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

AMICUS CURIAE BRIEF OF NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONER

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Interest of Amicus Curiae

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,487 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.[1]

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication to ensure that they may broadcast their messages of hope through First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

NRB is deeply concerned about the expanding use of the endorsement test within the government speech doctrine. A form of this test was employed by the European Court of Human Rights to uphold an Irish law which banned religious speech from being broadcast over commercial radio or television stations. A pastor sought to run the following ad on a commercial radio station:

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[1] Pursuant to Supreme Court Rule 37.6, counsel for your amicus certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief. Counsel additionally certifies that he gave written notice more than ten days prior to the due date to counsel for both parties that he intended to file this brief in support of granting the writ.

> What think ye of Christ? Would you, like Peter, only say that he is the son of the living God? Have you ever exposed yourself to the historical facts about Christ? The Irish Faith Centre are presenting for Easter week an hour long video by Dr Jean Scott PhD on the evidence of the resurrection from Monday 10th - Saturday 15th April every night at 8.30 and Easter Sunday at 11.30am and also live by satellite at 7.30pm.

Murphy v. Ireland, App. No. 44169/98, slip. op. at 2 (2003).[2]

The ECHR held that this ban on broadcasting religious speech was not a violation of the pastor's right of freedom of speech. *Id.* at 21 ("[A] wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.")

The endorsement test allows American officials to accomplish much the same censorship as this Irish law; it permits officials to ban religious speech on the ground that someone may be offended.

The free speech rights of America's religious broadcasters are not safe if legal tests allow officials to curtail speech on the ground that they don't want to give offense by "endorsing" religious content.

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[2] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61207%22]}

Summary of the Argument

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). "The real crux of the problem, however, is determining when in fact the government is speaking." Mary-Rose Papandrea, *The Government Brand*, 110 NW. U. L. REV. 1195, 1198 (2016) (footnote omitted). "While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

In *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, this Court announced a three-factor test to determine whether speech is private or governmental. 576 U.S. at 210–213. Those factors are: (1) the history of the speech; (2) the endorsement test; and (3) the government's control over the speech. *Id.* at 210–13. *See also* Papandrea, *The Government Brand*, 110 NW. U. L. REV. at 1209 (This Court had introduced these factors in First Amendment cases before. *Walker* was the first time it delineated them as a formal three-factor set to define government speech.).

Walker badly misinterpreted precedent by wrongly extrapolating an endorsement test that *Summum* never adopted. *Walker*, 576 U.S. at 227 (Alito, J., dissenting). Further, the test that *Walker* applied descends directly from now well-abandoned *Lemon*-era rulings and suffers from the same

"ambitiou[s], abstract, and ahistorical" defects. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022).

Retaining the endorsement test broadens what the government may censor under the guise of "government speech." The result is presumptively unconstitutional viewpoint discrimination dressed in the government speech doctrine. This Court should reject the continued use of this flawed and outdated test.

This case presents the opportunity to do so. The Eleventh Circuit applied the endorsement test when assessing whether a private prayer on a state-owned PA system constituted government speech. It found, applying the test, that the prayer constituted government speech because a reasonable observer might perceive it as endorsed by the state. *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 115 F.4th 1266, 1290 (11th Cir. 2024). The Eleventh Circuit's decision is riddled with the same mistakes as *Walker*. It's holding rapidly expands the government's viewpoint censorship of private speech. We respectfully urge this Court to grant certiorari.

