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* AWAKEN CHURCH IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Awaken Church (the "Church") is a non-denominational congregation founded in 2005. Over the past 20 years, the Church has expanded from a single location in San Diego, California, to 11 campuses in five states. This multi-campus, multi-generational Church describes itself as "a church that is fresh, real, powerful, and has at its heart the great commission to win souls and make disciples of all nations."

This case is of interest to Awaken Church because it involves the intersection of government speech and the free exercise of religion. In 2022, the Church requested to rent the Rady Shell—a concert venue owned by the San Diego Symphony Orchestra Association—for its Christmas program. Despite the Rady Shell being a place of public accommodation, its director declined to rent the venue to the Church, stating, "we have decided we must pass on this rental and any other potential rentals to religious organizations." While the Rady Shell reversed course and allowed the Church to rent the venue for its Christmas program, the controversy is a stark reminder that religious discrimination persists.[1]

1. Per Rule 37.2, all parties were timely notified of the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici, their members, or counsel, have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Ever since the early 1990s, when this Court granted government speech a qualified exemption from First Amendment scrutiny, lower courts have grappled with how to apply the resulting rule. Appellate judges and constitutional scholars alike have questioned both the legitimacy and strict application of the government-speech doctrine. In some courts, like the Eleventh Circuit below, the doctrine has evolved into a bright-line test that threatens to gut the Free Exercise Clause whenever the two collide. But as case after case in this Court has shown, the mere fact that a government entity is speaking does not invalidate free-exercise rights or permit religious discrimination.

Continued application of the government-speech doctrine as a bright-line rule will eventually lead to an erosion of First Amendment rights. Such a rule lacks a limiting principle as it fails to account for the nuanced interplay between government speech and private religious expression, which can lead to viewpoint discrimination. Further, such an approach could lead to broader consequences, such as converting public platforms into government speech and excluding religious viewpoints, thereby undermining pluralism and the educational value of public religious expression. The Free Exercise Clause should often prevail over the government-speech doctrine, as demonstrated in cases like *Kennedy v. Bremerton School District*, where the Court recognized the complementary purposes of the First Amendment's clauses. Finally, a merits ruling by the Court in this case could have far-reaching implications for pending cases involving similar issues, such as *Woolard v. Thurmond*

and *Gabriel Olivier v. City of Brandon*. This Court should clarify that the government-speech doctrine does not always defeat a Free Exercise claim, which would provide necessary guidance and resolution of these issues.

ARGUMENT

I. THE GOVERNMENT-SPEECH DOCTRINE DOES NOT ALWAYS DEFEAT THE FREE EXERCISE CLAUSE.

Below, Cambridge Christian claimed Florida High School Athletic Association ("FHSAA") violated its First Amendment rights of free speech and free exercise when it denied the school the right to use the stadium loudspeaker to broadcast a pregame prayer. *Cambridge Christian Sch. v. Fla. High Sch. Athletic Assoc., Inc.*, 115 F.4th 1266, 1288 (11th Cir. 2024). In its opinion below, the Eleventh Circuit acknowledges the history of the government speech doctrine. *Id.* To determine the validity of Cambridge Christian's claim, the Court applied a bright-line test, stating that "if the speech at issue here is government speech, Cambridge Christian's free speech claims **necessarily** fail." *Id.* (citing *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1072 (11th Cir. 2015); *Shurtleff v. City of Boston*, 596 U.S. 243, 251 (2022)) (emphasis added).

While the Eleventh Circuit's opinion is generally well-reasoned, it acknowledges that there has emerged a sort of bright-line rule when it comes to the government-speech doctrine. To uphold First Amendment rights, this Court should reject any such test.

A. The creation of the government-speech doctrine to determine whether a government entity had violated the First Amendment.

