No. 24-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When two Christian high schools made it to a championship football game organized by a state athletic association, they sought to use the stadium loudspeaker for a brief pre-game prayer, consistent with their belief in, and long practice of, communal prayer. Just three years earlier, the association permitted one of the schools to use the loudspeaker for pregame prayer at the same championship in the same stadium. This time, the association denied the request solely because, in its words, permitting the prayer would be "viewed as endorsing or sponsoring religion" and thus violate the Establishment Clause as interpreted by *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

Petitioner, Cambridge Christian School, sued for violation of its free-exercise and free-speech rights. 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. The courts below credited this argument, holding that two Christian schools using the loudspeaker to engage in communal prayer before a state-organized football game would be engaged in government speech. The Eleventh Circuit reached this conclusion despite record evidence showing the loudspeaker was regularly used for a wide array of private speech.

The questions presented are:

1. Whether *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), compels

a finding of government speech where two private Christian schools sought to engage in communal prayer over a loudspeaker before a football game organized by a state athletic association that otherwise permitted a wide array of private speech over the loudspeaker and should therefore be overruled in light of this Court's later holdings in *Matal v. Tam*, 582 U.S. 218 (2017), *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), and *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022).

2. Whether the endorsement factor of the government-speech doctrine revives *Lemon*'s "endorsement test offshoot" that "this Court long ago abandoned," *Kennedy*, 597 U.S. at 534, by providing a special veto for a private party's religious speech on any government owned platform.

PARTIES TO THE PROCEEDINGS

Petitioner Cambridge Christian School, Inc., was the sole plaintiff and appellant below. Respondent Florida High School Athletic Association, Inc., was the sole defendant and appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Cambridge Christian School, Inc., has no parent corporations, and no publicly held company owns ten percent or more of its stock.

STATEMENT OF RELATED CASES

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cambridge Christian School, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 115 F.4th 1266 and is reproduced in the Appendix ("App.") at App.1a. A prior opinion of the Eleventh Circuit is reported at 942 F.3d 1215 (*CCS I*) and is reproduced at App.95a.

The order of the Eleventh Circuit denying rehearing en banc is unpublished and is reproduced at App.164a.

The order of the district court is unpublished and is reproduced at App.54a. It is also available at 2022 WL 971778 (M.D. Fla. Mar. 31, 2022).

JURISDICTION

The Eleventh Circuit issued its decision on September 3, 2024, and denied a timely rehearing petition on February 6, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First and Fourteenth Amendments to the U.S. Constitution are reproduced at App.166a-68a.

INTRODUCTION

In 2015, two Christian schools qualified for a state championship football game organized by the Florida High School Athletic Association (FHSAA), a state actor. Consistent with their sincere belief in, and traditional practice of, corporate prayer, the schools requested use of the stadium loudspeaker so they could communally participate in a brief, pregame prayer. Despite having granted the same request at the same game three years earlier, FHSAA rejected the request this time around. The sole reason for the denial was FHSAA's conclusion that permitting loudspeaker prayer at a game between two Christian schools "can be viewed as endorsing or sponsoring religion" and thus "establishing a religion" under *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), which involved loudspeaker prayer at a public school.

Cambridge Christian School (CCS) filed suit, alleging FHSAA violated the school's free-speech and free-exercise rights. In litigation, FHSAA abandoned its argument that permitting the prayer would be impermissible endorsement under the Establishment Clause and instead asserted that permitting the prayer would constitute endorsement under the government-speech doctrine. But the "details" of the speech platform at issue, *Shurtleff v. City of Boston*, 596 U.S. 243, 255 (2022), show that far from being a platform solely for government speech, FHSAA's loudspeaker was awash in private speech. In addition to allowing the private prayer in 2012, FHSAA, at championship events, allowed: (1) schools to use the loudspeaker for unscripted, secular pregame welcoming remarks "periodically often"; (2) schools to

use the loudspeaker at halftime for unscripted remarks and music (with religious messages permitted); and (3) the loudspeaker to be used throughout the pre-game and game for private advertisements. Moreover, FHSAA permitted prayer over the loudspeaker at playoff games, which were governed by the same loudspeaker policies and scripts as the championships. The decision below holds that *all* this speech by private actors was government speech.

Just three years ago, this Court forcefully reaffirmed that "[r]espect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field," and the government may not "ferret out and suppress religious observances even as it allows comparable secular speech." *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 543-44 (2022). One way state actors suppress religious speech is by claiming private speech as their own. Indeed, the government-speech defense is "susceptible to dangerous misuse," and courts "must exercise great caution before extending … government-speech precedents." *Matal v. Tam*, 582 U.S. 218, 235 (2017). Here, the Eleventh Circuit eschewed that "great caution," significantly reshaping the government-speech inquiry in ways that contravene this Court's teachings. Incredibly, the Eleventh Circuit effectively reanimated the *Lemon* test through the government-speech doctrine, allowing it once again to "'si[t] up in its grave and shuffl[e] abroad." *Shurtleff*, 596 U.S. at 284 (Gorsuch, J., concurring) (quoting *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U. S. 384, 398 (1993) (Scalia, J., concurring in judgment)).

The decision below is egregiously wrong, splits with other circuits, and presents issues of utmost importance

for religious liberty in this country. If the decision stands, it will be virtually impossible to overcome government-speech defenses, and the government will again be empowered "to single out private religious speech for special disfavor." *Kennedy*, 597 U.S. at 514. This Court's review is necessary.

STATEMENT OF THE CASE

A. Factual Background

1. Cambridge Christian School seeks to "glorify God in all that we do." App.3a. One way CCS glorifies God is through communal prayer, which it practices throughout the school day and at the opening of all school events. *Id.* CCS thus has a long tradition of engaging in corporate prayer before athletic contests. *Id.* In large venues, like football stadiums, CCS uses the public-address (PA) system (or loudspeaker) to pray so that all CCS community members in attendance may hear and participate in the communal prayer. C.A. App.4234, 1152.

CCS engages in pre-game prayer, among other reasons, to: solemnize and commemorate the occasion; thank God for the opportunity to participate; request God's protection for players; thank God for certain individuals' contributions to the CCS community; and request that God help participants and fans display good sportsmanship. C.A. App.11905, 11935-37, 11952, 12690 (example of a CCS pre-game prayer).

2. The Florida High School Athletic Association is a state-created entity that organizes and regulates a high school athletic league for public and private schools.

App.1a-2a. CCS joined FHSAA in 1989 and began participating in FHSAA football in 2003. C.A. CCS Br.4-5.

FHSAA regulates regular season and postseason competition, including use of the loudspeaker at athletic contests. App.4a-6a. At all contests, FHSAA designates the PA announcer as a "bench official" who must "maintain complete neutrality at all times." App.6a. But FHSAA does not choose, contract with, or employ the PA announcer. App.6a. Instead, the host team chooses the PA announcer at regular season and playoff contests; at championship contests, the PA announcer is selected by the stadium operator. App.5a-6a. For all postseason contests (playoffs and championships), FHSAA prepares PA scripts and requires announcers to "follow the FHSAA script for promotional announcements … player introductions[,] and awards ceremonies," limiting "other announcements" to a specific list, which may include "messages provided by host school management." App.6a, 104a-05a; C.A. App.11034, 11040, 12197.

Critically, the PA announcer is not the only person whom FHSAA permits to use the loudspeaker. During the relevant time period, FHSAA, at championship contests, "periodically often" "turn[ed] over the PA microphone to representatives of schools to offer welcoming remarks," which FHSAA did not review or preapprove. App.196a-97a. While this lawsuit was pending, Florida enacted a statute—and FHSAA adopted a corresponding administrative policy—formalizing that "each school participating in a high school championship contest" must be provided "the opportunity to make brief opening remarks, if requested by the school, using the public address system." Fla. Stat., § 1006.185 (2023); C.A. Dkt. 77.

If there are such welcoming remarks, "an announcement must be made that the content of any opening remarks by a participating school is not endorsed by and does not reflect the views and/or opinions of the" FHSAA. *Id.*

Additionally, during halftime at football championships, FHSAA relinquished the loudspeaker to schools to use their own "half time announcer" to accompany their band or cheerleading performance. App.8a. This announcer could be "anybody the team designated," and "sometimes the whole halftime show they'd be speaking." C.A. CCS Br.23-24. FHSAA did not select, review, edit, or approve any speech or messages made by schools' halftime PA announcers, and FHSAA considered halftime performances to be expression of the school, not FHSAA. *Id.* Schools at halftime were also given use of the loudspeaker to play music of their choosing—and the music could be songs with overt religious messaging, such as "Ave Maria," "Battle Hymn of the Republic," or "Little Drummer Boy." *Id.*

FHSAA also permitted private parties to advertise over the loudspeaker through promotions read by the PA announcer before and during contests. *See, e.g.*, C.A. App.4292-4325 (2012 and 2015 PA scripts with promotional announcements). FHSAA rarely, if ever, altered the script copy provided by advertisers, and its officials considered the promotions to be the advertisers' speech. App.48a-49a; C.A. CCS Br.25-28.

Beyond the loudspeaker, FHSAA permitted private speech—including religious speech and speech with which FHSAA did not want to be associated—to occur throughout the game and across stadium platforms. C.A.

CCS Br.15-21, 28-31. For example, on the billboards containing the loudspeakers, FHSAA permitted alcohol advertisements, even though FHSAA did not want to be associated with alcohol. *Id.* at 30-31.

3. In 2012, two Christian schools—University Christian and Dade Christian—made the FHSAA Class 2A football championship game at the Citrus Bowl in Orlando. App.8a. Days before the game, University Christian asked FHSAA's permission to use the loudspeaker for a pre-game prayer. C.A. CCS Br. 9-10. Consistent with its practice of "periodically often" permitting schools to offer welcoming remarks, FHSAA granted the request and inserted into the game's PA script a prompt that read: "University Christian and Dade Christian will lead a prayer over the PA system at this time." *Id.*; C.A. App.4292. Before the game, Dade Christian's principal delivered the prayer over the loudspeaker. C.A. App.11894. FHSAA's Director of Athletics later testified that the prayer was not a message from FHSAA. C.A. App.11580-82.

4. In 2015, Cambridge Christian qualified for the FHSAA Class 2A football playoffs. App.9a. CCS won all three of its playoff games, which were held at publicly owned venues. *Id.* For playoff games, FHSAA imposed strict venue requirements, reserved the right to choose a venue, and dictated that the games were "not 'home contests' for the host schools" and must have "an atmosphere of neutrality." C.A. App.10991, 12130, 12138-39. At each 2015 playoff game, CCS engaged in pre-game communal prayer over the loudspeaker. App.10a.

In the championship game, CCS faced University Christian—the school whose request to pray over the loudspeaker FHSAA had approved in 2012. App.10a. On December 2, 2015, prior to the game, CCS's Head of School emailed FHSAA's then-Executive Director, Dr. Roger Dearing, asking FHSAA to "allow two Christian schools to honor their Lord before the game and pray ... over the loud speaker." C.A. App.12602; *see* App.11a. CCS made the request because it would allow for "communal prayer in a stadium that size" and for "families and students to celebrate the time together with a prayer." C.A. App.11738, 11753.

Dearing denied the request, explaining as follows:

> Although both schools are private and religious-affiliated institutions, the federal law addresses two pertinent issues that prevent us from granting your request.
>
> First is the fact that the facility is a public facility, predominantly paid for with public tax dollars, [*sic*] makes the facility 'off limits' under federal guidelines and precedent court cases.
>
> Second, is the fact that in Florida Statutes, the FHSAA (host and coordinator of the event) is legally a 'State Actor', [*sic*] we cannot legally permit or grant permission for such an activity.

App.11a, 198a-99a (emphasis original).

At the game, on December 4, 2015, student-athletes, coaches, and some FHSAA game officials joined at

midfield and prayed before the game. App.11a. CCS families in the stands were unable to hear and join the teams' prayer. App.12a. As one CCS player's mother, who was in the stands that day, explained:

> Because the prayer was not offered over the public-address system, I was unable to pray with my son Jacob before the game, unable to pray with all the Cambridge Christian fans and community members in attendance, and unable to join with fellow Christians from University Christian School in asking God's blessing and protection during the game.

C.A. App.13364. Her son likewise explained: "I was unable to pray together with my parents who were in the stands. I was also unable to join with Cambridge Christian friends and fans supporting both teams in praying for God's protection and blessing in the game." C.A. App.11908. Players were "frustrated and confused, feeling like the FHSAA's decision sent a message that it was wrong for us to use the public-address system so that we could pray together as two Christian school communities." *Id*.

During halftime, CCS's cheerleading team performed on the field to music of the school's choosing, which FHSAA did not review, edit, or preapprove. CCS's cheerleading coach was given access to the loudspeaker to broadcast this music. C.A. CCS Br.24.

5. On December 7, 2015, Dearing emailed the schools to further explain FHSAA's prayer ban. He stated the "issue is commonly referred to as the 'separation of church and state'" and that the "First Amendment … contains a

provision that prohibits government from 'establishing' a religion," which means "government may not engage in activities that can be viewed as endorsing or sponsoring religion." App.200a. Dearing said *Santa Fe* was "directly on point" and held that a "high school … cannot allow its football team members to lead a prayer on the field before the start of the game" because "the school gave the impression that it was endorsing the prayer by allowing the use of its PA system." App.200a-01a. According to Dearing, "[t]he issue was, and is, that an organization, which is determined to be a 'state actor,' cannot endorse nor promote religion," and thus "[i]t is simply not legally permitted under the circumstances." App.201a. Dearing offered no other reason for the prayer ban, and FHSAA's contemporaneous documents state that the decision was solely "based on" FHSAA's reading of *Santa Fe*. C.A. App.12798. Notably, Dearing did not claim that the loudspeaker was generally "off limits" to private speech—only that FHSAA prohibited private *religious* speech.

After announcing the prayer ban, FHSAA activated a public-relations team to "spin" the decision because CCS had "made a huge stink" about it. C.A. App.12798, 13420. "The goal … [was] to respond, move on and hope that it's over." C.A. App.13423.

6. In 2020, while this litigation was pending—and long after FHSAA knew that CCS and other schools pray over the loudspeaker at playoff games—CCS and University Christian again made the playoffs. They both continued to pray over the loudspeaker, without objection or restriction from FHSAA. App.12a; C.A. CCS Br.19.

B. The Eleventh Circuit's First Decision

1. In September 2016, CCS filed suit in the U.S. District Court for the Middle District of Florida, alleging FHSAA's prayer ban violated the free-speech and free-exercise guarantees of the U.S. and Florida constitutions. CCS sought declaratory relief, injunctive relief, and damages for the constitutional violation in 2015. App.13a. FHSAA moved to dismiss, contending that "the Establishment Clause of the First Amendment precludes the relief [CCS] seeks." C.A. App.673 (citing *Santa Fe* for the proposition that "permitting prayer at football games violated the Establishment Clause").

The district court granted FHSAA's motion, but on a ground FHSAA had not asserted therein—namely that "the entirety of the speech over the Stadium loudspeaker was government speech." C.A. App.896. The court also held that CCS's free-exercise rights were not violated because its players were permitted to pray on the field. C.A. App.907.

2. CCS appealed, and in November 2019 the Eleventh Circuit reversed, holding that CCS "plausibly allege[d]" free-speech and free-exercise violations. App.162a. Regarding the free-speech claim, the court reviewed the government-speech defense by analyzing the factors of history, endorsement, and control, as outlined in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The court found that history "weighs in favor of characterizing the speech over the loudspeaker as being, at least in part, private" because of the allegations about the 2012 loudspeaker prayer and 2015 playoff prayers. App.117a-19a. Regarding endorsement, the Court found that while

the state "likely would have been seen as endorsing any communication over the loudspeaker," this conclusion "might change if in the course of discovery" it is revealed that ads over the loudspeaker were "presented in more promotional terms" rather than as mere "'thank yous.'" App.121a-22a. Finally, the court found that whether FHSAA "controlled the content of the speech that went out over the loudspeaker [wa]s far from established on the limited record" at the pleading stage. App.124a. The court counseled that it would matter (1) "who made the announcements before or during the game, or, indeed, who would have been allowed to do so had they asked"; (2) whether "school messages" were "reworded, censored, or sometimes rejected"; (3) whether, beyond time limitations, FHSAA exerted any "meaningful control" over schools' halftime expression over the loudspeaker, such as a ban on "songs with, for example, explicitly religious … messages." App.124a-26a. In sum, the court held: "Since we cannot say, based on the complaint, that all communication over the loudspeaker during the 2A Championship Game was government speech, and since there are considerable facts alleged that yield a different conclusion, we reject the district court's … rationale for dismissing" the free-speech claim. App.127a.

The Eleventh Circuit also reversed the dismissal of CCS's free-exercise claims. It held that CCS pleaded a "sincere belief in the importance of communal pre-game prayer," consistent with communal prayer being "deeply rooted in religious traditions the world over." App.150a, 153a. Further, the court found that CCS had adequately pleaded burden on its free exercise because on-field prayer "does not necessarily stand in for prayer over a loudspeaker." App.155a.

C. Remand Proceedings

On remand, CCS obtained discovery on the open questions in the Eleventh Circuit's opinion. As noted above, that discovery revealed FHSAA: (1) had a practice of "periodically often" permitting schools to make secular welcoming remarks at championship events, (2) had a written policy of permitting schools to use the loudspeaker for their own halftime announcer and music, and (3) used the loudspeaker to broadcast unedited promotional messages from private parties. The discovery also confirmed that FHSAA expressly approved the loudspeaker prayer at the 2012 championship, and that loudspeaker prayer routinely occurred at FHSAA regular season and playoff games.

The parties moved for summary judgment. App.13a. On March 31, 2022, the district court ruled in FHSAA's favor. App.54a-94a. Analyzing the *Summum* factors, the district court again concluded that "pregame speech over the PA system at the championship finals football game … is government speech." App.68a. The court found "precedence in … *Santa Fe*" because it "specifically considered 'the pregame invocations'" and "the threshold question was the same—whether the speech was government speech or private speech." App.65a n.4.

The district court rejected the free-exercise claims because it concluded CCS only had a "mere 'preference'" for communal pre-game prayer, not a "sincerely held belief." App.92a. The court also concluded there was "[n]o evidence of burden" because when CCS played regular-season away games at public schools, it did not pray over the loudspeaker. App.93a.

D. The Eleventh Circuit's Second Decision

CCS appealed on April 14, 2022. Recall that in 2015, FHSAA told CCS it banned loudspeaker prayer because *Santa Fe*'s Establishment Clause holding—which sprang from *Lemon*—was "directly on point." App.201a. But by the time FHSAA filed its appellate brief in October 2022, this Court had decided *Kennedy* and declared *Lemon* a dead letter. So FHSAA shifted course, arguing *Santa Fe* was still "spot on," but now because it "answer[ed] the same question" of "whether a pregame prayer broadcast over a PA system is government speech." C.A. FHSAA Br.21.

In January 2024, while the parties were awaiting a decision in the appeal, CCS opted out of FHSAA football due to serious concerns over player safety arising from scheduling mismatches. C.A. Dkt. 89-2 at 4-5. But CCS remains in the FHSAA for other sports and believes it will return to FHSAA football in the future. *Id.* The parties filed supplemental briefing on how this development affected standing and mootness, and CCS pointed out, among other things, that it was immaterial to its nominal-damages claim. C.A. Dkt. 89 at 11-13.

On September 3, 2024, the Eleventh Circuit affirmed the district court. Turning first to jurisdiction, the court held CCS had standing for its nominal-damages claim but not its equitable claims. App.19a, 29a-32a. The court also held the equitable claims were moot because, under the new statute and corresponding policy, "the school won't be subjected to the PA system prayer ban at future state championship football games." App.24a. The court relied on FHSAA's belated admission—in a second

round of supplemental appellate briefing after a decade of litigation—that "'use of the PA system at Florida championship athletic contests by representatives of a school to deliver a pregame communal prayer … does not violate the Establishment Clause.'" App.27a.

On the merits, the court rejected CCS's free-speech claim, concluding that the *Summum* factors all "'strongly' support a finding of government speech." App.36a. The court first cabined the inquiry to "focus" on "pregame speech over the PA system at FHSAA football championship games, as opposed to speech at any other game, sport, or period of the championship game." App.35a. The court cited *Santa Fe* as support for this proposition. App.35a.

On history, the court listed all the facts it would not consider. It dismissed FHSAA's critical admission that it "periodically often" permitted schools to make welcoming remarks, by characterizing that testimony as pertaining to "*any* FHSAA sporting event" and not football specifically. App.9a n.3. It deemed irrelevant the loudspeaker prayers permitted at playoff games. App.37a-38a. The court did not even mention the undisputed history of school speech over the loudspeaker at halftime. And the court, abandoning its 2019 opinion, App.122a, deemed the "promotional messages … drafted by th[e] sponsor" as inconsequential because the messages are "approved and added to the PA script by the FHSAA," App.38a.

After discounting or ignoring all that history, the court was left with the loudspeaker prayer at the 2012 championship game. The court disregarded it because "[o]ne instance does not a history make." App.37a.

The court—echoing Dearing's 2015 email—next concluded that the context of a publicly owned stadium and pre-game ceremonies "paint[s] a compelling picture" of endorsement. App.40a-41a. The court held it makes no difference that the prayer "would have been delivered by a school representative … *perhaps* even after an introductory disclaimer by the PA announcer, which would have allowed the fans to distinguish between FHSAA speech and school speech." App.41a. The court also deemed private advertisements throughout the game "not as relevant to … pregame PA speech." App.44a.

As to control, the court held it favors government speech because, at the 2015 championship game specifically, "the only person who made announcements over the PA system … was the PA announcer." App.46a. But the court also held that even when private parties did access the loudspeaker—at halftime—this, too, "indicates government control" because such use was "pursuant to FHSAA policy" that governs "the length of halftime performances" and prohibits "offensive" music. App.47a. The court also found government control of sponsor speech because FHSAA "enters into sponsorship agreements," and thus "the fact that the FHSAA rarely rewords or rejects the proposed speech carries significantly less weight than it did in *Shurtleff*." App.48a-49a.

Finally, the court rejected CCS's free-exercise claims because the "government is not liable for suppressing the free exercise of religion 'when [it] restrains only its *own* expression.'" App.51a (quoting *Cap. Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 (1995) (plurality opinion)).

CCS sought rehearing en banc, which the court denied. App.164a-65a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is A Dangerous Expansion Of The Government-Speech Doctrine That Egregiously Conflicts With This Court's Modern Precedents

This should have been a straightforward First Amendment case. The government may not "ferret out and suppress religious observances even as it allows comparable secular speech." *Kennedy*, 597 U.S. at 543-44. That is exactly what happened here: FHSAA permitted private speech over its loudspeaker but impermissibly censored private *religious* speech solely because it was religious. To mask that discrimination, FHSAA resorted to a made-for-litigation government-speech defense—a "dangerous misuse" of the doctrine. *Tam*, 582 U.S. at 235.

The Eleventh Circuit bit hook, line, and sinker. In the process, it sharply departed from this Court's teachings, opening the door for the reemergence of the very religious intolerance that this Court has endeavored to stamp out in a string of cases over the last two decades. If the Eleventh Circuit's boundless version of government speech stands, state actors will be able to claim that virtually all private speech and religious exercise in a government setting lacks First Amendment protection.

1. "The boundary between government speech and private expression can blur when, as here, a government invites the people to participate in a program." *Shurtleff*, 596 U.S. at 252. When the government invites such participation and does not "intend[] to speak for itself," then the government-speech defense is inapplicable. *Id.*;

see also id. at 263, 267 (Alito, J., concurring) ("[C]ourts must focus on the identity of the speaker…. [G]overnment speech occurs if—but only if—a government purposefully expresses a message of its own through persons authorized to speak on its behalf…."). This Court has thus found speech to be governmental when "the message set out … [was] from beginning to end the message established by the" government. *Tam*, 582 U.S. at 237 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005)). As a "likely … outer bounds of the government-speech doctrine," this Court found specialty license plates to be government speech because they are "designed by the State," which "'maintain[ed] direct control over the messages conveyed.'" *Id.* at 238 (quoting *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 212-13 (2015)). Conversely, where the speech at issue expresses views of private parties, "endorse[s] a vast array of commercial products and services," or comes with a disclaimer that government involvement "does not constitute approval," then the speech at issue is private. *Id.* at 236-37. Said differently, where the speaker is "not seeking to convey a government-created message," "his speech [i]s private speech, not government speech." *Kennedy*, 597 U.S. at 529.

Here, FHSAA organized and invited private schools and sponsors to post-season tournaments, allowing them to use the loudspeakers throughout the series and at various times during contests within the series. This speech was often unscripted and not preapproved by FHSAA, and it included a variety of views and a vast array of commercial promotions. FHSAA's witnesses repeatedly testified such loudspeaker speech was *not* the government's speech:

- The halftime expression? Private speech. CCS C.A. Br. 23-24.

- The sponsor promotions? Private speech. *Id*. at 25-27.

- The prayers before playoff games? Private speech. C.A. FHSAA Br. 26.

- The prayer before the 2012 championship game? Private speech. C.A. CCS Br. 11.

And the private speakers themselves were "not seeking to convey a government-created message," *Kennedy*, 597 U.S. at 529, as CCS's request was to "allow two Christian schools"—not FHSAA—"to honor their Lord," C.A. App.12602.

On these facts, where it would be "far-fetched to suggest that the content of [the speech] is government speech," no elaborate balancing test is needed. *Tam*, 582 U.S. at 236; *see also Kennedy*, 597 U.S. at 529. Yet, instead of reaching the ready conclusion from this "case's context," *Shurtleff*, 596 U.S. at 252, the decision below opted for "rote application of rigid factors," *id.*, to conclude that FHSAA's loudspeaker *always* conveyed government speech. And, even applying those factors, the decision departs markedly from how *Shurtleff* instructs courts to proceed.

a. Scope of Inquiry. First, across factors, the decision below artificially constricts the scope of the inquiry to the precise moment when the private party sought to speak, rather than viewing the platform as a whole. App.35a

("[W]e will focus our government speech inquiry primarily on pregame speech over the PA system at FHSAA football championship games, as opposed to speech at any other game, sport, or period of the championship game."). This myopic approach improperly "loads the dice in favor of the government's position," *Shurtleff*, 596 U.S. at 265 (Alito, J., concurring), by eliminating the critical "context" in which speech must be viewed, *id.* at 252 (majority op.). Indeed, *Shurtleff* held that the government-speech inquiry encompasses far more than the precise moment that the private party sought to speak. There, the speech platform was Boston City Hall's flag poles. The Court examined "the 20 or so times a year when Boston allowed private groups to raise their own flags," not just the one time when a religious group was denied access. 596 U.S. at 253-55. *See also Walker*, 576 U.S. at 210-12 (examining entire history of Texas's license plate program); *Johanns*, 544 U.S. at 561 (analyzing "[a]ll proposed promotional messages").

The government-favoring bias inherent in artificially constricting the scope of inquiry is evident from the facts here. FHSAA's loudspeaker policies govern "all" playoff and championship contests at all times. C.A. App.12197-98 (§ 3.1.8). And FHSAA itself does not differentiate among sports, because its PA "scripts are … virtually identical from season to season, division to division, sport to sport." Dist. Ct. Dkt. 128-1 (Tr. 18:4-7). Nor is there any reason to distinguish the pregame period from the game itself or halftime, when the same crowd is sitting in the same stands, at the same game, viewing the same FHSAA-branded field and scoreboard, listening to messages from the same loudspeaker.

b. Endorsement. The decision below reworks the endorsement factor in ways that are unrecognizable in this Court's cases.

First, the Eleventh Circuit dismissed as meaningless the fact that the speaker at issue would have been a private party, identified as such (just as in 2012). The Eleventh Circuit held that the "identity of the speaker and any introductory disclaimer" cannot "tip[] the scales away from government endorsement." App.42a. Yet this Court has held precisely the opposite. In *Tam*, the Court—in rejecting the idea that trademarks are government speech—found significant the fact that the PTO "made it clear that registration does not constitute approval of a mark." 582 U.S. at 237. *See also Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995) (finding no endorsement of religion where state "has taken pains to disassociate itself from the private speech"); *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, 547 U.S. 47, 65 (2006) ("high school students can appreciate the difference between speech a school sponsors and speech the school permits"); *Santa Fe*, 530 U.S. at 321 (Rehnquist, C.J., dissenting) (concluding that student-led prayer "would be private, not government, speech"). And *Shurtleff* held that even less identification of a private speaker—the mere possibility that the public would see private citizens raising the flags—was enough to render the endorsement factor neutral. 596 U.S. at 255-56. Thus, the identification of the speaker as a private party (or a contemporaneous disclaimer of government endorsement) cannot possibly be meaningless to the government-speech inquiry.[1]

1. The decision below so radically departs from this principle that it appears to have ignored the Eleventh Circuit's prior

The Eleventh Circuit's conception of the endorsement factor is so unmoored from law and logic that it does not even hold throughout the opinion. The decision adopts FHSAA's view that the association's *new* policy—which it reads to permit loudspeaker prayer—would *not* constitute government endorsement of religion. App.27a-28a. Notably, that new policy requires FHSAA to announce that "the content of any opening remarks by a participating school is not endorsed by and does not reflect the views and/or opinions of the FHSAA." App.15a.

Second, the decision below held that the many sponsor ads read over the loudspeaker were also government speech. These ads were not mere "thank yous" but rather full-on promotions for private companies. *See, e.g.*, C.A. App.4301 ("For high-quality, high-performance sporting goods, you just can't beat the Spalding brand. Our dedication to excellence, quality and innovative ideas have kept us at the top of our game for more than 125 years."). *CCS I* correctly held that "this distinction [is] relevant" to finding against endorsement. App.122a. That conclusion tracked this Court's precedent. *See Tam*, 582 U.S. at 236 (rejecting idea that government is speaking when speech is "endorsing a vast array of commercial products and services"); *Johanns*, 544 U.S. at 560-61 (finding product promotional speech to be the government's only where the "message set out in the … promotions is from beginning to end the message established by the Federal Government," including through "review[] … both for substance and

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precedent, which correctly held that "[p]ermitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption." *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999).

for wording," with rewriting by the government). Yet the decision below inexplicably reverses course, holding that the promotional nature of the ads—and the fact that they are written by private parties and not edited by FHSAA—no longer matters because they were conveyed over a "government-owned PA system throughout the course of a government-organized event." App.44a. If such circumstances are enough to tip the endorsement factor toward government speech, then that factor will always favor the government because the government-speech defense arises only when private speech is conveyed over a government channel.

c. History. *Shurtleff* clarified that the "general history" of the medium at issue is "only our starting point," and that "the details" of the specific government platform at issue are paramount. 596 U.S. at 253, 255. Specifically, *Shurtleff* homed in on the instances when private parties are speaking to determine whether—at those times—the speech is governmental or private. *Id.* at 256-58. The Court found that while the general history of flag flying conveyed government speech, Boston's specific flag-flying program—which permitted private speakers to occasionally raise flags with little editorial control—was a medium for private speech. *Id.*

The same is true here. While some stadium loudspeakers run by the government may *generally* convey government messages, "*this* [loudspeaker] program" included many "times … when [FHSAA] allowed private groups to" deliver their own speech. *Id.* And when FHSAA did so, it "normally did not consider [] viewpoint, except occasionally to turn away [speech] it deemed 'offensive.'" *Id.* at 257 (citing *Tam*, 582 U.S. at 243-44). *See also*

App.47a. The key question for this case—whether FHSAA violated the First Amendment in 2015—is not what was done on other government loudspeakers, or what FHSAA could have done,[2] but what FHSAA *actually did* with its loudspeaker.

