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' REPLY BRIEF

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INTRODUCTION

This case is about equal access to an advertising forum opened by Lubbock Independent School District (LISD) for use by a variety of speakers, both for-profit and non-profit, religious and secular. LISD denied Little Pencil, LLC's and David Miller's (collectively, "Little Pencil") advertisement based on its religious viewpoint. LISD's efforts to justify this viewpoint discrimination by clinging to unsubstantiated fears of endorsement cannot survive the stipulated facts that: (1) LISD created an advertising forum that "permits many nonschool-related organizations, including nonprofit and for-profit organizations, to advertise at Lowrey Field" and other venues, ROA.1413; (2) advertisers permitted to use the forum include churches, religious universities, rehabilitation services, and businesses which speak on subjects such as religion, counseling, rehabilitation, and support, ROA.1413-1416; and (3) LISD actively solicits for-profit and non-profit advertisers, including churches, ROA.1420.

Under such circumstances, denying equal access to Little Pencil's advertisement is viewpoint discrimination against religious speech. "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). LISD fails this simple test because, as it openly admits, it denied Little

Pencil's advertisement because it "was a proselytizing message that was designed to advance Little Pencil's 'sincerely held religious beliefs' to the viewer." Lubbock Indep. Sch. Dist.'s Br. ("LISD Br.") 8. It was Little Pencil's "motivating ideology" and "perspective" that triggered LISD's censorship. That is viewpoint discrimination, which "violates the First Amendment regardless of the forum's classification." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 349-50 (5th Cir. 2001).

LISD seeks to distract the Court with tenuous arguments about tattoos, "proselytizing," and "controversial" speech, as well as the nature of the forum, the government speech doctrine, captive audiences, and advertisements for fictional terrorist organizations. None of these arguments come even close to carrying the day.

Consider the tattoo defense. Although LISD claims that it denied Little Pencil's advertisement primarily based on its depiction of tattoo-like artwork, LISD concedes that, even after Little Pencil offered to remove that artwork, it denied the advertisement because of its religious viewpoint. LISD Br. 18. Simply put, Little Pencil's offer to run the ad without tattoos immediately flushed out that this rationale was nothing more than a pretext for religious discrimination. As discussed in Little Pencil's opening brief and herein, LISD's shifting articulation of its tattoo rationale throughout this case and its own actions (sponsoring a class

activity where students drew tattoos on their arms and displayed them in school hallways) decidedly confirm the pretextual nature of LISD's tattoo defense.

Consider too LISD's implausible government speech defense. As shown below and in Little Pencil's opening brief, LISD has no chance of demonstrating that approving Little Pencil's advertisement—along with a host of other advertisements—to run on the Jumbotron (or any of the other advertising venues to which Little Pencil seeks access, ROA.519-520) would result in government endorsement of Little Pencil's religious advertisement under the Establishment Clause. And since LISD cannot prove endorsement, there is simply no way it can establish that Little Pencil's and other advertisers' speech is its own. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (restriction against government sponsorship of religion "applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum") (emphasis in original). Allowing government entities to circumscribe free speech by labeling it "government-sponsored" would strip speakers in every forum of their fundamental right to freedom of speech.

ARGUMENT

I. LISD Discriminated Against Little Pencil's Religious Viewpoint.

A. Denying Equal Access to School Facilities Based Upon the Speaker's Religious Viewpoint Is Unconstitutional.

Little Pencil's opening brief discusses numerous cases that explain that denying religious speakers and messages equal access to a forum is viewpoint discrimination. Little Pencil Opening Br. 18-24. Rather than responding to the substance of these cases, LISD dismisses them because they "address the non-school use of district facilities by outside organizations for their nonschool-sponsored activities and speech." LISD Br. 38.

Little Pencil couldn't agree more with LISD's description of these cases. Indeed, Little Pencil cited them precisely because this case *is about* the non-school use of the Lowrey Field jumbotron and other school facilities by Little Pencil, a private limited liability company, and other nonschool organizations for their nonschool-sponsored speech.

LISD's Policy GKB (Local), challenged here by Little Pencil both facially and as-applied, begins "[s]chool facilities shall not be used to advertise ... for any nonschool-related purpose without prior approval of the Superintendent." ROA.1441 (emphasis added). The policy itself emphasizes the nonschool-related nature of speech in the advertising forum. Policy GKB continues: "Nonschool-related organizations may use school facilities only in accordance with GKD."

ROA.1441 (emphasis added). And GKD, appropriately entitled "Nonschool Use of School Facilities," authorizes "nonschool use of designated District facilities," like the Jumbotron and other advertising venues, "for educational, recreational, civic, or social activities." ROA.1443.

