NO. 14-10731

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, IN SUPPORT OF APPELLEE LUBBOCK INDEPENDENT SCHOOL DISTRICT AND IN SUPPORT OF AFFIRMANCE OF THE DISTRICT COURT JUDGMENT

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

In compliance with Local Rule 29.2, the undersigned counsel certifies that the following listed entities have an interest in this Amicus Brief:

The Amicus Curiae, Texas Association of School Boards Legal Assistance Fund, is a trust, and is recognized as a tax-exempt organization under Section 501(c)(4) of the Internal Revenue Code. It is administered by a board of trustees, the members of which are drawn from the Texas Association of School Boards, Inc., the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The Texas Association of School Boards, Inc. ("TASB") is a non-profit corporation, of which over 1,000 Texas public school boards of trustees are members.

The Texas Association of School Administrators ("TASA") is a membership organization comprised of Texas school district superintendents and other school administrators.

The Texas Council of School Attorneys ("CSA") is a membership organization comprised of attorneys who represent Texas school districts.

S. Anthony Safi, and the firm of Mounce, Green, Myers, Safi, Paxson & Galatzan, A Professional Corporation, are legal counsel for the Amicus Curiae.

S. Anthony Safi

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MISCELLANEOUS

STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE OF THE AMICUS CURIAE

Approximately 740 public school districts in the State of Texas are participants in the Texas Association of School Boards Legal Assistance Fund ("TASB Legal Assistance Fund" or "Fund"), which advocates the interests of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("TCSA").

TASB is a non-profit membership association, whose members consist of approximately 1030 boards of trustees of Texas school districts. As locally-elected boards of trustees, TASB's members are responsible for the governance of Texas public schools. TASA represents the State's school superintendents and other administrators responsible for implementing the education policies adopted by the State and by local boards of trustees. TCSA is composed of attorneys who collectively represent more than 90% of Texas public school districts.

This case raises issues of critical importance to school districts across the state. With statutory caps on local ad valorem tax rates, uncertain state revenues that fluctuate from biennium to biennium, and constant demands to do more

with less, school districts are increasingly cognizant of the significance of advertising as a source of revenue to enhance the educational experience of their students. The Fund is concerned about the negative impact that the views expressed in Appellants' Brief, if adopted by this Court, could have on the many school districts across the State that utilize a Board Policy GKB (Local) that is worded similarly to the corresponding policy utilized by the Lubbock Independent School District.

The TASB Legal Assistance Fund believes that the forum analysis to be utilized by the Court in this case is of statewide significance, and that it is important for the law to recognize that a school district is not subject to the same legal standards in accepting or rejecting paid advertising as it would be for a traditional public forum, including with respect to messages with an overtly proselytizing religious message. It believes that school districts should be allowed the flexibility to decline to run advertising that may appear to involve products or services that do not promote the health, safety or welfare of their students – including tattoos. It submits that school districts should have a reasonable degree of flexibility in the acceptance or rejection of proposed advertising, so as to avoid

unduly controversial material that might in fact alienate other advertisers, or the intended audience.

The Fund's Board of Trustees authorized the filing of this Amicus Brief, and the Fund is paying all fees and costs associated with the preparation and submission of this Brief.

We file this Brief under the authority of FRAP 29(a), second clause of the second sentence, inasmuch as all parties have consented to its filing.

RULE 29(c)(5) STATEMENT

No counsel of any party hereto authored this Brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this Brief, except that Appellee Lubbock Independent School District, as one of 740 Texas school districts participating in the TASB Legal Assistance Fund, has made contributions to the Fund in the amount of $500.00 annually. No person, other than the Fund, its members, or its counsel, has contributed money that was intended to fund preparing or submitting this Brief.

SUMMARY OF THE ARGUMENT

In this Brief, we focus our attention on demonstrating that the District's Jumbotron advertising medium in this case is a nonpublic forum; that, therefore,

a reasonableness standard applies in determining the legality of rejection of advertising from that forum; that the rejection in this case was reasonable; and that LISD Board Policy GKB (Local) does not constitute an unconstitutional prior restraint, nor is it unconstitutionally vague.

We present our argument in a manner that we believe is the most cogent to examine the issues we address, rather than respond to the issues in the order presented by Appellant. We shall refer to the Plaintiffs-Appellants collectively as "Little Pencil" or "Plaintiffs" and to the Defendant-Appellee as "LISD," or the "School District."

ARGUMENT

I. The School District's Jumbotron is not a designated public forum (Responsive to Parts II and III of Appellant's Argument).

In deciding a speech case, the court must consider the nature of the forum the speaker seeks to employ. The standard by which the constitutionality of any regulation of speech must be evaluated depends upon the character of the forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 44 (1983). A governmental actor creates a designated public forum only if it "intended to designate a place

not traditionally open to assembly and debate as a public forum." *Cornelius, supra,* 473 U.S. at 802.

