FILED
17-0988
1/15/2018 11:44 AM
tex-1864958
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

IN THE
SUPREME COURT OF TEXAS

No. 17-0988

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

COTI MATTHEWS, ON BEHALF OF HER MINOR CHILD MACY MATTHEWS, ET AL.,
Respondents.

On Petition for Review from the
Ninth Court of Appeals at Beaumont, Texas

PETITION FOR REVIEW

THOMAS P. BRANDT
Texas Bar No. 02883500
tbrandt@fhmbk.com
FRANCISCO J. VALENZUELA
Texas Bar No. 24056464
fvalenzuela@fhmbk.com

FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206
(214) 369-1300 (office)
(214) 987-9649 (fax)

ATTORNEYS FOR PETITIONER

ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Petitioner:	**Kountze Independent School District ("KISD"), Defendant/Appellant/Petitioner**
Represented in the Appellate Courts by:	Thomas P. Brandt State Bar No. 02883500 tbrandt@fhmbk.com Joshua A. Skinner State Bar No. 24041927 jskinner@fhmbk.com John D. Husted State Bar No. 24059988 jhusted@fhmbk.com Francisco J. Valenzuela State Bar No. 24056464 fvalenzuela@fhmbk.com FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C. Two Energy Square 4849 Greenville Ave., Ste.1300 Dallas, Texas 75206 (214) 369-1300 (office) (214) 987-9649 (fax)
Represented in the Trial Court by:	Thomas P. Brandt State Bar No. 02883500 tbrandt@fhmbk.com Joshua A. Skinner State Bar No. 24041927 jskinner@fhmbk.com John D. Husted State Bar No. 24059988 jhusted@fhmbk.com FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.

	Two Energy Square 4849 Greenville Ave., Ste.1300 Dallas, Texas 75206 (214) 369-1300 (office) (214) 987-9649 (fax)
Respondents (at the conclusion of proceedings before the trial court)	**(1) Coti Matthews, on behalf of her minor child, [redacted];** **(2) Rachel Dean, on behalf of her minor child, [redacted];** **(3) Charles and Christy Lawrence, on behalf of their minor child, [redacted]** **(4) Tonya Moffett, on behalf of her minor child, [redacted];** **(5) Beth Richardson, on behalf of her minor child, [redacted];** **(6) Shyloa Seaman, on behalf of her minor child, [redacted]; and** **(7) Misty Short, on behalf of her minor child, [redacted]** **Plaintiffs/Appellees/Respondents**
Represented in the Appellate Courts by:	James C. Ho State Bar No. 24052766 jho@gibsondunn.com Prerak Shah State Bar No. 24075053 pshah@gibsondunn.com Bradley G. Hubbard State Bar No. 24075053 bhubbard@gibsondunn.com GIBSON, DUNN, & CRUTCHER LLP 2100 McKinney Avenue, Suite 1100 Dallas, Texas 75201-6912 (214) 698-3264 (214) 571-2917 (fax)

Represented in the Trial Court by:	David W. Starnes State Bar No. 19072700 390 Park, Suite 700 Beaumont, Texas 77701 (409) 835-9900 (409) 835-9905 (fax) Kelly J. Shackleford State Bar No. 18070950 Jeffrey C. Mateer State Bar No. 13185320 Hiram S. Sasser, III State Bar No. 24039157 Liberty Institute 2001 W. Plano Pkwy., Suite 1600 Plano, Texas 75075 (972) 941-4444 (972) 941-4457 (fax)
Intervenors	State of Texas
Represented by	Gregg Abbott Attorney General of Texas Patrick K. Sweeten State Bar No. 00798537 Special Litigation Division OFFICE OF THE ATTORNEY GENERAL P.O. Box 12548 (MC 059) Austin, Texas 78711-2548 (512) 936-0596 (512) 474-2697 (fax)
	Randall Jennings, Missy Jennings, A.J., and W.J.
Represented by	Charlotte Cover Gibbs & Associates Law Firm 5700 Gateway Boulevard, Ste 400 Mason, OH 45040

(513) 234-5545
(513) 234-5545 (fax)
ccover@gibbs-lawfirm.com

Amicus Curiae

Rebecca Robertson
State Bar No. 00794542
ACLU of Texas
1500 McGowen Street, Ste 250
Houston, TX 77004
(713) 942-8146
(713) 942-8966(fax)
rrobertson@aclutx.org

Counsel for Amici Curiae ACLU, ACLU of Texas, Anti-Defamation League, Interfaith Alliance Foundation, Hindu American Foundation, Americans United for Separation of Church and State, The Sikh Coalition, and Baptist Joint Committee for Religious Liberty.

Sean D. Jordan
Jackson Walker, L.L.P.
100 Congress Avenue, Ste 1100
Austin, TX 78701
(512) 236-2000
(512) 391-2101 (fax)

Counsel for Amici Curiae U.S. Senators Cruz and Cornyn

Robert M. Cohan
Jackson Walker L.L.P.
2323 Ross Avenue, Suite 600
Dallas, TX 75201
(214) 953-6046
(214) 661-6612 (fax)
bcohan@jw.com

Counsel for Amicus Curiae American Jewish Committee

TABLES OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Nature of the Case:	This case concerns the extent to which high school cheerleaders have free speech rights with respect to run-through banners at football games. Respondent cheerleaders filed suit against Petitioner claiming personal free speech rights to hold a run-through banner on the football field during pre-game ceremonies. Petitioner argues primarily that the case has become moot and secondarily that the cheerleaders do not have a cognizable free speech right with respect to the run-through banners.
Name of Judge Signing Trial Court Order:	Honorable Steven Thomas, Presiding.
Trial Court:	356th Judicial District Court, Hardin County, Texas
Disposition by the Trial Court:	Kountze ISD filed a plea to the jurisdiction (CR 90-128), as well as a motion for summary judgment (CR 261). The plaintiffs filed a motion for partial summary judgment. (CR 135). The trial court denied the plea to the jurisdiction and granted, in part, both summary judgment motions. (CR 1034-1035). The plaintiffs agreed, in form and substance, to the trial court's order dismissing all relief sought by the plaintiffs, except insofar as it was granted in the summary judgment order. (CR 1036).[1]

[1] Clerk's Record, cited by page number stamped onto each page (e.g., CR 131). Supplemental

Parties in Court of Appeals:	**Plaintiffs/Appellees** – (1) Coti Matthews, on behalf of her minor child, [redacted]; (2) Rachel Dean, on behalf of her minor child, [redacted] (3) Charles and Christy Lawrence, on behalf of their minor child, [redacted]; (4) Tonya Moffett, on behalf of her minor child, [redacted]; (5) Beth Richardson, on behalf of her minor child, [redacted]n; (6) Shyloa Seaman, on behalf of her minor child, [redacted]; and (7) Misty Short, on behalf of her minor child, [redacted]. **Defendant/Appellant** – Kountze Independent School District
Court of Appeals:	Ninth District, sitting in Beaumont
Name of Justices and Opinion Author:	McKeithen, C.J., Kreger and Horton, JJ.; Justice Kreger authored the opinion.
Citation:	*Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120 (Tex. App.–Beaumont 2014), *rev'd and remanded*, 484 S.W.3d 416 (Tex. 2016)
Appellate Disposition:	The trial court's denial of Kountze ISD's plea to the jurisdiction was reversed because the claims in question were moot.
Supreme Court:	Supreme Court of Texas

Clerk's Record, cited by number of supplement and by page number stamped onto each page (e.g., 2d SCR 233).

Name of Justices and Opinion Author:	Justice Devine authored the opinion of the Court, with a concurring opinion by Justice Willett and a concurring opinion by Justice Guzman. Justice Boyd did not participate in the decision.
Citation:	*Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016)
Supreme Court Disposition:	The court of appeals' decision that Plaintiffs' claims were moot was reversed and the case was remanded.
Court of Appeals:	Ninth District, sitting in Beaumont
Name of Justices and Opinion Author:	McKeithen, C.J., Kreger and Horton, JJ.; Justice Kreger authored the opinion.
Citation:	*Kountze Indep. Sch. Dist. v.* Coti Matthews, on behalf of her minor child, Macy Matthews, No. 09-13-00251-CV, 2017 WL 4319908 (Tex. App. – Beaumont 2017).
Appellate Disposition:	The trial court's denial of Kountze ISD's plea to the jurisdiction was affirmed. Kountze ISD's Motion to Dismiss based on lack of jurisdiction was denied.

STATEMENT OF JURISDICTION

This Court has jurisdiction based on Texas Government Code Section 22.001 because the appeal presents questions of law of importance to Texas jurisprudence. § 22.001(a), TEX. GOV'T CODE. Additionally, this Court may assert its jurisdiction over this appeal because the questions are presented to the Court through a petition for review, and this appeal was first brought to one of the courts of appeal (Beaumont). *See* § 22.001(b) and (c), TEX. GOV'T CODE.

This case presents important questions of Texas law regarding mootness, standing, and advisory opinions, as well as important questions regarding federal free speech rights. This Court has already addressed this case once before. *See Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016). While before this Court previously, the appeal included the submission of *amicus curiae* briefs from the State of Texas; Texas' United States Senators, Senators Cornyn and Cruz; the American Jewish Committee; the American Civil Liberties Union; the American Civil Liberties Union of Texas; the Anti-Defamation League; the Interfaith Alliance Foundation; the Hindu American Foundation; the Americans United for Separation of Church and State; the Sikh Coalition; and the Baptist Joint Committee for Religious Liberty.

The first issue of importance to Texas law is that the case became moot on March 24, 2017, and, as a result, the Beaumont Court of Appeals' September 28,

2017 decision is an advisory opinion on an issue of first impression for Texas state courts concerning federal constitutional law. As Texas courts are not permitted to issue advisory opinions, the Beaumont Court of Appeals' decision and judgment should be vacated and the appeal dismissed.

Moreover, this advisory opinion contains an error of law that impacts *all* Texas public school districts. Specifically, the court of appeals held that public school cheerleaders, during their official cheerleader duties, while wearing their cheerleader uniforms, while on the public school football field to which access is restricted to them and other specific persons, exercise a personal free speech right when they cheer for the school football team by holding a run-through banner on the field immediately before the start of a football game. This is incorrect as a matter of law and directly conflicts with binding Fifth Circuit precedent and the only case on point anywhere in the country, *Doe v. Silsbee Independent School District*, 402 Fed. Appx. 852, 855 (5th Cir. 2010), which held that, while cheering, cheerleaders engage in government speech. The court of appeals' decision creates an untenable situation for Texas school districts because it places them in the position of having to choose between two conflicting interpretations of the First Amendment in connection with conduct by cheerleaders.

Additionally, the Beaumont Court of Appeals' decision conflicts with U.S. Supreme Court decisions in *Walker v. Tex. Div., Sons of Confederate Veterans*,

Inc., 135 S. Ct. 2239 (2015) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

It is important that this Court correct these numerous errors of law.

ISSUES PRESENTED

1. All of the cheerleaders in this case have either graduated, left the school district, or are no longer on the cheerleading squad. The Court must determine whether, in these circumstances, this case has been rendered moot, the Respondents lack standing to sue, and all previous orders in this case should be withdrawn.

2. The run-through banners at issue in this case were held by public school cheerleaders while they were cheering for the school's football team, while they were in uniform at a school-sponsored event, and while they were on the school's football field to which access was limited by the school. In this circumstance, is the message contained on the run-through banners the private speech of the individual cheerleaders or is it the school's speech?

STATEMENT OF FACTS

A. Statement of Facts Concerning the Motion to Dismiss.

The court of appeals' denial of the Motion to Dismiss for Mootness and Lack of Standing did not state the nature of the case.

1. Plaintiffs' live petition asserted claims on behalf of seven students: Matthews, Dean, Lawrence, Moffett, Richardson, Gallaspy, and Short.[2] *See Supra* at xi-xii.

2. Matthews, Dean, Moffett, and Richardson all graduated from Kountze ISD by 2015. Appendix 67 [¶5].

3. Short and Lawrence transferred out of Kountze ISD in 2013. Appendix 67 [¶5]. Had they remained in Kountze ISD, Short and Lawrence were expected to graduate in 2016 and 2015, respectively. Appendix 67 [¶5].

4. Since Matthews, Dean, Moffett, Richardson, Short and Lawrence all either graduated from Kountze ISD or transferred out of Kountze ISD, none of them can ever again be members of Kountze ISD's cheerleading squad. Appendix 68 [¶13].

5. The remaining Plaintiff, Gallaspy, is a senior at Kountze ISD. Appendix 68 [¶¶9, 12]. Gallaspy is expected to graduate in May of 2018. Appendix 68 [¶12].

6. In March of 2017, Gallaspy failed to make the 2017-2018 cheerleading squad. Appendix 67 [¶6]. Since the 2017-2018 school year is Gallaspy's final

[2] Plaintiffs' Sixth Amended Petition was not timely or properly filed, but it included the same Plaintiffs as the Fifth Amended Petition. (CR 778-802, 1001-1025).

year of eligibility for the cheerleader squad, Gallaspy's failure to make the team in March of 2017 means that she will never again be a member of Kountze ISD's cheerleading squad. Appendix 68 [¶¶9-13].

7. The court of appeals' September 28, 2017 decision was issued more than six months after Gallaspy failed to make the squad.

8. On October 2, 2017, undersigned counsel became aware that Gallaspy failed to make the squad in March of 2017 and that she was not a cheerleader for Kountze ISD. Appendix 68 [¶13]; 71 [¶5]; 74 [¶¶4-5].

B. Statement of Facts Concerning the Merits.

The court of appeals did not include a separate rendition of the facts in its September 28, 2017 decision, but cited facts in its analysis. For the sake of clarity, Kountze ISD provides the following facts.

1. The cheerleader squads are school-sponsored, organized extracurricular activities of Kountze High School. (2d SCR 1940 [Res. 3, pp. 3, 9]).[3]

2. Cheerleaders take part in official, school-supervised activities including tryouts, practices, and football game performances. (2d SCR 135-136 [42:20 – 43:10]). The cheerleaders and their activities are organized by school officials.[4]

[3] (2d SCR 764 [17:7-10]; 2d SCR 1422 [17:8-9]; 2d SCR 1432 [27:2-4]; 2d SCR 973 [12:8-10]; 2d SCR 985 [57:14-16]; 2d SCR 1005 [12:21-23]; 2d SCR 952 [15:13-17]; 2d SCR 964 [65:12-14]; 2d SCR 740 [11:17-24]; 2d SCR 743 [25:16-18]; 2d SCR 929 [10:10-15]; 2d SCR 937 [42:15-17]; 2d SCR 793 [38:10-11]).

[4] (2d SCR 790-791 [27:7-12, 29:15-19]); (2d SCR 1466-1467 [61:24 – 62:5]; 2d SCR 765, 768 [21:20-22, 31:4-11, 15-17]; 2d SCR 954 [25:1-7]; 2d SCR 791 [30:17-23]; 2d SCR 935, 936

(2d SCR 1547 [141:25 – 142:2]; 2d SCR 989 [76:16-18]). School officials must attend these events to supervise the cheerleaders. (*See* 2d SCR 1946 [Res. 3, p. 9]).[5] Cheerleaders are required to fulfill certain duties, including attending all performances,[6] performing in their full uniforms,[7] and cheering at all football games. (2d SCR 792, 799 [35:12-18, 64:13-16]).[8]

3. The cheerleaders' uniforms identify the cheerleaders with the school district, bearing the school colors and emblazoned with "Kountze" or "KHS" on the high school uniforms. (2d SCR 903, 904 [32:18-21, 36:12-14]).

4. Cheerleaders can be disciplined for failure to abide by the cheerleader squad rules. (*See, e.g.*, 2d SCR 132 [39:6-15]).[9]

5. The first duty of the cheerleaders, pursuant to the squad's rules, is to create

---

[34:21 – 35:14; 36:9-11; 38:3-4]; 2d SCR 914 [17:15-16]; 2d SCR 768 [32:17 – 33:1]; 2d SCR 790-791 [28:12-21, 29:20 – 30:6]); (2d SCR 793 [39:1-4, 9-11]); (2d SCR 1504 [99:9-14] (sponsor stands on the sidelines while the run-through banners are displayed to supervise the cheerleaders)).

[5] (2d SCR 1417-1418 [12:25 – 13:7]; 2d SCR 180 [24:15-22] (No. 1 rule is no performance or practice without sponsor so cheerleaders are not supposed to do the banners on their own)).

