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 OF *AMICUS CURIAE* WILL WEATHERFORD IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other

INTEREST OF *AMICUS CURIAE*[1]

Will Weatherford, as *Amicus Curiae*, respectfully requests that this Court grant the Petition for Writ of Certiorari and reverse the Eleventh Circuit's decision below.

Will Weatherford is the former Speaker of the Florida House of Representatives and a father of four children who attend Cambridge Christian School. Will Weatherford supports this brief as a private citizen of the State of Florida.

SUMMARY OF THE ARGUMENT

This case presents an important question for the Court: Was it error for lower courts to consider possible spectator perception in deciding whether a prayer over a PA system at a football game between two private religious schools could be reasonably characterized as government speech? Applying this Court's recent First Amendment precedent as a guide, the answer is yes, the lower courts did indeed commit error. However, the government speech test as presently conceived unnecessarily complicates this analysis. Here, the Court can provide much needed clarity by abandoning the endorsement prong of the government speech test. Furthermore, the Court should reject the premise that a private religious school's representative's

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. *Amicus* provided notice to all parties in accordance with Rule 37.2(a).

prayer can unwittingly become government speech. Adopting principles of agency law to identify government speech ensures that a privately-led, pregame prayer is simply that.

This Court has long excluded listener perception as a way to resolve First Amendment questions. There is no constitutionally sound rationale for suppressing religious speech in the name of listener protection because the First Amendment does not contemplate the sensibilities of listeners. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). This Court has held that the right to speak freely cannot be curtailed unless it collides with the protected rights of another. *See id.* As there is no right to be free from *exposure* to religious expression, any suppression of speech in the name of such a non-existent right must fail. But as currently conceived, the government speech test can just as reasonably be used to suppress a pregame prayer as to allow it.

It is antithetical to concepts of free speech to curtail First Amendment Rights based on a hypothetical response of a hypothetical listener. Furthermore, this Court has consistently rejected the idea that religious actors can be unwittingly transformed into government actors when they make use of government services, platforms, or benefits.

Yet that is just what happened here. The Florida High School Athletic Association ("FHSAA") co-opted and then censored a privately-led pregame prayer. Then, in response to litigation, conjured the

theory that spectators at a championship game between two private Christian schools *might* have mistakenly attributed the prayer to FHSAA—a quasi-governmental association delegated authority by the state legislature to regulate high school athletics in Florida—if the prayer were amplified over the PA system. The only way to avoid misattribution, FHSAA argued, was to deny Cambridge Christian School ("CCS") access to the PA system.[2] To justify this abject discrimination, FHSAA claimed that use of the PA system was government speech. Because the government can curtail its *own* speech without violating the First Amendment, under FHSAA's logic, there was no First Amendment violation for the court to grapple with. Unfortunately for FHSAA, the religious protections of the First Amendment are stronger than the subjectively flawed discriminatory reasoning of FHSAA officials.

The Eleventh Circuit, in first reversing the district court for applying the wrong legal test, held that under the government speech test, the district court should have considered three things: (1) "the history of the government's use of the medium for

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[2] Following FHSAA's flawed logic to its conclusion, permitting a an official from a private religious school to stand at the 50-yard line and offer a prayer would not be perceived as government speech, but simply handing that person a microphone changes that perception? Both the players and spectators were accustomed to observing prayers at school events—after all, both participating teams are private religious schools. It is an absurd result indeed to assume family members who enrolled their children in private religious schools would suddenly perceive a prayer over a PA system—when they witness prayers at every school event—as endorsed government speech.

communicative purposes," (2) the "implication of government endorsement," and (3), the "degree of government control over those messages." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1223 (11th Cir. 2019).

On remand, the district court concluded that pregame use of the PA system was historically linked to government speech, closely identified in the public mind with the government, and significantly controlled by FHSAA. *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 2022 WL 971778 at *6, Mar. 31, 2022 (M.D. Fla. Tampa Div.). Absent from this analysis was the necessary objective question of whether a private prayer could be attributed to the government without *any* explicit delegation of authority.

This time, the Eleventh Circuit accepted the acrobatic logic that if a hypothetical spectator *could* erroneously assume the prayer heard on the PA system was government speech, then the prayer uttered over the PA system *must* have been government speech. Despite the existence of ample "background circumstances" that supported the conclusion that the prayer was not government speech, the Eleventh Circuit affirmed the district court and permitted religious discrimination against CCS. *See Ames v. Ohio Dep't. of Youth Serv's*, 605 U.S. ----, 145 S. Ct. 1540, 1543 (2025).

