IN THE SUPREME COURT OF TEXAS

NO. 14-0453

COTI MATTHEWS, ON BEHALF OF HER MINOR CHILD, M.M., ET AL., PETITIONERS,

v.

KOUNTZE INDEPENDENT SCHOOL DISTRICT, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

JUSTICE WILLETT, concurring.

One of the more memorable scenes in *The Lion King* occurs as Mufasa and Simba sit high atop Pride Rock overlooking Mufasa's kingdom.[1] In this granddaddy of all father-son moments, Mufasa shows Simba the territory he will inherit as king: "A king's time as ruler rises and falls like the sun. One day, Simba, the sun will set on my time here, and will rise with you as the new king." Simba is awestruck: "And this will all be *mine*?" "Everything," says Mufasa. "Everything the light touches," murmurs Simba in wonder. But then Simba spots dimness in the distance and turns to Mufasa for an explanation: "What about that shadowy place?" Mufasa replies, "That's beyond our borders. You must never go there, Simba."

In narrowly deciding that the school district's policy change did not moot the controversy in this case, the Court today rightfully stays within the borders of its authority, and I concur in full. I write separately, however, to ask, "What about that shadowy place?" The shadowy place in this

[1] THE LION KING (Walt Disney Pictures 1994).

case is well camouflaged by general phrases like "plaintiffs' claims" and "the constitutional challenge" in today's writings. The reality is that we know there is a live controversy, but we don't know much else. It is unclear from this record which claims are live, and consequently, what this case means for religious liberty—Texans' "natural and indefeasible right to worship Almighty God according to the dictates of their own conscience."[2]

A brief review of the facts illustrates my concern. Cheerleaders of Kountze Independent School District (KISD) profess deeply held religious beliefs. Before every football game, they construct and display run-through banners that KISD players—the mighty Kountze Lions—tear through as they storm the field. For years, the cheerleaders have placed inspirational religious messages on the banners. The messages are often based on Bible verses:

"A lion, which is strongest among beasts and turns not away from any."[3]

"I can do all things through Christ who strengthens me."[4]

"If God is for us, who can be against us?"[5]

"But thanks be to God which gives us victory through our Lord Jesus Christ."[6]

The cheerleaders' stated purpose was to express a positive, encouraging message in good sportsmanship, rather than the more fiery expressions displayed on other banners such as "Pluck the Eagles" or "Beat the Bulldogs."

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[2] TEX. CONST. art. 1, § 6.

[3] *See Proverbs* 30:30.

[4] *See Philippians* 4:13.

[5] *See Romans* 8:31.

[6] *See* 1 *Corinthians* 15:57.

In late 2012, the Freedom from Religion Foundation sought to uproot this tradition. The Foundation alleged in a letter to KISD that the cheerleaders' banners violated the Establishment Clause of the United States Constitution. The Foundation demanded that KISD "take immediate action to end the practice of displaying religious messages before school-sponsored events." KISD opted for preemptive capitulation (a common response) and promptly acceded to the Foundation's "ban the banners" dictate.

The cheerleaders sued KISD and obtained a temporary injunction preventing KISD's prohibition of the banners. The cheerleaders claimed that KISD's prohibition violated their free speech and free exercise rights under the Texas Constitution. They sought permanent relief preventing KISD from further violating those rights. For its part, KISD later concluded that the Establishment Clause did not require KISD to prohibit the banners and permitted the cheerleaders' banners subject to KISD's claimed "right to restrict the content of school banners." KISD denied, however, that it had violated the cheerleaders' free speech and free exercise rights and sought declaratory relief stating that the Establishment Clause did not require it to prohibit the cheerleaders' banners. In the parties' various motions, they vigorously debated whether the speech on the banners was the cheerleaders' private speech or KISD's speech.

That debate culminated in competing motions for summary judgment. KISD's motion repeated its request for declaratory relief on Establishment Clause grounds. The cheerleaders' motion proposed two solutions: (1) the trial court could sign a proposed order that virtually mirrored KISD's request for declaratory relief; or (2) the trial court could hold that the cheerleaders' speech is private speech uttered in a public forum. As to Option 1, the cheerleaders told the trial court that "KISD's sudden adoption of the Plaintiff's position that religious messages on the Cheerleaders' run-through banners are constitutionally permissible vindicates the

Cheerleaders' rights and brings this case to an end. All that is required is an appropriate order by the Court." In their words, the cheerleaders sought "the same relief" sought by KISD. The trial court chose Option 1 and signed the proposed order, which, in relevant part, states "[n]either the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events."