Where the governmental entity "is acting as a proprietor, . . . rather than acting as a lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). A governmental entity's decision to restrict access to a nonpublic forum "need not be the most reasonable or the only reasonable limitation. . . . Nor is there a requirement that the restriction be narrowly tailored or that the Government interest be compelling." *Cornelius*, 473 U.S. at 808-09. The Government's "interest in avoiding controversy" is a sufficient and legitimate basis for exclusion from a nonpublic forum. *Id.* at 809-10.

We have no argument with the forum analysis used in *Chiu v. Plano Indep. Sch. Dist.,* 260 F.3d 330 (5th Cir. 2001), cited by Little Pencil. This Court there noted that the governmental "intent with regard to the forum is the critical starting point for determining whether regulation of speech in a particular forum should be subject to strict scrutiny;" "that public entities have broad discretion to control access to and use of property or events that are not traditional public

forums;" that a designated public forum is not automatically created "'by permitting limited discourse' or 'selective access'"; that it is created "only by intentionally opening a nontraditional forum for public discourse;" and that the court must look "to whether the government was motivated by 'an affirmative desire,' or 'express policy' of allowing public discourse on the property in question." *Id.* at 346-47.

Based on the record before it, this Court in *Chiu* did not determine whether "Math Nights" constituted a designated public forum, but did determine that the school mail system was "properly considered a limited/nonpublic forum." *Id.* at 350. Significantly, the flyer in question was "not of a similar character" to any previous use of the school mail delivery system. *Id.* at 356. This Court held that "[i]dentity-based and subject matter distinctions in a nonpublic forum are perfectly permissible so long as they are not a covert attempt to suppress a particular viewpoint and are reasonable in light of the purpose of the forum," and went on to conclude that even if "viewpoint discrimination could be alleged," denying the "request to distribute a political petition" was "objectively reasonable" in light of the purposes of the school mail system. *Id.*

The Fifth Circuit recently warned that the "radically different factual context" in a case before it rendered the "Math Nights" portion of "*Chiu* incapable of providing any meaningful guidance to an educator trying to handle First Amendment concerns" involving a third-grade class party. *Morgan v. Swanson*, 755 F.3d 757, 761 (5th Cir. 2014). The factual context here, likewise, is "radically different" from the cases cited by Little Pencil.

The *Chiu* case makes clear that it is Little Pencil's burden to establish that the District has created a designated public forum. The summary judgment evidence fails to demonstrate, as a matter of law, that the School District intended to open its Jumbotron as a place "open to assembly and debate as a public forum." Rather, it is undisputed that the LISD is simply acting as a proprietor of its revenue-generating Jumbotron.

This Court has recognized the critical importance of considering factually similar cases when examining First Amendment issues, but the cases cited by Little Pencil stray far from the facts of this case. In *Concerned Women for Am., Inc. v. Lafayette Cnty.*, 883 F.2d 32 (5th Cir. 1989), the Court determined that by its practice, the county had created a public forum in the auditorium in the public library. That case dealt with the use of a public space for voluntary attendance at

non-government sponsored functions by interested persons – not with the proprietary function of advertising. Any attendance would be purely voluntary, by those persons interested. By way of contrast, the advertisements appearing on the Jumbotron at the football games will be displayed to all in attendance – students, siblings, and parents who came to watch a high school football game and marching bands – whether they wish to view them or not.

As discussed in the School District's Brief, the correct forum analysis, and the outcome of this case, are controlled by *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and its progeny, including *DiLoreto v. Downey Unified Sch. Dist.*, 196 F.3d 958 (9th Cir. 1999).

This case presents a somewhat unique factual context – paid advertising in a public school setting. The only case cited by Little Pencil in this context is *DiLoreto, supra*. The court there wrote that courts must "focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved." *Id.* at 966, *quoting Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 825 (9th Cir. 1991) (*en banc*). This requires that the court take into account the school's "pedagogical concerns, such as respecting audience maturity, disassociating itself from speech

inconsistent with its educational mission and avoiding the appearance of endorsing" particular views. *DiLoreto*, 196 F.3d at 966 (citations omitted). As in *DiLoreto*, the District here "reasonably could have believed that the controversy and distraction created by political and religious messages raised a potential for disruption of . . . school-sponsored events, particularly as students at these activities would be a captive audience to be had. In addition, the District reasonably could have been concerned that the school would be associated with any controversial views expressed in the advertisements . . .." *Id.* at 968.

In the *DiLoreto* case, nothing indicated that the district had opened the particular forum at issue – paid advertising signs on baseball field fences – to the subject of religion. Given "the potential for disruption and controversy, the District was justified in excluding that subject from the forum." *Id.* at 969. Likewise, in this case, there is no evidence that the particular forum at issue – the Jumbotron – had been opened to the expression of religious viewpoints.

