

COTI MATTHEWS, et al.,

Plaintiffs,

VS.

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

Defendants.

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IN THE DISTRICT COURT

356th JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

**TRADITIONAL MOTION FOR SUMMARY JUDGMENT
OF KOUNTZE INDEPENDENT SCHOOL DISTRICT REGARDING
ITS REQUEST FOR DECLARATORY RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant the Kountze Independent School District (hereinafter “Kountze ISD,” “the School District” or “Defendant”), and files this its Traditional Motion for Summary Judgment Regarding its Request for Declaratory Relief pursuant to Texas Rule of Civil Procedure 166a(c), seeking that the Court declare that the Establishment Clause of the First Amendment to the United States Constitution does not require Kountze ISD to prohibit the inclusion of religious-themed messages on banners. In support of this motion, Defendant would respectfully show unto the Court as follows:

**I.
SUMMARY**

Kountze ISD asks that the Court enter summary judgment in its favor on its request for declaratory relief. Based on the evidence available to it, the Kountze ISD has concluded that the fleeting expressions of religious sentiment occasionally found on Kountze High School “run-through” banners does not appear likely to create Establishment Clause concerns of the type expressed by the United States Supreme Court in its decision in *Santa Fe Independent School*

District v. Doe. However, Kountze ISD has received a letter from a staff attorney with the Freedom from Religion Foundation (FFRF) and the FFRF has filed an amicus brief with this Court asserting that permitting such religious messages on the “run-through” banners would violate the Establishment Clause. In order to resolve this controversy, Kountze ISD has filed a request for declaratory relief and now files this motion seeking summary judgment in its favor on its request for declaratory relief.

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III.
 GROUNDS FOR SUMMARY JUDGMENT

The Kountze Independent School District moves for summary judgment pursuant to Texas Rule of Civil Procedure 166a on the following grounds:

1. Kountze Independent School District's request for declaratory relief should be granted and the Court should hold that the Establishment Clause does not require Kountze Independent School District to prohibit the inclusion of religious messages on "run-through" banners displayed at Kountze High School football games.

IV.
SUMMARY JUDGMENT STANDARD

Declaratory judgments are considered under the same standards as other judgments and decrees. *Eisen v. Capital One, N.A.*, 232 S.W.3d 309, 312 (Tex. App. – Beaumont 2007, pet. denied); TEX. CIV. PRAC. & REM. CODE § 37.010. Consequently, declaratory judgments decided by summary judgment are reviewed under the same standards of review that govern summary judgments generally. *Dstj, L.L.P. v. M & M Res., Inc.*, No. 09-11-00292-CV, 2012 Tex. App. LEXIS 5114, at *13-*14 (Tex. App. – Beaumont 2012, pet. denied). The movant for a traditional summary judgment must establish that no genuine issues of material fact exist and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt.*, 690 S.W.2d 546, 548-49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* at 549. If the movant produces sufficient evidence to establish its entitlement to summary judgment, the burden shifts to the non-movant to produce evidence that raises a genuine issue of material fact. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223-24 (Tex. 1999).

V.
SUMMARY JUDGMENT EVIDENCE

Kountze ISD relies on the following summary judgment evidence in support of its traditional Motion for Summary Judgment:

1. KISD Board Resolution and Order No. 1 (Defendant's Exhibit No. 1)
2. KISD Board Resolution and Order No. 3 and Appendices
 - a. KISD Board Resolution and Order No. 3 (Defendants' Exhibit No. 2.1)
 - b. Appendix 1 to KISD Board Resolution and Order No. 3 (Defendants' Exhibit No. 2.2)
 - c. Appendix 2 to KISD Board Resolution and Order No. 3 (Defendants' Exhibit No. 2.3)
 - d. Appendix 3 to KISD Board Resolution and Order No. 3 (Defendants' Exhibit No. 2.4)

VI.
SUMMARY JUDGMENT FACTS

1. On October 16, 2012, the Kountze ISD Board of Trustees (“the Board”) adopted Resolution and Order No. 1, which instructed then-Superintendent Kevin Weldon to assist the Board in organizing an opportunity for the Board to receive evidence, both oral and written, regarding the perception of the on-going “run-through” banners controversy within the Kountze Independent School District Community (“the KISD Community”). *See* Defendants’ Exhibit No. 1.

2. On February 26, 2013, the Board heard and considered evidence pursuant to Resolution and Order No. 1. *See* Defendants’ Exhibit No. 2.2 [including the transcript of hearing]. In addition to the oral evidence heard and considered on February 26th by the Board, the Board also received and considered written submissions in connection with that hearing. *See* Defendants’ Exhibit No. 2.2 [including the written submissions]. The Board also received and considered additional evidence and historical material. *See* Defendants’ Exhibit No. 2.2 and 2.3 [Additional evidence and select historical and legal materials].

3. On April 8, 2013, the Board considered the available evidence and unanimously adopted Resolution and Order No. 3, finding as follows:

(a) Findings regarding the use of “run-through” banners by the Kountze Independent School District.

1. The Cheerleader Squad is an organized extracurricular activity of Kountze Middle School and Kountze High School, which are part of Kountze Independent School District.
2. The Cheerleader Squad serves a variety of purposes, including, but not limited to, teaching its student-members to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork and take pride in a quality performance through maintaining high standards.
3. For decades, one of the official activities of the High School Cheerleader Squad has been the preparation of “run-through” banners for display and use

at Kountze High School varsity football games. Such “run-through” banners generally display a brief message.

4. In addition, for decades, the Cheerleader Squad has prepared other banners for display and use in connection with their official activities as the Cheerleader Squad.
5. The banners displayed and used by the Cheerleader Squad, including “run-through” banners, have generally served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.
6. For decades, the KISD Community, the Kountze Independent School District, and the Board have understood and intended that in preparing and displaying banners as part of school activities, including the “run-through” banners, the Cheerleader Squad as a whole and the individual cheerleaders on the Cheerleader Squad act as representatives and spokespersons for the KISD Community, the Kountze Independent School District, and the Kountze Middle School or Kountze High School.
7. For decades, neither the Board nor the Kountze Independent School District has micro-managed the content of the banners, but has generally entrusted the Cheerleader Squad and their supervising sponsors with discretion to decide how to best speak on behalf of the community and school. The content of the banners has never before been a source of controversy.
8. It is and has been the understanding and intention of Kountze Independent School District that Kountze Independent School District Board of Trustees Policies FNA (LEGAL) and FNA (LOCAL) do not apply to the “run-through” banners 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 Independent School District.
9. For decades, it has been common knowledge among members of the KISD Community that many of its members, including many student athletes and fans, profess some religious belief, that many such persons identify themselves as Christians.
10. The banner messages, whether religiously themed or otherwise, have primarily served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.
11. Some or all of the “run-through” banners that were prepared and used during the 2012-2013 school year contained religiously-themed messages, including

quotations from the Bible and references to Jesus Christ. However, the vast majority, if not all, of the “run-through” banners in the past have not included any religiously-themed messages.