By transforming private speech like CCS's pregame prayer into government speech, government actors can avoid defending against claims of

viewpoint discrimination. The government speech test allows government actors to shift the analysis away from the government's discriminatory actions and onto subjective questions of history, endorsement, and control. *See Ind. Univ. Chapter of Turning Point USA v. City of Bloomington, Indiana*, 641 F. Supp. 3d 548, 559 (S.D. Ind. 2022); *Dean v. Warren*, 12 F.4th 1248, 1265 (11th Cir. 2021).

This Court warned that the government speech test was "susceptible to dangerous misuse" as a mechanism for suppression. *Matal v. Tam*, 582 U.S. 218, 235 (2017). The inclusion of subjective factors, particularly the endorsement prong of the government speech test, promotes abuse. *See id.* Here, the Court should decline to consider whether speech is "closely identified in the public mind" with government speech and instead rely on objective criteria and determine if the speech in question was *actually* government speech. *See id.* at 238. Such an approach accords with precedent, rejects the transformation of private citizens into government agents, and can be readily applied with reference to agency law.

Even after this Court overturned the *Lemon* test and discarded the idea that "the Establishment Clause is offended whenever a reasonable observer could conclude that the government has endorsed religion," a pervasive belief that the Establishment Clause requires the exclusion of religious speech from the public sphere remains. *See Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 533 (2022) (quotations

omitted) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971)).

Regardless of the legal vehicle used to accomplish censorship, protecting observers from various hypothetical harms is often a justification. *See Cohen v. California*, 403 U.S. 15, 21 (1971) (protecting listeners from obscenity); *Tinker*, 393 U.S. at 507 (protecting schools from possibility of disruption); *Fulton v. City of Philadelphia*, 593 U.S. 522, 531 (2021) (protecting foster parents from sincerely held religious beliefs); *Lemon*, 403 U.S. at 622 (protecting against political division); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 627 (protecting marginalized groups from bias); *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (protecting onlookers from taking offense).

The government speech test was first conceived to determine if government subsidized speech could be regulated without offending First Amendment principles. But even in this limited category of speech, the test soon gave rise to disparate results. Doctors who received federal funds suffered no First Amendment harm when they were barred from advising their patients about abortion. *Rust v. Sullivan*, 500 U.S. 173, 174 (1991). And in the context of a government program, the attribution of such speech to the government accords with agency law's conception of a principle and an agent. But ten years later, lawyers who could not advise their clients to challenge government benefit determinations as a condition of participation in a government program

did suffer a First Amendment harm. *Legal Serv's. Corp. v. Velazquez*, 531 U.S. 533, 537 (2001). Over time, the test was expansively applied beyond government subsidized programs to parades, license plates, public park displays, state university cheerleaders, art installations, roadside memorials, insurance regulation, and more. *Leake v. Drinkard*, 14 F.4th 1242, 1245 (11th Cir. 2021); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009); *Dean*, 12 F.4th at 1265; *Small Bus. in Transp. Coal. v. Bowser*, 610 F. Supp. 3d 149, 155 (D.D.C. 2022); *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1114 (10th Cir. 2010); *NRA of Am. v. Vullo*, 602 U.S. 175, 186 (2024).

The government speech test permits censorship by subjectively attributing private speech to the government. Common sense and well-established agency law suggests speech should only be attributed to its objectively identifiable speaker, but the endorsement prong of the government speech test too easily transforms the religious expressions of private speakers into government speech—thus stripping it of important First Amendment protections.

Under the government speech test, whether someone is a government speaker can be settled by mere perception of government endorsement or attribution. This subjective question shifts the analysis away from the actual speaker and onto the potentially incorrect perception of a casual observer.

This factor allows mistaken identity to be the legal identity of the speaker.

The government speech test absolves government actors of viewpoint discrimination. The doctrine catapults the legal analysis away from the constitutionally required burden analysis and into essentially a blank check excuse for government actors to engage in viewpoint discrimination. The results are wildly inconsistent. The Court should abandon the subjective government speech test and use settled principles of agency law to properly identify government speech.

