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

APPELLEE'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Defendant 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.

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Respectfully submitted this the 19th day of September, 2014

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STATEMENT OF THE ISSUES

We disagree with Little Pencil's Statement and submit our own.

1. The primary and ultimate issue is whether the District Court correctly granted summary judgment for LISD and denied summary judgment for Little Pencil.

This involves sub-issues (a)-(g).

(a) Whether LISD's refusal of Little Pencil's "jesustattoo" advertisement based on LISD's policy and Texas law prohibiting tattoos on students and minors violated Little Pencil's constitutional rights of free speech?

(b) Whether LISD's refusal of Little Pencil's "jesustattoo" advertisement on the LISD Jumbotron at weekly football games on constitutional grounds violated Little Pencil's constitutional right of free speech?

(c) Whether LISD's responsibilities under the Establishment Clause required it to refuse the advertisement which endorses a particular religion to a captive audience containing students and minors who might view the advertisement as being endorsed by LISD?

(d) Whether LISD's rejection of Little Pencil's advertisement on the Jumbotron, a limited public forum, satisfied the standard of reasonableness?

(e) Whether LISD's policy, coupled with its practice, requiring the LISD Superintendent to comply with First Amendment law is a sufficient guideline?

(f) Whether LISD violated Little Pencil's Equal Protection claim when no other advertisement on the Jumbotron was similarly situated?

(g) Whether LISD's rejection of Little Pencil's advertisement from the Jumbotron advertising forum, which allows only commercial speech, was a violation of Little Pencil's rights under the Free Exercise Clause and the Establishment Clause?

2. Whether the District Court abused its discretion in denying Little Pencil's Motion for Leave to Supplement Evidence?

STATEMENT OF THE CASE

This case concerns Little Pencil's allegations that LISD violated its free speech rights under the First Amendment by denying its "jesustattoo" advertisement to be placed on the electronic-medium Jumbotron at LISD's high school football stadium during its high school football games.

When Little Pencil sought to market its "jesustattoo" advertisement on the Jumbotron at District-owned Lowrey Field for showing at LISD high school football games, LISD was required to consider, under First Amendment parameters, the effect of the advertisement on its students at the football venue where the majority of participants were required to attend. It was clear that LISD's placing the "jesustattoo" advertisement would give the appearance of LISD's endorsing a particular religion since the advertisement was to be shown on the District's Jumbotron, operated by District employees, and the Superintendent was required to approve showing the advertisement.

Additionally, LISD maintained a "no visible tattoo" policy in its Student Code of Conduct, Dress Code, and Board Policy based on Texas law which

prohibits a tattoo artist from placing a tattoo on a minor. Little Pencil's "jesustattoo" advertisement was in contravention of these policies and state law.

Further, LISD considered the potential disruption due to controversy over the proselytizing nature of the advertisement which could result in lawsuits requiring LISD to place other proselytizing advertisements on the Jumbotron and creating further disruption with Christians who were offended by the tattooed Jesus.

LISD, by its Board policy, denied Little Pencil's advertisement on the following three bases: (1) tattoos are a violation of its "no visible tattoo" policy which is grounded in state law; (2) it caused a conflict with the Establishment Clause since the advertisement clearly endorsed one religion; and (3) it presented a potential for disruption.

Statement of the Facts

The District Court has correctly set out the material facts concerning LISD's denial of Little Pencil's "jesustattoo" advertisement on the Jumbotron at Lowrey Field in its Order dated May 29, 2014. ROA.1410-1420.

The only location Little Pencil requested to book the advertisement was on the Lowrey Field Jumbotron, ROA.1417, a 15' x 26' vibrant electronic advertising screen at LISD's high school football stadium. ROA.1257; ROA.1306. Little Pencil made no other request for any other advertising venues at LISD. ROA.1261,

1264. Only commercial advertisers were permitted to advertise on the Jumbotron. ROA.1261; ROA.1263. Denial of Little Pencil's request was based on Board Policy GKB(LOCAL), which restricts advertisement for any nonschool-related purpose without prior approval of the Superintendent, who is authorized to accept or reject submitted advertisements in a manner consistent with the First Amendment. ROA.1441. Board Policy GKB(LOCAL) allows advertising for the purpose of covering costs of providing materials and equipment and not for the purpose of establishing a communication forum. ROA.1441.

LISD denied Little Pencil's advertisement on three bases. First, the tattoo images on the body of Jesus with the words "jesustattoo.org," constitute a violation of its policy and state law. ROA.1419,¶46 Second, allowing the advertisement conflicts with the Establishment Clause because the picture of a tattooed Jesus with a crown of thorns and arms outstretched placed LISD in a position of endorsing one religion. ROA.1419,¶48. Regarding this second reason for denying the advertisement, Little Pencil admits that the advertisement was designed to be a religious message and sought to be expressed on the basis of their "sincerely held religious beliefs." ROA.1418. ¶44. Third, the advertisement was rejected because it would create controversies and potential disruption in the school. ROA.1257.

With regard to tattoos, Texas law forbids tattoo artists from giving minors under the age of 18 a tattoo without their parent's permission, and then, only to

cover an existing tattoo. 25 TEX. ADMIN. CODE §229.406(c) and (d). ROA.1427,n.3. In conformance, the District had a "no visible tattoo" policy in its Student Code of Conduct [ROA.1259, ROA.1293-1294, as well as in its Employee Handbook [ROA.1259, ROA.1299].

Following LISD's denial, Little Pencil failed to take advantage of LISD's grievance procedure GF(LOCAL) for a prompt review of the Superintendent's determination. ROA.1260; ROA.1307-1311.

Procedural History

For purposes of this appeal, the Appellants have correctly stated the course of the proceedings and disposition in the District Court. [Appellants' Brief at pp.13-14]

SUMMARY OF THE ARGUMENT

This District Court correctly held that LISD met both a reasonableness standard and a compelling state interest standard in denying Little Pencil's "jesustattoo" advertisement to be shown on the Jumbotron at LISD's Lowrey Field at high school football games to a captive audience of students and minors.

The District Court correctly analyzed Little Pencil's free speech issues by determining the forum at issue. The District Court held that the relevant forum and venue at issue in this case is limited to a unique advertising forum in LISD, the electronic advertising on the Jumbotron at Lowrey Field, because that was the only forum and venue for which the "jesustattoo" advertisement was submitted by Little Pencil for the Superintendent's approval. ROA.1425.

Next, the District Court correctly determined that the forum was characterized as a "limited public forum" by analyzing LISD's Board Policy GKB(LOCAL) regarding advertising for non-school-related purposes. The policy limits advertisements in a school facility for any non-school-related purpose by requiring the Superintendent's prior approval in a manner consistent with the First Amendment. Further, the policy indicates advertising is for the purpose of raising revenue to defray LISD expenses and is **not** for the purpose of establishing a forum for communication. ROA.1441.

The District Court applied the reasonableness standard to the limited public forum and correctly held that LISD's actions in denying Little Pencil's advertisement were reasonable on three bases.

First, LISD's denial was permissible because it was based on Little Pencil's advertisement's violation of LISD's "no visible tattoo" Board Policy, the Student Code of Conduct, and state law. LISD's "no visible tattoo" policy was clearly violated by Little Pencil's "jesustattoo" advertisement by focusing on visible body tattoos, as neither students nor LISD employees are permitted to exhibit visible tattoos. This policy is founded upon state law wherein a Texas tattoo artist is prohibited from placing a tattoo on a minor, regardless of the tattoo's message. ROA.1426-1428.

Second, Little Pencil's advertisement was a proselytizing message that was designed to advance Little Pencil's "sincerely held religious beliefs" to the viewer and that it was "not of a similar character to any previous use of the school's [forum];" therefore, its rejection was reasonable in light of the forum under the Establishment Clause. ROA.1429. The District Court heavily relied on *Santa Fe Independent School District v. Doe*, 530 US. 290 (2000), recognizing that a "perceived endorsement of and entanglement with religion by a school district creates an Establishment Clause violation," especially in a setting such as a high school football game. ROA.1430. Just as in *Santa Fe*, Little Pencil wanted access

to one of LISD's public address systems, the Jumbotron, to show a proselytizing message at high school football games to a captive audience. The District Court correctly held that the perception that the proselytizing speech was that of LISD is reasonable because the screen is under the control of LISD, is government-owned and operated, and an advertisement requires approval by the Superintendent of Schools. ROA.1431.

Third, the District Court correctly held that the potential for disruption and controversy by permitting the proselytizing message was also a valid reason for denying Little Pencil's running of the "jesustattoo" advertisement to students and spectators. Consequently, pursuant to the limited public forum reasonableness standard, the District Court correctly held that LISD's rejection of the ad did not violate Little Pencil's First Amendment Rights. ROA.1431-1432.

In the alternative, the District Court correctly held that, if LISD's Jumbotron was a designated public forum, LISD should still prevail based upon the "captive audience theory." As in *Santa Fe,* the District Court correctly held that LISD's responsibilities under the Establishment Clause required it to deny running the advertisement which endorsed a particular religion to a captive audience containing students and minors who might view the advertisement as being endorsed by LISD. ROA.1432.