The decision below inverts this inquiry. It focuses almost entirely on the general history of loudspeakers and pre-game ceremonies. App.36a (focusing on "national anthem, presentation of colors, and pledge of allegiance" as "inseparably associated with ideas of government") (simplified). And then the decision waives away the specific history of *this* loudspeaker program, contending in a footnote that private speech occurring "periodically often" is inconsequential unless it rises to the level of "custom[]." App.9a n.3, 36a-39a. The decision therefore concludes that the prayer at the 2012 game "does not a history make" and that two other examples of private "introductory remarks" were also immaterial. App.37a. The decision does not announce the decisive ratio of private to government speech or at what point "periodic" private speech evolves into custom. In *Shurtleff*, Boston permitted private groups access to its flagpoles "20 or so times a year," and most of those instances "reflect[ed] particular city-approved values or views." 596 U.S. at 255-56. Perhaps something between three and twenty instances of private speech is the magic number that overcomes a government-speech defense, but the decision below leaves parties guessing. Regardless, *Shurtleff* specifically rejects the "counting

2. "[N]othing prevents [FHSAA] from changing its policies going forward," *Shurtleff*, 596 U.S. at 258—but it has now opened the loudspeaker to even more private speech, rather than none. *Supra* p.6.

noses" approach to government speech that the Eleventh Circuit now endorses. *Id.* at 256.

d. Control. The decision below concludes that school speech over the loudspeaker "indicates government control" because it occurred "pursuant to FHSAA policy" and FHSAA "controls the length of halftime performances." App.47a. But *Shurtleff* instructs that the "key" question is whether the government "actively … shaped the messages" sent by private actors. 596 U.S. at 256. Boston, too, allowed private speech pursuant to "policy" and had "control over an event's date and time" and the "physical premises." *Id.* at 249, 256. But, like Boston, FHSAA's record of controlling "content and meaning" "is thin." *Id.* at 256. FHSAA routinely surrendered loudspeaker control at championship events, both during pregame and at halftime, when FHSAA exercised virtually no control over the content of a school's announcements. C.A. CCS Br.22-24. Moreover, the record conclusively shows FHSAA granted schools direct "access to the microphone" and that schools "could … play songs with … explicitly religious … messages," which *CCS I* found significant, App.125a-26a, but the decision below inexplicably rejects as meaningless.

The decision below also concludes that only a "come-one-come-all" policy points against a finding of control and thus dismisses the fact that FHSAA never reworded or rejected sponsor ad copy. App.48a. But that conclusion betrays *Shurtleff*. Whereas it was meaningful that Boston had "no record of denying a request until Shurtleff's," 596 U.S. at 257, the decision below discounts that FHSAA had a similar record, inclusive of at least one prior occasion in which FHSAA permitted prayer over the loudspeaker

at the same venue. The Eleventh Circuit, contravening precedent, renders the control factor a virtual nullity.

2. FHSAA, the district court, and the Eleventh Circuit all relied upon *Santa Fe* as support for the notion that the speech at issue here was government speech. The district court deemed *Santa Fe* to have answered "the same" question as this case presents, App.65a n.4, and FHSAA echoed that refrain in the Eleventh Circuit, C.A. FHSAA Br. 21 (deeming *Santa Fe* "spot on" because it "answer[ed] the same question … i.e., whether a pregame prayer broadcast over a PA system is government speech"). The Eleventh Circuit thought *Santa Fe* defines the scope of the government-speech inquiry when it comes to loudspeaker prayer. App.35a. But to find *Santa Fe* controlling here, one must ignore (i) the very different context of this case, (ii) the dubious nature of its government-speech holding, and (iii) the subsequent cases that undermine that dubious holding.

First, in *Santa Fe*, the Court found that the public school district entangled itself "in the selection of the speaker," "invite[d] and encourage[d] religious messages," dictated "requirements [of] the message," "failed to divorce itself from the religious content," and had a history of specifically seeking to require "the practice of prayer before football games." 530 U.S. at 305-06. This case has none of those features. FHSAA is not a compulsory public school; it is a voluntary league that invites religious schools to participate. The game featured two Christian schools whose players and coaches chose to attend religious schools and wanted to practice their sincere religious belief in communal prayer. The crowd largely comprised families and supporters of those religious communities.

FHSAA was not asked to coordinate the prayer, choose the person who would deliver the prayer, or police or prescribe the content of the prayer. Thus, the decision below represents not an application of *Santa Fe* but a dangerous extension of its government-speech holding.

Second, to the extent *Santa Fe* can be read to support the decision below, then this Court should overrule it as out of step with its more recent government-speech precedent. *Santa Fe* was dubious from the outset. As Chief Justice Rehnquist—joined by Justices Scalia and Thomas—noted in dissent, the decision "bristles with hostility to all things religious in public life." 530 U.S. at 318 (Rehnquist, C.J., dissenting). In *Kennedy*, this Court explained that such hostility finds no support in the Constitution, which "neither mandates nor tolerates" the "ferret[ing] out and suppress[ion of] religious observances." 597 U.S. at 543-44. Thus, *Santa Fe's* conclusion that a private party's loudspeaker prayer is government speech because it is permitted "by a government policy and take[s] place on government property at government-sponsored school-related events," 530 U.S. at 302, is difficult to square with the principle that the Constitution 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 (simplified). Indeed, even at the time, Chief Justice Rehnquist noted that "[s]upport for the Court's holding cannot be found in any of our cases." *Santa Fe*, 530 U.S. at 321 (Rehnquist, C.J., dissenting). That is doubly true today. Thus, far from permitting lower courts to *expand Santa Fe*, this case should be used to cabin or overrule its troublesome reasoning.

3. The decision below disposes of CCS's free-exercise claims by briefly concluding that once government speech is invoked, there can be no free-exercise violation. App.50a-53a. That conclusion, of course, rests on the faulty premise that the loudspeaker always conveyed government speech. But it also serves to underscore just how far the Eleventh Circuit has strayed from the thrust of this Court's modern religious liberty jurisprudence.

The loudspeaker is just one facet of an athletic program managed by FHSAA. Private schools, secular and religious, are invited to participate in that program, and they infuse it with their speech and viewpoints throughout the season and across time and space of individual contests. Thus, FHSAA events are awash in private speech—from fans with banners in the stands, to cheerleaders on the sidelines, to stadium billboards, to on-field interviews, to halftime shows, to all manner of school and commercial speech over the loudspeaker. C.A. CCS Br. 15-31. By denying CCS the ability to participate in one facet of that program *because of religion*, FHSAA ran afoul of the principles that government (i) may not "prohibit[] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," and (ii) may not "discriminate against religion when acting in its managerial role." *Fulton v. City of Philadelphia*, 593 U.S. 522, 536 (2021). *See also Carson v. Makin*, 596 U.S. 767, 778 (2022) (government "violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits").

By treating FHSAA's original anti-establishment decision as one about government-speech, the Eleventh Circuit effectively masked what really occurred here,

which was the government "proceed[ing] in a manner intolerant of religious beliefs [and] restrict[ing] practices because of their religious nature." *Fulton*, 593 U.S. at 533. As three Justices explained in *Shurtleff*, "not all governmental activity that qualifies as 'government speech' in th[e] literal and factual sense is exempt from First Amendment scrutiny.... Naked censorship of a speaker based on viewpoint, for example, might well constitute '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." *Shurtleff*, 596 U.S. at 268-69 (Alito, J., concurring). Just so here.

* * *

On virtually every doctrinal point, the decision below egregiously departs from this Court's teachings. If left standing, it presents a grave threat to religious speech and exercise.

II. The Decision Below Conflicts With Decisions From Other Circuits

Given this Court's warnings in *Tam* and *Shurtleff* against capaciously defining government speech, the Eleventh Circuit's cavalier expansion of the doctrine has created a sharp and irreconcilable division with other circuits. Unlike the Eleventh Circuit—which has found government speech in virtually every post-*Tam* case[3]—

3. *See Dean v. Warren*, 12 F.4th 1248 (11th Cir. 2021)*; Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021); *Gardner v. Mutz*, 857 F. App'x 633 (11th Cir. 2021); *Gundy v. City of Jacksonville*, 50 F.4th 60 (11th Cir. 2022); *McGriff v. City of Miami Beach*, 84 F.4th 1330 (11th Cir. 2023); *Corbitt v. Sec'y of Alabama Law*

other circuits have applied the government-speech doctrine much more cautiously.

1. In *Cajune v. Independent School District 194*, the Eighth Circuit confronted a case in which a school district funded an "Inclusive Poster Series" with "Black Lives Matter" posters "designed by private activists." 105 F.4th 1070, 1075 (8th Cir. 2024). The school denied a district resident's request to include posters "bearing the phrases 'All Lives Matter' and 'Blue Lives Matter.'" *Id.* The Eighth Circuit concluded the posters were private speech and, at every turn, took the opposite approach from the Eleventh Circuit here.

On history, the decision below heavily favored the general history of loudspeaker speech, discounted any specific history that was not a perfect analogue, and held "[o]ne instance [of directly analogous private speech] does not a history make." App.37a. Conversely, and correctly, the Eighth Circuit recognized that *Shurtleff* requires paramount attention to "specific history," 105 F.4th at 1079-80, and further held that (1) "a mirror image historical analogy is not required," and (2) a single instance of private speech was sufficient to "weigh[] in favor of the plaintiffs," *id.* at 1080. *See also Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018) (strongly favoring specific history of a program). Moreover, while the Eleventh Circuit found inconsequential the history of private actors creating the speech that ultimately went out over the loudspeaker, the Eighth Circuit deemed important "the involvement of private actors in the design

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Enforcement Agency, 115 F.4th 1335 (11th Cir. 2024). *But see Warren v. DeSantis*, 90 F.4th 1115 (11th Cir. 2024), *vacated*, 125 F.4th 1361 (11th Cir. 2025).

and adoption of the posters." *Cajune*, 105 F.4th at 1080. These circuits' post-*Shurtleff* approaches to the history factor are thus irreconcilable.

On endorsement, the decision below deemed speech by private actors to be the government's because FHSAA had final approval authority. App.44a, 48a-49a. The Eighth Circuit, however, rightly invoked *Tam*'s instruction that the government cannot "pass off certain speech as government speech by 'simply affixing a government seal of approval.'" *Cajune*, 105 F.4th at 1081 (quoting *Tam*, 582 U.S. at 235). Again, the two approaches cannot be squared.

On control, the Eleventh Circuit held that because FHSAA had "advance notice of (and, critically, control over) which entities will be submitting sponsor messages," it did not matter that "FHSAA's sponsors often draft their own proposed announcements, … that the FHSAA usually inserts those announcements into PA scripts without revision," or that "FHSAA has not developed any formal policies or procedures for reviewing the text of sponsor announcements." App.48a-49a. The Eighth Circuit held precisely the opposite: the control factor cut against a finding of government speech because, even though the school district had "final approval authority over the BLM posters," it did not "direct the design and content of the posters" and "maintained a passive role in the design of the posters." *Cajune*, 105 F.4th at 1081 & n.4, 1082. *Cajune* concludes that "[g]overnment speech requires that a government shape and control the expression." *Id.* at 1081. That holding is irreconcilable with the Eleventh Circuit's holding that FHSAA's passive approach to sponsor speech renders that speech governmental.

The split between these two circuits on the control factor is solidified by the Eleventh Circuit's decision in *McGriff*—a case, like *Cajune*, in which the government displayed "art installations" about "race relations" prepared by private parties. 84 F.4th at 1332. The Eleventh Circuit found that control favored government speech because the city contracted for the artwork, had final approval authority over it, and provided the exhibition space. *Id.* at 1334. Yet the Eighth Circuit deemed similar facts insufficient in *Cajune*.

2. In *Book People, Inc. v. Wong*, the Fifth Circuit confronted a Texas law that required vendors of public-school library materials to create and submit ratings for those materials. 91 F.4th 318, 325-27 (5th Cir. 2024). The court held these ratings were private speech and, in reaching that conclusion, departed significantly from the Eleventh Circuit's reasoning here.

On history, the Fifth Circuit rejected the state's appeal to the general history of media ratings to focus instead on the "important ways" Texas's specific ratings system was "different" from those examples. *Id.* at 337. Again, the Eleventh Circuit took the opposite approach, finding the program-specific facts to be far less meaningful than the general use of loudspeakers. App.36a-39a.

On endorsement, the Fifth Circuit concluded that "the public is not likely to attribute the ratings to the [government]" because "although the ratings will be posted on [the government's] website, the public will be able to see how each vendor rated material and will attribute the ratings to the vendor—not [the government]." 91 F.4th at 337. The Eleventh Circuit held the opposite: the

identification of the school as the speaker of the prayer—and even a disclaimer by the government—would not be enough to break the perception of government speech. App.41a-42a.

3. The Sixth Circuit's post-*Shurtleff* precedent is also in conflict with the decision below. In *Brown v. Yost*, 133 F.4th 725 (6th Cir. 2025), the court concluded that citizen ballot summaries are not government speech. Adhering to *Tam* and *Shurtleff*, the Sixth Circuit concluded that the state attorney general's "certification" of the summary does not transform it into government speech, especially because that certification comes with a disclaimer. *Id.* at 735. Again, this cannot be squared with the Eleventh Circuit's conclusion that the clear introduction of a private speaker and a disclaimer are inconsequential for endorsement.

* * *

In short, the Eleventh Circuit here (and elsewhere) has established a government-speech jurisprudence that transforms the inquiry into one that will nearly always result in a finding of government speech. That approach—in its overall thrust and in its particulars—directly conflicts with that of other circuits, which have faithfully followed this Court's admonition to "exercise great caution before extending our government-speech precedents." *Tam*, 582 U.S. at 235. This Court should resolve the conflict.

III. This Case Is Exceptionally Important

In *Shurtleff*, as here, the government censored private speech on purported Establishment Clause grounds—supposed fear of endorsement under the *Lemon* test—only to pivot to a government-speech defense once litigation ensued.[4] In a concurring opinion, Justice Gorsuch explored "why this state of affairs still persists," and noted "it's hard not to wonder whether some simply prefer the policy outcomes *Lemon* can be manipulated to produce." 596 U.S. at 281, 284 (Gorsuch, J., concurring). If a government actor finds religious expression "inappropriate or offensive," "the First Amendment is not exactly your friend," and "[d]ragging *Lemon* from its grave may be your only chance." *Id.* at 284. As in *Shurtleff*, "[t]here is more than a little in record before us to suggest this line of thinking" animated FHSAA officials. *Id. See, e.g.*, C.A. App.12798, 13420 (complaining about "misinformation" and that CCS "just made a huge stink about" wanting to practice its religion).

And so, just "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks about" again, *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment), this time reanimating

4. *Compare Shurtleff*, 596 U.S. at 250 ("The commissioner worried that flying a religious flag at City Hall could violate the Constitution's Establishment Clause…"), *and* Br. for Respondents, *id*. (defending solely on government-speech grounds), *with* App.200a (FHSAA executive director worrying that permitting two Christian schools to pray over the loudspeaker would be "the government … 'establishing' a religion"), *and* C.A. FHSAA Br. (defending solely on government-speech grounds).

itself as the "endorsement" factor of the government-speech doctrine. Thus, while this Court declared dead the idea that the Establishment Clause "compel[s] the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious," *Kennedy*, 297 U.S. at 535 (simplified), the Eleventh Circuit has revivified that exact fallacy under the "endorsement" prong of the government-speech doctrine. *See* App.44a n.10 (holding that FHSAA testimony that loudspeaker messages are "from that sponsor, not from the FHSAA" does not matter because "the point of the endorsement inquiry … is whether the *public* would consider the messages to be spoken or at least endorsed by the government"). *See also Kennedy*, 597 U.S. at 534 ("In time, the [*Lemon*] approach also came to involve estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion.").

Whereas, previously, hostile government officials could manipulate *Lemon* to discriminate against religion, now those same officials are seizing hold of what they think is the malleable government-speech doctrine. As this Court warned in *Tam*, "it is a doctrine that is susceptible to dangerous misuse," so courts "must exercise great caution before extending our government-speech precedents." 582 U.S. at 235. The decision below eschews that great caution, expanding the doctrine in ways that make it easy for government officials to discriminate against religion by transmogrifying private speech into the ghoul of state endorsement. The Eleventh Circuit once understood, but now seems to have forgotten, that courts, being faithful to the First Amendment, cannot allow "religious speech" to be "confine[d] … to whispers or banish[ed] … to broom

closets." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

Nearly a decade ago, a bureaucrat decided that allowing two Christian schools to audibly pray in a stadium would breach the "separation of church and state." App.200a. It may seem like a trifle to some. App.11a (recounting FHSAA's refrain that midfield prayer was good enough). But for the faithful at Cambridge Christian, and others subjected to religious discrimination by officials high and low, defending the right "to live out their faiths in daily life" is no small matter. *Kennedy*, 597 U.S. at 524. *See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 467 (2017) (even if religious discrimination only results "a few … scraped knees," it "is odious to our Constitution all the same, and cannot stand."). The decision below threatens not just to bless FHSAA's past constitutional violation, but to invite many more through a retrogressive distortion of the First Amendment rights this Court has been so determined to protect. This important case deserves this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 6, 2025

APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED SEPTEMBER 3, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11222

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff-Appellant,

versus

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Defendant-Appellee.

Filed September 3, 2024

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02753-CEH-AAS

Before GRANT, TJOFLAT, and ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

The Florida High School Athletic Association (FHSAA) is a state actor with statutory authority to govern some aspects of high school athletics in Florida.

See Fla. Stat. § 1006.20(1); *see also Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1224 (11th Cir. 2019). In that role it has authority over certain sports activities for hundreds of public and private schools throughout the state, one of which is Cambridge Christian School.

Cambridge Christian is a private Christian school in Tampa, Florida. In 2015, after a successful regular season and playoff run, its high school football team (aka The Lancers) made it to the FHSAA state championship game. Leading up to that game, Cambridge Christian asked the FHSAA for permission to use the stadium's public address system for a prayer before the game. The FHSAA denied permission. Cambridge Christian filed this lawsuit claiming, among other things, violations of its rights under the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions.

This is the lawsuit's second time before our Court. The first time we reversed the district court's grant of the FHSAA's motion to dismiss Cambridge Christian's free speech and free exercise claims, holding that the school had "plausibly alleged enough to enter the courtroom and be heard" on those claims. *See Cambridge Christian Sch.*, 942 F.3d at 1223.

In this second visit to our Court the school is appealing the district court's post-remand grant of summary judgment in favor of the FHSAA on the free speech and free exercise claims. Because we agree with the district court that the speech at issue is government speech, we

affirm the grant of summary judgment to the FHSAA on both the free speech and free exercise claims.

I. Background

A. Prayer At Cambridge Christian School

Cambridge Christian serves students in pre-kindergarten through twelfth grades. Religion is central to the school's mission, which is: "To glorify God in all that we do; to demonstrate excellence at every level of academic, athletic and artistic involvement; to develop strength of character; and to serve the local and global community."

To further that mission, the school regularly engages in communal prayer, meaning prayer that involves the school community. Each school day begins with a prayer broadcast over the intercom. Board meetings, staff meetings, concerts, ceremonies, weekly chapel services, and many classes and activities begin with prayer. According to Cambridge Christian's head of school, communal prayer is an integral part of the school's spiritual tradition and "stimulates the spiritual growth" of its students.

Communal prayer is also a regular feature of athletics at Cambridge Christian. Coaches lead prayer at practices, and all home sporting events open with public prayer using the loudspeaker. It is Cambridge Christian's practice to offer a prayer over the PA system before all home football games, even when the opponent is a secular school. For

away games Cambridge Christian "defer[s] to the tradition of the home team," and when those games are against non-Christian schools, Cambridge Christian does not use the PA system when praying. But most of Cambridge Christian's opponents are other private Christian schools, all of which also use a PA system for prayer before their home games.

B. FHSAA Football Playoffs

The Florida High School Athletic Association is one of the governing bodies for high school athletics in Florida. *See* Fla. Stat. § 1006.20(1). It has 25 full-time employees and administers more than two dozen sports for more than 800 public and private schools throughout the state. The FHSAA divides its member schools into classes based primarily on the number of students in the school. Cambridge Christian (or its predecessor school) has been a member of the FHSAA since 1989,[1] and, during the events that gave rise to this lawsuit, the school's football program was in Class 2A.

As part of its responsibilities the FHSAA organizes and regulates the high school football regular season and playoff games for its member schools, including the state championship game in each class of schools. The association has bylaws and administrative policies and procedures that govern all FHSAA sporting events, including regular season and playoff football games. It also

1. But as of now, Cambridge Christian is not scheduled to compete in FHSAA football for the 2024 and 2025 football seasons.

has a "Football Finals Participant Manual" that governs state championship football games specifically.

Regular season and non-championship playoff games are hosted by one of the two competing schools at a venue of the schools' choosing. Even so, FHSAA policy dictates that playoff games "are not 'home contests' for the host schools" and must maintain an "atmosphere of neutrality." State championship finals are not "hosted" by either competing school, and they are subject to the FHSAA's neutrality mandate. From 2007 to 2018, the FHSAA contracted with the Central Florida Sports Commission to hold the championship games at the Citrus Bowl in Orlando.[2]

Schools typically use public address announcers for their regular season football games, and FHSAA policy requires football playoff venues to have a PA system. For regular season and nonchampionship playoff games, the PA announcer is chosen by the host school. For the state

2. The parties dispute the extent to which the FHSAA itself is the "host" of state championship football games. The district court determined that the championship games are hosted by the FHSAA together with the Central Florida Sports Commission. Regardless, it is undisputed that neither of the competing schools is the "host" of the championship football game.

The Central Florida Sports Commission, now called the Greater Orlando Sports Commission, is an organization whose mission is to drive the economic development of the greater Orlando community through sports. The commission partners with venues like the Citrus Bowl and works with them to book sporting events. There is no contention by either party that the commission is a state actor.

championship games held at the Citrus Bowl, the PA announcer was chosen and hired by the Central Florida Sports Commission. At no point in the season are PA announcers considered FHSAA employees or contractors. According to FHSAA procedure, for regular season and playoff games, including state championship games, PA announcers are considered "bench official[s]" and must "maintain complete neutrality at all times."

The FHSAA creates scripts for all playoff football games, including state championship games, and expects PA announcers to follow those scripts. It also has a protocol that governs the use of PA systems at playoff games. According to that protocol, PA announcers must follow the PA scripts the FHSAA gives them for promotional announcements, player introductions, and awards ceremonies. The protocol limits all other announcements to: emergencies; lineups for the participating teams; messages provided by host school management (for the non-championship playoff games when there is a host school); announcements about the sale of FHSAA merchandise and concessions; and other "practical" announcements (*e.g.*, there is a car with its lights on).

As for game play, the PA protocol instructs PA announcers to recognize players attempting to make or making a play and to report penalties, substitutions, and timeouts. PA announcers may not call the "play-by-play" or provide "color commentary" (as if they were announcing for a radio or television broadcast), and they may not make comments that might advantage or criticize either team.

Appendix A

The FHSAA PA scripts include announcements recognizing the corporate partners that have helped make the event happen. They also include messages promoting the corporate partners' products or services. These promotional announcements are the result of sponsorship agreements that the FHSAA enters into with each sponsor.

According to the agreements, a sponsor may provide a brief statement to be read by the PA announcer over the PA system at some point during the FHSAA event in exchange for the sponsor making a financial contribution to the FHSAA. The FHSAA has guidelines regarding the types of sponsors it will contract with, and each sponsorship agreement must be approved by the FHSAA's executive director. The sponsors often draft the text of their promotional announcement themselves, but they send the proposed text to the FHSAA for approval before an FHSAA employee adds any text to a PA script.

At a typical state championship football game, the PA announcer makes a handful of scripted pregame announcements beginning about 35 minutes before kickoff. That leads into the presentation of colors, the pledge of allegiance, and the national anthem, which are also typically broadcast over the PA system. The pregame announcements conclude after the PA announcer introduces the starting players and officials, narrates the coin toss, and provides a weather report.

At halftime of championship football games, competing schools may use the PA system to play music for their halftime performances. Until 2016 schools were also permitted to use their own "half time announcer" to introduce their marching band and song selections over the PA system. But there's no evidence that either school used one at the 2015 Class 2A final, the championship game in which Cambridge Christian played.

C. Pregame Prayer At The 2012 Class 2A Football Championship

Cambridge Christian did not make it to the Class 2A state championships in 2012, but two other Christian schools did: University Christian and Dade Christian. That year the principal of Dade Christian led a pregame prayer over the PA system. According to the PA script for that game, the prayer occurred with 30 minutes remaining on the pregame clock, right after an announcement about sportsmanship and right before an announcement about scholar-athlete awards.

It's not clear who authorized pregame prayer at the 2012 2A state championship game. Dr. Roger Dearing, the FHSAA's executive director at the time, testified that he didn't know about the prayer until this litigation and still doesn't know who at the FHSAA approved its addition to the PA script. But a former FHSAA employee testified that he believed Dr. Dearing had told him to add the prayer to the script.

That 2012 prayer is the only example in the record of a school representative delivering a pregame message (religious or otherwise) over the PA system at an FHSAA football championship game.[3]

D. The FHSAA's Denial Of Cambridge Christian's Request To Use The PA System For Pregame Prayer At The 2015 Class 2A Football Championship

During the 2015 regular season, Cambridge Christian played its home football games at Skyway Park, a county-owned facility in Tampa. Before each home game, the school's PA announcer Greg Froelich or another Cambridge Christian representative used the PA system to broadcast a prayer. There was no FHSAA script at any of those regular season games and nothing in the record indicates the FHSAA knew anything about the prayers at them.

Cambridge Christian went undefeated that season and qualified for the Class 2A playoffs. The school won its playoff games against Northside Christian School, Admiral Farragut Academy, and First Baptist Academy to advance to the championship game. Cambridge Christian hosted all three of those playoff games. It played

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3. When asked how often the FHSAA turns over a PA microphone to a school representative for welcoming remarks at *any* FHSAA sporting event, the FHSAA's executive director answered: "I don't know. I can share that it's done periodically often." He gave three examples of school administrators making welcoming remarks at weightlifting meets. He then added, "I don't think it's necessarily something we customarily do."

its playoff games against Northside Christian and First Baptist Academy at its home field, Skyway Park. It played its playoff game against Admiral Farragut Academy at Jefferson High School, a public school. Cambridge Christian selected Froelich to be the PA announcer for each of those three playoff games, and at each game he followed the PA script prepared by the FHSAA. As was the school's usual practice, Froelich also led the assembled crowd in an unscripted, pregame prayer over the PA system before the kickoff of each game. There is nothing in the record to indicate that the FHSAA knew about any of those three prayers.

On Friday December 4, 2015, Cambridge Christian played against University Christian in the 2015 Class 2A state championship game at the Citrus Bowl. Following protocol for championship games at the Citrus Bowl, the Central Florida Sports Commission selected and hired the PA announcer for that game. As it did for all playoff games, the FHSAA also prepared the PA script. And like all other playoff PA scripts, the 2015 finals script included paid sponsor messages. There's no evidence that anyone other than the PA announcer made announcements over the PA system before or during that game.

During a conference call that took place three days before the December 4, 2015 state championship game, a University Christian representative had asked the FHSAA for permission to say a pregame prayer over the stadium loudspeaker, as it had (apparently) been allowed to do at the 2012 championship game. Cambridge Christian's athletic director was on the call and supported

the request. The FHSAA responded that neither school would be allowed to use the PA system to broadcast a pregame prayer.

The day after that conference call, Cambridge Christian's then-Head of School Tim Euler emailed Dr. Dearing, who was still the FHSAA's executive director, to formally request that the FHSAA "allow two Christian schools to honor their Lord before the game and pray" over the loudspeaker. University Christian's head of school responded to the email seconding that request. About an hour after that, Dr. Dearing responded, again denying the schools' request to use the PA system for pregame prayer. He explained that after consulting with the FHSAA's lawyer, he believed federal law prevented him from granting the request for two reasons: (1) the Citrus Bowl is a "public facility," making it "off limits" under federal law and Supreme Court precedent; and (2) "the FHSAA (host and coordinator of the event) is legally a 'State Actor'" and therefore can't "permit or grant permission" for communal prayer. Dr. Dearing feared that allowing prayer over the loudspeaker would subject the FHSAA to "tremendous legal entanglements." (He is not a lawyer.)

Although the FHSAA denied the schools access to the PA system for a pregame prayer, it suggested that the schools gather as teams to pray before the start of the game. So that's what they did. University Christian and Cambridge Christian student athletes, coaches, administrators, and at least one referee prayed together at midfield before the start of the game. Both schools also prayed on the field in the minutes following the game.

Those prayers were not broadcast over the PA system and could not be heard by the fans in the stands. Froelich, Cambridge Christian's announcer, was in the stands that day and, although his voice was not amplified, he led a prayer for the fans who were standing around him.

The Monday after the championship game, Dr. Dearing sent a follow-up email to the two headmasters elaborating on his decision to deny their request. He stated his belief that "under the circumstances," if the FHSAA were to allow prayer over the PA system, the State could be seen as "endors[ing]" or "promot[ing] religion," which would violate the Establishment Clause. Dr. Dearing referred to the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000), which held that a school district's policy permitting student-led prayer at football games violated the Establishment Clause; he said that the decision was "directly on point." The FHSAA explained its decision again in similar terms in a press release. (The press release did not mention that when he denied the schools access to the PA system Dr. Dearing was giving only his lay opinion.)

Cambridge Christian made the football playoffs again in 2020. That year the school's team played in the first two rounds of the playoffs before being eliminated. Cambridge Christian did not host either game, but both games were played against other Christian schools and at both games someone used the PA system to say a prayer before kickoff.

E. Procedural History

In September 2016 Cambridge Christian brought this lawsuit against the FHSAA under 42 U.S.C. § 1983, alleging that the association had violated its rights as guaranteed by the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions. The school sought damages, a declaratory judgment, an injunction against future restrictions on pregame prayer over the PA system at football championship games, and attorney's fees. Cambridge Christian also brought claims for declaratory relief under the Establishment Clauses of the United States and Florida Constitutions and included a state law claim under Florida's Religious Freedom Restoration Act.

The district court dismissed Cambridge Christian's complaint in its entirety for failure to state a claim. The school appealed, and we affirmed in part and reversed in part. *See Cambridge Christian Sch.*, 942 F.3d 1215. We affirmed the district court's denial of declaratory relief under the federal and state Establishment Clauses and its dismissal of the school's state law claim. *Id.* at 1252. But we held that Cambridge Christian had plausibly alleged violations of the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions, adding that "[t]here are too many open factual questions for us to say with confidence that the allegations" related to those claims "cannot be proven as a matter of law." *Id.* at 1223. We reversed the district court's dismissal of the federal and state free speech and free exercise claims and

remanded so that the "open factual questions" could be answered through discovery. *See id.* at 1223, 1252.

