No. 22-11222

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CAMBRIDGE CHRISTIAN SCHOOL, INC.

Plaintiff-Appellant,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division

BRIEF AMICI CURIAE OF THE FREEDOM FROM RELIGION FOUNDATION AND CENTRAL FLORIDA FREETHOUGHT COMMUNITY IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel hereby certifies that, in addition to the parties and entities identified in the Certificates of Interested Persons which the parties have submitted, the following may have an interest in the outcome of the proceedings:

1. Freedom From Religion Foundation, Inc. ("FFRF"), a 501(c)(3) non-profit corporation. FFRF has no parent corporation, subsidiaries, or conglomerates and is not owned by any affiliates. FFRF has one affiliated organization, Non-Belief Relief, Inc. No publicly held company owns any percentage of FFRF.
2. Central Florida Freethought Community ("CFFC"), a 501(c)(3) non-profit corporation. CFFC has no parent corporation, subsidiaries, or conglomerates and neither owns, nor is owned by any affiliates. No publicly held company owns any percentage of CFFC.
3. Rebecca S. Markert.

None of the foregoing is a publicly-traded company or corporation.

/s/ Rebecca S. Markert
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STATEMENT OF THE ISSUE

Does a private actor have a free speech right to co-opt a government actor's public-address system for the purpose of delivering a prayer to a diverse audience at a government-sponsored event, at a time when the PA system is otherwise used exclusively by the government?

INTEREST OF AMICI[1]

FFRF's purposes are to educate the public about nontheism and to preserve the cherished constitutional principle of separation between religion and government. FFRF works as an umbrella for those who are free from religion (free-thinkers, atheists, agnostics, and nonbelievers) and who are committed to upholding the Establishment Clause. FFRF currently has over 38,000 U.S. members. FFRF ends hundreds of state/church entanglements a year through education and persuasion, while also litigating, and maintaining a governmental affairs director in Washington, D.C. FFRF additionally works to educate the public about nontheism through its website, publications, events, and broadcasts.

[1] All parties consented to the filing of this amicus brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

The Central Florida Freethought Community ("CFFC") is a non-profit organization incorporated in Florida and headquartered in Oviedo, Florida. CFFC is a chapter of FFRF and has more than 300 members. CFFC's members include people who characterize themselves as atheists, agnostics, or otherwise nonreligious. CFFC includes members who have children that participate in high school athletics.

SUMMARY OF ARGUMENT

Cambridge Christian School has sought to force the Florida High School Athletic Association to broadcast prayers over the public-address system at State championship competitions hosted by the FHSAA. Cambridge Christian's free speech claim fails because it has not established that a forum exists for private speech at these government-sponsored events. Because speech over the PA system at FHSAA championship competitions is government speech, this Court should reject Cambridge Christian's petition for a special exception to broadcast its prayers. FHSAA may conduct its broadcast of events as it wishes, including controlling what messages it sends over the PA system at championship football competitions that it hosts. There is neither a free speech right, nor a free exercise right, to subject a captive audience to one's personally preferred religious message. Moreover, as a government entity, the FHSAA must comply with the

Establishment Clause, which prohibits the government from subjecting children to prayer at its events.

ARGUMENT

I. The FHSAA has not violated the Free Speech Clause because its PA messages are government speech, not a forum for private speech.

A private religious school does not have a constitutional right to commandeer the PA system at a state-sponsored athletic competition. The Free Speech Clause of the First Amendment only protects *private* speech, it does not implicate *government* speech. The Free Speech Clause does not implicate government speech because a government entity has the right to "speak for itself" and select the views that it wants to express. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (*citing Bd. of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 229 (2000), *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 833 (1995)). "This freedom includes 'choosing not to speak' and 'speaking through the . . . removal' of speech that the government disapproves." *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1074 (11th Cir. 2015), *cert. denied,* (Oct. 3, 2016) (quoting *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000)).

Cambridge Christian has failed to present a cognizable claim under the Free Speech Clause of the First Amendment. If FHSAA is "engaging in [its] own

expressive conduct, then the Free Speech Clause has no application." *Pleasant Grove City,* 555 U.S. at 467. Because FHSAA meticulously controls the pre-game broadcasts at its championship events, an outside party does not have a legal right to deliver a prayer or other message.

