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SUPREME COURT OF TEXAS
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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 Court of Appeals for the Ninth Judicial District, Beaumont, Texas, No. 09-13-00251-CV

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TABLE OF CONTENTS

Page

Identity of Parties and Counsel i

Index of Authorities iv

Statement of the Case vi

Statement of Jurisdiction viii

Issues Presented ix

Introduction 1

Statement of Facts 3

Summary of Argument 6

Argument 8

I. This Case Is Not Moot, Because KISD Has Not Actually Ceased Its Unconstitutional Conduct—It Is Still Violating The Cheerleaders' Constitutional Rights By Treating The Banners As Government Speech. 8

A. The Messages On The Banners Are The Cheerleaders' Own Private Speech, Not Government Speech. 9

1. There Are Three Types of Speech in Schools: Government Speech, Private Speech, and School-Sponsored Speech. 9

2. The Cheerleaders' Messages on the Run-Through Banners Are Not Government Speech. 11

3. The Cheerleaders' Messages on the Run-Through Banners Are Their Private Speech. 12

B. By Declaring The Banners To Be Government Speech, KISD Is Denying The Cheerleaders Their Constitutionally Protected Right To Take Ownership Of Their Own Speech. 16

TABLE OF CONTENTS
(CONTINUED)

Page

C. KISD's Assertion That The Banners Are Government Speech Has An Unconstitutional Chilling Effect On The Free Speech Of The Cheerleaders.......17

II. This Case Is Also Not Moot, Because KISD Has Not Met Its "Heavy Burden" Of Making It "Absolutely Clear" That It Will Never Again Ban Religious Messages On The Cheerleaders' Banners. 19

III. If This Court Allows The Court Of Appeals Decision To Stand, The Cheerleaders Will Soon Be Barred From Ever Displaying Religious Messages On Their Banners. 22

Prayer 26

Certificate of Compliance 27

Certificate of Service 27

INDEX OF AUTHORITIES

Page(s)

Cases

Axson-Flynn v. Johnson,
356 F.3d 1277 (10th Cir. 2004) 14

Bd. of Educ. of Westside Cmty. Sch. v. Mergens,
496 U.S. 226 (1990)....................15

Behymer-Smith v. Coral Acad. of Sci.,
427 F. Supp. 2d 969 (D. Nev. 2006)....................15

Bexar Metro. Water Dist. v. City of Bulverde,
234 S.W.3d 126 (Tex. App.—Austin 2007, no pet.).................... viii, 20

City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988)....................18

Del Valle Indep. Sch. Dist. v. Lopez,
863 S.W.2d 507 (Tex. App.—Austin 1993, writ denied).................... viii, 22

Fowler v. Bryan Indep. Sch. Dist.,
No. 01-97-01001-CV, 1998 WL 350488 (Tex. App.—Houston
[1st Dist.] July 2, 1998, no pet.) 22

Freedom from Religion Found., Inc. v. City of Marshfield, Wis.,
203 F.3d 487 (7th Cir. 2000) 23

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,
528 U.S. 167 (2000)....................20

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988)....................10

In re Commitment of Fisher,
164 S.W.3d 637 (Tex. 2005) 9

Johanns v. Livestock Mktg. Ass'n,
544 U.S. 550 (2005)....................17

Kountze Indep. Sch. Dist. v. Matthews,
No. 09-13-00251-CV, 2014 WL 1857797
(Tex. App.—Beaumont May 8, 2014, pet. filed) .... vii, 20, 21

Lakey v. Taylor ex rel. Shearer,
278 S.W.3d 6 (Tex. App.—Austin 2008, no pet.).................... viii, 21

INDEX OF AUTHORITIES
(CONTINUED)

Page(s)

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995)....................16

Pleasant Grove City, Utah v. Summum,
555 U.S. 460 (2009)....................10

Pounds v. Katy Indep. Sch. Dist.,
730 F. Supp. 2d 636 (S.D. Tex. 2010)....................9, 10

Rosenberger v. Rector & Visitors of Univ. of Va.,
515 U.S. 819 (1995)....................10

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290 (2000)....................4, 23

Tex. Health Care Info. Council v. Seton Health Plan, Inc.,
94 S.W.3d 841 (Tex. App.—Austin 2002, pet. denied)....................22

Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.,
465 F. Supp. 2d 369 (D.N.J. 2006)....................15

Washegesic v. Bloomingdale Pub. Schs.,
33 F.3d 679 (6th Cir. 1994)....................23

