

CAUSE NO. 53526

COTI MATTHEWS, on behalf of her
minor child,
MACY MATTHEWS;
RACHEL DEAN, on behalf of her
minor child,
REAGAN DEAN;
CATHIE FLOWER, on behalf of her
minor child,
KENNEDY FLOWER;
ELIZABETH O. HADNOT, on behalf of
her minor child,
T'MIA HADNOT;
KIM HAYNES, on behalf of her minor
child,
ADRIANNA HAYNES;
RHONDA KEMP, on behalf of her
minor child,
MORGAN DEROUN;
CHARLES & CHRISTY LAWRENCE,
on behalf of their minor child,
ASHTON LAWRENCE;
PATTY LEDOUX, on behalf of her
minor child,
KAYLEE LEDOUX;
TESSANDRA MCDANIEL, on behalf of
her minor child,
TEYONCE MCDANIEL;
TONYA MOFFETT, on behalf of her
minor child,
KIEARA MOFFETT;
BRETT PAGE, on behalf of his minor
child,
CASSANDRA PAGE;
BETH RICHARDSON, on behalf of her
minor child,
REBEKAH RICHARDSON;
SHYLOA SEAMAN, on behalf of her
minor child,
AYIANA GALLASPY;
MISTY SHORT, on behalf of her minor
child,
SAVANNAH SHORT;
PATRICE SONNIER, individually and
on behalf of her minor child,

IN THE DISTRICT COURT

HARDIN COUNTY, TEXAS

365th Judicial District

NAHISSAA BILAL,

Plaintiffs

v.

KOUNTZE INDEPENDENT SCHOOL
DISTRICT and KEVIN WELDON, in
his individual and official capacity as
Superintendent,

Defendants.

**MOTION OF THE FREEDOM FROM RELIGION FOUNDATION, INC. FOR
LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

The Freedom From Religion Foundation, Inc. (“FFRF”) respectfully requests that this Court grant leave to file an amicus curiae brief in this matter for the reasons set forth herein. In support of its Motion, FFRF states as follows:

1. FFRF is a non-profit organization with approximately 18,500 members throughout the United States, including members in Hardin County, Texas.
2. FFRF’s primary purposes are to protect the constitutional principle of separation between state and church and to represent the rights and views of nontheists and freethinkers. FFRF works to achieve these purposes by advocating for and representing the views of its membership in Establishment Clause claims.
3. FFRF contacted Kountze Independent School District on September 17, 2012, regarding the religious banners. After FFRF’s letter, Defendants denied Plaintiffs permission to display religious messages on the run-through banners.
4. FFRF therefore seeks leave to file an amicus curiae brief in an effort to

assist the Court in its consideration of the questions presented in the instant lawsuit. A copy of the proposed brief is attached hereto.

WHEREFORE, the Freedom From Religion Foundation, Inc. respectfully requests that this Honorable Court grant its Motion and allow it to file the amicus curiae brief attached hereto.

Respectfully submitted,

October 3, 2012

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Foundation, Inc.

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**BRIEF OF AMICUS CURIAE
FREEDOM FROM RELIGION FOUNDATION, INC.**

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Introduction

Amicus curiae the Freedom From Religion Foundation, Inc. (“FFRF”) is a non-profit organization whose primary purposes are to protect the constitutional principle of separation between state and church and to represent the rights and views of nontheists and freethinkers.¹ FFRF works to achieve these purposes by advocating for and representing the views of its membership in Establishment Clause cases. FFRF has more than 18,500 members across the country including nearly 900 in Texas.

Plaintiffs in this case are cheerleaders for the Kountze High School football team, a part of the Kountze Independent School District (“KISD” or “District”). For decades the cheerleaders have created run-through banners which the football team charges through at the beginning of each game. This year the cheerleaders began painting religious messages on these banners. Examples of such banners include: “But thanks be to God, which gives us Victory through our Lord Jesus Christ.” 1 Cor. 15:57; “A lion which is strongest among beasts, and turneth not away for any.” Proverbs 30:30; “I can do all things through Christ who strengthens me.” Philippians 4:13; “I press on toward the goal to win the prize for which God has called me in Christ Jesus.” Philippians 3:14. It appears that these banners are in furtherance of reported devotionals given by football coaches prior to each game. FFRF received a complaint from a local resident who attended a high school football game, saw and was offended by the banners, and sent a letter to the superintendent objecting to the practice on Establishment Clause grounds.