12. The banner messages have not functioned as prayers addressed to God, but as messages of encouragement addressed to athletes and perhaps other members of the KISD Community.
13. The messages on the “run-through” banners, including religiously-themed messages, have not been intended to proselytize or convey any message in any way hostile to any member of the KISD Community.
14. The messages on the “run-through” banners, including religiously-themed messages, have never been part of a prayer or other religious exercise and have not served to solemnize the event nor otherwise to induce reverence.
15. Spectators at Kountze High School football games are not required or expected to stand, bow their heads, or give any sign of consent or endorsement as to the message contained on the “run-through” banners.
16. The messages on the “run-through” banners, whether religiously-themed or otherwise, are displayed for a short period of time (generally no more than a couple of minutes), until they are destroyed by the student athletes and subsequently discarded.
17. Before, during, and after the brief display of the “run-through” banners, many non-religious messages of encouragement are communicated on behalf of the KISD Community and the Kountze Independent School District, whether by display, oral statements amplified by microphone, or otherwise.
18. Before September 17, 2012, there is no record of the Board receiving directly or indirectly any objection, by anyone, to the religious nature of any message on the run-through banners.
19. On September 17, 2012, Kevin Weldon (“Mr. Weldon”), Superintendent of the Kountze Independent School District, received a letter from the Freedom from Religion Foundation (“the FFRF letter”).
20. The FFRF letter states that inclusion of religiously-themed messages on the “run-through” banners violates the Establishment Clause of the First Amendment to the United States Constitution (“the Establishment Clause”), as that clause has been interpreted by the Supreme Court of the United States (“the Supreme Court”).
21. The FFRF letter does not specifically identify any person who has complained about the “run-through” banners, or whether that person has a child or other relative attending KISD schools.

22. Neither Mr. Weldon, Mr. Reese Briggs, the Interim Superintendent, nor the Board has received any complaints about the content of the “run-through” banners from any cheerleader, football player or other individual whose responsibilities require them to attend or participate in Kountze High School football games.
23. After receiving the FFRF letter, Mr. Weldon sought legal advice from two separate lawyers, both of whom informed Mr. Weldon that the “run-through” banners appeared to violate the Establishment Clause, as interpreted by the Supreme Court in a decision styled *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
24. Based on the legal advice he received, on September 18, 2012, Mr. Weldon notified the campus principals that “run-through” banners could no longer include religiously themed messages and asked the campus principals to convey this message to the students at their respective campuses.
25. Because of the immediacy of the situation, Mr. Weldon was forced to make a decision before he had the opportunity to consult with the Board, which by law must post a 72-hour notice before meeting.
26. On September 20, 2012, some members of the Cheerleader Squad and their parents filed a lawsuit against the Kountze Independent School District and Mr. Weldon, styled *Coti Matthews et al. v. Kountze Independent School District et al.*, Cause No. 53526 (356th Judicial District, Hardin County, Texas) (“the Lawsuit”).
27. On September 20, 2012, Judge Thomas entered a temporary restraining order in the Lawsuit. Judge Thomas subsequently entered a temporary injunction order on October 18, 2012. Kountze Independent School District and Mr. Weldon obeyed and have continued to obey the temporary restraining order and the temporary injunction order issued by Judge Thomas.
28. As a result of the issuance of the temporary restraining order and the subsequent temporary injunction order, the Board and Kountze Independent School District personnel have not had their ordinary authority over the contents of the run-through banners.
29. The Board is not aware of any messages displayed on the run-through banners since the issuance of the temporary restraining order of which it disapproves.
30. Other than the “run-through” banners, the Board is not aware of any school banners displayed or used by the Cheerleader Squad prior to September 20, 2012, that contained any religious messages.
31. Based on the information and evidence available, the Board believes that individuals in the KISD Community perceive the decision to prevent the display of the religiously themed run-through banners as conveying hostility

toward religion and a preference for those who believe in no religion over those who do believe.

32. The Board is disappointed that the attorneys representing the cheerleaders involved in the Lawsuit advocated immediate recourse to the district court rather than bringing their concerns to the Board, as provided for in State Law and KISD Board policy. On the date that the attorneys filed suit against KISD and sought a temporary restraining order, there was more than a week before the next Kountze High School varsity football game. Consequently, while it would have required quick action, there was still the possibility of the Board meeting, in compliance with the Texas Open Meetings Act, prior to the next varsity football game.
33. The actions of the attorneys in seeking immediate judicial relief prevented the Board from having an opportunity to consider the issue prior to the issuance of the temporary restraining order. In fact, the attorneys entirely failed to bring their concerns before the Board until February 26, 2013, at the hearing called for by the Board, on its own initiative, to investigate the questions raised by the FFRF Letter, the Lawsuit and the surrounding KISD Community concerns.
34. Despite the failure of the attorneys representing some of the cheerleaders to bring their concerns to the Board, the Board took prompt action to investigate and resolve the questions raised by the FFRF Letter and the Lawsuit.
35. The Board rejects the claims made against KISD in the Lawsuit. Based on how KISD and its extracurricular activities have operated for decades, the policies duly enacted by the Board, and the relevant constitutional and statutory provisions and judicial decisions, the school banners, including “run-through” banners, displayed by the Cheerleader Squad represent KISD and are not intended to represent the expression or beliefs of individual students or cheerleaders. In other words, the “run-through” banners are the speech of the school, not private speech.
36. The Board, and those school officials designated by it, are authorized by longstanding custom and practice, as well as by its role as a representative of the KISD Community to regulate the content of school banners.
37. For instance, the Board has been made aware of recent news reports indicating that students at a public school in Louisiana displayed, at a basketball championship game against a private school named Parkview Baptist, banners that stated, “Jesus [heart]’s you ... unless you attend Parkview Baptist.” The Board agrees with the position taken by the High School Cheerleader Squad Sponsors in their depositions in the Lawsuit that such a banner would constitute poor sportsmanship and should not be permitted to be displayed by the Kountze ISD Cheerleader Squad, regardless of its arguably religious content.

38. The Board is proud of the opportunity it has been able to provide to many of its students over the decades to participate in the Cheerleader Squad. As part of that participation, the cheerleaders have learned important lessons about teamwork, leadership and support for the KISD Community.

(b) Additional findings in light of historical practice and precedent outside the KISD Community.

1. It has been the unbroken and constant tradition in the United States from Colonial times to the present for both the People and the government to recognize the existence of God, His authorship of rights, our dependence on Him, and the duty to thank Him for his beneficence. Please see the Appendix No. 3 for a few of the numerous historical documents evidencing what is written herein.
2. Moreover, the Board agrees with the Supreme Court of the United States that the Establishment Clause should not be interpreted so as to prefer “those who believe in no religion over those who do believe.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). As the Supreme Court explained, there is “no constitutional requirement which makes it necessary for government to be hostile to religion.” 343 U.S. at 313. Nor must government “throw its weight against efforts to widen the effective scope of religious influence.” *Id.*
3. It is the experience of the Board and the KISD Community and of the United States more broadly that “we are a religious people whose institutions presuppose a Supreme Being.” *Zorach*, 343 U.S. at 313, repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963).
4. Similarly, the Constitution of the State of Texas begins by invoking “the blessings of Almighty God” and requires those holding public office to acknowledge the existence of a Supreme Being. TEX. CONST. Preamble and art. 1, § 4.
5. Based on the evidence and historical traditions, the Board concludes that religion has been and continues to be a legitimate, important, and positive part of the KISD Community.
6. In light of the traditions of this country, of this state and of this community, the Board concludes that the Establishment Clause of the First Amendment to the United States Constitution should not be interpreted so as to require KISD to eliminate all fleeting expressions of religious belief at school-sponsored events merely because they occur on school banners.
7. “Run-through” banners, like other school banners displayed by the Cheerleader Squad as part of their official activities, are the speech of KISD

and are subject to the control and oversight of various school officials including, but not limited to, the Superintendent, the campus principals, the athletic director, and the sponsors of the Cheerleader Squad.

