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 DEVINE delivered the opinion of the Court.

JUSTICE WILLETT filed a concurring opinion.

JUSTICE GUZMAN filed a concurring opinion.

JUSTICE BOYD did not participate in the decision.

The sole issue in this interlocutory appeal is whether the defendant's voluntary cessation of challenged conduct rendered the plaintiffs' claims for prospective relief moot. The court of appeals held that it did. ___ S.W.3d ___, 2014 WL 1857797, at *4-8 (Tex. App.—Beaumont 2014) (mem. op.). Because the challenged conduct might reasonably be expected to recur, we reverse and remand.

Middle school and high school cheerleaders, through their parents, sued Kountze Independent School District after the District prohibited them from displaying banners containing religious signs or messages at school-sponsored events. The District responded by filing a plea to the jurisdiction based on governmental immunity and lack of standing. The District later supplemented that plea to

assert mootness in light of its subsequent adoption of Resolution and Order No. 3, which provides that the District is "not required to prohibit messages on school banners . . . that display fleeting expressions of community sentiment solely because the source or origin of such message is religious," but "retains the right to restrict the content of school banners."

The trial court denied the District's plea, and the District took an interlocutory appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). Without reaching the governmental immunity or standing issues, the court of appeals reversed the trial court's order in part, finding all the cheerleaders' claims, except for attorney's fees, moot in light of the District's adoption of Resolution and Order No. 3. ___ S.W.3d at ___, 2014 WL 1857797, at *4–8. That is, the court of appeals held that the cheerleaders' claims for declaratory and injunctive relief are moot because the District voluntarily discontinued its prohibition on the display of banners containing religious signs or messages at school-sponsored events. The cheerleaders then petitioned this Court for review.

We must first consider the matter of our own appellate jurisdiction. Interlocutory appeals, such as this one, are generally final in the courts of appeals. *See* TEX. GOV'T CODE § 22.225(b)(3). Exceptions to this general rule exist, however, such as when the court of appeals holds differently from a prior decision of another court of appeals. *Id.* § 22.001(a)(2). Decisions that hold differently are defined to include those that have an "inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." *Id.* § 22.225(e). Since another court of appeals has required defendants to admit that their prior policies were unconstitutional in order to moot a case, and the District has not done so in this case, we have such an inconsistency. *See Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12(Tex. App.—Austin 2008,

no pet.); *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no. pet.); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App.—Austin 1993, writ denied).

The application of the mootness doctrine is reviewed de novo on appeal. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 149-50 (Tex. 2012). The mootness doctrine applies to cases in which a justiciable controversy exists between the parties at the time the case arose, but the live controversy ceases because of subsequent events. *Id.* at 162. It prevents courts from rendering advisory opinions, which are outside the jurisdiction conferred by Texas Constitution article II, section 1. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam).

A defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. *Jacks v. Bobo*, No. 12–07–00420–CV, 2009 WL 2356277, at *2 (Tex. App.—Tyler 2009, pet. denied) (mem. op.) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). If it did, defendants could control the jurisdiction of courts with protestations of repentance and reform, while remaining free to return to their old ways. *Id.* at *2-3. This would obviously defeat the public interest in having the legality of the challenged conduct settled. *Id.*

Nonetheless, dismissal may be appropriate when subsequent events make "absolutely clear that the [challenged conduct] could not reasonably be expected to recur." *Bexar Metro. Water Dist.*, 234 S.W.3d at 131 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Persuading a court that the challenged conduct cannot reasonably be expected to recur is a "heavy" burden. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

As a threshold matter, the parties dispute the scope of the challenged conduct. The cheerleaders contend that they are challenging the District's ongoing policy of treating their banners as "government" speech. The District contends that the cheerleaders are only challenging a discrete action by the District—the District's September 18, 2012, announcement that "student groups [are not allowed] to display any religious signs or messages at school sponsored events." In essence, the District contends that in opposing their plea the cheerleaders are attempting to reframe the controversy as broader than they state in their petition. We do not need to resolve this dispute, however, because, as demonstrated below, this case is not moot, even if the cheerleaders' claims are limited to the District's discrete action on September 18, 2012.

