No. 14-0453

IN THE SUPREME COURT OF TEXAS

COTI MATTHEWS, on behalf of her minor child, MACY MATTHEWS, *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

BRIEF OF AMICI CURIAE ACLU, ACLU OF TEXAS, et al.

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I. ISSUES PRESENTED

In *Santa Fe v. Doe*, 530 U.S. 290 (2000), the U.S. Supreme Court held that a school district's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause; the prayers were religious endorsements by the State, not private speech by students. Under *Santa Fe*, do school-sponsored "run-through banners," featuring quotes from the Bible, likewise violate the Establishment Clause's prohibition against the school-sponsored delivery of religious messages to students?

II. STATEMENT OF INTEREST

A. DESCRIPTION OF *AMICI*

This brief is tendered on behalf of the organizations identified below. No person was paid a fee for preparing this brief.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Texas is a state affiliate of the national ACLU. Throughout its 90-year history, the ACLU has been at the forefront of efforts to protect religious liberty and has appeared on numerous occasions before the U.S. Supreme Court, other

federal courts, and state courts in a variety of First Amendment and religious-liberty cases.

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

Interfaith Alliance Foundation is a 501(c)(3) non-profit organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance's members across the country belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance supports people who believe their religious freedoms have been violated as a vital part of its work promoting and protecting a pluralistic democracy and advocating for the proper boundaries between religion and government.

The Hindu American Foundation ("HAF") is an advocacy organization for the Hindu American community. HAF seeks to cultivate leaders and empower future generations of Hindu Americans. Since its inception, the Hindu American Foundation has made legal advocacy one of its main areas of focus. From issues of religious accommodation and religious discrimination to defending the fundamental constitutional principles of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or as *amicus curiae*.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization based in Washington, D.C. Its mission is twofold: (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters across the country. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in numerous church-state cases across the country, including numerous cases involving religious freedom in public schools. Through both lawsuits and non-litigation, Americans United regularly advocates on behalf of public-school

students and parents who wish to participate in school activities and events without having unwanted religious exercises and messages imposed on them.

The Sikh Coalition is the largest community-based Sikh civil rights organization in the United States. Founded on September 11, 2011, the Coalition works to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias and discrimination, and educate the broader community about Sikhism in order to promote cultural understanding and tolerance. The Establishment Clause of the First Amendment is as an indispensable safeguard for religious minority communities in public schools. The Sikh-American Community in Texas is robust, with significant clusters in the Dallas, Houston, Austin, and San Antonio metropolitan areas. Sikh children in Texas and around the country are often victims of bias-based school bullying and discrimination because of their religious articles of faith (*e.g.*, unshorn hair and turbans). Sikh-American children everywhere have the right to attend public schools and participate in extracurricular activities without undue pressure from a religious majority.

The Baptist Joint Committee for Religious Liberty ("BJC") is a 79-year-old education and advocacy organization that serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations in Texas and throughout the nation. BJC deals exclusively with religious liberty and

church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to ensure religious liberty for all Americans.

B. INTEREST IN THE CASE

Amici do not advocate for or against the appellate court's decision, or for specific relief for either party. Rather, *Amici* submit this brief to provide the Court with an analysis of the requirements of the Establishment Clause.

Both Petitioners and Respondent have misconstrued the Establishment Clause. Petitioners claim that the Establishment Clause does not apply here: The banners' messages are just the cheerleaders' expression of faith, not the school's endorsement of religion. (*See* Matthews Br. at 8-16). Respondent acknowledges that the banners are government-sponsored speech; but it contends that the government may approve and endorse religious messages so long as they reflect community sentiment. Both Petitioners and Respondent overlook the importance of Establishment Clause protections for school children, including school children who do not share the religious beliefs of the majority.

Texas public schools serve students of myriad faiths and religious beliefs. The Texas and U.S. Constitutions protect these students' rights to exercise and express their faith in school in a variety of ways: Students may pray individually or in groups, read religious literature, or engage in other religious practice during

free time (like recess or lunch) provided that they do not cause a disruption or interfere with the education of other students. Students may discuss their beliefs with their peers and those beliefs may be reflected in their assignments, so long as they are germane. Students are also entitled to form religious clubs in secondary schools and wear religious jewelry and clothing pursuant to their faith. *Amici* have defended all of these rights and more.[1]

Of equal importance, however, religious liberty gives students and families the right to decide for themselves which religious beliefs, if any, to adopt. It gives minority-faith students and nonbelievers the right to attend public schools—and to take part in all of the benefits and offerings of those schools—without being marginalized or made outcasts by school officials who favor or disfavor particular religious beliefs. When public schools sponsor or promote religious messages, they violate these fundamental rights and infringe students' freedom of conscience by (1) suggesting that students who adhere to the endorsed religious tenets are officially favored, and those who do not are second-class citizens within the school community, and (2) pressuring students to conform to the officially supported (usually majoritarian) beliefs.

[1] *See e.g.,* ACLU Defense of Religious Exercise in Public Schools, ACLU Program on Freedom of Religion and Belief, at http://www.aclu.org/aclu-defense-religious-practice-and-expression-public-schools; The Sikh Coalition, Bullying, http://www.sikhcoalition.org/endschoolbullying (detailing efforts to prevent biased-based bullying and harassment of Sikh children in public schools).

These infringements of conscience occur whether the school-sponsored religious messages are delivered by school officials themselves, invited guests, or students. Thus, the U.S. Supreme Court made clear in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), that student-led promotion of religion is impermissible under the Establishment Clause of the First Amendment to the U.S. Constitution where the religious messages are attributable to – or otherwise endorsed by – a public school. Whatever Texas law may provide, public schools must, first and foremost, comply with the requirements of the U.S. Constitution.

Respondent Kountze Independent School District ("KISD" or the "District") has maintained throughout this case that the run-through banners displayed at Kountze High School ("KHS") football games are school-sponsored messages (*i.e.*, government speech) – not the private speech of individual cheerleaders. Guided by well established public-school jurisprudence, *Amici* agree. The banners are made at the behest of the District. School officials review and approve the banners' content and give the cheerleading squad privileged access to the football field to display the banners during pregame ceremonies. As KISD has repeatedly asserted and the record evinces, the District has always "understood and intended that in preparing and displaying banners . . . the Cheerleader Squad as a whole and

the individual cheerleaders . . . act as representatives and spokespersons for . . . Kountze High School." (KISD Supp. R. at 1940 (Resolution & Order No. 3).)[2]

But *Amici* cannot agree, and nor should this Court, that the District may lawfully use the school-sponsored banners to disseminate Bible verses under its new policy governing so-called "fleeting expressions of community sentiment." In this context, "community sentiment" is a euphemism for the majority's religious beliefs. If the Establishment Clause means anything, it means that the government may not be complicit in imposing the majority's religious doctrine on followers of minority faiths. *See Santa Fe*, 530 U.S. at 317 (holding that when a school district "entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred"). The District cannot circumvent this fundamental principle and constitutional protection by trading in semantics.

The use of the term "fleeting," meanwhile, betrays the District's view that the regular infringement of students' constitutional rights via school-sponsored displays of scriptural passages during school events is too trivial to warrant concern. Here, too, the District is mistaken about what the Establishment Clause allows and disallows. As the Supreme Court has held, "it is no defense to urge that

[2] Citations to "KISD Supp. R." refer to the Supplemental Clerk's Record applied for by Thomas Brandt, Attorney for Kountze ISD, and delivered to the Court of Appeals July 8, 2013.

the religious practices here may be relatively minor encroachments on the First Amendment." *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963).

The District's policy allowing "fleeting expressions of community sentiment" is not supported by the case law, which clearly prohibits public schools from promoting biblical tenets and other religious messages to students. Allowing the banners to be displayed on this ground would strike at the heart of the Establishment Clause by giving broad cover to public schools across Texas to impose the majority's religious beliefs – under the guise of majority "community sentiment" – on their religiously diverse student bodies.

While all students have the right to practice their faith privately in the public-school setting, official religious promotion alienates and excludes students of minority faiths and nonbelievers and sparks religious tensions and divisiveness within school districts. This Court can ensure that these harms do not continue. *Amici* urge the Court to hold that the run-through banners are sponsored by the District, and that the Establishment Clause prohibits the District from using this official platform to promote Bible verses or other religious messages to students at school events.

III. STATEMENT OF FACTS

A. TEXAS PUBLIC SCHOOLS SERVE A RELIGIOUSLY DIVERSE POPULATION.

Texas is home to students and families of a wide variety of faiths and many people who claim no faith at all. Texas communities include, among other religious traditions, Protestants, Catholics, Orthodox Christians, Jews, Muslims, Baha'is, Buddhists, Hindus, Jains, Jehovah's Witnesses, Sikhs, Taoists, Unitarian Universalists, Mormons, and Zoroastrians. *See Religious Groups in Texas*, The Texas Almanac (May 14, 2012), http://www.texasalmanac.com/sites/default/files/images/religionchartA.pdf (compiled principally from the 2010 U.S. Religion Census conducted by the Association of Statisticians of American Religious Bodies); *see also Texas State Membership Report*, The Association of Religion Data Archives ("ARDA"), http://www.thearda.com/rcms2010/r/s/48/rcms2010_48_state_name _2010.asp (last visited Aug. 28, 2013) (compiling data from 2010 the U.S. Religion Census: Religious Congregations & Membership Study, published by the Association of Statisticians of American Religious Bodies).

Within these faith traditions, there is another layer of diversity in belief and practice throughout Texas. Protestantism, for example, is represented by Evangelical Protestants, Mainline Protestants, and Black Protestants, which, in turn, comprise assorted Methodist, Baptist, Pentecostal, Lutheran, Adventist,

Episcopalian/Anglican, and Holiness congregations. *See* ARDA, *supra*. Judaism is represented by Conservative, Orthodox, Reform, and Reconstructionist congregations; and Buddhism by Mahayana, Theravada, and Vajrayana congregations. *See id.* (listing denominations and congregations of various faith traditions throughout Texas).