On remand, after discovery the parties filed cross motions for summary judgment, each contending that after discovery those previously open questions were open no more, at least not at the district court level. In an order dated March 31, 2022, the district court agreed with the FHSAA and granted its summary judgment motion while denying Cambridge Christian's. On the free speech claims, the court concluded that the speech at issue—pregame speech broadcast over the PA system at FHSAA football championship games—is government speech and therefore unrestricted by the Free Speech Clause in the United States or Florida Constitution. Alternatively, the court believed that even if some of the speech could be considered non-governmental, there was no Free Speech Clause violation because "the Citrus Bowl's PA system is a nonpublic forum" and the FHSAA's restriction was "reasonable and appropriate." There was, the court also concluded, "no viewpoint discrimination."

As for the free exercise claims, the court concluded that Cambridge Christian's free exercise rights were not violated when it was denied access to the PA system for pregame prayer because the prayer restriction did not impermissibly burden a sincerely held religious belief. The court made a factfinding that based on the record, communal prayer broadcast over the PA system is not Cambridge Christian's typical practice at events that it is not hosting, and it did not host the game in question. The district court stated that while using the PA system for

communal pregame prayer is the school's "preference," it is "not a deeply rooted tradition that rises to the level of a sincerely held belief " that implicates either Free Exercise Clause.

Cambridge Christian filed this appeal.

F. House Bill 225 (2023)

In May 2023 the Florida legislature passed House Bill 225, which required the FHSAA to "adopt bylaws, policies, or procedures that provide each school participating in a high school championship contest or series of contests under the direction and supervision of the association the opportunity to make brief opening remarks, if requested by the school, using the public address system at the event." Ch. 2023-97, Fla. Laws, § 6 (codified at Fla. Stat. § 1006.185). The law became effective on July 1, 2023. *Id.* § 7.

In response, the FHSAA adopted a policy that allows schools participating in state championship events to make brief opening remarks over the PA system. *See* Florida High School Athletic Association, *2023-24 FHSAA Handbook* 60, Administrative Policy 10.7 (2024), https://fhsaa.com/documents/2023/7/13//2324_handbook.pdf?id=4394. According to the new policy, the remarks may not exceed two minutes per school and may not be derogatory, rude, or threatening. *See id.* And "[b]efore the opening remarks, the announcement must be made that the content of any opening remarks by a participating school is not endorsed by and does not reflect the views and/or opinions of the FHSAA." *Id.*

The new Florida law and the corresponding FHSAA policy create a potential mootness issue as to the prospective relief Cambridge Christian is seeking. And there's a standing problem, which, like the mootness issue, also requires us to look at how likely it is that Cambridge Christian will suffer the same injury in the future. We turn to those standing and mootness issues first.

II. Jurisdiction

We must satisfy ourselves of our own jurisdiction before proceeding to the merits of an appeal. *See Gardner v. Mutz*, 962 F.3d 1329, 1336-37 (11th Cir. 2020). Article III of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. Art. III, § 2. One element of that case-or-controversy limitation is that a plaintiff must have standing to sue. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). Another element is that the plaintiff's case cannot have become moot. *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216-17 (11th Cir. 2000); *see Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (explaining that the case-or-controversy limitation "underpins" the standing and mootness justiciability doctrines); *see also Baughcum v. Jackson*, 92 F.4th 1024, 1030 (11th Cir. 2024); *Gardner*, 962 F.3d at 1336; *Christian Coalition of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011).

Standing and mootness are closely related. *See Schultz v. Alabama*, 42 F.4th 1298, 1320 (11th Cir. 2022).

Put simply, the two doctrines ensure that "[t]he requisite personal interest that . . . exist[s] at the commencement of the litigation (standing) . . . continue[s] throughout its existence (mootness)." *Laidlaw*, 528 U.S. at 189 (quotation marks omitted); *see also id.* at 189-92 (discussing the differences between standing and mootness); *Christian Coalition of Fla.*, 662 F.3d at 1190 ("[T]he controversy 'must be extant at all stages of review, not merely at the time the complaint is filed.'") (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)); *Sims v. Fla., Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1459 (11th Cir. 1989) ("Mootness demands that the plaintiff's personal interest in the lawsuit (standing) continue to the lawsuit's end.").

Cambridge Christian's claims for declaratory and injunctive relief implicate both the standing and mootness doctrines. We may address standing and mootness in whatever order we prefer, *see Gardner*, 962 F.3d at 1336, and here we think it makes the most sense to first decide whether Cambridge Christian has standing to bring its claims for declaratory and injunctive relief and then decide whether those claims have since become moot. Our review of both questions is *de novo*. *Baughcum*, 92 F.4th at 1030.

A. Standing

To establish standing, a plaintiff must have: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540,

194 L. Ed. 2d 635 (2016). The plaintiff bears the burden of establishing each of those elements, *see id.*, and must do so "separately for each form of relief sought," *Laidlaw*, 528 U.S. at 185. Standing is determined as of the time the complaint was filed. *Schultz*, 42 F.4th at 1319.

A plaintiff seeking injunctive relief to prevent future injury must "establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury is certainly impending.'" *Laidlaw*, 528 U.S. at 190 (alteration adopted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)); *see also Clapper*, 568 U.S. at 409 (explaining that a threatened injury must be "certainly impending" to satisfy the injury-in-fact requirement for standing); *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (explaining that a plaintiff complaining that he is in danger of future injury must show that the threat of injury is "both real and immediate, not conjectural or hypothetical") (quotation marks omitted); *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects."); *Elend v. Basham*, 471 F.3d 1199, 1207 (11th Cir. 2006) ("The binding precent in this circuit is clear that for an injury to suffice for prospective relief, it must be imminent."). Allegations of "*possible* future injury" are not sufficient for Article III standing. *Clapper*, 568 U.S. at 409 (quotation marks omitted).

Likewise, a plaintiff has standing to seek declaratory relief only when "there is a substantial likelihood that he will suffer injury in the future." *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210-11 (11th Cir. 2019) (quotation marks omitted). "The controversy between the parties cannot be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury." *Id.* at 1210 (quotation marks omitted); *see also Elend*, 471 F.3d at 1207 (explaining that a prayer for both declaratory and injunctive relief requires a showing of "a real and immediate threat of future harm").

Cambridge Christian has not established that the threatened injury that concerns it is sufficiently imminent to justify its request for equitable relief. The school seeks "an injunction barring FHSAA from enforcing the Prayer Ban and prohibiting FHSAA from discriminating against religious speech over the loudspeaker." It defines the "Prayer Ban" as the FHSAA's 2015 "policy prohibiting schools participating in the football state championship game from using the stadium loudspeaker for pregame prayer." In other words, the school has limited its request for equitable relief to pregame prayer over the PA system at FHSAA state championship football matches. As Cambridge Christian puts it: "[Cambridge Christian] annually competes to make it to the championship game and, if it reaches that game, it will be denied the ability to engage in its constitutionally protected religious practice and speech."[4] But only, we would add, if it wins all of its

4. Cambridge Christian now asserts that the FHSAA's "Prayer Ban" is not limited to football and that even setting

playoff games leading to the state championship game, the final one.

Here's the problem with Cambridge Christian's position. Its football team has not returned to the FHSAA state championship since 2015. In fact, 2015 is the only year the team has ever made it to the state championship since the school started its football program in 2003. Only once in two decades.

Cambridge Christian acknowledges that its standing theory relies on "speculation" that it "will make it to another championship game," but the school contends that that speculation does not defeat standing because there's no need to prove that future harm is certain. True, Cambridge Christian is not required to demonstrate "that it is literally certain that the harms [it] identif[ies]

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football aside, the school has standing to bring claims for declaratory and injunctive relief based on its participation in other FHSAA sports. But Cambridge Christian has not made any allegations in its complaint about being denied access to the PA system to pray at a game other than at the football championship game. And when we asked the school to "clarify" the "exact nature of the equitable relief that [it] seeks," the school responded that it wants an injunction against the FHSAA policy against using the loudspeaker for pregame prayer at "the football state championship game." So we will hold Cambridge Christian to that answer to our question and to the relief it sought in its complaint. In any event, there's no evidence in the record to support the school's suggestion that its participation in a future championship game of another sport is "imminent," *see Elend*, 471 F.3d at 1207; in fact, there is no record evidence of the school making it to a championship final in any other sport besides football.

will come about." *See Clapper*, 568 U.S. at 414 n.5. But the school does need to demonstrate that future injury is "*certainly impending*," or at the very least, that there is a "*substantial risk*" that the harm will occur. *See id.* at 414 & n.5 (emphasis added). And given the Lancers' past performance on the gridiron, it cannot meet that standard. All the more so because as Cambridge Christian admits, the "competitiveness" of its football team "has waned" over the last few seasons, and the team is now in what it calls a "rebuilding phase" that it expects to last for a "few years." Hope springs eternal but standing cannot be built on hope. With all due respect to the Cambridge Christian Fighting Lancers, there's nothing to suggest that the team's participation in a future football state championship is imminent or even likely. *See Clapper*, 568 U.S. at 410 (rejecting the plaintiffs' "highly speculative" standing theory premised on a "highly attenuated chain of possibilities").

Cambridge Christian relies on *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003), where the Supreme Court held that a plaintiff had standing to seek declaratory and injunctive relief with respect to a university's use of race in its undergraduate admissions process, even though the plaintiff had not yet re-applied for admission, because he was "able and ready" to re-apply "should the University cease to use race in undergraduate admissions." *Id.* at 262. Cambridge Christian asserts that like the plaintiff in *Gratz*, it "stands able and ready to compete in the FHSAA league on a basis that does not discriminate" against its religious practices and speech.

Gratz is easily distinguishable. First, *Gratz* was an equal protection case, and this one is not. As the Supreme Court explained in *Gratz*, in an equal protection case challenging the denial of equal treatment based on the imposition of a barrier, the party challenging the barrier "need only demonstrate that it is able and ready" to compete on an equal basis "and that a discriminatory policy prevents it from doing so." *Id.* at 261-62 (quotation marks omitted). Second, in *Gratz* there was nothing keeping the plaintiff from reapplying for admission and subjecting himself to the challenged discriminatory policy, other than the challenged policy itself. Here, for Cambridge Christian to be subject to the challenged policy, it must win a specified series of football games, a task it has not been able to accomplish since 2015. While the school might be "ready" to compete in the state championship game if it ever gets to one again, it is not "able" to get to one without first clearing the many regular season and playoff hurdles that it has not been "able" to clear in the past eight years.

That the FHSAA may have violated the school's constitutional rights in 2015 by restricting use of the PA system for pregame prayer at the championship football game "presumably afford[s] [the school] standing to claim damages" against the FHSAA, but it "does nothing to establish a real and immediate threat" that it would suffer the same injury in the future. *Lyons*, 461 U.S. at 105 (holding that the plaintiff had failed to demonstrate standing for his equitable claims because the fact that he may have been illegally choked by police officers in the past was not enough to show "a real and immediate threat"

that he would again be illegally choked by an officer in the immediate future). Unable to show "the threat of injury [is] both real and immediate, not conjectural or hypothetical," *id.* at 102 (cleaned up), Cambridge Christian lacks standing to bring its claims for declaratory and injunctive relief.

B. Mootness

Even if the school had standing to bring its claims for declaratory and injunctive relief, those claims have become moot. Usually, a case must be dismissed as moot "if events that occur subsequent to the filing of a lawsuit deprive the court of the ability to give the plaintiff meaningful relief." *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1267 (11th Cir. 2020) (alterations adopted) (quotation marks omitted); *see also Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1217 ("[A] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.") (quotation marks omitted). "Mootness demands that there be something about the case that remains alive, present, real, and immediate so that a federal court can provide redress in some palpable way." *Gagliardi v. TJCV Land Tr.*, 889 F.3d 728, 733 (11th Cir. 2018).

"The purpose of an injunction is to prevent future violations," so for a claim for injunctive relief to remain a live controversy there must "exist[] some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct.

894, 97 L. Ed. 1303 (1953); *see also Cotterall v. Paul*, 755 F.2d 777 (11th Cir. 1985) ("Past exposure to illegal conduct does not in itself show a pending case or controversy regarding injunctive relief if unaccompanied by any continuing, present injury or real and immediate threat of repeated injury.") (quotation marks omitted). Similarly, a claim for declaratory relief becomes moot when there is no longer "a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment*." *Preiser*, 422 U.S. at 402.

Cambridge Christian's claims for declaratory and injunctive relief are moot. Based on Fla. Stat. § 1006.185 and the FHSAA's corresponding policy, which authorize pregame access to the PA system at state championship events for brief comments, it's clear that the school won't be subjected to the PA system prayer ban at future state championship football games, even if does return to FHSAA football. We recognize that under the "voluntary cessation" exception to the mootness doctrine, "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Laidlaw*, 528 U.S. at 174. Otherwise a defendant could willingly change its behavior to avoid a lawsuit and then, after doing so, "return to its old ways." *See Keohane*, 952 F.3d at 1267 (alteration adopted) (quotation marks omitted).

There are circumstances where a defendant's voluntary cessation of challenged conduct may moot a case after all, but the standard for that is "stringent":

A defendant's voluntary conduct may moot a case only if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 189 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)); *see also Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1255 (11th Cir. 2017) (en banc), *abrogated on other grounds by Uzuegbunam v. Preczewski*, 592 U.S. 279, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021). "The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Laidlaw*, 528 U.S. at 189 (alteration adopted) (quotation marks omitted).

A government defendant can often meet that burden by formally rescinding a challenged policy. *See Keohane*, 952 F.3d at 1267-68 (adding that "the repeal of a challenged statute—or other similar pronouncement" ordinarily makes it clear that the challenged behavior can't reasonably be expected to recur) (quotation marks omitted). That's because government defendants are "more likely than private defendants to honor a professed commitment to changed ways." *Id.* (quotation marks omitted); *see also Flanigan's*, 868 F.3d at 1256 ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities.") (quotation marks omitted); *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011) ("Hence, the

Supreme Court has held almost uniformly that voluntary cessation by a government defendant moots the claim.") (alteration adopted) (quotation marks omitted); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007) (explaining that "government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur").

Once a government defendant has repealed a challenged policy, the burden shifts to the plaintiff to present evidence that its challenge has not been mooted by that repeal. *Keohane*, 952 F.3d at 1268. To do so the plaintiff must show a "reasonable expectation" (or "substantial likelihood") that the government defendant will "reverse course" and reinstate the repealed policy if the lawsuit is terminated. *Id.* (quotation marks omitted); *see also Flanigan's*, 868 F.3d at 1256. In deciding whether a plaintiff has met that burden, we consider three non-exclusive factors: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction"; (2) whether the decision to end the challenged conduct was "unambiguous" and can be "fairly viewed as being 'permanent and complete'"; and (3) "whether the government has consistently maintained its commitment to the new policy." *Keohane*, 952 F.3d at 1268 (quoting *Flanigan's*, 868 F.3d at 1257).

The FHSAA contends that Fla. Stat. § 1006.185 and the athletic association's corresponding policy have eliminated any likelihood that Cambridge Christian will be denied the opportunity to offer a pregame prayer

over the PA system at a future championship football game (assuming the prayer complies with the statute and policy). We agree. The new law and policy unambiguously allow for brief opening remarks over the PA system at state championship events. The only content restriction on those remarks is that they may not be derogatory, rude, or threatening, and they can be no longer than two minutes in length. There are no specific restrictions applicable only to prayer. The law and corresponding policy effectively "repeal" the FHSAA's earlier prayer restriction, making it clear that the allegedly wrongful conduct—a ban of all pregame prayer over the PA system at a state championship football game—cannot reasonably be expected to recur. *See Laidlaw*, 528 U.S. at 189.

Cambridge Christian insists that the new state law and FHSAA policy have not mooted its claims for equitable relief because the FHSAA could still enforce the PA system prayer ban on the ground that the ban is required by the Establishment Clause. In supplemental briefing, the FHSAA has clarified its "position" that the "use of the PA system at Florida championship athletic contests by representatives of a school to deliver a pregame communal prayer that complies with the statute and the FHSAA's corresponding Administrative Policy does not violate the Establishment Clause or any other federal law." Cambridge Christian asks us to reject that "new version" of the FHSAA's "Establishment Clause Policy" as manufactured for litigation. The school fears that because the FHSAA has not repudiated its previous Establishment Clause position or publicly committed to its new one, the FHSAA could still decide that under certain

circumstances, pregame prayer over the PA system violates the Establishment Clause.

Cambridge Christian has not met its burden of showing a substantial likelihood that if this lawsuit is terminated the FHSAA will reverse course and ban use of the PA system for pregame prayer. *See Keohane*, 952 F.3d at 1267-68. True, the FHSAA stands by its executive director's belief in 2015 that allowing prayer over the PA system would have been an Establishment Clause violation "under the circumstances" *then*, but that question is not before us. *See Cambridge Christian Sch.*, 942 F.3d at 1252 (affirming the dismissal of Cambridge Christian's Establishment Clause claims).

As the FHSAA points out, the circumstances have changed enough that allowing pregame PA prayer *now* would not violate the Establishment Clause. In 2015 the FHSAA refused to give the schools pregame access to the PA system for religious speech when that access had not been historically available to other private speakers. *See infra* at 40-42. After the passage of Fla. Stat. § 1006.185, it appears that access has been made equally available to all speakers, religious and secular. And the Establishment Clause does not require the government to "refus[e] to extend free speech rights to religious speakers who participate in broad-reaching government programs" that are "neutral toward religion." *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839-40, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

Also, while the new statute may have been enacted in response to Cambridge Christian's legal challenge, there's no evidence the change is temporary or was made in "an attempt to manipulate our jurisdiction." *See Flanigan's*, 868 F.3d at 1257. Nor is there evidence that the FHSAA's policy change was made in an attempt in manipulate our jurisdiction; it was done to comply with the newly enacted state statute.[5]

For both standing and mootness reasons, we lack jurisdiction to consider Cambridge Christian's claims for declaratory and injunctive relief.

C. Nominal Damages

Even though we lack jurisdiction to consider Cambridge Christian's claims for declaratory and injunctive relief, we must proceed to the merits of the school's First Amendment claims because we have jurisdiction over the school's claims for nominal damages to redress the injury the school alleges to have suffered from the FHSAA's past constitutional violations. *See Uzuegbunam*, 141 S. Ct. at 802 ("[F]or the purpose of Article III standing, nominal

5. Cambridge Christian briefly asserts that the capable-of-repetition-yet-evading-review exception to mootness applies. It does not. For reasons already discussed, the school cannot show a "reasonable expectation" that it will be "subjected to the same action again," which is one of the requirements for that exception to mootness to apply. *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975); *see also Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (explaining that "a mere physical or theoretical possibility" of repeated action is not sufficient to invoke the exception).

damages provide the necessary redress for a complete violation of a legal right."); *Keister v. Bell*, 29 F.4th 1239, 1251, 1256 (11th Cir. 2022) (concluding that the plaintiff had standing to bring his claim for nominal damages for the defendants' past alleged violation of his First Amendment rights, and that the nominal damages claim had not been mooted by the defendants' replacement of the challenged policy); *see also Powell v. McCormack*, 395 U.S. 486, 497, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969) ("Where one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy.").

The FHSAA contends that Cambridge Christian has "waived and forfeited" its claim for nominal damages by not raising the possibility of them until this appeal. In its amended complaint Cambridge Christian asked for "[d]amages pursuant to 42 U.S.C. § 1983" and "28 U.S.C. § 2202" based on the alleged violations of its free speech and free exercise rights. Nowhere did the school specifically request nominal damages.

But a plaintiff need not plead nominal damages in a First Amendment case to be entitled to them. Nominal damages are "require[d] . . . upon proof of infringement of a fundamental First Amendment liberty." *Familias Unidas v. Briscoe*, 619 F.2d 391, 397, 402 (5th Cir. 1980) (holding that where the plaintiff sought declaratory and injunctive relief and compensatory damages for a violation of her First Amendment right of association but could not prove compensable injury, she was "entitled to receive nominal damages" based on the First Amendment

violation alone)[6]; *see also Uzuegbunam*, 141 S. Ct. at 800 ("Nominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded *by default* until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages.") (emphasis added); *Howard v. Int'l Molders & Allied Workers Union*, 779 F.2d 1546, 1553 (11th Cir. 1986) (quoting favorably *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965), which held that as a matter of federal common law "[i]t is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled"); *KH Outdoor, LLC v. City of Trussville*, 465 F.3d 1256, 1261 (11th Cir. 2006) (explaining that "nominal damages are . . . appropriate in the context of a First Amendment violation," even where the plaintiff "suffers no compensable injury") (quotation marks omitted); *Al-Amin v. Smith*, 511 F.3d 1317, 1335 (11th Cir. 2008) ("Our precedent thus recognizes the award of nominal damages for violations of the fundamental constitutional right to free speech absent any actual injury.") (quotation marks omitted).

The FHSAA relies on *Oliver v. Falla*, 258 F.3d 1277, 1282 (11th Cir. 2001), to support its contention that Cambridge Christian has waived its nominal damages claim. In *Oliver* we held that the plaintiff "waived" his right to nominal damages by failing to request a nominal

6. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

damages jury instruction. 258 F.3d at 1282. But this case is not like *Oliver*. For one thing, *Oliver* was an Eighth Amendment excessive force case, not a First Amendment case, and "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Carey v. Piphus*, 435 U.S. 247, 264-67, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) (holding that a § 1983 plaintiff is entitled to nominal damages for the deprivation of procedural due process even in the absence of actual injury because the right to procedural due process is "absolute"). Indeed, in *Oliver* we "question[ed] whether nominal damages are appropriate in an Eighth Amendment case" at all and concluded that at the very least they are "not automatic." 258 F.3d at 1282. Not so in a First Amendment case, where nominal damages are presumed when there has been proof of liability. *See Familias Unidas*, 619 F.2d at 402 (extending "the rationale of *Carey*" to the First Amendment context).

The parties' joint pretrial statement, which Cambridge Christian signed, states that "[n]either party claims monetary damages in this action." But that pretrial statement would have "govern[ed] the trial" and does not necessarily apply at this pretrial stage in the litigation. M.D. Fla. R. 3.06(b). Even if we were to hold the parties to their pretrial statement, we don't read that disclaimer of monetary damages to include waiving any potential claim for nominal damages.

So on to the merits.

III. Discussion

When the parties have filed cross-motions for summary judgment, we review *de novo* the district court's grant of summary judgment and view the facts in the light most favorable to the non-moving party on each motion. *See LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1189 (11th Cir. 2010). Summary judgment is appropriate if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We may affirm the district court for any reason supported by the record. *Waldman v. Ala. Prison Comm'r*, 871 F.3d 1283, 1289 (11th Cir. 2017).

The First Amendment provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . . " U.S. Const. Amend. I. Cambridge Christian claims that the FHSAA violated its First Amendment free speech and free exercise rights when it denied the school the opportunity to use the loudspeaker to broadcast a pregame prayer at the 2015 football finals. We will examine each claim in turn.[7]

A. Free Speech

The Free Speech Clause of the First Amendment "works as a shield to protect *private* persons from

7. The same principles and analyses that apply to Cambridge Christian's claims brought under the Free Speech and Free Exercise Clauses of the United States Constitution also apply to its claims brought under the analogous clauses of the Florida Constitution. *Cambridge Christian Sch.*, 942 F.3d at 1228 n.2.

encroachments by the government on their right to speak freely, not as a sword to compel the government to speak for them." *Leake v. Drinkard*, 14 F.4th 1242, 1247 (11th Cir. 2021) (alteration adopted) (citation and quotation marks omitted); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."). When the government speaks for itself, "it is not barred by the Free Speech Clause from determining the content of what it says," *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015), and "it can freely select the views that it wants to express," *Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (quotation marks omitted). So if the speech at issue here is government speech, Cambridge Christian's free speech claims necessarily fail. *See id.* at 1072; *Shurtleff v. City of Boston*, 596 U.S. 243, 251, 142 S. Ct. 1583, 212 L. Ed. 2d 621 (2022).

"Whether speech is government speech is inevitably a context specific inquiry." *Mech*, 806 F.3d at 1075. There is no "precise test" for determining whether speech is government or private speech, *id.* at 1074, but we generally consider three factors: "the history of the expression at issue; the public's likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression." *Shurtleff*, 596 U.S. at 252; *see also Mech*, 806 F.3d at 1074-75; *Leake*, 14 F.4th at 1248.

Those three factors—history, endorsement, and control—are not exhaustive and may not all be relevant in every case. *Mech*, 806 F.3d at 1075; *see Shurtleff*, 596 U.S. at 252 (describing the government speech analysis as a "holistic inquiry" that is "driven by a case's context rather than the rote application of rigid factors"). "But a finding that *all* [three factors] evidence government speech will almost always result in a finding that the speech is that of the government." *Leake*, 14 F.4th at 1248.

We are deciding the constitutionality of (in Cambridge Christian's words) a "policy prohibiting schools participating in the football state championship game from using the stadium loudspeaker for pregame prayer." For that reason, and given the "context specific inquiry" that is the government speech analysis, *Mech*, 806 F.3d at 1075, we will focus our government speech inquiry primarily on pregame speech over the PA system at FHSAA football championship games, as opposed to speech at any other game, sport, or period of the championship game. *See Santa Fe*, 530 U.S. at 302-03 (in considering whether student-led pregame prayer is government speech or private speech, focusing its analysis on speech during the pregame ceremony); *see also Shurtleff*, 596 U.S. at 253-58 (in considering whether a city's flag raising program constituted government speech, acknowledging the "general history" of flag flying but focusing on "the details of *this* flag-flying program" to conclude that the speech was private).

Here, the district court determined that all three factors "strongly" support a finding of government speech. We agree.

1. History

The first factor we look to is the "history of the expression at issue." *Shurtleff*, 596 U.S. at 252. This factor "directs us to ask whether the type of speech under scrutiny has traditionally 'communicated messages' on behalf of the government." *Cambridge Christian Sch.*, 942 F.3d at 1232 (quoting *Walker*, 576 U.S. at 211); *see Leake*, 14 F.4th at 1248.

In our earlier decision in this case we concluded that the history factor "plausibly weighs in favor of characterizing the speech over the loudspeaker as being, at least in part, private." *Cambridge Christian Sch.*, 942 F.3d at 1232. Now, with the benefit of a fully developed record at the summary judgment stage, we conclude that pregame speech over the PA system at football finals has traditionally constituted government speech. The pregame PA speech is entirely scripted and is typically limited to welcome messages from the FHSAA, announcements from sponsors, scholar athlete awards, the national anthem introduction and performance, the presentation of colors, the pledge of allegiance, and the introduction of the starters and officials—all narrated by the PA announcer, who is selected by the Central Florida Sports Commission and not by the schools competing in the game. The national anthem, presentation of colors, and pledge of allegiance are "inseparably associated with ideas of government."

See id. at 1233. And in context it's clear that the other introductory announcements are communicated on behalf of the FHSAA, a state actor.

There is only one example in the record of *any* private speaker using the PA system for a pregame message (religious or secular) at an FHSAA football state championship, and that was at the 2012 Class 2A finals when the principal of Dade Christian led the community in prayer.[8] One instance does not a history make.

Cambridge Christian points to the pregame prayers over the loudspeaker at their non-championship playoff football games in 2015 and 2020 to argue that the history factor weighs in favor of private speech. But the critical distinction between non-championship and championship playoff games in this league is that nonchampionship games are hosted by one of the participating schools while championship games are hosted at a neutral site by the Central Florida Sports Commission in partnership with the FHSAA. *See supra* at 5-6. Because the government speech analysis is context-specific and the central

8. Even looking at PA speech at *all* playoff games for *all* FHSAA sports, as Cambridge Christian would have us do for our government speech analysis, the 2012 Class 2A football finals is the only time an FHSAA script has mentioned prayer. And out of the hundreds of FHSAA scripts in the record, the school points to only two other instances where a school representative may have offered some kind of introductory remarks over the PA system at an athletic event of any kind: the 2019 boys weightlifting state championships, and the 2020 girls weightlifting state championships. In both instances the school representative would have been a public school principal, not a private speaker.

question is "whether the government is *speaking* instead of regulating private expression," *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring), we believe that distinction matters. *See also Cambridge Christian Sch.*, 942 F.3d at 1232 (suggesting that "how closely the FHSAA administered or monitored the early round playoff games hosted by Cambridge Christian" might be relevant to the government speech analysis).

As the host of its 2015 playoff games, Cambridge Christian chose the venue and the PA announcer for those games. For the football championships at the Citrus Bowl, on the other hand, the FHSAA chose the venue, and the Central Florida Sports Commission chose the PA announcer. While the FHSAA prepares the PA scripts for all playoff football games, the pregame prayers at the non-championship football games were unscripted, and it's undisputed that Cambridge Christian did not ask permission from the FHSAA to pray over the PA system at those games. In fact, there's no evidence that the FHSAA actively monitored those early round playoff games or even knew that prayer was taking place at them. For all of those reasons, we don't give much weight to the unscripted pregame prayer at non-championship playoff games.

The few scripted promotional messages from sponsors do not transform the pregame PA speech into private speech. The promotional messages are often drafted by that sponsor, but they must be approved and added to the PA script by the FHSAA. "When, as here, the government sets the overall message to be communicated and approves

every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560-62, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005) (holding that a promotional campaign written by a nongovernment entity constituted government speech when the message was "effectively controlled by" the government and the government "exercise[d] final approval authority over every word used in every promotional campaign"); *see also Summum*, 555 U.S. at 470-72 (holding that privately designed or funded monuments that the government accepts and displays on government land speak for the government); *Walker*, 576 U.S. at 216-17 (holding that where private parties propose designs that Texas may accept and display on its license plates, the messages still constitute government speech).

In sum, because the PA system "has traditionally communicated messages on behalf of the government" during the pregame period of football championship games, *Cambridge Christian Sch.*, 942 F.3d at 1232 (quotation marks omitted), the history factor weighs in favor of the conclusion that this is government speech.

2. Endorsement

The endorsement factor "asks whether the kind of speech at issue is 'often closely identified in the public mind with the government.'" *Id.* (quoting *Summum*, 555 U.S. at 472). Put another way, it asks whether "observers reasonably believe the government has endorsed the message." *Id.* at 1232-33 (quoting *Mech*, 806 F.3d at 1076).

We previously concluded that based on the allegations in Cambridge Christian's amended complaint, the endorsement factor appeared to weigh in favor of government speech. *Id.* at 1234. Discovery has borne that out. Nearly all of the alleged facts that we believed favored government speech are now undisputed: (1) "[t]he state organized the game"; (2) it was the championship game of "a class of a league organized by the FHSAA"; (3) "[t]he public-address system was part of a stadium owned by the government"; (4) the PA announcer was a neutral party[9]; (5) "[t]he prayer would have come at the start of the game, around when the National Anthem and Pledge of Allegiance are traditionally performed," which are rituals "inseparably associated with ideas of government"; (6) the loudspeaker was not used during the championship "by anyone other than the public-address announcer, with the exception of music played for the half time performances"; (7) there was no "host school" in the traditional sense at this championship game, which was held at a "neutral location"; and (8) the 2015 Football Finals Participant Manual doesn't indicate there was any

9. Based on the allegations in the amended complaint and its accompanying exhibits, we had described the PA announcer for the 2015 finals as a "representative of the government." *Cambridge Christian Sch.*, 942 F.3d at 1233. We know now that the PA announcer was not chosen by the FHSAA and was not considered an FHSAA employee. But it's undisputed that he was not a representative of either school. Given that fact and the fact that the 2015 finals was a state-organized championship event, the public would likely perceive the PA announcer to be a representative of the government, and that counts for this factor. *See Shurtleff*, 596 U.S. at 252; *Summum*, 555 U.S. at 472; *Mech*, 806 F.3d at 1076.

room for announcements by anyone other than the PA announcer. *Id.* at 1233-34.