Additionally, the District Court precisely held that Board Policy GKB(LOCAL) was not an impermissible prior restraint on Little Pencil's speech, that the forum for the Jumbotron is a limited public forum, and that LISD gave reasonable grounds for denying Little Pencil's proposed advertisement. ROA.1434. Moreover, the District Court held that GKB(LOCAL) is not unconstitutionally vague because the guidelines in the policy require the Superintendent to stay within the parameters of the First Amendment. Consequently, the District Court properly dismissed Little Pencil's due process, equal protection, free exercise of religion, and Establishment Clause claims because none of the other advertisements accepted by LISD were similar to Little Pencil's proselytizing speech. ROA.1437-1438.

Finally, the District Court did not abuse its discretion in denying Little Pencil's Motion to Supplement Evidence with photographs of LISD students' "henna" drawings based on untimely filing and irrelevance.

ARGUMENT

Little Pencil's Brief places the "cart before the horse" in its analysis of free speech rights under the First Amendment by immediately arguing viewpoint discrimination. To accurately analyze this case, we must first "begin with the basics," *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 819 (5th Cir. 1999), and focus on the proper steps in analyzing public school religion cases as established by the U.S. Supreme Court and the Fifth Circuit. We will reference our responses to Little Pencil's arguments.

I. The District Court Correctly Limited the Scope of the Forum to the Jumbotron. (Response to Little Pencil's Brief at Section II)

For First Amendment purposes, the Court's evaluation differs depending on the "character of the property at issue." *Perry Educator's Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 44 (1983). Little Pencil did **not** seek access to all of LISD's advertising fora. Little Pencil has made no other requests of LISD or its booster clubs to place its advertisement at any other venue. ROA.1261, 1264. *Id.* Therefore, the District Court did not err in limiting the forum and venue analysis to the electronic advertising on the Jumbotron at Lowrey Field because it was the "only forum and venue for which the ad was submitted and considered when it was reviewed by the Superintendent." ROA.1425. Moreover, the Jumbotron is like no other venue in the District. It is the only Jumbotron at the only football stadium.

II. The District Court Correctly Concluded that LISD's Advertising Forum Is Not a Designated Public Forum (Response to Little Pencil's Brief at Section III)

The Fifth Circuit characterizes government-owned property as one of four categories of fora: (1) the traditional public forum, (2) the designated public forum, (3) the limited public forum, and (4) the non-public forum. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345-346 (5th Cir. 2001). A "reasonableness" standard of scrutiny is applied to the limited and nonpublic fora while the "compelling state interest" standard is applied to the traditional public and designated public fora. *Id* at 346. Little Pencil argues that the District Court erred in finding that the Jumbotron constituted a limited public forum instead of a designated public forum and, consequently, applied the wrong standard of scrutiny.

In ascertaining whether or not a designated public forum has been created, the courts look to two factors: "(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." *Id*. In that regard, the District Court correctly analyzed LISD Board Policy GKB(LOCAL). The policy clearly indicated that it did not intend to establish a public forum, and the nature of the forum on the Jumbotron was inconsistent with proselytizing religious messages because LISD had reserved the forum for commercial speech. Therefore, the District Court held that the Jumbotrom was a limited public forum. ROA.1426.

The District Court justly relied upon *Diloreto v. Downey Unified School District.*, 196 F.3d 958, 963 (9th Cir. 1999), a case on point in a public school setting. In *Diloreto*, a high school baseball booster club solicited advertisements from local businesses as a fundraiser, and the advertisements were placed on the baseball field fence for an advertising "fee." Diloreto purchased such an advertisement and submitted a design that included the Ten Commandments. The principal of the high school declined posting that sign on the following two bases: (1) it conflicted with the Establishment Clause; and (2) its potential for disruption, including controversy and expensive litigation that might arise from the sign or from political statements that others might wish to post. *Id.* The *Diloreto* Court analyzed the validity of the school's conduct based on the forum, specifically, the baseball field fence. The Court held that there was not an intent to designate a public forum for all expressive activity but to reserve the forum for commercial speech, which was a non-public forum. *Id.* at 966.

The *Diloreto* Court found that the school had no intention to designate the baseball field fence as a public forum for expressive activity because the school sold advertising space on the fence in order to defray expenses for the athletic program. This limited purpose indicated the lack of intent by the school to open a traditional public forum since advertisements were solicited by the school booster club. The Court wrote "under these circumstances, we hold that the baseball field

fence was a nonpublic forum open for a limited purpose." *Id.* at 967. Likewise, LISD had **no intention** to designate the Jumbotron as a public forum because LISD sold commercial advertising space on the Jumbotron in order to defray expenses for the athletic program, and the advertisements were solicited by LISD's marketing agent. ROA.1258. LISD was "**engaged in commerce**." Therefore, the District Court correctly determined that the Jumbotron is a limited forum that exists for a limited purpose, i.e., commercial speech. ROA.1426.

Also, instructive on the issue of forum is *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 975 (9th Cir. 1998). In that case, the issue of forum focused on the advertising space on city buses, which the Court found to be commercial speech. The plaintiffs proposed an advertisement to be placed upon city buses that stated, "*Before I formed you in the womb, I knew you – God. Jeremiah 1:5…Choose Life!"* The city rejected *Children of the Rosary's* advertisement on the basis that it did not propose a commercial transaction but instead promoted a noncommercial message. The Court held that the city was **engaged in commerce**, that its buses were non-public fora, and that the City did not violate *Children of the Rosary's* First Amendment rights. *Id.* at 974-978.

More evidence regarding forum analysis came in *Lehman v. Shaker Heights,* 418 U.S. 298, 303 (1974), again involving the use of a city bus for advertising. In that case, the Supreme Court noted that the city was **engaged in commerce** and

had "discretion to develop and make reasonable choices concerning the type of advertising it would display" since the commuters were a captive audience. *Id.*

Contrary to relevant precedent and the District Court's holding, Little Pencil argues that the government-created forum of the Jumbotron is a designated public forum, but it does not cite a single comparable case. A designated public forum is found when the governmental entity intentionally opens a "place or channel of communication for use by the public at large for assembly and speech." *Cornelius v. NAACP Legal Defense Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985). A designated public forum is not created without **intentional** action by the governmental entity. *Id.*

In its efforts to convince this Court to overturn the District Court, Little Pencil uses a sloppy application of Board Policy GKB(LOCAL) to infer that LISD has opened its facilities "to any non-school-related purpose" for advertising. But, in its argument, Little Pencil has **failed to include the entire sentence** from GKB(LOCAL), which states the following:

> **School facilities shall not be used to advertise, promote, sell tickets, or collect funds for any non-school-related purpose without prior approval of the Superintendent or designee.**

(emphasis added). ROA.1441. Thus, when read and analyzed in its entirety, the standards in LISD's Policy GKB do not intentionally create a designated public forum.

In arguing that LISD did not meet the "intent" requirement, Little Pencil states that, in a limited public forum the standards must be "unambiguous and definite," citing *Christ's Bride Ministries, Inc. v. Se. Pennsylvania Transp. Auth.*, 148 F.3d 242, 251 (3rd Cir. 1998). LISD has complied with that requirement. Board Policy GKB states clearly that its intent in permitting advertising is "not for the purpose of establishing a forum for communication" and that the advertising "shall be accepted solely for the purpose of covering the cost of providing materials and equipment..." Additionally, the policy states "the District retains final editorial authority to accept or reject submitted advertisements in a manner consistent with the First Amendment." ROA.1441. LISD's policy clearly communicates its intentions. Thus, the District Court correctly held that the "plain wording indicates that the intent was not to establish a forum for all expressive speech and activity when allowing advertising." ROA.1426. As the Supreme Court has said, "Selective access does not transform government property into a public forum." *Perry*, 460 U.S. at 47 (rejecting a contention that the school had a designated public forum in its school mail system).

Little Pencil further attempts to create a designated public forum out of LISD's policies and practices by expanding the number and locations of the District's advertising fora. That attempt is foreclosed. The only forum to which Little Pencil sought access is the Jumbotron. ROA.1261, 1264. The nature of the

forum, a Jumbotron at a high school football stadium, is compatible with the limitation to commercial advertisements. Therefore, the District Court's conclusion that LISD's advertising forum is not a designated public forum is consistent with LISD's stipulations and the District Court correctly determined that the Jumbotron was a limited public forum. ROA.1426.

III. The District Court Correctly Held That the Denial of Little Pencil's Advertisement was Reasonable. (Response to Little Pencil's Brief at Section I.C.)

A. LISD's Denial of Little Pencil's Advertisement Based Upon Its Use of Allegorical Tattoos is Reasonable. (Response to Little Pencil's Brief at Section I.C.1)

For purposes of a limited public forum, the District Court correctly applied the reasonableness standard of scrutiny rather than the strict scrutiny standard, which is required for a traditional public forum and a designated public forum. *Chiu*, 260 F.3d at 346. The focus for implementing the reasonableness standard rests on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated. *Perry,* 460 U. S. at 50-51. ROA.1426-1428. LISD reasonably limited its advertising on the Jumbotron to commercial speech. Thus, LISD's denial of Little Pencil's advertisement based on allegorical tattoos is reasonable.

