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 TEXAS ASSOCIATION OF PRIVATE AND PAROCHIAL SCHOOLS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is a nonprofit organization founded in 1978 to foster and support academic, athletic, and fine arts programs for private and parochial schools throughout Texas. From its original membership of 20 schools, *amicus* has grown to include 230 member institutions representing more than 40,000 students. Its member schools are organized into six classifications and participate in statewide competitions that are rooted in values of fair play, good fellowship, true sportsmanship, and wholesome competition.

Amicus regularly interacts with both private and governmental organizations to coordinate statewide competitions and championships in Texas. Its mission is to build leadership, integrity, and sportsmanship in young men and women through structured competition that respects the distinctive religious and cultural identities of each member school. Its vision is to support an inclusive competitive environment that encourages mutual respect across diverse worldviews, while promoting excellence in education, athletics, and the arts.

Amicus joins this brief in support of Petitioner Cambridge Christian School, Inc. because it has a strong interest in ensuring not only that parochial schools are afforded their constitutionally protected right to free

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* and its counsel, has made a monetary contribution to its preparation or submission.

expression, but also that the courthouse doors remain open to schools that would challenge unlawful restrictions on that right. This case is of interest to *amicus* because the Eleventh Circuit's decision, if not reversed, would undermine parochial schools' ability to challenge policies that violate their First Amendment rights.

INTRODUCTION & SUMMARY OF ARGUMENT

Petitioner filed this lawsuit to challenge Respondent's policy of disallowing pregame prayer over the public address system at state championship football games. It seeks three forms of relief: (1) equitable relief enjoining enforcement of Respondent's prayer ban; (2) declaratory relief that the ban violates its free-speech and free-exercise rights; and (3) nominal damages. *See* Pet. App.13a. The Eleventh Circuit only reached the merits of Petitioner's claims for the third form—ultimately rejecting them. *See* Pet.App.29a–32a. As for the first two, the court opined that Petitioner no longer had standing to pursue them and that its claims were mooted. *See* Pet. App.17a–29a.

Amicus agrees with Petitioner, which asks that the Court grant certiorari to reverse the Eleventh Circuit's decision on the merits with regard to all three types of relief sought. But, the Eleventh Circuit decision does more than misconstrue the Court's free-expression and Establishment Clause precedents. It also erroneously closes the courthouse doors to parochial schools who—if wrongfully denied the right to engage in constitutionally-protected religious activity—would try to challenge the unlawful prohibition. Accordingly, *amicus* respectfully asks that the Court also correct the Eleventh Circuit's

standing and mootness analysis to hold: (1) that Petitioner has standing to pursue equitable and declaratory relief; and (2) its claims seeking as much are not moot.

If the Court issued a merits-only reversal—reviving Petitioner's request for nominal damages but not for equitable or declaratory relief—it would leave parochial schools ill-equipped to seek judicial restoration of their free-exercise rights. True, schools could seek nominal damages each time an administrator improperly denied its students, faculty, or coaches the ability to partake in constitutionally protected activity. But as this Court has acknowledged, nominal damages hardly constitute "full redress" of an unlawful deprivation. *Uzuegbunam v. Preczewski*, 592 U.S. 279, 291 (2021). If equitable and declaratory relief are off the table, parochial schools retain few means to remove unlawful restrictions on free exercise.

FACTUAL BACKGROUND

The controversy that gave Petitioner standing to pursue equitable and declaratory claims—and the one the Eleventh Circuit acknowledges still affords it standing for the damages claim—arose in 2015. *See* Pet.App.2a, 29a–30a. That year, Petitioner's football team, the Fighting Lancers, clinched a spot in the state championship game. *See* Pet.App.2a. During the two-week span between qualifying for the championship and the game itself, Petitioner and its opponent jointly asked Respondent Florida High School Athletic Association for permission to broadcast a pregame prayer over the public address system.

Respondent denied the request. It informed the schools that it had a policy flatly banning prayer over the loud system. *See* Pet.App.198a–201a. Notably, Respondent did allow school representatives to make welcome announcements of a non-religious nature. *See* Pet. App.196a–197a. But prayer, Respondent asserted, would violate the Establishment Clause. *See* Pet.App.198a–201a.

