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 THE RELIGIOUS FREEDOM INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

The Religious Freedom Institute (RFI) is committed to achieving broad acceptance of religious liberty as a fundamental human right, a source of individual and social flourishing, the cornerstone of a successful society, and a driver of national and international security. Among its core activities, RFI equips students, parents, policymakers, professionals, faith-based organization members, scholars, and religious leaders through programs and resources that communicate the true meaning and value of religious freedom, and apply that understanding to contemporary challenges and opportunities.

RFI envisions a world that respects religion as an indispensable societal good and which promises religious believers the freedom to live out their beliefs fully and openly. RFI submits this brief because this Petition raises fundamental questions about the rights of private high schools, through their representatives, to practice their faith openly, including by engaging in religious prayer over a loudspeaker before football games.

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[1] Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties received timely notice of this filing. *Amicus* certifies that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The decision below—prohibiting a private religious school from delivering loudspeaker prayer before a state championship football game—rests on untenable premises. *First*, it presupposes that the Government must be scrupulously neutral towards religion, lest the Government be accused of violating the Establishment Clause by supposedly "endorsing" a religion. That is fundamentally wrong. Rather, "[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition." *Lee* v. *Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting). *Second*, it applied an endorsement test that this Court repudiated in *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507 (2022). To the extent the Eleventh Circuit's decision was compelled by *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000), that case should be overruled, and this case presents the perfect vehicle to do so.

The decision below is not just fundamentally mistaken. It is fundamentally mistaken on an issue of critical importance. The decision below threatens to restrict the constitutionally-protected, private religious speech of schools of all faiths, including not just Christian schools (such as Petitioner here), but Muslim schools, Jewish schools, and private schools steeped in other faiths. Any outward manifestation of religiosity by any such school at a public or even public-adjacent function would arguably violate the Establishment Clause. That conclusion turns this country's history and tradition upside down.

ARGUMENT

I. The Decision Below Relies On A Fundamentally Wrong Understanding Of The Establishment Clause

A. "[A] page of history is worth a volume of logic." *New York Tr. Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). And as history and tradition show, the government has long been able to offer religious invocation as part of government functions or recognitions, which applies *a fortiori* to the private, pregame loudspeaker prayer at issue here.

"Establishment Clause jurisprudence simply does not mandate 'content neutrality.'" *Santa Fe*, 530 U.S. at 325 (Rehnquist, J., dissenting). The text of Establishment Clause does not mandate neutrality. And there is no basis for inferring one historically.

Although the Founders were "careful to establish, protect, and defend religious freedom and equality," the Constitution "contain[s] no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings." *Wallace* v. *Jaffree*, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 470 (Boston, Little Brown & Co. 2d ed. 1871) (1868)).

The historical record is replete with examples of government-sanctioned prayer. George Washington's

inaugural address explained that "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States." *Lee*, 505 U.S. at 633 (Scalia J., dissenting) (quoting *Inaugural Addresses of the Presidents of the United States*, S.Doc. 101–10, p. 2 (1989)).

Moreover, "[b]eginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God," and post-Independence, "President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1984). Indeed, "[t]he Declaration of Independence ends with this sentence: 'And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.'" *Engel* v. *Vitale*, 370 U.S. 421, 450 (1962) (Stewart, J., dissenting).

Following that, "during the summer of 1789, when it was in the process of drafting the First Amendment, Congress enacted the Northwest Territory Ordinance that the Confederation Congress had adopted in 1787—Article III of which provides: 'Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'"

Lamb's Chapel v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment).

Even today, Congress prescribes a national day of prayer. See 36 U.S.C. § 119 ("The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals ").

B. Disposing of the canard of strict neutrality with regard to public invocations or expressions of religiosity also disposes of the "endorsement" analysis that featured in the decision below. As Justice Rehnquist has explained, "the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 325 (Rehnquist, J., dissenting). In other words, if one accepts the premise that the government must be strictly neutral towards religion—a premise that lacks an anchor in history or tradition, *supra*—then the endorsement analysis effectively collapses into merely an assessment of whether the challenged action is neutral as to religion. If it is not, a court will conclude that the government has "endorsed" a particular religion, thereby violating the Establishment Clause.

That is effectively the analysis that Respondent here engaged in. In explaining why it prohibited Petitioner from offering a pregame prayer over the loudspeaker before the state championship football game

in 2015, Respondent explained that it "gave the impression that it was endorsing the prayer by allowing the use of its PA system." Pet.App.200a–01a.

That cannot possibly be right. Nothing in the Establish Clause "compel[s] the government to purge from the public sphere" anything that endorses or "partakes of the religious." *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment). And the government cannot back itself into the same spot by recasting the challenged action as unlawful "endorsement" due to the religious nature of the activity: "The proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Comty. Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Indeed, the opposite is true—the discrimination against the religious speech at issue here violates the dictates of the First Amendment. *Shurtleff* v. *City of Boston,* 596 U.S. 243, 258 (2022) ("Boston concedes that it denied Shurtleff 's request solely because the Christian flag he asked to raise promoted a specific religion." (cleaned up)).

