IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHRISTA SCHULTZ , et al	§	
Plaintiffs	§	
	§	
vs.	§	**CIVIL ACTION NO. 5:11-CV-422**
	§	
MEDINA VALLEY INDEPENDENT	§	
SCHOOL DISTRICT,	§	
Defendant	§	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant Medina Valley Independent School District ("Medina Valley ISD," "MVISD," "School District" or "the District") and files its Motion for Summary Judgment, and in support of such would show the following:

I. STATEMENT OF THE CASE AND RELEVANT PROCEDURAL BACKGROUND

1. Plaintiffs Christa Schultz, Danny Schultz, Trevor Schultz, and Corwyn Schultz (hereinafter collectively referred to as "Plaintiffs") have sued Medina Valley Independent School District, alleging that the District has violated their First Amendment Constitutional rights. (Dkt. Nos. 1, 75). Specifically, Plaintiffs claim that the District has violated the Establishment Clause by permitting student speakers at graduation and football games to pray during their remarks. (Dkt. No. 75 at ¶¶3, 115.) Additionally, Plaintiffs allege that school employees have prayed with students at school, made religious remarks at school, and/or had crosses or other religious symbols in their classrooms in violation of the Establishment Clause. (*Id.*) Plaintiffs seek injunctive relief, declaratory relief, nominal damages, and attorneys' fees. (*Id.* at ¶¶119-124.) On December 9, 2011, Defendant filed its Second Motion to Dismiss, asserting that Plaintiffs lack standing on all of their equitable claims and on their nominal damage claims for which they

lack injury in fact. (Dkt. No. 98). Defendant denies that it has violated the First Amendment in any way, and now files this its Motion for Summary Judgment, asking this Court to enter a judgment as a matter of law denying all of Plaintiffs' claims.

2. Pursuant to Local Rule CV-7 (c), attached to this Motion for Summary Judgment and incorporated by reference for all purposes is Appendix: Defendant's Evidentiary Summary of Material Facts in Support of Motion for Summary Judgment (hereinafter referred to as "Appendix") and its attached evidentiary exhibits, which prove as a matter of law that Defendant did not violate Plaintiffs' rights under the Constitution.

II. SUMMARY JUDGMENT STANDARD

3. The summary judgment standard is well known by this Court. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). In the case at bar, Plaintiffs make conclusory allegations of violations of law and cannot provide evidence to establish the necessary elements of their claims. Moreover, the District has submitted substantial summary judgment evidence to negate elements of Plaintiffs' causes of action, thereby establishing its right to summary judgment as a matter of law.

III. THE SUMMARY JUDGMENT EVIDENCE

4. The District incorporates by reference for all purposes the items attached to and made a part of this Motion for Summary Judgment in Appendix: Defendant's Evidentiary Summary of Material Facts in Support of Defendant's Motion for Summary Judgment.

IV. ARGUMENT AND AUTHORITIES

5. As discussed in more detail *infra*, Defendant is entitled to summary judgment on Plaintiffs' claims. Plaintiffs Christa, Danny, and Trevor Schultz' claims based on events occurring before May 26, 2009 are barred by statute of limitations. Additionally, Plaintiffs

cannot prove essential elements of their §1983 claims; that is, they have not alleged a constitutional violation, and they cannot establish that an official policy or custom of the District resulted in the alleged promotion of religion at the District.

A. STATUTE OF LIMITATIONS BARS CLAIMS

6. The Court must deny Danny, Christa, and Trevor's claims of alleged constitutional violations that are alleged to have occurred outside the applicable two-year statute of limitations period. Texas' two year statute of limitations applies to cases brought under §1983 for First Amendment violations. *See Hitt v. Connell*, 301 F .3d 240, 2 46 (5th Cir. 2002); *Piotrowski v. City of Houston*, 237 F .3d 567, 576 (5th Cir.), *cert. denied,* 534 U.S. 820 (2001); *see also* TEX. CIV. PRAC. & REM. CODE ANN. §16.003 (Vernon 2005). The limitations period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Piotrowski*, 237 F .3d at 576. The limitations period is tolled until the plaintiff turns 18 years old. TEX. CIV. PRAC. & REM. CODE ANN. §16.001 (Vernon 1987). Here, Plaintiffs filed suit on May 26, 2011 (Dkt. No.1). Trevor turned 18 years old on October 3, 2008, giving him until October 3, 2010 to file any claims he had prior to his 18th birthday, and Corwyn turned 18 on July 26, 2011. (Ex. A1 at 8:25; 9:1; Ex. A2 at 8:3-4). Christa and Danny Schultz are Corwyn and Trevor's adult parents. (See Ex. A3 at 9:16-17; Ex. A4 at 8:2-3). Any claims Danny, Christa and Trevor have that occurred before May 26, 2009 are time-barred by the statute of limitations. Trevor had until October 3, 2010 t o file any claim for injury that occurred while he was a minor. Thus, the following claims are barred by the statute of limitations:

a. **Football games-** Other than the football game they attended in a blatant attempt to create standing in the Fall of 2011 (*see* Dkt. No. 98 (which is incorporated by

reference for all purposes) at ¶21), Christa and Danny did not attend any football games in the Fall of 2010. The last time Christa and Danny had heard any student remarks, including any alleged prayer, at a Medina Valley High School football game was in the Fall of 2008, clearly outside the limitations period in this case. (*See* Appendix at ¶61). Therefore, the Court must deny their claims regarding football games. The last football game of Trevor's senior year was in the Fall of 2008, which is likewise outside his limitations period. (*See* Appendix at ¶62).

b. **Graduations –** The graduation attended by Plaintiffs Trevor, Christa, and Danny Schultz in 2008 is outside the limitations period, and any claims concerning the 2008 graduation should be denied as a matter of law. (*See* Appendix at ¶53).

c. **Trevor's claims** - The only claims Trevor has within his limitations period are those occurring May 26, 2009 or later. He graduated on June 6, 2009, and his last day of school finals his senior year was June 4, 2009. (Ex. V). Thus, he only had 10 days within which he was at school at Medina Valley High School that are within his limitations period. He was a student in Ms. Griggs' class his sophomore year of High School, which was approximately 2007. (Ex. O). Likewise, Trevor's claims concerning alleged prayer in his soccer team are barred by the statute of limitations. The last day of his soccer team season his senior year of high school was March 20, 2009 – two month outside his limitations period. (Ex. M, N). Accordingly, this Court should deny Trevor's claims regarding Coach Payne and the soccer team, Ms. Griggs' classroom, and any other claims he had occurring before May 26, 2009.

B. PLAINTIFFS' §1983 CLAIMS FAIL

1. No Constitutional Violation Occurred.

7. To prevail on a claim under §1983, Plaintiffs must prove: (1) that a constitutional violation occurred, and (2) that the defendant was legally responsible for that violation. *Collins*

v. City of Harker Heights, Texas, 503 U.S. 115, 120 (1992); *see Leffall v. Dallas Indep. Sch. Dist.,* 28 F.3d 521, 52 5 (5th Cir.1994). Here, Plaintiffs allege the following purported constitutional violations: (1) the promotion of religion through religious remarks or prayers by school employees and administrators (Dkt. No. 75 at ¶¶31, 34-42, 46, 53-54, 56-60, 64-66), (2) the promotion of religion by school employees and administrators through the display of religious objects (Dkt. No. 75 at ¶¶47-51), and (3) the promotion of religion by the District's policy or custom of allowing student speakers to pray at football games, graduations, and/or extra-curricular events (Dkt. No. 75 at ¶¶2, 61, 76, 82-85, 91-102, 105).

