IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

LITTLE PENCIL, LLC and DAVID L. MILLER,	)	
Plaintiffs,	)	
v.	)	
LUBBOCK INDEPENDENT SCHOOL DISTRICT,	)	
Defendant.	)	Civil Action No. 5:14-CV-014-C

ORDER

On this day the Court considered the parties' cross Motions for Summary Judgment filed April 13, 2014, together with the Responses filed April 27, 2014. The Court further considered the Statement of Stipulated Facts, filed March 21, 2014, and the summary judgment evidence submitted in each party's supporting appendix. After considering all the evidence and arguments, the Court is of the opinion that Defendant's Motion should be **GRANTED** and Plaintiffs' Motion should be **DENIED**.

I.
BACKGROUND

Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 for alleged violations of the First and Fourteenth Amendments. Plaintiffs seek an injunction enjoining Defendant's advertising policy due to the alleged constitutional violations. The following facts are adopted from the parties' Statement of Stipulated Facts, filed March 21, 2014:

1. Plaintiff Little Pencil, LLC, is a for-profit Texas Limited Liability Company.

2. Plaintiff David L. Miller is, and was at all times relevant to this Complaint, a resident of Texas.

3. Mr. Miller served as the Vice Chancellor of Research and Commercialization at Texas Tech University from 2007-2011.

4. Defendant, Lubbock Independent School District ("the District"), is organized under the laws of the State of Texas and may sue and be sued. Texas Education Code § 11.151(a) (recognizing that an independent school district may "sue and be sued"); *Bonillas v. Harlandale Indep. Sch. Dist.*, 832 F. Supp. 2d 729, 736-37 (W.D. Tex. 2011) (recognizing that "Texas independent school districts . . . are not protected by the sovereign immunity of the Eleventh Amendment.").

5. The District is a political subdivision of the State of Texas and is responsible for the education of more than 29,000 students in Lubbock, Lubbock County, Texas.

6. The District is charged, inter alia, with the administration, operation, and supervision of all schools and facilities within the District, including Lowrey Field at PlainsCapital Park.

7. Lowrey Field serves as the home field for the varsity football teams of four schools within the District: Lubbock High School, Coronado High School, Monterey High School, and Estacado High School.

8. The District is charged with the formulation, adoption, implementation, and enforcement of District policies, including the Policies governing advertising by nonschool-related organizations.

9. The District is responsible for its employees' enforcement of the Policies governing advertising by nonschool-related organizations within the scope of their authority.

10. The District is responsible for the enactment, enforcement, and existence of Policies and practices related to advertising by nonschool-related organizations at District schools and facilities.

11. The District is responsible for its officials' implementation and application of its Policies and practices pertaining to advertising by nonschool-related organizations at District events and facilities if it is done within the course and scope of their employment and pursuant to the Board's adopted policies.

12. As the official policy maker, the District, by and through its Board of Trustees, has enacted and is responsible for the Policies and practice challenged in this lawsuit.

13. The District, pursuant to Policy GKB (LOCAL) and its practice, permits nonschool-related organizations to use school facilities—which includes Lowrey Field, the jumbotron, and other communication channels at the stadium and at other District facilities and sports venues—"to advertise, promote, sell tickets, or collect funds for any nonschool-related purpose," subject to the "prior approval of the Superintendent or designee."

14. A true and accurate copy of Policy GKB (LOCAL) is attached as Exhibit 1.

15. Policy GKB (LOCAL) states that nonschool-related organizations may use school facilities pursuant to Policy GKD.

16. A true and accurate copy of Policy GKD (LOCAL) is attached as Exhibit 2.

17. Policy GKD (LOCAL) states that nonschool-related organizations may use school facilities for "educational, recreational, civic, or social activities when these activities do not conflict with school use or with this policy" and that school facilities are open for the use of both nonprofit and for-profit organizations.

18. According to Policy GKB (LOCAL), "[t]he District retains final editorial authority to accept or reject submitted advertisements in a manner consistent with the First Amendment. [See FMA regarding school-sponsored publications]."

19. Pursuant to Policy GKB (LOCAL) and its practice, the District permits nonschool-related organizations to advertise at Lowrey Field through short, TV-style commercials played on the jumbotron, still images displayed on the jumbotron, advertisements on the back of game tickets, large advertising signs along the field's sidelines or end zones, advertisements in the Gameday Program, and signage placed adjacent to the 25-second clock in the north and south entrances, among other means.

20. The District permits many nonschool-related organizations, including nonprofit and for-profit organizations, to advertise at Lowrey Field during football games.

21. Among those organizations the District has permitted to advertise at Lowrey Field are United Supermarkets, Lubbock Christian University, Wentz Orthodontics, Sonic, South Plains College, Coronado Cheer, Reagor Auto Mall, Taco Villa, Dion's, Academy (a sports equipment and apparel retail chain), Tejas Motors, Whataburger, and Lubbock National Bank.

22. The District has also permitted Mission Rehab Services, Chick-fil-A, and Full Armor Ministries, a local church, among others, to advertise at District basketball facilities, and has allowed numerous nonschool-related organizations, including Bethany Baptist Church, to place large banners, year-round on a Monterey High School fence facing one of the highest traffic intersections in Lubbock (50th and Indiana).

23. Nonschool-related organizations that have advertised at District facilities and sports venues have included photographs, logos, website addresses, mottos/taglines, descriptive content of their products or services, and other promotional messages in their advertisements.

24. Some of the advertisements the District has permitted include the following:

a. 30-second, TV-style commercials on the Lowrey Field jumbotron promoting Reagor Auto Mall, Tejas Motors, and Whataburger.

b. End zone signs at Lowrey Field promoting Lubbock Christian University, a nonprofit organization, that include the university's name, its motto ("Be Blue"), and the school's website address, LCU.edu.

c. Signs adjacent to the 25-second clocks at Lowrey Field promoting Sonic that include the company's name and the phrase "America's Drive-In."

d. Still images on the Lowrey Field jumbotron promoting the sports-retailer Academy.

e. A sign hung on the Estacado High School gymnasium wall promoting Full Armor Ministries, a local church, which includes its website, fullarmorministries.net, images of a Bible and cross, and the phrase "The Place Where We Move Men From Religion To Relationship."

f. A sign hung on the Lubbock High School gymnasium wall promoting Mission Rehab Services, which includes, among other things, the organization's website and the phrase "Empowering patients and caregivers to reach their goals."

g. A sign hung on the Lubbock High School gymnasium wall promoting Chick-fil-A.

