Cause No. 53526

COTI MATTHEWS, individually and on behalf of her minor child, MACY MATTHEWS, et al	§	**IN THE DISTRICT COURT**
Plaintiffs	§	**HARDIN COUNTY, TEXAS**
v.	§	
KOUNTZE INDEPENDENT SCHOOL DISTRICT and KEVIN WELDON, in his individual and official capacity	§	**356TH JUDICIAL DISTRICT**
Defendant	§	

KOUNTZE ISD'S PLEA TO THE JURISDICTION AND REQUEST FOR HEARING

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Kountze Independent School District and Kevin Weldon ("Weldon"), in his official capacity, (jointly hereinafter, "Defendant," "Kountze ISD" or "the School District"), defendants in the above-referenced cause, and files this Plea to the Jurisdiction seeking dismissal of all of Plaintiffs' claims against them and requesting a hearing thereon.[1]

Kounzte ISD asks this court to grant its plea to the jurisdiction and to dismiss all of Plaintiffs' claims against it because Plaintiffs lack standing and because Defendant is entitled to governmental immunity from Plaintiffs' claims.

[1] Kountze ISD and Kevin Weldon, in his official capacity, file their plea to the jurisdiction and request a hearing thereon pursuant to, among other statutes and rules, Texas Civil Practice and Remedies Code § 51.014(c)(2). Such filing and request are made within the time period set out in that statute, thus entitling Kountze ISD and Mr. Weldon, in his official capacity, to an automatic stay of all proceedings in the event that it is necessary to take an interlocutory appeal.

I.
SUMMARY

A. Introduction

In this case, the Court is faced with three competing legal theories. Plaintiffs present one theory, the Freedom from Religion Foundation (FFRF) presents a second theory and Kountze ISD presents a third. Respectively, the three theories can be summarized as follows:

1. Required to allow;
2. Required to prohibit; and
3. Allowed to allow.

1. Plaintiffs' theory: Required to allow.

Plaintiffs argue that the law requires Kountze ISD to allow religious run-through banners at high school football games.

2. The FFRF theory: Required to prohibit.

The FFRF contends that the law requires Kountze ISD to prohibit the religious run-through banners.

3. Kountze ISD's theory: Allowed to allow.

Kountze ISD presents a third theory which is fundamentally different from the other two. Kountze ISD disagrees with both Plaintiffs' theory and the theory of FFRF. Kountze ISD contends that the law does not, or at least should not, either require it to allow the run-through banners or require it to prohibit the run-through banners. Generally speaking, Kountze ISD contends that the law should allow it discretion to allow the religious run-through banners. More specifically, Kountze ISD has, from the very beginning of this case, expressed a desire to allow appropriate religious run-through banners. Thus, the end result of Kountze ISD's theory, like

that of Plaintiffs, would be the display of the run-through banners on the same terms that they have previously been displayed. This similarity in outcome, while relevant for showing that Plaintiffs' lack standing or a real controversy as required by the Texas Constitution, does not mean that there is no real distinction in the legal positions of Plaintiffs and Kountze ISD. Plaintiffs' position would, for instance, mean that Kountze ISD officials would be unable to restrict or prohibit messages on run-through banners merely because they showed bad sportsmanship. However, in contrast to their legal argument, neither of the Cheerleader Squad sponsors, Plaintiffs Beth Richardson and Tonya Moffett, said that they would allow the Cheerleader Squad to use banners demonstrating bad sportsmanship. That is because, when it comes down to it, Ms. Richardson and Ms. Moffett know what everyone else knows: the run-through banners displayed at Kountze High School football games reflect Kountze High School and the Kountze ISD community. In legal terms, those banners are "government speech." Plaintiffs try to make it sound as if the only way to allow the banners is to adopt their legal theory. That is false and has been demonstrably false since the beginning of this case. As Kountze ISD has requested since the very beginning, it should be permitted to allow appropriate religious messages on the run-through banners. The Court should reject both extreme positions: (1) that of the Plaintiffs, which would prevent Kountze ISD from exercising the normal discretion that should be applied to banners that represent the school; and (2) that of FFRF, which would exclude religious messages from the run-through banners merely because they are religious.

B. There is no subject matter jurisdiction because Plaintiffs lack standing.

Plaintiffs lack standing because there is no basis for concluding that there is any on-going

or likely threat to their desires to utilize religious messages on run-through banners. Kevin Weldon, former superintendent of Kountze ISD, made the decision to prohibit the banners based on a letter threatening a lawsuit and based on the legal advice he has received. As Mr. Weldon has explained, he took the action in order to avoid the possibility of a violation of the Establishment Clause of the First Amendment to the United States Constitution This Court entered in temporary restraining order before anyone was ever prohibited from displaying any religious messages and, before this Court entered its preliminary injunction, Kountze ISD filed a request for declaratory relief asking that the Court hold that display of the run-through banners would not violate the Establishment Clause.[2] Before any evidence was heard in this case, Kountze ISD and Mr. Weldon had already taken the position in open court that they wanted to allow the banners and were seeking a ruling from the Court as a result of the threatening letter received from the FFRF. Because of the position taken by Kountze ISD, there is no "real controversy" between Kountze ISD and the Plaintiffs because they are both seeking, explicitly or implicitly, the same thing – a ruling from the Court that Kountze ISD would not violate the Establishment Clause if the Cheerleader Squad utilizes religious messages on the run-through banners at high school football games.[3]

Plaintiffs also lack standing to sue on behalf of the Cheerleader Squad because, based on their own pleadings and testimony, the decisions regarding the messages on run-through banners

[2] In fact, Kountze ISD and Mr. Weldon filed a motion for preliminary declaratory relief seeking just such a declaration and set it for hearing at the same time as the scheduled injunction hearing, but Plaintiffs' counsel objected to the Court ruling on the motion.

[3] Kountze ISD has explicitly requested that the Court determine whether the Establishment Clause prohibits the banners because Kountze ISD otherwise has no intention of prohibiting appropriate banners merely because they are religious. Plaintiffs, on the other hand, must implicitly seek a ruling on this issue. If, as FFRF claims, the Establishment Clause prohibits the religious messages on the run-through banners, then any "claim" based on the Texas Constitution or Texas law would be irrelevant and unconstitutional. Consequently, it is implicit in the claims

are made by the unanimous consent of the cheerleaders. Plaintiffs, however, are not the entire Cheerleader Squad, have not been granted authority by the Squad to represent it, and, in fact, do not even represent a majority of the Cheerleader Squad. Consequently, Plaintiffs lack standing to sue based on the alleged speech of the Cheerleader Squad and this Court lacks subject matter jurisdiction. In addition, the Middle School Plaintiffs (the cheerleader plaintiffs who are in the Middle School Cheerleader Squad) lack standing because the Middle School Cheerleader Squad does not participate in the display of the run-through banners that are at issue in this case. Furthermore, some of the Plaintiffs' claims are moot because they are no longer members of the Cheerleader Squad. There is no need for an injunction as to those individuals since they are no longer be subject to any regulation of their activity associated with run-through banners and any chance that they might be so subject in the future is purely speculative. Consequently, their requests for injunctive relief are moot.