LISD's own policy demonstrates that Little Pencil's advertisement is private, not government, speech. Thus, cases requiring districts to regulate the nonschool use of school facilities in a viewpoint-neutral manner control here. In *Good News Club v. Milford Central School*, 533 U.S. 98, 102, 107 (2001), for example, a community Bible club sought to use school facilities for its religious worship activities pursuant to a policy that permitted "social, civic and recreational meetings," but it was denied "based on its religious nature." The Supreme Court found that the "exclusion constitute[d] viewpoint discrimination." *Id*. at 107.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 386-88 (1993), a church similarly sought to use school facilities to screen a religious film under a policy permitting facilities to be used for "social, civic, and recreational meetings." Finding that the film "was denied solely because [it] dealt with the subject from a religious standpoint," the Supreme Court held such a denial to be "plainly invalid." *Id*. at 394.

In *C.E.F. of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514, 519 (2004), a community Bible club sought to distribute advertisements

through an elementary school's literature distribution forum. The school's policy allowed materials discussing "pupil-related community activities" as long as the advertisements were "approved in advance by the superintendent/designee." *Id*. When the school district denied the flyers because they were "divisive," "controversial," and "proselytizing," the Third Circuit found these justifications to be "euphemisms for viewpoint-based religious discrimination." *Id*. at 527.[1]

Here, Little Pencil seeks to use school facilities to display its religious advertisement. It does so pursuant to a policy opening LISD's facilities to use for "educational, recreational, civic, or social activities," ROA.1443, with the "approval of the Superintendent or designee." LISD denied Little Pencil's request based upon its particular religious view, which it deemed "controversial" and "proselytizing." That is clear-cut viewpoint discrimination.

B. Little Pencil's Advertisement Addresses the Same Subjects as Other Advertisements in the Forum.

LISD argues that "there were no comparable advertisements" to Little Pencil's advertisement in the forum. LISD Br. 41. This is demonstrably false. It is undisputed that that Little Pencil offers counseling or support services. ROA.516 (testimony describing how visitors to jesustattoo.org can connect "with persons trained to provide biblically-based counsel about addiction, thoughts of suicide,

[1] *See* Little Pencil's Opening Br. 17-31 (discussing the clear cut evidence of viewpoint discrimination in this case).

divorce, family issues, grief, finances, and other issues"). And LISD stipulated that it allows advertisements from "counseling, rehabilitation, and support groups, like Lubbock Area Amputee Support Group and Mission Rehab Services, to promote their purposes of helping people overcome issues and circumstances that are negatively impacting their lives." ROA.1416.

These advertisements, just like Little Pencil's, provide minimal information about available services on their face. *See* ROA.597, ROA.602. Instead, they direct viewers to a website or phone number to learn more. The only difference between Little Pencil's ad and those of other counseling and support groups is its religious content and viewpoint, expressed through a simple, yet effective, religious image and the website address "jesustattoo.org."

In *Good News Club*, the Second Circuit (before being reversed by the Supreme Court) made the same error perpetuated by LISD in this case. It concluded that a Bible club's discussion of morality is "different in kind" from the discussion of morality by secular groups. Based on its finding that the religious club's activities fell "outside the bounds of pure 'moral and character development,'" the Second Circuit errantly concluded that the club's "exclusion did not constitute viewpoint discrimination." 533 U.S. at 111. It surmised that "reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not." *Id*.

This is LISD's argument: that Little Pencil's offer of counseling and support services is "tainted;" that it is not the type of "pure" counseling and support services offered by Lubbock Area Amputee Support Group and Mission Rehab Services. But *Good News Club* rejected any government reliance on religious taint, stating: "[W]e can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons." *Id*.; *see also Agostini v. Felton*, 521 U.S. 203, 224 (1997) (rejecting "antiquated notions of [religious] 'taint'"). Excluding "otherwise permissible subjects … on the ground that the subject is discussed from a religious viewpoint," the Court explained, "constitutes impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 111.

C. Little Pencil's Advertisement Is Directly Comparable to Other Religious Advertisements Allowed Into the Forum.

LISD's viewpoint discrimination is exacerbated by its differential treatment among religious advertisers. LISD argues that Little Pencil's advertisement is not "similarly comparable" to other religious advertisements because it "advances a religious message." LISD Br. 42. Yes, Little Pencil's advertisement advances a religious message, and so does every other religious advertiser in the forum. For example, LISD references the advertisement "for Lubbock Christian University ("LCU"), which had only the word 'Christian' in the sign with no religious message," *Id*. at 40, and was displayed at Lowrey Field, ROA.591. Comparably,

the only religious word in Little Pencil's advertisement is "Jesus." It contains a picture of a Christ-like figure and a link to a website. There is no meaningful difference between the advertisements. Both use religious keywords and a website address to communicate a religious message.