On top of all of that, "[t]he types of messages conveyed over the loudspeaker" by the PA announcer during the pregame period—welcome messages from the FHSAA, awards, and player introductions—"also suggest that observers would believe the government endorsed the messages." *Id.* at 1233. While any one of those facts alone might not indicate government endorsement, all together they paint a compelling picture.

Cambridge Christian counters that the prayer at the 2015 state championship game would have been delivered by a school representative and not the PA announcer, *perhaps* even after an introductory disclaimer by the PA announcer, which would have allowed the fans to distinguish between FHSAA speech and school speech. But "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere forum-provider," especially where the surrounding context otherwise indicates government endorsement. *Walker*, 576 U.S. at 217; *see id.* at 212-14, 216 (explaining that privately designed messages on state license plates still "have the effect of conveying a government message") (quoting *Summum*, 555 U.S. at 472); *Leake*, 14 F.4th at 1249-50 (holding that private sponsorship of and participation in a military parade did not "extinguish the governmental nature of the message, especially if, as here, the government is organizing and funding the event through which the message

is communicated") (citation and quotation marks omitted); *see also Gundy v. City of Jacksonville*, 50 F.4th 60, 79 (11th Cir. 2022) (finding that the endorsement factor weighed in favor of government speech even where the speech at issue, a legislative prayer, was made by a private party, and finding it relevant that the prayer was delivered along with the pledge of allegiance during the opening of a government occasion); *Dean v. Warren*, 12 F.4th 1248, 1265 (11th Cir. 2021) (separate opinion) (concluding that, where the speech at issue was speech by cheerleaders for a public university, government endorsement was "even more apparent in the context of the national anthem and other pre-game rituals"). Considering the context in which the prayer would have occurred, the identity of the speaker and any introductory disclaimer—if there were a disclaimer—would not have tipped the scales away from government endorsement in this specific case.

Cambridge Christian also argues that the sponsor advertisements cut against a finding of government endorsement. As we said in our earlier opinion, an announcer at a state-organized, state championship game who "guides the spectators through" the national anthem, the pledge of allegiance, the presentation of colors, and the introduction of starters, "and who maintains neutrality while calling plays would have been closely associated in the minds of spectators with the FHSAA." *Cambridge Christian Sch.*, 942 F.3d at 1234; *see also supra* at 42-43. For that reason, and without knowing more about the content of the sponsor messages, we previously suggested that "advertisements read by the announcer would also likely be perceived as government-endorsed." *Cambridge*

Christian Sch., 942 F.3d at 1234. But we suggested that the content of the ads might necessitate a different conclusion after discovery. *Id.; see also Mech*, 806 F.3d at 1076-77 (in concluding that promotional banners hung on school fences were endorsed by the government, finding it relevant that the banners were designed to recognize and "thank" the school's business partners and sponsors and were not "purely private advertising").

As it turns out, the sponsor messages that were read during the pregame period of the 2015 finals indicate FHSAA endorsement. A pair of messages announced that the Bright House Sports Network, "the official television partner of the FHSAA," would be streaming the game coverage live and would be airing replays of all eight FHSAA football championship games. Another message was on behalf of Team IP, the official merchandising company of the FHSAA, reminding fans to purchase an "FHSAA championship souvenir." The final sponsorship message asked athletic directors and coaches to stop by a designated suite to see new football and gear offerings from Champion Athletic Wear, the presenting sponsor of the 2015 final game. Those messages are closer to the recognition of official partners than they are to "purely private advertising." *See Mech*, 806 F.3d at 1077. Not to mention that they are sprinkled amongst welcome messages, sportsmanship announcements, scholar-athlete awards, player introductions, and other pregame rituals that spectators would undoubtably associate with the FHSAA.

More traditional advertisements do appear elsewhere in the 2015 finals script. But as we've discussed, we

think PA speech during other points in the game is not as relevant to our government speech analysis in this case as is the pregame PA speech. *See supra* at 37-38; *see*, *e.g.*, *Shurtleff*, 596 U.S. at 255. In any event, those advertisements were conveyed by a neutral announcer over a government-owned PA system throughout the course of a government-organized event, all made on behalf of "corporate partners" of the FHSAA. That combination would lead a reasonable spectator to believe that even those ads were delivered with FHSAA approval. *See Mech*, 806 F.3d at 1076 (finding the partnership designation relevant to endorsement); *Leake*, 14 F.4th at 1250 (same).[10]

In short, "we can safely assume" that the FSHAA "generally would not allow a public-address system to be used" at an event it organizes "to convey messages [it] didn't want to be associated with." *See Cambridge Christian Sch.*, 942 F.3d at 1233; *see also Summum*, 555 U.S. at 471-72 (in holding that privately funded and donated monuments displayed in public parks are government speech, explaining that "parks are often closely identified in the public mind with the government unit that owns the land" and that "[i]t certainly is not common for property owners to open up their property for the installation

10. Cambridge Christian points out that some FHSAA employees consider sponsor advertisements to be messages from that sponsor, not from the FHSAA. That argument misses the point of the endorsement inquiry, which is whether the *public* would consider the messages to be spoken or at least endorsed by the government. *See Shurtleff*, 596 U.S. at 252; *Mech*, 806 F.3d at 1076.

of permanent monuments that convey a message with which they do not wish to be associated"); *Leake*, 14 F.4th at 1249-50 (concluding that observers would interpret speech during a military parade as being endorsed by the government because governments "typically do not organize and fund events that contain messages with which they do not wish to be associated") (quotation marks omitted); *Mech*, 806 F.3d at 1076 (concluding that the endorsement factor favored government speech, in part because "schools typically do not hang [banners] on school property for long periods of time if they contain messages with which the schools do not wish to be associated") (alterations adopted) (quotation marks omitted); *Walker*, 576 U.S. at 212 (concluding that license plate designs are "closely identified in the public mind" with the government because "license plates are, essentially government IDs" and "issuers of ID[s] typically do not permit the placement on their IDs of messages with which they do not wish to be associated") (alteration adopted) (quotation marks omitted); *see also Dean*, 12 F.4th at 1265 (finding it relevant to endorsement that messages from public university cheerleaders were conveyed "on government property at government-sponsored school-related events") (quotation marks omitted).

For those reasons, in this specific context, the spectators would reasonably believe the government endorses the pregame speech over the PA system at the state championship game.

3. Control

The final factor—control—asks "whether the relevant government unit 'maintains direct control over the messages conveyed' through the speech in question." *Cambridge Christian Sch.*, 942 F.3d at 1234 (quoting *Walker*, 576 U.S. at 213). It is the government's control over the "content and meaning" of the messages that is "key," as that is the type of control that indicates that the government "meant to convey the . . . messages." *Shurtleff*, 596 U.S. at 256 (explaining that the city's control over an event's date and time, the physical premises, and the hand crank used to raise flags is not the kind of control this factor focuses on). Even so, the government need not have "complete control" over "every word or aspect of speech in order for the control factor to lean toward government speech." *Cambridge Christian Sch.*, 942 F.3d at 1235-36; *see also Leake*, 14 F.4th at 1250 ("The government-speech doctrine does not require omnipotence.").

In our earlier opinion we concluded that based on the limited record, the control factor did not "point clearly in either direction." *Cambridge Christian Sch.*, 942 F.3d at 1235. We agree with the district court that the record now points in the direction of government control.

At the 2015 football finals, the only person who made announcements over the PA system at any point during the game was the PA announcer. His announcements were entirely scripted (except for a halftime announcement about the game's statistical leaders which, of course, couldn't be scripted in advance). Every word of that script

was put there by an FHSAA employee. On top of that, in 2015 the FHSAA had rules governing the content of announcements and in-game commentary, and those rules required the PA announcer to follow the PA script. *See Shurtleff*, 596 U.S. at 257 (noting that "written policies or clear internal guidance" about speech content would evidence control). The 2012 prayer is the only example in the record of anyone other than the PA announcer delivering a pregame message over the PA system at a football championship, and even that was with FSHAA approval—the prayer made it into the FHSAA's PA script for that game.

Even the PA use at halftime indicates government control. Until 2016 participating schools were allowed to use a halftime announcer, but only to accompany the school's marching band or to introduce a song selection, and even that was pursuant to FHSAA policy. (Again, there's no evidence that either school took advantage of that policy in 2015.) The FSHAA tightly controls the length of halftime performances. As for halftime song selections, the FHSAA does not pre-screen the music the marching bands play, but it prohibits schools from playing music that it deems offensive. [11]

Relying on *Shurtleff v. City of Boston*, Cambridge Christian argues that because the FHSAA rarely

11. The FHSAA also exercises control over the content of "filler music" that is played during football finals. At the 2020 football championships, an FHSAA employee intervened and stopped the playing of a song with uncensored profanity over the PA system.

rewords or rejects messages from sponsors, it does not "actively control[]" the PA speech. *See id.* at 256. But *Shurtleff* is distinguishable. In that case the Supreme Court considered whether the flags that the city of Boston allowed groups to fly at city hall constituted government speech. *Id.* at 247, 251. The Court concluded that the control factor favored private speech because the city did not "actively control[] these flag raisings" or "shape[] the messages the flags sent." *Id.* at 256. The city invited anyone to apply to the flag raising program, and its practice was to approve all applications "without exception" and without ever seeing the flags in advance. *Id.* at 256-57. The Court found it relevant that the city had no record of ever denying a request until it denied the plaintiffs', and it had "no written policies or clear internal guidance [] about what flags groups could fly and what those flags would communicate." *Id.* at 257.

The FHSAA's approach to sponsor messages is very different from the city of Boston's "come-one-come-all attitude" in *Shurtleff*. *Id.* It's true that the FHSAA's sponsors often draft their own proposed announcements, and that the FHSAA usually inserts those announcements into PA scripts without revision. It's also true that the FHSAA has not developed any formal policies or procedures for reviewing the text of sponsor announcements. But here's the key: the FHSAA enters into sponsorship agreements with those sponsors—agreements that must be approved by the FHSAA's executive director—in which the sponsors pay a fee to the FHSAA in exchange for being allowed to advertise. In other words, unlike in *Shurtleff* where the city allowed

anyone who submitted an application to participate in the flag raising program, *id.* at 256, here the FHSAA has advance notice of (and, critically, control over) which entities will be submitting sponsor messages. And because of their preexisting relationship with the FHSAA, the sponsors are generally familiar with the kinds of messages the FHSAA would deem appropriate. So the fact that the FHSAA rarely rewords or rejects the proposed speech carries significantly less weight than it did in *Shurtleff*.

This case is more like *Summum*, where the Supreme Court held that monuments in a public park represented government speech even where the monuments were designed or built by private entities, because the city "exercis[ed] final approval authority" over which monuments to display and never "opened up the Park for the placement of whatever permanent monuments might be offered by private donors." 555 U.S. at 472-73 (quotation marks omitted); *see also id.* at 468 (adding that the government may "express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message"). And more like *Walker*, where the government likewise had to approve every license plate design before the design could appear on a license plate. 576 U.S. at 213. The FHSAA chooses in advance the entities that will receive advertising privileges, and all proposed sponsorship announcements are submitted to the FHSAA for final approval before an FHSAA employee adds them to a PA script. *See also Gundy*, 50 F.4th at 79-80 (finding evidence of government control where the government selected the speaker because "inviting speakers to give

invocations inherently exhibits governmental control over the invocation messages from the outset of the selection process," even if the government didn't have "editorial rights over the exact content of the invocations"); *Leake*, 14 F.4th 1250-51 (concluding that the city "effectively controlled the messages conveyed" at a military parade "by requiring applicants to describe the messages they intended to communicate and then by exercising final approval authority over their selection based on those descriptions," and adding that "[e]ither exclusion or advance preconditions would be adequate control") (quotation marks omitted).

We conclude that the control factor, like the other two government speech factors, suggests that the speech at issue is government, not private, speech. *See Leake*, 14 F.4th at 1248 ("[A] finding that *all* [factors] evidence government speech will almost always result in a finding that the speech is that of the government."). And because the pregame PA announcements are government speech, that speech does not violate the Free Speech Clause. Accordingly, the district court properly granted the FHSAA summary judgment as to Cambridge Christian's free speech claims.

B. Free Exercise

The FHSAA is also entitled to summary judgment on Cambridge Christian's free exercise claims for the same reason.

"[T]he Free Exercise Clause . . . requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). But the government is not liable for suppressing the free exercise of religion "when [it] restrains only its *own* expression."[12] *See Cap. Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (plurality opinion). In other words, the government's own speech cannot support a claim that the government has interfered with a private individual's free exercise rights. *See also Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139 n.7, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (Stewart, J., concurring) ("Government is not restrained by the First Amendment from controlling its own expression."); *Johanns*, 544 U.S. at 553 ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny."); *see also Santa Fe*, 530 U.S. at 302 ("[T]here is a crucial difference

12. To hold otherwise would put government officials "in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other." *Cap. Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 768, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995) (plurality opinion). If 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. *See also id.* (explaining that if the Establishment Clause could apply to bar private religious expression in public forums, government officials would face a Catch-22: permitting the speech could lead to an Establishment Clause violation, whereas restricting the speech could lead to a free speech or free exercise violation).

between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (quotation marks omitted); *Bowen v. Roy*, 476 U.S. 693, 699-700, 106 S. Ct. 2147, 90 L. Ed. 2d 735 (1986) ("Never to our knowledge has the Court interpreted the First Amendment to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. . . . The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government.") (alteration adopted) (quotation marks omitted); *Gundy*, 50 F.4th at 64 (holding that a legislative invocation constituted government speech and so was "not subject to attack on free speech *or free exercise* grounds") (emphasis added).

Because we conclude that the FHSAA was regulating its own expression when it restricted pregame speech over the PA system at the 2015 football championships, *see supra* at 49, Cambridge Christian's free exercise claims fail. *See also Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) (agreeing with the district court's determination that the speech at issue was government speech, which is subject "only to the proscriptions of the Establishment Clause," and affirming the grant of summary judgment to the government on the

plaintiff's free speech and free exercise claims for that reason) (quotation marks omitted).

IV. Conclusion

We vacate the district court's judgment in favor of the FHSAA on Cambridge Christian's claims for declaratory and injunctive relief, and we remand with instructions for the district court to dismiss those claims for lack of subject matter jurisdiction. We otherwise affirm the district court's summary judgment in favor of the FHSAA on Cambridge Christian's free speech and free exercise claims.

AFFIRMED in part, VACATED in part, and REMANDED with instructions.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, FILED MARCH 31, 2022

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:16-cv-2753-CEH-AAS

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff,

v.

FLORIDA HIGH SCHOOL
ATHLETIC ASSOCIATION, INC.,

Defendant.

Filed March 31, 2022

ORDER

This matter comes before the Court on Defendant Florida High School Athletic Association, Inc.'s Motion for Summary Judgment (Doc. 136), Plaintiff Cambridge Christian School, Inc.'s Motion for Summary Judgment (Doc. 137), the parties' responses in opposition (Docs. 148, 151), the replies (Docs. 153, 155), the Amended Joint Stipulation of Material Facts (Doc. 158), and Plaintiff's Notice of Supplemental Authority (Doc. 157). The Court heard oral argument on the cross motions for summary

judgment on December 21, 2021. Having considered the motions and being fully advised in the premises, the Court will grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment.

I. BACKGROUND[1]

A. Statement of Undisputed Facts (Doc. 158)

Plaintiff, Cambridge Christian School, Inc. ("CCS"), is an independent, co-educational, private Christian school in Tampa, Florida. Doc. 158 ¶ 1. Since 1989, CCS or its predecessor entity has continuously been a member of the Florida High School Athletic Association ("FHSAA"). *Id.* ¶ 2. Tim Euler was CCS's Head of School in 2015. *Id.* ¶ 3. Shawn Minks was CCS's Assistant Head of School in 2015 and is currently CCS's Head of School. *Id.* ¶ 4. Dr. Marianne Banales served as CCS's varsity cheerleading coach from 2012 to 2016. *Id.* ¶ 5. In 2015, Chad Goebert served as Athletic Director of CCS. *Id.* ¶ 6.

Defendant FHSAA is a state actor and a non-profit organization that governs high school athletics in Florida. *Id.* ¶ 7. Dr. Roger Dearing served as the FHSAA's Executive Director from 2009 to 2017. *Id.* ¶ 8. Dr. Dearing was the superintendent of Indian River County schools in 2000 and was aware of *Santa Fe Independent School*

1. The Court has determined the facts, which are undisputed unless otherwise noted, based on the parties' submissions, including declarations, depositions, and exhibits (Docs. 135, 136-1–136-28, 138, 139, 142, 149, 152, 154, 157), as well as the parties' Amended Joint Stipulation of Material Facts (Doc. 158).

District v. Doe, 520 U.S. 290 (2000), by at least 2003. *Id.* ¶ 9. George Tomyn has served as the FHSAA's Executive Director since 2017. *Id.* ¶ 10. Frank Beasley was the Coordinator of Athletics and Football Administrator for the FHSAA from December 2019 until the middle of March 2021. *Id.* ¶ 11. From the time he joined the FHSAA in 2015 until December 2019, Beasley held the title of Director of Athletics and oversaw the sport of football, among others. *Id.* Quinten Ershock is the Assistant Director of Marketing for the FHSAA and was a Marketing Specialist from December 2011 to September 2020. *Id.* ¶ 12. Justin Harrison was the FHSAA's Assistant Executive Director for Athletics in June 2012, and all sport administrators reported to him. *Id.* ¶ 13. Starting in the summer of 2015, Harrison became Associate Executive Director for Athletic Services. *Id.* He reports directly to the Executive Director. *Id.* Seth Polansky was a member of the FHSAA's communications staff as Membership and Web Director from April 2009 to January 2016. *Id.* ¶ 14. Jamie Rohrer is the FHSAA's Associate Executive Director for Administrative Services. *Id.* ¶ 15. In 2015, Rohrer was the FHSAA's Assistant Executive Director for Administrative Services. *Id.* In both roles, Rohrer reports directly to the Executive Director. *Id.* Shanell Young has worked at the FHSAA since 2003. *Id.* ¶ 16. From 2003 to 2005, Young was an assistant, and, around 2005, she became an Assistant Director of Athletics. *Id.* Young was then a Director of Athletics at the FHSAA for ten years, beginning around 2010. *Id.* In 2012 and 2015, Young was a Director of Athletics. *Id.* In 2016, Young became Coordinator of Technology. *Id.*

Appendix B

The FHSAA's membership includes public and private schools. *Id.* ¶ 17. As the governing authority for high school athletics in Florida, the FHSAA administers more than two dozen sports (including at least thirty championships during the 2015-16 academic year). *Id.* ¶ 18. The FHSAA has Bylaws, Administrative Policies, and Administrative Procedures that govern the FHSAA, its member schools' athletic programs, and all FHSAA sporting events, including FHSAA State Championship Series events. *Id.* ¶ 19; *see* Docs. 142-10 through 142-12 and 142-14 through 142-16. Additionally, the FHSAA has Football Participation Manuals for each school year. *See* Doc. 142-17 (2012 FHSAA Football Finals Participant Manual); Doc. 142-13 (2015 FHSAA Football Finals Participant Manual).

The FHSAA divides its member schools into classes primarily based upon student population counts of the member schools. Doc. 158 ¶ 21. For football, there are eight classes. *Id.* At the conclusion of the regular season, and for the purpose of determining the official state champion in each Class, the FHSAA conducts a Florida High School State Championship Series (the "State Championship Series"). *Id.* ¶ 22. In 2012 and 2015, for football Class 2A, the State Championship Series consisted of the Regional Semifinal, the Regional Final, the State Semifinal, and the State Championship Final. *Id.* The State Championship Series games preceding the State Championship Final are also known as the "playoffs." *Id.* All FHSAA football State Championship Final games from 2007 to 2018 occurred at the stadium known as the Citrus Bowl (now known as Camping World Stadium) in Orlando, Florida. *Id.* ¶ 23. The Citrus Bowl was publicly owned during that

time period. *Id.* The Central Florida Sports Commission ("CFSC"), now known as the Greater Orlando Sports Commission, is a "community partner" of the Citrus Bowl that works with the venue to book events at the stadium. *Id.* ¶ 24. However, the CFSC is not the operator of the Citrus Bowl. *Id.* The relationship between the CFSC and the Citrus Bowl is formalized contractually on an event-by-event basis. *Id.* The FHSAA and the CFSC entered into agreements in 2012 and 2015, as well as other years, for the FHSAA football championships to be held at the Citrus Bowl. *Id.* ¶ 25. Copies of the agreements covering 2012 and 2015 have been filed at Docs. 142-30 and 142-31.

For football games, the FHSAA designates the PA announcer as a "bench official" who must "maintain complete neutrality at all times" and may "not be a 'cheerleader' for any team." Doc. 158 ¶ 26. The PA announcer for football games is not an FHSAA employee or contractor. *Id.* ¶ 27. For State Championship Series playoff games, the FHSAA required that the venue have a public-address ("PA") system. *Id.* ¶ 28. The FHSAA creates PA scripts for use at State Championship Series events. *Id.* ¶ 29. During the pre-game period of the football State Championship Final game, the Presentation of Colors, Pledge of Allegiance, and national anthem are traditionally broadcast over the PA system. *Id.* ¶ 30. The FHSAA does not select the national anthem performer. *Id.* The CFSC selected and hired the PA announcer for the FHSAA football State Championship Final games at the Citrus Bowl. *Id.* ¶ 31.

In 2012, University Christian School ("UCS") played against Dade Christian School in the 2012 FHSAA Class

2A Football State Championship Game, which was held at the Citrus Bowl. *Id.* ¶ 32. The PA script for the 2012 FHSAA Class 2A Football State Championship Game included a prompt stating: "University Christian and Dade Christian will lead a prayer over the PA system at this time. (This should take one minute or less.)" *Id.* ¶ 33. The PA script indicated that the prompt should be read with 30 minutes on the pre-game clock. *Id.* The script indicated that a sportsmanship announcement should be read with 33 minutes showing on the pre-game clock. *Id.* The script indicated that an announcement regarding Junior Orange Bowl awards should be read with 28 minutes showing on the pre-game clock. *Id.* A copy of the PA script for the 2012 FHSAA Class 2A Football State Championship Game has been filed at Doc. 138-2 at 2-18.

During the 2015 football regular season, CCS played its home football games at Skyway Park in Tampa. Doc. 158 ¶ 34. That year CCS won all of its games and qualified for the Class 2A playoffs. *Id.* ¶ 35. In the 2015 FHSAA Class 2A Football State Championship Series, CCS won playoff games against (1) Northside Christian School, (2) Admiral Farragut Academy, and (3) First Baptist Academy. *Id.* ¶ 36. The participants in the 2015 Class 2A FHSAA Football State Championship Final game (the "2015 Final") were CCS and UCS. *Id.* ¶ 37. The FHSAA prepared the PA script for the 2015 Final. *Id.* ¶ 38. The FHSAA did not select, employ, hire, or pay the PA announcer at the 2015 Final. *Id.* ¶ 39. The FHSAA PA script for the 2015 Final included paid sponsor messages. *Id.* ¶ 40.

Before the 2015 Final, UCS asked the FHSAA for permission to broadcast a pre-game prayer over the PA system at the 2015 Final. *Id.* ¶ 41. The FHSAA denied this request. *Id.* Subsequently, on December 2, 2015, CCS Head of School Euler emailed FHSAA Executive Director Dearing requesting that the FHSAA permit broadcast of a pre-game prayer over the Citrus Bowl PA system. *Id.* ¶ 42; *see* Docs. 136-21, 142-18. UCS subsequently also emailed Dearing, supporting the request to broadcast a pre-game prayer over the PA system. Doc. 158 ¶ 43; Doc. 142-19. Dearing denied the request in an email. Doc. 158 ¶ 44; Docs. 136-22, 142-20. After the 2015 Final, Dearing sent a follow-up email further explaining his decision. Doc. 158 ¶ 45; Docs. 136-23, 142-21. UCS and CCS student athletes and coaches prayed together at the middle of the field before the 2015 Final. Doc. 158 ¶ 46. The prayer was not broadcast over the PA system. *Id.* Both schools also prayed on the field in the minutes following the 2015 Final. *Id.* ¶ 47. The prayer was not broadcast over the PA system. *Id.*

B. Procedural History

On February 3, 2017, the Magistrate Judge entered a report and recommendation recommending CCS's Motion for Preliminary Injunction be denied and FHSAA's Motion to Dismiss be granted. Doc. 50. Thereafter, the Court issued an order adopting the report and recommendation, denied the motion for preliminary injunction, granted the motion to dismiss, and granted CCS the opportunity to file an amended complaint. Doc. 57. CCS did not file an amended complaint, and instead, on June 20, 2017,

appealed the Court's order of dismissal to the Eleventh Circuit Court of Appeals. Doc. 58. On November 13, 2019, the appellate court issued an Order, *Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019), affirming dismissal of CCS's claims brought under the Florida Religious Restoration Act ("FRFRA") and for declaratory relief under the Establishment Clause, reversing dismissal as to the free speech and free exercise clause claims, and remanding to this Court for further proceedings. Doc. 73. Specifically, the Eleventh Circuit found that CCS plausibly alleged enough on its freedom of speech and freedom of religion claims to survive a Rule 12(b)(6) dismissal. *Cambridge Christian Sch.*, 942 F.3d at 1252. After remand, the parties engaged in extensive discovery and thereafter filed motions for summary judgment (Docs. 136, 137), which are ripe for the Court's consideration. The motions have been fully briefed, with multiple exhibits and additional authority filed in support of the respective motions. *See* Docs. 135, 136-1–136-28, 138, 139, 142, 148, 149, 151, 152, 153, 154, 155, 157, 158.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of stating the basis for its motion and identifying those portions of the

record demonstrating the absence of genuine issues of material fact. *Celotex*, 477 U.S. at 323; *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). That burden can be discharged if the moving party can show the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

When the moving party has discharged its burden, the nonmoving party must then designate specific facts showing that there is a genuine issue of material fact. *Id.* at 324. Issues of fact are "genuine only if a reasonable jury, considering the evidence present, could find for the nonmoving party," and a fact is "material" if it may affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). In determining whether a genuine issue of material fact exists, the court must consider all the evidence in the light most favorable to the nonmoving party. *Celotex*, 477 U.S. at 323. However, a party cannot defeat summary judgment by relying upon conclusory allegations. *See Hill v. Oil Dri Corp. of Ga.*, 198 F. App'x 852, 858 (11th Cir. 2006).

The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed. *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005). The Court must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion

is under consideration. *Id.* The Eleventh Circuit has explained that "[c]ross-motions for summary judgment will not, in themselves, warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *Id.* at 1555-56.

III. DISCUSSION

To understand what this case is about is to first recognize what it is not about. This case is not about whether two Christian schools may pray together at a football game. It is undisputed that CCS and UCS engaged in group prayer before and after the 2015 FHSAA Class 2A Football State Championship Final game. Indeed, players and coaches from both teams, along with some officials, met at the 50-yard line of the Citrus Bowl to pray together before the game and again on the sidelines after the game. Doc. 142-51. But they were not permitted to deliver their prayer over the PA system during the pregame. The issue before the Court is whether the First Amendment required the FHSAA to grant the teams unrestricted access to the PA system to deliver the prayer over the loudspeaker during the pregame. Thus, the questions to be answered are whether the inability to pray over the loudspeaker during the pregame of the State Championship Final football game violated CCS's First Amendment rights to freedom of speech and free

exercise of religion.[2] The Free Speech Clause of the First Amendment to the United States Constitution prohibits Congress from making any law "abridging the freedom of speech." The First Amendment also contains the Free Exercise Clause, which prohibits Congress from making any "law prohibiting the free exercise" of religion.[3] As discussed below, the Court concludes that the First Amendment does not apply because the speech at issue is government speech, but even if some portion of the speech is considered private speech, the Court finds no constitutional violation occurred.

A. Freedom of Speech

The first issue for the Court's consideration is whether the FHSAA violated CCS's First Amendment right to freedom of speech when it denied CCS's request to pray over the PA system prior to the 2015 FHSAA 2A Championship Final football game between CCS and another Christian school. The threshold question is whether the speech over the PA system is government speech or private speech. If the speech is government speech, the First Amendment does not apply and the inquiry goes no further. As discussed below, the

2. UCS declined CCS's request to participate in the lawsuit. Doc. 136-24 at 2. The stance of UCS's president was they were never denied the right to pray, only denied the right to use the microphone. *Id.*

3. Although the First Amendment explicitly applies to the actions of Congress, the due process clause of the Fourteenth Amendment renders it equally applicable to the States. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 n.1 (1996).

pregame speech over the PA system[4] at the state-hosted Championship Final football game is government speech.

Government Speech

"The Free Speech Clause of the First Amendment 'restricts government regulation of private speech; it does not regulate government speech.'" *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, (2009)); *see Johanns v. Livestock Mktg. Ass'n*, 544 U.S.

4. The Court focuses its analysis on pregame speech delivered over the PA system at a State Championship Final football game hosted by the FHSAA in a government-owned stadium. In so doing, the Court finds precedence in the Supreme Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In concluding the speech at issue was government speech in *Santa Fe*, the Supreme Court specifically considered "the pregame invocations." *Id.* Although *Santa Fe* was an Establishment Clause case, the threshold question was the same—whether the speech was government speech or private speech. In making its determination, the *Santa Fe* Court confined its consideration to speech over the PA system during the "pregame ceremony" during the public school's football game. *Id.* at 303 ("The Santa Fe school officials simply do not 'evince either by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally.") (brackets in original) (internal citations omitted). The Supreme Court did not compare the pregame speech to speech occurring at other points during the game, such as during half time. Nor did the Court compare the football pregame invocations with speech occurring at other sports contests. Finally, the *Santa Fe* Court did not compare the pregame prayer over the PA system with speech written on banners, in programs, or by advertisers.

550, 553 (2005) ("Government's own speech . . . is exempt from First Amendment scrutiny."). As described recently by the Eleventh Circuit, "[t]he First Amendment works as a shield to protect private persons from 'encroachment[s] by the government' on their right to speak freely, . . . not as a sword to compel the government to speak for them." *Leake v. Drinkard*, 14 F.4th 1242, 1247 (11th Cir. 2021) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995)). Thus, "[w]hen the government exercises 'the right to speak for itself,' it can freely 'select the views that it wants to express.'" *Mech.*, 806 F.3d at 1074 (quoting *Summum*, 555 U.S. at 467); *see also Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 213-14 (2015). "This freedom includes choosing not to speak and speaking through the removal of speech that the government disapproves." *Mech*, 806 F.3d at 1074 (citations, alterations, and quotation marks omitted).

