No. 24-1261

In the Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, INC., *Petitioner,*

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.

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

BRIEF OF *AMICUS CURIAE* PROTECT THE FIRST FOUNDATION SUPPORTING PETITIONER

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INTRODUCTION, SUMMARY, AND INTEREST OF *AMICUS CURIAE*[1]

In the decision below, the Eleventh Circuit held that the Florida High School Athletic Association ("FHSAA") may block a pre-game private prayer from being uttered over a loudspeaker that had been opened routinely to other private speech. Though the First Amendment forbids such viewpoint discrimination, the Eleventh Circuit held that the First Amendment was not even implicated—on the dubious theory that the proposed prayer, and by extension anything else that had ever been said by private parties on the loudspeakers, was government speech. That dangerous expansion of the already questionable government-speech doctrine flips the First Amendment on its head. The Court should grant review and reverse to stop governments from using this doctrine to silence disfavored viewpoints.

Amicus Protect the First Foundation, a non-profit, nonpartisan organization that advocates for protecting First Amendment rights, is concerned with the proliferation of expansive understandings of government speech because of the doctrine's tendency to "silence or muffle" what would otherwise be protected expression. *Matal* v. *Tam*, 582 U.S. 218, 235 (2017). Here, *Amicus* agrees that the Eleventh Circuit

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[1] This brief was not authored in whole or in part by counsel for any party and no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission. All parties received timely notice that this brief was forthcoming.

wrongly—and dangerously—extended this Court's government-speech precedents. Pet.29.

Amicus makes two further points in support of review. First, when public resources are used to fund viewpoint-restricted speech—whether viewed as government-favored private speech or the government's own speech—taxpayers are compelled to fund that speech. And, in the union context, this Court has recognized a First Amendment harm from compelled financial support for government-favored speech. This case presents an ideal vehicle for the Court to recognize that the same principle applies to the viewpoint-restricted compelled subsidization of government speech.

Second, many errors driving applications of the government-speech doctrine come from the misapplication of this Court's public-forum precedents. The loudspeaker here was, at least when private actors used it, a limited public forum—not a means for the government to express ideas. And since viewpoint discrimination is forbidden in public forums, the government violated the First Amendment when it prohibited religious speech despite allowing diverse secular speech. This case also presents a clean vehicle to resolve the conflict and confusion between this Court's government-speech and public-forum cases. For those reasons, this Court should grant review and reverse.

STATEMENT

FHSAA regularly lets others use its loudspeaker at the start of athletic events—without first approving the speech. App.196a-197a. It considered any speech spoken over the loudspeaker to be that person's alone. Pet.5-6; App.48a-49a; Br. of CCS at 25-28, No. 22-11222 (11th Cir.), Doc. 32. Different schools participating in those events thus take the opportunity to convey various messages, including welcoming remarks, player introductions, and sponsor advertisements. Pet.2-3; App.41a.

Not so with petitioner Cambridge Christian School. During the state championship football game, Cambridge sought to use its loudspeaker slot to offer a prayer to express thanks to God, solemnize the competition, and request God's help in ensuring a good game for players and fans alike. Record 11905, 11935-11937, 11952, 12690. But FHSAA rejected the school's message on the meritless theory that allowing a private party to offer prayer over its loudspeaker, even one open to other private speech, would violate the Establishment Clause. App.11a, 198a-199a.

Cambridge sued and FHSAA moved to dismiss, again raising its frivolous Establishment Clause argument. Record 673. The district court instead dismissed on a different meritless theory—that any speech over the loudspeaker "was government speech." Record 896. Accepting all factual allegations as true, the Eleventh Circuit found the speech claims plausibly alleged and reversed. App.162a. The district court again found that the speech was government

speech at summary judgment. App.68a. But this time, the Eleventh Circuit affirmed. App.36a, 52a-53a.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. The Court Should Reconsider Whether Viewpoint-Discriminatory Compelled Support for "Government" Speech Is Wholly Free from First Amendment Scrutiny.

As petitioner shows, the Eleventh Circuit dangerously expanded the government-speech doctrine in conflict with existing precedent. Pet.17-33. But even under a broader view of what constitutes government speech, the petition should still be granted because this case presents the Court with an ideal vehicle to reconsider its flawed prior holdings that government speech falls entirely outside the First Amendment's purview. While the government has substantial power to act in ways opposed by taxpayers, *speech* is constitutionally different from conduct, as the very existence of the First Amendment's Free Speech Clause confirms.

