UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

COLLIN COUNTY REPUBLICAN PARTY,	§	
Plaintiff	§	
	§	
v.	§	Civ. A. No. 4:14-cv-732
	§	
LOVEJOY ISD and TED MOORE, In his official capacity as Superintendent of Lovejoy ISD,	§	
Defendants	§	

LOVEJOY INDEPENDENT SCHOOL DISTRICT AND TED MOORE'S MOTION TO DISMISS AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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Defendants Lovejoy Independent School District ("LISD" or "the District") and Ted Moore[1] file this motion to dismiss Plaintiff's suit for failure to state a claim upon which relief can be granted, as authorized by Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6).

A. Introduction

1. Plaintiff is Collin County Republican Party (herein referred to as "Plaintiff" or "CCGOP"); Defendants are Lovejoy Independent School District (herein referred to as "Defendant LISD" or "LISD" or "District") and Ted Moore (herein referred to as "Defendant Moore" or "Moore" or "Superintendent").

2. On November 4, 014, election day, Plaintiff sued Defendants in state court for violations of Texas Election Code § 61.003 and received a temporary restraining order, with which the District complied. On November 13, 2014, Defendant LISD's Board of Trustees amended its policy to better align with the requirements of Texas Election Code § 61.003. On November 14, 2014, Plaintiff filed a supplemental complaint that added a claim for violation of the First

[1] Ted Moore is sued only in his official capacity, and as such, he and LISD are one in the same.

Amendment of the United States Constitution, plus requests for declaratory judgment and attorney fees. Defendants removed the case to Federal Court.

3. Because the original claim is now moot, and Plaintiff no longer has standing, this Court does not have jurisdiction.

B. Statement of the Issues

The issues in this case involve the following:

1. Whether this Court lacks jurisdiction over Plaintiff's request for a temporary and permanent injunction because the controversy is moot.
2. Whether the request for declaratory relief is moot.
3. Whether Plaintiff has stated a claim for a violation of Plaintiff's First Amendment rights.
4. Whether Plaintiff is entitled to an award of attorney fees in this case.

C. Standard of Review

Fed. R. Civ. P. 12(b)(1)

A motion to dismiss under Rule 12(b)(1) challenges a federal court's subject matter jurisdiction. Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. *See Stockman v. Federal Election Comm'n,* 138 F.3d 144, 151 (5th Cir. 1998). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the claim. *Home Builders Assoc., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998). The Fifth Circuit recognizes a distinction between a "facial attack" and a "factual attack" upon a complaint's subject matter jurisdiction. *See Rodriguez v. Tex. Comm'n on the Arts,* 992 F. Supp. 876, 878 (N.D. Tex. 1998). "A facial attack requires the court merely to decide if the plaintiff has correctly alleged a basis for subject matter jurisdiction" by examining the

allegations in the complaint, which are presumed to be true. *See id.* (citation omitted). A facial attack usually occurs early in the proceedings and directs the court's attention only to "the sufficiency of the allegations in the complaint because they are presumed to be true." *Patterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1998). If sufficient, those allegations alone provide jurisdiction. However, if the defendant supports the motion with evidence, then the attack is factual, and "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir. 1981). In a factual attack, matters outside the pleadings, such as testimony and affidavits, may be considered. *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir. 1980). Regardless of the nature of the attack, "[t]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Rodriguez*, 992 F. Supp. at 879. "A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders,* 143 F.3d at 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund,* 81 F.3d 1182, 1187 (2d Cir. 1996)).