Texas continues to become more and more religiously diverse. For example, according to the 2010 U.S. Religion Census, more Muslims live in Texas than any other state. *Religion*, The Texas Almanac, http://www.texasalmanac.com/topics/religion (last visited Aug. 28, 2013). Texas is second only to California in the number of Hindus, and it ranks third in the number of Buddhists and Catholics. *Id.* It has the fifth largest population of Mormons. *Id.* While Texas "remains one of the nation's more 'religious' states," more than 10 million Texans report no religious affiliation. *Religious Affiliation in Texas*, The Texas Almanac, http://www.texasalmanac.com/topics/religion/religious-affiliation-texas (last visited Aug. 28, 2013).

Kountze, Texas, where KISD is located, and other southeast Texas towns reflect these trends. In 1992, Kountze was the first town in the United States to

elect a Muslim mayor.[3] And over the last three decades, the citizens of Kaufman, Plano, Dickinson, Galveston, and Beaumont elected Jewish mayors.[4]

B. KOUNTZE ISD SPONSORS AND CONTROLS THE DISPLAY OF BIBLE VERSES ON RUN-THROUGH BANNERS AT FOOTBALL GAMES.

1. Cheerleading Is a District-Sponsored Activity.

For decades, KISD has operated a cheerleading squad as "an organized extracurricular activity of . . . Kountze High School ["KHS"]." (*See* KISD Supp. R. 1940 (Resolution & Order No. 3); *see also id.* at 1814-15 (Aff. of Reese Briggs).) The District established the squad for various education-related purposes, "including, but not limited to, teaching students to be responsible, have self-respect, put forth honest effort, strive for perfection, develop character, learn teamwork, and take pride in a quality performance through maintaining high standards." (*See id*. at 1940 (Resolution).) Like the District's athletic teams, the cheerleading squad is governed by District policies that apply to school-sponsored extracurricular groups, including FM Legal, "Student Activities" (*id*. at 1817-28),

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[3] *See* Manny Fernandez, *In Texas, A Legal Battle Over Biblical Banners*, N.Y. Times, Oct. 12, 2012, at A13; Richard Stewart, *Opponent Challenges Election of Beaumont's First Black Mayor*, Houston Chron., May 10, 1994, at A16.

[4] *Southern Jewish Mayors Throughout History*, The Goldring/Woldenberg Institute of Jewish Southern Life http://www.msje.org/history/archive/archive_mayors.htm (last visited Aug. 28, 2013).

and FO Local, "Student Discipline" (*id.* at 1838-1840).[5] Through these policies, the "District officially supports the cheerleading squad and exercises authority and control over the squad." (*See id.* at 1815 (Briggs Aff.).)

2. As Representatives of the District, Members of the Squad Must Meet District Requirements and Adhere to District Rules.

The KHS cheerleading squad includes student cheerleaders, a student manager, and one or two students who dress up and perform as the KHS mascot (a lion). (*See* KISD Supp. R. 276-79 (Cheerleader Constitution); 786 (Savannah Short Depo. at 11:1-13); 987 (Tonya Moffett Depo. at 68:2-5); 1536 (Beth Richardson Depo. at 131:18).) Unlike membership in "non-curriculum-related groups" (*supra* note 5), students must meet a number of requirements in order to be eligible for the squad. They must maintain a minimum grade average of 70 in each academic class and should exhibit "the ability to get along with teachers and other students." (*Id.* at 276.) Aspiring squad members also must "have an athletic

[5] KISD separately permits students to form "noncurriculum-related" groups. (KISD Supp. R. 1813-14, 1830-31 (Briggs Aff. & FNAB Local Policy).) Although these groups are permitted to meet on campus during noninstructional time and may publicize their events to students, the policy states they are *not* sponsored by the District and that they may not "imply to students or to the public that they are school-sponsored." (*Id.* at 1830 (FNAB Local).) To that end, the District requires that "[a]ll letterheads, flyers, posters, or other communications that identify the [noncurriculum-related] group shall contain a disclaimer of such sponsorship." (*Id.*) In addition, while the District assigns an employee "to attend and monitor each student group meeting," the monitor is only "present at meetings and activities in a nonparticipatory capacity to maintain order and protect school property." (*Id.* at 1830-31.) Monitors and other District personnel are banned from "promot[ing], lead[ing], or participat[ing] in the meetings of noncurriculum-related student groups," (*id.* at 1830), and the monitors are unpaid. (*Id.* at 1814 (Briggs Aff.).) The District's cheerleading squad was not formed pursuant to FNAB Local and is not operated in accordance with that policy. (*Id.* at 1814-15.)

physical just like any student who's in athletics." (*Id.* at 1516-17 (Beth Richardson Depo. at 111:25-112:3).) They must also "[b]e in total compliance with school policies," including the student code of conduct, and to "[h]ave good teacher recommendations." (*Id.* at 278 (Cheerleader Constitution).)

The District imposes these limitations on membership because cheerleaders are considered representatives of KHS and the District. As the squad's constitution explains, "[a] cheerleader's behavior in any activity must NEVER reflect adversely on the squad or the school. This may result in the loss of membership as a cheerleader." (*Id.*) Cheerleaders must "show good sportsmanship" and during games they must avoid "[f]rowning, pouting, non-participation, and other problems of a like nature." (*Id.* at 281.) They must "be leaders within the school and set a good example at all times" and be "courteous and friendly to all other team members as well as the student body." (*Id.*)

As representatives of the school, cheerleaders receive special privileges and recognition. In addition to playing a prominent role at football games, squad members make special appearances, in their uniforms, on behalf of the football team and the school. For example, the cheerleaders and the mascot lead students in cheers during pep rally assemblies, which typically take place during the school day in the KHS gym. (*See id.* at 748 (Ashton Lawrence Depo. at 42:11-45:8); 786 (Savannah Short Depo. at 11:20-12:23); 953 (Macy Matthews Depo. at 21:3-5);

1010-11 (Kieara Moffett Depo. at 32:20-33:2).) They also are featured in, and required to attend, the District's public homecoming parade. (*Id.* at 938 (Nahissaa Bilal Depo. at 48:1-49:14); 953, 956 (Matthews Depo. at 21:10-17, 33:16-19).) In addition, every Friday morning during football season, instead of attending their first-period class, cheerleaders (including the mascot) must visit the District's intermediate and elementary schools to greet children as they enter and to promote school spirit. (*See id.* at 2014 (Whitney Jennings Depo. at 8:11-21); 1970 (Misty Short Depo. at 17:20-25).) They are often accompanied by members of the football team. (*Id.* at 2014 (Whitney Jennings Depo. at 8:19-20).)

3. Paid District Employees Supervise the Squad.

The District pays two employees to "oversee, lead, organize, and, if necessary, discipline members of the squad." (KISD Supp. R. at 1815 (Briggs Aff.).) Sponsors report directly to the KHS athletic director and principal and receive a $2500 stipend for their additional responsibilities. (*Id.* at 984 (Tonya Moffett Depo. at 56:18-21); 1445, 1499, 1609 (Beth Richardson Depo. at 40:12-22; 94:14-18; 204:10-14).) During the 2011-2012 and 2012-2013 school years, these positions were filled by Beth Richardson, a counselor at KMS, and Tonya Moffett, a full-time substitute teacher in the District. (*Id.* at 974-75, 978, 984 (Tonya Moffett Depo. at 15:21-16:8, 30:9-14, 56:22-24); 1414, 1428 (Beth Richardson Depo. at 9:18-22, 23:3-10).) Unlike the chaperones appointed for non-

curriculum related groups, who may not participate in group activities in any way (*supra* note 5), the paid cheerleading sponsors play a hands-on role in supervising and managing the squad and have broad authority over the cheerleaders. (*See id.* at 1815 (Briggs Aff.).)

a. *The District-employed sponsors enforce the squad's membership and behavioral rules.*

Sponsors must attend and supervise all practices and performances, as well as all games, where they remain on the field or sidelines with the squad. (*See* KISD Supp. R. at 285 (Rules & Regulations); 989 (Tonya Moffett Depo. at 76:9-18); 1417-18, 1503-04 (Beth Richardson Depo. at 12:25-13:7, 98:14-99:14).) The sponsors are charged with enforcing squad membership and behavioral standards and may impose discipline or take other action if squad members fail to abide by the squad constitution and the cheerleader rules. (*See, e.g.*, *id.* at 281 (Cheerleader Constitution) ("Members who choose not to display these characteristics will be subject to probation or dismissal at the discretion of the coach/sponsor and/or principal."); 286 (Cheerleader Rules) ("The sponsor also has the right to bench a cheerleader from performances who exhibits behavior not considered ethical or moral.").) For example, the sponsors enforce the District's "no-pass-no-play" rule and hold students accountable for missed practices and games. (*See* KISD Supp. R. 979-80 (Tonya Moffett Depo. at 36:5-18, 38:1-15); *see also id.* at 792-93 (Savannah Short Depo. at 35:12-37:15); 902-03 (Adrianna Haynes Depo. at 27:20-

28:18, 29:19-30:14); 914-15 (T'mia Hadnot Depo. at 19:2-22); 938, 943 (Bilal Depo. at 51:2-17, 67:4-69:25); 1460-62 (Beth Richardson Depo. at 55-57:8:21).) While the current sponsors do not always enforce every aspect of the cheerleader constitution, such as issuing demerits, past sponsors did so, and the current sponsors affirmatively "reserve the right to enforce any one of those rules" as they see fit at any time. (*See id.* at 243-45 (Beth Richardson TRO Testimony at 87:2-89:3); *see also id*. at 908 (Haynes Depo. at 51:8-19).)