The Defendants properly denied Plaintiffs permission to continue displaying

¹ FFRF has not and will not be paid any fee for this *amicus* brief. Tex. R. App. P. 11(c) Neither of the parties contributed to writing this brief.

religious messages on the run-through banners. Among other claims, Plaintiffs now argue that this denial violates their right to free speech as guaranteed by the Texas Constitution. FFRF submits this amicus brief in order to discuss guiding precedent on the Free Speech Clause of the United States Constitution. Plaintiffs rely on federal free speech precedent. Plaintiffs also fail to cite any Texas case that treats article 1 section 8 of the Constitution of Texas differently than the First Amendment in this particular context. FFRF contends that the speech in question is government speech or school-sponsored speech and the Defendants have the right to regulate the content.

Summary of Argument

Plaintiffs have failed to establish that they have the probable right to recovery and will suffer probable irreparable injury. The speech in question is government speech or, at a minimum, school-sponsored speech. Thus, the Plaintiffs do not have a right to circumvent, and will not be injured by, the school's control over the cheerleaders' display of on-field run-through banners at school football games. The request for a temporary injunction should be denied.

Argument

A. Plaintiffs are unable to demonstrate a probable right to the relief sought and probable injury.

“A temporary injunction is an extraordinary remedy and does not issue as a matter of right.” *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002) *citing Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993). “To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the Defendants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Id.*

Resolution of the case on the merits is not before the court; “the legal issues before the trial court at a temporary injunction hearing are whether the applicant showed a probability of success and irreparable injury.” *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 882 (Tex. App. 2003). The party seeking an injunction has the burden of proving a probability of success. *See Camp v. Shannon*, 348 S.W.2d 517, 519 (Tex. 1961)(“An applicant for a temporary injunction seeks extraordinary equitable relief. He seeks to immobilize the defendant from a course of conduct which it may well be his legal right to pursue... If he cannot or does not discharge his burden he is not entitled to extraordinary relief.”).

The Plaintiffs are unable to establish that they have a probable right to the relief sought or that they will suffer irreparable injury. Given the context of the messages, which involves 30’ x 10’ run-through banners displayed on the field by cheerleaders in uniform, the Plaintiffs have not met their burden. They are not entitled to any relief and will not be injured in any way because they do not have a free speech right to display the run-through banner. *See Phillips v. Oxford Separate Municipal School District*, 314 F.Supp.2d 643 (N.D. Miss. 2003)(Denying student’s request for a preliminary injunction in a challenge to a school’s refusal to allow the display of a student election campaign poster with religious imagery).

Texas courts routinely deny injunctive relief where a plaintiff does not have a right to relief or has not suffered recognizable legal harm. *See Argyle Indep. Sch. Dist. ex rel. Bd. of Trustees v. Wolf*, 234 S.W.3d 229 (Tex. App. 2007)(Vacated trial court’s temporary injunction finding that school parents failed to show probable right to recover on claims that they had a right to attend district schools free of charge); *Friena Indep.*

Sch. Dist. v. King, 15 S.W.3d 653 (Tex. App. 2000)(Reversing grant of preliminary injunction, in part, based on finding that high school baseball player’s claim of harm was not established by the evidence).

The extraordinary nature of the relief sought is plain from Plaintiffs’ proposed order. It states that KISD must “cease and desist from preventing the cheerleaders of Kountze Independent School District from displaying banners or run-throughs at sporting events and/or censoring the sentiments expressed thereon.” This broad language severely limits the ability of school administrators to lawfully regulate school activities. KISD is under no obligation to allow anyone to display run-through banners as a part of the festivities at sporting events. Just as it would be inappropriate for cheerleaders in school uniforms at official school functions to sport banners saying, ‘Praise Allah!’ or quoting Koranic verses, so is it inappropriate for them to misuse the podium the school confers on them and their school-endorsed status to promote Christianity and bible verses as part of public school football games. If the majority of the cheerleaders were atheists, would a court support their “right” to hold up a banner insulting Christianity or all believers? The District has every right to simply prohibit *all* run-through and on-field banners.

B. The banners are government speech, which most comport with the Establishment Clause, not private speech. Thus, the cheerleaders do not have a free speech right to display the banners.

The banners are government speech because they are displayed in a context implying school endorsement and because the school has effective control over the messages. As government speech, the Plaintiffs have no First Amendment right or injury, “the Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 1131, 172 L. Ed. 2d 853 (2009).

When speech occurs in a context that would lead an objective observer to believe a public school is endorsing the speech, it “*is not properly characterized as ‘private’ speech.*” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (emphasis added). Even genuine student-led, student-initiated speech is government speech if a reasonable observer would perceive it as such. *Santa Fe*, 530 U.S. at 310. The *Santa Fe* Court held that the religious speech was government speech because of the context in which the message was delivered: “*The delivery of such a message — over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as ‘private’ speech.*” *Id.* (emphasis added).

If, “[i]n 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,” then the message is government speech. *Id.* at 308.