h. A sign hung on a fence at Monterey High School promoting Advanced Graphix, which is owned by the chair of the LISD Board of Education, Steve Massengale. The sign includes the company website, advancedgraphix.net, and the phrase "Your Promotional Idea Source," among other promotional messages.

i. A sign hung on a fence at Monterey High School promoting Bethany Baptist Church, which includes the image of a cross, the church's address, and its website, bethanybaptistlubbock.com.

j. A sign hung on a fence at Monterey High School promoting Just Kids Preschool, which is operated by Sunset Church of Christ.

k. A sign hung on a fence at Monterey High School promoting Brodericks Therapeutic World, which includes the company's website, brodericksthерapeuticworld.com, and an image of a bare-shouldered woman who is lying down and appears to be receiving a massage.

l. A sign hung on a fence at Monterey High School promoting the Lubbock Area Amputee Support Group. The sign includes, inter alia, the group's website and the word hope, displayed as "H.O.P.E."

m. A sign hung on a fence at Monterey High School promoting Superior Health Plan, a Texas health care company, which includes the company website, superiorhealthplan.com, the phrase, "You Don't Have Superior Health Care?," and the image of a child with a shocked expression on his face.

n. A sign hung on a fence at Monterey High School promoting All About Looks, which includes the phrase "Fabric ~ Furniture & Thrills," the company website, allaboutlooks.com, and other messages.

o. A sign hung on a fence at Monterey High School promoting Regal Pet Resort, which includes, inter alia, the company website, regalpetresort.com, the phrase "Where You And Your Pet Are Treated Like Royalty," and an image of a dog dressed up in king's clothes and wearing a crown.

p. A sign hung on a fence at Monterey High School promoting Little Guys Movers, which includes, inter alia, the company website, littleguys.com, and an image of a smiling "little guy" carrying a large fridge on his back.

25. The District permits counseling, rehabilitation, and support groups, like Lubbock Area Amputee Support Group and Mission Rehab Services, to promote their purpose of helping people overcome issues and circumstances that are negatively impacting their lives and the programs they offer to assist people in making positive life changes.

26. Lowrey Field stadium has an 8,500 seating capacity and hosts multiple high school football games each week from the end of August until the beginning of November.

27. High school football games at Lowrey Field are major community events and are open to the public.

28. Many students, parents, relatives, community members, the opposing teams, students, and their community members are in attendance at the football games.

29. District advertising for many sporting events is marketed by outside marketing firms.

30. The final acceptance of bookings is subject to the approval of the District's Superintendent of Schools or his designee.

31. On July 24, 2013, Plaintiffs' advertising agency, RD Thomas, inquired with Beverly McBeath at Texas Sports Marketing about whether a still image could be displayed on the Lowrey Field jumbotron and asked for pricing.

32. Ms. McBeath responded that a still image could be displayed for at least 15 seconds two times per game, and that the cost would be $1,600 dollars.

33. Ms. McBeath proposed the following dates for the advertisement to run: October 4, 10, 11, 17, 18, 24, 25, and 31.

34. The RD Thomas representative asked a few additional questions, including whether "a church can advertise at the field."

35. Ms. McBeath responded that "a church can advertise. . . in fact we have been calling on churches . . . as long as it's not private school related."

36. On July 29, 2013, RD Thomas informed Ms. McBeath that it wanted to book her July 24, 2013 proposal for advertising on the Lowrey Field jumbotron on behalf of its client.

37. RD Thomas informed Ms. McBeath that its client's name was "Little Pencil."

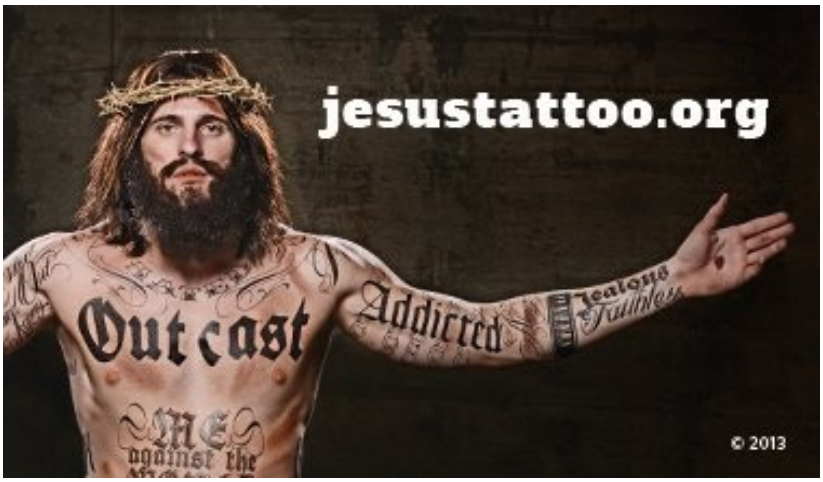
38. Ms. McBeath informed RD Thomas that the total gross for the advertisement would be $1,882 and exclaimed "THANKS for the business! Woohoo – great way to start the week."

39. On September 26, 2013, Ms. McBeath asked RD Thomas for the advertisement.

40. RD Thomas asked for dimensions of the jumbotron, which Ms. McBeath provided.

41. A few days later, on October 1, 2013, RD Thomas sent the advertisement to Ms. McBeath.

42. The following is the advertisement that was submitted:



43. The Plaintiffs' advertisement promoted an advertising campaign centered around a Jesus Tattoo marketing concept, which Mr. Miller developed as a new way to share the Bible's teachings through contemporary marketing methods, and included, inter alia, an image of a tattooed Jesus and the website address jesustattoo.org.

44. Plaintiffs desire to engage in the expressive activities described above on the basis of their sincerely held religious beliefs.

45. Ms. McBeath sent a copy of the Jesus Tattoo advertisement to Nancy Sharp, the District's Director of Communications and Community Relations, along with an email that stated: "Nancy – this is a campaign that was launched today. There are billboards, You Tube videos, and it started floating around Facebook in the past few days. They have purchased space on the Lowrey video board to run this graphic at every home [game] in October beginning this Friday. There is no audio associated with it, just the graphic. I wanted you to be aware of it in case you get questions about it. The ad was placed by the R.D. Thomas ad agency."

46. Shortly after RD Thomas submitted the advertisement, Ms. McBeath called RD Thomas and told them that the District had denied the advertisement because tattoos are prohibited by District policy.

47. Nonetheless, RD Thomas asked Ms. McBeath if the District would accept the advertisement if the tattoos were removed from the image.

48. On October 25, 2013, Mr. Miller's counsel delivered a letter via email and overnight courier to the District informing it that the exclusion of the Jesus Tattoo advertisement violated the First Amendment and requesting that the District immediately approve and run the ad at several upcoming football games.