In 2023, with Petitioner's case still pending, the state of Florida enacted Fla. Stat. § 1006.185. The statute requires Respondent and similar athletic organizations to allow high schools participating in state championships "the opportunity to make brief opening remarks" over the public address system, without regard to the "content" of the remarks. Fla. Stat. § 1006.185. Prior to the statute's enactment, this had been Respondent's practice for secular speakers—just not for those who wanted to pray. *See* Pet.App.196a–201a.

To this day, Respondent defends its 2015 decision. It has expressly refused to repudiate the prayer ban policy, asserting that the Establishment Clause not only allowed, but *compelled* it. *See* C.A. FHSAA Br.30; C.A. Dkt. 86 at 6. Respondent even posits that if it had expressly "disclaim[ed]" the prayer—or otherwise went to "extraordinary lengths" to publicly "disentangle itself from" it—that *still* would have violated the Establishment Clause. C.A. FHSAA Br.30.

Nevertheless, Respondent now claims that it would not violate the Establishment Clause to follow Fla. Stat. § 1006.185, even to allow prayer. *See* C.A. Dkt. 86 at 1. It first adopted this paradoxical view—which would appear to elevate the requirements of a state statute over those

of the Establishment Clause—in August 2023, after the Eleventh Circuit specifically requested briefing on the issue. *See* C.A. Dkt. 83, 86. The Eleventh Circuit deemed this sufficient to moot Respondent's equitable and injunctive relief claims. *See* Pet.App.28a.

ARGUMENT

I. The Eleventh Circuit's Standing Analysis Adopts an Overly Rigid, Binary Approach to Injury That This Court Has Never Sanctioned.

Our constitutional system does not afford litigants standing to put just any question before the courts, but only live cases and controversies. *See* U.S. Const. art. III, § 2. Standing requires, among other things, that the plaintiff has suffered an injury in fact. *See Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013). And where a plaintiff seeks equitable relief, this Court has long recognized that prospective injury can readily satisfy this requirement. *See, e.g., Swift & Co. v. United States*, 276 U.S. 311, 326 (1928) ("[A] suit for an injunction deals primarily, not with past violations, but with threatened future ones; and that an injunction may issue to prevent future wrong, although no right has yet been violated.").

To be sure, not all claims of prospective injury give rise to standing. The injury must be "actual or imminent," not "conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). But "actual or imminent" does not mean—and has never meant—that an injury must be "literally certain" to happen immediately. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). There need only be a "realistic

danger" of a direct injury. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988). The Court has held that even the "threat" of an injury can suffice where the prospect of follow-through is not "imaginary or speculative" but "quite realistic." *Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982).

There is no dispute that during the two-week period between clinching a championship berth and the game itself, Petitioner had standing to pursue equitable and declaratory relief when challenging the prayer ban. Its participation in the game—and corresponding exposure to the offending prayer ban—was certain. But the game has now been played, and Petitioner has not yet secured a spot in another state championship. Accordingly, the Eleventh Circuit has held that Petitioner no longer has standing. *See* Pet.App.17a–23a. To regain it, the court would require that Petitioner "win[] all of its playoff games leading to the state championship game, the final one." Pet.App.19a–20a. In other words, it must demonstrate certainty.

This requirement makes little sense. It extends far beyond the probabilistic standard this Court has consistently employed, *see, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (requiring a "substantial risk" of injury); *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 334 (1999) (requiring that injury be "substantially likely"); *Clinton v. City of New York*, 524 U.S. 417, 432 (1998) (requiring a "sufficient likelihood" of injury); *Pennell*, 485 U.S. at 8 (requiring a "realistic danger" of injury); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (same), and more closely resembles the "literally certain" standard that it has expressly rejected, *see Clapper*, 568 U.S. at 414 n.5.

Petitioner readily satisfies the Court's probabilistic standard. Petitioner's football team competes each season with the specific purpose of returning to the state championship. It successfully did so in 2015 and intends to do it again. *See* C.A. Dkt. 89-1 at 2 ("CCS intends and expects that its football team will return to FHSAA State Series competition."). Each season presents a renewed opportunity. When Petitioner succeeds, it will necessarily collide with Respondent's prayer ban policy again—thereby producing another injury. That more than suffices to create a "realistic danger" of injury. *Babbitt*, 442 U.S. at 298.

