech.

That dispute remains to this day. To be sure, the school district claims that it no longer wants to ban the cheerleaders from including religious messages on their banners. But those words ring hollow in light of KISD's continued insistence that the messages on the banners are its own government speech.

KISD's refusal to acknowledge that the messages on the banners are the private speech of the cheerleaders has grave consequences. Not only does it violate the constitutional rights of the cheerleaders, it ensures that the cheerleaders will soon be banned from ever including religious messages on their banners. After all, if KISD says this is government speech, then the Freedom From Religion Foundation and its allies will file a lawsuit that will condemn any religious messages on the banners as unconstitutional government speech.

So, by declaring this case moot, the court of appeals has not only sanctioned the ongoing violation of the cheerleaders' constitutional rights—it has also given its blessing to a future lawsuit that will ban religious messages from ever appearing on the cheerleaders' banners.

The court was wrong to declare this case moot. There is a live controversy between the cheerleaders and KISD—namely, whether the messages on the banners are plainly the private speech of the cheerleaders, as the district court held, or the government speech of the school, as no court has ever held.

This Court should grant this petition for review and reverse.

STATEMENT OF FACTS

The merits of this case boil down to one uncontested, dispositive fact: KISD allows its cheerleaders to select the messages included on the run-through banners that they will use to cheer on their classmates. *See*, *e.g.*, KISD Br. at 1-2 & n. 2; CR 163, 167-68, 172-73, 226. That is all that matters in this case: The cheerleaders select the messages, not the school—and then they voluntarily prepare the banners, on their own free time and using private funds. CR 162, 168, 172.

This has been the tradition for decades. CR 199. Thus, in 2012, a group of cheerleaders decided that they wanted to occasionally include various inspirational religious messages on their banners. CR 163.

But then KISD intervened. After receiving a complaint from the Freedom From Religion Foundation, KISD announced that the cheerleaders would be prohibited from including any religious messages on the banners. CR 19-20. The district made this decision because it believed that the banners were government speech and, as a result, any religious messages would violate the Establishment Clause. *See* KISD Br. at 7 (superintendent banned "religious messages on the run-through banners" because they "violated the Establishment Clause").[1]

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[1] *See also* CR 35 (First Amended Answer of KISD) (defending "actions taken by Defendant Weldon . . . based [on] his and legal counsel's interpretation of the Establishment Clause of the United States Constitution, specifically as it has been interpreted by the United States Supreme Court in *Santa Fe Independent School District*

[Footnote continued on next page]

The cheerleaders were accordingly forced to bring a lawsuit to protect their constitutional rights. Unsurprisingly, they won in the trial court—because the messages are obviously not government speech. The district court rejected KISD's plea to the jurisdiction—which argued that the case was barred by governmental immunity because it involved government, not private, speech. CR 108-13. The trial court also concluded that religious messages on the banners accordingly did not violate the Establishment Clause. CR 1034-36. Because of these rulings, the cheerleaders were able to continue to display their inspirational religious messages.

But then the Beaumont Court of Appeals declared the case moot, vacating the trial court's order protecting the cheerleaders' rights. Because of the court of appeals decision, KISD continues to treat the cheerleaders' personal religious messages on their banners as the school's own government speech.

[Footnote continued from previous page]

v. Doe, 530 U.S. 290 (2000), in which the Supreme Court held that student-led prayers at a high school football game violated the Establishment Clause"); *Texas high school bans religious banners at football games*, Associated Press, Sept. 20, 2012, *available at* http://www.foxnews.com/us/2012/09/20/texas-high-school-bans-religious-banners-at-football-games/ ("Superintendent Kevin Weldon gently explains to every parent who calls that a 2000 U.S. Supreme Court precedent-setting decision requires religion to be kept out of public schools . . . attorney for the Kountze Independent School District, believes a Supreme Court decision in 2000 that barred prayer at the start of a high school football game sets the precedent."); *Dallas Attorney Tom Brandt Discusses Constitutional Question in Kountze Cheerleader Signage Case*, *available at* http://www.youtube.com/watch?v=wBCHaIGqKxk ("[Counsel for KISD] Tom Brandt says scripture-themed banners displayed by Kountze High School cheerleaders violate the constitutional separation of Church and State.").

SUMMARY OF ARGUMENT

A case becomes moot if there is no longer a live case or controversy in dispute between the parties. In a declaratory judgment action, this can occur when a defendant voluntary ceases to engage in the complained-of conduct—and makes it "absolutely clear" that it will not engage in that conduct ever again.

Here, the court of appeals declared that the case was moot because there was no longer a case or controversy once KISD voluntarily announced that it intends to allow religious messages on the cheerleaders' banners. But this conclusion is incorrect, for two independent, yet equally fatal, reasons.

First, the court of appeals fundamentally misunderstood the dispute in this case. The case is not simply about whether KISD is currently allowing religious messages to appear on the cheerleaders' banners. Rather, the dispute is whether the speech on the banners is the private speech of the cheerleaders, or government speech of the school. That controversy remains very much alive—because KISD continues to unconstitutionally treat the cheerleaders' messages on their banners as its own government speech.

Second, KISD has not met the "stringent" standard for when the government's voluntary cessation of unconstitutional conduct can moot a case. Here, KISD has simply stated that it is not "required" to ban the cheerleaders' religious messages—but KISD maintains that it has the authority to ban the

messages if it so wishes. That is plainly insufficient to satisfy KISD's "heavy burden" of making it "absolutely clear" that it will never again engage in the unconstitutional conduct that led to this litigation.

Thus, the court of appeals plainly erred in declaring this case moot.

Moreover, the consequences of the court of appeals' mootness decision are severe. If the decision stands—and KISD is allowed to continue erroneously characterizing the banners as government speech—the days of the cheerleaders exercising their constitutional rights are numbered.

After all, if the religious messages are government speech, then they are unconstitutional under existing Establishment Clause precedent—and a court will have no choice but to ban all religious messages on the banners. And make no mistake: if the decision below stands, the Freedom From Religion Foundation, the ACLU, and all of the amici that supported KISD in the court below will file a federal lawsuit to do just that.

The way to stop that result is for this Court to step in and protect the constitutional rights of the cheerleaders.

Accordingly, this Court should grant this petition for review and reverse the decision of the court of appeals.

ARGUMENT

I. This Case Is Not Moot, Because KISD Has Not Actually Ceased Its Unconstitutional Conduct—It Is Still Violating The Cheerleaders' Constitutional Rights By Treating The Banners As Government Speech.

There is an unusually simple, yet fatal, flaw with the court of appeals' very invocation of the voluntary cessation doctrine: there actually has been no cessation in this case. A case or controversy still exists, because KISD has not stopped violating the cheerleaders' constitutional rights.

To this day, KISD maintains that the banners are government speech—which is why it believes there would be no constitutional violation if it were to ban the cheerleaders' religious messages. The cheerleaders, on the other hand, claim that the banners are their private speech—and that KISD has no authority to control the messages on the banners, let alone ban religious messages. That is a textbook case or controversy—and one that has nothing to do with whether or not KISD is currently banning religious messages on the banners.

KISD has argued that this hotly contested dispute between the parties is irrelevant—that the characterization of speech has no practical or legal consequences. But that is plainly incorrect—and only serves to highlight the severity of KISD's misconception of constitutional law.

The proper classification of government versus private speech is a critical issue, and misclassification can have enormous consequences. Erroneously

classifying private speech as government speech not only chills free speech, but also denies the speaker the right to have their own message attributed to them. That is why the misclassification of speech is in and of itself a violation of the right to free speech.

Thus, the school district continues to violate the cheerleaders' constitutional rights by declaring the messages on the banners to be government speech. That issue is plainly not moot—which is why this Court should grant this petition and declare once and for all that the cheerleaders' banners are not government speech.

A. The Messages On The Banners Are The Cheerleaders' Own Private Speech, Not Government Speech.

1. In school speech cases, there are "three recognized categories of speech: government speech, private speech, and school-sponsored speech." *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 642 (S.D. Tex. 2010).[2]

Government speech is the school's "own speech." *Id.* at 643. It exists *only* when the government itself "is the speaker or when it enlists private entities to convey its *own* message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515

[2] The cheerleaders have brought their claims under the Texas Constitution, not the United States Constitution. In cases like this, however, Texas courts rely on federal law for guidance. *See In re Commitment of Fisher*, 164 S.W.3d 637, 645 (Tex. 2005) ("Where, as here, the parties have not argued that differences in state and federal constitutional guarantees are material to the case, and none is apparent, we limit our analysis to the United States Constitution and assume that its concerns are congruent with those of the Texas Constitution.").