Both sides won, right?[7] Apparently not. News coverage following the trial court's order was replete with the parties' conflicting views of the order. KISD's attorneys said the order affirmed that the banners contain the school's speech, while the cheerleaders' attorneys said the order affirmed that the banners contain the cheerleaders' private speech.[8]

The record does not yield a conclusive answer. At the hearing on the parties' pending motions, the cheerleaders told the trial court that the signed order would be an *alternative* to the

[7] This question alone raises concerns about whether the order was advisory if the parties indeed sought the same relief.

[8] *See, e.g.*, *Texas Judge Rules for Cheerleaders in Bible Banner Suit*, FOX NEWS (May 8, 2013), http://www.foxnews.com/us/2013/05/08/texas-judge-rules-for-cheerleaders-in-bible-banner-suit/ (school district attorney stating the granted motion says "banners are the speech of the school, not private speech, so the school has a right to have editorial control over banners," versus cheerleaders' attorney stating "there is no ambiguity in the ruling and that the banners are the cheerleaders' protected private speech"); Jim Forsyth, *Texas Judge Rules that Cheerleaders May Display Bible Banners*, REUTERS (May 8, 2013, 6:58 PM), http://www.reuters.com/article/2013/05/08/us-usa-texas-cheerleaders-idUSBRE94718W20130508 (cheerleaders' attorney stating "[t]he message that this decision sends is it is impermissible for the government to ban the private speech of students"); Cindy Carcamo, *Texas Court Backs Cheerleaders' Display of Religious Banners*, LOS ANGELES TIMES (May 8, 2013), http://articles.latimes.com/2013/may/08/nation/la-na-texas-cheerleaders-20130509 (cheerleaders' attorney stating "I think [the order] has an impact across the country to let people know there is a big difference between the government [promoting] a message and cheerleaders privately promoting their own message" versus KISD's attorney citing a need "for further clarification" and stating "[w]e don't think you have a free-speech right to put up these banners because this is the school district's function"); Sarah Moore & Cassie Smith, *Anti-Religion Group Offering Fight After Judge Oks Kountze Bible Banners*, BEAUMONTENTERPRISE (May 9, 2013, 9:57 AM), http://www.beaumontenterprise.com/news/article/Anti-religion-group-offering-fight-after-judge-4502359.php (cheerleaders' attorney stating, "The establishment (of religion) clause just does not apply to the cheerleaders . . . . State law says it's their banners, not the school district's banners."); *Victory: Judge Says Texas Cheerleaders Can Display Bible Verse Banners*, FOX NEWS INSIDER (May 9, 2013, 12:06 PM), http://insider.foxnews.com/2013/05/09/judge-says-texas-cheerleaders-can-display-bible-verse-banners (observing "[t]he battle might not be over just yet though, since the school district and the cheerleaders' attorneys disagree on whether the ruling allows administrators 'editorial control' over what is written on the banners").

court having to decide whether their speech was private speech. The cheerleaders said "the order that's in front of the Court right now actually does not ultimately take sides on that question [of government-versus-private speech] but still gives us the relief we are willing to live with in order to be able to bring this case to a conclusion." The day before, however, in support of their summary-judgment motion, the cheerleaders had relied upon the text of the temporary injunction order, arguing that "[a]s the Court has already determined the messages on the Cheerleaders' banners [are] private speech[,] no additional ruling regarding the nature of the speech is necessary at this time." The temporary injunction order had indeed described the banner speech as "private religious expression." Additionally, the cheerleaders contended that "the Establishment Clause . . . is inapplicable to private speech." which, taken together with the text of the temporary injunction order, could explain the cheerleaders' understanding that the trial court's order designates the banner speech as private speech.

Bottom line: We don't know. What does the trial court's order accomplish? What claims have been preserved? What claims have been waived? In our pitched adversarial system, it is not uncommon for litigants to talk past each other, and uncertainty pervades the parties' briefs to this Court. But answers to these questions are critical for they speak to the fundamental free speech and free exercise rights enshrined in our Constitution.

Because this is an interlocutory appeal, the Court appropriately does not address those core merits issues, rendering Mufasa's admonition that Simba "never go there" inapposite for the moment. But if this case returns to the trial court, a future appellate court, including this one, may well be *required* to go there. My concern is that this case may return to the trial court for a final decision only to reappear on our docket with no clarity as to what this order achieves and what claims are actually live. If that situation arises, the parties and trial court would do well to confront

the shadowy place in this litigation and clarify with precision the status of this order and the cheerleaders' claims.

Don R. Willett
Justice

OPINION DELIVERED: January 29, 2016