No. 14-0453

In the Supreme Court of Texas

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
Ninth Court of Appeals at Beaumont, Texas

BRIEF OF *AMICI CURIAE* SENATORS JOHN CORNYN AND TED CRUZ IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Senators John Cornyn and Ted Cruz represent the State of Texas in the United States Senate. The Senators have a direct interest in promoting the constitutional rights of their 26 million constituents, including their right under the First Amendment to express their religious views.

Further, both Senators have unique qualifications to opine on the First Amendment issues raised in this case. Senator Cornyn currently serves as Chairman of the Senate Subcommittee on the Constitution, and prior to his service in the Senate, Senator Cornyn served as a Texas state district judge, a member of the Supreme Court of Texas, and as the Attorney General of Texas. As Attorney General, Senator Cornyn argued on behalf of the State of Texas in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), one of the principal cases cited by the school district and its *amici*. Senator Cruz previously served as Solicitor General of Texas from 2003 to 2008, during which time he represented the State of Texas in a number of religious liberty cases, including *Van Orden v. Perry*, 545 U.S. 677 (2005), another case that

the Court may consider important in determining the outcome of this case.

The Senators have considerable understanding of First Amendment jurisprudence, particularly in regard to Establishment Clause issues, the parameters of the government-speech doctrine, and the distinct challenges school districts face regarding student expression in the educational setting.[1]

1. No fee was paid for the preparation of this brief. TEX. R. APP. P. 11.

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The Kountze High School cheerleaders have historically made "run-through" banners to support their football team. The banners, which are designed and assembled by the cheerleaders on personal time and using private funds, display messages that are intended to motivate and rally the school spirit of the football players and their fans as the team takes the field. The content of the messages has always been chosen by the student cheerleaders, not the school. At no time

prior to the events that precipitated this litigation did the school require, encourage, or even suggest to the cheerleaders what the banners should say.

In 2012, the cheerleaders chose to include religious-themed messages on the banners, and did so for the first three games of the season. Before the fourth game, however, the Kountze Independent School District (KISD) announced that it would prohibit the cheerleaders from including religious messages on future run-through banners. After the cheerleaders and their parents brought suit and obtained injunctive relief permitting the cheerleaders' religious-themed banner messages, KISD changed its policy to allow the religious messages. Pursuant to its new policy, KISD claimed for the first time that the banner messages were its own "government speech." In KISD's view, the cheerleaders' individual expression was turned into KISD's own speech because the cheerleaders' activities must conform to school policies, sponsors must approve the banners, and the banners are displayed at a school function.

This amicus brief will address the question that the court of appeals below should have addressed: Are banners that reflect

genuinely student-initiated messages transformed into government speech merely because they are subject to approval by the school and displayed at a school-sponsored event?

Under the United States Supreme Court's government-speech jurisprudence the answer is straightforward: messages created solely by student cheerleaders do not become government speech simply because aspects of cheerleaders' activities are regulated by the school. Because the messages on the banners are the cheerleaders' messages, the content of which is not dictated by the school, the speech is not the school's, and it does not qualify as "government speech." The speech belongs to the cheerleaders, and it is entitled to First Amendment Protection.

ARGUMENT

I. THE CHEERLEADER-CHOSEN MESSAGES ON THE RUN-THROUGH BANNERS ARE AN EXPRESSION OF PERSONAL SPEECH, NOT KISD'S GOVERNMENT SPEECH.

The Supreme Court has cautioned that Establishment Clause jurisprudence is "delicate and fact-sensitive," *Lee v. Weisman*, 505 U.S. 577, 597 (1992), and that "[e]very government practice must be judged in its unique circumstances," *Lynch v. Donnelly*, 465 U.S. 668, 694

(1984) (O'Connor, J., concurring). Eschewing these principles, KISD envisions a broad interpretation of government speech in the Establishment Clause context, under which any speech by an authorized speaker at a school-sponsored event becomes the speech of the government.

KISD would characterize the cheerleaders' run-through banners as its own government speech because the banners are created as part of the squad's official cheerleading duties; the banners are checked by school employees for inappropriate statements; and they are ultimately displayed by the cheerleaders (who are obviously dressed in school cheerleading uniforms) at a school event.

The Court should reject KISD's invitation to endorse such a rule because it is contrary to Supreme Court jurisprudence establishing that government speech occurs only when a government entity prescribes the content of the speaker's message. Here, because the school never dictated, encouraged, or even suggested that the cheerleaders must choose any particular message for the banners, the speech belonged to the student cheerleaders. The fact that the banners were displayed at school-sponsored events and that the school regulated the cheerleaders'

activities does not alter the central, dispositive fact that the content of the messages on the banners was genuinely student-initiated speech protected by the First Amendment.