To the cases cited by LISD, we add *Lebron v. Nat'l R.R. Passenger Corp.*, 69 F.3d 650, *amended, reh'g denied*, 89 F.3d 39 (2d Cir. 1995), *cert. denied*, 517 U.S. 1188 (1996). Amtrak, a governmental actor, owned a large billboard, known as the "Spectacular," in New York City's Pennsylvania Station. Thousands of

passengers would pass by it each day. 69 F.3d at 653. Lebron entered into a lease agreement for the billboard with Amtrak's leasing agent, TDI. The lease provided that advertising copy was subject to approval of Amtrak, and if Amtrak "should deem such advertising objectionable for any reason," TDI would "have the right to terminate the contract and discontinue the service without notice." *Id.*

After signing the lease, Lebron submitted the proposed advertisement, which consisted of an allegorical political attack on the Coors (Beer) family and its perceived support of right-wing causes. Amtrak's licensing agreement with TDI stated that all advertisements "shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." *Id.* at 654. Amtrak rejected the ad, stating that its "policy is that it will not allow political advertising on the Spectacular advertising sign." Amtrak's policy was "not committed to writing." *Id.*

The Second Circuit held that in defining the relevant forum, the court must be "focused on the *access sought by the speaker*." *Id.* at 655, *quoting Cornelius*, 473 U.S. at 801 (emphasis added by Second Circuit). It determined that because Lebron had only sought access to the Spectacular, its consideration was limited to that advertising medium. *Id.* at 655-56. Likewise, in this case, the parties and the

Court must focus on the Jumbotron only, as we find no evidence that Little Pencil submitted the advertisement with a request that it be placed at any other District-owned location.

The Second Circuit determined that even though Amtrak did not maintain a written policy regarding access to the Spectacular, its practice was clear, in that it had undisputedly accepted only commercial advertising for that venue. Relying heavily on the *Lehman* case, and subsequent decisions, the Court held that Amtrak's decision, as a proprietor of its revenue-generating advertising venue, "to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable." *Id.* at 658.

The Court disposed of the argument that there had been some "borderline cases" of political advertisements in the past, by observing that even if the Spectacular had been so used in some cases, it still had "not become a forum for ads of such pointed political content as Lebron's." *Id.* at 660.

The leeway that the courts allow governmental entities when they are acting in a proprietary, revenue-raising capacity was demonstrated again in *Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275 (11th Cir. 2003) (*per curiam*). In an effort to maximize its revenue from bus-stop bench ads by

attracting "higher caliber" advertisers, the City decided to stop accepting advertising on that medium from "low caliber" advertisers. As a result, it changed its policy so as to refuse to accept "liquor, tobacco, X-rated movies, adult bookstore, massage parlor, pawn shop, *tattoo parlor*, or check cashing advertising of any nature." *Id.* at 1277 (emphasis added). The plaintiff, a pawn shop, argued that the fact that it had advertised on the bus benches for 14 years prior to the time that the City changed its policy indicated that the benches had become a designated public forum. On cross-motions for summary judgment, the trial court granted the City's motion.

The Eleventh Circuit affirmed, on the authority of *Lehman* and *Cornelius*, as well as *United States v. Kokinda*, 497 U.S. 720 (1990). It determined that the City was acting in a proprietary capacity, because it had demonstrated an intent to use the bus benches to generate revenue, and had not created a public forum open to all advertisers. The Court rejected the pawn shop's argument, and stated that inasmuch as the bus benches were in the nature of a commercial venture, in much the same way as the proprietor of a private sector communication medium, the City "has discretion to develop and make reasonable choices concerning the

type of advertising that may be displayed." *Id.* at 1279, *quoting Lehman*, 418 U.S. at 303.

Having determined that the benches were a nonpublic forum, the Court further held that it would be sufficient if the reasonableness of the exclusion of the rejected advertising was "intuitively obvious or common sensical," whether or not it was supported by empirical evidence. *Id.* at 1280. The Court also took into consideration that the plaintiff – as Little Pencil here – had numerous alternative channels for its advertisement, and had made no showing that it would be unable to utilize them. *Id.* at 1281.

Little Pencil repeatedly lists the various organizations that have advertised in one form or another, but as discussed in *Lebron*, the advertisers and advertisements should be limited to the only forum at issue in this case: the Jumbotron. None of those advertisements are controversial, or as "pointed" as Little Pencil's. None of them present a contrary "viewpoint" to Little Pencil – though as will be discussed further below, it is unclear what protected "viewpoint," if any, the ad itself communicates.

II. The District's decision not to publish Little Pencil's ad on the Jumbotron was reasonable and did not discriminate against any protected viewpoint (Responsive to Parts I and VII of Appellants' Argument).