ARGUMENT

I. The Court Should Abandon the Endorsement Prong of the Government Speech Test.

FHSAA argued that because spectators at a football game *might* have perceived a pregame prayer as government speech, it could censor certain religious speech at the game. As such, because the government can sensor its own speech without violating the First Amendment, its discriminatory denial of access to the PA system could not be a First Amendment violation. This perfectly encapsulates the usefulness of the government speech test for avoiding responsibility for clear-cut viewpoint discrimination. The endorsement prong of the government speech test requires courts "to guess whether some undetermined critical mass of the community might nonetheless perceive the [government] to be advocating a religious viewpoint."

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995). But this subjective approach to finding government speech leads to inconsistent results.

A. The Endorsement Prong Tips the Scales in Favor of Censorship.

As Justice Alito explained, the government speech test "obscures the real question" which is "whether the government is speaking instead of regulating private expression." *Shurtleff v. City of Boston*, 596 U.S. 243, 262 (2022) (J. Alito concurring). Employing the three-factor test allows the government to shift its burden from who was *actually* speaking to a highly manipulable question of who listeners may have *thought* was speaking.

Justice Ginsburg also objected to applying the label of government speech too broadly. In a concurring opinion, she explained that there were ample examples of the government taking positions at odds with the advertisements at issue, making it difficult to conclude that the government could simultaneously endorse them all. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 569 (2005) (J. Ginsburg, concurring). Beef producers were compelled to support government advertisements, but because the Court held that the advertisements were government speech, the compulsion did not represent a First Amendment violation. *Id.* at 559. But in light of other contradictory messages "Government conveys in its own name" Justice Ginsburg wrote that the

promotional messages at issue should not be considered "government speech." *Id.* at 569.

The same logic applies here. Just as in *Johanns,* FHSAA made contradictory statements. These contradictions oppose the possibility that FHSAA could have reasonable been perceived as the sponsor or source of the pregame prayer. Speech can either be attributed to the government or it cannot, and no complicated juggling of the facts should change that. Applying a subjective standard like the government speech test obscures the truth of who is speaking and promotes censorship.

B. The Endorsement Prong Justifies Censorship in the Name of Protecting Unsuspecting Listeners.

More than fifty years ago, this Court held that the right to free expression cannot be curtailed without evidence that the expression has infringed on the protected rights of another. *Tinker*, 393 U.S. at 513. Instead, the government "must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. But the endorsement prong of the government speech test is based entirely on concern for the "discomfort and unpleasantness" that *might* be experienced by an unsuspecting listener. The endorsement prong makes no inquiry into whether another's rights have been invaded, it only hypothesizes whether a message *could* be misinterpreted as government speech. Censorship

cannot be justified by concern that some unidentified listener at a football game *may* incorrectly conclude that a praying, private school representative is a government agent. Instead, the government should refrain from censorship of a "natural person[] acting on [his] own." *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n.*, 531 U.S. 288, 298 (2001).

Yet, the endorsement prong encourages courts to give weight to subjective criteria outside the control of the speaker. It suggests that if an unsuspecting listener *may* attribute the speech to the government, then the religious speaker *can* be censored. But if "the mere presumed presence of unwitting listeners . . . does not serve automatically to justify curtailing all speech capable of giving offense" then accidental misattribution cannot justify curtailing speech either. *See Cohen*, 403 U.S. at 21. Even fighting words cannot be censored unless they are "inherently likely to provoke [a] violent reaction." *See id.* at 20. It is first and foremost the actions of the speaker that give rise to government censorship. *See Tinker*, 393 U.S. at 513. But the endorsement prong prioritizes the hypothetical interpretation of a spectator over the actions of the speaker in deciding whether speech can be censored. The result is to grant more deference to profane, offensive, and even provoking speech than to the simple utterance of a pregame prayer.

C. The Endorsement Prong Infantilizes the Public.

The endorsement prong infantilizes the general public. Essentially, the more unintelligent the general public is (in whose eyes?), the more the government can censor speech because the unintelligent public might mistakenly perceive private religious expression as government religious expression. However, at the same time, the government that places "greater faith in the ability of individual voters to inform themselves" should also place greater faith in the ability of individual spectators to distinguish between government speech and private expressions of religious conviction. *See Tashjian v. Republican Party of Conn. et al.*, 479 U.S. 208, 220 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)).

