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

BRIEF FOR LIBERTY COUNSEL AS AMICUS CURIAE SUPPORTING PETITIONER

HORATIO G. MIHET
DANIEL J. SCHMID
KRISTINA S. HEUSER
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

Counsel for Amicus

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national civil liberties organization that provides education and legal defense on issues relating to religious liberty, the sanctity of life, and the family. Liberty Counsel is committed to upholding the historical understanding and protection of the rights to free speech and free exercise of religion and ensuring those rights remain an integral part of the country's cultural identity. Liberty Counsel has represented clients before this Court, including in a number of cases in which the Free Speech and Free Exercise Clauses were seminal issues, including, most notably as it applies to this case, in *Shurtleff v. City of Boston, Massachusetts*, 596 U.S. 243 (2022). Liberty Counsel frequently represents clients in cases implicating the First Amendment in every federal circuit court of appeals and many federal district courts. Liberty Counsel attorneys have also spoken and testified before Congress on matters relating to government infringement on First Amendment rights.

Amicus has an interest in ensuring that this Court's precedent established by *Shurtleff* is upheld and rightly applied throughout the lower courts. Amicus also has an interest in protecting the right of private parties to engage in public prayer and other religious expression.

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[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission. Pursuant to Rule 37.2, Amicus provided and counsel for the parties received timely notice of Amicus's intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When the government speaks for itself, it is immune from First Amendment scrutiny. This legal principle creates a safe haven for government that is ripe for abuse. "To prevent the government-speech doctrine from being used as a cover for censorship, courts must focus on the identity of the speaker." *Shurtleff v. City of Boston, Massachusetts,* 596 U.S. 243, 263 (2022) (Alito, J., concurring). The government speech test that has taken hold in the lower courts is not only a perversion of what this Court articulated in *Shurtleff*, but often loses sight entirely of the objective of the test—whether the government is *actually* speaking.

In *Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.*, 115 F.4th 1266 (11th Cir. 2024), the Eleventh Circuit engaged in a rigid analysis limited to three factors – history, endorsement, and control – and upheld the erroneous decision of the Florida High School Athletic Association ("FHSAA") to prohibit either of the two Christian schools participating in the high school football state championship from solemnizing the game with prayer. *Id.* at 1289-95. The court's rationale for upholding the FHSAA's blatantly unconstitutional viewpoint discrimination was that the proposed prayer would have been government speech and, therefore, was insulated from review. *Id.* The outcome is nonsensical because "in light of the ultimate focus of the government-speech inquiry, each of the factors mentioned…could be relevant only insofar as it sheds light on the identity of the speaker." *Shurtleff*, *supra* at 267 (Alito, J.,

concurring). In other words, when courts fail to follow the directive issued by this Court in *Shurtleff* to engage in a holistic analysis to determine if the government is the speaker, absurd results occur. For instance: imagine a court holding that the natural extension of *Shurtleff*'s government-speech test reaches two *private schools* having a *private representative* of one of the schools say a prayer before playing each other in a state championship football game at a *private facility*. Yet that is what happened here. If *Walker v. Texas Div., Sons of Confederate Veterans*, 576 U.S. 200 (2015) represented the "outer bounds of the government-speech doctrine," *see Matal v. Tam*, 582 U.S. 218, 238 (2017), the Eleventh Circuit's decision below is so far out of bounds that it practically left the stadium in which those two private schools played.

It is imperative that this Court grant certiorari, reverse the judgment of the Eleventh Circuit, and clarify and extend its holding in *Shurtleff* to make clear that "government 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." *Shurtleff*, *supra*, at 267 (Alito, J., concurring) (emphasis added).

ARGUMENT

I. The Eleventh Circuit's decision exacerbated the misapprehension of this Court's holding in *Shurtleff v. Boston* as promulgating a rigid tripartite test for what constitutes government speech, and a proper application of *Shurtleff* is necessary to quell this erroneous understanding in the Circuits.

A. The so-called *Summum/Walker* test employed by the Eleventh Circuit – and the First Circuit in *Shurtleff* – was neither articulated nor intended by this Court.

1. This Court took up *Shurtleff* to correct the misapplication of the government speech doctrine that was erroneously applied to private speech.