U.S. 819, 833 (1995) (emphasis added). Importantly, government speech is "not subject to scrutiny under the Free Speech Clause," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009)—which is why KISD believes it can completely ban religious messages on the banners if it wishes to do so.

By contrast, individuals *do* have a free speech right in the other two categories of school speech: private and school-sponsored speech.

Private speech is speech that happens to occur on school premises, but is not "affirmatively . . . promote[d]" by the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

The final category, school-sponsored speech, is unique to the school environment. It exists when student speech is "supervised by faculty members *and* designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271 (emphasis added).

2. Here, the messages on the banners are plainly not government speech; rather, they are the private speech of the cheerleaders.

Government speech only exists when it is the government's own message. Here, everyone acknowledges that the cheerleaders select the message displayed on the banners—so it is not government speech. *See, e.g.*, KISD Br. at 1 & n.2.

Nor are the messages school-sponsored speech.[3] Speech is school-sponsored, instead of private, if (a) it occurs in the context of activities that "may fairly be characterized as part of the school curriculum," *and* (b) it is "perceive[d] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 270-71.

Neither requirement is present in this case. The unrebutted evidence establishes that cheerleading is not curricular—it is not a class; the cheerleaders are not supervised by teachers; they do not receive any school credit for their participation on the squad; they are are not graded for their cheerleading activities; and all practices take place on their personal time, not during school hours. CR 161. Indeed, even KISD has admitted that cheerleading is not "directly related to instruction of [] essential knowledge and skills." KISD Br. at 3 n.7.

Nor do the messages on the banners bear the imprimatur of the school. KISD is merely tolerating—not affirmatively promoting—the cheerleaders' speech. After all, the cheerleaders select the messages that they wish to include on

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[3] This Court need not decide whether the banners are private speech or school-sponsored speech. Under either category, the cheerleaders have a free speech interest in the messages on their banners—and, accordingly, KISD's plea to the jurisdiction was properly rejected. Thus, the critical issue in this case is simply whether the messages are government speech or not—that will decide whether KISD or the cheerleaders should be victorious. Of course, this Court may nonetheless choose to decide the private speech versus school-sponsored speech question—and the cheerleaders would encourage the Court to do so. Declaring the speech to be private would further secure the constitutional rights of the cheerleaders, especially in a future Establishment Clause challenge. Moreover, it would be a relatively simple task, since the speech is clearly private.

the banners. The cheerleaders could choose a secular message, and KISD would treat the banners precisely the same as it does the religious messages. Thus, KISD is not promoting any particular speech from the cheerleaders. It is simply tolerating the speech that the cheerleaders themselves have chosen.

Accordingly, the messages on the banners are clearly the private speech of the cheerleaders.

It is no surprise, then, that the only court to ever address this question—the trial court—found that the religious messages on the banners were the cheerleaders' private speech. *See, e.g.*, CR 61 (Order Granting Temporary Injunction) ("If the temporary injunction is not issued, the Defendants' unlawful policy prohibiting *private religious expression* will remain in effect and the Plaintiffs will be prohibited from exercising their constitutional and statutory rights at all football games and other school sporting events.") (emphasis added).

B. By Declaring The Banners To Be Government Speech, KISD Is Denying The Cheerleaders Their Constitutionally Protected Right To Take Ownership Of Their Own Speech.

It is undisputed that the cheerleaders create the messages they wish to include on their banners, on their own and without any input from the school. Yet KISD continues to declare that those messages are actually the work of the school.

This is a violation of the cheerleaders' constitutional rights. As the U.S. Supreme Court has explained, "an author generally is free to decide whether or not

to disclose his or her true identity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995). The government infringes on this right when it makes the decision for an author, such as by claiming an author's work as its own.

Thus, just as there is a right to speak *anonymously*, an author has a corresponding right to speak publicly, under the author's own name, to promote the author's own message—and not be forced to take on the name of the government instead.

Yet that is precisely what KISD is doing here. It has declared, by government fiat, that the messages written by the cheerleaders are actually those of the school. It is not allowing the cheerleaders their constitutionally guaranteed right to claim ownership of their own work.

Similarly, "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring). And once again, the inverse is also true: just as the government cannot force association, it cannot force *disassociation*. The government cannot disassociate an author from his or her own speech, and instead attribute that speech to itself.

Yet that is again precisely what KISD is doing here. It has forcibly attached itself to the messages created privately by the cheerleaders—despite the fact that

the cheerleaders may not want their deeply held, personal beliefs co-opted by a public school district. That is unconstitutional.

C. KISD's Assertion That The Banners Are Government Speech Has An Unconstitutional Chilling Effect On The Free Speech Of The Cheerleaders.

Equally troubling is the effect KISD's actions have on the cheerleaders' exercise of free speech. The mere declaration that the messages on the banners are government speech instead of private speech has a chilling effect on the free speech of the cheerleaders.

This is because, if the banners are government speech, the school would have absolute discretion to ban whatever it wants, whenever it wants. If KISD wants to ban religious messages—it can do so. If KISD wants to ban any references to a football player's favorite music, forbid any discussion of the football team's academic excellence, or even randomly outlaw any use of the letter "Q"—it can do all of that as well. It can do whatever it wants.

The practical result of KISD's assertion of absolute power over the messages on the banners is an inhibition of the cheerleaders' free speech. If the cheerleaders are aware that KISD can ban their speech for any reason, they will be pressured to speak in a manner that KISD will not censor.

This is a violation of the cheerleaders' constitutional rights. As the U.S. Supreme Court has explained, "the mere existence of the [government's]

unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-57 (1988).

Indeed, it does not even matter if KISD never actually prevents the cheerleaders from speaking on a topic of their personal choice—the mere assertion of "unfettered discretion" chills the cheerleaders' speech. *See, e.g., id.* ("It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussio*n.") (quotations omitted).

* * *

In sum, this case is not moot, because a live case or controversy remains. KISD believes that the banners are government speech—and for that reason, its exercise of absolute control over the messages prepared by the cheerleaders does not violate the cheerleaders' constitutional rights. The cheerleaders believe that the banners are their private speech—and for that reason, KISD's actions do violate their constitutional rights.

If KISD admitted that it *cannot* ban religious messages on the banners *because* the messages are the private speech of the cheerleaders, then this case would be moot. But it has not done that.

II. This Case Is Also Not Moot, Because KISD Has Not Met Its "Heavy Burden" Of Making It "Absolutely Clear" That It Will Never Again Ban Religious Messages On The Cheerleaders' Banners.

The court of appeals fundamentally misunderstood the core constitutional error in this case—KISD's treatment of the cheerleaders' banners as government speech rather than private speech—and instead assumed the dispute was only about the district's ban on religious messages on the banners. Based on that misunderstanding, the court below found the case moot, because the school district announced that it no longer intended to ban religious messages on the banners.

But this too was wrong. Even setting aside the fundamental constitutional dispute in this case, the court below was wrong to find the case moot.

"The standard for determining whether a defendant's voluntary conduct has mooted a case is stringent." *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no pet.). It must be "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Moreover, the party asserting mootness must bear the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to resume." *Id.*

1. According to the court of appeals, KISD has met this "stringent standard" because, under the school district's revised policy, "school personnel are

not *required* to prohibit messages on school banners . . . solely because the source or origin of such messages is religious." *Kountze*, 2014 WL 1857797, at *4, *6 (emphasis added).

But that is plainly not enough to moot this case. All KISD has said is that it is not *required* to ban the cheerleaders' religious messages—it still maintains that it could if it wanted to. So KISD has not made it "absolutely clear" that it has abandoned its unconstitutional conduct—to the contrary, it has reaffirmed its right to engage in that unconstitutional conduct whenever it wants.

KISD's argument is akin to allowing a municipality to moot a racial discrimination case by declaring that it is not "required" to discriminate on the basis of race—but it could if it wanted to. That is obviously not correct. Yet it is precisely what the court of appeals allowed KISD to do.