It is unclear exactly what "viewpoint" Little Pencil's proffered advertisement, unaided by the video on its website, articulates. It can reasonably be interpreted in one of three ways: (1) it promotes tattoos, through a positive association with the most revered figure of the most prevalent religion in the community, state and county; (2) it is a proselytizing ad promoting the Christian religion; or (3) it is an attack against the person of Jesus Christ, branding him as an "outcast" who is "addicted, jealous, faithless," etc., and who has repeatedly violated one of the strictures in one of the books of the Bible: "Do not . . . put tattoo marks on yourselves." Leviticus 19:28 (New International Version ("NIV"), Zondervan 1985).

The confusing, ambiguous nature of the "viewpoint," if any, projected by the Little Pencil advertisement complicates Plaintiffs' case. To the extent that the advertisement is viewed as promoting tattoos, Plaintiffs do not argue that it is entitled to constitutional protection in the present factual context. Little Pencil does not argue in favor of the third plausible viewpoint – that it should be allowed to portray Jesus in a sacrilegious light on the Jumbotron. The only viewpoint of

the three for which it argues is the proselytizing viewpoint. That viewpoint, however, is probably the least likely to occur to a viewer of the ad who is not also familiar with Little Pencil's website.

Little Pencil argues at pp. 21-24 of its Brief for yet a fourth interpretation: that its advertisement essentially simply offers "counseling, rehabilitation and support" services and improvement of "a person's physical, mental and spiritual well-being," and that it is "indistinguishable" from other ads except for its "religious viewpoint." We have reviewed the advertisement top, side, and bottom, and it simply does nothing to promote or offer for sale counseling, rehabilitation, support or self-improvement services. It is nowhere close to the other paid advertising run on the Jumbotron. The fourth interpretation simply is not plausible.

The proffered ad simply does not articulate any viewpoint that is entitled to this Court's protection under the unique facts of this case. We discuss each of the three plausible interpretations of the ad further *seriatim* below.

A. The District's concern with an advertisement that would appear to place tattoos in a favorable light was an appropriate reason to decline the advertisement.

1. Tattooing minors is illegal in the State of Texas, and District policy prohibits the display of tattoos on students or employees.

In Chapter 146 of the Texas Health & Safety Code, the "Tattoo and Certain Body Piercing Studio Act," the Texas Legislature has prohibited a tattooist from tattooing any person younger than 18 years of age. The only exception is to cover a tattoo that is obscene, offensive, gang-related, drug-related, etc., and then only with the consent of the minor's parent or guardian. A minor commits a Class B misdemeanor offense if the minor lies about his or her age to a tattooist. Tex. Health & Safety Code § 146.012 (Vernon 2010).

Pursuant to the Act, the Texas Department of State Health Services has promulgated rules, codified at Title 25, Chapter 229 of the Texas Administrative Code. Any violation of the Act (other than as discussed above), or of the rules adopted thereunder by the Department of State Health Services, is a Class A misdemeanor offense. Tex. Health & Safety Code § 146.018 (Vernon 2010).

Clearly, tattooing minors violates the public policy of the State of Texas. Pursuant to that public policy, the School District has justifiably prohibited the

exhibition of any visible tattoos by its employees and its students, as discussed in the District's Brief. Little Pencil claims that its video depicts turning a negative tattoo into a positive one – but that certainly is *not* depicted on the ad it demanded be displayed on the Jumbotron. The only proposed ad submitted by Little Pencil, and the only one in evidence, depicts nothing but negative tattoos.

2. Tattoos pose the risk of significant health hazards.

It is with good reason that the State prohibits the tattooing of minors, and that the District does all that it can to discourage the practice. The Department of State Health Services requires the tattooist to inform the prospective client of "at least" the following risks: "possibility of discomfort or pain; the possibility of scarring; the possibility of bleeding; the possibility of swelling; the risk of infection; the possibility of nerve damage; and the increased risk for adolescents during certain stages of development." 25 Tex. Admin. Code § 229.406(h).

The Act requires tattooists to utilize aseptic techniques in an effort to prevent the spread of infection. Tex. Health & Safety Code § 146.008 (Vernon 2010). Nonetheless, infections occur, and must be reported. *Id.* § 146.014. Because of the inherent health hazards, the Commissioner of Health is authorized to issue emergency orders, without notice or hearing, if the Commissioner finds,

inter alia, that the "operation of the tattoo studio . . . or the performance of tattooing . . . by the tattooist . . . presents an immediate and serious threat to human health;" or if a "shooting, stabbing, or other violent act or an offense involving drugs" occurs at a tattoo studio, or involves a tattooist. *Id.* § 146.021(a).