[6] (2d SCR 135-136 [42:20 – 43:10]; 2d SCR 148 [55:16-22]; 2d SCR 1690 [13:1-2]; 2d SCR 1717 [12:14-16]; 2d SCR 1390 [30:10-15]).

[7] (2d SCR 1587 [182:14-17]; 2d SCR 131 [38:22-24]).

[8] (2d SCR 751-752 [57:21 – 58:1]; 2d SCR 916 [24:20 – 25:15, 39:18 – 40:1]; 2d SCR 905 [39:23-25]).

[9] Before tryouts, students must acknowledge that they received and agree to abide by the Cheerleader Constitution and the Cheerleader Squad Rules and Regulations. (2d SCR 243 [87:3-13]; 2d SCR 129-130 [36:10-20, 37:7-10, 37:13-25]; 2d SCR 808-816; 2d SCR 817-818; 2d SCR 177 [21:19-22]; 2d SCR 791-792 [32:11 – 33:7]; 2d SCR 770, 777 [40:3-7, 67:22-24]). Cheerleaders "agreed to abide by" the Cheerleader Constitution and Ms. Richardson "meant to reserve the right to enforce it." (2d SCR 243 [87:12-13, 19-21]; 2d SCR 1457 [52:12-14]). Ms. Richardson reserved the right to enforce any one of the rules, including the "the two pouts, you're out rule," and probably did reprimand cheerleaders for pouting. (2d SCR 244-245 [88:18-89:3]).

run-through banners. (2d SCR 818). The run-through banners are prepared at regular cheerleader practices at the high school. (2d SCR 171-172 [15:14-22, 16:9-24]; 2d SCR 253 [97:5-14]).

6. The sponsors are present when the banners are made and review and approve the content of the finished banners. (2d SCR 214, 253 [58:13-17, 97:3-4]).[10] The sponsors would not permit "inappropriate banners," which could include, for example, banners that demonstrated poor sportsmanship or included racial slurs. (2d SCR 254-255 [98:19 – 99:17]).[11]

7. Such banners have been displayed at the high school football games for decades and generally serve the purpose of encouraging athletic excellence, good sportsmanship, and school spirit. (2d SCR 1940 [Res. 3]).

8. At the time the run-through banners are displayed, and during the cheerleaders' other cheering duties, only the cheerleaders, players, trainers, and coaches are allowed on the field. (2d SCR 1808 [¶6]).

9. When the cheerleaders first thought of using Scripture verses on the banners, they immediately sought approval from the sponsors, Ms. Richardson and Ms. Moffett, because, as one cheerleader put it, "They're my boss." (2d SCR 2032-2033, 2036-2037, 2046 [2:24 – 3:1, 6:14 – 7:21, 16:16]). One of the plaintiff-

[10] (2d SCR 1583 [178:6-13]; 2d SCR 998 [110:11-18] (asked to approve each banner)).
[11] (CR 986-987 [21:19 – 22:16]). Even inoffensive messages might be inappropriate to place on the banners. (2d SCR 259, 261 [103:18-20, 105:6-8]).

cheerleaders explained that Ms. Richardson could have chosen not to allow the banners. (2d SCR 1016 [56:15-19]). The sponsors' initial reaction was to check to make sure it was okay so nobody would get in trouble. (2d SCR 2073 [5:11-18]; 2d SCR 2011 [5:5-7]). Consequently, Ms. Richardson called her boss and asked him about the idea. (2d SCR 2071 [3:20-25]; 2d SCR 2011 [5:10-18]). Some of the cheerleaders asked the football coach and some of the football players about the idea. (2d SCR 2074 [5:4-7]).

SUMMARY OF THE ARGUMENT

This case became moot six months before the court of appeals issued its decision. This Court should vacate the advisory opinion entered by the court of appeals after the case became moot. Alternatively, this Court should reverse the court of appeals' decision because it directly conflicts with Fifth Circuit precedent concerning cheerleaders' speech and U.S. Supreme Court precedent concerning government speech. If the Court were to deny the Petition for Review, Texas school districts will not know how to treat cheerleader speech, as it is considered government speech in Texas federal courts and individual speech in Texas state courts.

ARGUMENT

C. This Court should grant the petition for review because the case is moot and the court of appeals issued an advisory opinion.

1. Texas courts may not issue advisory opinions.

"Under article II, section 1 of the Texas Constitution, courts have no jurisdiction to issue advisory opinions." *Valley Baptist Medical Center v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam) (citing *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993)). If a court of appeals issues a decision after a case becomes moot, it is an advisory opinion. *Id*. This Court should vacate and dismiss advisory opinions of courts of appeals. *See id*.

2. Standing must exist throughout the litigation or the case becomes moot.

"Standing must exist at every stage of a legal proceeding, including appeal."[12] A court does not have "jurisdiction over a claim made by a plaintiff who lacks standing to assert it."[13] Therefore, if a plaintiff does not have standing to assert a claim, the court lacks jurisdiction over the claim and must dismiss that claim.[14] Similarly, when a plaintiff lacks standing to assert *all* claims in a lawsuit, the court *must* dismiss the entire action for want of jurisdiction.[15]

---

[12] *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008)).
[13] *Id*. (citing *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011)).
[14] *Id.* (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 392 (Tex. 2000)).
[15] *Id.* at 150-51 (citing *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex.

If at any stage of the legal proceeding, including the appeal, the controversy between the parties ceases to exists, a case becomes moot.[16] "If a controversy ceases to exist—'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome'—the case becomes moot."[17] Furthermore, a case is moot "if a judgment, when rendered, will not have practical legal affect upon the parties."[18] When a case becomes moot, the plaintiff loses standing to maintain the claims, and the case must be dismissed.[19]

As this Court has explained,

> a court cannot … decide a case that has become moot during the pendency of the litigation. A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer "live," or if the parties lack a legally cognizable interest in the outcome. Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests. If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.

Heckman, 369 S.W.3d at 162.

2010)).

[16] *In re Kellogg Brown & Root, Inc.*, 166 S.W. 3d 732, 737 (Tex. 2005) (citing *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005); *Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002).

[17] *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)); *Wende*, 92 S.W.3d at 427.

[18] *Wilson v. W. Orange-Cove Consol. Indep. Sch. Dist.*, No. 09-08-00068-CV, 2008 WL 5622697, at *2 (Tex. App.—Beaumont 2009, pet. denied) (citing *Houston Indep. Sch. Dist. v. Houston Teachers Ass'n*, 617 S.W.2d 765, 766-67 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ)).

[19] *Lara*, 52 S.W.3d at 184; *see also Heckman*, 369 S.W.3d at 150-51.

3. This case became moot on March 24, 2017.

Applying these principles to controversies between students and schools, this Court has affirmed that graduation, or similar ineligibility, renders a case moot. In *Texas A&M University- Kingsville v. Yarbrough*, 347 S.W.3d 289 (Tex. 2011), this Court cited *Governor Wentworth Reg. Sch. Dist. v. Hendrickson*, 201 F. App'x 7, *9 (1st Cir. 2006), which held that where a student plaintiff sought a "declaration regarding constitutionality of student suspension," the case became "moot after [the] student [had]graduated." *Id*. at 291.

Texas appellate courts have likewise dismissed student claims as moot where the student-plaintiffs were no longer eligible to assert the original claim. *See, e.g.*, *University Interscholastic League v. Buchanan*, 848 S.W.2d 298, 303 (Tex. App.—Austin 1993, no writ); *University Interscholastic League v. Jones*, 715 S.W.2d 759, 761 (Tex. App.—Dallas 1986, no pet.)

The instant case is similar to *UIL v. Jones*, in which the court explained the absurdity of continued litigation after a plaintiff could no longer exercise the right at issue:

> For us to affirm the judgment would require us to order that Greg Jones be allowed to play football for Highland Park in 1985. Greg Jones has already done so. Likewise, for us to order a reversal would require us to order that Jones be prohibited from playing football for Highland Park in 1985. The absurdity of such an order is apparent.

Id.; *see also, e.g., Schwarz v. Pully*, No. 05–14–00615–CV, 2015 WL 4607423 at *5 (Tex. App.—Dallas 2015, no pet.).

Like the plaintiff in *UIL v. Jones*, Respondents are no longer eligible to serve as cheerleaders for Kountze ISD. Matthews and Dean graduated from Kountze ISD in 2015. Appendix 67 [¶5]. Moffett and Richardson graduated from Kountze ISD in 2014. Appendix 67 [¶5]. Short and Lawrence transferred out of Kountze ISD in 2013, and they were expected to graduate in 2016 and 2015, respectively. Appendix 67 [¶5]. These Plaintiffs' claims became moot at the time they graduated or transferred. Appendix 67-68 [¶¶5-6, 9-13]. On March 24, 2017, Gallaspy did not make the cheerleading squad for her final year in Kountze ISD. Appendix 67-68 [¶¶6-8]. Therefore, Gallaspy's claim became moot on March 24, 2017 because she could no longer engage in cheerleading for Kountze ISD. Appendix 67-68 [¶¶6, 9-13]. Thus, on March 24, 2017, six months before the appellate court's September 28, 2017 opinion, the case became moot, Respondents lacked standing to assert their claims, and the appellate court lacked jurisdiction over the case.

4. The Court should grant the petition for review and vacate the court of appeals' decision and judgment.

As courts may not decide moot cases or render advisory opinions, Texas courts have long held that "[w]hen a cause becomes moot on appeal, all previous orders and judgment should be set aside and the cause, not merely the appeal,

dismissed."[20] Merely dismissing an appeal would "leave undisturbed the judgment of the lower court and thereby, in effect, affirm [the] same without according to the appealing parties a hearing upon the merits of their appeal."[21] As a result, "if a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction."[22]

As this case has become moot and Respondents lack standing, the courts lack jurisdiction over this matter, and this Court should grant the petition for review and dismiss the litigation for want of jurisdiction, vacating all prior orders and judgments.

D. This Court should grant the petition for review because the court of appeals' decision conflicts with Fifth Circuit precedent on federal constitutional law and places Texas school districts in an untenable position.

Assuming, *arguendo*, that the Court does not dismiss this case as moot, the Court should grant the petition for review and reverse the court of appeals' decision.

---

[20] *Multi-County Coal. v. Texas Comm'n on Envtl. Quality*, No. 11-12-00108-CV, 2013 WL 5777023, at *1 (Tex. App.—Eastland 2013); *see also, e.g.*, *Carrillo v. State*, 480 S.W.2d 612, 619 (Tex. 1972) ("This has been the course of action followed by this Court in a moot case for at least 94 years.").

[21] *Int'l Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory Workers*, 130 S.W.2d 282, 283 (Tex. 1939).

[22] *Heckman*, 369 S.W.3d at 162 (citing *Speer*, 847 S.W.2d at 229–30).

1. This Court should remedy the conflict between the court of appeals' decision and the Fifth Circuit on an issue of first impression for Texas courts regarding constitutional law.

In *Doe v. Silsbee*, a case which directly addressed the question of whether a cheerleader engaged in private speech or school speech when cheering at a high school game, the Fifth Circuit wrote:

> [i]n her capacity as a cheerleader, H.S. served as mouthpiece through which SISD could disseminate speech—namely support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, SISD had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit.

402 Fed. Appx. at 855. *Doe v. Silsbee* is the only on-point decision in federal or state case law (other than court of appeals' decision below) classifying cheerleader speech, and the Fifth Circuit decided that it was government speech.

This Court should grant the petition for review, reverse the court of appeals' decision, and issue a decision consistent with *Doe v. Silsbee*.

2. The court of appeals' decision places Texas school districts in an untenable position.

The court of appeals' decision not to follow *Doe v. Silsbee* on an issue of first impression for Texas state courts places Texas school districts in an untenable position in which the First Amendment has been interpreted in diametrically opposed ways in nearly identical circumstances. The First Amendment currently means one thing in Texas federal courts, but the opposite thing if the suit is filed in

state court. In federal court, a cheerleader who cheers at a game engages in government speech, but in state court, she engages in private speech.

A school district faced with questions concerning conduct by cheerleaders does not have the luxury of waiting until a suit has been filed in order to determine which course of action it should take. This Court should grant the petition for review, reverse the court of appeals' decision, and relieve school districts from having to attempt to comply with conflicting constitutional law decisions.

E. This Court should grant the petition for review because the court of appeals' decision conflicts with U.S. Supreme Court precedent.

Assuming, *arguendo*, that this case is not dismissed as moot, the Court should grant the petition for review and reverse the court of appeals' decision because it conflicts with U.S. Supreme Court precedents.

1. The court of appeals' decision incorrectly concluded that cheerleaders' banners are not government speech.

(a) The court of appeals misapplied the U.S. Supreme Court's *Walker* decision.

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), the Supreme Court established factors to determine whether speech is government speech: whether the government has historically used the medium of speech to speak; whether the medium and message are identified in the public mind with the government; and whether the government retained direct control over the message. *Id*. at 2248-2249. The factors favor holding the run-through

banners to be government speech. For decades, Kountze ISD has had its cheerleaders hold run-through banners as part of their cheers; a reasonable observer would understand the message to be government speech, as the cheerleaders are in school uniform, on a school field, taking part in a school activity, and are engaging in official support for a school team; and Kountze ISD personnel approved every run-through banner created. *Supra* at Statement of Facts §B. The court of appeals' decision misapplies the factors to conclude that the run-through banners are not government speech.

This Court should grant the petition for review and hold that the banners are government speech.

(b) The court of appeals' decision leads to absurd results.

The Court should grant the petition for review and reverse the court of appeals' decision because it leads to absurd results, allowing banners having no rational connection to the context of a football game and which Kountze ISD would be powerless to stop. For example, cheerleaders would have the right to display:

- a Confederate Flag unless Kountze ISD could show a history of racial disruptions, or "that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption." *A M v. Cash*, 585 F.3d 214, 224 (5th Cir. 2009) (citations omitted);

- images of drug and alcohol abuse as part of a public accusation that any public person (such as a coach) is a drug addict. *See Guiles v. Marineau*, 461 F.3d 320, 330-31 (2d Cir. 2006);
- gang-related symbols unless the School could present "evidence of a potentially disruptive gang presence." *Brown v. Cabell County Bd. of Educ.*, 714 F. Supp.2d 587, 593 (S.D. W.Va. 2010);
- messages critical of their uniforms. *Lowry v. Watson Chapel School District*, 540 F.3d 752, 758-59 (8th Cir. 2008);
- the message "I ♥ boobies!" or other speech that is "ambiguously lewd" to the reasonable observer if such speech can "plausibly be interpreted as commenting on a political or social issue." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 308 (3d Cir. 2013) (en banc); and
- a message containing the "n-word". *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 676 (2d Cir. 1995) (concurring opinion).

2. The court of appeals misapplied the U.S. Supreme Court's *Santa Fe* decision.

In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the U.S. Supreme Court held, under *very* similar factual circumstances, that student-led prayers offered before the start of high school football games were school speech:

> Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled,

> school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."
>
> In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.

Id. at 307-308. A court could write these words, almost without modification, about the present controversy.

The court of appeals misapplied *Santa Fe,* creating a conflict with *Santa Fe*. *Santa Fe* would consider the run-through banners school speech, but under the court of appeals' decision, the banners are considered a cheerleader's individual speech. This creates confusion for all Texas school districts.

This Court should reverse the court of appeals' decision and issue a decision correctly applying *Santa Fe*.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Petitioner Kountze Independent School District respectfully prays that this Honorable Court grant this Petition for Review, reverse the court of appeals' decision denying its Motion to Dismiss and vacate the court of appeals' advisory opinion and all prior orders and judgments due to mootness and lack of standing and jurisdiction. In the alternative, Petitioner Kountze Independent School District respectfully prays that this Honorable Court grant this Petition for Review, reverse the court of appeals' September 28, 2017 decision, and dismiss Respondents' claim on the merits.

Respectfully submitted,

FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.

By: /s/ Thomas P. Brandt

THOMAS P. BRANDT
Texas Bar No. 02883500
tbrandt@fhmbk.com
FRANCISCO J. VALENZUELA
Texas Bar No. 24056464
fvalenzuela@fhmbk.com
Texas Bar No. 24058695
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206
(214) 369-1300 (office)
(214) 987-9649 (fax)

ATTORNEYS FOR APPELLANT KOUNTZE INDEPENDENT SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Texas Rule of Appellate Procedure 9.4(i)(2)(D) because it contains 3,857 words, excluding any parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Thomas P. Brandt
THOMAS P. BRANDT

CERTIFICATE OF SERVICE

I, Thomas P. Brandt, hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by facsimile, messenger, regular U.S. Mail, certified mail, return receipt requested and/or electronic service in accordance with the Texas Rules of Appellate Procedure on this the 15th day of January, 2018.