C. There is no subject matter jurisdiction because Kountze ISD is entitled to governmental immunity.

Finally, Plaintiffs have failed to overcome Kountze ISD's entitlement to governmental immunity. In order to overcome Kountze ISD's common law entitlement to governmental immunity, Plaintiffs must demonstrate a clear and unambiguous legislative waiver of that governmental immunity. In addition, as regards causes of action that involve a burden shifting structure, governmental immunity is not waived unless Plaintiffs can establish their *prima facie* case.

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brought by Plaintiffs that they, just as much as Kountze ISD, need a ruling on the legal issue raised by FFRF in the threatening letter that it sent to Mr. Weldon.

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III.
EVIDENCE

Kountze ISD relies on, and incorporates herein, the following evidence in support of this plea:

Defendant's Exhibit No. 1 – Plaintiff's Third Amended Petition Application for Permanent Injunction

Defendant's Exhibit No. 2 – Defendants Kountze Independent School District's and Kevin Weldon's First Amended Answer, Affirmative Defenses, Jury Demand, Special Exceptions and Request for Declaratory Relief

Defendant's Exhibit No. 3 – Transcript from Temporary Injunction Hearing (October 4, 2012)

Defendant's Exhibit No. 4 – Affidavit of Kevin Weldon (December 21, 2012), with attachments

Defendant's Exhibit No. 5 – Kevin Weldon's Answers to Intervenors First Set of Interrogatories (February 4, 2013)

Defendant's Exhibit No. 6 – Kountze ISD's Answers to Intervenors First Set of Interrogatories (February 4, 2013)

Defendant's Exhibit No. 7 – Defendants' Answers and Objections to Plaintiffs' First Set of Interrogatories (February 4, 2013)

Defendant's Exhibit No. 8 – Plaintiffs' Response to Request for Disclosure (November 29, 2012)

Defendant's Exhibit No. 9 – Plaintiffs' Objections and Response to Defendants' First Set of Interrogatories (November 29, 2012)

Defendant's Exhibit No. 9.1 – Rachel Dean

Defendant's Exhibit No. 9.2 – Cathie Flower

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Defendant's Exhibit No. 9.12 – Brett Page

Defendant's Exhibit No. 9.13 – Beth Richardson

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Defendant's Exhibit No. 9.15 – Misty Short

Defendant's Exhibit No. 9.16 – Patrice Sonnier

Defendant's Exhibit No. 10 – Plaintiffs' Supplemental Objections and Response to Defendants' First Set of Interrogatories (March 19, 2013)

Defendant's Exhibit No. 10.1 – Rachel Dean

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Defendant's Exhibit No. 11 – Oral Deposition of Ashton Lawrence (February 19, 2013)

Defendant's Exhibit No. 12 – Oral Deposition of Rebekah Richardson (February 19, 2013)

Defendant's Exhibit No. 13 – Oral Deposition of Savannah Short (February 20, 2013)

Defendant's Exhibit No. 14 – Oral Deposition of Adrianna Haynes (February 20, 2013)

Defendant's Exhibit No. 15 – Oral Deposition of T'Mia Hadnot (February 20, 2013)

Defendant's Exhibit No. 16 – Oral Deposition of Nahissaa Bilal (February 21, 2013)

Defendant's Exhibit No. 17 – Oral Deposition of Maci Matthews (February 21, 2013)

Defendant's Exhibit No. 18 – Oral Deposition of Tonya Moffett (March 5, 2013)

Defendant's Exhibit No. 19 – Oral Deposition of Kieara Moffett (March 6, 2013)

Kountze ISD also reserves the right to supplement with additional evidence as it becomes available and to present additional evidence at the hearing on this plea.

IV.
STANDARD OF REVIEW IN DETERMINING A PLEA TO THE JURISDICTION

A. General Principles.

In analyzing a plea to the jurisdiction, the Court is to look at the allegations in the plaintiff's live pleading, construing the factual allegations as true. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446; *City of El Campo v. Rubio*, 980 S.W.2d 943, 945 (Tex. App. – Corpus Christi 1998, pet. dism'd w.o.j.). While the Court must construe the factual allegations in favor of the plaintiff, the Court is not bound by legal conclusions merely because they are pleaded by the plaintiff. *Salazar*

v. Morales, 900 S.W.2d 929, 932, n.6 (Tex. App. – Austin 1995, no writ). Rather, the Court determines questions of law based on the plaintiff's factual allegations. *Id.*

B. The Court should hear evidence.

In *Bland Independent School District v. Blue*, 34 S.W.3d 547 (Tex. 2000), the Texas Supreme Court held that "a court deciding a plea to the jurisdiction is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve the jurisdictional issues raised." *Blue*, 34 S.W.3d at 555 (emphasis added). "Because a court must not act without determining that it has subject-matter jurisdiction to do so, it **should hear evidence** as necessary to determine the issue before proceeding with the case." *Id.* at 554 (emphasis added); *see also County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002) ("In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry.").

V.
ANALYSIS OF PLAINTIFFS' CLAIMS

A. The Court lacks subject matter jurisdiction because Plaintiffs lack standing.

1. The Court lacks subject matter jurisdiction because there is no real controversy between the parties.

The Court lacks subject matter jurisdiction because there is no real controversy between the parties. Plaintiffs have not been harmed and there is no likelihood that any real harm will occur in the future. Plaintiffs' brought suit on September 20, 2012, and received a temporary restraining order without Kountze ISD or Mr. Weldon having the opportunity to be heard. Significantly, the temporary restraining order was issued before any prevention of the use or display of any religious messages. On October 3, 2012, before the hearing on Plaintiffs' request

for preliminary injunction and before any evidence had been presented, Kountze ISD and Mr. Weldon filed a request for declaratory relief, specifically informing the Court that they "would like to permit [the cheerleaders] to continue using the religiously-themed banners." Defs. Ex. 2 [Defs. 1st Amend. Ans., p. 7]. To that end, Kountze ISD and Mr. Weldon asked the Court for a declaration as to whether they are required, under the Establishment Clause, to restrict the banners. *Id.* If the Establishment Clause prohibits the banners, then the desires of Kountze ISD and the Plaintiffs are irrelevant. If, however, the Establishment Clause does not prohibit the banners, then there is no basis to believe that the banners would be prohibited and the representations made by Kountze ISD and Mr. Weldon in open court clearly demonstrate that they have no intention to prohibit the banners solely because they are religious unless required to do so in order to comply with the Establishment Clause.

Under the Texas Constitution, the courts of this state do not have subject-matter jurisdiction unless the litigants to a dispute have standing, and no standing exists unless there shall be "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (quoting *Bd. of Water Engineers v. City of San Antonio*, 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955)). This rule also prevails in lawsuits arising under the Texas Bill of Rights. *Kohout v. City of Fort Worth*, 292 S.W.3d 703, 708 (Tex. App.—Fort Worth 2009, no pet.). The plaintiff has the burden of alleging facts that affirmatively establish the trial court's subject matter jurisdiction.

