

COTI MATTHEWS, *et al.*

Plaintiffs,

VS.

KOUNTZE INDEPENDENT  
SCHOOL DISTRICT, *et al.*

Defendants.

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IN THE DISTRICT COURT

356<sup>th</sup> JUDICIAL DISTRICT

HARDIN COUNTY, TEXAS

**KOUNTZE INDEPENDENT SCHOOL DISTRICT’S THIRD AMENDED ANSWER,  
AFFIRMATIVE DEFENSES, JURY DEMAND AND REQUEST FOR DECLARATORY  
RELIEF**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Kountze Independent School District (“Kountze ISD” or “the School District”), Defendant named in the above entitled and numbered cause and files this its Third Amended Answer, Affirmative Defenses, Jury Demand and Request for Declaratory Relief, and in support thereof, would respectfully show unto the Court and jury as follows:

**I.  
GENERAL DENIAL**

Defendant generally denies the material allegations contained in the Plaintiffs’ Petition and says that, since the Plaintiffs have made such allegations, they should be required to prove them by a preponderance of the evidence as required by law, if they are able to do so.

**II.  
AFFIRMATIVE DEFENSES**

1. Defendant affirmatively pleads that it did not substantially burden Plaintiffs’ free exercise of religion.

2. Defendant affirmatively pleads that, even assuming Plaintiffs could prove that it substantially burdened Plaintiffs’ free exercise of religion, Defendant’s actions were the least

restrictive means of furthering a compelling governmental interest.

3. Defendant affirmatively pleads all applicable statutory caps and limitations on damages, including, but not limited to, those set forth in Section 110.005 of the Texas Civil Practice & Remedies Code.

4. Defendant affirmatively pleads that Plaintiffs failed to provide the required statutory notice under Section 110.006 of the Texas Civil Practice & Remedies Code to Defendant of their claims and, therefore, that this Court lacks subject matter jurisdiction over Plaintiffs claim under the Texas Religious Freedom Restoration Act.

5. Defendant affirmatively pleads that Plaintiffs are barred from receiving actual and other damages under the Texas Religious Freedom Restoration Act because they failed to provide the Defendant the required statutory notice under Section 110.006 of the Texas Civil Practice & Remedies Code regarding their claims.

6. Defendant affirmatively pleads that it did not refuse to permit Plaintiffs to use facilities open to the public.

7. Defendant affirmatively pleads that it did not refuse to permit Plaintiffs to use facilities open to the public because of Plaintiffs' religion.

8. Defendant affirmatively pleads that it did not impose an unreasonable burden on Plaintiffs because of Plaintiffs' religion.

9. Defendant affirmatively pleads that Plaintiffs lack standing.

10. Defendant affirmatively pleads that Plaintiffs failed to exhaust their administrative remedies.

11. Defendant affirmatively pleads that it is entitled to governmental immunity from Plaintiffs' claims.

12. Defendant affirmatively pleads that Plaintiffs' alleged rights were not violated by a policy, custom or practice of the School District.

13. Defendant affirmatively pleads that Plaintiffs' free exercise of religion was not substantially burdened by a 'government agency,' as that term is used in the Texas Religious Freedom Restoration Act.

14. Defendant affirmatively pleads that Plaintiffs' have not suffered any damages as a result of its actions and that Plaintiffs are not entitled to receive any actual, compensatory or nominal damages in this case.

15. Defendant affirmatively pleads that the Plaintiffs' claims for injunctive and declaratory relief are moot. Although *Plaintiffs* claims are moot since there is no longer an actual case or controversy between the parties as to the issue of the banners, *Defendant's* claim for declaratory relief is not moot since Defendant is still threatened with a lawsuit from the Freedom From Religion Foundation ("FFRF") and since FFRF has filed an amicus brief in this litigation.

16. Defendant affirmatively pleads all the defenses available to it as a result of its unanimous passage of Resolution and Order No. 3 ("Resolution No. 3") which is attached and marked as Defendant's Exhibit No. 1. The numerous defenses available to Defendant as a result of its unanimous passage of Resolution No. 3 include but are not limited to mootness, lack of standing, governmental immunity, failure to exhaust, and unclean hands. Defendant specifically draws the Court's attention to page 6, paragraphs 32-34 of Resolution No. 3 which state as follows:

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.