8. There are two distinct and oftentimes clashing constitutional rights expressed in the First Amendment to the U.S. Constitution: the Establishment Clause provides that "Congress shall make no law respecting the establishment of religion. . ." and the Free Exercise Clause provides that "Congress shall make no law. . . prohibiting the free exercise [of religion]." U.S. CONST. AMEND. 1; *see Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985) (both clauses apply to governmental bodies, including school districts, through Fourteenth Amendment). In describing current Establishment Clause jurisprudence, the Fifth Circuit noted in *Doe v. Duncanville Independent School District*, "[W]e believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence." 994 F.2d 160, 166 n7 (5th Cir. 1993). "Establishment Clause challenges are not decided by bright-line rules, but on a case-by-case basis with the result turning on the specific facts…. The inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Pelphrey v. Cobb County, Ga.,* 547 F.3d 1263, 1268-69 (11th Cir. 2008).

9. The purpose of the Free Exercise and Establishment Clauses of the First

Amendment, as explained by the U.S. Supreme Court, is "to prevent, as far as possible, the intrusion of either [the church or the state] into principles of the other." *Lemon v. Kurtzman* 403 U.S. 602, 614 (1971). The government may not demonstrate a preference for one particular sect or creed, including a preference for Christianity over other religions or a preference for religion over non-religion. *County of Allegheny v. Americans Civ. Liberties Union*, 492 U.S. 573, 604-05 (1989). Typically, to determine whether a p articular governmental practice violates the Establishment Clause, a court uses what is commonly referred to as the "*Lemon* test," based on the U.S. Supreme Court case *Lemon v. Kurtman*, 403 U.S. 602 (1971). To pass constitutional muster under the *Lemon* test, a governmental practice must (1) have a secular purpose, (2) neither advance nor inhibit religion in its principal or primary effect, and (3) not foster an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13; *County of Allegheny*, 492 U.S. at 592.

10. However, the Supreme Court also has often found it unnecessary to rely on *Lemon* in deciding Establishment Clause cases, refusing to be "confined to applying the *Lemon* principles in all cases 'in this sensitive area.'" *Warnock v. Archer*, 380 F.3d 1076, 1082 (8th Cir. 2004) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)); *see Lee v. Weisman,* 505 U.S. 577, 587 (1992); *Marsh v. Chambers*, 463 U.S. 783, 786-95 (1983). Courts have crafted a modified-*Lemon* endorsement inquiry, which provides that the "government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred." *See e.g., County of Allegheny,* 492 U.S. at 595; *Lynch*, 463 U.S. at 687-94 (O'Connor, concurring); *American Civil Liberties Union v. Deweese*, 633 F.3d 424, 431 (6th Cir.), *cert. denied*, 132 S.Ct. 368 (2011); *O'Connor v. Washburn Univ.,* 416 F.3d 1216, 1224 (10th Cir. 2005); *Nichol v. Arin Intermediate Unit 28*, 268

F. Supp.2d 536, 549 (W.D. Pa. 2003).

11. In looking at purpose, the court will give deference to the government actor's stated reasons. *Deweese,* 633 F.3d at 431. However, the court will also look at not just the government's stated purpose behind its speech but also look through the eyes of an "objective observer." *Deweese*, 633 F.3d at 432; *Trunk v. City of San Diego,* 629 F.3d 1099, 1108 (9th Cir. 2011). Under this endorsement test, the government violates the Establishment Clause when it acts in a manner that a reasonable person would view as an endorsement of religion. *Deweese*, 633 F.3d at 434. The legality of the government's actions does not turn on how Plaintiffs personally perceive the government's actions but how a reasonable observer would perceive them. *Weinbaum v. Las Cruces Pub. Sch.,* 541 F.3d 1017, 1031 (10th Cir. 2008). The challenged practice must have the *principle or primary* effect of advancing or endorsing religion. *Id.* (quoting *Bauchman v. West High Sch.*, 132 F.3d 542, 555 (10th Cir. 1997)), *cert. denied* 524 U.S. 953 (1998). However, the Supreme Court has pointed out that the word "endorsement" is not "self-defining." *County of Allegheny*, 492 U.S. at 593. The prohibition on "endorsement" of religion precludes the governmental entity from "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred,*" but the term is closely linked to the term "promotion." *Id.* Whether a reasonable observer would perceive the challenged action as an action by the governmental body is a question of fact; whether the challenged action is an endorsement of religion is a question of law. *Joki v. Board of Educ. of Schuylerville Central Sch. Dist.,* 745 F. Supp. 823, 827, 829 (N.D. N.Y. 1990); *see Lynch,* 465 U.S. at 694 (O'Connor, J., concurring) (whether a government activity constitutes endorsement of religion is largely question of law); *Foremaster v. City of St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989) (finding issue of material fact regarding how average observer would interpret city logo), *cert.*

denied, 495 U.S. 910 (1990).

12. In analyzing Establishment Clause claims, courts have taken into consideration several factors, including the context in which the alleged violation occurs, the permanence of the alleged unconstitutional display, the location of the alleged violation, and the passivity of the alleged violation. *See Clever v. Cherry Hill Township Bd. of Educ.,* 838 F. Supp. 929, 937-38 (D. N.J. 1993); *see also County of Allegheny,* 492 U.S. at 573 (finding context of display is critical to determine whether endorsement of religion occurred); *Edwards v. Aguillard,* 482 U.S. 578, 583-84 (1987) (noting Court is vigilant in monitoring compliance with Establishment Clause in school setting); *Lynch,* 465 U.S. at 686 (discussing passive symbol of crèche); *Stone v. Graham,* 449 U.S. 39, 41 (1980) (holding unconstitutional permanent display of Ten Commandments in school); *Deweese*, 633 F.3d at 434 (requiring inquiry to include "totality of circumstances surrounding the display"). "Every government practice [is] judged in its *unique circumstances* to determine whether it constitutes an endorsement or disapproval of religion." *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring). The context in which a symbol appears is critical because it may determine what viewers fairly understand to be the purpose of the display, and may negate any message of endorsement that the religious symbol might otherwise evoke. *County of Allegheny,* 492 U.S. at 573. Entanglement with religion must be "excessive" before it implicates the Establishment Clause. *Agostini v. Felton*, 521 U.S. 203, 233 (1997). "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden v. Perry,* 545 U.S. 677, 690 (2005).

13. Additionally, a crucial difference exists between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Exercise and Free Speech Clauses protect. *See Board of Educ. Of Westside Community*

Schools (Dist. 66) v. Mergens, 496 U.S. 226, 250 (1990). The Establishment Clause does not prohibit all religious expression in the public schools. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (citing *Engel v. Vitale,* 370 U.S. 421, 430 (1962)). Often, as in this case, the school "faces the difficult task in complying with its Establishment Clause responsibilities without infringing on the Free Exercise Clause rights" of its students and employees. *See Allen v. School Bd. for Santa Rosa County, Fla.,* 782 F. Supp.2d 1304, 1323 (N.D. Fla. 2011). In *Allen*, the school district was sued by students for various Establishment Clause violations and ultimately entered into a consent decree in which it agreed to prohibit teachers and school employees from displaying any religious symbols or quotations in their classrooms. *Id.* at 1311 n.8. Despite resolving the students' claims by entering into a consent decree, the school district was faced with another lawsuit this time brought by employees and parents concerning, among many things, the prohibition of religious items on their desks. *Id.* at 1313. In deciding whether or not to grant the school district's motion to dismiss, the court held that the employee-plaintiffs had pled sufficient facts to allege an arguable First Amendment injury, and allowed the employees' case to proceed to trial. *Id.* at 1316-17.