The government speech doctrine is relatively new in constitutional jurisprudence. A brief review of its formation is instructive for resolving the issue before the court. Previously, when determining whether the government had violated the First Amendment,[2] this Court would first assess where the violation occurred and then determine the level of scrutiny to be applied. *See Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018) (identifying the types of forums and corresponding standards of review). This approach started to shift in the early 1990s, when the Court began treating the government's speech differently. In *Rust v. Sullivan*, this Court upheld regulations from the Department of Health and Human Services that prohibited certain federal funds from going to programs that counseled or advocated for abortion, holding that the regulations did not violate the First Amendment. 500 U.S. 173, 203 (1991). The Court posited a limit to viewpoint discrimination, explaining that "[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Id.* at 194. This deference to the government's

2. The Free Speech Clause of the First Amendment (U.S. Const. Amend. I, cl. 2.) restricts government regulation of private speech and is applied to state governments through the Due Process Clause of the 14th Amendment (U.S. Const. Amend. XIV).

point of view resulted in *Rust* becoming the catalyst for today's "government-speech doctrine."[3]

Later, in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, this Court articulated the modern government-speech doctrine, establishing a three-part test: (1) whether the forum in which the speech occurs has historically been used for government speech, (2) whether the public would interpret the speech as being conveyed by the government, and (3) whether the government has maintained control over speech. 576 U.S. 200, 201 (2015).

And although the Court's jurisprudence has indicated that the government-speech doctrine is necessary for the government to function,[4] being necessary does not mean government-speech should go unfettered.

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3. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) ("The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J. concurring) (listing *Rust* among the Court's "decisions relying on the recently minted government speech doctrine").

4. *See Pleasant Grove City*, 555 U.S. at 467-68 ("A government entity has the right to 'speak for itself.' '[I]t is entitled to say what it wishes,' and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom.") ((citations omitted) (first quoting *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (2000); and then quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view....").

B. Appellate judges and constitutional scholars alike have questioned both the legitimacy and strict application of the government-speech doctrine.

1. Appellate judges and constitutional scholars have questioned legitimacy of the government-speech doctrine.

Since the first appearance of the government-speech doctrine, constitutional scholars have questioned the extent to which the doctrine should be applied—and some even go as far as to question its validity. In response to the test articulated in *Walker v. Texas,* Erwin Chemerinsky, Dean of University of California Berkley Law, expressed concern about the need for a limiting principle:

> [T]here is much that is troubling about the [C]ourt's approach. If license plates are government speech, and the government can say whatever it wants, does this mean the government can put any message it wants on license plates and require that people have that on their cars? What if the government wants to put a message that abortion is murder or a message to vote Republican? The [C]ourt's approach says that when the government is the speaker, it cannot be challenged for violating the speech clause of the First Amendment.[5]

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5. Erwin Chemerinsky, *Free Speech, Confederate Flags and License Plates*, Orange County Reg. (June 25, 2015, 3:57 PM), http://www.ocregister.com/articles/government-668320-texas-license.html [https://perma.cc/VQ78-DVGW].

Other scholars have expressed similar sentiments. Mary-Rose Papandrea, the Judge John J. Parker Distinguished Professor of Law and Associate Dean for Academic Affairs at the University of North Carolina School of Law, wrote that *Walker* "takes the Court's growing deference to government institutional actors and puts it on steroids, allowing the government to disfavor private speech in the name of protecting its image."[6] Likewise, Caroline Mala Corbin, Professor of Law at University of Miami School of Law, voiced concern that "contested speech will be categorized as government speech, giving the government the ability to eliminate competing viewpoints entirely."[7]

Other scholars go further. G. Alex Sinha, a Professor of Law at the Maurice A. Deane School of Law at Hofstra University, has called for the eradication of the government speech doctrine:

> Recall the puzzle before the Court: how to accommodate the fact that the government does, and must, endorse various propositions, often by clearing the field for its message and channeling that message through private citizens or private media. In other words, the Court needed a way to account for the inevitable failure of the government always and forever to remain viewpoint neutral in how its conduct affects private speech. That is a First

6. Mary-Rose Papandrea, *The Government Brand*, 110 Nw. U. L. Rev. 1195, 1197 (2016).

7. Caroline Mala Corbin, *Government Speech and First Amendment Capture*, 107 Va. L. Rev. Online 224, 232 (2021).

> Amendment problem in the sense that the Court has made viewpoint neutrality an important concept in First Amendment jurisprudence, but it is not a First Amendment problem per se: there is nothing in the First Amendment that demands the government itself remain viewpoint neutral always, everywhere, come what may. We need not actually exempt the government from First Amendment scrutiny when it speaks. We only need to mold First Amendment jurisprudence around the communicative demands of governance. More specifically, we need to relax the Court's historic insistence that restrictions on private expression remain viewpoint neutral, but only in contexts where such restrictions follow directly from the government's own (appropriate) expressive activity.[8]