1. Little Pencil Offered to Submit Its Advertisement Without the Tattoos But Not to Remove "jesustattoo.org." (Response to Little Pencil's Brief at Section I.C.1.(a))

Under Texas law, a minor under the age of 18 is prohibited from having a tattoo placed on his body by any tattoo artist licensed in the state. 25 TEX. ADMIN. CODE §229.406(c). Therefore, consistent with state law, the LISD Board of Trustees adopted its Student Code of Conduct to include a dress code that requires all tattoos to be covered. ROA.1259; ROA.1293-1294. Similar restrictions on exhibition of existing tattoos on LISD personnel are contained in the LISD Employee Handbook. ROA.1259; ROA.1299. Thus, exhibiting the "jesustattoo" advertisement on a 15' x 26' advertising screen that is vibrant and in color would fly in the face of the restrictions LISD has in place for both its students and employees. ROA.1306. Therefore, LISD's denial of Little Pencil's "jesustattoo" advertisement was reasonable and viewpoint neutral in that any other similar advertisement pertaining to prohibited conduct, such as for alcohol, tobacco, or sexual activities, would, likewise, be denied placement on the Jumbotron.

The record reflects that the very first reason given to R.D. Thomas Ad Agency on October 1, 2013, for LISD's denial of the advertisement was based upon the tattoos. ROA.1419, ¶46. Little Pencil orally inquired about submitting the advertisement with the tattoos removed. ROA.1261. Still, LISD denied the advertisement because, even if the tattoos were removed from the image of Jesus,

the phrase "jesustattoo.org" would remain on the advertisement, and Little Pencil made no offer to remove "jesustattoo.org" from its advertisement. ROA.1261. Moreover, Little Pencil did not submit a revised version of the advertisement. ROA.1261. It is important to note that, in Little Pencil's advertising campaign, it erected approximately 59 identical billboards around the City of Lubbock which, undeniably, connected the phrase, "jesustattoo," with or without the tattoos on the image of Jesus Christ, to the advertisement. ROA.1317-1318.

2. Little Pencil Offered No Evidence Regarding the Henna Drawings. (Response to Little Pencil's Brief at Section I.C.1(b))

Little Pencil has tried to do indirectly what the District Court disallowed, that is to place the "Henna" drawings as evidence before this Court. The District Court did not abuse its discretion in denying the late filing of the evidence which was submitted nearly a month after the Court's filing deadline. ROA. 366. Because of the untimely filing, LISD has had no opportunity to respond that the "henna" drawings were irrelevant and that the drawings did not contradict LISD's tattoo defense on the basis that they were not tattoos. For purposes of LISD's Student Code of Conduct, tattoos are defined in the Texas Health and Safety Code, §146.001(3):

> "Tattoo" means the practice of producing an indelible mark or figure on the human body by scarring or inserting a pigment under the skin using needles, scalpels or other related equipment. The term includes the application of permanent cosmetics."

Not only were the drawings not tattoos, but they were not in violation of state law pursuant to 25 TEX. ADMIN. CODE § 229.406(c) as were the tattoos in the "jesustattoo" advertisement.

The District Court did not abuse its discretion in denying Little Pencil's motion to file its late-filed evidence.

3. Little Pencil's Advertisement Displaying Tattoos is in Violation of LISD's Student Code of Conduct and State Law for Minors. (Response to Little Pencil's Brief at Section I.C.1(c))

LISD's denial of the "jesustattoo" advertisement was based on the fact that its exposed tattoos are a violation of the Student Code of Conduct and tattoos are a violation of Texas law for minors. The denial was not based on the idea that the advertisement would encourage minors to obtain tattoos.

Contrary to Little Pencil's assertion, the District Court did not find that Little Pencil's advertisement "would compel students to run out and get tattoos." [Appellant's Brief, p.34.] Instead, the Court correctly held that "the ad at issue depicts images of tattoos and the Court realizes, as argued by Defendant, that a school may exercise control over some speech so long as the actions are reasonably related to legitimate pedagogical concerns." ROA.1428, quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

For the first time in its Appellant's Brief, Little Pencil raises an issue of the school mascot. Little Pencil had ample opportunity in its Motion for Summary Judgment and its Reply to LISD's Motion for Summary Judgment to raise this issue but it failed to do so. Further, Little Pencil did not file a Motion for Leave to File Supplemental Evidence. Little Pencil's failure to properly and timely raise the issue again gave LISD no opportunity to respond that the historical logo is **not** in violation of school policy or state law. Unlike tattoos, it is not a violation of LISD policy for a student to bring a firearm on school grounds in certain situations and state law also permits guns on school grounds under certain circumstances. For instance, state law provides the following:

> EXCEPTION A student may not be expelled solely on the basis of the student's use, exhibition, or possession of a firearm that occurs:
>
> 1. At an approved target range facility that is not located on a school campus; and
> 2. While participating in or preparing for a school-sponsored shooting sports competition or a shooting sports educational activity that is sponsored or supported by the Parks and Wildlife Department or a shooting sports sanctioning organization working with the department.

TEX. EDUC. CODE §37.007(k). The District Court correctly held that the display of tattoos on the "jesustattoo" advertisement was in violation of LISD's Student Code of Conduct and state law for minors.

4. The First Amendment Does Not Protect the Use of Tattoos to Convey a Social Religious Message Where it is a Violation of School Policy and State Law in an Advertising Setting in a Limited Public Forum. (Response to Little Pencil's Brief at Section I.C.1(d))

Little Pencil asserts that the District Court's analysis would result in broad categories of speech being placed off limits to students. In support of its position, Little Pencil cites *Morse v. Frederick*, 551 U.S. 393 (2007) and *Ponce v. Socorro Ind. Sch. Dist.*, 508 F.3d 765, 769 (5th Cir. 2007) (Alito, J., concurring) for the proposition that, under the compelling interest standard, schools can restrict student speech where "a reasonable observer would interpret as advocating illegal drug use," as opposed to that speech that can plausibly be interpreted as commenting on any political or social issue. Again, unlike the case at bar, *Morse* is a student speech case, not an advertising case. In *Morse*, the student was watching a parade across from the school and unfolded a banner that stated, "Bong Hits for Jesus." The school district disciplined the student for his statement because it advocated illegal drug use, and the Court upheld the school's application of discipline, extending the disruption exception of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

Throughout Little Pencil's brief, it confuses the rights of student speech under the First Amendment with the rights of an advertiser under the First Amendment. Student speech is highly protected as noted in Little Pencil's cited

cases, such as in *B.H. v. Easton Area School District*, 725 F.3d 293, 297 (3rd Cir. 2013) *cert. den'd*, 134 S.Ct. 1515 (2014) (a student was allowed to wear a bracelet that said "I ♥ Boobies! (Keep abreast)" as the student's expressed support of breast cancer cure, which was in violation of the dress code that forbade clothing containing sexual innuendos.) Little Pencil is not a student and the forum in which it demands admission is not a student speech forum. Neither *Morse* nor *B.H.* extend First Amendment advertising protection to advertisers exhibiting tattoos on a school's Jumbotron. The District Court correctly held that "LISD's enforcement of its policy against visible tattoos reasonably related to the school's legitimate pedagogical concerns." ROA.1428 .

5. Little Pencil's Advertisement Conflicts with LISD's Student Code of Conduct and Texas Law. (Response to Little Pencil's Brief at Section I.C.1(e))

Little Pencil advocates that its advertisement does not conflict with LISD's dress code because students can wear clothing depicting tattoos as long as they do not depict gang symbols, letters, profanity, or inappropriate pictures. [Appellant's Brief, p.37]. T-shirts depicting tattoos on them are not "tattoos" under the Texas Administrative Code nor the Texas Health & Safety Code. Paintings on t-shirts are acceptable. Tattoos on students' bodies are not. Little Pencil's argument again is misplaced because the image of Jesus in its advertisement is not wearing a tattoo t-shirt; he is exhibiting what appears to be authentic tattoos. ROA.1427.

Further, Little Pencil argues that its advertisement "complies with state law in the exception of covering an existing tattoo," [Appellant's Brief,p.37] The advertisement on its face does not show covering an existing tattoo, ROA.1418, nor is there covering of an existing tattoo on the face of Little Pencil's advertisement. ROA.1418. LISD disallows visible tattoos by policy, and its policy conforms with state law. ROA.1259; ROA.1293-1294. Little Pencil's argument fails.