Digging deeper to the organizations' respective websites, the similarities only increase. Contrary to LISD's claims, LCU's website contains religious messages, stating that LCU "is a special place committed to our Christian faith and fostering spiritual growth in every person" and that LCU is "intentional about facilitating a deepened relationship with God through regular worship and attention to Him." *Spiritual Life*, LUBBOCK CHRISTIAN UNIVERSITY, http://www.lcu.edu/about-lcu/spiritual-life (last visited Sept. 25, 2014). Little Pencil's website similarly instructs readers how to "turn your life over to Jesus Christ" and "grow your relationship with him." *What's Next*, JESUSTATTOO.ORG, http://jesustattoo.org/whats-next/ (last visited Sept. 25, 2014).

The purpose of both LCU and Little Pencil is to connect people to Jesus Christ—i.e., to advance a religious message. Yet LISD casually dismisses the viewpoint discrimination inherent in its differential treatment of these religious speakers and their faith-based speech. *See* Little Pencil Opening Br. 23-25.

Little Pencil's advertisement is also comparable to other religious advertisements allowed in LISD's forum. Bethany Baptist Church advertises

through a large banner containing a Christian cross, the church's address, and website—an advertisement that LISD wrongly labels "a daycare advertisement." LISD Br. at 40. *But see* ROA.599 (displaying a picture of the Church's banner without any reference to daycare); ROA.1415 (stipulating that the banner does not reference a daycare). Little Pencil's advertisement is equally minimalistic. It has a picture of a Christ-like figure and a link to a website; nothing more. And like a visitor to Little Pencil's website, a visitor to Bethany Baptist Church's website is walked through the process of entering into a relationship with Jesus Christ:

> The single most important question that you'll ever face is this: "If I were to die today, would I spend eternity in Heaven with God?" Your relationship to Jesus Christ determines the answer to that question.

Eternity, BETHANY BAPTIST CHURCH, http://bethanybaptistlubbock.com/eternity/ (last visited Sept. 25, 2014).

Full Armor Ministries, whose advertisement LISD blithely describes as "differ[ing] sufficiently in form and substance from Little Pencil's advertisement to make a comparison inapplicable," LISD Br. at 40, has an overtly religious message on its banner, which hangs prominently over a LISD basketball arena. ROA.595; ROA.1414. It contains a cross, Bible, the church's address, worship service times, pictures of pastors, and a description of the organization's mission to "move men from religion to relationship" with Christ. ROA.595-596; ROA.1414. Unlike Little Pencil's advertisement, which would have been displayed for a total

of 30 seconds during a football game, ROA.1417, Full Armor Ministries' banner hangs over the court for the entire duration of every basketball game, assembly, or other activity occurring in the Estacado High School gym. ROA.1414.

In short, LISD's alleged "compelling interest to assure a separation of church and state," LISD Br. at 42, does not permit it to "foreclose private religious conduct." *Good News Club*, 533 U.S. at 115. And it certainly does not permit LISD to discriminate in favor of certain religious viewpoints and speakers over Little Pencil.

D. Excluding Private, "Proselytizing" Speech Is Viewpoint Discrimination.

LISD does not dispute that private, proselytizing speech is afforded full constitutional protection. It could hardly do otherwise in light of this Court's decision in *Morgan v. Swanson*, 659 F.3d 359, 412 n. 28 (5th Cir. 2011), which held that excluding a student's proselytizing speech from an otherwise open forum is viewpoint discrimination. Consequently, LISD creates a straw man and argues that "government-endorsed proselytizing speech is not constitutionally allowable." LISD Br. 45.

But the cases on which LISD relies involved special, not equal, treatment for religious expression. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), for example, the Supreme Court struck down a state law exempting religious periodicals from paying sales tax. "[W]hen government directs a subsidy

exclusively to religious organizations … [it] cannot but convey a message of endorsement to slighted members of the community." *Id*. at 15 (internal quotations and alterations omitted) (emphasis added). It was not the proselytizing nature of the speech, but the government's favoritism of religion over non-religion that violated the Constitution.

Here, no favoritism of religion would result from granting Little Pencil equal access to LISD's advertising forum. "For the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Good News Club*, 533 U.S. at 114. Government neutrality towards religious speech is the polar opposite of endorsement.

County of Allegheny v. ACLU, another case cited by LISD, also addressed the favoritism of proselytizing speech. There, a crèche display was given a prime location "on the Grand Staircase, the 'main' and 'most beautiful part' of the building." 492 U.S. 573, 599 (1989). The crèche "st[ood] alone: it [was] the single element of the display." *Id*. at 598. Such prominent and favorable display of a religious message to the exclusion of all others sent "an unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message." *Id*. at 600. But the same county did not endorse a menorah that

stood "next to a Christmas tree and a sign saluting liberty, *id*. at 614, because "it is not 'sufficiently likely' that residents of Pittsburgh [would] perceive the combined display of the tree, the sign, and the menorah as an 'endorsement.'" *Id*. at 620.