Statutes

TEX. GOV'T CODE § 22.001....................viii

Rules

Tex. R. App. P. 55.2....................5

Other Authorities

Dallas Attorney Tom Brandt Discusses Constitutional Question in Kountze Cheerleader Signage Case, *available at*
http://www.youtube.com/watch?v=wBCHaIGqKxk....................4

Texas cheerleaders continue court fight over Bible banners, CBS This Morning (Aug. 8, 2014), *available at*
http://www.cbsnews.com/news/texas-cheerleaders-take-bible-banner-fight-to-state-supreme-court/....................25

Texas high school bans religious banners at football games,
Associated Press, Sep. 20, 2012....................4

STATEMENT OF THE CASE

Nature of the Case:	A group of middle school and high school cheerleaders brought a civil rights suit against their school district. They alleged that the district had violated their constitutional rights by declaring their private speech to be government speech—and accordingly prohibiting them from including their own religious messages on banners they had created to cheer on their school football teams.
Trial Court:	The Honorable Steven R. Thomas 356th Judicial District Court, Hardin County.
Trial Court Disposition:	Plea to the jurisdiction denied; declaratory relief granted, stating that the cheerleaders may continue to display religious messages on their banners; and summary judgment granted to the extent consistent with the Court's order.
Parties in the Court of Appeals:	*Appellees:* Coti Matthews, on behalf of her minor child, M.M.; Rachel Dean, on behalf of her minor child, R.D.; Charles & Christy Lawrence, on behalf of their minor child, A.L.; Tonya Moffett, on behalf of her minor child, K.M.; Beth Richardson, on behalf of her minor child, R.R.; Shyloa Seaman, on behalf of her minor child, A.G.; and Misty Short, on behalf of her minor child, S.S. *Appellant:* Kountze Independent School District. *Amici in Support of Appellees:* The State of Texas; U.S. Senator John Cornyn; and U.S. Senator Ted Cruz.

	Amici in Support of Appellant: American Civil Liberties Union; Americans United for Separation of Church and State; Anti-Defamation League; Interfaith Alliance Foundation; Muslim Advocates; Union for Reform Judaism; Hadassah, The Women's Zionist Organization of America, Inc.; Sikh Coalition; Hindu American Foundation; American Jewish Committee; Randal Jennings; Missy Jennings; Ashton Jennings; and Whitney Jennings.
Court of Appeals:	Ninth District Court of Appeals, Beaumont.
Panel:	Opinion by Kreger, J., joined by McKeithen, C.J., and Horton, J.
Citation:	*Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2014 WL 1857797 (Tex. App.—Beaumont May 8, 2014, pet. filed).
Court of Appeals Disposition:	Reversed and rendered in part; affirmed and remanded in part; without oral argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction because the ruling below conflicts with the decisions of other appellate courts regarding the proper application of the mootness doctrine—including, for example, *Lakey v. Taylor ex rel. Shearer*, 278 S.W.3d 6 (Tex. App.—Austin 2008, no pet.); *Bexar Metropolitan Water District v. City of Bulverde*, 234 S.W.3d 126 (Tex. App.—Austin 2007, no pet.); and *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507 (Tex. App.—Austin 1993, writ denied). *See* TEX. GOV'T CODE § 22.001(a)(2).

ISSUES PRESENTED

1. Did the court of appeals err when it held that this case was moot, even though the parties continue to dispute whether banners created by cheerleaders are the *private* speech of the cheerleaders, and not the *government* speech of their school district?

2. Did the court of appeals err when it mooted this case based on the school district's voluntary cessation of unconstitutional conduct, even though it is not "absolutely clear" that the district will not once again violate the cheerleaders' constitutional rights?

INTRODUCTION

For over two decades, cheerleaders in the Kountze Independent School District have prepared run-through banners to cheer on their school football teams. Over the years, the messages on the banners have changed—as each generation of cheerleaders passed through the school, they brought with them their own ideas—but the school's approach to the cheerleaders and their banners has not. KISD has always allowed the cheerleaders the freedom to select their own messages.

This tradition continued without controversy until 2012, when the cheerleaders decided to include religious messages on their run-through banners to provide encouragement and positive support to the student-athletes.

This should have been no problem, because the banners are the *private* speech of the cheerleaders—not the *government* speech of KISD. But the Freedom From Religion Foundation nonetheless threatened suit under the Establishment Clause, claiming that the cheerleaders' speech was actually unconstitutional government speech. And KISD agreed—so it banned the cheerleaders from including any religious messages on their banners.