6. The District Court's Reliance on *Hazelwood* Was Not Misplaced. (Response to Little Pencil's Brief at Section I.C.1(f))

The District Court correctly relied on *Hazelwood*, to hold that "a school may exercise control over some speech so long as the actions are reasonably related to legitimate pedagogical concerns." ROA.1428. Little Pencil has asserted that *Hazelwood's* holding is not so broad and should be construed narrowly as applying only to school-sponsored speech. The issue for which the District Court cited *Hazelwood* is the enforcement of LISD's policy against visible tattoos being shown on the Jumbotron. *Hazelwood* is a student-speech case regarding a high school principal's decision to excise two pages from the student newspaper based on the article's references to student pregnancy issues. The Court held that the school was not a public forum and "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-

sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 261 (emphasis added). According to Merriam-Webster, "pedagogical" is defined as "relating to, or befitting…education." *See*, "Pedagogical" [Def.1] *Merriam-Webster Online*, Retrieved September 16, 2014, available at: http://www.Merriam-Webster.com/dictionary/pedagogical. As such, a no "visible tattoo policy" relates to educational concerns for the health and safety of students and is consistent with prohibition contained in state law.

Little Pencil argues that neither its advertisement nor the advertising forum at Lowrey Field would be perceived as school-sponsored by a reasonable person. [Appellant's Brief p.9] As the school publication is school-sponsored in *Hazelwood*, it is clear that football games at Lowrey Field are school-sponsored events. It is also clear that the Jumbotron is owned by LISD and it is operated during the school-sponsored football game only by individuals led by LISD or engaged by LISD. If student speech can be regulated as in *Hazelwood*, it is a lesser test to regulate the content of a non-student advertisement on LISD's Jumbotron.

In its Brief, Little Pencil fails to accept the fact that the Jumbotron, on which advertisements are placed, is a government-owned and operated advertising venue. Advertisements may only be placed on the Jumbotron with authority of the Superintendent. Therefore, the advertisements give the impression that the speech

is school-sponsored and a reasonable person would understand the expression on the Jumbotron to be approved government speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 486 (2009) (Souter, J., concurring). The District Court correctly relied upon LISD's enforcement of its policy prohibiting visible tattoos as being reasonably related to the school's legitimate pedagogical (educational) concerns. ROA.1428.

Consequently, the District Court correctly held that LISD's denial of Little Pencil's advertisement was reasonable in a limited public forum on the basis of its no visible tattoo policy.

B. The Establishment Clause Does Provide a Reasonable Basis for Refusing Little Pencil's Advertisement. (Response to Little Pencil's Brief at Section I.C.2)

The District Court correctly held that LISD was justified in rejecting Little Pencil's advertisement because "it was reasonable for [LISD] to believe that running [Little Pencil's] advertisement on the jumbotron during Friday night football games could be viewed as [LISD's] endorsement of the message…" ROA.1431. In reaching this conclusion, the District Court properly relied upon the Supreme Court's decision in *Santa Fe*. ROA.1430.

1. <u>Government Endorsed Speech</u>

The *Santa Fe* Court found that the student speech, which was a student-led prayer at a football game, was government endorsed speech because: (1) the

invocations were authorized by government policy; (2) the invocation took place on government property; (3) the student used government equipment and facilities to say the invocation; (4) the event was at a government-sponsored school-related event; (5) the District did not evidence, either by policy or practice, any intent to open the pre-game ceremony to an indiscriminate use by the student body; and (6) the invocations bore the imprint of the state. *Santa Fe*, 530 U.S. at 290-291.

Contrary to Little Pencil's assertions in its Brief, the showing of Little Pencil's advertisement on LISD's 15' x 26' Jumbotron, like the speech in *Santa Fe*, could lead any reasonable person to conclude that the "jesustattoo" advertisement on the advertising Jumbotron was government endorsed speech because: (1) pursuant to Board Policy GKB(LOCAL), the Superintendent would have had to authorize the advertisement; (2) the advertisement would take place on school (government) property; (3) LISD personnel would have to actively download the advertisement and display it on LISD's property, i.e., Lowrey Field; (4) the advertisement was to be shown on LISD's Jumbotron, i.e., government property, at a school-related event, i.e., LISD football games; and (5) the advertisement, like other advertisements, would be shown interspersed with LISD-related announcements. ROA.1255; ROA.1261-1262, ROA.1263-1264. Thus, LISD's exhibiting the "jesustattoo" advertisement on the Jumbotron would be

reasonably considered government endorsed speech, like the student prayers given in *Santa Fe*.

Speech can take on the character of government endorsed speech even if not prepared by a governmental entity. For example, in *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 560 (2005), the U.S. Supreme Court expanded the government speech doctrine to include a promotional campaign to encourage beef consumption because the government had effectively controlled the campaign. Even though the government did not pay directly for the campaign, it funded the campaign by charging an assessment on the importation of cattle and on imported beef products. Final authority over every word used in the promotional campaign had to be approved by the government. However, nothing in the campaign noted that there was government participation in it. Nevertheless, the Supreme Court found that the campaign was government speech. *Id*. at 560.

Similarly, the Supreme Court found government speech in the *Summum*, case. *Summum*, 555 U.S. at 481. In *Summum*, the city had denied a request by a religious organization to erect a monument in a city park. The city determined which private monuments it would accept or reject for installation at the park. Since the Court determined that the city "intended the monument to speak on its behalf," the Court found that the city "made no effort to abridge the traditional free speech rights." *Summum*, 555 U.S. at 474. Moreover, the Court added that the

result did not change just because the monuments were privately financed and donated. *Id.* at 470-471.

In determining whether or not speech on the Jumbotron is government endorsed speech, this Court should look to *Santa Fe*, *Livestock Marketing*, and *Summum*. All three of these cases are applicable. The speech is government endorsed speech when it is under the government's "effective control." LISD is exercising "effective control" over the content of the speech because it is at the LISD football stadium; the Jumbotron is on LISD school property; it is LISD school equipment; advertisements are placed on the video screen by an LISD employee; and authority must be given by LISD to place the advertisement on the screen. In *Summum*, the Supreme Court held there was no First Amendment violation because "the city's decision to accept certain privately donated monuments while rejecting others [*Summum*] is best used as a form of government speech." *Summum*, 555 U.S. at 481.

The *Summum* Court further noted that the city had "'effectively controlled' the messages sent by the monuments in the park by exercising 'final approval authority' over their selection." *Id.* at 473. Unlike *Summum*, the Jumbotron is not a monument, but it is, a multitude of times, the central focus of all attendees at the high school stadium during each football game.

Here, LISD chose to limit the Jumbotron speech to commercial speech advertisements approved by the Superintendent. Because LISD has full ownership and complete control of its property, the Jumbotron, through which it communicates to a captive audience, and because final approval authority is given to, and exercised by, the Superintendent to select the advertisements or types of advertisements to be shown on the Jumbotron, the District has "effective control" of the messages displayed on the Jumbotron. Thus, communication from the Jumbotron is government endorsed speech. Consequently, Little Pencil's First Amendment arguments and cited cases are not applicable.

2. *Lemon* Test

Since the Jumbotron messages are government endorsed speech, in order to constitutionally allow the "jesustattoo" advertisement to be shown on the Jumbotron, LISD is required to ensure that the activity passes each of the three-prongs of the *Lemon* Test so that it may defend itself against a possible subsequent lawsuit by parties who may be offended by LISD's exhibition of the advertisement's explicitly Christian message. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). To satisfy the test, the governmental practice must: (1) reflect a clearly secular purpose; (2) have the primary effect that neither advances nor inhibits religion; and (3) avoid excessive entanglement with religion. *Id.*

The second prong of the *Lemon* Test, i.e., that the primary effect of the government action neither advances nor inhibits religion, cannot be met by permitting Little Pencil's advertisement. *Id.* at 612. Notwithstanding Little Pencil's assertions, the *Santa Fe* case is on point. The Supreme Court in *Santa Fe* set forth boundaries to assist future courts in determining whether a particular governmental action has the primary effect of neither advancing nor inhibiting religion. *Santa Fe*, 530 U.S. at 302-311. Applying these boundaries to the "jesustattoo" advertisement, the District Court correctly held that it was "properly characterized as a proselytizing message designed to advance Plaintiffs' 'sincerely held religious beliefs'" and that it was "religiously oriented and sought to advance a religious message." ROA.1429. The Court then held that "the ad 'is not of a similar character to any previous use of the school's [forum].'" ROA.1429, citing *Chiu*, 260 F.3d at 356. The District Court was correct in holding that the "jesustattoo" advertisement was proselytizing in nature. If LISD were to display the advertisement on its Jumbotron, it would be engaging in speech that has as its primary purpose the advancement of a Christian religious message. This action would violate the second prong of the *Lemon* test and result in LISD violating the Establishment Clause.

3. Captive Audience

Moreover, the District Court was correct in being "bound by the precedent set in *Santa Fe* "in that the students were a captive audience." ROA.1430. In discussing a captive audience, the District Court was also correct in distinguishing the Supreme Court's recent decision in *Town of Greece, N.Y. v. Galloway*, ― U.S. ―, 134 S.Ct. 1811 (May 5, 2014), which upheld ceremonial prayer at town meetings. Unlike in *Santa Fe* and in the case at bar, the individuals in *Town of Greece* voluntarily attended the town meetings where prayer took place. They were not students attending the government activity for class credit under compulsion. In other words, the citizens of the town of Greece were not a captive audience. They were adults, free to come-and-go at their discretion. The District Court rightly placed great weight on the school setting in *Santa Fe* wherein the students were compelled to attend for class credit. No similar compulsory attendance was required at the town hall meeting in *Town of Greece*.