49. A true and accurate copy of Plaintiffs' counsel's letter is attached as Exhibit 3.

50. Mr. Miller's counsel asked for a response by October 30, 2013, and included a public records request pursuant to the Texas Open Records Law.

51. Counsel indicated that a response to the public records request was required only if the District denied the advertisement.

52. On November 1, 2013, the District's attorneys responded on behalf of the District denying the Jesus Tattoo advertisement.

53. A true and accurate copy of the District's counsel's letter is attached as Exhibit 4.

54. The District also inquired if Mr. Miller's counsel still desired a response to the public records request.

55. On November 5, 2013, Mr. Miller's counsel sent the District's counsel a letter confirming that they still desired the public records requested.

56. On November 18, 2013, the District provided a response to the public records request.

57. The District's public records response shows that the District has not rejected any nonschool-related organizations' advertising request, except Plaintiffs.

58. The District has contracted with an advertising agency, Texas Sports Marketing, to, inter alia, solicit advertisements for the various communication channels open to nonschool-related organizations during football games at Lowrey Field and at other sports venues and District facilities throughout the school year.

59. The District, on its own and through its agent Texas Sports Marketing, solicits and books advertisements to be run on the jumbotron during high school football games, and for the additional communicative channels at Lowrey Field and other District facilities and sports venues, throughout the year.

60. Texas Sports Marketing has, on behalf of the District, solicited local churches to advertise during high school football games at Lowrey Field, so long as the church does not seek to advertise an associated private school and it has the approval of the Superintendent or his designee.

61. The District, in conjunction with Texas Sports Marketing, produced a 2013 Football Partnership Opportunities brochure to market advertising opportunities at Lowrey Field.

II.
STANDARD

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 247 (1986) (internal quotations omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id*. at 248. An actual controversy of fact exists only where both parties have submitted evidence of contradictory facts. *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999). The contradictory facts must be relevant, because disputed fact issues which are irrelevant and unnecessary will not be considered by the court when ruling on a summary judgment. *Anderson*, 477 U.S. at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id*. at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Giles v. General Elec. Co*., 245 F.3d 474, 493 (5th Cir. 2001) (quoting *Celotex*, 477 U.S. at 324).

III.
DISCUSSION

Each party seeks summary judgment in support of its respective position on Plaintiffs' claims. The parties do not dispute the relevant facts of the case and simply argue differing applications of the law to the facts. That is, the parties take differing views as to whether the denial of Plaintiffs' advertisement on Defendant's jumbotron at weekly football games violated Plaintiffs' constitutional rights when viewed in light of the case law within this Circuit, outside this Circuit, and from the Supreme Court.

First Amendment Right to Exercise Free Speech

In justifying the denial to run the ad, Defendant argues that the ad violates Defendant's prohibition against visible tattoos on campus by students or faculty and thereby goes against school policy. Defendant further contends that the ad is clearly an advancement of a religious message and goes beyond general commercial advertising allowed on the jumbotron and is unlike anything offered previously in any other advertising allowed on the jumbotron or anywhere on district property, such as the ads put up by booster clubs on other venues contained on district property (gym walls, baseball field fences, etc.). Thus, Defendant determined that these two grounds, tattoo images and advancement of a religious message, were valid and reasonable bases for declining to accept the ad for airing during the football games at Lowrey Field on Friday nights. Plaintiffs assert that the Defendant's denial of airing the ad is nothing more than impermissible viewpoint discrimination against Plaintiffs' religious message.

Defendant relies heavily upon the premise that "[g]overnment policies and practices that historically have allowed commercial advertising, but have excluded political and religious

expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 965 (9th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974)). Plaintiffs, instead, rely upon the premise that Defendant's advertising restrictions are just disguised viewpoint discrimination that "'strikes at the very heart of the First Amendment,'" and "[t]he right to be free from viewpoint discrimination is no less important in our public schools." *Morgan v. Swanson*, 659 F.3d 359, 401-12 (5th Cir. 2011) (quoting *Morse v. Frederick*, 551 U.S. 393, 423 (2007)). The Court is tasked with navigating the entangled and generally fact-reliant First Amendment precedence as it relates to public school settings to arrive at a conclusion to settle the parties' conflicting views of how to apply the relevant legal authority to the facts of this case.

1. Category of Forum and Applicable Standard

The most fundamental of differences in the parties' arguments is what is the precise forum at issue and how should it be classified. Plaintiffs contend that Defendant's policies for facility use support Plaintiffs' contention that Defendant "intend[ed] to open its advertising forum to a broad array of nonprofit and for-profit organizations to promote their diverse interests, programs, products, and services." (Pls.' Br. in Supp. Pls.' Mot. 23.) Defendant counters that its policies have maintained a non-public forum or, at the most, a limited public forum for advertising. (Def.'s Br. in Supp. Def.'s Mot. 4.) Defendant further advances that the relevant forum at issue here is the jumbotron with the venue located at Lowrey Field, whereas Plaintiffs argue that the relevant forum includes all advertising at any venue or campus in the District

whether solicited by the District itself or by booster clubs.[1] The Court believes, as is often the case, the answer lies in the middle of the parties' respective positions on both the question of relevant forum and venue.

Under First Amendment analysis, schools may open their doors for expression of particular kinds or by particular groups and in so doing have created "limited public forums." *See Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 242-43 (1990). When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). "To create a forum of this type, the government must intend to make the property 'generally available' . . . to a class of speakers." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). The government may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics," and it has the right to limit subject matter to those subjects proper for which the forum was reserved. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995). However, a school may not limit viewpoints on particular subjects that it has allowed in a limited public forum. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Moreover, the subject-matter restriction must be "reasonable in light of the purpose served by the forum." *Id.* at 806.

As argued by Defendant, the fact that the ads submitted by advertisers must first be approved for the venue and forum is a further indication that the forum was not an open forum as Plaintiffs attempt to argue. Likewise, even under the broader policy relating to use of District

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[1]None of the LISD booster clubs sold advertising at Lowrey Field in 2013. (Def.'s App. 336.)

facilities (which, Plaintiffs argue, has created an open forum), the policy states in relevant part that "[s]chool facilities shall not be used to advertise, promote . . . without prior approval of the Superintendent." (Stip. Ex. 1.) The jumbotron advertising forum is an entirely different forum from the Defendant's facilities use forum and the two require differing analyses. Thus, after considering the arguments and the facts specific to this case, the Court finds that the relevant forum and venue at issue here are limited to the electronic advertising on the jumbotron at Lowrey Field, as this is the only forum and venue for which the ad was submitted and considered when it was reviewed by the Superintendent. Even if the Court were to consider the entire Lowrey Field advertising forum and venue as the proper scope at issue, the result would not differ.

