No. 14-0453

In the Supreme Court of Texas

COTI MATTHEWS, ON BEHALF OF HER MINOR CHILD, M.M, ET AL.,
Petitioners,

v.

KOUNTZE INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Petition for Review from the
Ninth Court of Appeals, Beaumont
Case No. 09-13-00251-CV

BRIEF OF *AMICUS CURIAE* THE STATE OF TEXAS

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INTRODUCTION AND STATEMENT OF INTEREST

Texas public schoolchildren have a constitutional right to express *their own messages* at school and school-related events, provided the messages are not disruptive, vulgar, or inappropriate for a public-school setting. The guarantees in the United States Constitution and Texas Constitution safeguarding that right extend to personal expressions of religious faith. This case involves personal expressions of faith by cheerleaders at Kountze Independent School District (KISD) and an ill-advised school-district change of policy that mislabels the cheerleaders' expressions of faith as "government speech." The State of Texas participated as a party in the most recent United States Supreme Court government-speech case, *Walker v. Sons of the Confederate Veterans*, 135 S. Ct. 2239 (2015), and so is well-suited to discuss the case and the government-speech doctrine.

KISD, in an effort to resolve a dispute over religiously-themed messages on run-through banners displayed by cheerleaders at high-school football games, reversed decades of consistent school-board policy and practice by announcing that the cheerleaders' banners convey only the school's speech, over which KISD can exercise full control. In support

of its policy about-face, KISD invokes *Walker* and other government speech cases, but it misapplies them. The cheerleaders take issue with KISD's usurpation of their speech because, among other things, the identity of the speaker often shapes and defines the message, including its implications for those receiving it. Moreover, students who understand that their personal messages are actually attributable to their school may alter those messages, or choose not to convey them at all.

If accepted by this Court, KISD's government-speech policy shift—regardless of its motivations—would effectively authorize public school administrators across the State to control and stifle student expression. Because KISD muddles the government-speech inquiry under *Walker*, and because the State of Texas has a profound interest in safeguarding Texas schoolchildren's freedom to express their religious and other personal viewpoints, the State respectfully submits this *amicus curiae* brief discussing the government-speech doctrine and its misapplication in this case.[1]

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[1] No fee was paid for the preparation of the brief.

ISSUE PRESENTED

This brief will discuss the government-speech doctrine as it pertains to the following issue presented: Did the court of appeals err when it held that this case was moot, even though the parties continue to dispute whether banners created by cheerleaders are the private speech of the cheerleaders, and not the government speech of their school district?

STATEMENT OF FACTS

The parties' and other *amici*'s briefs provide an extensive account of the factual background of this case, and the State will not repeat those presentations. The following facts, however, are particularly relevant to the State's interest as *amicus curiae*.

For decades, cheerleaders at Kountze High School created run-through banners, which they used at football games to entertain and inspire the football players and fans. CR.162, 167. Historically, the design and content of the banners was left solely to the discretion of the cheerleaders, who through the years created and painted a variety of banner messages and pictures. *Id*. Thus, "[t]he messages on the banners are the students' own words." CR.163. "In previous years, messages on

the run-through banners typically included negative language about opposing teams, such as "Beat the Bulldogs." CR.163, 168, 173, 787; *see* CR.19 ("'Mangle the Tigers,' 'Cage the Eagles,' 'Bury the Bobcats'"); *see also Kountze ISD v. Matthews*, No. 09-13-00251-CV, 2014 WL 1857797, at *1 (Tex. App.—Beaumont, May 8, 2014, pet. filed) (mem. op.) ("[T]he run-through banners generally display a brief message intended to encourage the athletes and fans."). The cheerleaders always created the banners on their own time and with privately purchased materials. CR.19, 162-63. At football games, the cheerleaders, wearing privately purchased uniforms, hold up the banners so that the football players can run through them to increase pregame excitement. CR.172-73.

The school is only marginally involved with the cheerleaders' banners. The rules and regulations for the Kountze cheerleaders permit the creation of run-through banners, and those rules and regulations have never included any restrictions on the content or viewpoint of the banners. 2.SCR.808-19. Likewise, the school district's policy regarding student speech—at least before the current controversy—is silent with respect to run-through banners and their content. 1.SCR.122-26 ("Student Rights and Responsibilities, Student Expression (FNA

(LOCAL))" policy). Indeed, the only oversight ever previously exercised by school sponsors of the cheerleaders is an examination of the cheerleaders' finished banners for compliance with a general school policy prohibiting obscene, disruptive, or otherwise inappropriate speech during school-related activities. *See* CR.162, 179.