This Court has no subject matter jurisdiction over Plaintiffs' claims because (1) unless required to do so by the Establishment Clause, neither Kountze ISD nor Mr. Weldon (who is no

longer employed by Kountze ISD) have any intention of generally prohibiting the display of such religiously themed banners solely because they are religious; and (2) Kountze ISD and Mr. Weldon have already formally requested that the Court declare that the Establishment Clause does not require such a prohibition. By opposing this request, Plaintiffs' counsel are needlessly prolonging this litigation. For instance, when Kountze ISD and Mr. Weldon sought to have their motion for preliminary declaratory relief heard by the Court on October 4th, Plaintiffs' counsel objected argued that this Court should not consider the motion. Plaintiffs' counsel are trying to create a controversy where none exists. No one was ever prevented from displaying religious messages and there is no reason to believe that they are likely to be so prevented in the future. Although Plaintiffs' counsel appear determined to cast Kountze ISD in the role of the evil, anti-religious school district, nothing could be further from the truth. Kountze ISD has no desire whatsoever to be hostile to religion and had Plaintiffs' counsel given it a reasonable chance to address the issue before declaring war on it, perhaps this entire litigation could have been avoided. Perhaps if Plaintiffs' counsel had run to the Board of Trustees with as much speed and enthusiasm as he had run to the courthouse and the media, then perhaps Kountze ISD could be spending its precious and limited resources, time and energy on educating the students in the district rather than spending it in fighting a war which should never have been waged and which should not now continue. This Court should not waste its limited resources on unnecessary and wasteful litigation initiated by lawyers who never even gave the school district the courtesy of an opportunity to address the problem.

2. The Court lacks subject matter jurisdiction because Plaintiffs lack standing to bring suit on behalf of the Cheerleader Squad.

The Court lacks subject matter jurisdiction because, on the Plaintiffs' own theory of the

case, they lack standing to sue on behalf of the Cheerleader Squad. Plaintiffs allege, in essence, that the Kountze High School Cheerleader Squad is a private association that displays run-through banners at high school football games. Plaintiffs further allege that the decisions as to the content of those run-through banners are made based on a consensus of the various members of the Squad; that is to say, that the decision to use a specific message is made by the *entire* squad and is neither a decision by an individual cheerleader nor even of a majority of the cheerleaders. Plaintiffs, who do not even represent a majority of the cheerleaders on the Squad, lack standing to sue to enforce the alleged rights of the Squad to choose religious messages for inclusion on the run-through banners.

The plaintiffs have not satisfied their burden to establish that they have standing to assert the claims brought in this lawsuit. Indeed, the plaintiffs' own pleadings and testimony demonstrate that the plaintiffs do not have standing to assert the free-speech and free-exercise claims at issue.

According to the Plaintiff cheerleaders, the message of each banner had to be approved by the entire Cheerleader Squad. Consequently, even assuming that the banners are "private" as opposed to "governmental" speech, it is the speech of the Squad, not of the individual cheerleaders. Plaintiffs essentially allege that while in uniform at a school-sponsored event, the cheerleaders are, at the same time, speaking not on behalf of the school, but on behalf of themselves collectively. In this respect, then, the Plaintiffs are members of an organization; this organization, which Plaintiffs do not designate differently from the school-sponsored Cheerleaders Squad, we might call the "Cheerleaders Association." Plaintiffs allege that, as cheerleaders, they concurrently act as representatives of the school and as members of this

private association.

Under Texas statutory law, this "Cheerleaders Association," as described in the Plaintiffs' pleadings and testimony, arguably falls under the definition of a "nonprofit association," which is "an unincorporated organization, other than one created by a trust, consisting of three or more members joined by mutual consent for a common, nonprofit purpose." TEX. BUS. ORG. CODE § 252.001(2). Consistent with the statute, according to the Plaintiffs' allegations and testimony, this Association has at least one nonprofit purpose—speech, including religious speech, on the banners—and at least one rule of internal governance: the Association effects its purpose through a rule of unanimous consent.

Assuming, *arguendo*, that such a private organization, as alleged, is a "person" and "man" for purposes of enjoying the constitutional "liberty to speak" and "right to worship," respectively,[4] the plaintiffs do not have standing to assert the Association's constitutional or statutory rights.

Neither statutory law, nor common law, nor private agreement has conferred this standing. By statutory law, a nonprofit association, such as the one to which the Plaintiffs allegedly belong, can file suit on behalf of the association's members, and only in certain defined circumstances. *Id.* § 252.007(b). But the statute is utterly silent as to the right of one or more members to sue on behalf of the association.

The governing statute, however, incorporates supplemental "[p]rinciples of law and equity." *Id.* § 252.002. Still, no principle of equity or common law confers standing on these

[4] TEX. CONST. art. I, §§ 6, 8, ; *cf.*, *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 114 S.W.3d 617, 636 (Tex. App.—Austin 2003) (assuming but not holding that a corporation is a "person" and "man" under these sections of the Texas Constitution), *rev'd on other grounds*, 235 S.W.3d 627 (Tex. 2007).

Plaintiffs. Absent statutory authority, neither common law nor equity give the members of an organization the right to sue on that organization's behalf. *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990) (applying this rule to a corporation and their shareholders); *7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 221-22 (5th Cir. 1994) (holding that *Wingate*'s precedent applies to determining whether a limited partner has standing to directly sue for injuries to the partnership); *Hall v. Douglas*, 380 S.W.3d 860, 873 (Tex. App.—Dallas 2012, no pet.) (citing *Wingate* and holding that "[a] limited partner does not have standing to sue for injuries to the partnership that merely diminish the value of that partner's interest"); *Asshauer v. Wells Fargo Foothill*, 263 S.W.3d 468, 472 (Tex. App.—Dallas 2008, pet. denied) (holding that even where the member-plaintiffs' loss was "indirect to and duplicative of" the entity's right of action" the members still lacked standing); *cf. Allied Chem. Co. v. DeHaven*, 824 S.W.2d 257, 264 (Tex. App.—Houston [14th Dist.] 1992, no writ) (concluding that "the common law rule that *all* partners can bring suit themselves on behalf of the partnership is still in force" (emphasis added)); *see also R2 Enters. v. Whipple*, No. 2-07-257-CV2008 Tex. App. LEXIS 4780 (Tex. App.—Fort Worth June 26, 2008, pet. denied) (declaring that an "individual stakeholder in a legal entity does not have a right to recover personally for harms done to the legal entity" and citing multiple reported cases).

Therefore, neither statutory nor common law confers on the Plaintiffs, as mere members, standing to file suit on behalf of the "Cheerleaders' Association." The Association, of course, could authorize one or more of its members to sue on its behalf. Yet Plaintiffs' pleadings and testimony include no statement or even suggestion that the Plaintiffs received such authority. To the contrary, the pleadings indicate that the Association acts by rule of unanimous consent. The

absence of some of the Cheerleaders from this lawsuit, then, indicates that the Association has tacitly chosen not to file this suit.

3. The Court lacks subject matter jurisdiction because the Middle School Plaintiffs lack standing to bring suit based on any issues connected with the run-through banners.