8. The religiously-themed messages on the “run-through” banners, like countless other messages on the “run-through” or other school banners, are fleeting expressions of community sentiment.
 9. The Board does not believe that, in the context of the KISD Community, the use of the religiously-themed messages on the “run-through” banners created or is likely to create an establishment of religion.
 10. The Board believes that the Establishment Clause does not require it to exclude such fleeting expressions merely because some of them express religious sentiments that are widely held within the KISD Community.
 11. Despite the Board’s belief that the “run-through” banners do not violate the Establishment Clause, Mr. Weldon nevertheless received the FFRF Letter from a Freedom from Religion Foundation staff attorney. In addition, the Freedom from Religion Foundation has filed an amicus brief in the Lawsuit asserting that permitting religiously-themed “run-through” banners violates the Establishment Clause.
 12. In order to make clear its legal obligations, the Board has requested that Judge Thomas issue a ruling declaring whether or not the Establishment Clause requires KISD to prohibit the inclusion of religiously-themed messages on the “run-through” banners.
 13. The Board anticipates receiving Judge Thomas’ decision prior to the beginning of the 2013-2014 school year and prior to the beginning of any Cheerleader Squad activities for the 2013-2014 school year. All Cheerleader Squad activities for the 2012-2013 school year have already finished and there are no more activities until the start of the activities for the 2013-2014 school year.
4. Based on the Board’s findings, the Board provided guidance to school personnel, including the following:

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

The Board and school personnel retain the right to restrict the content of school banners, including run-through banners. The

Board notes that such restrictions generally relate to the overall purpose of run-through banners as part of school sporting events.

VII. ARGUMENTS AND AUTHORITIES

A. The Court should defer to the findings of Board.

The Court should defer to the findings of the Board, the local government legislative body that is uniquely suited to gather evidence and make findings on local problems. The United States Supreme Court has explained that the findings and conclusions of local legislative bodies are entitled to deference because such bodies are in a better position than the judiciary to gather and evaluate data on local problems. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 440 (2002). This is the same deference that the courts grant to Congress, even when considering issues in which First Amendment rights are implicated. *See id.* (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion)). The Supreme Court explained the issue more fully in *Turner Broadcasting*:

We owe Congress' findings deference in part because the institution "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon" legislative questions. *Turner, supra*, 512 U.S. at 665-666 (plurality opinion) (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 331, n. 12, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985)); *Ward*, 491 U.S. at 800; *Rostker v. Goldberg*, 453 U.S. 57, 83, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981) (courts must perform "appropriately deferential examination of Congress' evaluation of the evidence"); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973). ... Though different in degree, the deference to Congress is in one respect akin to deference owed to administrative agencies because of their expertise. *See FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814, 56 L. Ed. 2d 697, 98 S. Ct. 2096 (1978) ("Complete factual support in the record for the [FCC's] judgment or prediction is not possible or required; 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency'"); *United States v. Midwest Video Corp.*, 406 U.S. at 674 (it was "beyond the competence of the Court of Appeals itself

to assess the relative risk and benefits” of FCC policy, so long as that policy was based on findings supported by evidence). This is not the sum of the matter, however. We owe Congress’ findings an additional measure of deference out of respect for its authority to exercise the legislative power. Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy.

Turner Broadcasting, 520 U.S. at 195-196.

B. The application of the Establishment Clause to the case at bar should not require Defendants to prohibit fleeting references to religion on “run-through” banners.

The application of the Establishment Clause to the case at bar should not require Defendants to prohibit fleeting references of community sentiment on “run-through” banners merely because some of those references are religious. As the United States Supreme Court observed in *Zorach v. Clauson*, mandating separation between the government and religion beyond the specific reach of the Establishment Clause would “show a callous indifference to religious groups” and would make government and religion “aliens to each other – hostile, suspicious, and even unfriendly.” 343 U.S. 306, 312 and 314 (1952). As the Court further explained, the Establishment Clause should not be interpreted so as to prefer “those who believe in no religion over those who do believe.” *Id.* at 314. Defendants contend that the Establishment Clause should not be interpreted so as to require Defendants to prohibit such fleeting references of community sentiment merely because they are sometimes religious.

The main difficulty lies in the interpretation of the Supreme Court’s decision in *Santa Fe Independent School District v. Doe*, which held that student-led, student-initiated prayers at high school football games violates the Establishment Clause. 530 U.S. 290, 301 (2000). Defendants note, however, that there was no evidence in *Doe* that the exclusion of the prayers before the

football games would create the appearance of hostility to religion¹ and, perhaps more to the point, a prayer would appear to fit more clearly within the scope of prohibited religious-state interaction. *Doe*, 530 U.S. at 301-302 (explaining that analysis “is properly guided by the principles that we endorsed in” *Lee v. Weisman*, 505 U.S. 577 (1992), in which the Supreme Court held that a prayer delivered by a rabbi at a middle school graduation ceremony violated the Establishment Clause). However, as the Supreme Court explained in *Zorach*, there is “no constitutional requirement which makes it necessary for government to be hostile to religion.” 343 U.S. at 313. Nor must government “throw its weight against efforts to widen the effective scope of religious influence.” *Id.*

Defendants request that the Court issue a declaration that, while the Kountze High School run-through banners are government speech, *Santa Fe Independent School District v. Doe* should not be applied so as to prohibit the religious messages on the banners because, they do not create, at least in the context of the KISD Community, Establishment Clause concerns sufficient to require their prohibition.

C. Establishment Clause decisions requiring the exclusion of religion from public life should be narrowly construed or reconsidered.

The application of Establishment Clause decisions should be narrowly construed or reconsidered to the extent that they result in the exclusion of religion from public life. As the United States Supreme Court has repeatedly affirmed, “we are a religious people whose institutions presuppose a Supreme Being.” *Zorach*, 343 U.S. at 313, repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963). Much of modern Establishment Clause jurisprudence finds its roots in efforts to forbid government support of

¹ Chief Justice Rehnquist did express concern that the tone, more so than the actual holding, of the Court’s decision

“pervasively sectarian,” that is, Catholic, institutions. *Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) (Op. of the Court).² Like the Supreme Court in *Mitchell*, this Court should disavow the “shameful pedigree” that prohibits innocuous religious messages in public life. *Id.* at 828; see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-55 (2004) (Thomas, J., concurring in judgment).

Justice Thomas has pointed to a number of different bases for reconceiving the Establishment Clause along more traditional lines. In particular, Justice Thomas has argued that (1) the Establishment Clause is a federalism provision that does not create an individual right, (2) due to the federalism nature of the Clause, it resists incorporation through the Fourteenth Amendment, and (3) the Establishment Clause would only apply to government coercion of religious orthodoxy and of financial support by force of law and threat of penalty. Justice Thomas, quoting Justice Stewart, has noted the irony that incorporation of an individual right under the Establishment Clause has resulted in the prohibition of precisely what the Establishment Clause was intended to protect – state establishments of religion. *Newdow*, 542 U.S. at 51.

Defendants contend that these considerations, and the questionable pedigree of Establishment Clause jurisprudence, counsels in favor of a narrow interpretation, or rejection if necessary, of prior Establishment Clause case law.

D. Religion should not be excluded from public life where, as here, it serves a legitimate, secular purpose.

Religion and religious references should not be excluded from public life where, as in the case at bar, they serve a legitimate, secular purpose. See, e.g., *Croft v. Perry*, 624 F.3d 157, 167

in *Doe* “bristle[d] with hostility to all things religious in public life.” *Id.* at 318 (dissenting).