4. Coercion Test

Showing the "jesustattoo" advertisement on the Jumbotron during school football games is coercive in nature because it exhibited a religious message to a captive audience. *See Lee v. Weisman,* 505 U.S. 577, 586 (1992). In the "Coercion Test" formulated by the Supreme Court, even if the students do not object to the religious nature of the advertisement, their attendance and participation in the

state-sponsored activity is, in a real sense, obligatory. Like in *Santa Fe*, in the case at bar, coercion exists because students, such as cheerleaders, band members, pep squads, and team members, are required to attend the event for class credit. Similarly, many other students, parents and relatives, as well as opposing teams and their student bodies, attend the games, out of differing degrees of obligation. ROA.1255-1256. Certainly, all LISD students and the visiting team members required to attend the games, at a minimum, are a captive audience. Due to the conflict between having a captive audience and an advertiser wanting to display an admittedly Christian proselytizing advertisement, the District Court correctly followed the precedent in *Santa Fe*, and held that the advertisement would not pass the perceived endorsement test, would be coercive in nature, and, thus, would violate the Establishment Clause. ROA.1430-1431.

5. Establishment Clause

This Court should not reverse the District Court. Under the Establishment Clause, LISD cannot endorse a particular religion. *Lemon*, 403 U.S. at 612-613. The "jesustattoo" advertisement was requested to be shown on the Jumbotron twice during each football game. ROA.1255, ROA.1261. As in *Diloreto*, LISD's decision was viewpoint neutral disallowing any controversial proselytizing religious speech. For example, there would be no logical difference between showing the "jesustattoo" advertisement on the Jumbotron and showing an

advertisement based on the sincere religious beliefs of a Muslim Jihadist with a religious belief in the sanctity of Jihad (holy war) martyrdom. Thus, if an advertisement were submitted to LISD with a picture of a Jihad mother preparing her son for martyrdom with the (fictitious) website designated as www.jihadmartyrdom.com, to-wit:

ROA. 667, the District would likewise reject the advertisement because the religious message would be viewed as endorsing a particular religion to a captive audience.

Displaying either the "jesustattoo" advertisement or the hypothetical jihadmartyrdom.org advertisement on the Jumbotron at a high school football games would constitute a violation of the Establishment Clause, which would be beyond First Amendment Free Speech Clause protection. Neither advertisement would pass the Supreme Court's Endorsement Test. Consequently, the District Court did not err in finding that LISD's disallowing the "jesustattoo" advertisement was reasonable.

IV. The District Court Correctly Concluded That the Denial of Little Pencil's Advertisement Was Not Based On Its Viewpoint and Was Reasonable. (Response to Little Pencil's Brief at Section I)

A. The District Court Correctly Applied the Standard for Speech Restrictions in a Limited Public Forum (Response to Little Pencil's Brief at Section I.A.)

Little Pencil claims that LISD exercised viewpoint discrimination. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (stating that "permissible subjects cannot be excluded on the grounds that the subject is discussed from a religious viewpoint.") However, that discrimination is limited not to "subject matter, but particular views taken by speakers on a subject." *Chiu,* 260 F.3d at 350, citing *R.A.V. City v. City of St. Paul*, 505 U.S. 377, 379 (1992). LISD did not exercise viewpoint discrimination. As the District Court correctly held, LISD did not discriminate between particular views; rather, it held that, of the other advertisements allowed by LISD, "none are comparable to the 'allegorical tattoos' advertisement submitted by [Little Pencil] to be run on a Jumbotron at Lowrey Field." ROA.1436, fn6.

1. LISD's decisions were content-neutral.

LISD denied Little Pencil's advertisement on three bases: (1) visible tattoos are against school policy and tattooing minors is against state law; (2) allowing proselytizing messages at football games by public schools conflicts with the Establishment Clause; and (3) its potential for controversy and disruption in the

school setting. ROA.1257. All of these reasons were content neutral. LISD incorporates its arguments in III.A.1. with regard to tattoos. LISD has a duty to protect the health and safety of its students, and the Superintendent denied the advertisement that displayed tattoos just as he would one that displayed alcohol or tobacco. ROA.1258. His first content-neutral reason for denial was on that basis. The second reason for denying the "jesustattoo" advertisement was based on its conflict with the Establishment Clause. No other religious advertisements were shown on the Jumbotron, only commercial speech. LISD incorporates its arguments in III.B. Third, LISD was concerned about this controversial advertisement causing disruption by giving rise to lawsuits, requiring LISD to include other proselytizing advertisements on the Jumbotron, and offending many Christians. Again, the District Court correctly held that its decision was content neutral. It did not involve impermissible viewpoint discrimination. ROA.1434.

V. The District Court Correctly Concluded that LISD's Policy and Practice Survives Strict Scrutiny, Which Applies to a Designated Public Forum. (Response to Little Pencil's Brief at Sections I.B. and IV.)

A. The District Court Correctly Held No Viewpoint Discrimination. (Response to Little Pencil's Brief at Section I.B.)

The current standard regarding school-sponsored religious speech is articulated in *Santa Fe.* There the Supreme Court decided that the creation of a public forum does not "shield the government from scrutiny under the Establishment Clause." *Santa Fe*, 530 U.S. 303, n.13. Put simply, the *Santa Fe*

Court stated, "School sponsorship of a religious message is impermissible." *Id.* at 309.

Little Pencil is incensed because the District Court addressed Little Pencil's claim of viewpoint discrimination only in a footnote near the close of its opinion. ROA.1436-1437. The District Court correctly dismissed Little Pencil's claim of viewpoint discrimination in this case because there was none.

Little Pencil presents no case law supporting its argument of viewpoint discrimination of proposed advertisements in limited forum commercial venues, such as a Jumbotron at a high school football game. All of the cases Little Pencil cites regarding viewpoint discrimination address the non-school use of district facilities by outside organizations for their nonschool-sponsored activities and speech. *Good News Club*, 533 U.S. at 98-99 (facility use for community groups prohibited a religious club from using its facilities to teach children from a religious perspective.) *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (a state university refused to use student activity funds to pay for a student's religious newspaper's outside printer for printing costs); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (the school district opened its facilities for community uses and prohibited a church from using its facilities to show a film.)

In addition, Little Pencil relies upon flyer distribution cases to convince the Court that its "jesustattoo" advertisement does not endorse religion. *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Township Sch. Dist.*, 386 F.3d 514 (3rd Cir. 2004) (distribution of religious material with other flyers and participation in Back to School nights for parents); *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Pub. Sch.*, 373 F.3d 589 (4th Cir. 2004) (flyer distribution containing only advertising time and place of meeting).

All of these cases easily are distinguishable. The facts of this case do not resemble a flyer distribution case, giving time at a school-called meeting for opposing views case, or a right to equal access to a school building for non-school use case. In contrast, this case involves a commercial advertising forum, i.e., a Jumbotron, at a school football game. Little Pencil's proposed message for display at the forum is an admittedly religious one intended to reach a broad audience to entice conversion of non-adherents to Christianity.

B. LISD Did Not Discriminate Against Little Pencil's Religious Viewpoint as it Did Not Allow Other Viewpoints on the Same Subject Matter. (Response to Little Pencil's Brief at Section I.B.1)

The District Court correctly held that Little Pencil's arguments which related to other advertisements were unpersuasive because "none is comparable to the 'allegorical tattoos' as submitted by [Little Pencil] to be run on a Jumbotron at Lowrey Field." ROA.1436-1437, n.6. The District Court singled out four of the

advertisements that could reasonably be alleged to be connected to a religiously affiliated organization that were located at LISD venues other than the Jumbotron. The District Court correctly analyzed those four signs alleged by Little Pencil to be religious in nature. One was for Lubbock Christian University, which had only the word "Christian" in the sign with no religious message even on their website.[1] Other signs that were not at Lowrey Field were a Bethany Baptist Church sign that was a daycare advertisement; Just Kids Preschool that was a preschool advertisement; and Full Armor Ministries, which differed sufficiently in form and substance from Little Pencil's advertisement to make a comparison inapplicable. ROA.1436-1437, n.6. The Court correctly held that the signs relied upon by Little Pencil were "irrelevant in that none are similarly comparable in design, message, or imagery to [Little Pencil's] advertisement." ROA.1437, n.6. Little Pencil tries to circumvent the Court's reasoning by stating that LISD discriminates among advertisements related to "counseling, rehabilitation and support groups and holds that Little Pencil offers the same assistance but from a religious perspective" and that Little Pencil offers to improve a person's physical, mental, and spiritual well-being like Ocean's Massage School and Broderick's Therapeutic World. In

[1] LCU's advertisements were its "Be You, Be Blue" and "Be Loud, Be Blue" university recruitment videos. The original is available at: http://vimeo.com/91648835. YouTube versions are available at: "Be You, Be Blue" https://www.youtube.com/watch?v=5hqJalzRwtc&list=PL7DB529EBB6E2E983&index=6, and https://www.youtube.com/watch?v=HX8bAtaOATk&list=PL7DB529EBB6E2E983&index=7. ROA.1279.

essence, Little Pencil is trying to compare its "jesustattoo.org" message with the massage school's message. There is no comparison. The "jesustattoo" advertisement says nothing about overcoming difficult life issues, counseling rehabilitation and support groups or offering to improve a person's physical, mental, and spiritual wellbeing -- it is a picture of Jesus covered with negative tattoos, with no explanation, and a website .url that includes a reference to Jesus and tattoos.