As recently as 2022, Justice Alito has proposed using a different test for government speech:

> I would resolve this case using a different method for determining whether the government is speaking. In my view, the minimum conditions that must be met for expression to count as "government speech" can be identified by considering the definition of "government speech" and the rationale for the government-speech doctrine. Under the resulting view, government speech occurs if—but only if—a

8. G. Alex Sinha, The End of Government Speech, 44 Cardozo L. Rev. 1899, 1929–30 (2023) (internal citations omitted).

> government purposefully expresses a message of its own through persons authorized to speak on its behalf, and in doing so, does not rely on a means that abridges private speech.

Shurtleff v. City of Boston, 596 U.S. 243, 267 (2022) (Alito, J., concurring).

These criticisms reveal a concern among jurists and legal scholars that the current government-speech doctrine is not conducive to producing results that comport with the First Amendment.

2. The Appellate judges and constitutional scholars have questioned the strict application of the government-speech doctrine.

The Eleventh Circuit's opinion acknowledges that there has emerged a sort of bright-line rule when it comes to the government-speech doctrine. As the Eleventh Circuit explains, "the government's own speech **cannot** support a claim that the government has interfered with a private individual's free exercise rights." *Cambridge Christian Sch.*, 115 F.4th at 1296 (emphasis added).[9]

9. The Eleventh Circuit includes a string of binding cases holding that the government's speech is immune from treading on free exercise rights, including: *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm'n*, 412 U.S. 94, 139 n.7, (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech ... is exempt from First Amendment scrutiny.").

Setting aside the perceived fallacies of the doctrine itself, the problem with the Eleventh Circuit applying a bright-line rule is that it—like other courts and constitutional scholars—has previously admitted that the government-speech doctrine is not clear.[10]

For example, in *Mech v. School Board of Palm Beach County, Florida*, the Eleventh Circuit examined whether the school board violated Mr. Mech's constitutional rights when three schools removed banners for his tutoring business from the fences after discovering the listed address was the same as his pornography business. 806 F.3d 1070 (11th Cir. 2015). Judge William Pryor wrote for the majority that "[t]he Supreme Court has not articulated a precise test for separating government speech from private speech." *Id.* at 1074. The first line of the opinion summarizes the legal quandary and its anticipated consequences: "The Supreme Court once predicted that '[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.' This appeal presents one of those situations." *Id.* at 1071 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009)).

10. Courts beyond the Eleventh Circuit have acknowledged the confusing nature of the government-speech doctrine. *See R.J. Reynolds Tobacco Co. v. Bonta*, 272 F. Supp. 2d 1085, 1101 (E.D. Cal. 2003), aff'd sub nom. *R.J. Reynolds Tobacco Co. v. Shewry*, 384 F.3d 1126 (9th Cir. 2004), opinion amended and superseded on denial of reh'g, 423 F.3d 906 (9th Cir. 2005) ("I cannot acknowledge the doctrine, however, without also expressing my serious reservations about its undefined and open-ended nature."); *Adams v. Maine Mun. Ass'n*, No. 1:10-CV-00258-JAW, 2013 WL 9246553, at *16 (D. Me. Feb. 14, 2013) ("Although the government speech doctrine is now securely fixed as part of First Amendment jurisprudence, it is still comparatively new and undeveloped.").

Clay Calvert, Professor of Law and Brechner Eminent Scholar Emeritus at the University of Florida Levin College of Law, has commented on the impact of applying the government-speech doctrine as a bright-line rule in *Mech*:

> If the government speech doctrine was cast aside, such speaker-based discrimination would be blatantly unconstitutional after the United States Supreme Court's ruling in *Citizens United v. Federal Election Commission*.[11]
>
> There, Justice Anthony Kennedy emphasized for the majority that "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers." He elaborated that "[t]he Government may not ... deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each."[12]

Over the years, several Justices have warned against applying the government-speech doctrine as a bright-line rule. Justice Stevens expressed a desire to limit the government-speech doctrine, in his concurrence to the *Summum* opinion—with Justice Ginsberg joining—where

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11. 558 U.S. 310 (2010).