2. The court of appeals also pointed to the fact that KISD has stated that it "does not intend to reinstate [the] ban on" religious messages. *Id.* at *6.

But that is also plainly not enough to moot this case—because it is not "absolutely clear" that KISD will not *someday* return to its prior policy, even if the Court were to credit its professed *current* intent not to enforce the policy.

The *only* way for KISD to meet the "heavy burden" required to moot this case is for it to admit that its prior policy was unconstitutional—and can thus *never* be enforced. *See, e.g.*, *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex.

App.—Austin 2008, no pet.) ("Where a policy is challenged as unconstitutional, voluntary cessation of such policy, without an admission or judicial determination *regarding its constitutionality*, is not sufficient to render the constitutional challenge moot.") (emphasis added).[4]

The court of appeals' decision to the contrary must be corrected.

III. If This Court Allows The Court Of Appeals Decision To Stand, The Cheerleaders Will Soon Be Banned From Ever Displaying Religious Messages On Their Banners.

The judgment of mootness below is not only wrong as a doctrinal matter—it has dire practical consequences for the cheerleaders' rights to free speech and religious expression.

KISD and the court of appeals have loudly professed that their actions will do no harm—that they are still allowing the cheerleaders to include religious messages on their banners. But, in fact, their actions are the death knell for the cheerleaders' right to freedom of speech and religious expression.

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[4] *See also Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App.—Austin 1993, writ denied) ("Without a declaration by the court or an admission by Del Valle that the at-large system was unconstitutional, Del Valle was free to return to the at-large system. Therefore, because Del Valle refused to admit that the at-large system was unconstitutional, a declaration by the court that the system was unconstitutional was essential to [the plaintiffs'] purpose. . . . Accordingly, we conclude that the Appellees had a valid cause of action . . . which was not moot."). *But see Fowler v. Bryan Indep. Sch. Dist.*, No. 01-97-01001-CV, 1998 WL 350488 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication) (allowing school to moot a case even though it had not expressly admitted unconstitutionality, because it enacted precisely the "types of [procedures] the students sought . . . before trial"—unlike KISD here).

If the banners are government speech, they violate the Establishment Clause under existing Supreme Court precedent. And a court will have little choice but to follow that precedent to ban the cheerleaders from expressing any religious messages on their banners.

For example, in *Santa Fe Independent School District v. Doe*, the Supreme Court declared that it was unconstitutional for a Texas high school to allow students to vote on whether to have student-led prayers made over the school's public address system before football games. 530 U.S. at 297-98. The Court held that the prayers violated the Establishment Clause because, under the school's policies, the prayers were "not properly characterized as 'private' speech," but were actually government speech. *Id.* at 309-10, 317.

As the Court explained, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 302.

Indeed, because of this crucial difference, "the determination of whom we should impute speech onto is critical." *Freedom from Religion Found., Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 491 (7th Cir. 2000). *See also Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 684 (6th Cir. 1994) (portrait of Jesus Christ placed in school hallway violated the Establishment Clause because portrait was

government speech reflecting "the preference of the school itself," rather than private speech reflecting "the preference of individuals").

So too here. The only way the banners can be constitutionally permissible under existing Supreme Court precedent is if they are not government speech. They must be the private speech of the cheerleaders.

Indeed, KISD itself once admitted that if the banners were government speech, they violated the Establishment Clause—and have presumably only changed its mind in an effort to avoid the vociferous public backlash it received for fighting the cheerleaders. *See, e.g.*, *supra* n.1; KISD Br. at 9-10 n.9 ("The Kountze ISD Board also expressed concern that some members of the Kountze ISD community interpreted [the superintendent's] actions as hostile to religion.").

To this day, KISD has not cited a single case to defend the proposition that religious banners could be government speech and still survive an Establishment Clause challenge under existing jurisprudence—because it cannot.

* * *

Make no mistake: If KISD is allowed to continue treating the banners as government speech, the Freedom From Religion Foundation, the ACLU, and all of the amici that supported KISD below will pounce. They will file a lawsuit. *See, e.g.*, Br. of ACLU, et al. at 65 ("*Amici* respectfully urge this Court to . . . render a decision holding that the run-through banners at issue in this case are government

speech and cannot, therefore, display Bible verses or other religious messages without violating the Establishment Clause of the First Amendment to the U.S. Constitution.”). And, if the banners are government speech, a court will have little choice but to stop the cheerleaders from including religious messages on their banners, under existing Establishment Clause precedent.

That is why it is critical that this Court grant this petition. If the opinion below is not reversed, it could lead inevitably to the silencing of the speech of the cheerleaders—whose only desire is to cheer on their fellow students with a message of their own choosing and their own faith.

PRAYER

The Court should grant this petition for review and reverse the decision of the court of appeals.

DATED: August 6, 2014

Respectfully submitted,

/s/ *James C. Ho*

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COUNSEL FOR PETITIONERS

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), I hereby certify that this petition contains 4,130 words, excluding the portions of the petition exempted by Rule 9.4(i)(1).

/s/ *James C. Ho*
James C. Ho

CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2014, a true and correct copy of the foregoing Petition for Review was served via electronic service and electronic mail on the following counsel of record:

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Counsel for Respondent Kountze Independent School District

/s/ *James C. Ho*
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APPENDIX

APPENDIX TABLE OF CONTENTS

TAB A

FILED FOR RECORD

2013 MAY -8 PM 1:40

Cause No. 53526

COTI MATTHEWS, et al,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	HARDIN COUNTY, TEXAS
	§	
VS.	§	
	§	
KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity as Superintendent,	§	356TH Judicial District
	§	
Defendants.	§	
	§	

SUMMARY JUDGMENT ORDER

On Tuesday April 30, 2013, the Court heard Kountze I.S.D.'s Plea to the Jurisdiction, the No Evidence Motion for Summary Judgment of Kountze I.S.D. and Kevin Weldon on Damages, the No Evidence Motion for Summary Judgment of Kountze I.S.D. on Ultra Vires, Plaintiffs' Motion for Partial Summary Judgment, Defendants Kountze I.S.D.'s and Kevin Weldon's Special Exceptions to Plaintiffs' Motion for Partial Summary Judgment, Kountze I.S.D.'s Motion for Reconsideration, for Clarification and for Protective Order, Kountze I.S.D.'s Objections to Plaintiffs' Summary Judgment Evidence and Motion to Strike, and Plaintiffs' Objections and Motion for Protective Order to Defendant's Subpoenas; the responses to these motions; and the evidence presented as well as the arguments of counsel.

Based upon the pleadings and briefs of the parties, the evidence presented, and the argument of counsel, and after due consideration, IT IS ORDERED, ADJUDGED AND DECREED that the Court makes the following findings of fact and conclusions of law:

1. On October 18, 2012, the Court entered a temporary injunction enjoining Defendant from preventing the cheerleaders of Kountze Independent School District from displaying banners or run-throughs containing religious messages at sporting events. The injunction served to allow the cheerleaders to continue to display their banners at Kountze Independent School District football games for the remainder of the 2012 football season.

2. The evidence in this case confirms that religious messages expressed on run-through banners have not created, and will not create, an establishment of religion in the Kountze community.

3. The Kountze cheerleaders' banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible.

4. Neither the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that

Plaintiffs' Motion for Partial Summary Judgment and Defendants' Traditional Motion for Summary Judgment of Kountze Independent School District Regarding Its request for Declaratory Judgment are GRANTED to the extent those Motions are consistent with this order of the Court.

All other relief sought by the parties and not expressly granted herein is denied, other than the issue of attorneys' fees, which is reserved for further consideration by the Court.

Signed this 24 **day of** May **, 2013.**

Honorable Steven Thomas
Judge, 356th Judicial District

Agreed to in Substance and Form:

David W. Starnes
Counsel for the Cheerleader Plaintiffs

Thomas P. Brandt
Counsel for Kountze I.S.D.