Infections can emanate not only from the needles, but also from the ink itself. *Tattoo Inks Pose Health Risks*, U.S. Food and Drug Administration, http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM385186.pdf (February 2014, last visited September 25, 2014). The FDA stated that it was particularly concerned about a family of bacteria "called non-tuberculosis Mycobacteria (NTM) that has been found in recent outbreaks of illnesses linked to contaminated tattoo inks." This bacteria "can cause infections of skin, joints, lungs, and other organs, as well as eye problems." The FDA further warned that in addition to NTM, tattoo inks can also become contaminated by "other types of bacteria, mold and fungi." *Id.*

Tattoo-associated NTM infections in multiple states during the 2011-12 time frame had previously been reported by the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. *Tattoo-Associated Nontuberculosis Mycobacterial Skin Infections: Multiple States, 2011-2012*,

http://www.cdc.gov/mmwr/pdf/wk/mm6133.pdf (August 24, 2012, pp. 653-56, last visited September 25, 2014). Those infections can result in "severe abscesses requiring extensive and multiple surgical debridements," and "are difficult to treat and can require a minimum of 4 months of treatment with a combination of two or more antibiotics." *Id.*

The FDA had also reported that bad reactions to tattoo inks sometimes do not manifest themselves until "years later." In addition to NTM, other types of infection that can result include hepatitis and HIV. Additional health risks include allergies, granulomas, and various complications. *Think Before You Ink, Are Tattoos Safe?* http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143401.pdf (October 2009, last visited September 25, 2014).

Just last month, the FDA issued yet another warning. *Inks Used in Certain Tattoo Kits Cause Infections,* http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM408487.pdf (August 2014, last visited September 25, 2014). In this latest report, the Director of FDA's Office of Cosmetics and Colors was quoted as saying that "tattooing poses a risk of infection to anyone, ..." The report further stated as follows:

> She notes that injecting contaminated ink into the skin or using contaminated needles may result in infections at the site of the tattoo. Signs of localized infection include redness, swelling, weeping wounds, blemishes, or excessive pain at the site. If you experience any of these signs, seek medical care right away. Even after a localized infection has healed, the area may be permanently scarred.
>
> Further, an infection that is left untreated or inadequately treated could spread through the bloodstream (a process known as sepsis). These infections may be associated with fever, shaking chills (rigors), and sweats. If these symptoms arise, treatment with antibiotics, hospitalization and/or surgery may be required.

Certainly it was not unreasonable of the District to refuse to run on the Jumbotron the advertisement submitted by Little Pencil. The District justifiably would not want to run any advertisement on the Jumbotron that could be interpreted by the many young and impressionable minors in attendance at high school football games as placing tattoos in a favorable light, or that might encourage them to be tattooed in violation of State and District policy. Despite Little Pencil's empty claim at p. 15 of its Brief that the advertisement "does the opposite," there is simply nothing in the advertisement itself that does anything to discourage tattoos.

Little Pencil evidently offered to run the ad without the tattoos showing, but we do not find any such advertisement in the summary judgment evidence. Little Pencil's prayer for relief in its Motion for Summary Judgment demanded to

run the "Jesus Tattoo advertisement," presumably the only one in the record. ROA.407; ROA.476. The concept of running the ad without tattoos is purely hypothetical, as no such ad was ever submitted, offered into evidence, or appears in the record.

Even if such an ad had been submitted, its rejection would have been reasonable. Presumably, Little Pencil's website, jesustattoo.org, would still be prominently displayed. That website address alone could convey the message that tattoos are acceptable, by using the word "tattoo" in association with the name of the most revered figure of the largest religion in the community, state and country.

B. The District had a legitimate concern that publishing the advertisement would violate the Establishment Clause.

The School District in its Brief has capably discussed how the Establishment Clause of the First Amendment fully justified its refusal to run Little Pencil's ad on the Jumbotron, to the extent that it can be interpreted as presenting a proselytizing message for the Christian faith. To that discussion, we add the recent case of *Bronx Household of Faith v. Bd. of Educ.*, 750 F.3d 184 (2d Cir. 2014). The New York Board of Education generally allows non-school use of school buildings outside of school hours by third parties. At issue was a regulation

prohibiting use of a school building "for the purpose of holding religious worship services." The court concluded that this exclusion "is constitutional in light of the Board's reasonable concern to observe interests favored by the Establishment Clause and avoid the risk of liability under that clause." *Id.* at 188.

The court rejected the plaintiffs' Free Exercise and Establishment Clause claims, and concluded that if the Board "has a reasonable, good faith concern that making its school facilities available for the conduct of religious worship services would give rise to a substantial risk of violating the Establishment Clause, the permissibility of the Board's refusal to do so does not turn on whether such use of school facilities would in fact violate the Establishment Clause." *Id.* at 197. Because of continuing uncertainty regarding the exact contours of the Establishment and Free Exercise Clauses, the Board only had to have a "reasonable, good faith judgment that it runs a substantial risk of incurring a violation of the Establishment Clause" in order to justify its actions. *Id.* at 198. The Second Circuit noted that the Supreme Court had espoused this view in *Locke v. Davey*, 540 U.S. 712, 718-19, 725 (2004). *Id.* It also cited some of its own prior decisions holding that a governmental entity "must be accorded some leeway" in its efforts to avoid Establishment Clause violations. *Id.* at 198-99.