The cheerleaders filed suit, explaining that KISD was violating their constitutional rights by treating their private speech as its own government speech. The cheerleaders unsurprisingly won in the district court, which held that the religious messages on the banners were not government speech and did not violate

the Establishment Clause. On appeal, however, the court of appeals declared the case moot and vacated the trial court order.

But this dispute over the fundamental constitutional right to freedom of speech and religious expression is anything but moot. To be sure, KISD claims that it no longer wants to ban the cheerleaders from including religious messages on their banners. Except those words ring hollow in light of KISD's continued insistence that the messages on the banners are its own government speech.

KISD's refusal to acknowledge that the messages on the banners are the private speech of the cheerleaders has dire consequences. Not only does it violate the constitutional rights of the cheerleaders, it could prevent the cheerleaders from ever including religious messages on their banners. After all, if the banners are government speech, then the Freedom From Religion Foundation and its allies will file a lawsuit to condemn any religious messages on the banners as unconstitutional government speech.

The court of appeals was wrong to declare this case moot. There is a live controversy between the cheerleaders and KISD—namely, whether the messages on the banners are the private speech of the cheerleaders, as the district court held, or the government speech of the school, as no court has ever held.

This Court should reverse the court of appeals and affirm the trial court's order protecting the constitutional rights of the cheerleaders.

STATEMENT OF FACTS

This case boils down to one uncontested, dispositive fact: KISD allows its cheerleaders to select the messages included on the run-through banners that they use to cheer on their classmates. *See, e.g.*, KISD Br. at 1-2 & n.2; CR 163, 167-68, 172-73, 226. That is all that matters in this case: The students select the message, not the school.

Indeed, the school does not require that the cheerleaders prepare run-through banners at all—confirming that the school is not even attempting to convey its own message though the banners. CR 162. Rather, the cheerleaders select the message—and then they voluntarily prepare the banners, on their own free time, using private funds. CR 162, 168, 172.

This has been the tradition for decades. CR 199. So in 2012, a group of cheerleaders decided that they wanted to include various inspirational religious messages on their banners. CR 163. These religious messages appeared on the banners during the first three games of the 2012 football season. CR 19.

But then KISD intervened. After receiving a complaint from the Freedom From Religion Foundation, KISD announced that the cheerleaders would be prohibited from including any religious messages on the banners. CR 19-20. The district made this decision because it believed that the banners were government speech and, as a result, any religious messages would violate the Establishment

Clause. *See, e.g.*, KISD Br. at 7 (explaining that Superintendent Kevin Weldon banned "religious messages on the run-through banners" because they "violated the Establishment Clause").[1]

In response to KISD's ban on religious messages, the cheerleaders sued to protect their constitutional rights and obtained an immediate temporary restraining order permitting them to display religious messages on their banners. The district court later converted that temporary restraining order to a temporary injunction—because KISD's prohibition on religious messages would violate the constitutional rights of the cheerleaders. CR 61.

KISD filed a plea to the jurisdiction, arguing that it was entitled to governmental immunity from the cheerleaders' constitutional claims because the

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[1] *See also* CR 35 (First Amended Answer of KISD) (defending "actions taken by Defendant Weldon . . . based [on] his and legal counsel's interpretation of the Establishment Clause of the United States Constitution, specifically as it has been interpreted by the United States Supreme Court in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), in which the Supreme Court held that student-led prayers at a high school football game violated the Establishment Clause"); *Texas high school bans religious banners at football games*, Associated Press (Sept. 20, 2012), *available at* http://www.foxnews.com/us/2012/09/20/texas-high-school-bans-religious-banners-at-football-games/ ("Superintendent Kevin Weldon gently explains to every parent who calls that a 2000 U.S. Supreme Court precedent-setting decision requires religion to be kept out of public schools . . . . [A]ttorney for the Kountze Independent School District, believes a Supreme Court decision in 2000 that barred prayer at the start of a high school football game sets the precedent."); *Dallas Attorney Tom Brandt Discusses Constitutional Question in Kountze Cheerleader Signage Case*, NBC 5 (KXAS) (Oct. 19, 2012), *available at* http://www.youtube.com/watch?v=wBCHaIGqKxk ("[Counsel for KISD] Tom Brandt says scripture-themed banners displayed by Kountze High School cheerleaders violate the constitutional separation of Church and State.").

run-through banners were government speech—and thus the cheerleaders had no free speech rights to assert. CR 108-13. The district court rejected KISD's plea to the jurisdiction. CR 1034-36. In doing so, the court also concluded that religious messages on the banners did not violate any law. *Id.* Because of this ruling, the cheerleaders were able to continue to display their inspirational religious messages.