12. Clay Calvert, *The Government Speech Doctrine in Walker's Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 Wm. & Mary Bill Rts. J. 1239, 1270 (2017).

he wrote that "[u]nlike other decisions relying on the government speech doctrine, our decision in this case excuses no retaliation for, or coercion of, private speech.... For even if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses." 555 U.S. at 481-82 (Stevens, J., concurring).

The apprehension among members of this Court is well founded. Bright-line rules are generally disfavored across the board, and this Court has been rejecting their application in the First Amendment context for decades. In *Cohen v. California*, for example, Justice John Harlan wrote for the majority, rejecting bright-line rules distinguishing "offensive conduct" from protected expression and emphasizing the value of nuance and context. 403 U.S. 15, 25 (1971) ("Against this perception of the constitutional policies involved, we discern certain more particularized considerations ..."). Justice Abe Fortas explained in *Tinker v. Des Moines Independent Community School District*, that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," rejecting the bright-line rule that students lose their First Amendment rights by setting foot in school, and introducing a contextual test based on material interference and substantial disruption. 393 U.S. 503, 508 (1969). Similarly, in *FCC v. Pacifica Foundation*, this Court declined to set a bright-line rule about indecent speech, choosing instead a narrow, fact-specific holding. 438 U.S. 726 (1978). There, Justice John Paul Stevens wrote for the majority: "It is appropriate, in conclusion, to emphasize the narrowness of our holding.... The Commission's decision rested entirely on a nuisance

rationale under which context is all-important. The concept requires consideration of a host of variables." *Id.* at 750.

More recently, the Court declined to adopt a bright-line rule that would remove constitutional protections from certain categories of private speech. When considering whether the First Amendment protects Westboro Baptist Church's protests near a military funeral, Chief Justice Roberts wrote for the Court: "Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain.... [W] e cannot react to that pain by punishing the speaker." *Snyder v. Phelps*, 562 U.S. 443, 460-61 (2011). Thus, this Court then rejected attempts to create a bright-line ban on hurtful or outrageous speech, confirming broad protection for unwelcome expression in public spaces. *Id.* And, while *Lemon v. Kurtzman*, 411 U.S. 192 (1973), was an attempt to establish a bright-line rule Establishment Clause analysis, this Court eventually rejected that rule in favor of the more flexible rule in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

II. A BRIGHT-LINE APPLICATION OF THE GOVERNMENT-SPEECH DOCTRINE WILL EVENTUALLY ERODE THE FREE EXERCISE CLAUSE WHEN, OTHERWISE, PRIVATE RELIGIOUS EXPRESSION WOULD OFTEN RIGHTLY PREVAIL.

A. Erosion of the Free Exercise Clause is a predictable consequence of a bright-line rule, as seen in the Eleventh Circuit's decision below.

The Free Exercise Clause guarantees "first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). "The Clause protects not only the right to harbor religious beliefs inwardly and secretly," but "perhaps its most important work" is "protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through "the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022). This clause often overlaps in practice with the Free Speech Clause, and "[t]hese Clauses work in tandem." *Id.* at 523. Application of these principles require a nuanced, "contextual" approach. *Tinker*, 393 U.S. at 508.

While the Eleventh Circuit rightfully recognized these principles, it found that because it determined FHSAA had engaged in government speech, Cambridge Christian's free exercise claims necessarily failed. *Cambridge Christian*, 115 F. 4th at 1296. This bright-line application of the government-speech doctrine resulted in depriving Cambridge Christian of its First Amendment rights. Several other predictable consequences of this

decision, if left to stand, will negatively impact the way religious organizations and individuals express their faith in public settings, degrading the Free Exercise Clause.

