No. 09-13-00251-CV

# In the Court of Appeals for the Ninth Judicial 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 District Court of Hardin County, Texas

## BRIEF OF AMICI CURIAE SENATORS JOHN CORNYN AND TED CRUZ IN SUPPORT OF APPELLEES

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Rule**

## STATEMENT OF INTEREST OF AMICI CURIAE[1]

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

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

The Senators have considerable understanding of First Amendment jurisprudence, particularly in regard to Establishment Clause issues, the parameters

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

of the government-speech doctrine, and the distinct challenges school districts face regarding student expression in the educational setting.

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TO THE HONORABLE NINTH COURT OF APPEALS:

Like their counterparts in schools across Texas, for many years Kountze High School's cheerleaders have made so-called "run-through" banners to support their football team. The banners typically have messages on them, and the content of those messages has always been chosen by the student cheerleaders, not the school. At no time has the school required, encouraged, or even suggested to the cheerleaders what the content of the messages on the banners should be. And as one would expect, those messages have varied over the years.

In 2012, the cheerleaders chose to include religious-themed messages on the banners. The Kountze Independent School District ("the District") maintains that these messages are government speech. In the District's view, the cheerleaders' individual expression has been turned into the District's own speech because the cheerleaders' activities must conform to school policies, sponsors must approve the banners, and the banners are displayed at a school function.

Thus, the central question before the Court is straightforward: are banners that reflect genuinely student-initiated messages transformed into government speech merely because they are subject to regulation by the school and displayed at a school-sponsored event?

Under the United States Supreme Court's government-speech jurisprudence the answer is equally straightforward: messages created solely by student cheerleaders do not become government speech simply because those messages, and the cheerleaders' activities generally, are regulated by the school. Because the statements on the banners are the cheerleaders' ideas from beginning to end, the speech is not the school's. Rather, the speech belongs to the cheerleaders, and it is entitled to First Amendment protection.[2]

2. Because the resolution of this appeal involves the application of established constitutional principles, and the district court's judgment was plainly correct, the Senators agree with the Court's conclusion that oral argument is unnecessary.

## ARGUMENT

### I. THE RUN-THROUGH BANNERS ARE AN EXPRESSION OF PERSONAL RELIGIOUS BELIEF, NOT GOVERNMENT SPEECH.

The Supreme Court has cautioned that Establishment Clause jurisprudence is "delicate and fact sensitive," *Lee v. Weisman*, 505 U.S. 577, 597 (1992), and that "[e]very government practice must be judged in its unique circumstances," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). Eschewing these principles, the District envisions a broad interpretation of government speech in the Establishment Clause context, under which any speech by an authorized speaker at a school-sponsored event becomes the speech of the State.

The Court should reject the District's invitation to endorse such a rule because it is contrary to Supreme Court jurisprudence establishing that government speech occurs only when a government entity prescribes the content of the speaker's message. Here, because the school never dictated, encouraged, or even suggested that the cheerleaders choose any particular message for the banners, the speech belonged to the student cheerleaders. The fact that the banners were displayed at school-sponsored events and that the school regulated the cheerleaders' activities does not alter the central, dispositive fact that the content of the messages on the banners was genuinely student-initiated speech protected by the First Amendment.

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

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

Thus, for example, the government does not offend the First Amendment by assessing a tax on beef producers and using the proceeds to fund beef-related promotional campaigns. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005). Nor does the government's content-based refusal to accept a monument for display in a public park infringe the would-be monument donor's Free Exercise rights. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). A government entity has the right to "speak for itself." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000). "[I]t is entitled to say what it wishes," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the views that it wants to express, *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

The defining characteristic of "government speech" is the government's actual *control* of the message, and its *right to control* the message. "When . . . the

government sets the overall message to be communicated and approves every word that is disseminated," it engages in "government-speech." *Johanns*, 544 U.S. at 562.

The fact that speech is allowed by the government or occurs on government property does not make it "government speech." Even a prayer "authorized by a government policy and tak[ing] place on government property at government-sponsored school-related events" is not necessarily government speech. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000); *see also Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (*Chandler II*); *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999) (*Chandler I*).[3] Thus, like the symbolic arm bands in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), or the censored newspaper articles in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), speech that is not government controlled remains individual speech even though it takes place with the government's permission or on its premises. *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1341 (11th Cir. 2001) ("What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message.").

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

To determine whether the cheerleaders' speech should be characterized as "government speech" or individual speech, the Court must therefore look to the level of control exercised by the government over the message conveyed. "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected." *Chandler II*, 230 F.3d at 1317.

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

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

Both the District and its *amici* make much of the fact that the cheerleaders' sponsors "approved" the banners after they were made and that they were allowed to be displayed at school functions. But neither of these facts establishes the level of control necessary to equate the cheerleaders' speech with "government speech."