LISD is not excluding speech discussing otherwise permissible topics. The District Court correctly held that LISD did not discriminate against Little Pencil's religious viewpoint because there were no comparable advertisements even outside of the Jumbotron venue. ROA.1429.

C. LISD Did Not Discriminate Among Religious Viewpoints (Response to Little Pencil's Brief at Section I.B.2)

Little Pencil claims that LISD engaged in viewpoint discrimination by favoring certain religious speakers and messages over others. Little Pencil is again erroneously trying to expand the scope of the forum at issue, which is the Jumbotron. There are no advertisements on the Jumbotron with religious messages.

They are all commercial speech. The District Court was correct in focusing on the fact that Little Pencil's advertisement was not "similarly comparable" to any other advertisement on the Jumbotron, in Lowrey Field or throughout the District, and finding 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. As in *Santa Fe*, running the "jesustattoo" advertisement on the Jumbotron would give the impression of LISD endorsing one religion, s*upra* p. 9-12, and the students who are either required to attend, or desire to attend, are a captive audience and should not be coerced to view such a message. LISD's interest in avoiding conflict with the Establishment Clause fully justifies LISD's refusal to display the advertisement on its Jumbotron during its football games.

LISD has a compelling interest to assure a separation of church and state. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Government may accommodate the free exercise of religion and the right to free speech; however, these rights "do not supersede the fundamental limitations imposed by the Establishment Clause." *Lee*, 505 U.S. at 587.

The District Court correctly held that LISD did not discriminate among religious viewpoints.

D. Rejection of Proselytizing Speech is Not Viewpoint Discrimination in Light of the Forum. (Response to Little Pencil's Brief at Section I.B.3)

The District Court correctly 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.

There is no question that proselytizing is an expressive activity whether it is verbal or written. The concept of "proselytizing" lies at the heart of opinions addressing both "viewpoint discrimination" prohibited by the Free Speech Clause and publicly-sponsored "religious exercise" prohibited by the Establishment Clause. In its effort to walk the thin line between the two clauses, the Third Circuit determined the meaning of "proselytizing" as follows:

> …to recruit members for an institution, team, or group and "to convert from one religion, belief, opinion or party to another."

Child Evangelism Fellowship of New Jersey, Inc., 386 F.3d at 528 *quoting* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1821 (1976).

The Supreme Court dealt with "proselytizing" concerns in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5-6 (1989). A publisher of a non-religious periodical brought suit challenging a Texas statute that provided a sales tax exemption for religious periodicals and not for non-religious publications. In that case, the Court held that the statute violated the Establishment Clause for two reasons: (1) government's "proselytizing" was an Establishment Clause violation; and (2) any

governmental support using taxpayer dollars for an individual's "proselytizing" has an impact on adherents and violates the Establishment Clause. *See Id.*

Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573, 609 (1989), the majority found that a Jesus nativity creche displayed on the steps of a county courthouse was proselytizing and, at the very least, "proselytizing" was a line that could not be crossed in a state-sponsored activity because it becomes an endorsement of religion. Similarly, the Courts in both *Lee* and *Santa Fe* held, under Establishment Clause principles that the "proselytizing rule" stressed that school sponsorship of any proselytizing message was impermissible because it sent the ancillary message to members of the audience who were not adherents "that they were outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe*, 530 U.S. at 309–310.

Distinguishing the above, the Court, in *Van Orden v. Perry*, upheld, as constitutional, a display of the Ten Commandments on a monument at the Texas State Capital, by finding "there is nothing unconstitutional in the state favoring religion generally, honoring God through public prayer and acknowledgement, or, in a ***non-proselytizing*** manner, venerating the Ten Commandments." 545 U.S. 677, 691-692 (2005) (emphasis added). This holding indicated the converse is true, that

there is something unconstitutional with the state honoring God in a **proselytizing** manner.

In determining whether or not the actions were proselytizing, by analysis, the Court found in another case, *Walz v. Egg Harbor Township Board of Education*, that "there is a marked difference between expression that symbolizes individual religious observance, such as wearing your cross on a necklace, and an expression that proselytizes a particular view." 342 F.3d 271, 278-79 (3rd Cir. 2003). Importantly, the Courts have found that the mere mention of Jesus Christ, to the exclusion of other potential deities, indicates an effort to advance one's faith. *See Wynne v. Town of Great Falls, South Carolina*, 376 F.3d 292, 301 (4th Cir. 2004).

Some courts have extended the ban on proselytizing even to certain student expression. Even though student-initiated expression relating to their religion at school related events had normally been permitted as constitutional due to the student activities, the Supreme Court recognized that the student-initiated government-endorsed proselytizing speech is not constitutionally allowable: "Proselytizing speech is inherently coercive and the Constitution prohibits it from the government's pulpit." *Lee*, 505 U.S. at 587; *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999) (*vacated and remanded* by *Chandler v. Siegelman*, 530 U.S. 1256 (2000)) (*reinstated* by 230 F.3d 1313 (11th Cir. 2000), *cert. den'd*).

Little Pencil fails to consider the difference between mature adults and minors and the effect of a school allowing proselytizing speech to students as prohibited in *Lee* (sectarian prayers were not permitted due to violation of the Establishment Clause) and limited by *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991) (non-proselytizing and non-sectarian student-initiated and student-led prayers at commencement exercises allowed). Proselytizing in the sense of *Lee* and *Clear Creek* is favoring one religion or endorsing one religion. A school allowing proselytizing leads to the implementation of the Endorsement Test. The Courts rarely limit student religious speech, but did so in *Santa Fe* and *Clear Creek.* Where government is acting as a proprietor of an advertising forum, such as in the case at bar, the government is given much greater leeway than in regulating student speech.

Little Pencil attempts to confuse the Court regarding the definition of proselytizing by use of words such as "recruits" and other synonyms from the Thesaurus. But the Third Circuit's definition goes to the core of proselytizing by including "to convert from one religion to another." [Appellant's Brief pp.26-27] If the "jesustattoo" advertisement were shown, LISD would clearly be endorsing converting from one religion to another and, thus, violating the Endorsement Test. The Jumbotron is not a forum for proselytizing advertisements, only commercial advertisements.

The District Court correctly held that Little Pencil's advertisement was properly characterized as a proselytizing message "designed to advance Little Pencil's 'sincerely held religious beliefs' to the viewer" and because there were no other advertisements on the Jumbotron in the same category as the "jesustattoo," there is no viewpoint discrimination. ROA.1429. The perceived endorsement of a religion by a school district creates an Establishment Clause violation, especially when conducted at a school-sponsored function on school property over school equipment that is subject to control by school officials. *Santa Fe*, 530 U.S. at 307-308. ROA.1430-1431.

E. Labeling Speech as Disruptive, Controversial, or Offensive is Not A Cloak for Viewpoint Discrimination (Response to Little Pencil's Brief at Section I.B.4)

The District Court properly held that it was permissible for LISD to reject Little Pencil's advertisement because of its "potential for disruption due to controversy." ROA.1431, n.5. Little Pencil now tries to confuse this Court using the words "controversial" to equate to viewpoint discrimination. Little Pencil is in error. As noted by the District Court, LISD believed that if it permitted the "jesustattoo" advertisement to run during its football games, it likely would have been faced with potential lawsuits by those offended by the advertisement. ROA.1257. The greatest controversy that LISD feared goes to the heart of the Establishment Clause. Acceptance of Little Pencil's advertisement would force

LISD to open its forum to "all expressions of personal beliefs." ROA.1431. Further, even Christians could find the tattooed Jesus offensive. ROA.1431.

The District Court, in that regard, cited *Diloreto*, which stated that advertisements in a particular forum could create controversies about which the school could have been reasonably concerned. ROA.1431-1432. *Diloreto*, 196 F.3d at 968. Further, the Court cited *Bannon v. School District of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004). *Bannon* involved a school beautification project and, on the construction site, the school allowed students to place art work. The Fellowship of Christian Athletes group placed pictures and words that were Christian oriented. When asked to remove the verbiage, a student filed suit. The *Bannon* Court found that the school did not engage in viewpoint discrimination but rather censored the murals on the basis of their content. They still did not permit any student to communicate such messages and restricted speech on the basis of the content and held that "a school's content-based censorship of school-sponsored student expression survives review under *Hazelwood* if it is reasonably related to legitimate pedagogical concerns." *Bannon*, 387 F.3d at 1217 (citing *Hazelwood*, 484 U.S. at 273). The Court also found that the District had a "legitimate pedagogical concern in avoiding the disruption of the school's learning environment caused by [the student's] murals." *Bannon*, 387 F.3d at 1217. It is instructive to note that the content-based restriction permitted in

Bannon was placed on student speech, which is typically protected much more than commercial advertisements.