² There was no majority opinion in *Mitchell v. Helms*. The opinion of the Court was supported by four of the justices.

(5th Cir. 2010) (upholding “under God” in Texas Pledge of Allegiance because, despite its recent insertion into the Texas Pledge, the phrase served a nonreligious purpose); *see also Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, C.J., dissenting) (quoting the Northwest Ordinance of 1787, enacted by Congress, for the proposition that government can support religion when it serves a secular purpose, such as “good government and the happiness of mankind”).

The Kountze High School football run-through banners serve the legitimate, secular purposes of, at the very least, encouraging the football team, stimulating school spirit, and encouraging good sportsmanship. Kountze ISD should not be required to exclude religious references from the Kountze High School banners solely because of their religious content in light of the fact that the banners, even those including religious references, serve a legitimate, secular purpose and constitute mere fleeting expressions of community sentiment.

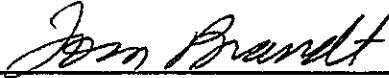
VIII. CONCLUSION

Kountze ISD is entitled to summary judgment on its request for declaratory relief.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests that this its Traditional Motion for Summary Judgment be set for hearing, that upon hearing and consideration that it be granted, and that the Court enter an Order declaring that Kountze Independent School District is not required by the Establishment Clause to prohibit religious references on “run-through” banners, as well as for such other and further relief, both general and special, at law or in equity, to which it may show itself to be justly entitled.

Respectfully submitted,

**FANNING HARPER MARTINSON
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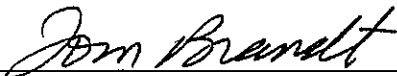
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed, telecopied, or hand delivered to all attorneys of record, in compliance with Rule 21a of the Texas Rules of Civil Procedure, on the 11th day of April, 2013.



THOMAS P. BRANDT

Cause No. 53526

COTI MATTHEWS, et al.,

Plaintiffs,

VS.

KOUNTZE INDEPENDENT
SCHOOL DISTRICT and KEVIN
WELDON, in his individual and
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IN THE DISTRICT COURT

356th JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

FIAT

IT IS ORDERED that a hearing on the foregoing Defendant the Kountze Independent School District's and Kevin Weldon's, in his official capacity as Superintendent, Traditional Motion for Summary Judgment Requesting Declaratory Relief is set for the ____ day of _____, 2013 at ____ o'clock __.m. in the Courtroom of the 356th District Court in Hardin County, Texas.

Signed this ____ day of _____, 2013.

JUDGE PRESIDING

RESOLUTION AND ORDER NO. 1

A RESOLUTION OF THE BOARD OF TRUSTEES, KOUNTZE INDEPENDENT SCHOOL DISTRICT, ADOPTING AN ORDER CONCERNING COMPLAINTS OF HOSTILITY TO RELIGION OR THE FAVORING OF IRRELIGION OVER RELIGION.

WHEREAS, the Kountze High School Cheerleaders ("the Cheerleaders squad") is an organized activity of Kountze High School, which is part of Kountze Independent School District.

WHEREAS, the Cheerleaders serve a variety of purposes, including, but not limited to, teaching the students participating in the Cheerleaders squad to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork and pride in a quality performance through maintaining high standards.

WHEREAS, one of the official activities of the Cheerleaders squad is, and has been for decades, the preparation of "run-through" banners for display and use at Kountze High School varsity football games.

WHEREAS, the "run-through" banners generally serve the purpose of encouraging school spirit and good sportsmanship.

WHEREAS, some or all of the "run-through" banners that were prepared and used during the 2012-2013 school year contained religiously-themed messages, including quotations from the Bible and references to Jesus Christ.

WHEREAS, the religiously-themed banners served to encourage school spirit and good sportsmanship.

WHEREAS, on September 17, 2012, Kevin Weldon ("Mr. Weldon"), Superintendent of the Kountze Independent School District, received a letter from the Freedom From Religion Foundation ("the FFRF letter").

WHEREAS, the FFRF letter states that inclusion of religiously-themed messages on the "run-through" banners violates the Establishment Clause of the First Amendment to the United States Constitution ("the Establishment Clause"), as that clause has been interpreted by the Supreme Court of the United States ("the Supreme Court").

WHEREAS, after receiving the FFRF letter, Mr. Weldon sought legal advice from two separate lawyers, both of whom informed Mr. Weldon that the "run-through" banners appeared to violate the Establishment Clause, as interpreted by the Supreme Court in a decision styled *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).



WHEREAS, based on the legal advice he received, on September 18, 2012, Mr. Weldon notified the campus principals that "run-through" banners could no longer include religiously themed messages and asked the campus principals to convey this message to the students at their respective campuses.

WHEREAS, Mr. Weldon, in making the decision to restrict further religiously themed run-through banners, was performing a discretionary duty within the scope of his authority.

WHEREAS, Mr. Weldon took action to restrict the religiously themed run-through banners in good faith, relying on the advice of legal counsel.

WHEREAS, Texas educators, in maintaining the dignity of the profession, shall respect and obey the law, demonstrate personal integrity, and exemplify honesty. *See* Kountze Independent School District Policy DH (Exhibit); 19 TEX. ADMIN. CODE § 247.1

WHEREAS, Mr. Weldon fulfilled his obligation to "respect and obey the law" by taking action in accordance with the legal advice available to him at the time.

WHEREAS, because of the immediacy of the situation, Mr. Weldon was forced to make a decision before he had the opportunity to consult with the Board of Trustees of the Kountze Independent School District ("the Board").

WHEREAS, the members of the Board are elected officials and, upon taking office, each swore or affirmed that he or she "will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God." TEX. CONST. art. 16, § 1.

WHEREAS, the Board and each of its members individually intend, with the help of God, to fulfill their oath of office, preserving, protecting and defending the Constitution and laws of the United States and of this State.

WHEREAS, on September 20, 2012, various students who participate in the Cheerleaders squad and their parents filed a lawsuit against the Kountze Independent School District and Mr. Weldon styled *Coti Matthews et al. v. Kountze Independent School District et al.*, Cause No. 53526 (356th Judicial District, Hardin County, Texas) ("the Lawsuit").

WHEREAS, on September 20, 2012, Judge Thomas in the 356th Judicial District, Hardin County, Texas, issued a temporary restraining order against Kountze Independent School District and Mr. Weldon, prohibiting them from restricting the display of the religiously themed run-through banners. No representative of Kountze Independent School District or Mr. Weldon was present at the hearing in which the plaintiffs requested a temporary restraining order.

WHEREAS, Kountze Independent School District and Mr. Weldon obeyed the temporary restraining order issued by Judge Thomas.

WHEREAS, on October 4, 2012, there was a hearing before Judge Thomas in connection with the plaintiffs' request for a temporary injunction ("the Hearing").

WHEREAS, one of the students, Kieara Moffett ("Ms. Moffett"), who testified during the Hearing stated that the decision to prevent the Cheerleaders squad from displaying the religiously themed run-through banners caused her to feel that her religion was considered "not good enough" and that she perceived the actions of the school officials involved indicated hostility toward her religious faith.

WHEREAS, the members of the Board were present at the Hearing and personally heard the testimony of Ms. Moffett regarding the impression made on her by the decision to prevent the display of the religiously themed run-through banners.

WHEREAS, Ms. Moffett's testimony regarding her feelings about the decision to prevent the display of the religiously themed run-through banners was credible.