Argument

I. The Endorsement Test for Government Speech Should be Abandoned

A. The Endorsement Test was Incorrectly Extrapolated from *Summum*

In *Walker*, this Court held that speech may be treated as governmental if a reasonable observer would perceive it as state endorsed. *Walker*, 576 U.S.

at 212–13 (laying out one of three factors in a government speech analysis). While the endorsement test was applied to government speech before in *Santa Fe*, *Walker* was the first time the Court elevated public perception to a formal part of the government speech inquiry. Papandrea, *The Government Brand*, 110 NW. U. L. REV. at 1212. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307–08 (2000). In forming the endorsement test, *Walker* relied *exclusively* on language from *Pleasant Grove City v. Summum*, quoting that certain speech may be "closely identified in the public mind with the [State]" and thus appear to be endorsed by the government. *Id.* at 212 (brackets in original) (quoting *Summum*, 555 U.S. at 472). From this, *Walker* inferred that endorsement by perception could determine whether the government is speaking. *Walker*, 576 U.S. at 212–13 ("[A] person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message.").

But *Walker* created an endorsement test that *Summum* never adopted. In fact, *Summum* cautioned against it. *See Summum*, 555 U.S. at 474–76. *See also* Papandrea, *The Government Brand*, 110 NW. U. L. at 1213 ("The perception of a reasonable observer played a relatively small and uncertain role in Justice Alito's majority opinion in Summum."). It was Justice Souter, in a solo concurrence, who proposed that the endorsement test should guide the government speech inquiry. *See Summum*, 555 U.S. at 487 (Souter, J., concurring in judgment) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would

understand the expression to be government speech[.]").

The holding in *Summum* rested on the government's long historical tradition of "us[ing] monuments to speak to the public." *Summum*, 555 U.S. at 470. Although it referenced the perception-based inference of government speech, it did not adopt it as a standard for determining government speech. *Id*. at 474. The opposite is true. The majority rejected respondent's demand that "the City adopts or embraces the message that it associates with" by erecting a monument in a public park. *Id*. (brackets omitted) (internal quotation marks omitted). For good reason. Monuments and "written words" alike "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Id*. For instance:

> What, for example, is "the message" of the Greco–Roman mosaic of the word "Imagine" that was donated to New York City's Central Park in memory of John Lennon? Some observers may "imagine" the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and may "imagine" a world without religion, countries, possessions, greed, or hunger . . . . These text-based monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers[.]

Summum, 555 U.S. at 474–75

Walker "badly misunder[stood] *Summum*" when it attempted to use the case as the sole authority for the creation of a formal endorsement test. *Walker*, 576 U.S. at 227 (Alito, J., dissenting). If anything, *Summum* rejected the endorsement test. *Summum*, 555 U.S. at 476–77 (emphasis added) ("By accepting such a monument, a government entity *does not necessarily endorse* the specific meaning that any particular donor sees in the monument."). Given the test's dubious formation, several members of this Court have shown caution in relying on *Walker* in subsequent cases. *See. e.g.*, *Walker*, 576 U.S. at 222 (Alito, J., dissenting, joined by Roberts, C.J., and Scalia and Kennedy, JJ.) ("This capacious understanding of government speech takes a large and painful bite out of the First Amendment."); *Matal v. Tam*, 582 U.S. 218, 238 (2017) ("[Walker] marks the outer bounds of the government-speech doctrine."); *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 261–62 (2022) (Alito, J., concurring in the judgment, joined by Thomas and Gorsuch, JJ.) ("I cannot go along with the Court's decision to analyze this case in terms of the triad of factors . . . that our decision in *Walker* derived from *Pleasant Grove*"). It is more than appropriate for this Court to fully review this test.

This case is the perfect vehicle for that review. The Eleventh Circuit, in conducting an endorsement analysis, concluded that the conveyance of prayer over the loudspeaker "suggest[s] that observers would believe the government endorsed the messages." *Cambridge Christian*, 115 F.4th 1266, 1291 (11th Cir. 2024) (quoting *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1233 (11th Cir. 2019)). The Circuit relied near exclusively

on *Walker* to reach this conclusion.[3] *Id*. at 1289–93. If *Walker* "badly misunder[stood] *Summum*," then the Circuit did as well. *Walker*, 576 U.S. at 227 (Alito, J., dissenting). It ignored warnings in *Summum* against using an ambiguous endorsement test, and it ignored subsequent warnings from this Court in applying the "outer bounds of government speech doctrine" as a rigid test for government speech. *Tam*, 582 U.S. at 238.