The District Court also cited *Fleming v. Jefferson County School District*, 298 F.3d 918 (10th Cir. 2002). Following a school shooting where multiple students were killed, the school district decided to change the appearance of the interior building in order to disassociate students from the tragedy. As a result, an expansive tile project was launched that placed restrictions on images that could be placed on the tiles, including no names or initials of students, no religious symbols, and nothing obscene or offensive. Some students wished to place messages, such as "Jesus Christ is Lord" and "4-20-99 Jesus wept." Prior approval of the tiles was required before they were fired and glazed. In review of the tiles, approximately 90 tiles were found to be inconsistent with the guidelines, including crosses, gang graffiti, an anarchy symbol, a Jewish star, angels, and a blue Columbine ribbon. *Fleming*, 298 F.3d at 921-922. The *Fleming* Court found that a nonpublic forum had been established by the school and it determined that the tile project constituted school-sponsored speech. The Court further found that the speech restrictions reasonably related to legitimate pedagogical concerns to avoid religious controversy that would be disruptive to the learning environment. *Id.* at 934.

A public high school's "decision not to promote or sponsor speech…which might place it on one side of a controversial issue, is a judgment call which

Hazelwood reposes in the discretion of school officials and which is afforded substantial deference." *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (citing *Hazelwood*, 484 U.S. at 273, n.7).

Likewise, the *Diloreto* Court ultimately found that "a public secondary school could restrict advertising of controversial topics in programs for high school athletic events, even where the school has created a limited [designated] public forum for other advertisements." *Diloreto*, 196 F.3d at 968 (citing *Clark County*, 941 F.2d at 829-30). Clearly, the same rationale applies to the restrictions LISD has placed on its Jumbotron advertisements, and the District Court correctly applied such rationale in the case at bar. ROA.1428-1429.

In its Brief, Little Pencil relies upon *Texas Division, Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388 (5th Cir. 2014), wherein the State of Texas refused to print a confederate flag on state-produced plates to be purchased and attached to personal automobiles due to its controversial nature. In *Vandergriff*, the Fifth Circuit first found no government speech because the confederate flag was private speech as it was placed on an individual's car. This placement of a government plate on a private vehicle distinguishes *Vandergriff* from Little Pencil's advertisement on the Jumbotron. In fact, *Vandergriff* presents the opposite set of circumstances from those presented in this case. In *Vandergriff*,

there is a government license plate on a private citizen's automobile, whereas in the case at bar, Little Pencil wants to put its message on LISD's property. Just like placing the confederate flag on a government license plate to be displayed on a private vehicle did not make the flag government speech, neither does placing a private proselytizing message on a government-owned Jumbotron make the message private speech. Instead, LISD's speech on the Jumbotron is government-sponsored at a school-sponsored activity. Therefore, the District Court was correct in holding that Little Pencil's advertisement was controversial, disruptive, and offensive for displaying on an advertising forum and was content-based.

F. The Establishment Clause Does Provide a Compelling Interest to Deny Religious Speakers Access to a Forum. (Response to Little Pencil's Brief at Section IV.A)

Little Pencil argues that if there is viewpoint discrimination, the Supreme Court has not yet settled the question of whether or not the Establishment Clause violation can justify viewpoint discrimination. ROA.1433. *See Child Evangelism Fellowship of New Jersey, Inc.*, 386 F.3d at 530. To the contrary, all of Little Pencil's cases cited, including *Widmar v. Vincent*, 454 U.S. 263 (1981); *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011); *C.E.F. of N.J., Rosenberger*; and *C.E.F. of Maryland*, deal with student speech, as well as with equal access to school facilities during non-school hours. This case, however, is entirely different from those cases because it is on point with *Santa Fe*. Prior to *Santa Fe*, prayer at high

school football games over the government-owned and operated public address system had not been held to be unconstitutional and a violation of the Establishment Clause, especially with regard to student speech. In its holding in *Santa* Fe, the Supreme Court placed great restrictions on a school district, including holding that the religious speech in such setting was government endorsed speech and, thus, prohibited by the Establishment Clause. Further, the Establishment Clause concerns for a school district are extremely important, and it is a state interest sufficiently compelling to justify content-based restrictions on speech. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 761-762 (1995).

Throughout the long history of Establishment Clause litigation, the United States Supreme Court has drawn a distinction between activities that occur within and outside the context of primary and secondary education because of the significant role that public schools play in our nation and in the lives of students. *Edwards v. Aguillard*, 482 U.S. 587, 583-584 (1987). In so doing, the Court strictly monitors compliance with the Establishment Clause for elementary and secondary schools because the students' attendance is involuntary and the government exerts great authority and coercive power through its mandatory attendance requirements. *Id.* (citing *Illinois Ex. Rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948)).

In that regard, the District Court herein correctly held that "the speaker is an outside for-profit entity seeking to advance its religious message to a captive audience on school property utilizing school equipment. Such a fact distinguishes this case from the basic premise of most cases discussing free speech in an educational setting." ROA.1433. The District Court correctly states that it would be impossible to plausibly argue that a "school must accept any and all speech by outside organizations or speakers. The school setting is a particular venue that the Supreme Court has repeatedly recognized reserves certain restrictions on speech, and more so concerning religious speech." ROA.1434, citing *Van Orden*, 545 U.S. at 691; *Edwards*, 482 U.S. at 583-84; *Hazelwood*, 484 U.S. at 268-6; and *Santa Fe*, 530 U.S. at 307-09.

The District Court correctly held that LISD had a compelling interest not to violate the Establishment Clause by running the advertisement on the Jumbotron at its football games. It likened LISD's predicament to *Santa Fe*, stating that a school district cannot "stamp a religious message with its seal of approval such that an endorsement might be perceived." ROA.1434. The District Court correctly held that the decision not to post the advertisement was a permissible content-based limitation on the forum and not viewpoint discrimination, thus passing even the strict scrutiny analysis.

G. The Rejection of Little Pencil's Advertisement Was the Least Restrictive Means of Serving LISD's Interest. (Response to Little Pencil's Brief at Section IV.B)

Little Pencil argues that the Establishment Clause interest of the District could easily be cured without resort to rejection in that LISD could educate the public by sending home an announcement to the parents setting out a broad range of policies and making clear that it does not necessarily endorse all the groups whose materials are distributed or posted. Little Pencil's reliance on a least restrictive means test is misguided. LISD has an advertising forum, the Jumbotron. Board Policy states that final authority for advertisements has to be given by the Superintendent. That, in and of itself, gives the imprint of the state. Since it is an advertising forum, LISD has the right to choose which types of advertisements will be placed within it. LISD did so and only allowed commercial speech. Least restrictive means was not required in light of the forum.

H. An Audience Composed of Community Members, Parents, and Students at a High School Football Game is a Captive Audience and Students are not Mature Enough to Understand that Little Pencil's Advertisement is Private Speech. (Response to Little Pencil's Brief at Section IV.C)

The District Court correctly raised concerns about a captive audience of mostly minor-aged students at football games who would see Little Pencil's advertisement. Like in *Santa Fe*, the case on point, the Court held that students at a football game are captive audiences when they are present for class credit. *Santa*

Fe, 530 U.S. at 292. Students who are required to be at a football game are unlike the adults who voluntarily attend a town hall meeting as in *Town of Greece, N.Y.*, 134 S.Ct. at 1813. Little Pencil's argument regarding captive audience is wholly flawed.

VI. The District Court Correctly Held that LISD's Policy GKB Does Not Create an Unlawful Prior Restraint. (Response to Little Pencil's Brief at Section V)

Little Pencil complains that LISD's GKB policy imposes an unlawful prior restraint and cites *Shanley v. Northeast Ind. School District*, 462 F.2d 960, 965 (5th Cir. 1972), (distribution of student literature where there were no guidelines or policy for the principal's decision); *Ysleta Federation of Teachers v. Ysleta Independent School District*, 720 F.2d 1429, 1431 (5th Cir. 1983) (no standards set out for the superintendent to determine whether employee literature distribution interfered with school use); *Hall v. Board of School Commissioners of Mobile County, Alabama*, 681 F.2d 965, 967-969 (5th Cir. 1982) (no guidelines on Superintendent's exercise of power for literature distribution), all of which are easily distinguished. Unlike in *Shanley*, *Ysleta*, and *Hall*, LISD Board Policy GKB(LOCAL) does provide guidelines for the Superintendent's decision. That policy states:

> **"**The District retains final editorial authority to accept or reject submitting advertisements **in a manner consistent with the First Amendment."**

ROA.1441.