Governments must not be permitted to censor speech based upon the inadequacies of the least informed listener. The Court has already rejected the theory of the government as "guardian[] of public morality" to justify suppressing speech. *See Cohen*, 403 U.S. at 22. In *Cohen*, the Court emphasized that it is not the job of the government to protect passersby from speech they would rather not hear. *Id.* at 21. Instead, it is the job of the passerby to avert her eyes. *See id.* This properly places power over exposure to speech in the hands of the public. *See id.* at 22.

In fact, the idea of government as guardian runs "a substantial risk of suppressing ideas in the process," a risk that was realized in this case. *See id.*

at 26. FHSAA took it upon itself to protect high school football spectators from public prayer, an act at odds with the proper role of government. FHSAA allowed commercial sponsors and school representatives to access the PA system to share advertisements, music, and entertainment. But when CCS asked to pray, FHSAA seized "upon the censorship of particular words"—a prayer—"as a convenient guise for banning the expression of unpopular views." *Id.* at 26.The

D. Endorsement Prong Encourages Outcome-Determinative Reasoning.

The government speech test—just like its cousins: the entwinement test, the public function test, the significant encouragement test, the willful participant in joint activity test, the state actor test, and the government control test—is a blank check for viewpoint discrimination. Each of these tests is used to determine when a private actor, sometimes in conjunction with a government actor, "becomes," a government actor. With the result of any of these tests in hand, a court can determine whether that actor is a private person entitled to Constitutional protections or a government actor constrained by them. The flaw of these balancing tests is that they can be manipulated to overstate the risk of private entities being confused with the government and therefore denied constitutional protection.

The Oklahoma Supreme Court recently relied on the state actor test and the public function test to revoke St. Isidore of Seville Catholic Virtual School's public school charter. *Drummond v. Okla. Statewide*

Virtual Charter Sch. Bd., 558 P.3d 1, 10, 13 (Okla. 2024). The court concluded that the charter constituted state "adoption" of sectarian principles and therefore violated both the Oklahoma Constitution and the United States Constitution. *Id.* The court took pains to describe St. Isidore as a private, religious institution but then foisted upon the school the title of State Actor by virtue of its newly minted charter. *Id.* The court reasoned that the Establishment Clause forbade the state from "establishing a religious public charter school," and that with a state charter in hand, St. Isidore was transformed into a government actor and was similarly constrained. *Id.* at 14. On these grounds, the court summarily dispensed with any free exercise claim. *Id.*

The Court held that St. Isidore was a "state-created school that [did] not exist independently of the State" so Free Exercise questions did not apply. *Id.* But this same outcome determinative logic could have been used to manipulate the facts of *Carson v. Makin* to deny the parents in that case access to government benefits for their children. *See* 596 U.S. 767 (2022). According to this flawed logic, one could conclude that the parents in *Carson* who received tuition vouchers acted "in furtherance of the State's objective" and their ability to pay for their children's private school education did "not exist independently of the State," therefore they were government actors, enjoined from supporting a religious school. *See Drummond*, 558 P.3d at 13. Such is the power of this family of subjective tests.

While the Oklahoma Supreme Court relied on the state actor test and the public function test to reach its conclusion in *Drummond*, the government speech test is similarly problematic. Its subjective nature allows judges and litigants to prioritize outcomes and preferred speech over constitutional protections. The Oklahoma Supreme Court determined that because St. Isidore's religious identity had been subsumed by its new government identity, it could not seek equal treatment with other private entities. *Id.* But this reasoning directly contradicts this Court's precedent.

In *Carson*, the Court held that "conditioning the availability of benefits" on disavowal of religious conviction, as FHSAA did, "effectively penalizes the free exercise of religion." 596 U.S. at 780 (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)). When CCS's religious message was unattractive to FHSAA administrators, FHSAA denied access to the PA system. And the government speech test made that possible. Just as the state actor test and the public function test allowed the Oklahoma Supreme Court to transform St. Isidore into a state actor, the government speech test allowed the Eleventh Circuit to give greater weight to certain facts and transform a pregame prayer into an impermissible government message.