In order to succeed on its free speech claim, Cambridge Christian must first establish that it has a right to speak *at all* over the loudspeaker during state championship pre-game ceremonies. Any rejection of program content by FHSAA does not violate the Free Speech Clause unless FHSAA restricted speech within a forum for private speech. The Supreme Court has said, "When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others." *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). It is only when the government operates a clearly defined forum for private speech that it becomes obligated not to engage in viewpoint discrimination. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (relating to use of school facilities by community groups for "social, civic, and recreational" purposes); *Rosenberger,* 515 U.S. 819, 822 (relating to student group application for payments from the Student Activities Fund); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001) (relating to request to use school facilities pursuant to a community use policy); *Matal*, 137 S.Ct. 1744, 1758 (relating to a trademark application to the Patent and Trademark Office).

But Cambridge Christian cannot meet its initial obligation to establish that a forum for private speech even exists in this case. "[C]ourts in this circuit must weigh [three factors] when determining whether speech constitutes government speech." *Gundy v. City of Jacksonville*, No. 21-11298, 2022 WL 4591231 (11th Cir. Sept. 30, 2022) (citing *Cambridge Christian Sch., Inc. v. FHSAA, Inc.*, 942 F.3d 1215, 1232–36 (11th Cir. 2019)). Those three factors—history, endorsement, and control—are the three-factors recognized by the Supreme Court in *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251 (2015) (concluding that specialty license plates for vehicles in Texas were government speech). These same three factors were also considered by the Supreme Court when it decided whether monuments on government property constitute government speech, *see Summum*, 555 U.S. at 470–72, and have been applied consistently by this Court at least since *Walker* was decided. *See Mech*, 806 F.3d at 1074–79 (discussing and applying the *Walker* factors). In *Walker*, the Court first considered history and whether the government historically used the particular media to speak. Second, the Court considered whether the message would be viewed as coming from the government. Third, it considered the extent of government control over the message. In this case, each factor strongly supports the conclusion that messages over the FHSAA public address system constitutes government speech.

A. The PA system has been used exclusively to communicate government speech.

Cambridge Christian cannot point to a written policy for third party use of the PA system for pre-game announcements at FHSAA-sponsored state championship games. Nor can it identify a consistent *history* of other speakers using the PA system at the same time or for the same type of speech. Instead, the school offers a handful of examples where the PA system has been used for atypical purposes, but almost never by third parties and rarely during playoff events. In fact, Cambridge Christian devotes an entire subsection of its brief (App. Br. at 9–11) to a prayer broadcast before one of the state's eight 2012 championship games precisely because it is the one and only comparable use of FHSAA's PA system to what Cambridge Christian requested. But irregular and atypical uses of the PA system do not establish a custom or practice—just the opposite; they are *outliers*. Cambridge Christian has utterly failed to demonstrate that similarly situated persons have been expressly permitted to speak in the same manner that it requested. There is no viewpoint discrimination here, because there has been no differential treatment.

Absent an established forum, the FHSAA has no obligation to cede to the request of third parties to broadcast their own desired speech to those in attendance at these government-sponsored events. A mere request for FHSAA to

communicate something via the PA system does not create a nonpublic forum. Cambridge Christian is not requesting equal access in this case; it is requesting special treatment.

B. The FHSAA appears to endorse all of the pre-game messages communicated over the PA system.

In *Mech* this Court concluded that "thank you" banners identifying a school district's business partners were government speech because "Observers would reasonably interpret them as 'conveying some message on the [school's] behalf.'" *Mech*, 806 F.3d at 1077 (quoting *Walker*, 155 S.Ct. at 2252). This conclusion was inevitable, because, as the Supreme Court established in *Santa Fe Indep. Sch. Dist. v. Doe*, when speech occurs in a context that would lead an objective observer to believe a government entity is endorsing the speech, it "is not properly characterized as 'private speech.'" 530 U.S. 290, 310 (2000). In *Santa Fe* specifically, the scope of government speech was defined to include student-led, student-initiated statements at a high school football game, when made over the PA system during the pre-game announcements. *Id.* Strikingly, Cambridge Christian does not even *mention* the *Santa Fe* decision in its brief to this Court, let alone attempt to distinguish those prayers, which were ruled *constitutionally impermissible*, from its prayer request in this case, which it urges this Court to rule constitutionally *required*. This Court must reject Cambridge Christian's invitation to ignore Supreme Court precedent. Just as in *Santa Fe*, messages delivered at

FHSAA championship events are reasonably interpreted by observers as coming from FHSAA.

