No. 24-1261

In the Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, 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 *AMICUS CURIAE* ROBERTSON CENTER FOR CONSTITUTIONAL LAW IN SUPPORT OF PETITIONER

Christopher T. Holinger
Counsel of Record
Robertson Center for Constitutional Law
1000 Regent Univ. Dr.
Suite 303
Virginia Beach, VA 23464
(757) 410-2293 x709
Chriho3@regent.edu

Counsel for *Amicus Curiae*

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Interest of Amicus Curiae

The Robertson Center for Constitutional Law is an academic center within the Regent University School of Law. Established in 2020, the Center pairs scholarship and advocacy to advance the first principles in constitutional law, including religious liberty and the rule of law. The Center regularly represents organizations from various faith traditions that support religious freedom and rights of conscience. Accordingly, the Center is interested in ensuring that religious Americans of all faiths receive the full protection afforded by the Constitution.[1]

Summary of the Argument

The Government Speech Doctrine is susceptible to dangerous misuse—and that is precisely what occurred in this case. The lower court concluded that speech becomes "government speech" merely because it was delivered over publicly owned loudspeakers. This expansive interpretation allows the government to shift the goalposts at will, recasting free exercise claims as government speech and thereby avoiding constitutional scrutiny. Properly applied, this Court's post-*Kennedy* Establishment Clause jurisprudence does not bar the prayer at issue, and FHSAA's actions plainly violate Petitioner's rights under the Free Exercise Clause.

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[1]Under Rule 37.2, *amicus* provided timely notice of its intention to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

This case presents an ideal opportunity for the Court to clarify the boundary between government speech and private religious expression, resolve circuit conflicts over the doctrine's scope, and prevent its misuse as a tool for suppressing religious exercise in public settings. The Court should grant the petition to correct this error and safeguard the rights guaranteed by the First Amendment.

Argument

I. The Government Speech Doctrine is Susceptible to Misuse.

The government speech doctrine allows the government to "speak for itself," deciding "what to say and what not to say" when it seeks to "state an opinion," "speak for the community," or "implement programs." *Shurtleff v. City of Bos.*, 596 U.S. 243, 251–52 (2022). But, as this Court has recognized, "the government does not have a free hand to regulate private speech on government property." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). When the government opens a forum for private expression, it is no longer delivering its own message. *Shurtleff*, 596 U.S. at 258. At that point, the government "may not exclude speech based on 'religious viewpoint'" as doing so would amount to viewpoint discrimination. *Id.* (holding the government may not reject the display of a "Christian flag" when it previously allowed the display of other private expression).

The line between government speech and private expression is, at best, murky. *See, e.g.*, *id.* at

248. The key question is whether the government is acting as a speaker or just providing a forum for others to speak. But this Court has yet to create a clear test for separating government speech from private speech, so the answer can turn on a variety of face-intensive inquiries, including "the history of the government's use of the medium for communicative purposes, the implication of government endorsement of messages carried over that medium, and the degree of government control over those messages." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1223 (11th Cir. 2019).

Unsurprisingly, courts have struggled to define the exact boundaries of the doctrine, leading to inconsistent applications. For example, within the realm of public education, the Eighth Circuit recently held that displaying "Black Lives Matter" posters in public school classrooms may plausibly be considered private speech in a limited forum, not government speech. *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1082 (8th Cir. 2024). Thus, denying "All Lives Matter" or "Blue Lives Matter" posters was considered viewpoint discrimination. *Id.* at 1083.

The Ninth Circuit, however, came to a different conclusion in two separate cases. In *Downs v. L.A. Unified School District*, faculty and staff were invited to post materials related to Gay and Lesbian Awareness Month on a school bulletin board. 228 F.3d 1003, 1006 (9th Cir. 2000). When a teacher posted materials expressing opposing religious views on a competing board, school administrators demanded the materials be removed. *Id.* at 1006–08. The Ninth

Circuit held that the expression on the bulletin boards constituted government speech, reasoning that the school district's acceptance of certain materials—and rejection of others—amounted to the government choosing what to say and what not to say. *Id.* at 1011–1012.