First, the policy of "approving" banners to ensure they did not include obscene or objectively offensive material does not transform the cheerleaders' personal speech into government speech. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). It is commonly understood that "a [government body] normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The record demonstrates that the extent of the sponsors' approval was limited to ensuring that the banners complied with generally applicable school policy against obscenity. Sponsor "approval" to ensure that the banners are not obscene does not equate with expression of the government's viewpoint.

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

*Tinker*, 393 U.S. at 506 ("[S]tudents . . . do not shed their constitutional rights to freedom or expression at the schoolhouse gate."). Because "[n]othing in the Constitution . . . prohibits any public student from voluntarily praying at any time before, during, or after the school day," *Santa Fe*, 530 U.S. at 313, "it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other purpose," *Chandler II*, 230 F.3d at 1316-17.

As the Eleventh Circuit explained in *Chandler I*:

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

*Chandler I*, 180 F.3d at 1261; *see also Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (warning against the "risk [of] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires") (quoting *Rosenberger*, 515 U.S. at 845-46).

Because there is no allegation or even a suggestion that the school controls the messages that the cheerleaders paint on the banners, it cannot be considered the school's own speech. Rather, the evidence points to the opposite conclusion. It is undisputed that the cheerleaders have made banners for years, and that historically their content has not been religious. The idea for the religious messages came from the cheerleaders, not the school. Although the messages were displayed at a

school function and with the permission of school administrators, the messages were neither controlled nor coerced by the school. Thus the "government speech" doctrine is inapplicable. The messages conveyed on the run-through banners were the cheerleaders' own speech, not the school's.

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

The District's *amici* contend that the Supreme Court's decision in *Santa Fe* requires the contrary conclusion that the run-through banners were not the personal speech of the cheerleaders, but rather the "government speech" of the District. The Court should reject that view of *Santa Fe*.

As explained by the Eleventh Circuit in *Chandler II*, *Santa Fe* did not conclude that, across the board, students may not engage in any religious activity at school functions. 230 F.3d at 1316; *see also Santa Fe*, 530 U.S. at 302 ("These invocations are authorized by a government policy and take place on government property at government sponsored school-related events. Of course, *not every message delivered under such circumstances is the government's own*.") (emphasis added). Nor does the opinion provide an answer to the question of when religious speech at a school function can be considered private, and thus, protected. *Chandler II*, 230 F.3d at 1316; *Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 612 (8th Cir. 2003). Rather, *Santa Fe* concluded only that the particular student-

led-speech policy implemented by that district was constitutionally infirm, and for very specific reasons. *Chandler II*, 230 F.3d at 1315.

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

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

Considering the revised policy in light of its history and the public's perception of it, the Court concluded that the policy was in reality a subterfuge for the actual practice of school-sponsored prayer that had been in place at that district for many years. *Id*. at 305-09. Indeed, the Court found that "the policy, by its terms, invites and encourages religious messages." *Id.* at 306. The Court found it highly significant that the policy required an "invocation" whose purpose was to

"solemnize" the event. *Id*. In the Court's view, the policy had the effect of suggesting, if not out-right requiring, a religious message by the limitation that the message be "solemn." And the fact that the public understood that the message was intended to be religious reinforced the coerciveness of the policy. *Id*. at 307.

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

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

Read in its proper context, *Santa Fe* is hardly the blanket prohibition that the District and its *amici* contend it to be. *Santa Fe* instructs that a school district cannot save an already constitutionally infirm policy of government-sponsored speech by instituting a process that would serve only to preserve that popular

tradition. *Santa Fe* does not "obliterate the distinction between State speech and private speech in the school context," nor does it "reject the possibility that some religious speech may be truly private even though it occurs in the schoolhouse." *Chandler II*, 230 F.3d at 1316. Likewise, *Santa Fe* did not hold that "all religious speech is inherently coercive at a school event. On the contrary, the prayer condemned [in *Santa Fe*] was coercive precisely because it was *not* private." *Id*. (emphasis in original).

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

* * *

Historically, and in light of the school's policy, the words on the run-through banners have always been the personal speech of the cheerleaders. The fact that the particular group of cheerleaders in charge of the challenged banners chose to convey religious messages rather than non-religious messages, as prior cheerleaders had done, does not change the character of the speech to "government speech." The Court should hold that the cheerleaders' speech was their own personal, religious speech, the expression of which was fully protected by the First Amendment.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief of Appellees, the Court should affirm the judgment of the district court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that, on December 4, 2013, a true and correct copy of the foregoing document was served by electronic mail on the following parties:

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## CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements of TEX. R. APP. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of TEX. R. APP. P. 9.4(i) because it contains 2,837 words, excluding any parts exempted by TEX. R. APP. P. 9.4(i)(1).

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