No. 24-1261

IN THE
Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, INC.,
Petitioner,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* JOSEPH KENNEDY IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

Joseph Kennedy is a former high school football coach and was the petitioner in *Kennedy* v. *Bremerton School District*, 597 U.S. 507 (2022), a landmark ruling of this Court that reaffirmed the rights of public employees to engage in religious expression. Coach Kennedy has a strong interest in this case because it presents similar constitutional stakes.

The Eleventh Circuit upheld the Florida High School Athletic Association's ("FHSAA's") decision to prohibit Cambridge Christian School ("Cambridge Christian") from offering a pregame prayer over the public address system before a state championship football game, holding that the public address announcements were government speech and that therefore Cambridge Christian's Free Exercise Clause claim failed. In so doing, the Eleventh Circuit ignored the core lesson of *Kennedy*: that government entities may not single out religious expression for exclusion simply because it is religious.

As someone who has personally experienced the consequences of government efforts to suppress religious expression in the name of neutrality, Coach Kennedy is uniquely positioned to underscore the dangers of the Eleventh Circuit's approach. Accordingly, *Amicus* urges the Court to grant certiorari and reaffirm that respect for religious exercise is not a constitutional violation, but a constitutional command.

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[1] Counsel obtained consent of all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici and their counsel, made any monetary contribution toward the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In its zeal to protect high school football from any taint of religion, the Eleventh Circuit made two errors. First, it applied a rigid three-factor test to decide that the FHSAA was speaking during the PA announcements. And second, once it concluded that the FHSAA was speaking, the Eleventh Circuit held that the FHSAA could promote and exclude whatever viewpoints it wished.

Both steps contradict this Court's precedents. First, this Court has instructed lower courts that whether particular expression constitutes government speech follows a "holistic inquiry," not a rigid test. *Shurtleff* v. *City of Boston*, 596 U.S. 243, 252 (2022). The object of this inquiry is the nature of the message—in other words, is the government speaking for itself, or is the message a private party's? The Eleventh Circuit reached the wrong result because it focused on cramped and isolated factors, controlled by irrelevant facts, missing the proverbial forest for the trees.

Second, while the Free Speech Clause does not constrain the government's own speech, other Constitutional provisions still do. Yet, the Eleventh Circuit summarily disposed of Cambridge Christian's Free Exercise claim on the basis that the PA announcements were government speech. But the FHSAA did violate the Free Exercise Clause by "ferret[ing] out and suppress[ing]" Cambridge Christian's "religious observance[] even as [FHSAA] allow[ed] comparable secular speech." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 543–44 (2022).

The Eleventh Circuit's decision undercuts this Court's recent holdings in *Shurtleff* and *Kennedy*. The

Court should grant and reverse to reaffirm those important decisions.

ARGUMENT

I. THE ELEVENTH CIRCUIT MISAPPLIED THIS COURT'S GOVERNMENT SPEECH PRECEDENTS, LEADING IT TO THE WRONG RESULT.

Despite this Court's unbroken line of precedent evaluating government speech cases holistically, the Eleventh Circuit carved up Cambridge Christian's case and forced the pieces into three buckets—history, endorsement, and control. In so doing, it misapplied blackletter government speech law, cited facts unrelated to who was actually speaking at the State Championship game, and wrongfully concluded that the PA announcements were government speech.

A. Under This Court's Precedents, a Rigid, Multi-Factorial Test Does Not Drive the Government Speech Analysis.

This Court has never established a firm test for analyzing whether a speaker is a private party or the government. To the contrary, it has used a different methodology in nearly all its government speech cases, because the analysis "is driven by a case's context rather than the rote application of rigid factors." *Shurtleff*, 596 U.S. at 252.

Context matters in such cases because the government speech analysis centers on the message. The key question is whether the government is "speaking on its own behalf." *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 470 (2009); *Walker* v. *Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 216 (2015). To determine who is speaking, this Court

looks to the message that is communicated. If the message is "governmentally determined" and delivered "purposeful[ly] . . . by a person exercising a power to speak for a government," then the government is speaking. *Shurtleff*, 596 U.S. at 268 (Alito, J., concurring); see *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). If any part of the message is not, the government is instead "providing a forum for private speech." *Summum*, 555 U.S. at 470. In so doing, the government is acting as a regulator.