Similarly, in *Johnson v. Poway Unified School District*, the Ninth Circuit upheld a school district's decision requiring a teacher to remove religious banners from his classroom. 658 F.3d 954, 970 (9th Cir. 2011). The court reasoned that plaintiff "did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher—a government employee." *Id.* at 967.

Inconsistent application is far from the only challenge the government speech doctrine faces. As this Court has warned, "the government-speech doctrine is . . . susceptible to dangerous misuse." *Matal v. Tam*, 582 U.S. 218, 235 (2017). And lower courts have at times stretched the concept beyond its intended bounds. For instance, some have treated library curation as a form of government speech. In *PETA, Inc. v. Gittens*, the D.C. Circuit observed that "with respect to [a] public library, the government speaks through its selection of which books to put on the shelves and which books to exclude." 414 F.3d 23, 28 (D.C. Cir. 2005). And in *Bryant v. Gates*, the same court later stated that government speech can encompass not only "the words of government officials" but also the collection of third-party speech by public institutions "such as libraries, broadcasters, newspapers, museums, schools, and the like." 532

F.3d 888, 898 (D.C. Cir. 2008) (Kavanaugh, J., concurring). If curating library collections is government speech, then the government could, in theory, purge public libraries of all books authored by religious individuals—simply because of their viewpoint. That outcome would be hostile to core First Amendment principles.

This potential for misuse might explain the criticism government speech has received from some of this Court's Justices. In *Walker*, dissenting from this Court's holding that a state's regulation of specialty license plates is government speech, four Justices expressed serious concerns that "[t]his capacious understanding of government speech takes a large and painful bite out of the First Amendment." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 222 (2015) (Alito, J., joined by Roberts, C.J., Scalia, & Kennedy, JJ., dissenting). More specifically, the quartet of Justices noted that expansion of the doctrine might permit the government to disguise "private speech as government speech," creating a precedent that endangers expression the government disfavors. *Id.* at 221.

The Justices' concerns are not without merit. Taken to its logical extreme, the doctrine allows the government to continually shift the goalposts, shoehorning free exercise claims into the government speech framework, which heavily favors deference to government actions. Indeed, this case exemplifies such concerns. Throughout this case, FHSAA has continually hidden behind the doctrine, using it to restrict the Petitioner's religious conduct without any

interference from the First Amendment. Further, FHSAA's failure to repudiate its original policy banning pregame prayer over stadium loudspeakers—a policy adopted to avoid a baseless Establishment Clause concern—supports the inference that it is using this muddled legal theory to justify a Free Exercise violation. *See Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 115 F.4th 1266, 1285 (11th Cir. 2024).

It is unfortunate that the Eleventh Circuit accepted this approach, as this Court has admonished against taking such leaps. *See Matal*, 582 U.S. at 235. Had the court rejected FHSAA's overbroad theory of government speech, it would have recognized that, under the proper framework established in *Kennedy*, prayer over government loudspeakers raises no Establishment Clause concerns. It would have seen FHSAA's action for what it was: an egregious infringement on the rights of students and spectators to freely engage in the religious practice of communal prayer.

II. Pregame Prayer Over Loudspeakers Does Not Offend the Establishment Clause.

This Court's decision in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022) restored a historical understanding of the Establishment Clause—one that does not prohibit voluntary prayer over loudspeakers. *Kennedy* explained that a private act of religious expression did not transform into government speech simply because it occurred in public. *Kennedy*, 597 U.S. at 531. In rejecting a strained reading of the Establishment Clause, this

Court did more than resolve the case—it laid *Lemon* to rest. *Id.* at 534.

But, as the Fourth Circuit observed, "[w]ith *Lemon* finally dead, the question is what comes next." *Firewalker-Fields v. Lee*, 58 F.4th 104, 121 (4th Cir. 2023). Without much detail, this Court said, "[i]n place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'" *Kennedy*, 597 U.S. at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). "'[T]he line' that courts and governments 'must draw between the permissible and the impermissible' has to 'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" *Id.* at 535–36. That principle, while important, lacks detailed guidance on how the new framework should operate in practice. In response, scholars have debated what *Kennedy's* shift to history and tradition truly entails.

