No. 14-10731

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LITTLE PENCIL, L.L.C. and DAVID MILLER

Plaintiffs-Appellants

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT

Defendant-Appellee

On appeal from the United States District Court
for the Northern District of Texas, Lubbock Division

APPELLANTS' BRIEF

Kevin H. Theriot (TX 00788908)
Jeremy D. Tedesco (AZ 023497)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Phone: (480) 444-0020
Fax: (480) 444-0028

Robert S. Hogan (TX 00796767)
Hogan Law Firm, P.C.
1801 13th Street
Lubbock, TX 74901
Phone: (806) 771-7925
Fax: (806) 771-7925

David A. Cortman (GA 188810)
J. Matthew Sharp (GA 607842)
Rory T. Gray (GA 880715)
Alliance Defending Freedom
1000 Hurricane Shoals Rd NE, D-1100
Lawrenceville, GA 30043
Phone: (770) 339-0774
Fax: (770) 339-6744

Counsel for Plaintiffs-Appellants

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Plaintiffs certifies that the following listed persons as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

1. Little Pencil, L.L.C., Plaintiff-Appellant
   Little Pencil, L.L.C. is a Texas limited liability company. It does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

2. David Miller, Plaintiff-Appellant

3. Jeremy D. Tedesco, Esq., Attorney for Plaintiffs-Appellants
   Kevin H. Theriot, Esq., Attorney for Plaintiffs-Appellants

ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
Phone: (480) 444-0020
Fax: (480) 444-0028

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J. Matthew Sharp, Esq., Attorney for Plaintiffs-Appellants
Rory T. Gray, Esq., Attorney for Plaintiffs-Appellants
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd NE, D-1100
Lawrenceville, GA 30043
Phone: (770) 339-0774
Fax: (770) 339-6744

Robert S. Hogan, Esq., Attorney for Plaintiffs-Appellants
HOGAN LAW FIRM, P.C.
1801 13th Street
Lubbock, TX 74901
Phone: (806) 771-7925
Fax: (806) 771-7925

4. Lubbock Independent School District, Defendant-Appellee

5. David P. Baukus, Esq., Attorney for Defendant-Appellee
Ann Manning, Esq., Attorney for Defendant-Appellee
UNDERWOOD LAW FIRM, P.C.
1111 West Loop 289
Lubbock, TX 79416
Phone: (806) 793-1711
Fax: (806) 793-1723

Respectfully submitted this, the 18th day of August, 2014.

/s/ Jeremy D. Tedesco
Attorney of record for Plaintiffs

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs request oral argument as the legal issues raised in this appeal are of the highest importance, including claims related to Plaintiffs' constitutional right to freedom of speech, freedom of religion, equal protection, and due process of law. Oral argument would assist the Court by ensuring a clear understanding of the law and the parties' positions on these matters.

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JURISDICTIONAL STATEMENT

Plaintiffs sued in the district court to vindicate their rights arising from the First and Fourteenth Amendments to the United States Constitution, pursuant to 42 U.S.C. §§ 1983 and 1988. The district court's federal question jurisdiction arose under 28 U.S.C. §§ 1331 and 1334, and this Court has appellate jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment under Fed. R. Civ. P. 54 that disposed of all parties' claims. Plaintiffs appeal the lower court's May 29, 2014 denial of their Motion for Summary Judgment and grant of Defendant's Motion for Summary Judgment. ROA.1410. Plaintiffs also appeal the lower court's May 29, 2014 denial of their Motion for Leave to File Supplemental Evidence. ROA.1409. Plaintiffs timely filed their Notice of Appeal on June 26, 2014, in accordance with Fed. R. App. P. 4(a)(1). ROA.1455.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did LISD, through its advertising policies and its rejection of Plaintiffs' religious advertisement from inclusion in a forum open to for-profit and non-profit, religious and secular advertisements discriminate against Plaintiffs' advertisement based upon its religious content and viewpoint?

2. Does LISD's alleged concern regarding a potential and unsubstantiated, not actual, violation of the Establishment Clause provide a compelling justification for excluding Plaintiffs' advertisement from equal access to the advertising forum, and are LISD's restrictions the least restrictive means of accomplishing the alleged interest?

3. Did LISD, through its advertising policies that lack clear standards or criteria to guide school officials, create an unlawful prior restraint in violation of the First Amendment and an impermissibly vague restriction in violation of the Fourteenth Amendment?

4. Did LISD, through its differential treatment of Plaintiffs' religious advertisement as compared to other similarly-situated advertisers and advertisements in the forum, violate Plaintiffs' rights under the Equal Protection Clause?

5. Did LISD violate Plaintiffs' rights under the Free Exercise and Establishment Clauses by rejecting its religious advertisement from inclusion in

the advertising forum while granting access to other religious and secular groups?

6. Did the District Court err in denying Plaintiffs' Motion for Leave to File Supplemental Evidence that related directly to, and completely undermined, LISD's asserted "no visible tattoo" defense?

STATEMENT OF THE CASE

A. Nature of the Case

Imagine a typical student in Defendant Lubbock Independent School District (LISD) who plays basketball and football for his school. When playing basketball at Lubbock High School, ads for Mission Rehab Services and Chick-fil-A hang on the walls of the gymnasium. ROA.1414; ROA.597. During games at Estacado High School, he sees the large advertisement for Full Armor Ministries that includes a Bible, cross, and the phrase "The Place Where We Move Men from Religion to Relationship." ROA.1414; ROA.595-96.

Full Armor Ministries

While driving to games at Monterey High School, he passes over twenty banner ads on the school's fence including those for Brodericks Therapeutic World, Advanced Graphix, Bethany Baptist Church, Just Kids Preschool—operated by Sunset Church of Christ, the Lubbock Area Amputee Support Group, and dozens more. ROA.1415-1416; ROA.598-618.

Brodericks Therapeutic World

During football season, he plays many of his games at Lowrey Field in PlainsCapital Park—named for the one of the largest banking corporations in the state. Scattered throughout the stadium are ads for Lexus, Subway, Lubbock Christian University, Sonic restaurant, and Academy sports retailer. ROA.1414;

ROA.589-592. Ads are on the programs, ticket stubbs, sidelines, and endzones. ROA.1413; ROA.586-593. They are plastered on the scoreboard. ROA.1413; ROA.589-90. And throughout the game, commercials for Reagor Auto Mall, Tejas Motors, Whataburger, Lubbock Christian University, and others play on the jumbotron. ROA.1414; ROA.654 (providing links to Lubbock Christian University's advertisements).

Every week, students within LISD are exposed to dozens of these advertisements. Yet amongst the ocean of advertisers that LISD welcomes at its sporting venues, LISD has denied access to only one: Plaintiffs Little Pencil, LLC and David Miller (collectively Little Pencil). LISD explained this unique exclusion by stating that it "is prohibited from allowing religious advertisement[s] with the use of government property based on the Establishment Clause," ROA.1449, a conclusion with which the District Court erroneously agreed, finding that running the advertisement "could be viewed as Defendant's endorsement of the message," ROA.1431. The District Court thus held that students, while being bombarded by scores of advertisements during athletic activities every day, would momentarily become confused and believe that a mere 15-second ad promoting jesustattoo.org was officially endorsed by LISD. This is an unreasonable conclusion.

Moreover, despite stipulations that LISD "solicited local churches to advertise," ROA.1420, displayed ads for religious ministries, Christian daycares,

and Christian universities, ROA.1414-1415, and welcomed ads from groups whose purposes are "helping people overcome issues and circumstances that are negatively impacting their lives," ROA.1416, the District Court found "no viewpoint discrimination occurred on the subject matter of religion" when LISD denied Little Pencil's advertisement promoting a ministry that helps people overcome past failures and mistakes, ROA.1436.

This is a simple case of content- and viewpoint-based discrimination against religious speech that fits well within the parameters of LISD's speech forum, pursuant to a Policy that grants officials unbounded discretion over protected expression. The District Court erred by failing to conclude that LISD's denial of Little Pencil's advertisement, and the policies on which that denial was based, violate the First and Fourteenth Amendments.

B. Statement of the Facts

The facts in this case are not in dispute and were predominantly stipulated to by the parties. ROA.481-503 (Stipulations); ROA.1410-1420 (District Court's Opinion reciting stipulated facts).

1. LISD's Advertising Policies.

Little Pencil challenges, both facially and as applied to deny its religious advertisement, LISD's Policy GKB (LOCAL), which governs advertising by nonschool-related organizations at school facilities. ROA.507. Policy GKB

welcomes nonschool-related organizations—which LISD stipulated includes "nonprofit and for-profit organizations," ROA.1413, and even "local churches," ROA.1420—to use school facilities to "advertise, promote, sell tickets, or collect funds for any nonschool-related purpose," subject to the "prior approval of the Superintendent or designee." ROA.1441. By permitting advertising on "any nonschool-related purpose," the Policy sets no limits on the permissible subjects that may be discussed. The Policy simply grants LISD officials "final editorial authority to accept or reject submitted advertisements in a manner consistent with the First Amendment." ROA.1441.[1]

Policy GKB is supplemented by Policy GKD (LOCAL), titled "Community Relations: Nonschool Use of School Facilities." ROA.1441. Policy GKD authorizes for-profit, non-profit, religious, and secular organizations to use school facilities for "educational, recreational, civic, or social activities." ROA.1443-1444.

2. <u>The Wide-Breadth of LISD's Advertising Forum</u>.