This Court has long recognized that "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse." *Matal*, 582 U.S. at 235. The Court identified such misuse in the facts and the lower court's application of the doctrine in *Shurtleff v. City of Boston*, 986 F.3d 78, 86–87 (1st Cir. 2021), *rev'd and remanded sub nom. Shurtleff v. City of Boston*, 596 U.S. 243 (2022). The Court granted certiorari in that case to correct the misapplication and misinterpretation of the government-speech doctrine, but the problem has only grown worse and exacerbated the First Amendment violations created by its potent application to silence private speech. The Court's intervention is again needed in this case to rectify the erroneous interpretation and application of

this doctrine by the Eleventh Circuit so that "government [cannot] silence or muffle the expression of disfavored viewpoints." *Matal*, 582 U.S. at 87.

In *Shurtleff*, *supra*, the First Circuit, generously extrapolating from this Court's holdings in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), and *Walker*, 576 U.S. at 200, took it upon itself to "map the relevant contours of the government speech doctrine." *Shurtleff*, 986 F.3d at 87. The court then articulated a "three-part *Summum/Walker* test" and deemed it "controlling." *Id.* at 88.

The test authoritatively promulgated by the lower court in *Shurtleff* improperly expanded the government-speech doctrine to swallow up private speech in a public forum. This Court granted certiorari in *Shurtleff* to reassert its government-speech precedent – which never established a litmus test for what constitutes government speech – and remind lower courts that they must "be very careful when a government claims that speech by one or more private speakers is actually government speech." *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring).

2. Identifying government speech requires a holistic analysis, not application of a rigid tripartite test.

"The line between a forum for private expression and the government's own speech is important, but not always clear." *Shurtleff*, 596 U.S. at 248. For this reason, it is necessary for courts to "conduct a holistic inquiry designed to determine whether the government intends to speak for itself or to regulate private expression." *Id.* at 252. This inquiry "is not

mechanical; it is driven by a case's context rather than the rote application of rigid factors." *Id.*

Although the Eleventh Circuit in *Cambridge Christian* paid lip service to this central tenet of the Court's holding in *Shurtleff* and to the overall government-speech doctrine, the court, in fact, applied the defunct tripartite test this Court expressly overruled in *Shurtleff*. It did so by departing from *Shurtleff* and holding that "a finding that *all* [three factors] evidence government speech will almost always result in a finding that the speech is that of the government." 115 F.4th at 1288 (citing *Leake v. Drinkard,* 14 F.4th 1242, 1248 (11th Cir. 2021), *cert denied Leake v. Drinkard,* 142 S. Ct. 1443 (2022)). As a result of the Eleventh Circuit limiting its analysis to the three factors it deemed exclusively important in detecting government speech – history, endorsement, and control – the court upheld the FHSAA's censorship of *private* prayer of a *private* individual at the start of a high school football championship game between two *private* Christian schools at a non-FHSAA venue.

This Court has never "set forth a test that always and everywhere applies when the government claims that its actions are immune to First Amendment challenge under the government-speech doctrine." *Shurtleff*, 596 U.S. at 261–62 (Alito, J. concurring). And the reason the Court has declined to do so and has instead required a holistic analysis is because cherry-picking facts to meet certain factors without regard to the entirety of the context in which the dispute over restricted speech arose can lead to absurd results. Borrowing an illustration used by Justice Alito's concurrence in *Shurtleff*, "Government

control over speech is relevant to speaker identity in that speech by a private individual or group cannot constitute government speech if the government does not attempt to control the message. But control is also an essential element of censorship… And it is not as though 'actively' exercising control over the 'nature and content' of private expression makes a difference, as the Court suggests, *ibid.* Censorship is not made constitutional by aggressive and direct application." *Id.* at 264.