Some say there is no test. For example, Richard Epstein claims this Court overruled *Lemon* "without developing a different test, beyond making a now fashionable bow toward the 'original meaning and history' of constitutional language in [its] interpreting of the Establishment Clause." Richard A. Epstein, Unnecessary Church-State Confusion, Hoover Inst.: Defining Ideas (July 25, 2022), https://perma.cc/DE2X-RGSR. Others contend that *Kennedy* has simply replaced *Lemon* with some type of blanket coercion test. *See* Noah Feldman, Supreme Court is Eroding the Wall Between Church and State, WASH. POST (June 30, 2022), https://perma.cc/J9N8-5BGK?type=image. Still others have read the signals

in *Kennedy* as endorsing a hybrid approach grounded in the traditional features of an establishment.

Stephanie Barclay, for example, claims "the Court appears to be adopting an approach that gives distinct meaning to a variety of historical hallmarks relevant to what was viewed as an established religion at the founding." Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton Sch. Dist.*, 108 Iowa L. Rev. 2097, 2104 (2023) [hereinafter *Religion Clauses After Kennedy*]. She points to a footnote in *Kennedy*, where this Court emphasized that the paradigmatic example of an established religion is one in which the government coerces individuals into religious observance under threat of legal punishment. *Id.* at 2105. But as Barclay notes, that is not the only circumstance that can give rise to an Establishment Clause violation.

Barclay observes that *Kennedy* cited Justice Gorsuch's concurring opinion in *Shurtleff,* which cited scholarship by Professor Michael McConnell identifying several distinct "hallmarks" of established religion. *Religion Clauses After Kennedy* at 2104. Justice Gorsuch's *Shurtleff* opinion offers a concise summary of those hallmarks, which includes government actions such as: (1) controlling church doctrine and leadership; (2) mandating church attendance under threat of punishment; (3) punishing dissenting churches or individual religious practices; (4) restricting political participation by religious dissenters; (5) providing financial support to one church over others; and (6) assigning civil functions to a church, often by granting it a monopoly over certain duties. 596 U.S. 243, 285–86 (2022) (Gorsuch, J.,

concurring). In the future, Barclay suggests, this Court "will likely look to whether . . . the challenged practice resembles one of these hallmarks in important respects." *Religion Clauses After Kennedy* at 2105.

Although each theory has its own doctrinal merits, ultimately, the future of Establishment Clause jurisprudence remains uncertain. This has left lower courts guessing and sharply divided. Some have attempted to sidestep the issue entirely, while others have embraced conflicting analytical frameworks. Among the courts that do engage with *Kennedy*, the approaches fall (roughly) into four camps. Some circuits apply a bare coercion test, focusing solely on whether government action compels religious observance. *See, e.g.*, *Lozano v. Collier*, 98 F.4th 614, 627–28 (5th Cir. 2024). Others follow Barclay's lead, weighing potential Establishment Clause violations against the six hallmarks. *See, e.g.*, *Hilsenrath v. Sch. Dist. of the Chathams*, 136 F.4th 484, 491 (3d Cir. 2025). Still other circuits continue to rely on pre-*Kennedy* precedent, effectively declining to embrace the Court's new framework. *See Firewalker-Fields*, 58 F.4th at 122; *Gundy v. City of Jacksonville*, 50 F.4th 60, 70 (11th Cir. 2022). Finally, some circuits have no framework. The Ninth Circuit has applied *Kennedy* in three different ways within a single year. In *Hunter v. Department of Education*, the court interpreted *Kennedy* as requiring a two-part test: first, determine whether the practice was accepted by the Framers and long enduring; if not, the state must provide historical analogues. 115 F.4th 955, 965–66 (9th Cir. 2024). Just months later in *Loffman v. California Department of Education*, the circuit grafted

Kennedy's history-based analysis into strict scrutiny review. 119 F.4th 1147, 1171 (9th Cir. 2024). Finally, in *Markel v. Union of Orthodox Jewish Congregations of America*, the Ninth Circuit glossed over *Kennedy* altogether, applying instead a general coercion test that required "actual legal coercion" to demonstrate an establishment. 124 F.4th 796, 808–09 (9th Cir. 2024). Three cases, three frameworks, one circuit—all within twelve months.