Pursuant to its Policy and practice, LISD has welcomed a multitude of for-profit and non-profit, religious and secular organizations to advertise their programs, products, and services. ROA.1413-1416. Advertisers can access

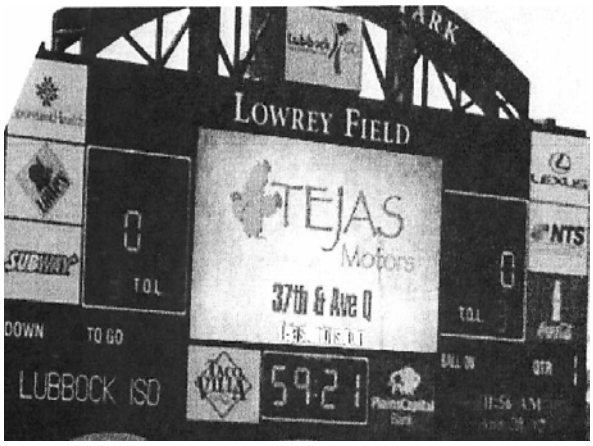
[1] Little Pencil also challenged Policy FMA below because it was incorporated by reference in Policy GKB. ROA.507. In light of LISD's statement that FMA applies only to student speech in school-sponsored publications, ROA.547, Little Pencil does not challenge Policy FMA on appeal.

numerous opportunities for publicity at Lowrey Field, including short commercials and graphics played on the jumbotron, large advertising signs along the field's sidelines or end zones, advertisements in the Gameday Program, and signage placed adjacent to the twenty-five second clock located in the north and south entrances. ROA.1413. For-profit, non-profit, religious, and secular organizations may also place signs on gymnasium walls during high school basketball games and large banners year-round on a fence at Monterey High School facing one of the highest traffic intersections in Lubbock. ROA.1413. LISD actively solicits advertisements, working with a local marketing firm to find willing organizations and businesses. ROA.1420; ROA.584-594 (LISD Advertising Brochure).

LISD welcomes a broad array of for-profit and non-profit, religious and secular advertisers to use its forum. ROA.1413. Indeed, LISD actively solicits churches to "advertise during high school football games at Lowrey Field, so long as the church does not seek to advertise an associated private school and," like all others seeking access, it receives "the approval of the Superintendent or his designee." ROA.1420. Indeed, LISD's advertising brochure includes an image of Lubbock Christian University's advertisement. ROA.591.

LISD allows advertisers to use photographs, logos, website addresses, mottos/taglines, descriptions of their purposes, products, or services, and other promotional messages in their advertisements. ROA.1414. At PlainsCapital Park's

Lowrey Field (where Little Pencil sought equal access), LISD has approved:



- Ads for Subway, Lexus, NTS Communications, Coca-Cola, Taco Villa, PlainsCapital Bank, and others that pepper the scoreboard. ROA.589.

- TV-style commercials and graphics for Reagor Auto Mall, Tejas Motors, Whataburger, Academy, and Lubbock Christian University that run on the jumbotron during the games. ROA.1414; ROA.654.

- Lubbock Christian University ads on end zone signs that include the university's name, its motto ("Be Blue"), and the school's website address, LCU.edu. ROA.1414; ROA.591. LCU's mission is "[t]o honor its [Christian] heritage" by "imparting [the Christian] faith and its values to future generations."[2]

- Sonic Drive-In advertisements located on the twenty-five second clocks at each of the end zones. ROA.1414; ROA.592.

Inside the gymnasiums at LISD high schools, the advertising blitz continues, with ads such as:

- Full Armor Ministries' banner promoting the church, its website, fullarmor ministries.net, images of a Bible and cross, and the phrase "The Place Where We Move Men From Religion To Relationship." ROA.1414; ROA.595-596.

- Mission Rehab Services' ad, which includes an image of the cross, the organization's website, and the phrase, "Empowering patients and caregivers to reach their goals." ROA.1414; ROA.597.

- Chick-fil-A's ad. ROA.1414; ROA.597.

[2] Lubbock Christian Univ., Our Mission, *available at* http://www.lcu.edu/about-lcu/messagefrom-the-president/our-mission.html (last visted Aug. 12, 2014).

The adertisements continue to the chain link fences surrounding Monterey High School, which contain ads for:

- Bethany Baptist Church that contain the image of a cross, the church's address, and its website, bethanybaptistlubbock.com. ROA.1415; ROA.599.

- Sunset Church of Christ's Just Kids Preschool program. ROA.1415; ROA.600. The Preschool's purpose is to "provide a solid academic foundation in a Christ-centered educational environment."[3]

- Brodericks Therapeutic World that displays the company's website, brodericksthерapeuticworld.com, and an image of a bare-shouldered woman lying down who appears to be receiving a massage. ROA.1415; ROA.601.

- Lubbock Area Amputee Support Group's ad, which includes the group's website and the word "H.O.P.E." ROA.1415; ROA.602. The amputee group exists to "improve the lives of individuals … through encouragement, education, and empowerment." *See* www.laasg.org.

- And many others, such as Ocean's Massage School, Superior Health Care, Danny's Catering, and Regal Pet Resort. ROA.1415-1416; ROA.598-618 (displaying pictures of over 20 ads at Monterey High School).

None of this evidence is disputed. As LISD stipulated, it "permits many nonschool-related organizations, including nonprofit and for-profit organizations, to advertise at Lowrey Field," "to advertise at District basketball facilities," and to "place large banners, year-round on a Monterey High School fence." ROA.1413.

3. LISD's Denial of Little Pencil's Advertisement.

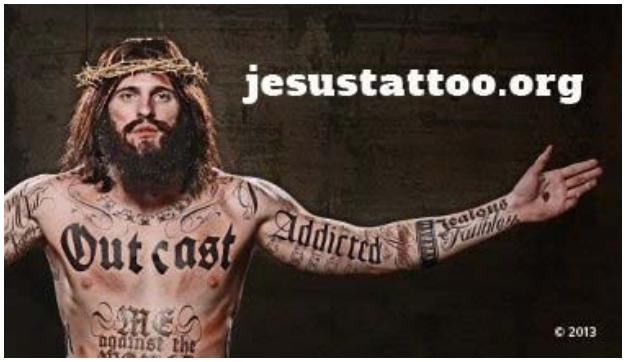
Mr. David Miller, a devout Christian and sole member of Little Pencil, LLC, sought to create "new and innovative ways to share the Bible's teachings regarding

[3] Sunset Church of Christ, Just Kids Preschool, *available at* www.sunset.cc/justkids (last visited Aug. 13, 2014).

real-life issues that people face in their daily lives." ROA.508. Seeking an eye-catching marketing technique, Little Pencil developed a marketing campaign centered around a Jesus Tattoo concept. ROA.515. As part of this concept, Little Pencil produced a video and created a website and social media content. ROA.516. In the video, people's emotional pain is symbolized by a negative word tattooed on them—representing a permanent emotional scar each person carries through life. ROA.515. Various individuals bearing unique "emotional scar tattoos" enter a "tattoo parlor" operated by a Christ-like figure. ROA.515. Using a tattoo pen, the Christ-like figure changes those negative words representing "emotional scars" into positive ones (i.e., "fear" becomes "trust," "outcast" becomes "accepted," "useless" becomes "purpose," etc.), showing how a relationship with Jesus can transform a person's negative past into a positive future. ROA.515. At the end of the video, it is revealed that the Christ-like figure has taken all of these people's scars onto himself—the negative words now figuratively inked on his own skin. ROA.516. On the Jesus Tattoo website (jesustattoo.org), visitors can contact persons trained to provide biblically-based counseling services regarding addiction, thoughts of suicide, divorce, family issues, grief, finances, and more. ROA.516.

Little Pencil decided to run an initial Jesus Tattoo marketing campaign in the Lubbock, Texas, area in the Fall of 2013. ROA.516. As part of the campaign, Little Pencil instructed its advertising agency, RD Thomas, to place the still-image

advertisement below, showing a Christ-like figure marked with negative words representing the emotional scars of others he has taken on himself, on the Lowrey Field jumbotron during football games:



ROA.1417-1418. The advertisement would run for 15 seconds twice a game—a mere 30 seconds total out of a multi-hour event. ROA.1417.

Shortly after its advertisement was submitted, Little Pencil was informed that its advertisement was denied because it contained tattoos. ROA.1419. Even though LISD's Policy GKD governing nonschool-related organizations' advertisements does not mention tattoos, Little Pencil, in the spirit of cooperation, offered to remove the tattoos from the advertisement—as stipulated to by LISD. ROA.1419. LISD nonetheless reaffirmed the denial, now based upon the advertisement's religious message. ROA.518.

Little Pencil's' counsel sent a letter to LISD on October 25, 2013, informing it that excluding Little Pencil's advertisement violated the First Amendment and requesting its immediate approval. ROA.1446-1447. A few days later, LISD's counsel affirmed the denial. ROA.1449-1450. LISD deemed Little Pencil's private

speech to be "public speech of a religious nature" and asserted that it was "prohibited from authorizing this public religious speech on governmental property using the jumbotron which is governmental property at a school-related event based on the Establishment Clause." ROA.1450.

Little Pencil has a continuing desire to display the advertisement on the Lowrey Field jumbotron during the 2014 and successive football seasons, and to gain equal access to the numerous additional communication channels at Lowrey Field, as well as other District sports venues for its religious advertisements. ROA.621-622. Little Pencil is, however, prohibited from doing so by LISD's unconstituional policy and practice.

C. Procedural History

On January 28, 2014, Little Pencil filed the present suit in the United States District Court for the Northern District of Texas challenging LISD's denial of its religious advertisement and the policies upon which that denial was based. On January 31, 2014, Little Pencil filed a Motion for Preliminary Injunction seeking to enjoin LISD's denial of its advertisement. On February 24, 2014, LISD filed an answer to Little Pencil's complaint and a response to the motion for preliminary injunction. Correctly ascertaining that the case presents primarily questions of law with few material factual disputes, the District Court entered an order asking the parties to provide their views on whether the case could proceed directly to

summary judgment on stipulated facts. The parties agreed that it could.

On March 21, 2014, the parties jointly submitted a Statement of Stipulated Facts. ROA.481-503. The parties filed their cross-motions for summary judgment on April 13, 2014. Little Pencil later filed a Motion for Leave to File Supplemental Evidence on May 27, 2014, to present newly discovered evidence that wholly undermined LISD's "no visible tattoo" defense.