James C. Ho (lead counsel) — *Via U.S. Mail*
Bradley G. Hubbard — *Via Facsimile: 214-571-2917*
GIBSON, DUNN & CRUTCHER, LLP
2100 McKinney Avenue, Suite 1100

Dallas, TX 75201-6912

David W. Starnes
390 Park, Suite 700
Beaumont, Texas 77701

Via Facsimile: 409-835-9905
Via U.S. Mail

Kelly J. Shackelford
Hiram S. Sasser, III
LIBERTY INSTITUTE
2001 W. Plano Pkwy, Suite 1600
Plano, Texas 75075

Via Facsimile: 972-941-4457
Via U.S. Mail

Counsel for Respondents

Ken Paxton
Attorney General of Texas
Michael Neill
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548

Via Facsimile: 512-474-2697
Via U.S. Mail

Counsel for Intervenor the State of Texas

Charlotte Cover
Gibbs & Associates Law Firm
5700 Gateway Boulevard, Ste 400
Mason, OH 45040

Via Facsimile: 513-234-5545
Via U.S. Mail

Counsel for Intervenors
Randall Jennings, Missy Jennings,
A.J., and W.J.

Rebecca Robertson
ACLU of Texas
1500 McGowen Street, Ste 250
Houston, TX 77004

Via Facsimile: 713-942-8966
Via U.S. Mail

Counsel for Amici Curiae ACLU,
ACLU of Texas, et. al.

Sean D. Jordan
Jackson Walker, L.L.P.
100 Congress Avenue, Ste 1100
Austin, TX 78701

Counsel for Amici Curiae U.S. Senators Cruz and Cornyn

Via Facsimile: 512-391-2101
Via U.S. Mail

Robert M. Cohan
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202

Counsel for Amici Curiae American Jewish Committee

Via Facsimile: 214-661-6612
Via U.S. Mail

/s/ Thomas P. Brandt
THOMAS P. BRANDT

27310/564455

APPENDIX

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 7th **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

[illegible]

Court of Appeals

Ninth District of Texas at Beaumont

[illegible]

[illegible]. [illegible]

[illegible]

[illegible]

MEMORANDUM [illegible]

This appeal is before us on remand from the Texas Supreme Court. *See Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120 (Tex. App.[illegible]Beaumont 2014), *rev'd and remanded*, 484 S.W.3d 41[illegible] (Tex. 201[illegible]). This is an interlocutory appeal from the trial court[illegible]s denial of Kountze Independent School District[illegible]s ([illegible]Kountze ISD[illegible]) plea to the [illegible]urisdiction.

The facts of this case were set forth extensively in this Court's previous opinion. *See Kountze Indep. Sch. Dist.*, 482 S.W.3d at 124–2. Therefore, we recite only those facts relevant to the resolution of the issues presently before us. The Appellees, consisting of parents of certain cheerleaders from Kountze High School, on behalf of the cheerleader students ("Cheerleaders"), brought suit against Kountze ISD and its former superintendent, Kevin Weldon, after Weldon issued a decree that prohibited the Cheerleaders from including religious messages on run-through banners used at the beginning of high school football games.[1] 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 the Cheerleaders' motion for partial summary judgment, the trial court issued a partial summary judgment order on May 8, 2013. In the order, the trial court granted, in part, Cheerleaders' motion for partial summary judgment,

[1] For example, during the 2012 homecoming pregame ceremony, the Cheerleaders displayed a banner proclaiming, "I can do all things through CHRIST which strengthens me." The "T" in "CHRIST" was painted to resemble a wooden cross, and the biblical citation, "Phil. 4:13," was noted beneath the scriptural quote. Another week, the official run-through banner declared, "But thanks be to God, which gives us victory through our Lord Jesus Christ," and featured a citation to the Bible verse, "I Cor. 15:57." In early October 2012, one run-through banner urged, "Let us RUN with Endurance the race GOD has set Before US." The banner, which also cited the source for the quotation, "Hebrews 12:1," was painted in the school colors of red, white, and black. "A lion which is strongest among beast . . . turneth not away for any. Proverbs 30:30."

thereby implicitly denying Kountze ISD's plea to the jurisdiction. *See Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006) (noting that by ruling on the merits of the plaintiff's claims, the trial court assumed jurisdiction and necessarily implicitly denied the defendant's jurisdictional challenge, providing the appellate court jurisdiction for interlocutory appeal.).

Jurisdiction

Kountze ISD appealed the trial court's denial of its plea to the jurisdiction. Generally, an appeal may only be taken from a final judgment. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). When there has been no conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or clearly and unequivocally states that it finally disposes of all claims and parties. *Id*. at 205. 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. 2016). Kountze ISD is a governmental unit under section 101.001. *See id*. § 101.001(3)(B) (West Supp.

201□). Therefore, we have □urisdiction to consider the interlocutory appeal of the trial court□s implicit denial of the plea to the □urisdiction. *See id.* □51.014(a)(8).[2]

□□□□d □rd □f □□□□□

A plea to the □urisdiction is a dilatory plea that challenges a trial court□s authority to decide a case on the merits. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). To have authority to resolve a case, a court must have sub□ect matter □urisdiction. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Sovereign and governmental immunity from suit deprive a trial court of sub□ect matter □urisdiction. *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 200□). In a suit against a governmental entity, the plaintiff must prove a valid waiver of immunity from suit and must plead sufficient facts to affirmatively demonstrate the court□s □urisdiction in order to invoke the court□s sub□ect matter □urisdiction over the claim. *Tex. Dep't of Parks & Wildlife v.*

[2] We have no □urisdiction to consider the partial summary □udgment as such is not a final order. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Kountze ISD contends in its brief that "[t]he order denied all relief sought by the parties except for the relief specifically granted by the order and the relief of attorneys□ fees. By signing the order, *the □Cheerleaders□ agreed to dismissal of all their claims*, except those included in the trial court□s summary □udgment order.□ However, the partial summary □udgment does not dismiss all other claims or otherwise dispose of every pending claim and party or clearly and unequivocally state that it finally disposes of all claims and parties. *See id.* at 205. Instead, the order simply denies summary □udgment for all claims before it and not expressly granted in the order.

Miranda, 133 S.W.3d 217, 22 (Tex. 2004) *Tex. Ass'n of Bus.*, 852 S.W.2d at 44 . Whether the trial court has subject matter jurisdiction is a question of law that we review under a *de novo* standard, construing the pleadings liberally in plaintiff s favor and accept the pleadings factual allegations as true. *Miranda,* 133 S.W.3d at 22 *Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 855 (Tex. 2002). The reviewing court does not examine the merits of the cause of action when considering a trial court s ruling on a plea to the jurisdiction, but considers only the plaintiff s pleadings and any evidence relevant to the jurisdictional inquiry. *Cty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

In order to overcome the school district s entitlement to governmental immunity, the Cheerleaders are required to allege facts that affirmatively demonstrate the trial court s jurisdiction. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 44 .

A

It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 50 (19 9). This often quoted sentence from one of the most important Supreme Court cases in history protecting the constitutional rights of students conveys that schools are not

institutions immune from constitutional scrutiny: students retain their constitutional freedoms even when they cross the threshold into the school. At the same time, the Court has also held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The rights of students "must be 'applied in light of the special characteristics of the school environment.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506).

The central disagreement between the Cheerleaders and Kountze ISD has revolved around the question of whether the Cheerleaders' run-through banners are, for purposes of free speech law, "government speech" as maintained by the school district, or "private speech" as claimed by the Cheerleaders. Kountze ISD contends there is no waiver of governmental immunity as to the Cheerleaders' free speech claims because they have not established that the banners are private speech, and thus, the trial court erred by denying the plea to the jurisdiction. We will address the issue concerning whether the speech is government speech or private speech, as the resolution of that issue controls the question of governmental immunity in this matter.

Government speech is not subject to scrutiny under the Free Speech Clause. *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009). That is, the government may restrict its own speech, which includes speech expressed by others under government control, without implicating the Free Speech Clause. *Id*. at 467–68. The "government speech doctrine" is "justified at its core by the idea that, in order to function, government must have the ability to express certain points of view, including control over that expression. *See*, *e.g.*, *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) ("It is the very business of government to favor and disfavor points of view . . . ."). The doctrine gives the government an absolute defense to an individual's free-speech claim. Thus, if the Cheerleaders' speech as painted on the run-through banners is pure government speech, the Cheerleaders could not prove a valid waiver of immunity from suit in order to invoke the court's subject matter jurisdiction over their claim. *See Miranda*, 133 S.W.3d at 226. Private speech, on the other hand, is generally subject to constitutional protections of free speech, save and except for certain enumerated types of forbidden speech not applicable here, and governmental immunity has been waived for such claims.

A

The Cheerleaders clearly alleged in their petition that, among other things, the "Defendants deprived and continue to deprive "them" of their rights to free speech." They also sought "a declaration from the Court . . . that the conduct and actions of Defendants as described violate state law, to include the Texas Constitution." The Texas Constitution provides: "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." Tex. Const. art. I, § 8. The U.S. Supreme Court has held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker*, 393 U.S. at 50. The Cheerleaders offer no arguments based on the text, history, or purpose of section 8 that it provides them any greater protection in this context than that provided by the First Amendment of the U.S. Constitution. As such, we may rely upon persuasive authorities applying free speech protections under both the federal and Texas constitutions. *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.") *Tex. Dep't of Transp. v. Barber*, 111 S.W.3d 8, 10 (Tex. 2003); *Davenport v. Garcia*, 834 S.W.2d 4, 40 (Tex. 1992) (Hecht, J., concurring) ("When state and federal provisions overlap or correspond, state law, as well as federal law and the law of other states, may be helpful in analyzing their proper application.").

The Fifth Circuit's Guidance

The Fifth Circuit has explained that

> "when educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion.

Morgan v. Swanson, 659 F.3d 359, 371 (5th Cir. 2011). This body of law has been described by other courts as "complicated." *See, e.g.*, *id.* at 382. We thus evaluate student speech claims "in light of the special characteristics of the school environment," beginning by categorizing the student speech at issue. *Morse v. Frederick*, 551 U.S. 393, 394 (2007) (quoting *Tinker*, 393 U.S. at 506). For

resolution of this interlocutory appeal, we need only look to the Supreme Court's general school-speech precedents.[3]

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 3, 42 (S.D. Tex. 2010). Kountze ISD argues that the banners are "government speech," that is, speech of individuals acting in their official capacity as representatives of the school, and thus, constitutional free speech protections are not implicated and none of the cheerleaders individually, nor the group as a whole, has a constitutional right to control the content of the banners.

A. Standard of Review

In determining whether speech is the government's, the "key inquiry is the degree of governmental control over the message." Speech constitutes government speech when it is "effectively controlled" by the government. *Pelts & Skins, LLC v. Landreneau*, 448 F.3d 743, 743 (5th Cir. 2006) (quoting *Johanns v. Livestock Mktg., Assoc.*, 544 U.S. 550, 560-61 (2005)). The quintessential example of pure

[3] Neither party has raised any issue concerning the Establishment Clause, and viewpoint discrimination precedents are not dispositive of this appeal and become relevant only if we determine that the trial court may exercise subject matter jurisdiction of these claims. Therefore, we limit our discussion to categorizing the student speech at issue.

government speech in the school setting is a principal speaking at a school assembly. *Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002).

Kountze ISD relies primarily upon the Supreme Court cases of *Pleasant Grove City v. Summum*, 555 U.S. 4□0 (2009) and *Garcetti v. Ceballos*, 547 U.S. 410 (200□) to support its contention that the run-through banners displayed at varsity football games are government speech.[4] In *Summum*, the Supreme Court held that Pleasant Grove City, Utah (□the City□) had not violated the First Amendment free speech rights of Summum, a religious organization, when the City refused to erect a permanent monument that Summum had tried to donate and place in a public park. *Summum*, 555 U.S. at 481. The Court held there was no First Amendment violation because □the City□s decision to accept certain privately donated monuments while re□ecting □Summum□s□ is best viewed as a form of government speech.□ *Id*. The Supreme Court noted that the City □effectively controlled□ the messages sent by the monuments in the Park by exercising □final

[4] Kountze ISD cites *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852, 855 (5th Cir. 2010), cert, denied, 131 S. Ct. 2875 (2011) for its assertion that the cheerleaders are representing and acting on behalf of the school when they engage in their cheerleading activities, arguing that □a□s the Fifth Circuit held in a case out of nearby Silsbee ISD, cheerleaders do not have free speech rights over when or how they participate in cheerleading activities because they serve □as a mouthpiece□for the school.□The Federal Appendix covers opinions and decisions from 2001 to date issued by the U.S. courts of appeals that are not selected for publication in the Federal Reporter. These unpublished opinions are not binding precedent, although they may be cited as authority. *See* Fed. R. App. Pro. 32.1.

approval authority over their selection. *Id*. at 473 (quoting *Johanns*, 544 U.S. at 560–61). The Court explained that governments have historically used monuments, such as statutes, triumphal arches, and columns, to speak to the public. *Id*. at 470. These permanent monuments displayed on public property typically represent government speech. *Id*. The Court also recognized that public parks are a traditional public forum. *Id*. at 469. Public parks are often closely identified in the public mind with the government unit that owns the land. *Id*. at 472. Thus, given the context, there was little chance that observers would fail to appreciate that the government was the speaker. *Id*. at 471.

Like *Summum*, *Johanns v. Livestock Marketing Ass'n*, is another often cited decision wherein the Supreme Court has most clearly formulated the government speech doctrine. In *Johanns*, the Supreme Court held that a promotional campaign to encourage beef consumption that the government effectively controlled was government speech. 544 U.S. at 560. The government did not pay for the campaign itself instead, it funded the campaign by charging an assessment on all sales of cattle and imported beef products. *Id*. at 554. The government, though, had set out the overarching message and some of its elements and had final approval authority over every word used in every promotional campaign. *Id*. at 561. Thus, because the message in the promotional campaign was from beginning to end the

message established by the Federal Government, the campaign was categorized as government speech. *Id*. at 5 0.

Garcetti v. Ceballos instructs that, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline. 547 U.S. at 421. The critical question identified in *Garcetti* was whether the speech at issue was itself ordinarily within the scope of the employee s duties, not whether it merely concerned those duties. *Id*. at 423 24. If so, the public employee s speech is not entitled to constitutional protection. *Id*.

Garcetti was used recently to affirm a school district s decision not to renew the contract of a beloved high school football coach who, following the end of each football game, would silently take a knee at mid-field and say a short, silent prayer. *Kennedy v. Bremerton Sch. Dist*., No. 1 -35801, 2017 U.S. App. E IS 1 10 (9th Cir., Aug. 23, 2017). Despite the fact that the game was over, that he was not exercising authority over any student-athlete, and that he had no specific, assigned task at the time of his prayer, the Ninth Circuit held that the coach s speech was part of his ob responsibilities. *Id*. at 29 34. Thus, his speech was not entitled to constitutional protection. *Id*. at 42 43. The Court held that the coach spoke as a public employee, not as a private citizen when he kneeled and prayed on the fifty-

yard line immediately after games in school-logoed attire while in view of students and parents that he had a professional responsibility to communicate demonstratively to students and spectators and that he took advantage of his position to press his particular views upon the impressionable and captive minds before him. *Id*. at 37, 40–41 (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011)). The panel held that because plaintiff's demonstrative speech fell within the scope of his typical job responsibilities, he spoke as a public employee, and the district was permitted to order him not to speak in the manner that he did. *Id*. at 37.

In the most recent case dealing with the issue of government speech, the Supreme Court held that the messages on Texas specialty license plates are government speech and, using the same analysis as in *Summum*, cited three key factors from that opinion. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 135 S.Ct. 2239 (2015). First, license plates have long been used by the States to convey state messages. *Id.* at 2248. Second, license plates "are often closely identified in the public mind" with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of "government ID." *Id.* (internal quotation marks omitted). Third, Texas

"maintained direct control over the messages conveyed on its specialty plates." *Id*. at 2249. The Court explained that

> a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.

Id. at 2249. Because Texas's specialty license plate designs constitute government speech, Texas was consequently entitled to refuse to issue plates featuring a private party's proposed design. *Id*. at 2253.