The Court similarly invalidated the City of Philadelphia's attempt to transform Catholic Social Services into a government actor. *Fulton*, 593 U.S. at 522. In *Fulton*, the Court rejected the district court's conclusion that Catholic Social Services was

performing governmental work which constituted government speech. *Id.* The Court held that to condition Catholic Social Services' participation in foster care services on the disavowal of religious convictions, violated the First Amendment. *Id.* at 542.

The Court has also rejected the premise that "simply affixing a government seal of approval" to speech eliminates its First Amendment protection. *Matal*, 582 U.S. at 235. When Mr. Tam sought a trademark for his band, "The Slants," the U.S. Patent and Trademark Office marshalled the government speech test to attempt to defend against Mr. Tam's Free Speech claim. *Id.* at 235. But to no avail. The Court held that Mr. Tam's trademark could not be peremptorily "passed off as government speech." *Id.* at 236. But FHSAA passed off CCS's speech as government speech and eliminated CCS's First Amendment protection. *Cambridge Christian Sch., Inc.*, 115 F.4th 1266, 1289 (11th Cir. 2024). The government speech test paved the way.

E. The Endorsement Prong and its Bedfellows Lead to Inconsistent Outcomes.

More examples of disparate outcomes enabled by the government speech test can be found in professional speech cases. In 2001, the Court held that provision of legal services funded by a government program was private speech and could not be curtailed, but in 1991, held that medical advice funded by a different government program was government speech and not protected by the First

Amendment. *Legal Serv's. Corp.*, 531 U.S. at 549; *Rust*, 500 U.S. at 203.

The government speech test has been famously used to avoid forum analysis with unpredictable results. A flag raised at Boston City Hall is not government speech, while Pleasant Grove City's collection of privately donated religious monuments is government speech. *Shurtleff*, 596 U.S. at 258; *Pleasant Grove*, 555 U.S. at 471. In *Shurtleff*, city employees denied an application to raise a Christian flag at what the Court held to be a limited public forum. 596 U.S. at 272. Because this was a limited public forum, city officials violated the First Amendment when they discriminated against a Christian viewpoint. *Id.* at 259. But in *Pleasant Grove*, when the city solicited private memorial donations for a display in a public park, the Court determined the collection was not a public forum. 555 U.S. at 464. Instead, the collection of memorials was government speech, and a viewpoint discrimination claim could not apply. *Id.* These two cases hinged on the question of who an observer would have believed was speaking. *Shurtleff*, 596 U.S. at 255; *Pleasant Grove*, 555 U.S. at 470. Apparently in Boston, a flagpole at City Hall is clearly a venue for individual expression while a city park in Utah is not.

Cities across America painted "Black Lives Matter" murals following the death of George Floyd in 2020. Afterwards, different groups petitioned to have similar, yet opposing murals painted. Some requested murals with messages like "All Lives Matter" or "Blue Lives Matter." When those requests

were denied and legal challenges ensued, the courts were divided. Some held that rejecting the opposing murals violated the First Amendment, while others held that the original murals were government speech, immune from First Amendment challenges. *See, e.g., Ind. Univ. Chapter of Turning Point USA*, 641 F. Supp. 3d at 548; *Small Bus. in Transp. Coal.*, 610 F. Supp. 3d at 149; *Penkoski v. Bowser*, 548 F. Supp. 3d 12 (D.D.C. 2021). This microcosm of American disagreement is another example of the government speech test aiding and abetting viewpoint discrimination against disfavored speech.

But even where a message is clearly government speech, outcomes are not consistent. The Iowa and Texas legislatures recently passed legislation regulating materials provided in public school libraries. In subsequent legal challenges, two circuits came to opposite conclusions about whether the curation of books in school libraries represents government speech. The Eighth Circuit found it "doubtful that the public would view the placement and removal of books in public school libraries as the government speaking" when a library could simultaneously contain *Mein Kampf*, *The Prince*, and Plato's *The Republic* on its shelves. *GLBT Youth in Iowa Sch's Task Force v. Reynolds*, 114 F.4th 660, 668 (8th Cir. 2024). By contrast, the Fifth Circuit held that its public school library collections did represent government speech, even if it was one of those "situations in which it is difficult to tell." *Little v. Llano Cnty.*, 138 F.4th 834, 852 (5th Cir. 2025) (*quoting Pleasant Grove*, 555 U.S. at 470). Without an objective framework, divisions in interpretation will

only deepen. With the endorsement prong in hand, courts can come to opposite conclusions about government speech even where, as in Texas and Iowa, the facts are nearly identical.