On appeal, however, the Beaumont Court of Appeals declared the case moot, on the ground that KISD—despite continuing to declare that the banners were government speech—had announced that it would permit the cheerleaders to include religious messages on the banners. The court of appeals accordingly vacated the trial court order protecting the cheerleaders' rights.[2]

Because of that decision, KISD continues to treat the cheerleaders' personal religious messages on their banners as the school's own government speech, though the district does currently permit religious messages on the banners.

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[2] In its ruling, the court of appeals correctly stated the nature of the case, *see* TEX. R. APP. P. 55.2(g)—except for its language that suggests KISD will always permit religious messages on the cheerleaders' banners in the future. There is no factual basis in the record for that assumption.

SUMMARY OF ARGUMENT

A case becomes moot if there is no longer a live case or controversy in dispute between the parties. In a declaratory judgment action, this can occur when a defendant voluntary ceases the complained-of conduct—and makes it "absolutely clear" that it will not engage in that conduct ever again.

Here, the court of appeals declared that the case was moot because there was no longer a case or controversy once KISD voluntarily announced that it intends to allow religious messages on the cheerleaders' banners. But this conclusion is incorrect, for two independent, yet equally fatal, reasons.

First, the court of appeals fundamentally misunderstood the dispute in this case. The case is not simply about whether KISD is currently allowing religious messages to appear on the cheerleaders' banners. Rather, the dispute is whether the speech on the banners is the private speech of the cheerleaders, or government speech of KISD. That controversy remains very much alive—because KISD continues to treat the cheerleaders' messages as the school's own government speech, when it is actually the private speech of the cheerleaders.

Second, KISD has not met the "stringent" standard for when the government's voluntary cessation of unconstitutional conduct can moot a case. Here, KISD has simply stated that it is not "required" to ban the cheerleaders' religious messages—but KISD maintains that it has the authority to ban the

messages if it so wishes. That is plainly insufficient to satisfy KISD's "heavy burden" of making it "absolutely clear" that it will never again engage in the unconstitutional conduct that led to this litigation.

Thus, for two independent reasons, the court of appeals plainly erred in declaring this case moot.

Worse still, the consequences of the court of appeals' mootness decision are severe. If the decision stands—and KISD is permitted to erroneously characterize the banners as government speech—the days of the cheerleaders exercising their constitutional rights may be numbered.

After all, if the religious messages are government speech, then they are unconstitutional under existing Establishment Clause precedent—a court will have no choice but to ban all religious messages on the banners. And make no mistake: if the decision below stands, the Freedom From Religion Foundation, the ACLU, and all of the amici that supported KISD in the court below will sue to do just that. The way to prevent that result is for this Court to step in and protect the constitutional rights of the cheerleaders.

Accordingly, this Court should reverse the decision of the court of appeals and affirm the decision of the district court.

ARGUMENT

I. This Case Is Not Moot, Because KISD Has Not Actually Ceased Its Unconstitutional Conduct—It Is Still Violating The Cheerleaders' Constitutional Rights By Treating The Banners As Government Speech.

There is an unusually simple, yet fatal, flaw with the court of appeals' invocation of the voluntary cessation doctrine: there actually has been no cessation in this case. A case or controversy still exists, because KISD has not stopped violating the cheerleaders' constitutional rights.

To this day, KISD maintains that the banners are government speech—which is why it believes there would be no constitutional violation if it were to ban the cheerleaders' religious messages. The cheerleaders, on the other hand, claim that the banners are their private speech—and that KISD has no authority to completely ban religious messages. That is a textbook case or controversy—and one that has nothing to do with whether or not KISD is currently banning religious messages on the banners.

KISD has argued that this hotly contested dispute between the parties is irrelevant—that the characterization of the cheerleaders' speech has no practical or legal consequences. That is plainly incorrect—and only serves to highlight the severity of KISD's misconception of constitutional law.

The proper classification of government versus private speech is a critical issue—and misclassification can have enormous consequences. Erroneously

classifying private speech as government speech not only chills free speech, but also denies speakers the right to have their own message attributed to them. That is why the misclassification of speech is in and of itself a violation of the right to free speech.

Thus, KISD continues to violate the cheerleaders' constitutional rights by declaring the messages on the banners to be government speech. That issue is not moot.

A. The Messages On The Banners Are The Cheerleaders' Own Private Speech, Not Government Speech.

KISD's argument on the merits of this case is premised on a fundamental error of constitutional law: it believes that the run-through banners prepared by the cheerleaders are *not* the private speech of the cheerleaders, but are instead its own government speech. This is incorrect.