A motion under Rule 12(b)(1) may be brought for lack of subject matter jurisdiction on the grounds that a claim is moot. Fed. R. Civ. P. 12(b)(1); *see also Am. W. Sav. Ass'n v. Farmers Market of Odessa, Inc.,* 753 F. Supp. 1338, 1347 (W.D. Tex. 1990). A case becomes moot if it "no longer present[s] a case or controversy under Article III, § 2 of the Constitution." *Spencer v. Kemna,* 523 U.S. 1, 7 (1998). Under the case or controversy requirement, "[t]he parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Id.* (citing *Lewis v. Cont'l Bank Corp.,* 494 U.S. 472, 477-78 (1990)). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Id.*

For a federal court to adjudicate a claim, a plaintiff must have standing to assert the claim. *See Xerox Corp. v. Genmorra Corp.,* 888 F.2d 345, 350 (5th Cir. 1989). Accordingly, standing challenges are properly dealt with under Rule 12(b)(1). *Id.* In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson,* 645 F.2d at 413. Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Home Builders,* 143 F.3d at 1010.

When reviewing a Federal Rule of Civil Procedure 12(b)(1) motion concurrently with other Rule 12(b) motions, the court considers the Rule 12(b)(1) jurisdictional question before considering any motions based on the merits of the claim. *Wolcott v. Sebelius,* 635 F.3d 757, 762 (5th Cir. 2011).

Fed. R. Civ. P. 12(b)(6)

Motions to dismiss for failure to state a claim are appropriate when a defendant attacks the complaint because it fails to state a legally cognizable claim. Fed. R. Civ. P. 12(b)(6). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court as follows: "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See also Grisham v. United States,* 103 F.3d 24, 25-26 (5th Cir. 1997). This motion to dismiss outlines the multiple grounds for which dismissal is appropriate under this standard.

"[T]he plaintiff's complaint is to be construed in a light most favorable to the plaintiff, and the allegations contained therein are to be taken as true." *Oppenheimer v. Prudential Sec., Inc.,* 94 F.3d 189, 194 (5th Cir. 1996). In other words, a motion to dismiss under Rule 12(b)(6)

"admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). Nevertheless, "a plaintiff must plead specific facts, not mere conclusory allegations.... We will not accept as true conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). It is paramount in this case to remember that legal conclusions or opinions—even when couched as factual conclusions—are not given a presumption of truthfulness. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995) (citing *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.").

Moreover, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citations omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. In other words, if the pleading or allegation is not plausible enough to be considered truthful, it will not survive a motion to dismiss. While the Court should not dismiss the case simply because Plaintiff's claims are deemed "chimerical," it is the "conclusory nature of [Plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id*.

Temporary Restraining Orders/Temporary Injunctions

The purpose of a temporary restraining order (TRO) is to preserve the status quo, which is defined as "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 617 (1962) (per curiam).

Here, the state court granted temporary injunctive relief to alter the status quo and prohibit LISD from following its policy, on election day, in a manner that gave notice only to one party's candidates that signs could be posted at LISD schools.

Finally, this Court must examine the Complaint to determine whether the allegations provide relief on any possible theory. *Bryant v. Lubbock Indep. Sch. Dist.*, Civ. A. No. 504CV083, 2004 WL 884471, *2 (N.D. Tex. 2004) (citing *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994)).

D. Undisputed Facts

Lovejoy High School was a designated polling place on the statewide general election day, November 4, 2014. Pl.'s Original Pet. & Application for TRO & Temporary Inj. *3 (hereinafter Original Pet.). On the day of the election, LISD's policy GKDA (LOCAL) stated that "Political campaign signs, cards, posters, and other similar materials shall not be posted or placed on any District property, including sites designated as polling places." GKDA (LOCAL) at 2. On the November 4 election day, consistent with its policy, LISD removed all campaign signs posted on LISD property, regardless of the location of the sign within or without the 100 foot zone where electioneering is prohibited. Original Pet. at *3 The Collin County Republican Party filed suit, requesting and receiving a temporary restraining order prohibiting LISD from following its policy and prohibiting the placement of campaign signs on LISD property. On November 4, 2014, a telephone hearing was held on the temporary restraining order at which all parties appeared. Pl. Collin Cnty. Republican Party's Supp'l Original Pet. and Application for Injunctive Relief (hereinafter Supp'l Pet.) at 2. The Court issued a temporary restraining order barring LISD from enforcing its policy GKDA (LOCAL) and/or removing political signs. *See* App. to Notice of Removal (ECF # 1-4) at 19-20. On November 13, the LISD Board of Trustees amended and has promulgated its policy GKDA (LOCAL) to unequivocally comply with Texas