Cambridge Christian offers no evidence to distinguish PA announcements at FHSAA-sponsored state championship games from the announcements at issue in *Santa Fe*. Nor does it adequately address this Court's prior conclusion that the State—not Cambridge Christian—"would have been seen as endorsing any communication over the loudspeaker" because even if the school's own representative delivered the pre-game prayer, "the prayer *would have come at the start of the game*, around when the National Anthem and Pledge of Allegiance are traditionally performed . . . [and such] *pre-game* rituals in particular are inseparably associated with ideas of government." *Cambridge Christian*, 942 F.3d at 1233 (emphasis added). Cambridge Christian's failure to focus on this Court's prior conclusion regarding pre-game speech is striking, considering that the Court expressly invited the school to "develop more facts as the litigation proceeds" if it hoped to change the Court's mind. *Id.* at 1234.

The school failed to uncover any facts addressing this Court's concerns over third-party use of the PA system "at the start of the game," in close approximation to the Pledge of Allegiance and National Anthem. Instead, Cambridge Christian pivots immediately to discussing speech during the halftime show, *see* App. Br. at 51–52, and commercial speech, *see id.* at 54–55, despite the former occurring at a

different time and the latter occurring in a different manner than the proposed speech at the heart of this case. Cambridge Christian also asserts that the audience would be capable of distinguishing between State-initiated speech and private speech over the PA system, while citing solely to the Supreme Court's 1990 *Mergens* decision, *see id.* at 52, without addressing the Court's far more analogous and more recent decision in *Santa Fe.* Such willful blindness to existing precedent is telling. Just as in *Santa Fe,* pre-game messages over the PA system at State championship games are endorsed by the government, and the audience understands that to be the case.

C. FHSAA maintains control over the PA system.

The Supreme Court in *Santa Fe* rejected an argument that the school district had created a forum for private speech because "Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, it is clear that the District's pregame ceremony is not the type of forum discussed in such cases." *Id.* at 290-91. The Court found that no forum existed in part because the school district did not "open its ceremony to indiscriminate use by the student body generally," and instead allowed one student to deliver the invocation, "which is subject to particular regulations that confine the content and topic of the student's message." *Id.* at 291.

The facts in this case even more strongly demonstrate that the pre-game messages delivered over the PA system at FHSAA championship events are government speech. Unlike the school system in *Santa Fe,* FHSAA has not even sought to allow a speaker to deliver an invocation or other private message. The PA system is not only closed to "indiscriminate use" by third-party speakers, but is closed to speakers other than the PA announcer almost entirely. The FHSAA has adopted a "PA Protocol," which addresses statements made by the "PA announcer." *See* Doc 8-1, pp. 15-16.

The FHSAA has extensive control over the PA system. This includes selecting a single speaker, the PA announcer, and then limiting what that announcer may say pursuant to the PA Protocol. The announcer is tasked with maintaining neutrality and is required to follow an FHSAA script for promotional announcements. Doc. 8-1, pp. 15-16. Not only were the public announcements subject to FHSAA control, but numerous aspects of the game were controlled by detailed FHSAA policies and regulations. See generally, Doc 8-1; Doc. 8-2. This includes that the event "shall be conducted in accordance with the policies established by the Board of Directors and shall be under the direction and supervision of the FHSAA Office." Doc. 8-1, p. 15.

For its part, Cambridge Christian points to a few scattered instances where third-party messages have been broadcast over PA systems. Most of these

examples happened: at *times* that are not equivalent to a pre-game announcement (such as halftime performances); in *places* that are not analogous to the PA system at a State championship event; and in *manners* that are not equivalent to handing over the microphone to a third-party speaker (such as pre-approved, paid for commercial advertisements). But even if these examples were close in time, place, and manner to the pre-game prayer Cambridge Christian sought to broadcast, the school needs to point to more than isolated, atypical events in order to make its case. When it comes to reviewing government control, "[n]o case precedent says that the government must control every word or aspect of speech in order for the control factor to lean toward government speech." *Gundy*, 2022 WL 4591231 at *14 (quoting *Cambridge Christian*, 942 F.3d at 1235–36). Cambridge Christian needs to establish a pattern of conduct that amounts to the creation of a public forum by the FHSAA. Its examples simply do not achieve that.

Cambridge Christian wants to force a state agency to allow the school to promote its Christian message through a mechanism limited to conveying government speech. FHSAA has rightly declined to do so, not only because it would violate the Establishment Clause of the First Amendment, but more generally because the government simply has not created a forum for private speech *at all*.