We note that neither *Summum* nor *Garcetti*, relied upon by Kountze ISD, nor *Johanns* or *Walker*, actually involved school speech – a crucial distinction, because "student speech claims" are different from other types of speech claims and must be evaluated "in light of the special characteristics of the school environment." *Morgan*, 559 F.3d at 375 (quoting *Morse*, 551 U.S. at 39). In *Garcetti*, the speaker was a government employee, not a private citizen or a student. 547 U.S. at 421–22. In both *Summum* and *Walker*, the speaker was the government itself, conveying a government message via a monument in a government park and specialty license plates, respectively. *Summum*, 555 U.S. at 472; *Walker* 135 S.Ct. at 2253. Here, by contrast, the Cheerleaders are not school employees, nor are they conveying the

government's own message. And, while *Kennedy* is an example of government speech within the public school setting, the Cheerleaders cannot be said to be public employees and thus, *Kennedy* is distinguishable. *See Kennedy*, 2017 U.S. App. LEXIS 1510, at *37.

Kountze ISD asserts that the run-through banners are prepared by the Kountze High School Cheerleaders, an official school organization, at their school-sponsored, school-supervised practices on school property. The Cheerleaders are generally required to prepare and display the banners as part of their duties. The banners are displayed on government property (the football stadium), in an area that is not generally accessible to the public (the football field), and at a time when a limited number of individuals are allowed on the field (players, cheerleaders, coaches, staff and band members). The cheerleader sponsors (paid school district employees) have the right to control the content and review and approve each of the banners before it is displayed. Kountze ISD asserts that, based on all of these factors, the Cheerleaders' speech as contained on the banners is best categorized as government speech.

On the other hand, the Cheerleaders contend that a single, dispositive fact controls the categorization of speech of the run-through banners: the school district allows the Cheerleaders to select the message that is placed on the banners.

Regardless of the amount of supervision of the Cheerleaders' activities, or the extent of Kountze ISD's post-selection review of the messages on the banners, because the students select the message each week and not the school, the statements on the run-through banners must be categorized as pure private speech of the Cheerleaders.

To determine whether speech or expressive conduct constitutes government speech, the Supreme Court identified three relevant factors: (1) whether the government has historically used the medium of speech as conveying a message on the government's behalf; (2) whether a reasonable observer would interpret the speech as conveying a message on the government's behalf; and (3) whether the government retained control and final authority over the content of the message. *See Walker*, 135 S.Ct. at 2248–50; *Summum*, 555 U.S. at 470–73.

Applying this three-factor test in our case, we first review the facts from the record before us to determine whether Kountze ISD has historically used run-through banners during the pregame ceremony as a means to convey a message on behalf of the school district. Kountze ISD portrayed that the purpose of the run-through banners was "to get the crowd and the football players excited." The football players run through the banner shortly after it is held up by the cheerleaders; it is displayed for up to a couple of minutes before it is destroyed by

the football players running through it. The purpose of the run-through banners is generally to encourage athletic excellence, good sportsmanship, and school spirit. Kevin Weldon, former Superintendent for Kountze ISD, acknowledged in his testimony that cheerleading is an extracurricular or non-curriculum activity for which students receive no grade or credit for participation. The sponsors for the cheerleaders, who are paid employees for Kountze ISD, testified that they do not have a prepared script for the banners from the school district, nor do they suggest or edit the language chosen by the cheerleaders for the banners. The sponsors provided sworn testimony that the only supervisory control they exercise over the messages on the run-through banners is to ensure that the messages do not violate school policy.[5] The sponsors, though, approved each one of the banners before it was displayed during the pregame ceremony.

While the tradition of run-through banners began decades ago, the sponsors affirmed that the banners are not required and are not always created for every game. In previous years, messages on the banners typically included negative

[5] This policy, contained in FNA (□OCA□) and FMA (□EGA□), provides that any student messages may not: be obscene, vulgar, offensively lewd, or indecent□ likely result in a material and substantial interference with school activities or the rights of others, promote illegal drug use□violate the intellectual property rights, privacy rights, or other rights of another person□ contain defamatory statements about public figures or others□ or advocate imminent lawless action or are likely to incite or produce such action.

language about opposing teams, such as "Scalp the Indians" and "Beat the Bulldogs." Other examples included by the Cheerleaders included "Thrash the Tigers," "Destroy the Dogs," and "Bury the Bobcats." The Cheerleaders decided that "positive expressions would serve as a model of good sportsmanship and would be preferable over the typical derogatory language customarily seen on other run-through banners." The run-through banners are hand-painted in the Cheerleaders' handwriting, and they do not have the school or district's name anywhere on them. No school funds are used to make any of the banners—instead, they are funded by private funds. The banners are made after regular school hours.

Based on the record before us, we find that historically, Kountze ISD has not used run-through banners as a means to convey a message on behalf of the school district. This factor weighs against finding the use of a run-through banner to be pure government speech.

Second, we ask whether a reasonable observer would interpret the speech as conveying a message on the school district's behalf. The Cheerleaders are members of an organized student-activity of Kountze High School. They are required to wear an approved uniform bearing the school colors and containing the name or initials of the school at all times that they are performing their role as cheerleaders. However, the Cheerleaders purchase their own uniforms with private

funds. Only the football team and staff, the band, cheerleaders, and other authorized personnel are allowed on the stadium field. The Cheerleaders are allowed to display the run-through banners on the field before the game begins. The banners are unfurled on the field just before the team is announced. Immediately thereafter, the football players charge through the paper sign and it is destroyed, never to be displayed again.

While there is some potential that a reasonable person may interpret the speech as conveying a message on the school district's behalf, the Supreme Court has specifically observed that high school students "are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." *See Bd. of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250-51 (1990). The run-through banners are hand-painted by the Cheerleaders. Traditionally, they have used such slogans as "Destroy the Dogs" or "Scalp the Indians," words and display not readily attributable to a government entity such as the school district. The banners are hardly the type of official publication or communication that would allow a reasonable person to interpret the speech as conveying a message on the school district's behalf. Our analysis of this factor weighs against finding the use of run-through banners before a football game to be pure government speech.

Finally, we review the facts of this case to determine if Kountze ISD retained control and final authority over the content of the message. The Court interprets this factor as analyzing the extent of control exercised over the content of each run-through banner. Kountze ISD acknowledged through a resolution adopted by its Board of Trustees that, although the Superintendent and the school board retain ultimate authority to approve or disapprove of a banner, Kountze ISD has traditionally entrusted the preparation of such banners to the cheerleader squads under the authority of their sponsors. However, the resolution in question was not adopted by the school board until after the decree was issued by the Superintendent and this lawsuit was filed and a temporary restraining order issued. Therefore, for purposes of our analysis, we consider only the control and authority exercised by the school district prior to the issuance of the decree forbidding the religious language on the run-through banners. The evidence before the trial court shows that the banners are student-initiated and student-led, and Superintendent Weldon acknowledged that there was no approved script in creating the banners, nor were the Cheerleaders delivering a message that had been approved in advance by anyone with the school district. The sponsors and the Cheerleaders are expected to exercise good sense in the preparation of the banners. The sponsors review and approve the content of the banners after they are finished. The sponsors would not

permit inappropriate banners, which could include, for example, banners that demonstrated poor sportsmanship or included racial slurs, as set forth above.

While the school district has shown that it exercises some editorial control over the preparation of the run-through banners, the facts fail to establish the level of control necessary to equate the Cheerleaders speech with government speech. First, the policy of approving banners to ensure they did not include obscene or objectively offensive material does not transform the Cheerleaders speech into government speech. *Compare Johanns*, 544 U.S. at 5 1 2 (wherein degree of supervision resulted in government control of message conveyed) *with Pounds*, 730 F.Supp.2d at 45 (wherein school s exercise of final approval of parent-selected messages did not set the overall message communicated). The Supreme Court has held that regardless of how you might characterize the speech, schools always have the right to prevent students from delivering speech that is vulgar, lewd, profane or offensive to the school environment, even if the message would not be considered inappropriate outside of an educational environment. *Fraser*, 478 U.S. at 83 (Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.), 85 (The First Amendment does not prevent the school officials from determining that to permit . . . vulgar and lewd speech would undermine the school s basic

educational mission.□). And the school district need not permit banners that advocate illegal activity, such as drug use. *Morse*, 551 U.S. at 397.

The editorial control exercised by the school district in this case cannot be said to rise to the level of control that the government exercised over the monuments it placed in its public parks in *Summum*, nor is it comparable to the absolute editorial control the State of Texas exercises over its personalized license plates. To the contrary, we find the run-through banners more akin to the bumper stickers referenced in *Walker* than the personalized license plate. The testimony of former Superintendent Weldon provides strong indication that Kountze ISD does not retain control and final authority over the content of each message painted on the run-through banners: □I commend them for what they□re doing and their boldness of what they□ve done.□ This statement does not support the school district□s argument that the banners are its own speech, but that it is, instead, the speech of the student cheerleaders. Therefore, this factor also weighs against finding the use of run-through banners to be pure government speech.

Kountze ISD argues further that the case of *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), supports its claim that the run-through banners are government speech. In that case, the Supreme Court held that pregame student-led prayers were government speech because the prayers occurred □on government

property at government sponsored school-related events and that the school district had not opened up its pregame ceremony to indiscriminate use by the general public. *Id.* at 302–303.[ ] However, a careful reading of the holding shows *Santa Fe* explicitly reaffirms the basic principle that 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 (quoting *Mergens*, 49 U.S. at 250).

In *Santa Fe*, the Supreme Court reaffirmed that the Establishment Clause of the First Amendment prohibits a school district from taking affirmative steps to create a vehicle for prayer to be delivered at a school function. *See id*. at 310–11. The Court applied that principle to hold that Santa Fe's policy of allowing students to vote on whether to have prayer before football games constitutes such an affirmative step. *Id.*

Several facts were critical to its holding. First, the school board had adopted the following policy: "The board has chosen to permit a student to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event." *Id.* at 298 n. Second, the

[ ] The Supreme Court's opinion contains significant additional factual details and discussion concerning why the prayers at issue in that case were not private speech. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. at 303–08.

school board instituted its policy by establishing a two-step election process. *Id.* at 297. First, students voted on whether to have an invocation or message prior to football games. *Id.* at 297–98. If so, a second election was held to choose a student to do so. *Id*. Only that student was allowed to speak at the game, and the same student delivered the message at each game. *Id*. at 303.

In view of these facts, the Court rejected Santa Fe's argument that it was merely providing a neutral accommodation of private religious speech. *Id*. at 304. The Court found significant that the school policy "approved" of only one specific kind of message, an "invocation." *Id*. at 309. Under such circumstances, the Court concluded that "the District has failed to divorce itself from the invocations' religious content," and has crossed the line from state neutrality toward religion to state sponsorship of religion. *Id*. at 291.

In *Santa Fe*, the school district attempted to disentangle itself from the religious messages by instituting a student election process, believing it could satisfy the constitutional requirement for neutrality toward religious speech by allowing such speech to be chosen by the majority. *See id.* at 297–98. In the Court's view, however, "Santa Fe's student election system ensured" that only those messages deemed "appropriate" under the District's policy "could be delivered. That is, the majoritarian process implemented by the District

guaranteed, by definition, that minority candidates would never prevail and that their views would be effectively silenced. *Id.* at 304. Such a policy, the Court concluded, substitutes the views of the majority for the government neutrality required by the Establishment Clause. *Id*.

In contrast, Kountze ISD makes no claim in this case that the Cheerleaders were required or encouraged in any way to include religious messages on the banners. Likewise, there is no school policy or rule that, in actuality or effect, even suggested, much less required, the placement of religious messages on the banners. Indeed, until the school year in question, the messages painted on the banners had been entirely non-religious in nature. The extent of the school's policy concerning banners was that the cheerleaders should make banners to promote school spirit at football games. The text and content of the message, aside from the prohibition on obscene material, is, was, and always had been, left up to the discretion of the cheerleaders. Thus, we find the reasoning in *Santa Fe* to be inapposite.

Instead, we find the reasoning in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler I*) and *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (*Chandler II*), instructive, particularly insofar as the prayer involved in those cases was distinguished from the prayer that was actively or surreptitiously encouraged by the school in *Santa Fe*. In *Chandler I*, the Eleventh Circuit held that

as long as prayer at a student event was "genuinely student-initiated," it was protected private speech:

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's--either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler I, 180 F.3d at 1211. In *Chandler II*, the Eleventh Circuit revisited its holding in *Chandler I* and reiterated that a school policy does not improperly *endorse* religion simply because it does properly *tolerate* it.[7] *Chandler II*, 230 F.3d at 1317. The court reasoned that "the Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Id.* at 1311. "Private speech endorsing religion is constitutionally protected" even in school. Such speech is not the school's speech even though it may occur in the school." *Id.* at 1317.

[7] The record before us indicates that the policy of Kountze ISD properly tolerated religious student speech before it received a letter from the Freedom from Religion Foundation. A school district's toleration of student religious speech that happens to re-occur does not evolve into improper endorsement of religion by the school district. It is the hastily-crafted and hastily-adopted school board resolution(s) that stemmed from the letter and subsequent lawsuit that historically runs afoul of the Establishment Clause and entangles school districts in endorsement of religion violations.

In light of the record before us, applying the three-factor test set forth by the U.S. Supreme Court in *Summum* and *Walker*, we find the Cheerleaders' speech on the pregame run-through banners cannot be characterized as government speech.

[illegible]

School-sponsored speech is a category of speech devised for the distinctive context of the public school. It is neither pure government speech nor pure private speech, but rather student expression that "may fairly be characterized as part of the school curriculum," which means that it is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Such speech may be regulated by the school so long as "editorial control over the style and content of student speech in school-sponsored expressive activities . . . is" reasonably related to legitimate pedagogical concerns." *Id.* at 273. School-sponsored speech includes "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. These speech activities are school-sponsored because they "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart

particular knowledge or skills to student participants and audiences. *Id.* One justification for giving schools this additional authority is to ensure that the views of the individual speaker are not erroneously attributed to the school. *Id*. This is important, among other reasons, so that the school may refuse to sponsor student speech that would impinge upon the rights of other students or associate the school with any position other than neutrality on matters of political controversy. *Id*. at 271–72. According to the Supreme Court, this level of authority was consistent with their oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of judges. *Id*. at 273. Federal courts should only intervene in decisions to restrict school-sponsored speech when the decision has no valid educational purpose. *Pounds*, 730 F.Supp.2d at 548–49 (quoting *Hazelwood*, 484 U.S. at 273). Because the speech at issue is not pure government speech, and because the doctrines overlap to such a great extent, *see Morse*, 551 U.S. at 429–30 (Breyer, J., concurring in the judgment in part and dissenting in part), a *Hazelwood* analysis is appropriate for the sake of completeness. Kountze ISD argues that if the speech is not pure government speech, it may be analyzed under *Hazelwood*.

The speech at issue in *Hazelwood* was a high school newspaper published every three weeks by students in the school's journalism II class. 484 U.S. at 262.

It was funded by the school board and supplemented by advertising sales. *Id*. The newspaper's faculty adviser submitted page proofs to the school principal before each publication. *Id*. at 263. Following one such submission, the principal withheld from publication two student-written stories, one describing the experiences of three pregnant students and another discussing the impact of divorce on students. *Id*. That led three students to file the underlying suit, alleging that the censorship violated their First Amendment Rights. *Id*. at 264. In reviewing the school's actions, the Court drew a distinction between private student speech that "happens to occur on the school premises" and school-sponsored expression, where "students, parents, and members of the public might reasonably perceive "expression" to bear the imprimatur of the school" and the expression occurs in a curricular activity. *Id.* at 270–71. Applying this standard, the Supreme Court held that the student newspaper was school-sponsored speech and that the principal acted reasonably in redacting the two pages that concerned him. *Id*. at 274–77.

