

MATTHEWS V. KOUNTZE INDEPENDENT SCHOOL DISTRICT:
AN OUTLIER IN A SEA OF ESTABLISHMENT CLAUSE OUTLIERS

Joe Dryden*

INTRODUCTION

The balance between the Establishment and Free Exercise Clauses of the First Amendment, and student expression rights in the K-12 public school system sits atop a moving fulcrum, the position of which is fluctuating as a function of the predilections of the parties and judges involved.¹ The result is a series of contradictory outcomes which Justice Thomas described as “incapable of coherent explanation.”² A case involving the display of religious messages on large run-through banners (RTBs) by cheerleaders as part of a high school football game in Kountze, Texas, is a perfect illustration.³ School officials are expected to synthesize the competing tension between the expression and Free Exercise rights of students, the limitations of the Establishment Clause, and the need for some control over the messages disseminated at school-sponsored events.

A case that began as an alleged Establishment Clause violation⁴ evolved into an analysis regarding the balance between the private speech rights of students versus the authority of school officials to control the content of messages communicated at school-sponsored events.⁵ In the end, several Supreme Court holdings were narrowly distinguished to fashion a confounding decision that allows student groups, who represent the school, to exercise their private speech rights at school-sponsored events with inadequate editorial control reserved for school officials. If even possible, *Kountze Independent*

¹ See *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 13 (2011) (Thomas, J., dissenting from denial of certiorari).

² *Id.* at 22. See also Mark Strasser, *Religion in the Schools: On Prayer, Neutrality, and Sectarian Perspectives*, 42 AKRON L. REV. 185, 186 (2009).

³ See *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 Tex. App. LEXIS 9165, at *1 (Apr. 1, 2016).

⁴ See *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2012 WL 4834948 (Tex. Dist. Sep. 20, 2012).

⁵ See *Kountze*, 2017 Tex. App. LEXIS 9165, at *4-5.

School District v. Matthews represents an anomaly amid a sea of Establishment Clause outliers.

Section I of this Article describes the facts and procedural history of *Kountze Independent School District v. Matthews*. Section II analyzes the rationale behind the holding of the Court of Appeals for the Ninth District in Texas, and it argues that the court misinterpreted and misapplied First Amendment U.S. Supreme Court jurisprudence. Specifically, the court misapplied the government speech test articulated in *Pleasant Grove City v. Summum*,⁶ the school-sponsored speech exception articulated in *Hazelwood v. Kuhlmeier*,⁷ the protection for student-initiated non-curricular student groups in *Board of Education of Westside Community Schools v. Mergens*,⁸ and the prohibition against the dissemination of religious messages as part of a public high school football game in *Santa Fe Independent School District v. Doe*.⁹ Section III examines the constitutionality of the Religious Viewpoint Anti-Discrimination Act and the contradiction between its mandates and the holding of the Texas Court of Appeals which characterized the Kountze High School football field as a closed forum.¹⁰

I. BACKGROUND

A. *Statement of the Facts*

According to the 2010 census, Kountze, Texas, is home to 2,123 residents, of which 70% are Caucasian, 23% African-American, 5% Hispanic, and 1% Asian, with the remaining 1% being a combination of Native Americans, Filipinos, and Asian Indians.¹¹ Kountze, the county seat of Hardin County, is located near the Big Thicket National Preserve, approximately 50 miles west of the Texas-Louisiana Border and 50 miles north of the Gulf of Mexico.¹² Kountze's

⁶ *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009).

⁷ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

⁸ *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 252 (1990).

⁹ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

¹⁰ *Kountze*, 2017 Tex. App. LEXIS, at *41.

¹¹ *Kountze, Texas Population: Census 2010*, CENSUS VIEWER, <http://censusviewer.com/city/TX/Kountze>.

¹² Driving Directions from Kountze, TX, to LA and Gulf of Mex., GOOGLE MAPS, <http://maps.google.com> To calculate the driving time, follow the "Directions" hyperlink; then search starting point field for "Kountze, TX" and search destination field for "Texas-Louisiana Border;" then search destination field for "High Island, TX."

primary industries are construction, healthcare, retail sales, manufacturing and administrative services, and hospitality.¹³ The community is exceptionally religious with almost 100 churches located in or near Kountze.¹⁴

In 2017, Kountze Independent School District (KISD) served 1,166 students, 78.6% of the students were White, 12.2% were African American, 5.9% were Hispanic, 2.1% were more than one race, and the remaining 1.1% were Asian, American Indian, or Pacific Islander.¹⁵ The KISD Texas Academic Performance Report (TAPR) shows that the district met state accountability standards despite scoring slightly lower than the state averages in virtually every grade and subject.¹⁶ Yet, graduation rates in KISD exceeded state averages.¹⁷

For many years, the Kountze High School cheerleading squad prepared RTBs that they displayed before the start of home football games.¹⁸ Players would run through the RTBs to a cheering crowd of students, parents, and guests as part of a school-sponsored extra-curricular event.¹⁹ Although the cheerleading squad created the RTBs, the cheerleading sponsors, who were non-faculty school employees, reviewed and approved the messages displayed on them.²⁰ Before the beginning of the 2012-2013 school year, the cheerleading squad decided to begin including religious messages, such as “I press on toward the goal to win the prize for which God has called me in Christ Jesus” on the RTBs and did so at the first three home games of the season.²¹ On September 17, 2012, then superintendent of KISD, Kevin Weldon, received a letter from the Freedom from Religion Foundation (FFRF), claiming that the cheerleaders’ new practice con-

¹³ *Industries in Kountze Independent School District*, STATISTICAL ATLAS, <https://statisticalatlas.com/school-district/Texas/Kountze-Independent-School-District/Industries>.

¹⁴ *Churches in or Near Kountze, Texas*, (listing almost 100 churches within a 13 mile radius, 32 with Kountze addresses), <https://churches.find-near-me.info/in/kountze-tx>.

¹⁵ *2016-2017 Texas Academic Performance Report, Kountze ISD*, TEXAS EDUCATION AGENCY 16, https://rptsvr1.tea.texas.gov/cgi/sas/broker?_service=marykay&year4=2017&year2=17&_debug=0&single=N&title=2017+Texas+Academic+Performance+Reports&_program=perf.rept.perfmast.sas&prgopt=2017%2Ftapr%2Ftapr.sas&ptype=P&level=district&search=district&namenum=Kountze&district=100903

¹⁶ *Id.* at 1-6.

¹⁷ *Id.* at 13.

¹⁸ *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120, 124 (Tex. App. 2014).

¹⁹ *Id.*

²⁰ *Id.* at 124.