Adam W. Aston
Counsel for the State of Texas

TAB B

IN THE NINTH COURT OF APPEALS

09-13-00251-CV

Kountze Independent School District
v.
Coti Matthews, on behalf of her minor child [redacted], et al

On Appeal from the
356th District Court of Hardin County, Texas
Trial Cause No. 53526

JUDGMENT

THE NINTH COURT OF APPEALS, having considered this cause on appeal, concludes that the trial court's order should be reversed and rendered in part, affirmed and remanded in part. IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that we reverse the trial court's order in part and render judgment that Kountze ISD's plea to the jurisdiction is granted as to Parents' constitutional claims, statutory claims and any claims for attorney's fees under Chapters 106 and 110 of the Civil Practice and Remedies Code. We vacate the October 18, 2012 temporary injunction. As to the Parents' claims for attorney's fees under the Declaratory Judgment Act, we affirm the trial court's order denying Kountze ISD's plea to the jurisdiction and remand this cause to the trial court to determine recoverable attorney's fees, if any. All costs of the appeal are assessed one-half (1/2) against the appellant and one-half (1/2) against the appellees.

Opinion of the Court delivered by Justice Charles Kreger

May 8, 2014

REVERSED AND RENDERED IN PART,
AFFIRMED AND REMANDED IN PART

****

Copies of this judgment and the Court's opinion are certified for observance.

Carol Anne Harley
Clerk of the Court

TAB C

Not Reported in S.W.3d, 2014 WL 1857797 (Tex.App.-Beaumont)
(Cite as: 2014 WL 1857797 (Tex.App.-Beaumont))

H

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Beaumont.
KOUNTZE INDEPENDENT SCHOOL DISTRICT, Appellant
v.
Coti MATTHEWS, on Behalf of her Minor Child [redacted] et al., Appellees.

No. 09–13–00251–CV.
Submitted Dec. 4, 2013.
Decided May 8, 2014.

On Appeal from the 356th District Court, Hardin County, Texas, Trial Cause No. 53526. Steven R. Thomas, Judge.

Thomas P. Brandt, Joshua A. Skinner, John D. Husted, Fannin Harper Martinson Brandt & Kutchin, Dallas, TX, for Appellant.

James Ho, Prerak Shah, Gibson Dunn & Crutcher, Dallas, TX, David W. Starnes, Beaumont, TX, Kelly J. Shackelford, Jeffrey C. Mateer, Hiram S. Sasser, III, Liberty Institute, Piano, TX, for Appellee.

Charlotte Cover, Gibbs & Associates Law Firm, Mason, OH, for Intervenors, [redacted]

Rebecca L. Robertson, American Civil Liberties Union of Texas, Houston, TX, Daniel Mach, Heather Weaver, American Civil Liberties Union Foundation, Washington DC, Jennifer Lee, American Civil Liberties Union Foundation, New York, NY, for Amicus Curiae, American Civil Liberties Union, American Civil Liberties Union of Texas Anti-Defamation League, Interfaith Alliance Foundation, Muslim Advocates, Union for Reform Judaism, Hadassah, Hindu American Foundation, Americans United for Separation of Church & State The Sikh Coalition.

Robert M. Cohan, Ryan D. Pittman, Jackson Walker, LLP, Dallas, TX, Marc D. Stern, General Counsel, Avital Blanchard, Assistant General Counsel, American Jewish Committee, New York, NY, for Amicus Curiae, American Jewish Committee.

Greg Abbott, Attorney General of Texas, Daniel T. Hodge, First Assistant Attorney General, Jonathan F. Mitchell, Solicitor General, Adam W. Aston, Deputy Solicitor General, Patrick K. Sweeten, Chief, Special Litigation Division, Michael Neill, Assistant Attorney General, Austin, TX, for Amicus Curiae, The State of Texas.

Sean D. Jordan, Kent C. Sullivan, Danica L. Milios, Jason C. Petty, Thomas W. Curvin, Sutherland Asbill & Brennan, Austin, TX, for Amicus Curiae, Senators John Cornyn and Ted Cruz.

Before McKEITHEN, C.J., KREGER, and HORTON, JJ.

MEMORANDUM OPINION

CHARLES KREGER, Justice.

***1** This is an accelerated appeal from the trial court's denial of Kountze Independent School District's (“Kountze ISD”) plea to the jurisdiction. Appellees, parents of certain cheerleaders from Kountze High School (“Parents”), brought suit against Kountze ISD and its former superintendent, Kevin Weldon, after Weldon issued a decree that prohibited the cheerleaders from including religiously-themed messages on the run-through banners used at the beginning of school football games. After a combined hearing on multiple motions, including Kountze ISD's plea to the jurisdiction, Kountze ISD's motion for summary judgment on its

request for declaratory relief, and Parents' motion for partial summary judgment, the trial court issued its summary judgment order on May 8, 2013. In the order, the trial court denied Kountze ISD's plea to the jurisdiction and granted, in part, Parents' motion for partial summary judgment.[FN1]

> FN1. The trial court also granted, in part, Kountze ISD's motion for summary judgment on its request for declaratory relief. Kountze ISD's request for declaratory relief is not a claim against Parents and the grant of summary judgment to Kountze ISD on the declaratory relief claim is not challenged on appeal by any party.

Kountze ISD appealed the trial court's denial of its plea to the jurisdiction. Appellate courts have authority to review interlocutory orders only when authorized by statute. *Bally Total Fitness Corp. v. Jackson,* 53 S.W.3d 352, 352 (Tex.2001). Section 51.014 of the Civil Practice and Remedies Code allows an appeal from an interlocutory order that "grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001[.]" Tex. Civ. Prac. & Rem.Code Ann. § 51.014(a)(8) (West Supp.2013). Kountze ISD is a governmental unit under section 101.001. *See id.* § 101.001(3)(B). Therefore, we have jurisdiction to consider this interlocutory appeal. *See id.* § 51.014(a)(8).

Kountze ISD asserts the trial court erred when it denied its plea to the jurisdiction because Parents' claims are moot and the trial court, therefore, lacked subject matter jurisdiction over Parents' claims. After review, we agree that Parents' constitutional claims and statutory claims under chapters 106 and 110 of the Texas Civil Practice and Remedies Code have been rendered moot. We reverse the trial court's order in part and render judgment that Kountze ISD's plea to the jurisdiction is granted as to these claims. We, therefore, vacate the October 18, 2012 temporary injunction. As to Parents' claims for attorney's fees under the Declaratory Judgment Act, we affirm that portion of the trial court's order denying Kountze ISD's plea to the jurisdiction and remand this case to the trial court to determine whether the parties are entitled to attorney's fees.

I. Factual Background

For a number of years, the Kountze High School Cheerleading Squad has prepared run-through banners for display and use at Kountze High School varsity football games.[FN2] The cheerleading squad generally holds a banner up for the football team to charge through as the players enter the field before each game. The run-through banners are usually displayed for only a short time before the players run through and destroy the banners. Though the messages have varied throughout the years, the run-through banners generally display a brief message intended to encourage the athletes and fans. The cheerleading squad decides the content of the banners and creates the banners before each game. The cheerleading squad's sponsors have traditionally reviewed and approved the content of the run-through banners to insure that the banners are appropriate for the event and do not demonstrate poor sportsmanship.

> FN2. There is also some evidence to support that the Kountze Junior High School Cheerleading Squad prepares run-though banners for display and use at football games.

***2** Prior to the start of the 2012 football season, the cheerleading squad decided to include references and quotes from the Bible on the banners as a way to provide a positive message of encouragement to athletes and fans. At the beginning of the 2012 football season, the cheerleading squad implemented this plan and began using run-through banners that included religiously-themed content.

On September 17, 2012, Superintendent Weldon received a letter from a staff attorney with the Freedom from Religion Foundation (FFRF) [FN3]. The FFRF attorney urged Weldon to take immediate action to prevent the use of run-through banners

containing religious messages. She informed Weldon that the content of the banners must remain secular; otherwise, she contended the school district is in violation of the Establishment Clause. After receiving the letter and seeking legal advice, Weldon determined to restrict the use of religiously-themed messages on the run-through banners. On September 18, 2012, Weldon notified the campus principals that the run-through banners could no longer include religiously-themed messages and asked campus principals to convey this message to their staff and sponsors of student groups. Later that same day, a high school administrator made an announcement over the school's intercom system relaying Weldon's new policy. Weldon made this determination without having presented the issue to the Kountze ISD Board of Trustees.