1. This Court has held that government speech is beyond the First Amendment's ambit. See *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015). As discussed below, that holding is in tension with this Court's repeated recognition of the dangers of compelled support for viewpoint-discriminatory speech. This case presents a clean vehicle to resolve that tension. And getting that question right is a matter of utmost importance, since "[f]undamental free speech rights are at stake." *Janus*

v. *American Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 886 (2018).

That private speech rights are implicated by the government-speech doctrine cannot seriously be questioned. When the government speaks, it necessarily does so with compelled funds—taxes.[2] This Court's precedents, however, set the overarching baseline principle that "no official, high or petty, can * * * force citizens to confess by word or act" ideas with which they disagree. *West Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943). Indeed, for decades, the Court has recognized that the right to speak includes both the right *not* to speak, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and the right not to be "compelled to *subsidize* the propagation of [opposed] political or ideological views," *Chicago Tchrs. Union* v. *Hudson*, 475 U.S. 292, 305 (1986) (emphasis added). Any system that compels a person's "propagation of opinions which he disbelieves" is, moreover, "tyrannical." *Id.* at 305 n.15 (quoting Irving Brant, *James Madison: The Nationalist* 354 (1948)). In recognition of that principle, this Court most recently held that "[c]ompelling a person to subsidize the speech of other *private* speakers" is a "significant impingement on First Amendment rights." *Janus*, 585 U.S. at 893 (quoting *Knox* v. *Service Emps. Int'l Union*, 567 U.S. 298, 310-311 (2012)).

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[2] The category of government speech covers expression by the government qua government: agency communications and similar affirmative statements. By contrast, speech by individual politicians—for example, when campaigning for reelection or when speaking or debating in Congress—is private political speech.

2. Yet this Court, through the government-speech line of cases, has carved out a large exception to the First Amendment's protection against compelled support for speech. By using necessarily compelled public funds to express a selective perspective on matters of controversy, the government forces many taxpayers to pay to advance viewpoints on political and social questions with which they disagree—the very harm this Court considered tyrannical when addressed in the public-union context. Just as government restrictions on or compelled support for speech are constitutionally different from government restrictions on or compelled support for conduct, so, too, government-compelled support for its own viewpoint-discriminatory *speech* is constitutionally different than compelled support for government conduct.

The problems posed by such compelled speech are particularly stark in the context of partisan messages issued by the government. If, in 2028, the White House were to hoist a flag or fund an ad campaign with a message supporting Vice President J.D. Vance as the Republican nominee—or a third term for President Donald Trump himself—it would be clear that the government was using compelled taxes or taxpayer-funded property to express a political message. The same would be true if California were to use state funds to erect a giant billboard supporting Governor Gavin Newsom's expected presidential run or attacking California Republicans. Such compelled support for overtly partisan political speech cannot be squared with the First Amendment.

But free speech concerns are implicated even where government speech is less clearly partisan. As this Court has recognized, "[T]he people lose when the government is the one deciding which ideas should prevail." *National Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 772 (2018). That is just what the government is doing when it uses taxpayer funds to express *ideological* viewpoints or positions on political questions. Redirecting public resources to support speech on one side of divisive issues, the government forces those who don't espouse its chosen message to fund a viewpoint they oppose. Put differently, viewpoint-based government speech on ideological issues—subsidized by the taxpayer—compels all taxpayers to speak. Such efforts have the self-evident goal of using the compelled funding and machinery of the State to manipulate public opinion.

3. Given this reality, the Court was incorrect to suggest in past cases that "the democratic electoral process" provides an adequate check on viewpoint-based government speech. See *Walker*, 576 U.S. at 207. Because citizens may "influence the choices of a government," the argument goes, they do not need First Amendment protection from government speech that runs counter to their political, social, or religious beliefs. See *ibid.* Such an argument proves too much, however, and could be applied to all infringements of the First Amendment. And it fails to recognize that *speech*—whether restricted, compelled, or subsidized by involuntary funding—is definitionally and constitutionally different from *conduct* under the First Amendment.

