NO. 24-1261

IN THE
Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOLS, INC.,

Petitioner,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF LIBERTY, LIFE AND LAW FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Liberty, Life and Law Foundation ("LLLF"), as *amicus curiae*, respectfully urges this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Eleventh Circuit.

LLLF is a North Carolina nonprofit corporation established to defend fundamental constitutional liberties, including religion and speech. LLLF's founder is the author of *Death of a Christian Nation* (2010) and many *amicus curiae* briefs in this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENR

The Florida High School Athletic Association ("FHSAA") cites this Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) to support its position denying Cambridge Christian School's request to use the PA system for a brief pregame prayer. Like *Santa Fe*, the Eleventh Circuit ruling "bristles with hostility" to religion. *Santa* Fe, 530 U.S. at 318 (Rehnquist, J., dissenting). That hostility is readily traced to the now defunct *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a ruling that "stalked" this Court's Establishment Clause

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

jurisprudence for five decades. This Court should grant certiorari to clarify that the *Lemon* "ghoul" and its endorsement offshoot are dead and buried, never to rise again.

The Eleventh Circuit employs the government speech doctrine to mask censorship of private religious speech, ignoring the broad history of public prayer in America since the founding. The three key factors examined (history, perception, control), used properly, would reveal that the government is merely facilitating private speech, not presenting its own message.

ARGUMENT

I. THE ELEVENTH CIRCUIT SKIRTS THE PRIMARY ISSUE – WHETHER THE GOVERNMENT IS SPEAKING ITS OWN MESSAGE OR MERELY REGULATING PRIVATE SPEECH.

As multiple precedents confirm, the government may adopt policies, endorse views, and "speak" for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009); *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). When speaking for itself, the government is "not barred by the Free Speech Clause" and may determine the content. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015); *Summum*, 555 U.S. at 467.

In *Shurtleff v. City of Boston*, three Justices offered this succinct definition: "[G]overnment speech

occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech." 596 U.S. 243, 267 (2022) (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). The government may be subject to the First Amendment if – although literally "speaking" – it infringes on private expression, "as is the case with compelled speech." *Id*. at 269 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment); *Walker,* 576 U.S. at 219; *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977)).

A. The government speech doctrine must not be used to mask censorship.

The government speech doctrine is a "rule of thumb, not a rigid category . . . lest we turn 'free speech' doctrine into a jurisprudence of labels." *Summum*, 555 U.S. at 484 (2009) (Breyer, J., concurring). It must be restrained to prevent the power and machinery of government from being used to stifle private expression. Courts should be cautious about importing legal tests developed for a unique context into other dissimilar settings. Monuments, license plates, flags, and spoken prayers vary in many respects. The analysis requires carefully finetuning distinctions—some of them obvious. A permanent means of transmission on government property suggests government speech, because it is "not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Shurtleff*, 986 F.3d at 89, quoting *Summum*, 555 U.S. at 471. "Speakers, no matter how

long-winded, eventually come to the end of their remarks . . . monuments, however, endure." *Id.* at 479. They monopolize use of the land on which they stand and interfere permanently with other uses of that public space. Private speech on public property is typically transient, e.g., oral communication or literature distribution. *Id*. at 464. Spatial limitations "played a prominent part" in *Summum*'s analysis. *Walker*, 576 U.S. at 228 (Alito, J., dissenting).

Here, the literal speaker is a *person*—not a monument, flag, or license plate—speaking on behalf of a private Christian school, not as a public employee within the scope of his duties or other government representative. Even a public employee speaking on public property is not necessarily engaged in "government speech" with every word he utters. When Coach Kennedy prayed on the field, "[h]e was not seeking to convey a government-created message." *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 529 (2022). The private character of the speech in *Cambridge* should be evident, but the Eleventh Circuit's "capacious understanding of government speech takes a large and painful bite out of the First Amendment." *Walker*, 576 U.S. at 222 (Alito, Scalia, Kennedy, J.J., dissenting).

There is a heightened risk of censorship or mixed messages when private speech occurs in a context involving the government. Some courts suggest it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time." *Sons of Confederate Veterans, Inc. v. Comm'r of Va.*

Dep't of Motor Vehicles, 305 F.3d 241, 244-45 (4th Cir. 2002). In *Summum*, the Fraternal Order of the Eagles was responsible for the message on the Ten Commandments monument it donated—but the final compilation "spoke" on behalf of Pleasant Grove City, which crafted a message about its pioneer history by selecting monuments based on historical relevance and the donor's ties to the community. The display, comprised of diverse elements, resembled a museum or library; the City did not parrot the words on the monuments. The final display was analogous to a collective whole under copyright law, where the works of several authors are collected to create a new work.