And speaking and regulating are related—when the message is not the government's, the government is by default allowing some private parties to speak and excluding others. See *Walker*, 576 U.S. at 214; *Summum*, 555 U.S. at 464. For example, the state of Ohio provided a nonpublic forum when it opened a city bus for advertisements, *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 302 (1974), but the *Walker* Court observed that the advertising space also "bore no indicia that the speech was owned or conveyed by the government," *Walker*, 576 U.S. at 218. And an Indiana school district provided a nonpublic forum when it allowed private parties to access an interschool mail system, *Perry Educ. Ass'n* v. *Perry Loc. Educs. Ass'n*, 460 U.S. 37, 49 (1983), but, again, the *Walker* Court observed that "[i]t was [also] therefore clear that private parties, and not only the government, used the system to communicate." *Walker*, 576 U.S. at 218.

Thus, to determine the character of the message and, ultimately, whether the government is providing a forum for private speech or speaking for itself, this Court has always analyzed the government speech question holistically. And it has adopted different methodological approaches as warranted by the facts

of each case. See *Shurtleff*, 596 U.S. at 263 (Alito, J., concurring) ("[This Court] has never attempted to specify a general method for deciding" whether "the government is actually expressing its own views or the real speaker is a private party.").

Sometimes, this Court considers a wide variety of facts. In *Walker,* for example, this Court evaluated several types of evidence to determine whether license plates are government speech. It considered whether governments traditionally speak through license plates, how much control the state had over the plates' design, what type of forum a license plate would be, and various other facts relating to a license plate's nature. 576 U.S. at 213–14. This was not a rigid box-checking exercise but an effort to reason by analogy to the facts of *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009). *Walker*, 576 U.S. at 208–09 ("Our reasoning rests primarily on our analysis in *Summum*, a recent case that presented a similar problem."); see also *Matal* v. *Tam*, 582 U.S. 218, 237–39 (2017) (resting holding on analogical reasoning to facts of prior government speech cases). Of course, not "every element of [the Court's] discussion in *Summum* [wa]s relevant" to the facts in *Walker*—the permanence of the monuments in *Summum* was out of place in *Walker*, for example—as they were different cases warranting different analyses. *Walker*, 576 U.S. at 213.

The circumstances of still other cases have warranted a different focus. For instance, in *Johanns* v. *Livestock Marketing Ass'n*, 544 U.S. 550 (2005), this Court held that beef advertising funded by a federal program constituted government speech. *Id.* at 560–61. The Court's conclusion centered on a single fact: The government "effectively controlled" the message

from "beginning to end." *Id.* The unique posture of *Johanns* meant few other factual issues affected its analysis. For example, it did not consider "whether the . . . reasonable viewer would identify the speech as the government's," see *id.* at 564 n.7, and it addressed facts relating to the funding structure but determined they were out of scope, see *id.* at 562.

And in *Matal*, holding that trademarks are not government speech, this Court considered several facts in addition to history, public perception, and governmental control: the government approves trademarks adopting a wide variety of contradictory positions, the Patent and Trademark Office ("PTO") expressly disclaims approval of a trademark's message, and the PTO does not consider a trademark's viewpoint when deciding whether to register it. 582 U.S. at 236–38.

These cases present fact-intensive questions, for which a rigid multi-factor test is a poor fit. Instead, this Court considers each case on its facts, reasoning by analogy to past cases, to determine whether the government is speaking on its own behalf or providing a platform for a private party.

B. Instead, the Eleventh Circuit Applied a Rigid, Multi-Factor Test.

The Eleventh Circuit misread this Court's precedents as mandating a formal three-part test. By forcing the facts of this case into one of those three buckets, the Eleventh Circuit compounded its error—many of the facts it claimed support its conclusion do not aid in the government speech analysis or in fact point the other direction.

At the outset, the Eleventh Circuit stated that it would "consider three factors"—history, public

perception, and control. Pet. App. 34a. While it recognized that these factors "are not exhaustive and may not all be relevant in every case," it did not consider any facts outside these three narrow categories. *Id.* at 53a.

What is more, not all the facts in Cambridge Christian's case fit neatly into one of the three factors or bore on the government speech question. Committed to its multi-factor test, not only did the Eleventh Circuit fail to consider several relevant facts outside the three categories, as discussed below at Section I.C., but also considered irrelevant facts simply because they touched on a factor.

