No. 09-13-00251-CV

IN THE COURT OF APPEALS
FOR THE NINTH DISTRICT
BEAUMONT, TEXAS

KOUNTZE INDEPENDENT SCHOOL DISTRICT, *Appellant*

v.

COTI MATTHEWS, on behalf of her minor child, MACY MATTHEWS, *et al.*, *Appellees*

On Appeal from Cause No. 53526
356th Judicial District Court of Hardin County, Texas

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

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I. ISSUES PRESENTED

Issue on appeal: Whether the trial court erred in ruling on motions for summary judgment – in direct conflict with controlling U.S. Supreme Court authority *Santa Fe v. Doe* – that school-sponsored "run through banners" featuring biblical quotes are consistent with the Establishment Clause's prohibition against school officials directing or delivering 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.

Muslim Advocates, formed in 2005, is a national legal advocacy and educational organization dedicated to promoting freedom, justice, and equality for all, regardless of faith. Muslim Advocates advances these objectives through legal advocacy, policy engagement, civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.

The Union for Reform Judaism has 900 member congregations across North America, which includes 1.3 million Reform Jews. The Central Conference of American Rabbis counts more than 2,000 Reform rabbis as members. The Women of Reform Judaism represents more than 65,000 women in nearly 500 women's

groups in North America and around the world. These three organizations share a common commitment to the principle of separation of church and state, believing that the First Amendment is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history.

Hadassah, The Women's Zionist Organization of America, Inc., founded in 1912, has over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in funding health care and other initiatives in Israel, Hadassah also has a proud history of domestic and international advocacy, including protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the protection of the strict separation of church and state that has served as a guarantee for religious freedom and diversity. Hadassah has participated in numerous *amicus* briefs upholding this fundamental principle. Hadassah opposes any effort to bring organized religion into the public schools, including the introduction of officially sponsored, organized, or sanctioned prayer at public school sporting events or programs.

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.

B. INTEREST IN THE CASE

Amici submit this brief to provide the Court with information regarding the requirements of the Establishment Clause. 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, religious liberty also includes the right of students to decide for themselves which religious beliefs, if any, to adopt. It ensures the right of minority-faith students and nonbelievers 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.

These infringements of conscience occur regardless of whether the school-sponsored religious messages are delivered by school officials themselves, invited

[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/our-programs/advocacy/bullying (detailing efforts to prevent biased-based bullying and harassment of Sikh children in public schools).

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 this federal constitutional mandate.

Appellant 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 "Fleeting Expressions of Community Sentiment" policy. In this context, "community sentiment" is merely a euphemism for the majority's religious beliefs, and 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. 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 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 "fleeting expressions of community sentiment" policy is not supported by the case law, which clearly prohibits public schools from promoting

[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 this Court July 8, 2013.

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, this type of official religious promotion alienates and excludes students of minority faiths and nonbelievers and sparks religious tensions and divisiveness within school districts. *Amici* urge this Court to ensure that these harms do not come to fruition by holding that the run-through banners are sponsored by the District and that the District's use of this official platform to promote Bible verses or other religious messages to students during football games contravenes the Establishment Clause.

III. STATEMENT OF FACTS

A. TEXAS'S 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 broad 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).

Religious diversity across the state continues to grow. 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 are not immune to these trends. In 1992, Kountze was the first town in the United States to elect a Muslim mayor.[3] In addition, over the last three decades, the citizens of Kaufman, Plano, Dickinson, Galveston, and Beaumont have all voted Jewish mayors into office.[4]

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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).

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), 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.).)

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[5] KISD separately permits students to form, on their own, "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 explicitly 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

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 physical just like any student who's in athletics." (*Id.* at 1516-17 (Beth Richardson Depo. at 111:25-112:3).) They are further expected to "[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

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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 not paid. (*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.)

on the squad or the school. This may result in the loss of membership as a cheerleader." (*Id.*) This means that cheerleaders must "show good sportsmanship" and avoid "[f]rowning, pouting, non-participation, and other problems of a like nature" during games. (*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 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) are required to 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).) Football players often accompany the cheerleaders. (*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, the District tapped Beth Richardson, a counselor at KMS, and Tonya Moffett, a full-time substitute teacher in the District, to fill these positions. (*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 strictly regulate the dress and grooming of cheerleaders. (*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 for any number of reasons. (*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, creating the banners is identified in the squad's governing documents 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 sized 30 feet by 10 feet and feature a "victory slogan." (*Id.* at 358 (KISD Interrogs. Resp.).) This past 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*

[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).)

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 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 last year 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 from school officials to implement their plan. (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 the banners and the biblical messages on them. (*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 preceding 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.)

Prior to 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 pursuant to Texas Rule of Civil Procedure 166a(c). 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 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

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

both motions "to the extent . . . consistent with th[e] order," but failing to identify the grounds for its ruling. (*Id.* at 1034-35.)

The two-page 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 this Court on May 28, 2013. (*Id.* at 1044-45.)

IV. SUMMARY OF ARGUMENT

Appellants and Appellees misapprehend the nature and purpose of the Establishment Clause, viewing it as an obstacle to religious practice when, in fact, robust enforcement of the Establishment Clause is a vital and necessary means of ensuring that freedom of individual conscience can flourish in our society. 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. Moreover, parents 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, then, 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. 18-20, 21-26, 26-27.) 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" because, regardless of the title, governmental policies that authorize the majoritarian imposition of religious beliefs on minority faiths adherents and nonbelievers violate the core of the Establishment Clause. And this fundamental constitutional principle does not 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 reverse

the lower court's grant of summary judgment and render a decision holding that the religious run-through banners are sponsored by the school and, therefore, unconstitutional.