Election Code § 61.003, and specifically Texas Election Code § 61.003(a-1).[2] *See* LISD Board Policy GKDA (LOCAL), attached hereto and incorporated herein as Exhibit A.[3] This Court may take judicial notice of the policies and ordinances of a local government. *See e.g. U.S. v. City of Miami, Fla.*, 664 F.2d 435, 446 (5th Cir. 1981) (taking judicial notice of a city ordinance). Further, Defendants may provide evidence in support of a motion to dismiss under Fed. R. Civ. P. 12(b)(1). *Williamson,* 645 F.2d at 413.

E. Argument

The temporary and permanent injunctions should be denied because the issue is moot and Plaintiff has no standing. LISD has modified its policies to indisputably comply with Texas Election Code § 61.003, and there is no evidence in the record to indicate that LISD would change its policy back to the previous form.

1. This court lacks jurisdiction because the issue is moot.

a. The actions complained of by Plaintiff are moot.

A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971) (per curiam) ("federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them"); *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005). Public interest in the resolution of an issue cannot replace the necessary individual interest in the outcome. *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974) (per curiam). The fact that a valid controversy existed between the parties at the time the case was originally filed cannot substitute for the actual case or controversy requirement for this Court to exercise

[2] Defendants do not concede that the previous policy violated the statute. Rather, as it is moot, there is no reason to further defend the policy.
[3] Policy GKDA (LOCAL) available at:
http://pol.tasb.org/Policy/Download/319?filename=GKDA(LOCAL).pdf.

jurisdiction. *Honig v. Doe*, 484 U.S. 305, 316 (1988). A justiciable controversy exists when there is "a real and substantial controversy involving [a] genuine conflict of tangible interests and not merely a theoretical dispute." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *see also Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 27-28 (5th Cir. 1989). The Supreme Court described the process of mooting an issue as to "prevent[] the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders." *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

A court will find that a controversy is moot when an allegedly wrongful behavior has passed and could not be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170 (2000)*; Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no pet.). The actual controversy must persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 92 (2009)).

Mootness deprives a court of subject-matter jurisdiction. *Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100-01 (Tex. 2006). Subject matter jurisdiction is essential to a trial court's authority to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). The mootness prohibition is rooted in the separation of powers doctrine in the United States and Texas Constitutions, both of which prohibit courts from rendering advisory opinions. *See* U.S. Const. art. III, § 2, cl. 1; Tex. Const. art. II, § 1; *see also Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam); *Texas Ass'n of Bus.*, 852 S.W.2d at 444.

Plaintiff complains of the actions of Defendants based on LISD policy GKDA (LOCAL), and avers that such policy wording is in violation of Texas Election Code § 61.003. Orig. Pet. at

*2-3, ECF No. 2.[4] Specifically, Plaintiff requests three elements of relief:[5]

1. Prohibiting LISD from enforcing the prohibition on distribution[6] and posting of political materials on District property, including sites designated as polling places;
2. Removing political signs placed by candidates or campaigns in accordance with Election Code § 61.003; and
3. A declaration that the LISD policy is in violation of the Election Code (and attorney fees associated with the declaration).