State law is consistent with the school's hands-off approach. The Texas Religious Viewpoints Discrimination Act (RVAA), for its part, reflects a thumb on the side of the scale favoring free and open student expression on faith-based topics. It requires school districts to "treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the district treats a student's voluntary expression of a secular . . . viewpoint," and it provides that the district "may not discriminate against the student based on a religious viewpoint expressed by the student." TEX. EDUC. CODE §25.151. The RVAA also requires school districts to "adopt a policy, which must include the establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak." *Id.* §25.152.

For the 2012 high-school football season, the cheerleaders (not their sponsors or the school) decided to include Bible verses on the run-through

banners to express a positive message of encouragement. CR.163; 2.SCR.116-17. Accordingly, the cheerleaders designed, constructed, and then displayed banners containing Bible verses at the first three football games of the season. But before the fourth game, KISD superintendent Kevin Weldon instructed school administrators to prohibit banners that expressed the cheerleaders' encouragement from a religious viewpoint or included religious messages. CR.19-20.

Many cheerleaders (and their parents) filed suit, CR.2-21, and obtained a temporary restraining order preventing the superintendent's prohibition, CR.22-25. The cheerleaders obtained an injunction on October 18, 2012, which preserved the *status quo* by permitting banners with religious messages for the remainder of the football season. CR.58-62.

After litigation had proceeded for several months, the KISD school board passed Resolution and Order No. 3, announcing KISD's intention to change its extant policy on student expression. CR.335-45, 2.SCR.1938-48. Under KISD's new policy, the run-through banners were no longer considered *student* speech, as had previously been the case, but were now considered *the school's* speech. CR.343. As a result, the banners

were no longer a means for the cheerleaders to design, construct, and display messages (on any topic not otherwise inappropriate) to the football players and fans but were now, according to KISD, only an embodiment of the school's speech. Of course, the school had never played any role whatsoever in designing the banners, devising the content or viewpoint of the messages displayed, paying for the construction of the banners, or actually constructing the banners.

After a hearing at which the district court considered KISD's plea to the jurisdiction, as well as cross-motions for summary judgment filed by the students and KISD, the court issued its summary-judgment order on May 8, 2013. CR.1034-36. The court denied KISD's plea to the jurisdiction and partially granted the cheerleaders' and KISD's motions for summary judgement, at least to the extent they were consistent with the district court's order declaring that the cheerleaders may continue to display religious messages on their run-through banners. *Id.*

On May 13, the district passed, on second reading, Resolution and Order No. 3, which explained the Board's position that "in the context of the KISD Community," the Board did not believe that "the use of the religiously-themed messages on the 'run-through' banners created or is

likely to create an establishment of religion." CR.290; *see* Minutes of Regular Meeting, Kountze Indep. Sch. Dist. (May 13, 2013), http://s3.amazonaws.com/scschoolfiles /289/51313_minutes.pdf. KISD then appealed. CR.1044-46.

KISD appealed from the denial of its plea to the jurisdiction. The Ninth Court of Appeals concluded that the cheerleaders' claim had become moot, and it vacated the district court's order that had been protecting the cheerleaders' rights. *Matthews*, 2014 WL 1857797, at *1. Reasoning that the cheerleaders' parents "brought this suit so their children could continue to display religiously-themed messages on run-through banners at school football games," the court held that KISD's adoption of a new policy permitting display of religiously-themed banners eliminated any ongoing controversy between the cheerleaders and KISD. *Id.* at *3,*4-*5. The court declined to address the fact that, in adopting a new policy permitting religiously-themed banners, KISD asserted control over the content of the banners by claiming that they contain only government speech. *Id.* at *8. Thus, while the new KISD policy theoretically permits religiously-themed banners, the cheerleaders no longer, under the new policy, control the messages on their banners.

Indeed, the messages are no longer the cheerleaders' messages at all, according to the new KISD policy, because "[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 135 S. Ct. at 2245.

SUMMARY OF THE ARGUMENT

After months of litigation, KISD conceded that cheerleaders' inclusion of Bible verses and religious messages on their run-through banners does not violate the Establishment Clause. But in doing so, KISD announced that the run-through banners are, in its view, government speech, not the cheerleaders' personal expressions of religious faith. KISD, in essence, sought to end the parties' dispute by taking over the speech in question and then allowing the speech to continue, albeit under KISD's sole control.