II. The Court Should Overrule *Santa Fe*

To the extent the endorsement analysis suggested by Respondent and accepted by the courts below is correct, *Santa Fe* should be discarded—and this case presents the ideal vehicle to do so.

A. If not already outrightly rejected, the endorsement test has been narrowed to the point that its contours are no longer discernable even under a microscope. As the Court explained in *Kennedy*, "this Court

long ago abandoned *Lemon* and its endorsement test offshoot." 597 U.S. at 534. Thus, "in place" of the endorsement test, *id.* at 535, courts are to "refer[] to historical practices and understandings," *Town of Greece* v. *Galloway*, 572 U.S. 565, 576 (2014).

And that is for good reason. The endorsement test makes little sense given this Nation's history and tradition. "[W]hat exactly qualifies as impermissible 'endorsement' of religion in a country where 'In God We Trust' appears on the coinage, the eye of God appears in its Great Seal, and we celebrate Thanksgiving as a national holiday ('to Whom are thanks being given')?" *Am. Legion* v. *Am. Humanist Ass'n*, 588 U.S. 29, 85 (2019) (Gorsuch, J., concurring) (quoting *Harris* v. *Zion*, 927 F.2d 1401, 1423 (7th Cir. 1991) (Easterbrook, J., dissenting)). Indeed, "[w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions." *Zorach* v. *Clauson,* 343 U.S. 306, 313–14 (1952); *Lamb's Chapel*, 508 U.S. at 400 (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which *itself* gives "religion in general" preferential treatment . . . forbids endorsement of religion in general." (emphasis in original)).

B. If the endorsement inquiry is off the table or has been narrowed to the point of uselessness—which this Court has undoubtedly signaled, and which is correct as a historical matter—then *Santa Fe* should be overruled.

Santa Fe turned nearly entirely on whether the school district in that case impermissibly "endorsed"

religion by permitting students to pray over a loudspeaker before football games. As the Court explained:

> [T]he District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion.

Santa Fe, 530 U.S. at 305; *id.* at 307 (referring to the "[t]he actual or perceived endorsement of the message"); *id.* at 315 (explaining the "policy was implemented with the purpose of endorsing school prayer"); *id.* at 316 ("Government efforts to endorse religion cannot evade constitutional reproach[.]").

To be sure, in *Kennedy*, this Court sought to distinguish *Santa Fe* on the basis that the student-led prayer there could be said to be "problematically coercive." 597 U.S. at 541. But coercion is simply the flip side of endorsement. *Lee*, 505 U.S. at 605 n.6 (Blackmun, J., concurring) ("[A]nytime the government endorses a religious belief there will almost always be some pressure to conform."). Thus, a concern for undue coercion cannot exist apart from endorsement; if the endorsement test is a dead letter, so too for any test centered on "coercion." And there is no

textual, historical, or traditional justification for laminating a "coercion" test onto the Establishment Clause either. See generally *Lee*, 505 U.S. at 631–46 (Scalia, J., dissenting).

C. This is a good vehicle to overrule *Santa Fe*. Respondent's then-Executive Director, Roger Dearing, said *Santa Fe* was "directly on point" in justifying Respondent's decision to prohibit the pregame prayer at issue. Pet.App.200a-01a.

Moreover, the district court found "precedence in … *Santa Fe*" because it "specifically considered 'the pregame invocations'" and "the threshold question was the same—whether the speech was government speech or private speech." Pet.App.65a n.4. Respondent contended that *Santa Fe* was "spot on" in defending the district court's judgment. Pet. 14. And in assessing whether the school prayer here was "government speech," the Eleventh Circuit invoked *Santa Fe*, Pet.App.35a, and then assessed whether the activity at issue here constituted an unwarranted "endorsement" of religion, *id* at 39a–45a.

Although the decision below was ultimately decided on free speech and free exercise grounds, *id*. at 33a–53a, both claims turned on whether pregame loudspeaker prayer constituted government speech; indeed, the Eleventh Circuit cited *Santa* Fe for this point in its free-exercise analysis, *id*. at 51a–52a. And the government-speech analysis cannot be disentangled from the endorsement test. See *Santa Fe*, 530 U.S. at 324 (Rehnquist, J., dissenting) ("The 'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and

private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect,' applies with particular force to the question of endorsement." (emphasis in original) (quoting *Bd. of Educ. of Westside Comty. Schs,* 496 U.S. at 250 (plurality opinion))). *Santa Fe*'s continued viability is thus squarely implicated in this appeal.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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