FN3. The Freedom from Religion Foundation is an advocacy group, which claims to be the "nation's largest association of freethinkers (atheists, agnostics and skeptics)[.]" *See* Freedom From Religion Foundation, http:// ffrf.org. Its worldview is that "most social and moral progress has been brought about by persons free from religion." *See* http://ffrf.org/about. FFRF identifies itself as a "watchdog organization" and appears to regularly send letters to federal, state, and local government officials objecting to activities that they believe violate the Establishment Clause. *See* http://ffrf.org/legal (identifying self as watchdog organization); https://ffrf.org/publication s/freethought–today/item/18923–ffrf–statechurch–complaints–make–headlines (reporting a number of letters and complaints made by FFRF).

On September 20, 2012, Parents filed an original petition, an application for a temporary restraining order, and a request for injunctive relief. On October 18, 2012, after a hearing, the trial court granted Parents' request for a temporary injunction, which prohibited Kountze ISD, Weldon, and others associated with Kountze ISD, from preventing members of the Kountze Cheerleading Squad from displaying run-through banners "containing expressions of a religious viewpoint at sporting events."

Parents have alleged a number of causes of action against Kountze ISD. FN4 Parents allege that Weldon's new policy is an unconstitutional restriction of the cheerleaders' speech, denies the cheerleaders' free exercise of religion, and denies them equal protection under the law. Parents sought injunctive relief and declaratory relief.FN5 Each claim stems from Weldon's creation of a new policy—prohibiting religious messages or symbols on run-through banners—and the school administrators' subsequent enforcement of that policy. Parents also sought attorney's fees under chapters 37, 106, and 110 of the Texas Civil Practice and Remedies Code.

FN4. Parents have since dismissed all claims against Weldon.

FN5. In Parents' Fifth Amended Petition, they also appear to seek recovery of actual and nominal damages under the Texas Religious Freedom Restoration Act. *See* Tex. Civ. Prac. & Rem.Code Ann. § 110.005 (West 2011). However, during their depositions, Parents consistently denied that they were seeking any monetary award in this litigation. Parents' counsel informed the trial court that they were not seeking compensatory damages, but only nominal damages in the form of a dollar to memorialize that KISD committed a violation under the Act. The Act provides that a party who successfully asserts a claim under the Act is entitled to recover "compensatory damages for pecuniary and nonpecuniary losses[.]" *Id.* § 110.005(a)(3). Even if Parents had consistently sought compensatory damages as permitted under the Act, Parents cannot maintain a claim for damages. In their petition, Parents concede that they

> failed to provide the 60–day notice required under the Act. *See id.* § 110.006(a). Parents allege that they were not required to provide written notice because KISD's policy would "cause imminent harm to Plaintiffs and there was not inadequate time to provide notice." Assuming Parents' allegations are true and that their claims fall within the statutory exception to the 60–day notice requirement, Parents' cannot rely on this exception to support their claims for damages under the Act because the exception only applies to claims for declaratory and injunctive relief. *See id.* § 110.006(a), (b).

Kountze ISD filed a plea to the jurisdiction, as well as a motion for summary judgment regarding its request for declaratory relief. Parents filed a motion for partial summary judgment. The trial court denied the plea to the jurisdiction and granted, in part, both summary judgment motions.

II. Standard of Review

A plea to the jurisdiction challenges the trial court's subject matter jurisdiction over the claims that a plaintiff has asserted in the lawsuit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000). We review the trial court's order on a plea to the jurisdiction de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex.2004). In our de novo review, we do not weigh the merits of the plaintiff's claims, but we consider the plaintiff's pleadings and the evidence pertinent to the jurisdictional inquiry. *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002) . The plaintiff bears the burden in a lawsuit to allege facts that affirmatively demonstrate the trial court's subject matter jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993). "[W]e construe the pleadings in the plaintiff's favor and look to the pleader's intent." *Brown*, 80 S.W.3d at 555. If the plea to the jurisdiction challenges the existence of jurisdictional facts, we will consider only the evidence relevant to the resolution of the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 227.

III. Plea to the Jurisdiction

***3** On appeal, Kountze ISD argues that Parents' underlying constitutional and statutory claims against Kountze ISD have been rendered moot in light of the school's change in policy.

A. The Mootness Doctrine

Mootness deprives a court of subject-matter jurisdiction. *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100–01 (Tex.2006). Subject matter jurisdiction is essential to a trial court's authority to decide a case. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443. Appellate courts are likewise prohibited from deciding moot controversies. *See Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex.1988). The mootness prohibition is rooted in the separation of powers doctrine in the United States and Texas Constitutions, both of which prohibit courts from rendering advisory opinions. *See* U.S. CONST. art. III, § 2, cl. 1; Tex. Const. art. II, § 1; *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex.2000) (per curiam); *Texas Ass'n of Bus.*, 852 S.W.2d at 444.

"A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome." *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex.2005). A justiciable controversy exists when there is "a real and substantial controversy involving [a] genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex.1995). We will find that a controversy is moot when an allegedly wrongful behavior has passed and could not be expected to recur. *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex.App.-Austin 2007, no pet.). The actual controversy must persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, —— U.S. ——, ——, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92, 130 S.Ct. 576, 175 L.Ed.2d 447 (2009)).

In a declaratory judgment action, the standard for determining whether a defendant's voluntary conduct has mooted a case is stringent—the defendant must show it is " 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Bexar Metro. Water Dist.*, 234 S.W.3d at 131 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). The United States Supreme Court has explained that defendants bear this heavy burden to establish mootness after voluntary cessation "because otherwise they would simply be free to 'return to [their] old ways' after the threat of a lawsuit had passed.... Thus they must establish that 'there is no reasonable likelihood that the wrong will be repeated.' " *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 72, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)).

B. No Live Controversy Remains

Parents brought this suit so their children could continue to display religiously-themed messages on run-through banners at school football games. Kountze ISD argues the case has become moot during the pendency of this litigation because it has adopted a new policy that allows student cheerleaders to display religious content on the run-through banners. The evidence shows that, in response to this litigation, on October 16, 2012, Kountze ISD initiated legislative proceedings in the community to gather evidence and consider the controversy presented by Weldon's new policy regarding the run-through banners. On April 8, 2013, the Kountze ISD Board of Trustees adopted Resolution and Order No. 3, which states, in part,

> ***4** Based on the evidence, including oral and written testimony, submitted to the Board, the Board concludes that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious.

The Resolution also instructed the superintendent "to distribute a copy of this resolution and order to all campus principals and to instruct all campus principals to distribute [the new policy] to the athletic director, the coaches of the various sports teams, and the Cheerleader Squad sponsors."

Not only has Kountze ISD formally adopted a new policy since the initiation of the underlying lawsuit, it has made judicial admissions in the pending litigation to affirm its new policy and its future intentions regarding religious content on the run-through banners. We regard assertions of fact in a party's live pleadings that are not pleaded in the alternative, as formal judicial admissions. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex.2001) (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex.1983)). For a statement in a pleading to be a judicial admission, it must be clear, deliberate, and unequivocal. *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 95 (Tex.2004). In its answer, Kountze ISD states,

> Kountze ISD does not intend to prohibit messages from being placed on the banners merely because the content of the messages is religious or is from a religious source. Kountze ISD does not intend, for example, to prohibit a banner from containing a quotation from the Bible or citation to the Bible merely because the quotation or citation is from the Bible. While it is possible that there could be quotations from the Bible that would not be appropriate for a run-through banner at a sporting event, no quotation from the Bible should be rejected merely because it comes from the Bible.[FN6]

FN6. In its Resolution and Order No. 3, Kountze ISD gives an example of when a Biblical quote would not be allowed on the run-through banners. It explains,

> For instance, the Board has been made aware of recent news reports indicating that students at a public school in Louisiana displayed, at a basketball championship game against a private school named Parkview Baptist, banners that stated, "Jesus [loves] you ... unless you attend Parkview Baptist." The Board agrees with the position taken by the High School Cheerleader Squad Sponsors in their depositions in the Lawsuit that such a banner would constitute poor sportsmanship and should not be permitted to be displayed by the Kountze ISD Cheerleader Squad, regardless of its arguably religious content.
>
> In their depositions, appellees, Moffett and Richardson, agreed that using religious content on banners in this manner is inappropriate and demonstrated poor sportsmanship. They both indicated that as the cheerleading sponsors, they would have restricted the cheerleaders from using a message like that used in the description above.