On May 29, 2014, the District Court granted LISD's Motion for Summary Judgment and denied Little Pencil's Motion for Summary Judgment and Motion for Leave to File Supplemental Evidence. Little Pencil timely filed its Notice of Appeal, and Amended Notice of Appeal, on June 26, 2014.

SUMMARY OF THE ARGUMENT

Can a government entity discriminate against certain religious viewpoints in an advertising forum opened to virtually indiscriminate use by both for-profit and non-profit, religious and secular advertisers? The District Court answered "yes," incorrectly approving the denial of Little Pencil's religious advertisement. The most critical error by the District Court was its erroneous application of the standard for limited public forums. The District Court leapfrogged the question of whether LISD engaged in viewpoint discrimination, instead focusing on whether its denial of Little Pencil's advertisement was reasonable. But given that similar advertisers—such as those promoting counseling, rehabilitation, wellness, and

religious services—were welcomed into the forum, LISD's viewpoint discrimination is clear. The District Court also wrongly concluded that LISD could exclude Little Pencil's advertisement because it is "proselytizing," potentially "controversial," and "offensive." But many federal courts, including this Court, have rejected these labels as merely providing a justification for censorship and as euphemisms for viewpoint discrimination.

Rather than consider LISD's advertising forum as a whole, which includes advertisements scattered throughout Lowrey Field and other LISD sporting venues, the District Court narrowly focused on the jumbotron. This excluded many other comparable advertisements that show LISD engaged in viewpoint discrimination even though Little Pencil desires equal access to each venue. Accordingly, the District Court incorrectly held that the forum was a limited public forum, despite stipulated evidence that LISD indiscriminately welcomed scores of advertisers into the forum, a practice which establishes a designated public forum.

The District Court's determination that LISD's censorship was reasonable based upon LISD's alleged "no visible tattoo" policy was also in error. Not only does Little Pencil's advertisement not promote or encourage minors to get tattoos, it actually does the opposite—using allegorical tattoos to represent past mistakes and regrets that are wiped away. And LISD's own actions in allowing one of its schools to create a school-sponsored art display showing students covered in henna

tattoos directly undermine its alleged interest in prohibiting Little Pencil's advertisement.

While the District Court did not apply strict scrutiny, the correct standard here, it further erred in concluding that LISD's concerns regarding a potential violation of the Establishment Clause were sufficient to deny Little Pencil equal access to a government forum for private speech. In addition to finding that a mere Establishment Clause concern is insufficient, courts have found that the Establishment Clause is not violated in similar cases involving private expression, such as advertisements submitted by a wide array of community organizations. And the District Court failed to even consider whether banishment of Little Pencil's religious advertisement was the least restrictive means of accomplishing LISD's asserted interest.

The District Court additionally erred in upholding LISD's Policy GKB. That Policy is a prior restraint because it provides school officials with unbridled discretion to censor advertisements at their whim. Its lack of clear standards also renders it void-for-vagueness. Likewise, the District Court's dismissal of Little Pencil's claims for equal protection, free exercise of religion, and violations of the Establishment Clause were in error because LISD favored other religious advertisers over Little Pencil, to the detriment of Little Pencil's religious exercise.

Finally, the District Court abused its discretion in denying Little Pencil's

Motion to Supplement the Evidence with photographs of the school-sponsored art display of students' arms and hands adorned with henna tattoos. This newly discovered evidence of LISD's school-sponsored activities directly contradicts LISD's claimed reliance on a "no visible tattoo" policy.

STANDARD OF REVIEW.

The Court "review[s] a district court's judgment on cross motions for summary judgment de novo, addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 745 (5th Cir. 2009). Summary judgment should be affirmed "only if there is no genuine issue of material fact and the party is entitled to prevail as a matter of law." *Id*. *Accord Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

This Court reviews a district court's denial of a motion to supplement the record for an abuse of discretion. *In re Liljeberg Enterprises, Inc.*, 304 F.3d 410, 433 n.43 (5th Cir. 2002).

ARGUMENT

I. The District Court Erred in Finding That the Denial of Little Pencil's Advertisement Was Not Based on Its Viewpoint and Was Reasonable.

A. The District Court Misapplied the Standard for Speech Restrictions in a Limited Public Forum.

Although the District Court improperly concluded that LISD's advertising

forum was a limited public forum (*see infra* Part III), its most grievous error was concluding that LISD's actions were neither viewpoint discriminatory nor unreasonable, a standard applicable across all forum classifications. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 349 (5th Cir. 2001) (viewpoint discrimination would "violate the First Amendment whether Math Nights were designated or limited/nonpublic forums"). But the District Court leapfrogged this critical viewpoint analysis and instead focused solely on whether LISD's actions were reasonable. ROA.1426.

Between determining that the advertising venue is a limited public forum, ROA.1425, and concluding that LISD was "entitled to summary judgment" because its "restrictions that led to the denial of Plaintiffs' ad for [sic] airing on the jumbotron at Lowrey Field were reasonable in light of the purpose of the forum," ROA.1432, the District Court did not reference viewpoint a single time. Instead, the District Court dismissively addressed Little Pencil's claim of viewpoint discrimination—a claim that forms the heart of this lawsuit—in a footnote near the close of its opinion. ROA.1436-1437.

B. The District Court Erred in Finding No Viewpoint Discrimination.

"[V]iewpoint discrimination 'strikes at the very heart of the First Amendment.'" *Morgan v. Swanson*, 659 F.3d 359, 401 (5th Cir. 2011) (quoting *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring)).

> Discrimination against speech because of its message is presumed to be unconstitutional. When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant…. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995) (internal citations omitted).

The overwhelming weight of Supreme Court legal authority supports a finding of viewpoint discrimination here. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-10 (2001) (school district that opened its facilities to community groups committed viewpoint discrimination when it prohibited a religious club from using school facilities to teach morals and character development to children from a religious perspective); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (school district that broadly opened its facilities for community uses committed viewpoint discrimination when it prohibited a church from using its facilities to show a film about child-rearing and family values from a religious perspective).

In the school advertising context, several appellate courts have applied *Rosenberger*, *Good News Club*, and *Lamb's Chapel* to find viewpoint discrimination where a school denied equal access to a religious group in an advertising forum. In *C.E.F. of New Jersey, Inc. v. Stafford Township School*

District, a religious group that sought to advertise its after-school religious activities through flyer distribution and other methods available to nonschool organizations was denied access. 386 F.3d 514, 519-21 (3d Cir. 2004). The school claimed it banned "religion as a subject or category of speech." *Id*. at 527-28. The Third Circuit ruled for the religious group, finding that "if government permits the discussion of a topic from a secular perspective, it may not shut out speech that discusses the same topic from a religious perspective." *Id*.

Similarly, in *C.E.F. of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589, 593 (4th Cir. 2004), an after-school religious club was denied the ability to distribute flyers advertisings its programs even though numerous community groups, and several religious groups, were permitted to advertise their activities. The Fourth Circuit held that "exclusion of the flyers from the take-home flyer forum constitutes viewpoint discrimination in violation of [the] First Amendment." *Id*. at 594.

The District Court casually dismissed these appellate cases. *See* ROA.1433 (stating Little Pencil's status as "an outside, for-profit entity seeking to advance its religious message" distinguished this case from others "discussing free speech in an educational setting"). No such distinction exists. All of these cases involved efforts by outside, religious groups—not students—to advertise their programs in public schools through a literature distribution program. And in each of them, the

court found that restrictions on religious speech were viewpoint-based.

1. LISD Discriminated Against Little Pencil's Religious Viewpoint While Allowing Other Viewpoints on the Same Subject Matter.

LISD has opened its advertising forum to both for-profits and non-profits to advertise on a virtually unlimited variety of topics—from church ministries and counseling groups to massage parlors and pet resorts. *See* ROA.1413-1416. In fact, the only limitation ever mentioned by LISD prior to its denial of Little Pencil's ad was that it does not accept ads from private schools, ROA.1417, essentially limiting advertisements from its competitors. Yet other than its religious viewpoint, Little Pencil's advertisement is indistinguishable from the content permitted in other advertisements. It has a picture and a website address, ROA.1418, the same as almost every other advertisement permitted in the forum. ROA.1413-1416.

Two of the permissible forum topics among the virtually unlimited assortment allowed in the forum are worth specific attention. First, LISD discriminates among advertisements related to "counseling, rehabilitation, and support groups." LISD admits that it has allowed groups like Lubbock Area Amputee Support Group and Mission Rehab Services to advertise about their programs that "help[] people overcome issues and circumstances that are negatively impacting their lives." ROA.1416. Little Pencil offers the same type of

assistance—helping "transform a person's negative past into a positive future," ROA.515—but from a religious perspective. Visitors to Little Pencil's website can be connected "with persons trained to provide biblically-based counsel about addiction, thoughts of suicide, divorce, family issues, grief, finances, and other issues." ROA.516.

Second, LISD also permits advertisements offering to improve a person's physical, mental, and spiritual well-being. Oceans Massage School, one of the advertisers touting its website, ROA.606, proclaims that it can help you "find treatments that care for you … body, mind and soul!"[4] And Broderick's Therapeutic World, whose website explains that it can "aid you on the road to recovery, well-being or maintaining your level of health,"[5] is also permitted to advertise in the forum. ROA.601. Yet Little Pencil, whose ad shows how the Bible's teachings can restore a person's body, mind, and soul, is excluded.

"[S]peech discussing otherwise permissible subjects cannot be excluded … on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 112. Yet that is exactly what LISD is doing by prohibiting Little Pencil's religious advertisement from gaining equal access to the forum.

[4] *See* http://webcache.googleusercontent.com/search?q=cache:http://www.oceansmassage.com/ (last visited Aug. 11, 2014).
[5] *See* http://www.brodericksthерapeuticworld.com/faq.html (last visited Aug. 11, 2014).