First, the Eleventh Circuit placed decisive weight on the fact that the record contains only one example of a "private speaker using the PA system." Pet. App. at 37a. But the "speaker" is not necessarily the mouthpiece. Compare *Matal*, 582 U.S. at 239 (government trademarks are not government speech), with *Summum*, 555 U.S. at 472 (privately donated monuments are government speech). What matters is whether the FHSAA broadcast a private *message*. See*, e.g.*, *Summum*, 555 U.S. at 472–73 (monuments are privately donated but government delivers the message); see also *Shurtleff*, 596 U.S. at 268 (Alito, J., concurring) ("Governments are not natural persons and can only communicate through human agents who have been given the power to speak for the government.").

Second, the Eleventh Circuit considered evidence of whether "observers reasonably believe the government has endorsed" the PA announcements. Pet App. 39a (cleaned up); see *Mech* v. *Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1076 (11th Cir. 2015). But such evidence has no place in the government speech

analysis. For one, this subjective framework conjures the specter of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and "its endorsement test offshoot," which "this Court long ago abandoned." *Kennedy*, 597 U.S. at 534. And further, "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); see *Johanns*, 544 U.S. at 564 n.7.

Third, the Eleventh Circuit concluded that by limiting PA announcements to paying advertisers, FHSAA took ownership of the messages. Because advertisers paid FHSAA to place their copy in the announcements, the Eleventh Circuit explained, the FHSAA had "advance notice of . . . which entities [would] be submitting sponsor messages." Pet App. 49a. But if "familiar[ity] with the kinds of messages the [government] would deem appropriate," *id.*, were enough, one wonders why the Court needed more than a few sentences to decide *Johanns*. See 544 U.S. at 553 (only beef producers and importers invited to develop beef advertising campaign); see also *Walker*, 576 U.S. at 205 (only nonprofits invited to submit specialty license plate designs). This Court's cases are clear—a government must do more than limit access to the venue to take ownership of the message.

Fourth, and relatedly, the Eleventh Circuit attempted to distinguish the flag-raising program in *Shurtleff* as a free offering, whereas FHSAA charged its corporate-sponsor speakers. Pet. App. 48a–49a. Charging a fee cannot suffice to transform a private message into the government's, as this Court made clear when rejecting a similar argument in *Walker*. 576 U.S. at 217–18.

Fifth, the Eleventh Circuit considered it relevant that the announcements included the national anthem, presentation of colors, and pledge of allegiance, as all are "inseparably associated with ideas of government." Pet. App. 76a (internal quotations omitted). But the fact that the government might agree with some of the message does not make the entire message the government's own. *Shurtleff*, 596 U.S. at 256.

Sixth, the Eleventh Circuit stated that FHSAA's role as organizer of the championship game was a "fact[]" that "favor[s] government speech." Pet. App. 40a. But the government's provision of a venue for speech does not mean that the government has determined the message and empowered a speaker to deliver it. See*, e.g.*, *Johanns*, 544 U.S. at 562 (federally funded promotional campaign); *Summum*, 555 U.S. at 472 (monument in a public park); *Walker*, 576 U.S. at 208 (specialty license plates); *Matal*, 582 U.S. at 235 (federally registered trademark); *Shurtleff*, 596 U.S. at 251 (flagpole).

Seventh, the Eleventh Circuit acknowledged three examples of private messages in past FHSAA playoff games—two instances of "introductory remarks" on behalf of the school and the aforementioned private speaker's Christian prayer. Pet. App. 37a n.8. Focusing nearly exclusively on the Christian prayer, it brushed the prayer aside as insufficient, declaring that "[o]ne instance does not a history make." *Id.* at 37a. But this Court does "not settle [a] dispute by counting noses." *Shurtleff*, 596 U.S. at 256. A Christian prayer in a past FHSAA playoff game is a strong sign FHSAA is regulating private access to the PA announcements, not speaking for itself.

The Eleventh Circuit's decision to follow a strict three-factor test not only defied this Court's precedents but also led it down the wrong analytical path.

C. When Reviewed Holistically, the FHSAA's PA Announcements Are Clearly Private Speech.

Had the Eleventh Circuit considered this case holistically, it would have recognized that the FHSAA was not speaking for itself throughout the entirety of the PA announcements. Like in *Matal* and *Shurtleff*, the wide variety of viewpoints expressed during the PA announcements and the lack of review by FHSAA are facts strongly supporting the conclusion that the PA announcements are more akin to a forum for private and public speech than a purely government message.