In determining whether speech is government speech or private speech, courts consider three factors: "history, endorsement, and control." *Dean v. Warren*, 12 F.4th 1248, 1265 (11th Cir. 2021) (Pryor, C.J.) (citing *Cambridge Christian Sch.*, 942 F.3d at 1231). "These factors are neither individually nor jointly necessary for speech to constitute government speech. . . . But a finding that *all* evidence government speech will almost always result in a finding that the speech is that of the government." *Leake*, 14 F.4th at 1248 (11th Cir. 2021) (citations omitted) (emphasis in original).

The opinion in *Dean* is instructive. In support of a national movement intended to curb police brutality

against African Americans and advance the cause of racial justice, the plaintiff in *Dean*, a cheerleader at Kennesaw State University, kneeled during the pre-game national anthem at a university football game.[5] *Dean*, 12 F.4th at 1251. Thereafter, university officials told the cheerleaders they would not be allowed on the field during the anthem but instead would remain in the stadium tunnel. *Id.* at 1252. Dean sued alleging a deprivation of her First Amendment rights. After analyzing the three factors of history, endorsement, and control, the appellate court concluded that Dean engaged in government speech when she cheered in a team uniform at a football game on behalf of her public university. *Id.* at 1264. The court noted that the appearance of the university's endorsement of the message was even more apparent because Dean kneeled at the time of the pregame rituals, which are "inseparably associated with ideas of government." *Id.* at 1265 (quoting *Cambridge Christian Sch.*, 942 F.3d at 1233). "Because the Free Speech Clause does not restrict government speech," the court concluded, "Kennesaw State University did not violate [Dean's] First Amendment rights when it prevented her from kneeling on the field."[6] *Id.*

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5. The movement was sparked by the actions of Colin Kaepernick, a San Francisco 49ers quarterback, who refused to stand for the national anthem during the National Football League's 2016 season, choosing instead to kneel in protest of police brutality against African Americans. *Dean*, 12 F.4th at 1251.

6. Chief Judge Pryor noted the potential absurd results if the First Amendment protected Dean's right to express herself in any manner she chooses while she is in uniform on the field. "By this logic, Dean would have a right to perform her own unapproved, self-choreographed cheer, to cheer for the opposing

The Court addresses each of the three factors below in the context of this case and concludes that all three factors strongly support a finding that pregame speech over the PA system at the championship finals football game hosted by the FHSAA at a state-owned venue is government speech. Thus, FHSAA did not violate CCS's First Amendment rights when it did not open up access to the PA system to allow CCS to deliver a prayer over the loudspeaker during the pregame.

1. History

"The first factor, history, 'ask[s] whether the type of speech under scrutiny has traditionally communicated messages on behalf of the government.'" *Dean*, 12 F.4th at 1265 (quoting *Cambridge Christian Sch.*, 942 F.3d at 1232). Considering the evidence before the Court on a fully developed record, the Court determines that this factor weighs in favor of a finding that speech over the PA system during the FHSAA Championship Final football pregame is government speech. Although the Eleventh Circuit initially thought this factor tipped in favor of CCS because of CCS's allegations that prayer occurred at the 2012 Championship Final game and prayer occurred at least at three playoff games in 2015, with the benefit of discovery, the picture is now clear. In

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team, or to refrain from cheering at all. She would also have a right to stage a hunger strike, to hold up campaign posters for a political candidate, to entertain the crowd with expressive dance, to cut up the American flag, or to wear a leather jacket over her cheerleader uniform with the words 'f*** the draft' stitched onto the back." *Id.* at 1266.

the history of FHSAA State Football Championships, only one time has an FHSAA script (either in a finals game or a playoff game) ever mentioned prayer—the 2012 Championship Game. Despite CCS's claim that it prayed at the 2015 playoff games, prayers were not referenced or included in the FHSAA scripts of the 2015 playoff games, or any other year's football playoff or final game. *See* Docs. 136-13–136-17. Relying on CCS's Complaint, the Eleventh Circuit accepted CCS's allegations regarding prayer occurring before three 2015 playoff games, but the appellate court questioned how closely the FHSAA administered or monitored the playoff games hosted by CCS. *See Cambridge Christian Sch.*, 942 F.3d at 1232. Evidence shows that the FHSAA does not choose the facility for playoff games. Doc. 136-2 at 6. The FHSAA does not send representatives to regular season or playoff games.[7] Docs. 136-10 ¶ 10; 110-8 ¶ 4; 136-3 at 7. There are more than 3,500 FHSAA High School State Championship Series contests. Doc. 142-9 at 7. The FHSAA did not have the resources to monitor regular season and playoff games. Doc. 136-10 ¶ 10. It is undisputed that CCS never requested permission from FHSAA to pray over the loudspeaker at the 2015 playoff games (Doc. 136-9 at 5), nor is there any evidence that the FHSAA knew that

7. The undisputed evidence shows that the FHSAA had a limited budget and approximately 25 full-time employees. Doc. 110-8 ¶ 3. Florida high schools participate in thousands of events in thirty sports during a school year. Doc. 25-1 ¶ 3. Thus, given its staffing and budgetary limitations, the FHSAA lacks the resources to monitor or attend on an official basis regular season events or playoff events other than championship finals. Doc. 136-10 ¶ 22; *see also* Doc. 110-8 ¶ 4.

CCS was engaging in prayer over the PA system at the playoff games that CCS hosted. Docs. 136-2 at 7; 139-2 at 19; 103 at 4-5.

As for the single occurrence of prayer in the 2012 script, the Court is not persuaded that the one incident creates a "history" of private speech. While there is record evidence that prayer occurred in the 2012 Class 2A football championship final pregame (Docs. 136-5 at 6; 142-1 ¶ 9), the isolated incident of prayer against the backdrop of a decade's worth of football championship final scripts without any mention of prayer (*see*, *e.g.*, Docs. 136-13–136-17) is an aberration which cannot be relied upon to evidence a history of private speech. Indeed, at oral argument, the FHSAA acknowledged the 2012 prayer was permitted in error. CCS submits the transcript of Seth Polansky, former membership and website director, who testified that he recalls Dearing told him to include the prayer in the 2012 script. Doc. 139-10 at 14. Dearing disputes this and has testified that he does not know who from the FHSAA approved the prayer in 2012. Doc. 136-3 at 8. In any event, it is illogical to conclude that the one occurrence establishes the norm.

Relying on the playoff games in 2015, CCS argues that the occurrence of prayer was more than once because, according to CCS, it engaged in prayer at every playoff game it hosted in 2015. But CCS does not direct the Court to any evidence to show that FHSAA knew that CCS was delivering a pregame prayer over the PA during the 2015 playoff games, other than to state that the PA announcer at playoff games is a "bench official." However,

the undisputed evidence reflects the PA announcer is not hired by the FHSAA, nor is the PA announcer employed by the FHSAA. Doc. 158 ¶ 39.

CCS further argues that the FHSAA's regulation of the playoff games supports that it administered and monitored the playoff games. As discussed above, the evidence does not bear this out. Although the FHSAA prepares scripts for the playoff games leading up to the State Championship Final, CCS's reliance on what occurred at the playoff games is not persuasive as to the analysis of whether there is a history of government speech at the State Championship Final game. Critically, the playoff games are hosted by one of the participating schools at a venue chosen by the participating schools. This is factually distinguishable from speech occurring at the State Championship Final football game which is held at a neutral site and is hosted by the FHSAA and its partner host, in 2015 the Citrus Bowl. And as discussed above, while the FHSAA may regulate the playoff games, it did not monitor or attend the games, other than the championship game.

It is clear the 2015 FHSAA playoff scripts did not include a reference or provision for prayer in the PA script (Docs. 136-12), but CCS submits the declaration of Greg Froelich, who states that as the PA announcer for the 2015 playoff games, he delivered a prayer at all three playoff games over the loudspeaker. Doc. 142-7. As admitted by CCS representatives, however, no one from CCS requested permission from the FHSAA to say a prayer over the PA system at those events (Doc. 136-9 at

5), and it is undisputed that the FHSAA had no knowledge that the schools were praying over the PA system at those games. *See* Docs. 137 at 17; 142-7 ¶ 23 (2015 prayers delivered at the 2015 playoff games were unscripted, and not reviewed, edited, or preapproved by anyone, including the FHSAA). Additionally, there is no evidence that FHSAA representatives attended the playoff games. *See* Doc. 136-10 ¶ 22 (FHSAA lacks resources to monitor or attend playoff games on an official basis). FHSAA representative, Jamie Rohrer, states that regular season and early playoff games are hosted by member schools at venues of the school's choosing. Doc. 136-10 ¶ 4. The Court is unpersuaded that prayer occurring at the 2015 playoff games, without the FHSAA's knowledge, establishes a history of private speech at a State Championship Final football game.[8] And the single incident of prayer at the 2012 State Championship Final football game cannot establish a history of non-government speech over the PA.

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8. CCS submits the declaration of its athletic director, Mark Butler, who states that at CCS's 2020 playoff games, just before the national anthem, the PA announcer led a prayer. Doc. 142-2 at 4. According to Bulter's declaration, CCS played two Christian schools in the 2020 playoff games—the November 13, 2020 playoff game hosted by Keswick Christian at Keswick's home field and the November 20, 2020 playoff game hosted by Seffner Christian Academy at King's Academy High School. *Id.* Like the 2015 playoff games, the 2020 playoff games were hosted by one of the participating schools at their home field or the host school's chosen venue. The playoff games were not hosted at a large state venue such as the Citrus Bowl. There is no evidence members of the FHSAA were present. Review of the FHSAA scripts for the playoff games in 2020 reflect no mention of prayer. *See* Doc. 138-31 at 34-40, 41-48.

To the contrary, the history factor weighs in favor of a finding of government speech. Review of a decade of scripts from football championship finals (Docs. 136-13–136-17) shows the FHSAA traditionally used the PA system to communicate to the public. The speech over the PA system is completely scripted and the pregame speech includes communications such as a welcome message, a sportsmanship message, presentation of scholar-athlete awards, color guard introduction, Pledge of Allegiance, and introduction of the anthem singer. *See*, *e.g.*, Doc. 136-13 at 6-8, 23-25, 41-43, 59-61; *see also* Docs. 136-14; 136-15; 136-16; 136-17. These pregame rituals traditionally "associated with ideas of government" support a finding of government speech.

CCS argues that the FHSAA "routinely" permitted and broadcast prayers. Doc. 137 at 13. In support, CCS cites to cheerleader banners, athlete on-field interviews, FHSAA Facebook posts of athletes and their coaches engaged in prayer, and FHSAA social media messages wishing Merry Christmas and sending "thoughts and prayers." *Id.* at 13-15. CCS's argument and reference to these messages is unavailing, as that is not the type of speech at issue here.

To the extent CCS argues the speech over the PA is private speech because of the advertising sponsors, the Court disagrees. "When . . . the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental

sources in developing specific messages." *Johanns*, 544 U.S. at 562 (ruling that the message set out in beef promotions pursuant to the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 et seq., was government speech even though the government solicited assistance from a nongovernmental source—various cattle farmer associations—in developing specific messages, and rejecting the associations' contention that the federal beef program did not qualify as government speech because it was funded by a targeted assessment of beef producers rather than by general revenues). Here, the overall message is specifically scripted by the FHSAA to convey the messages it wanted conveyed. The questions that left the appellate court wondering whether historically the PA system was being used by others during the pregame to convey their own messages has been answered, and it is a resounding "no." Based on the fully developed record, it is apparent the history factor supports a finding that the pregame PA speech at the FHSAA State Championship Final football game is government speech.

2. Endorsement

"The second factor, endorsement, 'asks whether the kind of speech at issue is often closely identified in the public mind with the government, or put somewhat differently, whether observers reasonably believe that the government has endorsed the message.'" *Dean*, 12 F.4th at 1265 (quoting *Cambridge Christian*, 942 F.3d at 1232-33) (citation and internal quotation marks omitted). The Eleventh Circuit previously found this factor weighed in favor of a finding of government speech.

Cambridge Christian Sch., 942 F.3d at 1234. After additional discovery, this conclusion is further supported by the record. As pointed out by the appellate court, this was a State-organized game classified as the "State" championship final. *Id.* at 1233. The PA system was part of the government-owned stadium. *Id.* Unlike the playoff games, there is no "host school" in the State Championship Final football game. Rather, the FHSAA—a state actor—is the host of the event. Significantly, the PA system was not used by anyone other than the PA announcer, except for the music played during the half time performance.[9]

Critically, the prayer requested by CCS would have come at the beginning of the game at the same time as the pre-game rituals of presentation of the color guard, singing of the national anthem, and recitation of the Pledge of Allegiance. *See Cambridge Christian Sch.*, 942 F.3d at 1233. The Eleventh Circuit found the pivotal question on

9. CCS's efforts to demonstrate there were no restrictions on the PA system during half time regarding the music or any other message is not supported by the record. The cheer coach testified it was known the music must be "G-rated." Doc. 136-6 at 3. She never played religious music. *Id.* There is no evidence the microphone was turned over to anyone who wanted to use the PA during half time for any reason other than to introduce the half-time show and play music for it. Doc. 136-10 ¶ 20. FHSAA's Rohrer states she cannot recall any situation in which musical accompaniments were inappropriate. *See id.* In Rohrer's experience, PA announcers have been professional and followed the script. *Id.* ¶ 12. Although not an improper use of the PA system, she recalls an instance in which inappropriate "filler music" was played over the PA system at a championship final game and a representative of the FHSAA requested that it be stopped, and it was. *Id.* ¶ 25.

the endorsement factor to be whether the speech would be "closely identified in the public mind with the government." *Id.* at 1234 (citing *Summum*, 555 U.S. at 472). The Court finds particularly persuasive, as did the appellate court, the fact that CCS sought to deliver the prayer over the PA during the same time as these pregame rituals that are "inseparably associated with ideas of government." *See Cambridge Christian Sch.*, 942 F.3d at 1233.

On appeal, the court noted that the PA Protocol provides for the possibility of "Messages provided by host school management." *Id.* As previously stated, however, there was no host school in the State Championship Final game. The FHSAA was the host. And discovery has confirmed that the host school "messages" referenced in the Protocol were not an opportunity for others to convey messages over the loudspeaker during the Championship Final game because there was no "host school." *See* Doc. 136-10 ¶ 19. Additionally, as noted by the appellate court, the Participant Manual does not indicate any room for announcements other than by the FHSAA. *Cambridge Christian Sch.*, 942 F.3d at 1234.

The Eleventh Circuit also questioned whether the advertisements read by the PA announcer were more in the form of "thank-yous" to the sponsors or presented in promotional terms. *Id.* First, to the extent that CCS points to other advertisements on the jumbotron or banners lining the field as evidence of private speech, the Court notes the appellate court specifically rejected this argument, finding these types of messages to be irrelevant to the analysis before the court because CCS

did not request to pray by means of a banner or by using the Jumbotron.[10] *See id.* at 1234 n.3.

As for the advertisements in the PA script, review of the 2015 Class 2A State Championship Final football game script reveals there is minimal reference to advertising or sponsors during the pregame. *See* Doc. 136-26. The PA announcer reads announcements about FHSAA-licensed souvenirs from Team IP, about the games being replayed by Bright House Sports Network, and inviting coaches and athletic directors to stop by the "Champion Suite" to view the new football uniform and gear offerings. *Id.* at 2, 8. Otherwise, the pregame speech consists of a sportsmanship message, scholar athlete awards, welcome message, color guard introduction, Pledge of Allegiance, anthem singer introduction, team introductions, coin toss, and officials' introduction. *Id.* at 2-8. The local sponsors are introduced and thanked starting during the first charged team time-out of the half. *Id.* at 8. Sponsor messages are included in each quarter. Speech occurring at other points during the game is less controlling.

CCS argues that the sponsorship messages are more than thank yous, and therefore cannot be government speech. Nothing about the references to sponsors in the pregame speech would take away from "observers reasonably believ[ing] that the government has endorsed the message." *Dean*, 12 F.4th at 1265. The endorsement factor weighs in favor of government speech.

10. The Court would add that discussions regarding topics or messages contained on FHSAA's website and in social media posts are similarly irrelevant to the issues before the Court.

3. Control

The third factor, control, "asks whether the relevant government unit maintains direct control over the messages conveyed through the speech in question." *Dean*, 12 F.4th at 1265 (quoting *Cambridge Christian*, 942 F.3d at 1234) (citation and internal quotation marks omitted). Given the paucity of allegations regarding control, the Eleventh Circuit assumed, in CCS's favor, that the State's control was limited. *Cambridge Christian Sch.*, 942 F.3d at 1235. The evidence now reveals that the FHSAA had significant control over the content of the speech, further supporting a finding of government speech.

The appellate court acknowledged the FHSAA controlled access to the microphone but was unclear whether the FHSAA controlled the content. *Id.* Discovery has confirmed that the PA scripts are created by FHSAA employees, and every word that goes into the PA scripts that the FHSAA provides to PA announcers at FHSAA sporting events is put there by an FHSAA employee. Doc. 136-10 ¶ 7. Every FHSAA sponsor must send their proposed text to the FHSAA before it is included in the script. *Id.* ¶ 11. Although CCS argues that the FHSAA never modified a sponsor's proposed text, the FHSAA nevertheless retains the ultimate authority to do so and would have exercised that right if necessary. *Id.* ¶ 12. As the FHSAA points out, its sponsors are generally familiar with appropriate sponsorship announcements and what is acceptable and appropriate for a high school event. *Id.*

The appellate court next questioned who made the announcements before or during the game or who would

have been allowed had they requested. *Cambridge Christian Sch.*, 942 F.3d at 1235. Again, discovery has confirmed that only the PA announcer had access to the loudspeaker and the announcer was instructed to follow the FHSAA-written script, with the participating schools only having access to the PA system at half time to play a musical selection to accompany the half-time performance. Doc. 136-10. Prior to 2016, the FHSAA allowed the participating schools limited access to introduce the band at half-time, but that stopped in 2016. *Id.* ¶ 21. The FHSAA had the authority to reject a musical selection if inappropriate. *See id.* ¶¶ 24, 25.

FHSAA Administrative Procedures directed the PA announcer to follow the script and limit other announcements to only those referenced.[11] Specifically, the PA announcer was prohibited from ad-libbing in the form of "play-by-play," or "color commentary," and criticism of schools, players, coaches, or officials was prohibited. *See* Doc. 142-12 at 15-16. The control factor decidedly falls on the side of finding government speech. Thus, the Court concludes that CCS's freedom of speech claim necessarily fails because the First Amendment does not apply here where all three factors—history, endorsement, and control—support a finding of government speech.

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11. The types of limited announcements the PA announcer could make included those in the nature of an emergency (*i.e.*, paging a doctor, lost child), practical announcements (*i.e.*, vehicle lights left on), starting line-ups, player attempting or making a play, penalty as called by a referee, FHSAA souvenir merchandise and concession items for sale, announce substitutions and time-outs. Doc. 142-12 at 15-16.

Appendix B

Private Speech

Even if some of the speech conducted over the PA system at the 2015 2A State Championship Final football game could be classified as private speech, the FHSAA's viewpoint neutral regulation of the speech in the nonpublic forum was not unconstitutional.

1. Forum Analysis

Courts use a "forum analysis" to evaluate government restrictions on private speech that occurs on government property. *Walker*, 576 U.S. at 215 (citation omitted). As noted by the Eleventh Circuit, "the first critical step in the analysis is to discern the nature of the forum at issue, namely the stadium's public-address system." *Cambridge Christian Sch.*, 942 F.3d at 1236. "The Supreme Court has referred to four categories of government fora: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum." *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017) (citing *Walker*, 576 U.S. at 215-16). The parties here do not contend that the speech over the PA system constituted a traditional public forum or a designated public forum. Rather, at issue—if the speech is considered private—is whether the PA system at the Citrus Bowl during the State Championship Final football game is a limited public forum or a nonpublic forum.

CCS urges the PA system is a limited public forum.[12] However, as the appellate noted, the Supreme

12. A "'limited public forum' . . . exists where a government has 'reserv[ed a forum] for certain groups or for the discussion of

Court in *Santa Fe* specifically rejected this premise, holding that it was clear that a PA system at a public high school football game was not a limited public forum. *Cambridge Christian Sch.*, 942 F.3d at 1238 (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 (distinguishing *Rosenburger*, 515 U.S. 819)). Nothing revealed in discovery changes the Eleventh Circuit's conclusion on this issue.

Based on the record before it, the Court finds that the Citrus Bowl's PA system is a nonpublic forum because the FHSAA did not open the PA system for use by the general public for any purpose. Like the school mailboxes in the *Perry Education Association* case, there is no indication that the Citrus Bowl PA system during the 2015 State Championship Final game was opened up for use by the general public, and thus the PA system is a nonpublic forum. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 47 (1983) (noting that "[p]ermission to use the [mail] system to communicate with teachers must be secured from the individual building principal [and there was] no court finding or evidence in the record which demonstrates that this permission has been granted as a matter of course to all who seek to distribute material"). Here, only the PA announcer had control of the microphone during the pregame except when the national anthem was sung. Further, any limited use by the cheerleading squad for its music at halftime did not open it up as a public forum because "selective access does not transform government property into a public forum." *Perry Educ. Ass'n*, 460 U.S.

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certain topics.'" *Walker*, 576 U.S. at 215 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

at 47; *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993) (stating that "there is no question" that a government entity "may legally preserve the property under its control for the use to which it is dedicated." (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985)).

"Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. The Court turns next to an assessment of the reasonableness of the restrictions imposed.

2. Content vs. Viewpoint Restriction

"Public property which is not by tradition or designation a forum for public communication is governed by different standards." *Id.* at 46. Indeed, the Supreme Court recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.* (quoting *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981)). "In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not

an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Educ. Ass'n*, 460 U.S. at 46 (citing *Greenburgh*, 453 U.S. at 131, n. 7). Even in a nonpublic forum, however, any restriction on speech must be viewpoint neutral. *Cambridge Christian Sch.*, 942 F.3d at 1240.

CCS contends that the restrictions imposed on its speech were unreasonable, based on viewpoint, and haphazardly applied. In support, CCS relies on *InterVarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855 (8th Cir. 2021), for its argument that preclusion of CCS's prayer over the PA system at the State Championship Final football game final constituted improper viewpoint discrimination.

In *InterVarsity*, the Eighth Circuit found the University of Iowa's decision to de-register a Christian organization because it required its leaders to affirm statements of faith constituted viewpoint discrimination in violation of the First Amendment. Membership and participation in the University's chapter of InterVarsity was open to all students, but those who sought leadership roles were required to affirm a statement of faith, including "the basic biblical truths of Christianity." *Id.* at 861. Finding this requirement to obtain a leadership role to be in violation of the University's Human Rights Policy,[13]

13. The University of Iowa's Human Rights Policy provides that "in no aspect of [the University's] programs shall there be differences in the treatment of persons because of race, creed, color, religion, national origin, age, sex, pregnancy, disability, genetic information, status as a U.S. veteran, service in the

the University deregistered InterVarsity as a school organization.[14] In a lawsuit filed by InterVarsity against the University of Iowa, the district court found, and the appellate court agreed, that while the University's Human Rights Policy was reasonable and viewpoint neutral, it was not so as applied to InterVarsity.

CCS's argument that the FHSAA similarly selectively applied its policies to CCS's speech misses the mark. *InterVarsity* is distinguishable from the instant case for at least two critical reasons. First, it is undisputed that the forum in *InterVarsity* was a limited public forum, which is not the case here. As discussed above, the Citrus Bowl PA system during the 2015 State Championship Final pregame constituted a nonpublic forum. Second, the *InterVarsity* court concluded that the University's application of its Human Rights Policy to religious organizations, but not secular ones such as sororities and fraternities, enforced its policy selectively. Here, no one

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U.S. military, sexual orientation, gender identity, associational preferences, or any other classification that deprives the person of consideration as an individual, and that equal opportunity and access to facilities shall be available to all." *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 859 (8th Cir. 2021).

14. The University of Iowa allows students to form organizations, referred to as RSOs ("Registered Student Organizations"). RSOs are voluntary special interest groups organized for educational, social, recreational, and service purposes. "RSOs get a variety of benefits, including money, participation in University publications, use of the University's trademark, and access to campus facilities." *InterVarsity*, 5 F.4th at 859.

else was permitted to speak over the PA system during the pregame except the announcer, and pursuant to a predetermined script, which did not include speech and viewpoints of other groups, organizations, or religions. Even though CCS points to Dearing's emails precluding the speech because it purportedly runs afoul of the Supreme Court's *Santa Fe* opinion, as the Eleventh Circuit pointed out, this was not a situation in which Jewish, Muslim or other religious messages were permitted, but Christian messages were not.[15] *Cambridge Christian Sch.*, 942 F.3d at 1242. There was no viewpoint discrimination, and at most, it was content based.

3. Reasonableness of Restriction

The last step in the analysis is to determine whether the content-based restriction is reasonable. The undisputed evidence shows that the FHSAA's "purposes in pregame festivities at football championship finals

15. The Court is unpersuaded by CCS's argument that other "solemnizing" messages were permitted, but those from a religious viewpoint were not. First, most of the other messages CCS points to are those found in different forms of speech, *i.e.*, social media posts and website messages, which are irrelevant to the speech at issue. Additionally, messages contained in scripts from other sports contests are not particularly insightful as very few venues for other Florida high school sporting events are as big and as public as the Citrus Bowl. Next, to the extent CCS points to the pregame speech including the national anthem, color guard, sportsmanship message, welcome message, and Pledge of Allegiance, as being solemnizing in nature, such pregame rituals, many of which are traditionally associated with government, further support the argument that the speech at issue is government speech.

are to minimize administrative and logistical burdens, promote patriotism and respect for the United States and its symbols, to create an atmosphere of excitement and anticipation, and to adhere to the Association's traditions for football championship finals." Doc. 136-10 ¶ 5. The Eleventh Circuit recognized, and this Court agrees, that a bar on speech by the participating schools or others during the pregame "could reasonably serve the purpose of orderly administering the game and providing for the usual pregame ceremony." *Cambridge Christian Sch.*, 942 F.3d at 1246. However, the appellate court found troubling the purported inconsistent application of the prohibition, pointing to four instances of prayer at prior State series football games (the 2012 Championship Final and the three 2015 playoff games). *See id.* Evidence now shows that three of the four instances were unknown and unauthorized by the FHSAA. In that regard, the instances of prayer at the 2015 playoff games over the PA system were unknown to or not condoned by the FHSAA, whose employees would not have attended those games. Thus, it was only the isolated incident at the 2012 State Championship Final football game in which the schools were granted access to the PA system to deliver a prayer over the loudspeaker.

The reasonableness test is a "forgiving" one. *Cambridge Christian Sch.*, 942 F.3d at 1243 (citing *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018)). "Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters All.*, 138 S. Ct. at 1888. The FHSAA's restrictions on speech delivered over

the PA system at the State Championship Final football game are reasonable and appropriate. Under the forgiving test articulated in *Minnesota Voters*, the one aberration in 2012 does not change the result that the restriction was not applied in a haphazard manner. Accordingly, the Court finds no freedom of speech violation. As no genuine issues of material fact exist, FHSAA is entitled to judgment in its favor on CCS's freedom of speech claim. CCS's Motion for Summary Judgment on this claim is due to be denied.

B. Free Exercise Clause

To state a claim under the Free Exercise Clause, a plaintiff must allege that he or she has a sincere religious belief, and that "the law at issue in some way impacts the plaintiff's ability to either hold that belief or act pursuant to that belief." *GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d 1244, 1256-57 (11th Cir. 2012). In other words, the plaintiff must allege that the government impermissibly burdened a sincerely held religious belief. *Id.* (citing *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007)). Additionally, "[t]he Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (*Chandler II*). In the school setting, "the State [must] tolerate genuinely student-initiated religious speech," but may cross the line to improper state action if it "participates in or supervises the speech." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir. 1999) (*Chandler I*).

CCS argues that communal prayer is a fundamental belief and practice of the CCS community. Doc. 137 at

42. CCS's current head of school, Shawn Minks, explains that communal prayer is one way that CCS implements its religious message of "glorify[ing] God in all that we do." Doc. 142-6 ¶¶ 9, 10. In discussing the importance of communal prayer and how it is integrated into CCS activities, Mr. Minks describes how teachers lead communal prayer before classes and activities, coaches lead communal prayer at the beginning and close of practice, school opens with communal prayer over the school's intercom, and weekly chapel services include opening and closing prayers. *Id.* ¶¶ 10-12. Other school events that open with communal prayer include sporting events, choir concerts, awards banquets, graduation ceremonies, drama performances, school board meetings, parent nights, and staff meetings. *Id.* ¶ 12. Additionally, parents engage in communal prayer through "Moms in Prayer" and "Dads in Prayer" groups that meet regularly at on-campus locations. *Id.* ¶ 13. At all regular season home games that he has attended, Mr. Minks delivers a pre-game prayer over the PA system before the national anthem. *Id.* ¶ 17. In a light favorable to CCS, praying together in the classroom and at school events on campus is an important part of the school's religious practice and the education of its students.

The prayer at issue here, however, is not prayer at an event on the CCS campus or at an event hosted by CCS. The proposed prayer was to be delivered over the loudspeaker in the Citrus Bowl at a State Championship Final football game hosted by the FHSAA and the Citrus Bowl. It is undisputed that CCS and its opponent UCS were allowed to, and did, pray together at the center of the field both before and after the championship game. Doc.

142-51. Mr. Minks acknowledges that the teams met at the 50-yard line before the game to pray. Doc. 142-6 ¶ 27. Thus, the issue was not that the schools, their students, or their fans were precluded from praying; the issue, which is the gravamen of CCS's claims, is they were not given access to the microphone during the pregame in order to deliver a prayer over the loudspeaker.

CCS contends that not having access to the PA system frustrated their ability to pray together as a community. But, contrary to CCS's argument, communal prayer over a PA system is not the typical practice at events not hosted by CCS or not occurring on CCS's campus. The evidence shows that when visiting non-Christian schools, CCS defers to the home school's tradition and CCS would not request prayer over the PA system. Doc. 136-9 at 3-4. Mr. Minks testified that CCS has not requested to pray over the PA system at away games when playing non-Christian schools. *Id.* CCS prays as a team at away games against non-Christian schools but not over the PA system, and the fans and family members in attendance cannot hear the prayers. *Id.* at 4-5. It was acceptable to CCS to not pray over the loudspeaker when it played an away game at a non-Christian school because, according to Former Head of School Tim Euler, "that's honoring the facilities that you go to." Doc. 136-5 at 8. Mr. Minks testified that CCS's right to exercise religious freedom has not been burdened by not praying over the PA system at away games. Doc. 136-9 at 3-4.

It is undisputed that CCS does not have a written policy regarding pregame communal prayer over a PA

system (Doc. 136-6 at 4) and that CCS routinely played away football games without pregame communal prayer over the PA system (Doc. 136-25 at 2). As Mr. Euler testified, CCS would defer to the host school when playing away games. Doc. 136-5 at 3-4. Mr. Euler further testified he is not aware of CCS requesting to pray over the PA system at away games CCS played in 2015. *Id.* at 4-5. And CCS did not initially request to pray at the 2015 2A FHSAA State Championship Final football game. Rather UCS made the initial request to pray over the PA system during the pregame, and CCS subsequently joined in the request.