2. LISD Discriminated Among Religious Viewpoints.

LISD further engaged in viewpoint discrimination by favoring certain religious speakers and messages over others. LISD welcomes and actively solicits advertisements from religious organizations. ROA.1420. Full Armor Ministries' ad promotes its church and website address, and includes images of a Bible and cross and the phrase "The Place Where We Move Men From Religion To Relationship." ROA.1414. Bethany Baptist Church's advertisement invites viewers to its services and includes an image of a cross and the church's website. ROA.1415. Lubbock Christian University promotes its Christian educational offerings. ROA.1414. And Sunset Church of Christ does the same for its Just Kids Preschool. ROA.1415. Notably, both Full Gospel Ministries and Little Pencil promote the message that people need to cultivate a relationship with Jesus Christ. ROA.515-516.

Relegating its analysis of this critical issue to a footnote, the District Court ignored the other examples of viewpoint discrimination (i.e., counseling and well-being services) and focused solely on the differential treatment among religious speakers. It acknowledged that the ads described above were religious and that several of them contained religious words and phrases, website addresses directing people to religious websites, and iconography like a cross and the Bible, ROA.1436-1437—the exact same content as Little Pencil's advertisement, which has a website address and religious iconography (a Christ-like figure with arms

extended). But despite the identical nature of the words and imagery, the District Court summarily determined that these religious advertisements are "simply irrelevant in that none of them are similarly comparable in design, message, or imagery to the Plaintiffs' advertisement." ROA.1437.

Most troubling, the District Court focused on Little Pencil's ideology in concluding that its advertisement was not "similarly comparable." It found that Little Pencil's advertisement "clearly advances a religious message and is designed 'as a new way to share the Bible's teachings through contemporary marketing methods.'" ROA.1437 (quoting from Pls.' Verified Complaint, ROA.504). As *Rosenberger* explained, the "specific motivating ideology or the opinion or perspective of the speaker" cannot be "the rationale for the restriction." 515 U.S. at 829. But that is the exact rationale accepted by the District Court to rule that there was no viewpoint discrimination here.

The District Court's conclusion is plain error. Line drawing between religious speech clearly violates the prohibition against viewpoint discrimination. As the Third Circuit explained in *C.E.F. of New Jersey*, the school district "disfavored Child Evangelism because of the particular religious views that Child Evangelism espouses." 386 F.3d at 529. The court noted that "[s]everal of the groups that Stafford has allowed to distribute and post materials … espouse religious views and require or encourage members to endorse these beliefs." *Id*. It

rightly concluded that "[s]uppressing speech on this ground is indisputably viewpoint-based." *Id*. at 530; *see also, Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996) (finding viewpoint discrimination where the city "opened the doors of its Senior Centers to presentations about religion" but excluded a specific religious viewpoint).

LISD's denial of Little Pencil's religious advertisement—an ad which is similar to other ads welcomed into the forum and discusses the same subject matter—is viewpoint discrimination.

3. Censorship of Proselytizing Speech is Viewpoint Discrimination.

The District Court concluded that Little Pencil's advertisement "is properly characterized as a proselytizing message" and that a restriction on such speech is "reasonable in light of the purpose served by the forum." ROA.1429. Yet federal courts have consistently held that speech characterized as proselytizing is afforded full First Amendment protection and such labels are nothing more than a cloak for viewpoint discrimination. The Supreme Court has, for example, "not excluded from free-speech protections religious proselytizing." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). In *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981), the Court reiterated that "religious appeals to nonbelievers constitute[] protected 'speech'" and there is "no reason why the Establishment Clause, or any other provision of the Constitution, would require different

treatment for religious speech designed to win religious converts." This also applies to the public school setting where in *Good News Club*, 533 U.S. at 111, the Court held that expression that is "'quintessentially religious' or 'decidedly religious in nature'" may not be excluded from a speech forum on that basis. And in *Rosenberger*, 515 U.S. at 831, 867, the Court determined that the university engaged in viewpoint discrimination when it excluded a religious group's speech because it contained "exhortation[s] to enter into a relationship with God as revealed in Jesus Christ."

Following this precedent, this Court has rejected the argument that labeling speech as "proselytizing" allows for speech restriction in public schools.

> To the extent that the principals characterize the [religious] speech as "proselytizing," such a characterization does not affect our holding that religious viewpoint discrimination is not permissible against private student speech …. There is no such thing as "good religious speech" and "bad religious speech."

Swanson, 659 F.3d at 412 n.28. Simply labeling Little Pencil's advertisement as "proselytizing" does not strip it of protection against viewpoint discrimination, even in the educational context.

The District Court's error is magnified when one considers that the forum to which Little Pencil sought access is designed specifically for proselytizing. In *C.E.F. of New Jersey*, 386 F.3d at 528, the Third Circuit recognized that "[t]o proselytize means both 'to recruit members for an institution, team, or group' and

'to convert from one religion, belief, opinion, or party to another.'" Synonyms for "proselytize" include terms such as "advocate," "convince," "persuade," and "sway." *See* http://thesaurus.com/browse/proselytize. That is the purpose all advertisements serve: to convince or sway others to join causes, use services, or buy products. At Lowrey Field, dozens of advertisers seek "converts" to the broad array of nonschool-related causes, services, or products they promote. Whataburger wants you to choose their burgers over McDonalds. ROA.1414. Lubbock Christian University wants to persuade you attend it rather than University of Texas. ROA.1414. And Academy tries to convince you to buy athletic gear at their store rather than at Wal-mart. ROA.1414.

LISD does not ban proselytizing. "What [LISD] appears to mean when it says that it excludes groups that proselytize is that it rejects religiously affiliated groups that attempt to recruit new members and persuade them to adopt the group's views. This is viewpoint discrimination." *C.E.F. of New Jersey*, 386 F.3d at 528.

4. Labeling Speech as "Disruptive," "Controversial," or "Offensive" Is a Cloak for Viewpoint Discrimination.

The District Court found that it was permissible for LISD to censor Little Pencil's advertisement because of its "potential for disruption due to controversy." ROA.1431 n.5. It further noted that the ad "could also be found to be offensive to some in the Christian faith." ROA.1431. Yet rather than justifying the exclusion of

Little Pencil's advertisement, the District Court's use of these labels confirms that LISD's exclusion of the ad constitutes viewpoint discrimination.

"To exclude a group simply because it is controversial" amounts to "viewpoint discrimination," for controversy will only occur if "some take issue with its viewpoint." *C.E.F. of New Jersey*, 386 F.3d at 527; *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1079 n.12 ("By definition, that which is 'controversial' is a cause of disagreement, or subject to opposing views." (quotation omitted)). That is why federal courts have long barred government officials from granting "the use of a forum to people whose views it finds acceptable, but deny[ing] use to those wishing to express less favored or more controversial views." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972); *see also United Food & Comm. Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 361 (6th Cir. 1998) (banning "controversial" advertisements "unquestionably allows" for "viewpoint discrimination"); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 12 (1st Cir. 1994) (rejecting ads because they might "generate controversy" leads to an impermissible "appearance of viewpoint discrimination").

The same is true of speech labeled as "offensive." In *Morse*, the Supreme Court recently rejected a call to grant schools authority to restrict "offensive" speech. Although the student's "Bong Hits 4 Jesus" banner was "no doubt offensive to some," 551 U.S. at 401, schools lack the authority to censor "speech

that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some." *Id*. at 409. In fact, this was one of the few points that both the majority and dissent agreed upon. In his dissent, Justice Stevens warned that "this case strikes at 'the heart of the First Amendment' because it upholds a punishment meted out on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint." *Id*. at 437 (Stevens, J., dissenting).

This Court's recent decision in *Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 13-50411, 2014 WL 3558001 (5th Cir. July 14, 2014), is particularly instructive. In that case, the Texas Department of Motor Vehicles rejected a proposed license plate from the Sons of Confederate Veterans that included a confederate battle flag because "many members of the general public find the design offensive." *Id*. at *2. After first concluding that specialty license plates are "the speech of the individual driving the car," *id*. at *8, the Court turned to the concerns over potential "offensiveness" of the speech. "We understand that some members of the public find the Confederate flag offensive. But that fact does not justify the Board's decision; this is exactly what the First Amendment was designed to protect against." *Id*. at *9. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it

constitutional protection." *Id*. (quoting *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991)). The Court concluded the specialty plate "was rejected because of its 'controversial' and 'offensive' viewpoint, which is impermissible viewpoint discrimination." *Id*. at *10.

Here, Little Pencil's advertisement, which would be one among many ads at Lowrey Field, is even more clearly private speech than the government-issued license plates in *Vandergriff*. And the confederate battle flag, with its strong connections to slavery and discrimination, is much more controversial than an allegorical Christ-like figure that does not mock Christianity or any other faith.

Given the recent decisions from the Supreme Court and this Circuit striking down efforts to censor speech by labeling it "controversial" or "offensive," the District Court's reliance on the Ninth Circuit's distinguishable decision in *DiLoreto* was in error. There, a school district prohibited a community group from displaying the Ten Commandments on the high school baseball fence. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 962 (9th Cir. 1999). Integral to the Ninth Circuit's holding were two important facts: (1) the advertising forum was open only to commercial advertisers, and (2) the forum was consistently closed "to the subject of religion." *Id*. at 963, 969.

Neither of these determinative facts are present here. First, LISD has opened the advertising forum to both for-profit entities (like Little Pencil) and non-profit

entities. ROA.1410; ROA.1413. Under such circumstances, even the *DiLoreto* court acknowledged that "where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora." 196 F.3d at 966. Second, LISD welcomes and even actively solicits advertisements on the subject of religion. It has accepted ads from Bethany Baptist Church, Full Armor Ministries, Lubbock Christian University, and Sunset Church of Christ. ROA.1414-1415. It specifically "solicited local churches to advertise during high school football games at Lowrey Field." ROA.1420. In sum, the facts on which the *DiLoreto* court based its holding are simply not present in this case.