This Court should resolve the analytical uncertainty by marrying the past with the present. A close reading of *Kennedy* reveals that this Court did not merely swap one abstract test (*Lemon*) for another centered solely on coercion. Instead, it embraced an approach rooted in individualized historical inquiry. This analysis should begin with the six factors identified in *Shurtleff*, assessing whether the government's actions amount to an establishment of religion. If any one of the hallmarks is present, the government action is presumed to violate the Establishment Clause. If none are present, the action is presumed constitutional. But the analysis cannot end there. The Court's repeated emphasis on history and tradition cannot mean that judges must simply compare modern practices to a checklist summarily buried in a footnote, without engaging in context-specific historical analysis. *See Town of Greece*, 572 U.S. at 576 ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"). Courts should still conduct an independent historical inquiry to confirm or rebut that presumption, ensuring that the outcome aligns with the original meaning of the Establishment Clause.

When a government action is presumed constitutional, the supporting historical evidence need not be an exact match; rather, it must be "relevantly similar" to the current practice. This Court applied this approach in *United States v. Rahimi* when evaluating 18 U.S.C. § 922(g)(8), a statute prohibiting individuals subject to certain domestic violence restraining orders from possessing firearms. 602 U.S. 680, 692 (2024). Writing for the majority, Chief Justice Roberts rejected the notion that modern laws must have a precise "historical twin" from 1791. *Id.* at 700. Instead, Chief Justice Roberts emphasized that contemporary regulations must reflect the underlying principles of the Second Amendment. This approach endorsed a flexible standard—one that does not require a perfect historical match, but a tradition that reflects the same principles or purposes.

The same logic should apply here. When government action is presumed constitutional, it is enough that the historical tradition be "relevantly similar"; it need not be a "historical twin." *Id.* at 692. The presumption that the government acted within the bounds of the Constitution can only be overcome in these cases by a complete absence of similar historical support. This approach mirrors rational basis review, the most deferential form of constitutional scrutiny, where courts presume a law is valid and place the burden on the challenger to show it violates the Constitution. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–14 (1993) ("Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'"). When the *Shurtleff* hallmarks are absent, the historical inquiry should be highly

deferential, not requiring the government to painstakingly scour the annals of history in search of identical governmental action.

Take, for example, the historical investigation conducted in *Town of Greece*, which involved prayer at town board meetings. 572 U.S. at 570. Unlike in state legislatures or Congress, this was a local setting where citizens petition the government. *Id.* One could argue that prayer in such a setting might cause citizens to feel pressured to participate while, for example, seeking a zoning approval or permit—perhaps creating greater danger of coercion. But the Court upheld the town's practice, noting that Congressional prayer has been used since the First Congress and does not violate the Establishment Clause simply because it is religious in nature. *Id.* at 577. Thus, when a challenged government action does not precisely match its historical precursors, "it still may be analogous enough to pass constitutional muster," *Rahimi*, 602 U.S. at 692, so long as the actions do not conflict with the core historical understandings of what the Establishment Clause prohibits, embodied in the *Shurtleff* hallmarks.

The analysis changes when a government action bears one of the hallmarks of a religious establishment. In those instances, the action is presumed to be unconstitutional. To overcome that presumption, the government must present strong historical evidence showing that the practice falls within a well-established tradition previously understood to comport with the Establishment Clause. Although the historical analogue need not be identical to the challenged practice, it must be

especially similar—closer to a "twin" than a "cousin." *See id.* at 739 (Barrett, J., concurring).

This framework offers a method for evaluating Establishment Clause claims that is rooted in genuine historical investigation. Avoiding both abstract balancing tests and mechanical checklists, this framework offers sufficient clarity and restraint to guide lower courts. By applying this new framework, we can see that prayer over loudspeakers at a football game raises no Establishment Clause concerns.

A. None of the hallmarks of an establishment are present.

Our proposed framework begins with the hallmarks outlined in *Shurtleff*. *See Kennedy*, 597 at 537 n.5. The Court has not yet decided whether all six are required or whether some combination is sufficient. But that question need not be resolved here. None are present.