The Court lacks subject matter jurisdiction over the claims of the Middle School Plaintiffs because they were not involved in the selection or display or the run-through banners. Based on the testimony of the Plaintiffs and the admissions of their counsel, Mr. Starnes, to the Court, the Cheerleader/Plaintiffs who are on the Middle School Cheerleader Squad have no involvement in the issues raised in this lawsuit. In particular, they were not and are not involved in the selection, preparation or display of the run-through banners.

B. The Court lacks subject matter jurisdiction because some of the Plaintiffs are no longer part of the Cheerleader Squad.

The Court lacks subject matter jurisdiction because some of the Plaintiffs (e.g., Rebekah Richardson) are no longer on the Cheerleader Squad and, consequently, lack standing to seek declarative or injunctive relief against Kountze ISD.

C. The Court lacks subject matter jurisdiction because Plaintiffs cannot overcome the District's entitlement to governmental immunity.

Plaintiffs allege the following causes of action: (1) free exercise of religion under the Texas Constitution; (2) free speech under the Texas Constitution; (3) equal protection under the Texas Constitution; (4) religious discrimination under Chapter 106 of the Texas Civil Practice and Remedies Code; (5) free exercise of religion under the Texas Religious Freedom Restoration Act (Chapter 110 of the Texas Civil Practice and Remedies Code); (6) viewpoint discrimination under the Religious Viewpoints Anti-Discrimination Act (Chapter 25 of the Education Code);

and (7) ultra vires under Uniform Declaratory Judgments Act.

1. There must be a clear and unambiguous constitutional or statutory waiver of governmental immunity before a district court has subject matter jurisdiction.

The doctrine of governmental immunity prohibits suits against a governmental entity unless there has been a clear and unambiguous constitutional or statutory waiver of that immunity. *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998); *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997); *Univ. of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Absent such a waiver, a trial court does not have subject matter jurisdiction over a suit against a governmental body. *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999) (per curiam) ("The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission."); *Harris County v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Fed. Sign*, 951 S.W.2d at 403; *Lamar Univ. v. Doe*, 971 S.W.2d 191, 194 (Tex. App. – Beaumont 1998, no pet.).

Because governmental immunity from suit defeats a trial court's subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Sykes*, 136 S.W.3d at 638; *Tex. Natural Res. & Conservation Comm'n v. White*, 13 S.W.3d 819, 822 (Tex. App. – Fort Worth 2000), *rev'd on other grounds*, 46 S.W.3d 864 (Tex. 2001)); *see also Jones*, 8 S.W.3d at 639. The plaintiff bears the burden of establishing the trial court's jurisdiction over a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993) (The standard for reviewing subject matter jurisdiction "requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause."); *White*, 13 S.W.3d at 822 ("The plaintiff has the burden

to allege facts that affirmatively demonstrate the lack of governmental immunity and, hence, the court's jurisdiction to hear the cause.") "Unless there is a pleading of consent, the trial court has no jurisdiction to hear the case." *Tex. Parks & Wildlife Dep't v. Garrett Place, Inc.*, 972 S.W.2d 140, 143 (Tex. App. – Dallas 1998, no pet.)

2. A plaintiff must establish a prima facie entitlement to relief in order to overcome a governmental entity's entitlement to governmental immunity.

A plaintiff must establish a prima facie case of entitlement to relief in order to overcome a governmental entity's entitlement to governmental immunity. *State of Texas v. Lueck*, 290 S.W.3d 876 (Tex. 2009); *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 637 (Tex. 2012).

3. Plaintiffs do not have a constitutional or statutory right to use school banners to promote their specific messages, religious or otherwise.

a. Plaintiffs do not have a free speech right to use school football banners to communicate their personal messages, whether religious or otherwise.

Plaintiffs cannot establish a prima facie case based on a free speech right. Their speech was not substantially burdened and they do not have a free speech right to use school football run-through banners to communicate their private speech because those banners are the speech of the school. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). A government entity has the right to "speak for itself." *Id.* It is entitled to say what it wishes, and to select the views that it wants to express. *Id.* at 467-468. A government entity may exercise this freedom in a variety of ways, including when it receives assistance from private sources for the purpose of delivering a government-controlled message. *Id.* at 468. This does not mean that

there are no restraints on government speech. "For example, government speech must comport with the Establishment Clause." *Id.* In addition, involvement of public officials in advocacy may be limited by law, regulation, or practice. *Id.* And of course, a government entity is ultimately accountable to the electorate and the political process for its advocacy. *Id.* "If the citizenry objects, newly elected officials later could espouse some different or contrary position." *Id.* at 468-469.

In the context of a speech by a representative of a governmental entity, the United States Supreme Court has focused on the reason why the speech occurred. In the employment context, the Supreme Court explained,

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.

Garcetti v. Ceballos, 547 U.S. 410, 421-422 (2006) (citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Foote v. Town of Bedford*, 642 F.3d 80, 85 (1st Cir. 2011) (government's interest in ensuring that its agents "sing from the same sheet of music" applies equally to paid and unpaid advisors). While those acting on behalf of governmental entities retain the prospect of constitutional protection for their contributions to civil discourse, this prospect of protection does not invest them with a right to perform their jobs however they see fit. *Garcetti*, 547 U.S. at 422.[5] As the Fifth Circuit explained in rejecting a Free Speech claim by a cheerleader, the First Amendment does not require schools to promote particular student speech. *Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852, 855 (5th Cir. 2010). In a

[5] *See also Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1204 (10th Cir. 2007); *Williams v. Dallas*

student's capacity as a cheerleader, the student serves "as a mouthpiece through which [the school district] could disseminate speech; namely, support for its athletic teams." *Id.*

The Kountze High School run-through banners at its varsity football games are government speech under *Summum* and *Garcetti*. The run-through banners are prepared by the Kountze High School Cheerleaders, an official school organization, at their school-sponsored, school-supervised practices on school property. Preparation of the banners is a requirement of participation in the Cheerleaders squad, according to both the Cheerleading Constitution and Ms. Kieara Moffett.[6] The banners are displayed on government property (the football stadium), in an area that is not generally accessible to the public (the football field), and at a time when a limited number of individuals are allowed on the field (players, cheerleaders and coaches).

Plaintiffs vainly attempt to sidestep the "government speech" doctrine by citing to the Supreme Court's decision in *Johanns v. Livestock Mktg. Assoc.*, 544 U.S. 550 (2005), and the United States Court of Appeals for the Fifth Circuit's decision in *Pelt & Skins, LLC v. Lanreneau*, 448 F.3d 743 (5th Cir. 2006). In *Johanns*, the federal government contended that government-imposed requirements that private entities fund speech promoting the consumption of beef were not subject to review under the First Amendment because the speech was "government speech." 544 U.S. at 560. Various private associations and individuals sued the

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Indep.-Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479-80 (7th Cir. 2007).