II. As a government entity, the FHSAA would violate the Establishment Clause if it broadcast prayer to students at its events.

If the FHSAA is forced to broadcast prayers at its events, it will violate the constitutional rights of thousands of families. The Establishment Clause of the First Amendment prohibits the FHSAA from subjecting students to government-sponsored religious messaging, which is precisely what would happen if the government broadcasts an exclusively Christian prayer to the entire audience at a government-sponsored event.

It is well settled that the government may not include prayer at activities for school-age children, including government-sponsored extra-curricular events. *See, e.g.*, *Santa Fe*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577 (1992) (ruling prayers over the public address system at public school graduations are an impermissible establishment of religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (overturning law requiring daily "period of silence not to exceed one minute . . . for meditation or daily prayer."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (declaring unconstitutional devotional bible reading and recitation of the Lord's Prayer in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (finding prayers in public schools unconstitutional).

Any students who participate in, or attend, FHSAA-sponsored State championship competitions cannot be the subject of publicly-broadcast prayer by

FHSAA. This is especially concerning when public schools are participating in the events, but it remains true even when two private Christian schools participate. Under the Establishment Clause, the government may not lend its support to one particular religious message by permitting it to be broadcast, while excluding other religions or sects. There is no exception even if most of the audience would be receptive to the religious message. "[W]e do not count heads before enforcing the First Amendment." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005) (O'Connor, J., concurring). FHSAA cannot be the mouthpiece of religious organizations or be used to gather event attendees to engage in a communal expression of one particular brand of Christian worship. Requiring the FHSAA to broadcast prayers would raise a host of issues, including entangling the FHSAA in religious judgments, such as whether a proposed Christian prayer is sufficient to cover the religious views of both participating schools, or whether it must entertain requests for two competing prayers.

Even beyond the circumstances of this case, students have a right to attend athletic events that their school participates in without being coerced into prayer. As the Supreme Court has said, the Constitution "demands" that schools may not force students to decide "between attending these games and avoiding personally offensive religious rituals." *See Santa Fe,* 530 U.S. at 312. Courts have protected parental and student rights where government actors have subjected public school

students to prayers, regardless of whether the school itself is broadcasting the prayer. For example, a public school coach's participation in a team's prayer circle is unconstitutional. *Borden v. Sch. Dist. of the Township of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009) (declaring the coach's organization, participation, and leading of prayers before football games unconstitutional); *Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402 (5th Cir. 1995) (declaring basketball coach's participation in student prayer circles an unconstitutional endorsement of religion).

It is no defense to the Establishment Clause to claim that publicly broadcast prayers at government-sponsored events are merely "voluntary." The Supreme Court has highlighted the problem with forcing students to opt out of such activities: "To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high." *Lee*, 505 U.S. at 596 (citations omitted); *see also Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 825, 832 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) ("[W]hether the complaining individual's presence was voluntary is not relevant to the Establishment Clause analysis . . . . The Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual.").

Forcing the FHSAA to broadcast religious messages also forces an objecting student to violate their right of conscience, or else to forfeit their "rights and benefits at the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596. This "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe,* 530 U.S. at 309-10 (citations omitted).

The FHSAA has an obligation to ensure that the First Amendment rights of students—and the rights of parents to dictate the religious or nonreligious upbringing of their children—are protected from state-sponsored religious messages. Thus, the FHSAA cannot allow public prayer broadcasts at any State championship events. This well-established constitutional principle also refutes Cambridge Christian's laughable argument that it has a free exercise right to broadcast prayers indiscriminately to the entire audience at a State-sponsored event. To the knowledge of amici, no court has *ever* adopted the irrational view that the Free Exercise Clause permits one private religious group to subject a diverse collection of private individuals to that group's preferred religious message.

CONCLUSION

Messages over the FHSAA-controlled public address system constitute government speech. As a government entity, the FHSAA cannot broadcast prayer in violation of the Establishment Clause, but more fundamentally, Cambridge Christian does not have a constitutional right to take over a PA system that is used for government speech and to use it for its own religious purposes. The school is not seeking equal treatment in this case—it's suing to gain a special privilege not available to any other private actor.

Dated: October 14, 2022

Respectfully submitted,

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STATEMENT OF COMPLIANCE

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 3,561 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in 14 point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that, on October 14, 2022, I electronically filed the foregoing brief with the Clerk of Court using CM/ECF and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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