WHEREAS, through their involvement in the local community, the members of the Board are concerned that other individuals, both connected with and unconnected with Kountze High School, perceive the decision to prevent the display of the religiously themed run-through banners as conveying hostility toward religion and a preference for those who believe in no religion over those who do believe.

WHEREAS, the Board believes that it would be useful to hold hearings and collect evidence to determine whether the exclusion of the religiously themed run-through banners has created the impression that the Board, Mr. Weldon or other school officials are hostile toward religion or prefer those who believe in no religion over those who do believe.

WHEREAS, the Board has no intention to take actions that are hostile to religion nor does it intend to prefer those who believe in no religion over those who do believe.

WHEREAS, the Board does not believe that Mr. Weldon has or had any intention to take actions that are hostile to religion nor does he intend to prefer those who believe in no religion over those who do believe.

WHEREAS, the Board agrees with the Supreme Court that the Establishment Clause should not be interpreted so as to prefer "those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). The Board further agrees with the Supreme Court that there is "no constitutional requirement which makes it necessary for government to be hostile to religion." 343 U.S. at 313. Nor must government "throw its weight against efforts to widen the effective scope of religious influence." *Id.*

WHEREAS, the Board agrees with the Supreme Court when it explains that "we are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313, repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963).

WHEREAS, the Supreme Court's admonition that "we are a religious people whose institutions presuppose a Supreme Being" is echoed in the Constitution of the State of Texas, which requires those holding public office to acknowledge the existence of a Supreme Being. TEX. CONST. art. 1, § 4.

NOW, THEREFORE, BE IS RESOLVED BY THE BOARD OF TRUSTEES OF THE KOUNTZE INDEPENDENT SCHOOL DISTRICT THAT THE FOLLOWING ORDER BE ADOPTED:

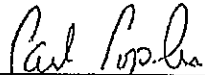
ORDER

Section 1: The Superintendent of the Kountze Independent School District, Kevin Weldon, is ordered to investigate and assist the Board of Trustees in investigating whether the exclusion of religiously themed run-through banners from Kountze Independent School District athletic events has created the impression of hostility to religion or the impression that Kountze Independent School District or Kevin Weldon favors those who believe in no religion over those who believe.

Section 2: The Board of Trustees of the Kountze Independent School District intends to hold hearings, with testimony from the public, as well as receive and consider other evidence relating to the question of whether the exclusion of religiously themed run-through banners from Kountze Independent School District athletic events has created the impression of hostility to religion or the impression that Kountze Independent School District or Kevin Weldon favors those who believe in no religion over those who believe.

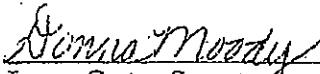
IT IS SO ORDERED.

ENACTED and ORDERED by the Board of Trustees of the Kountze Independent School District on the 16 day of October, 2012 at a duly constituted special called meeting of the Board of Trustees.


Wayland Whisenant, President
Board of Trustees
Kountze Independent School District


CARL COPLEN
VICE PRESIDENT

ATTEST:


~~Logan Carter, Secretary~~
Board of Trustees
Kountze Independent School District

DONNA MOODY
ACTING SECRETARY

APPROVED AS TO FORM:


Tanner Hunt
General Counsel
Kountze Independent School District

RESOLUTION AND ORDER NO. 3

**A RESOLUTION OF THE BOARD OF TRUSTEES, KOUNTZE
INDEPENDENT SCHOOL DISTRICT, ADOPTING AN ORDER
CONCERNING FLEETING REFERENCES TO RELIGION
DURING SCHOOL-SPONSORED EVENTS.**

WHEREAS, the members of the Board of Trustees of the Kountze Independent School District (“the Board”) are the duly elected representatives of the people of the Kountze Independent School District (“the KISD Community”), live in the KISD Community and have knowledge of the KISD Community.

WHEREAS, each member of the Board, upon taking office, swore or affirmed that he or she would “to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.” TEX. CONST. art. 16, § 1.

WHEREAS, the Board and each of its members individually intend, with the help of God, to fulfill their oath of office, by preserving, protecting and defending the Constitution and laws of the United States and of this State.

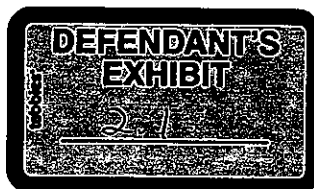
WHEREAS, under the Constitution of the United States, the whole United States is obliged to guaranty to each State a republican form of government, and all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

WHEREAS, the People of the State of Texas, in the constitutional exercise of these reserved powers, through the Constitution and laws of Texas, have established and maintained a republican government, and have vested this elected Board with the primary authority and duty to implement the state’s system of public education in the KISD Community.

WHEREAS, in the exercise of this authority, in response to concerns of members of the KISD Community regarding the appearance of hostility to religion or the favoring of irreligion over religion, the Board adopted Resolution and Order No. 1, which instructed Superintendent Kevin Weldon to assist the Board in organizing an opportunity for the Board to receive evidence, both oral and written, regarding the perception of the on-going “run-through” banners controversy within the KISD Community.

WHEREAS, the Board held a hearing on February 26, 2013, to hear evidence pursuant to Resolution and Order No. 1. The Board has received evidence, both oral and written, regarding the “run-through” banners controversy. The oral and written evidence submitted to the Board in connection with the February 26, 2013, hearing is included in Appendix No. 1.

WHEREAS, the Board received additional evidence from counsel, which is included in Appendix No. 2.



WHEREAS, on behalf of themselves and the KISD Community, the Board is proud of the Kountze High School Cheerleaders (“the High School Cheerleader Squad”) the Kountze Middle School Cheerleaders (“the Middle School Cheerleader Squad”) (jointly, “the Cheerleader Squad”) and conveys, to all past and present members of the Cheerleader Squad, the KISD Community’s gratitude for their work on behalf of the school and the community.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF TRUSTEES OF THE KOUNTZE INDEPENDENT SCHOOL DISTRICT THAT THE FOLLOWING ORDER BE ADOPTED:

ORDER

ARTICLE I PURPOSE AND INTENT

Section 1.01 Adoption of Preamble

The “whereas” clauses above constitute the preamble of this resolution. The findings contained in the preamble of this resolution and order are determined to be true and correct and are adopted as a part of this resolution and order.

Section 1.02 Purpose and Intent

It is the purpose of this resolution and order to fully comply with all of the Board’s duties under federal and state law, including the Board’s obligations under both the Fourteenth Amendment to the Constitution of the United States and the Texas Bill of Rights, and the Board’s duty under Texas law to govern the provision of public education in the KISD Community. It is also the purpose and intent of this resolution and order to provide guidance to personnel of the Kountze Independent School District to promote the health, safety, morals and general welfare of the members of the Kountze Independent School District community and to respect the constitutional rights of all.