The Court's role is not to "drill too far down into 'belief' and 'sincerity'" to determine whether communal pregame prayer is a sincerely-held belief of CCS. *See Cambridge Christian Sch.*, 942 F.3d at 1248. However, on the instant record, it is undisputed that while CCS has a preference for engaging in communal pre-game prayer using the PA system at football games, there is no evidence to support that such pregame communal prayer is a long-standing practice and tradition for CCS. To the contrary, CCS continued to play football games throughout the 2015 season without pregame prayer delivered over the PA system at away games with non-Christian schools. The cheer coach states that she would pray with the cheerleaders, but no one ever told her she should be praying with the parents or fans. Doc. 136-6 at 5-6. Her prayers with the cheerleaders before and after each practice and game occurred regardless of whether there was a PA system. *Id.* at 7-8. The athletic director sees no difference in not praying over the PA system at

away games with non-Christian schools and not praying over the PA system at the 2015 2A State Championship Final football game, where neither CCS nor UCS were the host team. Doc. 136-25 at 2.

In support of its position, CCS argues that amplification through the PA system was the only means available to engage in communal prayer due to the size of the facility and because bullhorns were banned.[16] Doc. 153 at 15. This argument is less persuasive considering CCS's routine practice of not praying over the PA system at away games against non-Christian schools. CCS additionally argues that the state championship game is one of the most memorable experiences and for a religious community "that opens just about *every* group event with communal prayer, from the mundane to the momentous, it goes without saying that being denied communal prayer . . . constituted a substantial burden on the exercise of religion." Doc. 137 at 42-43 (emphasis in original). CCS relies on declarations from students and parents who champion the importance of praying together as a community. Docs. 142-3, 142-4, 142-5. Citing to the allegations of CCS's complaint about the importance of using a "loudspeaker at all home games and at away games" and the need for the use of a loudspeaker at football games because of the size of the venue, the Eleventh Circuit accepted that the use of a loudspeaker was critical to CCS's tradition of communal prayer. *Cambridge Christian Sch.*, 942 F.3d at 1247. With

16. FHSAA disputes that "bullhorns" were banned, noting FHSAA administrative procedures prohibited whistles or noisemakers that mimic a game whistle, but not devices that amplified voices. Doc. 148 at 8; *See* Doc. 8-1 at 15.

a fully developed record, the Court finds CCS's claim of using a loudspeaker to pray at away football games to be contradicted by the record.

Specifically, the evidence does not support that prayer over the PA system occurred at "just about *every*" group event as claimed by CCS. As discussed, when CCS was not the host or the event was not on its campus, CCS was fully willing to defer to the host school. Neither CCS, nor UCS, were the host schools for the 2015 2A State Championship Final football game at the Citrus Bowl; it follows that CCS's standard practice should have been to defer to the host. Requesting access to the PA system at the Championship final, at which neither it nor UCS hosted, was actually inconsistent with its routine of deferring to the host.

The evidence demonstrates that while many types of events occurring at CCS (*i.e.*, theater performances, classes, athletic practices, parent meetings, school board meetings) are started with group prayer, the prayer does not have to occur over the PA system, and particularly for away games or those not hosted by CCS, it was acceptable for CCS to defer to the host school. The question before the Court is whether communal pre-game prayer is a protected "belief," rather than a mere "preference." On the facts of this case, the Court concludes that communal pregame prayer over the PA system is a preference of CCS's, not a deeply rooted tradition that rises to the level of a sincerely held belief.

Indeed, CCS did pray together with their opponent at the 50-yard line. A former CCS student and football

player states that often after a football game, the team would pray with parents, teachers, classmates, and friends on the field or along the sidelines. Doc. 142-3 ¶ 13. There is no evidence before the Court that such sideline prayer could not have occurred at the 2015 Championship Final game. In fact, the evidence shows that the players did pray together after the game. It is evident that praying together is important to CCS, but nothing about the facts of this case demonstrates that delivering the prayer over the PA system is part of CCS's sincerely held religious beliefs. To the contrary, it was acceptable and routine for CCS to defer to the host school for away games. Further as stated by Mr. Minks, the inability to pray over the loudspeaker at away games did not burden CCS's right to exercise religious freedom (Doc. 136-9 at 3-4). *See*, *e.g.*, *GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d at 1257 ("all Free Exercise Clause challenges must include allegations that the law at issue creates a constitutionally impermissible burden on a sincerely held religious belief"). No evidence of burden exists here, as confirmed by CCS's Head of School. As no genuine issues of material fact exist, FHSAA is entitled to judgment in its favor on CCS's free exercise clause claim. CCS's Motion for Summary Judgment on this claim is due to be denied.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Defendant Florida High School Athletic Association's Motion for Summary Judgment (Doc. 136) is **GRANTED**.

2. Plaintiff Cambridge Christian School, Inc.'s Motion for Summary Judgment (Doc. 137) is **DENIED**.

3. The Clerk is directed to enter Judgment in favor of Defendant Florida High School Athletic Association and against Plaintiff Cambridge Christian School, Inc.

4. The Clerk is further directed to terminate any pending motions and deadlines and **CLOSE** this case.

DONE AND ORDERED in Tampa, Florida on March 31, 2022.

/s/
Charlene Edwards Honeywell
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED NOVEMBER 13, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12802

D.C. Docket No. 8:16-cv-02753-CEH-AAS

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff-Appellant,

versus

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(November 13, 2019)

Before TJOFLAT, MARCUS and NEWSOM, Circuit Judges.

MARCUS, Circuit Judge:

At the end of the 2015 high school football season, Cambridge Christian School and University Christian

School faced off in the Division 2A State Championship Game, supervised and regulated by the Florida High School Athletic Association ("FHSAA"), a state actor. The two schools, both Christian institutions, asked the FHSAA for permission to conduct a joint prayer over the loudspeaker before kickoff, as they each typically did before all other games. The schools presented this request and the practice of communal prayer more generally as being tied to their religious missions and as being very important to the members of their communities. The FHSAA denied the request, citing the Supreme Court's Establishment Clause precedent and the principle of "separation of church and state."

Cambridge Christian then brought this lawsuit in federal district court, raising a variety of claims, primarily arising under the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions. The school alleged that its right to freedom of speech was violated when the FHSAA denied access to the loudspeaker for its proposed religious speech while at the same time allowing secular messages to be transmitted. It also claimed that its right to Free Exercise was similarly violated—communal prayer was integral to its spiritual tradition and practice, and, without access to the loudspeaker system, the school was unable to unite players and spectators in communal prayer before the last and most important game of the season. Cambridge Christian asked the district court for declaratory and injunctive relief as well as damages.

The trial court dismissed the entirety of Cambridge Christian's complaint for failure to state a claim under

Federal Rule of Civil Procedure 12(b)(6). For starters, it concluded, on the Free Speech claims, that all speech over the loudspeaker was government speech and therefore that the school enjoyed no expressive freedoms in that medium. In the alternative, the court determined that the loudspeaker was a nonpublic forum and that Cambridge Christian was not entitled to access it. As for the Free Exercise Clauses, the court held that the school's free exercise rights had not been implicated when the FHSAA denied access to the loudspeaker because the teams were still allowed to pray together at the center of the football field, albeit without the aid of a loudspeaker system. Finally, the trial court denied declaratory relief under the Establishment Clauses on the ground that the controversy was more properly framed under the other clauses.

As we see it, the district court was too quick to dismiss all of Cambridge Christian's claims out of hand. Taking the complaint in a light most favorable to the plaintiff, as we must at this stage in the proceedings, the schools' claims for relief under the Free Speech and Free Exercise Clauses have been adequately and plausibly pled. There are too many open factual questions for us to say with confidence that the allegations cannot be proven as a matter of law. The question of whether all speech over the microphone was government speech is a heavily fact-intensive one that looks at the *history* of the government's use of the medium for communicative purposes, the implication of government *endorsement* of messages carried over that medium, and the degree of government *control* over those messages. Here, the history factor weighs against finding government speech and the control factor is

indeterminate, so, based on this limited record, we find it plausible that the multitude of messages delivered over the loudspeaker should be viewed as private, not government, speech. And while we agree with the district court that the loudspeaker was a nonpublic forum, we conclude that Cambridge Christian has plausibly alleged that it was arbitrarily and haphazardly denied access to the forum in violation of the First Amendment. Likewise, we cannot say, again drawing all inferences in favor of the appellant, that in denying communal prayer over the loudspeaker, the FHSAA did not infringe on Cambridge Christian's free exercise of religion.

We, therefore, reverse the district court's decision in part. The lower court was too quick to pull the trigger insofar as it dismissed the appellants' free speech and free exercise claims. We cannot say whether these claims will ultimately succeed, but Cambridge Christian has plausibly alleged enough to enter the courtroom and be heard.

We do agree with the district court, however, that Cambridge Christian has failed to plead a "substantial burden" under the Florida Religious Free Restoration Act (FRFRA) because it has not alleged that the FHSAA *forbade* it from engaging in conduct that its religion mandates. Thus, we affirm the district court's dismissal of the FRFRA claim. We also affirm the district court's decision in part, insofar as it rejected the school's request for declaratory relief under the Establishment Clauses.

Appendix C

I.

A.

Cambridge Christian School is a private Christian school in Tampa, Florida, running from preschool through twelfth grade. Like many private schools, Cambridge Christian's religious mission is an integral part of its identity. The school's overall religious mission is stated this way: "To glorify God in all that [it does]; to demonstrate excellence at every level of academic, athletic, and artistic involvement; to develop strength of character; and to serve the local and global community."

Prayer is especially important to Cambridge Christian; it is a basic part of many school activities, including its class lectures and meals, and it has been fully incorporated into the mission of the school's athletic department. The athletic department defines its mission this way: "to glorify Christ in every aspect of [its] athletic endeavors while using the platform of athletics to: Teach the Principles of Winning; Exemplify Christian Morals and Values in [its] Community; Achieve Maximum Physical, Moral and Spiritual Character Development; and Mentor Young Men and Women to Deeper Walk with Jesus." In service of this mission, Cambridge Christian has a "long-standing tradition" of beginning all sporting events with an opening prayer, led by a student, parent, or school employee, delivered using the loudspeaker at home events "and at away games when possible." The school would "not pre-select or pre-approve an official prayer" or

"provide a script or any direction . . . ; rather, the speakers chose and delivered their messages themselves."

Cambridge Christian's football team played in Division 2A, which was supervised and regulated by the Florida High School Athletic Association. The FHSAA is "the governing nonprofit organization of Florida high school athletics." The FHSAA was so designated by the Florida legislature in 1997, and, because of the statutory delegation of authority, is a state actor. Fla. Stat. § 1006.20 (2016). It includes over 800 member high schools throughout Florida, many of which are private and religious in nature. Notably for our purposes, the FHSAA organizes and oversees championship games for all Florida high school athletics divisions.

The complaint states that Cambridge Christian fielded a successful football team in 2015; they won all nine of their regular season games and made it to the Division 2A playoffs. That season, Cambridge Christian claims that it had prayed over the loudspeaker at "each home regular season game as well as [at] away games, whenever possible." In three earlier rounds of the playoffs, Cambridge Christian was the home team, and hosted the games at Skyway Park, a public facility in Tampa owned by Hillsborough County. Before each of these games, Cambridge Christian apparently was allowed to pray over the loudspeaker at Skyway Park. At the end of the season, Cambridge Christian's football team was playing in the Division 2A Florida state football championship at Camping World Stadium (formerly known as the Citrus Bowl) in Orlando. The stadium has a regular capacity of

41,000 for football games. Cambridge Christian's opponent in the championship was University Christian School, "a school with a similar mission and traditions involving prayer."

During a December 1, 2015 conference call with the FHSAA—three days before the big game—representatives of Cambridge Christian *and* University Christian asked to use the loudspeaker at the stadium to lead attendees in a pre-game prayer. University Christian explained that it had been allowed by the FHSAA to use the loudspeaker prior to a 2012 championship game against a different Christian school. But this year, its request was denied. The following day, Tim Euler, the Head of School at Cambridge Christian, sent an email to Roger Dearing, the Executive Director of the FHSAA, asking again that the schools be allowed to use the loudspeaker for a pre-game prayer. Heath Nivens, the Head of School of University Christian, followed up with a similar email making the same request of the FHSAA. Dearing responded later that day and said he was unable to comply with their request. He explained that the facility was a public facility, that the FHSAA was a "state actor" and, therefore that it could not permit or grant a request for pre-game prayer.

The game was played on December 4, 2015, before a crowd of 1,800. "Immediately prior to the start of the game, the two teams met at the 50-yard line to pray together as a sign of fellowship," Am. Compl. ¶ 50, but the loudspeaker was not allowed to be used for prayer. Fans were unable to hear the pre-game prayer due to the size of the stadium.

Thus, says Cambridge Christian, "the FHSAA denied the students, parents, and fans in attendance the right to participate in the players' prayer or to otherwise come together in prayer as one Christian community." Notably, before, during, and after the game, the PA system was used by the FHSAA public-address announcer to "deliver[] various messages, including advertisements, commentary, and other communications." At halftime, each team was given seven minutes for its cheerleading squad to perform. During this time Cambridge Christian says it was permitted by the FHSAA to "take control of the loudspeaker," which the cheerleading coach used to play music from her smartphone. No apparent limitations were placed on the content of the messages the schools could and did deliver at halftime.

On December 7, the Monday following the game, the FHSAA emailed the schools again, reiterating its decision not to allow prayer over the loudspeaker at the start of the game. The FHSAA explained that prayer before football games had been "richly debated—and decided in the courts of the United States." He referenced—unmistakably, but not by name—the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000), as being "directly on point" and as established precedent preventing the FHSAA from granting the request. Doing so, the Association explained, would mean that a "state actor" was "endors[ing]" or "promot[ing] religion." The email also argued that no one had really been prevented from praying:

> The fact of the matter is that both schools involved had prayer on the field, both before and after the football game. The issue was never whether prayer could be conducted. The issue was, and is, that an organization [the FHSAA], which is determined to be a 'state actor' cannot endorse nor promote religion. The issue of prayer, in and of itself, was not denied to either team or anyone in the stadium. It is simply not legally permitted under the circumstances, which were requested by [Cambridge Christian].

The FHSAA explained its position again, in similar terms, in a press release issued the following January.[1]

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1. The statement said that "The FHSAA has always accommodated pre- and post-game on-field prayer opportunities for its member schools." It explained, from the FHSAA's perspective, that the following were "the facts" regarding Cambridge Christian's prayer request:

- The FHSAA received a request for a prayer to be lead over the PA system at The Citrus Bowl.
- The request for prayer to be lead publicly over the PA system was denied, in accordance with a prior U.S. Supreme Court decision (Texas, 2000) and Florida Statutes.
- The FHSAA presented alternative options for team prayers, including on-field prayer, in lieu of the publicly lead prayer, as requested, over the PA system.
- Representatives of each participating school accepted the FHSAA's alternative options to the initial request.

Cambridge Christian points to these repeated statements as evidence of an ongoing policy evincing hostility to religious expression.

B.

Cambridge Christian attached as exhibits to its complaint the Administrative Procedures of the FHSAA and the 2015 FHSAA Football Finals Participant Manual. At this early stage of litigation, and without the benefit of any discovery, these exhibits are critical to our understanding of the school's claims and the FHSAA's decisionmaking.

The Administrative Procedures "govern the [FHSAA]'s interscholastic athletic programs," and "apply to all regular season contests as well as . . . Championships." They read this way about the PA system:

> **Public-Address Protocol**. The public-address announcer shall be considered a bench official for all Florida High School State Championship Series events. He/she shall maintain complete neutrality at all times and, as such, shall not be a "cheerleader" for any team. The announcer will follow the FHSAA script for promotional

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- Both teams participated in a personally lead on-field organized prayer prior to and following the 2A State Championship game at The Citrus Bowl.

The press release also included photographs of the players and coaches praying together on the field before and after the game.

announcements, which are available from this association, player introductions and awards ceremonies. Other announcements are limited to:

- Those of an emergency nature (e.g., paging a doctor, lost child or parent, etc.);
- Those of a "practical" nature (e.g., announcing that a driver has left his/her vehicle lights on);
- Starting lineups or entire lineups of both participating teams (what is announced for the home team must be announced for the visiting team); and
- Messages provided by host school management; and
- Announcements that FHSAA souvenir merchandise, souvenir programs and concessions are on sale in the facility. During the contest, the announcer:
- Should recognize players about to attempt a play (e.g., coming up to in baseball [*sic*], punting, kicking or receiving a punt or kick in football, serving in volleyball, etc.);
- Should recognize player(s) making a play (e.g., "Basket by Jones" in basketball, "Smith on the kill" in volleyball, etc.);

- Should report a penalty as signaled by the referee;
- Should report substitutions and timeouts;
- Must not call the "play-by-play" or provide "color commentary" as if he/she were announcing for a radio or television broadcast;
- Must not make any comment that would offer either competing team an unfair advantage in the contest; and
- Must not make any comment critical of any school, team, player, coach or official; or any other comment that has the potential to incite unsporting conduct on the part of any individual.

The announcer should be certain of the accuracy of his/her statements before making them. When in doubt, the announcer should remain silent.

Regarding halftime, the Administrative Procedures specify that halftimes in football games will be twenty minutes, that school bands may perform at halftime for up to eight and a half minutes per side, and that the same number of cheerleaders in uniform as cheered during the regular season may be admitted free of charge. The Administrative Procedures do not say anything about accessing or using the PA system during halftime. Dearing (the FHSAA Executive Director) later attested in

a declaration that FHSAA policy allows the PA announcer "to play a musical selection *provided by the school* for that school's cheerleaders during their half-time performance if that school does not have a band to play the musical selection." No apparent limitations were included.

While the Administrative Procedures govern the entire football season, the Participant Manual is specific to the state championship games which were to be held over the weekends of December 4-5 and 11-12, 2015. It was provided to Cambridge Christian either shortly before or just after their December 1 conference call. The Manual provides game day schedules, facility and game operations, sidelines access rules, and similar information that schools playing in the games would need. It set out the following schedule for the Division 2A Championship Game: The field would become available to teams at 11:37 AM. The stadium would open at 12:00, with all officials and the PA announcer in place by 12:15. Pre-game warm ups would end at 12:37, thirty minutes before kickoff. A Scholar Athlete Award would be given around that same time. The announcer would begin a pre-game script at 12:47. There would then be a presentation of colors, the Pledge of Allegiance, and a performance of the National Anthem. At 12:52, the teams would be lined up in their tunnels, and they would be introduced. Captains and officials would head to midfield for a coin toss at 1:04, and kickoff would be at 1:07.

A form attached to the end of the Participant Manual provides some information about halftime performances. It contains a section titled "Cheerleader Information,"

and indicates that halftime performances would be seven minutes long. The form asks whether a cheer team from the school would be performing at halftime. The next section is titled "Band and Drill Information" and asks whether a band would perform (again, for seven minutes) at halftime, and whether the school had "a half time announcer."

C.

Cambridge Christian filed this lawsuit against the FHSAA on September 27, 2016 in the United States District Court for the Middle District of Florida. After amending its complaint on September 30 and moving for a preliminary injunction on the same day, the school leveled seven charges against the FHSAA. Count I alleged that since secular messages were conveyed over the state's loudspeaker, the FHSAA's policy "prohibit[ed] religious speech, and only religious speech, from being broadcast." Thus, the FHSAA had "place[d] a substantial burden on Cambridge Christian's sincerely held religious beliefs by not allowing [it] to partake in its religious tradition of pre-game prayer over the loudspeaker." The school claimed this constituted "content-based and viewpoint-based discrimination" in violation of the First Amendment. In Count I, the school sought injunctive relief against the FHSAA policy and damages under § 1983, plus fees and costs. Count II sought a declaratory judgment that the policy violated the Free Speech and Free Exercise Clauses, along with, again, injunctive relief against the Policy, damages, fees, and costs. Count III also sought a declaratory judgment that the FHSAA's policy was

not required by the Establishment Clause, and, for a third time, injunctive relief, damages, fees, and costs. Counts IV through VI replicated the first three, but were brought under the Florida Constitution's parallel Free Speech, Free Exercise, and Establishment Clauses.[2] Finally, Count VII alleged a violation of Florida's Religious Freedom Restoration Act because the FHSAA "intentionally place[d] a substantial burden on Cambridge Christian's sincerely held religious beliefs by not allowing [the school] to partake in its tradition of pre-game prayer over the loudspeaker as required by its religious mission." This final count also sought injunctive relief, damages, fees, and costs.

The FHSAA moved to dismiss the complaint, arguing that nothing in the First Amendment or in Florida's Constitution or the Florida Statutes compelled it "to engage in proselytization of audience members attending

2. Florida's courts have treated the Free Speech and Free Exercise Clauses of the Florida Constitution as being coextensive with those embodied in the United States Constitution, and have adopted the same principles and methods of analysis. *See Cafe Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002) (Free Speech); *Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002) (Free Exercise). The Florida Establishment Clause, however, goes somewhat further than the corresponding clause in the United States Constitution by decreeing that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination. . . ." Fla. Const. art. I, § 3; *see also Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 595-96 (11th Cir. 2013) (comparing the Establishment Clauses).

state-sponsored sporting events," and that while no one was denied the ability to express themselves through prayer, the law did not require *or* permit the FHSAA "to promote sectarian prayer through state-run public address systems." It emphasized "the neutral Public-Address Protocol," under which "the public-address announcer is the only one making statements and providing announcements over the public-address system," and that members of the Cambridge Christian community were not prevented from praying together on the field, but only from using a loudspeaker system to do so. The Magistrate Judge to whom the case was referred issued a Report and Recommendation (R&R) recommending that the Motion to Dismiss be granted in all respects and that preliminary injunctive relief be denied. The district court agreed and adopted the Magistrate Judge's R&R.

The district court began its analysis by addressing Cambridge Christian's Free Speech claims. It concluded, based on a review of the complaint, that all communication over the loudspeaker during the 2A Championship was *government* speech, thereby eliminating all of the Free Speech claims but that, in the alternative, even if some of the speech over the loudspeaker was private speech, it occurred in a nonpublic forum where the exclusion of Cambridge Christian's requested prayer amounted to a permissible content-based restriction. The district court also concluded that the complaint failed to state a claim under the Free Exercise Clause, reasoning that the school had not been prevented from engaging in prayer. Public, communal prayer was conducted "at the most central location of the Stadium," the center of the field, and, the

court reasoned, simply denying access to the PA system did not affect the school's ability to hold communal prayer or to act pursuant to its beliefs.

The remaining claims were dealt with in quick succession. The claim for declaratory relief stating that the Establishment Clause did not require the FHSAA to bar the school from access to the loudspeaker for the purposes of prayer was dismissed because there was "no actual controversy as to this claim," and because Cambridge Christian's arguments under the Establishment Clause were better considered under the Free Exercise and Free Speech Clauses. Finally, Cambridge Christian failed to state a claim under the Florida Religious Freedom Restoration Act, Fla. Stat. § 761.03, because pre-game prayer was "required by its religious *mission*," and not by its "religious belief," and thus any burden on Cambridge Christian's actual *beliefs* was not a substantial one. A preliminary injunction was also denied.

Cambridge Christian timely appealed to this Court.

II.

"We review *de novo* the grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. We accept, as we must at this stage, the allegations in the complaint as true and construe them in the light most favorable to the plaintiff[]." *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1347 (11th Cir. 2016). We then ask whether the complaint "contain[s] sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556

U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *see also Ray*, 836 F.3d at 1347-48. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

"We review the district court's dismissal of a Declaratory Judgment Act claim for an abuse of discretion. Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. The act vest[s] district courts with discretion in the first instance[] because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *Smith v. Casey*, 741 F.3d 1236, 1244 (11th Cir. 2014) (citations and quotations omitted); *see also* 28 U.S.C. § 2201(a) (providing that district courts "may" exercise jurisdiction over a declaratory judgment claim).

Finally, the denial of a preliminary injunction is reviewed for abuse of discretion, but the underlying legal conclusions are reviewed *de novo*. *Bloedorn v. Grube*, 631 F.3d 1218, 1229 (11th Cir. 2011). We also review "core constitutional facts" *de novo*, while historical facts are reviewed only for clear error. *Id.* Historical facts deal with "the who, what, where, when, and how of the controversy," while constitutional facts are the "'why' facts" that relate to "intent" or "motive." *ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1206 (11th Cir. 2009).

Appendix C

III.

Perhaps of greatest significance, the parties disagree about how we ought to classify and analyze Cambridge Christian's claims under the Free Speech Clauses. The Florida High School Athletic Association claims that all speech over the loudspeaker was government speech, and thus not subject to the expressive speech provisions of the First Amendment at all. The FHSAA argues in the alternative that even if the prayer would have been private speech, the public-address system was still a nonpublic forum to which the FHSAA reasonably denied access in light of the forum's purpose. Cambridge Christian argues, however, that the public-address system was a limited public forum, but that forum analysis is beside the point because the FHSAA discriminated against its speech on the basis of its religious viewpoint, which would be impermissible even in a nonpublic forum.

The district court reached two basic, albeit independent conclusions on the Free Speech claims. First, it held that all communication over the loudspeaker during the 2A Championship Game was *government* speech. If so, these claims necessarily fail because "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). Alternatively, the trial court concluded that even if the public-address system was some type of forum for private speech, it was a nonpublic forum at best and the restriction it imposed was lawful.

We disagree with both conclusions. As we see it, there are simply too many key facts left undetermined at this preliminary stage and, when we draw all of the inferences as we must in Cambridge Christian's favor, we are left with a complaint that has plausibly stated a claim under the Free Speech Clause. "At the motion to dismiss stage, . . . we are not asking whether the complaints meet any probability requirement, only whether they plausibly allege violations" of the First Amendment. *City of Miami v. Wells Fargo & Co.*, 923 F.3d 1260, 1265 (11th Cir. 2019). We conclude that Cambridge Christian has done so.

A.

It is by now clear under the First Amendment that if all of the speech over the loudspeaker at the 2A Championship Game was government speech, Cambridge Christian's case could not proceed under the Free Speech Clause. "When the government exercises 'the right to speak for itself,' it can freely 'select the views that it wants to express.'" *Mech v. Sch. Bd. of Palm Beach Cty.*, 806 F.3d 1070, 1074 (11th Cir. 2015) (quoting *Summum*, 555 U.S. at 467); see also *id.* ("Because characterizing speech as government speech 'strips it of all First Amendment protection' under the Free Speech Clause, we do not do so lightly." (citation omitted)). While we lack "a precise test for separating government speech from private speech," *id.*, three leading cases—two from the Supreme Court and one decided by a panel of this Court—have laid out a series of factors that we are required to consider in the calculus: history, endorsement, and control. *Id.* at 1074-75.

Appendix C

Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009), was the first of these cases. There, a religious group petitioned a city mayor for permission to place a stone monument proclaiming some of its religious beliefs in a city park where a number of other monuments—including one of the Ten Commandments—had stood for some time. *See id.* at 465. Some of these had been donated by private groups. *Id.* at 464-65. The Court determined that the city was not required to allow the proposed monument because "a permanent monument in a public park is best viewed as a form of *government* speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id.* at 464 (emphasis added). This case, only a decade old, was the first to consider the history of the medium, the implication of government endorsement, and the degree of government control as foundational to government speech analysis—though these factors were not so cleanly identified and delineated in their first appearance. *See id.* at 470-72. All three weighed heavily in favor of finding that the monuments in the public park were a form of government speech, notwithstanding that some had been privately funded and donated. *See id.*

In *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015), the Court considered these factors again, this time concluding that "specialty license plates issued pursuant to [a state] statutory scheme" were also a form of government speech. *Id.* at 2246. The Sons of Confederate Veterans, Texas Division had applied to sponsor a specialty license plate in Texas, but the Texas Department of Motor Vehicles Board rejected their application and proposed design, which

included a Confederate battle flag, because "members of the general public [found] the design offensive," and these views were reasonable since "a significant portion of the public associate the confederate flag with organizations advocating expressions of hate." *Id.* at 2245. The Court modeled its analysis of the state's license plates as government speech on its discussion in *Summum*, now drawing out and identifying precisely for the first time the three factors—history, endorsement, and control—and finding again that each of them pointed to the conclusion that the license plates were a form of government speech. *Id.* at 2248-49. As a result, the state could not be required to issue plates sponsored by the Sons of Confederate Veterans or featuring their proposed design. *See id.* at 2253. Those license plates would have been Texas's own speech, not the Confederates', and it was, therefore, up to the state whether it would promote their organization through its license plates.

Most recently, a panel of this Court evaluated "banners on [public schools'] fences [recognizing] the sponsors of school programs." *Mech*, 806 F.3d at 1072. The plaintiff in *Mech v. School Board of Palm Beach County*, 806 F.3d 1070 (11th Cir. 2015), was a former adult film actor who had become a math tutor and who wanted the Palm Beach County School Board to hang a banner at three schools advertising his tutoring business and its sponsorship of school programs, alongside banners advertising other school sponsors. *Id.* at 1072-73. The School Board initially hung his banners, which complied with all the requirements of their sponsorship program, but removed them when they learned about Mech's previous career,

citing "the educational mission" of the Board and their "community values." *Id.* at 1073. This prompted Mech to sue the school board under the Free Speech Clause. *Id.* We applied the factors employed by the Supreme Court in *Walker* and *Summum* to the banners. *See id.* at 1075-79. We determined that control and endorsement weighed in favor of government speech strongly enough that we were comfortable holding that the banners amounted to government speech, even in the absence of any evidence about the historical antecedent. *See id.*

Taking the facts in a light most favorable to Cambridge Christian, we find a history of private speech, and also that the allegations regarding control of speech delivered over the public address system paint an unclear picture. Because one of the three factors points toward finding that at least some private speech was disseminated over the public-address system and the control factor is mixed, we reverse the district court's threshold conclusion that the public-address system was used to convey only government speech, along with its dismissal of the Free Speech claims and remand for further exploration of the relevant facts.

1. History

The first factor—history—directs us to ask whether the type of speech under scrutiny has traditionally "communicated messages" on behalf of the government. *Walker*, 135 S. Ct. at 2248. In *Summum*, the Court observed that "[g]overnments have long used monuments to speak to the public." *Summum*, 555 U.S. at 470.

Monuments on public land, even privately funded ones, were no different as far as this factor was concerned. *See id.* at 470-71. "Since ancient times," the Court said "kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power," and today governments erect monuments "to convey some thought or instill some feeling in those who see the structure." *Id.* at 470. License plates, too, the Supreme Court said, had a well-recognized history of communicating messages from the states that issued them, whether in graphics, slogans, or text. *Walker*, 135 S. Ct. at 2248. License plates had not been around as long as monuments, but the Court noted that as early as 1917 states were displaying graphics on the plates they issued, and state slogans had appeared on some plates since 1928. *Id.* Texas, specifically, had employed both graphics and slogans over the years. *Id.* In *Mech*, we could find no lengthy history surrounding banners being hung on school fences, but we observed there that this factor was not determinative; "a long historical pedigree is not a *prerequisite* for government speech." *Mech*, 806 F.3d at 1076.