1. There Are Three Types of Speech in Schools: Government Speech, Private Speech, and School-Sponsored Speech.

In school speech cases, there are "three recognized categories of speech: government speech, private speech, and school-sponsored speech." *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 642 (S.D. Tex. 2010).[3]

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[3] The cheerleaders have brought their claims under the Texas Constitution, not the United States Constitution. In cases like this, however, Texas courts rely on federal law for guidance. *See In re Commitment of Fisher*, 164 S.W.3d 637, 645 (Tex. 2005) ("Where, as here, the parties have not argued that differences in state and federal constitutional

[Footnote continued on next page]

Government speech is the school's "own speech." *Id.* at 642-43. It exists *only* when the government itself "is the speaker or when it enlists private entities to convey its *own* message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). Importantly, government speech is "not subject to scrutiny under the Free Speech Clause," *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009)—which is why KISD believes it can completely ban religious messages on the banners if it wishes.

By contrast, students *do* have a First Amendment free speech right in the other two categories of school speech: private and school-sponsored speech.

Private speech is speech that happens to occur on school premises, but is not "affirmatively . . . promote[d]" by the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988).

The final category, school-sponsored speech, is unique to the school environment. It exists when student speech is "supervised by faculty members *and* designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271 (emphasis added).

[Footnote continued from previous page]

guarantees are material to the case, and none is apparent, we limit our analysis to the United States Constitution and assume that its concerns are congruent with those of the Texas Constitution.").

2. The Cheerleaders' Messages on the Run-Through Banners Are Not Government Speech.

The messages on the banners are plainly not government speech. Government speech only exists when it is the government's own message. Here, everyone acknowledges that the cheerleaders select the messages displayed on the banners. *See, e.g.*, KISD Br. at 1 & n.2.

In the court below, KISD argued that the banners are government speech because individuals affiliated with the school supervise the activities of the cheerleaders and the school reviews the message on the run-through banners *after* the cheerleaders have selected a message. But that type of supervision has *never* been deemed sufficient to convert student speech to government speech—because, at the end of the day, it is still a student-selected message.

Consider, for example, the U.S. Supreme Court's decision in *Hazelwood*. In that case, the speech at issue was a student newspaper published as part of an official journalism class. *Hazelwood*, 484 U.S. at 262. The students wrote their stories under the supervision of their teacher, and the teacher submitted proofs of each issue to the high school principal for his review prior to publication. *Id*. at 262-63. Additionally, the teacher "selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories,

reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company." *Id.* at 268-69.

In short, the teacher "was the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content." *Id.* at 269.

Yet, despite all of this supervision and control—considerably greater than any alleged supervision of the cheerleaders in this case—the Supreme Court held that the speech was *not* government speech. *Id*. at 272-73.

Indeed, we have not found a single case where a *student*, speaking a message of her choice, was deemed a *government* speaker. This Court should decline the invitation to become the first court to rule otherwise.

3. The Cheerleaders' Messages on the Run-Through Banners Are Their Private Speech.

The conclusion that the run-through banners are not government speech ends this case on the merits—this Court need not decide whether the banners are private speech or school-sponsored speech. Under either category, the cheerleaders have a free speech interest in the messages on their banners—and, accordingly, the district court properly rejected KISD's plea to the jurisdiction. Thus, the critical issue in this case is simply whether the messages are government speech or not—that decides whether KISD or the cheerleaders should be victorious on appeal.

If, however, the Court wishes to confirm the full scope of the rights of the cheerleaders, it can continue the constitutional speech analysis and hold that the messages on the banners are the private speech of the cheerleaders, and not school-sponsored speech.

While not necessary for the disposition of this appeal, that determination would be important for two reasons. First, students possess greater rights with respect to private speech than school-sponsored speech—and given KISD's conduct in this litigation, those additional protections may be necessary to safeguard the religious and free speech rights of KISD students in the future. Second, in any future lawsuit alleging that religious messages on the banners violate the Establishment Clause, school-sponsored speech would be scrutinized more closely than private speech—even though the result, that the messages do not violate the Establishment Clause, would be the same.

Moreover, it would not be difficult for the Court to engage in this analysis—the messages on the cheerleaders' run-through banners are unquestionably private speech, not school-sponsored speech.

Speech is school-sponsored, instead of private, if it (a) occurs in the context of activities that "may fairly be characterized as part of the school curriculum," *and* (b) is perceived to bear the imprimatur of the school. *Hazelwood*, 484 U.S. at 270-71. Neither requirement is present in this case.