KISD's arguments, if accepted, threaten to set a precedent under which public schools and individual administrators could usurp a wide range of student speech to control its content and viewpoint. KISD's actions and arguments present a serious danger to the First Amendment rights of all public-school students, regardless of whether KISD's motives are benevolent.

The Court should reject KISD's attempt to appropriate the cheerleaders' speech because the run-through banners do not convey government speech. That the messages on the banners cannot be shoehorned into the category of government speech is demonstrated by the United States Supreme Court's government-speech jurisprudence, including its most recent decision in *Walker*, which KISD's brief misapplies. *See* KISD Br. at 12-19.

In the alternative, and even assuming run-through banners could in some circumstances be government speech, the Court should reject that conclusion in this case. KISD's usurpation of its student speech, after decades of contrary action, is an impermissible subterfuge camouflaging a power-grab that would permit content and viewpoint discrimination. The danger of viewpoint-based censorship is heightened where, as here, the purported justification for appropriating the cheerleaders' expressions of personal faith is baseless. Here, KISD argues the banners must be government speech, over which it may exercise content and viewpoint discrimination, because that is the only way KISD can "regulat[e] offensive banners." KISD Br. at 17. But KISD has long had the authority to supervise *student speech* for

appropriateness; its ill-advised government-speech policy switch is unnecessary and should be rejected.

ARGUMENT

I. THE CHEERLEADERS' RUN-THROUGH BANNERS ARE NOT GOVERNMENT SPEECH.

For decades it has been understood that the unique circumstances of the public-school environment allow schools to exercise some control over student expression.[2] That authority includes preventing students from expressing messages that are inappropriate for the public-school setting.[3] But at the same time, control over inappropriate student speech does not necessarily transform student speech into school speech. *E.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that "educators do not offend the First Amendment by exercising editorial control over the style and content *of student speech* in school-sponsored

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[2] *See Morgan v. Swanson*, 659 F.3d 359, 408 (5th Cir. 2011) (noting that supervision of student speech is permissible where the speech occurs during "'activities [that] may fairly be characterized as part of the curriculum,' [ ] are 'supervised by faculty members,' and [are] designed to impart particular knowledge or skills.'" (brackets added) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)).

[3] *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (noting that school officials have "comprehensive authority . . . to prescribe and control conduct in the schools").

expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (emphasis added)). Accordingly, KISD's concern that a school district cannot regulate inappropriate student speech without eliminating it (by transforming it into government speech) is inaccurate. *See* KISD Br. at 17-18.

In *Hazelwood*, for example, the school exercised significant control over a school newspaper, including acting as "final authority with respect to almost every aspect of the production and publication of [the newspaper], *including its content*." *Id.* at 268 (emphasis added). Yet despite that significant control, the Court was concerned with restrictions on *student* speech; it did not hold that the school could control the speech because it was actually the school's speech. *Id.* at 271-72 ("A school must be able to set high standards for *the student speech* that is disseminated under its auspice . . . ." (emphasis added)); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (holding that "a [school] principal may, consistent with the First Amendment, restrict *student speech* at a school event, when that speech is reasonably viewed as promoting illegal drug use" (emphasis added)).

Not every message delivered "at government-sponsored school-related events . . . is the government's own." *Santa Fe ISD v. Doe*, 530 U.S. 290, 302 (2000). At events like football games, students retain First Amendment rights, even assuming school officials might supervise student speech to ensure that it is not inappropriate for a school setting. *See Hazelwood,* 484 U.S. at 273; *see also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to . . . students.").

A. *Walker* Demonstrates That the Cheerleaders' Banners Are Not Government Speech.

By asserting that the cheerleaders' banners convey government speech, KISD advocates for a dramatic, unwarranted expansion of the government-speech doctrine. The Supreme Court's government-speech jurisprudence, specifically the Court's recent decision in *Walker*, demonstrates the error of KISD's and the court of appeals' overly robust application of that doctrine.