b. *The District controls the cheerleaders' public behavior, image, and expression because cheerleaders are representatives of the school.*

Unlike the unpaid chaperones attached to non-curriculum-related groups (*supra* note 5), the sponsors of extracurricular activities are authorized to "establish standards of behavior, including consequences for misbehavior, that are stricter than those for students in general." (*See* KISD Supp. R. 1899 (KHS Student Handbook); 1840 (FO Local); *see also id*. at 978 (Tonya Moffett Depo. at 30:17-20) (agreeing that sponsors have "authority to decide what behaviors . . . to allow and . . . disallow in the cheerleaders").) For example, the cheerleading sponsors have required prospective cheerleaders to sign an "Addendum to the Cheerleader Bylaws" prohibiting them from "represent[ing] themselves, or the squad in an unfavorable, questionable, or illegal manner through electronic media . . . or using electronic communication devices in such a way as to bring discredit, dishonor, or disgrace on their squad or members of any other school organizations." (*Id.* at

284.) Violations of these rules will result in "disciplinary actions determined by appropriate school officials . . . which may include dismissal from the squad." (*Id.*)

In addition, the sponsors regulate the cheerleaders' dress and grooming. (*Id.* at 1463 (Beth Richardson Depo. at 58:8-21).) They decide what "can or cannot be included on uniforms," determine when and where cheerleaders may wear their uniforms, and make sure that cheerleaders do not modify their uniforms or otherwise appear in a manner that the sponsors consider immodest. (*See id.* at 141 (Kieara Moffett TRO Testimony at 48:10-17); 920 (Hadnot Depo. at 39:14-22); 986 (Tonya Moffett Depo. at 62:10-17); 1463, 1624-25 (Beth Richardson Depo. at 58:8-20, 219:25-20:1-19).) With the exception of the homecoming game, the cheerleaders are required "to attend games in uniforms whether they perform or not" because they "will still be representing the team and KHS." (*See id.* at 279 (Cheerleader Constitution); *see also id.* at 131, 134-35 (Kieara Moffett TRO Testimony at 38:22-24, 41:21-42:6); 983-84 (Tonya Moffett Depo. at 52:21-53:11).)

Sponsors also have final authority over cheerleaders' dance choreography and cheer routines and may intervene if they consider moves to be inappropriate. (*See id*. at 1484-85, 1624-25 (Beth Richardson Depo. at 79:11-80:21, 219:15-220:19) (stating that sponsors are empowered to limit provocative or immodest

moves even if they do not rise to the level of lewd); 995-96 (Tonya Moffett Depo. at 100:21-13) (agreeing that sponsors may prohibit dance choreography or cheers that are inappropriate, including those that are "immodest," "in poor taste," "not showing good sportsmanship," or "showing disrespect for the other team").)

Finally, the sponsors supervise the cheerleaders' preparation of run-through banners during practices, which take place on school grounds. (*See, e.g., id.* at 1521 (Beth Richardson Depo. at 116:2-21).) Sponsors review and approve the banners before they are displayed at games. (*See id.* at 1611 (Beth Richardson Depo. at 206:9-13).) Sponsor Moffett explained the process:

> Q. During that year did you and Ms. Richardson approve all the banners before they were taken out to the football games?
>
> A. Yes.
>
> Q. And did you do it in the same way? The banner was painted. Then you were asked to approve the banner itself?
>
> A. Yes.

(*See id.* at 998 (Tonya Moffett Depo. at 110:11-18).)

School officials view the banners as "a reflection of Kountze High School" and "would not allow banners that reflect poorly on" the school. (*See id.* at 360 (KISD Interrogs. Resp.).) The sponsors and other school administrators reserve the right to change the message on any banner or veto its display if they consider the banner to be inappropriate or offensive. (*See, e.g., id.*; *see also, e.g., id.* at 203

(Weldon TRO Testimony at 47:5-21); 254-55 (Beth Richardson TRO Testimony at 98:19-99:14) (testifying that banner messages may not show poor sportsmanship); 360 (KISD Interrogs. Resp.) (stating that banners may not include unsportsmanlike, racist, inappropriate, or offensive messages); 1141-42 (Tonya Moffett Depo. at 104:12-105:17) (explaining that she would not allow squad to use unsportsmanlike or inappropriate messages on banners).)

4. The Religious Run-Through Banners Are School-Sponsored Speech.

KHS "has a longstanding tradition of run-through banners at varsity football games." (KISD Supp. R. 360 (KISD Interrogs. Resp.); *see also id*. at 940 (Resolution & Order No. 3).) The banners have always been prepared by the cheerleading squad. (*Id.* at 358 (KISD Interrogs. Resp.).) KISD has always "understood and intended that in preparing and displaying banners . . . the Cheerleader Squad as a whole and the individual cheerleaders . . . act as representatives and spokespersons for . . . Kountze High School." (*Id*. at 1940 (Resolution & Order No. 3).)

Although the sponsors and some cheerleaders have testified that the squad did not make banners on several occasions this past school year, the squad's governing documents identify banner creation as an official squad responsibility. (*See, e.g.*, *id.* at 286 (Cheerleader Rules) (listing the "creat[ion of] sideline signs and run-through signs" as the first of cheerleaders' "minimum" duties). And for

more than two decades, the squad has routinely made and displayed the banners at "almost all Kountze High School varsity football games." (*See id.* at 358 (KISD Interrogs. Resp.); 1547 (Tonya Moffett Depo. at 142:17-24); *see also id.* at 148 (Kieara Moffett Depo. at 55:6-15); 749 (Lawrence Depo. at 47:8-11); 902-03 (Haynes Depo. 29:16-30:14).)

a. *The religious run-through banners are not the speech of any individual student.*

The banners prepared by the squad are typically 30 feet by 10 feet and feature a "victory slogan." (*Id.* at 358 (KISD Interrogs. Resp.).) In the 2012-2013 school year, the cheerleaders came up with the idea to replace the usual messages on run-through banners with Bible verses. Although there is some disagreement about the exact process followed, it is clear that "[t]he messages are not the choice of any one cheerleader; rather, the squad decides the message by general consensus." (*See* KISD Supp. R. at 359 (KISD Interrogs. Resp.); *see also* 795-97 (Savannah Short Depo. at 46:6-24, 53:2-9) (stating that they decide on the specific passages as a group); 899 (Haynes Depo. at 14:9-15:19) (testifying that the weekly squad leaders would pick the Bible quote and then consult with the remaining team members to come to agreement via informal discussion); 995 (Tonya Moffett Depo. at 98:16-100:14 (explaining that weekly leaders determine which scripture

to use and the rest of the squad goes along with it); 1548-49 (Beth Richardson Depo. at 143:13-144:15).)[6]

Because the banners include both the biblical message and the citation to the Bible chapter and verse, "there's no mistaking, [it] is a quote from the Bible." (*See id.* at 164 (Matthews TRO Testimony at 8:10-9:6) (agreeing that the banners obviously feature Bible passages).) For example, during the 2012 homecoming pregame ceremony, cheerleaders displayed a banner proclaiming, "I can do all things through CHRIST which strengthens me." The "T" in "CHRIST" was painted to resemble a wooden cross, and the biblical citation, "Phil. 4:13," was noted beneath the scriptural quote. (*See Judge Rules Kountze ISD Cheerleaders Can Display Religious Signs*, KSAT.com (May 8, 2013), http://www.ksat.com/news/judge-rules-kountze-isd-cheerleaders-can-display-religious-signs/-/478452/20066982/-/30057gz/-/index.html (photo included in Appendix); *see also* KISD Supp. R. 755 (Lawrence Depo. at 70:6-14); 1021 (Kieara Moffett Depo. at 77:1-12); 1534 (Beth Richardson Depo. at 129:5-13); 2034 (Ashton Jennings Depo. at 4:11-16).) Another week, the official run-through banner declared, "But thanks be to God, which gives victory through our Lord

[6] Each week, the sponsors appoint three squad members to run practices and lead that week's activities. (*See* KISD Supp. R. 937 (Bilal Depo. at 43:19-44:1-5); 995 (Tonya Moffett Depo. at 98:7-15); 1518 (Beth Richardson Depo. at 113:13-25).) To prevent conflict and ensure success for the week, the sponsors select students based on class year and "certain personalities that would work better" in their opinion. (*See id.* at 1519 (Beth Richardson Depo. at 114:1-11).)

Jesus Christ," and featured a citation to the Bible verse, "I Cor. 15:57." (KISD Supp. R. at 301 (photo included in Appendix); 922 (Hadnot Depo. at 46:20-25).)

In early October 2012, one run-through banner urged, "and Let us RUN with Endurance the race GOD has set Before US." (*Id.* at 772 (Rebekah Richardson Depo. at 49:7-18); 164-65 (Matthews TRO Testimony at 8:10-9:6); 1534 (Beth Richardson Depo. at 129:14-18).) The banner, which also cited the source for the quotation, "Hebrews 12:1," was painted in the school colors of red, white, and black. (*See* Jason Morris, *Cheerleaders Win Temporary Injunction In High-profile Free Speech Case*, CNN.com (Oct. 18, 2012), http://religion.blogs.cnn.com/2012/10/18/cheerleaders-win-temporary-injunction-in-high-profile-free-speech-case/ (photo included in Appendix).)