B. The Endorsement Test Descends from Abrogated Establishment Clause Doctrine

In his *Summum* concurrence, Justice Souter claimed the endorsement test was "the best approach" to government speech analysis, as it "is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause." *Summum*, 555 U.S. at 487 (Souter, J., concurring in judgment) (citing *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 630, 635–636 (1989) (O'Connor, J., concurring in part and concurring in judgment)). The Court would go on to apply that test in *Walker*. *Walker*, 576 U.S. at 212–13. But this approach grounds the government speech doctrine in *Lemon*-era logic this Court has rejected. *Kennedy* 597 U.S. at 534.

Both the Establishment Clause's endorsement test and the government speech endorsement test rest on the same logic: If speech appears to be government-

[3] The Circuit either cited to *Walker*, quotations from *Summum* which *Walker* relied on, or on other rulings by the Eleventh Circuit citing to *Walker*.

endorsed, the government may suppress it while avoiding a First Amendment violation. *See Santa Fe*, 530 U.S. 290, 302–13 (2000).

The Establishment Clause endorsement test asked whether a reasonable observer would view the government as endorsing religious belief or "appearing to take a position on questions of religious belief." *Allegheny*, 492 U.S. at 594, 620. If so, the government may suppress the speech without violating the Free Exercise clause. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."). Failure to do so runs the risk of violating the Establishment Clause. *See Allegheny*, 492 U.S. at 594–95.

The government speech endorsement test asks whether a reasonable observer would view the government as endorsing speech, or if the speech is "closely identified in the public mind with the [State]." *Walker*, 576 U.S. at 212 (brackets in original) (quoting *Summum*, 555 U.S. at 472). If so, the government may suppress the speech without violating the Free Speech Clause. *Walker*, 576 U.S. at 207 ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."); *Santa Fe*, 530 U.S. at 307–08 (treating prayer on school property, at school-sponsored events, over the school's public address system, as government speech).

Both doctrines overlap. *See id.* at 302–13 (applying both a government speech endorsement test and an Establishment Clause endorsement analysis). It is no surprise, then, that some would seek to use the discredited Establishment Clause endorsement test by reincarnating it as the government speech endorsement test. For example, in *Summum*, "[e]ven though, for example, Establishment Clause issues ha[d] been neither raised nor briefed . . . [the] government speech claim ha[d] been litigated by the parties with one eye on the Establishment Clause" *Summum*, 555 U.S. at 486–86 (Souter, J., concurring in judgment) (cleaned up). Or in *Shurtleff*, "[t]he real problem . . . [didn't] stem from Boston's mistake about the scope of the government speech . . . . It thought displaying the petitioners' flag would violate the Constitution's Establishment Clause." *Shurtleff*, 596 U.S. at 276 (Gorsuch, J., concurring in judgment).

With this understanding, it makes little sense to abandon the endorsement test in one context and preserve it in another. "[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot" describing them as "ambitiou[s], abstract, and ahistorical." *Kennedy*, 597 U.S. at 534 (cleaned up) (quoting *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 48 (2019)). "[T]hese tests invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators." *Kennedy*, 597 U.S. at 534 (internal quotation marks omitted) (quoting *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768–769, n. 3 (1995)).

How then can the endorsement test in a government speech context be considered good law?