As to the classification of the forum, Plaintiffs assert that Defendant's actions should be analyzed under a public forum analysis because once Defendant accepted advertising from outside entities/businesses, then the forum became an open forum. Defendant argues that the forum is a non-public forum because it is reserved only for commercial speech and not expressive messages. After careful consideration of the facts, arguments presented, and applicable case law, the Court finds that Plaintiffs' claims alleging violations of First Amendment rights should be analyzed under the "limited public forum" methodology. The Court comes to that conclusion, to apply the "limited public forum" standard, after considering the arguments and evidence relating to "(1) the [Defendant's] intent with respect to the forum, and (2) the nature of the forum and its compatibility with the speech at issue." *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346 (5th Cir. 2001) (internal quotes and brackets omitted). Board Policy GKB (LOCAL) states in pertinent part that advertising is accepted "solely for

purpose of covering the costs of providing materials and equipment, *not for the purpose of establishing a forum of communication*." (Def.'s App. 330.) The plain wording indicates that the intent was not to establish a forum for all expressive speech and activity when allowing advertising. *See DiLoreto*, 196 F.3d at 966.

2. Reasonableness of Restriction

Next, any restriction such as the denial of Plaintiffs' ad must be reasonable in a limited public forum. On this issue, the nature and function of public schools would, of course, be a relevant consideration in evaluating the reasonableness of any limits the Defendant may have imposed on advertising. Defendant contends that its conduct was reasonable in light of the setting and the function that advertising is intended to serve in the delineated forum.

a. Visible tattoos

The first reason offered to Plaintiffs for denying approval to run the advertisement is that Defendant maintains a no-visible-tattoo policy for its students and faculty while on school property. Defendant further supports its position by relying upon Texas law generally prohibiting tattoo artists from providing a tattoo to anyone younger than 18 years of age. Defendant argues that running the ad would have undermined Defendant's tattoo policy because the ad was based upon conduct prohibited by Defendant's dress-code policies. Defendant contends that the submitted advertisement depicts multiple, visible tattoos and directs the observer to a website containing further tattoo images and a video of a tattoo parlor and, as such, was clearly in direct contradiction to the district's "no-visible-tattoo" policy for students and faculty. Plaintiffs counter that such a justification for denying the ad is a ruse because Plaintiffs offered to remove the tattoos from the image of Jesus after being informed of Defendant's policy on tattoos.

Plaintiffs contend that they never submitted an ad copy with the tattoos removed because the Plaintiffs were informed in the meantime that the Establishment Clause was an additional basis for denial.[2] Lastly, Plaintiffs argue that no reasonable person could interpret the advertisement as urging minors or anyone else to get a tattoo, but instead the ad can and should plausibly be interpreted as commenting on a social and religious issue.

Defendant counters that regardless of whether the image of Jesus contained tattoos on his body or did not, the website domain itself contains the word "tattoo" and the ad still would have referenced the website domain name and directed students to the site—a website containing a tattoo parlor video and the very tattoo images Plaintiffs contend they offered to remove from the submitted image of Jesus. Thus, Defendant argues, the ad still would have contained the word tattoo and directed viewers to a domain containing pictures of the tattoos and a depiction of Jesus as a tattoo artist modifying tattoos on the tattooed people depicted in the video. Defendant further argues that no copy of the ad was ever actually submitted with the tattoos removed from the image of Jesus so that such an ad could be reviewed under District policy. Finally, on the issue of tattoos and minors/students, the Defendant asserts that Texas law does not allow minors to receive tattoos.[3]

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[2]The summary judgment record indicates that the oral reason given initially for denial of the ad was that it violated the tattoo policy. Then, after the Defendant received a letter from Plaintiffs' counsel threatening legal action, Defendant's counsel sent a letter to Plaintiffs' counsel citing the Establishment Clause as a basis for denying the advertisement. It is unclear if the Defendant actually relied upon Establishment Clause grounds prior to the letters by counsel.

[3]Plaintiffs assert that its advertisement fits within an exception to the law against minors receiving tattoos. *See* 25 Texas Admin. Code § 229.406(c) (an artist may not tattoo a person younger than 18 years of age). That exception provides that with parental consent a minor may get a tattoo when it is determined to be in the best interest of the minor in order to cover an

(continued...)

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. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). The Court finds that Defendant's enforcement of its policy against visible tattoos is reasonably related to the school's legitimate pedagogical concerns.

b. Conflict with Establishment Clause

Plaintiffs argue that the ad was designed to be a religious message and sought to be expressed "on the basis of their sincerely held religious beliefs." The ad at issue that Plaintiff Miller sought to have shown on the jumbotron depicts an image of Jesus with long hair, beard, a crown of thorns on his head, arms outstretched with a nail hole in his hand, and multiple "negative word" tattoos all over his body. To the side of this image is simply the website domain name "jesustattoo.org." Admittedly, the "allegorical tattoos" ad seeks to further direct people to a website described by the Plaintiffs as depicting a video of Jesus in a tattoo parlor where he uses his tattoo pen to change the people's tattoos of negative words into positive words.[4] Plaintiffs assert that this imagery is to represent to the viewer how Jesus can transform a person's negative past into a positive future. Plaintiffs further assert that the conclusion of the video found at the

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[3](...continued)
existing tattoo. *Id*. at § 229.406(d). Plaintiffs offer that their advertisement is actually supportive of what Texas law allows as an exception to the ban on minors receiving tattoos because the video found at the website depicts negative tattoos being changed to positive tattoos.

[4]The website also offers contacts to social media in furtherance of the ad campaign and message, the ability to access further information, contacts for persons to seek biblically based counseling for various issues, and products to be purchased to spread Plaintiffs' religious message. Plaintiff Miller owns the copyright to the video, to "jesustattoo.org," and to all other materials derived from the concept.

jesustattoo.org website further depicts Jesus as having taken on all of the negative words from these people onto his own skin. The ad and the website to which it further directs its viewers are described by Plaintiffs as a religious message in advancement of Plaintiffs' "sincerely held religious beliefs." The Court finds, as argued by Defendant and admitted by Plaintiffs, that Plaintiffs' ad is properly characterized as a proselytizing message designed to advance Plaintiffs' "sincerely held religious beliefs" to the viewer.