Here, the district court concluded that the history factor weighed against finding that speech over the loudspeaker was government speech. We agree because the allegations in the complaint strongly suggest that the state has allowed the dissemination of prayer over the public-address system in the past. Thus, the complaint tells us that University Christian told the FHSAA that they had been allowed to pray over the loudspeaker before a 2012 championship game (only three years earlier).

The complaint also recounts that Cambridge Christian prayed before three 2015 *playoff* games leading up to the championship. There is significant uncertainty in the facts as pled. The attestation that there was prayer before the 2012 championship comes to us secondhand, and we do not know how closely the FHSAA administered or monitored the early-round playoff games hosted by Cambridge Christian at their home field. The history presented in the complaint may be inaccurate or unprovable, but we cannot say so with any confidence, and at this preliminary stage in the case we are required to view it in a light most favorable to Cambridge Christian. Thus, we are satisfied that Cambridge Christian has alleged enough for us to say that history plausibly weighs in favor of characterizing the speech over the loudspeaker as being, at least in part, private.

2. Endorsement

The second of the factors—endorsement—asks whether the kind of speech at issue is "often closely identified in the public mind with the government," *Summum*, 555 U.S. at 472, or put somewhat differently, whether "observers reasonably believe the government has endorsed the message," *Mech*, 806 F.3d at 1076. Monuments in public parks were identified with government because "parks are often closely identified in the public mind with the government unit that owns the land," and because "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated."

Summum, 555 U.S. at 471, 472. And in *Walker*, "Texas license plates [were], essentially, government IDs," closely identified with the state because the government required them and regulated them for undeniably governmental purposes, and because every license plate had the word "TEXAS" stamped at the top. *Walker*, 135 S. Ct. at 2248-49. Finally, in *Mech*, we concluded that the banners were also presumably government-endorsed because "schools typically do not hang [banners] on school property for long periods of time if they contain 'message[s] with which [they] do not wish to be associated.'" *Mech*, 806 F.3d at 1076 (quoting Walker, 135 S. Ct. at 2249). Moreover, the banners were all required to include the schools' initials and these critical words: "Partner in Excellence." *Id.*

The same logic that applies to the banners and the monuments applies here as well. While speech disseminated over a loudspeaker at an event plainly is more transient than any of our comparators—statues, license plates, or banners—it is tied to government spatially, in the same way the banners were tied to the schools and the monuments were tied to the city, because it occurs at a government-organized event. Just as we assumed that the owners of property do not generally put up banners or monuments that convey messages with which they disagree, so too we can safely assume that the organizers of a sporting event—a league, a home team, or, in this case, the FHSAA—generally would not allow a public-address system to be used to convey messages they didn't want to be associated with.

The state organized the game and likely would have been seen as endorsing any communication over the loudspeaker because, although the game was between two Christian schools, it was the Championship of Division 2A, a class of a league organized by the FHSAA. The heads of both schools referred to the weekend of games as the "State Championships." The public-address system was part of a stadium owned by the government (albeit a different level of government), and the announcer was a representative of the government. The FHSAA's Public-Address Protocol emphasizes that he must "maintain complete neutrality." The schools envisioned their own representatives actually leading the prayer over the loudspeaker, but the prayer would have come at the start of the game, around when the National Anthem and Pledge of Allegiance are traditionally performed (and were performed at this championship game). These pre-game rituals in particular are inseparably associated with ideas of government.

The types of messages conveyed over the loudspeaker also suggest that observers would believe the government endorsed the messages conveyed over the loudspeaker. As the district court noted: "Cambridge Christian does not allege that the loudspeaker was used during the championship game by anyone other than the public-address announcer, with the exception of the music played for the half time performances." The Protocol does provide for the possibility of "Messages provided by host school management," but does not anticipate that host school management will make their own announcements. (Nor was there a "host school" in the traditional sense at this

championship game—it was held at a neutral location.) The Participant Manual likewise does not indicate any room for announcements other than by the FHSAA.

Advertisements over the public-address system might be relevant to any analysis of the endorsement factor but, at this point, we don't know much about them. All the complaint tells us is that messages were delivered by the FHSAA's public-address announcer.[3] The public-address protocol requires "complete neutrality" on the part of this announcer, who is designated as a "bench official." The Participant Manual also says that the announcer had a "pre-game script" which ran through the presentation of colors, the Pledge of Allegiance, the National Anthem, and the introduction of starters for each team. We think an announcer who guides the spectators through these processes, and who maintains neutrality while calling plays would have been closely associated in the minds of spectators with the FHSAA, so, absent further information, advertisements read by the announcer would also likely be perceived as government-endorsed. This might change if in the course of discovery, further details are developed about the ads. Thus, for example, we don't know if the ads were framed as "thank yous" or were presented in more promotional terms. *See Mech*, 806 F.3d at 1076-77 (finding this distinction relevant).

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3. The complaint also alleges that messages from corporate sponsors lined the perimeter of the field and were displayed on the "Jumbotron." These messages do not appear to be relevant because Cambridge Christian did not ask to pray by means of messages lining the field or by using the Jumbotron.

Cambridge Christian argues, nevertheless, that the endorsement factor weighs "strongly" in its favor, but that argument is unconvincing. It points to our statement that: "views do not become the state's views merely by being uttered at a state event on a state platform." *Adler v. Duval Cty. Sch. Bd.*, 206 F.3d 1070, 1080 (11th Cir.) (en banc), *vacated*, 531 U.S. 801, 121 S. Ct. 31, 148 L. Ed. 2d 3 (2000), *reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc). But we said this in an Establishment Clause case, not a Free Speech case,[4] and in reference to "government speech" overall, not in an analysis of the endorsement factor. It is surely right that views don't become the state's merely because they are uttered on a state platform, but being uttered on a state platform certainly helps. The factors and analyses drawn from *Summum*, *Walker*, and *Mech* are the appropriate means of deciding whether views expressed on a state platform have become the state's. The more precise question on the endorsement factor is whether the speech would be "closely identified in the public mind with the government." *Summum*, 555 U.S. at 472. Thus, we think it would likely be so in this case. Cambridge Christian is free to develop more facts as the litigation proceeds, but, for now, the endorsement factor appears to us to weigh in favor of government speech.

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4. *Adler* asked whether it was *permissible* for student-initiated, student-led prayer (that was not reviewed by the School Board) to occur at a high school graduation. In Count I, Cambridge Christian is arguing, under a different clause, that the FHSAA was *obligated* to allow school-initiated, school-led prayer, during a different kind of event—one that contained no other private speakers like local politicians or celebrities contributing their personal views.

3. Control

Finally, the control factor asks whether the relevant government unit "maintains direct control over the messages conveyed" through the speech in question. *Walker*, 135 S. Ct. at 2249. In *Summum*, the city had "rules governing the acceptance of artwork for permanent placement in city parks," requiring approval of the finished product or a model before any piece of art would be accepted. *Summum*, 555 U.S. at 472. Likewise, Texas expressly reserved "final approval authority" over all license plate designs and would reject designs inconsistent with how the state chose "to present itself and its constituency." *Walker*, 135 S. Ct. at 2249. Finally, Florida's schools both had approval authority and control over the banners' design, typeface, color, contents, size, and location, including mandating that the school's initials and the phrase "Partner in Excellence" appear on each banner. *Mech*, 806 F. 3d at 1078.

The FHSAA controlled physical access to the microphone, but, notably, whether it controlled the content of the speech that went out over the loudspeaker is far from established on the limited record we have. For one thing, we do not know who made the announcements before or during the game, or, indeed, who would have been allowed to do so had they asked. The Administrative Procedures do not tell us whether anyone other than the FHSAA announcer spoke over the loudspeaker. The Procedures suggest that the FHSAA did control what the announcer could say, for instance by requiring neutrality and announcements of the starting lineup and

forbidding "play-by-play," "color commentary," or criticism of schools, players, coaches, or officials. The Procedures also list a variety of announcements, and seem to imply that the FHSAA announcer would make them all, but they do not say for sure one way or the other. One type of announcement listed is "[m]essages provided by host school management." The use of "provided by" (as opposed to, say "made by") might imply that the FHSAA would control any such announcements, but we don't know how closely. Would school messages be reworded, censored, or sometimes rejected? Or would the FHSAA announcer simply read *any* statement provided by a host school? Since we don't know we must assume, in Cambridge Christian's favor, that the state's control was limited.

The Administrative Procedures are likewise silent when it comes to the halftime show, the one time that we know for a fact someone other than the announcer actually did control what went out over the loudspeaker. The complaint says that "each school was permitted to, and Cambridge Christian did in fact, take control of the loudspeaker while its cheerleaders performed a halftime show" and that the "cheerleading coach played music of the school's choosing from her smart phone over the loudspeaker." We have some reason to think that the government exerted some control, at least by means of placing time limitations (seven minutes for each team) on the expression, but we can discern no indication of any meaningful control beyond that. Thus, we can find nothing in the Administrative Procedures or the Participant Manual to indicate whether the FHSAA reserved any right to reject a song or musical choice or that the participating

schools could not play songs with, for example, explicitly religious or political messages. We also don't know what it means to "take control of the loudspeaker," and whether this entailed access to the microphone. Given the paucity of facts as pled that the FHSAA had any rules limiting the schools' halftime choices, we simply do not know if any limits were in place.

Although this final factor does not point clearly in either direction, the school's assertion that it "did not seek—nor would it have accepted—a circumstance in which the FHSAA would exercise control over its message" misconstrues the question. No case precedent says that the government must control every word or aspect of speech in order for the control factor to lean toward government speech. Cambridge Christian cites *Johanns v. Livestock Marketing Association*, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005), as establishing otherwise, but this case says that control of every word is a sufficient, not a necessary condition, for government speech. *See id.* at 562 ("When, as here, the government . . . approves every word that is disseminated. . . ." (emphasis added)). A lack of control over every word is not determinative because complete control is not required.

* * *

The long and the short of it is that we simply do not have enough information to say with any confidence that, if everything in the complaint is true, speech disseminated over the public-address system was and would have been government speech as a matter of law. The history of

prayer at past games, as alleged in the complaint, tilts the first factor against finding that speech presented over the loudspeaker was government speech, but the implicit endorsement of messages carried over the loudspeaker at a state event cuts the other way. The allegations regarding the control factor point in both directions, at least at this point, and there are many key questions left unanswered by the very preliminary record now before us. Since we cannot say, based on the complaint, that all communication over the loudspeaker during the 2A Championship Game was government speech, and since there are considerable facts alleged that yield a different conclusion, we reject the district court's first rationale for dismissing Cambridge Christian's Free Speech claim, and thus turn to the nature of the forum and the bases for the restrictions imposed by the State.

B.

If some or all of the speech conducted over the loudspeaker at the 2015 2A Championship was not government speech, this necessarily means that at least some of it was private speech. Our courts have employed a "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property" by private speakers. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992). This requires us to consider (1) what kind of forum the FHSAA created, (2) what type of restriction on access to the forum it enforced against Cambridge Christian, and, finally, (3) whether that restriction was constitutionally permissible. We conclude that the

complaint plausibly alleged that the FHSAA created a nonpublic forum, that the FHSAA restricted Cambridge Christian's speech on the basis of its content, and that the restriction was unreasonable on account of the FHSAA's arbitrary and haphazard application of its policies.

1.

The first critical step in the analysis is to discern the nature of the forum at issue, namely the stadium's public-address system. Broadly, we have identified four types of government fora. *See Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1226 (11th Cir. 2017). Two of these may safely be eliminated from our consideration. Based on our review of the complaint, the FHSAA plainly did not create a traditional public forum. "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885, 201 L. Ed. 2d 201 (2018). No one has suggested that the loudspeakers are a traditional public forum like a town square, and we may safely put this possibility aside. We can also say with great confidence that we are not looking at a designated public forum. These are "spaces that have 'not traditionally been regarded as a public forum' but which the government has 'intentionally opened up for that purpose,'" and in which it may not restrict speech any more than in a traditional public forum. *Id.* (quoting *Summum*, 555 U.S. at 469-70).

It is clear that the loudspeakers were not intentionally opened for speech as widely as a public park.

Two options thus remain—what is called a limited public forum[5] or a nonpublic forum. A "'limited public forum' . . . exists where a government has 'reserv[ed a forum] for certain groups or for the discussion of certain topics.'" *Walker*, 135 S. Ct. at 2250 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)). Unlike a designated public forum, which "grants general access to the designated class," a limited public forum "can be set up to grant only selective access to that class." *Barrett*, 872 F.3d at 1224 (quotation marks omitted). Thus, by way of example, we have identified the public-comment portions of school board meetings, among other things, as limited public forums. *Id.*; *see also Widmar v. Vincent*, 454 U.S. 263, 272, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981) (university buildings open for meetings of student groups); *Rowe v. City of Cocoa*, 358 F.3d 800, 802 (11th Cir. 2004)

5. At times, this Court and the Supreme Court have said there are only three kinds of forums, leaving out the limited public forum. *See, e.g., Minn. Voters All.*, 138 S. Ct. at 1885 ("Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums."); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 871 (11th Cir. 2011). We do not take these general statements to imply that the concept of a limited public forum—which the Supreme Court has invoked in recent cases that have not been overruled or abrogated—is no longer good law. *See Walker*, 135 S. Ct. at 2250; *Rosenberger*, 515 U.S. at 829. Whether the limited public forum is a distinct type or merely a variant of one of the other three is not important to our analysis.

(city council meetings); *Crowder v. Hous. Auth. of City of Atlanta*, 990 F.2d 586, 591 (11th Cir. 1993) (common area in a public housing building).

Finally, a nonpublic forum is a government "space that 'is not by tradition or designation a forum for public communication.'" *Minn. Voters All.*, 138 S. Ct. at 1885 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)). A space where the state is acting only as "a proprietor, managing its internal operations," falls into this category. *Walker*, 135 S. Ct. at 2242 (2015). Examples include polling places, *Minn. Voters All.*, 138 S. Ct. at 1886, the mailboxes of public school teachers, *Perry Educ. Ass'n*, 460 U.S. at 46, terminals in publicly operated airports, *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 679, and military bases, *Greer v. Spock*, 424 U.S. 828, 838, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976).

Cambridge Christian has not plausibly alleged that the FHSAA created anything more than a nonpublic forum. A state actor "does not create a public forum"—limited or otherwise—"by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius*, 473 U.S. at 802. The extent to which a forum is open to various speakers "is relevant for what it suggests about the Government's intent in creating the forum." *Id.* at 805. The complaint contains limited factual allegations that bear on the distinction between a limited public forum and a nonpublic forum. Of note, the Public-Address Protocol tells us that the announcer may read some undefined "[m]

essages provided by host school management" over the loudspeaker; an FHSAA official attested that at halftime the loudspeaker would "play a musical selection *provided by the school* for that school's cheerleaders during their half-time performance if that school does not have a band to play the musical selection," apparently without any restriction or prescreening; and Cambridge Christian alleges that pregame prayers were delivered through the public-address system before FHSAA-governed playoff games on at least four prior occasions.

Our analysis is guided by the Supreme Court's resolution of this issue in a remarkably similar factual context. In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000), the Court addressed the question whether a public high school policy of permitting student-led, student-initiated prayers over a loudspeaker system at the start of football games violated the Establishment Clause. There, the Court concluded that it was "clear" that the public-address system at the stadium was not a limited public forum. *Id.* at 303. The Court noted that the school did "not evince either by policy or by practice, any intent to open the pregame ceremony to indiscriminate use by the student body generally." *Id.* (quotations omitted and alterations adopted). Instead, "the school allow[ed] only one student . . . to give the invocation," and because the student was selected by a majority vote, minority views would be "effectively silenced." *Id.* at 303-04. As the Court explained, "the extremely selective access of the policy and other content restrictions confirm[ed] that it [was] not a content-neutral regulation that create[d] a limited public

forum for the expression of student speech." *Id.* at 315. Here, access appears to be similarly limited to—at most—the *two* participating schools, and we think it is doubtful that the FHSAA intended to create any kind of forum for the expression of private speech in any broad sense. Nothing in the complaint suggests that the loudspeaker system was open to "indiscriminate use" by the student body, the public at large, or any other broad population of speakers. And no "minority views" would be heard in this forum either, since only the schools were empowered to provide any messages. As in *Santa Fe*, then, this forum appears not to be a limited public forum.

Indeed, in *Santa Fe* the Court observed that in a previous decision, *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983), it held that an interschool mail system that "allowed *far more* speakers to address a *much broader* range of topics" was also only a nonpublic forum. *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303 (emphasis added). In *Perry*, a union seeking to represent public school teachers challenged a policy barring it from using the interschool mail system and accessing teachers' individual mailboxes. *Perry Educ. Ass'n*, 460 U.S. at 39-41. The union argued that the mail system was a limited public forum because there was "periodic use of the system by private non-school connected groups" and because the union previously had unrestricted access. *Id.* at 47. The Court rejected these arguments, finding that "there [was] no indication in the record that the school mailboxes and interschool delivery system [were] open for use by the general public," that the school principals' permission was required for all outsiders

to use the system, and that the record did not show that permission was granted "as a matter of course." *Id.* at 47. Outside organizations like the YMCA, Cub Scouts, and other civic and church organizations could use the system, but this was only "selective access" that was not enough to make the forum "public" in any sense. *Id.*; *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (holding that a charitable fundraising drive conducted in a federal workplace was a nonpublic forum).

Cambridge Christian argues, nevertheless, that the FHSAA created a limited public forum by "opening the Stadium facilities up to private speech, including using the loudspeaker for school messages and halftime shows and use of other Stadium facilities for other messages." Cambridge Christian is correct that the complaint shows that the loudspeaker system was open, at least to some extent, to private, nongovernment speakers. However, the complaint says precious little to create the inference that the FHSAA intended to open the loudspeaker to a broad range of discourse by private speakers. Discourse is the "verbal interchange of ideas." Webster's Third New International Dictionary 647 (2002). Allowing the schools to play music over the loudspeaker at halftime and to provide some kind of messages, presumably of an informational nature, does not suggest that the FHSAA intended to create a forum for the free expression of ideas by members of the public more broadly. Moreover, the loudspeaker was accessible by at most two private speakers, for what appear to be limited purposes, that is, to facilitate the standard ceremonial accompaniments to a

high school football game. This "type of selective access" identified by Cambridge Christian does not "transform government property into a public forum," limited or otherwise. *Perry Educ. Ass'n*, 460 U.S. at 47; *see also Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1204 (11th Cir. 1991) ("[T]he practice of allowing some speech activity on [government] property does not amount to the dedication of such property to speech activities.").

Cambridge Christian cites only to *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995), in support of its claim that the FHSAA had created a limited public forum.[6] *Rosenberger*, however, involved a program by a public university that provided funds for a broad array of

6. It is not at all clear to us that Cambridge Christian has adequately preserved this argument. In its opening brief, Cambridge Christian raised the issue in only one short, conclusory sentence in a footnote. That sentence reads, "It bears noting, however, that upon opening the Stadium facilities up to private speech, including using the loudspeaker for school messages and halftime shows and use of other Stadium facilities for other messages, the FHSAA created a limited public forum. *See Rosenberger*, 515 U.S. at 829." Opening Br. at 30 n.7. We have repeatedly held that "[a] party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it, 'for instance by devoting a discrete section of his argument to those claims.'" *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (quoting *Cole v. United States AG*, 712 F.3d 517, 530 (11th Cir. 2013)). A solitary "passing reference[]" in a footnote in a section of the brief dedicated to a different argument likely fails to meet that standard. *Id.* at 682. In any event, assuming that the citation to *Rosenberger* was enough to preserve the issue, we reject Cambridge Christian's argument.

student groups to pay third-party contractors for certain expenses. *Id.* at 824-25. A group established "[t]o publish a magazine of philosophical and religious expression" from a Christian perspective was denied funding to pay printing costs on the grounds that the group engaged in "religious activit[ies]." *Id.* at 825-26. The Supreme Court concluded that the funding program in effect created a limited public forum. *Id.* at 829.

Undeniably, that forum was much more open than the loudspeaker at the state championship game. In fact, the funding program created by the University of Virginia could be used by "any group the majority of whose members are students, whose managing officers are fulltime students, and that complies with certain procedural requirements," *id.* at 823, although funds were not provided for certain kinds of activities and expenses, *id.* at 825. The record showed that 343 student groups qualified to participate in the program in the relevant academic year, 135 applied for funds from the program, and 118 received funding. *Id.* Groups receiving funding included the Muslim Students Association, the Jewish Law Students Association, the C.S. Lewis society, and fifteen publications covering various topics like politics, literature, and environmental law. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 18 F.3d 269, 271 & n.3 (4th Cir. 1994), *rev'd*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700. Access to this forum was therefore much broader and generally available than the forum involved here, which at most two private parties could access. The complaint does not allege that the loudspeaker was generally accessible to members of the public, nor does

it say that participating schools were entitled to use it as a matter of course however they chose. We conclude that the complaint has plausibly alleged only a nonpublic forum and no more.

2.

That brings us to consider the nature of the FHSAA's restriction on Cambridge Christian's speech. Speech in a nonpublic forum can be restricted in order to preserve the forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Minn. Voters All.*, 138 S. Ct. at 1885. Indeed, the government has "much more flexibility to craft rules limiting speech" in a nonpublic forum than in any other kind of forum. *Id.* But it is equally clear that "nonpublic forum status 'does not mean that the government can restrict speech in whatever way it likes.'" *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998) (quoting *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 687). Thus, it remains true that even in a nonpublic forum, any barrier to access or restriction on speech must be viewpoint neutral, *Christian Legal Soc'y*, 561 U.S. at 679, and it cannot be exercised in an arbitrary and haphazard manner, *Minn. Voters All.*, 138 S. Ct. at 1888.

The prohibitions on content and viewpoint discrimination are "distinct but related limitations that the First Amendment places on government regulation of speech." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229-

30, 192 L. Ed. 2d 236 (2015). A "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Viewpoint discrimination is "an egregious form of content discrimination" that occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the regulation." *Rosenberger*, 515 U.S. at 829., In other words, a "content-based regulation either explicitly or implicitly presumes to regulate speech on the basis of the substance of the message," while a "viewpoint-based law goes beyond mere content-based discrimination and regulates speech based upon agreement or disagreement with the particular position the speaker wishes to express." 1 Smolla & Nimmer on Freedom of Speech § 3:9 (2019). So to distinguish between viewpoint and content discrimination, we must determine whether the speech restriction was based on "the specific motivating ideology" or particular position of the speaker, or "the topic discussed" or the substance of the message more generally.

Because there is little reason to think from the complaint and the limited record before us that the FHSAA would have allowed prayer from one religious sect but not from another, or that it would have allowed some solemnizing messages but would not have allowed a similar message from a religious viewpoint, we think the FHSAA's restriction amounts to a restriction based on content, not on viewpoint.

The complaint tells us that the FHSAA's explanation for denying access to the loudspeaker focused on the

religious nature of the message Cambridge Christian proposed to deliver. After the schools asked for permission, the FHSAA's first responsive email suggested that its decision was shaped by a desire to keep government and religion separate. The FHSAA's Executive Director observed that "both schools are private and religious-affiliated institutions" and said that "the fact that the facility is a public facility, predominantly paid for with public tax dollars, makes the facility 'off limits' under federal guidelines and precedent court cases." The Director also asserted that the FHSAA could not "legally permit or grant permission for such an activity" because it is a state actor. While the First Amendment or the religion clauses are not specifically mentioned in the first email, the implication is clear enough that the religious nature of the message was the main concern.

Two days after the game, the Director of the Florida High School Athletic Association sent a second email explaining in greater detail the basis for its decision. This time he referenced the religious content of the proposed speech explicitly:

> The issue is commonly referred to as the "separation of church and state." The First Amendment to the United States Constitution contains a provision that prohibits the government from 'establishing' a religion. . . . [C]ourts have interpreted this provision to generally mean that the government may not engage in activities that can be viewed as endorsing or sponsoring religion. For example,

> in 2000, the U.S. Supreme Court told a Texas high school that it cannot allow its football team members to lead a prayer on the field before the start of the game where the school allowed the team to use the stadium's PA system to broadcast the prayer to the spectators. While no school employee was involved in the actual prayer, the Court said the school gave the impression that it was endorsing the prayer by allowing the use of its PA system and allowing the prayer as part of the pre-game ceremonies.

The email concluded that since the FHSAA "is determined to be a 'State Actor' by the Florida courts," the organization could not have granted Cambridge Christian's request without running afoul of *Santa Fe Independent School District v. Doe*, where the Supreme Court held that a public school district's policy of permitting student-led, student-initiated prayers over a loudspeaker system at the start of football games violated the Establishment Clause.[7]

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7. Despite the similar, although not identical, facts concerning prayer before a football game, *Santa Fe* does not enable us to resolve the entire case at this stage in the proceedings. For one thing, it was presented to the courts under the Establishment Clause, as a challenge to prayers that were allowed, and indeed encouraged, by the state. Cambridge Christian's challenge is to the *denial* of a request for prayer and is primarily brought under the Free Speech and Free Exercise Clauses.

We have no occasion today to decide the hypothetical case that would have arisen had the FHSAA allowed the prayer and faced a suit under the Establishment Clause. *See infra* Part V. In theory and in practice, the Free Exercise and Establishment Clauses are sometimes found in some tension with one another, but "there is

See 530 U.S. at 301-17. As the FHSAA saw it, "[t]he issue was . . . that an organization, which is determined to be a 'state actor,' cannot endorse nor promote religion." It further explained that "prayer, in and of itself, was not denied to either team or to anyone in the stadium," it just could not be conducted over the loudspeaker.

Cambridge Christian argues that its request was denied because of the religious perspective of its speech, which makes the FHSAA's decision viewpoint discrimination, but we disagree. The line between viewpoint and content discrimination is admittedly "not a precise one," *Rosenberger*, 515 U.S. at 831, and that is particularly true when it comes to restrictions on religious speech. But based on the facts alleged in Cambridge Christian's complaint, the FHSAA's restriction falls decidedly on the content side of the line. It is clear that the

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room for play in the joints between them." *Locke v. Davey*, 540 U.S. 712, 718, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) (quotations omitted). "Justice Goldberg cogently articulated the relationship between the Establishment Clause and the Free Exercise Clause when he said that '[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief.'" *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 695 (11th Cir.) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring)), *vacated on other grounds, Dunn v. Ray*, 139 S. Ct. 661, 203 L. Ed. 2d 145 (2019). Most significantly, as we explain *infra* in Part III.B.3, Cambridge Christian's complaint plausibly alleged that the state arbitrarily and haphazardly denied prayers on some occasions but allowed them before at least four prior playoff games for no apparent reason. This consideration, however, played no role in *Santa Fe*.

FHSAA relied on the nature of the proposed message as a prayer when it decided not to grant the schools' request. The FHSAA did not simply say "no messages from the schools are permitted," or "only the public-address announcer is permitted to use the loudspeaker," or "no Christian messages are allowed"; instead, the FHSAA said, in effect, "no prayer, of any kind, at the outset of the football game." That is a restriction on speech "based on the substantive content or the message it conveys," in other words, a content-based restriction. *Rosenberger*, 515 U.S. at 828. The complaint does not allege, for instance, that Christian prayer was prohibited but that Jewish or Muslim prayer would have been allowed, which would present an obvious case of viewpoint discrimination. We proceed, then, on the theory that the complaint has plausibly alleged that the FHSAA's restriction was based on the content of the message as a prayer, not the schools' religious viewpoint.[8]

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8. We do not rule out the possibility that discovery might reveal that the FHSAA barred the schools from speaking because the prayer would have expressed an impermissibly religious *viewpoint* on a topic that was included in the ambit of the forum and could otherwise have been discussed in a nonreligious way. Thus, for example, if a secular act of solemnization or invocation of some sort would have been permitted by the state at the outset of the game, Cambridge Christian's case for discrimination against a religious viewpoint would be stronger. *See Rosenberger*, 515 U.S. at 831 (explaining that excluding "a theistic . . . perspective" from a forum is impermissible, just like excluding any other "political, economic, or social viewpoint"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993) (holding that excluding speech "dealing with the subject matter from a religious standpoint" is viewpoint

3.

Having concluded that the complaint plausibly alleged that the forum was likely a nonpublic one and that the FHSAA's restriction was likely content based, the final step in our analysis is to examine the restriction for reasonableness. This is a "forgiving test." *Minn. Voters All.*, 138 S. Ct. at 1888. "The reasonableness of the Government's restriction of access to a nonpublic forum must be assessed in the light of the purpose of the forum and all the surrounding circumstances." *Cornelius*, 473 U.S. at 809. "Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters All.*, 138 S. Ct. at 1888.

The Supreme Court has made it clear that even in a nonpublic forum the government must avoid the haphazard and arbitrary enforcement of speech restrictions in order for them to be upheld as reasonable. Thus, for example, in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018), the Supreme Court invalidated a state law prohibiting voters from wearing certain kinds of expressive clothing and accessories inside the polling place. The Minnesota law at issue prohibited voters from wearing any "political badge, political button, or other political insignia." *Id.* at 1883. The Court determined that the polling place was a nonpublic forum, that the law did

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discrimination). Nothing in the complaint, however, suggests that the state's restriction was imposed on the basis of viewpoint, rather than content.

not facially discriminate on the basis of viewpoint, and that it was reasonable for the State to determine that "some forms of advocacy should be excluded from the polling place, to set it aside as 'an island of calm in which voters can peacefully contemplate their choices.'" *Id.* at 1886, 1887. But the Court determined that the law still failed the reasonableness test because the ban on "political" apparel was too indeterminate and haphazardly applied. *Id.* at 1888; *see also id.* at 1891 ("A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the *First* Amendment? It would be allowed.").

The complaint has plausibly alleged that the FHSAA's prohibition on prayer at the 2015 championship game had a similar substantial defect—the restriction was arbitrarily and haphazardly applied by the state. "[A] challenged regulation may be unreasonable, regardless of the reasons for its adoption, if it is inconsistently enforced." *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 330 (D.C. Cir. 2018); *see also Seattle Mideast Awareness Campaign v. King County*, 781 F.3d 489, 500 (9th Cir. 2015) (finding a speech restriction reasonable because it was "sufficiently definite and objective to prevent arbitrary or discriminatory enforcement"); *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001) (en banc) (holding that speech restrictions "were not reasonable because they were arbitrary").

Notably, Cambridge Christian has alleged that the two participating teams, University Christian and Dade Christian School, were allowed to pray before the 2012

championship game administered by the FHSAA and that it prayed over the loudspeaker during the first *three* rounds of the 2015 playoffs before games conducted under the auspices of the FHSAA. In sharp contrast, the complaint tells us that in the 2015 championship game, while Cambridge Christian and University Christian could provide some "messages" of some undefined character, they could not deliver a prayer. The only explanation for the new restriction offered by the FHSAA was that prayer was not permitted by the Establishment Clause and the Supreme Court's decision in *Santa Fe*, but both of these were on the books when prayer was allowed in the championship game in 2012 and again in the first three playoff rounds in 2015. The FHSAA hasn't told us why this explanation barred speech at the 2015 championship game when it didn't bar the high schools from offering the same form of speech at three earlier semifinal games and one final game. *Cf. Searcey v. Harris*, 888 F.2d 1314, 1322 (11th Cir. 1989) (holding that a speech restriction put in place by a school board was unreasonable, in part because there was "no evidence which even arguably explain[ed] the Board's change in position"). In *Searcey*, a panel of this Court found it illuminating that a particular kind of speech—discussion of a career path by individuals who are no longer employed in the field at a Career Day event—had been previously allowed in the same forum. *Id.* at 1321-22 (noting that the new regulation would bar some "individuals [who] have participated in the past" and questioning whether the new "present affiliation" policy was a reasonable content restriction). Permitting certain speech on Monday, Tuesday, Wednesday, and Thursday and barring precisely the same message on Friday without

any credible explanation of what may have changed is the essence of arbitrary, capricious, and haphazard—and therefore unreasonable—decisionmaking.