The Court articulated that restriction on school-sponsored speech must be "reasonably related to legitimate pedagogical concerns." *Id*. at 273. Courts applying the *Hazelwood* standard have found this final element satisfied if the action is reasonably related to "the school district's desire to avoid controversy within a school environment." *Fleming*, 298 F.3d at 925–26. "Indeed, the

pedagogical concern in *Hazelwood* itself was to avoid the controversial subjects of pregnancy and divorce in a school setting because of the potentially disruptive nature of such subjects upon young students. *Id.* at 92 (*see also, e.g.*, *Curry v. Hensiner*, 513 F.3d 570, 578 (5th Cir. 2008) (upholding school's decision to prevent a student from selling candy cane ornaments with religious messages as part of a school project finding that the legitimate pedagogical concerns of preventing other students from being offended and/or subjected to unwanted religious messages that might conflict with their parents' religious teachings motivated the decision) *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1217. (11th Cir. 2004)(finding that the legitimate pedagogical concern of avoiding disruption to the learning environment caused by controversial student-painted murals with overtly religious messages permitted the school to remove the murals) *Fleming*, 298 F.3d at 934 (holding that a high school's desire to avoid a religious debate that would be disruptive to the learning environment was a legitimate pedagogical concern). In this case, the Kountze ISD has not raised disruption of the learning environment as a concern. There was no testimony in the record that anyone made a complaint about the banners, and the cheerleaders testified that they received compliments and encouragement from the players, students from visiting schools, and the public

regarding their choice of wording on the run-through banners containing religious statements and references.

We find the reasoning in *Fleming* persuasive and illustrative of an example of school-sponsored speech outside of the classroom. Following the tragic shooting at Columbine High School, the school officials decided to re-open the school but made concerted efforts to change the appearance of the school building to avoid triggering any disturbing memories of the attack. *Fleming*, 298 F.3d at 920. Teachers at the school came up with an idea of having the students paint 4-inch-by-4-inch tiles that would be installed throughout the halls of the school. *Id*. The purpose of the project was two-fold: students would have an opportunity to come into the school and become more comfortable with it and, by participating in creating the tile art, they would also be a part of the reconstruction of their school. *Id.* at 920–21. To ensure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy, school administrators published various rules and guidelines for the tiles that prohibited certain language, names of the shooting victims or date of the attack, religious symbols, and anything obscene or offensive. *Id.* at 921. Tiles that did not conform to the guidelines were not to be installed. *Id*. The tiles and supplies to be used in the tile art project were paid for by private donations. *Id*.

A few of the painted tiles turned in contained messages such as "Jesus Christ is Lord," and "4/20/99 Jesus Wept," "There is no peace says the Lord for the wicked," names of victims killed in the shooting, and crosses. *Id*. at 921. The teachers supervising the painting informed them that tiles that were inconsistent with the guidelines would be fired separately and would not be affixed to the walls, but would be given to them for their personal use." *Id*.

The tiles were screened for compliance with the guidelines by various volunteers, but due to the volume of tiles, a few that were inconsistent with the guidelines were affixed to the walls. *Id*. A school official inspected the building and noticed some inappropriate tiles that were posted and had them removed. The removed tiles included ones with crosses, gang graffiti, an anarchy symbol, a "Jewish star," the blue Columbine ribbon, a skull dripping with blood, a teacher's name on a tile the teacher painted, the date of the attack, and a mural containing red colors that some people found disturbing. *Id*. at 921–22.

Plaintiffs brought suit alleging, among other things, a violation of their free speech rights. To discern whether the expressive activity was government speech, the Tenth Circuit Court applied a four factor analysis:

> (1) whether the "central purpose" of the project is to promote the views of the government or of the private speaker; (2) whether the government exercised "editorial control" over the content of the speech; (3) whether the government was the "literal speaker"; and (4)

> whether "ultimate responsibility" for the project rested with the government.

Id. at 923. Having determined through its analysis that the expressive activity was not properly characterized as government speech, the court performed a *Hazelwood* analysis to determine if it was school-sponsored speech. *Id*. The court held that

> "school-sponsored speech is student speech that a school "affirmatively" promotes", as opposed to speech that it "tolerates." Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school constitute school-sponsored speech, over which the school may exercise editorial control, so long as "its" actions are reasonably related to legitimate pedagogical concerns.

Id. at 923–24 (quoting *Hazelwood*, 484 U.S. at 270–71) (internal citations omitted). The court concluded that the tile art project at Columbine High School constituted school-sponsored speech and was governed by the holding in *Hazelwood*. *Id* at 924.

While the court recognized that there may be expressive activities that occur on the school property that do not bear the imprimatur of the school, activities such as the tile art project that the school allowed to be integrated permanently into the school environment and that students pass by during the school day bore the imprimatur of the school. *Id*. at 925. "Further, the level of involvement of school officials in organizing and supervising such an event "also" affects whether that

activity bears the school's imprimatur." *Id*. The court held that when a tile, created pursuant to a project that the school supervised, and for which it approved funding, is displayed permanently on school grounds, and when that project aims to advance pedagogical concerns, the tile will normally be considered school-sponsored speech. *Id.* at 930. In that case, the court felt a reasonable observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the tiles it allowed to become a part of the school itself. *Id*. "Although the painting activity took place outside of school hours and was not mandatory, the *effects* of the painting were visible on the school walls throughout the building, during the school day when children are compelled to attend." *Id*. (emphasis in original). Because the school permanently integrated the tiles into the school environment, and was significantly involved in the creation, funding, supervision, and screening process of the tile project, the court concluded that the tiles bore the imprimatur of the school and thus, the expressive activity was best categorized as school-sponsored speech. *Id*. at 931.

Further, the court found that the school's restriction on religious symbols or language on the tiles was reasonably related to a pedagogical interest. The school asserted two pedagogical reasons for its restrictions on religious references: "(1) religious references may have served as a reminder of the shooting, and (2) to

prevent the walls from becoming a situs for religious debate, which would be disruptive to the learning environment. *Id*. at 933.

> The critical inquiry in deciding whether speech is "school-sponsored" under *Hazelwood* is whether it could reasonably be understood to bear the school's imprimatur, which is synonymous with "sanction" or "approval." Relevant considerations include (1) where and when the speech occurred; (2) to whom the speech was directed and whether recipients were a "captive audience"; (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials; and (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students.

Morgan, 459 F.3d at 372. When we apply the factors under *Hazelwood* to the facts of this case, there is no clear distinction between characterizing the expressive activity involved in this case as school-sponsored speech and pure private speech. The Cheerleaders certainly prepared the run-through banners for display and delivery of their speech during a high school football game sponsored by the school district, performed on the school district's playing field, while they were fulfilling their duties as official cheerleaders for the school. The recipients are not simply going about their own business but have paid to attend the school sponsored event and thus, are more of a captive audience than not. However, we distinguish the momentary display of run-through banners containing religious-themed statements from the school-sponsored prayer that the Supreme Court found would

exact religious conformity from a student as the price of joining her classmates at a varsity football game. *Santa Fe*, 530 U.S. at 312 (quoting *Lee v. Weisman*, 505 U.S. 577, 59 (1992)). The activity of displaying the run-through banner is conducted under the supervision of school officials. A factor that weighs against characterizing the speech as school-sponsored speech is that football and cheerleading are non-curriculum or extracurricular activities and, while the student athletes may certainly gain valuable life lessons from engaging in the team sports, the activities are not designed specifically to impart some specific knowledge or skills to the students in a pedagogical sense. The court in *Fleming* read the language designed to impart particular knowledge or skills to student participants and audiences in *Hazelwood* to mean activities that affect learning, or in other words, affect pedagogical concerns. *Fleming,* 298 F.3d at 925. That standard was satisfied because the tile project was intended to reacquaint the students with the school and participate in community healing after the tragic shootings at the school. *Id.* at 931. Here, the purpose is simply to energize the crowd and teams, in keeping with the traditional role of cheerleaders. The former Superintendent and the sponsors all agreed that cheerleading is a non-curriculum activity and is not designed to impart particular knowledge or skills as contemplated by the Supreme Court in *Hazelwood*. While Texas Friday Night football is a tradition all of its own

and is a great source of local community pride, football does not appear to us on this record to involve the formal pedagogical instruction contemplated by the Supreme Court in *Hazelwood*. Further, given the nature of the expressive activity – a hand-drawn, playful paper banner, displayed by cheerleaders engaged in an extra-curricular activity, only momentarily before the football team runs through the banner – it is highly unlikely that the banner would appear to those in attendance at the game to contain a message endorsed by the school.

Courts have found this final element satisfied if the action is reasonably related to "the school district's desire to avoid controversy within a school environment." *Id.* at 925–26. Indeed, the pedagogical concern in *Hazelwood* itself was to avoid the controversial subjects of pregnancy and divorce in a school setting because of the potentially disruptive nature of such subjects upon young students. *Id*. at 926. In this case, the Kountze ISD has not raised disruption of the learning environment as a concern. Kountze ISD has not offered any evidence of the pedagogical concern implicated nor has it asserted any such concerns as the basis of the prohibition of the biblical references on the run-through banners.

Thus, we find the speech at issue is not properly characterized as school-sponsored speech.

□. □r□□□□□ □□□□□□

The first step in analyzing the appropriate constitutional standard to apply to private speech is to identify the nature of the forum in question, whether a traditional public forum, a limited public forum, or a non-public forum. *See Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.,* 4□0 U.S. 37, 44□45 (1983). However, a detailed discussion of the forum issue is not necessary in the context of the instant case. Unless school officials have opened school facilities for indiscriminate use by the public, a school is a non-public forum, pursuant to which □school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.□ *Hazelwood,* 484 U.S. at 2□7. There is nothing in the record to suggest that Kountze ISD opened the pre-game ceremony at football games for use indiscriminately by the general public. Therefore, it is deemed to be a non-public forum.

In *Tinker*, the Court addressed the protection students have under the First Amendment to engage in speech or demonstration on school premises. School officials may only restrict such private, personal expression to the extent it would □materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,□ or □impinge upon the rights of other students.□393 U.S. at 509 (quoting *Burnside v. Byars*, 3□3 F.2d 744, 749 (19□□)).

The rights announced in *Tinker*, though, do not extend to several broad categories of student speech: "lewd, indecent, or offensive" speech "school-sponsored speech" and speech "that a reasonable observer would interpret as advocating illegal drug use." *Morgan*, 359 F.3d at 374.

The "private speech" at issue in *Tinker* was the "silent, passive expression of opinion" of students who wore black armbands to school to protest the Vietnam War. 393 U.S. at 508. The Supreme Court held that the black armbands worn by the students in *Tinker* are representative of the pure student expression that a school must tolerate unless it can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities." *Id.* at 514. In this case, Kountze ISD has not raised substantial disruption of or material interference with school activities as a concern. Kountze ISD has not pleaded or offered any evidence of disruption or interference as the basis for the prohibition of the biblical references on the run-through banners. In fact, the only evidence in the record is that the Cheerleaders received compliments and encouragement from those in attendance, from the community overall, the players, as well as the players and participants from opposing schools. Therefore, we conclude that the Cheerleaders' speech expressed on the run-through banners is best characterized as the pure private speech of the students.

In conclusion, taking all of the Cheerleaders' pleadings as true, we hold the Cheerleaders pleaded sufficient facts to show both a waiver of immunity and to affirmatively demonstrate that the trial court possessed jurisdiction over the dispute. *See Miranda*, 133 S.W.3d at 22[illegible]. We overrule the school district's issue on appeal and affirm the trial court's ruling to deny Kountze ISD's plea to the jurisdiction.

[illegible]d [illegible]

Kountze ISD further complains that the cheerleaders who sued lack standing to bring suit because the individual cheerleaders who sued do not represent the entire squad. Because standing implicates the trial court's subject matter jurisdiction to hear a case, we address this issue on remand. *See Nootsie, Ltd. v. Williamson Cty. Appraisal Dist.*, 925 S.W.2d [illegible]59, [illegible]2 (Tex. 199[illegible]). As the Texas Supreme Court has succinctly stated:

> A plaintiff must have both standing and capacity to bring a lawsuit. The issue of standing focuses on whether a party has a sufficient relationship with the lawsuit so as to have a justiciable interest in its outcome, whereas the issue of capacity is conceived of as a procedural issue dealing with the personal qualifications of a party to litigate . . . . A plaintiff has standing when it is personally aggrieved, regardless of whether it is acting with legal authority[illegible]a party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.

Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848 (Tex. 2005). (internal citations omitted). The alleged misconduct complained of here is a violation of each student's individual right of free speech. As a general matter, injury is the "invasion of a legally protected interest." *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663 (1993).

The individual cheerleaders who sued testified that the messages on the run-through banners were decided by the unanimous consent of the cheerleader squad and that no individual cheerleader had the authority to decide the content of any message. The school district argues that, even assuming that the banners are "private speech," they would be the "private speech" of the cheerleader squad, not of the individual cheerleaders, because decisions about the content of the banners were up to the squad, not individual cheerleaders. Therefore, the school district argues that the individual cheerleaders who sued do not have standing to sue on behalf of the squad because the entire squad is not included as plaintiffs, nor even a majority of the squad.

Kountze ISD cites *Wingate v. Hajdik* for the principle that absent statutory authority, neither common law nor equity give the members of an organization the right to sue on behalf of the organization. 795 S.W.2d 717, 719 (Tex. 1990). The school district's challenge to standing misrepresents the claims of the individual

cheerleaders who sued the district. The cheerleaders who sued have initiated this lawsuit as individuals alleging their individual constitutional rights were violated. Unlike the shareholders in *Wingate*, the individual cheerleaders who are the plaintiffs in this suit are not attempting to recover damages personally for a wrong done to their organization. *Id*. at 719. Rather, the individual cheerleaders are pursuing "a personal cause of action and personal injury." *Id*.

We find no support for the argument of Kountze ISD that the cheerleaders who sued lose their individual rights to free speech by speaking as a group. The fact that multiple individual cheerleaders contributed to the final message as a group does not mean the individual cheerleaders were not harmed when the message approved by the group was suppressed.

It is undisputed that each of the individual cheerleaders who sued was represented by their parents as that respective minor's next friend and, on the date of the filing of the lawsuit, was a minor and a member of the cheerleader squad. Tex. Rule. Civ. Proc. 44. "Although a minor" may have suffered an injury and thus have a "justiciable interest in the controversy, 'a minor' lacks 's' the legal authority to sue" the law therefore grants another party the capacity to sue on their behalf." *Lovato*, 171 S.W.3d at 849. Because each minor cheerleader was represented by next friend, and each minor has alleged a breach of her

constitutional right to freedom of speech, we conclude each minor has a justiciable interest in the controversy and thus, standing. *See id.* We overrule this issue on appeal. Having overruled all of the issues of Kountze ISD on appeal, we affirm the trial court's denial of the plea to the jurisdiction.

AFFIRMED.

CHARLES KREGER
Justice

Submitted on April 1, 2017
Opinion Delivered September 28, 2017

Before McKeithen, C.J., Kreger and Horton, JJ.

IN THE NINTH COURT OF APPEALS

09-13-00251-CV

Kountze Independent School District
v.
Coti Matthews, on behalf of her minor child Macy Matthews, 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 denial of Kountze Independent School District's plea to the jurisdiction should be affirmed. IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that the trial court's denial of Kountze Independent School District's plea to the jurisdiction is affirmed. All costs of the appeal are assessed against the appellant.

Opinion of the Court delivered by Justice Charles Kreger

September 28, 2017

AFFIRMED

****

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

Carol Anne Harley
Clerk of the Court

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

End of Document

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

APPELLANT'S MOTION TO DISMISS FOR MOOTNESS AND LACK OF STANDING

TO THE HONORABLE COURT OF APPEALS:

Appellant Kountze Independent School District ("Kountze ISD" or "Appellant") files this its Motion to Dismiss for Mootness and Lack of Standing and respectfully requests that the Court grant its Motion to Dismiss and vacate all prior orders and judgments.

I.
Summary

All of the Plaintiffs in this case have either graduated from Kountze ISD, have transferred out of Kountze ISD, or are no longer on the cheerleader squad. As a result, Plaintiffs' claims are moot and the Plaintiffs lack standing to assert their claims against Kountze ISD. The Court should dismiss this case for want of jurisdiction and vacate all prior orders and judgments entered in this case.

II.
Background

A. The parties to the case.

1. The plaintiffs filed an original petition and six amended petitions.[1] Kountze ISD argues that Plaintiffs' Sixth Amended Petition was not timely and was not properly filed. For purposes of this Motion, however, it is irrelevant whether the Fifth or Sixth Amended Petition is the live petition because in both petitions Plaintiffs were composed of only the following persons:

[1] Original Petition (3d SCR 2-27); First Amended Petition (1st SCR 34-69); Second Amended Petition; (1st SCR 254-288); Third Amended Petition (CR 63-89); Fourth Amended Petition (CR 299-322); Fifth Amended Petition (CR 778-802); Sixth Amended Petition (CR 1001-1025).

a) Coti Matthews, on behalf of her minor child, [redacted] ("Matthews");

b) Rachel Dean, on behalf of her minor child, [redacted] ("Dean");

c) Charles and Christy Lawrence, on behalf of their minor child, [redacted] ("Lawrence");

d) Tonya Moffett, on behalf of her minor child, [redacted] ("Moffett");

e) Beth Richardson, on behalf of her minor child, [redacted] ("Richardson");

f) Shyloa Seaman, on behalf of her minor child, [redacted] ("Gallaspy"); and

g) Misty Short, on behalf of her minor child, [redacted] ("Short").