The government exerted no control over church doctrine or personnel, mandated no religious attendance, provided no financial support, and delegated no civil authority to any religious institution. That alone removes hallmarks one, two, five, and six from consideration. *See Shurtleff*, 596 U.S. at 285–86. As to hallmarks three and four—punishment of dissenters and exclusion from political participation—the record is clear: no individual was penalized for nonparticipation, and no religious belief stood as a barrier to civic life. In this case, the schools participating in the game merely requested the

opportunity to pray. *Cambridge Christian Sch.*, 115 F.4th at 1274. They did not seek to compel a government agent or any official intermediary to offer the prayer. Rather, they simply wished to express their faith in accordance with their religious beliefs.

From an Establishment Clause standpoint, this case presents even less constitutional concern than *Town of Greece*, 572 U.S. at 591–92 (upholding sectarian prayer before town board meetings), or *Marsh v. Chambers*, 463 U.S. 783, 795 (1983) (upholding legislative prayers offered by a publicly funded chaplain). In both cases, the government arranged the prayers and directed them to public bodies, yet this Court found no constitutional violation. *Marsh*, 463 U.S. at 795; *Town of Greece*, 572 U.S. at 591–92. Here, by contrast, two private teams voluntarily agreed to offer a prayer over loudspeakers. *See Cambridge Christian Sch.*, 115 F.4th at 1276–77. Because none of the hallmarks of an establishment are present, prayer over government loudspeakers should be presumed constitutional. The next question is whether "relevantly similar" historical support exists to justify this practice. It does.

B. Historical support exists to support this practice.

FHSAA could rebut the presumption that Cambridge's prayer is constitutional only by showing that such a practice lacks any "relevantly similar" historical analogue. But the historical tradition does not need to be a precise match in form or setting. It need only reflect a comparable understanding of the

role of religious expression in public life. Here, the record does more than meet that standard—it demonstrates a longstanding tradition of prayer at significant civic and educational events, firmly rooting Cambridge's practice in the historical fabric the Establishment Clause was never meant to tear apart.

That tradition reaches back to the founding itself. On September 7, 1774, the First Continental Congress opened its first full session not with debate, but with supplication. *John Adams to Abigail Adams, 16 Sept. 1774*, Founders Online (Sept. 16, 1774), https://founders.archives.gov/documents/Adams/04-01-02-0101. At the urging of Samuel Adams, the Congress invited Jacob Duchè, an Anglican minister, to lead them in prayer. *Id.* He began by reading the Thirty-fifth Psalm, then delivered an extemporaneous prayer so "elegant and sublime" that, as John Adams recounted, it "filled the Bosom of every Man present." *Id*. If prayer can precede the birth of a nation, surely it can precede a football game without violating the Constitution.

The historical role of prayer extends beyond Congress. Just as prayer was present at our Nation's founding, it was also part of the early development of American public education. For instance, when the cornerstone of the University of North Carolina at Chapel Hill—the first public university in the United States—was laid in 1793, it began with "short, animated prayers." Kemp P. Battle, *History of the University of North Carolina*, Vol. 1, at 40 (1907) (cleaned up). The practice continued once students entered the classroom. One student who refused to

join in daily prayers was promptly told: "If he could not hold with Prayers, the University could not hold with him." *Id.* at 222. And when the Class of 1894 took their seats at commencement, the program began, as it always had, with prayer. *Univ. of N.C. at Chapel Hill, Commencement* (1894), https://archive.org/details/commencement18941894univ/page/n1/mode/2up.

This custom was not unique to Chapel Hill. Historical records from public universities across the country show that it was common for major academic events, including commencements and convocations, to begin with prayer. At the University of Georgia, early 19th-century commencement programs regularly opened with invocations, often led by local clergy or university chaplains. Thomas Walter Reed, Hist. of the Univ. of Ga. 62 (Univ. of Ga. Press 1949) (beginning as early as 1785, "[t]he commencement exercises were opened with prayer"). Similarly, records from the early 1800s at the Universities of Vermont and Tennessee show that public prayer was a customary and expected element of academic ceremonies. *Univ. of Vt., Burlington Commencement Exercises* (July 28, 1813), https://digitalvermont.org-/files/original/47/4799/378_743-VK-1813_UVMCommencementExercises001.jpg (opening with prayer); *Commencement of East Tennessee Univ., 1841 Summer*, Digit. Collections 2 (Aug. 4, 1841), https://digital.lib.utk.edu/collections/islandora/object/utkcomm%3A10015#page/2/mode/2up (opening with

prayer). Many other historical records say the same.[2] This widespread and consistent practice underscores how deeply integrated prayer was in the fabric of American public education during the 18th and 19th centuries. Far from being isolated instances, these examples provide a strong historical grounding for the constitutionality of voluntary prayer at public events today.