As such, the Court finds that the subject matter of the "Jesustattoo" advertisement was religiously oriented and sought to advance a religious message. Thus, the ad "is not of a similar character to any previous use of the school's [forum]." *See Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 356 (5th Cir. 2001) (finding that although the organization fit the definition of the school's policy as a group allowed to use the forum, the use sought by the group was not of a character similar to previous use of the forum). The Court further finds that the restriction by Defendant in denying the advertisement is clearly permissible in that it is "reasonable in light of the purpose served by the forum." *Cornelius*, 473 U.S. at 806; *see also Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 280 (3d Cir. 2003) (In an elementary school setting, a school's decision to prohibit the "stated purpose" of promoting a religious message was upheld as reasonable due to school's restrictions which were designed to prevent proselytizing speech that would be at cross-purposes with the school's educational goal and could appear to bear the school's seal of approval). As such, under the limited public forum standard, Defendant's actions did not violate the Plaintiffs' First Amendment rights. *See DiLoreto*, 196 F.3d at 968-69.

i. Perceived endorsement

The factual similarities between the setting in this case and that in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), cannot be ignored by the Court when analyzing the issue. Both the case at hand and *Santa Fe* involved captive audiences of students at high school football games. The Court feels bound by the precedent set in *Santa Fe*, and the Plaintiffs have not sufficiently dissuaded the Court that *Santa Fe* would not govern the outcome of this case due to those similarities. Plaintiffs attempt to argue that the facts at hand should be viewed more in line with precedent allowing facility usage by organizations to advance a message. However, in such cases, the attendees voluntarily attended the meetings in the open facilities and could freely choose to stay or leave at any time because it was not a school function that any student was required to attend. Here, the facts are distinguishable. Moreover, there is no evidence before the Court that Defendant has accepted any similar ads for airing on the jumbotron which advance a religious message in such a manner as the ad at issue.

Importantly, in its most recent opinion discussing the Establishment Clause, the Supreme Court still places emphasis on the setting of *Santa Fe*. *See, e.g., Town of Greece, N.Y. v. Galloway*, 2014 WL 1757828 at *16, — U.S. —, 134 S. Ct. 1811 (May 5, 2014) (Kennedy, J., joined by Roberts, C.J., and Alito) (fact-sensitive inquiry taking into account the setting and the audience, including whether attendance or participation is compulsory) (citing *Santa Fe*, 530 U.S. at 322); *see Santa Fe*, 530 U.S. at 307-08 (perceived endorsement of and entanglement with religion by a school district creates an Establishment Clause violation especially when conducted at a school-sponsored function, on school property, over school's equipment that is subject to control by school officials). Though in the elementary school setting, this circuit has likewise

continued to recognize a possibility of the appearance of imprimatur in "structured [school] activities" that may be "under the supervision of teachers" and which may occur in "a captive audience of students." *Morgan v. Swanson*, 659 F.3d 359, 387 (5th Cir. 2011) (determining no indication those conditions existed in that instance). In light of the facts at hand and the similarities to the setting of *Santa Fe*, the Court finds that it was reasonable for Defendant to believe that running Plaintiffs' advertisement on the jumbotron during Friday night football games could be viewed as Defendant's endorsement of the message, or at least carry the implication of support.

ii. Disruption and controversy

Defendant also argues that it considered the potential for disruption in setting the limits of its forum and that the potential for disruption due to controversy is a legitimate concern supporting the reasonableness of its decision. Defendant contends that it would have likely been faced with potential lawsuits if it accepted and ran the ad. It further asserts that to begin accepting ads of such a nature would force it to open the forum to all expressions of personal beliefs. Thus, one consideration involved in the decision was an intent to avoid such disruptive controversy.[5]

> The District reasonably could have believed that the controversy and distraction created by political and religious messages raised the potential for disruption of [] classes and school-sponsored events, particularly as students at these activities would be a captive audience to the ads. In addition, the District reasonably could have been concerned that the school would be associated

[5]The Defendant further makes a brief reference in passing that implied that the imagery of the ad, depicting Jesus in an untraditional view as someone covered in tattoos, could also be found to be offensive to some in the Christian faith.

> with any controversial views expressed in the advertisements on the [particular forum].

DiLoreto, 196 F.3d at 968; *see Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1215 (11th Cir. 2004) (legitimate pedagogical concerns of preventing disruption with overtly religious messages permitted school's conduct); *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 933-34 (10th Cir. 2002) (desire to avoid religious controversy that would be disruptive to the learning environment was a legitimate concern for school-sponsored speech).

The Court finds that, to the extent Plaintiffs' advertisement might have been considered school-sponsored speech by those in attendance, avoiding disruption is a legitimate and reasonable basis for denying the advertisement.

iii. Defendant's restrictions were reasonable

For the reasons discussed above and argued by Defendant, the Court finds that Defendant's restrictions that led to the denial of Plaintiffs' ad for airing on the jumbotron at Lowrey Field were reasonable in light of the purpose of the forum and the venue in which the forum was located. Thus, Defendant is entitled to summary judgment on Plaintiffs' First Amendment claim.

3. Alternatively, Strict Scrutiny Analysis

Defendant also argues in the alternative that even if a higher level of strict scrutiny is applied in analyzing the restrictions under a "designated public forum" analysis, Defendant still prevails because Defendant's responsibilities under the Establishment Clause required it to deny running the advertisement to a captive audience containing students and minors who might view the ad as being endorsed by Defendant. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290

(2000) (age of students and requirement of some of them to be in attendance at the football games considered as weighty factors in determining that an Establishment Clause violation had occurred when prayer was offered by a student over the school district's public announcement system).

Plaintiffs contend that Defendant's limit on the forum is really just impermissible viewpoint discrimination and that the Supreme Court has repeatedly held in facility-use and flyer-distribution cases that such restrictions on religious messages are impermissible. Defendant argues that those cases are inapplicable due to the nature of the facts here. The Court agrees and concludes that here, 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. Often a student, student group/club, or entity in which a student is involved is the "speaker" in the cases cited and relied upon by the parties. The "flyer" cases generally involve challenging a school district's policy in distributing flyers supporting a particular religious event or message by student or student-affiliated organizations. Even when students are the speakers, Establishment Clause considerations may limit their right to air religious doctrines. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817 (5th Cir. 1999) (discussing the effect prong of the *Lemon* test in determining whether the practice under review in fact conveys a message of endorsement). At any rate, the Court notes that "[t]he Supreme Court has not yet settled the question whether a concern about possible Establishment Clause violation can justify viewpoint discrimination." *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twn. Sch. Dist.*, 386 F.3d 514, 530 (3d Cir. 2004).