Examples of biblical quotes used on other run-through banners include:

- "I press on toward the goal to win the prize for which God has called me in Christ Jesus. Phil. 3:14." (*See* CNN.com, *supra*.)
- "If God is for us, who can be against us? Romans 8:31." (*See* KISD Supp. 1534 (Beth Richardson Depo. at 129:12-13); *see also* Danny Merrell, *Kountze Cheerleaders Get Victory in Bible Banner Case*, Kicks105.com (May 8, 2013), http://kicks105.com/kountze-cheerleaders-get-victory-in-bible-banner-case/ (photo included in Appendix).)
- "A lion, mighty among beasts, retreats before nothing. Proverbs 30:30." (KISD Supp. R. 302 (photo).)

b. *School officials approved the religious run-through banners.*

After coming up with the idea to paint Bible verses on the run-through banners, the squad immediately sought permission for their plan from school officials. (KISD Supp. R. 2011 (Whitney Jennings Depo. at 5:3-18); 2032, 2036-37 (Ashton Jennings Depo. at 2:24, 6:24-7:7).) The sponsors and Kountze Middle School Principal John Ferguson, who was nearby at the time, approved the plan, claiming that it was permissible and a "good idea as long as it's student-led." (*See id.* at 2011 (Whitney Jennings at 5:3-18); *see also id.* at 2032-33, 2037-39 (Ashton Jennings Depo. at 2:24-3:4, 6:9-8:9).)

As with previous banners, the sponsors were present and supervising practices when the squad painted the Bible verses. (*Id.* at 981 (Tonya Moffett Depo. at 44:3-14).) They even advised cheerleaders how to spell long words that appeared in some of the scriptural quotations. (*See id.* at 2013 (Whitney Jennings Depo. at 7:3-14).) Per the District's usual policy and practice, the sponsors reviewed and approved the religious banners before their display at football games. (*See id.* at 998 (Tonya Moffett Depo. at 109:4-110:23) (testifying that the sponsors followed their usual review and approval process and agreeing that their "role in reviewing the banners and what was placed on the banners took place after the banner was painted and the girls asked [them] to say yes or no whether or not this banner could appear at a football game"); 1583 (Beth Richardson Depo. at 178:3-

14) (stating that she did not dispute cheerleader's previous testimony that she had expressed approved of the banners).) The sponsors not only approved the banners for display, but they informed the cheerleaders that they liked both the banners and their biblical messages. (*See id.* at 123-25 (Kieara Moffett TRO Testimony at 30:19-32:12); 173 (Matthews TRO Testimony at 17:4-13 (testifying that both sponsors expressed approval of the banner messages); 983 (Tonya Moffett at 49:8-10) (admitting that she told the cheerleaders that she liked the scriptural quotations on the banners).)

5. As Representatives of the District, the Cheerleaders Are Given Special Access to the Football Field to Display the Run-Through Banners During the Pregame Ceremony.

The KHS football field and the KHS track are enclosed by a chain-link fence. (KISD Supp. R. 1807 (Tracy Franklin Aff.).) Immediately before and during games, the enclosed area is off limits to spectators, and the entrance gates are guarded by school personnel who admit only authorized individuals. (*Id.*) All others must remain in the spectator area outside of the enclosure. The only students permitted to enter this area are football players, cheerleaders, and the marching band. (*Id.* at 1808.)

Before the introduction of the football players, the cheerleaders and a student costumed as the KHS mascot gather on the football field, near the end zone and close to the home stands. (*See id.* at 786 (Savannah Short Depo. at 11:20-25);

958 (Matthews Depo. at 40:1-5); 1973-74 (Misty Short Depo. at 20:23-21:7).) The cheerleaders are dressed in designated squad uniforms, which feature the school colors (red, black, and white) and the name of the District, "Kountze." (*Id.* at 903 Haynes Depo. at 32:18-22).)

With the crowd cheering, the cheerleaders unfurl and hoist the banner for the football players to run through as they emerge from an inflatable tunnel emblazoned with the mascot to enter the field. (*Id.* at 358 (KISD Interrogs. Resp.).) As the football players break through the banners and run onto the field, they are also dressed in school uniforms (*id.*), and the squad collectively chants a cheer, such as "go lions." (*Id.* at 989 (Tonya Moffett Depo. at 75:21-76:8).) The cheerleaders do not engage in individualized messages or speech at this time. (*See id.*; *see also id.* at 1501-02 (Beth Richardson Depo. at 96:15-97:5).)

No other students or individuals are allowed on the field to display their own similar banners or messages. (*See id.* at 132-33 (Kieara Moffett TRO Testimony at 39:25-40:9) (agreeing that "the coach and the sponsors don't just let anybody get on the field" and that "if you want to be on the field, you either have to be a member of the football team or a member of the cheerleading squad"); 357 (KISD Interr. Resp.).) In other words, it is a "special privilege that cheerleaders have that they can go on the field and hold banners up for the boys to run through." (*See id.*

at 984 (Tonya Moffett Depo. at 55:23-56:6) (agreeing with this characterization); *see also* 132 (Kieara Moffett TRO Testimony at 39:19-24).)

6. The District Concedes That the Banners Constitute School-Sponsored Religious Messages.

After being contacted by a religious-liberty advocacy organization on behalf of a complainant who expressed discomfort with the school-sponsored display of biblical verses on the banners, KISD Superintendent Kevin Weldon sought legal advice from the Texas Association of School Boards ("TASB"), which informed him that the run-through banners appeared to be unconstitutional. (KISD Supp. R. 1942 (Resolution & Order No. 3); 199 (Weldon TRO Testimony at 43:2-6).) Weldon also consulted with the District's attorney, who concurred with TASB's advice and pointed Weldon to the Supreme Court's decision in *Santa Fe*. (*Id.* at 199 (Weldon TRO Testimony at 43:8-14).) Weldon subsequently directed the KHS principal to prohibit the display of such official religious messages during football games. (*Id.* at 1942 (Resolution & Order No. 3).)

The District commenced an investigation of the complaint and issued its findings and conclusions via Resolution and Order No. 3, which the Board of Trustees adopted on April 8, 2013. (*Id.* at 1938-49).) The Board reached two key conclusions. First, the Board asserted that '"[r]un-through' banners, like other school banners displayed by the Cheerleader Squad as a part of their official activities, are the speech of KISD and are subject to the control and oversight of

various school officials, including, but not limited to, the Superintendent, the campus principals, the athletic director, and the sponsors of the Cheerleader Squad." (*Id.* at 1945. *Accord* KISD App. Br. 29 ("The competent summary judgment evidence demonstrates that the messages on the banners are 'government speech,' as that term is used in First Amendment jurisprudence."); *id.* at 36, 44.)

Second, the Board deemed the Bible verses featured on the banners "fleeting expressions of community sentiment" and stated its belief "that the Establishment Clause does not require it to exclude such fleeting expressions merely because some of them express religious sentiments that are widely held within the KISD community." (KISD Supp. R. 1945 (Resolution).)

Pursuant to these findings, the Board adopted several formal policies. The first policy, "Guidance to School Personnel Regarding Supervision of the Cheerleading Squad" reaffirms that sponsors "are expected to approve in advance or otherwise supervise all banners prepared by the Cheerleader Squad for display as part of the normal activities and duties of the Cheerleader Squad." (*Id.* at 1947.) Under the policy, District officials expressly "retain the right to regulate the display and content of such banners." (*Id.*)

A second policy, "Fleeting Expressions of Community Sentiment," provides that "school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community

sentiment solely because the source or origin of such messages is religious." The policy expressly notes that school officials retain the right to restrict the content of school banners.

C. PROCEDURAL HISTORY

In response to Superintendent Weldon's temporary prohibition of religious-themed run through banners at high school football games, members of the cheerleading squad filed suit on September 20, 2012.[7] Represented by their parents, the students alleged violations of the Texas State Constitution, the Texas Religious Freedom Restoration Act, and the Texas Education Code, and sought a temporary restraining order ("TRO"), temporary injunction, and permanent injunction allowing them to display the religious banners at football games. (Clerk's R. 2-21 (Plfs.' Orig. Pet.).) The court granted the TRO the same day that Plaintiffs filed their petition (*id.* at 23-25), and, after holding an evidentiary hearing on October 18, 2012, issued a temporary injunction. (*Id.* at 58-62.)

On April 13, 2013, Plaintiffs filed a motion for partial summary judgment. Contending that the banners were the private speech of individual students, the motion asked the court to rule, *inter alia*, that the display of religious-themed run through banners at high school football games was not prohibited by the

[7] Some students later withdrew from the lawsuit or decided not to pursue cheerleading for the upcoming academic year. (*See* KISD Appendix at Tab 1.)

Establishment Clause. (Clerk's R. 135-260.) KISD filed its traditional motion for summary judgment two days later, contending that the banners were school sponsored, but asking the court to "declare that the Establishment Clause . . . does not require Kountze lSD to prohibit the inclusion of religious-themed messages on banners." (*Id.* at 261.) After oral argument, the court issued its summary judgment order on May 8, 2013, granting both motions "to the extent . . . consistent with th[e] order," but failing to identify the grounds for its ruling. (*Id.* at 1034-35.)

The order concluded that (1) the "religious messages expressed on run-through banners have not created, and will not create, an establishment of religion in the Kountze community"; (2) the "banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible"; and (3) "[n]either the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events." (*Id.*)

KISD filed an accelerated appeal with the Ninth Court of Appeals on May 28, 2013. (*Id*. at 1044-45.). On May 8, 2014, that court vacated the trial court's order: it held that KISD's new policy permitting the cheerleaders to include religious messages on the banners rendered any controversy moot. The cheerleaders petitioned this Court for review.

IV. SUMMARY OF ARGUMENT

Far from creating an obstacle to religious practice, robust enforcement of the Establishment Clause is vital to ensuring that freedom of conscience can flourish. The Establishment Clause does not mandate the elimination of truly private religious expression from all spheres of public life; nor does it exist in tension with the right of individuals to exercise their faith freely. Rather, the Establishment Clause works hand-in-hand with the Free Exercise Clause to protect the integrity of individual conscience in religious matters by ensuring that individuals have the authority to decide for themselves which faith, if any, to follow. These protections apply equally to adherents of every religion and prevent the majority from imposing their religious beliefs on the minority. The Establishment Clause also guards against the civic divisiveness that arises when the government takes sides in religious debates because religious strife of this nature can threaten the viability of a pluralistic, democratic society.