[6] Mrs. Beth Richardson and Ms. Macy Matthews, a cheerleader, disputed whether preparation of the run-through banners is a requirement. To explain their meaning, they pointed out that the girls were permitted to not prepare a run-through banner at three games last year, toward the end of the season. Mrs. Richardson's and Ms. Matthews' testimony, however, does not change the fact that the banners are a requirement. The requirement comes from the Cheerleader Constitution. Mrs. Richardson stated that she frequently does not enforce the Cheerleader Constitution, but also admitted that (1) she required all applicants for the Cheerleading squad to agree to the Cheerleader Constitution, (2) she never told them that it does not apply, and (3) she reserves the right to enforce the Cheerleader Constitution when she wants to. In other words, Mrs. Richardson is lax in enforcement. That Mrs. Richardson is lax in enforcement of the banner requirement does not change the fact that it is a requirement.

federal government, contending that the speech was private because the federal government solicited assistance from nongovernmental sources in developing the specific messages. *Id.* The Supreme Court rejected the claims of the private associations and individuals, holding that when the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages. *Id.* at 563. The Supreme Court did not limit the government speech doctrine to speech that is "effectively controlled" or subject to "final approval" by the government. Rather, it held that such speech certainly qualifies as government speech, regardless of whether nongovernmental sources develop the specific message. The Fifth Circuit's decision in *Pelt & Skins* establishes virtually nothing since it is merely an order from the court of appeals stating that the district court in that case did not have the benefit of *Johanns* when it issued its ruling and, since the case involves a similar government-mandated advertising scheme, remanding it to the district court for resolution. 448 F.3d at 743.

Plaintiffs also attempt to escape the "government speech" doctrine by claiming that school banners are a limited public forum. Plaintiffs' limited public forum argument is without merit; it gets the cart before the horse. The question is whether the speech is "government speech" or "private speech." It is only if the speech is "private speech" that the question of limited public forums becomes relevant. Thus, to argue, as Santa Fe ISD did in *Doe*, that the "speech" is protected because there is a limited public forum is to entirely miss the point. Plaintiffs have not and cannot establish that the speech in question is, at the very least as a matter of United States constitutional law, "student" or "private" speech. Consequently, Plaintiffs

arguments about free speech, the Religious Viewpoints Anti-Discrimination Act and Kountze ISD's Policy FNAA are meritless. Neither the Texas Constitution, the RVAA nor Policy FNAA convert or claim to convert "government speech" into "private speech."

In *Garcetti*, the Supreme Court explained that the speech of an employee that is in pursuance of the employee's duties is "government speech," despite the fact that it is obviously spoken and intended by the individual employee. 547 U.S. at 421-422. Making the same point in an almost identical legal context to the case at bar (i.e., a cheerleader alleging a violation of her free speech rights), the United States Court of Appeals for the Fifth Circuit explained that the cheerleader had no speech rights when acting as a cheerleader because she serves "as a mouthpiece through which [the school district] could disseminate speech; namely, support for its athletic teams." *Doe*, 402 Fed. Appx. at 855. As the Supreme Court recently explained in *Summum*, even when the speech in question came from a private source and the government did not formally endorse it, that does not change the fact that it is "government speech." 555 U.S. at 476. The local government thereby "engages in expressive conduct," regardless of whether the intended and perceived significance of the conduct may or may not coincide with the thinking of the message's donor or creator. *Id.*

The run-through banners are prepared by the Kountze High School Cheerleaders as a group. They are prepared as part of their official duties as Kountze High School Cheerleaders during official and school-supervised practices, and their school appointed and paid sponsors reserve the right and authority to discipline them for failure to prepare the run-through banners. In turn, the banners are subject control by government officials because the school sponsors review and approve them prior to use and because the sponsors (or at least Mrs. Richardson, who

testified) and the superintendent believe that the content of the banners may be restricted because it is "offensive" (Mrs. Richardson's testimony) or "inappropriate" (Mr. Weldon). These school-sponsored banners are displayed by the Kountze High School Cheerleaders in uniform at varsity football games and the football players run through them as part of the opening of the football game. Whether the Court considers the banners as representing Kountze ISD, Kountze High School, the varsity football team, or the cheerleaders makes no difference, because any such attribution means that the speech is "government speech" as that term is defined in constitutional jurisprudence. What is clear is that the banners are not the speech of individual cheerleaders. There is no evidence, and could be no evidence, that the banners reflect the message of a specific cheerleader. Taking the issue at its very narrowest, the banners were prepared by the cheerleading squad as a group; that is, as a school-sponsored, school-supervised group. Just as the football team represents Kountze ISD playing football, the cheerleading squad represents Kountze ISD in their cheering.

b. The Texas Religious Viewpoints Anti-Discrimination Act does not change the banners into "private speech."

Plaintiffs mistakenly claim that the Texas Religious Viewpoints Anti-Discrimination Act (RVAA) operates to change the school banners from government speech into private speech. The RVAA does no such thing. The RVAA protects private religious speech of students in certain circumstances and in certain forums. *Cf.* TEX. EDUC. CODE §§ 25.151 and .152. The main thrust of Defendants' argument, however, is that the banners are not student speech and that it is not the students who are speaking through the banners in question. The fact that a private party paid for or developed a particular message does not convert government speech into private speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (holding that privately

donated monuments, including monument of the Ten Commandments, were government speech). As the United States Court of Appeals for the Fifth Circuit recent pointed out, a cheerleader serves "as a mouthpiece" through which *the school district* disseminates speech; namely, support for its athletic teams. *Doe*, 402 Fed. Appx. at 855. There is nothing in the RVAA that destroys a school district's ability to control its own speech, no matter who is serving as its mouthpiece.[7]

4. Plaintiffs cannot establish a prima facie case on their Texas RFRA and Constitutional freedom of worship claims.

Plaintiffs cannot establish a prima facie case on their Texas RFRA and Texas constitutional freedom of worship claims for at least the following reasons: (1) Plaintiffs' free exercise of religion was not substantially burdened; and (2) Plaintiffs' banner making and displaying was not substantially motivated by sincere religious belief.

The Texas Religious Freedom Restoration Act (Texas RFRA) is one result of the on-going debate about the scope of the Free Exercise Clause of the First Amendment that developed in the wake of the United States Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). As the United States Court of Appeals for the Fifth Circuit put it,

> Texas did not enact TRFRA on a clean slate. The act is a response to a twenty-year federal kerfuffle over the level of scrutiny to apply to free exercise claims under the First Amendment of the United States Constitution.

A.A. v. Needville Indep. Sch. Dist., 611 F.3d 248, 258 (5th Cir. 2010).[8]

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[7] For the same reasons, Kountze ISD policies applying the RVAA do not convert government speech into private speech.

[8] Plaintiffs note in their briefing that the Texas Constitution's freedom of religion provision provides no greater protection for religious exercise than the First Amendment to the United States Constitution. Since Texas RFRA was enacted to provide greater protection than is available under the First Amendment, Defendant has not separately briefed Plaintiffs' constitutional freedom of religion claim and Defendant's arguments against Plaintiffs' Texas

The Texas RFRA generally prohibits government agencies from substantially burdening a person's free exercise of religion. TEX. CIV. PRAC. & REM. CODE § 110.003(a). However, a government agency may substantially burden a person's free exercise if the government agency demonstrates that the application of the burden to the person:

1. is in furtherance of a compelling governmental interest; and

2. is the least restrictive means of furthering that interest.