Plaintiffs cannot 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. *See, e.g., Van Orden v. Perry*, 545 U.S. 677, 691 (2005) ("[I]t stands as an example of the fact that we have 'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.'") (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)); *see Hazelwood*, 484 U.S. at 268-69 (1988) (material contained in school newspaper represented school-sponsored speech because it was required to be reviewed by teacher, editors were selected by faculty, and entire paper was reviewed by principal before publication); *Santa Fe. Indep. Sch. Dist.*, 530 U.S. at 307-09 (speech clothed with mantle of school approval when the speech was incorporated into an official school-sponsored event, on school property, and broadcast over school's electronic public address system).

Here, Plaintiffs stipulated that the ad was a "new and innovative way[] to share the Bible's teachings" designed "to deliver his religious message." The Court agrees with Defendant's argument and finds that, even under a higher level of scrutiny, Defendant's denial of the ad was proper when considered in light of Defendant's compelling interest not to violate the Establishment Clause by running the advertisement. *See Santa Fe*, 530 U.S. at 307-08, 313 (although government cannot impose a prohibition on all religious activity in our public schools, it also cannot stamp a religious message with its seal of approval such that endorsement might be perceived); *see also DiLoreto*, 196 F.3d at 969 ("decision not to post the [ad] was permissible, content-based limitation on the forum, and not viewpoint discrimination"). Thus, even analyzed

under a designated-public-forum standard, the Court finds that Defendant is entitled to summary judgment on Plaintiffs' First Amendment claims.

Fourteenth Amendment Due Process and Equal Protection Violations

Because the Court has found that Defendant did not violate Plaintiffs' First Amendment rights in denying the ad for inclusion on the jumbotron, and for the reasons argued by Defendant in its Brief, the Court finds that no violation of Plaintiffs' Fourteenth Amendment Due Process Clause rights occurred. The forum for advertising on the jumbotron is a limited public forum, and Defendant has offered a rational basis for rejecting the advertising. Plaintiffs take issue with Defendant's written policy relating to advertising, which states: "The District retains final editorial authority to accept or reject submitted advertisements in a manner consistent *with the First Amendment*." (Stip. Ex. 1 (emphasis added)). More specifically, Plaintiffs allege that such broad discretion by the Defendant and its Superintendent is unconstitutionally vague. However, as argued by Defendant, the Court finds that due to the fact-specific intricacies of First Amendment law, any attempt to list all the criteria of First Amendment law would be futile as such a list would be too voluminous, complex, and cumbersome. The Court is satisfied that, in this instance, the Superintendent, with advice and counsel, is sufficiently restrained by First Amendment law to prevent abuse by "unfettered discretion." Finally, as also argued by Defendant, Plaintiffs 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. Thus, Plaintiffs have not identified a protected interest in life, liberty, or property that they have been denied without due process of law.

Likewise, no Equal Protection Clause violation has occurred. In order for a violation to have occurred, Plaintiffs must at a minimum show that others who were similarly situated were treated differently. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Defendant argues that, here, no other advertisement that was approved to run on the jumbotron can reasonably and objectively be said to have 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. Defendant further argues that even if the forum considered were to include all advertising on other venues in the district (as argued by Plaintiffs to be the proper scope), none of those rose to such a level either.[6] After careful review of the

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[6]Plaintiffs contend that an employee of the ad agency hired by Defendant to coordinate and manage the advertising on the jumbotron expressed that said agency "ha[d] been calling on churches" to advertise. Plaintiffs contend that this shows viewpoint discrimination in not allowing Plaintiffs' religious advertisement while admittedly seeking advertising from churches. However, such an argument fails to take into account that someone answering a phone at an ad agency may not know the particulars of the First Amendment boundaries required to be followed by schools. Additionally, the advertising policy of Defendant requires that any advertisement must first be approved by the Superintendent before being accepted and placed for viewing. As such, it follows that just because an ad agency might enthusiastically receive an ad, it does not necessarily establish that the advertisement will pass review by the Superintendent. At any rate, no other church or religious advertisements were accepted and allowed on the jumbotron. Thus, no viewpoint discrimination occurred on the subject matter of religion.

In attempting to argue comparative similarity, Plaintiffs list several signs at other venues on Defendant's campuses that were allowed to be placed on school property. The Court finds Plaintiffs' arguments relating to other cited ads unpersuasive in that none is comparable to the "allegorical tattoos" ad submitted by the Plaintiffs to be run on a jumbotron at Lowrey Field.

Although several other ads are referenced in the arguments, only the four discussed in this footnote are reasonably alleged to be connected to a religious affiliate organization. That one ad is from a university and contains the word "Christian" in its name is unremarkable. Although the ad for the university was allowed at Lowrey Field, a review of that ad indicates that it contains no religious message or allegories—simply its name contains the word "Christian." (Def.'s App. 92.) Likewise, a sign on a fence at one of the district's football practice fields advertising a

(continued...)

arguments and evidence relating to other advertising allowed by Defendant, the Court agrees and finds that Plaintiffs' claim for an Equal Protection violation cannot stand.

Plaintiffs' Free Exercise and Establishment Clause Claims

For the reasons argued by Defendant, as well as those already discussed herein, the Court finds that summary judgment is proper as to Plaintiffs' claims for alleged violations of the Free Exercise Clause of the First Amendment. Plaintiffs allege that by not being able to run their ad on the jumbotron, Defendant has prevented the free exercise of their religion in that by not having the advertising forum available to them, they were not able to exercise their religious beliefs and tenets. Plaintiffs' arguments, however, are advanced under the premise that the forum was a public forum for the free expression of ideas and views. The Court has found that

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[6](...continued)
preschool is stipulated to be affiliated with a church. Yet, Plaintiffs do not offer how an innocuous advertisement containing only the name of the preschool, "Just Kids Preschool," and a phone number advances any proselytizing message or breaches the forum limits. (Def.'s App. 102.) The sign ad for Bethany Baptist Church is also located on the same football field fence as the daycare ad and not at Lowrey Field. The Bethany ad contains an address and web address and what appears to be the outlined image of a cross. (Def.'s App. 101.) An image of a cross has been held to not constitute religious connotation that would violate the Establishment Clause when the symbol is incidental and the size and placement not significant. *See Croft v. Perry*, 624 F.3d 157, 168 (5th Cir. 2010) (citing *Murray v. City of Austin*, 947 F.2d 147, 156 (5th Cir. 1991) (finding relevant the size and placement of the image to the viewer)). Finally, Plaintiffs rely upon one other ad they contend is affiliated with a religious organization—Full Armor Ministries. (Pls.' App. 131.) Although that ad contains a small image of a cross and bible, the phrase "The Place Where We Move Men From Religion To Relationship," and a website address, the Court finds the Full Armor ad to not be in the same venue or forum at issue; and even if it were to be considered within the forum, it differs sufficiently in form and substance from Plaintiffs' ad to make its comparison inapplicable.