B. The risk of censorship escalates in cases of religious speech.

As concurring Justices warned in *Shurtleff*, "courts must be very careful when a government claims that speech by one or more *private* speakers is actually *government* speech." 596 U.S. at 262 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment) (emphasis added). The government speech doctrine becomes "susceptible to dangerous misuse." *Ibid*., citing *Matal v. Tam*, 582 U.S. 218, 235 (2017). That is precisely what happened here. The Eleventh Circuit concluded that the prayers of private school representatives were "actually government speech," even though the government neither "purposefully express[ed] a message of its own" nor spoke "through persons authorized to speak on its behalf." *Shurtleff,* 596 U.S. at 267 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). The result was the court's erroneous conclusion that "Cambridge Christian's free speech claims necessarily fail."

Cambridge Christian Sch., Inc. v. Fla. High Sch. Ath. Ass'n, Inc., 115 F.4th 1266, 1288 (11th Cir. 2024), citing *Shurtleff*, 596 U.S. at 251.

When this Court decided *Summum*, "[t]he interaction between the 'government speech doctrine' and Establishment Clause principles ha[d] not . . . begun to be worked out." *Summum*, 555 U.S. at 486 (Souter, J., concurring). That decision, which hinged on the distinction between government and private speech, was litigated "in the shadow" of the Establishment Clause (*id.* at 482 (Scalia, J., concurring)), "with one eye on [that] Clause" (*id.* at 486 (Souter, J., concurring)). The Establishment Clause was not expressly at issue but lurked beneath the surface and sparked comments from several concurring Justices. Monuments on government land are presumably government speech, but in certain contexts—"[s]ectarian identifications on markers in Arlington Cemetery come to mind"—a display with religious symbolism "does not look like government speech at all" and does not represent the government's chosen view. *Id.* at 487 (Souter, J., concurring). "And to recognize that is to forgo any categorical rule at this point." *Ibid.* "The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire." *Id.* at 482 (Scalia, J., concurring). The City's intent was to visually *describe* its history, not to *prescribe* religious doctrine or to echo the words engraved on the donated monument.

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or *restricts practices because of their religious nature*."

Fulton v. City of Philadelphia, 593 U.S. 522, 533 (2021) (emphasis added). That is exactly what occurred in *Shurtleff*: "Boston acknowledge[d] that it denied Shurtleff 's request because it believed flying a religious flag at City Hall could violate the Establishment Clause." 596 U.S. at 258. But the government may not exclude speech based on its "religious viewpoint" where the government is not speaking for itself (*ibid.*)—that would "constitute[] impermissible viewpoint discrimination." *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001). The dispute in *Shurtleff* arose "only because of a government official's *mistaken understanding* of the Establishment Clause." *Shurtleff*, 596 U.S. at 261 (Kavanaugh, J., concurring) (emphasis added). Courts should concentrate on genuine threats to liberty, not fears that someone might erroneously perceive government endorsement of religion.

C. The three factors—history, perception, and control—must not be rigidly applied, especially in a case where public and private speech intersect.

The Eleventh Circuit relied on three factors to characterize the pregame prayers: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Cambridge,*115 F.4th at 1288 (11th Cir. 2024), citing *Shurtleff*, 596 U.S. at 252; *see Walker*, 576 U.S. at 209-214. But "[t]he boundary between government speech and private expression can blur" when private speakers

participate in a program that involves government, so it is critical to "determine whether the government intends to speak for itself or to regulate private expression." *Shurtleff*, 596 U.S. at 252. As three Justices warned, "treating those factors as a test obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression." *Id.* at 261 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). This warning against rigid application of the factors is particularly pertinent where religious speech is involved. Is the government "actually expressing its own views" or is the "real speaker a private party," with the government "surreptitiously engaged in the 'regulation of private speech'"? *Id.* at 263 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment), citing *Summum*, 555 U.S. at 467.