In Kountze ISD's response to Parents' motion for partial summary judgment, it states,

> Kountze ISD does not have and does not plan to have any ban on the inclusion of religious messages on "run-through" banners at Kountze ISD sporting events. Moreover, Kountze ISD does not and does not plan to prevent the Cheerleader Squad from using religious messages on "run-through" banners at Kountze ISD sporting events.

During the hearing on the plea to the jurisdiction, Kountze ISD's counsel argued to the trial court:

> We think this case is moot. We think that there is no case or controversy now because there is no prospect anyone in the school district is going to try to stop somebody from putting scriptures on banners—quotations on banners. But we haven't—the way our approach is if you grant the Plea to the Jurisdiction, then the scripture quotations can be put on the banners and there won't be anyone trying to stop that.

In its brief to this Court, Kountze ISD states, "The school district intends to permit religious-themed banners on the same terms as they were allowed prior to the FFRF Letter."

***5** The Texas Supreme Court has acknowledged that where a plaintiff challenges a statute or written policy, the challenges may become moot if the statute or policy is repealed or fundamentally altered. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 167 (Tex.2012) (citing *Trulock v. City of Duncanville*, 277 S.W.3d 920, 925–27 (Tex.App.-Dallas 2009, no pet.). In *Heckman*, a group of named plaintiffs sued on behalf of themselves and a putative class of persons who were allegedly denied constitutional rights in criminal misdemeanor pretrial matters. *Id.* at 144. The plaintiffs sued the county and five of its judges, alleging it was the defendants' custom and practice to systematically and deliberately deprive indigent misdemeanor defendants of their constitutional rights to counsel, self-representation, and open courts. *Id.* at 144, 165, 167. The defendants challenged the trial court's jurisdiction. *Id.* at 145. The court of appeals held the plaintiffs' claims were moot and dismissed the suit for want of jurisdiction. *Id.* at 145. On appeal, the Supreme Court found the court of appeals erred in dismissing the lawsuit based on standing. *Id.* at 150. In regards to the claims of the putative class, the defendants argued that the claims of the entire putative class were moot in light of the changes the county made to its counsel-appointment policies, which the defendants claimed remedied all of the claims of the putative class. *Id.* at 161, 166. The defendants pointed to intervening events that they argued mooted the putative class's claims, including the county's subsequent adoption of a new policy for appointing counsel to indigent criminal defendants in the county, the State's newly

enacted statute changing the requirements for appointment counsel to indigent defendants, and new federal court opinions that changed the law governing indigent defense. *Id.* at 166. The Court acknowledged that challenges to a statute or written policy may become moot if the statute or policy is repealed or fundamentally altered. *Id.* at 167. However, revisions of a written policy do not moot a case when the focus of the plaintiffs' complaint was not the defendants' written policies, but rather their custom and practice of systematically and deliberately depriving indigent misdemeanor defendants of their constitutional rights. *Id.* at 167. The Court noted that the plaintiffs' allegations did not hinge on the constitutionality of the county's policies. *Id.* The Court explained, "Indeed, plaintiffs might argue that defendants violated their constitutional rights *in spite of* the then-existing policy. Thus, the existence of new written policies may have no practical effect on how defendants actually treat individuals who appear in Williamson County's courtrooms." *Id.*

Heckman is distinguishable from this case. Here, the focus of Parents' complaint is the superintendent's new policy that banned all religiously-themed messages on run-through banners at school football games. KISD repealed the complained of policy and replaced it with a written policy that addresses Parents' complaint. While Parents allege there is a "long tradition of the cheerleading squads producing the run-through banners," there is not a specific allegation that prior to the superintendent's ban, KISD attempted to restrict the banners in this manner. Parents do not plead any specific facts to support that KISD had a custom or practice of banning religiously-themed run-through banners.

***6** In *Trulock v. City of Duncanville*, the defendant, a municipality, issued a plaintiff a number of citations pursuant to a city ordinance. 277 S.W.3d at 922. The plaintiff challenged the ordinance as unconstitutional. *Id.* The trial court dismissed the plaintiff's claims for want of jurisdiction. *Id.* at 922–23. The defendant argued on appeal that the plaintiff's challenge to the city's ordinance became moot when the city subsequently repealed, amended, and modified the complained-of ordinance. *Id.* at 921, 925. After examining the complained-of ordinance, and the ordinance the city later adopted, the court determined the changes in the ordinance significantly altered the original city ordinance. *Id.* at 926–27. In fact, the new ordinance modified the portions of the old ordinance that the plaintiff had complained were unconstitutional. *Id.* at 927. Ultimately, the court concluded the city's adoption of the new ordinance rendered the plaintiff's claims moot. *Id.* at 928. Like *Trulock*, KISD's adoption of Resolution and Order No. 3 specifically addressed Parents' central complaint—the superintendent's policy, which required school personnel to prohibit all religiously-themed messages on run-through banners. KISD's new policy specifically provides that "school personnel are not required to prohibit messages on school banners[.]"

In *Del Valle Independent School District v. Lopez*, the Austin Court of Appeals held a challenge to the constitutionality of a district's at-large electoral system was not moot even though the district voluntarily abandoned the at-large system because the board could reimplement the challenged system at any time and had not admitted to the system's unconstitutionality. 863 S.W.2d 507, 511 (Tex.App.-Austin 1993, writ denied). Unlike *Del Valle Indep. Sch. Dist.*, here, Kountze ISD has not simply abandoned a challenged policy. Kountze has replaced Weldon's policy regarding the run-through banners with a new policy that allows the student cheerleaders to do what they sought to do in the first place—to display messages of encouragement and school spirit that may incorporate religious content. Moreover, in this case, we have a number of judicial admissions where Kountze ISD has stated that it does not intend to reinstate Weldon's ban on the run-through banners.

In *Robinson v. Alief Independent School District*, the Houston Court of Appeals considered

whether a voluntary action mooted a case. 298 S.W.3d 321, 323 (Tex.App.-Houston [14th Dist.] 2009, pet. denied). In *Robinson*, a former teacher sought to enjoin the school to expunge his employee file. *Id.* The school filed a plea to the jurisdiction and argued that the teacher's injunctive claims were moot because the school, *sua sponte*, had agreed to expunge the teacher's personnel file as requested. *Id.* The teacher argued that the school's unilateral decision to expunge his employee file was not enough to moot his claim for injunctive relief without the school also having made a judicial admission of wrongdoing or receiving an extrajudicial action preventing the school from reversing its decision in the future. *Id.* at 325. The court held that the teacher's request for injunctive relief was moot. *Id.* at 327. The court explained that the teacher requested that his employee file be expunged, and the school fully agreed to comply with his request. *Id.* at 326. The court rejected the teacher's argument that he needed an injunction to prevent the school from reinstating the complained of material in his file at some point in the future. *Id.* at 326–27. The court explained that "[w]ithout any evidence of an existing or continuing present injury, or a reasonable expectation that [the school] will reinstate the expunged documents in his employee file, [the teacher's] request is merely [conjectural] and hypothetical," and, thus, "any judicial action would be advisory." *Id.*

***7** Additionally, while we recognize that the unpublished case of *Fowler v. Bryan Independent School District* has no precedential value, we find the reasoning and analysis of the appellate opinion persuasive. *See* No. 01–97–01001–CV, 1998 WL 350488 (Tex.App.-Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication). In *Fowler*, students brought suit against a school for peer hostile environment sexual harassment. *Id.* at *1. The school argued that the students' claims were moot because the school had subsequently adopted sexual harassment policies and training. *Id.* at *4. The trial court rendered summary judgment in favor of the school. *Id.* The students responded with evidence of incidents that occurred before the school's adoption of the new policy, and the only evidence they presented of circumstances after the new policy's adoption demonstrated that the new policy addressed the students' concerns. *Id.* at *4–5. The school had not simply abandoned its challenged policies and procedures, but it had replaced them with the types of procedures the students had sought. *Id.* at *6 n. 17. Additionally, the school continued to function under this new policy for two to four years after its implementation. *Id.* The court determined the alleged wrongful behavior had passed, was not likely to recur, and that the mootness exceptions did not apply; therefore, the court found the students' case moot. *Id.* at *6–7. The court found the case moot despite the fact that the school had not admitted its prior actions were unconstitutional. *Id.* at *6. The court explained that the school obviously recognized a problem existed as demonstrated by its adoption of a new policy. *Id.*