A. Government Speech Is Defined by Government Control Over the Message.

The "government speech doctrine" is justified at its core by the idea that, in order to function, government must have the ability to express certain points of view, including control over that expression. *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment) ("It is the very business of government to favor and disfavor points of view . . . ."). The doctrine gives the government an absolute defense to an individual's free-speech claim.

Thus, for example, the government does not offend the First Amendment by assessing a tax on beef producers and using the proceeds to fund beef-related promotional campaigns. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). Nor does the government's content-based refusal to accept a monument for display in a public park infringe the would-be monument donor's Free Exercise rights. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). A government entity has the right to "speak for itself." *Bd. of Regents of Univ. of Wis. Sys. v.*

Southworth, 529 U.S. 217, 229 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). *See also Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2246 (2015) (explaining that, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position").

The defining characteristic of "government speech" is the government's *actual control* of the message. "When . . . the government sets the overall message to be communicated and approves every word that is disseminated," it engages in "government-speech." *Johanns*, 544 U.S. at 562. Thus, in *Pleasant Grove City v. Summum*, the Supreme Court held that a local government's selection of certain permanent monuments for placement on public land constituted government speech, noting that "[a]cross the country, municipalities generally exercise editorial control over donated monuments through prior submission requirements, design input, requested modifications, written criteria, and legislative approvals of specific content proposals." 555 U.S. at 472 (internal quotation marks and citation omitted).

And last term in *Walker*, the Supreme Court recognized the State of Texas' authority to engage in government speech through its specialty license plate designs. *Walker*, 135 S.Ct. at 2255. Again, looking to the level of control exercised by the State in approving and designing the plates, as well as the history and nature of license plates generally, the Court concluded that the designs accepted by the State for use on specialty license plates were "meant to convey and [had] the effect of conveying a government message." *Id.* at 2250.[2]

In contrast, when the government merely allows speech to occur on its property without exerting control over the message, the government does not engage in "government speech." Even a prayer "authorized by a government policy and tak[ing] place on government property at government-sponsored school-related events" is not necessarily government speech. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *see also Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (*Chandler II*); *Chandler v. James*, 180 F.3d 1254,

2. The Senators agree with the well-reasoned and thorough discussion of *Walker*, and KISD's misapplication of *Walker*'s principles, in the *amicus curiae* brief submitted by the State of Texas.

1261 (11th Cir. 1999) (*Chandler I*).[3] Like the symbolic arm bands in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), or the censored newspaper articles in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), speech that is not government controlled remains individual speech even though it takes place with the government's permission or on its premises. *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1341 (11th Cir. 2001) ("What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message.") (citing *Santa Fe*, 530 U.S. at 301-02).

To determine whether the cheerleaders' speech should be characterized as "government speech" or individual speech, the Court must therefore look to the level of control exercised by the government over the message conveyed. "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or

3. In *Chandler II*, the Eleventh Circuit reconsidered its prior decision in *Chandler I*, which was vacated and remanded by the Supreme Court in light of *Santa Fe*, 530 U.S. 1256 (2000). The Eleventh Circuit reaffirmed its prior decision, holding that it was error for the district court to enjoin the state defendants from allowing private prayer at any school function. 230 F.3d at 1317.

surreptitiously encourages it, the speech is private and it is protected." *Chandler II*, 230 F.3d at 1317.

B. Because the Messages on the Run-Through Banners Were Neither Controlled, Coerced, Nor Even Suggested by the School, They Were the Cheerleaders' Speech, Not the School's.

The undisputed facts of this case establish that the messages written on the banners and displayed at the football games were the cheerleaders' words, not the school's. KISD makes no claim that the cheerleaders were required or encouraged in any way to include religious messages on the banners. Likewise, there is no school policy or rule that, in actuality or effect, even suggested, much less required, the placement of religious messages on the banners. Indeed, until the school year in question, the messages painted on the banners had been entirely non-religious in nature. The extent of the school's policy concerning banners was that the cheerleaders should make banners to promote school spirit at football games. The text and content of the message, aside from the prohibition on obscene material, is, was, and always had been, left up to the discretion of the cheerleaders.

Both KISD and its *amici* focus on the fact that the cheerleaders' sponsors "approved" the banners after they were made and that they

were allowed to be displayed at school functions. But neither of these facts establishes the level of control over the message necessary to equate the cheerleaders' speech with "government speech."

First, the policy of "approving" banners to ensure they did not include obscene or objectively offensive material does not transform the cheerleaders' personal speech into government speech. The messages on the banner still belong to the cheerleaders. Checking to ensure that no obscene material is included does not suddenly create a programmatic message chosen by KISD like the sort at issue in *Johanns* or a unifying theme defining KISD's image like the monument park in *Summum*.