Robust enforcement of Establishment Clause principles is especially important in public schools: Students are more susceptible to the harms of school-sponsored religious messages and exercise; and public schools play a unique role in our democracy by bringing together students of diverse religious backgrounds and preparing them for their responsibilities as citizens. Parents also trust that,

when they send their children to public schools, the state will not usurp their role by indoctrinating children with religious messages inconsistent with their parents' faith. Hence, it is well established that school officials may not direct or deliver religious messages under the Establishment Clause, and the federal courts have rejected efforts by public schools to circumvent this rule by delegating to students the composition or delivery of such religious messages. No matter what state law may provide regarding religious promotion, public schools must, first and foremost, comply with the federal Constitution.

The mere fact that KISD's run-through banners are initially prepared by the KHS cheerleading squad does not insulate them from Establishment Clause scrutiny. The banners are prepared at the behest of school officials, as part of the squad's official duties. (*See supra* pp. 21-26.) School officials review and approve banners before they are displayed at football games, and the District gives the cheerleaders special access to the field to unfurl and present the banners to the crowd. (*See supra* pp. 25-26.) The Bible verses painted on the banners are, therefore, attributable to the District—a fact that KISD does not dispute. (*Supra* pp. 27-29.).

The dissemination of Bible passages in this manner cannot be squared with the Establishment Clause under any of the three tests that have been applied by the Supreme Court. The Court has repeatedly held that school promotion of such

religious messages is unconstitutional. The District cannot evade this clear precedent by branding the religious banners "fleeting expressions of community sentiment." Regardless of how they are described, governmental policies that authorize the majority to impose its religious beliefs on religious minorities and nonbelievers implicate the core of the Establishment Clause. Nor does this fundamental constitutional principle operate according to a stopwatch: The Establishment Clause does not give so-called "fleeting" messages of official religious endorsement a free pass. Accordingly, *Amici* urge this Court to hold that the religious run-through banners are sponsored by the school and that they violate the Establishment Clause.

V. ARGUMENT

Attending football games is a central part of the traditional public-school experience for many Texas students. As the Texas Supreme Court has observed, "for a great number of Texans, high school football is king." *Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 424 (Tex. 1993) (Gonzalez, J., concurring) (internal quotation marks omitted). If the District, Petitioners, and the State Attorney General have their way, however, public schools across Texas will be able to use football games and other school events to marginalize students of minority faiths and nonbelievers by sponsoring official displays of majoritarian religious messages.

KISD's use of school-sponsored run-through banners to disseminate Bible verses illustrates why the Constitution requires public schools to refrain from promoting or endorsing religious beliefs. Consider the example of a Muslim cheerleader who joins the KHS squad: She would have to participate in the purportedly consensus-based process that the squad's sponsors have established for determining which Bible verse to include on the banners. When the weekly leaders designated by the sponsors propose, for instance, painting on the banner, "I can do all things through CHRIST which strengthens me (Phil. 4:13)," along with a picture of a wooden cross, the Muslim cheerleader has few options. She must either (1) withhold her objection and participate in making the Christian banners, despite the conflict with her religious beliefs, or (2) protest the proposed message and refuse to assist with the banners, risking alienation from the squad only because she is of a minority faith, and facing possible disciplinary action for refusing to take part in the squad's official duties. Whichever path she chooses, the cheerleader will be forced to make a similar "choice" again in front of the whole school. Standing on the field with her fellow cheerleaders, the mascot, the football players, coaches, sponsors, and other school officials, and with all eyes directed toward that very spot, she must decide whether to help hoist the banner and cheer on her team or remain still and silent as a sign of her disagreement.

Or imagine a Jewish football player, who must break through a banner that proclaims, "But thanks be to God, which gives victory through our Lord Jesus Christ." He must take the field knowing that school officials have approved this message, which implies that the team cannot achieve victory unless its players are Christian and that, as a Jew, he is a liability to his team. By equating support for the football team with being a Christian and subscribing to biblical beliefs, the same banner suggests to those in the audience that students of minority faiths and nonbelievers, by virtue of their non-Christian identity, lack school spirit and do not support the team.

Under these circumstances, students of minority faiths and nonbelievers will feel alienated from their peers and will be deterred from exercising or expressing their faith in school, lest they be further ostracized or retaliated against for not subscribing to the officially favored religious beliefs. Some students might even feel compelled to adopt, or pretend to adopt, the favored biblical beliefs. Christian students might also be offended and feel excluded by the practice, believing that the school's use of sacred scripture to cheer a football team to victory devalues their spiritual beliefs. But they, too, would likely be reluctant to object given that the run-through banners bear the imprimatur of school officials.

The Establishment Clause protects public school students from these impositions on individual conscience. It ensures that students of all faiths feel free

to enjoy the formative experiences of school – including school-sponsored sporting events, rallies, social gatherings, and graduation ceremonies – without fear of social isolation or alienation because of what they believe. And it curtails religious divisiveness within the school community so that officials can provide an effective and sound educational foundation for future citizens.

A. RELIGIOUS LIBERTY CANNOT THRIVE IN TEXAS'S DIVERSE PUBLIC SCHOOLS WITHOUT ROBUST ENFORCEMENT OF THE ESTABLISHMENT CLAUSE.

Texas is already rich in religious diversity, and, if the past three decades are any indication, the state will grow even more diverse in the coming years. In light of these trends, Texas public schools must serve students and families with a wide range of faiths and beliefs. It is thus critical that schools respect "the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall." *See Schempp*, 374 U.S. at 241 (Brennan, J., concurring). ("[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve.").

1. The Establishment Clause Protects the Right of Individual Conscience and Minimizes Religious Discord.

The First Amendment protects the "unambiguous" right to "select any religious faith or none at all." *See Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985).

The Establishment Clause is rooted, in part, in the Founders' experience that the right of individual conscience is threatened when government becomes involved with religious matters. It also serves as an important safeguard against the imposition of majority-faith beliefs on adherents of minority religions. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Writing in opposition to a Virginia bill proposing to levy a tax in support of teachers of religion, James Madison explained:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

James Madison, Memorial and Remonstrance Against Religious Assessments (1785) (collected in *Selected Writings of James Madison* 21 (Ralph Ketcham ed., 2006)).

The Establishment Clause is not an obstacle to the free exercise of religion, but rather its foundation. It reflects the Founders' understanding that, "[t]o make

room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary, the government must not align itself with any one of them." *See Lee v. Weisman*, 505 U.S. 577, 608 (1992) (Blackmun, J., concurring) (internal quotation marks omitted); *cf. McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring) ("[T]he goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat."). The Texas Constitution embodies similar principles. Proclaiming that "[a]ll men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences," the State Constitution provides that "[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship." Tex. Const. art. I., § 6.

The wisdom of this approach is evident in Texas's (and the nation's) ever-growing religious diversity, (*see supra* pp. 10-12), which bears out James Madison's famous reminder that "[r]eligion flourishes in greater purity, without, rather than with the aid of government." Letter from James Madison to Edward Livingston (July 10, 1822), *available at* http://press-pubs.uchicago.edu/founders/

documents/amendI_religions66.html. At the same time, the Founders recognized the need, with greater religious freedom and diversity, to prevent political and social fracturing along religious lines. They intended that, by prohibiting the government from favoring one faith over others or religion over non-religion, the Establishment Clause would minimize the type of religious discord that could destabilize or even ruin a pluralistic, democratic society. *See Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) ("[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process."); *see also* Madison, Memorial and Remonstrance Against Religious Assessments, *supra* pp. 39 (warning that "intermeddle[ing] Religion" with government "destroy[s] . . . moderation and harmony" and is an "enemy to the public quiet").

Strong enforcement of the Establishment Clause has served our nation well. To be sure, there have been intense disagreements over religious matters in the past and many controversies persist today. Yet "[a]t a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish." *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring). As Justice O'Connor has observed, "Those who would renegotiate

the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?" *Id.*

2. Enforcement of the Establishment Clause in Public Schools Is Especially Important If Texas Is to Effectively Serve Religiously Diverse Student Bodies.

The protections of the Establishment Clause are perhaps most vital in the public schools. First, as Justice Kennedy warned in his majority opinion in *Lee*, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592 (1992) (holding that public school could not invite clergy to deliver prayer at graduation ceremony). Justice Kennedy added that, in school, "[t]he pressure [to conform], though subtle and indirect, can be as real as any overt compulsion." *Id.* at 593. The tendency of young people to respond to such social pressure also creates a concomitant willingness to obey school officials and an acute sensitivity to school-sponsored messages that suggest that they do not belong, or are outsiders in their school community, because of their religious beliefs. *See Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.")

Such messages can be profoundly alienating and coercive for students, as illustrated by the example of the Muslim cheerleader: While a cheerleading squad may claim to have decided on a particular Bible verse by consensus, as noted above, it is not difficult to imagine that she would be extremely reluctant to voice her opposition. Nor is it hard to imagine that a Jewish football player, an atheist marching band member, or a Buddhist student sitting in the stands would feel left out of the pregame festivities and excitement upon learning that school officials had approved and even encouraged the display of such an exclusionary religious message.

Second, schools are important social institutions not only because they shape individual students' growth and development of identity, but also because they help to maintain our democratic and pluralistic society. Public schools are "the symbol of our democracy and [are] the most pervasive means for promoting our common destiny." *Edwards*, 482 U.S. at 584. They "serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions." *Schempp*, 374 U.S. at 241-42 (1963) (Brennan, J., concurring). Accordingly, "[i]n no activity of the State is it more vital to keep out divisive [religious] forces than in its schools." *See Edwards*, 482 U.S. at 584; *see also McCollum v. Bd. of Ed.*, 333

U.S. 203, 216-17 (1948) (Frankfurter, J., concurring) ("Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects."); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 382 (6th Cir. 1999) (noting that public schools exist "to foster democratic values in the nation's youth, not to exacerbate and amplify differences between them").