Section 1.03 Findings

Based on evidence known to the Board concerning the practice of utilizing school banners, and particularly “run-through” banners, in the KISD Community and based on the historical practices of the United States government and people relating to the religious messages presented in hearings and in reports made available to the Board, and based on findings and holdings in the cases of *Lee v. Weisman*, 505 US 577 (1992), *Santa Fe Independent School Dist. v. Doe*, 530 US 290 (2000), *Van Orden v. Perry*, 545 US 677 (2005), and *McCreary County v. American Civil Liberties Union of Ky.*, 545 US 844 (2005), the Board makes the following legislative findings of fact:

- (a) Findings regarding the use of “run-through” banners by the Kountze Independent School District.**

1. The Cheerleader Squad is an organized extracurricular activity of Kountze Middle School and Kountze High School, which are part of Kountze Independent School District.
2. The Cheerleader Squad serves a variety of purposes, including, but not limited to, teaching its student-members to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork and take pride in a quality performance through maintaining high standards.
3. For decades, one of the official activities of the High School Cheerleader Squad has been the preparation of “run-through” banners for display and use at Kountze High School varsity football games. Such “run-through” banners generally display a brief message.
4. In addition, for decades, the Cheerleader Squad has prepared other banners for display and use in connection with their official activities as the Cheerleader Squad.
5. The banners displayed and used by the Cheerleader Squad, including “run-through” banners, have generally served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.
6. For decades, the KISD Community, the Kountze Independent School District, and the Board have understood and intended that in preparing and displaying banners as part of school activities, including the “run-through” banners, the Cheerleader Squad as a whole and the individual cheerleaders on the Cheerleader Squad act as representatives and spokespersons for the KISD Community, the Kountze Independent School District, and the Kountze Middle School or Kountze High School.
7. For decades, neither the Board nor the Kountze Independent School District has micro-managed the content of the banners, but has generally entrusted the Cheerleader Squad and their supervising sponsors with discretion to decide how to best speak on behalf of the community and school. The content of the banners has never before been a source of controversy.
8. It is and has been the understanding and intention of Kountze Independent School District that Kountze Independent School District Board of Trustees Policies FNA (LEGAL) and FNA (LOCAL) do not apply to the “run-through” banners 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 Independent School District.

9. For decades, it has been common knowledge among members of the KISD Community that many of its members, including many student athletes and fans, profess some religious belief, that many such persons identify themselves as Christians.
10. The banner messages, whether religiously themed or otherwise, have primarily served the purpose of encouraging athletic excellence, good sportsmanship, and school spirit.
11. Some or all of the “run-through” banners that were prepared and used during the 2012-2013 school year contained religiously-themed messages, including quotations from the Bible and references to Jesus Christ. However, the vast majority, if not all, of the “run-through” banners in the past have not included any religiously-themed messages.
12. The banner messages have not functioned as prayers addressed to God, but as messages of encouragement addressed to athletes and perhaps other members of the KISD Community.
13. The messages on the “run-through” banners, including religiously-themed messages, have not been intended to proselytize or convey any message in any way hostile to any member of the KISD Community.
14. The messages on the “run-through” banners, including religiously-themed messages, have never been part of a prayer or other religious exercise and have not served to solemnize the event nor otherwise to induce reverence.
15. Spectators at Kountze High School football games are not required or expected to stand, bow their heads, or give any sign of consent or endorsement as to the message contained on the “run-through” banners.
16. The messages on the “run-through” banners, whether religiously-themed or otherwise, are displayed for a short period of time (generally no more than a couple of minutes), until they are destroyed by the student athletes and subsequently discarded.
17. Before, during, and after the brief display of the “run-through” banners, many non-religious messages of encouragement are communicated on behalf of the KISD Community and the Kountze Independent School District, whether by display, oral statements amplified by microphone, or otherwise.
18. Before September 17, 2012, there is no record of the Board receiving directly or indirectly any objection, by anyone, to the religious nature of any message on the run-through banners.
19. On September 17, 2012, Kevin Weldon (“Mr. Weldon”), Superintendent of the Kountze Independent School District, received a letter from the Freedom from Religion Foundation (“the FFRF letter”).

20. The FFRF letter states that inclusion of religiously-themed messages on the “run-through” banners violates the Establishment Clause of the First Amendment to the United States Constitution (“the Establishment Clause”), as that clause has been interpreted by the Supreme Court of the United States (“the Supreme Court”).
21. The FFRF letter does not specifically identify any person who has complained about the “run-through” banners, or whether that person has a child or other relative attending KISD schools.
22. Neither Mr. Weldon, Mr. Reese Briggs, the Interim Superintendent, nor the Board has received any complaints about the content of the “run-through” banners from any cheerleader, football player or other individual whose responsibilities require them to attend or participate in Kountze High School football games.
23. After receiving the FFRF letter, Mr. Weldon sought legal advice from two separate lawyers, both of whom informed Mr. Weldon that the “run-through” banners appeared to violate the Establishment Clause, as interpreted by the Supreme Court in a decision styled *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
24. Based on the legal advice he received, on September 18, 2012, Mr. Weldon notified the campus principals that “run-through” banners could no longer include religiously themed messages and asked the campus principals to convey this message to the students at their respective campuses.
25. Because of the immediacy of the situation, Mr. Weldon was forced to make a decision before he had the opportunity to consult with the Board, which by law must post a 72-hour notice before meeting.
26. On September 20, 2012, some members of the Cheerleader Squad and their parents filed a lawsuit against the Kountze Independent School District and Mr. Weldon, styled *Coti Matthews et al. v. Kountze Independent School District et al.*, Cause No. 53526 (356th Judicial District, Hardin County, Texas) (“the Lawsuit”).
27. On September 20, 2012, Judge Thomas entered a temporary restraining order in the Lawsuit. Judge Thomas subsequently entered a temporary injunction order on October 18, 2012. Kountze Independent School District and Mr. Weldon obeyed and have continued to obey the temporary restraining order and the temporary injunction order issued by Judge Thomas.
28. As a result of the issuance of the temporary restraining order and the subsequent temporary injunction order, the Board and Kountze Independent School District personnel have not had their ordinary authority over the contents of the run-through banners.

29. The Board is not aware of any messages displayed on the run-through banners since the issuance of the temporary restraining order of which it disapproves.
30. Other than the “run-through” banners, the Board is not aware of any school banners displayed or used by the Cheerleader Squad prior to September 20, 2012, that contained any religious messages.
31. Based on the information and evidence available, the Board believes that individuals in the KISD Community perceive the decision to prevent the display of the religiously themed run-through banners as conveying hostility toward religion and a preference for those who believe in no religion over those who do believe.
32. The Board is disappointed that the attorneys representing the cheerleaders involved in the Lawsuit advocated immediate recourse to the district court rather than bringing their concerns to the Board, as provided for in State Law and KISD Board policy. On the date that the attorneys filed suit against KISD and sought a temporary restraining order, there was more than a week before the next Kountze High School varsity football game. Consequently, while it would have required quick action, there was still the possibility of the Board meeting, in compliance with the Texas Open Meetings Act, prior to the next varsity football game.
33. The actions of the attorneys in seeking immediate judicial relief prevented the Board from having an opportunity to consider the issue prior to the issuance of the temporary restraining order. In fact, the attorneys entirely failed to bring their concerns before the Board until February 26, 2013, at the hearing called for by the Board, on its own initiative, to investigate the questions raised by the FFRF Letter, the Lawsuit and the surrounding KISD Community concerns.
34. Despite the failure of the attorneys representing some of the cheerleaders to bring their concerns to the Board, the Board took prompt action to investigate and resolve the questions raised by the FFRF Letter and the Lawsuit.
35. The Board rejects the claims made against KISD in the Lawsuit. Based on how KISD and its extracurricular activities have operated for decades, the policies duly enacted by the Board, and the relevant constitutional and statutory provisions and judicial decisions, the school banners, including “run-through” banners, displayed by the Cheerleader Squad represent KISD and are not intended to represent the expression or beliefs of individual students or cheerleaders. In other words, the “run-through” banners are the speech of the school, not private speech.
36. The Board, and those school officials designated by it, are authorized by longstanding custom and practice, as well as by its role as a representative of the KISD Community to regulate the content of school banners.