"The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). It is commonly understood that "a [government body] normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The record demonstrates that the extent of the

sponsors' approval was limited to ensuring that the banners complied with generally applicable school policy against obscenity. Sponsor "approval" to ensure that the banners fall within the bounds of decency does not equate to expression of the government's viewpoint.

Second, the display of the banners at football games also does not transform the message into government speech. Cheerleaders, like all students, retain their right to express their personal religious beliefs, even at school-sponsored events. *Tinker*, 393 U.S. at 506.

Citing *Doe v. Silsbee Independent School District*, 402 Fed. Appx. 852 (5th Cir. 2010), KISD argues that "cheerleaders do not have free speech rights over when or how they participate in cheerleading activities because they serve 'as a mouthpiece' for the school." KISD Br. at 13-14 (quoting *Silsbee*, 402 Fed. Appx. at 855). KISD mischaracterizes the Fifth Circuit's holding. In *Silsbee*, the cheerleader argued that she had a First Amendment right not to cheer for a certain basketball player. The court rejected her complaint—but it did not hold, as KISD suggests, that cheerleaders do not have free speech rights.

The court began by acknowledging that "public school students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Silsbee*, 402 Fed. Appx. at 855 (quoting *Tinker*, 393 U.S. at 509). Nonetheless, the court rejected the cheerleader's challenge, holding that "student speech is not protected when that speech would '"substantially interfere with the work of the school."' *Id.* (quoting *Tinker*, 393 U.S. at 509). The court went on to explain that, because the cheerleader's refusal to cheer for a particular player was disruptive and substantially interfered with the game, it was not protected. *Id.* Thus, *Silsbee* stands only for the unremarkable proposition that, like other students, cheerleaders retain their First Amendment rights at school events, but those rights do not encompass disruptive behavior.

KISD's attempt to analogize the cheerleaders to the disciplined employee in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), is equally unpersuasive. In *Garcetti*, the Supreme Court held that a public employee could be disciplined for writing a memorandum that contradicted his government employer's position. *Id.* at 421. The Court's holding was premised on the fact that when a government

employee speaks pursuant to his official duties, he is by definition engaging in "government speech." *Id.* at 421-22. And because the government has the right to control what is said on its behalf, it may institute discipline when the employee fails to correctly deliver the message. *Id.*

Garcetti and similar cases involving public-employee speech have no application here. Those cases involve citizens who have entered government service and therefore accepted unique limitations on their freedom of speech. *Id.* at 418; *see also id.* (explaining that "[g]overnment employers . . . need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services"); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign"). The Court has never held that limitations on government-employee speech apply to student speech at school-sponsored activities or events, and there is no precedent for treating students who participate in such activities or events as government employees. To the contrary, courts have recognized that student speech

is qualitatively different than that of government employees, and that student speech is subject to a different analysis than government-employee speech under the First Amendment. *See, e.g.*, *Kramer v. N.Y. City Bd. of Educ.*, 715 F.Supp.2d 335, 352-53 (E.D.N.Y. 2010) (discussing public-employee speech as governed by *Garcetti* in contrast with student speech as governed by *Tinker*); *Roberts v. Ward*, 468 F.3d 963, 967 n.1 (6th Cir. 2006) (criticizing government-employee plaintiffs for relying on cases involving the regulation of public-school students' free speech, and calling those cases "entirely distinguishable from cases involving the speech of government employees").

In short, because there is no allegation or even a suggestion that the school controls the messages that the cheerleaders paint on the banners, it cannot be considered the school's own speech. Rather, the evidence points to the opposite conclusion. It is undisputed that the cheerleaders have made the banners for many years, and that historically their content has not been religious. The idea for the religious messages came from the cheerleaders, not the school. Although the messages were displayed at a school function and with the permission of school administrators, the messages were neither

controlled nor coerced by the school. Thus the "government speech" doctrine is inapplicable. The messages conveyed on the run-through banners were the cheerleaders' own speech, not the school's.

II. *SANTA FE* DOES NOT DICTATE THE CONTRARY RESULT ADVOCATED BY KISD'S *AMICI*.

KISD's *amici* contend that the Supreme Court's decision in *Santa Fe* requires the contrary conclusion that the run-through banners were not the personal speech of the cheerleaders, but rather KISD's "government speech." This reading of *Santa Fe* should be rejected by the Court.