V. ARGUMENT

Without a doubt, 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, Appellees, 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, after suffering this indignity – a constitutional violation in itself – 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.

It is hardly a stretch to conclude that, under these circumstances, students of minority faiths and nonbelievers would feel alienated from their peers and would 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 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 strong 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 youth – 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 our future citizenry.

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 only grow more pluralistic in the coming years. In light of these trends, Texas's public schools must serve students and families who practice 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 a hurdle to free exercise of religion, but rather the indispensable foundation for it. 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 protect against 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. 38-39 (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 opined, "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.

Justice O'Connor's observation is particularly relevant to the public-school context, where Establishment Clause protections are perhaps most vital. 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). Kennedy explained 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 obviously exclusionary religious message.

Second, schools are important social institutions not only because they shape individual students' growth and development of identity, but also because of the role they play in maintaining 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 absolutely 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 case 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 plainly 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 Appellees below, the lone fact that students made and displayed the run-through banners does not resolve whether the banners violated the Establishment Clause. Per *Santa Fe*, the relevant question is whether the school impermissibly sponsored the biblical messages delivered by the students. Throughout this case, KISD has vehemently argued 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).

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 – relying heavily on the Supreme Court's government-forum jurisprudence – argued that the prayers were private student speech, the Court rejected this claim for several reasons. *See id.* at 302-03.

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, importantly, 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. When considered with the history of the policy and the context in which the prayers would be delivered, these details instead 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. *See id.* at 291, 307-08, 310-11, 314-15.

These facts also prompted the Court to hold that the policy ran afoul of 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. Nor, the Court reasoned, is it a choice that the public schools may constitutionally 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. *It is patently clear from the record that 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 Fed. App. 852, 855 (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 are not given *carte blanche* to display any message they desire on the banners. (*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 admit that they 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 school controls the events at which the banners are displayed, *i.e.*, 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.*) In light of these factors, the banner messages are clearly sponsored by KISD.

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

Appellees' 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 disregards the nature and terms of the policy itself and the 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, presumably aware of the damage, injury, and liability risks, as well as the cost of providing additional security were hordes of students and other spectators allowed on the field, 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.[8] As in *Santa Fe*, there is simply 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 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)).

[8] 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; *cf., e.g., Chandler v. James*, 985 F. Supp. 1068, 1089 (M.D. Ala.1997) (The court is not persuaded that a limited public forum has been created in regard to classroom distributions or that it could be with regard to classroom distributions."); *Herdahl*, 933 F. Supp. at 589 ("As a matter of law, even if the defendants established a limited open forum for student speech over the intercom, devotionals and sectarian prayer broadcast over the public school loudspeaker would still violate the First Amendment.").

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 test, 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 [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 very similar to the context identified by the *Santa Fe* Court as important to its endorsement analysis. 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 featuring 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.)
- As the Court noted in *Santa Fe*, 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. In broad terms, the banners send a powerful message to Christian students that they are favored by the school and to non-Christian students that they are second-class members of the school community whose beliefs are not on equal standing. More specifically, the banners link school spirit to Christian identity 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 unmistakably 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. This dissonance is nothing short of 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.[9]

Students who are not required by school officials to attend football games are also subject to coercive pressures. Many students 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.)

[9] 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.

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), state action 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 is devoid of a predominantly secular purpose.[10] 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 Appellees' repeated claims that their faith compels them to spread the Word via school-sponsored banners,[11] a religious purpose that the District improperly adopted and affirmed by announcing it would

[10] 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").

[11] *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).

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. No further discussion is necessary because analysis under this prong is similar to the endorsement inquiry. *See, e.g.*, *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999).

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

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

The District cannot save the school-sponsored run-through banners by characterizing the featured Bible verses as "expressions of community sentiment."

Quite the opposite, KISD's policy highlights why the Christian-themed banners are unconstitutional by expressly codifying the majority's religious beliefs as the official "community sentiment" and guaranteeing the right to impose those 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, as in *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 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*, where 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 case law in support of its proposed "fleeting expressions of community sentiment" exception to the Establishment Clause because 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 nearly the whole body of Establishment Clause law 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 single ritual used to present the football team to the audience, at which time those in attendance are captive to the banner's Christian messages. This ritual unfolds in a dramatic fashion: A single, gigantic banner is unfurled and displayed by the cheerleaders for at least several minutes, if not longer, as the cheerleaders and audience wait with bated breath for the football players to make their grand entrance and charge through the banner. Under these circumstances, the banners

unquestionably run afoul of the Establishment Clause and must be prohibited by the District.

VI. PRAYER

The Establishment Clause ensures that, across Texas and the nation, students of every faith, as well as nonbelievers, may participate fully in their school communities and that these communities remain free of religious divisiveness that could undermine the core functions of public schools. For the forgoing reasons, *Amici* respectfully urge this Court to (1) reverse the lower court's grant of summary judgment; and (2) render a decision holding that the run-through banners at issue in this case are government speech and cannot, therefore, display Bible verses or other religious messages without violating the Establishment Clause of the First Amendment to the U.S. Constitution.

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 14,960 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).

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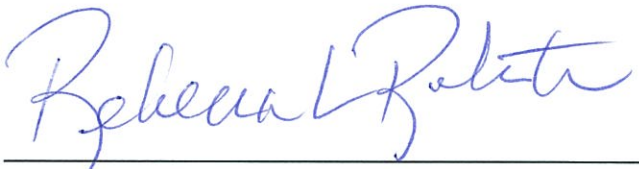

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APPENDIX

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