II. AMERICAN HISTORY HAS DEEP RELIGIOUS ROOTS.

In *American Legion v. American Humanist Assn.*, this Court examined "prominent actions taken by the First Congress" at the founding — President Washington's Thanksgiving Proclamation, the Northwest Territory Ordinance, Washington's Farewell Address — and concluded it was customary to consider historical practice. 588 U.S. 19, 61 (2019). The Northwest Territory Ordinance provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, quoting 1 Stat. 52, n. (*a*). Washington's Farewell Address promoted religion

and morality as "indispensable supports" to "political prosperity." Farewell Address (1796), in 35 The Writings of George Washington 229 (J. Fitzpatrick ed. 1940). The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Bremerton*, 597 U.S. at 514.

A. There is a broad history of public prayer in America.

Prayer is speech—*religious* speech. It is no surprise that "the First Amendment doubly protects religious speech." *Bremerton*, 597 U.S. at 523. That protection is a "natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Id.* at 524, citing A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). "[I]n Anglo-American history, . . . government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). In *Bremerton*, the School District admitted to restricting Coach Kennedy's speech *because* it was religious. 597 U.S. at 523. This cuts directly against historical practice. So does the *Cambridge* ruling.

The Eleventh Circuit ignored America's broad tradition of public prayer and concluded that the private schools' pregame prayer practice is "not a deeply rooted tradition that rises to the level of a sincerely held belief." *Cambridge*, 115 F.4th at 1279.

The court reasoned that because the PA system "has traditionally communicated messages on behalf of the government" during the pregame time for football championship games, the prayers must be characterized as government speech—outside the First Amendment's protection. *Id.* at 1280, 1289.

Concurring Justices in *Shurtleff* remind us that the "real question" is "whether the speech *at issue* expresses the government's own message," not "whether a form of expression is *usually* linked with the government." 596 U.S. at 264-265 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). The pregame prayers offered by private school representatives do not express the *government*'s own message. It is absurd to suggest otherwise.

B. The *Cambridge* pregame prayers are remarkably similar to legislative invocations.

Public prayer "fits within the tradition long followed in Congress and the state legislatures." *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). The legal battles surrounding legislative invocations support the constitutionality of acknowledging America's religious roots. In *Marsh v. Chambers*, even the dissent "recognized that government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." 463 U.S. 783, 810-811 (1983) (Stevens, J., dissenting). This Court cited legislative prayer as an example of its shift to a "more modest approach" that "looks to

history for guidance" instead of *Lemon*'s ambitious attempt at a "grand unified theory of the Establishment Clause." *American Legion*, 588 U.S. at 60.

This Court has twice affirmed the constitutionality of legislative prayer as a practice "deeply embedded in the history and tradition of this country," flowing from "colonial times through the founding of the Republic and ever since." *Marsh v. Chambers,* 463 U.S. at 786. "[T]he First Congress provided for the appointment of chaplains only days after approving language for the First Amendment." *Town of Greece*, 572 U.S. at 576. Judiciary committees in the 1850's reevaluated and affirmed that the practice posed "no threat of an establishment." *Id.* at 576-577.

The very factors that doomed the pregame invocations in *Santa Fe* are present in legislative prayer cases—and in this case. Legislative invocations are "authorized by a government policy and take place on government property at government-sponsored . . . events." *Santa Fe*, 530 U.S. at 302. Such policies "explicitly and implicitly encourage[] public prayer." *Id.* at 310. There is only one speaker at a time. *Id.* at 303, 304. "[T]he only type of message that is expressly endorsed . . . is an 'invocation' – a term that primarily describes an appeal for divine assistance." *Id.* at 306-307. The choice to implement a prayer policy is "a choice attributable to the State." *Id.* at 311.

Government-private speech. Like *Cambridge*, legislative prayer cases raise the critical distinction

between public and private speech. *Private* citizens pray in a *government* context. The government speech doctrine did not develop until long after *Marsh*. The pregame prayers here, much like legislative invocations, represent a unique blend of both government and private speech. This confusing blend could potentially thrust courts into a Catch-22 where they must either enter forbidden theological territory or squelch the liberties of citizens who voluntarily pray in public. Establishment Clause, Free Speech, and Free Exercise principles are all implicated. If the prayers are *government* speech, the government may become entangled in religion, but if they are *private* speech there is a risk of viewpoint discrimination. The Constitution does not require either alternative.