The Court finds the examples of various signs relied upon by the Plaintiffs to be simply irrelevant in that none are similarly comparable in design, message, or imagery to the Plaintiffs' advertisement. Plaintiffs allege and argue that their ad clearly advances a religious message and is designed "as a new way to share the Bible's teachings through contemporary marketing methods . . . ." (Pls.' Verified Compl. 1.)

the forum at issue was not a designated open forum as argued by Plaintiffs, but a limited public forum subject to less rigorous review.

As argued by Defendant, the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Additionally, and also as argued by Defendant, denying placement of an advertisement on a jumbotron screen at a high school football stadium cannot in any substantive manner prohibit Plaintiffs from exercising their religion. It is not precisely clear how Plaintiffs' fundamental right to freely exercise their religion and worship is implicated in not being allowed to advertise their message on the jumbotron. As such, the Court finds that Defendant need only show a rational relationship to a legitimate purpose in denying the advertisement for airing on the jumbotron. For similar reasons already discussed herein, the Court finds that Defendant has shown several legitimate purposes rationally related to the denial of the ad. For these reasons, as well as those argued by Defendant, Plaintiffs' alleged Free Exercise Clause claim fails, and summary judgment is proper as to that claim.

Plaintiffs' Establishment Clause claim also fails for the reasons already discussed above, and summary judgment is proper as to that claim as well.

Injunctive Relief

Because the Court has determined that Defendant's actions did not violate the Plaintiffs' First and Fourteenth Amendment rights, Plaintiffs are not entitled to injunctive relief. No genuine issue of material fact remains on Plaintiffs' claim for injunctive relief, and summary judgment is proper.

IV.
CONCLUSION

For the reasons stated herein, as well as those argued by Defendant, the Court finds that Defendant's Motion for Summary Judgment should be **GRANTED** and Plaintiffs' Motion for Summary Judgment should be **DENIED**.

SO ORDERED this 29th day of May, 2014.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

EXHIBIT 1

Lubbock ISD
152901

COMMUNITY RELATIONS GKB
ADVERTISING AND FUND RAISING IN THE SCHOOLS (LOCAL)

PROMOTIONAL ACTIVITIES

School facilities shall not be used to advertise, promote, sell tickets, or collect funds for any nonschool-related purpose without prior approval of the Superintendent or designee. Nonschool-related organizations may use school facilities only in accordance with GKD.

ADVERTISING

Advertising shall be accepted solely for the purpose of covering the cost of providing materials and equipment, not for the purpose of establishing a forum for communication. The District retains final editorial authority to accept or reject submitted advertisements in a manner consistent with the First Amendment. [See FMA regarding school-sponsored publications]

EXHIBIT 2

Lubbock ISD
152901

COMMUNITY RELATIONS
NONSCHOOL USE OF SCHOOL FACILITIES

GKD
(LOCAL)

SCOPE OF USE

The District shall permit nonschool use of designated District facilities for educational, recreational, civic, or social activities when these activities do not conflict with school use or with this policy.

Approval shall not be granted for any purpose that would damage school property or to any group that has damaged District property.

Note: See the following policies for other information regarding facilities use:

- Use by employee professional organizations: DGA
- Use of facilities for school-sponsored and school-related activities: FM
- Use by noncurriculum-related student groups: FNAB
- Use by District-affiliated school-support organizations: GE

NONPROFIT FUND-RAISING

The District shall permit nonprofit organizations to conduct fund-raising events on District property when these activities do not conflict with school use or with this policy.

FOR-PROFIT USE

The District shall permit individuals and for-profit organizations to use its facilities for financial gain when these activities do not conflict with school use or with this policy.

SCHEDULING

Requests for nonschool use of District facilities shall be considered on a first-come, first-served basis.

Academic and extracurricular activities sponsored by the District shall always have priority when any use is scheduled. [See FM] The Superintendent or designee shall have authority to cancel a scheduled nonschool use if an unexpected conflict arises with a District activity.

APPROVAL OF USE

The Superintendent or designee is authorized to approve use of any District facility.

EMERGENCY USE

In case of emergencies or disasters, the Superintendent may authorize the use of school facilities by civil defense, health, or emergency service authorities.

USE AGREEMENT

Any organization or individual approved for a nonschool use of District facilities shall be required to complete a written agreement indicating receipt and understanding of this policy and any applicable administrative regulations, and acknowledging that the District is

not liable for any personal injury or damages to personal property related to the nonschool use.

FEES FOR USE

Nonschool users shall be charged a fee for the use of designated facilities.

The Superintendent shall establish and publish a schedule of fees based on the cost of the physical operation of the facilities, as well as any applicable personnel costs for supervision, custodial services, food services, security, and technology services.

EXCEPTIONS

Fees shall not be charged:

- When school buildings are used for public meetings sponsored by state or local governmental agencies;
- For use by District employee professional organizations; or [See DGA]
- For use by District-affiliated school-support or booster organizations. [See GE]

REQUIRED CONDUCT

Persons or groups using school facilities shall:

1. Conduct business in an orderly manner.
2. Abide by all laws and policies, including but not limited to those prohibiting the use, sale, or possession of alcoholic beverages, illegal drugs, and firearms, and the use of tobacco products on school property. [See GKA]
3. Make no alteration, temporary or permanent, to school property without prior written consent from the Superintendent.

All groups using school facilities shall be responsible for the cost of repairing any damages incurred during use and shall be required to indemnify the District for the cost of any such repairs.

INSURANCE

All groups using school facilities for athletic purposes shall provide to the District an original certificate of insurance, with the District named as an additional insured, indicating minimum limits of insurance in accordance with the schedule established by the District's finance office.

CONCESSIONS

Any concessions made available during a nonschool use of school facilities shall be provided by District-affiliated and/or school-sponsored organizations only.

EXHIBIT 3

ALLIANCE DEFENDING
FREEDOM
FOR FAITH FOR JUSTICE

October 25, 2013
Via Email and UPS Overnight Delivery

Dr. Berhl Robertson, Jr. (superintendent@lubbockisd.org)
Superintendent, Lubbock Independent School District
Steve Massengale (smassengale@lubbockisd.org)
President, LISD Board of Education (and on behalf of the members of the Board)
1628 19th Street
Lubbock, TX 79401

Re: Censorship of Religious Advertisement and Public Records Request

Dear Superintendent Robertson and President Massengale:

Lubbock Independent School District (LISD) has rejected an advertisement our client submitted for display on the jumbotron at Lowrey Field at PlainsCapital Park based on its religious message. We write to inform you that this action violates our client's First Amendment rights and to ask LISD to immediately rectify the situation.