Walker applied a multi-factor analysis to determine that specialty license plates issued by Texas are government speech, even though the license plates were designed with input from private individuals or

entities. The factors relevant to *Walker*'s government-speech inquiry include: (1) the history surrounding the speech and whether the government has "long used" the speech "to convey some thought or instill some feeling in those who" perceive it; (2) whether the speech at issue is "often closely identified in the public mind" with the government; and (3) whether the government "maintains direct control over the messages conveyed," which includes an inquiry into whether the government has actually "exercised this authority." *Walker*, 135 S. Ct. 2247-49; *see Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009).

Here, each factor supports a finding that the messages on the cheerleaders' banners are the cheerleaders' speech, not the school's.

1. The history of the cheerleaders' banners shows that they convey the cheerleaders' messages, not the school's.

In discussing the first factor, the Supreme Court in *Walker* concluded that "the history of license plates shows . . . they long have communicated messages from the States." 135 S. Ct. at 2248 (noting historical evidence dating from 1917 of state messages conveyed on license plates issued by a number of states). Likewise, the Texas-specific historical evidence reflected a long practice of Texas license plates

conveying particular messages that Texas wished to communicate. These included messages of state pride, as with plate designs displaying the word "Centennial," the Lone Star symbol, and the silhouette of the State. *Id*. Also included were messages promoting events of importance to the State, like a plate design displaying the phrase, "Hemisfair 68," which the State used to promote an event in San Antonio. *Id*.

In contrast, the history surrounding the cheerleaders' run-through banners demonstrates that they have exclusively conveyed messages from the cheerleaders, not the school. For decades, the cheerleaders designed and constructed the banners on their own time and with privately purchased materials. CR.19, 162-63, 167. During that time, the content and viewpoint of the banners' messages were left to the sole discretion of the students. CR.162, 167.

The school's historical involvement with the banners was marginal, at best. No rules governing the cheerleaders restricted their freedom to select the content and viewpoint of the banners' messages. *See* 2.SCR.808-19. The banners' messages did not historically convey any kind of official school message; they instead typically conveyed encouragement from the cheerleaders to the football team, the rest of the

student body, and the community watching the game. For example, "'Bury the Bobcats,'" as displayed on a cheerleader banner, is hardly an official message from KISD. CR.19; *Matthews*, 2014 WL 1857797, at *1 ("[T]he run-through banners generally display a brief message intended to encourage the athletes and fans."); *cf. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (describing government speech as including "when [the government] enlists private entities to convey its own message").

Historically, the official school board policy said nothing about the banners and their content. *See* 1.SCR.122-26. The only oversight reserved for the school in that policy was consistent with the oversight that schools across the country exercise every day: the ability to control the *students'* speech if it becomes offensive or inappropriate for the school environment. *See id.*; *Hazelwood*, 484 U.S. at 272-273. There was no policy making the banners a KISD communication.

It is immaterial here that cheerleaders are charged with "increase[ing] school spirit and enthusiasm for the game" as part of their duties on the cheerleading squad, KISD Br. at 13, or that "there is a long-standing tradition of utilizing run-through banners as part of efforts to

increase school spirit," KISD Br. at 17, or even that "Kountze ISD has not opened its football fields up to the general public and, in fact, *only* the cheerleader squads are permitted to display the run-through banners," *id*. The long-standing history of run-through banners at KISD reflects that it is the cheerleaders, not the school, who select *the content of the message*. Expressions of personal faith on run-through banners and "Bury the Bobcats" are not the school's messages; they are and always have been the students' messages. Even KISD's findings supporting its new policy recognize that "messages on 'run-through' or other school banners[] are fleeting expressions of *community sentiment*." CR.290 (emphasis added). KISD's theory of government-speech under *Walker* is untenable and does not reflect the actual history of the banners in question.

2. The banners are closely identified in the public mind with the cheerleaders, not the school and its administration.

In *Walker*, the Court noted that Texas license plates have long been closely identified with the State. "Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification." *Walker*, 135 S. Ct. at 2248. "The

governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate." *Id.* "[T]he State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State." *Id.* "Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations." *Id.* "And Texas dictates the manner in which drivers may dispose of unused plates." *Id.* Finally, "Texas license plates are, essentially, government IDs," and "persons who observe designs on IDs routinely—and reasonably—interpret them as conveying some message on the [issuer's, *i.e.*, Texas',] behalf." *Id.* at 2249 (quotation marks omitted).