14. School employees do not give up their free exercise or free speech rights when they become government employees. *Warnock v. Archer,* 380 F.3d 1076, 1082 (8th Cir. 2004); *see also Brown v. Polk County, Iowa,* 61 F.3d 650, 652-59 (8th Cir. 1995) (government employee allowed to display plaques and posters with prayers and religious references in his office), *cert. denied*, 516 U.S. 1158 (1996). When a disputed "activity is clearly personal and does not convey the impression that the government is endorsing it, the mere fact that it occurs in a government setting does not render it unconstitutional." *Warnock*, 380 F.3d at 1082. Only when a government employee's speech and acts can reasonably be attributed to the government itself do

the restrictions of the Establishment Clause apply. *Id.*

a. Religious objects or symbols

15. Here, Plaintiffs claim the following District employees had religious objects displayed in alleged violation of the Constitution: Nurse Moody, Ms. Griggs, Ms. Hecker, Ms. Maldonado, Mr. Wolfshohl, Ms. English, Mr. Turcato, and Assistant Superintendent Martinez. (Dkt. No. 75 at ¶¶47-51; *see* Appendix at ¶¶65-82). Particularly instructive to the case at hand is *Warnock v. Archer*, in which a public school teacher sued the school and its Superintendent under §1983 for alleged Establishment Clause violations, in part, for the Superintendent's displaying religious effects in his office. 380 F.3d 1076, 1082 (8th Cir. 2004). The teacher complained that the Superintendent displayed a Bible on his desk and had a framed scriptural quotation in his office. *Id.* at 1079. The Eighth Circuit Court of Appeals held that the personal religious effects in the school employee's office did not violate the Establishment Clause. *Id.* at 1082. The court found that the personal religious effects of the Superintendent were constitutionally protected under the free speech and free exercise clauses and did not simultaneously violate the Establishment Clause. *Id.*

16. Also instructive is *Nichol v. Arin Intermediate Unit 28,* in which the federal district court in Pennsylvania held that the elementary school employee-plaintiff had a First Amendment right to wear religious jewelry at school. 268 F.Supp. 2d 536, 561 (W.D. Pa. 2003). In *Nichol*, the school-defendant prohibited its employees from wearing religious emblems, dress, or insignia at school, including crosses and Stars of David. *Id.* at 541. The plaintiff was suspended after she wore and refused to remove a cross necklace. *Id.* The court reviewed the school's actions with the modified-*Lemon* endorsement inquiry, considering whether a "'reasonable observer' who is deemed aware of the history and context of a challenged policy or

program would consider the government policy or program to be an endorsement of religion, which would violate the Establishment Clause, or simply an accommodation of religious beliefs or practices in the interests of individuals' rights to freely practice or express their religion, which does not." *Id*. at 550. The court took into account that elementary school children are typically more impressionable than high school or college students, but noted that "unless the employees are doing something that is likely to influence the students by exploiting their impressionability," the impressionability of students is not a sufficient reason for denying the employees' First Amendment rights. *Id.* at 553. Given the inconspicuous nature of the employee's expression of her religious beliefs by wearing a necklace, the court found it "extremely unlikely that even elementary students would perceive [the school] to be *endorsing"* her Christian viewpoint. *Id.*at 554. "Merely employing an individual, such as plaintiff, who unobtrusively displays her religious adherence is not tantamount to government endorsement of that religion, absent evidence of endorsement or coercion." *Id.*

17. As set out in the Appendix, the crosses about which Plaintiffs complain were items that were in the teacher's or school employee's personal space, such as on their desk, near the teacher's desk, or in their personal office. As in *Warnock* and *Nichol*, these items were clearly personal and did not convey the impression that the District was endorsing them. Items on a teacher's desk often include such as things a family photos and mementos. Having a small cross, which oftentimes is simply a gift from a student, alongside family photos or other student gifts, clearly does not demonstrate government endorsement. The mere fact that it occurs in a government setting does not render it unconstitutional. *See Warnock,* 380 F.3d at 1082. The items on the teachers' or employees' desks or personal office space clearly were not permanent displays and were not used in instructing the students. (*See* Ex. V). There was no danger of a

high school student getting the wrong impression that the District was promoting religion when a teacher displayed a cross next to her other family, vacation, or other personal mementos any more than having a family photo on the teacher's desk proves that the District promotes procreation or going skiing. Moreover, the items on a teacher's desk are much less obtrusive than religious jewelry worn by a teacher as in *Nichol*, in that the students are typically looking at the teacher at the front of the room while she teaches during the majority of the class-time instruction rather than looking at her desk and personal office space. Additionally, as set out below, the context in which these alleged religious items were displayed show that there was no entanglement, endorsement, or non-secular purpose in their display. *See Clever,* 838 F. Supp. at 937-38.

Nurse Moody's Office

18. Regarding Nurse Moody's office, Plaintiffs claim she had a Bible verse displayed in her office; however, neither Corwyn nor Trevor recalls what the Bible verse was or what was quoted, but both admit that the verse was in her personal office, behind a door. (*See* Appendix at ¶¶69-70). Likewise, Trevor admitted that the small cross he allegedly observed in Nurse Moody's office was on her desk in her office. (*Id.*) As set out in the Appendix, to Nurse Moody, the Lamp of Learning picture with a reference to being the "Light of the World" displayed in her personal office was a personal reminder for herself that she may be the one positive influence a student may have in his or her life. (*Id.*) However, students did not ordinarily go into her personal office, which was separate from the clinic. (*Id.*) As a matter of law, Nurse Moody's personal effects in her office were not an official government endorsement of religion, but clearly personal and in her personal, unobtrusive space. Additionally, Nurse Moody's stated purpose of having those items in her office was personal, and Plaintiffs lack any objective

evidence showing that said effects were used principally and primarily to advance religion. Simply having some religious meaning or content is not enough to show unconstitutional endorsement of religion. *See Van Orden,* 545 U.S. at 690. Nurse Moody's personal effects did not violate the Establishment Clause. *See Warnock*, 380 F.3d at 1082; *Nichol*, 268 F. Supp.2d at 554.

Ms. Griggs' cross

19. Regarding Ms. Griggs' alleged display of crosses, although Ms. Griggs disputes Corwyn's testimony that she had three black crosses in her classroom, any alleged crosses that Corwyn claims were in her classroom were by her desk. (*See* Appendix at ¶¶71-79). Additionally, the two crosses that Ms. Griggs acknowledges she had were all on or near her desk in her personal space in the classroom. (*Id.*) One of the crosses in her room was a gift from a student and was hanging up n ext to various other personal items, including personal photographs. (*Id.*) Additionally, none of her personal items were in full view of the students in the classroom. (*Id.*) The other small cross was on her desk. (*Id.*) As a matter of law, this display was personal and could not be perceived as government endorsement of religion. *See Warnock*, 380 F.3d at 1082; *Nichol*, 268 F. Supp.2d at 554. Moreover, as stated *supra*, there is no evidence showing that said effects were used principally and primarily to advance religion; simply having some religious meaning or content is not enough to show unconstitutional endorsement of religion. *See Van Orden,* 545 U.S. at 690. As a matter of law, Ms. Griggs' personal effects did not violate the Establishment Clause.

Ms. Hecker's cross

20. Regarding geometry teacher Ms. Hecker's alleged display of a cross, the testimony clearly shows that she did not display a religious item at all. (*See* Appendix at ¶¶74-

75). She displayed student geometric artwork, one of which happened to have a geometric shape of a cross. (*Id.*) When discussing the purported offensive object, Corwyn acknowledged: "[Ms. Hecker] was a geometry teacher and there was a string around it shaped like a pattern." (*Id.*) As Ms. Hecker explained, she assigned students in her class to make geometric designs using designs and materials of their own choosing. (*Id.)* Approximately four years ago, one student in her class designed a geometric pattern using an object that was cross-shaped with yarn. (*Id.*) Ms. Hecker displayed that cross-shaped geometric object in the classroom, along with the designs that other students in her class had created, such as a boat, dragonfly, and guitar. (*Id.*) She often displayed the geometric designs made by her students in her classroom. (*Id.)* The object about which Corwyn complains in Ms. Hecker's room was not even a personal display but a display of various student geometric projects, one of which happened to be cross-shaped. (*Id.*) This display plainly was not a religious display. The evidence shows that the context of the display was a small, student-created geometric piece displayed with various other geometric student artwork from the same assignment. (*Id.)* Ms. Hecker had no involvement in the student's decision to use a cross-shaped pattern. (*Id.*) There clearly was no primary or principal effect of advancing or endorsing religion by displaying the student geometric artwork. *See Agostini,* 521 U.S. at 233. Corwyn's claim concerning Ms. Hecker's alleged "religious" object fails as a matter of law.