An activity is curricular if it is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 271. Here, the evidence that cheerleading is not curricular is overwhelming: (1) cheerleading is not a class; (2) the cheerleaders are not supervised by teachers; (3) the cheerleaders do not receive any school credit for their participation on the squad; (4) the cheerleaders are not graded for their cheerleading activities; and (5) all practices take place on the cheerleaders' personal time, not during school hours. CR 161. Even KISD has admitted that cheerleading is not "directly related to instruction of [] essential knowledge and skills." KISD Br. at 3 n.7.

Nor is the second aspect of school-sponsored speech present here: the messages on the run-through banners do not bear the imprimatur of the school. *Cf. Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (explaining that school-sponsored speech is "speech that a school 'affirmatively . . . promotes,' as opposed to speech that it 'tolerates'" (alteration in original) (quoting *Hazelwood*, 484 U.S. at 270-71)).

Here, KISD is merely *tolerating*—not affirmatively promoting—the cheerleaders' speech. The cheerleaders select the message that they wish to include on the banners. The cheerleaders could, for example, choose a secular message, and KISD would treat the banners precisely the same as it does banners with religious messages. Thus, KISD is not promoting any particular speech from

the cheerleaders. It is simply tolerating the speech that the cheerleaders have chosen. Accordingly, there is no risk here that students or adults would consider those messages to bear the "imprimatur" of the school.

Indeed, the Supreme Court has specifically observed that high school students "are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250-51 (1990) (O'Connor, J.) (quotations omitted).

As a result, courts have repeatedly held that student speech—even at school-related or school-sponsored events—is private speech, because the student's expression did not bear the "imprimatur" of the school. *See, e.g.*, *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 377 (D.N.J. 2006) (finding that a student's performance of a religious song in after-school talent show "was the private speech of a student and not a message conveyed by the school itself"); *Behymer-Smith v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 973 (D. Nev. 2006) (student's recitation of a poem at competition supervised by school officials was private speech).

It is no surprise, then, that the only court ever to address this question—the trial court—found that the religious messages on the banners were the cheerleaders' private speech. *See, e.g.*, CR 61 (Order Granting Temporary

Injunction) ("If the temporary injunction is not issued, the Defendants' unlawful policy prohibiting *private religious expression* will remain in effect and the Plaintiffs will be prohibited from exercising their constitutional and statutory rights at all football games and other school sporting events." (emphasis added)).

B. By Declaring The Banners To Be Government Speech, KISD Is Denying The Cheerleaders Their Constitutionally Protected Right To Take Ownership Of Their Own Speech.

It is undisputed that the cheerleaders create the messages they include on their banners, on their own and without any input from the school. Yet KISD continues to declare that those messages are actually the work of the school.

This is a violation of the cheerleaders' constitutional rights. As the U.S. Supreme Court has explained, "an author generally is free to decide whether or not to disclose his or her true identity." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995). The government infringes on this right when it makes that decision for an author, such as by claiming an author's work as its own.

Thus, just as there is a right to speak *anonymously*, an author has a corresponding right to speak publicly, under the author's own name, to promote the author's own message—and not be forced to take on the name of the government instead.

Yet that is precisely what KISD is doing here. It has declared, by governmental fiat, that the messages written by the cheerleaders are actually those

of the school. It is not allowing the cheerleaders their constitutionally guaranteed right to claim ownership of their own work.

Similarly, "[t]he government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring). And once again, the inverse is also true: just as the government cannot force association, it cannot force *disassociation*. The government cannot disassociate an author from his or her own speech, and instead attribute that speech to itself.

Yet that is precisely what KISD is doing here. It has forcibly attached itself to the messages created privately by the cheerleaders—despite the fact that the cheerleaders may not want their deeply held, personal beliefs co-opted by a public school district. That is unconstitutional.

C. KISD's Assertion That The Banners Are Government Speech Has An Unconstitutional Chilling Effect On The Free Speech Of The Cheerleaders.

Equally troubling is the effect KISD's actions have on the cheerleaders' exercise of free speech. The mere declaration by KISD that the messages on the banners are government speech—instead of private speech—has a chilling effect on the free speech of the cheerleaders.

The school is claiming absolute power to ban whatever it wants, whenever it wants. If KISD wants to ban religious messages—it can do so. If KISD wants to ban any references to a football player's favorite music, forbid any discussion of the football team's academic excellence, or even randomly outlaw any use of the letter "Q"—it can do all of that as well. It can do whatever it wants.

The practical result of KISD's assertion of absolute power over the messages on the banners is to inhibit the cheerleaders' free speech. Knowing that KISD might ban their speech for any reason, the cheerleaders will be pressured to speak in a manner that KISD will not censor.