The statute that Plaintiff relies upon for electioneering is Texas Election Code 61.003, which includes language that "The entity that owns or controls a public building being used as a polling place may not, at any time during the voting period, prohibit electioneering on the building's premises outside of the area described in Subsection (a), but may enact reasonable regulations concerning the time, place, and manner of electioneering." LISD believed its policy, which had been in place for five years, to be a "reasonable regulation," "but based upon the concern raised by Plaintiff on November 4, held a meeting and amended its policy. Effective November 13, 2014, the LISD Board of Trustees adopted a new policy GKDA (LOCAL) (*see* Exhibit A) that incorporates the requirements of Texas Election Code § 61.003, and includes time, place, and manner restrictions reasonably related to the business of the school. The new policy only prohibits distribution of political materials (but not placement of signs outside the 100 foot barrier) during the drop-off and pick-up hours at a campus serving as a polling place. The congestion that would ensue if, during drop-off and pick-up times, electioneers were to cross the parking lot and traffic lanes to hand leaflets to prospective voters would be frustrating to both

[4] Defendants are unable to give pinpoint citations because the Petition does not contain numbered paragraphs or page numbers.
[5] The request for declaratory judgment and attorney fees is found at Supp'l Pet. at 3, ¶ 8, ECF No. 3.
[6] Nothing in the past or present policy includes an absolute prohibition on distribution of political materials.

those trying to get their children and those trying to cross the stream of slowed traffic to vote, not to mention dangerous for the electioneers and children walking to and from the building.[7]

Nevertheless, the Plaintiff continued pursuing its suit, and centers on section 61.003 of the Election Code and whether that section has been violated and will continue to be violated in the future. The First Amendment claim derives from the Election Code claim. From the evidence attached to Plaintiff's Petition, it is apparent that the former policy had been in place since March 19, 2009, and the Plaintiff has presented no evidence why the policy has suddenly become an issue requiring extraordinary relief. *See* Orig. Pet., Ex. A, ECF No. 2. What occasioned the delay until Election Day? The status quo has been misinterpreted in this instance because the Plaintiff failed to take any action on this open and public practice for five years. *See In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004) (explaining that when the petitioner, without explanation, delays for years enforcing provisions of the Election Code, the "status quo" is the prior uncontested, though potentially illegal, conduct). Ironically, the state court, in granting a TRO, did not maintain the "status quo," which was the policy in place at the time, but rather in essence prohibited LISD from following its own policy, hours before the close of voting on election day, and with no notice to any of the non-Republican party candidates, which left them the only parties truly damaged by the ruling.

For relief, Plaintiff continues to request that the Court enjoin LISD from enforcing *the earlier policy*, adopted in 2009; however that policy is not enforceable by LISD because it has been replaced with a policy that without contest conforms to the requirements of Election Code § 61.003, and Plaintiff has presented no allegations or evidence that LISD has plans to remove political signs from district property on any future election day. A court will regard assertions of fact in a party's live pleadings that are not pleaded in the alternative, as formal judicial

[7] Plaintiff has not claimed LISD's current policy violates the Texas Election Code.

admissions. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)). For a statement in a pleading to be a judicial admission, it must be clear, deliberate, and unequivocal. *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship*, 146 S.W.3d 79, 95 (Tex. 2004). LISD has pleaded that it amended the offending policy to be in clear conformance with state law, and has pleaded that it has no intention to revert the policy to the prior version; no controversy remains between the parties. When a court is unable to grant the relief requested because the offending policy or ordinance is no longer in effect, the matter is moot. *See generally Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-251-CV, 2014 WL 1857797 (Tex. App.—Beaumont May 8, 2014) (mem. op.).

> Because of the possibility that the defendant could merely return to his old ways,' [t]he test for mootness in cases such as this is a stringent one.... A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " [*Sec'y of Labor v.*] *Burger King*, 955 F.2d [681] at 684 [(11th Cir.1992)] (quoting *Greenwood Utils. Comm'n v. Hodel*, 764 F.2d 1459, 1462–63 (11th Cir.1985)). "However, governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Coral Springs St. Sys*. [*Inc., v. City of Sunrise*], 371 F.3d [1320] at 1328–29 [(11th Cir. 2004)]. "[W]hen the defendant is not a private citizen but a government actor, there is a rebuttable presumption that the objectionable behavior will not recur." *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla*., 382 F.3d 1276, 1283 (11th Cir. 2004) (emphasis in original). "When government laws or policies have been challenged, the Supreme Court has held almost uniformly that cessation of the challenged behavior moots the suit." *Id*. "The [Supreme] Court has rejected an assertion of mootness" in a voluntary cessation case "only when there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated." *Id*. at 1283–84 (emphasis in original).