TEX. CIV. PRAC. & REM. CODE § 110.003. In determining whether an interest is a compelling governmental interest, courts shall give weight to the interpretation of compelling interest in federal case law relating to the free exercise of religion clause of the First Amendment of the United States Constitution. TEX. CIV. PRAC. & REM. CODE § 110.001(b). More generally, because the Texas RFRA, the federal Religious Freedom Restoration Act and the federal Religious Land Use and Institutionalized Persons Act were all enacted in response to *Smith* and for the same general purpose, the Texas Supreme Court held that it "will consider decisions applying the federal statutes germane in applying the Texas statute." *Barr v. Sinton*, 295 S.W.3d 287, 296 (Tex. 2009); *see also Merced v. Kasson*, 577 F.3d 578, 588 (5th Cir. 2009).

a. Plaintiffs' free exercise of religion was not substantially burdened.

Plaintiffs' free exercise of religion was not substantially burdened. The question of whether a person's free exercise of religion is substantially burdened is analyzed by focusing on the degree to which a person's religious conduct is curtailed and the resulting impact on his religious expression. *Barr*, 295 S.W.3d at 301; *Id.* at 307 (burden of proof is on claimant). While the Texas Supreme Court declined to craft a bright-line rule for when a burden is substantial

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RFRA claim should be applied to their freedom of religion claim as well.

under Texas RFRA, it specifically cited a formulation by the United States Court of Appeals for the Fifth Circuit as relevant to the issue: "'[A] government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.'" *Id.* (quoting *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004)). Evidence of alternative avenues for religious expression is certainly relevant to the issue of whether the restriction imposes a substantial burden. *Barr*, 295 S.W.3d at 302.

The United States Court of Appeals for the District of Columbia recently rejected an analogous claim under the federal Religious Freedom Restoration Act. *Mahoney v. Doe*, 642 F.3d 1112, 1120-1122 (D.C. Cir. 2011). Mahoney claimed that the District of Columbia substantially burdened the free exercise of his religion by prohibiting him from doing religiously motivated chalk writings on the sidewalk outside the White House. *Id.*[9] The D.C. Court of Appeals held that the outright prohibition on Mahoney's chalk drawings does not substantially burden his free exercise of religion because it is at most a restriction on one of a multitude of means by which Mahoney could spread his message. *Mahoney*, 642 F.3d at 1121 (citing *Henderson v. Kennedy*, 253 F.3d 12 (D.C. Cir. 2001) (upholding National Park Service regulation banning the sale of message-bearing t-shirts in designated sections of the National Mall because restriction was of one particular means and did not prevent plaintiffs from otherwise engaging in their vocation to spread the gospel)).

Defendants have not excluded religion from high school football games because, among

[9] Mahoney was participating in the annual "March for Life" protest against the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973). *Cf. Mahoney*, 642 F.3d at 1114. Mahony was also protesting President Obama's position on abortion. *Id.*

other reasons, Plaintiffs (and other students) have alternative opportunities to express their religious message when they are not acting as representatives of the school. Throughout this litigation and in their testimony in the injunction hearing and in depositions, Plaintiffs have been more interested in focusing on their free speech claims and have wholly failed to provide evidence that their religion was substantially burdened.

b. Plaintiffs have not satisfied the burden of establishing that their actions were substantially motivated by sincere religious belief.

Plaintiffs' actions, i.e., the preparation of football run-through banners as part of their duties as cheerleaders, were not substantially motivated by sincere religious belief. The phrase "Free exercise of religion" means an act or refusal to act that is substantially motivated by sincere religious belief. TEX. CIV. PRAC. & REM. CODE § 110.001(a)(1). Plaintiffs prepared and displayed football run-through banners as part of their responsibilities as cheerleaders for the Kountze High School varsity football team. In order to establish their claim against Defendants, Plaintiffs must first establish that their actions were substantially motivated by sincere religious belief, rather than by the fulfillment of the secular purpose of preparing signs as part of their duties as cheerleaders. *Cf. Balawajder v. Tex. Dep't of Crim. Justice Institutional Div.*, 217 S.W.3d 20, 26 (Tex. App. – Houston [1st Dist.] 2006, pet. denied) ("the plaintiff bears the initial burden of showing that the government is substantially burdening his free exercise of religion").

The preparation of football run-through banners was not substantially motivated by sincere religious belief, but rather in order to fulfill their duties as cheerleaders and to encourage team spirit. In addition, there is no evidence that the inclusion of religious messages on the run-through banners was *substantially motivated* by sincere religious belief. There has been vague testimony that the religious themes were "related" to their faith, but the more clear testimony

merely established that religious themes were included in order to encourage good sportsmanship or team spirit. The encouragement of good sportsmanship and team spirit, while a laudable goal, does not establish that Plaintiffs were substantially motivated by sincere religious belief.

5. Plaintiffs cannot establish the prima facie case on their equal protection claim.

Plaintiffs cannot establish the prima facie case on their equal protection claim because the speech in question is "government speech," not "private speech."

Ordinarily, a law that treats different persons differently will survive an equal protection challenge as long as the distinction it makes rationally furthers a legitimate state purpose. *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 436 (Tex. 1998) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983)). The Constitution requires higher scrutiny only if the law discriminates against a suspect class or impinges on a fundamental right. *Benton*, 980 S.W.2d at 437 (citing *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982)). While speech is certainly a fundamental right, see *Plyler*, 457 at 217 & n.15, a plaintiff may not expand his speech rights simply by reurging them under a different constitutional provision. *Benton*, 980 S.W.2d at 437. "We have rejected [his] contention when cast as a First Amendment argument, and it fares no better in equal protection garb." *Benton*, 980 S.W.2d at 437 (quoting *Perry Educ. Ass'n*, 460 U.S. at 54).

Plaintiffs attempt to unnecessarily duplicate and obfuscate the limited reach of their claims by alleging an equal protection claim, despite the fact that it is based on the same erroneous theory as their free speech claim (i.e., that the speech is private, rather than governmental). Just as Plaintiffs' free speech claim is without merit, so is their equal protection claim. *Benton*, 980 S.W.2d at 437.

6. Plaintiffs cannot establish the prima facie case on their Chapter 106 claim because they were not subject to any undue burden, were not denied access to public facilities, and were not treated differently based on their religion.

Plaintiffs do not have a claim under Texas Civil Practice and Remedies Code § 106.001, because Defendants have not refused to permit the Plaintiffs to use facilities open to the public, nor imposed an unreasonable burden on Plaintiff's because of their religion. Section 106.001 of the Texas Civil Practice and Remedies Code states in pertinent part:

> Sec. 106.001. PROHIBITED ACTS. (a) An officer or employee of the state or of a political subdivision of the state who is acting or purporting to act in an official capacity may not, because of a person's race, religion, color, sex, or national origin:
> ...
>
> (3) refuse to permit the person to use facilities open to the public and owned, operated, or managed by or on behalf of the state or a political subdivision of the state; [or]
>
> (6) impose an unreasonable burden on the person.