²¹ Brief for ACLU of Texas, et al. as Amici Curiae Supporting Appellants at 23-24, *Kountze Indep. Sch. Dist. v. Matthews*, 2013 WL 6162618 (Tex. App. Sept. 5, 2013).

stituted a violation of the Establishment Clause of the First Amendment of the U.S. Constitution.²² After consulting with KISD's attorney, Superintendent Weldon informed the secondary campus principals that the RTBs could no longer include religious messages, and from that point forward, KISD would prohibit the cheerleading squad from including religious messages on the RTBs.²³

B. *Procedural History*

1. First Round of Litigation

On September 20, 2012, eleven parents of KISD cheerleaders filed an application for a temporary restraining order and a request for injunctive relief on behalf of their minor children, claiming that Superintendent Weldon's actions violated their children's rights under the Texas Constitution and the Religious Viewpoint Anti-Discrimination Act (RVAA).²⁴ Although KISD responded with a plea to the jurisdiction, the 356th Judicial District Court in Hardin County granted the parents' application, ordering KISD to "cease and desist from preventing the cheerleaders of Kountze Independent School District from displaying banners or run throughs at sporting events and/or censoring the sentiments expressed thereon."²⁵ The state trial court also ordered the school district to show cause as to why the temporary restraining order should not be made into a temporary injunction.²⁶

Before the court's hearing on the request for a temporary injunction, then state Attorney General and current Governor of Texas,

²² *Kountze*, 481 S.W.3d at 125. See also Julie Chang, *Kountze Super Resigns, Gives No Explanation Why*, BEAUMONT ENTERPRISE (December 19, 2012), <https://www.beaumontenterprise.com/news/article/Kountze-super-resigns-gives-no-explanation-why-4132722.php> (The KISD School Board accepted the resignation of Superintendent Weldon shortly after he prohibited the display of religious messages on RTBs at the district's middle and high school football games).

²³ *Id.* at 125.

²⁴ Plaintiff's Original Petition, Application for Temporary Restraining Order, Application for Temporary Injunction, and Application for Permanent Injunction, *Matthews v. Kountze Indep. Sch. Dist.* 2012 WL 5183593 at *7 (Tex. Dist. 2012) (No. 53526); Plaintiff's Reply in Support of Application for Temporary Injunction, *Matthews v. Kountze Indep. Sch. Dist.*, 2012 WL 8203203 at *1 (Tex. Dist. 2013) (No. 53526).

²⁵ *Matthews v. Kountze Indep. Sch. Dist.*, 2012 WL 4834948 at *1 (Tex. Dist. 2012) (No. 53526).

²⁶ *Id.*

Greg Abbott, sent a letter to the defendant KISD citing the RVAA's mandate that all school districts in Texas treat a student's voluntary expression of a religious viewpoint in the same manner as the district treats a student's voluntary expression of a secular viewpoint.²⁷ He accused the FFRF as having a long history of bullying schools into adopting restrictive religious speech policies and affirmed his position to file a brief with the court to protect the cheerleaders religious liberties.²⁸

In October 2013, after considering KISD's motion for declaratory relief, the court's response to the plaintiffs' request for a temporary injunction, and the plaintiffs' reply and supplemental briefings, the trial court, in an abbreviated opinion, awarded the temporary injunction with little explanation, simply stating that "[p]laintiffs' claims of constitutional injury present a substantial threat that irreparable injury would result if the temporary injunction [is] not issue[d]."²⁹

In response to community concerns, the KISD School Board adopted Resolution and Order No. 3 on April 8, 2013, which stated in part:

[S]chool personnel are not required to prohibit messages on school banners . . . that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious.³⁰ . . . [r]un-through banners, like other school banners displayed by the Cheerleader Squad as a part of their official activities, are the speech of KISD and are subject to the control and oversight of various school officials.³¹

The Board viewed the Bible verses featured on the RTBs as "fleeting expressions of community sentiment" and stated "the Establishment Clause does not require it to exclude such fleeting expressions merely

²⁷ Attorney General of Texas, Greg Abbott, *Texas Attorney General's Office Defends Constitutionality of the Texas Religious Viewpoints Anti-Discrimination Act* (Oct. 17, 2012), <https://web.archive.org/web/20121027002759/https://www.oag.state.tx.us/oagnews/release.php?id=4181>; see also TEX. EDUC. CODE §25.151 (LexisNexis 2007).

²⁸ *Id.*

²⁹ *Matthews v. Kountze Indep. Sch. Dist.*, 2012 WL 5269957 at *1 (Tex. Dist. 2012).

³⁰ Brief of ACLU of Texas, et al. as Amici Curiae at *27-28, *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120 (Tex. App. 2014) (No. 14-0453).

³¹ Resolution of the Bd. Of Trustees, *Kountze Indep. Sch. Dist.*, Adopting an Order Concerning Fleeting References to Religion During School-Sponsored Events at 3, in Brief of Appellant, *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120 (Tex. App. 2014).

because some of them express religious sentiments that are widely held within the KISD community.”³²

In May 2013, the trial court granted the plaintiffs’ motion for summary judgment and held the following: (1) “[t]he 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;” (2) “[t]he Kountze cheerleaders’ banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible;” and (3) “Neither the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events.”³³

KISD appealed the trial court’s denial of its plea to the jurisdiction, claiming that the revised policy regarding RTBs rendered the parents’ claims moot and that the trial court lacked subject-matter jurisdiction.³⁴ The Texas Court of Appeals in Beaumont agreed and reversed, holding that the adoption of a new district policy that allowed the cheerleaders to display their religious messages at school-sponsored events rendered the parents’ claims moot.³⁵ Furthermore, KISD made numerous judicial admissions that it would no longer restrict the contents of the RTBs solely due to any religious references.³⁶

Although reasonable minds might conclude that the case and controversy was settled because KISD no longer prevented its cheerleaders from including religious messages on the RTBs, the parents were uncomfortable with the school claiming control over the messages on the RTBs.³⁷ The parents believed that the messages on the RTBs were the cheerleaders’ private speech and that retaining control meant that KISD could reinstate the ban at a later date, post-litigation. The parents, therefore, filed a petition with the Texas Supreme Court asking for a review of KISD’s interlocutory appeal.³⁸

³² *Id.* at 28.

³³ *Matthews v. Kountze Indep. Sch. Dist.*, 2013 WL 1914796 (Tex. Dist. 2013).

³⁴ *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120, 124 (Tex. App. 2014).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Victory: Judge Says Texas Cheerleaders Can Display Bible Verse Banners*, FOX NEWS INSIDER (May 9, 2013), <http://insider.foxnews.com/2013/05/09/judge-says-texas-cheerleaders-can-display-bible-verse-banners>.