Freedom from Religion Found., Inc. v. Orange Cnty. Sch. Bd., No. 6:13-CV-922-ORL-18, 2014 WL 3057881, *4 (M.D. Fla. July 3, 2014). Plaintiff cannot rebut and can only provide conclusory speculation to support its assertion that LISD *might someday change its policy again*.

b. There are no applicable exceptions to the mootness doctrine

As Plaintiff argues that LISD's policy as it applies to Texas Election law is not moot, we look mostly to Texas jurisprudence on the issue. The Texas Supreme Court has recognized two exceptions to the mootness doctrine: "capable of repetition yet evading review[;]" and collateral consequences.[8] *F.D.I.C. v. Nueces Cnty.*, 886 S.W.2d 766, 767 (Tex. 1994). Neither applies in this case.

A. Capable of Repetition

The "capable of repetition yet evading review" exception applies when a party challenges an action that is of such a short duration that the party cannot obtain review before the issue becomes moot. *Tex. A & M Univ.—Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011); *see also, Roe v. Wade*, 410 U.S. 113, 125 (1973). The party must show that there is a reasonable expectation that the same action will occur again if the court does not address the issue. *Id.* The ban challenged in this lawsuit is not an action of such short duration that it would evade review. In fact, the old policy had been in place for over five years. The new policy has been adopted looking at other local districts,[9] and created with necessary time, effort, and review of the Election Code. Any possible future change to the policy can be timely challenged at a later date. This Court is not empowered to decide cases on Plaintiff's future contingencies or hypotheticals. *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles, Cal.*, 133 S. Ct. 2096, 2104-2105 (2013) ("We see no reason to take a guess now about what the [defendant] will do later"); *City of Dallas v. Woodfield*, 305 S.W.3d 412, 419 (Tex. App.—Dallas 2010, no pet.) (citing *Murphy v. Hunt*,

[8] "[T]he public interest exception permits judicial review of questions of considerable public importance if the nature of the action makes it capable of repetition and yet prevents effective judicial review." *F.D.I.C.*, 886 S.W.2d at 767. The Texas Supreme Court has not recognized the public interest exception to the mootness doctrine. *See F.D.I.C.*, 886 S.W.2d at 767 (noting that the Court has not previously decided the viability of the public interest exception and finding it unnecessary to reach that issue under the facts of that case); *see also Jackson v. Blanchard*, No. 09–11–00273–CV; 2011 WL 4999537, at *1 (Tex. App.—Beaumont Oct. 20, 2011, pet. denied).

[9] *See, e.g.*, Frisco ISD Policy GKD (LOCAL) at http://pol.tasb.org/Policy/Download/309?filename=GKD(LOCAL).pdf; McKinney ISD Policy GKD (LOCAL) at http://pol.tasb.org/Policy/Download/310?filename=GKD(LOCAL).pdf.

455 U.S. 478, 482 (1982) ("The mere physical or theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test.")). Any ruling based on what LISD might do in the future, without any evidence or indication of a specific action, would constitute a prohibited advisory opinion because the issue is not ripe. *See, e.g., Tex. Employment Comm'n v. Camarena*, 754 S.W.2d 150, 151-52 (Tex. 1988) (vacating an injunction based on speculation that the government would attempt to enforce anything less than a law newly enacted to resolve the issue in controversy).