See Summum, 555 U.S. at 487 (Souter, J., concurring in judgment) (The adoption of the endorsement test in government speech doctrine "would thus serve coherence within Establishment Clause law."). *See also Kennedy*, 597 U.S. at 534 ("[T]his Court long ago abandoned Lemon and its endorsement test offshoot.") *See also* Stephanie Barclay. *The Religion Clauses After Kennedy v. Bremerton*, 108 IOWA L. REV. 2097, 2106 (2023) ("[The *Santa Fe*] reasonable observer analysis is likely no longer good law, as it is part of Lemon's 'endorsement test offshoot' the Court disavowed"). If it somehow still is good law, there is no reason it should be. The government speech endorsement test suffers from the same ambitious and abstract application that its predecessor did. *See Walker*, 576 U.S. 200, 221–23 (2015) (Alito, J. dissenting). And worse, leaving it alive simply permits courts to relabel Establishment Clause claims as government speech claims and circumvent any admonishment they might have received from citing to *Lemon* or its endorsement progeny. *See Summum*, 555 U.S. at 486 (Souter, J., concurring in judgment); *Shurtleff*, 596 U.S. at 276 (Gorsuch, J., concurring in judgment).

Here, the Eleventh Circuit does exactly that. It simply changed labels from its earlier Establishment Clause holding to announce the same result under the government speech test. This sleight of hand is readily apparent from the record. In 2015, FHSAA informed CCS that it could not pray over the loudspeaker because, in its view, *Santa Fe's* Establishment Clause holding, grounded in *Lemon*, was "directly on point." *Cambridge*, 115 F.4th at 1278. But when FHSAA submitted its appellate brief in

October 2022, this Court had decided *Kennedy* and made clear that *Lemon* was abandoned. FHSAA then revised its position, asserting that *Santa Fe* remained "spot on," because of its government speech holding. C.A. FHSAA Br.21. But this argument is "simply an old wine in a new bottle." *Culhane v. Aurora Loan Servs. of Nebraska*, 708 F.3d 282, 294 (1st Cir. 2013) (citation omitted). Ultimately, FHSAA was concerned with creating an Establishment Clause violation by permitting the prayer. *Cambridge Christian*, 115 F.4th at 1278. It is no doubt that the claims here have "been litigated by the parties with one eye on the Establishment Clause," *Summum*, 555 U.S. at 486 (Souter, J., concurring), and "[t]he real problem . . . [didn't] stem from . . . the scope of the government speech[.]" *Shurtleff*, 596 U.S. at 276 (Gorsuch, J., concurring in judgment). FHSAA thought that permitting petitioners prayer "would violate the Constitution's Establishment Clause." *Id.* At the same time, FHSAA recognized that it could no longer present a *Lemon* era argument. C.A. FHSAA Br.21. So it clothed its claim as government speech. The Eleventh Circuit has planted seeds that threaten to grow into a new *Lemon* tree. This rehabilitation of *Lemon* will likely continue unless this Court expressly abandons the endorsement test that permits this relabeling game.

C. The Endorsement Test Ignores the Purpose of the Government Speech Doctrine Determining: Who is Speaking

The purpose of the government speech analysis is to determine the identity of the speaker. *See Summum*, 555 U.S. at 470 ("There may be situations

in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech . . . ."). *See also Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) (quoting *Summum*, 555 U.S. at 467) ("The ultimate question is whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the 'regulation of private speech.'"). The endorsement test disregards this purpose. Instead, the test depends on whether "observers [may] . . . appreciate the identity of the speaker." *Summum*, 555 U.S. at 471. But that assumption is untenable.

First, "[u]nless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed merely *appearing* to speak." *Shurtleff*, 596 U.S. at 265 (Alito, J., concurring) (emphasis in original). This perception-based inquiry inherently leads to inaccuracies. For example, a law invidiously censoring purely private speech could be upheld simply because it *appears* to be government-endorsed. *See* Steven Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH L. REV. 266, 271 (1987) (providing a similar critique for the *Lemon* endorsement test).

This is counterintuitive to settled doctrine. "[T]he government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469. But by the endorsement test's logic, appearance gives the government a "free hand" to regulate it. *Summum*, 555 U.S. at 469.