2. Matthews, Dean, Moffett, and Richardson have all graduated from Kountze ISD. Matthews and Dean graduated in 2015. (Exhibit "A"; ¶5). Moffett and Richardson graduated in 2014. (Exhibit "A"; ¶5).

3. Short and Lawrence transferred out of Kountze ISD. Short transferred to another school district in 2013, and Lawrence transferred to the Texas Academy Leadership at Lamar University in 2013. (Exhibit "A"; ¶5). If they had stayed enrolled in Kountze ISD, Short was expected to graduate in 2016 and Lawrence was expected to graduate in 2015. (Exhibit "A"; ¶5).

4. Since Matthews, Dean, Moffett, Richardson, Short and Lawrence have all either graduated from Kountze ISD or transferred out of Kountze ISD, none of them can ever again be members of Kountze ISD's cheerleading squad. (Exhibit

"A"; ¶13). Of the seven Plaintiffs, Ms. Ayianna Gallaspy is the only one who is still enrolled as a student at Kountze ISD. (Exhibit "A"; ¶9).

5. Ms. Gallaspy is a senior at Kountze ISD. (Exhibit "A"; ¶¶9, 12). Ms. Gallaspy is expected to graduate in May of 2018. (Exhibit "A"; ¶12).

6. In March of 2017, during the end of her junior year of high school, Ms. Gallaspy failed to make the 2017-2018 cheerleading squad. (Exhibit "A"; ¶6). Since the 2017-2018 school year is Ms. Gallaspy's final year of eligibility for the cheerleader squad, Ms. Gallaspy's failure to make the team in March of 2017 means that she will never again be a member of Kountze ISD's cheerleading squad. (Exhibit "A"; ¶¶9-13).

7. This Court issued its most recent decision in this matter on September 28, 2017. This Court's decision was issued more than six months *after* the Court lost jurisdiction over this case.

8. On October 2, 2017, undersigned counsel became aware, for the first time, that Ms. Gallaspy had failed to make the cheerleading squad in March of 2017 and that she was no longer a cheerleader for Kountze ISD. (Exhibit "A"; ¶13; Exhibit "B"; ¶5; Exhibit "C"; ¶¶4-5).

III.
The Case Became Moot on March 24, 2017

A plaintiff is required to have standing as a prerequisite to their suit, and therefore, "[s]tanding must exist at every stage of a legal proceeding, including

appeal."[2] A court does not have "jurisdiction over a claim made by a plaintiff who lacks standing to assert it."[3] As a result, if a plaintiff does not have standing to assert one of their claims, the court lacks jurisdiction over the claim and must dismiss that claim.[4] Similarly, when a plaintiff lacks standing to assert *all* of their claims, the court *must* dismiss the entire action for want of jurisdiction.[5]

If at any stage of the legal proceeding, including the appeal, the controversy between the parties ceases to exists, a case becomes moot.[6] "If a controversy ceases to exist—'the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome'—the case becomes moot."[7] Furthermore, a case is moot "if a judgment, when rendered, will not have practical legal affect upon the parties."[8] When a case becomes moot, the plaintiff loses standing to maintain their claims, and thus, the claims must be dismissed.[9]

---

[2] *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex. 2008)); *In re Z.B.*, No. 09-14-00398-CV, 2014 WL 5409078, at *1 (Tex. App.—Beaumont Oct. 23, 2014) (mem. opin.) (citing *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001)).

[3] *Heckman*, 369 S.W.3d at 150 (citing *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex. 2011)).

[4] *Id.* (citing *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 392 (Tex. 2000)).

[5] *Id.* at 150-51 (citing *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex. 2010)) (emphasis added).

[6] *In re Kellogg Brown & Root, Inc.*, 166 S.W. 3d 732, 737 (Tex. 2005) (citing *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005); *Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002); *Lara*, 52 S.W.3d at 184.

[7] *Lara*, 52 S.W.3d at 184 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982)); *Wende*, 92 S.W.3d at 427.

[8] *Wilson v. W. Orange-Cove Consol. Indep. Sch. Dist.*, No. 09-08-00068-CV, 2008 WL 5622697, at *2 (Tex. App.—Beaumont Feb. 12, 2009, pet. denied) (citing *Houston Indep. Sch. Dist. v.*

For example, the Texas Supreme Court has held that two former inmates, challenging the constitutionality of a religious education program at the county jail, lacked "a legally cognizable interest in obtaining injunctive or declaratory relief" because they were released from the jail and "no longer face[d] the unconstitutional conduct about which they complain[ed]."[10] As a result, the Texas Supreme Court dismissed the inmates' requests for injunctive and declaratory relief because their claims were moot.[11] The Texas Supreme Court also held that a person's claim to avoid vacating her apartment and seeking to suspend the enforcement of a judgment, or in the alternative the setting of a supersedeas bond, was moot because "no live controversy between the parties as to the right of current possession" existed following the date of her apartment lease expiring.[12] Additionally, this Court of Appeals held that a former employee's appeal from a trial court's dismissal of his action seeking injunctive and declaratory relief for nonrenewal of his employment contract was moot because the employer's decision not to renew the employment contract had become final.[13] As a result, this Court dismissed the former employee's claims.[14]

Houston Teachers Ass'n, 617 S.W.2d 765, 766-67 (Tex.Civ.App.—Houston [14th Dist.] 1981, no writ)).

[9] *Lara,* 52 S.W.3d at 184; *see also Heckman,* 369 S.W.3d at 150-51.

[10] *Lara,* 52 S.W.3d at 184.

[11] *Id.*

[12] *Marshall v. Hous. Auth. of City of San Antonio,* 198 S.W.3d 782, 787 (Tex. 2006).

[13] *Wilson,* 2008 WL 5622697, at *3.

[14] *Id.* at *4.

Although the Texas Supreme Court provides two exceptions to the mootness doctrine, "capable of repetition yet evading review" and "a reasonable expectation that the same complaining party would be subject to the same action again," "the mere physical or theoretical possibility that the complaining party may be subjected to the same action again is not sufficient to satisfy the test."[15] In order for a moot issue to be "capable of repetition yet evading review," the plaintiff must prove that a reasonable expectation exists that the same complaining party will be subjected to the same action again.[16] If the plaintiff fails to satisfy this burden, the plaintiff's claims will be moot, and as a result, the court *must* dismiss the plaintiff's claims.[17]

For example, this Court of Appeals held that a political action committee's request for permanent injunction against a city to prevent a vote on the prohibition of photographic traffic signal enforcement systems was moot because the election had already passed.[18] Additionally, this Court held that the mere possibility that a different petition to amend the city charter could be submitted in the future or that the city council may pass a similar ordinance requesting another charter

---

[15] *City of Cleveland v. Keep Cleveland Safe*, 500 S.W.3d 438, 453-54 (Tex. App.—Beaumont 2016, no pet.) (quoting *Murphy*, 455 U.S. at 482 and citing *Trulock v. City of Duncanville*, 277 S.W.3d 920, 924 (Tex. App.—Dallas 2009, no pet.)).
[16] *Lara*, 52 S.W.3d at 184; *Amarillo v. Railroad Commission of Texas*, 2016 WL 3020304 (Tex. App.—Amarillo May 25, 2016, no pet. h.); *Rawlings v. Gonzalez*, 407 S.W.3d 420, 426 (Tex. App.—Dallas 2013, no pet.).
[17] *Id.*; *see also Heckman*, 369 S.W.3d at 150-51 (emphasis added).
[18] *Keep Cleveland Safe*, 500 S.W.3d at 453.

amendment was insufficient to satisfy the narrow "capable of repetition, yet evading review" exception to the mootness doctrine.[19] As a result, this Court dismissed the political action committee's request for permanent injunction.[20]

As the Texas Supreme Court has explained,

> a court cannot not decide a case that has become moot during the pendency of the litigation. A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer "live," or if the parties lack a legally cognizable interest in the outcome. Put simply, a case is moot when the court's action on the merits cannot affect the parties' rights or interests. If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.

Heckman v. Williamson County, 369 S.W.3d 137, 162 (Tex. 2012).[21]

Applying these principles to controversies between students and schools, the Texas Supreme Court has affirmed that graduation, or similar ineligibility, renders a case moot. In *Texas A&M University- Kingsville v. Yarbrough*, 347 S.W.3d 289 (Tex. 2011), the Texas Supreme Court cited with approval a decision by the federal

[19] *Id.*
[20] *Id.*
[21] Though the Supreme Court wrote, "cannot not," in context this appears to be a typographical error. *See also Pondersosa Pine Energy, LLC v. Illinova Generating Company n/k/a Illinova Corporation*, 2016 WL 3902559, No. 05–15–00339–CV, at *6 (Tex. App.—Dallas 2016, no pet.); *Velsor v. Elko*, 2016 WL 1639681, No. 03–15–00033–CV, at *1 (Tex. App.—Austin 2016, no pet.); *Leonard v. The State of Texas*, 2016 WL 685834, No. 08–15–00163–CR, at *1 (Tex. App.—El Paso 2016, no pet.); *In re Jennifer Machacek*, 2015 WL 5159126, No. 13–15–00333–CV, at *1 (Tex. App.—Corpus Christi-Edinburg 2015, no pet.); *Aubrey v. Steeg*, 2015 WL 3827127, No. 03–14–00498–CV, at *1 (Tex. App.—Austin 2015, no pet.); *Pate v. Edwards*, 2014 WL 172509, No. 12–13–00231–CV, at *2 (Tex. App.—Tyler 2014, no pet.); *Blackwood v. Bunton*, 2013 WL 5498186, No. 02–12–00325–CV, at *1 (Tex. App.—Ft. Worth 2013, no pet.).

First Circuit, *Governor Wentworth Reg. Sch. Dist. v. Hendrickson*, 201 F. App'x 7, *9 (1st Cir. 2006), which, according to the Texas Supreme Court, held: that where a student plaintiff sought a "declaration regarding constitutionality of student suspension," the case became "moot after [the] student [had]graduated" and that any "collateral potential bearing on student's prospective employment possibilities lacked [the] immediacy and reality required to support [any] declaratory judgment." *Id*. at 291.

Texas appellate courts have likewise dismissed student claims as moot where the student-plaintiffs were no longer eligible to assert the original claim. *See, e.g.*, *University Interscholastic League v. Buchanan*, 848 S.W.2d 298, 303 (Tex. App.—Austin 1993, no writ); *University Interscholastic League v. Jones*, 715 S.W.2d 759, 761 (Tex. App.—Dallas 1986, no pet.)

This case is similar to *UIL v. Jones*, in which the court explained the absurdity of continued litigation after a plaintiff had enjoyed the right while eligible, but could no longer exercise:

> For us to affirm the judgment would require us to order that Greg Jones be allowed to play football for Highland Park in 1985. Greg Jones has already done so. Likewise, for us to order a reversal would require us to order that Jones be prohibited from playing football for Highland Park in 1985. The absurdity of such an order is apparent.

Jones, 175 S.W.2d at 761 (cited with approval at *Schwarz v. Pully*, No. 05-14-00615-CV, 2015 WL 7607423, at *5 (Tex. App.—Dallas Aug. 3, 2015, no pet.);

Hatten v. Univ. Interscholastic League, No. 13-06-00313-CV, 2007 WL 2811833, at *2 (Tex. App.—Corpus Christi Sept. 27, 2007, pet. denied)).

In like manner to the plaintiff in *UIL v. Jones*, though Plaintiffs in the case have been permitted, as cheerleaders, to display religious messages, with the permission of the District, they are no longer eligible to serve as cheerleaders. Matthews and Dean graduated from Kountze ISD in 2015. (Exhibit "A"; ¶5). Moffett and Richardson graduated from Kountze ISD in 2014. (Exhibit "A"; ¶5). Short transferred to another school district in 2013, and Lawrence transferred to the Texas Academy Leadership at Lamar University in 2013 and each was expected to graduate in 2016 and 2015, respectively. (Exhibit "A"; ¶5). These Plaintiffs' claims became moot at the time they graduated or transferred. (Exhibit "A"; ¶¶5-6, 9-13). Ms. Gallaspy did not make the cheerleading squad in March of 2017, and, therefore, her claim became moot as of that time because she can no longer engage in cheerleading for Kountze ISD, the very activity in question in this litigation. (Exhibit "A"; ¶¶6, 9-13). In other words, on March 24, 2017, before this Court's opinion on September 28, 2017, the case became moot, Plaintiffs lacked standing to assert their claims, and this Court lacked jurisdiction.

For these reasons, the case is moot, Plaintiffs lack standing, and this Court should dismiss this case with prejudice for want of jurisdiction.

IV.
The Court Must Dismiss this Case Including All Prior Orders and Judgments

An appellate court may not decide moot cases or render advisory opinions; therefore, Texas courts have long held that "[w]hen a cause becomes moot on appeal, all previous orders and judgment should be set aside and the cause, not merely the appeal, dismissed."[22] Merely dismissing an appeal would "leave undisturbed the judgment of the lower court and thereby, in effect, affirm [the] same without according to the appealing parties a hearing upon the merits of their appeal."[23] As a result, "if a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction."[24]

As this case has become moot and Plaintiffs lack standing, this Court lacks jurisdiction, and the Court should dismiss the litigation for want of jurisdiction, vacating any and all prior orders and judgments issued in this matter, including specifically the trial court's orders and judgment, as well as this Court's decision of September 28, 2017, and this Court's judgment.

---

[22] *Multi-Cty. Coal. v. Texas Comm'n on Envtl. Quality*, No. 11-12-00108-CV, 2013 WL 5777023, at *1 (Tex. App.—Eastland Oct. 24, 2013); *Carrillo v. State*, 480 S.W.2d 612, 619 (Tex. 1972) ("This has been the course of action followed by this Court in a moot case for at least 94 years."); *Int'l Ass'n of Machinists, Local Union No. 1488 v. Federated Ass'n of Accessory Workers*, 133 Tex. 624, 626, 130 S.W.2d 282, 283 (Comm'n App. 1939); *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863, 863-64 (1943); *Barnett v. Conroe Indep. Sch. Dist.*, 455 S.W.2d 376, 381 (Tex. Civ. App.—Beaumont 1970); *LeFebvre v. LeFebvre*, 510 S.W.2d 29, 31 (Tex. Civ. App.—Beaumont 1974); *Sw. Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871, 876 (Tex. Civ. App.—Beaumont 1976).

[23] *Int'l Ass'n of Machinists, Local Union No. 1488*, 130 S.W.2d at 283.

[24] *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012) (citing *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229–30 (Tex. 1993)).

V.
Conclusion

This case is moot and Plaintiffs lack standing. Kountze ISD respectfully requests that the Court dismiss this case for want of jurisdiction and vacate all prior orders and judgments.

Respectfully submitted,

By: /s/ Thomas P. Brandt
THOMAS P. BRANDT
Texas Bar No. 02883500
tbrandt@fhmbk.com
FRANCISCO J. VALENZUELA
Texas Bar No. 24056464
fvalenzuela@fhmbk.com
FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206
(214) 369-1300 (office)
(214) 987-9649 (fax)

ATTORNEYS FOR APPELLANT KOUNTZE INDEPENDENT SCHOOL DISTRICT

CERTIFICATE OF CONFERENCE

I hereby certify that on October 29 and 30, 2017, I attempted to confer with lead counsel for Appelles, Mr. James Ho, regarding this motion. On October 29, 2017 at 2:07 p.m. I sent Mr. Ho an email regarding this motion. On October 30,

2017 at approximately 9:35 a.m. I left a voice mail with Mr. Ho regarding this motion. On October 30, 2017 at 11:34 a.m. Mr. Ho responded to my email. His email response stated "I'm out of town today for client meetings so I'm afraid I won't be able to respond to your Sunday email until after today. We can just plan to report our position to you and to the Court once we're ready to do so, under the regular deadlines." This motion is submitted to the Court for its consideration.