The District no longer prohibits the cheerleaders from displaying religious signs or messages on banners at school-sponsored events. But that change hardly makes "absolutely clear" that the District will not reverse itself after this litigation is concluded, without the cheerleaders' requested declaratory and injunctive relief. *See Bexar Metro. Water Dist.*, 234 S.W.3d at 131. Throughout this litigation, the District has continually defended not only the constitutionality of that prohibition, but also its unfettered authority to restrict the content of the cheerleaders' banners—including the apparent authority to do so based solely on their religious content. In fact, while the District has indicated it does not have any current "intent" or "plan" to reinstate that prohibition, the District has never expressed the position that it could not, and unconditionally would not, reinstate it. The District's stance is a significant factor in the mootness analysis, and one which prevents its mootness argument from carrying much weight. *See Lakey*, 278 S.W.3d at 12 (finding plaintiffs' claims were not moot where defendant had not admitted unconstitutionality of challenged policy); *Bexar Metro.*

Water Dist., 234 S.W.3d at 131 (finding plaintiff's claims against water district were not moot where district had not admitted it was acting outside of its enabling act); *Del Valle Indep. Sch. Dist.*, 863 S.W.2d at 511 (finding challenge to at-large election scheme was not moot "[w]ithout a declaration by the court or an admission by [the defendant] that the at-large system was unconstitutional"); *see also Lubbock Prof'l Firefighters v. City of Lubbock,* 742 S.W.2d 413, 419 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.) (finding plaintiffs' claims were not moot based on defendant's "vigorous trial and appellate opposition to the major claims advanced [by plaintiffs]," which indicated that the defendant had no intention of permanently discontinuing its challenged practices).

Indeed, while there are cases where the defendant's voluntary conduct yielded mootness in the absence of an admission by the defendant that the challenged conduct was illegal, those cases generally involved conduct that could not be easily undone, and thus foreclosed a reasonable chance of recurrence. *See Robinson v. Alief Indep. Sch. Dist.,* 298 S.W.3d 321, 326 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (finding mootness after defendant expunged plaintiff's personnel file of complained-of material); *Fowler v. Bryan Indep. Sch. Dist*., No. 01–97–01001–CV, 1998 WL 350488, at *6–7 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication) (finding mootness after defendant adopted peer sexual harassment policies and training plaintiff sought). This is not such a case: the District's September 18, 2012, prohibition could be easily reinstated.

This case is instead like *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841 (Tex. App.—Austin 2002, pet. denied). There, the state sent a letter threatening Seton with statutory penalties of "no less than the amount of $153,000" for failing to file certain annual

reports. *Id*. at 844. The statute in question provided a civil penalty of no more than $10,000 for "each act of violation," which the state interpreted to mean each day of violation. *Id.* Seton, however, interpreted it to mean each annual report, and filed a declaratory judgment action against the state to that effect. *Id.* After Seton sued, the state withdrew its letter, and conceded in its counterclaim that $10,000 per report was the maximum civil penalty that it sought for the violations at issue. *Id*. at 844–45. The state, however, refused to concede that it misinterpreted the statute or that $10,000 per report was the maximum statutory penalty that it may assess in the future. *Id.* The state nonetheless argued that its conduct had mooted Seton's claims. *Id.* The court of appeals disagreed. *Id.* at 846-47. It held Seton's claims were not moot, because the state's voluntary abandonment of its efforts to collect the $153,000 in the context of the pending lawsuit, without other action, provided no assurance that the state would not adopt its earlier statutory interpretation in future disputes with Seton. *Id*. at 849.

Like the state's voluntary abandonment in *Seton*, the District's voluntary abandonment here provides no assurance that the District will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future. Indeed, Resolution and Order No. 3 only states the District is not *required* to prohibit the cheerleaders from displaying such banners, and reserves to the District unfettered discretion in regulating those banners–including the apparent authority to do so based solely on their religious content. Thus, like *Seton*, this case is not moot.

Accordingly, we grant the cheerleaders' petition for review and without hearing oral argument, TEX. R. APP. P. 59.1, reverse the court of appeals' judgment and remand the case to that court for further proceedings.

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John P. Devine
Justice

Opinion delivered: January 29, 2016