C. Like *Santa Fe*, the Eleventh Circuit ruling "bristles with hostility."

Santa Fe's surface similarities to *Cambridge* weigh in favor of rejecting it as relevant precedent. *Santa Fe* applied "the most rigid version" of *Lemon* and "appear[ed] openly hostile toward . . . the policy's stated purposes." 530 U.S. at 319, 322 (Rehnquist, J., dissenting). Not only the ruling itself but "the tone of the Court's opinion . . . bristles with hostility to all things religious in public life." *Id*. at 318 (Rehnquist, J., dissenting). That hostility stands in stark contrast to George Washington's proclamation of a day of "public thanksgiving and prayer" . . . "at the request of the very Congress which passed the Bill of Rights." *Ibid*., citing Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897). Surely Washington's

Proclamation, early in the nation's history, "encourage[d] prayer." *Santa Fe*, 530 U.S. at 310.

People who reject religion are entitled to reasonable accommodation but not complete protection from exposure to religious expression: "[S]ome references to religion in public life and government are the inevitable consequence of our Nation's origins." *Elk Grove v. Newdow,* 542 U.S. 1, 35 (2004) (O'Connor, J., concurring). A long line of unbroken authority in this Court affirms that the Constitution "mandates accommodation" and "forbids hostility" toward religion. *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984); *see also Zorach v. Clauson,* 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 211 (1948). Anything less would require the "callous indifference" never intended by the Establishment Clause. *Zorach*, 343 U.S. at 314; *Lynch v. Donnelly,* 465 U.S. at 673. *Marsh* is a "striking example of the accommodation of religious belief intended by the Framers," because America's first congressmen had no constitutional problem with employing chaplains to offer daily prayers in the Congress. *Lynch v. Donnelly*, 465 U.S. at 674. The government may recognize and accommodate "the central role religion plays in our society. . . . Any approach less sensitive to our heritage would border on latent hostility toward religion." *County of Allegheny v. ACLU,* 492 U.S. 573, 657 (1989) (Kennedy, J., concurring).

Lemon poisoned this Court's Establishment Clause jurisprudence for decades, sparking demands for a radical "neutrality" that restricts liberty rather than preserving it. Several Justices of this Court and

numerous scholars "criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 399 (1993) (Scalia, J., concurring). *Lemon's* incoherent test proved unworkable in practice and has finally been relegated to the scrap heap of history as a failed 50-year experiment. Yet for years *Lemon* "stalk[ed] our Establishment Clause jurisprudence" like a "late night ghoul in a horror movie" as this Court applied, buried, resurrected, and sometimes ignored it (*id.* at 398 (Scalia, J., concurring))—before finally renouncing it.

D. There is no hint of coercion.

This Court has long recognized that compelled religious exercise is inconsistent with a "historically sensitive understanding" of the Establishment Clause. *Bremerton*, 597 U.S. at 536-537, citing *Zorach*, 343 U.S. at 314. In contrast to such compulsion, the pregame prayers are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." *Lee v. Weisman,* 505 U.S. 577, 630 (1992). "The coercion that was a hallmark of historical establishments . . . was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. 677, 693 (2005) (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting) (emphasis in original). The pregame prayers do not place "the power, prestige, and financial support of government behind a

particular religious belief." *Engel v. Vitale,* 370 U.S. 421, 431 (1962).

Even the soft "coercion" present in *Lee v. Weisman* and *Santa Fe* is absent here. In *Santa Fe*, this Court observed that, "while students generally were not required to attend games, attendance *was* required for 'cheerleaders, members of the band, and, of course, the team members themselves.'" *Bremerton*, 597 U.S. at 541-542, citing *Santa Fe*, 530 U.S. at 311. But here, the students involved are *private Christian school* students, not *public school* students.

III. THE ELEVENTH CIRCUIT IGNORES THIS COURT'S DECISIONS—AND EVEN ITS OWN PRECEDENT—CONFIRMING THE DEMISE OF *LEMON* AND ITS ENDORSEMENT OFFSHOOT.

The Eleventh Circuit ignores this Court's landmark ruling in *Bremerton* and even bypasses its own precedent, less than a month later, confirming "the final death knell of the *Lemon* test" in this circuit. Amanda Harmon Cooley, *Establishing an End to Lemon in the Eleventh Circuit*, 77 U. Miami L. Rev. 972, 975 (Summer 2023); *Rojas v. City of Ocala*, 40 F.4th 1347, 1351 (11th Cir. 2022) ("the Supreme Court drove a stake through the heart of the ghoul and told us that the *Lemon* test is gone, buried for good, never again to sit up in its grave"). This Court "long ago abandoned *Lemon* and its endorsement test offshoot," replacing it with an emphasis on historical practice. *Bremerton*, 597 U.S. at 534-535; *see also Town of Greece*, 572 U.S. at 576-577 (declining an invitation to use *Lemon* test); *American Legion*, 588

U.S. at 84 (describing *Lemon* as a "misadventure"); *Shurtleff,* 596 U.S. at 83 (Gorsuch, Thomas, J.J., concurring) ("Recognizing *Lemon*'s flaws, this Court has not applied its test for nearly two decades.").