This Court put the final nail in the coffin of the *Lemon* test with *Shurtleff*. *Id.* at 288 ("[t]his Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie" (Gorsuch, J., concurring)). And, then officially overruled it in *Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022). The reason: it recognized how by "dial[ing] down your hypothetical observer's concern with facts and history and dialing up his inclination to offense, the test is guaranteed to spit out results more hostile to religion than anything a careful inquiry into the original understanding of the Constitution could sustain" *Id.* at 284 (Gorsuch, J., concurring) (cleaned up)). This Court should take this opportunity to deliver the same fatal blow to the equally easy-to-manipulate *Summum/Walker* test, to protect the guarantees of the First Amendment from being overrun by the government-speech doctrine. If raising *a Christian flag on a government flagpole* open to all applicants is private speech, as this Court held in *Shurtleff*, 596 U.S. at 258, and if the speech of a *public employee* (Coach Kennedy) at the start of a high school football game between two *public schools* at a stadium on a *public school campus* is not government speech,

as this Court plainly held in *Kennedy*, 597 U.S. at 509, then what could compel the conclusion that that every aspect of a virtually identical prayer by *private actors* somehow becomes government speech because it was offered over a PA system? The answer: manipulation and abuse of the government-speech doctrine and a misunderstanding of *Shurtleff*'s requirements.

3. The Court's intervention is necessary to correct the misapplication of the government speech doctrine and the misinterpretation of *Shurtleff* invoked by some of the circuit courts.

Neither in *Shurtleff* nor any case before it has this Court "attempted to specify a general method for deciding th[e] question [of whether speech is attributable to the government or a private party], and the Court goes wrong in proceeding as though our decisions in *Walker* and *Summum* settled on anything that might be considered a 'government-speech analysis.'" *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring). Notwithstanding this Court's precedent and ignoring the fact that the prayers were offered by *private* individuals (not the government or even a government employee), the Eleventh Circuit limited its government-speech analysis in *Cambridge Christian*, *supra*, to the three factors that comprised the so-called *Summum/Walker* test. 115 F.4th at 1288-89. But, the Eleventh Circuit is not the only Circuit Court to have gone awry and taken *Shurtleff* to mean something entirely different than this Court intended.

The same factors that the First Circuit previously termed the *Summum/Walker* test, the Fifth Circuit has recently coined "the *Shurtleff* factors." *Little v.*

Llano Cnty., 138 F.4th 834, 856 (5th Cir. 2025). Similarly, in *Brown v. Yost*, 133 F.4th 725 (6th Cir. 2025), the Sixth Circuit considered the same three factors to the exclusion of all other facts and circumstances that may inform the analysis. It opined, "[w]hen ascertaining whether speech can be attributed to the government—and therefore is immune from First Amendment review—the Supreme Court has instructed us to look at [these factors]." *Id.* at 734 (citing *Shurtleff*).

Courts have also applied *Shurtleff* in deciding challenges to school districts and other public entities removing certain books from their libraries. The Eighth Circuit found that the school library's collection is not government speech, but the Fifth Circuit found that the collection at the County public library is. Both invoked *Shurtleff* to support their respective decisions. *See GLBT Youth in Iowa Schools Task Force v. Reynolds*, 114 F.4th 660, 668 (8th Cir. 2024), and *Little*, *supra*.

This Court should grant certiorari to resolve these conflicts and clarify that *Shurtleff* "did not set out a test to be used in all government-speech cases, and did not purport to define an exhaustive list of relevant factors." *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) (cleaned up). This is critical because "each of the factors mentioned in those cases could be relevant only insofar as it sheds light on the identity of the speaker, but when considered in isolation from that inquiry, the factors central to *Walker* and *Summum* can lead a court astray," and, as illustrated above, already has. *Ibid.* (cleaned up).

II. Had the Eleventh Circuit engaged in the appropriate forum analysis rather than the errant *Summum/Walker* test, it necessarily would have determined that the FHSAA violated the First Amendment rights of Cambridge Christian School by barring it from praying over its otherwise accessible loudspeaker.

A. Forum analysis is the correct approach to analyzing the private speech at issue in this case.

This "Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985). "Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum." *Id.* The Eleventh Circuit arrived at the erroneous conclusion it did below because the court failed to engage in forum analysis. Had the lower court adhered to this Court's precedent, it would have taken appropriate steps to determine the nature of the forum and the appropriate level of scrutiny to apply to ascertain if the FHSAA's prayer ban violated the First Amendment.