Our client (who desires to remain anonymous at this time) submitted, through an advertising agency, an advertisement to Texas Sports Marketing (LISD's advertising agency) for placement on the Lowrey Field jumbotron. The advertisement included an image of a tattooed Jesus and a website address, jesustattoo.org. Our client requested that the advertisement be displayed twice during a game, for 15 seconds each time. The ad agency approved the ad, stated that it would run at high school football games on October 4, 10, 11, 17, 18, 24, 25, and 31, and quoted a price. Our client accepted.

When our client's agency sent a picture of the Jesus Tattoo ad to LISD's ad agency, however, LISD officials rejected it. Initially, LISD officials stated that the ad was unacceptable because tattoos were against District policy (a review of the District's policies did not reveal any provision addressing tattoos). Our client then offered to take the tattoos off the image of Jesus. LISD officials still denied the ad because of its religious message.

LISD has created a forum for expression by opening the Lowrey Field jumbotron to advertisements from private parties. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 345 (5th Cir. 2001) (setting out the legal framework for forum analysis under the First Amendment). The advertisements are typically short videos. Advertisers have included, among many others, Reagor-Dykes Auto Mall, Whataburger, NTS Telecom, Plains Capital Bank, ASCO Equipment, and Wentz Orthodontics. Like our client's advertisement, the permitted advertisements call viewers' attention to a product, service, or thing and usually include a website address where people can find additional information.

The exclusion of our client's advertisement based on its religious message violates the First Amendment. Indeed, this is a clear-cut case of unlawful viewpoint discrimination. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (school district that had

opened its facilities to community groups committed viewpoint discrimination when it prohibited a religious club from using those facilities to teach morals and character development to children from a religious perspective); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school district that had broadly opened its facilities for community uses committed viewpoint discrimination when it prohibited a church from using its facilities to show a film about child-rearing and family values because of the religious perspective of the film).

We ask that you respond to this letter **by Wednesday, October 30, 2013**, and provide written confirmation that (1) our client's ad will run on the Lowrey Field jumbotron during the high school football games occurring on October 31 and November 1 and 8,[1] and (2) LISD will amend its advertising policies to state that advertisements will not be prohibited in the future based on their religious content or viewpoint. If we do not receive confirmation by Wednesday, we will advise our client of his right to pursue legal action against the District.

In addition, should the District refuse to run our client's advertisement, please provide copies of the following pursuant to the Texas Open Records Law, Tex. Gov't Code Ann. § 552.001, *et seq*:

1. Any and all LISD policies, rules, guidelines, or instructions governing the process and procedures by which requests for advertising on the Lowrey Field jumbotron are submitted and approved/denied.

2. Any and all correspondence, emails, or other documents received, sent, or created within the last 3 years pertaining to requests to advertise on the Lowrey Field jumbotron. This request includes, but is not limited to, documents pertaining to the advertising requests and to how the requests were handled by LISD, whether approved or denied.

3. Any and all correspondence, emails, or other documents pertaining to or in any way mentioning our client's Jesus Tattoo advertisement request.

We are willing to pay all lawful and reasonable costs of duplication or statutory fees associated with this request.

We look forward to receiving your prompt response.

Sincerely

Jeremy D. Tedesco, Senior Legal Counsel
Matt Sharp, Legal Counsel

[1] Our client's advertisement was initially supposed to run at high school football games throughout October. Because October has now nearly passed, we are asking that LISD rectify its unlawful ban on our client's speech by permitting the Jesus Tattoo ad to run during the last few remaining high school football games at Lowrey Field this season, including those occurring in November.

EXHIBIT 4

UNDERWOOD
ATTORNEYS AT LAW

ANN MANNING
Board Certified in Labor and Employment Law
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1111 West Loop 289
Lubbock, TX 79416
MAILING ADDRESS:
P.O. Box 16197
Lubbock, TX 79490

November 1, 2013

Via facsimile (480) 444-0028
Via email JPeterson@alliancedefendingfreedom.org
and ***CM/RRR #7011 1570 0002 3927 8641***
Jeremy D. Tedesco
Matt Sharp
Alliance Defending Freedom
15100 N. 90th St.
Scottsdale, AZ 65260

Re: Censorship of Religious Advertisement and Public Records Request

Dear Mr. Tedesco and Mr. Sharp:

As attorneys for Lubbock Independent School District (the "District"), I am in receipt of your letter dated October 25, 2013, regarding your concerns about Texas Sports Marketing's denial of your client's advertisements on the jumbotron at PlainsCapital Lowrey Field. As such, I have reviewed your position that the District has created a limited open forum and, as such, under the First Amendment, it created free speech rights and that the District cannot exercise viewpoint discrimination to reject the religious advertisement. The District respectfully disagrees. The District is prohibited from allowing religious advertisement with the use of government property based on the Establishment Clause.

As you are aware, the District is a governmental entity which must comply with constitutional requirements set out by federal and state courts. In that regard, in the case of *Doe v. Santa Fe ISD*, 520 U.S. 290 (2000), the U.S. Supreme Court examined a situation similar to this which occurred at a school-sponsored school football game. In *Doe*, students led a prayer prior to the beginning of the football game. Previously, student-led religious activity had consistently been upheld under the First Amendment rights of students since it had no governmental involvement.

However, the U.S. Supreme Court limited the free speech rights even of students when governmental facilities and sponsorship is involved on the basis of the violation of the Establishment Clause. It held that student led pre-game prayer at a football game was public

speech authorized by a governmental policy, that the religious activity took place on governmental property with use of government-owned property and equipment, and that it was at a government-sponsored school-related event. As such, the court found that the District's policy involved both perceived and actual governmental endorsement of a delivery of prayer at important school events.

In applying the laws to our facts at hand, the District is a governmental entity. Your client, a non-student, desires to exercise its free speech rights which would be deemed public speech of a religious nature. District property and equipment would be used at a school-related event. Therefore, the District is prohibited from authorizing this public religious speech on governmental property using the jumbotron which is governmental property at a school-related event based on the Establishment Clause.

If you still desire the open records that you have requested in your letter, we will gather those in a reasonable amount of time and forward them to you. Please do not hesitate to contact my office if you have any questions.

Sincerely,

UNDERWOOD LAW FIRM

By:
Ann Manning

AM/dpp

cc: LISD