

Cause No. 53526

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

DEFENDANTS KOUNTZE INDEPENDENT SCHOOL DISTRICT'S AND KEVIN WELDON'S SPECIAL EXCEPTIONS TO PLAINTIFFS' THIRD AMENDED PETITION AND APPLICATION FOR PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Kountze Independent School District ("Kountze ISD" or "the School District") and Kevin Weldon in his official capacity (jointly, "Defendants"), Defendants named in the above entitled and numbered cause and file this their Special Exceptions to Plaintiffs' Third Amended Petition and Application for Permanent Injunction ("Plaintiffs' Petition"), and in support thereof, would respectfully show unto the Court and jury as follows:

**I.
SPECIAL EXCEPTIONS**

Special Exception No. 1: Middle School cheerleaders' standing

Defendants specially except to Plaintiffs' Petition because the Middle School Cheerleader/Plaintiffs have no legal interest in this litigation and, as a result, lack standing. Counsel for Plaintiffs, Mr. Starnes, has represented to the Court that the middle school cheerleaders were not involved in the display of religious messages and have no direct connection to the facts that provide the basis for Plaintiffs' claims against Defendants. Mr. Starnes has also represented to the Court that he has no intention of calling any of the middle

school cheerleader/plaintiffs to testify at trial. Although he did not specifically address the issue, it would seem to be implicit in Mr. Starnes' statement that he has no intention to have the middle school cheerleaders present testimony to the court in any format any time. For example, it would seem that Mr. Starnes has no intention of submitting any affidavits or verified interrogatories answers on behalf of the middle school cheerleaders in any pre-trial or trial proceedings. It would seem from the representations made by Plaintiffs' counsel to this Court that the middle school cheerleader/plaintiffs (and their parents who have sued on their behalf) should be dismissed from this litigation for lack of standing. Mr. Starnes essentially told the Court in chambers that the middle school cheerleaders and their parents were mistakenly included as plaintiffs in the case and that they really have nothing to do with the controversy in the case. In light of this representation by Mr. Starnes, it would seem to be appropriate for the middle school cheerleaders and their parents to withdraw from the case. Inexplicably, though, Mr. Starnes has refused to drop the claims made by the middle school cheerleaders and their parents. In light of the fact that there is apparently no factual basis for the middle school cheerleaders and their parents to sue, Defendants respectfully ask this Court to grant this special exception and order the Plaintiffs to amend Plaintiffs' Petition to state clearly the factual basis which, if proven, would establish that the Middle School Cheerleaders and their parents have a legal interest in this litigation and hence have standing to bring claims against the Defendants.

Special Exception No. 2: Ultra Vires claim

Defendants specially except to Plaintiffs' claim brought under the Declaratory Judgment Act, which is also described as Plaintiffs' *ultra vires* claim, because it does not allege sufficient facts to apprise Defendants of the essential nature of the claim. Plaintiffs should be required to

allege specific facts which, if proven, would establish that the actions taken by Kevin Weldon in this case were *ultra vires* actions.

Special Exception No. 3: Official capacity claims are unclear or redundant

Defendants specially except to Plaintiffs' Petition because Plaintiffs' claims against Kevin Weldon in his official capacity are unclear or duplicative of their claims against Kountze Independent School District. It is unclear from Plaintiffs' Petition which claims are brought against Defendant Kevin Weldon in his official capacity. Insofar as any claims are brought against both Kountze Independent School District and Kevin Weldon, in his official capacity, those claims are duplicative and the duplicative claim against Mr. Weldon in his official capacity should be dismissed. Plaintiffs should be required to re-plead in such a way as to state clearly which claims are brought against Kevin Weldon in his official capacity and which claims are brought against Kountze ISD. To the extent that those claims are duplicative, they should be dismissed.

Special Exception No. 4: Official capacity claims against Weldon in light of his new employment

Defendants specially except to Plaintiffs' official capacity claims against Kevin Weldon since Mr. Weldon no longer has any official capacity with Kountze ISD. Mr. Weldon is no longer employed by Kountze ISD, having resigned to take a job with another school district. Plaintiffs should be required to amend their petition to drop all official-capacity claims against Kevin Weldon since he no longer holds any official capacity at Kountze ISD.

Special Exception No. 5: RVAA does not create a cause of action

Defendants specially except to Plaintiffs' claim under the Texas Religious Viewpoints Anti-Discrimination Act because it does not create a cause of action.

Special Exception No. 6: Amount of actual damages

Defendants specially except to Plaintiffs' Petition because it does not specify the amount of actual damages being sought.

Special Exception No. 7: Amount of nominal damages

Defendants specifically except to Plaintiffs' Petition because it does not specify the legal basis for Plaintiffs' requests for nominal damages.

Special Exception No. 8: Factual basis for damages

Defendants specially except to Plaintiffs' Petition because it does not state the factual basis for Plaintiffs' claims for actual damages. The undisputed facts are that none of the Plaintiffs were ever denied the opportunity to display religious messages at school sponsored events. Although Kevin Weldon sent an email prohibiting religious messages on the run through banners, Weldon's directive was only in effect from 3:08 pm on Tuesday, September 18, 2012 until Thursday, September 20, 2012 at 1:50 pm when this Court entered its TRO. Mr. Weldon's directive was in effect for a total of 46 hours and 42 minutes. Because the Court granted the TRO, extended the TRO and then granted the temporary injunction, Mr. Weldon's directive has never been in effect after that initial 46 hour and 42 minute long period. Plaintiffs should be required to plead with specificity how Mr. Weldon's directive, in effect for only 46 hours and 42 minutes, actually prevented the Plaintiffs from exercising their asserted rights to display religious messages at school sponsored events. Specifically, Plaintiffs should be required to plead facts which, if proved, would establish that during that 46 hour and 42 minute time period that Weldon's directive was in effect that a specific school sponsored event occurred at which Plaintiffs were prevented from displaying religious messages.

Special Exception No. 9: Legal basis for damages

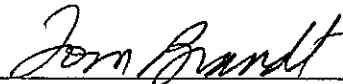
Defendants specially except to Plaintiffs' Petition because it does not state a valid legal basis for Plaintiffs' claims for actual damages. The only statute cited is Chapter 110 of the Texas Civil Practice and Remedies Code, but actual damages are not recoverable under that statute in this lawsuit because Plaintiffs did not provide the statutorily required 60-days notice. Tex. Civ. Prac. & Rem. Code §110.006(b).

II.
PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Defendants Kountze Independent School District and Kevin Weldon pray that their special exceptions be set for hearing and, after hearing, sustained and Plaintiffs ordered to replead, and for such other and further relief, both at law and in equity, both general and special, to which they may show themselves to be justly and equitably entitled.

Respectfully submitted,

**FANNING HARPER MARTINSON
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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, via certified mail, return receipt requested, telecopied, or hand delivered to all attorneys of record, in compliance with Rule 21a of the Texas Rules of Civil Procedure, on the 8th day of March, 2013.



THOMAS P. BRANDT