Here, Little Pencil is not requesting a prominent placement of its advertisement on LISD's Jumbotron or fence signage exclusive of all others. It merely seeks to be one of dozens of for-profit and non-profit, secular and religious groups that advertise in LISD venues.

Each case LISD cites involves either indisputably government speech promoting religion or overt government favoritism of private religious speech. *See Lee v. Weisman*, 505 U.S. 577 (1992) (school orchestrated and endorsed prayers); *Van Orden v. Perry*, 545 U.S. 677 (2005) (state's display of a Ten Commandments monument); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (town's legislative prayer practice, which the court treated as government speech). But here, where there is no government speech nor favoritism of private, religious messages in a forum open to a multitude of subjects and viewpoints, 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." *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981).

E. Banning Private, Religious Speech Based on Its "Controversial" or "Offensive" Nature Is Viewpoint Discrimination.

LISD criticizes equating "the words [sic] 'controversial' [with] viewpoint

discrimination." LISD Br. at 47. But this association comes not from Little Pencil, but from the Supreme Court, who explicitly warned against "deny[ing] use [of a forum] 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 Texas Div., Sons of Confederate Veterans, Inc. v. Vandergriff*, 759 F.3d 388, 399 (5th Cir. 2014) ("SCV's proposed plate was rejected because of its 'controversial' and 'offensive' viewpoint, which is impermissible viewpoint discrimination.").

Rather than respond to any of Little Pencil's legal authority, LISD cites four lower-court, out-of-circuit—and thus non-binding—cases that it claims authorize a school to censor "controversial" speech. LISD's reliance on these cases is flawed because each of them found that private speech was "school-sponsored" and governed by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *See Diloreto v. Downey Unified Sch. Dist.*, 196 F.3d 958, 962 (9th Cir. 1999) (applying *Hazelwood* to hold that a school can restrict speech in an advertising forum "that would be disruptive to the educational purpose"); *Bannon v. Sch. Dis. of Palm Beach Cnty.*, 387 F.3d 1208, 1214 (11th Cir. 2004) (applying *Hazelwood* after determining that the mural "occur[red] in the context of a curricular activity"); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002) ("We believe that the tile project at CHS constitutes school-sponsored speech and is therefore governed by *Hazelwood*."); *Planned Parenthood of S. Nev., Inc. v. Clark*

Cnty. Sch.l Dist., 941 F.2d 817, 819 (9th Cir. 1991) (applying *Hazelwood* because the case involves "the extent to which educators may exercise editorial control over the contents of high school publications").

Years after these out-of-circuit cases were decided, Justice Alito's controlling concurrence in *Morse v. Frederick*, 551 U.S. 393, 423 (2007), clarified that *Hazelwood* only "allows a school to regulate what is in essence the school's own speech."[2] This Court has accordingly held that *Hazelwood* "should be construed narrowly." *Morgan*, 659 F.3d at 408-09. "School-sponsored" speech is limited to "'activities that may be fairly characterized as part of the curriculum,' which are 'supervised by faculty members,' and designed to impart particular knowledge or skills" to students. *Id*. Private advertisements that have no relation whatsoever to students, faculty, or the curriculum simply cannot fit the bill.

While a school may have a "pedagogical interest" in regulating "controversial" speech in its own publications or in curricular assignments, no such interest exists where a school creates a non-curricular forum for speech by private nonschool groups. "Even in the school setting, 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint' is not enough to justify the suppression of speech." *C.E.F. of New Jersey*, 386 F.3d at

[2] *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (deeming Justice Alito's concurring opinion in *Morse* controlling).

528 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)); *accord Lamb's Chapel*, 508 U.S. at 395-96 (concerns that use of school facilities "for the purpose of proselytizing … would lead to threats of public unrest … would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise opens to discussion on District property").

II. Little Pencil's Advertisement, One of Dozens Displayed at Lowrey Field, Is Not "Government Speech" Nor Does It Create a Perception of Endorsement.

LISD argues that Jumbotron advertisements are "government speech." *See* LISD Br. 51 ("LISD's speech on the Jumbotron is government-sponsored."). This argument is wrong both factually and legally. Indeed, accepting this argument would grant bureaucrats unfettered discretion to censor protected speech in every forum by unilaterally declaring that all speech appearing therein is "government speech."