Ms. Maldonado's cross, Mr. Wolfshohl's cross, Ms. English's cross, Mr. Martinez' cross, and Mr. Turcato's plaque

21. Regarding Ms. Maldonado, Mr. Wolfshohl, and Mr. Martinez, according to Corwyn, Ms. Maldonado and Mr. Wolfshohl allegedly had a cross on their desks, and according to Christa and Danny Schultz, Mr. Martinez had a cross in his personal office. (Appendix at ¶¶76-77, 81). As discussed above, any such display on a teacher's desk or in an administrator's

office is constitutionally permissible as a personal effect; those objects are not an endorsement by the government itself. Regarding Mr. Turcato's office, Corwyn testified (and the District stipulates) that the Vice-Principal in 2009, Mr. Fletcher Turcato, had a sign in his office that he set on his window sill that stated "Trust in the Lord with all your heart." (*See* Appendix at ¶¶67-68). According to Corwyn, Mr. Turcato's sign faced into the office hallway and not into his own personal office. (*Id.*) Mr. Turcato was employed at the District for only a short period of time. (*Id.*) As with the employees discussed *supra*, Mr. Turcato's sign was not an unconstitutional endorsement of religion as a matter of law; the sign was a personal effect in his personal office, and the display of the sign was temporary since Mr. Turcato was only at the District for a short time. A dditionally, Mr. Turcato never discussed his religion or faith with Corwyn. (*Id.*) Accordingly, the Court should deny Plaintiffs' claims concerning Ms. Maldonado's cross, Mr. Wolfshohl's cross, Mr. Martinez' cross, and Mr. Turcato's plaque as a matter of law.

22. Regarding Ms. English's classroom, according to Corwyn, Ms. English had one object that "was like two infinity signs making a cross, kind of" and was "colored in with Crayola it looked like." (See Appendix at ¶78). The object was about the size of a hand, five inches long, on the class bulletin board. (*Id.*) Corwyn indicated that he believed the object to be a cross. (*Id.*) However, he also testified that he interprets any item that has two straight intersecting lines to be a religious cross. (*Id.*) Without even knowing or being able to articulate what exactly he saw in Ms. English's class, Corwyn is unable to produce any evidence concerning any alleged exploitation or advancement of religion in Ms. English's classroom. As a result, the Court should deny Plaintiffs' claims concerning Ms. English's alleged cross as a matter of law.

Front desk cross

23. Corwyn testified that he observed a small, approximately 3 inch cross near the front desk in the High School administration offices. (*See* Appendix at ¶¶79-80). The cross was behind assistant Ms. Witherall's desk. (*Id.*) The only cross that was found during the course of investigating Plaintiffs' allegations in this lawsuit was one on a trophy that was sitting behind the front desk; that trophy was from an FCA-sponsored 5k race in which a small cross is present on the trophy itself. (*Id.*) Like the other objects discussed above, this cross was displayed in an employee's personal space. Moreover, the cross in this instance is on a trophy. The display of a trophy is hardly an advancement or endorsement of religion, but instead boasting rights of participating in a 5k race. There is no evidence of exploiting or advancing religion, and therefore, the Court should deny Plaintiffs' claims regarding any alleged cross at a front desk.

24. As a matter of law, these objects in the employees' personal space did not violate the Establishment Clause. None of these personal displays could be attributed to the District as government speech. *See Warnock*, 380 F.3d at 1082. Much less conspicuous than a teacher's wearing religious jewelry or garb daily in front of the class, these personal, small displays are extremely unlikely to be perceived by a secondary school student as District-endorsed rather than an employee's personal expression. *Nichol*, 268 F. Supp.2d at 554. As stated by Justice Guy in his concurring opinion in *Washegesic v. Bloomindale Public Schools,* such "trivial allegations of purported Establishment Clause violations establish "a class of 'eggshell' plaintiffs of a delicacy never before known to the law. I can well understand that someone. . .in some sense could be offended…but 'injured' is another matter. In this multicultural world that young persons are entering today, I would hope our schools are turning out people with a little more resiliency than is evidenced here…. [I]f I am permitted to use the expression, for heaven's sake, stay out of the

courthouse and quit trivializing the Constitution!" 33 F.3d 679, 684-85 (6th Cir. 1994)(Guy, J., concurring), *cert. denied*, 514 U.S. 1095 (1995). The Court should deny Plaintiffs' claims concerning the display of religious objects as a matter of law.

b. Religious speech of school employees or officials

25. Concerning alleged speech of school employees, as set out in the Appendix, Plaintiffs allege that Corwyn Schultz heard the following school personnel make religious comments: High School Principal Toby Tyler, teacher Patti Maldonado, teacher Deesa Griggs, teacher Mary Ann Wolfshohl, band director Keith Riley, and office clerk Christine Willing. (See Dkt. No. 75 at ¶¶31, 34-42, 46, 53-54, 56-60, 64-66; Appendix at ¶7). Corwyn also claims that he heard Officer Lynn Sides make religious comments. (*See* Appendix at ¶¶29-30). Trevor asserts that he heard the following school personnel make religious statements at school: Coach Nathan Payne, Mr. Tyler, and teacher Nicole Houston. (*Id.* at ¶¶8-17, 24-28).

Principal Toby Tyler

26. Regarding Mr. Tyler, Corwyn and Trevor recall Mr. Tyler once referring to a "good book" during morning school announcements. (*See* Appendix at ¶¶ 8-17). Neither recalled the context in which Mr. Tyler said "good book." (*Id.)* According to Corwyn, Mr. Tyler "said a prayer" for a teacher, Mr. Bollinger, who had recently died. (*Id.)* Trevor testified that Mr. Tyler "prayed" over the school intercom, but Trevor does not recall what exactly Mr. Tyler may have said that constituted a prayer other than he used "Christian language in the form of a prayer" and said the word "Amen" on at least one occasion. (*Id.*) Of the purported religious references by Mr. Tyler, his saying "God bless" was the most frequent of his alleged religious remarks, according to Corwyn and Trevor. (*Id.)* Additionally, Plaintiffs believe that saying "God bless" or "God bless you" is a prayer; they even believe that saying "God bless you" when

someone sneezes or saying "God Bless Texas," "God Bless America" or "God save the United States and this honorable Court" constitutes a prayer and/or promotes religion, and "God damn it" is a religious utterance. (*Id.*)

27. Mr. Tyler acknowledges saying "God bless" at school in reference to school sports teams or the U.S. troops, but feels like those references were colloquial and not religious in nature. (*Id.)* Mr. Tyler denies ever praying or using Christian language over a loudspeaker or school announcement. (*Id.*) His purpose behind such statements was congratulatory and often colloquial. (*Id.)* Mr. Tyler denies ever praying or using Christian language over a loudspeaker or school announcements. (*Id.)* School employees do not recall Mr. Tyler ever praying during school announcements, and deny he prayed for Mr. Bollinger on the school loudspeaker. (Ex. A9 at 86:12-15; Exhibits K, O, P, Q, T).