Speech appearing on government property, or through use of government forums, innately carries with it the appearance of government speech and thus a perception of endorsement. *See e.g.*, *Santa Fe*, 530 U.S. at 307–08. Justice Gorsuch's concurrence in *Shurtleff*, though critiquing the *Lemon* endorsement test, captures this flaw well with a hypothetical:

> Ultimately, *Lemon* devolved into a kind of children's game. To play, expose your [reasonable observer] to the display and ask for his reaction. How does he *feel* about it? Mind you: Don't ask him whether the proposed display actually amounts to an establishment of religion. Just ask him if he *feels* it "endorses" religion. If so, game over.

Shurtleff, 596 U.S. at 279 (Gorsuch, J., concurring in judgment) (emphasis in original).

The same children's game is played in the government speech endorsement test. To play, expose the reasonable observer to speech and ask if he thinks the government is speaking. Mind you: It does not matter who is *actually* speaking, nor if the government actually endorsed the speech. Only if he *feels* the government is speaking. If so, "game over." *Id*. The government may censor private speech freely.

Second, relying on the endorsement test permits the identity of the speaker to vary as courts "pick [their] own reasonable observer[.]" *Shurtleff*, 596 U.S. at 278 (Gorsuch, J., concurring in judgment) (cleaned up) (describing the endorsement test flaws in a *Lemon* context).

This Court has not provided a concrete understanding of who the "reasonable observer" is. In *Capitol Square*, Justice O'Connor's concurrence described the reasonable observer as "a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share." 515 U.S. at 780 (O'Connor, J., concurring in part). In Justice Stevens's dissent, he criticized Justice O'Connor's approach for supposing "a well-schooled jurist, a being finer than the tort-law model." *Id.* at 800 n.5 (Stevens, J., dissenting). In *McCreary County v. ACLU of Kentucky*, the Court explained that the reasonable observer is presumed to understand the relevant context and historical background and is not "an absentminded objective observer." 545 U.S. 844, 866 (2005). Other applications "suggested that a reasonable observer could make mistakes about the law or fail to consider all the facts." *Shurtleff*, 596 U.S. at 278 (Gorsuch, J., concurring in judgment) (citing *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1160–1161 (C.A.10 2010)). "Because it is not clear who the reasonable observer is and precisely what background knowledge [they] might have, this test leads to uncertainty and unpredictability." Papandrea, *The Government Brand*, 110 NW. U. L. Rev. at 1216 (footnote omitted).

The Eleventh Circuit dismissed any inquiry into the identity of the speaker. Instead, it wrongly held that the "identity of the speaker . . . would not have tipped the scales away from government endorsement in this specific case." *Cambridge Christian*, 115 F.4th at 1291–92. It made no difference to the court that the prayer "would have

been delivered by a school representative . . . perhaps even after an introductory disclaimer by the PA announcer, which would have allowed the fans to distinguish between FHSAA speech and school speech." *Id.* at 1291. Only that "the governmental nature of the message . . . indicates government endorsement" *Id.* (citing *Walker*, 576 U.S. at 217). But this approach cannot accurately determine whether a prayer, administered through the FHSAA PA system, was actually government speech.

First, it inappropriately categorizes all speech that *appears* to be endorsed by the government as government speech. On Friday, December 4, 2015, it was the University Christian representative who requested the FHSAA for permission to say a pregame prayer over the stadium loudspeaker. *Cambridge Christian*, 115 F.4th at 1278–79. There is no indication otherwise that the prayer could not be, as it was in 2012, delivered by a representative of one of the Christian schools. *Id.* at 1276–79. Yet the Circuit was unconvinced. The identity of the speaker did not matter. *Id.* at 1291–92. The fact that the speech came from government property was deemed determinative. *Id.* Such a finding lacks common sense and contradicts this Court's precedent. "While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469.