A. The Stipulated Facts and Admissions in This Case Establish That Advertisements at LISD Facilities Are Private Speech.

LISD effectively stipulated that the advertisements throughout its facilities, including the Jumbotron, are not "government speech."

- "[P]ursuant to Policy GKB (LOCAL) and its practice, [LISD] permits nonschool-related organizations to use school facilities—which includes Lowrey Field, the jumbotron, and other communication

channels … to advertise, promote, sell tickets, or collect funds for any nonschool-related purpose…." ROA.1412.

- "The District … solicits and books advertisements to be run on the jumbotron during high school football games." ROA.1420.
- "The District has not rejected any nonschool-related organizations' advertising request, except Plaintiffs." ROA.1420.

LISD even argues in its brief that "this case involves a commercial advertising forum, i.e., a Jumbotron, at a school football game." LISD Br. 39 (emphasis added).[3]

LISD's stipulations emphasize that it created a public forum for advertisers—both for-profit and non-profit, religious and secular—to engage in private speech, i.e., advertising goods and services completely unrelated to the school district. It actively solicits advertisers to speak on a variety of subject matters, even "solicit[ing] local churches to advertise during high school football games at Lowrey Field." ROA.1420. A forum opened so broadly to private speakers bears no resemblance to "government speech," nor does it even create a perception of endorsement. Far from picking and choosing advertisers to present a

[3] As discussed *infra* Part IV, any efforts to define "commercial" so as to exclude Little Pencil fails because, *inter alia*, (1) LISD has stipulated that its advertising forums are open to all "nonschool-related organizations, including nonprofit and for-profit organizations," ROA.1413; and (2) Little Pencil is a commercial advertiser—it is a for-profit limited liability company, ROA.1410, and it sells goods related to its advertising campaign on its website, ROA.516.

unified government message selected solely by itself, LISD welcomes everyone but Little Pencil.

B. Authorization and Facilitation of Private Speech by Government Officials Does Not Transform It Into Government Speech.

Relying on *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), LISD argues that all advertisements in its forum are government endorsed speech because they are approved by the Superintendent, occur on school property during a school event, and are downloaded for display by LISD employees. LISD Br. 28. There are two primary problems with this argument. First, these were not the determinative factors in *Santa Fe*. Rather, the concern was that the school district's invocation policy "by its terms, invites and encourages religious messages." 530 U.S. at 306. "[T]he expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students underst[ood] the policy." *Id*. at 307.

The factors that LISD relies upon—administrative approval by a government official, speech occurring on government property, neutral government facilitation of speech—are present in every case involving a government created forum. If these factors were determinative of whether or not private speech was government endorsed, it would swallow up forum analysis and strip private speakers of any constitutional protection in designated and limited public fora.

Second, in cases involving in-school advertising by nonschool groups, courts

have rejected the argument that the schools facilitation of private speech resulted in endorsement. For instance, in *C.E.F. of Maryland, Inc. v. Montgomery County Public Schools*, 373 F.3d 589, 601 (4th Cir. 2004), the school district argued that its "teachers' 'active' role in picking up the flyers [from a religious organization] from their mailboxes and distributing them to the students … would constitute unconstitutional endorsement of religion." The court found that the teachers were acting in a purely "administrative capacity" that was identical to when they "distribute students' homework, classwork, and flyers from other 'non-proselytizing' religious organizations and secular groups." *Id*. at 601-02. Such "minimal activity" did not create "endorsement or entanglement" with religion. *Id*. at 602; *see also Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418, 421 (6th Cir. 2004) ("no reasonable observer could conclude" that the school was endorsing religion where school permitted religious and nonreligious community groups to distribute flyers); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1055 (9th Cir. 2003) ("[N]either the age of the schoolchildren nor the time and manner of flyer distribution requires the District to exclude the [religious] brochure or run afoul of the Establishment Clause.").

The "minimal" government involvement in *C.E.F. of Maryland* is no different than LISD's role here where it neutrally authorizes advertisements and, after receiving payment, facilitates the display of the advertisement, whether

downloading a video file for the Jumbotron or hanging a banner in the school gymnasium. Such neutral facilitation of private messages on an even-handed basis does not raise Establishment Clause concerns.

C. LISD Does Not Exercise Sufficient Control Over the Content of Advertisements to Transform Them Into Government Speech.

Relying on *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), and *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), LISD argues that it "has 'effective control' of the messages displayed on the Jumbotron." LISD Br. 31. What LISD omits is the Supreme Court's definition of what it means to "effectively control" speech. In *Johanns*, a compelled-speech case involving a government controlled marketing campaign funded by assessments levied against beef producers, the message belonged to the government because (1) "from beginning to end the message [was] established by the Federal Government;" (2) the government "specified, in general terms, what the promotional campaigns shall contain;" (3) "the Secretary exercises final approval authority over every word used in every promotional campaign;" and (4) government officials "participate in the open meetings at which proposals are developed." 544 U.S. at 560-61.