First, it would convert use of a PA system—a platform for speech—to a declaration of governmental beliefs. This could have broader-reaching consequences. For example, next time Awaken Church seeks to use a public commodity like the Rady Shell[13] for its annual Christmas program, it could be met with renewed opposition because such use of the public property could temporarily transform it into a vessel for religious speech. But, not unlike the school grants and vouchers considered in this Court's recent free exercise cases, opening PA access to the public means that certain members of the public can't be excluded based on their religious status. FHSAA tries to sidestep this by insisting that the PA system is strictly controlled for government speech only. But when all sorts of optional and ancillary messages are allowed to be broadcast before, during, and after the football game, the forum starts to take on a public character. FHSAA should have maintained religious neutrality, not by excluding religion entirely, but by allowing equal access to this public platform for all viewpoints. And while FHSAA may argue the point is moot, in "court the association maintained that the prayer would have constituted government endorsement but shifted away from its Establishment Clause reasoning, arguing instead that the prayer was government speech." Pet. at pg. *i*.

13. The Rady Shell "serves as a public center for all of San Diego" and was "[m]ade possible by an agreement between the San Diego Symphony and the Unified Port of San Diego. *The Rady Shell at Jacobs Park: A New Reason to be Proud of San Diego*, https://www.theshell.org/about/the-rady-shell/.

Second, it would send a message that some student groups can express opinions or lead activities while other groups can't. It likewise allows the government to decide that religious viewpoints are less welcome or less protected than secular ones. FHSAA had the opportunity to foster a climate of free expression without necessarily endorsing religion. Instead, it allowed for public expression of other private content, such as advertisements and music, but specifically excluded religious expression. Rather than suppressing religious voices to supposedly avoid controversy, FHSAA could have promoted pluralism, allowing for diversity of voices.

Third, the decision below's bright-line rule would fail to recognize the educational value in permitting public prayer.[14] Permitting public expressions of different faiths teaches students how to engage in civil discourse, navigate differences in a pluralistic society, and understand the role of faith in public life. These valuable lessons will stay with students long after they leave the football field and bleachers.

14. The Court recognized the value of permitting public prayer in *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565 (2014). In that case, the Court acknowledged "[t]hat the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society." *Id.* at 576. The Court held that legislative prayers do not violate this tradition and are therefore acceptable under the First Amendment. *Id.* at 584.

B. The Free Exercise Clause often rightly prevails over the government-speech doctrine.

While government speech can at times weaken the Free Exercise Clause, it can't defeat it. Coercion and endorsement still matter. Even when speech is government-owned, it can violate the Free Exercise Clause or the Establishment Clause, as this Court has recognized in a series of cases.

Kennedy v. Bremerton School District

Kennedy v. Bremerton School District is factually akin to this case. 597 U.S. 507 (2022). Joseph A. Kennedy, a high-school football coach, would take a knee following each game at the 50-yard line—and pray. *Id.* at 514-15. Coach Kennedy started the practice on his own, but eventually, most of the team was praying alongside Coach Kennedy. *Id.* At 515.

Coach Kennedy engaged in this practice for over seven years. *Id.* Then, the school district told him to stop, citing concerns about violating the Establishment Clause. *Id.* at 515-16. Coach Kennedy continued to pray, and the school district responded by placing him on administrative leave and not renewing his contract. *Id.* at 519-20.

Coach Kennedy filed suit against the school district. *Id.* at 520-21. While the school district argued Coach Kennedy's rights to religious exercise and free speech must yield to the school district's interest in avoiding an Establishment Clause violation, *id.* at 509-10, this Court acknowledged that "[a] natural reading of [the First Amendment] would seem to suggest the Clauses have

'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others," *id.* at 533 (citing *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 13, 15 (1947)).

Ultimately, this Court held that the school district violated Coach Kennedy's free-exercise and free-speech rights by disciplining him for his private prayer on the public football field. And, this Court held that Coach Kennedy's conduct was private speech—not government speech. *Id.* at 544.

Trinity Lutheran Church of Columbia, Inc. v. Comer

Even in cases not directly involving government speech per se, this Court has held that individuals' free-exercise rights do not give way to a state's expressed First Amendment concern for advancing certain religious viewpoints. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, a church-operated preschool and daycare center challenged the denial of its application for a competitively-awarded grant due to a policy of denying grants to religiously affiliated applicants. 582 U.S. 449 (2017). This Court cited a previous opinion considering the same policy: "the state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause." *Id.* at 466 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)). Further, this Court held that the Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that target the religious for 'special disabilities' based on their 'religious status.'" *Id.* (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533, 542 (1993)).