³⁸ *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417-18 (Tex. 2016) (noting that it will only entertain interlocutory appeals when there is a conflict between the holdings of state

The Texas Supreme Court reversed and remanded, holding that the issue was not moot because KISD could reinstate the prohibition at any time.³⁹ The court distinguished other Texas cases that were dismissed as moot by noting that those respective courts required the defendants to admit that their prior policies were unconstitutional.⁴⁰ Simply changing the policy did not render a case and controversy moot. Other factors must make it “absolutely clear that the [challenged conduct] could not reasonably be expected to recur.”⁴¹

Throughout this litigation, [KISD] . . . has continually defended not only the constitutionality of that prohibition but also its unfettered authority to restrict the content of the cheerleaders’ banners—including the apparent authority to do so based solely on their religious content. In fact, while the District has indicated it does not have any current intent or plan to reinstate that prohibition, the District has never expressed the position that it could not, and unconditionally would not, reinstate it.⁴²

The Texas Supreme Court never reached the question of whether the messages on the RTBs were school-sponsored speech or the students’ private speech, whether the display of the religious messages on the RTBs violated the Establishment Clause, nor did it determine if the review should focus on the prior or current KISD policy. Its holding was limited only to the question as to whether KISD’s adoption of the new policy mooted the parents’ claims.⁴³

2. Second Round of Litigation

On remand, the Court of Appeals began its review by analyzing whether it had subject matter jurisdiction over the dispute.⁴⁴ The Civil Practice and Remedies Code allows an appeal of an interlocutory

appeals courts whereas, here, other courts required the defendants to admit that their prior policy was unconstitutional but KISD made no such admission.).

³⁹ *Id.* at 419.

⁴⁰ *Id.* at 418 (citing *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex. App. 2008); *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App. 2007); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App. 1993), *writ denied* 863 S.W.2d 507 (Tex. App. 1994).

⁴¹ *Matthews*, 484 S.W.3d at 418 (quoting *Bexar Metro. Water Dist.*, 234 S.W.3d at 131).

⁴² *Id.* at 419.

⁴³ *Id.* at 419-20.

⁴⁴ *Kountze Indep. Sch. Dist. v. Matthews*, 2017 Tex. App. LEXIS 9165, at *2.

order in cases where lower courts allow or dismiss a plea to the jurisdiction by a government entity.⁴⁵ Those conditions were present in the case at hand, thus, the Court of Appeals had jurisdiction.⁴⁶ As will be described in detail *infra*, the Court of Appeals, on remand, made hair-splitting distinctions between the facts of the case and what should be controlling case precedent to arrive at an inexplicable and confounding determination.

After losing at the appeals court, KISD filed a petition for review with the Texas Supreme Court renewing their argument that the case was moot and, in the alternative, that the decision of the Court of Appeals contained errors of law that were in direct conflict with *Doe v. Silsbee*.⁴⁷ The Texas Supreme Court denied the petition thereby allowing the troubling outcome to survive.

II. ANALYSIS

A. *Were the RTBs Government Speech?*

KISD argued that the speech on the RTBs was government speech and entitled to government immunity, thereby stripping the trial court of subject matter jurisdiction and making the court's findings an advisory opinion.⁴⁸ The determination as to whether the speech in question is government speech depends on the degree of control exercised by the government.⁴⁹ To aid its analysis, the Court of Appeals examined six federal cases that classified an individual's speech as government speech, none of which, however, involved student expression at school-sponsored events.⁵⁰

⁴⁵ See TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (LexisNexis 2015).

⁴⁶ *Kountze*, 2017 Tex. App. LEXIS 9165, at *3.

⁴⁷ Petition for Review at *xiv-XV, *Kountze Indep. Sch. Dist. v. Matthews*, No. 17-0988, 2018 WL 556866 (Tex.). *Doe v. Silsbee Indep. Sch. Dist.* was a federal case arising when a cheerleader refused to cheer for a student who she claimed had committed acts of sexual assault. *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. App'x 852, 853 (5th Cir. 2010). The federal court upheld the school district's actions and concluded that cheerleaders serve as representative for their school district. *Id.* at 855.

⁴⁸ *Id.* at 13-14; see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) ("Government speech is not subject to constitutional scrutiny under the Free Speech Clause.").

⁴⁹ *Matthews*, 2018 WL 556866 (Tex.), at *13.

⁵⁰ *Matthews*, 2017 Tex. App. LEXIS 9165, at *9-15 (citing *Summum*, 555 U.S. 460 (2009); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005); *Walker v. Tex. Div., Sons of*

In *Pleasant Grove City v. Summum*, members of a religious group sued the city of Pleasant Grove, Utah, after city officials refused to display the Seven Aphorisms of Summum in a city-owned park, despite that fact that eleven other religious monuments were displayed including one containing the Ten Commandments.⁵¹ The U.S. Supreme Court characterized the messages displayed in the park as government speech, and held that the refusal to display the Seven Aphorisms of Summum was not subject to scrutiny under the Free Speech Clause.⁵² The Court in *Summum* applied a three-part test: (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.⁵³ The following analysis applies this three-part test to the *Kountze* case and will argue that the messages displayed on the RTBs are school-sponsored speech.

1. KISD Has Historically Used the RTBs as Conveying a Message on the KISD's Behalf

Despite the conclusion of the Texas Court of Appeals, there is little doubt that KISD has used the RTBs over the last several decades to convey messages of school spirit and good sportsmanship to get the crowd and players excited.⁵⁴ If the purpose of the RTBs was not to convey a message, then why were messages painted on the side facing the audience, or why were words used at all? Why not just have a blank piece of paper? What if the cheerleaders sold advertising on the RTBs to offset the cost of the supplies? Would the advertisers consider their words the conveyance of a message? They likely would. The Court of Appeals even acknowledged that in 2012, the cheerleaders decided that positive expressions would be preferable to the derogatory messages previously appearing on the RTBs, such as

Confederate Veterans, Inc., 135 S. Ct. 2239 (2015); *Fleming v. Jefferson Cnty. Sch. Dist.* R-1, 298 F.3d 918 (10th Cir. 2002).

⁵¹ *Summum*, 555 U.S. at 465-66.

⁵² *Id.* at 481.

⁵³ *Kountze*, 2017 Tex. App. LEXIS 9165, at *15-16 (citing *Walker*, 135 S. Ct. at 2248-50; *Summum*, 555 U.S. at 470-73).

⁵⁴ *Kountze*, 2017 Tex. App. LEXIS 9165, at *16.

“Scalp the Indians” or “Bury the Bobcats.”⁵⁵ Clearly the RTBs conveyed messages.