Summum, involving a request to erect a permanent monument on government property, also provides no support for LISD's radical expansion of the government speech doctrine. The Court noted that "forum analysis simply does not

apply to the installation of permanent monuments on public property." 555 U.S. at 480. Rather, the monuments were "effectively controlled" by the government because (1) the park was never opened "for the placement of whatever permanent monuments might be offered;" (2) "[t]he City has selected those monuments … for the purpose of presenting the image of the City that it wishes to project;" and (3) the City "has taken ownership of most of the monuments in the Park." *Id*. at 473.

A government controlled marketing campaign and city owned monuments are a far cry from LISD's advertising forum, which is open to multitudes of nonschool organizations that solely produce the content of their advertisements. Nor are any of the indicia of "effective control" described in either *Johanns* or *Summum* present here. LISD does not "set out" the messages in the various advertisements. It does not rewrite advertisements, participate in meetings where the advertisements are developed, or take ownership of the intellectual property presented in the advertisements.

LISD merely opened venues for all organizations—both non-profit and for-profit, religious and secular—to advertise. ROA.1413. It welcomes advertisements on a virtually unlimited assortment of subjects and viewpoints. *See* ROA.1413-1416. Indeed, LISD has denied only one advertisement—Little Pencil's. ROA.1420. Simply put, LISD has not spoken as a government entity; rather, it has created a quintessential public forum for private speech. As such, it is subject to

the restraints imposed by the First Amendment. *Widmar*, 454 U.S. at 267 (explaining that once government opens a speech forum it must operate it in accordance with "applicable constitutional norms").

D. Granting Little Pencil Equal Access to the Advertising Forum Easily Satisfies *Lemon* and Other Establishment Clause Tests.

LISD argues that allowing Little Pencil's advertisement would violate the *Lemon* test because its "primary purpose" would be "the advancement of a Christian religious message." LISD Br. 32; s*ee Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (describing the three prongs of this test). In *Lamb's Chapel*, the Court found that granting a religious group equal access "would not have been an establishment of religion under the three-part test articulated in *Lemon*." 508 U.S. at 395. Similarly, in *Widmar*, when discussing the application of the "primary purpose" prong to a religious groups' use of university facilities, the Court explained that it was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U.S. at 273.

Displaying Little Pencil's advertisement would further not be "coercive … to a captive audience." *See* LISD Br. 33. That students may be required to attend football games does not alter the fact that a neutral policy of equal access does not create endorsement or coercion. As the Supreme Court explained in *Board of Education of Westside Community School District v. Mergens*, 496 U.S. 226, 250 (1990), "[w]e think that secondary school students are mature enough and are

likely to understand that a school does not endorse or support [religious] speech that it merely permits on a nondiscriminatory basis." *See also C.E.F. of Md.*, 373 F.3d at 598 ("[T]he Supreme Court has *never* found unconstitutional coercion in an equal access case.").

Finally, LISD once again compares Little Pencil's advertisement with a fictional ad for "www.jihadmartyrdom.com" depicting a child wearing a suicide bombing vest, LISD Br. 35, a tactic LISD unsuccessfully used below, ROA.254. At a time when Americans are being publicly beheaded on Youtube by jihadists, this comparison is reprehensible and undeserving of any substantive response.[4]

III. LISD's Objections to Tattoo Imagery Are a Pretext Because Little Pencil Offered to Remove the Tattoos and Because LISD Acknowledges That the Advertisement Does Not Promote Them.

LISD, and the amicus brief filed by the Texas Association of School Boards Legal Assistance Fund (TASB), fixate on the fact that Little Pencil used tattoo artwork (and even the word "tattoo") in its advertisement to communicate a religious message. But as LISD acknowledged, Little Pencil offered to remove the tattoo artwork. ROA.1419; LISD Br. 18. But LISD still denied the advertisement because of its religious content, ROA.1449-1450, demonstrating that LISD's alleged concerns about tattoos are merely pretextual. Given this unqualified denial,

[4] Little Pencil's argument is not that just because an advertisement is religious it must be admitted to the forum, and LISD is wrong to assume otherwise. LISD is free to prohibit depictions of child abuse and violence, which would clearly exclude LISD's fictitious advertisement showing a mother strapping a suicide bomb to her young child.

it would have been futile to submit a revised advertisement.