B. Collateral Consequences

The "collateral consequences" exception to the mootness doctrine has been applied when Texas courts recognize that prejudicial events have occurred "whose effects continued to stigmatize helpless or hated individuals long after the unconstitutional judgment had ceased to operate. Such effects were not absolved by mere dismissal of the cause as moot." *Spring Branch Indep. Sch. Dist. v. Reynolds*, 764 S.W.2d 16, 19 (Tex. App.—Houston [1st Dist.] 1988, no writ). Although the collateral consequences doctrine is most often applied in review of criminal convictions, it has sometimes applied in the civil context. Wright, Miller & Cooper *Fed. Practice & Procedure* § 3533.2 (2d ed. 1984). Nevertheless, the types of cases in which the doctrine is applied indicate that the action being brought forward carries some sort of ongoing stigma that sets the Plaintiff apart from others. *See*, e.g., *Umanzor v. Lambert*, 782 F.2d 1299 (5th Cir. 1986) (stigma of deportation); *Dailey v. Vought Aircraft Co.*, 141 F.3d 224 (5th Cir. 2009) (stigma of disbarment); *Connell v. Shoemaker*, 555 F.2d 483 (5th Cir. 1977) (stigma of imputation of bigotry).

In order to invoke collateral consequences, Plaintiff must show both that a concrete disadvantage resulted from the judgment and that the disadvantage will persist even if the TRO is lifted and the case dismissed as moot. *Marshall v. Hous. Auth. of City of San Antonio*, 198

S.W.3d 782, 789 (Tex. 2006) (citing *Spencer*, 523 U.S. at 8). Plaintiff will be hard-pressed to show that it suffered any disadvantage whatsoever considering the overall election results for November 4, 2014. The collateral consequences exception does not apply.

2. This Court lacks jurisdiction because Plaintiff does not have standing.

The plaintiff's burden, in a lawsuit brought to force compliance, is to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury is certainly impending. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). The prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness. *Friends of the Earth*, 528 U.S. at 170. "Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest. *Id.*

LISD has changed the policy that mandated the actions from which Plaintiff complained. What makes this policy different than other previously litigated election cases is that all parties were treated the same by LISD; no party reaped an advantage or disadvantage through LISD's previous policy. The changes conform to the conditions permitted under the most recent version of the statute. Operating under the new policy, there is nothing LISD could do to harm Plaintiff, so Plaintiff's speculation (and it is pure speculation) that LISD poses some future threat to Plaintiff is not sufficient to grant standing to request extraordinary relief.

3. Declaratory Judgment Act

To satisfy the "actual controversy" requirement of the Declaratory Judgment Act, the dispute must be definite and concrete, touching the legal relations of parties having adverse legal interests; the dispute must be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts. 28 U.S.C.A. § 2201(a) (West 2014). Because the controversy between

the parties is moot, the Court need not issue such an advisory opinion. Further, under Texas law, when a request for injunctive relief becomes moot because the action sought to be enjoined has been accomplished, as in this case, a request for declaratory relief also becomes moot. *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993); *see also Wilson v. Birnberg*, 667 F.3d 591, 596-97 (5th Cir. 2006) (explaining the highly unique circumstances that must be in place for the declaratory judgment action to be maintained following mooting the claim for injunctive relief).

4. First Amendment

Plaintiff has failed to appropriately plead a claim of violation of rights guaranteed in the First Amendment to the United States Constitution. *See Gitlow v. State of N.Y.*, 268 U.S. 652, 666 (1925).

We recognize the Court may choose, upon request, to grant Plaintiff the opportunity to amend and correct its complaint. In *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346 (2014), the Supreme Court held: "For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to §1983. *See* 5 Wright & Miller, *supra*, §1219, at 277–278 ('The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.' (footnotes omitted)); Fed. R. Civ. P. 15(a)(2) ('The court should freely give leave [to amend a pleading] when justice so requires.')."

Regardless, Defendants amended the policy before Plaintiff had filed its Supplemental Petition to claim a First Amendment violation and demand declaratory relief.

5. Attorneys' Fees

Plaintiff made no claim for attorney fees in the Original Petition and Application for

Temporary Restraining Order. Texas Election Code chapter 61 has no provision for an award of damages or attorney fees for a violation of this section. While some chapters of the Election Code provide for awards of damages and/or fees, Chapter 61 has no such governing provision. *See, e.g., Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881 n.2 (Tex. 1990). An award of attorney fees is not appropriate in this case.