Allegations that Little Pencil's advertisement is too controversial, disruptive, or offensive for display in the advertising forum are simply a guise for viewpoint discrimination. The District Court erred in upholding these restrictions.

C. The District Court Erred in Finding that the Denial of Little Pencil's Advertisement Was Reasonable.

The District Court also erred by focusing almost exclusively on the reasonableness of the denial of Little Pencil's advertisement. Its conclusion that LISD's denial was reasonable is also unsupported by case law.

1. LISD's Denial of Little Pencil's Advertisement Based Upon Its Use of Tattoos for Allegorical Purposes is Not Reasonable.

The District Court determined that it was reasonable for LISD to deny Little

Pencil's advertisement because of LISD's alleged policy against visible tattoos. But this conclusion is undermined by LISD's own actions, Texas law, and the protection the First Amendment affords such speech

a) Little Pencil Offered to Submit Its Advertisement Without the Allegorical Tattoos.

LISD stipulated that, after first rejecting LISD's advertisement because of the tattoos, Little Pencil offered to remove the tattoos. ROA.1419 ("RD Thomas asked Ms. McBeath if the District would accept the advertisement if the tattoos were removed from the image."). LISD immediately responded to this offer by explaining that the advertisement would still be denied because of its religious message. ROA.518. Moreover, nowhere in the letter from LISD's counsel affirming the initial denial does it reference tattoos, showing that LISD's tattoo argument was and is a pretext for censorship based upon the advertisement's religious viewpoint. This explains why "no copy of the ad was ever actually submitted," a fact that apparently troubled the District Court. ROA.1427. Plainly, it would have been futile for Little Pencil to submit a modified ad that LISD had already rejected "based on the Establishment Clause." ROA.1449.

b) LISD Permitted a School-Organized Art Display of Temporary Tattoos.

In May, LISD's Hutchinson Middle School students participated in a class activity where they drew tattoos on their hands and arms, photographed the tattoos,

and displayed the approximately 120 photographs in the hallways for students, faculty, and visitors to see. ROA.1405-1408. These tattoos, known as henna, are indistinguishable from those in Little Pencil's advertisement. In fact, henna tattoos have a strong religious purpose in Hinduism. "Women and children often get mehndi designs before the holiday of Diwali, the Hindu Festival of Lights. Hindus believe that Lakshmi, the goddess of prosperity, lives in henna designs." Carrie Griffin Basas, *Henna Tattooing: Cultural Tradition Meets Regulation*, 62 Food & Drug L.J. 779, 782 n.32 (2007). LISD permits these school-sponsored tattoos with their strong religious connections, but prohibits Little Pencil from using tattoo imagery in an allegorical manner. That is not reasonable—it is viewpoint discrimination, leaving LISD in the difficult position of justifying why it allowed these: but rejected this:

Approved Student Henna Tattoo Art Project

Little Pencil Ad

While Little Pencil's 15-second advertisement at a football game would not encourage minors to get tattoos at all, LISD's school-sponsored tattoo art project—where students put ink to hand and hung the resulting tattoos in the hallway for the whole school community to see—runs a strong risk of doing so.

c) Little Pencil's Advertisement Does Not Encourage Minors to Obtain Tattoos.

The District Court accepted LISD's argument that the very sight of Little Pencil's religious advertisement would compel students to run out and get tattoos. The court focused on the use of the word "tattoo" and the link to Little Pencil's website where a visitor can view the video depicting a Christ-like figure as a tattoo artist. ROA.1427. But no reasonable person would interpret Little Pencil's advertisement as promoting tattoos for minors (or anyone else). Rather, it uses tattoos as an allegory—much like Jesus did through parables—to explain how a relationship with Jesus can transform one's negative past into a positive future and that Jesus takes our sin upon himself. Students are well-versed in allegory and symbolism. They study it in their literature classes as they read Aesop's fables or Shakepeare's sonnets. It imbues the pop music they listen to. No reasonable student, upon viewing Little Pencil's advertisement, would be encouraged or compelled to go and obtain a tattoo.

The unreasonableness of this interpretation is demonstrated by the mascot for Monterrey High School: the Plainsman, a rifle-toting frontiersman of the Great Plains. This logo is on the football players' helmets, fan merchandise, and countless other objects that students regularly see and wear to school. But LISD's Student Code of Conduct prohibits students from possessing

firearms on campus.[6] Likewise, Texas law prohibits anyone from selling a firearm to a minor. *See* Tex. Penal Code § 46.06(a)(2). Yet no reasonable person would interpret the mascot as violating the Student Code of Conduct through its depiction of a person carrying a firearm. Nor would any reasonable person interpret the mascot as encouraging students to bring firearms to school or to illegally purchase a firearm. Yet that is the uncharitable interpretation put forward by LISD and accepted by the District Court.

LISD's double-standard is also evident in the other ads it permits. For example, it displays ads for Lexus and Tejas Motors on the Lowrey Field Jumbotron. ROA.1414; ROA.589. Under Texas law, minors under the age of 16 cannot drive. Tex. Transp. Code Ann. § 521.204(a)(1). Yet these ads, which promote an activity that is illegal for many of the students viewing them, are not banned. The same would be true for advertisements promoting restaurants that serve alcohol. Contrary to the District Court's conclusion, it is not reasonable to ban Little Pencil's advertisement, which does not promote or encourage minors to get tattoos, while permitting ads related to activities that are illegal for minors.

d) The First Amendment Protects the Use of Tattoos to Convey a Social, Religious Message.

The District Court's reasonableness analysis would result in broad categories

[6] *See* LISD Student Code of Conduct at 20, *available at* http://www.lubbockisd.org/files/_3GL6M_/69c55e60940de8023745a49013852ec4/2014-2015_Student_Code_of_Conduct.pdf (last visited Aug. 13, 2014).

of speech being placed off-limits to students, despite the important social or religious message conveyed in the speech. If the District Court is correct, no student, parent, or community member could every use an item that is illegal or banned by LISD's Code of Conduct to communicate a message. But courts have rejected such limitations. For instance, in *Morse*, 551 U.S. at 422, the Supreme Court held that schools can restrict student speech "that a reasonable observer would interpret as advocating illegal drug use." But Justice Alito's controlling opinion[7] made clear that this did not apply to speech "that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the 'wisdom of the war on drugs or of legalizing marijuana for medicinal use.'" *Id*. And in *B.H. v. Easton Area School District*, 725 F.3d 293, 297 (3d. Cir. 2013), the Third Circuit held that the First Amendment protects the right of a middle school student to wear bracelets saying "I ♥ boobies!" to promote breast cancer awareness despite a dress code that forbade clothing depicting sexual innuendos. "Because the bracelets here are not plainly lewd and because they comment on a social issue, they may not be categorically banned." *Id*. at 298.

Here, LISD stipulated that Little Pencil's advertisement was "developed as a new way to share the Bible's teachings" and was motivated by Little Pencil's "sincerely held religious beliefs." ROA.487. The ad uses the shame of tattoos to

[7] *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (describing Alito's opinion as "controlling").

represent the shame that many people carry with them due to past circumstances and mistakes. The use of tattoos is designed specifically to convey Little Pencil's social, religious message—the exact type of speech contemplated by Justice Alito in *Morse*. The District Court was wrong to conclude that it was reasonable for LISD to ban an ad that used tattoos as an allegory to communicate its viewpoint.

e) Little Pencil's Ad Conforms to LISD's Student Code of Conduct and Texas Law.

Little Pencil's advertisement does not conflict with either LISD's Student Code of Conduct or Texas Law. Under the dress code contained in the Code of Conduct, students can wear clothing that depicts tattoos as long as the tattoos do not "depict gang symbols/letters, profanity, or inappropriate pictures." ROA.1051. Presumably, this allows students to wear shirts depicting their favorite heavily tattooed NBA player, like Lebron James. But the tattoos in Little Pencil's advertisement do not depict "gang symbols/letters, profanity, or inappropriate pictures." Thus, LISD's own policy would allow a student to wear a t-shirt to school with Little Pencil's advertisement.

As discussed above, Little Pencil's advertisement in no way encourages minors to obtain tattoos in violation of Texas law, which prohibits giving a tattoo to a minor. In fact, the law specifically allows a minor, with parental consent, to get a tattoo when needed "to cover an existing tattoo" that contains "(A) obscene or offensive language or symbols; (B) gang-related names, symbols, or markings;

(C) drug-related names, symbols, or pictures; or (D) some other type of words, symbols or markings that … would be in the best interest of the minor to cover." 25 Texas Admin. Code 229-406(d); *see also* Tex. Health & Safety Code § 146.012(a-1). This law recognizes that students sometimes make mistakes and get a tattoo that they later view as negative. It allows them to get those tattoos fixed.

This is the exact message of Little Pencil's advertisement. It encourages people from all backgrounds to learn how a relationship with Jesus can fix their past mistakes or circumstances—which are represented as tattoos with negative words in the advertisement. Little Pencil's advertisement harmonizes with Texas law, recognizing that many people have things in their past that need to be changed to give them a clean start going forward.

f) The District Court's Reliance on *Hazelwood* is Misplaced.

Finally, the District Court relied on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), to find that "a school may exercise control over some speech so long as the actions are reasonably related to legitimate pedagogical concerns," ROA.1428, *i.e.*, the schools' asserted visible tattoo policy. But *Hazelwood* is not nearly so broad. To the contrary, "[l]ike all exceptions to the First Amendment's protections, the *Hazelwood* exception should be construed narrowly. It applies only where the speech is school-sponsored." *Swanson*, 659 F.3d at 408-09. Such "school-sponsorship" occurs only for "activities [that] may fairly be characterized

as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so 'that the views of the individual speaker may not be erroneously attributed to the school,' such as in a school newspaper or a school play." *Id*. at 408 (quoting *Hazelwood*, 484 U.S. at 271).