The Texas Supreme Court has emphasized that courts should narrowly interpret the scope of Chapter 106 because a violation of Chapter 106 also includes a criminal sanction. *Bd. of Trustees v. Toungate*, 958 S.W.2d 365, 369 (Tex. 1997);[10] *see also* TEX. CIV. PRAC. & REM. CODE § 106.003 (misdemeanor punishable by $1,000 fine, confinement or both).

[10] In determining that the school's suspension of a male student for violating its hair length policy did not violate Chapter 106, the Texas Supreme Court found: "Another factor to consider in construing the statute is that there are criminal penalties for knowing violations of section 106.001... It is difficult to believe that in 1971, when the Legislature first included 'sex' in the predecessor of section 106.001, it intended to subject administrators of schools all across Texas to criminal penalties for enforcing hair-length restrictions for male students that differed from those applicable to female students. If that is what the Legislature intended, then it also intended criminal penalties to be imposed on school administrators who enforce dress codes that prohibit males from wearing dresses or skirts. If hair-length regulations are discrimination 'because of sex,' then certainly the prohibition of males wearing dresses is 'because of sex.' ...The fact that criminal penalties are associated with violations of section 106.001 weighs heavily against construing it to prohibit school officials from enforcing dress codes."

a. Plaintiffs were not refused permission to use facilities open to the public.

Plaintiffs cannot prove that they were refused permission to use facilities open to the public. While Defendants are not aware of any precedent specifically interpreting an application of this subsection, this provision is analogous to civil rights era precedent regarding use of public facilities. *See Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (State and local governments may not "provide certain facilities for whites and others for Negroes."); *see also Watson v. Memphis*, 373 U.S. 526, 533 (1963) ("Solely because of their race, the petitioners here have been refused the use of city owned or operated parks and other recreational facilities which the Constitution mandates be open to their enjoyment on equal terms with white persons.").

In this case, Defendants are not refusing to permit the cheerleader Plaintiffs use of the facilities based on their religious beliefs. The cheerleader Plaintiffs have been allowed on the field in their capacity as the High School Cheerleaders, regardless of their religion(s). No cheerleader Plaintiffs were prevented access to the field or removed from the field.

Moreover, the High School's football field, before and during a football game, is not a facility open to the public. Only the schools' cheerleaders, football teams, football officials, and, when applicable, the band are allowed on the field at that time. The facilities are not open for indiscriminate use by any member of the public. Access is strictly controlled by the school during and immediately preceding football games. The Cheerleader Plaintiffs are allowed on the field only in their capacity as representatives of the High School.

b. Defendants did not impose an unreasonable burden on Plaintiffs.

Plaintiffs cannot prove that an unreasonable burden was imposed. In one of the few cases interpreting the "undue burden" portion of Chapter 106, the Texas Court of Criminal Appeals

held that a criminal statute that imposed a greater criminal penalty for a male assaulting a female than for other types of assaults did not constitute an undue burden. *Buchanan v. State*, 480 S.W.2d 207, 210 (Tex. Crim. App. 1972). It is difficult to see how the restriction on the messages contained in the school banners could constitute an undue burden when increased *criminal* penalties does not.

In *Buchanan v. State*, 480 S.W.2d 207, 210 (Tex. Crim. App. 1972), a male convicted of aggravated assault challenged the conviction, because, instead of receiving the benefit of being tried for simple assault, he contends that the county attorney imposed an unreasonable burden upon him by prosecuting him for aggravated assault, solely on account of his sex. Instead of trying Buchanan for simple assault, the County Attorney applied a statute that states: "An assault or battery becomes aggravated...When committed by an adult male upon the person of a female." The convict argued that Chapter 106's predecessor, Art. 6252-16, § 1(a)(7) (Supp. 1971), which provides: " No officer or employee of the state or of a political subdivision of the state, when acting or purporting to act in his official capacity, may...refuse to grant a benefit to, or impose an unreasonable burden upon, a person because of the person's race, religion, color, sex or national origin," prohibits the enforcement of the law that changes assault to aggravated assault based on gender against him. The Texas Criminal Court of Appeals disagreed, and held that imposing this greater penalty on Plaintiff because he was a male "is neither refusing to grant a benefit **nor imposing an unreasonable burden** upon appellant," because of his sex. *Buchanan*, 480 S.W.2d at 210.

In this case the Cheerleader Plaintiffs are not having an unreasonable burden imposed upon them based on their religion. See *Buchanan*, 480 S.W.2d at 210 (where even the imposition

of a greater criminal penalty on a convict based solely on gender constitutes "neither refusing to grant a benefit nor imposing an unreasonable burden"). The Cheerleader Plaintiffs had no greater burden imposed upon them, since the School and its Administrators always had ultimate control over the cheerleading squad and the content of any banners.

c. No one acted against Plaintiffs because of their religion.

Plaintiffs cannot show that the alleged acts were because of their religion.

The language of Chapter 106 is analogous to equal protection claims, where a plaintiff must show that the state's actions were motivated by the plaintiff's protected status. *See Doe v. Silsbee Indep. Sch. Dist.*, 402 Fed. Appx. 852, 854-855 (5th Cir. 2010) (Student's equal protection claim that the student was treated differently "because she is female," failed where plaintiff appellants could not make the necessary showing that the student's gender, as opposed to her actions and speech, motivated the defendant appellees' actions.) (*citing U.S. v. Crew*, 916 F.2d 980, 984 (5th Cir. 1990); *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).

Another analogous case, *Daniels v. City of Arlington*, 246 F.3d 500 (5th Cir. 2001), shows that Superintendent Weldon's actions were justified and, consequently, were not "because of a person's...religion." Daniels was an Arlington police officer who brought Title VII religious discrimination claims against the City and Chief of Police, because he was not permitted to wear a small gold cross pin on his official police uniform. The defendants did not permit Daniels to wear the cross pin on his uniform, not because of his religion, but because the Chief of Police disagreed that such a symbol would be appropriate for a uniformed police officer to wear. The Court rejected Daniel's religious discrimination claim, holding that, as a matter of

law, it would be an undue hardship for the police department to be forced to let individual officers to add religious symbols to their official uniforms. *Daniels*, 246 F.3d at 506.

Similarly, in this case, the Superintendent did not act because of the Plaintiffs' religion(s). Rather, he acted because there was good reason to believe that the religious banner held up by the uniformed cheerleaders would cause undue hardship for the Kountze Independent School District, Superintendent Weldon, and, ultimately, the Kountze taxpayers, of being sued for allegedly violating Establishment Clause precedent, as was threatened in a letter from the FFRF and agreed to by two experienced school law attorneys.

7. There is no waiver of governmental immunity as to Plaintiffs' RVAA claim because the RVAA does not create a cause of action or waive governmental immunity.