In a move of desperation, LISD argues that "even if the tattoos were removed …, the phrase 'jesustattoo.org' would remain." LISD Br. 18-19. Thus, now even the *word* "tattoo" is banned—a *post hoc* restriction contained nowhere in LISD's policies or the record. The scope of such a ban is staggering. Would a teacher be prohibited from showing photographs of Jews, tattooed with a serial number, as they are being processed in concentration camps, or even discussing the historical fact of such tattoos? Would the book "The Illustrated Man" by Ray Bradbury be banned because of its discussion of a tattooed man, whose tattoos each told a different tale? And if the very word "tattoo" is banned, how can LISD even attempt to justify the henna tattoos its students created for an art project? ROA.1405-1408.

Like the henna tattoos, Little Pencil's advertisement does not show actual tattoos. As LISD explains in defending the henna tattoos, tattoos are "an indelible mark or figure on the human body by scarring or inserting a pigment under the skin." LISD Br. 19. The tattoos depicted in the Jesustattoo video itself are fake, as shown by the change from negative to positive words during the course of the Jesustattoo video. So, under LISD's own definition, there are no actual "tattoos" depicted in Little Pencil's advertisement.

LISD concedes that its denial of Little Pencil's ad "was not based on the

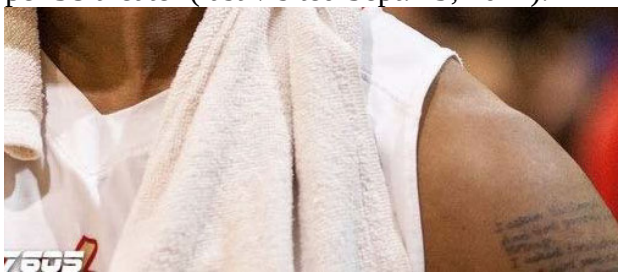
idea that [Little Pencil's] advertisement would encourage minors to obtain tattoos." LISD Br. 20. Indeed, any viewer of Little Pencil's video would realize that tattoos are depicted in a negative light—as a mark of shame in need of removal. Because the parties agree that Little Pencil in no way encourages minors to get a tattoo, TASB's arguments about the harms caused by tattoos are simply meritless.

Little Pencil offered to remove the tattoo artwork, but its ad was denied nonetheless because of its religious viewpoint. Thus, LISD's arguments regarding its "no visible tattoo" policy—a policy which it does not strictly enforce[5]—is a pretextual feint intended to distract the Court from its constitutional infractions.

IV. LISD Created a Public Forum Open to a Variety of Speakers.

LISD accuses Little Pencil of using "a sloppy application of Board Policy GKB (LOCAL) to infer that LISD opened its facilities 'to any non-school-related

[5] On the Coronado High School Boys Basketball team's Facebook page, a school within LISD, are several photos showing a specific player on the team with a tattoo on his left arm. *See* https://www.facebook.com/138389958386/photos/pb.138389958386.-2207520000.1412042799./10151990253853387/?type=3&theater (last visited Sept. 29, 2014).



"The Fifth Circuit has determined that courts may take judicial notice of governmental websites." *Hyder v. Quarterman*, 2007 WL 4300446, at *3 (S.D. Tex. Oct. 10, 2007) (citing *Hawk Aircargo, Inc. v. Chao.*, 418 F.3d 453, 457 (5th Cir. 2005)). Just as this Court may take notice of the Monterrey High School mascot as it appears on an LISD website, *see* Little Pencil's Opening Br. at 34-35, so too may it take judicial notice of photographs on a website of one of LISD's basketball teams.

purpose' for advertising." LISD Br. 15. Instead, LISD claims that it is "engaged in commerce" and thus can discriminate freely among protected private speech. *See* LISD Br. 17 (arguing that the Jumbotron is "limit[ed] to commercial advertisements"). This argument is severely flawed.

First, LISD stipulated that it "permits many nonschool-related organizations, including nonprofit and for-profit organizations, to advertise at Lowrey Field during football games." ROA.1413. Its forum, including the Jumbotron, has been used by both commercial advertisers (United Supermarkets) and non-profit ones (Lubbock Christian University). ROA.1413.

Second, Little Pencil is a commercial advertiser—a "for-profit Texas Limited Liability Company." ROA.1410. On its website, it sells merchandise to promote its "JesusTattoo" concept and video. ROA.516. The only difference between it and the other groups advertising in LISD's venues is its particular religious viewpoint.

If, as LISD argues, the purpose of its forum is "raising revenue to defray LISD expenses," LISD Br. 7, then booking Little Pencil's advertisement for $1,600 would readily accomplish that purpose, ROA.1417.

Finally, the cases relied upon by LISD to argue it has more leeway to discriminate when "engaged in commerce" do not apply here. *Diloreto* explained that where a government's policy and practice permits "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 (citation omitted). As discussed above, LISD has stipulated that both commercial and non-commercial advertisers are permitted, resulting in the creation of a public forum.