37. For instance, the Board has been made aware of recent news reports indicating that students at a public school in Louisiana displayed, at a basketball championship game against a private school named Parkview Baptist, banners that stated, "Jesus [heart]'s you ... unless you attend Parkview Baptist." The Board agrees with the position taken by the High School Cheerleader Squad Sponsors in their depositions in the Lawsuit that such a banner would constitute poor sportsmanship and should not be permitted to be displayed by the Kountze ISD Cheerleader Squad, regardless of its arguably religious content.

38. The Board is proud of the opportunity it has been able to provide to many of its students over the decades to participate in the Cheerleader Squad. As part of that participation, the cheerleaders have learned important lessons about teamwork, leadership and support for the KISD Community.

(b) Additional findings in light of historical practice and precedent outside the KISD Community.

1. It has been the unbroken and constant tradition in the United States from Colonial times to the present for both the People and the government to recognize the existence of God, His authorship of rights, our dependence on Him, and the duty to thank Him for his beneficence. Please see the Appendix No. 3 for a few of the numerous historical documents evidencing what is written herein.
2. Moreover, the Board agrees with the Supreme Court of the United States that the Establishment Clause should not be interpreted so as to prefer "those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). As the Supreme Court explained, there is "no constitutional requirement which makes it necessary for government to be hostile to religion." 343 U.S. at 313. Nor must government "throw its weight against efforts to widen the effective scope of religious influence." *Id.*
3. It is the experience of the Board and the KISD Community and of the United States more broadly that "we are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313, repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963).
4. Similarly, the Constitution of the State of Texas begins by invoking "the blessings of Almighty God" and requires those holding public office to acknowledge the existence of a Supreme Being. TEX. CONST. Preamble and art. 1, § 4.

5. Based on the evidence and historical traditions, the Board concludes that religion has been and continues to be a legitimate, important, and positive part of the KISD Community.
6. In light of the traditions of this country, of this state and of this community, the Board concludes that the Establishment Clause of the First Amendment to the United States Constitution should not be interpreted so as to require KISD to eliminate all fleeting expressions of religious belief at school-sponsored events merely because they occur on school banners.
7. "Run-through" banners, like other school banners displayed by the Cheerleader Squad as part of their official activities, are the speech of KISD and are subject to the control and oversight of various school officials including, but not limited to, the Superintendent, the campus principals, the athletic director, and the sponsors of the Cheerleader Squad.
8. The religiously-themed messages on the "run-through" banners, like countless other messages on the "run-through" or other school banners, are fleeting expressions of community sentiment.
9. The Board does not believe that, in the context of the KISD Community, the use of the religiously-themed messages on the "run-through" banners created or is likely to create an establishment of religion.
10. The Board believes that the Establishment Clause does not require it to exclude such fleeting expressions merely because some of them express religious sentiments that are widely held within the KISD Community.
11. Despite the Board's belief that the "run-through" banners do not violate the Establishment Clause, Mr. Weldon nevertheless received the FFRF Letter from a Freedom from Religion Foundation staff attorney. In addition, the Freedom from Religion Foundation has filed an amicus brief in the Lawsuit asserting that permitting religiously-themed "run-through" banners violates the Establishment Clause.
12. In order to make clear its legal obligations, the Board has requested that Judge Thomas issue a ruling declaring whether or not the Establishment Clause requires KISD to prohibit the inclusion of religiously-themed messages on the "run-through" banners.
13. The Board anticipates receiving Judge Thomas' decision prior to the beginning of the 2013-2014 school year and prior to the beginning of any Cheerleader Squad activities for the 2013-2014 school year. All Cheerleader Squad activities for the 2012-2013 school year have already finished and there are no more activities until the start of the activities for the 2013-2014 school year.

ARTICLE II

DEFINITIONS

Section 2.01 **Definitions**

“School banner” means, for purposes of this Resolution, a sign or banner displayed by the Cheerleader Squad, either the Middle School Cheerleader Squad or the High School Cheerleader Squad, as part of their school-sponsored activities as the Cheerleader Squad.

“Run-through banner” means a sign or banner displayed in a stadium or auditorium during or in conjunction with a sports game through which a Kountze Independent School District sports team runs through. “Run-through banners” are a type of “school banner.”

“Cheerleader Squad” means the group of students who have been selected to serve as cheerleaders at Kountze Independent School District sporting events.

ARTICLE III **AMENDMENT TO POLICY FNA (LOCAL)**

Section 3.01 **Amendment**

Kountze Independent School District Policy FNA (LOCAL) is amended to include the following declaratory and clarificatory paragraph at the conclusion of the section titled “STUDENT SPEAKERS AT NONGRADUATION EVENTS”:

Run-through banners are not a limited public forum for student speakers at Kountze Independent School District sporting events. Run-through banners are not an opportunity for students “to publicly speak” as that phrase is used in this policy.

An amended and restated version of Policy FNA (LOCAL) is attached hereto and marked as Exhibit No. 1.

ARTICLE IV **MISCELLANEOUS**

Section 4.01 **Guidance to School Personnel Regarding Supervision of the Cheerleader Squad**

The Middle School Cheerleader Squad and the High School Cheerleader Squad are extracurricular activities of KISD pursuant to Board Policy FM(LEGAL). The Cheerleader Squad is sponsored by KISD and sponsors are employed and paid by KISD for the specific purpose of overseeing, leading, organizing and, as necessary, disciplining students involved in the Cheerleader Squad. In fact, Board policy, for instance, FNC(LOCAL), FNCA(LOCAL), and FO(LOCAL), specifically permits the sponsors to develop higher standards of conduct than normally apply to KISD students.

The Middle School Cheerleader Squad and the High School Cheerleader Squad are not noncurriculum-related groups under Board Policy FNAB(LOCAL). The sponsors of the

Cheerleader Squad are not "employee monitors" as that term is used in Board Policy FNAB(LOCAL).

Those individuals responsible for supervising the Cheerleader Squad, specifically the Cheerleader Squad sponsors, are expected to approve in advance or otherwise supervise all banners prepared by the Cheerleader Squad for display as part of the normal activities and duties of the Cheerleader Squad. While the day-to-day responsibility to approve or otherwise supervise such banners is entrusted primarily to the Cheerleader Squad sponsors, other appropriate school personnel retain the right to regulate the display and content of such banners.

For purpose of this section, "other appropriate school personnel" means the superintendent, the campus principals, the athletic director, the coach of the sports team playing, and such other school personnel designated by one of these identified school personnel.

Section 4.02 **Fleeting Expressions of Community Sentiment**

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


The Board and school personnel retain the right to restrict the content of school banners, including run-through banners. The Board notes that such restrictions generally relate to the overall purpose of run-through banners as part of school sporting events.

Section 4.03 **Distribution of this Order and Resolution**

The Superintendent or his designee is directed to distribute a copy of this resolution and order to all campus principals and to instruct all campus principals to distribute it to the athletic director, the coaches of the various sports teams, and the Cheerleader Squad sponsors.

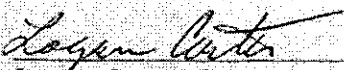
IT IS SO ORDERED.

ENACTED and ORDERED by the Board of Trustees of the Kountze Independent School District on the 8th day of April, 2013 at a duly constituted specially called meeting of the Board of Trustees.