17. Defendant affirmatively pleads that, for many reasons in fact, in law, and in equity neither the Plaintiffs, nor their attorneys, nor Liberty Institute should be granted an award of attorney fees in this case. Defendant specifically re-asserts its general denial and its request for a jury trial as to the issue of attorney's fees should the Court, for whatever reason, not rule in favor of Defendant on the issue of attorney fees prior to trial. The affirmative defenses asserted to Plaintiffs' request for attorney's fees include but are not limited to the following:

**A. Plaintiffs have not presented a proper basis for an award of attorney fees**

Under Texas law, attorney's fees may not be recovered from an opposing party unless such recovery is authorized by statute or by contract between the two parties. *Travelers Indem. Co. v. Mayfield*, 923 S.W.2d 590, 593 (Tex. 1996). Authorization for attorney's fees may not be inferred, instead it "must be provided for by the express terms of the statute in question." *Id.* In this case, there is no contract between the parties. Moreover, Defendant is entitled to governmental immunity from an award of attorney's fees to the extent that the statutory provisions relied upon by the Plaintiffs have not clearly and unambiguously waived

governmental immunity for attorney's fees.

**B. Plaintiffs have not prevailed and will not prevail**

Plaintiffs have not prevailed in this case and, as a result, are not entitled to any award of attorney's fees even if one were to assume, arguendo, that Plaintiffs have asserted any valid statutory or constitutional basis for an award of fees, which they have not.

**C. Numerous Factors Weigh Heavily against an Award of Attorney's Fees to Plaintiffs' Attorneys**

Plaintiffs should not be awarded attorney's fees against the Defendant because all or most of their fees incurred could have been avoided by simply pursuing a grievance before the school board. See Defendant's Exhibit No. 1. Plaintiffs should not be rewarded with an award of attorney's fees when they never took the easiest, simplest, most inexpensive and most direct route to resolving this matter by bringing their concerns to the school board.

Upon information and belief, Plaintiffs' attorneys should not be entitled to recover attorney's fees from the Defendant because they come to the Court with unclean hands. The unclean hands doctrine applies to numerous aspects of this case from the initial contact made by Plaintiffs' counsel to the Plaintiffs and others, to the representations made at the initial meeting with Plaintiffs and others, through the discovery process and through representations made to the public and to and through various media, to name but a few.

Upon information and belief the initial contact from Plaintiffs' counsel to the Plaintiffs and others may have been in violation of Rule 7.03(a) of the Texas Disciplinary Rule of Professional Conduct. If such contact was in violation of the ethical rules then that should be taken into consideration by the Court regarding whether or not an award of attorney's fees is appropriate and, if so, should be considered as a fact regarding the amount.

Upon information and belief, Plaintiffs' counsel represented to his clients and others at

the initial meeting that a lawsuit would not be filed unless it was absolutely necessary and that such a filing would be “the last straw.” Despite this representation to his clients and others, Plaintiffs’ counsel, the very next day, filed the instant case. This calls into question whether Plaintiffs’ counsel had authority to file the lawsuit at the time it was filed and, consequently, also calls into question the legitimacy of any claim for Plaintiffs’ attorney fees arising from said lawsuit.

Upon information and belief, Plaintiffs’ attorneys stated to the Plaintiffs and others at their initial meeting on September 19, 2012 words to the effect of “you-all get ready. You’re going to be the next big movie. Start thinking now who you’d like to play your character.” This factor should be considered by the Court in its evaluation of Plaintiffs’ attorney fee request.

Upon information and belief, Plaintiffs’ attorneys have abused the discovery process in a variety of ways which have obstructed the normal flow of discovery and have unnecessarily added to the costs of this case. Among the discovery abuses, Plaintiffs’ counsel has committed clear and egregious violations of the Texas Rules of Civil Procedure regarding discovery. Plaintiffs’ counsel repeatedly violated Texas Rule of Civil Procedure 199.5 during the depositions. This abuse is clear on the record and such abuse should be taken into account by the Court in determining whether to award Plaintiffs’ attorneys any fees and, if so, the amount of fees. The discovery abuse included, among other things, disrupting the depositions with objections which were more than allowed by the rules, with objections which suggested to the deponent how to answer, with coaching of the witnesses regarding the substance of their answers and suggesting, at times, that the deponent may not remember certain things and with instructing the witness not to answer. See TRCP 199.5 (d) (e) & (f).

Before any final determination is made with respect to attorney’s fees, Defendant would

ask the Court to take into consideration judicial determinations and decisions which have been made regarding attorney's fee requests from Liberty Institute and lawyers employed by or associated with Liberty Institute or its predecessor Liberty Legal.

The Court should consider the fact that Plaintiffs' counsel has repeatedly and publicly referred to themselves as volunteer attorneys or attorneys working free of charge. This fact should be taken into consideration by the Court when it determines whether or to what extent Plaintiffs' attorneys should be awarded fees.