Second, the Eleventh Circuit relies on a hypothetical reasonable observer that is abstract, unmoored, and should be rejected. The Circuit pronounced that the type of messages conveyed over

the loudspeaker would lead "observers [to] believe the government endorsed the messages." *Id.* (quoting *Cambridge Christian*, 942 F.3d 1215, 1233 (11th Cir. 2019)). But no context is laid for who this observer is. It appears, according to the lower court's description, that the reasonable observer may lack either ears or simple reason. As the Circuit noted that any "introductory disclaimer—if there were a disclaimer—would not have tipped the scales away from government endorsement." *Cambridge Christian*, 115 F.4th at 1292. Simply put, what more would a reasonable observer require to be informed that the speech was not governmental than a disclaimer? The Circuit has, through the most ambiguous and arbitrary application of the endorsement test, selected the most offendable, illogical, and inflammatory observer to perceive government speech.

II. Retaining the Endorsement Test Invites Presumptively Unconstitutional Content-Based Suppression of Private Speech

While the government is free to impose content-based restrictions on its own speech, *Shurtleff*, 596 U.S. at 251, it may not impose content-based restrictions on private speech. *Summum*, 555 U.S. at 467–469.

"When a government does not speak for itself, it may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'"[4] *Shurtleff*, 596 U.S. at 258

[4] It is a longstanding rule that "[c]ontent-based laws" imposed on private speech "are presumptively unconstitutional" and survive

(quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). For example, in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, this Court found that a school district violated the Free Speech Clause by refusing a church's request to use school facilities for a film series, on the basis that the film content was religious. 508 U.S. 384, 394 (1993). In *Capitol Square*, this court held that an Ohio advisory board violated the Ku Klux Klan's free speech rights by refusing to issue a permit to erect a Latin cross in a public park, striking down the state's concern of religious endorsement. *Capitol Square*, 515 U.S. at 764–65 (internal quotation marks omitted) ("We find it peculiar to say that government promotes or favors a religious display by giving it the same access to a public forum that all other displays enjoy."). Or in *Shurtleff*, this Court found impermissible viewpoint discrimination when "Boston concede[d] that it denied Shurtleff 's request solely because the Christian flag he asked to raise promot[ed] a specific religion." *Shurtleff*, 596 U.S. at 258 (cleaned up).

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judicial scrutiny only if "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). *See also R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (Laws that censor based on content and viewpoint are "presumptively invalid"). A law is content-based if it cannot be "'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (brackets in original).

Despite this Court's strong concern against viewpoint discrimination, it seems counterintuitive that the Court would maintain a test that empowers this behavior. The endorsement test "encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government[,]" permitting viewpoint discrimination of private speech by rapidly expanding the sphere of government speech. *Id*. at 265 (Alito, J., concurring in judgment). *Shurtleff* provided an excellent example of the expansive nature of the test:

> "[A] passerby on Cambridge Street" confronted with a flag flanked by government flags standing just outside the entrance of Boston's seat of government would likely conclude that all of those flags "conve[y] some message on the government's behalf." If that is the case, this factor supports the exclusion of private parties from using the flagpoles even though the government allows private parties to use the flagpoles to express private messages, presumably because those messages may be erroneously attributed to the government. But there 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.

Id. at 266 (quoting majority).

Under the endorsement test, this danger becomes structural. All that a government agency must do to censor disfavored private views is create the appearance of endorsement. If the message aligns

with its views, the government permits it. If it does not, the government rejects it. When faced with a viewpoint discrimination challenge, it can simply invoke the government speech doctrine, claiming a reasonable observer would believe the message to be its own.

That is exactly what has happened here. FHSAA denied Cambridge Christian's request to offer a private prayer over the loudspeaker because it was concerned that the message would run afoul of the Establishment Clause. *Cambridge Christian*, 115 F.4th at 1278. The concern is not novel. This Court has seen the same concern arise in viewpoint discrimination cases before. *See e.g.*, *Lamb's Chapel* 508 U.S. at 394; *Capitol Square*, 515 U.S. at 764–65; *Shurtleff*, 596 U.S. at 258. But here, the government blatantly relies on the endorsement test to justify viewpoint-based censorship. This Court should grant review to stop this subterfuge.

Conclusion

For the above-mentioned reasons, this Court should grant a writ of certiorari in this matter.

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