Espinoza v. Montana Department of Revenue

Similarly, in *Espinoza v. Montana Department of Revenue*, Montana created a tax-credit scholarship program to aid students in attending private schools. 591 U.S. 464 (2020). The Montana Department of Revenue prohibited the use of these scholarships at religious schools, citing an amendment to the state's constitution barring public funds from going to religious institutions. *Id.* at 468-70. Parents who wanted to use the scholarships to send their children to a Christian school sued the state, arguing the no-aid provision violated the Free Exercise Clause. Applying the precedent from *Trinity Lutheran*, this Court held that the no-aid provision discriminates based on religious status and therefore is unconstitutional. *Id.* at 487 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious."). Here, too, while not involving speech in the traditional sense, the tension between a state's declination to publicly platform religious views, on one hand, and citizens' desire to participate in a public program regardless of their religious status, on the other, gave way in favor of free exercise.[15]

Carson as next friend of O. C. v. Makin

Shortly after this Court decided *Espinoza*, it considered *Carson as next friend of O. C. v. Makin*, 596 U.S. 767 (2022). In *Carson*, Maine had enacted a tuition-

15. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (treating spending as speech and holding that a federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment).

assistance program for parents who live in school districts that do not operate a secondary school of their own. *Id.* at 771-72. Parents were able to designate the secondary school they would like their child to attend—public or private—and the school district was to transmit payments to that school to help defray the costs of tuition. *Id.* at 772-73. While most private schools were eligible to receive the payments, they had to be "nonsectarian." *Id.* at 773. The Court noted that in *Trinity Lutheran* and *Espinoza*, it held that:

> the Free Exercise Clause forbids discrimination on the basis of religious status. But those decisions never suggested that use-based discrimination is any less offensive to the Free Exercise Clause. This case illustrates why.... [a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism."

Id at 787.

Thus, this Court held that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 789.

In each of these cases, the Court could have held that the government was being forced to speak in some way:

- In *Kennedy*, this Court could have held that as a public-school employee, Mr. Kennedy was speaking on behalf of the government, and therefore compelling it to promote religion;

- In *Trinity Lutheran* and *Espinoza*, this Court could have held that the decision whether to award or deny funds to church-operated schools was government speech and therefore immune from First Amendment scrutiny;

- In *Carson*, this Court could have held that the decision to exclude religious schools from tuition-assistance programs is government speech that doesn't violate the Free Exercise Clause.

In these cases, the government entities raised the Establishment Clause as a defense—and lost. *See, Kennedy*, 597 U.S. at 516, 518; *Trinity Lutheran*, 582 U.S. at 465, 466; *Carson*, 596 U.S. at 774-75. But consider if the government-speech doctrine as such a bright-line rule approach applied by the Eleventh Circuit had been applied? The doctrine could be utilized by litigants as an end-run around these sound decisions, creating an unwanted loophole that would have infringed on private individuals' constitutional rights to free expression or exercise, while providing nominal benefit to the government. So, these cases highlight why a more flexible analysis deferential to individual rights is constitutionally appropriate when determining whether government speech should defeat free exercise—not a harsh, bright-line rule.

III. IF THIS COURT GRANTS THE PETITION FOR WRIT OF CERTIORARI, A NUMBER OF PENDING CASES WILL BE IMPACTED BY THE OUTCOME.

A merits ruling by the Court in this case will have far-reaching, beneficial, and clarifying implications beyond the immediate parties. Accordingly, in considering the petition, this Court should consider not only the present dispute, but also the broader consequences of its holding—particularly, how its reasoning may influence the development of the government-speech doctrine and its intersection with the Free Exercise Clause.

Currently, there are numerous cases pending around the country that involve this issue.