The Court of Appeals observed that the RTBs were hand-painted in the cheerleaders’ handwriting—a fact that is largely irrelevant.⁵⁶ In *Hazelwood School District v. Kuhlmeier*, student-written stories in the school newspaper were still considered school-sponsored speech, not the private speech of the students.⁵⁷ The Court of Appeals also pointed out that the RTBs did not contain the school or district’s name.⁵⁸ Although true, this point is *de minimus* because the uniforms of the cheerleaders and players, as well as the scoreboard, were emblazoned with the school’s name and logo. Even though the Court of Appeals noted that no public-school funds were used in making the banners,⁵⁹ the banners were displayed on a field, paid for and maintained with state and local funds, and under the lights of a football stadium, which also necessitated the expenditure of public funds. Furthermore, the cheerleading sponsors, although not teachers, were school employees who were paid a stipend and vested with the authority to review and approve the content of the banners to avoid the display of inappropriate messages.⁶⁰ If the RTBs were not used to convey a message, then why would anyone need to make sure the messages on the RTBs were appropriate?

2. Would a Reasonable Observer Interpret the Speech as Conveying a Message on the Government’s Behalf?

Citing *Board of Education of the Westside Community Schools v. Mergens*,⁶¹ the Court of Appeals concluded that a reasonable person would not interpret the RTBs as a type of official publication that conveyed a message on behalf of the school.⁶² Granted, the RTBs were not the type of official publication equivalent to a school newspaper; however, the RTBs were intended to enhance school and community spirit not on behalf of the opponents, but on behalf of KISD.⁶³

⁵⁵ *Id.* at *17.

⁵⁶ *Id.* at *18.

⁵⁷ See *Hazelwood*, 484 U.S. at 271, 273.

⁵⁸ *Kountze*, 2017 Tex. App. LEXIS 9165, at *18.

⁵⁹ *Id.*

⁶⁰ *Id.* at *15.

⁶¹ *Bd. of Ed. v. Mergens*, 496 U.S. 226, 250-51 (1990).

⁶² *Kountze*, 2017 Tex. App. LEXIS 9165, at *19.

⁶³ *Id.* at *38-39.

As observed by the Texas Association of School Boards, “[c]heerleaders are not selected to share their personal views on whatever topics they see fit to the general public; they are selected to cheer *for the school*.”⁶⁴

Thus, reliance on *Mergens* is misplaced. The cheerleaders were not ordinary students who decided to form a student-led club such as a robotics or anime club. Cheerleaders served as representatives and mouthpieces for KISD,⁶⁵ a position substantially different from other student-led clubs that meet periodically during non-instructional times to pursue common hobbies or interests. Cheerleaders at KISD were required to “maintain a minimum grade average of 70 in each academic class, . . . exhibit ‘the ability to get along with teachers and other students,’ . . . ‘have an athletic physical,’ . . . ‘be in total compliance with school policies, [and] have good teacher recommendations.’”⁶⁶ Cheerleaders also had to avoid behavior that reflected negatively on the school, show good sportsmanship, and avoid pouting, frowning or non-participation.⁶⁷ They had to be leaders in the school, set good examples, and be friendly at all times.⁶⁸ The cheerleaders in KISD played a prominent role at football games, and made special appearances on behalf of the football team and the school.⁶⁹ The cheerleaders coordinated and led pep rallies, and they missed class to perform.⁷⁰ Cheerleaders performed in the school’s homecoming parade and were often dismissed from school to visit KISD’s intermediate and elementary schools.⁷¹ They represented the school in multiple community contexts, and their appearance was always tightly controlled.

The paid cheerleading sponsors “enforce[d] . . . behavioral standards and may impose discipline . . . if squad members fail[ed] to abide by the squad constitution and the cheerleader rules.”⁷² They

⁶⁴ Brief for Texas Association of School Boards Legal Assistance Fund as Amicus Curiae Supporting Petitioner, *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 Tex. App. LEXIS 9165 (Tex. App. 2017) (No. 17-0988), 2018 WL 993795.

⁶⁵ See *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. App’x. 852, 855 (5th Cir. 2010).

⁶⁶ Brief for ACLU, et al. as Amici Curiae at 13-14, *Matthews v. Kountze Indep. Sch. Dist.*, 2015 WL 4531573 (2015) (No. 14-0453) (internal citations omitted).

⁶⁷ *Id.* at 14.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 15.

⁷² Brief for ACLU, et al., *supra* note 66, at 16.

monitored the cheerleaders' dress and grooming habits, which have been classified by the Fifth Circuit as a form of expression.⁷³ Further, the paid sponsors made sure that the cheerleaders did not modify their uniforms and decided when and where the uniforms were to be worn.⁷⁴ The paid sponsors had final approval over dance choreography and would intervene if they determined that certain moves were inappropriate.⁷⁵ Without argument, serving in the coveted position of a cheerleader at Kountze High School brought with it substantial limits on behavior, appearance, and speech. These limitations and expectations are not necessary conditions for participating in the student clubs recognized by *Mergens*. Although the reasonable person may not conclude that messages from the robotics or anime club are the type of official publication that conveys a message on behalf of the school, the cheerleaders' messages displayed as part of a school-sponsored event are far different from those at issue in *Mergens*.

In addition, in 2010, the Fifth Circuit held that "cheerleaders act as representatives and spokespersons for their school when engaged in official squad activities."⁷⁶ This Fifth Circuit case originated in Silsbee, Texas, located just ten miles away from Kountze.⁷⁷ If cheerleaders in Silsbee acted as representatives and spokespersons for their school while participating in official squad activities, then the messages communicated on the RTBs by the cheerleaders in Kountze *unquestionably* represent KISD.

Furthermore, the messages on the RTBs were delivered at a school-sponsored event where attendance for many students was compulsory. In many towns in Texas, especially small towns, with the possible exception of graduation, football games may represent the most significant and widely attended school events of the year. Football games, from the plays, to the cheers, to the half-time performance, are carefully choreographed and practiced. The reasonable person possessing all the necessary facts and knowledge could not but conclude

⁷³ See *id.* at 18. See also *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441 (5th Cir. 2001).

⁷⁴ Brief for ACLU et al., *supra* note 66, at 18. See *Mathews*, 2017 Tex. App. LEXIS 9165, at *18.

⁷⁵ Brief for ACLU et al., *supra* note 66, at 18.

⁷⁶ Brief for ACLU et al., *supra* note 66, at 49 (citing *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852 (5th Cir. 2010)).

⁷⁷ Driving Directions from Silsbee, TX to Kountze, TX, GOOGLE MAPS <http://maps.google.com>. To calculate the driving time, follow "Directions" hyperlink; then search starting point field for "Silsbee, TX" and search destination field for "Kountze, TX".

that the RTBs were conveying a message on KISD's behalf. As observed by the Texas Association of School Boards,⁷⁸ if a parent feels that the messages displayed on the RTBs are inappropriate, who will they contact to complain, the cheerleaders or school officials?