To protect students from undue influence in religious matters, prevent the imposition of majority beliefs on students of minority faiths, and preserve the unique role our schools play in educating future citizens, it is imperative that school officials avoid religious indoctrination, including the promotion of religious beliefs. Religious education must remain the province of students, families, and faith communities – not the government. *See Edwards*, 482 U.S. at 584 ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."); *accord McCollum*, 333 U.S. at 217 (Frankfurter, J., concurring) ("The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to

instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.").

B. THE DISTRICT'S DISPLAY OF SCHOOL-SPONSORED RUN-THROUGH BANNERS FEATURING BIBLE VERSES VIOLATES THE ESTABLISHMENT CLAUSE.

For the reasons discussed above, the Supreme Court has been "particularly vigilant in monitoring compliance with the Establishment Clause and has consistently prohibited public schools from promoting religious beliefs and messages to students." *Edwards*, 482 U.S. at 583 (barring public school inculcation of biblical beliefs about the origin of life); *Lee*, 505 U.S. at 586; *Stone v. Graham*, 449 U.S. 39, 40 (1980) (ruling that display of Ten Commandments in public-school classrooms violated the Establishment Clause"); *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (finding that daily recitation of official school prayer violated the Establishment Clause). This constitutional prohibition applies to all school-sponsored religious messages, including those that are delivered or led by students.

Under governing law, the run-through banners are attributable to the District because they are prepared at the behest of school officials, who supervise the process and retain control over the final message. The use of these banners to disseminate Bible verses violates each of the three Establishment Clause tests applied by the Supreme Court (the endorsement, coercion, and *Lemon* tests). The District's "fleeting expression of community sentiment" policy does not render the

school-sponsored biblical banners constitutional. The District may not impose religious messages on students no matter how many people in the community subscribe to those beliefs and no matter how "fleeting" the imposition.

1. The Run-Through Banners Are School-Sponsored Speech.

Contrary to the position of Petitioners below, the Establishment Clause does not fall away merely because students made and displayed the run-through banners. Under *Santa Fe*, the relevant question is whether the school impermissibly sponsored the biblical messages delivered by the students. Throughout this case, KISD has insisted that the run-through banners are sponsored by the District and do not constitute the private speech of individual cheerleaders. *Amici* agree.

a. *School-sponsored religious messages violate the Establishment Clause, even if led or delivered by students.*

"School sponsorship of a religious message is impermissible because it sends the ancillary message to . . . [students] who are nonadherents that they are outsiders, not full members of the political [and school] community, and an accompanying message to [students who are] adherents that they are insiders, favored members of the political [and school] community." *Santa Fe*, 530 U.S. at 309-10 (internal quotation marks omitted). This constitutional prohibition extends to student-led religious messages that are directed, controlled, or otherwise facilitated by school officials. *See, e.g., id.* (prohibiting pregame, student-led

prayers held according to student vote); *Schempp*, 374 U.S. at 207 (1963) (striking down state statute requiring student-led recitation of the Lord's Prayer and reading of ten Bible verses selected by students each morning in public schools); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1287 (11th Cir. 2004) ("School personnel may not facilitate prayer simply because a student requests or leads it."); *Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 277, 279-80 (5th Cir. 1996) (overturning state statute that authorized public schools to incorporate "student-initiated" prayer into "compulsory or noncompulsory school-related student assemblies, student sporting events, graduation or commencement ceremonies and other school-related student events"); *Karen B. v. Treen*, 653 F.2d 897, 902-03 (5th Cir. 1981) (holding that a state statute permitting public school teachers to ask class whether any student wished to offer a morning prayer violated the Establishment Clause), *aff'd*, 455 U.S. 913 (1982); *Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996) ("The defendants' practice in directing teachers to pause before the class leaves for lunch, to specifically announce and provide an opportunity for vocal [student-led] group prayer . . . is patently contrary to the separation of church and state."); *Goodwin v. Cross Cnty. Sch. Dist. No. 7*, 394 F. Supp. 417, 426-27 (E.D. Ark. 1973) (ruling that allowing

students to read Bible verses and recite the Lord's Prayer daily over the school's intercom system was unconstitutional).[8]

In *Santa Fe*, for example, the Court invalidated a school policy providing that students could "deliver a brief invocation and/or message" before varsity football games. 530 U.S. at 298 n.6. Under the policy, the high school was required to hold a vote each spring to "determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, . . . [to] elect a student, from a list of student volunteers, to deliver the statement or invocation." *Id.* Although the school district argued that it had created a public forum and that the prayers were private speech, the Court rejected this claim for several reasons. *See id.* at 302-03.

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[8] *See also Cole v. Oroville Union High School District*, 228 F.3d 1092, 1103 (9th Cir. 2000) (Establishment Clause prohibits a school district from allowing the valedictorian "to make a sectarian, proselytizing speech as part of the graduation ceremony"); *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979, 983–85 (9th Cir. 2003) (same); *Corder v. Lewis Palmer School District No. 38*, 566 F.3d 1219, 1230 (10th Cir. 2009) (same where school "named valedictory speakers based on the School District's qualifications"); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1479 (3d Cir. 1996) (en banc) ("School officials decide the sequence of events and the order of speakers on the program," "ceremonies are typically held on school property at no cost to the students," and "the atmosphere at [the] graduation is characterized by order and uniformity."); *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989) ("When a religious invocation is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the school endorses the religious invocation."); *Appenheimer v. Sch. Bd. of Wash. Cmty. High Sch. Dist. 308*, No. 01-1226, 2001 WL 1885834, at *6 (C.D. Ill. May 24, 2001) (religious message attributable to school district when "the commencement falls under the imprimatur of the state. . . . the invocation and benediction is delivered to a large audience as part of a regularly scheduled, school-sponsored function conducted on school property. The prayer is broadcast over the school's public address system, which remains subject to the control of school officials"); *Gearon v. Loudon Cnty. Sch. Bd.*, 844 F. Supp. 1097, 1099 (E.D. Va. 1993) ("A constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who makes the decision that the prayer will be given and who authorizes that actual wording of the remarks."); *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331, 337 (N.D. Iowa 1989) (religious message attributable to school district when it "organizes, authorizes, and sponsors" the graduation program, conducts it on school property, and "retain[s] control over the type of speech admissible at the ceremony").

First, the prayers were "authorized by a government policy and [took] place on government property at government-sponsored school-related events." *Id.* at 302. Second, school officials had not opened the pregame ceremony to "indiscriminate use . . . by the student body generally." *Id.* at 303. Instead, the District allowed "only one student, the same student for the entire season," to deliver the opening message. *Id.* And the school retained control over the content of the pregame message by requiring that the invocation remain nonsectarian and nonproselytizing and comport with "the goals and purposes of [the district] policy," which were "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Id.* at 298, 306.

Finally, the Court expressed serious concern that the policy "place[d] the students who hold . . . [minority religious] views at the mercy of the majority." *Id.* at 305. Pointing to the district's majoritarian election scheme, the Court warned that "minority candidates [would] never prevail and that their views [would] be effectively silenced." *Id.* at 304. While the policy would have "ensure[d] that *most* of the students [we]re represented, it d[id] nothing to protect the minority; indeed, it likely serve[d] to intensify their offense" and "increase their sense of isolation." *Id.* at 305.

The Court concluded that these facts were not consistent with the creation of a genuine forum that "foste[rs] free expression of private persons." *Id.* at 309. Rather, they evinced that the prayers were school-sponsored speech, which "involve[d] both perceived and actual endorsement of religion" by the District—in violation of the endorsement and *Lemon* tests. *Id.* at 291, 307-08, 310-11, 314-15.

The Court also held that the student-led prayers violated the coercion test set forth in *Lee*. Many students "such as cheerleaders, members of the band, and, of course, the team members themselves" are required to attend football games. *Id*. at 311. Others "feel immense social pressure, or have a truly genuine desire, to be involved in the event that is American high school football." *Id.* As the Court explained, "football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause." *Id.* at 312. For many students, then, "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Santa Fe*, 530 U.S. at 312. And this is not a choice that the public schools may impose on students: "The constitutional command will not permit the District to 'exact religious conformity from a student as the price' of joining her classmates at a varsity football game." *Id.* (quoting *Lee*, 505 U.S. at 596).

b. *The religious messages on the run-through banners are attributable to the District.*

As in *Santa Fe*, the religious messages challenged here are attributable the District. The cheerleading squad is an officially sponsored extracurricular activity akin to the District's various sporting teams. (*See supra* pp. 13-17.) The banners are created at the District's behest, as part of the squad's official duties. (*See supra* pp. 18-26.) Cheerleaders act as representatives and spokespersons for their school when engaged in such official squad activities. (*See supra* pp. 13-16, 18-20, 21-27; *see also Doe v. Silsbee Indep. Sch. Dist., 402 F. App'x 852 (5th Cir. 2010)* (denying cheerleader's free speech claim because "in her capacity as cheerleader, [the student] served as a mouthpiece through which [the District] could disseminate speech – namely, support for its athletic teams").) As a result, the District goes to great lengths to ensure that the squad is closely supervised, hiring and paying two District employee sponsors to oversee every aspect of the squad's operations – from grooming, dress, and behavior to choreography and performance of routines and preparation of the run-through banners. (*See supra* pp. 14-26.)

The cheerleaders do not have *carte blanche* to display any message they want. (*Supra* pp. 16-26, 27-29.) Like the pregame messages at issue in *Santa Fe*, the banners are "subject to particular regulations that confine the content and topic of the . . . message." 530 U.S. at 303. Banners must, for example, reflect support

for the football team and encourage school spirit and cannot exhibit poor sportsmanship. (*See supra* pp. 16-26.)