It is not by chance that the policy was written in such a manner. If all of the First Amendment criteria were to be placed into the policy, it would be voluminous, complex, and cumbersome. The guidance pointing the Superintendent to First Amendment precedent is clear, leaves no room for unfettered discretion, and establishes neutral criteria as it incorporates standards established by case law. *See Murray v. West Baton Rouge Parish School*, 472 F.2d 438, 443-444 (5th Cir. 1973). The Superintendent's decision-making is limited to those areas permitted by First Amendment precedent for limited public fora. In order to violate the Constitution, the policy must be impermissibly vague in all of its applications. Little Pencil cites *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). *Village of Hoffman Estates* is a case where a store operator sued the city over an ordinance regarding drug paraphernalia which had criminal penalties for its violation. *Id.* This proposition is not the case herein. This is an advertising case where LISD acts as a proprietor of the advertising venue. No criminal penalties attach. The District Court was correct in holding that LISD's Policy GKB did not impose a prior restraint.

VII. The District Court Correctly Held That There is No Fourteenth Amendment Violation. (Response to Little Pencil's Brief at Section VI)

The District Court correctly concluded that LISD's policy did not violate Little Pencil's due process and equal protection rights under the Fourteenth Amendment. ROA.1435. The "jesustattoo" advertisement was not similarly situated to other advertisements allowed in the forum; therefore, the District Court was correct in its equal protection analysis. ROA.1435-1437.

A. LISD's Policy GKB is Not Void for Vagueness. (Response to Little Pencil's Brief at Section VI.A)

Little Pencil complains that Policy GKB lacks "any standards to guide LISD officials in making advertising decisions." [Appellant's Brief, p.57] Little Pencil cites *Shanley*, 462 F.2d at 977, for the proposition that a literature distribution policy requiring prior approval yet lacking guidelines was void for vagueness. *Shanley* can be distinguished. LISD does have guidelines for the Superintendent, and the District Court correctly held that the Superintendent was officially restrained by First Amendment law to prevent abuse by "unfettered discretion." ROA.1435. Little Pencil cited two cases in support of its proposition: *Hall*, 681 F.2d at 971 (a case regarding Board policies without standards and guidelines), and *Riseman v. School Committee of City of Quincy*, 439 F.2d 148, 149 n. 1 (1st Cir. 1971), (a student literature distribution case in which the policy gave no standards upon which a committee could base a decision in light of First Amendment rights.)

In contrast, the LISD Board Policy GKB(LOCAL) had standards and guidelines to make it constitutional because advertisements were to be approved by the Superintendent and acceptance or rejection was to be made in a "manner consistent with the First Amendment." The Superintendent followed the policy in a constitutional manner.

The District Court correctly held that "due to the fact-specific intricacies of the First Amendment law, any attempt to list all the criteria of the First Amendment law would be futile as such a list would be too voluminous, complex, and cumbersome," and that Board Policy GKB was not void for vagueness and was constitutional. ROA.1435.

The application of vagueness is applied differently in the school context. In defining vagueness in a school district case, by way of example, a plaintiff complained that the school dress code policy was unconstitutionally vague because the students did not have adequate notice of what clothing was prohibited. *See A.M. v. Cash & Bd. of Trustees of Burleson Indep. Sch. Dist.*, 585 F.3d 214, 224 (5th Cir. 2009). The Court disagreed and found that the application of vagueness is applied differently in the school context. *Id.* at 225. "School disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986)). Even though the instant case is not a student disciplinary case, the unique characteristics

of a school, and its enforcement to protect the safety, health, and welfare of its students and to follow state law [ROA.1258], rise to a level of meeting a legitimate objective. The District Court was correct to allow LISD latitude in determining what type of advertising should be permitted on its Jumbotron during school football games.

B. Little Pencil Failed to Exhaust Administrative Remedies and to Request a Hearing by the Board of Trustees. (Response to Little Pencil's Brief at Section VI.B)

The District Court did not err when it held that Little Pencil "failed to exhaust administrative remedies available to them." ROA.1435. LISD agrees that exhaustion of administrative remedies is not a prerequisite to an action under §1983 in this instance. However, Little Pencil was offered due process and failed to take advantage of its opportunities. For advertisers dissatisfied with a decision of the Superintendent under Board Policy GKB(LOCAL), LISD provides an appeal procedure for prompt review of the Superintendent's determination under Board Policy GF(LOCAL). An appeal under that policy ultimately can go to the Board of Trustees for a final determination. ROA.1260, ROA.1307-1311. Little Pencil did not avail itself of this avenue of redress of grievances and dispute resolution. ROA.1260.

Therefore, the District Court was correct in its holding that Little Pencil failed to exhaust the administrative remedies available because they failed to take

advantage of the appeals procedure for prompt review of the Superintendent's determination. Further, the District Court was correct in finding that Little Pencil had not "identified a protected interest in life, liberty, or property that they had been denied without due process of law." ROA.1435.

C. The District Court Correctly Held No Violation of the Equal Protection Clause. (Response to Little Pencil's Brief at Section VI.C.)

The District Court properly held 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. Little Pencil is in error by stating that the conclusion ignores the fact that LISD is differentiating between similarly-situated organizations based on religion. This is not the case. Little Pencil cannot show that others who are similarly situated were treated differently. In the District Court's review, there were no other advertisements, either on the Jumbotron or around the District, as Little Pencil so asserted, that come close to the subject matter expoused in the "jesustattoo" advertisement. As the District Court correctly assessed, there were only four advertisements that were "reasonably alleged to be connected to the religious affiliate organization." ROA.1436-1437, n.6. None of those four advertisements included or endorsed a particular religion in violation of the *Lemon*

test. None of those advertisements were in violation of LISD's policy, the Student Code of Conduct, or state law. The District Court correctly held that there was no violation of the Equal Protection Clause.

VIII. The District Court Correctly Held That There Was No Free Exercise Violation. (Response to Little Pencil's Brief at Section VII)

The District Court correctly held that Little Pencil was not denied its right to freely exercise its religion and worship by LISD's rejection of its advertisement. The District Court held that LISD had shown several legitimate purposes rationally related to the denial of its advertisement and that LISD only needed to show a rational relationship to the legitimate purpose in denying the advertisement for display on the Jumbotron, and it did so. The District Court held that LISD had met its burden. ROA.1438.

Little Pencil was incorrect in stating that LISD's denial of its advertisement while permitting other religious advertisements violates the Free Exercise Clause. Again, as stated multiple times in this Brief, there were no religious advertisements displayed on the Jumbotron nor were there any comparable religious advertisements to Little Pencil's permitted at any other LISD advertising venue. The Jumbotron was held strictly for a commercial use. That use requires only that a rational relationship exist for LISD's regulatory decision-making. In error, Little Pencil is also trying to expand the scope of the forum. The District Court correctly held no free exercise of religion violation by LISD.

IX. The District Court Correctly Held That There Was No Establishment Clause Violation. (Response to Little Pencil's Brief at Section VIII)

The District Court correctly held that there was no Establishment Clause violation on the part of LISD. ROA.1438. It is interesting to note that Little Pencil would even raise this issue in view of its vehement Establishment Clause arguments that it has expounded negating the same. The Establishment Clause, according to Little Pencil, must be neutral in its relationship with groups of religious believers and nonbelievers. That is exactly what LISD was doing. LISD was not allowing in its advertising forum the endorsement of one religion, which is exactly what Little Pencil was trying to accomplish. The District Court correctly held that there was no Establishment Clause violation.

X. The District Court Did Not Abuse Its Discretion in Denying Little Pencil's Motion for Leave to File Supplemental Evidence. (Response to Little Pencil's Brief at Section IX)

The District Court did not abuse its discretion in denying the late filing of the evidence which was submitted nearly a month after the Court's filing deadline. The Court issued an Order that all evidence on the Motions for Summary Judgment and Replies were to be filed no later than April 28, 2014. ROA.366. Little Pencil filed its Motion for Leave to File Supplemental Evidence on May 27, 2014. ROA. 1395. The evidence it submitted was untimely and the Court did not abuse its discretion in denying the Motion.

Moreover, the late-filed evidence was irrelevant. These drawings were not tattoos as defined by 25 TEX. ADMIN. CODE §229.406(c) or TEX. HEALTH & SAFETY CODE §146.001.

> "Tattoo" means the practice of producing an indelible mark or figure on the human body by scarring or inserting a pigment under the skin using needles, scalpels or other related equipment. The term includes the application of permanent cosmetics."

As such, Henna drawings are in contrast to the "jesustattoo.org" website. ROA.1427. The District Court correctly held that Little Pencil's tattoos were tattoos placed by "Jesus in a tattoo parlor where he uses his tattoo pen." ROA.1428. For both reasons, the District Court did not abuse its discretion in denying Little Pencil's Motion for Leave to File Supplemental Evidence.

CONCLUSION

The Record does not present any material issue of fact and as a matter of law the District Court's Judgment is correct. It should be affirmed.

Respectfully submitted this 19th day of September, 2014.

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