This case is similar to *Fowler*. In *Fowler*, the school adopted a new policy to address the concerns presented by the students. All of the evidence relied on by the students in *Fowler* concerned problems that existed before the school adopted a new policy. Here, there are no allegations and no evidence to support any claim that the school has prohibited or attempted to prohibit the cheerleaders' speech in any way other than through Weldon's ban, which has subsequently been repealed and replaced with a contrary policy. The school adopted this new policy in April 2013, and there is no evidence in the record to suggest that it has been altered since that time. Without evidence to the contrary, we assume that Kountze ISD's formally announced changes to its official school policy are not merely litigation posturing. *See Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325–26 (5th Cir.2009), *aff'd on other grounds*, —— U.S. ——, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011).[FN7] We presume that Kountze ISD implemented its policy change in good faith to address Parents' complaints regarding Weldon's ban on the run-through banners. *See id.* We conclude that the adoption of Resolution and

Order No. 3, along with Kountze ISD's judicial admissions throughout this lawsuit, are sufficient to satisfy its burden of showing it is absolutely clear that the complained of policy cannot reasonably be expected to recur.

> FN7. After acknowledging the heavy burden a defendant must meet to establish mootness in voluntary cessation cases, the Fifth Circuit explained:
>
> > On the other hand, courts are justified in treating a voluntary governmental cessation of possibly wrongful conduct with some solicitude, mooting cases that might have been allowed to proceed had the defendant not been a public entity—a practice that is reconcilable with *Laidlaw*. Although *Laidlaw* establishes that a defendant has a heavy burden to prove that the challenged conduct will not recur once the suit is dismissed as moot, government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties. Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.
>
> *Sossamon*, 560 F.3d at 325. Applying this reasoning, the Court concluded that an affidavit stating the policy had been changed satisfied the government's burden of making " 'absolutely clear' " the condition created by the policy cannot " 'reasonably be expected to recur[.]' " *Id.*

***8** In response to Kountze ISD's mootness argument, Parents argue that a controversy still exists because Kountze ISD disagrees with Parents as to the nature of the speech in question—whether it is governmental speech, student-sponsored speech, or private speech. However, as discussed above, we have no authority to resolve a theoretical or contingent dispute. *See Beadle*, 907 S.W.2d at 467. With the adoption of Kountze ISD's new policy, there is no evidence that Kountze ISD has prohibited the speech of the students, such that we would be required to determine whether a violation of their free speech right has occurred. Parents cite to no evidence in their brief to this Court and we find no evidence in the record that under Kountze ISD's new policy, the cheerleaders' speech has been prohibited. We conclude the allegedly wrongful behavior has passed and cannot reasonably be expected to recur. We next consider whether any exceptions to the mootness doctrine prohibit its application to the facts in this case.

C. No Applicable Exceptions to the Mootness Doctrine

While Parents do not assert an exception to the mootness doctrine, we will analyze whether an applicable exception exists. The Texas Supreme Court has recognized two exceptions to the mootness doctrine: "capable of repetition yet evading review[;]" and collateral consequences.[FN8] *F.D.I.C. v. Nueces Cnty.*, 886 S.W.2d 766, 767 (Tex.1994).

> FN8. The Texas Supreme Court has not recognized the public interest exception to the mootness doctrine. *See F.D.I.C.*, 886 S.W.2d at 767 (noting that the Court has not previously decided the viability of the public interest exception and finding it unnecessary to reach that issue under the facts of this case); *see also Jackson v. Blanchard*, No. 09–11–00273–CV; 2011 WL 4999537, at *1 (Tex.App.-Beaumont Oct. 20, 2011, pet. denied). "[T]he public interest exception permits judicial review of questions of considerable public importance if the nature of the action makes it capable of repetition and yet prevents effective judicial review." *F.D.I.C.*, 886 S.W.2d at 767.

1. Capable of Repetition

The "capable of repetition yet evading review"

exception applies when a party challenges an action that is of such a short duration that the party cannot obtain review before the issue becomes moot. *Tex. A & M Univ.—Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex.2011). The party must show that there is a reasonable expectation that the same action will occur again if the court does not address the issue. *Id.* The ban challenged in this lawsuit is not an action of such short duration that it would evade review. The cheerleaders were junior high and high school students. Many of the students had a number of years before graduation within which they could seek redress for the alleged wrongful act.

Kountze ISD's new policy has been in effect since April 2013. While theoretically, the Board of Trustees for the school could repeal its new policy and reinstate Weldon's ban, we find that unlikely given the effort, time, and careful planning that went into the creation of the school's new policy. Any future policy regarding the cheerleaders' speech can be challenged at a later date. We are not empowered to decide cases on future contingencies or hypotheticals. *See City of Dallas v. Woodfield*, 305 S.W.3d 412, 419 (Tex.App.-Dallas 2010, no pet.) (citing *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) ("The mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test.")). There is no evidence in the record to explain how there is a "reasonable expectation" that the student cheerleaders would be subjected to enforcement of the former superintendent's ban. As explained above, the Board of Trustees has essentially repealed the ban and modified its policy in such a way to allow the religiously-themed messages on the banners. Accordingly, we conclude, there is no reasonable expectation that the student cheerleaders will suffer the same alleged wrong. While Kountze ISD has not conceded that the superintendent's ban was unconstitutional, it obviously recognized a problem existed and adopted a new policy to address that concern. We conclude the capable of repetition exception does not apply.

2. Collateral Consequences

***9** Because the effects of a prejudicial event may not be resolved by the dismissal of a case as moot, the "collateral consequences" exception prevents dismissal when prejudicial events have occurred and the effects of those events continue to stigmatize helpless or hated individuals long after the judgment ceases to operate. *Gen. Land Office of State of Tex. v. Oxy U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex.1990) (quoting *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 19 (Tex.App.-Houston [1st Dist.] 1988, no writ)).

This exception is likewise not applicable in this case.[FN9] The cheerleaders have not suffered the type of prejudicial treatment envisioned by this exception. The cheerleaders never faced the consequences of Weldon's ban because of the trial court's restraining order and subsequent injunction that immediately went into place. No judgments or orders have been issued in this case that create a stigma or any kind of adverse consequences for the cheerleaders. This exception does not apply to the facts presented in this case.

> FN9. The courts have generally applied this exception in cases related to short-term mental health commitment orders, juvenile delinquency adjudications, and custody orders. *See, e.g., State v. Lodge*, 608 S.W.2d 910, 912 (Tex.1980) (applying exception to mootness doctrine in a case involving involuntary commitment to a mental hospital); *Carrillo v. State*, 480 S.W.2d 612, 617 (Tex.1972) (applying exception to mootness doctrine in case involving juvenile delinquency adjudication); *Ex parte Ullmann*, 616 S.W.2d 278, 280 (Tex.Civ.App.-San Antonio 1981, writ dism'd) (applying exception to protective custody order, because of stigma and adverse consequences flowing from such order); *Jones v. State*, 602 S.W.2d 132, 134 (Tex.Civ.App.-Fort Worth 1980, no writ)

(applying exception to temporary involuntary commitment order, because of stigma of such order).

IV. Attorney's Fees

Next, we must determine whether Parents' claims for attorney's fees is moot. Parents have pleaded that they are entitled to recover attorney's fees under chapters 37, 106, and 110 of the Texas Civil Practice and Remedies Code. As we have found Parents' claims under chapters 106 and 110 moot, we conclude Parents' claims for attorney's fees under these chapters are moot as well. *See* Tex. Civ. Prac. & Rem.Code Ann. § 106.002(b) (West 2011) (stating that a court may only award reasonable attorney's fees to the prevailing party); § 110.005(a)(4) (stating a court may only award reasonable attorney's fees to the party "who successfully asserts a claim or defense" under this chapter).