The District Court's reliance on *Hazelwood*'s progeny, like *Bannon v. School District of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004), and *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002), is therefore also misplaced. Both of those cases involved art projects—a mural in *Bannon* and tile painting project in *Fleming*—that were school-sponsored, a type of speech over which schools have greater authority.

Neither Little Pencil's advertisement nor any of the numerous others permitted in the advertising forum are school-sponsored. No reasonable person would perceive it as such given the scores of advertisements displayed throughout Lowrey Field. *Hazelwood* does not apply, nor does it provide authority for LISD to censor private speech in a government forum.

2. The Establishment Clause Does Not Provide a Reasonable Basis for Censoring Little Pencil's Advertisement.

The District Court next found that LISD was justified to exclude Little Pencil's advertisement because "it was reasonable for Defendant to believe that running Plaintiffs' advertisement on the jumbotron during Friday night football games could be viewed as Defendant's endorsement of the message…."

ROA.1431. In reaching this conclusion, the District Court relied heavily upon the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). But that case involves an important distinction, one recognized by both this Court and the Supreme Court: namely, the school district did not create a private speech forum but rather endorsed a single student opening football games with a prayer. "In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id*. at 308. Prior to *Santa Fe* arriving at the Supreme Court, this Court explained how the legal analysis of a true forum for private speech would have been different:

> [I]f a graduation program, open … [to] a limited number of student-elected or selected speakers, constitutes a limited public forum, the graduation prayer policy blessed in *Clear Creek II* [which required prayers to be nonsectarian and nonproselytizing] would, in fact, be *un* constitutional—not, however, as a violation of the Establishment Clause, but as impermissible viewpoint discrimination: Once the State has established a limited public forum, it cannot discriminate against speech because of the message, even if that message is religious in nature.

Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 821 (5th Cir. 1999) (emphasis in original). This Court properly recognized in *Santa Fe* that a school-ordained process specifically designed to ensure a single student offers a prayer at a football game is subject to different standards than a true forum for private speech.

Over ten years later, this Court again recognized that *Santa Fe* applied only

when "a government employee is selecting the religious message, delivering the religious message, endorsing the religious message, or giving an otherwise private speaker preferential access to a forum." *Swanson*, 659 F.3d at 411 (internal citations omitted). "In short, what one child says to another child"—or here, what one advertiser communicates through a public forum—"is within the protection of the First Amendment unless one of the narrow exceptions discussed above applies." *Id*. at 412.

None of those exceptions apply. LISD did not select the content of Little Pencil's advertisement. The ad was not "delivered" by an LISD employee, nor was the message endorsed by the school district. *See infra* Part IV.A (discussing lack of endorsement). Little Pencil was certainly not given "preferential access" to the advertising forum. All Little Pencil seeks is equal access to the advertising forum.

To bolster its reliance on *Santa Fe*, the District Court cited the Supreme Court's recent decision in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014), which upheld ceremonial prayer at town meetings. Like *Santa Fe*, *Town of Greece* involved a government policy where individuals gave a government-sponsored prayer. It did not involve a public forum like LISD's forum. Importantly, the practice was upheld despite the "occasional attendance of students" at the meetings. 134 S. Ct. at 1832. If government-sponsored prayers do not impermissibly coerce students at town meetings, then a religious advertisement

included in a forum with scores of other advertisements at a football field does not even come close to raising Establishment Clause concerns.

II. The District Court Erred In Limiting the Scope of the Forum to the Lowrey Field Jumbotron.

When analyzing whether government restrictions on private speech violate the First Amendment, a court must define the scope of the forum. The District Court erred by narrowly defining the forum to encompass only the Lowrey Field Jumbotron. ROA.1425 ("[T]he Court finds that the relevant forum and venue at issue here are limited to the electronic advertising on the jumbotron…."). As a result, the District Court improperly ignored the vast majority of the advertisements at PlainsCapital Park and the other advertisements at sports facilities operated by LISD in evaluating the nature of the forum.

"In defining the forum, [courts focus] on the access sought by the speaker." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985). Little Pencil seeks access to all of LISD's advertising forum, which encompasses the Lowrey Field Jumbotron, the advertisements scattered throughout the stadium, on the backs of tickets, and elsewhere, and includes the other advertising venues opened by LISD. ROA.519-520 (Little Pencil desires "to gain equal access to the numerous additional communication channels at Lowrey Field and at other District facilities and sports venues").

LISD treats all of these venues and communicative channels as being part of

a single advertising forum. As LISD stipulated, Policy GKB governs access to "Lowrey Field, the jumbotron, and other communication channels at the stadium and at other District Facilities." ROA.1412. Additionally, LISD has contracted with a single advertising agency, Texas Sports Marketing, to "solicit advertisements for the various communication channels open to nonschool-related organizations during football games at Lowrey Field and at other sports venues and District facilities." ROA.1420. The materials prepared to solicit advertisers on LISD's behalf lump many of the communicative channels together, offering potential advertisers the option to "sponsor the game of your choice," ROA.586; have "[y]our company logo and offer … included on the back of football, basketball, baseball, softball, and soccer tickets," ROA.587; place an ad on the jumbotron, ROA.589-590; or many more advertising options, ROA.590-593. Finally, the advertisements in each of these venues target the same basic audience: community members, parents, and students who attend LISD sporting events. ROA.486 (stipulating that "students, parents, relatives, community members, the opposing team, and their community members are in attendance" at the sporting events).

Given that Little Pencil desires to access all of the communicative channels made available by LISD and that a single policy, a single advertising agency, and a single pamphlet covers the numerous advertising opportunities available at LISD,

there is simply no basis for the District Court's conclusion that the relevant forum is the Jumbotron only. *See Air Line Pilots Ass'n, Int'l v. Dep't of Aviation of City of Chicago,* 45 F.3d 1144, 1152 (7th Cir. 1995) ("Because the ALPA sought access to the advertising space and not to the airport as a whole, the advertising space is the proper focus of forum analysis.").

III. The District Court Errantly Concluded that LISD's Advertising Forum Is Not a Designated Public Forum.

The District Court's conclusion that LISD's advertising forum is not a designated public forum conflicts with LISD's own stipulations that scores of advertisers use the numerous venues that comprise the forum. ROA.1413. Schools create public forums when they "designat[e] ... a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Chiu,* 260 F.3d at 345. To ascertain whether a designated public forum as been created, courts look to "(1) the government's intent with respect to the forum, and (2) 'the nature of the [forum] and its compatibility with the speech at issue.'" *Chiu,* 260 F.3d at 346 (citation omitted).

The District Court errantly focused on a single factor in concluding that the advertising forum was a limited public forum: LISD's self-serving statement in Policy GKB that "[a]dvertising shall be accepted solely for the purpose of covering the cost of providing materials and equipment, not for the purpose of establishing a

forum for communication." ROA.1425-1426 (Opinion); ROA.1441 (Policy GKB). "Inquiry into intent, however, is not merely a matter of deference to a stated purpose." *Air Line Pilots Ass'n*, 45 F.3d at 1152. And an "abstract policy statement purporting to restrict access to a forum is not enough." *Hopper*, 241 F.3d at 1075. Rather, one must "look[] to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802 (emphasis added). Specifically, this Court looks to the "the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation." *Chiu*, 260 F.3d at 349.

Not only does Policy GKB widely open the forum to advertisements for "any nonschool-related purpose," ROA.1441, LISD's actions confirm that it has established a designated public forum. LISD stipulated that it welcomes scores of nonschool-related organizations—both for-profit and non-profit, religious and secular—to advertise "for any nonschool-related purpose" at its various athletic venues. ROA.1413-1416 (listing many of the advertisers). LISD "has not rejected any nonschool-related organizations' advertising request, except Plaintiffs." ROA.1420. LISD solicits advertisements, including those from local churches, for all of its sports venues, including the Lowrey Field Jumbotron. ROA.1420. The solicitation materials prepared on LISD's behalf do not focus on "covering the cost

of providing materials and equipment" as LISD claims. Rather, LISD's solicitation materials inform potential advertisers that they can:

- "have your company logo and special offer listed on the back of tickets," ROA.587;
- "have live liners talking about your business" and "[u]se the live liners to give some immediacy to your message. This is a great way to promote seasonal products," ROA.588;
- "[r]each fans of all four Lubbock high schools with a full page, four-color ad in each school's program, ROA.592; and
- have "the best announcers, the best stations, and exciting sports action all combine to give you the best bang for your buck," ROA.593.

Even the character and purpose of PlainsCapital Park establish LISD's intent to open the facility up to a broad swath of advertisers. The tickets, programs, twenty-five second clock, field signage, and pre-game show are all designed to accommodate advertisements. ROA.1413 (stipulating that LISD permits advertisements on these items); ROA.587-592 (LISD's solicitation materials). Even the jumbotron was designed to play thirty-second commercials and still images, as well as to accommodate numerous advertisements on the structure of the jumbotron itself. ROA.589-590.

A speech forum's classification turns on "the government's consistent policy

and practice and the forum's compatibly with expressive activity." *Air Line Pilots Ass'n*, 45 F.3d at 1152 (emphasis added); *see also, United Food*, 163 F.3d at 352-53 (brushing aside the government's stated intent to create a nonpublic forum); *Christ's Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*, 148 F.3d 242, 251 (3d Cir. 1998) (same). LISD has consistently invited for-profit, non-profit, religious, and secular entities to advertise at its sports facilities on a wide variety of topics, including ads related to counseling, rehabilitation, support groups, ROA.1416, and religion, ROA.1420. Little Pencil's advertisement is therefore undoubtedly compatible with the designated public forum in question. *See, e.g.*, *Concerned Women for Am., Inc. v. Lafayette Cnty.*, 883 F.2d 32, 33 (5th Cir. 1989) (public library's policy opening facilities for use by "civic, cultural, or educational" organizations created designated public forum and library's exclusion of religious meetings from facilities was unlawful content based discrimination).