As discussed in the *Bronx Household* case, this Court need only conclude that the District's action was justified by a reasonable good faith concern that running the ad as submitted would have given rise to a substantial risk of violating the Establishment Clause. We submit that the District has more than discharged that burden.

C. The District justifiably refused to publish an advertisement on the Jumbotron that viewers could well perceive as placing the central figure of one of the world's great religions in a negative light.

Little Pencil acknowledges in its Brief that the Establishment Clause prohibits governmental hostility toward religion. Under the third plausible interpretation of the ad, the District would run a significant risk of being perceived as demonstrating hostility toward the Christian religion by exhibiting the ad on its Jumbotron.

Chapter 19 of the Book of Leviticus in the Bible contains various laws that the "LORD said to Moses," and that Moses was to "Speak to the entire assembly of Israel." One of those, at Verse 28, was "Do not . . . put tattoo marks on yourselves" (New International Version ("NIV"), Zondervan 1985).

We find nothing in the New Testament to the effect that Jesus himself had any tattoos, or that he approved of tattoos. Thus, one could reasonably expect

that a Christian viewer of the ad with a working knowledge of the Old Testament could find the mere presence of the tattoos on the body of a man representing Jesus in Little Pencil's ad – not to mention the terms "outcast, addicted, jealous, faithless," etc. tattooed on his body – as not only controversial, but offensively anti-Christ and anti-Christian.[1]

And it is at least "intuitively obvious or common sensical" that the ad – which the summary judgment evidence shows has been displayed on billboards throughout Lubbock – can be interpreted in this way. A local resident, as early as October of last year, interpreted the ad as "very derogatory," another as "blasphemous." One commentator observed that it is "total blasphemy and dishonors God greatly. It takes the Lord's name in vain . . .." *Tattooed Jesus on Billboards Sparks Controversy in Texas*, www.huffingtonpost.com/2013/10/12/jesus-tattoo-billboard_n_4089928.html (last visited September 25, 2014).

From another commentator: "This all looks like the deceivable, works of Satan, using the same method he used to entice 'Eve'." *Tattooed Jesus:*

[1] We certainly do not mean to attribute these motives to Little Pencil; we simply say that a viewer of the ad, particularly one who had not visited Little Pencil's website and viewed the video thereon, could easily come to this conclusion. Little Pencil repeatedly – and mistakenly – presupposes that a viewer of the ad will immediately appreciate the symbolism of the unseen video.

Blasphemy or Blessing?, www.denisonforum.org/cultural-commentary/856-tattoed-jesus-blasphemy-or-blessing (last visited September 25, 2014).

Another commentator: "[A]s long as it's a tattoo you taking the wrath of God upon you and sign a ticket to hell . . ., as Bible states clearly . . . that no one will enter the Kingdom with the tattoo's." "[P]lease stop this blasphemy you have here." *Id.*

Another commentator: "What would be my first thought of a billboard picture of Jesus with names such as Outcast, Addict, etc.? Honestly, my first thought would be that someone had labeled Him with those terms . . . trying to suggest that He was those things." *Id.*

Another commentator: "[T]o create an image of our God is blasphemy! Then to add insult to injury by marking . . . Leviticus 19:28 ESV." *Id.*

Another commentator: "Jesus would have had nothing to do with putting any such marks like tattoos on His body Himself. He fulfilled the Law perfectly and the Law required that no Hebrew was to do any cutting, or marking, on his body. . . . Marking one's body intentionally is a sign of paganism. . . . While I think the message may be well intentioned, it is a way for the world to be given the idea that Jesus was no different than the pagan priests around Him, and that

these marks, cuttings, would be a normal thing for Him to do. . . . [A]n attempt to discredit the Scripture and Christ as well." *Id.*

The negative reaction to the ad by some Lubbock residents has drawn international attention. *Tattooed Jesus billboard campaign is condemned as blasphemous by Bible Belt residents in city where posters went up,* www.dailymail.co.uk/news/article-2452535/Tattooed-Jesus-billboard-campaign-condemned-blasphemous-Bible-Belt-residents.html#ixzz2yK1NziBJ (last visited September 25, 2014).

Clearly, the ad would have been reasonably viewed as sacrilegious and hostile to the Christian religion by a number of viewers. Little Pencil does not argue that this viewpoint was intended by it, or that the District was required to promote it. But it is a highly plausible interpretation of the ad it submitted. Thus, Establishment Clause considerations, from this perspective as well, justified the District's decision not to display it on its Jumbotron.