28. The context of Mr. Tyler's "God Bless" comments show that no reasonable observer would find that his comments were an endorsement of religion, but mere colloquial, congratulatory remarks to the various sports teams and/or organizations being announced and very similar in content to what our nation's own President uses in his speeches in public schools. (Ex. A15 and A16).[1] Indeed, President Obama told public school students they had "God-given potential" and concluded his speech to them with "God bless you, and God bless the United States of America." (Ex. A15). Plaintiffs' hypersensitivity to any phrase that has the word "god" in it (such as their beliefs that "God damn it" and "God bless you" after someone sneezes are religious utterances) does not mean a reasonable observer would perceive such common and

[1] President Obama gave remarks to the nation's public schools, which were broadcast to students across the nation during school and which included references to the students' "God-given" talent and "preaching to the choir." (Ex. A15:**http://www.whitehouse.gov/the-press-office/2010/09/14/remarks-president-back-school-speech-philadelphia-pennsylvania** His inaugural address also concluded with "God Bless you. And God Bless the United States of America." (Ex. A16: **http://www.whitehouse.gov/blog/inaugural-address/))**

colloquial phrase as "God bless" a sports team or the troops as an endorsement of religion. Mr. Tyler's comments clearly did not have a principal or primary effect of promoting religion. As shown in his own deposition testimony, he is known for frequently using colloquial phrases – from "holy smokes" to "irritates the devil out of me." (*See* Appendix at ¶14). Mr. Tyler's comments did not violate the Constitution as a matter of law.

Ms. Griggs

29. Corwyn testified that Ms. Griggs told her class on one occasion, "If there's ever a day to whisper, today's the day. My head is killing me. I can't even turn it. Maybe I'm having an aneurysm. Pray for me." (*See* Appendix at ¶18). Ms. Griggs does not recall ever saying that, and even if she had ever made such a comment, she would never intend such statement to be taken literally or spiritually. (*Id.*) Ms. Griggs did not promote her personal religious beliefs; as a matter of law, even if said statement were made by Ms. Griggs, the comment was isolated in nature and clearly not advancing or promoting religion. Plaintiffs' claim regarding Ms. Griggs' comment must be denied as a matter of law.

Ms. Wolfshohl

30. According to Corwyn, a student in Ms. Wolfshohl's physics class exclaimed, "Jesus, Jesus!" apparently because the student was upset or frustrated. (See Appendix at ¶19). Corwyn testified that after the student said that, Ms. Wolfshohl said, "loves you." (*Id.)* Ms. Wolfshohl does not recall ever saying that, and even if she had made such a comment, she would never intend it to be a statement concerning her own personal beliefs. (*Id.*) Looking at the context and isolated nature of this alleged statement, even taking it as true, the evidence shows that as a matter of law the alleged comment was not a promotion of her religious views. Thus, Plaintiffs' claims concerning Ms. Wolfshohl must be denied.

Ms. Maldonado

31. Pursuant to Corwyn's testimony, in Ms. Maldonado's English class, a student asked if students were allowed to say "Merry Christmas" at school and stated that there was a rumor going around that any kids who said "Merry Christmas would be sent to ISS." (*See* Appendix at ¶¶20-21). Ms. Maldonado responded, "No, I'm a Christian. Why would I do that?" (*Id.*) Ms. Maldonado does not recall the students in her class ever discussing whether they were allowed to say "Merry Christmas." (*Id.*) She does remember, however, a student asking her if she was a Christian, to which she responded yes and then quickly redirected the class' attention to the lesson at hand. (*Id.*) Taking either version of said events in context and their isolated nature, no reasonable observer would perceive an endorsement by the District itself of religion. Moreover, Ms. Maldonado clearly did not proselytize or otherwise promote her religion in the classroom; she quickly changed the subject when the student brought up the topic of religion. As a matter of law, there was no endorsement of religion, and the Court should deny Plaintiffs' claims regarding Ms. Maldonado.

Mr. Riley

32. Corwyn testified that Mr. Keith Riley, one of the school's band directors, told the band during practice, "God bless this upcoming marching season." (*See* Appendix at ¶22). Mr. Riley, denies ever saying that and denies ever invoking the name of God, any deity, or any blessing in the presence of students. (*Id.*) Even assuming Corwyn's allegations as true, as discussed *supra,* "God bless" is merely a colloquialism and a wish for good luck, not a promotion of religion. There is no evidence that Mr. Riley was attempting to promote his personal religious beliefs in anyway. The Court should deny Plaintiffs' claims concerning Mr. Riley.

Ms. Willing

33. Corwyn also claims that when Ms. Christine Willing, an attendance clerk in the District, saw that he was wearing a shirt with a picture of President Obama on it, she asked him why he was wearing that shirt, and he responded that he liked the president. (*See* Appendix at ¶23). According to Corwyn, she then said, "Well, I'll pray for you." (*Id.*) Contrary to Corwyn's claims, Ms. Willing contends that she was joking with Corwyn and told him that President Obama needed prayer, not Corwyn. (*Id.*) Regardless of which version is accurate, Vice-Principal McHazlett took swift, corrective action as soon as these allegations were reported to him and directed Ms. Willing not to discuss politics or prayer with students. (*Id.*) No reasonable observer could have viewed the District as endorsing Ms. Willing's viewpoint when it took such prompt, remedial action concerning Ms. Willing as soon as her comment was reported. Ms. Willing's viewpoint clearly was her own, inappropriate or not, and the District did something about it as soon as Corwyn reported it. The Court should deny Plaintiffs' claims concerning Ms. Willing.

Officer Sides

34. Regarding Officer Sides, Plaintiffs never reported Officer Sides to anyone at the District. (*See* Appendix at ¶¶29-30). Officer Sides is not and at all times relevant to this lawsuit was not an employee of the District. (*Id.*) Not being an employee of the District and wearing his Sheriff-issued uniform at all times, Officer Sides clearly communicated with the students as an employee of the Sheriff's office and not of the District; his comments could not have been perceived by a reasonable observer as being endorsed by the District. Accordingly, Plaintiffs' claims concerning Officer Sides should be denied as a matter of law. Additionally, as discussed *infra*, Plaintiffs' claims concerning Officer Sides should be denied because the District had no

knowledge of his purported inappropriate actions.

35. As a matter of law, the purported comments by school employees did not violate the Establishment Clause. The Court should deny Plaintiffs' claims concerning the above employees' alleged comments as a matter of law.

c. Religious speech of students

36. Plaintiffs allege that the purported religious speech of students at graduation and football games violated the Establishment Clause.

37. In 2007, the Texas legislature passed the Religious Viewpoints Antidiscrimination Act (hereinafter referred to as "RVAA"), which requires in part that school districts adopt a policy that establishes a limited public forum for student speakers at all school events at which a student is to "publicly speak," specifically including graduation.[2] *See* TEX. EDUC. CODE §§25.151-156. A student speaker using the school's limited public forum cannot be discriminated against based on the expression of his or her religious viewpoint. *See* TEX. EDUC. CODE §25.152(a)(1). Additionally, school districts must employ neutral criteria for the selection of these student speakers. TEX. EDUC. CODE §25.152(a)(2). While school districts must ensure that the speech is not offensively lewd, obscene, vulgar, or indecent, there are few other restrictions that can be placed on the speech. *See* TEX. EDUC. CODE §25.152(a)(3). Graduation ceremonies must include a disclaimer (in writing, orally, or both) that clarifies that the student's speech does not reflect the endorsement, sponsorship, position, or expression by the school district. TEX. EDUC. CODE §25.152(a)(4). The disclaimer must be provided for as long as a need

[2] Even the District's federal funding under the No Child Left Behind Act is predicated upon the District's certifying in writing that it has no policy which prevents, or otherwise denies participation in constitutionally protected prayer in public schools as set forth in the Guidance issued by the U.S. Department of Education. *See* 20 U.S.C.A. § 7904 (b); U.S. Dept. of Educ. (Feb. 7, 2003) "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools (http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (student religious expression at graduation may not be restricted because of its religious (or anti-religious) content if school employed neutral criteria in selection of speakers)

exists to dispel confusion over the district's nonsponsorship of the student's speech. *Id.*

38. The Supreme Court has also held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects. *Perry Educ. Ass'n v. Perry Local Educators Ass'n,* 460 U.S. 37, 46 n. 7; *see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009). In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral. See *Good News Club v. Milford Central School,* 533 U.S. 98, 106–107 (2001). The RVAA codified these principles.