KISD's control over the banners' content goes even further: The sponsors review and approve the banners before their display at the football games, and they are, in fact, *required* to do so as a condition of their employment as sponsors. (*See supra* pp. 16-26, 27-29.) If the sponsors or other school administrators view the contents of the banners as "offensive" or "inappropriate" for any number of reasons, they reserve the right to order that the squad change the message or to veto the use of the banner at the game. (*See supra* pp. 26-29.) The undisputed testimony of students, sponsors, and administrators establishes that the sponsors not only approved the idea of putting Bible verses on banners, but they continue to review and approve the banners and, at all times, retain final authority over the messages. (*See supra* pp. 16-26.)

Moreover, the banners are displayed at the school's football games (*id.*), which are "regularly scheduled, school-sponsored function[s] conducted on school property." *Santa Fe*, 530 U.S. 307. School officials also control which students display the banners, when they are displayed, and where, giving the squad special dispensation to carry the banners onto the field and to display them to the entire audience, which is looking on in anticipation of the football players' grand

entrance. (*See supra* pp. 26-27.) The school does not afford this privilege to any other student (individually or as part of a group) or community member. (*Id.*)

c. *The District has in no way created a public forum where private speech occurs.*

Petitioners' claim that District Policy FNA (Local), Student Rights and Responsibilities, Student Expression (KISD Supp. R. 62), somehow transforms the banners from government, school-sponsored speech into private speech. This argument disregards the nature and terms of the policy itself as well as the Supreme Court's reasoning in *Santa Fe*.

By its own terms, FNA (Local) does not apply to the banners. Rather, the policy purports to establish a limited public forum for "student speakers at all school events at which a student is to *publicly speak*." (*Id.* at 322 (emphasis added).) The policy expressly notes, however, that a student is *not* "publicly speak[ing]" when he or she "is delivering a message that has been approved in advance or otherwise supervised by school officials." (*Id.*) By definition, the policy is inapplicable to the run-through banners, which are reviewed and approved by the sponsors or other school officials.

Nor, as in *Santa Fe*, has the District otherwise created a limited public forum for student speech. As noted above, school officials actively review and approve the banners. They retain control over the final message displayed to the crowd. Viewed from the perspective of District officials, this policy is necessary to ensure

that the banners, which are officially integrated into an important school function, are not used as vehicles for "offensive, racist, unsportsmanlike, or other inappropriate messages." *See* KISD App. Br. at 43.

Further, the District closes off access to the field during games. School officials grant cheerleaders special entry to display the banners, but they do not open up the field during the pregame ceremony for individual students, student groups, or community members to display their own banners as the football players run in. School officials also do not rotate responsibility for making and displaying the banners among various student groups or individuals, and the school provides no opportunity for other views to be expressed in the same way as the banners. Indeed, because the cheerleaders prepare the banners via group consensus – led by the sponsor-appointed weekly head cheerleaders – even if individual cheerleaders hold minority beliefs, they are "effectively silenced" and their views never reflected on the banners. *See Santa Fe*, 530 U.S. at 291.[9] As in *Santa Fe*, then, there is no evidence that the District has made the field or official banners available for "indiscriminate use" by students or student organizations. *See Santa Fe*, 530 U.S. at 303; *see also Herdahl*, 933 F. Supp. at 589 (holding that

[9] Even if the District does decide to open up the field to allow other students to participate similarly in the pregame ceremonies and relinquishes control over the cheerleading squad and the banners, the "mere creation of a public forum" does not "shield[] the government entity from scrutiny under the Establishment Clause." *See Santa Fe*, 530 U.S. at 303 n.13.

unconstitutional prayer and Bible reading by members of religious student club over morning announcements could not be '"sanitize[d] by also sponsoring non-religious speech'" through a purported limited public forum because the school was "not maintaining a soapbox for the religious, social or political expressions of members of the student body who want to preach, teach or politicize over the intercom system") (quoting *Berger v. Rensselaer Cent. School Corp*., 982 F.2d 1160, 1168) (7th Cir. 1993)).

2. The Use of School-Sponsored Run-Through Banners to Disseminate Bible Verses to Students Fails the Endorsement, Coercion, and *Lemon* Tests.

As the District concedes, because the banners are school-sponsored, they "must comport with the Establishment Clause." *See* KISD App. Br. 36 n.55. Whether analyzed under the endorsement, *Lemon*, or coercion tests, the banners are unconstitutional.

a. *The banners fail the endorsement test.*

The endorsement test asks "whether an objective observer, acquainted with the text, legislative history, and implementation of [a government action], would perceive it as a state endorsement of [religion] in public schools." *See Santa Fe*, 530 U.S. at 308 (internal quotation marks omitted). The KISD religious banners are unveiled in a setting nearly identical to that at issue in *Santa Fe*. The banners are presented to "a large audience assembled as part of a regularly scheduled,

school-sponsored function conducted on school property." *See Santa Fe*, 530 U.S. at 307. Though some cheerleaders claimed that the religious messages were intended to encourage the football players, the banners are hoisted so that the Bible verses face the audience. (*Supra* pp. 26-27.) The banners are enormous – 30 feet by 10 feet. (*Supra* p. 22.) The Bible quotations, which include a citation to the chapter and verse from which the quotation derives, are painted in large letters, often using school colors. (*Supra* pp. 22-27.) Many banners have included direct references to Jesus Christ and at least one included a depiction of a wooden cross. (*Id.*)

As the cheerleaders display the banner and wait for the football players' grand entrance, they are positioned near the home stands on the field, which, like the public address system in *Santa Fe*, remains "subject to the [complete] control of school officials." *See Santa Fe*, 530 U.S. at 307. As the football team is announced, the players break through the banner as part of a "pregame ceremony [that] is clothed in the traditional indicia of school sporting events":

- The cheerleaders and football players wear uniforms bearing the school colors and name. *See Santa Fe*, 530 U.S. at 307-08.
- They are accompanied on the field by a squad member who is dressed as the school mascot; and the school marching band is also present at the game. (*Supra* pp. 26-27.)
- The "school's name is likely written in large print across the field" and "[t]he crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who

> may also be waving signs displaying the school name." *Santa Fe*, 530 U.S. at 308.

An objective student observer would perceive all of these facts. She would also be aware, as discussed above, that: (1) the school authorizes only cheerleaders to display run-through banners during football games and strictly limits access to the field at that time, a directive that the District enforces by posting security and administrative personnel at the field-enclosure gates (*supra* pp. 26-27); (2) the school restricts the content of the banners and reviews and approves them before display, all the while reserving the right to veto any message that is deemed "inappropriate" (*supra* pp. 18-26); and (3) the school, through the cheerleading sponsors, specifically approved and expressed support for the idea of including Bible verses on banners, even though there are infinite non-religious ways of encouraging good sportsmanship or celebrating team spirit (*supra* pp. 21-26).

Given this context, "an objective [Kountze] High School student will unquestionably perceive the . . . [religious banners] as stamped with her school's seal of approval." *See Santa Fe*, 530 U.S. at 308. The banners tell Christian students that they are favored by the school and tell non-Christian students that they are second-class members of the school community. More specifically, the banners link school spirit to Christian observance and, therefore, suggest that students of minority faiths and nonbelievers do not – and, because of their religious beliefs, cannot – join their peers in supporting their school football team.

These messages of religious favoritism violate the endorsement test. They are constitutionally impermissible because they hinge students' status within the school community on their adherence to specific religious tenets and they "encourage[] divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause." *See id.* at 317.

b. *The banners fail the coercion test.*

The coercion test examines whether the challenged governmental action directly or indirectly "coerce[s] anyone to support or participate in religion or its exercise." *Santa Fe*, 530 U.S. at 302 (internal quotation marks omitted). As in *Santa Fe*, KISD violates this test by putting vulnerable students in the untenable position of having to choose between participating in school events and avoiding government-sponsored religious teachings. "The Constitution[] demands that the school may not force this difficult choice upon . . . students for '[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.'" *Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 596).

In addition to the Muslim cheerleader or Jewish football player (*supra* pp. 35-36), consider the example of a Hindu or Sikh marching band member who is required to attend football games. Confronted with an enormous banner displayed in the school's "home" end zone, painted in school colors, and featuring a Bible

verse that welcomes the football players onto the field, that young student must decide whether to continue playing and cheering along with other students and band members, signaling her support of the religious message, or to sit silently until after the team's grand entrance. Forcing the student to make that choice is impermissibly coercive. *See Lee*, 505 U.S. at 593 (holding that the government may not "place objectors in the dilemma of participating [in religious activity], with all that implies, or protesting"); *Wallace*, 472 U.S. at 60 n.51 ("That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."). In the end, the school-sponsored Bible-themed banners effectively bar students of minority faiths and those of no faith from becoming full participants in school athletic teams, cheerleading squads, bands, or other groups that are required by school officials to attend games.[10]

[10] Some cheerleaders testified that all squad members are Christian, but that understanding is based either on what squad members felt comfortable telling them or pure supposition. (*See, e.g.*, KISD Supp. R. 774 (Rebekah Richardson Depo. at 56:19-25) ("They all say they are [Christian]."); 921 (Hadnot Depo. at 44:21-46:15) (admitting that she had not actually asked all squad members what faith they were and that she did not know whether all squad members went to church).) Not all squad members joined the lawsuit, and a student of minority faith, an atheist, or even a Christian cheerleader who believes the banners devalue cherished biblical scripture may not feel safe outing herself as having different religious beliefs from her peers. These students may not be forced to profess their differing beliefs or nonbelief as a condition of being a cheerleader. *See Lee*, 505 U.S. at 593-94.