The Declaratory Judgments Act allows attorney fees to be awarded on an "equitable and just" basis. Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2014). A party need not prevail to be awarded attorney's fees. *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 637 (Tex. 1996). Nevertheless, Plaintiff filed the petition for declaratory judgment (upon which its claim for fees is based) the day *after* LISD acceded to Plaintiff's demands and changed its policy. Under even the best light, this demand for attorney's fees is simply shady and punitive. LISD *may have* erred in its previous policy. Plaintiff had years to raise concerns about the policy prior to the election, and to exhaust administrative remedies by bringing this matter to the school board before Election Day.[10] Plaintiff brought these issues to the LISD on Election Day, and LISD was prohibited from holding a meeting to review the concerns with the policy because there was not 72 hours to legally give notice of a meeting. Texas Gov't Code Ann § 551.043(a) (West 2014).

Nonetheless, LISD has amended its policy; Plaintiff, therefore, now seeks a declaratory judgment against the current policy (which was already in place when Plaintiff added its declaratory judgment cause of action). Plaintiff seeks a declaratory judgment that LISD is not to follow its **previous** policy! Plaintiff challenged LISD; LISD gave Plaintiff what it had asked for to begin with. Once Plaintiff has succeeded, to allow Plaintiff to come back and add additional

[10] Under LISD policy, Plaintiff had the right to grieve this matter to the LISD Board of Trustees and give them the first opportunity to consider a possible policy change.

claims about a policy no longer in force just so Plaintiff can claim attorneys' fees is unconscionable.

F. CONCLUSION

The Temporary Restraining Order/Temporary Injunction is moot and should be dissolved. Declaratory relief should be denied. Defendants pray that Plaintiff's Supplemental Petition be denied in all respects and that this Court dissolve the Temporary Restraining Order/Temporary Injunction. Lovejoy ISD prays for such other and further relief, both general and special, at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

EICHELBAUM WARDELL
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading has been served upon counsel via the electronic filing system of this Court on November 24, 2014 to the following:

George B. Flint
The Flint Firm, P.C.
16970 Dallas Pkwy, Ste. 550
Dallas, Texas 75248
(972) 509-4805 (facsimile)

___/s/ Dennis J. Eichelbaum___
Dennis J. Eichelbaum

Lovejoy ISD
043919

NONSCHOOL USE OF SCHOOL FACILITIES
DISTRIBUTION OF NONSCHOOL LITERATURE

GKDA
(LOCAL)

DISTRIBUTION OF NONSCHOOL LITERATURE PERMITTED

Written or printed materials, handbills, photographs, pictures, films, tapes, or other visual or auditory materials not sponsored by the District or by a District-affiliated school-support organization shall not be sold, circulated, distributed, or posted on any District premises by any District employee or by persons or groups not associated with the District, except in accordance with this policy.

The District shall not be responsible for, nor shall the District endorse, the contents of any nonschool literature distributed on any District premises.

[See CPAB regarding use of the District's internal mail system and FNAA regarding distribution of nonschool literature by students]

LIMITATIONS ON CONTENT

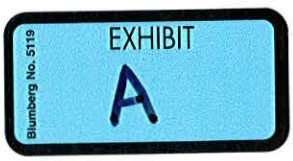
Nonschool literature shall not be distributed on District property if:

1. The materials are obscene, vulgar, or otherwise inappropriate for the age and maturity of the audience.
2. The materials endorse actions endangering the health or safety of students.
3. The materials promote illegal use of drugs, alcohol, or other controlled substances.
4. The distribution of such materials would violate the intellectual property rights, privacy rights, or other rights of another person.
5. The materials contain defamatory statements about public figures or others.
6. The materials advocate imminent lawless or disruptive action and are likely to incite or produce such action.
7. The materials are hate literature or similar publications that scurrilously attack ethnic, religious, or racial groups or contain content aimed at creating hostility and violence, and the materials would materially and substantially interfere with school activities or the rights of others.
8. There is reasonable cause to believe that distribution of the nonschool literature would result in material and substantial interference with school activities or the rights of others.