> [F]orum, by definition, is a space for private parties to express their own views. So when examination of the government's policy and practice indicates that the government has

> intentionally opened a nontraditional forum for public discourse, a court may immediately infer that private-party expression in the forum is not government speech. There is no need to consider history, public perception, or control in the abstract.

Shurtleff, 596 U.S. at 272 (Alito, J., concurring) (cleaned up). *See also Christian Legal Soc. Ch. of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("[I]n a progression of cases, this Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.").

In *Cambridge Christian*, the lower court's opinion acknowledges that there were "pregame prayers over the loudspeaker at non-championship playoff football games in 2015 and 2020, the pregame prayers at the non-championship football games were unscripted, and promotional messages from sponsors drafted by th[e] sponsor[s]" were played over the loudspeaker during the pregame period at the championship game. 115 F.4th at 1289–90 (cleaned up). These factors lend themselves to forum analysis. Forum analysis becomes relevant and is defined "in terms of the access sought by the speaker." *Cornelius*, 473 U.S. at 801. These considerations all involve use of an otherwise unavailable platform for speech that has been opened for use by private speakers. Promotional messages were offered by private sponsors who otherwise would not have been allowed to speak, *i.e.*, the loudspeaker was the access which the sponsors sought to express their promotional messages. *Id.*

This Court explained it did not implement forum analysis in *Walker* "[b]ecause the State is speaking on

its own behalf," 576 U.S. at 215, nor in *Summum* because "where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place." 555 U.S. at 480. Neither of those rationales apply in *Cambridge Christian* because the loudspeaker at FHSAA football games – including championship games – was open for select private parties to deliver their own messages, not the government's.

It is well-settled that forum analysis is to be utilized by courts "to evaluate government restrictions on purely private speech that occurs on government property." *Walker*, *supra*, at 215 (citing *Cornelius,* 473 U.S. at 800). The Eleventh Circuit erred by not engaging in forum analysis, and the speech at issue became the sacrificial lamb as a result. In essence, the upshot of the Eleventh Circuit's decision is that the defunct tripartite test can be used as "a subterfuge for favoring certain private speakers over others." *Summum*, 555 U.S. at 473. Under the guiding principle that more speech is better than less speech, the Court should bolster forum analysis as the starting point in challenges to speech restrictions on government property. Only if no forum can be found should government speech be considered.

B. The loudspeaker at FHSAA games is a limited public forum.

As an initial matter, the Eleventh Circuit defined the forum too narrowly, which skewed its analysis towards the unconstitutional conclusion at which it ultimately arrived. In determining if the government-speech doctrine should be implemented to assess the constitutionality of the barred speech in *Cambridge*

Christian, the court decided to "focus our government speech inquiry primarily on pregame speech over the PA system at FHSAA football championship games, as opposed to speech at any other game, sport, or period of the championship game." 115 F.4th at 1288.

This Court has previously determined that, "in defining the forum we have focused on the access sought by the speaker." *Cornelius*, 473 U.S. at 801. Here, Petitioner sought access to the public address system during football games in which it participated, and that is the forum that ought to be analyzed. The Eleventh Circuit, by contrast, noted that it was "focus[ing] [its] government speech inquiry primarily on the pregame speech over the PA system at FHSAA football championship games, as opposed to speech *at any other game, sport, or period of the championship game*." *Id.* at 1288 (emphasis added). By limiting its analysis of the forum to only the pregame period during one particular game, the court purposefully excluded from its consideration access to the loudspeaker the FHSAA routinely provided to petitioner, other participant schools, and sponsors throughout the season. In other words, it removed every relevant consideration from the forum analysis.

The Eleventh Circuit confirmed that at playoff games the school chose the PA announcer and the school's designee prayed over the loudspeaker prior to the start of the game. *Id.* at 1277. The Central Florida Sports Commission, which is not a government entity, chose the PA announcer for the championship game. *Id.* at 1276. The FHSAA allowed sponsors access to the loudspeaker during the pregame period at the championship to provide messages of the sponsors' respective choices. *Id.* at 1290. The schools were

permitted PA announcers during halftime to make a halftime presentation, which did not require review or approval of the FHSAA in advance of the game. *Id.* at 1276. The Eleventh Circuit's exclusion of all this information fundamentally flawed its analysis of the relevant forum.