Contrary to the suggestion of KISD's *amici*, *Santa Fe* did not conclude that, across the board, students may not engage in any religious activity at school functions. *Chandler II*, 230 F.3d at 1316; *see also Santa Fe*, 530 U.S. at 302 ("These invocations are authorized by a government policy and take place on government property at government sponsored school-related events. Of course, *not every message delivered under such circumstances is the government's own*.") (emphasis added). Nor does the opinion provide an answer to the question of when religious speech at a school function can be considered private, and thus, protected. *Chandler II*, 230 F.3d at 1316; *Doe v. Sch.*

Dist. of Norfolk, 340 F.3d 605, 612 (8th Cir. 2003). Rather, *Santa Fe* concluded only that the particular student-led-speech policy implemented by that district was constitutionally infirm, and for very specific reasons. *Chandler II*, 230 F.3d at 1315.

As described by the Supreme Court, *Santa Fe* came to it "as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." 530 U.S. at 315. One of the challenged practices was the district's "long-established tradition of sanctioning student-led prayer at varsity football games." *Id.* The "narrow question" before the Court was "whether implementation of [a revised] policy insulate[d] the continuation of such prayers from constitutional scrutiny." *Id.*

The policy considered by the Court in *Santa Fe* permitted "students to deliver a brief invocation and/or message . . . during the pre-game ceremonies of home varsity football games to solemnize the event." 530 U.S. at 298 & n.6. The student was chosen via a two-step election process that would decide first whether a message would be delivered at all, and second who would give it. *Id.* at 296-97.

Considering the revised policy in light of its history and the public's perception of it, the Court concluded that the policy was in reality a subterfuge for the actual practice of school-sponsored prayer that had been in place at that district for many years. *Id.* at 305-09. Indeed, the Court found that "the policy, by its terms, invites and encourages religious messages." *Id.* at 306. The Court found it highly significant that the policy required an "invocation" whose purpose was to "solemnize" the event. *Id.* In the Court's view, the policy had the effect of suggesting, if not outright requiring, a religious message by the limitation that the message be "solemn." And the fact that the public understood that the message was intended to be religious reinforced the coerciveness of the policy. *Id.* at 307.

None of those factors is present here. To begin with, the school's "policy" concerning the cheerleaders' run-through banners—disallowing obscenity and requiring only a message that encourages school spirit—is not remotely similar to the detailed policy considered in *Santa Fe*. Here there is no requirement that the words be "solemn" or any other description that could be code for "religious."

Moreover, there is no allegation of any historical practice of the school conveying religious messages on the run-through banners. Rather, the banners have historically been *non-religious*, and often irreverent. *See* CR.19 ("'Mangle the Tigers', 'Cage the Eagles,' 'Bury the Bobcats'"). And because there is no history of religious messages on the banners, there is no reason to conclude, like the Court did in *Santa Fe*, that an objective observer at a football game, "acquainted with the text . . . history, and implementation of the [policy]," would believe the speech to represent the views of the school. *Id.* at 308.

Read in its proper context, *Santa Fe* is hardly the blanket prohibition that the District and its *amici* contend it to be. *Santa Fe* instructs that a school district cannot save an already constitutionally infirm policy of government-sponsored speech by instituting an election process that would serve only to preserve that popular tradition. *Santa Fe* does not "obliterate the distinction between State speech and private speech in the school context," nor does it "reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse." *Chandler II*, 230 F.3d at 1316. Likewise, *Santa Fe* did not hold that "all religious speech is inherently coercive at a school

event. On the contrary, the prayer condemned [in *Santa Fe*] was coercive precisely because it was *not* private." *Id.*

Finally, reading *Santa Fe* to stand for the broad proposition that all speech at a school-sponsored and regulated event is necessarily attributable to the school (and therefore must be censored of religious elements), would endorse an unreasonable and unconstitutional rule. For example, meetings of school clubs are authorized, scheduled, and hosted by the school, but a school does not speak through a Bible club any more than through a chess or math club. Likewise, graduation is arguably the most important event at any school, but a guest speaker from the community, or for that matter the valedictorian, voices not the school's sentiments, but his own. Put simply, the blanket assertion that any and all religious messages delivered by an authorized speaker at a school-sponsored event are attributable to the State is unrealistic, and would unconstitutionally require censorship of personal, religious speech.

Because "[n]othing in the Constitution . . . prohibits any public student from voluntarily praying at any time before, during, or after the school day," *Santa Fe*, 530 U.S. at 313, "it does not prohibit prayer

aloud or in front of others, as in the case of an audience assembled for some other purpose," *Chandler II*, 230 F.3d at 1316-17.

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler I, 180 F.3d at 1261.

PRAYER

The Court should grant the petition for review, reverse the decision of the court of appeals, and affirm the decision of the district court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i) because it contains 3,663 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

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