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[2] *See, e.g.*, *Commencement Program*, Md. Agric. Coll., Univ. Archives (June 26, 1863), https://digital.lib.umd.edu/result/id/e2a8e7e7-2493-47cd-b3f3-09dc198db421?relpath=dc/2023/3 (opening with prayer); *1892 Commencement Program State Univ. of N.Y. College at Cortland*, SUNY College Cortland Digit. Commons 2 (Jan. 19, 1892), https://digitalcommons.cortland.edu/cgi/viewcontent.cgi?article=1042&context=commencements_programs (opening with prayer); *Addresses of Graduates, Class '92, December Section, December 13, 1892 Iowa State Normal Sch.*, UNI ScholarWorks (Dec. 13, 1892), https://scholarworks.uni.edu/cgi/viewcontent.cgi?article=1299&context=commencement_programs (opening with an invocation); *First Annual Commencement of Wash. State Normal Sch. Cent. Wash. Univ.*, Univ. Archives & Special Collections (June 15, 1892), https://digitalcommons.cwu.edu/cgi/viewcontent.cgi?article=1002&context=cwu_commencement_programs (same); *State Agric. Coll. of S.D. Commencement Program*, SDSU Archives & Special Collections (Aug. 4, 1892), https://openprairie.sdstate.edu/cgi/viewcontent.cgi?article=1195&context=registrar_commencement (same); *Ill. State Normal Univ. First Commencement*, ISU ReD (June 29, 1860), https://ir.library.illinoisstate.edu/cgi/viewcontent.cgi?article=1000&context=commencement (opening with "The Lord's Prayer"); *Commencement Program, 1857*, M.E. Grenander Special Collections & Archives Univ. of Albany (Jan. 29, 1857), https://archives.albany.edu/challenge?next=/concern/daos/348501160 (opening with prayer).

As the evidence shows, prayer before public school events is a practice with historical roots stretching to the early days of the Republic. That tradition provides more than a sufficiently close analogue to the voluntary, student-led prayer at issue here. *See Rahimi*, 602 U.S. at 692. In the absence of any evidence of a religious establishment, the presumption of constitutionality should stand. The Establishment Clause does not require the government to suppress religious expression merely because it provides neutral or incidental support. That version of "neutrality" is not neutrality at all—it is religious discrimination that not only misconstrues the Establishment Clause but also gives rise to a serious Free Exercise violation.

III. The Prayer Ban Violates Cambridge's Free Exercise Rights.

The "free exercise" of religion refers not only to religious beliefs but also to religious practices. *Kennedy*, 597 U.S. at 524 (quoting *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). The government can violate a person's free exercise rights by burdening their sincere religious conduct, especially through policies that are not neutral or generally applicable. *See id.* at 525. If a policy burdens a fundamental right, it must satisfy strict scrutiny, meaning the policy serves a compelling interest and is narrowly tailored to achieve that interest. *Id.* (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993)).

A. Cambridge's communal prayers are sincere religious practices.

Religious practices protected by the Free Exercise Clause include communal activities such as gathering to worship and participating in group prayers. *Smith*, 494 U.S. at 877 (free exercise includes assembling to worship and participating in sacramental acts); *Tandon v. Newson*, 593 U.S. 61, 62 (2021) (at-home religious gathering was religious exercise); *Emad v. Dodge County*, 71 F.4th 649, 651–53 (7th Cir. 2023) (Muslim prayer practiced in groups was religious exercise); *Sabir v. Williams*, 52 F.4th 51, 59–60 (2d Cir. 2022) (Jewish communal prayer was religious exercise). While the sincerity of one's religious practice is a factual question, the reasonableness of the practice falls outside the scope of judicial inquiry. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (noting that the reasonableness of religious belief is a question "courts have no business addressing"); *Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981) ("The determination of what is a 'religious' belief or practice . . . is not to turn upon a judicial perception of the particular belief or practice in question.").