The *Cambridge* ruling "bristles with hostility," like the *Santa Fe* case FHSAA cited to support its denial of the private school's request for pregame prayer: "[I]f the FHSAA were to allow prayer over the PA system, the State could be seen as 'endors[ing]' or 'promot[ing] religion,' which would violate the Establishment Clause." *Cambridge*, 115 F.4th at 1278, citing *Santa Fe*, 530 U.S. 301 as "directly on point." Similarly in *Shurtleff*, the City admitted to denying Shurtleff's request "because it believed flying a religious flag at City Hall could violate the Establishment Clause." 596 U.S. at 258. In *Bremerton*, too, the School District "issued an ultimatum" against "any overt actions" that might even *appear* to endorse the Coach's prayer (597 U.S. at 517-518), allowing his prayers only at a "private location" (*id.* at 519) and reasoning that his suspension "was essential to avoid a violation of the Establishment Clause" (*id.* at 532). This Court rejected that paranoid approach to the First Amendment, but now, similarly, the FHSAA allowed Cambridge participants to pray before the games only where "[t]hose prayers were not broadcast over the PA system and could not be heard by the fans in the stands." *Cambridge*, 115 F.4th at 1278.

It is troubling that a constitutional violation hinges on "an observer's potentially mistaken belief that the government has violated the Constitution, rather than on whether the government has *in fact*

done so." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 1004 n. 7 (2011) (Thomas, J., dissenting from denial of certiorari). It is "a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment . . . forbids endorsement of religion in general." *Lamb's Chapel,* 508 U.S. at 400 (Scalia, J., concurring). The focus on "perception" or "endorsement" easily morphs into the phantom constitutional violations that arose in *Santa Fe*, *Shurtleff*, and now in this case. These imaginary concerns do not "justify actual violations of an individual's First Amendment rights." *Bremerton*, 597 U.S. at 543. Religious expression need not be shoved into a closet. *See Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (the government is not compelled to purge religion from the public sphere); *Bremerton*, 597 U.S. at 535. On the contrary, the blurry "wall" between church and state should not be so high and thick that government callously disregards religion.

The real question in *Cambridge* is whether the government itself is speaking, not whether it has endorsed another speaker's message. Even under the defunct and widely criticized *Lemon* test, "[f]or a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000), quoting *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 337 (1987). The government speech doctrine is inapplicable where private speech is "merely subsidized or otherwise facilitated by the government." *Shurtleff*, 596 at 271. When the "government does not speak for

itself," it may not exclude a "religious perspective." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 832 (1995). Here, FHSAA is merely asked to accommodate private religious speech, not endorse it.

A. The emphasis on perception – or endorsement – creates serious threats to free expression.

A "natural reading" of the First Amendment suggests that the Speech and Religion Clauses have complementary, "not warring" purposes. *Bremerton*, 597 U.S. at 533; *see Everson v. Board of Ed.*, 330 U.S. 1, 13, 15 (1947). Together they guard liberty, prohibiting state coercion to either *prescribe* religious exercise (Establishment Clause) or to *proscribe* it (Free Exercise Clause). Patrick M. Garry, *The Supreme Court Corrects a Seventy-Five-Year Distortion in Establishment Clause Jurisprudence*, 56 Ind. L. Rev. 95, 114-115 (2022); Michael Stokes Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. 795, 798 (1993). Courts should consider whether liberty is truly threatened by a challenged practice, "rather than relying on tests that only tangentially tr[y] to reflect the intended purpose of the Establishment Clause." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 100. Public prayers by private speakers do not threaten the liberty of others. Objectors are free to disregard them but have no iron-clad right to be free of such brief exposure to religious expression.