This is a violation of the cheerleaders' constitutional rights. As the U.S. Supreme Court has explained, "the mere existence of the [government's] unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-57 (1988).

Indeed, it does not even matter if KISD never actually prohibits the cheerleaders from speaking on a topic of their personal choosing—the mere assertion of "unfettered discretion" chills the cheerleaders' speech. *See, e.g.*, *id.* ("It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussio*n.") (quotations omitted).

* * *

In sum, this case is not moot because a live case or controversy remains. KISD believes that the banners are government speech—and for that reason, KISD believes its exercise of absolute control over the messages prepared by the cheerleaders does not violate the cheerleaders' constitutional rights. The cheerleaders believe that the banners are their private speech—and for that reason, they believe that KISD's actions do violate their constitutional rights. That is a live controversy—one that should be resolved in favor of the cheerleaders by affirming the decision of the district court to deny KISD's plea to the jurisdiction.

To be sure, if KISD admitted that it *cannot* ban religious messages on the banners (beyond any restrictions permitted by the U.S. and Texas Constitutions) *because* the messages are the private speech of the cheerleaders, then this case would be moot. But it has not done that.

II. This Case Is Also Not Moot, Because KISD Has Not Met Its "Heavy Burden" Of Making It "Absolutely Clear" That It Will Never Again Ban Religious Messages On The Cheerleaders' Banners.

The court of appeals fundamentally misunderstood the core constitutional error in this case—KISD's treatment of the cheerleaders' banners as government speech rather than private speech—and instead assumed the dispute was only about the district's ban on religious messages on the banners. Based on that

misunderstanding, the court below found the case moot, because KISD announced that it no longer intended to ban religious messages on the banners.

This too was wrong. Even setting aside the fundamental constitutional dispute in this case, the court below should not have found the case moot based on voluntary cessation.

"The standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent." *Bexar Metro. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App.—Austin 2007, no pet.). It must be "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Moreover, the party asserting mootness must bear the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to resume." *Id.*

According to the court of appeals, KISD has met this "stringent standard" because, under the school district's revised policy, "school personnel are not *required* to prohibit messages on school banners . . . solely because the source or origin of such messages is religious." *Kountze Indep. Sch. Dist. v. Matthews*, No. 09-13-00251-CV, 2014 WL 1857797, at *4, *6 (Tex. App.—Beaumont May 8, 2014, pet. filed) (emphasis added).

But that is plainly not enough to moot this case. All KISD has said is that it is not *required* to ban the cheerleaders' religious messages—it still maintains that it could if it wanted to. So KISD has not made it "absolutely clear" that it has abandoned its unconstitutional conduct—to the contrary, it has reaffirmed its right to engage in that unconstitutional conduct whenever it sees fit.

KISD's argument is akin to allowing a municipality to moot a racial discrimination case by declaring that it is not "required" to discriminate on the basis of race—but it could if it wanted to. That is obviously not correct. Yet it is precisely what the court of appeals allowed KISD to do.

The court of appeals also pointed to the fact that KISD has stated that it "does not intend to reinstate [the] ban on" religious messages. *Id.* at *6. But that is also not enough to moot this case—because it is not "absolutely clear" that KISD will not return to its prior policy, even if the Court were to credit its professed *current* intent not to enforce the policy.

The *only* way for KISD to meet the "heavy burden" required to moot this case is for it to admit that its prior policy was unconstitutional—and can thus *never* be enforced. *See, e.g.*, *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." (emphasis added)).[4]

But it has not done so. Accordingly, this case is not moot.

III. If This Court Allows The Court Of Appeals Decision To Stand, The Cheerleaders Will Soon Be Barred From Ever Displaying Religious Messages On Their Banners.

The judgment of mootness below not only is wrong as a doctrinal matter—it has dire practical consequences for the cheerleaders' rights to free speech and religious expression.

KISD and the court of appeals have loudly professed that their actions will do no harm—that they are still allowing the cheerleaders to include religious messages on their banners. But, in fact, their actions are a death knell for the cheerleaders' rights to freedom of speech and religious expression.