3. KISD Retained Control and Final Authority Over the Content of the RTBs During its High School Football Games

The Court of Appeals limited its application of the third part of the *Summum* test to the practice and policies in existence before Superintendent Weldon issued the prohibition on the display of religious messages on the RTBs and before the passage of Resolution and Order No. 3.⁷⁹ In doing so, the Court of Appeals asked the following: How much control did KISD exercise over the messages on the RTBs, and did it have final authority in September of 2012?⁸⁰ The court recognized that, although there was no pre-approved script or message, the paid cheerleader sponsors reviewed and approved the messages on the RTBs once completed and would not permit the display of inappropriate messages.⁸¹ The Court of Appeals, however, concluded that the facts were insufficient to classify the messages as government speech because KISD did not exercise the same degree of control as that illustrated in *Summum*⁸² or *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, where Texas exercised control over the appearance and images on the state's personalized license plates.⁸³ But neither *Summum* nor *Walker* involved the special characteristics of the school setting. In *Kountze*, the court did recognize that school officials could prohibit speech that is substantially disruptive,⁸⁴ lewd, vulgar, or obscene,⁸⁵ or messages that advocate drug use.⁸⁶ Correspondingly, this leaves large areas where offensive, divisive and inap-

⁷⁸ See Brief for ACLU et al., *supra* note 66, at 27.

⁷⁹ *Kountze*, 2017 Tex. App. LEXIS 9165, at *20-21.

⁸⁰ *Id.* at *20.

⁸¹ *Id.* at *20-21.

⁸² *Id.* at *21-22.

⁸³ *Walker*, 135 S.Ct. 2239, 2249 (2015).

⁸⁴ *Kountze*, 2017 Tex. App. LEXIS 9165, at *42 (citing *Tinker v. Des Moines*, 393 U.S. 503, 514 (1969)).

⁸⁵ *Kountze*, 2017 Tex. App. LEXIS 9165, at *21-22 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-85 (1986)).

⁸⁶ *Kountze*, 2017 Tex. App. LEXIS 9165, at *22 (citing *Morse v. Frederick*, 551 U.S. 393, 397 (2007)).

propriate messages could be displayed that are not covered by *Tinker*,⁸⁷ *Bethel*,⁸⁸ or *Morse*.⁸⁹

What if members of the cheerleading squad wanted to bring attention to the evils of abortion by calling out a classmate who recently terminated a pregnancy and decided to paint “Abortion is Murder, right Susie?” What if they wanted to make a political statement about illegal immigration and painted the message: “Secure the Border” accompanied by pictures of children killed by drunk drivers who were in the country illegally? What if one of the cheerleaders had been sexually assaulted by one of the players and painted “End Sexual Violence at Kountze High School”? Reliance only on *Tinker*, *Bethel*, and *Morse* may not be enough to prohibit these political and controversial messages from being displayed on RTBs at a high school football game. The hypothetical messages do not advocate drug use, which eliminates *Morse*.⁹⁰ They do not appear to meet the definition of lewd, vulgar or obscene, which eliminates *Bethel*.⁹¹ Thus, the analysis would turn largely on the application of *Tinker*’s substantial disruption test, which cannot be used simply to avoid the unpleasant feelings brought about by unpopular viewpoints.⁹² Administrators must articulate facts which would lead the reasonable administrator to believe that a substantial disruption was imminent before they can prohibit student expression.⁹³ In limiting the court’s analysis to the degree of control exercised by KISD prior to the letter from Superintendent Weldon, which prohibited the inclusion of religious messages on the RTBs, the Court of Appeals concluded that KISD never exercised any direct control over the messages, thereby rejecting its government-speech claim.⁹⁴

Nevertheless, numerous facts demonstrate that KISD retained tight control over the messages disseminated at its high school football games. The field was surrounded by a chain-link fence and gates, which were off limits to spectators and guarded by school officials who

⁸⁷ See *Tinker*, 393 U.S. at 503, 514.

⁸⁸ See *Bethel*, 478 U.S. at 675, 683-85.

⁸⁹ See *Morse*, 551 U.S. at 393, 397.

⁹⁰ *Kountze*, 2017 Tex. App. LEXIS 9165, at *22 (citing *Morse v. Frederick*, 551 U.S. 393, 397 (2007)).

⁹¹ *Bethel*, 478 U.S. at 683-85.

⁹² See *Tinker*, 393 U.S. at 509.

⁹³ *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (citing *Tinker*, 393 U.S. at 514).

⁹⁴ *Kountze*, 2017 Tex. App. LEXIS 9165, at *20-21.

limited access to players, cheerleaders, band members, and other authorized individuals.⁹⁵ “No other students or individuals [were] allowed on the field to display their own similar banners or messages.”⁹⁶ It is probably fair to assume that anyone who gained access to the field without permission could be punished by school officials or law enforcement.

The Court of Appeals also relied on the Supreme Court’s decision in *Garcetti v. Ceballos*, but *Garcetti* involved the speech of an adult public employee who was speaking pursuant to his official, paid duties.⁹⁷ Although the cheerleaders here were representatives for KISD, they were not paid public employees, so *Garcetti* is easily distinguished from the current case. Furthermore, such an application of *Garcetti* would seem to undermine the claim of the cheerleaders because the display of the RTBs were pursuant to their duties as school cheerleaders.⁹⁸ At the time the messages were displayed, the cheerleaders were not speaking as private citizens; they were carrying out their responsibilities as school representatives.⁹⁹

B. *Even If the RTBs Were Not Government Speech, They Constituted School-Sponsored Speech*

Both parties in the case, based on their pleadings and briefs, suggest that the messages displayed were either government or private speech. But this dichotomous, either-or analysis ignores the reality that there are “three recognized categories of speech: government speech, private speech, and school-sponsored speech.”¹⁰⁰ One could argue that government speech is aligned with the messages displayed by local, state, or federal agencies which have maintained their facilities as closed forums. School-sponsored speech would include messages disseminated under the auspices of the school or supervision of school employees, such as student articles in school newspapers,¹⁰¹

⁹⁵ Brief for Appellant at *25-26, *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tx. App. 2016) No. 14-0453, 2015 WL 4531573.

⁹⁶ *Id.* at 27.

⁹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006) (holding that testimony regarding the validity of a search warrant was not the speech of a private citizen but was made pursuant to the plaintiff’s official duties and therefore not protected by the First Amendment).

⁹⁸ Brief for ACLU et al., *supra* note 30, at *13.

⁹⁹ *Id.* at *11-12.