Ignoring recent developments in this Court, the Eleventh Circuit asks whether "*observers* reasonably believe the government has endorsed the message." *Cambridge*, 115 F.4th at 1290, quoting *Cambridge*

Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, 942 F.3d 1215, 1232-33 (11th Cir. 2019) (quoting *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1076 (11th Cir. 2015)) (emphasis added). But three current Justices of this Court have warned against this focus on public perception, because it "encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government," thus "allow[ing] governments to exploit public expectations to mask censorship." *Shurtleff*, 596 at 265-266 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). Only a few years after *Lemon*, "[f]our dissenting Justices" of this Court "disputed that endorsement could be the proper test" because it condemns many time-honored practices that date back to the founding. *Town of Greece*, 572 U.S. at 579-580, citing *Allegheny,* 492 U.S. at 670-671 (Kennedy, J., concurring in the judgment in part and dissenting in part).

B. The historically inaccurate "wall of separation" metaphor has created hostility that inhibits religious expression.

This Court took a "jurisprudential wrong turn" in 1947 when it suggested that "the Establishment Clause was meant to create a wall of separation." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 100; *Everson,* 330 U.S. at 16. The original reference was about a wall of *protection* for the church; *see Reynolds v. United States*, 98 U.S. 145, 164 (1878). But the metaphor has been repeatedly employed to breed hostility to religion, "misstat[ing] the Framers'

intentions" and "directly contradict[ing] the American historical experience." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 100.

Misunderstanding persists, as demonstrated by *Santa Fe* and *Shurtleff*. School officials in *Santa Fe* denied students the right to voluntarily pray, fearing the perception of government approval. 530 U.S. at 308-309. Boston officials in *Shurtleff* were convinced the Constitution prohibited them from allowing private parties to "fly a religious flag on public property." 596 U.S. at 273-274. A nearly identical error occurred here—FHSAA believed federal law precluded prayer at a public facility. *Cambridge*, 115 F.4th at 1278.

These recurring misunderstandings are unnecessary now that *Bremerton* has demonstrated how much "our Establishment Clause jurisprudence ha[s] gone off the rails." 597 U.S. at 540. The School District asserted that it not only "*may* prohibit" its employees' private prayers "but that it *must* do so in order to conform to the Constitution." *Ibid*. Officials contended they had a "duty to ferret out and suppress religious observances." *Id*. at 543-544. But this Court found "no historically sound understanding" of the Establishment Clause that would require that hostile approach. *Id*. at 541. On the contrary, "[t]he Constitution neither mandates nor tolerates that kind of discrimination." *Id*. at 544.

C. The "*reasonable* observer" has increasingly been replaced by the "*offended* observer."

Lemon created a monster, leading to use of the Establishment Clause as a "reverse Free Exercise Clause" to protect offended observers from exposure. Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 118. Some courts "adopted a separationist view interpreting the Establishment Clause as confining religion to the private realm." *Id*. at 102. The frequent result was an approach that "required functional hostility . . . to religion by treating the promotion of religious freedom as distinguished from the promotion of religion as an improper government motivation." *Id*. at 99 n. 40, quoting Paulsen, *Lemon Is Dead*, 43 Case W. Res. L. Rev. at 801. It was decades before this Court finally recognized and reversed "this chaotic legacy of *Lemon*, as well as the hostility to religion it had produced." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 110. The endorsement test had become a "dissenter's veto, allowing anyone offended by or opposed to religious expressions to censor them." *Ibid*. Instead of guarding religious freedom, courts began to "shield a secular society, as well as opponents of religion." *Id*. at 107; *see id*. at 107 n. 113, Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 Chi.-Kent L. Rev. 669, 675-76 (2003).

Religious expression need not be excised from public life. *Lemon*'s highly subjective endorsement test spawned lawsuits over trivial offenses, based on an imaginary "reasonable" observer's disapproval. That observer is not—or at least should not be—"*any*

person who could find an endorsement of religion" or "*some* reasonable person" who *might* be offended or "*might* think the State endorses religion." *Pinette,* 515 U.S. at 780 (O'Connor, J., concurring) (internal quotation marks omitted). The consequences can be devastating if the test allows a "hecker's veto" to rule the outcome. *Elk Grove v. Newdow,* 542 U.S. at 35 (O'Connor, J., concurring), citing *Pinette,* 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.").