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[4] *See also Tex. Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 847-50 (Tex. App.—Austin 2002, pet. denied) (ruling a live controversy still existed even though the "immediate controversy forming the initial crux of [the plaintiff's] declaratory judgment action has ceased" because the "State had not expressly admitted" that its interpretation of the statute at issue was incorrect); *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App.—Austin 1993, writ denied) ("Without a declaration by the court or an admission by Del Valle that the at-large system was unconstitutional, Del Valle was free to return to the at-large system. Therefore, because Del Valle refused to admit that the at-large system was unconstitutional, a declaration by the court that the system was unconstitutional was essential to [the plaintiffs'] purpose. . . . Accordingly, we conclude that the Appellees had a valid cause of action . . . which was not moot."). *But see Fowler v. Bryan Indep. Sch. Dist.*, No. 01-97-01001-CV, 1998 WL 350488, at *6 n.17 (Tex. App.—Houston [1st Dist.] July 2, 1998, no pet.) (not designated for publication) (allowing school to moot a case even though it had not expressly admitted unconstitutionality, because it enacted precisely the "types of [procedures] the students sought . . . before trial"—unlike KISD here).

If the banners are government speech, then they violate the Establishment Clause under existing Supreme Court precedent. And a court will have little choice but to follow precedent and ban the cheerleaders from expressing any religious messages on their banners.

For example, in *Santa Fe Independent School District v. Doe*, the Supreme Court declared that it was unconstitutional for a Texas high school to allow students to vote on whether to have student-led prayers recited over the school's public address system before football games. 530 U.S. 290, 297-98 (2000). The Court held that the prayers violated the Establishment Clause because, under the school's policies, the prayers were "not properly characterized as 'private' speech," but were actually government speech. *Id.* at 309-10, 317.

As the Court explained, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 302 (quotations omitted).

Indeed, because of this crucial difference, "the determination of whom we should impute speech onto is critical." *Freedom from Religion Found., Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 491 (7th Cir. 2000). *See also Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 684 (6th Cir. 1994) (portrait of Jesus Christ placed in school hallway violated the Establishment Clause because portrait was

government speech reflecting "the preference of the school itself," rather than private speech reflecting "the preference of individuals").

So too here. The only way the banners can be constitutionally permissible under existing Supreme Court precedent is if they are not government speech. They must be the private speech of the cheerleaders.

Indeed, KISD itself once admitted that if the banners were government speech, they violated the Establishment Clause—and has presumably changed its mind only in an effort to avoid the vociferous public backlash it faced for fighting the cheerleaders. *See, e.g.*, *supra* note 1; KISD Br. at 9-10 n.9 ("The Kountze ISD Board also expressed concern that some members of the Kountze ISD community interpreted [the superintendent's] actions as hostile to religion.").

To this day, KISD has not cited a single case to defend the proposition that religious banners could be government speech and still survive an Establishment Clause challenge under existing jurisprudence—because it cannot.

* * *

In a perfect world, this case would be moot. KISD would admit that it violated the cheerleaders' constitutional rights when it banned religious messages from the run-through banners and that the messages are not government speech. That would not only vindicate the constitutional rights of the cheerleaders, but also

help prevent a future court from striking down religious messages on the banners as unconstitutional government speech under existing Supreme Court precedent.

Because make no mistake: If KISD is allowed to continue treating the banners as government speech, the Freedom From Religion Foundation, the ACLU, and all of the amici that supported KISD below will pounce and file a lawsuit.[5] And, if the banners are government speech, a court will have little choice but to prohibit the cheerleaders from including religious messages on their banners, in light of existing Establishment Clause precedent.

That is why it is critical that this Court reverse the opinion below. If the opinion below stands, it will lead to the silencing of the speech of the cheerleaders—whose only desire is to cheer on their fellow students with a message of their own choosing.

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[5] *See, e.g.*, Br. of ACLU, et al. at 65 ("*Amici* respectfully urge this Court to . . . render a decision holding that the run-through banners at issue in this case are government speech and cannot, therefore, display Bible verses or other religious messages without violating the Establishment Clause of the First Amendment to the U.S. Constitution."); *Texas cheerleaders continue court fight over Bible banners*, CBS This Morning (Aug. 8, 2014), *available at* http://www.cbsnews.com/news/texas-cheerleaders-take-bible-banner-fight-to-state-supreme-court/ ("'Nothing has changed,' [Freedom From Religion Foundation lawyer Elizabeth] Cavel said. 'These banners continue to be school-sponsored speech, and they continue to violate the Establishment Clause, so depending on the outcome of this litigation, we'd certainly be prepared to sue.'").

PRAYER

The Court should reverse the decision of the court of appeals and affirm the decision of the district court.

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Respectfully submitted,

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Certificate of Compliance

In compliance with Texas Rule of Appellate Procedure 9.4(i), I hereby certify that this brief contains 5,188 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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Certificate of Service

I hereby certify that, on May 1, 2015, a true and correct copy of the foregoing Brief of Petitioners was served via electronic service on all counsel of record in this case.

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