In addition to the inexplicably narrow scope of the Eleventh Circuit's definition of the forum it analyzed, its conclusion still does not pass constitutional muster. The court reasoned, "[t]he few scripted promotional messages from sponsors do not transform the pregame PA speech into private speech." *Id.*; *but see Shurtleff*, 596 U.S. at 258. ("[T]he city's lack of meaningful involvement in the selection of flags or the crafting of their messages leads us to classify the flag raisings as private, not government, speech."). In 2012, there was prayer over the loudspeaker during the pregame period of the championship game. The FHSAA disavows any knowledge of the circumstances under which this occurred. *Cambridge Christian*, 115 F.4th at 1277. The Eleventh Circuit dismissed the relevance of this altogether, remarking that "[o]ne instance does not a history make." *Id.* at 1289.

The facts disregarded by the Eleventh Circuit are actually critical – or should have been – in determining the nature of the forum at issue. "The Court has [] held that a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Summum*, 555 U.S. at 469–70. The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent. *Cornelius,* 473 U.S. at 802. Here,

we have a loudspeaker at a stadium open to the public – clearly instrumentalities of conveying and hearing expressive activity protected by the First Amendment. It is undisputed that the loudspeaker was open to some groups for some messages. Hence, the FHSAA created a limited public forum. "In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint neutral." *Summum*, 555 U.S. at 470.

C. FHSAA's denial of Cambridge Christian's request to pray over the loudspeaker prior to the start of the football game on the basis that it is religious speech, while permitting commercial and other non-religious speech, is unconstitutional viewpoint discrimination in violation of the First Amendment.

1. FHSAA's prohibition of use of the loudspeaker for pregame prayer during the championship game between two Christian schools constituted impermissible viewpoint discrimination.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "Viewpoint discrimination is [] an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829. "When a government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'" *Shurtleff* 596 U.S. at 258 (quoting *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 112 (2001)).

In *Cambridge Christian*, the FHSAA explained that its denial of the schools' requests to pray over the loudspeaker before the game was based on its concern that permitting the prayer would violate the Establishment Clause, specifically referencing this Court's Opinion in *Santa Fe Independent School*

District v. Doe, 530 U.S. 290 (2000). *See* 115 F.4th at 1278. This is a prime example of the "strange world in which local governments have sometimes violated the First Amendment in the name of protecting it" while the *Lemon* test still reigned. *Shurtleff*, 596 U.S. at 280–81 (Alito, J., concurring). But, as Justice Alito went on to remark, it is "less clear [] why this state of affairs still persists [as] *Lemon* has long since been exposed as an anomaly and a mistake." *Ibid.*

Apart from being a clearly erroneous and untenable legal position, the FHSAA's initial rationale for its position vis-à-vis pregame prayer clearly evinces that the FHSAA censored the prayer because of its religious nature. The circumstances here are strikingly similar to those in *Shurtleff*, where "Boston acknowledge[d] that it denied Shurtleff's request because it believed flying a religious flag at City Hall could violate the Establishment Clause.'" *Shurtleff*, 596 U.S. at 258. Thus, the Court should reach the same conclusion as it did in *Shurtleff*: "that Boston's flag-raising program does not express government speech [and] the city's refusal to let Shurtleff and Camp Constitution fly their flag based on its religious viewpoint violated the Free Speech Clause of the First Amendment." *Id.* at 258–59.

This Court must intervene in this matter to continue to ensure that "the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint." *Summum*, 555 U.S. at 473.

2. At a minimum, FHSAA's prohibition of use of the loudspeaker for pregame prayer at the championship game was a content-based restriction, and the Eleventh Circuit's decision conflicts with this Court's decision in *Reed v. Town of Gilbert* mandating that all content-based restrictions satisfy strict scrutiny.

"[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination…And, it must be acknowledged, the distinction is not a precise one." *Rosenberger*, 515 U.S. at 830–31 (internal citation omitted). So, even if the Court does not find that the censorship of pregame prayer represents viewpoint discrimination, there is no escaping that the restriction was content-based as it was aimed specifically at prayer.