"[T]he First Amendment embraces the right to select any religious faith—or none at all." *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). Yet too many cases have granted legal standing to "offended observers," resulting in judgments based on the imaginations of a nebulous "reasonable observer." This malleable imaginary person is easily manipulated to reach desired results. The combination of "offended" and "reasonable" observers is lethal, leading to blatant hostility to all things religious in the public square—a result never contemplated by the Constitution's Framers. This chaotic jurisprudence jeopardizes liberty. In some cases, courts dare to presume unconstitutionality based on what a poorly defined observer might mistakenly think. That approach should be jettisoned and replaced with a return to coercion as "the touchstone" of the inquiry. *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). The offended observer's "injury" is far removed from the coercion that characterized historical establishments. Offense is not tantamount to coercion.

D. The Eleventh Circuit fails to recognize the demise of *Lemon*.

The uncertainty generated by *Lemon* "led one court to label the Establishment Clause caselaw as suffering 'from a sort of jurisprudential schizophrenia.'" Garry *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 97 n. 14, citing *Thomas v. Anchorage Equal Rts. Comm'n*, 165 F.3d 692, 717 (9th Cir. 1999), *rev'd en banc*, 200 F.3d 1134 (9th Cir. 2000). In *Shurtleff*, "at least some of the blame trace[d] back" to *Lemon*'s attempt "to devise a one-size-fits-all test" that "bypassed any inquiry into the Clause's original meaning." 596 U.S. at 276-277 (Gorsuch, Thomas, J.J., concurring in the judgment). Boston "chose to follow *Lemon* anyway." *Ibid*. FHSAA made the same mistaken choice by relying on *Santa Fe*, which in turn replicates *Lemon*.

Lemon created "a chaotic and unpredictable patchwork of constitutional tests," a "patchwork" resulting in "a confused muddle of contradictory mandates." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 95. "The more tests that evolved, the more confusion that reigned"—allowing prayer at legislative meetings (*Town of Greece*) but not before school football games (*Santa Fe*). *Id*. at 99.

Establishment is a word that by its "very definition . . . requires more than a transitory or isolated association between a government entity and an individual religious practice or expression." Garry, *Seventy-Five-Year Distortion*, 56 Ind. L. Rev. at 113. This case implicates only a transitory association. The misunderstanding that stems from the wall metaphor

has led to a "mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights." *Id.* at 100 n. 52, quoting *Wallace v. Jaffree*, 472 U.S. at 107 (Rehnquist, J., dissenting).

IV. THE GOVERNMENT HAS ZERO CONTROL OVER THE CONTENT OF THE PRAYERS.

The Eleventh Circuit asked the right question but got the wrong answer. The "central question" is "whether the government is *speaking* instead of regulating private expression." *Cambridge*, 115 F.4th at 1289-1290; *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring). But as in *Town of Greece* and *Shurtleff*, the government has zero control over the message. In contrast to *Walker*, the government does not "maintain[] direct control over the message[] conveyed" or approve every prayer before it may be spoken. *See Walker*, 576 U.S. at 213; *Shurtleff*, 596 U.S. at 257. Unlike *Summum*, the government is not using privately designed or funded content to craft and convey *its own* message. FHSAA did not, and indeed *should* not, "exercise[] final approval authority" over the prayers. *See Summum,* 555 U.S. at 470-472. A brief spoken prayer is not comparable to a permanent monument woven into a government-designed display. The speaker is a Christian school representative who creates the content, not a government agent speaking in his official capacity "seeking to convey a government-created message . . . pursuant to a government policy." *Bremerton*, 597 U.S. at 529. The private school, not the government, is responsible for the message. In contrast to *Lee v. Weisman*, 505 U.S. at 588, the content is not "directed and controlled" by a *public* school official. *Santa Fe,*

530 U.S. at 324 (Rehnquist, J., dissenting). "[A]ny speech that may occur . . . here would be *private*, not *government*, speech." *Id.* at 321 (Rehnquist, J., dissenting) (emphasis in original).

"[S]peech by a private individual or group cannot constitute government speech if the government does not attempt to control the message." *Shurtleff*, 596 U.S. at 263-264 (Alito, Gorsuch, Thomas, J.J., concurring in the judgment). Government control over the "content and meaning" is the "key" to whether the government "meant to convey the messages." *Cambridge*, 115 F.4th at 1293, quoting *Shurtleff*, 596 U.S. at 256. But just as in *Shurtleff*, the extent of government control over the message—the prayers—was "not at all" except for the "event's date and time" and "control over the . . . physical premises." *Shurtleff*, 596 U.S. at 256.

CONCLUSION

This Court should grant the Petition and reverse the Eleventh Circuit ruling.

Respectfully submitted,

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