Likewise, in *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978 (9th Cir. 1998), the court emphasized that there was not a public forum for advertising on city buses because "Phoenix … restrict[s] advertising on its buses to commercial advertising." Again, LISD does not enforce such a policy; to the contrary, it solicits both commercial and non-commercial advertisers on the Jumbotron. ROA.1420 (LISD stipulating that it "solicited local churches to advertise"). And Little Pencil fits within the forum regardless because it is commercial.

The designated public forum is not restricted to the Jumbotron. Little Pencil desires "to gain equal access to the numerous additional communication channels at Lowrey Field and at other District facilities and sports venues." ROA.519-520. All of LISD's venues are governed by a single policy and managed by a single advertising agency. ROA.1412; ROA.1420. LISD's stipulations, practice, and the very wording of its Policy GKB, show that LISD intended to create a designated public forum consisting of multiple venues for "any nonschool related

organizations" to express their private views on a wide variety of subjects. ROA.1413-1416.

V. LISD's Policies Grant the Superintendent Unbridled Discretion and Are Impermissibly Vague.

LISD's responses to Little Pencil's prior restraint and void-for-vagueness arguments are essentially the same, i.e., that Policy GKB (LOCAL)'s requirement that LISD act "in a manner consistent with the First Amendment" precludes constitutional scrutiny. LISD Br. 55-57. But federal courts across the nation have struck down such language because it fails to meaningfully restrain government officials or provide the speakers with sufficient notice of what is prohibited in the forum. "We will not presume that the public official responsible for administering a [advertising] policy will act in good faith and respect a speaker's First Amendment rights." *United Food & Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 359 (6th Cir. 1998). In *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007), the court held that an unconstitutional speech restrictions was not saved by exemptions for "behavior protected by the First Amendment."

> This sentence communicates virtually nothing. How are college students to be able to determine (when judges have so much difficulty doing so) whether any particular speech or expressive conduct will be deemed (after the fact) to fall within the protections of the First Amendment? … The persons being regulated here are college students, not scholars of First Amendment law.

Id. at 1020-21.

Neither Little Pencil nor other advertisers are First Amendment scholars. The burden is on LISD to clearly articulate the guidelines for use of its facilities, and Policy GKB (LOCAL) fails to meet this burden. The Policy is a prior restraint and is unconstitutionally vague.

VI. LISD Has Welcomed Other Religious Advertisers Into Its Forum, and Its Denial of Little Pencil's Advertisement Violates the Free Exercise and Equal Protection Clauses.

LISD argues that it did not violate the Free Exercise and Equal Protection Clauses because no similar religious advertisements were permitted in the advertising forum. LISD Br. 60-61. But LISD's argument is based upon the false premise that disparate treatment between Little Pencil and *all other advertisers* is irrelevant for purpose of equal protection and free exercise. To reach that conclusion, LISD completely disregards the obvious similarities between the Little Pencil's advertisement and those of *both* secular advertisers like Mission Rehab *and* religious groups like Lubbock Christian University and Full Armor Ministries. Coupled with the discriminatory treatment of Little Pencil's advertisement, this shows that Little Pencil's rights to equal protection and free exercise of religion have been violated. *See* Little Pencil Opening Br. 59-61.

As to other religious advertisers in the forum, LISD surprisingly claims that "none of those four advertisements included or endorsed a particular religion."

LISD Br. 60. This argument defies logic because two of the advertisements promote churches. ROA.1414-1415. It is hard to fathom an advertisement that more strongly "endorse[s] a particular religion" than one soliciting viewers to attend a specific church. Little Pencil's advertisement offers a religious viewpoint similar to these church advertisements, yet it alone was singled out for exclusion.

VII. LISD's Submission of Supplemental Evidence Was Neither Untimely Nor Irrelevant.

Contrary to LISD's arguments, Little Pencil's submission of additional evidence of the henna tattoo art project was not untimely. It was submitted within days of its discovery by Little Pencil, ROA.1395, providing LISD an opportunity, both then and on appeal, to respond to the evidence.

Additionally, the evidence of the school-sponsored henna tattoo art project is clearly relevant, because those temporary tattoos are no different in substance than the tattoo artwork used in Little Pencil's advertisement. Under LISD's definition of "tattoo," neither is an "indelible mark." LISD has no legitimate basis to deny Little Pencil's advertisement using tattoo artwork while instructing students to draw identical tattoo artwork on themselves and displaying it in school hallways for all to see day in and day out.

CONCLUSION

The District Court erred in granting summary judgment to LISD. Its decision should be reversed and this Court should rule that LISD violated Little Pencil's

rights under the First and Fourteenth Amendments.

Respectfully submitted this 6th day of October, 2014.

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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:

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