PRIOR REVIEW

All nonschool literature intended for distribution on school campuses or other District premises under this policy shall be submitted to the Superintendent for prior review in accordance with the following:

1. Materials shall include the name of the person or organization sponsoring the distribution.



2. Using the standards found in this policy at LIMITATIONS ON CONTENT, the Superintendent shall approve or reject submitted materials within two school days of the time the materials were received.

EXCEPTIONS TO PRIOR REVIEW

Prior review shall not be required for distribution of nonschool literature in the following circumstances:

1. Distribution of materials by an attendee to other attendees at a school-sponsored meeting intended for adults and held after school hours;

2. Distribution of materials by an attendee to other attendees at a community group meeting held in accordance with GKD(LOCAL) or a noncurriculum-related student group meeting held in accordance with FNAB(LOCAL); or

3. Distribution for electioneering purposes during the time a school facility is being used as a polling place in accordance with state law [see BBB].

All nonschool literature distributed under these exceptions shall be removed from District property immediately following the event at which the materials were distributed.

Even when prior review is not required, all other provisions of this policy shall apply.

~~PROHIBITION ON SIGNS~~

~~Political campaign signs, cards, posters, and other similar materials shall not be posted or placed on any District property, including sites designated as polling places.~~

LIMITATION ON SIGNS

During the applicable period of voting at designated polling sites, signs no larger than 24 inches by 24 inches (or four square feet) may be placed and/or posted on District property. Placement and/or posting of signs is restricted to the primary driving entrances of the property and areas where voters will enter the polling locations or such other locations as the District may designate. Larger signs and other material such as cards, posters, and other similar material shall not be posted or placed on any District property, including sites designated as polling places. If signs are posted in areas that are deemed to make arrival or dismissal of students unsafe, either the candidate shall be requested to remove only those signs considered a safety hazard or, without notice to the candidate, the District shall be authorized to remove only those signs considered a safety hazard.

Lovejoy ISD
043919

NONSCHOOL USE OF SCHOOL FACILITIES
DISTRIBUTION OF NONSCHOOL LITERATURE

GKDA
(LOCAL)

TIME, PLACE, AND MANNER RESTRICTIONS	The Superintendent shall designate times, locations, and means for distribution of nonschool literature at District facilities, in accordance with this policy.
VIOLATIONS OF POLICY	Failure to comply with this policy regarding distribution of nonschool literature shall result in appropriate administrative action, including but not limited to confiscation of nonconforming materials and/or suspension of use of District facilities. Appropriate law enforcement officials may be called if a person refuses to comply with this policy or fails to leave the premises when asked. [See GKA]
APPEALS	Decisions made by the administration in accordance with this policy may be appealed in accordance with the appropriate District complaint policy. [See DGBA or GF]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

COLLIN COUNTY REPUBLICAN PARTY,	§	
Plaintiff	§	
	§	
v.	§	Civ. A. No. 4:14-cv-732
	§	
LOVEJOY ISD and TED MOORE, In his official capacity as Superintendent of Lovejoy ISD,	§	
Defendants	§	

ORDER GRANTING DEFENDANT LOVEJOY INDEPENDENT SCHOOL DISTRICT'S MOTION TO DISMISS

The Court, after considering the Motion, and any response and reply thereto, hereby ORDERS as follows:

The Court finds that Defendant's Motion to Dismiss is well taken and should be granted in every and all respects.

IT IS THEREFORE ORDERED that all claims against Defendant are dismissed:

_____ with prejudice to the re-filing of same

_____ without prejudice to the re-filing of same

and that Plaintiff take nothing by these claims.

IT IS ALSO ORDERED that each party shall bear its own costs and fees and that all relief not expressly granted herein is DENIED.