The context in this case is nearly identical to *Santa Fe*. Both cases involve student-led, student-initiated religious messages delivered at the pregame ceremony of a Texas public school football game. In *Santa Fe*, the context would lead an “objective student” to “unquestionably perceive” the message “as stamped with her school’s seal of approval.” *Id.* If anything, the context of the Kountze messages is *more* indicative of government speech than *Santa Fe*.

As in *Santa Fe*, the Kountze “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." *Id.* at 307 (emphasis added). In Kountze, the school football team runs through a huge, inflated helmet and tunnel bearing the school name and school mascot. The biblical banners are held at the end of this tunnel.

Like *Santa Fe*, the Kountz message is "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. *See also id.* at 302 (the religious messages were "authorized by a government policy and take place on government property at government-sponsored school-related events.") The District owns the field and sidelines and presumably controls access to who may be on the field during school-sponsored football games. In *Summum*, the ownership of the property was dispositive: "property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely—and reasonably—interpret them as conveying some message on the property owner's behalf. *In this context, there is little chance that observers will fail to appreciate the identity of the speaker.*" *Summum*, 555 U.S. at 471 (emphasis added).

Control of the message is sufficient to turn private speech into government speech. *Summum* makes it clear that the property owners' ability to exclude other messages is equivalent to control. *Summum*, 555 U.S. at 471 ("property owners typically do not permit the construction of such monuments on their land, persons who observe...monuments routinely—and reasonably—interpret them as conveying some

message on the property owner's behalf"). Control was also important in *Santa Fe*: "the message is broadcast over the school's public address system, which remains subject to the control of school officials." *Santa Fe*, 530 U.S. at 307. The Kountze messages are (like *Summum*) displayed on public property -- the school athletic field. School officials control access to the field. It is fenced off to exclude all but school representatives and is likely patrolled by school officials and possibly police. The school allows the cheerleading squad to exist in order to represent school spirit. The school authorizes the cheerleading team to display messages on the field. The school grants the cheerleaders a unique podium, and a unique place on the field, directing audience attention to the cheerleaders. The school controls who delivers the message. *See id.* at 306 ("school selection of speaker" shows school control). Other students are not granted access to display 30 foot banners on the school's field as part of the football game, an official school function.

The District controls everything about this message including: (1) where the message is presented; (2) who presents the message; (3) what the students holding the message are wearing; (4) the property where the message is delivered; and (5) the event at which the message is presented. The cheerleading squad represents and speaks for all members of that team, the football team, and the student body.

Like the monument in *Summum* and the religious messages in *Santa Fe*, the Kountze banners are government speech. "[R]egardless of the listener's support for, or objection to, the message, an objective [] High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." *Id.* at 308. The religious banners displayed at each home game are no different than the

school offering a student a microphone to deliver a prayer as in *Santa Fe*. Here, the school is providing a “podium” for the cheerleaders to proselytize. This inevitably leads a reasonable observer to conclude that Kountze Independent School District endorses the religious doctrine the banners espouse, as witnessed by the complaint FFRF received from one of the audience members who observed this religious ritual. Superintendent Weldon’s actions *correct* this blatant violation of the Establishment Clause.

The Plaintiffs have no right to free speech in this context, as their speech is government speech, and therefore they suffer no injury and have no probability of success on the merits. The injunction should be denied. If the cheerleaders wish to exercise their Free Speech and Free Exercise rights, they are free to do so as private citizens and not in their capacity as school representatives.

C. Even if this court deems the banners do not constitute government speech, they unquestionably constitute school-sponsored speech.

While “students or teachers [do not] 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, 89 S. Ct. 733 (1969), “the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.” *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 3164 (1986). Since the *Tinker* decision, the Supreme Court and other lower federal courts have repeatedly limited the constitutional rights of students in public schools.

The United States Supreme Court in *Hazelwood* provided a third option to analyze student speech cases, known as “school-sponsored” speech. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988). This third category has been designed to analyze when student speech “may fairly be characterized as part of the

school curriculum, so long as it is supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Pounds v. Katy Indep. Sch. Dist.*, 730 F.Supp.2d 636, 643 (S.D. Tex 2010) (quoting *Hazelwood*, 484 U.S. at 271, 108 S. Ct. 562). Schools are allowed to regulate the content of student speech so long as its actions are “reasonably related to legitimate pedagogical concerns” or so that “the views of the individual speaker are not erroneously attributed to the school.” *Id.* See also *Hazelwood*, 484 U.S. at 271. “The universe of legitimate pedagogical concerns is by no means confined to the academic ...[for it includes] discipline, courtesy, and respect for authority.” *Poling*, 872 F.2d at 762. Many cases have applied a *Hazelwood* analysis to activities outside the traditional classroom where, so long as the imprimatur test is satisfied, the pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment.’ ” *Fleming v. Jefferson Cty. Sch. Dist. R-1*, 298 F.3d 918, 923-24 (10th Cir. 2002).