But under the Eleventh Circuit's novel standard, competition with the objective of a championship berth is not enough. Rather, teams must decisively establish that they *will* clinch a championship appearance. The Eleventh Circuit writes off Petitioner's chances of making the championship not with a sound application of this Court's precedents, but uninformed guesswork. "[G]iven the Lancers' past performance on the gridiron," it speculates, "there's nothing to suggest that the team's participation in a future football state championship is imminent or even likely." Pet.App.21a.

Standing must not turn on amateur high schools sports prognostication from appellate judges[2] musing about which teams are serious championship contenders and which are not. Indeed, the only way to conclusively demonstrate one's status as championship contender under this standard would be to clinch a spot in the championship. This all-or-nothing approach is not only

2. The district court never raised these concerns.

completely out-of-step with this Court's precedents, but it is practically unworkable—especially in the context of high school athletics. If Petitioner won its semifinal game and clinched a championship spot, it would have only two weeks within which to litigate the prayer ban issue before its standing dissipated, and another season would have to pass before it could once again prove its status as a championship contender.

If allowed to stand, the Eleventh Circuit's holding with regard to standing would shut the courthouse doors on parochial schools challenging unlawful restrictions on free expression. In contravention to this Court's consistent holdings on this point, the opinion below would relegate schools to passively enduring the "threat" of an offending policy, *Blum*, 457 U.S. at 1000–01, until such time as a conflict is "literally certain" to occur, *Clapper*, 568 U.S. at 414 n.5. Particularly in the world of high school athletics—where competition is dynamic and a team's standing relative to its peers is susceptible to rapid change—the Eleventh Circuit's approach to standing is untenable. It should be reversed accordingly.

II. The Eleventh Circuit Uncritically Accepted Respondent's New Version of the Prayer Ban Policy—Blessing a Thinly-Veiled Attempt to Manufacture Mootness.

Separately, the Eleventh Circuit held that Petitioners' equitable and declaratory relief claims were mooted by Respondent's purported acceptance of Fla. Stat. § 1006.185. Its rationale for so holding allowed Respondent to hold two logically inconsistent positions—one of which purportedly mooted Petitioners' requests for equitable

and declaratory relief, the other of which defeated its request for damages on the merits. The Court should correct this incoherent result.

Respondent's position throughout this litigation has been that tolerating *any* prayer over the PA system at FHSAA events would violate the Establishment Clause, and "[n]o amount of disclaiming would belie" that blunt fact. Dist. Ct. Dkt. 155 at 6. The Eleventh Circuit appears to agree. *See* Pet.App.41a ("Considering the context in which the prayer would have occurred, the identity of the speaker and any introductory disclaimer—if there were a disclaimer—would not have tipped the scales away from government endorsement in this specific case."). *Amicus* and Petitioner do not.

But if—assuming *arguendo*—Respondent and the Eleventh Circuit are correct, it follows that a Florida statute compelling Respondent to allow prayer over the public address system would necessarily amount to government speech, even if accompanied by a disclaimer. The newly-enacted Fla. Stat. § 1006.185 compels Respondent to allow just that. The statute affords each school competing in a state championship the opportunity to make whatever remarks they choose over the loudspeaker before the game—including prayer.

In the event of a conflict between a state statute and the Establishment Clause, the latter must win out. Any "act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). This should have forced Respondent (and the Eleventh Circuit) to select one of two positions—*either* pregame prayer over the loudspeaker amounts to impermissible government

speech, which would render a state statute compelling Respondent to allow it unconstitutional, *or* allowing schools the opportunity to pray over the loudspeaker does not amount to impermissible government speech, rendering the rationale behind the prayer ban policy incorrect. Choosing the former would allow Respondent to prevail on the merits in this litigation, but it would require resisting implementation of the new statute. Choosing the latter would mean complying with the new statute but ceding the Establishment Clause point in this litigation.

Instead, Respondent chose a third option. It asserts that the Establishment Clause compelled the prayer ban policy in 2015 but no longer does because of the new statute. *See* C.A. Dkt. 86 at 2 ("Under these circumstances, it does not violate the Establishment Clause to make the access to the PA system granted by section 1006.185, a facially neutral statute, equally available for religious messages (including prayers) as for any other type of speech."). This, of course, makes no sense. "[A]n enactment by a legislature cannot validate action which the Constitution prohibits[.]" *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 107 (1952).