¹⁰⁰ *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 642 (S.D. Tex. 2010).

¹⁰¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

messages in school yearbooks,¹⁰² theatrical performances by students in the school's drama class,¹⁰³ tile painting,¹⁰⁴ valedictorian speeches,¹⁰⁵ murals painted on temporary plywood as a part of school beautification projects¹⁰⁶—and yes, in this author's opinion, even RTBs at school football games. Private speech is just that, the private speech of individuals without connection or reference to any representational status. If a student wants to hold up a banner which includes a religious message in the stands at a football game, such an act would represent that person's private expression, not the school's. When school cheerleaders do so as a part of a scripted, choreographed school-sponsored event, where the messages must be approved by paid school employees, and where access to the field is tightly controlled, the message is no longer private; it becomes school-sponsored speech.

The seminal case involving school-sponsored speech is *Hazelwood v. Kuhlmeier*, where Justice White wrote:

[S]chool-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. These activities 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.¹⁰⁷

This Article already asserted that the public might reasonably perceive the religious messages displayed on the RTBs by the KISD cheerleaders at school-sponsored events to bear the imprimatur of the school. The second component articulated by Justice White asks us to determine whether cheerleading was part of the school curriculum. The attorneys for the cheerleaders pointed out that their clients did not receive grades or credit toward graduation, and that all practices

¹⁰² *Planned Parenthood v. Clark Cnty. Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991).

¹⁰³ *Boring v. Buncomb*, 136 F.3d 364, 368 (4th Cir. 1998).

¹⁰⁴ *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002).

¹⁰⁵ *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009).

¹⁰⁶ *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1217 (11th Cir. 2004).

¹⁰⁷ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

took place after school.¹⁰⁸ Therefore, they argued that cheerleading was not a part of the school curriculum.¹⁰⁹ The Court of Appeals agreed and ruled “that football and cheerleading are non-curriculum or extracurricular activities and, while the student athletes may certainly gain valuable life lessons from engaging in team sports, the activities are not designed specifically to impart some specific knowledge or skills to the students in a pedagogical sense.”¹¹⁰ This ruling, however, ignores other factors suggesting the opposite. First, cheerleading, football, and marching band can all be used as courses to satisfy the PE credit required for graduation in Texas.¹¹¹ Second, the Court in *Hazelwood* did not place the additional vague qualifier that the knowledge and skills had to align with a pedagogic sense, only that the activities are designed to impart particular knowledge and skills to student participants and audiences.¹¹² Board Resolution No. 3 recognizes that one purpose of cheerleading is to “teach[] its student-members to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork, and take pride in quality performance through maintaining high standards.”¹¹³ These are all valuable skills to learn.

Furthermore, it is naive to suggest that being a cheerleader requires no acquisition of knowledge or skill. Regina Bailey, former Washington Redskins cheerleader, who now works as an emergency medical physician and lawyer described what she learned as a cheerleader:

I developed a great sense of self-confidence and fearlessness; after dancing in front of more than 70,000 screaming fans, there is not too much that makes me nervous. I honed my public speaking and com-

¹⁰⁸ Plaintiffs’ Reply in Support of Application for Temporary Injunction, *supra* note 24, at 22.

¹⁰⁹ *Id.*

¹¹⁰ *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *12 (Tex. Ct. App. Sept. 28, 2017), *review denied* (Aug. 31, 2018), *reh’g of petition for review denied* (Nov 09, 2018).

¹¹¹ See 19 TEX. ADMIN. CODE § 74.62(b)(7)(C) (LexisNexis 2014).

¹¹² *Kuhlmeier*, 484 U.S. at 271.

¹¹³ Resolution of the Bd. Of Trustees, *Kountze Indep. Sch. Dist.*, Adopting an Order Concerning Fleeting References to Religion During School-Sponsored Events at 3, *in* Brief of Appellant, *Kountze Indep. Sch. Dist. v. Matthews*, 482 S.W.3d 120 (Tex. App. 2014).

munication skills; I did many appearances and talked with people from all walks of life. And I use all of those skills today.¹¹⁴

Third, it is important to note that some school districts in Texas publish cheerleader manuals outlining the knowledge and skills that must be learned before students are allowed to cheer, and these manuals are classified as curricular materials.¹¹⁵ Finally, the attorneys for the cheerleaders asserted that the use of *Hazelwood* as precedent here failed because the cheerleading sponsors were not faculty members.¹¹⁶ The authority to supervise school-sponsored speech, however, is not limited to faculty members. Surely school administrators retain the authority to regulate school-sponsored speech even if they are not classified as members of the faculty. The same can be said of paid employees such as the cheerleading sponsors who must follow job-related requirements including, but not limited to, reviewing and approving the contents of RTBs before each home football game.¹¹⁷

The Supreme Court in *Hazelwood* suggested that the restriction on school-sponsored speech must be “reasonably related to legitimate pedagogical concerns,”¹¹⁸ but the Court did not define the term “pedagogic.” Cases following *Hazelwood* found legitimate pedagogic concerns involving the distribution of candy canes that contained religious messages to prevent other students from being offended¹¹⁹ and the removal of religious murals to avoid possible disruptions caused by potentially controversial material.¹²⁰ Based on these examples, the religious messages on the RTBs at KISD football games created equivalent pedagogic concerns.

The tortured justification provided by the Texas Court of Appeals in *Kountze* relied on *Fleming v. Jefferson County School District*,¹²¹ a

¹¹⁴ Regina Bailey, *Use Cheerleading as a Bridge to Other Careers*, N.Y. TIMES (May 1, 2014), <https://www.nytimes.com/roomfordebate/2014/05/01/professional-cheerleaders-and-their-pompom-problems/use-cheerleading-as-a-bridge-to-other-careers>.

¹¹⁵ *Cheerleading Safety Manual: An Introductory Guide to Safe Practices*, FRISCO INDEP. SCH. DIST., <http://www.friscoisd.org/ly/schools/finearts/documents/safetymannual-cheer.pdf>.

¹¹⁶ Brief of Petitioners, 2015 WL 2114536, at 13-15, *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tex. 2016).

¹¹⁷ Brief for ACLU, et al., *supra* note 66, at *19.

¹¹⁸ See *Kuhlmeier*, 484 U.S. at 273 (1988).

¹¹⁹ *Curry v. Hensiner*, 513 F.3d 570, 578-80 (6th Cir. 2008).

¹²⁰ *Ahlquist v. City of Cranston*, 840 F. Supp. 2d 507, 526 (D.R.I. 2012).