/s/ Thomas P. Brandt
THOMAS P. BRANDT

CERTIFICATE OF SERVICE

I, Thomas P. Brandt, hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by facsimile, messenger, regular U.S. Mail, certified mail, return receipt requested and/or electronic service in accordance with the Texas Rules of Appellate Procedure on this the 30th day of October, 2017.

James C. Ho (lead counsel) — *Via the Court's EFM*
Bradley G. Hubbard — *Via Facsimile: 214-571-2917*
GIBSON, DUNN & CRUTCHER, LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912

David W. Starnes
390 Park, Suite 700
Beaumont, Texas 77701

Kelly J. Shackelford

Hiram S. Sasser, III
LIBERTY INSTITUTE
2001 W. Plano Pkwy, Suite 1600
Plano, Texas 75075

Counsel for Petitioners

Ken Paxton
Attorney General of Texas
Michael Neill
Assistant Attorney General

Via the Court's EFM and/or
Via Facsimile: 512-474-2697

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548

Counsel for Intervenor the State of Texas

Charlotte Cover
Gibbs & Associates Law Firm
5700 Gateway Boulevard, Ste 400
Mason, OH 45040

Via the Court's EFM

Counsel for Intervenors
Randall Jennings, Missy Jennings,
A.J., and W.J.

Rebecca Robertson
ACLU of Texas
1500 McGowen Street, Ste 250
Houston, TX 77004

Via the Court's EFM

Counsel for Amici Curiae ACLU,
ACLU of Texas, et. al.

Sean D. Jordan
Jackson Walker, L.L.P.
100 Congress Avenue, Ste 1100
Austin, TX 78701

Via the Court's EFM

Counsel for Amici Curiae U.S. Senators Cruz and Cornyn

Robert M. Cohan
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202

Via the Court's EFM

Counsel for Amici Curiae American Jewish Committee

/s/ Thomas P. Brandt
THOMAS P. BRANDT

27310/557411

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

AFFIDAVIT OF JOHN FERGUSON

State of Texas §
§
County of Hardin §

BEFORE ME, the undersigned authority, personally appeared John Ferguson, who being by me duly sworn, upon his oath deposed as follows:

1. "My name is John Ferguson. I am over twenty-one years of age, have never been convicted of a felony or a crime involving moral turpitude, and am fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

EXHIBIT A

2. "I am the Superintendent of Kountze ISD and have served in this position since June 2014.

3. "It is my understanding that the case before the Court involves claims which related to the practice of displaying run-through banners at Kountze High School varsity football games. As a result of my understanding, I believe it may be beneficial for the Court to understand the facts and circumstances of the practice including the identity of those who regularly participate in the practice.

4. "The practice of having run-through banners at Kountze High School varsity football games involves two items and four groups. The two items are: (1) a large inflatable and (2) a run-through banner. The run-through banner is positioned at the end of the large inflatable such that the individuals who run through the large inflatable also must run through the banner. The varsity cheerleaders hold the run-through banner at the end of the large inflatable and then three groups run through the large inflatable and through the run-through banner. The first group is the Kountze varsity football team. The second group consists of young boys ages 5-12 who attend Kountze ISD schools and who participate in a local youth football organization. The third group consists of young girls ages 5-12 who attend Kountze ISD schools and who participate in a local youth cheerleading organization.

5. "[redacted] have all graduated from Kountze ISD or transferred to another District. [redacted] graduated in 2015, [redacted] graduated in 2015, [redacted] graduated in 2014, [redacted] graduated in 2014, and [redacted] transferred to another District in 2013, [redacted] transferred to the Texas Academy Leadership at Lamar University in 2013. If [redacted] had stayed enrolled in Kountze ISD, she was expected to graduate in 2016, and had [redacted] stayed enrolled in Kountze ISD, she was expected to graduate in 2015.

6. "In March of 2017, I became aware that [redacted] did not make the cheerleading squad. I became aware of this through communications from Ms. Gallaspy's mother shortly before she filed a grievance with Kountze ISD regarding Ms. Gallaspy's not making the squad for the 2017-2018 school year.

7. "Cheerleading tryouts for the 2017-2018 cheer squad were held on March 23, 2017. A total of 21 contestants participated in the tryouts. Ms. Gallaspy and two other participants were not selected for the squad.

8. "In order to ensure objectivity in the choosing of all cheerleaders, Kountze ISD hired three impartial judges from the Universal Cheerleaders Association in the Houston area to evaluate the students who tried-out for the cheerleading squad. This was the process which was followed in the March 23-24,

2017, cheerleading tryouts and decision-making as well as in prior years. I did not then, nor do I now, know the identity of the judges. Upon review of the pertinent records, Ms. Gallaspy was the contestant with the second lowest score total. Ms. Gallaspy's failure to make the cheerleading squad had nothing to do with this litigation, or any other complaints asserted by Ms. Gallaspy or on her behalf.

9. "Ms. Gallaspy attends Kountze High School.

10. "The 2017 Kountze High School regular season for its varsity football team is scheduled to end on November 10, 2017.

11. "Kountze High School's graduation for the 2017-2018 school year is scheduled for May 25, 2018.

12. "As Ms. Gallaspy is a high school senior, she is anticipated to graduate on May 25, 2018.

13. "In order to be eligible to be a cheerleader for Kountze ISD, a person must be an enrolled Kountze ISD student. If a person has graduated from high school, they are no longer eligible to be a Kountze ISD cheerleader.

14. "As I am not a lawyer, I did not understand that Ms. Gallaspy's not making the cheerleading squad during her senior year could be of any importance to this lawsuit. Consequently, the first time that I mentioned the information concerning Ms. Gallaspy's not being on the cheerleading squad to anyone connected with this lawsuit was on October 2, 2017."

FURTHER AFFIANT SAYETH NOT.

JOHN FERGUSON
Superintendent, Kountze ISD

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on the 24 day of October, 2017.

Notary in and for the State of Texas

JERI SMITH
Notary Public, State of Texas
Comm. Expires 02-13-2020
Notary ID 4502764

My Commission Expires: 2-13-20

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

AFFIDAVIT OF THOMAS P. BRANDT

State of Texas §
§
County of Dallas §

BEFORE ME, the undersigned authority, personally appeared Thomas P. Brandt, who being by me duly sworn, upon his oath deposed as follows:

1. "My name is Thomas P. Brandt. I am over twenty-one years of age, have never been convicted of a felony or a crime involving moral turpitude, and am fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

2. "I have served as lead counsel for Kountze ISD in the above-referenced matter throughout this litigation.

3. "On January 29, 2016, the Texas Supreme Court issued its decision in the above-referenced matter, remanding it to the Beaumont Court of Appeals.

4. "On September 28, 2017, the Court of Appeals issued its decision in the above-referenced matter.

5. "On October 2, 2017, during a telephone conference with Superintendent John Ferguson, I became aware, for the first time, that Ayiana Gallaspy did not make, and is not on, the cheerleading squad for the 2017-2018 school year."

FURTHER AFFIANT SAYETH NOT.

THOMAS P. BRANDT

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on the 30th day of October, 2017.

SHAWN MEADOWS
Notary Public, State of Texas
My Comm. Expires May 30, 2018

Notary in and for the State of Texas

My Commission Expires: 5/30/18

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

AFFIDAVIT OF SHELLIE HOFFMAN CROW

State of Texas §
§
County of Hardin §

BEFORE ME, the undersigned authority, personally appeared Shellie Hoffman Crow, who being by me duly sworn, upon her oath deposed as follows:

1. "My name is Shellie Crow. I am over twenty-one years of age, have never been convicted of a felony or a crime involving moral turpitude, and am fully competent to make this affidavit. I have personal knowledge of the facts stated herein and they are true and correct.

EXHIBIT C

2. "Walsh Gallegos Treviño Russo & Kyle, P.C. ("Walsh") serves as Kountze ISD's general counsel, and I serve as the principal attorney for Kountze ISD on general education matters. Neither Walsh, in general, nor I, specifically, serve as litigation counsel in the above-referenced litigation.

3. "In March of 2017, I found out that Ayiana Gallaspy did not make the cheerleading squad. I became aware of this in the regular course of my work with Kountze ISD because Ms. Gallaspy's mother, Shyloa Seaman, complained to the District about Ms. Gallaspy's not having made the squad. At the time, as I was not involved as counsel in the above-referenced litigation, I did not know that Ms. Seaman is a Plaintiff in the above-referenced litigation and that she is bringing suit on behalf of Ms. Gallaspy.

4. "I did not come to understand Ms. Seaman's and Ms. Gallaspy's association with the above-referenced litigation until a much later date.

5. "It was not until October 2, 2017, that I came to understand that Ms. Gallaspy's failure to make the cheerleading squad for the 2017-2018 year was an important fact to the litigation."

FURTHER AFFIANT SAYETH NOT.

SHELLIE HOFFMAN CROW

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on the 30 day of October, 2017.

VICKI LIMON
Notary Public, State of Texas
Expires FEBRUARY 16, 2020
I.D.# 130541467

Notary in and for the State of Texas

My Commission Expires: February 16, 2020

ACCEPTED
09-13-00251-CV
NINTH COURT OF APPEALS
BEAUMONT, TEXAS
10/30/2017 4:05 PM
CAROL ANNE HARLEY
CLERK

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
AT BEAUMONT

No. 09-13-00251-CV

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Appellant,

v.

COTI MATTHEWS, on behalf of her minor child,
MACY MATTHEWS, et al.,
Appellees.

On Appeal from the 356th Judicial District Court
of Hardin County, Texas
The Honorable Steven R. Thomas, Presiding
Trial Court Cause No. 53526

APPELLANT'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Pursuant to Texas Rule of Appellate Procedure ("TRAP") 49, and subject to its Motion to Dismiss, Appellant Kountze Independent School District ("KISD"), files this its Motion for Rehearing.

POINTS RELIED ON FOR REHEARING

Pursuant to TRAP 49.1, KISD provides the following points on which it relies for its request for rehearing:

1. The Court erred in failing to follow *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852 (5th Cir 2010), which is the only case on-point. The Court's failure to follow *Doe v. Silsbee* places Texas school districts in an untenable position in which run-through banners are considered government speech in federal courts and private speech in state courts.

2. The Court erred in its decision that the cheerleader's run-through banners are not government speech under *Walker v. Texas Div., Son of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) and *Santa Fe Indep. Sch. District v. Does*, 530 U.S. 290 (2000). The Court's opinion, that the run-through banners are neither government speech nor school sponsored speech, leads to absurd results.

3. The Court also erred by, essentially, holding that prior restraints and viewpoint discrimination are permissible.

I.
SUMMARY

This Court erred when it ignored *Doe v. Silsbee*, the only case that is on-point. The Court also erred in its interpretation of *Walker* and *Santa Fe*, which indicates that the banners are government speech. The Court's decision leads to absurd results and appears to permit unconstitutional prior restraints and viewpoint discrimination.

II.
ARGUMENTS & ANALYSIS

A. The Court's Decision Conflicts with the Only Decision On-Point.

In *Doe v. Silsbee*, the Fifth Circuit wrote:

> [i]n her capacity as a cheerleader, H.S. served as mouthpiece through which SISD could disseminate speech—namely support for its athletic teams. Insofar as the First Amendment does not require schools to promote particular student speech, SISD had no duty to promote H.S.'s message by allowing her to cheer or not cheer, as she saw fit."

Id. at 855. This Court expressly refused to follow that holding, writing that Federal Appendix "opinions are not binding precedent, although they may be cited as authority." See Fed. R. App. Pro. 32.1. The Court's decision, to ignore the *only* on-point case because it is found in the Federal Appendix, is inconsistent with this Court's practice.[1] Instead of citing to the one Fifth Circuit case which is directly

[1]Appellant's research revealed no less than nine cases since 2006 in which this court has cited approvingly cases which were reported in the Federal Appendix.

on-point, the Court considered cases of other federal circuits, none of which are directly on-point.

This Court's failure to follow *Doe v. Silsbee* places school districts in an untenable position in which the First Amendment has been interpreted in diametrically opposed ways in nearly identical circumstances. The First Amendment now means one thing in federal court, but it means the opposite if the suit is filed in state court. In federal court, the cheerleader's speech is government speech, in state court it is allegedly her own private speech.

B. Under *Walker*, the Run-Through Banners are Government Speech.

1. The First *Walker* Factor Shows that the Run-Through Banners are Government Speech.

The first *Walker* factor the Court examined in its decision is "whether government has historically used the medium of speech as conveying a message on the government's behalf." *Kountze Indep. Sch. Dist. v. Matthews*, 2017 WL 4319908, at *5 (Tex.App--Beaumont 2017 no pet. h.)(citing *Walker*, 135 S. Ct. at 2248-50. In *Walker*, the Supreme Court recognized that states have longed used license plates to convey messages. *Walker*, 135 S. Ct. at 2248. In *Walker*, the Court was deciding whether a system by which individuals created proposed license plates on their own time and then presented them to the government for approval was government speech or private speech. *Id.* at 2243-2246.

In its decision, this Court wrote that KISD's purpose for the run-through banners is "to energize the crowd and teams, in keeping with the traditional role of cheerleaders." *Matthews*, 2017 WL 4319908 at *12. This long-standing tradition created by KISD "generally required [the cheerleaders] to prepare and display the banners as part of their duties." *Id.* at *5. Unlike the creators of the specialty license plates in *Walker*, who created their plates on their own time, the banners were created by KISD cheerleaders, who are "an official school organization, at their school-sponsored, school-supervised practices on school property." *Id.* at *5. Unlike the license plates in *Walker* which, if approved, would be displayed on plates belonging to private vehicles wherever private citizens drove, the run-through banners were displayed on government property, at a time when a limited number of persons were allowed on the field by the government, and were held for specific government-mandated purposes. *Id.* at *5. As in *Walker*, in which government employees would review and approve license plate messages, this Court recognized that the cheerleader sponsors (government employees) "control the content and review and approve each of the banners," and that the sponsors actually approved "each one of the banners before it was displayed during the pregame ceremony." *Id.* at *5, 6.

Applying the facts as written in this Court's decision to *Walker*, this Court's finding that KISD has not historically used run-through banners to convey messages is a *non sequitur*.

2. The Second *Walker* Factor Shows that A Reasonable Observer Would Interpret the Banners as Government Speech.

The second *Walker* factor, "whether a reasonable observer would interpret the speech as conveying a message on the government's behalf," leads to the conclusion that the run-through banners are government speech.[2] *Matthews*, 2017 WL 4319908 at *6.

In *Walker*, the Court noted that Texas requires vehicle owners to display license plates, all of which are issued by the state, and the state restricts the messages on the plates, not permitting messages with which it does not wish to be associated. *Walker*, 135 S.Ct. at 2248-2249. For this reason, people interpret license plates as conveying a message on the state's behalf. *Id*. at 2249. The Supreme Court noted that having a message approved by the state for inclusion on a plate may be to demonstrate the state's approval of a message, as opposed to simply affixing a bumper sticker on a vehicle. *Id*. at 2249.

This Court noted that cheerleading is an official KISD student activity, and that, while cheerleading, cheerleaders are required to wear the approved KISD

[2] The Supreme Court described the second factor as follows: "Texas license plate designs 'are often closely identified in the public mind with the [State].'" *Walker*, 135 S. Ct. at 2248 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 472 (2009)).

uniforms bearing school colors and insignias. *Matthews*, 2017 WL 4319908 at *6. The Court further noted that the cheerleading takes place on a government field during a time when access is restricted by the government to persons related to the football game (government-sponsored event) and that the run-through banners are exhibited for a specified period of time. *Id.* at *6. As in *Walker*, KISD restricts the messages on the run-through banners by having its employees review and approve the messages, so as not to have a message presented with which it does not want to be associated. As in *Walker*, holding up run-through banners at the time, place, manner, and attending circumstances can only lead to the conclusion that a reasonable person would associate the banner with government speech. In light of the attendant circumstances, the banners are like the license plates in *Walker* and not like the bumper stickers.

This Court incorrectly concluded that the second *Walker* factor favors finding the banners to be private speech. Apparently, the Court reached this erroneous conclusion because it found significant that the cheerleaders purchase their uniforms. *Id.* at *6. This fact is irrelevant since the license plates discussed in *Walker* were also purchased. Moreover, the key question is not who purchased either the plates or the uniforms, but how the banners and license plates are reasonably viewed for purposes of who the speaker is. In light of the circumstances, both are government speech.