Wayland Whisenant, President
Board of Trustees
Kountze Independent School District

ATTEST:



Logan Carter, Secretary

APPROVED AS TO FORM:

Tanner Hunt

Board of Trustees
Kountze Independent School District

General Counsel
Kountze Independent School District

STUDENT RIGHTS AND RESPONSIBILITIES
STUDENT EXPRESSION

FNA
(LOCAL)

STUDENT
EXPRESSION OF
RELIGIOUS
VIEWPOINTS

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

STUDENT SPEAKERS
AT NONGRADUATION
EVENTS

The District hereby creates a limited public forum for student speakers at all school events at which a student is to publicly speak. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion.

For purposes of this policy, a "school event" is a school-sponsored event or activity that does not constitute part of the required instruction for a segment of the school's curriculum, regardless of whether the event takes place during or after the school day.

For purposes of this policy, "to publicly speak" means to address an audience at a school event using the student's own words. A student is not using his or her own words when the student is reading or performing from an approved script, is delivering a message that has been approved in advance or otherwise supervised by school officials, or is making brief introductions or announcements.

Run-through banners are not a limited public forum for student speakers at Kountze Independent School District sporting events. Run-through banners are not an opportunity for students "to publicly speak" as that phrase is used in this policy.

INTRODUCTORY
SPEAKERS

Student speakers shall be given a limited public forum to introduce:

1. High school and middle school football games; and
2. High school and middle school banquets.

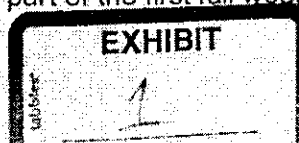
The forum shall be limited in the manner provided by this section on nongraduation events.

ELIGIBILITY AND
SELECTION

Students are eligible to use the limited public forum if they:

1. Are in the highest two grade levels of the school,
2. Volunteer, and
3. Are not in a disciplinary placement at the time of the speaking event.

Eligible students who wish to volunteer shall submit their names to the campus principal during the first full week of instruction each semester. Students are not eligible to volunteer if they are in a disciplinary placement during any part of the first full week of instruction.



STUDENT RIGHTS AND RESPONSIBILITIES
STUDENT EXPRESSION

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tion. If there are no student volunteers, the District shall seek volunteers again at the beginning of the next semester.

The names of the students who volunteer to speak shall be randomly drawn until all names have been selected; the names shall be listed in the order drawn.

ASSIGNMENT OF
INTRODUCTORY
SPEAKERS

Each selected student shall be matched chronologically to the single event for which the student shall give the introduction. The list of student speakers shall be chronologically repeated as needed, in the same order. If no students volunteer or if the selected speaker declines or becomes ineligible, no student introduction will be made at the event.

The District shall repeat the selection process at the beginning of each semester.

CONTENT OF
STUDENT
INTRODUCTIONS

The subject of the student introductions shall relate to the purpose of introducing the designated event. The student must stay on the subject. The student may not engage in speech that:

- Is obscene, vulgar, offensively lewd, or indecent;
- Creates reasonable cause to believe that the speech would result in material and substantial interference with school activities or the rights of others;
- Promotes illegal drug use;
- Violates the intellectual property rights, privacy rights, or other rights of another person;
- Contains defamatory statements about public figures or others; or
- Advocates imminent lawless action and is likely to incite or produce such action.

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

DISCLAIMER

For as long as there is a need to dispel confusion over the fact that the District does not sponsor the student's speech, at each event in which a student shall deliver an introduction, a disclaimer shall be stated in written or oral form, or both, such as, "The student giving the introduction for this event is a volunteering student selected on

STUDENT RIGHTS AND RESPONSIBILITIES
STUDENT EXPRESSION

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neutral criteria to introduce the event. The content of the introduction is the private expression of the student and does not reflect the endorsement, sponsorship, position, or expression of the District."

OTHER STUDENT
SPEAKERS

Certain students who have attained special positions of honor in the school have traditionally addressed school audiences from time to time as a tangential component of their achieved positions of honor, such as the captains of various sports teams, student council officers, class officers, homecoming kings and queens, prom kings and queens, and the like, and have attained their positions based on neutral criteria. Nothing in this policy eliminates the continuation of the practice of having these students, regardless of grade level, address school audiences in the normal course of their respective positions. The District shall create a limited public forum for the speakers and shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against a student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

STUDENT SPEAKERS
AT GRADUATION
CEREMONIES

OPENING AND
CLOSING REMARKS

The District hereby creates a limited public forum consisting of an opportunity for a student to speak to begin graduation ceremonies and another student to speak to end graduation ceremonies. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion.

The forum shall be limited in the manner provided by this section on student speakers at graduation.

ELIGIBILITY

Only students who are graduating and who hold one of the following positions of honor based on neutral criteria shall be eligible to use the limited public forum: the top four academically ranked students. A student who shall otherwise have a speaking role in the graduation ceremonies is ineligible to give the opening and closing remarks. Students who are eligible shall be notified and given an opportunity to volunteer. Students are not eligible to volunteer if they were in a disciplinary placement during any part of the spring semester.

The names of the eligible students who volunteer shall be randomly drawn. The student whose name is drawn first shall give the opening and the student whose name is drawn second shall give the closing.

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STUDENT EXPRESSION

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CONTENT OF
OPENING AND
CLOSING
REMARKS

The topic of the opening and closing remarks shall be related to the purpose of the graduation ceremony and to the purpose of marking the opening and closing of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event.

OTHER STUDENT
SPEAKERS

In addition to the students giving the opening and closing remarks, the valedictorian and salutatorian may have speaking roles at graduation ceremonies. For each speaker, the District shall set a maximum time limit reasonable and appropriate to the occasion and to the position held by the speaker. For this purpose, the District creates a limited public forum for these students to deliver the addresses. The subject of the addresses shall be related to the purpose of the graduation ceremony, marking and honoring the occasion, honoring the participants and those in attendance, and the student's perspective on purpose, achievement, life, school, graduation, and looking forward to the future.

The student shall stay on the subject, and the student shall not engage in speech that:

- Is obscene, vulgar, offensively lewd, or indecent;
- Creates reasonable cause to believe that the speech would result in material and substantial interference with school activities or the rights of others;
- Promotes illegal drug use;
- Violates the intellectual property rights, privacy rights, or other rights of another person;
- Contains defamatory statements about public figures or others; or
- Advocates imminent lawless action and is likely to incite or produce such action.

The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and shall not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

DISCLAIMER

A written disclaimer shall be printed in the graduation program that states, "The students who shall be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages

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FNA
(LOCAL)

of the students' own choices. The content of each student speaker's message is the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District."

RELIGIOUS
EXPRESSION IN
CLASS ASSIGNMENTS

A student may express his or her beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of the student's submission. Homework and classroom work shall be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school. A student shall not be penalized or rewarded because of religious content. If a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards, including literary quality, and not penalized or rewarded because of its religious content.

FREEDOM TO
ORGANIZE RELIGIOUS
GROUPS AND
ACTIVITIES

Students may organize prayer groups, religious clubs, "see you at the pole" gatherings, and other religious gatherings before, during, and after school to the same extent that students are permitted to organize other noncurricular student activities and groups. [See FNAB] Religious groups shall be given the same access to school facilities for assembling as is given to other noncurricular groups, without discrimination based on the religious content of the group's expression. If student groups that meet for nonreligious activities are permitted to advertise or announce the groups' meetings, for example, by advertising in a student newspaper, putting up posters, making announcements on a student activities bulletin board or public address system, or handing out leaflets, school authorities shall not discriminate against groups that meet for prayer or other religious speech. School authorities may disclaim sponsorship of noncurricular groups and events, provided the disclaimer is administered in a manner that does not favor or disfavor groups that meet to engage in prayer or other religious speech.