As reiterated in a recent Fifth Circuit decision, “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.’” *Morgan v. Swanson*, 659 F.3d 359, 376 (5th Cir. 2011). In order to make this determination one must consider “(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.” *Id.* These elements are discussed below.

The facts presented undoubtedly fulfill the elements set forth to qualify the Christian banners as school-sponsored speech. Courts have continuously held that athletic teams and athletic events are school-sponsored. *Santa Fe*, 530 U.S. at 307 (Football game is a regularly scheduled, school-sponsored activity); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995)(Basketball “games are school-sponsored, controlled events that do not provide any sort of open forum for student expression.”); *Seidman v. Paradise Valley Unified Sch. Dist.*, 327 F.Supp.2d 1098,1107 (D. Ariz 2004) (*Hazelwood* test also applies to school-sponsored athletic programs despite the fact that they are not a part of the course curriculum).

The speech in question takes place at KISD sponsored football games, prior to the start of the game. The cheerleaders are dressed in their Kountze High School uniforms, set up on the Kountze High School football field, displaying 30’ x 10’ banners in the home end zone. Images and media reports of these banners indicate that these banners are undeniably visible to all audience members in attendance. The entire purpose of these banners is to draw attention to the football team as they enter the field before the start of the game. The cheerleaders intentionally choose banners of this size for the purpose of ensuring they are seen by all audience members. Plaintiffs’ factual allegations indicate the banners are created during summer months and/or at various other practice times throughout the year. (Pet. ¶ 5.7) The school district’s control over the content of banners on the football field is reasonable given their proselytizing and exclusionary message. The banners with biblical quotations are an affront to non-Christian and non-religious students, faculty, and members of the school community. Even supporters of the banners have acknowledged to national news media that they could be upsetting to

Jewish students. The school district is within its rights to have its cheerleaders display appropriate messages on the field at football games. Such limitations are reasonable given the schools legitimate pedagogical concerns in creating an inclusive school environment.

Students on the cheerleading squad and the football team may be offended by the exclusionary message because they are not Christian or religious. Given the elite status that football has in the State of Texas, what dissenter on the squad or team would dare speak out? Allowing the religious messages on these banners forces those students to violate their rights of conscience, or else to “forfeit his ...rights and benefits at the price of resisting conformance to state-sponsored religious practice.” *Lee v. Weisman*, 505 U.S. 577, 596, 112 S. Ct. 2649, 2660, 120 L. Ed. 2d 467 (1992) This “[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe*, 530 U.S. at 309-10

Cheerleading for the school is undeniably a school-sponsored activity and the banners displayed by the cheerleaders take place during a school-sponsored event. The recipients of the message are football players, band members, fellow students of all ages, parents and community members in attendance. Extracurricular, school-sponsored activities are offered for the purposes of broadening students’ knowledge and skills so that they become an involved participant in their community and society. The knowledge and skills gained from being a cheerleader go beyond the cheers themselves. It teaches

them how to work with others, how to develop relationships, and most importantly, how to represent their school in a respectful manner.

Plaintiffs' reliance on *Shultz v. Medina Valley* is misplaced. No. 11-50486 (5th Cir. June 3, 2011). First, in a one paragraph decision, the court simply determined that based on the "incomplete record" and at the "preliminary injunction" stage, the Plaintiffs had not shown that they would likely prevail on the merits. *Id.* Subsequently, the district court entered a consent decree. *Schultz v. Medina Valley Indep. Sch. Dist.*, CIV.A. SA-11-CA-422, 2012 WL 517518 (W.D. Tex. Feb. 9, 2012). Second, *Medina Valley* is distinguishable given the school policies and the speech involved. Here, the school district has not affirmatively sought to create a limited public forum for student speakers to hold up run-through banners. The 30-foot banners are displayed only by cheerleaders. The limited access, type of expression, and group display, are unlike individual student comments offered by a graduation speaker.

The religious banners displayed by the cheerleaders at every home game constitute school-sponsored speech and the District was well within its rights to regulate that speech to avoid a perception of endorsement of a religious doctrine.

Conclusion

For these reasons, amicus FFRF respectfully submits that Plaintiffs' speech, if allowed on the football field by the cheerleaders by Kountze Independent School District, would constitute an illegal endorsement of religion and would therefore violate the Establishment Clause of the First Amendment to the United States Constitution. Plaintiff's request for an injunction must be denied.

Respectfully submitted,

October 3, 2012

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CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of the above instrument has been:

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_____ Mailed by U.S. Certified Mail, return receipt requested, by depositing this document in a postpaid, properly addressed wrapper, in an official depository in the custody and control of the United States Postal Office,

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_____ Federal Expressed

_____ Facsimile to all attorneys of record.

Randall L. Kallinen