At past state championship football games, the FHSAA has permitted a wide variety of speech, including corporate advertisements and prayer. See Pet. App. 37a–39a. Those who read promotional copy—including the government—do not necessarily assume ownership of the message by doing so. Particularly so for the government, which otherwise would be "unashamedly endorsing a vast array of commercial products and services[,] . . . providing Delphic advice to the consuming public." *Matal*, 582 U.S. at 236. *Matal* is not the only case in which this Court has rejected the Eleventh Circuit's corporate-advertisements-are-government-speech maxim. Take one example: When an Ohio city displayed an advertisement on the side of a bus, this Court determined the government had opened a nonpublic forum, not spoken for itself. See *Lehman*, 418 U.S. at 304; *Walker*, 576 U.S. at 218. So too here.

What is more, the prayer at the 2012 state championship game shows that the FHSAA is not speaking for itself during the PA announcements. *Shurtleff*, 596 U.S. at 256 ("[W]e do not settle [a] dispute by counting noses."). As discussed above, the FHSAA is instead acting as a regulator, permitting prayer in one year and denying it in another.

Further, the FHSAA plays a muted role in the writing of the corporate advertisements. Indeed, it reads the copy "without revision," and has no "policies or procedures for reviewing the text." Pet. App. 48a; see *Shurtleff*, 596 U.S. at 257 ("[Boston] had nothing—no written policies or clear internal guidance—about what flags groups could fly."). Just as in *Shurtleff*, there is no evidence that FHSAA "actively shaped [the messages]" sent by the corporate sponsors. 596 U.S. at 256; see also *Johanns*, 544 U.S. at 560–61.

Thus, not only did the Eleventh Circuit err by shoehorning Cambridge Christian's case into ill-forged shackles, but also, through this exercise, the court incorrectly determined that prayer and corporate sponsorships are government speech. They are not. This Court should grant certiorari to fix this profound error.

II. THE ELEVENTH CIRCUIT SHOULD HAVE ANALYZED THE BURDEN ON CAMBRIDGE CHRISTIAN'S RELIGIOUS EXERCISE.

The Eleventh Circuit held that "the government's own speech cannot support a claim that the government has interfered with a private individual's free exercise rights." Pet. App. 51a. But when the government uses its own expressive power to selectively exclude or suppress religious exercise, it

engages in constitutionally suspect behavior—regardless of how the speech is labeled. When properly analyzed, it is apparent that the FHSAA violated Cambridge Christian's free exercise rights.

A. Labeling the Speech "Government Speech" Does Not End the Free Exercise Inquiry.

As explained supra Part I, the FHSAA was not speaking for itself by using the PA system. But assuming *arguendo* that it was, this Court has recognized that the government must not infringe on constitutional rights even when the government is speaking.

Examples abound. In *Walker*, this Court held that "[t]he Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." 576 U.S. at 208. Similarly, in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), this Court recognized that New Hampshire's state motto "Live Free or Die" was "the State's ideological message," yet still evaluated whether compelling citizens to drive with license plates displaying the motto violated their First Amendment right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Id.* at 715; see *Shurtleff*, 596 U.S. at 268 (Alito, J., concurring) ("[N]ot all governmental activity that qualifies as 'government speech' in [the] literal and factual sense is exempt from First Amendment scrutiny.").

This is true of other parts of the First Amendment. This Court has also held that government speech may violate the Establishment Clause. See*, e.g.*, *McCreary Cnty.* v. *ACLU*, 545 U.S. 844, 867–74, 881 (2005)

(striking down Ten Commandment displays in Kentucky courthouses as an Establishment Clause violation); *Edwards* v. *Aguillard*, 482 U.S. 578, 593–94 (1987) (striking down public school district's required teaching of creation science as Establishment Clause violation). So too in the Equal Protection context. See Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 Wm. & Mary L. Rev. 159, 183–84 (2012) (collecting this Court's cases recognizing that government speech "might deny its targets 'the equal protection of the laws'").

