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 GUZMAN, concurring.

At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.[1]

The fundamental right of every American to hold and profess individual religious beliefs is deeply rooted in our constitutional firmament and derives from the ideal of religious liberty that gave birth to our nation. In enacting the Texas Constitution, the people of this great State, "[h]umbly invoking the blessing of Almighty God," further guaranteed freedom of religious expression. *See* TEX. CONST. PREAMBLE & ART. 1, §§ 6–8. While efforts to accommodate competing constitutional interests may necessitate reasonable limitations on each of those interests, the challenge is knowing

[1] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

where to draw the line. Constitutional analysis is rarely susceptible to doctrinal absolutes, but courts, guided by the words of our charters, must not shy away from defining the contours; otherwise, freedom is compromised. In this case, I agree with the Court that a justiciable controversy is presented.[2] I write separately only to emphasize that, in considering the delicate balance of correlative constitutional rights, free religious expression must be afforded no less than equal respect.

The Constitutions of the United States and the State of Texas protect freedom of expression and guarantee our citizens the right to practice their own religion or no religion at all. *See* U.S. CONST. AMEND. I.; TEX. CONST. art. 1, §§ 6–8. Similar to the Texas Constitution, the United States Constitution assures religious freedom through a pair of complementary but potentially opposing directives: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. AMEND. I; *see also* TEX. CONST. art. 1, §§ 6–8; *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 642 (Tex. 2007) (sections 6 and 7 of the Texas Constitution are Establishment Clause equivalents). Given the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton v. Richardson*, 403 U.S. 672, 677 (1971) (plurality opinion), governmental authorities attempting to navigate the fine line that can separate the two risk unduly impinging one in an effort to comply with the other, *cf. Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (recognizing that these two clauses "often exert conflicting pressures"). Freedom of expression is often felled as collateral damage.

[2] The facts and legal principles pertinent and germane to the jurisdictional inquiry are ably set forth in the Court's opinion, and the details need not be restated here.

Because "'there is room for play in the joints' between the Clauses," *id.*, neither freedom of expression nor free exercise of religion should be sacrificed at the altar of uncertainty.

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Yet, in untold situations, that is precisely what happens, and it occurs more frequently than our constitutional safeguards permit. Too often, public-school officials unduly target religious speech, at times misunderstanding Supreme Court precedent allowing them to preserve order at school, *see id.* at 513, or due to confusion about the religious-endorsement proscription, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 305–08 (2000). Examples abound:

- A third-grader in Plano Independent School District allegedly tried to give "candy cane ink pen[s]" and bookmarks discussing Jesus and "The Legend of the Candy Cane" as gifts at a school winter-break party. *Morgan v. Swanson*, 659 F.3d 359, 366 (5th Cir. 2011) (en banc). School officials prohibited the religious message but allowed other students to distribute nonreligious items at the party. *Id.* The Fifth Circuit, sitting en banc, held that "discriminating against student speech solely on the basis of religious viewpoint [] is unconstitutional under the First Amendment." *Id.* at 412 (Elrod, J., writing for majority on this point).
- A second-grader in Plano allegedly tried to give classmates tickets to a religious play at a nearby church, but the principal refused to allow distribution of the tickets. *Id.*

at 368–69 (Benavides, J., writing for majority). When the same student celebrated her "half birthday" at school, the principal prohibited her from giving pencils as gifts because the pencils read, "Jesus loves me this I know for the Bible tells me so." *Id.* Again, such viewpoint discrimination is unconstitutional. *Id.* at 412 (Elrod, J., writing for majority on this point).

- An elementary school in Katy allowed parents to purchase student artwork as "holiday cards." *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 639–40 (S.D. Tex. 2010). Citing Establishment Clause concerns, school officials blacked out the only card on the order form referencing a specific deity (Jesus). *Id.* at 639–40. The court held that including the religious card would not have violated the Establishment Clause and that the school's "admitted viewpoint discrimination violated the First Amendment." *Id.* at 639, 660.
- An Arizona elementary school fundraiser allowed parents to purchase personalized tiles to be affixed to the school halls. *Seidman v. Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp. 2d 1098, 1102 (D. Ariz. 2004). The school allowed "'inspirational' or 'encouraging' messages from parents to their children" on the tiles. *Id.* at 1112. However, citing Establishment Clause concerns, it prohibited "the same type of messages presented from a religious perspective." *Id.* This impermissible viewpoint discrimination violated the parents' free-speech rights. *See id.* at 1114–15.