The Court should also take into consideration the fact that Plaintiffs' counsel has, for their own benefit, encouraged media coverage of this case in an effort to enhance their professional standing and have used this case as a fundraising opportunity for Liberty Institute. Such benefits they have already received should be considered as determining whether to award attorney's fees and if so, how much.

**D. The Court Should Consider the Application of Certain Provisions of the Education Code**

Among the many factors the Court should consider in determining whether or not to award attorney's fees, and, if so, the amount of those fees, the Court should consider the following sections of the Texas Education Code: Section 11.161; Section 22.055; and Section 22.0517. A number of the claims prosecuted by the Plaintiffs have been frivolous and/or without foundation. Plaintiffs should not be awarded fees for time spent on those failed claims. Moreover, the Court can offset any award Plaintiffs' attorneys might arguably be entitled to by considering the fact that Defendant had to incur fees and costs associated with the defense of such claims.

**III.  
REQUEST FOR DECLARATORY RELIEF**

This request for declaratory relief is brought under Texas Local Government Code §§ 243.0075 and 243.010 the Texas Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code §§37.001, *et seq.* for the purpose of determining a question of actual controversy.

Defendants request that the Court declare whether or not they are required, under the Establishment Clause of the First Amendment to the United States Constitution, to prevent certain school banners, displayed as part of official school sporting games, from containing religious messages or messages from religious sources.

The Kountze High School, a school in Kountze Independent School District, occasionally displays banners, known as run-through or break-through banners, at sporting events, including varsity high school football games. Such signs are generally prepared by the Kountze Cheerleader Squad, which is an official organization of the school, and are displayed at the beginning of football games. The banners generally contain messages related to the sporting event or to sportsmanship. Recent banners have included religious messages. Superintendent Kevin Weldon recently received a letter from the Freedom from Religion Foundation on behalf of an anonymous complainant, contending that the banners containing the religious messages violate the Establishment Clause of the First Amendment to the United States Constitution, specifically as interpreted by the United States Supreme Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), in which the Supreme Court held that student-led, student-initiated prayers at the beginning of high school football games violate the Establishment Clause. The Freedom from Religion Foundation has also filed an amicus brief in this litigation asserting that the banners containing the religious messages violate the Establishment Clause of the First Amendment.



It is the understanding of Defendants that some or all of the cheerleaders on the Kountze Cheerleader Squad would like to continue using the religiously-themed banners.

Kountze ISD, acting through its duly elected representatives and after soliciting and receiving evidence, has made legislative findings of fact regarding the banners and their role in the Kountze ISD Community. *See* Resolution and Order No. 3, which is attached to this answer.

Based on those legislative findings, Kountze ISD does not intend to prohibit messages from being placed on the banners merely because the content of the messages is religious or is from a religious source. Kountze ISD does not intend, for example, to prohibit a banner from containing a quotation from the Bible or citation to the Bible merely because the quotation or citation is from the Bible. While it is possible that there could be quotations from the Bible that would not be appropriate for a run-through banner at a sporting event, no quotation from the Bible should be rejected merely because it comes from the Bible.

Kountze ISD has, moreover, found that permitting the religiously-themed banners is not likely to create an establishment of religion in violation of the First Amendment and that, at least in the context of the Kountze ISD Community, the legal conclusions presented by the Freedom from Religion Foundation are incorrect. Kountze ISD should not be required to place restrictions on the use of religious messages that do not apply to non-religious messages.

Because of the letter received from the Freedom from Religion Foundation and the position taken by that organization in this litigation, Kountze ISD seeks a declaration from the Court confirming that the Establishment Clause does not require Kountze ISD to restrict the banners in question.

An actual controversy exists herein within the meaning of Tex. Civ. Prac. & Rem. Code, §§ 37.001, *et seq.*, and this Court is vested with the power in the instant case to declare and

adjudicate the rights and other legal relationships of the parties to this action with reference to the issues raised by this Petition.

**V.**  
**REQUEST FOR JURY TRIAL**

Defendants prays that all issues of fact, on Plaintiffs' claims and claims for attorney's fees and Defendants' request for declaratory relief, be submitted to a jury pursuant to Rule 216 of the Texas Rules of Civil Procedure.

**VI.**  
**PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Defendant Kountze Independent School District prays that Plaintiffs have and recover nothing of Defendant and that, on trial hereof, Defendant be discharged with its costs herein, and for declaratory relief as pled, 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  
BRANDT & KUTCHIN, P.C.**

  
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**ATTORNEYS FOR DEFENDANT**

**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 3<sup>rd</sup> day of May, 2013.

  
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THOMAS P. BRANDT