Inconsistent results are a feature of the government speech test. As a balancing test, litigants can give greater weight to favorable facts and urge their preferred outcome in any variety of circumstances. And though the Court referred to license plates as the likely "outer bounds of the government-speech doctrine" those bounds have proven elusive and permeable. *See Matal*, 582 U.S. at 238 (citing *Walker*, 576 U.S. at 209-10).

The endorsement prong is particularly vulnerable to abuse because the outer bounds of when the public might attribute a message to the government are necessarily undefined. Litigants need not provide evidence of actual listener perception. Instead, they can merely present a dramatic picture of listener confusion or misattribution of the message to a government speaker. With this hypothetical harm in hand, litigants can place their thumbs on the scale for a finding of government speech.

Here, the Eleventh Circuit considered several factors in its public perception analysis then wrote that "[o]n top of all that the types of messages . . . also suggest that observers would believe the government endorsed the messages." *Cambridge Christian*, 115 F.4th at 1291 (quotations omitted). Absent from this subjective factor analysis was any actual "evidence that persons powerless to avoid [the PA messages

would] in fact object" or consider a pregame prayer to have originated from a government actor. *See Cohen*, 403 U.S. at 22.

II. The Court Should Reject the Judicial Transformation of Private Actors Into Government Agents.

For decades, courts have relied upon the government speech test and other judge-created standards to absolve government actors of responsibility for burdening religious expression. Rather than identify the actual speaker, courts muddy the waters by employing the endorsement prong to treat private actors like government agents. With these defenses in hand, government censors avoid responsibility for discrimination against religious speakers. The test catapults the legal analysis away from a simple question about who is speaking and into an affirmative defense to viewpoint discrimination.

The Court anticipated the Eleventh Circuit's misuse of the government speech test in *Matal*. 582 U.S. at 235. There, the Court narrowed the concept of government speech and cautioned against broadly applying it beyond its banks. *Id.* But the Court declined to remove the endorsement prong from the test when it decided *Matal*. *See id.* at 238. Thus, this subjective element is still causing problems today.

The endorsement prong asks a question that is a vestige of the *Lemon* Test: when may religious individuals speak? *See McCreary Cnty. v. ACLU*, 545

U.S. 844, 860 (2005) (discussing *Lemon*, 403 U.S. 602 (1971)). This question runs through free expression cases and invites the government to transform religious speech into government speech, thereby constitutionalizing censorship. Asking "when can religious individuals speak" confusingly implies that one's rights of religious expression are dispensed *ala carte* by the government. Such is not the case. The right question is: "when can the government censor religious speech?"—thus starting with the presumption that the speaker *already possesses* its right to speak and does not need to wait for the government's blessing. This reframing correctly assigns the limit to the government, just as written in the First Amendment. The Court's First Amendment precedent places that limit on one of the greatest dangers to free expression: "allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana." *Moody v. NetChoice, LLC*, 603 U.S. 707, 742 (2024). But enforcing this limit requires the Court to adopt an objective standard for determining when the government is speaking.

III. The Court Should Use Objective Principles of Agency Law to Find Government Speech.

An objective government speech test can borrow from agency law. Only when it is clear to all affected parties that the speaker is acting within actual, delegated government authority, is a government agent's speech attributable to the principal. After determining whether speech can appropriately be attributed to the government,

government speech should be further limited to purposeful communications that do not abridge the First Amendment rights of private individuals. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). This proposed objective test would improve public forum analysis and reduce unconstitutional censorship.

A. Agency Law Provides a Commonsense Metric For Determining If a Speaker is an Agent of the Government.

This agency law approach is a commonsense method for determining whether a message can accurately be called "government speech." The Courts should look to the actual authority granted to an entity or individual to speak on behalf of the government. Absent an explicit grant of authority, apparent authority is only indicated if the speech reflects the ordinary scope of the agent's government duties. In the case of library collections, a statute that regulates which books will be available in school libraries is an explicit grant of authority, indicating government speech. In contrast, CCS received no explicit grant of authority to speak for FHSAA over the PA system. Nor would a pregame prayer be reasonably considered within the ordinary scope of FHSAA's government role. As such, CCS's prayer cannot be attributed to FHSAA. To the contrary, attributing CCS's religious speech to FHSAA impermissibly abridged the First Amendment rights of a private entity. Under this test, the pregame prayer is not government speech because CCS cannot reasonably be construed as a government agent.