Establishment Clause considerations aside, a governmental entity's "interest in avoiding controversy" is a sufficient and legitimate basis for exclusion from a nonpublic forum. *Cornelius*, 473 U.S. at 809-10. At a minimum, the ad would have generated undue controversy, inappropriate to the otherwise festive

atmosphere that should permeate a high school football game. The District, acting as the proprietor of its revenue-generating Jumbotron and revenue-generating football ticket sales, was well within its rights in declining the ad.

III. Board Policy GKB (Local) is valid (Responsive to Parts V and VI of Appellant's Argument).

LISD's Board Policy GKB (Local) represents guidelines, approved by the District's Board of Trustees, for use by the Superintendent in accepting paid advertising on District-owned media, a tiny subset of the available advertising media in the community. If Plaintiffs believed that the policy was poorly worded, or improperly applied by the Superintendent, they could have appealed to the District's policy maker – the Board. As noted by the lower court and the LISD, they failed to do so. Even without the benefit of any clarification that might have been obtained through that process, however, the policy is neither an unconstitutional prior restraint on the Plaintiffs' speech, nor an unconstitutionally vague prohibition of that speech.

A. Board Policy GKB (Local) does not impose an unlawful prior restraint.

The cases cited by Little Pencil on the prior restraint issue all involve governmental entities restricting access to a traditional or designated public

forum, acting as "lawmakers with the power to regulate or license," not as proprietors of revenue-generating media. Those cases are all simply inapposite: *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (prohibiting "public speaking, parades, or assemblies in 'the archetype of a traditional public forum'" [citation omitted]); *Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist.*, 720 F.2d 1429, 1433 (5th Cir. 1983) (by opening use of its mail system, district had created designated public forum in its mail system);[2] *Hall v. Bd. of Sch. Comm'rs*, 681 F.2d 965, 968 (5th Cir. 1983) (unbridled discretion "used to interfere with protected communication rights of the teachers and their representatives"); *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 964-65 (5th Cir. 1972) (newspaper authored and published by students outside of school, and distributed by students on public sidewalk before and after school hours).

B. Board Policy GKB (Local) is not unconstitutionally vague.

In Section VI.A of its Argument, Little Pencil again cites cases dealing with prohibitions on speech – not with the sale of advertising. *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979) dealt with a penal ordinance that restricted solicitation activities at the city airport. The Court's language

[2] The Fifth Circuit panel in the *Ysleta* case attempted to distinguish *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37 (1983). Any continuing vitality to the *Ysleta* case has been limited to, at most, its specific facts. *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350 (5th Cir. 2001).

quoted by Little Pencil on p. 56 of its Brief is preceded, *in the same sentence*, with the following introductory language: "[v]ague statutes are unacceptable partly because they 'encourage arbitrary and erratic *arrests and convictions, ...*'" *Id.* at 823 (emphasis added), *quoting Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (overturning fines and jail sentences for violation of vague vagrancy ordinance). Furthermore, the *Eaves* case was decided before the Supreme Court had refined its forum analysis, and 13 years before the Supreme Court's decision in *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), discussed above and in LISD's Brief.

Likewise, *Reeves v. McConn*, 631 F.2d 377 (5th Cir. 1980) involved a penal ordinance. That ordinance prohibited the use of sound amplification equipment throughout the City of Houston, except under certain circumstances. The Court in *Reeves* held that the portion of the ordinance prohibiting sound amplification that was "unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility," was sufficiently precise to withstand a vagueness challenge. *Id.* at 385-86.

Little Pencil at p. 56 of its Brief correctly quotes from a portion of this opinion, with one significant exception. This Court spoke of the vagueness of a

"statute" – a penal statute. *Id.* at 383. Little Pencil glibly replaces the word "statute" with "[policy]." Little Pencil attempts to misapply the *Reeves* case by purporting to equate a penal ordinance – which prohibited sound amplification anywhere within the city limits of Houston – to the policy in this case, which simply provides direction regarding the advertising that will be accepted on the very limited media owned by the District, and imposes no criminal sanctions and no restrictions whatsoever on Little Pencil's use of the myriad of other media available to it.

The *Shanley* and *Hall* cases are distinguishable for the reasons discussed above. They involved designated public forums, which the District's Jumbotron clearly is not.

Little Pencil mischaracterizes the holding in *Riseman v. Sch. Comm.*, 49 F.2d 148 (1st Cir. 1971). There, the school had a rule that "was obviously devised for the quite different purposes of controlling in-school advertising or promotional efforts of organizations," but was misused to stifle the non-disruptive distribution of student literature. *Id.* at 149. The court did *not*, as Little Pencil claims, strike down the entire regulation as void; rather, it preliminarily enjoined enforcement of the regulation "prohibiting absolutely the distribution on the school grounds . .

. by *students* of leaflets, brochures, or other written forms of expression." *Id.* at 149 n. 2 (emphasis added). The literature in question was nondisruptive political speech, consisting of "an anti-war leaflet and 'A High School Bill of Rights.'" *Id.* at 148.