Cambridge's practice of communal prayer before school events is a sincere religious practice, as it is rooted in the school's core religious beliefs and reinforced by longstanding tradition. With the help of the loudspeakers, the entire Cambridge community engages in communal pre-game prayer to give thanks, request divine protection and direction, and, as one community member put it, experience "the presence of God . . . even more fully realized." A-11953 (quote

from Cambridge parent and volunteer PA announcer); *see* A-11905; A-11935-37; A-11952; A-4234; *see also* A-11934 ("[C]ommunal prayer stimulates the spiritual growth of students, develops in them a biblical world and life view, teaches them to perceive God's work in all areas of their lives, and generates spiritual renewal."). The Cambridge community prays together at all kinds of school gatherings. A-4233-34; A-13361–63; A-11818. And the tradition of communal prayer before football games, in particular, goes back "decades." *Cambridge Christian Sch.*, 942 F.3d at 1247.

B. The prayer ban is not neutral or generally applicable.

A government policy is not "neutral" if it is "specifically directed at religious practice." *Kennedy*, 597 U.S. at 526 (quoting *Smith*, 494 U.S. at 878). Even if a policy does not "discriminate[] on its face," it can still fail this test if "a religious exercise is otherwise its object." *Id.* (quoting *Lukumi*, 508 U.S. at 533). That is exactly what happened here. FHSAA admitted the reason for the denial was the religious nature of the request, explaining that "the government may not engage in activities that can be viewed as endorsing or sponsoring religion." A-12607; A-12611. The ban therefore cannot be considered neutral. *See Masterpiece Cakeshop v. Colorado C.R. Comm'n*, 584 U.S. 617, 638 (2018) (quoting *Lukumi*, 508 U.S. at 534) ("The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion.").

Nor is the policy generally applicable. A policy is not "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" or "if it provides 'a mechanism for individualized exceptions.'" *Kennedy*, 597 U.S. at 526 (quoting *Fulton v. City of Philadelphia*, 593 U.S. 522, 534 (2021)). FHSAA has regularly allowed schools and sponsors to make announcements over loudspeakers, including at halftime and in promotional messages—something it openly acknowledged and permitted during the 2015 Class 2A football championship game. A-11177-23; A-4309–25. By allowing these secular uses, FHSAA undercut any claim that its policy was generally applicable.

C. The prayer ban cannot survive strict scrutiny.

Because the prayer ban burdens Cambridge's free exercise rights and is not neutral or generally applicable, it must survive strict scrutiny. FHSAA attempted to justify the ban by invoking the Establishment Clause. *Cambridge Christian Sch.*, 942 F.3d at 1244 (stating the "only explanation for the . . . restriction . . . was that prayer was not permitted by the Establishment Clause"). Officials claimed the Clause prohibits the government from engaging in any activity that might be seen as endorsing or sponsoring religion. *Id.* As noted in Part II, *supra*, proper application of the post-*Kennedy* Establishment Clause does not prohibit pre-game prayer. But even if there were "concerns" about a possible Establishment Clause violation, that alone is not a compelling reason to stifle free exercise. The Establishment Clause does

not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Kennedy*, 597 U.S. at 535 (quoting *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in judgment)).

Further, FHSAA permitted prayer at the 2012 championship game and during the first three rounds of the 2015 playoffs. *Cambridge Christian Sch.*, 942 F.3d at 1244. Yet FHSAA has offered no reason why prayer at the 2015 championship suddenly posed an Establishment Clause issue, despite allowing similar prayers before. This inconsistency further undermines FHSAA's alleged concerns.

Even if FHSAA had a compelling interest, its policy was not narrowly tailored. It could have simply clarified over the loudspeakers that the schools were delivering their own message and allowed the prayer. That alone is enough to show the ban fails constitutional scrutiny.

Conclusion

The lower court's decision reflects a troubling misuse of the government speech doctrine that threatens religious liberty across the country. This Court should grant the petition to correct this error, to clearly define the limits of the Government Speech Doctrine, and to safeguard the rights guaranteed by the First Amendment.

Respectfully submitted,

Christopher T. Holinger
Counsel of Record
Robertson Center for
Constitutional Law
1000 Regent Univ. Drive
Suite 303
Virginia Beach, VA 23464
(757) 410-2293 x709
chriho3@regent.edu

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