Even *DiLoreto*, the Ninth Circuit case relied upon by the District Court to support is erroneous determination that LISD intended to create a limited public forum, found that "where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora." 196 F.3d at 966.

Finally, the decision "to limit access" to government property "is not dispositive in answering whether or not the government created a designated public

forum." *United Food*, 163 F.3d at 350-51. Only where the government's "standards for inclusion and exclusion are clear and are designed to prevent interference with the forum's designated purpose" will courts find a nonpublic forum. *Id.* at 352; *see also Christ's Bride*, 148 F.3d at 251 (recognizing that in a nonpublic forum "standards for inclusion and exclusion … must be unambiguous and definite" (quotation omitted)). Because the standards in LISD's Policy GKB are decidedly unclear and grant LISD unbridled discretion, a valid nonpublic forum cannot exist.

IV. The District Court Erred in Concluding that LISD's Policy and Practice Survive Strict Scrutiny, Which Applies to a Designated Public Forum.

The District Court's analysis of LISD's actions under the scrutiny applicable to a designated public forum was severely flawed. "[T]he government may not exclude speech on the basis of its content from ... a forum created by government designation, unless the exclusion is necessary to serve a compelling state interest which cannot be served by a less restrictive action." *C.W.A., Inc.*, 883 F.2d at 34-35. The District Court correctly assumed that LISD's rejection of Little Pencil's advertisement was based on its content. *Id*. at 35 (excluding meetings with religious content from a library auditorium forum was content-based discrimination). But it short-circuited the "compelling interest" analysis and simply found that "Defendant still prevails because Defendant's responsibilities under the Establishment Clause required it to deny running the advertisement to a captive

audience containing students and minors who might view the ad as being endorsed by the Defendant." ROA.1432. This holding suffers from three errors: (1) the Establishment Clause does not provide a compelling interest in this case, (2) LISD cannot satisfy the least restrictive means analysis, and (3) no "captive audience" is involved.

A. The Establishment Clause Does Not Provide a Compelling Interest to Deny Religious Speakers Equal Access to a Forum.

Quoting from *C.E.F. of New Jersey*, the District Court ruled that Establishment Clause concerns can justify censorship against certain viewpoints because "the Supreme Court has not yet settled the question whether a concern about possible Establishment Clause violation can justify viewpoint discrimination." ROA.1433. But the District Court ignored the very next sentence of *C.E.F. of New Jersey*, which stated that "we need not decide this issue here, because giving Child Evangelism equal access to the fora at issue would not violate the Establishment Clause." 386 F.3d at 530 (emphasis added).

Giving private religious speech equal access to a public school forum does not violate the Establishment Clause. Here, there is clearly no Establishment Clause violation in granting equal access to Little Pencil's advertisement. *Rosenberger*, 515 U.S. at 839 (rejecting the position that the "Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral

in design"). LISD thus raises an unsubstantiated fear of an Establishment Clause violation. But merely raising the specter of Establishment Clause concerns is wholly inadequate to deny equal access. *Widmar*, 454 U.S. at 271 (while an interest in complying with "constitutional obligations may be characterized as compelling," "[i]t does not follow … that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases.").

As this Court explained in *Swanson*, Establishment Clause concerns are implicated only when government-endorsement of religious speech has occurred. "[T]he Court's Establishment Clause jurisprudence draws a sharp distinction 'between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" 659 F.3d at 409 (quoting *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990)). Thus, federal courts have consistently rejected the use of the Establishment Clause as a rationale for denying equal access to a religious speaker. *See Swanson*, 659 F.3d at 411 n.27 ("[S]chool officials need not fear an Establishment Clause violation from allowing schoolchildren with religious views to speak under the same reasonable, viewpoint-neutral terms as other students."); *C.E.F. of New Jersey*, 386 F.3d at 534 ("[G]ranting Child Evangelism equal access to the fora in question would not have constituted an endorsement of religion."); *C.E.F. of Maryland, Inc.*, 373 F.3d at

598 ("[T]he Supreme Court has *never* found unconstitutional coercion in an equal access case.").

Simply put, granting religious speakers (like Little Pencil) equal access to public forums in educational institutions (like LISD's advertising forum) does not violate the Establishment Clause. Thus, there is no actual or objectively reasonable perception of LISD's endorsement of Little Pencil's advertisement here. Absent an action violation of this sort, mere misguided Establishment Clause worries do not provide a compelling interest for the censorship of private speech.

B. The Banishment of Little Pencil's Advertisement Was Not the Least Restrictive Means of Serving LISD's Interests.

The District Court failed to ask whether censorship was the least restrictive means of satisfying LISD's alleged Establishment Clause interest. But that ill-conceived interest could easily be cured without resort to outright censorship; LISD could educate.

In similar contexts, courts have found that a school should use these opportunities to educate students about the distinction between private and government speech. As the Ninth Circuit explained in *Hills*:

> [T]he desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is far better to teach students about the first amendment, about the difference between private and public action, about why we tolerate divergent views .... The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it.

Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1055 (9th Cir. 2003) (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299–1300 (7th Cir.1993)). Rather than educating the audience at football games, LISD chose to throw up its hands, claiming to be incapable of simply teaching that advertisements are private speech and not endorsed by the school. As the Third Circuit explained, "if Stafford is legitimately worried about possible misunderstandings there are obvious steps that it can take. Stafford can send home an announcement to parents setting out its broad-ranging policies and making clear that it does not necessarily endorse all the groups whose materials are distributed or posted." *C.E.F. of New Jersey*, 386 F.3d at 534.

Less restrictive alternatives to censorship exist, but the District Court failed to consider them, instead choosing to uphold LISD's total ban on Little Pencil's protected speech.

C. An Audience Composed of Community Members, Parents, and Students Is Not a Captive Audience, and Students Are Mature Enough to Understand That Little Pencil's Ad Is Private Speech.

The District Court raised concerns about a captive audience of students at the football games who would see Little Pencil's advertisement. First, as stipulated by LISD, football games at Lowrey Field "are major community events." ROA.1416. "Many students parents, relatives, [and] community members" attend the games. ROA.1416. In such a diverse body predominated by adults, where

people are constantly coming and going and focused on the action on the field, not a 15-second advertisement on the scoreboard, concerns about a captive audience are misplaced.

Second, students at Lowrey Field are no different than thousands of students across the country who routinely receive religious advertisements from private groups during school hours through literature distribution programs. Often, these flyers are distributed by teachers. *See C.E.F. of New Jersey*, 386 F.3d at 520 (noting that "the teachers then distribute these materials to the students, usually at the close of the school day just prior to dismissal"). Yet courts have not considered these students to be a "captive audience" in need of protection from religious materials distributed as part of an open forum. *See C.E.F. of Maryland, Inc.*, 373 F.3d at 597 n.4 (rejecting the argument that compulsory attendance laws make students a captive audience for C.E.F.'s religious advertisements).

Second, public school students are exposed to thousands of advertisements every day and are mature enough to understand that a religious advertisement on a jumbotron—one of many appearing throughout the game—is not endorsed by the school. As the Supreme Court has explained, "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Mergens*, 496 U.S. at 250. In fact, the *Mergens* court noted that "Congress

specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion." *Id*. Thus, the District Court's concerns over a captive audience are misplaced.

V. LISD's Policy GKB Creates a Prior Restraint.

The District Court did not address Little Pencil's claim that LISD's Policy GKB creates an unlawful prior restraint through its complete lack of standards or criteria to guide school officials. Policies requiring prior approval cannot "delegate overly broad ... discretion to a government official." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

This Court has repeatedly struck down school district policies that, like Policy GKB, provide unbridled discretion in their implementation. In *Shanley v. Northeast Independent School District*, 462 F.2d 960, 965 (5th Cir. 1972), for example, this Court struck down a policy banning student literature distribution "without the specific approval of the principal." The policy had "no standards whatsoever by which a principal may accept or reject a student publication" *Id*. at 976. To survive constitutional scrutiny, this Court stated the policy "must include guidelines stating clear and demonstrable criteria that school administrators should utilize to evaluate materials." *Id*. at 977.

A policy that required "prior approval of the Assistant Superintendent" but did "not furnish sufficient guidance to prohibit the unbridled discretion that is

proscribed by the Constitution" was struck down in *Hall v. Board of School Commissioners*, 681 F.2d 965, 967-69 (5th Cir. 1982). And in *Ysleta Federation of Teachers v. Ysleta Independent School District*, 720 F.2d 1429, 1431 (5th Cir. 1983), this Court struck down a policy permitting literature distribution by employee organizations when it "does not interfere with school use as determined by the Superintendent." The policy was facially invalid because it "lack[ed] the guidelines, criteria or standards that would render the rule constitutionally acceptable by limiting the discretion of the Superintendent." *Id*. at 1434.

LISD's Policy GKB suffers from the same constitutional infirmity. It opens up use of the advertising forum to for-profit, non-profit, religious, and secular organizations for discussion of virtually any topic, but requires the "prior approval of the Superintendent," and gives LISD "final editorial authority to accept or reject submitted advertisements in a manner consistent with the First Amendment." ROA.1441. Policy GKB's complete absence of clear and binding criteria for approving advertisements, and its complete allocation of unbridled authority to the Superintendent, creates an unlawful prior restraint.

VI. The District Court Erred in Finding No Fourteenth Amendment Violation.

The District Court concluded that LISD's Policy did not violate Little Pencil's Due Process and Equal Protection rights under the Fourteenth Amendment. ROA.1435. But it did so only by failing to properly apply the

vagueness standards associated with Due Process to LISD's Policy. The District Court also erred in its Equal Protection analysis by finding that Little Pencil's advertisement is not similarly situated to other ads allowed in the forum.[8]

A. Policy GKB is Void for Vagueness.

"[V]ague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable." *Int'l Soc. for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809, 822-23 (5th Cir. 1979). Furthermore, "[t]he traditional standard of unconstitutional vagueness is whether the terms of a [policy] are so indefinite that 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Reeves v. McConn*, 631 F.2d 377, 383 (5th Cir. 1980). Here, LISD's Policy GKB suffers both of these flaws. It requires nonschool-related organizations to obtain prior approval and directs school officials to exercise "editorial authority" over their advertisements pursuant to their understanding of the "First Amendment." R.O.A. 483. However, as demonstrated by this case, highly experienced lawyers often disagree as to the meaning of the First Amendment. School officials invariably do likewise.