B. Limiting Government Speech to Purposeful Communication Eliminates Impermissible Censorship of Private Actors.

Under the currently conceived subjective government speech test, government actors can assign a label of government speech and then censor disfavored speech. An objective government speech test closes this loophole in First Amendment analysis by only finding government speech where there has been a purposeful communication of a government message. There must first be an identifiable government agent, and that agent must have intentionally issued the government message. Stated differently—unless it is clear that the individual is speaking on behalf of the government, any tie goes to the speaker and not to the government.

This proposed test recognizes only those intentional government messages issued by true government agents. This construction rejects the idea that an unsuspecting CCS representative can be transformed into a government agent merely by making use of the PA system. This logic is consistent with the conceptualization of the relationship between government and private entities in this Court's First Amendment precedent. In *Matal*, the Patent and Trademark Office could not co-opt a trademark applicant's message. 582 U.S. 218. In *Fulton*, the City of Philadelphia could not co-opt Catholic Social Service's religious expression. 593 U.S. 522. In *Kennedy,* the school district could not co-opt Coach Kennedy's private religious observance. 597 U.S. 507. And in none of these cases, could

government actors censor disfavored speech after placing upon it the label "government speech."

C. An Objective Test Tethered to Agency Law Will Improve Forum Analysis.

An objective government speech test will bolster forum analysis because it will narrow the circumstances in which the government speech test can be used as an affirmative defense for First Amendment violations. Without multiple factors to manipulate with hand selected facts, cases that properly belong under forum analysis will remain there. The urge to focus on the favored outcome will be curtailed by a clear, exacting standard. If this Court were to apply the objective government speech test in this case, the Court would find that CCS is not a government agent capable of issuing a purposeful government message. The case properly belongs within a forum analysis framework.

IV. FHSAA Engaged in Unjustifiable Viewpoint Discrimination in a Limited Public Forum.

FHSAA unconstitutionally silenced CCS's speech by denying CCS access to the PA system to pray. The PA system at issue in this case was a limited public forum "created for a limited purpose such as use by certain groups … or for the discussion of certain subjects.[3] Here, FHSAA reserved the limited public forum for interested parties to the

[3] Marc Rohr, *The Ongoing Mystery of the Ltd. Pub. F.*, 33 Nova L. Rev. 299, 307-308 (2009).

championship football game. Because CCS was a school competing in the championship game, they were an interested party. Still, FHSAA wrongfully excluded CCS based on the school's religious viewpoint.

A. Time, Place, And Manner Restrictions do not Justify FHSAA's Exclusion of CCS From the Limited Public Forum.

FHSAA's exclusion of CCS cannot be justified by time, place, or manner restrictions. Permissible restrictions must be content neutral, narrowly tailored, and provide "alternative channels of communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989). First, the restriction was not content neutral because the restriction was based solely on the religious content of the speech. Second, the restriction was not narrowly tailored to serve a governmental interest. FHSAA could just as effectively facilitate the high school football game without the restriction—we know this because FHSAA previously permitted prayer over the PA system without issue. Finally, FHSAA failed to provide CCS with "ample alternative channels of communication" because without the PA system, CCS was unable to communicate its message to its intended audience. FHSAA cannot justify its wrongful exclusion of CCS from the PA system.

B. Excluding CCS was Viewpoint Discrimination.

FHSAA engaged in unconstitutional viewpoint discrimination when it excluded CCS from accessing the PA system to offer a pregame prayer. Viewpoint discrimination is "presumed impermissible when

directed against speech otherwise within the forum's limitations." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("otherwise permissible subjects cannot be excluded [because they are] discussed from a religious viewpoint."). At other times, FHSAA granted access to the PA system for welcoming remarks, religious messages, and private advertisements. This disparate treatment was discrimination based on a religious viewpoint. Such a form of discrimination is "presumptively unconstitutional" and should be treated as such by this Court. *Iancu v. Brunetti*, 588 U.S. 388, 393 (2019).

CONCLUSION

This Court should grant Petitioner's Writ for Certiorari and reverse the Eleventh Circuit decision.

Respectfully submitted,

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