¹²¹ *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *10 (Ct. App. Tex. Sept. 28, 2017) (citing *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 920 (10th Cir. 2002)).

case where school officials decided to allow students to design tiles which were permanently affixed to the building to ease students' transition back into the school setting after the Columbine shooting.¹²² There, the U.S. Court of Appeals for the Tenth Circuit held that the tiles represented school-sponsored speech.¹²³ The Texas Court of Appeals in *Kountze* used the facts of *Fleming* to build a fragile and somewhat illusory distinction—primarily the fact that the tiles were permanent, while the RTBs were fleeting.¹²⁴ Yet, the duration of the constitutional violation is of little, if any, significance, as the Supreme Court has held, “it is no defense to urge that the religious practices here may be relatively minor encroachments on the *First Amendment* . . . [because] [t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent.”¹²⁵ A fleeting constitutional violation is still a constitutional violation.

C. *The RTBs Were Not Private Speech*

The Texas Court of Appeals relied upon *Tinker* to proffer its interpretation of private speech in *Kountze*, but the two cases are factually juxtaposed. In *Tinker*, the wearing of the black armbands represented the expressive acts of individual students who did not represent the school in any capacity, and who displayed their messages without the assistance or promotion of the school.¹²⁶ In *Kountze*, the RTBs represented the expressions of the school's cheer-leading squad who displayed the messages at carefully-orchestrated, carefully-controlled, school-sponsored events.¹²⁷ If a student or even a group of students—not a part of any officially recognized or sponsored school group—held up religious signs in the stands during a football game, such would be the equivalent of the *Tinkers'* black armband, but this is not the case with the KISD cheerleaders who are selected through tryouts to serve as school representatives.

¹²² *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 920 (10th Cir. 2002).

¹²³ *Id.* at 924.

¹²⁴ *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *11-12 (Ct. App. Tex. Sept. 28, 2017).

¹²⁵ *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963).

¹²⁶ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504-06 (1969).

¹²⁷ *See Kountze*, 2017 WL 4319908, at *11-12.

D. *Santa Fe Independent School District v. Doe*

Anyone familiar with cases involving religious expressions at high school football games should be reminded of *Santa Fe Independent School District v. Doe*, where the U.S. Supreme Court ruled that prayers delivered “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.”¹²⁸

The Court of Appeals distinguished *Santa Fe* by noting that the KISD school board did not take “affirmative steps to create a vehicle for prayer to be delivered at a school function.”¹²⁹ While true, this factor was not the sole determining factor in *Santa Fe*, as the U.S. Supreme Court noted that the realities of the practice “involve[d] both perceived and actual endorsement of religion.”¹³⁰ The Court stated:

. . . 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.¹³¹

With the exception of a policy calling for an invocation and a different means of communication, every other concern expressed by the Court in *Santa Fe* is present in the *Kountze* case.

¹²⁸ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000).

¹²⁹ *Kountze*, 2017 WL 4319908, at *8.

¹³⁰ *Santa Fe*, 530 U.S. at 291.

¹³¹ *Id.* at 307-08.

The Court in *Santa Fe* also expressed concern over the coercive impact of the religious displays on those who are required to attend the game as a condition for class credit.¹³² Citing *Lee v. Weisman*,¹³³ the Court stated:

High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for “[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”¹³⁴

Students on the Kountze High School football team, band, cheer-leading squad, and drill team are in the identical position as those identified in *Santa Fe* as subject to coercion. A non-believer, or a member of a non-Christian faith will be forced to participate in an expressive, religious act as a cost of team membership or risk the coercive pressure oftentimes placed on those who choose otherwise.¹³⁵ Limiting the analysis to a determination as to whether the messages on the RTBs represented private, of government speech ignores this coercive element and “empowers the [school’s cheerleaders] with the authority to subject students of minority views to constitutionally improper messages.”¹³⁶

¹³² *Id.* at 311-12.

¹³³ *Lee v. Weisman*, 505 U.S. 577 (1992).

¹³⁴ *Santa Fe*, 530 U.S. at 312 (citing *Lee*, 505 U.S. at 596).

¹³⁵ *See Doe v. Duncanville*, 986 F.2d 953 (5th Cir. 1993). Spectators and teammates questioned why one of the members of the girls’ basketball team was not standing with the rest of the team as they recited the Lord’s Prayer at center court. She was ever referred to as a “little atheist.” *Id.* at 956.

¹³⁶ *Santa Fe*, 530 U.S. at 316.

III. THE RVAA AND LIMITED PUBLIC FORUMS

In Governor Abbott's petition to intervene, he cites the RVAA as the statutory justification to allow religious student expressions at school events.¹³⁷ The RVAA is a set of constitutionally questionable statutes which appear to circumvent prior Supreme Court decisions limiting religious activities at school and school-sponsored events.¹³⁸ Some sections of the RVAA simply codify existing student Free Exercise rights such as protecting students who include relevant religious references in class assignments,¹³⁹ or the right of students to organize non-curricular religious student groups in a limited public forum.¹⁴⁰ Other sections, however, appear to tread on unconstitutional footing.

Section 25.152 of the Texas Education Code (TEC) mandates that "a school district shall adopt a policy, which must include the establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak."¹⁴¹ Does the state have the authority to force school districts to relinquish control over messages that are displayed or disseminated at school-sponsored events? This is a critical question, as the attorneys for the cheerleaders argued that Kountze High School football games were a limited public forum because KISD adopted the model policy recommended through the RVAA.¹⁴² The model policy mandates that "[s]tudent speakers shall introduce: (1) football games; (2) any other athletic events designated by the district; (3) opening announcements and greetings for the school day; and (4) any additional events designated by the district, which may include, without limitation, assemblies, and pep rallies."¹⁴³ Furthermore, the RVAA mandates that school districts must "provide a method based on neutral criteria for the selection of student speakers at school events and graduation ceremonies."¹⁴⁴ The RVAA creates an environment where students can

¹³⁷ Petition in Intervention of the State of Texas, at 5, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2012 WL 8203205 (Tex. Dist. 2012).

¹³⁸ See Joe Dryden, *The Religious Viewpoint AntiDiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 *Miss. L.J.* 127, 158, 162-63, 165-65, 173 (2013).

¹³⁹ TEX. EDUC. CODE §25.153 (LexisNexis 2007).

¹⁴⁰ TEX. EDUC. CODE §25.154 (LexisNexis 2007).

¹⁴¹ TEX. EDUC. CODE §25.152(a) (mandating limited-public forum) (LexisNexis 2007).

¹⁴² See TEX. EDUC. CODE §25.156 (LexisNexis 2007).

¹⁴³ *Id.*

¹⁴⁴ TEX. EDUC. CODE §25.152(a)(2) (LexisNexis 2007).

be used as surrogates to subjugate the Establishment Clause of the U.S. Constitution. It should not be used as the mechanism for breaches of religious neutrality.