We have also found Parents' constitutional claims moot. However, unlike the chapters 106 and 110 claims for attorney's fees, with respect to chapter 37, the Declaratory Judgments Act, a separate controversy can persist even when the underlying controversy is moot. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex.2005) (holding that a party's interest in obtaining attorney's fees "breathe[d] life" into an appeal of declaratory judgment where the underlying claims had become moot).

We conclude that the trial court must still determine if Parents are entitled to equitable and just attorney's fees as authorized by the Uniform Declaratory Judgments Act. The Uniform Declaratory Judgments Act authorizes an award of attorney's fees on an equitable basis. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.009 (West 2008). Under this Act, a party need not "substantially prevail" in the litigation to receive attorney's fees. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637–38 (Tex.1996). A trial court may award just and equitable attorney's fees to a non-prevailing party. *Tex. A & M Univ.—Kingsville v. Lawson*, 127 S.W.3d 866, 874–75 (Tex.App.-Austin 2004, pet. denied).

***10** Even though we hold Parents' underlying claims are moot, their claims for attorney's fees are a separate controversy that persists. *See Camarena*, 754 S.W.2d at 151; *Pate v. Edwards*, No. 12–13–00231–CV, 2014 WL 172509, at *2–3 (Tex.App.-Tyler Jan.15, 2014, no pet.). Parents obtained a ruling in their favor before their case was rendered moot. The trial court awarded Parents a temporary restraining order and a temporary injunction against Kountze ISD. Moreover, Kountze ISD has stated that Parents' lawsuit prompted it to change the school's policy. Because there is a question about whether Parents have a legally cognizable interest in recovering attorney's fees and costs under chapter 37 of the Civil Practice and Remedies Code, this claim for attorney's fees remains a live controversy and has not been rendered moot. *See Camarena*, 754 S.W.2d at 151; *see also Pate*, 2014 WL 172509, at *2–3.

V. Conclusion

The trial court erred in denying Kountze ISD's plea to the jurisdiction as to Parents' constitutional claims and statutory claims under chapters 106 and 110 of the Civil Practice and Remedies Code when those claims were rendered moot by Kountze ISD's adoption of a new policy that resolved any live controversy between the parties. We reverse the trial court's order in part and render judgment that Kountze ISD's plea to the jurisdiction is granted as to these claims and any claims for attorney's fees under chapters 106 and 110. We vacate the October 18, 2012 temporary injunction. As to Parents' claims for attorney's fees under the Declaratory Judgment Act, we affirm the trial court's order denying Kountze ISD's plea to the jurisdiction and remand this cause to the trial court to determine recoverable attorney's fees, if any.

REVERSED AND RENDERED IN PART, AFFIRMED AND REMANDED IN PART.

Tex.App.-Beaumont,2014.
Kountze Independent School Dist. v. Matthews

Not Reported in S.W.3d, 2014 WL 1857797 (Tex.App.-Beaumont)

END OF DOCUMENT

TAB D

CAUSE NO. 53526

COTI MATTHEWS, on	§	IN THE DISTRICT COURT
behalf of her minor child,	§	
[redacted];	§	
RACHEL DEAN, on	§	
behalf of her minor child,	§	
[redacted];	§	
CATHIE FLOWER,	§	
on behalf of her minor child,	§	
[redacted];	§	
ELIZABETH O. HADNOT,	§	
on behalf of her minor child,	§	HARDIN COUNTY, TEXAS
[redacted];	§	
KIM HAYNES, on	§	
behalf of her minor child,	§	
[redacted];	§	
RHONDA KEMP, on	§	356th Judicial District
behalf of her minor child,	§	
[redacted];	§	
CHARLES & CHRISTY LAWRENCE,	§	
on behalf of their minor	§	
Child, [redacted];	§	
PATTY LEDOUX, on	§	
behalf of her minor child,	§	
[redacted];	§	
TESSANDRA MCDANIEL,	§	
on behalf of her minor child,	§	
[redacted];	§	
TONYA MOFFETT, on	§	
behalf of her minor child,	§	
[redacted];	§	
BRETT PAGE, on	§	
behalf of his minor child,	§	
[redacted];	§	
BETH RICHARDSON,	§	
on behalf of her minor child,	§	
[redacted];	§	
SHYLOA SEAMAN,	§	

FILED FOR RECORD
12 OCT 18 PM 1:00
DISTRICT CLERK
HARDIN COUNTY, TEXAS

IMAGED

and on behalf of her minor child, [redacted];	§
MISTY SHORT, on behalf of her minor child [redacted]; and	§
PATRICE SONNIER, on behalf of her minor child [redacted]	§
Plaintiffs,	§
v.	§
KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity as Superintendent,	§
Defendants.	§

ORDER ON PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION

CAME ON FOR CONSIDERATION Coti Matthews, on behalf of her minor child, [redacted], Elizabeth O. Hadnot, on behalf of her minor child, [redacted], Kim Haynes, on behalf of her minor child, [redacted] Rhonda Kemp, on behalf of her minor child, [redacted], Charles & Christy Lawrence, on behalf of their minor child, [redacted], Tonya Moffett, on behalf of her minor child, [redacted], Beth Richardson, on behalf of her minor child, [redacted], Shyloa Seaman, on behalf of her minor child, [redacted], Misty Short, on behalf of her minor child, [redacted], Patrice

Sonnier, on behalf of her minor child, [redacted] ("Plaintiffs"), application for a temporary injunction, presented to the Court today. The Court examined the pleadings of Plaintiffs, the evidence presented, and the argument of counsel, and after due consideration finds that:

1) a cause of action against the defendants exists;

2) Plaintiffs have a probable right to the relief sought; and

3) Plaintiffs will suffer a probable, imminent, and irreparable injury in the interim.

Therefore, Plaintiffs are entitled to a temporary injunction.

It is therefore ORDERED that the clerk of this Court issue a temporary injunction enjoining Defendants, Kountze Independent School District (hereinafter "KISD") and its Superintendent, Kevin Weldon, and any other person(s) with knowledge of this Order, to cease and desist from preventing the cheerleaders of Kountze Independent School District from displaying banners or run throughs at sporting events and/or censoring the sentiments expressed thereon. This order shall stand until further Order of this Court.

Plaintiffs have shown a probable injury because the harm is imminent; if the temporary injunction does not issue, the injury would be irreparable; and the applicant has no other adequate legal remedy.

If the temporary injunction is not issued, the Defendants' unlawful policy prohibiting private religious expression will remain in effect and the Plaintiffs will be prohibited from exercising their constitutional and statutory rights at all football games and other school sporting events. The Plaintiffs wish to engage in religious expression at sporting events in the future, including the remaining football games; therefore, the harm to their constitutional and statutory rights is imminent.

Plaintiffs claims of constitutional injury present a substantial threat that irreparable injury would result if the temporary injunction does not issue.

Finally, Plaintiffs have no other adequate remedy at law because no amount of money can compensate them for the loss of their constitutional and statutory rights. However, Plaintiffs are not required to prove that they have no adequate remedy at law when they have a statutory right to an injunction, as provided by sections 106.002(a) and 110.005(a)(2) of the Texas Civil Practice and Remedies Code.

This temporary injunction is effective immediately and shall continue in force and effect until further order of this Court. This order shall be binding on Defendants, and any other person(s) who receive actual notice of this order by personal service or otherwise. It is further,

ORDERED that this temporary injunction be effective immediately and the bond paid by Plaintiffs in the amount of $250.00 for each Defendant, $500.00 total payable to Defendants will extend to this temporary injunction. The Clerk of this Court is hereby ORDERED to issue citation and notice to Defendant KISD and its Superintendent, Kevin Weldon to cease and desist preventing the cheerleaders of Kountze Independent School District from displaying banners or run throughs containing expressions of a religious viewpoint at sporting events.

This cause is set for trial on June 24, 2013.

SIGNED on October 18, 2012 at 1:00 p.m.

Judge Presiding

TAB E

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Sec. 6. FREEDOM OF WORSHIP. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

TAB F

THE TEXAS CONSTITUTION

ARTICLE 1. BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and established, we declare:

Sec. 8. FREEDOM OF SPEECH AND PRESS; LIBEL. Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press. In prosecutions for the publication of papers, investigating the conduct of officers, or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence. And in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.