Students who are not required by school officials to attend football games are also subject to coercive pressures. Many students understandably view football games as important school activities, and attending them is a demonstration of school spirit. The District even allows cheerleaders (and sometimes football players) to skip their first-period classes on Fridays to visit the elementary and middle schools, where they whip up enthusiasm for the upcoming games. (*Supra* pp. 14-16.) Whether the decision to attend is "purely voluntary," or a result of peer pressure, once they arrive at the game, these students are presented with "choices" similar to those faced by the Muslim or atheist cheerleader, the Jewish football player, or the Hindu and Sikh band members. "To recognize that the choice imposed by the State [in these situations would] constitute[] an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Lee*, 505 U.S. at 594.

The District attempts to avoid any constitutional infirmity by claiming that the "banner messages have not functioned as prayers addressed to God." (KISD Supp. R. 1941 (Resolution & Order No. 3).) But the coercion analysis is not limited to prayer or "overt religious activity." *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 855 (7th Cir. 2012) (en banc) (holding that public-school graduation ceremony located in church violated the coercion test, despite absence of prayer, because "when a student who holds minority (or no) religious beliefs

observes classmates at a graduation event taking advantage of Elmbrook Church's offerings or meditating on its symbols (or posing for pictures in front of them) or speaking with its staff members, [it] may create subtle pressure to honor the day in a similar manner").

c. *The banners fail the* Lemon *test.*

Under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), government conduct violates the Establishment Clause if it (1) lacks a predominantly secular purpose, (2) has the primary effect of advancing or inhibiting religion, or (3) excessively entangles government with religion. *See id.* at 612-13; *McCreary*, 545 U.S. at 860. The District's religious run-through banners violate all three prongs.

First, the use of school-sponsored banners to disseminate Bible verses does not have a predominantly secular purpose.[11] Some cheerleaders have said that they settled on the Bible verses to provide positive encouragement to the football players, yet it is not clear if the football players ever see the banners since they are turned toward the gathered crowd. The decision to display these religious messages to the audience is, instead, more consistent with the Petitioners' repeated

[11] Schools cannot use clearly religious means to achieve allegedly secular ends. *See Karen B.*, 653 F.2d at 901 ("The unmistakable message of the Supreme Court's teachings is that the state cannot employ a religious means to serve otherwise legitimate secular interests."); *see also Holloman*, 370 F.3d at 1283 (rejecting teacher's claim that in-class prayer was permissible way of teaching compassion in connection with character education instruction because prayer "is not within the range of tools among which teachers are empowered to select in furtherance of their pedagogical duties").

claims that their faith compels them to spread the Word via school-sponsored banners.[12] And the District has improperly adopted and affirmed this religious purpose by announcing that it would permit the use of religious scripture as an "expression of community sentiment." (*See* KISD Supp. R. 1941 (Resolution) ("For decades, it has been common knowledge among members of the KISD Community that many of its members, including many student athletes and fans, profess some religious belief, that many such persons identify themselves as Christians.").)

Second, the banners violate *Lemon*'s primary effects prong for the same reasons they run afoul of the endorsement test. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ*., 185 F.3d 337, 346 (5th Cir. 1999) (analysis under endorsement and primary effects tests is the same).

Finally, the banners excessively entangle the school with religion because school officials review and approve or veto the banners' religious messages before they are permitted to be displayed at football games. *See Ingebretsen*, 88 F.3d at 279 ("To the extent that school administrators participate in prayers in their official capacity or review the content of prayers to ensure that they meet these

[12] *See, e.g.*, KISD Supp. R. 917 (Hadnot Depo. at 28:16-20) ("[W]e were trying to spread the Word of God and we couldn't anymore."); *see also, e.g., id.* at 755, 757 (Lawrence Depo. at 73:9-13, 81:17-20); 900, 907 (Haynes Depo. at 18:12-19, 46:10-15); *cf. id.* at 262 (TRO Transcript at 106:7-21) (Appellees' counsel reciting Jeremiah 1:4 as evidence of the cheerleaders' religious motivations in creating the banners).

requirements, the School Prayer Statute excessively entangles government with religion.").

3. The District's "Fleeting Expressions of Community Sentiment" Policy Is a Legal Fabrication and Places Students of Minority Faiths and Beliefs at the Mercy of the Majority.

The District cannot save the school-sponsored run-through banners by calling the featured Bible verses "expressions of community sentiment." Quite the opposite, KISD's policy highlights why the Christian-themed banners are unconstitutional: The policy codifies the majority's religious beliefs as the official "community sentiment" and then guarantees the right to impose those majority religious beliefs on students, families, and others of minority faiths who may be in attendance at football games. Deferring to "community sentiment" about matters of faith is no different than holding a majoritarian election over them, a practice that was prohibited by *Santa Fe*. In both cases, government officials, using the machinery of the State, empower the majority to "subject students of minority views to constitutionally improper messages." *See Santa Fe,* 530 U.S. at 316.

Nor does the purportedly "fleeting" nature of the state-sponsored religious messages cure the constitutional violation. The Establishment Clause guards against *all* encroachments on religious liberty, including those that may strike some as innocuous, because "[t]he breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it

is proper to take alarm at the first experiment on our liberties.'" *See Schempp*, 374 U.S. at 225 (quoting Memorial and Remonstrance Against Religious Assessments); *see also Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 283 (3d Cir. 2011) (there is no "de minimis" defense to a First Amendment violation), *cert. denied*, 132 S. Ct. 1097 (2012); *cf. DeSpain v. DeKalb Cnty. Comm. Sch. Dist.*, 428, 384 F.2d 836, 837, 840 (7th Cir. 1967) (enjoining school-sponsored snack prayer – "We thank you for the flowers so sweet; We thank you for the food we eat; We thank you the birds that sing; We thank you for everything" – even though the verse "was as innocuous as could be insofar as constituting an imposition of religious tenets upon nonbelievers").

In *Lee*, the challenged nonsectarian prayer lasted a mere two minutes. Writing for the majority, Justice Kennedy rebuffed the suggestion that religious messages "of a de minimis" character are somehow permissible under the Establishment Clause:

> We think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights.

505 U.S. at 594. *Accord Engel*, 370 U.S. at 436 (rejecting "view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom"); *Holloman*, 370 F.3d at 1288 ("Our own precedents clearly state that

[t]he Establishment Clause does not focus on the amount of time an activity takes, but rather examines the religious character of the activity.") (internal quotation marks omitted); *Jager v. Douglas Cnty. Pub. Schs.*, 862 F.2d 824, 832 (11th Cir. 1989) (holding that official prayers at football games violated the Establishment Clause, though they lasted for only 60 to 90 seconds).

KISD cites no cases supporting its proposed "fleeting expressions of community sentiment" exception to the Establishment Clause. This is unsurprising: It is a legal fabrication that has never been recognized by any court within or outside of the public-school context. Indeed, the proposed exception would swallow the body of Establishment Clause law nearly whole, and give cover to a wide range of government-sponsored promotion of religion. For example, prayers are often quick and short. They are fleeting by their very nature and often reflect the community's sentiment and beliefs. When the government sponsors these religious messages, however, it nonetheless violates the First Amendment.

In any event, the religious run-through banners are hardly innocuous or *de minimis* endorsements of religion, as KISD's "fleeting expressions" policy implies. These are not signs that are passively displayed by visitors in the stands, or even by individuals on the sidelines. Rather, the banners are a key part of the District's pregame ceremony and tradition. They are formally integrated into the ritual used to present the football team to the audience, whose members are captive to the

banner's Christian messages. This ritual unfolds in a dramatic fashion: A gigantic banner is unfurled and displayed by the cheerleaders for at least several minutes as the cheerleaders and audience wait for the football players to make their entrance and charge through the banner. Under these circumstances, the banners violate the Establishment Clause and must be prohibited by the District.

VI. PRAYER

The Establishment Clause ensures that students of every faith, as well as those who practice no faith, may participate fully in their school communities and that the majority may not impose their religious views on others. *Amici* respectfully urge this Court to hold 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.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief complies with the type-volume limitation of Rule 9.4(i)(2)(B). This brief contains 15,017 words, excluding the parts of the brief exempted by Rule 9.4(i)(1). This brief complies with the typeface and type style requirements of Texas Rule of Appellate Procedure 9.4(e). It has been prepared in a proportionally spaced, conventional typeface using Microsoft Office Word in Times New Roman 14-point font (12-point for footnotes).

Dated: July 22, 2015.

Rebecca L. Robertson

CERTIFICATE OF SERVICE

I hereby certified that on July 22, 2015, a true and correct copy of the foregoing Brief of Amici Curiae was served via electronic service on all counsel of record in this case.

Rebecca L. Robertson

APPENDIX

The following photos of run-through banners referenced in the brief are included for the convenience of the Court:

A: Photo of run-through banner: “If God is for us, who can be against us?”

B: Photo of run-through banner: “But thanks be to God, which gives us victory through our Lord Jesus Christ.”

C: Photo of run-through banner: “And let us run with endurance the race God has set before us.”

D: Photo of run-through banner: “I can do all things through Christ which strengthens me.”

Photo A: Danny Merrell, *Kountze Cheerleaders Get Victory in Bible Banner Case*, Kicks105.com (May 8, 2013), http://kicks105.com/kountze-cheerleaders-get-victory-in-bible-banner-case/

Photo B: KISD Supp. R. at 301

Photo C: From Jason Morris, *Cheerleaders Win Temporary Injunction In High-profile Free Speech Case*, CNN.com (Oct. 18, 2012), http://religion.blogs.cnn.com/2012/10/18/ cheerleaders-win-temporary-injunction-in-high-profile-free-speech-case/

Photo D: *Judge Rules Kountze ISD Cheerleaders Can Display Religious Signs*, KSAT.com (May 8, 2013), http://www.ksat.com/news/judge-rules-kountze-isd-cheerleaders-can-display-religious-signs/-/478452/20066982/-/30057gz/-/index.html