The characteristics of a high school football game, where access to the field is strictly limited, lie counter to the open, mostly indiscriminate use of school facilities by multiple student-led organizations, characteristic of the limited public forum envisioned by the U.S. Supreme Court in *Mergens*.¹⁴⁵ The Texas Court of Appeals even agreed and stated that there was nothing in the record to indicate that KISD opened the football field up to indiscriminate use.¹⁴⁶ Therefore, the portion of the RVAA which mandates that all public schools in Texas are limited public forums may stand in contradiction to the findings of the Court of Appeals.

The RVAA mandates that school districts take affirmative steps not only to protect the dissemination of religious viewpoints in class assignments and in voluntary student expression, but to facilitate the dissemination of religious viewpoints by providing the forum at almost every school event where students address a portion of the student body.¹⁴⁷ Protecting students' religious references in class assignments and voluntary religious student organizations is a reflection of equality and neutrality. Forcing schools to allow the dissemination of religious expressions at school-sponsored events to a captive audience of children who may have divergent religious views is the antithesis of neutrality. It is sponsorship, endorsement, and unconstitutional.

CONCLUSION

Although students do not leave their constitutional rights at the schoolhouse gate,¹⁴⁸ “the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings,”¹⁴⁹ and “must be ‘applied in light of the special characteristics of the school environment.’”¹⁵⁰ This means that we cannot

¹⁴⁵ See *Mergens*, 496 U.S. at 235-240 (reasoning that the student who initiated non-curricular clubs at issue in *Mergens* did not stand in a representational capacity for the school.).

¹⁴⁶ *Kountze*, 2017 WL 4319908, at *41.

¹⁴⁷ See TEX. EDUC. CODE §25.152(a)(1) (LexisNexis 2007).

¹⁴⁸ *Tinker*, 393 U.S. at 506.

¹⁴⁹ *Fraser*, 478 U.S. at 682.

¹⁵⁰ *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506).

treat schools exactly like municipalities,¹⁵¹ or students exactly like public employees.¹⁵² Courts have consistently recognized that schools are special places,¹⁵³ where school officials are entrusted with carrying out “perhaps the most important function of state and local governments.”¹⁵⁴ As a result, courts have consistently vested school officials with additional authority beyond that afforded to city officials or public employers.¹⁵⁵ The U.S. Court of Appeals for the Fifth Circuit explained that “[w]hen 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.”¹⁵⁶ How can school officials protect a child’s Free Exercise rights within the school setting without running afoul of the Establishment Clause? How can we protect a child’s expression rights while providing school officials with the authority to control the information disseminated at school or school-sponsored events?

Justice Clarence Thomas, in a dissenting opinion attached to a denial of certiorari, described Establishment Clause jurisprudence as “incapable of coherent explanation.”¹⁵⁷ Indeed there are numerous examples where a specific Establishment Clause case has an exact and opposite holding.¹⁵⁸ *Matthews v. Kountze ISD* represents another

¹⁵¹ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 472-81 (2009) (describing the standard for municipality speech).

¹⁵² See *Garcetti v. Ceballos*, 547 U.S. 410, 417-21 (2006) (describing the standard for public employee speech).

¹⁵³ E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 340-43 (1985) (establishing that a lower standard of suspicion is needed before school officials can conduct student seizures and searches than that needed by law enforcement officials outside of schools).

¹⁵⁴ *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954).

¹⁵⁵ E.g., *T.L.O.*, 469 U.S. at 340-48.

¹⁵⁶ *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011).

¹⁵⁷ *Utah Highway Patrol v. Am Atheists*, 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of certiorari).

¹⁵⁸ Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that the display of a crèche satisfied both the modified *Lemon*/Endorsement Test), with *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (holding that the display of a crèche failed the *Lemon*/Endorsement Test). Compare *Van Orden v. Perry*, 545 U.S. 677 (2005) (electing not to use the *Lemon*/Endorsement Test in ruling that a display of Ten Commandments on the grounds of the Texas State Capital did not violate the Establishment Clause), with *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005) (electing to use the *Lemon*/Endorsement Test to hold that a display of the Ten Commandments in a courthouse to be unconstitutional). Compare *Jones v. Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992) (holding nonsectarian non-proselytizing prayer delivered by an elected member of the senior class without school approval, sponsorship or

example of an anomaly in a sea of outliers in Establishment Clause cases. Had this case been tried in federal court, the outcome likely would have been different, because federal judges are appointed rather than elected,¹⁵⁹ and are, therefore, in theory, not subject to political pressure. The analysis of the Texas Court of Appeals in *Kountze* seemed almost tortured in constructing an opinion which would inappropriately characterize the RTBs as the cheerleaders' private speech. While serving as a cheerleader, students represented their school, and as such, their expressions were far more analogous to school-sponsored, or to even government speech than they were to private speech. When cheerleaders put on their uniforms and perform at a school-sponsored function, they are not acting as private citizens; they are acting as representatives of the school.

What started out as an Establishment Clause case,¹⁶⁰ evolved into a forum analysis case,¹⁶¹ and the outcome raises more questions than it answers. The Court of Appeals' holding, that the football field was not an open forum, coupled with the fact that Kountze High School does not allow student initiated groups to display messages, means that the football field is more akin to a closed forum where the government retains greater control.

Students should be free to make controversial statements when acting in their own capacity, so long as their expressions are not substantially disruptive, lewd, vulgar or obscene, or encouraging drug use; but doing so as a member of a group that represents the school in a closed forum at a school-sponsored event is different. School officials *must* have the authority to approve the messages displayed as part of any and all school-sponsored events, just as the city of Pleasant Grove

oversight was not an Establishment Clause violation), *with* *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (holding that the same approach that was approved by the Fifth Circuit in *Clear Creek* was a violation of the Establishment Clause). *Compare* *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (holding that a school's restrictions on a student's distribution of pencils that bore religious messages did not violate the student's First Amendment rights), *with* *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (holding that virtually identical restrictions violated the Constitution under the First Amendment.).

¹⁵⁹ See Adam Liptak, *Judges who are elected like Politicians Tend to Act Like Them*, N.Y. TIMES (Oct. 3, 2016), <http://www.nytimes.com/2016/10/04/us/politics/judges-election-john-roberts/html>.

¹⁶⁰ See *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2012 WL 8203205 (Tex. Dist. 2012)

¹⁶¹ See *Defendants' Response to Plaintiffs' Request for Temporary Injunction, Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2017 Tex. App. LEXIS 9165 at *40-41 (Tex. App. 2017).

had the authority to determine which messages would be displayed in city parks, and just as Texas has the authority to determine the messages displayed on its license plates.