- A Florida school district prohibited a fourth-grader from distributing invitations to an Easter egg hunt so her classmates could "have fun and learn the true meaning of Easter." *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty.*, 905 F. Supp. 2d 1262, 1266–67 (M.D. Fla. 2012). The court, however, granted a preliminary injunction enjoining the school district from prohibiting the invitations to religious events "unless such restriction [would be] necessary to prevent a material and substantial interference with schoolwork or discipline." *Id.* at 1265.
- Though students in a Pennsylvania school district were generally allowed to distribute invitations to birthday parties, Valentine's Day dances, and Halloween parties, the district prohibited a fifth-grader from distributing invitations to a church Christmas party. *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 102–03 (3d Cir. 2013). The Third Circuit affirmed a preliminary injunction prohibiting the district from stopping the distribution of religious flyers. *Id.* at 102–03.

A review of cases from around the country confirms these are not isolated instances of viewpoint discrimination.[3]

---

[3] *See, e.g.*, *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 536 (3d Cir. 2004) (holding school district "clearly engaged in a practice of viewpoint discrimination that cannot be justified as an effort to avoid an Establishment Clause violation"); *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589, 602 (4th Cir. 2004) (holding religious organization was entitled to a preliminary injunction granting it access to a school's "take-home flyer forum," and that such access likely would not violate the Establishment Clause); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044, 1053 (9th Cir. 2003) (holding that when school distributed literature for secular summer camps, it could not "refuse to distribute literature advertising an off-campus summer program because it is taught from a Christian perspective"); *Wright ex rel. A.W. v. Pulaski Cnty. Special Sch. Dist.*, 803 F. Supp. 2d 980, 981–82 (E.D. Ark. 2011) (granting preliminary injunction requiring school to allow student to distribute flyers concerning church-sponsored activities when school already permitted flyers advertising secular activities); *J.S.*

In limited circumstances, courts have allowed school districts to curtail students' religious expression,[4] but the standards for achieving constitutional compliance are not always clear. A litany of cases and an extensive body of literature on this very subject demonstrates the guidance that could enable educators to determine whether the decisions they make comply with constitutional standards is often insufficient. *See Pounds*, 730 F. Supp. 2d at 638 & n.1. Confusion exists about the extent to which restraints on religious expression are permissible.

The need for further guidance is exemplified by cases in which perplexed school officials have switched sides multiple times, sometimes allowing and other times disallowing the contested speech.[5] This case presents yet another example of vacillating policy without genuine resolution of the underlying dispute. Quashing free expression may be the most expedient method of alleviating pressure arising from countervailing interests, but suppression must not be perpetuated as a safety valve.

---

ex rel. Smith v. Holly Area Sch., 749 F. Supp. 2d 614, 625, 630 (E.D. Mich. 2010) (granting preliminary injunction in student's favor when school banned all "student-to-student distribution of materials"); *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 381 (D.N.J. 2006) (holding school district's refusal to permit a student to sing a specific religious song at a school talent show "amounted to unlawful viewpoint discrimination").

[4] *See, e.g.*, *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, 573–74 (6th Cir. 2008) (holding elementary school could prohibit student from "selling" his pipe-cleaner candy canes with an attached religious message at a simulated marketplace as part of the school curriculum); *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 274, 280 (3d Cir. 2003) (holding elementary school could prohibit student from distributing candy canes with an attached Christian message at a seasonal holiday party).

[5] *See Hills*, 329 F.3d at 1047–48 (describing how school district repeatedly changed its mind regarding whether a brochure for a summer camp with Bible classes could be distributed at school); *Kiesinger v. Mex. Acad. & Cent. Sch.*, 427 F. Supp. 2d 182, 185–87 (N.D.N.Y. 2006) (describing school district that sold personalized bricks for sidewalk as a fundraiser; first, the district allowed religious inscriptions on the bricks, then it placed a disclaimer that the messages on the bricks were not its own, and eventually it removed bricks referring to particular religious beliefs).

Our state and federal constitutions embody a fundamental commitment to religious liberty and guarantee the freedom to express diverse thoughts without governmental interference. To adequately protect these rights, courts must not jealously guard their jurisdiction when disputes arise. "[O]ur Constitution requires vigilance lest courts overstep their jurisdictional bounds, [but] courts also must dutifully exercise jurisdiction rightly theirs." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 144 (Tex. 2012). A justiciable controversy exists in this case because Kountze Independent School District has not met its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). To the contrary, the school district has offered no promise of permanency, only an equivocal and conditional change of policy. *See Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6, 12 (Tex. App.—Austin 2008, no pet.) ("Where a policy is challenged as unconstitutional, voluntary cessation of such policy, without an admission or judicial determination regarding its constitutionality, is not sufficient to render the constitutional challenge moot."). Because the constitutional challenge at issue in this case has not been resolved with the degree of assurance required to deprive the courts of jurisdiction over the controversy, I fully join the Court's opinion and judgment.

_____

Eva M. Guzman
Justice

Opinion delivered: January 29, 2016