Plaintiffs appear to allege that Kountze ISD has violated their rights under Chapter 25 of the Education Code, also called the Religious Viewpoints Anti-Discrimination Act (RVAA). However, the RVAA neither creates a cause of action for damages, declaratory or injunctive relief, not waives governmental immunity. Consequently, to the extent Plaintiffs are attempting to assert a claim under the RVAA, that claim should be dismissed because this Court lacks subject matter jurisdiction in the absence of an express legislative waiver of governmental immunity.

8. Plaintiffs cannot establish a prima facie case for relief under the Uniform Declaratory Judgments Act.

Plaintiffs cannot establish a prima facie case for relief under the Uniform Declaratory Judgments Act. To the extent that Plaintiffs request for relief is premised on violations of laws addressed above, such requests are without merit and the UDJA does not create a waiver of governmental immunity nor does it create subject matter jurisdiction where there is no waiver

nor subject matter jurisdiction. In regard to Plaintiffs' claim that Mr. Weldon acted *ultra vires*, Plaintiffs misunderstand the meaning of the term "discretion" as used in this context. Plaintiffs suppose that a public official acts *ultra vires* whenever the official misapplies the Texas Constitution or Texas law. Plaintiffs are mistaken. The question of "discretion" for *ultra vires* claim is, as the Beaumont Court of Appeals has noted, connected with the question of "discretion" in the official immunity context. *See Townsend v. Montgomery Cent. Appraisal Dist.*, No. 09-10-00394-CV, 2011 Tex. App. LEXIS 5782, at *13-*14 (Tex. App.—Beaumont 2011, pet. denied)

In the immunity context, a distinction is made between discretionary and ministerial acts. *Lane v. Young*, No. 09-06-260 CV, 2007 Tex. App. LEXIS 144, at *14-*15 (Tex. App. – Beaumont 2006, no pet.) (citing *Downing v. Brown*, 935 S.W.2d 112, 114 (Tex. 1996)). Ministerial acts are those where the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion and judgment. *Lane*, 2007 Tex. App. LEXIS 144, at *15; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). An action involving personal deliberation, decision, and judgment is discretionary. *Lane*, 2007 Tex. App. LEXIS 144, at *15; *Chambers*, 883 S.W.2d at 654; *Ramos v. Texas Dep't of Public Safety*, 35 S.W.3d 723, 727 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). If the actor is entitled to personally deliberate about the manner or means of performance and invoke his own judgment, then the act is discretionary. *Lane*, 2007 Tex. App. LEXIS 144, at *15. In other words, discretionary authority exists when the law does not specify the precise action that the official must take. *Leo v. Trevino*, 285 S.W.3d 470, 484 (Tex. App. – Corpus Christi 2006, no pet.).

Kevin Weldon acted pursuant to his duty as superintendent to manage the day-to-day operations of the school district. As the Beaumont Court of Appeals has pointed out, a superintendent's "duty to manage the day-to-day operations of [a school district] does not specify how this duty [is] to be performed, nor does it define his responsibility with such precision as to leave nothing to [the superintendent's] exercise of judgment or discretion." *Lane*, 2007 Tex. App. LEXIS 144, at *15. Even where there is a "mandatory duty," such as a "mandatory duty to supervise," such duties involve the exercise of judgment or discretion. *Leo*, 285 S.W.3d at 484. Mr. Weldon's decision to take action to restrict the messages contained on the "run-through" banners at Kountze High School football games required the exercise of judgment or discretion, and consequently cannot serve as the basis for an *ultra vires* claim.

9. There is no waiver of governmental immunity as to Plaintiffs' request for actual or nominal damages.

There is no waiver of governmental immunity as to Plaintiffs' request for actual or nominal damages. The Texas Constitution does not permit the recovery of actual or nominal damages. *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 149 (Tex. 1995). The only statute upon which Plaintiffs have brought suit that permits the recovery of actual or nominal damages is the Texas Religious Freedom Restoration Act. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 106.002 (no actual or nominal damages under Chapter 106); TEX. CIV. PRAC. & REM. CODE § 110.006 (Texas RFRA). However, Texas RFRA only permits the recovery of actual or nominal damages if a plaintiff complies with the 60-day notice requirement. TEX. CIV. PRAC. & REM. CODE § 110.006. In cases in which the plaintiff did not comply with the 60-day notice requirement, Texas RFRA waives governmental immunity only for declaratory and injunctive relief. TEX. CIV. PRAC. & REM. CODE § 110.006(b); *State of Texas v. Lueck*, 290 S.W.3d 876

(Tex. 2009) (notice requirements are jurisdictional and failure to comply with them means that governmental immunity has not been waived). Consequently, the Court lacks subject matter jurisdiction over Plaintiffs' claims for actual or nominal damages.

VI.
DISMISSAL OF PLAINTIFFS' CLAIMS IS WARRANTED

The Court, in granting Kountze ISD's Plea to the Jurisdiction, should enter an order dismissing Plaintiffs' claims with prejudice, rather than affording Plaintiffs an opportunity to amend their pleadings. When a claimant has failed to allege necessary jurisdictional facts, but the pleading at issue does not affirmatively demonstrate a lack of jurisdiction, then leave to amend to cure the pleadings deficiency should be granted. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). "On the other hand, if the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend." *Brown*, 80 S.W.3d at 555; *Peek v. Equip. Serv. Co.*, 779 S.W.2d 802, 804-05 (Tex. 1989).

Dismissal is warranted in this case because Plaintiffs do not have deficient pleadings that simply lack some necessary jurisdictional allegation. Rather, it is apparent that Plaintiffs are pursuing claims for which they lack standing or from which Kountze ISD enjoys immunity. As such, Plaintiffs' pleadings affirmatively demonstrate the absence of jurisdiction, rather than being simply defective in jurisdictional allegations. Accordingly, the Court should dismiss the claims addressed herein in granting the plea to the jurisdiction, rather than affording an opportunity to replead.

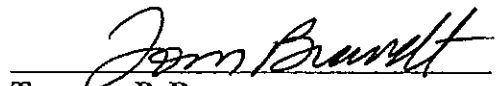
VII.
CONCLUSION

In order to for the Court to have subject matter jurisdiction of Plaintiffs' claims against the Kountze ISD, Plaintiffs must establish that they have standing and must plead a cause of action that falls within a clearly established waiver of Kountze ISD's common-law governmental immunity from suit. In the absence of such a waiver, the Court is without jurisdiction to hear Plaintiffs' claims, and they must be dismissed. Plaintiffs do not have standing and their claims do not implicate any common-law or statutory waiver of governmental immunity. As such, Kountze ISD's Plea to the Jurisdiction should be granted and an order entered dismissing Plaintiffs' claims with prejudice.

WHEREFORE, PREMISES CONSIDERED, Defendant Kountze Independent School District and Kevin Weldon, in his official capacity, *pray that this Plea to the Jurisdiction be set for hearing*; that upon hearing and consideration that said Plea be granted; and that the Court dismiss Plaintiffs' causes of action for lack of subject matter jurisdiction, with prejudice to the re-filing of same; Defendants further prays for such other and further relief, both general and special, at law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

FANNING HARPER MARTINSON BRANDT & KUTCHIN, P.C.



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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 25th day of March, 2013.

THOMAS P. BRANDT