The cheerleaders' banners have for decades been closely associated with the cheerleaders, not with the school or KISD. The record contains no evidence that the cheerleaders' banners were ever used to convey an official school message provided to the cheerleaders for placement on the banners, or a message that anyone would have any reason to believe came from the school, as opposed to the individual student cheerleaders. Nor does the record reflect that officials supervising the banners ever dictated to the students what messages to include, or that those officials

ever edited the messages for any reason apart from those consistent with ensuring that *student speech* is appropriate for the school environment.

Unlike Texas laws requiring all vehicles to display license plates, *see id.* at 2248, the school district did not require the cheerleaders to display or make run-through banners, *see* 2.SCR.118. The record shows that the school's name never appeared on the banners, CR.162, unlike Texas license plates that each bear the State's name, *see Walker*, 135 S. Ct. at 2248. And where Texas produces license plates and owns the plate designs, *id.*, the cheerleaders produce the banners of their own design, *see* CR.19, 162-63 (reflecting that the banners are hand-painted by cheerleaders using privately purchased paper and paint supplies). Finally, whereas license plates serve an official government purpose and act as a *de facto* form of government ID, *Walker*, 135 S. Ct. at 2248-49, the banners serve no similar official school purpose.

3. The lack of control exercised by the school over the banners reflects that they convey student speech.

In *Walker*, the government board charged with approving design proposals for Texas license plates retained final editorial control over the content of the plates. *Id.* at 2249. Thus, "Texas law provides that the

State has sole control over the design, typeface, color, and alphanumeric pattern for all license plates," and it retains final approval authority over all specialty license plates. *Id.* (internal quotation marks omitted); *see* TEX. TRANSP. CODE §504.005(a); *see also* 43 TEX. ADMIN. CODE §217.45(i)(8)(B) (explaining that the board retains "final approval authority of all specialty license plate designs"). Moreover, the board has "actively exercised this authority." *Walker*, 135 S. Ct. at 2249. This actively exercised control "allows Texas to choose how to present itself and its constituency" through communications made via license-plate designs. *Id.*

In contrast, the limited control exercised over the cheerleaders' banners is consistent with their being student speech. The school's minimal oversight is nothing like the pervasive control Texas exercises over license plates. KISD established no requirements regarding the content, design, message, or even size of the run-through banners. CR.163 (explaining that "[t]he content of each banner is decided solely by the Cheerleaders themselves" and all of "[t]he messages on the banners are the students' own words"). And KISD did not exercise ownership over the banners, such as to convey that it was engaging in its own expressive

conduct. *See Walker*, 135 S. Ct. at 2251 (taking "ownership of each specialty plate design" demonstrated that the State was intending to "engag[e] in expressive conduct"). Although the cheerleaders' school sponsors could review the final banners to ensure that they did not contain lewd or otherwise inappropriate speech,[4] the record reflects that the sponsors and KISD did not exercise anything close to the same type of control as Texas does over its license plates.

4. The *Walker* factors establish that the banners contain student speech, not government speech.

The *Walker* factors all pointed ineluctably to a government-speech finding:

> Texas, through its Board, selects each design featured on the State's specialty license plates. Texas presents these designs on government-mandated, government-controlled, and government-issued IDs that have traditionally been used as a medium for government speech. And it places the designs directly below the large letters identifying "TEXAS" as the issuer of the IDs. The [designs] that are accepted, therefore, are meant to convey and have the effect of conveying a

[4] For decades the U.S. Supreme Court has recognized that the unique circumstances of the school environment allow a school to exercise some control over student expression and prohibit some types of speech, and that limited control has never been deemed sufficient to transform the students' speech into governmental speech. *See supra* pp. 11-13. Accordingly, this situation does not present a Hobson's choice between giving a school district complete control over all student expression or precluding a school district from prohibiting speech that would substantially disrupt the educational environment.

> government message, and they thus constitute government speech.

Walker, 135 S.Ct. at 2250 (quotation marks omitted). In this case, the factors point the opposite way. The banners are not government speech but rather the cheerleaders' speech.

- There is no history of the school using cheerleaders to disseminate official messages via run-through banners. The banners, instead, have historically conveyed cheerleaders' messages.

- The messages on the banners are devised, crafted, owned, and ultimately expressed by the cheerleaders, thus reflecting a close association in the public mind with the cheerleaders, not some official school message.

- The school hardly exercises any control over the banners and their messages, and what control the school has exercised is consistent with permissible control over *student* speech.

B. Labeling Run-Through Banners Government Speech Merely Because Cheerleaders Are School "Representatives" Would Be Erroneous.