The First Amendment was adopted precisely because the Founders "[r]ecogniz[ed] the occasional tyrannies of governing majorities," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)), and the unique dangers and distortions of government manipulation of speech and other forms of expression and belief. In light of those dangers, it is poor comfort to tell a disfavored minority to take to the ballot box or public protests to influence the government to change the viewpoints it favors. That is particularly so given the risk that government may, as with the loudspeaker here, exclude that minority from speaking in a seemingly public forum like a sporting event, a park, or a public meeting under expanding claims that government ownership of a forum or of a channel of communication renders all speech using that forum or channel "government speech" that can freely be selected or restricted based on viewpoint.

So long as the members of the minority remain politically weak, they will be coerced to support speech with which they fundamentally disagree. Surely, the First Amendment—properly understood—has something to say when the government expresses viewpoints that are not held, and may even be vehemently opposed, by those forced to subsidize it.

4. Recognizing that the First Amendment has something to say vis-à-vis government speech would not, however, cripple the government's ability to operate. Contrary to this Court's prior holdings, a *carte blanche* carve-out of government speech from the First Amendment's protection does not follow from the

government's greater freedom to regulate or support *conduct*.[3] Nor is First Amendment scrutiny always fatal to viewpoint-neutral support for speech or for incidental speech support that does not unduly burden First Amendment rights. See *Free Speech Coal., Inc.* v. *Paxton*, 606 U.S. __, 2025 WL 1773625, at *11, *17 (June 27, 2025) (statute that incidentally burdened protected speech survived intermediate scrutiny).

To the contrary, even if the First Amendment applied to government speech, the government could still speak by providing information germane to its policies and programs—publishing laws, regulations, and guidance, for example—without treading into the dangerous territory of viewpoint-based speech. And any challenge to whether government speech were germane to the government's legitimate functions could be addressed the same way as in this Court's other compelled-speech cases—by "employ[ing] exacting scrutiny, if not a more demanding standard." *Janus*, 585 U.S. at 925.

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[3] The First Amendment, of course, does not prohibit the government from compelling or restricting *behaviors*. Laws may require citizens to pay taxes to support government operations and spending, to adhere to speed limits, to pay for roads and garbage collection, and to seek licenses for driving, hunting or flying planes. Again, *speech* is different. Some government speech is, of course, integral to government conduct, such as advocacy on behalf of the United States in international affairs or in court cases. But viewpoint-based advocacy within those confines is permissible not because the First Amendment does not *apply*, but because such collective speech is *necessary* to conduct international affairs and to participate in our adversarial judicial system and thus would survive any level of First Amendment scrutiny.

In any such inquiry, familiar First Amendment principles would apply: "[T]he State * * * must affirmatively establish the reasonable fit [the Court] require[s]." *Board of Trs. State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989). That means that any speech from the government would have to be "narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end." *Americans for Prosperity Found.* v. *Bonta*, 594 U.S. 595, 610 (2021). Requiring the government to prove that its speech is narrowly tailored to enable its legitimate conduct would be entirely consistent with this Court's longstanding recognition that, "[i]n the First Amendment context, fit matters." *Id.* at 609 (quoting *McCutcheon* v. *Federal Election Comm'n*, 572 U.S. 185, 218 (2014)). And it would end the anomaly inherent in the current government-speech doctrine that the First Amendment does not apply when the government compels support to further its *own* viewpoints as opposed to the favored viewpoints of third parties.

In short, whenever the government expresses a particular viewpoint, it compels support for speech. The same standards that apply in other compelled-speech and subsidy cases should thus apply to compelled subsidies of viewpoints expressed through government speech.

II. The Court Should Also Review Whether the Government Is Speaking When It Merely Facilitates Private Speech.

Even if this Court does not fully reconsider the First Amendment's role in policing compelled government speech, review would still be warranted to resolve the conflict and confusion between this Court's government-speech cases and its public-forum precedents.

1. Many of the compelled-speech harms addressed above could be avoided altogether if this Court were to endorse Justice Alito's conclusion that the government-speech doctrine does not apply when "the government is * * * merely facilitating private speech" and is not "actually expressing its own views." *Shurtleff* v. *City of Boston*, 596 U.S. 243, 263, 266 (2022) (Alito, J., concurring). Applying that standard, rather than the more malleable multi-factor standard for determining government speech established in other cases, *id.* at 252 (majority op.), would have made this case easy.[4] The FHSAA would not itself have been speaking had it allowed a student to use the limited public forum it created to pray at the championship football game. Rather, it would have been refusing to discriminate based on viewpoint in a forum that facilitates diverse student speech.