Government speech may violate the Constitution under the Free Exercise Clause, just as it can under the Free Speech Clause, Establishment Clause, and Equal Protection Clause. Were it otherwise, "the government-speech doctrine [would] become[] 'susceptible to dangerous misuse.'" *Shurtleff* 596 U.S. at 262 (Alito, J., concurring) (quoting *Matal*, 582 U.S. at 235). Censorship of religious speech on the basis that the speech is religious violates the Free Exercise Clause whether or not the government is "speaking" through its censorship. See *id.* at 269 ("Naked censorship of a speaker based on viewpoint . . . might well constitute [government] 'expression' in the thin sense that it conveys the government's disapproval of the speaker's message. But plainly that kind of action cannot fall beyond the reach of the First Amendment.").

The Eleventh Circuit failed to grasp this point, largely because it regarded the Establishment Clause as being in tension with the Free Exercise Clause. The Eleventh Circuit relied, in part, on the argument that "[i]f the Free Exercise Clause required the government to accommodate religion in its own expression in some circumstances, then compliance with the Free

Exercise Clause could itself lead to a violation of the Establishment Clause." Pet. App. 51a n.12 (emphasis omitted). But that fundamentally misunderstands the relationship between the Free Exercise and Establishment clauses. The two clauses "have 'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others." *Kennedy*, 597 U.S. at 533; see Stephanie H. Barclay, *The Religion Clauses After Kennedy v. Bremerton School District*, 108 Iowa L. Rev. 2097, 2109 (2023) ("Perhaps one of the most important implications of *Kennedy* is that it rejects the idea that the Establishment Clause and Free Exercise Clause are conceptually in 'direct tension' with one another.").

Accordingly, the government cannot escape a Free Exercise challenge merely by labeling its discrimination "government speech." While the government speech doctrine protects governmental expression in some circumstances, the doctrine is not a blank check for infringing on the Constitution's guarantee of the right to freely exercise religion.

B. The FHSAA Unconstitutionally Burdened Cambridge Christian's Religious Exercise.

Thus, the Eleventh Circuit should have evaluated the burden on Cambridge Christian's sincere religious exercise. It did not. The FHSAA's refusal to allow Cambridge Christian to pray over the PA system was not neutral or generally applicable, was not justified by a compelling state interest, and was not narrowly tailored. This Court should grant certiorari to make clear that policies like the FHSAA's fail strict scrutiny.

1. The FHSAA's Policy Is Not Neutral or Generally Applicable.

A plaintiff "may carry the burden of proving a free exercise violation [] by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy*, 597 U.S. at 525 (quoting *Emp. Div., Dept. of Human Res.* v. *Smith*, 494 U.S. 872, 879–881 (1990)). No one disputes that Cambridge Christian seeks to engage in sincerely religiously motivated exercise. A government policy that is "specifically directed at [] religious practice," "discriminate[s] on its face" against religion, or otherwise has religion as its "object" is not neutral. *Emp. Div., Dept. of Human Res.* v. *Smith*, 494 U.S. 872, 878 (1990); *Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). Similarly, government policies that "prohibit[] religious conduct while permitting secular conduct that undermine[] the government's asserted interests in a similar way" or that provide "a mechanism for individualized exemptions" are not generally applicable. *Fulton* v. *City of Philadelphia*, 593 U.S. 522, 533–34 (2021).

The cases involving religious exercise that this Court decided during the COVID-19 pandemic provide a useful illustration of why government policies that allow commercial enterprises to engage in categories of activity while restricting religious entities from doing the same are not neutral or generally applicable. In *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020) (per curiam), the Court evaluated whether New York's COVID-19-era rules restricting gatherings at houses of worship to either 10 or 25 persons, while allowing businesses in those areas to "admit as many people as they wish" "violate[d] 'the

minimum requirement of neutrality to' religion." *Id.* at 16–17 (quoting *Lukumi*, 508 U.S. at 533). New York's restrictions, the Court held, were not neutral or generally applicable because "a large store in Brooklyn" could have "literally hundreds of people shopping there on any given day," while "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Id.* at 17; see *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1614 (2020) (mem.) (Kavanaugh, J., dissenting) ("California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.").

The FHSAA offered a microphone to corporate advertisers but silenced Cambridge Christian because its message was prayerful, rather than promotional. As the Eleventh Circuit acknowledged, the FHSAA "periodically often" allowed schools to use the PA system for unscripted secular welcoming remarks. See Pet. App. 9a n.3. The FHSAA also allowed private sponsor advertisements to be read over the PA system. *Id.* at 43a. The FHSAA, however, refused to allow Cambridge Christian to use the very same PA system for welcoming remarks. In so doing, the FHSAA allowed private commercial entities to speak, but prohibited religious entities from engaging in the same activity. FHSAA's sole reason for their policy banning Cambridge Christian from using the PA system was that Cambridge Christian's speech was religious. Pet. App. 12a.