City of Lakewood v. Plain Dealer Publ'g Co., 46 U.S. 750 (1989) dealt with an ordinance giving a city official unbridled discretion to prohibit or limit the placement of newspaper racks on city sidewalks, a traditional public forum. On p. 58 of its Brief, Little Pencil misquotes the following sentence from the opinion: "This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face." *Id.* at 770. The Court went on to say that "standards absent from the ordinance's face" *could* save the ordinance from a vagueness challenge, to the extent they had been "made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Id.* None of those factors were present in that case.

The policy in this case does not limit speech within any traditional public forum, such as city sidewalks. Even assuming *arguendo* that *City of Lakewood* applies, its conditions are satisfied here. The policy explicitly states that the overriding purpose of accepting advertising is generation of revenues. The policy

expressly incorporates the First Amendment, which necessarily includes binding judicial constructions of the First Amendment in similar factual contexts. Moreover, as demonstrated by the School District, its practice had been to accept only advertising of a non-controversial, commercial nature for the Jumbotron. Thus, the policy at issue does contain limitations on the Superintendent's discretion, "by textual incorporation, binding judicial or administrative construction, or well-established practice."

The prior restraint and vagueness cases cited by Little Pencil simply do not aid its cause. Much more on point than any of the cases cited by Little Pencil is the *Lebron* case discussed above. There, the Second Circuit rejected the argument that the unwritten "policy" against political advertisement was void for vagueness. The court held that the "fact that a policy is not committed to writing does not of itself constitute a First Amendment violation." 69 F.3d at 658, *citing City of Lakewood*, *supra*, 486 U.S. at 770. Notwithstanding the language of its licensing agreement, Amtrak's historic practice of reserving the Spectacular for commercial advertisement was sufficient to dispel the argument that it would use "unbridled discretion" to reject only political advertisements with which it disagreed.

The court held that because Lebron had actually submitted only one proposed advertisement, and only for the Spectacular, its attempt to argue against Amtrak's policies "generally, rather than on the Spectacular, amounts, in substance, to a facial challenge to those policies as they might be applied to advertisements other than Lebron's and to locations not at issue," and that Lebron did not have standing to make any such challenge. 89 F.3d at 39 (as amended on denial of rehearing). Such a general challenge might conceivably be applicable to "the government in its role as a regulator, not as a proprietor." The concerns that would justify such a challenge were "not implicated by Amtrak's role as the proprietor of Penn Station, essentially seeking to derive revenues from the sale of advertising while minimizing interference with or disruption of the station's commercial function." 69 F.3d at 659-60.

Likewise, in this case, the School District is acting as a proprietor, not a "regulator." Facial challenge analysis is simply inapplicable. As in *Lebron*, Policy GKB (Local) must be viewed in conjunction with the District's practice thereunder. Because the Jumbotron is so new, the practice history is short; but that short history cannot be used to penalize the District when it rejects an advertisement

that is more "pointed" than, and unlike, any other advertisement that it has ever received for that venue.

Board Policy GKB (Local) states that the purpose of paid advertising is to raise revenues for the District. It expressly negates the concept of District-owned advertising media being used "for the purpose of establishing a forum for communication." It expressly states that the rejection of any advertisement must be "in a manner consistent with the First Amendment." Little Pencil has failed to demonstrate that more detailed written guidelines are legally required in the context of this case. More detailed guidelines alone would not have entitled Little Pencil to run the ad on the Jumbotron, for the multiple reasons discussed in the lower court's Order, the School District's Brief, and hereinabove.

CONCLUSION

This case simply involves a school district, acting as a proprietor, exercising judicious control over the paid advertisements placed on its revenue-producing Jumbotron. Utilization of the correct forum analysis leads inexorably to the conclusion that the School District's Jumbotron is a nonpublic forum; that the District was acting as the proprietor of that advertising medium; that its advertising policy was reasonable and valid; that its refusal to run Little Pencil's ad

on the Jumbotron at high school football games was reasonable and did not discriminate against any protected viewpoint; and that, therefore, all of Plaintiff's claims are utterly lacking in merit and must be rejected.

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae Texas Association of School Boards Legal Assistance Fund respectfully prays that this Honorable Court affirm the Judgment of the District Court.

Respectfully submitted,

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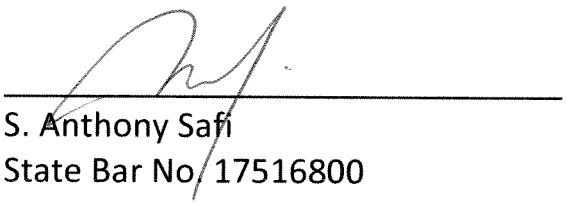
By: 

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CERTIFICATE OF SERVICE

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