The Court also seems to indicate that, because the banners are displayed at high school football games, that high school students are capable of distinguishing between private and government speech. *Id.* at *6. But high school students are not the only students at the games. Young KISD students (5-12 years old) involved in youth football and cheerleading are actually on the field and run through the banners. See Exhibit "A," ¶4 to KISD's Motion to Dismiss. Moreover, as the Court noted, "Texas High School Friday Night Football is a tradition all of its own and is a great source of local community pride." It cannot seriously be contended that members of the Kountze community and of the visiting team, of all ages, are not present at the games.

The Court specifically noted that the run-through banners are hand-painted by the cheerleaders. *Matthews*, 2017 WL 4319908 at *6. This is of no legal consequence. The specialty license plates in *Walker* were designed by private parties and were still found to be government speech.

3. The Third *Walker* Factor Shows that KISD Retained Control and Final Authority Over the Content of the Message.

In *Walker*, the Court found that the license plates were government speech, in part, because Texas retained direct control over the messages conveyed by actually approving every specialty plate, thereby controlling the message conveyed, "'exercising final approval authority.'" *Walker*, 135 S.Ct. at 2249

(quoting *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 560-561 (2005)). This allowed Texas to choose how to present itself. *Id.* at 2249.

In the instant case, the Court found that, while the actual message on the banners was picked by cheerleaders, KISD retained ultimate approval authority for the message on the run-through banners *Matthews*, 2017 WL 4319908 at *5-7. This is similar to *Walker*, in which private parties would create plates and they would be displayed only if permitted to do so by the state. *Walker*, 135 S.Ct. at 2249 (quoting *Johanns*, 544 U.S. at 560-561).

This Court attempted to distinguish *Santa Fe*. KISD urges the Court to reconsider its conclusion as the *Santa Fe* case is instructive regarding the issues in the instant litigation. This Court wrote that the Supreme Court held in *Santa Fe* that "pregame student-led prayers were government speech because the prayers occurred 'on government property at government sponsored school-related events' and that the school district had not opened up its pregame ceremony to 'indiscriminate use' by the general public." *Matthews*, 2017 WL 4319908 at *7. This Court noted that, in *Santa Fe*, the school district policy approved of only one kind of message that would be deemed appropriate. *Id.* at *8. This Court then concluded that KISD did not require religious messages on the banners, but only messages that promote school spirit, and that the "text and content of the message,

aside from the prohibition on obscene materials, is, was, and always had been, left up to the cheerleaders." *Id.* at *8.

This Court's analysis of *Santa Fe* is incomplete. In *Santa Fe*, the school district did not determine what particular words the student-chaplain used, but required the invocation to be consistent with stated goals, including the promotion of sportsmanship, safety, and to create the proper environment for competition. *Santa Fe*, 530 U.S. at 306. This is similar to KISD allowing the cheerleaders to create the banners to promote sportsmanship and to energize the spectators and players. The Supreme Court found that, by specifying goals such as sportsmanship and the creation of an environment suitable to the football game, that the school district was narrowing what type of message would be appropriate, meaning that a message on foreign policy would be deemed inappropriate. *Id*. at 306. This is equally applicable to KISD and its cheerleaders.

Crucially, the Supreme Court found,

> The actual or perceived endorsement of the message…is established by factors beyond just the text of the policy. Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms

> sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."
>
> In this context the members of the listening audience ***must*** perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.

Id. at 307-308 (emphasis added). This reasoning applies with equal force to the run-through banners. Indeed, with almost no edits, a court could write those words about the present controversy, finding that the students "will unquestionably perceive the inevitable pregame prayer [or run-through banners] as stamped with her school's seal of approval." *Id*. at 308.

Santa Fe indicates that the run-through banners are government speech.[3]

C. The Court's Decision That the Banners are Private Speech Leads to Absurd Results.

This Court holds that the run-through banners are private, not government, speech even though they are held by official KISD cheerleaders carrying out

[3] The Court found *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) and *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) instructive, but the *Chandler* cases are inapplicable. In those cases, the court considered a broad injunction placed against private religious speech in public schools and held that private speech, whether religious or not, does not become government speech simply because it takes place in schools. Kountze ISD does not dispute that, but argues that the run-through banners, whether displaying a religious message or not, are government speech in light of the law and circumstances.

approved cheerleading functions for KISD, in KISD uniforms at a KISD-sponsored sporting event on a KISD field for the purpose of supporting the KISD football team. This holding leads to absurd results.

For example, under the Court's holding the cheerleaders would have the right to display a Confederate Flag unless KISD could meet its burden of showing either a history of racial disruptions, or "that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption." *A M v. Cash*, 585 F.3d 214, 224 (5th Cir. 2009) (citations omitted). Without any historical record of disruption, or similarly robust data to support the fear of substantial disruption, school administrators may not prohibit the display of the Confederate Flag or any other racially-divisive symbol. *A M*, 585 F.3d at 223-224 (citing *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 543-44 (6th Cir. 2001) (other citations omitted)). In *Castorina*, the Sixth Circuit held that the display of the Confederate Flag was indistinguishable from the display of black armbands vindicated in *Tinker*. Castorina, 246 F.3d at 542.

The cheerleaders would have a right to display images of drug and alcohol abuse as part of a public accusation that any public person (such as a coach) is a drug addict. *See Guiles v. Marineau*, 461 F.3d 320, 330-31 (2d Cir. 2006) (declaring unconstitutional a school policy requiring a student to cover images of

cocaine and alcohol on a t-shirt accusing the President of drug and alcohol addiction).

The cheerleaders would have a right to display gang-related symbols *unless* the School could present "evidence of a potentially disruptive gang presence." *Brown v. Cabell County Bd. of Educ.*, 714 F. Supp 2d 587, 593 (S.D. W.Va. 2010).

The cheerleaders would have a right to display messages critical of the uniforms they are required to wear, if not also add a protest arm-band to their uniform. *Lowry v. Watson Chapel School District*, 540 F.3d 752, 758-59 (8th Cir. 2008).

The cheerleaders would have a right to display the message "I ♥ boobies!" or any other speech that is "ambiguously lewd" to the reasonable observer if such speech can "plausibly be interpreted as commenting on a political or social issue." *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 308 (3d Cir. 2013) (en banc).

The cheerleaders might even have a right to display a message with the "n-word" on it. *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 676 (2d Cir. 1995) (concurring opinion).

The Court's decision could lead to the display of messages, which would have no rational connection to the context of a football game and which KISD would be powerless to stop. The Court should grant this Motion and withdraw its opinion.

D. The Court's Decision Should be Withdrawn Because it Permits Unconstitutional Prior Restraints and Viewpoint Discrimination.

1. The Court's Decision Permits Unconstitutional Prior Restraints.

This Court wrote that KISD could properly prevent the cheerleaders from displaying run-through banners that would "'materially and substantially interfere with the requirements of appropriate discipline in the operation of a school,' or 'impinge upon the rights of other students." *Matthews*, 2017 WL 4319908, at *13 (citing *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)). This Court noted that the *Tinker* standard did not extend to "'lewd, indecent, or offensive' speech; school-sponsored speech; and speech 'that a reasonable observer would interpret as advocating illegal drug use.'" *Matthews*, 2017 WL 4319908, at *13 (quoting *Morgan v. Swanson*, 659 F.3d 359, 374 (5th Cir. 2011)).

This Court also found that KISD controlled both the message and the purpose of the banners:

- KISD employees "have the right to control the content and review and approve each of the banners before it is displayed; (p. 16)"
- the purpose of the banners was "'to get the crowd and the football players excited;'" (p. 17); "the purpose is simply to energize the crowd and teams, in keeping with the traditional role of cheerleaders; (p. 37)"
- "The purpose of the run-through banners is generally to encourage athletic excellence, good sportsmanship, and school spirit; (p. 18)"
- The cheerleader sponsors exercise supervisory control over the message on the run-through banners "to ensure that the messages do

not violate school policy" FNA (LOCAL) and FMA (LEGAL); (p. 18)

- The sponsors reviewed and approved each banner before the banner was displayed; (p. 18, 21)
- The cheerleaders were "expected to exercise good sense in the preparation of the banners; (p. 21)"
- The sponsors would not permit "'inappropriate banners', which would include, for example banners that demonstrated poor sportsmanship or included racial slurs, as set forth below;" (p. 22)
- The displaying of the run-through banner is "conducted under the supervision of school officials; (p. 37)"

Id. at 5-7, 12, n. 5. In other words, KISD would review and approve the banners to ensure that they complied with school policy and were in keeping the purpose of the banners – "to encourage athletic excellence, good sportsmanship, and school spirit."

Because the Court held that the cheerleader's speech was their private speech and that the school district had some control over it, the Court has necessarily permitted KISD to engage in unconstitutional prior restraints of speech beyond the scope previously recognized by the Supreme Court.

"The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'" *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). This Court's decision stands for the proposition that the cheerleader's alleged private speech on the banners can be reviewed and that

their proposed speech can be silenced if they did not use "'good sense'", if they "'demonstrated poor sportsmanship'", or they "'included racial slurs.'" This prior restraint is supposedly justified by the Court because it is in an effort to avoid "'inappropriate banners.'" But the effort to avoid "'inappropriate banners'" is not a recognized limitation on the constitutional standards of *Tinker* or its progeny. The Court has failed to articulate a constitutional basis for the silencing of private student speech based on the vague standard of "inappropriateness."

This Court held that KISD personnel could, consistent with the cheerleader's free speech rights, avoid "'inappropriate banners'" by ensuring that the banners did not violate KISD policies FNA (LOCAL) and FMA (LEGAL) which the Court characterized as

> provid[ing] that any student messages may not: be obscene, vulgar, offensively lewd, or indecent; likely result in a material and substantial interference with school activities or the rights of others, promote illegal drug use; violate the intellectual property rights, privacy rights, or other rights of another person; contain defamatory statements about public figures or others; or advocate imminent lawless action or are likely to incite or produce such action.

Matthews, 2017 WL 4319908, at *n. 5. Though some of these categories of student speech are permissibly silenced under *Tinker* and its progeny, some of the listed categories are not. The Court's decision would permit the silencing of

student speech for reasons beyond those which have been previously recognized as constitutionally permissible.

KISD is not suggesting that its policies constitute a prior restraint on student speech, but simply that, as characterized by this Court in the context of this case, this Court's decision, if left intact, would improperly authorize KISD to engage in prior restraints on speech.[4]

2. The Court's Decision Permits Unconstitutional Viewpoint Discrimination.

Viewpoint discrimination is unconstitutional even if the Court's opinion is correct that the run-through banners are a non-public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-393 (1993). Under the Texas and Federal Constitutions, "[t]o be viewpoint-neutral, a regulation must not be based on the message's ideology." *Tex. Dept. of Transp. v. Barber*, 111 S.W.3d 86, 93 (Tex. 2003) (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

[4] Kountze ISD denies that its FNA (LOCAL) policy applies. FNA (LOCAL) does not apply for at least the following reasons: (1) the run-through banners are approved in advance or otherwise supervised by school officials; (2) the run-through banners are subject to the supervision of, among others, the High School Cheerleader Squad sponsors, the Athletic Director, the Campus Principal and the Superintendent; and (3) preparation of the run-through banners has traditionally been entrusted to the High School Cheerleader Squad, an organized extracurricular activity of Kountze ISD. FMA (LEGAL), by its terms, only would apply to the banners if the Court were to hold that the banners constitute school-sponsored speech, which this Court has rejected.

This Court's decision makes clear that the purpose of the run-through banners was to energize the crowd and the players and to promote sportsmanship. *Matthews*, 2017 WL 4319908, at * 6, 12. As a result, banners which do not energize the crowd or display good sportsmanship, as determined by KISD employees, would arguably not be allowed. This Court's decision suggests that KISD is permitted to engage in unconstitutional viewpoint discrimination by allowing state actors to discriminate on viewpoints expressed by cheerleaders. If it were true that the cheerleader's speech was private speech, then there would be no legal justification for requiring the cheerleaders to cheer at all, to cheer for KISD's team or not to cheer for the opposition.

In *Matal v. Tam*, 137 S.Ct. 1744 (2017), in a concurring opinion that echoed the sentiments of a plurality of the Supreme Court, Justice Kennedy wrote:

> A subject that is first defined by content and then regulated or censored by mandating only one sort of comment is not viewpoint neutral. To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.…The logic of the Government's rule is that a law would be viewpoint neutral even if it provided that public officials could be praised but not condemned. The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.

Id. at 1766.

This Court's decision holds that allegedly private cheerleader speech can be silenced if it does not express the viewpoints of good sportsmanship, if it uses racial slurs, with no evidence of an actual or a probable material and substantial disruption of school operations, or if it in anyway presents a viewpoint with which KISD disagrees. KISD is not suggesting that it engages in viewpoint discrimination, or that it intends to do so. Unfortunately, this Court's opinion implies that it is permissible for school districts to engage in viewpoint discrimination.

III.
CONCLUSION

The Court should grant KISD's Motion for Rehearing and withdraw its decision.

Respectfully submitted,

By: /s/ Thomas P. Brandt
THOMAS P. BRANDT
Texas Bar No. 02883500
tbrandt@fhmbk.com
FRANCISCO J. VALENZUELA
Texas Bar No. 24056464
fvalenzuela@fhmbk.com
FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.
Two Energy Square
4849 Greenville Avenue, Suite 1300
Dallas, Texas 75206
(214) 369-1300 (office)
(214) 987-9649 (fax)

ATTORNEYS FOR APPELLANT KOUNTZE INDEPENDENT SCHOOL DISTRICT

CERTIFICATE OF CONFERENCE

I hereby certify that on October 29th and 30th, 2017, I attempted to confer with lead counsel for Appellees, Mr. James Ho, regarding this motion. On October 29, 2017 at 2:07 p.m. I sent Mr. Ho an email regarding this motion. On October 30, 2017 at approximately 9:35 a.m. I left a voice mail with Mr. Ho regarding this motion. On October 30, 2017 at 11:34 a.m. Mr. Ho responded to my email. His email response stated "I'm out of town today for client meetings, so I'm afraid I won't be able to respond to your Sunday email until after today. We can just plan to report our positon to you and to the Court once we're ready to do so, under the regular deadlines." This motion is submitted to the Court for its consideration.

/s/ Thomas P. Brandt
THOMAS P. BRANDT

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Texas Rule of Appellate Procedure

9.4(i)(2)(D) because it contains 4,288 words, excluding any parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Thomas P. Brandt
THOMAS P. BRANDT

CERTIFICATE OF SERVICE

I, Thomas P. Brandt, hereby certify that a true and correct copy of the foregoing instrument was served upon the parties listed below by facsimile, messenger, regular U.S. Mail, certified mail, return receipt requested and/or electronic service in accordance with the Texas Rules of Appellate Procedure on this the 30th day of October, 2017.

James C. Ho (lead counsel) — *Via the Court's EFM*
Bradley G. Hubbard — *Via Facsimile: 214-571-2917*
GIBSON, DUNN & CRUTCHER, LLP
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201-6912

David W. Starnes
390 Park, Suite 700
Beaumont, Texas 77701

Kelly J. Shackelford
Hiram S. Sasser, III
LIBERTY INSTITUTE
2001 W. Plano Pkwy, Suite 1600
Plano, Texas 75075

Counsel for Petitioners

Ken Paxton — *Via the Court's EFM and/or*
Attorney General of Texas — *Via Facsimile: 512-474-2697*

Michael Neill
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548

Counsel for Intervenor the State of Texas

Charlotte Cover — *Via the Court's EFM*
Gibbs & Associates Law Firm
5700 Gateway Boulevard, Ste 400
Mason, OH 45040

Counsel for Intervenors
Randall Jennings, Missy Jennings,
A.J., and W.J.

Rebecca Robertson — *Via the Court's EFM*
ACLU of Texas
1500 McGowen Street, Ste 250
Houston, TX 77004

Counsel for Amici Curiae ACLU,
ACLU of Texas, et. al.

Sean D. Jordan — *Via the Court's EFM*
Jackson Walker, L.L.P.
100 Congress Avenue, Ste 1100
Austin, TX 78701

Counsel for Amici Curiae U.S.
Senators Cruz and Cornyn

Robert M. Cohan — *Via the Court's EFM*
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, TX 75202

Counsel for Amici Curiae

American Jewish Committee

/s/ Thomas P. Brandt
THOMAS P. BRANDT

27310/557618