FHSAA's policy was thus not neutral because it "discriminate[d] on its face" against religious speech. *Lukumi*, 508 U.S. at 533; *Cuomo*, 592 U.S. at 16–17 (restriction that applied to religious establishments

but not businesses was not neutral). And because FHSAA's policy allowed nonreligious schools to give welcoming remarks and private sponsor advertisements to be read over the PA system, the policy was not generally applicable. *Fulton*, 593 U.S. at 534; *Cuomo*, 592 U.S. at 17–18 (restriction that applied to religious entities but not "factories and schools" when both "have contributed to the spread of COVID-19" was not generally applicable). FHSAA's policy therefore impermissibly "ferret[ed] out and suppress[ed] religious observances even as it allow[ed] comparable secular speech." *Kennedy*, 597 U.S. at 543–44.

2. The FHSAA's Policy Fails Strict Scrutiny.

Because the FHSAA burdened Cambridge Christian's rights under the Free Exercise Clause, FHSAA must show that its policy was "justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 597 U.S. at 525. FHSAA cannot meet that high burden.

FHSAA's sole justification for denying Cambridge Christian use of the public address system for its pre-game prayer was FHSAA's belief that the prayer would "establish[ ] a religion." Pet. App. 200a. As this Court made clear in *Kennedy*, however, "there is no conflict between" the Free Exercise Clause and the Establishment Clause, and a government's concerns about "phantom constitutional violations" never "justify actual violations of an individual's First Amendment rights." *Kennedy,* 597 U.S. at 543. Indeed, the fears of endorsement espoused by the FHSAA echo *Lemon's* "reasonable observer" standard, which, as discussed supra at 8, this Court "long ago abandoned." *Kennedy,* 597 U.S. at 534. And, although a state may

have an interest in avoiding an *actual* violation of the Establishment Clause, this Court "[has] never inferred . . . that a State has a constitutionally sufficient interest in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns." *Locke* v. *Davey*, 540 U.S. 712, 730 n.2 (2004) (Scalia, J., dissenting); see *Bd. of Educ.* v. *Mergens*, 496 U.S. 226, 251 (1990) ("[The] fear of a mistaken inference of endorsement is largely self-imposed, because the [government] itself has control over any impressions it gives."). The FHSAA thus does not have a compelling interest in denying Cambridge Christian use of the PA system.

Even were avoiding the appearance of government endorsement of religion a compelling state interest, the means FHSAA uses to achieve that interest must be narrowly tailored. *Kennedy*, 597 U.S. at 532. They were not. Blanket suppression of prayer over the loudspeaker is not the least restrictive means FHSAA could have used to avoid the appearance of endorsement. FHSAA could have achieved its goal through disclaimers that the views expressed are those of the schools and not the state, or through neutral access policies allowing every participating school a certain allotted amount of time to engage in speech, religious or otherwise. Attendees of the game would "reasonably understand" that FHSAA allowing Cambridge Christian and other schools to pray over the PA system "evinces neutrality toward, rather than endorsement of, religious speech." *Mergens*, 496 U.S. at 251. Indeed, the FHSAA in 2023 adopted exactly that policy, demonstrating that that less restrictive approach was reasonable.

Cambridge Christian has a longstanding tradition of, and deeply held belief in, opening games with a prayer over the stadium loudspeaker. In 2012, two Christian schools had been allowed to pray over the loudspeaker during the same type of game—the FHSAA state championship football game—and at the same stadium as in this case. Pet. App. 8a–9a. Yet when Cambridge Christian participated in the state championship game, FHSAA refused to allow Cambridge Christian to broadcast the same type of prayer FHSAA had allowed only three years earlier.

FHSAA does not have a compelling interest in banning Cambridge Christian from using the PA system, nor is its policy narrowly tailored to achieve that interest. As the Court observed in *Cuomo*, "[e]ven in a pandemic, the Constitution cannot be put away and forgotten." 592 U.S. at 19. Nor can it be suspended at kickoff. If corporate sponsors and other secular entities are allowed to speak, then religious schools must be allowed to pray.

The Court should grant certiorari to make clear that the Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Kennedy*, 597 U.S. at 535 (citation omitted).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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