KISD and the ACLU argue that cheerleaders are KISD's "representatives." *See* ACLU Amicus Br. 17-28; KISD Br. 14-15. From this premise, KISD concludes that cheerleaders' speech necessarily is school speech. *See* KISD Br. 14-15. This argument overreaches. Under it, cheerleaders and other student-athletes at games or performances could speak only for the school, never themselves. Accordingly, every high-

school athlete's personal comments after a game or performance would be school speech that could be controlled by, and must be attributed to, the school. The argument improperly oversimplifies the law and, ultimately, goes too far.

Cheerleaders and football players (and students in general) are not at all times and for all purposes "representatives" of their schools, in a First Amendment sense. Students are certainly not legal representatives of the school; a cheerleader could not under normal circumstances enter into a binding agreement on behalf of the school or take other official action. Often students are "representatives" of their school in a colloquial sense, which is to say that students' behavior *reflects upon* the school. But that is not the test for government speech. *Walker*'s fact-intensive multifactor inquiry reflects that determining when and whether a student is conveying the school's message—and not her own message—requires more than simply affixing a one-size-fits-all label of school "representative."

II. IN THE ALTERNATIVE, KISD'S CHANGE IN LONGSTANDING POLICY THAT WOULD TRANSFORM STUDENT SPEECH INTO GOVERNMENT SPEECH SHOULD BE REJECTED AS MERE SUBTERFUGE.

KISD's appropriation of the cheerleaders' speech, if approved by the Court, would create a troubling precedent under which public schools could engage in viewpoint and content discrimination. As KISD notes in its brief, "when the government speaks, it is not barred from determining the content of what it says." KISD Br. at 12. While KISD's actions might be motivated by good intentions—KISD cites a desire to control offensive speech—KISD cannot use unlawful means to pursue good intentions. Thus, even if run-through banners could properly be seen as government speech in some circumstances, KISD's belated policy about-face to re-label the banners should be rejected here.

As the Supreme Court recognized in *Summum*, there is a "legitimate concern that the government speech doctrine [could] be used as a subterfuge" through which a government entity could reserve to itself the unilateral power to control speech and favor "certain private speakers over others based on viewpoint." 555 U.S. at 473. For decades, the cheerleaders have made run-through banners to display messages of their own devising. CR.18-19, 256-57. They have done so with supplies

purchased with private funds, and they have always enjoyed complete control over the content, design, and tone of the messages displayed (subject only to the general school policy prohibiting vulgar, lewd, disruptive, or otherwise inappropriate speech in a school-related setting). *See* CR.19, CR.246-47 (noting that content on banners were not subject to "an approved script" and that creating the banners was "student initiated and student led"); *see also* CR.256-57; 2.SCR.120-21. For KISD now to claim, for the first time, that run-through banners are school speech is mere pretense for allowing KISD to control the banners' messages into the future.[5]

KISD's justification for this power grab rings hollow. Although KISD claims that it must label all run-through banners as government speech in order to control offensive messages, KISD Br. 17, KISD already has that control without the "government speech" moniker. *See supra* pp.

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[5] The history and tradition of run-through banners is also relevant to Establishment Clause analysis. Because run-through banners created by student cheerleaders have historically been used to express secular, rather than religious, messages of encouragement for the home team or hostility toward the opponent, *see, e.g.*, CR.19 ("'Mangle the Tigers,' 'Cage the Eagles,' 'Bury the Bobcats'"), this history and tradition confirms that KISD did not invent its policy as a sort of subterfuge to promote some individual students' religious views, *cf. Santa Fe ISD v. Doe*, 530 U.S. at 308 (holding that the history behind the school's policy of allowing a student to pray over the loudspeaker before a football game undermined the school's professed secular purpose).

11-13. KISD's fallback argument, that it may sometimes be difficult to fit "offensive" messages into a category of speech over which a school district historically may exercise control, is equally unavailing. *See* KISD Br. 18. Chilling speech and shutting down speakers' opportunity to express their personal views are not, and have never been, justified by the perceived complexity of First Amendment jurisprudence or the inconvenience it may cause the government.

The Court should reject KISD's actions that, if approved, would effectively authorize discrimination based on content and viewpoint through a government entity's after-the-fact, contrived labeling.

Prayer

The Court should grant the petition for review and reverse the court of appeals' judgment.

Respectfully submitted.

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