The Eleventh Circuit's excusal of the FHSAA's content-based restriction without subjecting it to strict scrutiny conflicts with well-established First Amendment jurisprudence. "Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). *See also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.").

As strict scrutiny is "the most demanding test known to constitutional law," *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997), it is unlikely this

discriminatory restriction would have been upheld had the Eleventh Circuit rightly applied the law. The FHSAA certainly would have been unable to demonstrate that it had a compelling state interest in restricting two *private* Christian schools from opening their high school football game with prayer by a *private* individual, particularly where they opened with prayer over the loudspeaker at nearly every regular season and playoff game without incident, and the championship game a few years earlier in which a different Christian school participated was also opened with pregame prayer over the loudspeaker.

Even if the FHSAA could articulate a compelling interest in prohibiting pregame prayer in the limited public forum it created (which it cannot), the FHSAA would still have to prove that its restriction was narrowly tailored to achieve its stated end. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."). It is the FHSAA's burden to prove that its restriction is narrowly tailored. *See McCullen v. Coakley*, 573 U.S. 464, 495 (2014); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Total prohibitions on constitutionally protected speech are substantially broader than any conceivable government interest could justify. *See Bd. of Airport Comm'rs of City of*

L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987). A narrowly tailored regulation of speech is one that achieves the government's interest "without unnecessarily interfering with First Amendment freedoms." *Sable Commc'ns*, 492 U.S. at 126.

Because the Eleventh Circuit failed to hold the FHSAA to its burden to defend its content-based restriction against strict scrutiny, the discriminatory prohibition against pregame prayer must fail.

III. Even under the three factors predominantly relied upon by this Court in *Shurtleff*, the Eleventh Circuit's decision below conflicts with this Court's precedent because Cambridge Christian School's proposed loudspeaker prayer would not constitute government speech.

As discussed *infra,* the Eleventh Circuit erred by creating and applying a rigid tripartite test to discern whether the speech at issue was government speech, rather than taking a holistic approach as this Court has directed lower courts to do. This is problematic because "treating those factors [highlighted by the Court] as a test obscures the real question in government-speech cases: whether the government is *speaking* instead of regulating private expression." *Shurtleff*, 596 U.S. at 261–62 (Alito, J., concurring). Notwithstanding that this is the wrong approach, the factors compel against finding government speech in this case.

A. The historical use of the loudspeaker at FHSAA games weighs against a finding of government speech, because Cambridge Christian School opened with prayer at all of its regular season home and playoff games, and a previous championship game.

The first prong of the test applied by the Eleventh Circuit is history. The court said, "[t]his factor directs us to ask whether the type of speech under scrutiny has traditionally 'communicated messages' on behalf of the government." *Cambridge Christian*, 115 F.4th at 1289 (internal quotes and citations omitted). It is unclear what "type of speech" should be subject to this analysis. The Eleventh Circuit determined the type of speech was "pregame speech over the PA system at football finals." *Id.* Accepting the limited scope imposed by the lower court, history shows that pregame speech over the PA system included speech by private entities, and even included pregame prayer at the 2012 championship game just a few years prior. *Id.* at 1288.

B. The public would not perceive the proposed prayer to be "government speech" where it would be given by a representative of one of the participating schools whose identity and affiliation would be announced immediately preceding the prayer.

The second factor weighed by the Eleventh Circuit was whether the speech at issue would be perceived as government endorsement of religion. 115 F.4th at 1290. Under the circumstances of this case, there is no plausible reason why the public would perceive a pregame prayer presented by a designee of one of the

two participating Christian schools as government speech.

The FHSAA championship game is held at a private stadium. The game's announcer is selected and paid by a private organization. Various private messages are broadcast over the loudspeaker. Even if many of these messages are approved by the FHSAA before being broadcast, as this Court observed in *Matal*, "[i]f the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently... It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services." 582 U.S. at 236. This principle is equally applicable to the array of approved sponsor messages broadcast at the football game.