39. Here, the District complied with state law concerning graduation speeches and student remarks at football games, having adopted a substantially similar policy to the statute's model policy and implemented neutral criteria for the selection of speakers. (*See* Appendix at ¶4). Prohibiting a student who is speaking at graduation from expressing their religious viewpoint would result in the District's being in violation of the RVAA, in essence, discriminating against the student based on the private religious content of his or her speech.

40. The Establishment Clause by no means imposes a prohibition on all religious expression in the public schools. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) (citing *Engel v. Vitale,* 370 U.S. 421, 430 (1962)). Nothing in the Constitution, as interpreted by the Supreme Court, prohibits any public school student from voluntarily praying at any time before, during, or after the school day. *Id.* An Establishment Clause analysis calls for the difficult task of separating a student's private message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter; this determination is of necessity, one of line-drawing, sometimes quite fine, based on the particular facts of each case. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 847 (1995) (O'Connor, concurring).

1. Football Games

41. The touchstone decision in cases involving prayer at school football games is *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In *Santa Fe*, the school policy at issue explicitly authorized two student elections concerning remarks at football games – first to determine whether an "invocation" should be delivered at the football games and the second to select the spokesperson to deliver them. *Id.* at 297, 305-06. Key to the Court's decision in *Santa Fe* was the fact that the students voted on whether to have prayer at football games at all. *Id.* at 297, 305-06. It was this policy that the Court declared facially unconstitutional. *Id.* at 315 ("The narrow question before us is whether implementation of the [school] policy insulates the continuation of such prayers from constitutional scrutiny"). The history of the school's policy in *Santa Fe*, where the school had a dedicated student chaplain that delivered prayer before football games for many years prior to the enactment of the school's policy on voting on whether to have prayer, evinced a perception that the school itself encouraged prayer. *See id.* at 294-95, 308. The Court held that the school's policy did not survive a facial challenge "because it impermissibly imposes upon the student body a majoritarian election on the issue of prayer." *Id.* at 316.

42. In the case at bar, the evidence shows that no prayer or religious remarks were even given by students at the Medina Valley High School football games from the Fall of 2000 through the Fall of 2009. (See Appendix at ¶¶54-55). During those years, the Student Council Advisor had advised the students speaking at football games not to pray or make religious remarks based on her interpretation of the *Santa Fe* case. (*Id.*) She even gave those student speakers sample remarks, which most students used. (*Id.*) The remarks had no reference to a deity or blessings and clearly were not a form of prayer. (*Id.*). It was not until the Fall of 2010

and 2011 that a student chose to make generic, non-proselytizing religious remarks or prayer at the introduction of the football games. (*See* Appendix ¶56-60).

43. The religious remarks made by students Kallisyn Guoard and Jenna Bippert in 2010 and 2011, respectively, were constitutionally permissible. *Santa Fe* is clearly distinguishable from the present case. Unlike *Santa Fe*, here, at no time did the student body vote on whether to allow prayer at football games. *See Chandler v. Siegelman,* 230 F.3d 1313 (11th Cir. 2000) (distinguishing *Santa Fe* based on majoritarian election process for prayers), *cert. denied*, 533 U.S. 916 (2001). The District has not permitted an election by the student body on whether to allow prayer at football games or on who the speakers at the games should be. (*See* Appendix at ¶4). Indeed, the District's very policy prohibits a majoritarian election on religion or encouraging prayer at school events. (*See* Ex. C-5 (Policy FNA (Legal)). Central to the holding in *Santa Fe* was the fact that the school policy put the decision whether to have prayer at football games in the hands of the student body by majority vote. *Santa Fe,* 530 U.S. at 297, 305-06; *see Chandler*, 230 F.3d at 1315. That did not happen here.

44. Additionally, the RVAA which was passed after the *Santa Fe* decision, *requires* the District to create a limited public forum at any event at which a student is to publicly speak, which would include football games. TEX. EDUC. CODE. ANN. §25.152(a) (Vernon 2008). The District's Policies FNA (Legal) and (Local) were modeled after said statute. The District's policies created a limited public forum for introductions at football games. (*See* Ex. C-5, C-6). The RVAA, District Policies FNA (Legal) and (Local), and Supreme Court precedent prohibit the District from engaging in viewpoint discrimination against the student speakers in such a forum. *See* TEX. EDUC. CODE. ANN. §25.152(c) (Vernon 2008); *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07 (2001).

45. A policy, like the one in this case, that merely "*tolerates* religion does not improperly *endorse* it." *See Chandler*, 230 F.3d at 1317. Neither the District's policies nor its employees told or otherwise encouraged the student speakers to pray or discuss religion in their introductory remarks at the football games. (*See* Appendix ¶¶54-61). There was absolutely no endorsement or sponsorship of any religious remarks of students by the District. *See Chandler*, 230 F.3d at 1317. The student speakers were free to choose their own wording in their remarks, even if they chose to include religious remarks. (*See* Appendix ¶¶54-61). Additionally, a disclaimer was read and printed in the football programs at all Fall 2011 football games. (*See* Appendix ¶60). The 2010 and 2011 student remarks were wholly the students' own wording and solely the student's choice as to what to say; Ms. Bippert and Ms. Guaord did not receive any input from school employees or officials concerning the content of their remarks. (*See* Appendix ¶¶56-60). Any prayer that resulted from the District's current policy (as modeled by RVAA) was wholly incidental. As stated in *Chandler*, "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent." *Id.* at 1315. Here, the evidence shows that no prayer or religious remarks occurred at football games after the *Santa Fe* decision in 2000 through 2009. The 2010 and 2011 student remarks at the football games were purely the students' own words, permitted under law and not endorsed by the District. Moreover, the 2010 and 2011 remarks given by the students were non-proselytizing. *See Pelphrey*, 547 F.3d at 1277-78 (references to "Jesus" or other deities is not proselytizing *per se*; proselytizing requires aggressive advancement of beliefs or disparaging other faiths). As a result, the District is entitled to summary judgment as a matter of law denying Plaintiffs' claims concerning prayer or religious remarks at football games.

2. Graduation

46. The Fifth Circuit has repeatedly upheld policies allowing a student to initiate nonproselytizing and nonsectarian prayer at graduation ceremonies against Establishment Clause challenges. In *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) (hereinafter *Clear Creek II*), the Fifth Circuit explicitly held that the school district's policy "allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at a high school graduation ceremony…did not violate the dictates of the Establishment Clause. *Clear Creek II*, 977 F.2d at 968-72; *see also Doe v. Santa Fe Indep. Sch. Dist.,* 168 F.3d 806, 815 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (citing *Clear Creek II*). The constitutionality of allowing a student "to choose to pray at high school graduation to solemnize that once-in-a-lifetime event" was again upheld in *Ingebretsen on B ehalf of Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 280 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996); s*ee also Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402, 406 (5th Cir. 1995). Likewise, in *Doe v. Tangipahoa Parish School Board*, the Fifth Circuit reflected on the facts and holding of *Clear Creek II*, stating "[t]he student-driven nature of the prayers…and the lack of involvement with religious institutions allowed them to pass constitutional muster." *Doe,* 473 F.3d 188, 199 (5th Cir. 2006), *vacated on other grounds,* 494 F.3d 494 (5th Cir. 2007) (citing *Jones v. Clear Creek Indep. Sch. Dist.,* 977 F.2d at 968-72).

47. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) does not change the Fifth Circuit's graduation prayer precedent. *Santa Fe* does not stand for the proposition that prayer initiated and led by students at *graduation* ceremonies violates the Establishment Clause. Indeed, the Supreme Court in *Santa Fe Indep. Sch. Dist. v. Doe* ruled on the issue of "prayer at ***football games***." *Santa Fe Indep. Sch. Dist.,* 528 U.S. at 1002 (emphasis added). Indeed, after

the ruling in *Santa Fe,* the Eleventh Circuit Court of Appeals, en banc, upheld a school's policy that permitted seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir.), *cert. denied*, 534 U.S. 1065 (2001). In the *Adler* court's opinion, the student messages made possible by that policy did not need to be constrained because the messages would constitute purely private speech. *Id.* As here, the policy at issue in *Adler* forbade the school officials from regulating the content of any student speech, and the policy was entirely neutral as to the content of the student's message. *Id.*

48. In another post-*Santa Fe* case, the Eleventh Circuit held that a school district's allowing nonsectarian, nonproselytizing student-initiated prayer, invocations, and benedictions during such events as graduation ceremonies did not violate the Establishment Clause. *Chandler,* 230 F.3d at 1315-16. The Eleventh Circuit court found that "*Santa Fe* condemns school *sponsorship* of student prayer, while *Chandler* condemns school *censorship* of student prayer." *Id.* at 1315. *Santa Fe* did not obliterate the distinction between State speech and private speech in the school context. *Id.* at 1316. "The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Id.*

49. Here, as mandated by the RVAA, at all times relevant to this lawsuit, the District had adopted and followed a neutral policy concerning the selection of student speakers for its graduation ceremony, unlike the unconstitutional selection by majority vote indicated in *Santa Fe*. The District's students, or a "majority vote," do not and did not vote on who their graduation speakers would be nor on whether there would be prayer at the graduation ceremony. (*See*

Appendix at ¶4). Instead, the District chose its student speakers based on neutral criteria and refrained from discriminating against the student speakers based on any religious viewpoint expressed by the student. District Policy FNA (Local) set out the criteria for selection of student speakers. (*See* Appendix at ¶4). The following students were eligible to give opening and closing remarks at graduation: the top three academically ranked graduates, the class president, and student council representatives. (*Id.*) The valedictorian and salutatorian speakers were chosen solely on class rank, and the class officers and student council representatives decided amongst themselves which speaking role they would take in the graduations that occurred through 2009. (*See* Appendix at ¶¶31-33). In 2011, the Lead Counselor, Julie Center, asked class officers and student council representatives if they were interested in volunteering for the speaking roles their predecessors in past years had. (*See* Appendix at ¶¶44-46). Additionally, the 2011 graduation program guide contained a disclaimer. (*See* Appendix at ¶¶47-48). No speaker was asked to pray or deliver religious remarks; the students were told that they were to write their own remarks and were to choose what to say. (*See* Appendix at ¶¶33, 43, 44-46). There clearly was no endorsement by the District of any students' religious remarks, and no student engaged in proselytizing speech. *See Pelphrey*, 547 F.3d at 1277-78; *see also* Appendix at ¶¶31-52. As a matter of law, the Court should enter judgment in favor of the District on Plaintiffs' claims concerning graduation.

3. *The Board of Trustees had no knowledge of any alleged constitutional violations.*

50. Even if a school employee violated the First Amendment, in order to hold a school district liable for alleged constitutional violations, Plaintiffs must prove that an "official policy or custom" of the district "was a cause in fact of the deprivation of rights inflicted." *Leffall,* 28 F.3d at 525. An "official policy or custom" of a school district is: (1) "a policy

statement, ordinance, regulation or decision that is officially adopted and promulgated by the district, or by an official to whom the district has delegated policy-making authority;" or (2) "a persistent, widespread practice of district officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents district policy." *Eugene v. Alief Indep. Sch. Dist.,* 65 F.3d 1299, 1304 (5th Cir.1995), *cert. denied*, 517 U.S. 1191 (1996); *Johnson v. Moore,* 958 F.2d 92, 93 (5th Cir. 1992). Actual or constructive knowledge of such custom must be attributable to the governing body of the district or to an official to whom that body had delegated policy-making authority. *Id.*

51. A school district cannot be held liable based solely under a theory of respondeat superior; instead, Plaintiffs must prove that the alleged constitutional violations were committed pursuant to an official governmental policy or custom. *Monell v. Dept. of Soc. Servs. of New York,* 436 U.S. 658, 691 (1978); *Rivera v. Houston Indep. Sch. Dist.,* 349 F.3d 244, 247 (5th Cir. 2003). Therefore, to prove their §1983 claims, Plaintiffs cannot rely solely on evidence of an employee's actions; they must identify a policymaker with final policymaking authority and a policy that is the "moving force" behind the alleged constitutional violation. *Meadowbriar Home for Children, Inc. v. Gunn,* 81 F.3d 521, 532-33 (5th Cir.1996); *see Doe v. Wilson County Sch. Sys.,* 564 F. Supp.2d 766, 804 (M.D. Tenn. 2008).

52. Whether a particular official has "final policy-making authority" is a question of state law. *St. Louis v. Praprotnik,* 485 U.S. 112, 128 (1988). It is well-settled law that, in Texas, only the District's Board of Trustees has final policy-making authority in an independent school district. TEX. EDUC. CODE ANN. §11.151 (Vernon 2006); *Jett v. Dallas Indep. School Dist.,* 7 F.3d 1241, 1245 (5th Cir. 1993); *see Barrow v. Greenville Indep. Sch. Dist.* 480 F.3d 377, 381-

82 (5th Cir.), *cert. denied*, 552 U.S. 888 (2007); *Rivera,* 349 F.3d at 247-48. Neither a superintendent of schools nor a school administrator has final policy-making authority in a school district. *See Jett*, 7 F.3d at 1245; *see also Hinojosa v. State,* 648 S.W.2d 380, 386 (Tex. App.-Austin 1983, pet. ref'd) ("superintendent and his subordinates were but employees or agents of the trustees"); *Pena v. Rio Grande City Consolidated Indep. Sch. Dist.,* 616 S.W.2d 658, 660 (Tex.App.—Eastland, 1981, no writ) ("superintendent is merely an employee or agent of the school board;" "school superintendent merely performs functions delegated to him by the trustees who do not by such delegation abdicate their statutory authority or control"). Courts carefully distinguish "between those having mere *decisionmaking* authority and those having *policymaking* authority." *Jett,* 7 F.3d at 1246.

53. In the case at bar, the District's own policy provides that the Board has full and final authority on all District policy. (*See* Ex. C-I; C-1, C-2 (Board Policies BBE (Legal) and (Local)). As stated in its own policy, the "Board has final authority to determine and interpret the policies that govern the schools, and . . . has complete and full control of the District." (*Id.* at Ex. C-2). Additionally, the District's Policy BBE (Legal) further states that the "Board members as a body corporate have the *exclusive* power and duty to govern and oversee the management of the public schools of the District." (*Id.* at Ex. C-1 (Emphasis added)). The law and District policy are clear that neither the Superintendent nor any other administrator act as the policymaker for the District. Only the actions or knowledge of the Board itself are pertinent to ultimate liability determinations under §1983. *See Jett*, 7 F.3d at 1245.