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[4] Indeed, using a variable test that includes among its factors "the extent to which the government has actively shaped or controlled the expression," *Shurtleff*, 596 U.S. at 252, inverts First Amendment fundamentals by suggesting that greater censorship and viewpoint discrimination would circumvent, rather than violate, the First Amendment.

2. Replacing the current government-speech factors—which, as three Justices have shown, are "an uncertain guide to speaker identity" anyway, *id.* at 266 (Alito, J., concurring)—with an objective speaker-focused view of government speech would neither meaningfully infringe on the government's ability to operate nor mean that the government would have to allow all speech. Rather, when private actors seek to use government property as a platform for their speech, this Court can (and should) instead rely on its public-forum precedents to identify means of allocating limited government resources compatible with the First Amendment.

To be sure, non-public forums would remain, by far, the "largest class of government property."[5] Usually, then, the government would be allowed to "preserve the property under its control for the use to which it is lawfully dedicated"—even if that means not allowing *any* private speech on the property. *Perry Educ. Ass'n* v. *Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) (quoting *U.S. Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129-130 (1981)). On the coin's other side, public streets, sidewalks, and parks would remain open for the exercise of First Amendment rights since they are "traditional public fora * * * for expressive activity regardless of the government's intent." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 678

[5] Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 Gonz. L. Rev. 113, 120 (2010).

(1998). So, too, would any property which the government has "intentionally opened up for" the expression of private views. *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 469 (2009); *Shurtleff*, 596 U.S. at 256-257.

Treating private speech as private—rather than assigning it to the government—would thus, at most, continue to constrain the government's ability to regulate speech in limited public forums, which the government can reserve for "certain groups or for the discussion of certain topics." *Walker*, 576 U.S. at 215 (quoting *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). In such forums, the government cannot easily engage in "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Rosenberger*, 515 U.S. at 830; *accord Matal*, 582 U.S. at 243 (when "a unit of government creates a limited public forum for private speech," "viewpoint discrimination is forbidden"). And the Court has used viewpoint discrimination "in a broad sense," repeating "time and again" that when the government prohibits ideas "merely because the ideas are themselves offensive to some of their hearers," it has engaged in viewpoint discrimination. *Matal*, 582 U.S. at 243-244 (quoting *Street* v. *New York*, 394 U.S. 576, 592 (1969)). Allowing an expanded application of the government-speech doctrine to convert government-sponsored forums into government-controlled propaganda vehicles would vitiate these more fundamental First Amendment principles.

3. Applying those principles, what the FHSAA did here by allowing private parties attending its athletic events to use the loudspeaker for a designated time was "to create * * * a limited public forum. It has allowed state property" (the loudspeaker) "to be used by private speakers according to rules that the State prescribes." *Walker*, 576 U.S. at 234 (Alito, J., dissenting). And, although the FHSAA was not required to make the loudspeaker open for private speech, its decision to do so subjected it to the First Amendment's prohibition against discrimination based on viewpoint.

The FHSAA ran headlong into that prohibition when it excluded private religious speech. Elsewhere, this Court has made clear that the government may not exclude those with religious viewpoints from access to state resources. See *Espinoza* v. *Montana Dep't of Revenue*, 591 U.S. 464, 475 (2020). The First Amendment forbids the government from imposing on the religious "special disabilities" based on their "religious status." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 458 (2017) (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 533, 542 (1993)). That general prohibition on denying religious people a benefit based solely on their religious status goes hand-in-hand with this Court's prohibition on viewpoint discrimination in the public forum context. As this Court recognized in *Rosenberger*, although "[r]eligion may be a vast area of inquiry, * * * it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." 515 U.S. at 831; *accord Good News Club* v. *Milford*

Cent. Sch., 533 U.S. 98, 112 (2001). And here, a prayer to solemnize the forthcoming competition, thank God, and seek His help in ensuring a good game for players and fans alike offers a religious viewpoint. That viewpoint must be respected and permitted every bit as much as a speech thanking parents, teachers, and the school, or merely cheering, "Go team!" See Pet.4.

By applying the government-speech doctrine, the Eleventh Circuit allowed the FHSAA to discriminate against that religious viewpoint in a way that—properly applied—this Court's public-forum decisions do not allow.

CONCLUSION

The Court should grant the petition either to clarify that government speech must still satisfy some level of First Amendment scrutiny or to establish that the government is not speaking when it merely facilitates private speech by opening its property as a platform for that speech. The First Amendment deserves as much.

Respectfully submitted,

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