Woolard v. Thurmond

Woolard v. Thurmond is currently pending at the Ninth Circuit Court of Appeals.[16] In that case, parents are challenging the constitutionality of publicly funded homeschool-aid programs in California. The programs are operated by charter schools and grant parents' access to funds to purchase curricula and other instructional materials from secular organizations to use to teach their own children. Unfortunately, the programs deny funds to religious families who wish to homeschool their children with comparable faith-based materials from faith-based organizations. So far, the litigation has constricted First Amendment rights. The district court dismissed the families' claims for (1) violation of their free exercise

16. Case No. 24-4291 (9th).

rights despite allegations that they were denied access to a publicly funded program of private choice because of their religion and (2) violation of their free speech rights despite allegations that they were denied access to a public program of private choice because they sought to express religious viewpoints. *Woolard v. Thurmond*, No. 2:23-CV-02305-JAM-JDP, 2024 WL 3010899 (E.D. Cal. June 10, 2024)

Arroyo-Castro v. Gasper

Confusion about whether and how government views override free exercise rights is brewing *within* schools, too. Marisol Arroyo-Castro is a tenured public-school teacher and practicing Catholic with a case pending in federal district court in Connecticut.[17] For over three decades, she has educated students. And, for approximately ten years, Ms. Castro displayed a small crucifix on the wall of her classroom, next to her desk. Other teachers at the school display personal expressive items in their desk areas, including action figures, sports mementos, and pictures of family and friends. In fact, some of Ms. Castro's fellow teachers display items with religious connotations, such as a coffee mug citing chapter 31 of Proverbs, a photograph of the Virgin Mary, and a Christmas tree.

But last year, Ms. Castro received an email from the school's vice principal expressing a "concern" about the crucifix. After meeting with the vice principal, Ms. Castro was instructed to take it down. The vice principal followed up with an email stating that "any permanent displays of religious symbols are prohibited from public schools,

17. *Arroyo-Castro v. Gasper*, 3:25-CV-00153 (D. Conn.)

based on the First Amendment of the United States Constitution." He noted that if she didn't take it down, "it would lead to insubordination and disciplinary measures," and thanked her "for complying with the expectation to remove the permanent religious display as public schools may not erect any type of religious display on school property." Ms. Castro did not take down the crucifix.

After a later meeting with the school's principal and a school district representative, Ms. Castro agreed to compromise by placing the crucifix in a less-visible location: attached to the underside of her desk. But the next morning, Ms. Castro returned it to its original location on the wall and was sent a letter of reprimand with further threats of suspension and eventual termination. The next day, she arrived at school to discover that the crucifix had been removed. In another meeting with the principal's office, Ms. Castro was instructed that a few days without pay would help her better "reflect" on whether it was in her "best interest" to keep hanging the crucifix. She was suspended for two days for being "insubordinate," and was told she could return to work on the condition that she agree to remove the crucifix. Unwilling to take down the religious symbol in good conscience, Ms. Castro informed the principal and other school and district staff that she could not comply with their directives. She was placed on paid administrative leave. Ms. Castro then filed suit, in expectation that her free exercise rights will be protected despite the government's desire to stifle her expression.

Gabriel Olivier v. City of Brandon

Recently, this Court granted the petition for a writ of certiorari in *Gabriel Olivier v. City of Brandon*.[18] Mr. Olivier is a Christian who was arrested and fined for violating an ordinance targeting "protests" outside a public amphitheater in Brandon, Mississippi. The ordinance prohibits individuals from engaging in religious speech on city-owned sidewalks and grassy areas in the park, forcing Mr. Olivier to evangelize in a remote "protest" area. After his arrest, Mr. Olivier challenged the ordinance in federal court.

Each of these cases could be impacted by this Court's handling of the case at bar. As displayed by the Eleventh Circuit's opinion in the current case, courts are inclined to apply a bright-line rule for the government-speech doctrine—one that has been questioned by constitutional scholars across the legal spectrum and that at times has proven a right-constricting blunt instrument. Now, this Court has the opportunity to alleviate confusion by clarifying that the government-speech doctrine does not always defeat a Free Exercise claim.

18. *Gabriel Olivier v. City of Brandon*, 24-993 (U.S.).

CONCLUSION

The Court should grant the petition and take up the thorny question of whether and when government speech can be used to override free exercise rights. As the Eleventh Circuit's grappling below shows, only this Court can provide the clarity and resolution needed.

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