[8] The District Court held that Little Pencil's Fourteenth Amendment rights were not violated because "Defendant did not violate Plaintiffs' First Amendment rights." ROA.1435. However, a finding that LISD can legally ban religious advertisements from the forum does not mean that the policy is not void-for-vagueness, or that LISD has not violated the Equal Protection Clause.

Policy GKB lacks any standards to guide LISD officials in making advertising decisions. Federal courts, including this Court, have struck down similar policies as impermissibly vague. *See Shanley*, 462 F.2d at 977 (literature distribution policy requiring prior approval yet lacking guidelines was void-for-vagueness); *Hall*, 681 F.2d at 971 (failure to define terms like "political or sectarian" and "special interest" render policy vague); *Riseman v. Sch. Comm.*, 439 F.2d 148, 149 n.1 (1st Cir. 1971) (school policy barring advertising by non-school groups unless the superintendent found that "the educational value of the material considerably offsets any incidental advertising disadvantages" stricken as void).

Contrary to the District Court's conclusion, ROA.1435, LISD need not list all First Amendment criteria for Policy GKB to be constitutional. Rather, the Policy must, with "specificity and clarity," make an "attempt to distinguish the specific forms of [speech] that the [School District] may constitutionally prohibit." *Reeves*, 631 F.2d at 387, 388. First Amendment jurisprudence defines certain forms of speech as having no protection (*i.e.* fighting words, obscenity, etc.) while affording full protection to other forms of speech (*i.e.* religious speech and political speech). Unlike policies banning "obscene language," *Bethel School Dist. v. Fraser*, 478 U.S. 675, 678 (1986), or "a policy specifically prohibiting visible displays of the Confederate battle flag," *A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 225 (5th Cir. 2009), Policy GKB gives no notice of what is prohibited.

Lastly, despite recognizing that considering "fact-specific intricacies" is necessary in applying the First Amendment, ROA.1435, the District Court emphasized that Policy GKB prevented abuse because the Superintendent can use "advice and counsel" in making decisions. ROA. 1435. Taken to its logical conclusion, this argument would allow the District Court to nullify any vagueness argument simply because government officials can ask lawyers for legal advice. But it cannot be "presume[d] the [Superintendent] will act in good faith and adhere to [the ordinance's] standards.... [T]his is the very presumption that the doctrine forbidding unbridled discretion disallows." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988).

Simply put, Policy GKB is impermissibly vague through its lack of guidelines and binding criteria to ensure that officials act "consistent with the First Amendment." The Constitution demands more of policies restricting free speech.

B. Little Pencil Was Not Required to Exhaust Administrative Remedies.

The District Court erred when it found that Little Pencil "failed to exhaust the administrative remedies available" to them. ROA.1435. As the Supreme Court explained over thirty years ago, "exhaustion of state administrative remedies is not a prerequisite to an action under § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 507 (1982). The Court has never held otherwise but has instead repeatedly affirmed this principle. *See Felder v. Casey,* 487 U.S. 131, 147 (1988)

("[P]laintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court."). Because exhaustion of administrative remedies is not required, the District Court should have proceeded to the merits of Little Pencil's due process claims, namely that its speech was censored pursuant to an impermissibly vague policy that deprived Little Pencil of adequate notice as required by the Due Process Clause. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (a policy with "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process").

C. The District Court Erred in Finding No Violation of the Equal Protection Clause.

The District Court found no Equal Protection violation because LISD had not allowed advertisements on the jumbotron that "contained such levels of controversy, religious proselytizing, perceived endorsement of a religion, or perceived sacrilege for placing the central figure of a religion in a negative light." ROA. 1436. This conclusion ignores the fact that LISD is plainly differentiating similarly-situated *organizations* based on religion, a suspect classification. *Burlington N.R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (establishing "race [and] religion" as "suspect" "classif[ications]").

> [U]nder the Equal Protection Clause ... government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial

> views.... Once a forum is opened up to ... speaking by some groups, government may not prohibit others from ... speaking on the basis of what they intended to say.

Mosley, 408 U.S. at 96.

As stipulated by LISD, it welcomes a multitude of for-profit, non-profit, religious, and secular organizations into its advertising forum. ROA.1413-1416. Little Pencil, a "for-profit Texas Limited Liability Company," is among the categories of speakers allowed in the forum. It offers services that are similar to other advertisers that promote counseling and the well-being of those in need. It is also similar to the religious organizations promoting their religious services and viewpoints. LISD's differential treatment of Little Pencil's religious advertisement—speech that was "less favored" and labeled "controversial" by LISD, *Mosely*, 408 U.S. at 96—violates the Equal Protection Clause.

VII. The District Court Erred in Finding No Free Exercise Violation.

The Free Exercise Clause prohibits regulations that "impose special disabilities on the basis of religious views." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("[A] law targeting religious beliefs as such is never permissible"). If a government restriction "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons," it violates the Free Exercise Clause. *Lukumi*, 508 U.S. at 532.

The parties stipulated that Little Pencil sought to place the Jesus Tattoo advertisement "on the basis of [its] sincerely held religious beliefs." ROA.1418. And its ad was denied because of its religious message. ROA.1449-1450. While this alone is sufficient to establish a Free Exercise violation, the violation is exacerbated because LISD selectively targeted Little Pencil while permitting ads by several religious advertisers, such as Bethany Baptist Church, Full Armor Ministries, and Lubbock Christian University. ROA.1414-1415. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (recognizing that government may not "favor religions that are traditional, that are comfortable, or whose mores are compatible with the State").

In *Lukumi*, the Court found that a law that prohibited some religious animal killings but not others such as "kosher slaughter," violated the Free Exercise Clause. 508 U.S. at 536. "[F]ew if any killings of animals [were] prohibited other than Santeria sacrifice." *Id*. LISD's singular banishment of Little Pencil's advertisement, while permitting (and actively soliciting) other religious advertisements, does the same and thus violates the Free Exercise Clause.

Contrary to the District Court's assertion that LISD "need only show a rational relationship to a legitimate purpose," the Supreme Court demands that restrictions against religious exercise that are not neutral and generally applicable must be "justified by a compelling interest and … narrowly tailored to advance that

interest." *Id*. at 533. Neither is present here.

VIII. The District Court Erred in Finding No Establishment Clause Violation.

The Establishment Clause "forbids hostility toward any [religion]." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Supreme Court has explained that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. Moreover, the Establishment Clause demands that the government "be … neutral in its relations with groups of religious believers and non-believers." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

Thus, LISD's opening of its forum to non-religious speakers but not to those "advanc[ing] … a religious message" demonstrates hostility rather than neutrality toward religion. ROA.1422. Furthermore, Defendant's allowance of other religious groups who explicitly foster the "advancement of a religious message," *id.*, while denying Little Pencil's advertisement "risk[s] fostering a pervasive bias or hostility to religion [and between religions], which could undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 845-46.

IX. The District Court Abused Its Discretion By Denying the Admission of Newly Discovered Evidence that Directly Refuted a Central Premise of LISD's Defense.

A primary component of the District Court's decision and LISD's defense is LISD's claim that it strictly enforces a "no visible tattoo" policy at its schools.

After summary judgment briefing was complete, Little Pencil discovered an art display at one of LISD's schools depicting scores of students' hands and arms adorned with henna tattoos. Because of the relevance of this newly uncovered information, Little Pencil immediately sought to supplement the record. ROA.1395, *et seq*. Without explanation, the District Court denied this motion. ROA.1409.

That denial constitutes an abuse of discretion. After invoking its alleged "no visible tattoo" policy, LISD orchestrated a school-sponsored display that involved students drawing tattoos on their skin in direct contradiction of its alleged policy. This newly discovered evidence cements what is already obvious: that LISD's purported "no visible tattoo" policy is merely a pretext for viewpoint discrimination against Little Pencil's religious advertisement. This important new evidence, which eviscerates one of LISD's primary excuses for denying Little Pencil equal access to the advertising forum, should have been accepted by the District Court.

CONCLUSION

For the foregoing reasons, Little Pencil respectfully requests that this Court (1) reverse the District Court's decisions denying Little Pencil's Motion for Summary Judgment and Motion for Leave to File Supplemental Evidence; (2) determine that LISD's rejection of Little Pencil's advertisement, and the Policy

GKB upon which that denial was based, violated Little Pencil's rights under the First and Fourteenth Amendments; and (3) remand the case for further proceedings consistent with the Court's opinion.

Respectfully submitted this 18th day of August, 2014,

By: /s/Jeremy D. Tedesco

Kevin H. Theriot (TX 00788908)
Jeremy D. Tedesco (AZ 023497)
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Phone: (480) 444-0020
Fax: (480) 444-0028

Robert S. Hogan (TX 00796767)
Hogan Law Firm
1801 13th Street
Lubbock, TX 74901
Phone: (806) 771-7925
Fax: (806) 771-7925

David A. Cortman (GA 188810)
J. Matthew Sharp (GA 607842)
Rory T. Gray (GA 880715)
Alliance Defending Freedom
1000 Hurricane Shoals Rd NE, D-1100
Lawrenceville, GA 30043
Phone: (770) 339-0774
Fax: (770) 339-6744

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

Ann Manning
Underwood Law Firm, P.C.
P.O. Box 16197
Lubbuck, TX 79490
Ann.Manning@uwlaw.com
Attorney for Defendant-Appellee Lubbock Independent School District

this 18th day of August, 2014.

/s/ Jeremy D. Tedesco
Jeremy D. Tedesco

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