54. The evidence in this case shows that, even assuming Plaintiffs' allegations concerning employees' speech and display of religious objects as constitutional violations, Plaintiffs' claims still fail as a matter of law because there was no practice or custom in Medina

Valley ISD of any Medina Valley ISD employee or official or Officer Lynn Sides promoting, sponsoring, or encouraging religion, praying,[3] making religious remarks, or displaying religious symbols, texts, or icons during school or at school events or functions. (See Appendix at ¶¶83-93). Out of the approximately 70 (seventy) classrooms and 25 (twenty-five) offices in Medina Valley High School, Plaintiffs only reported seeing purported religious symbols in approximately 7 (seven) rooms plus the central administrative office of Assistant Superintendent Martinez. (*See* Appendix at ¶6). That is a far cry from a "widespread practice or custom" of displaying religious objects. Additionally, out of over 80 (eighty) employees at Medina Valley High School, Plaintiffs heard a combined total of 9 (nine) employees plus Officer Sides make purported religious speech. (*Id.*) And of those 10 (ten) people, with the exception of Plaintiffs' allegations concerning Mr. Tyler and Trevor's barred claims regarding Coach Payne, none of those employees made the allegedly offensive comments more than once – hardly a "widespread practice or custom" of engaging in religious speech. (*See* Appendix at ¶¶18-29).

55. In *Doe v. Wilson County School System*, a school principal had permitted, among other things, a religious parent prayer group to meet on school campus during the school day, permitted prayer at a student Thanksgiving classroom celebration, allowed the distribution of Bibles to students at school, and permitted the prominent display of the Ten Commandments at school. 564 F. Supp. 2d at 776-87. The plaintiffs brought their concerns about the principal's actions to the attention of the school system's Director. *Id.* at 779, 787-88. Although the principal's actions were unconstitutional and central administrators had notice of the principal's conduct, the school district did not have any actual or constructive notice of the principal's inappropriate conduct. *Id.* at 804. As a result, the school district could not be held liable for the

[3]Other than the ceremonial, generic prayers at Board meetings, which the 5th Circuit is currently split on their permissibility. *See Doe v. Tangipahoa Parish Bd. of Educ.,* 473 F.3d 188 (5th Cir. 2006), *vacated on other grounds,* 494 F.3d 494 (5th Cir. 2007).

principal's unconstitutional conduct. *Id.*

56. As in *Wilson County School System,* here, even assuming a practice or custom of displaying religious objects or engaging in religious speech existed at the District, which the evidence clearly negates, Plaintiffs' §1983 claims fail because the Board had no actual or constructive knowledge of any such alleged practice or custom at the District. (*See* Appendix at ¶¶83-93). Indeed, the official District policy actually prohibits the very thing that Plaintiffs accuse District employees of doing. Policies (EMI) (Legal) and (Local) prohibit teachers from using religious texts or materials unless such materials are used objectively in a field of study concerning history, culture, literature, music, drama, or art and are intrinsic to that field of study. (*See* Appendix at ¶3). Policy EMI (Local) expressly prohibits the prominent display of religious symbols unless it is being used as a teaching aid and is limited to the specific teaching activity, and Policy EMI (Legal) prohibits religious exercises, including prayer, during classroom time. (*Id.)* Clearly, there is no official policy of the District permitting teachers or employees to pray with students in class or otherwise promote religion.

57. The only official policies Plaintiffs can claim permit possible religious expression at school are Policies FNA (Legal) and (Local), which establish a limited public forum for student speakers at all school events at which a student is to publicly speak. (*See* Appendix at ¶4). While these policies do not expressly authorize religious speech, the policies do prohibit the District from discriminating against a student who may voluntarily choose to express a religious viewpoint during his or her speech. (*Id.*)

58. The evidence shows that Plaintiffs never brought a complaint, filed a grievance, or otherwise expressed their concerns to the Board of Trustees concerning religious objects or symbols in the classrooms or school buildings, any religious speech of any school employee or

Officer Sides, or any religious speech by students at school events. (*See* Appendix at ¶¶83-85). Indeed, other than Plaintiffs' complaint to Principal Tyler and to Mr. Martinez about Mr. Tyler's saying "God Bless" over the loudspeaker, his complaint to Mr. Tyler regarding Mr. Turcato's sign, and his complaint to the principal and vice-principal regarding Ms. Willing's comment that she "would pray for him," Plaintiffs admit that they never even complained to school administrators or to the teacher or school employee whom they believed were unconstitutionally promoting religion. (*See* Appendix at ¶¶18-30, 67-82). Despite Plaintiffs' outrage concerning Officer Sides' giving Corwyn a Christian pamphlet and Ms. Houston's praying in class, they never reported them to anyone in the District, including the Board. (*See* Appendix at ¶¶28, 29, 82). This lawsuit was the first time the School Board ever heard any allegations concerning religious entanglement or promotion of religion at school. (*See* Appendix at ¶¶83-93). Plaintiffs acknowledged in their individual depositions that they never complained or otherwise expressed their concerns regarding the alleged promotion of religion to the Board of Trustees. (*See* Appendix at ¶¶17, 19, 20, 22, 28, 29, 67, 69, 71, 74, 76-79, 81-82).

59. Moreover, Corwyn and Trevor received a student handbook each school year, which detailed the procedures to file a grievance or complaint with the Board. (*See* Appendix at ¶5). Additionally, Assistant Superintendent Martinez explained the grievance process to Danny and Christa and told them that they could take their concerns to the Board. (*Id.* at ¶17). Nevertheless, Plaintiffs never followed the complaint procedures or otherwise expressed their concerns to the Board. (*Id.* at ¶¶5, 17, 83).

60. The Board was absolutely unaware of any alleged prayers or religious comments by employees in the classroom or at school events, any discussion of religion by Officer Sides, or any religious symbols or crosses in any employee's office or classroom. (*Id.* at ¶¶83-93). As set

out in the Appendix and its attached exhibits, a Board member does not normally have personal knowledge of the day to day classroom activities, unless the Superintendent or administrator reports concerns to the Board or a parent, student, employee, or member of the public brings the concerns to the attention of the Board, usually through the grievance process. (*Id.* at ¶87). Board members do not usually walk through classrooms in the District. (*Id.*) Having failed to ever complain about Officer Sides or any coach, teacher, or other employee in the District, Plaintiffs wholly failed to ever call to the attention of the Board the alleged promotion of religion or alleged Establishment Clause violations. (*Id.* ¶¶83-93). Even though they were pointed to the school's grievance process, Plaintiffs failed take their concerns to the Board. The evidence clearly shows that the Board had no knowledge, whether actual or constructive, of any alleged constitutional violations, endorsement of religion, or custom or practice of the same. (*Id.*)

61. Because there was neither an official policy nor a widespread custom or practice in the District of promoting religion, Plaintiffs' cannot prove an essential element of their §1983 claims. Likewise, because the Board lacked any actual or constructive knowledge of any alleged custom or practice of the same, Plaintiffs' §1983 claims fail. Therefore, as a matter of law, the District is entitled to summary judgment denying Plaintiffs' §1983 claims.

V. **CONCLUSION**

62. As shown *supra,* the District is entitled to summary judgment on all of Plaintiffs' claims. WHEREFORE, PREMISES CONSIDERED, for the reasons shown above, the District respectfully moves this Court to grant this Motion for Summary Judgment, deny all of Plaintiffs' claims and requests for relief, and to further grant the District all such other and further relief, special or general, at law or in equity, to which it shows itself justly entitled.

Respectfully submitted,

WALSH, ANDERSON, BROWN,
GALLEGOS & GREEN, P.C.
100 NE Loop 410, Suite 900
San Antonio, Texas 78216
Tel No. 210-979-6633
Fax No. 210-979-7024

By: /s/ D. Craig Wood
D. CRAIG WOOD
ATTORNEY IN CHARGE
State Bar No. 21888700
cwood@sa.wabsa.com
STACY TUER CASTILLO
State Bar No. 00796322
scastillo@sa.wabsa.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Mr. Gregory M. Lipper
Americans United for Separation of Church & State
1301 K Street, NW, Ste. 850
Washington, DC 20005

/s/ D. Craig Wood
D. CRAIG WOOD