Even if logic alone were not enough for the hearer to separate the messages spoken over the loudspeaker from the FHSAA, the person offering the prayer over the loudspeaker could announce that the prayer is being offered by the school and not the government. Problem solved. "[T]here is no obvious reason why a government should be entitled to suppress private views that might be attributed to it by engaging in viewpoint discrimination. The government can always disavow any messages that might be mistakenly attributed to it." *Shurtleff*, 596 U.S. at 266 (Alito, J., concurring).

C. The FHSAA did not exercise control over the loudspeaker at high school football games *except* for the pregame period at the championship game.

1. FHSAA had no written policies governing use of the loudspeaker at sporting events at member schools.

The Eleventh Circuit focused its analysis exclusively on written policies promulgated by the FHSAA guiding the announcer in his use of the loudspeaker during the pregame period of the championship game. *Cambridge Christian*, 115 F.4th at 1289–90. But the court acknowledged that there were no FHSAA policies governing announcements at regular season games other than a directive to maintain neutrality, *id.* at 1275, and the limited policies that governed use of the public address system at playoff games did not prevent prayer from occurring at those games. *Id.* at 1289.

Though FHSAA policies were not lacking to the same extent as City of Boston's in *Shurtleff*, 596 U.S. at 257 ("the city had nothing—no written policies or clear internal guidance—about what flags groups could fly and what those flags would communicate"), the absence of written policies for regular season games and the limited scope and reach of the policies governing post-season games indicates that the FHSAA did not seek to control all messages broadcast over the loudspeaker at its sporting events.

2. FHSAA was not involved in crafting or reviewing messages spoken over the loudspeaker at sporting events *except* for portions of end-of-season games.

In looking for indicia of government speech, it makes sense that control over the message would factor in. But control over only a portion of the messaging conveyed in the same forum implies that the forum is open to the public, and the government is but one speaker among many.

The lower court found that the FHSAA provides scripts to guide PA announcers during the pregame period of playoff and championship games. *Cambridge Christian*, 115 F.4th at 1276. The FHSAA takes no interest and has no involvement in what is spoken over the loudspeaker for any portion of any regular season game. *Id.* at 1275. Even at the post-season games, the FHSAA prescribes what the announcer will say for team lineups and athlete awards, and to lead into the presentation of colors and the national anthem, but the sponsor messages the announcer conveys are drafted and provided by the sponsor, not the government. *Id.* at 1276. During halftime, the loudspeaker is handed over to the participant schools to make a halftime presentation, which the school – not the government – creates.

The circuit court glossed over the inclusion of private speech in this forum, reasoning that because "the FHSAA has advance notice of (and, critically, control over) which entities will be submitting sponsor messages," and because of "their preexisting relationship with the FHSAA, the sponsors are generally familiar with the kinds of messages the FHSAA would deem appropriate. So the fact that the

FHSAA rarely rewords or rejects the proposed speech carries significantly less weight than it did in *Shurtleff*." *Id.* at 1294–95.

The facts in *Shurtleff*, however, are not as distinct as the Eleventh Circuit imagined.

> Boston maintained control over an event's date and time to avoid conflicts. It maintained control over the plaza's physical premises, presumably to avoid chaos. And it provided a hand crank so that groups could rig and raise their chosen flags. But it is Boston's control over the flags' content and meaning that here is key; that type of control would indicate that Boston meant to convey the flags' messages.

Shurtleff, 596 U.S. at 256.

Here, the FHSAA provided an announcer and a script to guide the order in which the various messages were to be presented and certain other guard rails, but this does not negate that most of the messaging spoken over the loudspeaker was created – and often even presented by – private, non-government entities.

As this Court cautioned in *Matal*, *supra*, "If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints." *Id.* at 235. The censored pregame prayer would have been private – not government – speech. It was censored because of its religious nature, as expressly stated by FHSAA officials upon denying the schools' request to pray.

CONCLUSION

The petition for a writ of certiorari should be granted and the Eleventh Circuit's judgment reversed.

Respectfully Submitted,

HORATIO G. MIHET
DANIEL J. SCHMID
KRISTINA S. HEUSER
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854

MATHEW D. STAVER
Counsel of Record
LIBERTY COUNSEL
109 Second Street NE
Washington, D.C. 20002
(202) 289-1776
court@lc.org

Counsel for Amicus

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