Respondent attempts to square this circle by advancing a new position—undisclosed until the Eleventh Circuit expressly asked for supplemental briefing on Fla. Stat. § 1006.185—that the Establishment Clause does not prohibit prayer over the public address system *per se*, but only if other, non-religious speakers are disallowed access to the public address system. *See* C.A. Dkt. 86 at 7–9. It now claims that its opposition to prayer was not actually categorical, but merely a means of making sure that religious speakers did not get special "privileged access" to the public address system not available to

"secular speakers[.]" C.A. Dkt. 86 at 8. And because Fla. Stat. § 1006.185 requires that religious and secular speakers get access to the public address system on an equal basis, pregame prayer is now permissible. *See* C.A. Dkt. 86 at 7–9.

This answer contradicts both Respondent's prior statements and its conduct, both before this litigation and during. Respondent's position—prior to the Eleventh Circuit's request for supplemental briefing—had been that *any* prayer would violate the Establishment Clause, regardless of whether Respondent expressly "disclaim[ed]" it. C.A. FHSAA Br.30; *see also* Dist. Ct. Dkt. 155 at 6. Even going to "extraordinary lengths to disentangle itself from a prayer" would not suffice. C.A. FHSAA Br.30. And while Respondent now claims that the prayer ban policy served to prevent religious speakers from obtaining special privileges not afforded to secular speakers, the record clarifies that the inverse actually took place. Indeed, Respondent has conceded that secular speakers *have* been afforded the opportunity to make remarks—a privilege not afforded to religious speakers. *See* Pet.App.196a–197a.

Simply put, the Eleventh Circuit handed Respondent an opportunity to moot Petitioner's equitable and declaratory relief claims, and Respondent took it. It did so by conjuring up a new, previously unannounced version of its prayer ban policy that is both logically contradictory and ahistorical. The Eleventh Circuit uncritically accepted this incoherent position.

Mootness applies either "when the issues presented" in a case "are no longer 'live'" or when the "parties lack

a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). The Eleventh Circuit supposes that Respondent's purported new iteration of the prayer ban policy—adopted in response to its request for supplemental briefing about Fla. Stat. § 1006.185—renders Petitioner's requests for equitable and declaratory relief no longer "live." *See* Pet. App.26a–27a. But Respondent's own words and actions plainly belie the new version of the policy, which places Petitioner and other schools at a high risk that Respondent will continue suppressing prayer once this litigation is dismissed.

This Court has been properly "wary of attempts by parties"—including government actors—"to manufacture mootness in order to evade review." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York, New York*, 590 U.S. 336, 351 (2020) (Alito, J., dissenting). It has expressly held that the "voluntary cessation of challenged conduct does not ordinarily render a case moot," especially where the defendant could just as easily resume "the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012). Voluntary cessation of challenged conduct will not moot a case where "[t]here is no certainty that a similar course would not be pursued" once the case has been dismissed as moot. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Here, not only is there "no certainty" that Respondent will not implement its old version of the policy once this litigation concludes, but Respondent *expressly refused* to repudiate the old policy when the Eleventh Circuit gave it the opportunity to do so. *See* C.A. Dkt. 86 at 6.

It thus remains unclear whether the challenged conduct in this litigation has ceased *at all*—let alone whether Respondent would return to it upon dismissal. If nothing else, the new policy's incompatibility with Respondent's previous words and actions suggests that the second question is to be answered in the affirmative. And if Respondent refuses to repudiate its policy, then it is "no mere risk that" Respondent may "repeat its allegedly wrongful conduct"—it may never have stopped. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993).

By rubber-stamping Respondent's transparent attempt at manufacturing mootness, the Eleventh Circuit has opened the door to significantly more gamesmanship in free-exercise cases. If left unchecked, this decision would afford government actors nearly unlimited latitude to concoct farfetched, *post hoc* positions that have the appearance of mooting requests for equitable and declaratory relief. The Court has rejected this sort of gamesmanship in the past and should do so again here.

CONCLUSION

The Court should grant the Petition, not only to correct the opinion below on the merits, but also to address the Eleventh Circuit's standing and mootness analysis.

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