Moreover, the Supreme Court has observed that "[a] restriction on speech is 'reasonable' when 'it is wholly consistent with the [government's] legitimate interest in 'preserv[ing] the property . . . for the use to which it is lawfully dedicated.'" *Perry Educ. Ass'n*, 460 U.S. at 50-51 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130, 101 S. Ct. 2676, 69 L. Ed. 2d 517 (1981)). We cannot say with any reasonable confidence that barring the schools' speech was "wholly consistent" with preserving the purpose of the forum. The FHSAA tells us that the purpose of the public-address system is "to facilitate a state actor conducting the championship games for the varying divisions." Answer Br. at 27. But that is not evident from the complaint itself, and nowhere does the FHSAA tell us why barring the school's message is necessary to or even consistent with this purpose. We know that some pregame solemnizing messages of a different sort—the presentation of colors, Pledge of Allegiance, and the National Anthem—were considered appropriate for the forum. And we know that the FHSAA saw no problem with the teams praying together at the 50-yard line before the game began. Most significantly, the fact that prayers were previously allowed over the loudspeaker plausibly suggests that the FHSAA did not consider them to be in conflict with the purpose of the forum, or at least that they were not in conflict on four prior occasions. *See Searcey*, 888 F.2d at 1323.

We also find some guidance in Justice O'Connor's opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 830, 112 S. Ct. 2709, 120 L. Ed. 2d 669 (1992). As relevant here, the Supreme Court struck down a ban on the distribution of written material in airport terminals, though no single rationale commanded a majority of the Court.[9] *Id.* In a separate opinion, Justice O'Connor concluded that the restriction

9. Five Justices, including Justice O'Connor, voted to strike down the leafletting prohibition, but her opinion was the only one to hold that the terminal was a nonpublic forum *and* that the restriction was invalid. The four Justices concurring in the judgment concluded that an airport terminal was a public forum and that the restriction could not pass muster under that more demanding standard. *See Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 703 (Kennedy, J., concurring in the judgments). The four dissenting Justices agreed with Justice O'Connor that an airport terminal is a nonpublic forum but would have upheld the restriction on distributing literature as reasonable. This Court has previously observed that "the precise holding of *Lee* as to the ban on the sale of literature is unclear." *ISKCON Miami, Inc. v. Metro. Dade Cty.*, 147 F.3d 1282, 1287 (11th Cir. 1998). At least two of our sister circuits have expressly identified Justice O'Connor's opinion as controlling, since it arguably provided the narrowest grounds for the decision. *See Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 556 (2d Cir. 2002); *New England Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002); *see also Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . ." (quotation marks omitted)). Even if Justice O'Connor's opinion is not binding law, we rely on it as persuasive authority.

on leafletting in the nonpublic forum of an airport terminal could not withstand reasonableness review. *Id.* at 685 (O'Connor, J., concurring and concurring in the judgment). Justice O'Connor began by looking to the purpose of the forum. She noted that activity in the airport terminal was not tightly constrained to "facilitating air travel," since the terminal included shops, restaurants, banks, private clubs, and other ancillary establishments. *Id.* at 688-89. The question, then, was whether the ban on distributing literature was "reasonably related to maintaining the multipurpose environment that the Port Authority has deliberately created." *Id.* at 689. Justice O'Connor concluded that it was not, for two primary reasons: there was nothing inherent to leafletting that was "naturally incompatible" with the forum, and the defendant never offered "any justifications or record evidence to support its ban on the distribution of pamphlets" in the absence of intrusive solicitation. *Id.* at 690-91.

Here too, we lack any "explanation as to why [Cambridge Christian's] speech is inconsistent with the intended use of the forum," *id.* at 691-92, when we know both that some private, albeit indeterminate, messages can be read over the public-address system and that time is set aside for other ceremonial proceedings at the outset of the game. And we further know that the schools are free to perform a halftime show orchestrated to music and dance without any restriction on content, even if the halftime show is religious in nature.

The schools' message does not appear to be "naturally incompatible" with the purposes of the forum—we know

that prayers were delivered on four prior occasions, presumably without incident, that undefined messages may be presented by the schools, and that the schools had considerable leeway in presenting their halftime shows—and at this preliminary stage of the litigation we lack any record evidence to explain the FHSAA's restriction. The FHSAA's explanation—that it wanted to comply with the Establishment Clause and the Supreme Court's decision in *Santa Fe*—might have been reasonable in a vacuum, but that does not explain why the restriction was enforced in an inconsistent manner. As the case moves forward, the FHSAA may produce some reasoned explanation for its new-found position or other support for the reasonableness of its actions, but, based solely on the complaint and the attached exhibits, we think Cambridge Christian has plausibly alleged otherwise. "We cannot *infer* the reasonableness of a regulation from a vacant record." *Searcey*, 888 F.2d at 1322. Even if a bar on any speech by the schools or anyone other than the public-address announcer could reasonably serve the purpose of orderly administering the game and providing for the usual sorts of pregame ceremony, the allegation that the prohibition has been enforced inconsistently on at least four recent occasions is sufficiently troubling to allow this free speech case to progress to discovery.

We do not foreclose that a court may later conclude on a fuller record that any message delivered over the loudspeaker was government speech or that the restriction was reasonable. The only question we face today is whether Cambridge Christian "has said enough to make out a plausible case—not whether it will probably prevail."

City of Miami, 923 F.3d at 1264. All that we conclude now is that Cambridge Christian has plausibly alleged that the FHSAA violated its free speech rights under the First Amendment.

IV.

Cambridge Christian also lodged three claims against the Florida High School Athletic Association relating to the free exercise of religion—one under the Free Exercise Clause of the U.S. Constitution, one under the corresponding clause found in the Florida Constitution,[10] and one pursuant to the Florida Religious Freedom Restoration Act (FRFRA), Fla. Stat. § 761.03. While the analysis under the Free Exercise Clauses is identical, FRFRA is slightly different. *See Warner v. City of Boca Raton*, 887 So.2d 1023, 1030 (Fla. 2004) (noting that although the Florida Supreme Court had not squarely analyzed the question, other Florida courts had treated the Free Exercise Clauses under the Florida and federal constitutions as "coequal").

The Free Exercise Clauses require a plaintiff to allege a religious belief and a burden that has been placed by the government on the exercise of that belief. To plead a claim for relief under the Free Exercise Clauses of the U.S. and Florida Constitutions, a plaintiff "must allege that the government has impermissibly burdened one of [its] 'sincerely held religious beliefs.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007). This belief

10. *See supra* note 2.

must be "rooted in religion," since "personal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1256 (11th Cir. 2012) (quoting *Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 833, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989)). We have read this pleading requirement as having two components: "(1) the plaintiff holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular; and (2) the law at issue in some way impacts the plaintiff's ability to either hold that belief or act pursuant to that belief." *Id.* at 1256-57 (citing *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)).[11]

As for the first prong—a sincere religious belief that rises above the level of a preference—Cambridge Christian's pleading is worded less directly than it might have been, but it conveys enough for us to discern a sincere belief in the importance of communal pre-game prayer. The school pled that it has a "clearly defined religious mission" *and* that "[s]tudent prayer is an integral

11. We note that under the Free Exercise Clause, there is an important distinction drawn between laws that are "neutral and generally applicable without regard to religion" and those that "single out the religious for disfavored treatment." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2020, 198 L. Ed. 2d 551 (2017). The FHSAA has not claimed that their policy barring the schools' prayer was neutral and generally applicable—and for good reason, since reading the complaint in Cambridge Christian's favor shows that the decision to deny the schools' request was based at least in part on religion. As a result, we have no occasion to address this issue today.

component of [that] mission": prayer "is offered throughout the school year at, among other events, chapel services, parent and student gatherings, as well as prior to meals, around the flag pole, and to commission students, faculty, staff, administrators, buildings, and student trips and missions." Several of these "events" could necessitate communal prayer of some sort. Moreover, the school's athletic department "has its own mission statement," which incorporates religious elements, although it does not mention prayer specifically. Prayer before football games is part of a "long-standing tradition" at the school, going back "decades." These prayers are "given using the loudspeaker at all home games and at away games when possible." "Using the loudspeaker is important to Cambridge Christian's tradition of prayer because it allows the Cambridge Christian community to come together in prayer. In most sports venues, this union of students, parents, faculty, administration, coaches, and fans in prayer is not possible without the use of the loudspeaker because the venues are too large for a human voice to be heard, without amplification, throughout the entire venue." At football games, the size of the typical venue means that the school "cannot engage in a community prayer without the use of a loudspeaker."

What's clear from this pleading is that communal pre-game prayer is an important part of Cambridge Christian's religious belief system. The harder question is whether it is more than a preference and rises to the level of a sincerely held belief. As the record now stands, we think the school has said enough to plausibly suggest that it does. What constitutes a "sincerely held belief" is not a

probing inquiry, and "courts have rightly shied away from attempting to gauge how central a sincerely held belief is to the believer's religion." *Watts*, 495 F.3d at 1295. The Supreme Court itself has "consistently refused to 'question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'" *Ben-Levi v. Brown*, 136 S. Ct. 930, 934, 194 L. Ed. 2d 231 (2016) (Alito, J., dissenting from denial of certiorari) (quoting *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). It has said that such assessments generally are "not within the judicial ken," *Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S. Ct. 2136, 104 L. Ed. 2d 766 (1989); it has admonished us to "not undertake to dissect religious beliefs . . . because [the] beliefs are not articulated with . . . clarity and precision," *Thomas v. Review Bd. Of Indiana Employment Security Div.*, 450 U.S. 707, 715, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981); and it has reminded us that "the guarantee of the Free Exercise Clause . . . is 'not limited to beliefs which are shared by all of the members of a religious sect,'" *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 863, 190 L. Ed. 2d 747 (2015) (quoting Thomas, 450 U.S. at 715-16). And in *Hobby Lobby*, Justice Alito, writing for the Court, noted that it was "not for [the Court] to say that [the litigant's] religious beliefs are mistaken or insubstantial"; rather, the Court's "'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'" *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (quoting *Thomas*, 450 U.S. at 716).

Appendix C

The hesitation of courts to drill too far down into "belief" and "sincerity" is well justified. The line between "belief" and "practice" or "custom" is a murky one, and a searching judicial inquiry into "sincerity" is a difficult proposition. *Cf. Hobby Lobby Stores, Inc.*, 573 U.S. at 710 ("[T]he 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"); *Gillette v. United States*, 401 U.S. 437, 457, 91 S. Ct. 828, 28 L. Ed. 2d 168 (1971) ("[W]e must also recognize that 'sincerity' is a concept that can bear only so much adjudicative weight."). In short, "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Watts*, 495 F.3d at 1295 (quoting *Smith*, 494 U.S. at 887).

What we can say with confidence is that communal prayer practices *may* be so important as to rise to the level of "belief." For instance, in Judaism, certain prayers *require* the presence of at least ten persons, known as a "minyan." *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1221 (11th Cir. 2004). "A *central tenet* of Orthodox Jewish faith requires daily prayers and the presence of a 'minyan'—a quorum of ten males over the age of thirteen—for the reading from the Torah on the weekly Sabbath and religious holidays." Id. (emphasis added). The communal nature of the prayer is a condition precedent to the prayer itself. We also know generally that communal prayer is deeply rooted in religious traditions the world over. Christians in particular have been engaging in communal prayer and ritual since the first century. *See* Valeriy A. Alikin, The Earliest History

OF THE CHRISTIAN GATHERING: ORIGIN, DEVELOPMENT AND CONTENT OF THE CHRISTIAN GATHERING IN THE FIRST TO THIRD CENTURIES 285-86 (2010) ("Originally, the first part of the gathering was the Lord's Supper or Eucharist; it consisted of a communal meal, preceded by a prayer of thanksgiving and the drinking of wine. The second part of the gathering comprised the reading aloud of authoritative literary compositions, teaching, preaching, the passing on of revelations, singing, prayer, acclamations and other ritual actions.").

Communality, then, may not just be incidental, but rather central to the ability to pray. Put differently, the communal nature of the prayer may be just as important as the prayer itself. We are reluctant to say on so limited a record that communal prayer was not for these litigants a sincerely held religious belief where the little we do have in the complaint suggests that communal prayer was exceedingly important to them. We fully appreciate, as already explained, that courts will not probe too deeply into the sincerity with which a plaintiff holds a particular belief, or the centrality of that belief to the plaintiff's religion. Even so, we think that discovery may well shed light on the determination whether communal pre-game prayer is indeed a protected "belief" rather than a mere "preference."

To be clear, the fact that Cambridge Christian does not use the word "belief" when describing the centrality of communal prayer to its spiritual community is not determinative at the motion to dismiss stage. In *Watts v. Florida International University*, 495 F.3d 1289 (11th Cir.

2007), this Court asked, rhetorically, "How do you plead sincerity of belief? One way is to state that the belief is, in fact, your religious belief." *Id.* at 1296. But, as we said, this is only one way of doing so. Another way is to do what Cambridge Christian has done, to plead a longstanding practice and tradition that is unmistakably and closely tied to basic religious beliefs and which strongly implies an underlying belief which may be adduced with more particularity as the litigation proceeds. We are satisfied that Cambridge Christian has plausibly pled a sincerely held religious belief.

The burden prong under the Free Exercise Clauses has also plausibly been fulfilled by Cambridge Christian's pleadings. Because the school was denied prayer over the loudspeaker, it was unable to engage in a communal prayer that united the team and the spectators. The teams on the field were able to pray together at the 50-yard line, but this does not necessarily stand in for prayer over a loudspeaker, because it is not the same thing as the communal prayer practice that Cambridge Christian described in its complaint, and which was denied. Accepting, as we must at this stage in the proceedings, that what was critical for Cambridge Christian was uniting the players and fans together in prayer, it does not jump off the page at us that there was a readily available alternative to accessing the loudspeaker system, given the size of the stadium. It may well be, as the FHSAA claims, that a bullhorn or prayer cards would have sufficed, but we are reluctant to make that determination at this early stage. It is not at all obvious to us that a bullhorn or prayer cards would unite the players, coaches, and fans in communal prayer inside

a large football stadium, although further development of the record may show otherwise. Accordingly, we reverse the district court's dismissal of the Free Exercise claims for failure to state a claim.

FRFRA is a different story. That law states that "[t]he government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability," unless the government can identify that the burden "(a) [i]s in furtherance of a compelling government interest; and (b) [i]s the least restrictive means of furthering that compelling interest." Fla. Stat. § 761.03.

FRFRA requires showing that "[1] the government has placed a substantial burden on a practice [2] motivated by a sincere religious belief." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004). This may sound strikingly similar to the tests under the Free Exercise Clauses but the standards for each prong enunciated by the Florida Supreme Court—which we are *Erie*-bound to follow as to the meaning of Florida law—compel a different result here.

First, the belief prong of FRFRA is actually broader than the "sincerely held belief" standard under the Free Exercise Clauses. *Warner*, 887 So. 2d at 1032 (noting that FRFRA's protections are "broader than United States Supreme Court precedent"). The statute defines "exercise of religion" as "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a

large system of religious belief." Fla. Stat. § 761.03. The Florida Supreme Court has said that the statute's belief prong requires only that a plaintiff plead "a practice *motivated by* a sincere religious belief." *Warner*, 887 So. 2d at 1032 (emphasis added). Because we think Cambridge Christian has pled enough for the Free Exercise Clauses' belief prong, it necessary follows that it has adequately pled the first prong of a free exercise claim under FRFRA.

But the belief prong is not the end of the story because the Florida Supreme Court has set a much more stringent standard for what constitutes a "substantial burden." In *Warner*, the Florida Supreme Court assessed three competing standards adopted at that time by federal courts evaluating the federal Religious Freedom Restoration Act (RFRA). 887 So.2d at 1033. The Florida Supreme Court explicitly adopted the narrowest of these standards, holding that "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Id.*

As this Court has explained, a burden on religious exercise is only substantial under FRFRA "if a person is prohibited from engaging in protected religious conduct (or, if the exercise of religion is a refusal to act, the person is compelled to act)" and that under this standard "[l]aws that merely inconvenience religion do not create a substantial burden." *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1290 (11th Cir. 2010), *vacated*, 616 F.3d 1229 (11th Cir. 2010), *reinstated*

in part, 638 F.3d 756 (11th Cir. 2011) (en banc) (reinstating the panel opinion as to, inter alia, the FRFRA claim). In *First Vagabonds*, the plaintiffs—a church consisting mostly of homeless congregants and a nonprofit—held services and provided food for congregants at a public park in Orlando. *Id.* at 1280. After complaints from people living in neighborhoods near the park, the City passed an ordinance that required a permit for any event likely to attract 25 or more people for the delivery or service of food in city parks, and limited the number of permits any person or organization could obtain for a single park to two per year. *Id.* at 1280-81. We affirmed the district court's dismissal of the plaintiffs' FRFRA claim, accepting that feeding the homeless was a protected religious exercise under FRFRA, but concluding that the ordinance did not "*affirmatively forbid* the Church from feeding its members as part of its religious services." *Id.* at 1291 (emphasis added); *see also id.* at 1290 ("The FRFRA does not provide the Church with a right to conduct its services at any location it desires; it does not guarantee access to the City's most desirable park (or, for that matter, any park at all)."). Indeed, in that case, the district court had dismissed the claim even though it "considered the burden on the Church and its members 'significant,'" because even a "significant" burden does not meet FRFRA's substantial burden prong. *Id.*

We can find nothing in the complaint, drawing every reasonable inference in favor of Cambridge Christian, that comes close to pleading a substantial burden as defined by Florida's Supreme Court. Because Cambridge Christian did not plead—nor does it even say in its briefing

to this Court—that the FHSAA *forbid* it from engaging in conduct that its religion mandated when it was denied access to the loudspeaker, Cambridge Christian has failed to plausibly plead a claim under FRFRA. Accordingly, we affirm the district court's dismissal of that claim.

V.

Counts III and VI of the complaint sought declaratory judgments under the Establishment Clauses of the U.S. and Florida Constitutions. We review the district court's dismissal of these actions only for abuse of discretion. *Smith v. Casey*, 741 F.3d 1236, 1244 (11th Cir. 2014).

Overturning a district court's denial of declaratory relief, even at the motion to dismiss stage requires a heavy lift. Not only do we review this matter only for abuse of discretion, but the district court's initial decision has an explicitly wide range of discretion. District courts have "broad statutory discretion to decline declaratory relief." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995). Reposing broad discretion in the district courts is wholly consonant with the purposes of declaratory relief. The Supreme Court has said that '[b]y the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants." *Id.* at 288. The remedy is "nonobligatory" and "[i]n the declaratory judgement context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial

administration." *Id.* "When all is said and done . . . 'the propriety of declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power.'" *Id.* at 287 (quoting *Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243, 73 S. Ct. 236, 97 L. Ed. 291 (1952)).

The district court held that "there [was] no actual controversy as to this claim" and that the allegations made by Cambridge Christian under the Establishment Clause "were more appropriately addressed in the context of its claims under the Free Exercise and Free Speech Clauses." It is unclear from the district court's ruling whether this was intended as a constitutional holding that the Establishment Clause claims failed to state a "case or controversy" under Article III, or simply a holding that the essence of this case was more appropriately framed under other clauses and that the district court was not inclined to spend time and energy addressing a far more speculative claim, even if it was justiciable.

"[T]he Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts," meaning that, at the very least, a controversy under the Act must also be a "case or controversy" under Article III. *GTE Directories Pub. Corp. v Trimen Am., Inc.*, 67 F.3d 1563, 1567 (11th Cir. 1995); *see also Gagliardi v. TJCV Land Tr.*, 889 F.3d 728, 734-35 (11th Cir. 2018) ("[T]here must . . . be a case or controversy that is live, is 'definite and concrete,' and is susceptible to 'specific relief through a decree of a conclusive character, as distinguished from an opinion

advising what the law would be upon a hypothetical state of facts.'" (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41, 57 S. Ct. 461, 81 L. Ed. 617 (1937))).

In any event, we need not decide whether the holding was a constitutional one, since the district court acted well within its discretion and since we agree that the case is better presented under the Free Exercise and Free Speech Clauses. In seeking declaratory relief under the Establishment Clause, Cambridge Christian asks for a ruling that the FHSAA was not required by the Establishment Clause to deny its prayer request. If Cambridge Christian has any legal interest in this sort of declaratory relief, it must be because it suffered an injury when it was not allowed to pray over the loudspeaker. That injury would have to be an injury to Cambridge Christian's rights under the Free Speech or Free Exercise Clauses; it wouldn't be an Establishment Clause injury. That is to say, it is hard to see how Cambridge Christian could win declaratory relief under the Establishment Clause without first establishing that it was entitled to injunctive relief under the Free Speech or Free Exercise Clauses. If it did win injunctive relief under one of those other clauses, declaratory relief under the Establishment Clause would be redundant, and without injunctive relief under one of those other clauses, a declaratory judgment stating that the FHSAA wasn't required to deny the prayer request would not get the school any closer to praying over the loudspeaker.

With the real controversy rooted in the Free Speech and Free Exercise Clauses, it's understandable that

the district court would view the Establishment Clause declaratory relief as beside the point. It did not abuse its considerable discretion in declining to engage in the circuitous reasoning that would have been required for it to declare that the Establishment Clause would not bar the FHSAA from allowing prayer over the loudspeaker. It was not an abuse of discretion for the district court to view the declaratory judgment action as being largely hypothetical and lacking "sufficient immediacy," especially when it was presented alongside more straightforward claims that could yield the same result. Thus, we affirm the district court's decisions on Claims III and VI.

VI.

At the end of the day, Cambridge Christian has said enough to plausibly allege violations of the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions. We reverse the district court's decision insofar as it bars the claims brought under these provisions. We affirm the district court's dismissal of the FRFRA claim. We also affirm the decision insofar as it relates to the Establishment Clauses. With the limited exception of its decision not to entertain declaratory judgments under those claims and to dismiss the FRFRA claim, we think the district court was not appropriately generous in its reading of Cambridge Christian's pleading. We do not know whether the course of litigation will establish violations of the First Amendment, but Cambridge Christian has plausibly pled enough in its complaint to get into the courthouse and be heard.

Accordingly, we remand these claims to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 6, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11222

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff-Appellant,

versus

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Defendant-Appellee.

Filed February 6, 2025

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:16-cv-02753-CEH-AAS

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before GRANT, TJOFLAT, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.

APPENDIX E — CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix E

U.S. CONST. AMEND. XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Appendix E

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix E

FLORIDA STATUTES § 1006.185

1006.185. Opening remarks at high school athletic contests

Each athletic association designated under s. 1006.20 whose membership includes public schools shall adopt bylaws, policies, or procedures that provide each school participating in a high school championship contest or series of contests under the direction and supervision of the association the opportunity to make brief opening remarks, if requested by the school, using the public address system at the event. Such remarks may not be longer than 2 minutes per participating school. The athletic association may not control, monitor, or review the content of the opening remarks and may not control the school's choice of speaker. Member schools may not provide remarks that are derogatory, rude, or threatening. Before the opening remarks, an announcement must be made that the content of any opening remarks by a participating school is not endorsed by and does not reflect the views and/or opinions of the athletic association. The decision to allow opening remarks before regular season contests is at the discretion of each school.

Appendix E

FLORIDA STATUTE § 1006.20

1006.20. Athletics in public K-12 schools

(1) Governing nonprofit organization.—The Florida High School Athletic Association (FHSAA) is designated as a governing nonprofit organization of athletics in Florida public schools. If the FHSAA fails to comply with this section, the commissioner must designate a nonprofit organization to govern athletics with the approval of the State Board of Education. The FHSAA is not a state agency as defined in s. 120.52. The FHSAA is subject to s. 1006.19. A private school that wishes to engage in high school athletic competition with a public high school may become a member of the FHSAA. Any high school in this state, including charter schools, virtual schools, and home education cooperatives, may become a member of the FHSAA and participate in the activities of the FHSAA; however, membership in the FHSAA is not mandatory for any school. The FHSAA shall allow a school the option of maintaining full membership in the association or joining by sport and may not discourage a school from simultaneously maintaining membership in another athletic association. The FHSAA shall allow any school joining by sport to participate in the championship contest or series of contests for that sport. The FHSAA may not deny or discourage interscholastic competition between its member schools and non-FHSAA member Florida schools, including members of another athletic governing organization, and may not take any retributory or discriminatory action against any of its member schools that participate in interscholastic competition with non-FHSAA member Florida schools. The FHSAA may not

unreasonably withhold its approval of an application to become an affiliate member of the National Federation of State High School Associations submitted by any other organization that governs interscholastic athletic competition in this state. The bylaws of the FHSAA are the rules by which high school athletic programs in its member schools, and the students who participate in them, are governed, unless otherwise specifically provided by statute. For the purposes of this section, the term "high school" includes grades 6 through 12.

(2) Adoption of bylaws, policies, or guidelines.—

(a) The FHSAA shall adopt bylaws that, unless specifically provided otherwise by statute, establish eligibility requirements for all students who participate in high school athletic competition in its member schools. The bylaws governing residence and transfer must allow the student to be immediately eligible in the school in which he or she first enrolls each school year or the school in which the student makes himself or herself a candidate for an athletic team by engaging in a practice before enrolling in the school. The bylaws must also allow the student to be immediately eligible in the school to which the student has transferred. The student remains eligible in that school so long as he or she remains enrolled in that school. Subsequent eligibility must be determined and enforced through the FHSAA's bylaws. Requirements governing eligibility and transfer between member schools must be applied similarly to public school students and private school students. The commissioner may direct the FHSAA to revise its bylaws at any time.

1. Any changes to the FHSAA's bylaws must be ratified by the State Board of Education.

2. A bylaw adopted by the FHSAA board of directors may not take effect until it is ratified by the State Board of Education.

(b) The FHSAA shall adopt bylaws that specifically prohibit the recruiting of students for athletic purposes. The bylaws shall prescribe penalties and an appeals process for athletic recruiting violations.

1. If it is determined that a school has recruited a student in violation of FHSAA bylaws, the FHSAA may require the school to participate in a higher classification for the sport in which the recruited student competes for a minimum of one classification cycle, in addition to the penalties in subparagraphs 2. and 3. and any other appropriate fine or sanction imposed on the school, its coaches, or adult representatives who violate recruiting rules.

2. Any recruitment by a school district employee or contractor in violation of FHSAA bylaws results in escalating punishments as follows:

a. For a first offense, a $5,000 forfeiture of pay for the school district employee or contractor who committed the violation.

b. For a second offense, suspension without pay for 12 months from coaching, directing, or

advertising an extracurricular activity and a $5,000 forfeiture of pay for the school district employee or contractor who committed the violation.

c. For a third offense, a $5,000 forfeiture of pay for the school district employee or contractor who committed the violation. If the individual who committed the violation holds an educator certificate, the FHSAA shall also refer the violation to the department for review pursuant to s. 1012.796 to determine whether probable cause exists, and, if there is a finding of probable cause, the commissioner shall file a formal complaint against the individual. If the complaint is upheld, the individual's educator certificate shall be revoked for 3 years, in addition to any penalties available under s. 1012.796. Additionally, the department shall revoke any adjunct teaching certificates issued pursuant to s. 1012.57 and all permissions under ss. 1012.39 and 1012.43, and the educator is ineligible for such certificates or permissions for a period of time equal to the period of revocation of his or her state-issued certificate.

3. Notwithstanding any other provision of law, a school, team, or activity shall forfeit all competitions, including honors resulting from such competitions, in which a student who participated in any fashion was recruited in a manner prohibited pursuant to state law or the FHSAA bylaws.

4. A student may not be declared ineligible based on violation of recruiting rules unless the student or parent has falsified any enrollment or eligibility document or accepted any benefit if such benefit is not generally available to the school's students or family members or is based in any way on athletic interest, potential, or performance.

5. A student's eligibility to participate in any interscholastic or intrascholastic extracurricular activity, as determined by a district school board pursuant to s. 1006.195(1)(a) 3., may not be affected by any alleged recruiting violation until final disposition of the allegation.

(c) The FHSAA shall adopt bylaws that require all students participating in interscholastic athletic competition or who are candidates for an interscholastic athletic team to satisfactorily pass a medical evaluation each year before participating in interscholastic athletic competition or engaging in any practice, tryout, workout, conditioning, or other physical activity associated with the student's candidacy for an interscholastic athletic team, including activities that occur outside of the school year. Such medical evaluation may be administered only by a practitioner licensed under chapter 458, chapter 459, chapter 460, or s. 464.012 or registered under s. 464.0123 and in good standing with the practitioner's regulatory board. The bylaws shall establish requirements for eliciting a student's medical history and performing the medical evaluation required under this paragraph,

which shall include a physical assessment of the student's physical capabilities to participate in interscholastic athletic competition as contained in a uniform preparticipation physical evaluation and history form. The evaluation form shall incorporate the recommendations of the American Heart Association for participation cardiovascular screening and shall provide a place for the signature of the practitioner performing the evaluation with an attestation that each examination procedure listed on the form was performed by the practitioner or by someone under the direct supervision of the practitioner. The form shall also contain a place for the practitioner to indicate if a referral to another practitioner was made in lieu of completion of a certain examination procedure. The form shall provide a place for the practitioner to whom the student was referred to complete the remaining sections and attest to that portion of the examination. The preparticipation physical evaluation form shall advise students to complete a cardiovascular assessment and shall include information concerning alternative cardiovascular evaluation and diagnostic tests. Results of such medical evaluation must be provided to the school. A student is not eligible to participate, as provided in s. 1006.15(3), in any interscholastic athletic competition or engage in any practice, tryout, workout, or other physical activity associated with the student's candidacy for an interscholastic athletic team until the results of the medical evaluation have been received and approved by the school.

(d) Notwithstanding the provisions of paragraph (c), a student may participate in interscholastic athletic competition or be a candidate for an interscholastic athletic team if the parent of the student objects in writing to the student undergoing a medical evaluation because such evaluation is contrary to his or her religious tenets or practices. However, in such case, there shall be no liability on the part of any person or entity in a position to otherwise rely on the results of such medical evaluation for any damages resulting from the student's injury or death arising directly from the student's participation in interscholastic athletics where an undisclosed medical condition that would have been revealed in the medical evaluation is a proximate cause of the injury or death.

(e) The FHSAA shall adopt bylaws that regulate persons who conduct investigations on behalf of the FHSAA. The bylaws shall include provisions that require an investigator to:

1. Undergo level 2 background screening under s. 435.04, establishing that the investigator has not committed any disqualifying offense listed in s. 435.04, unless the investigator can provide proof of compliance with level 2 screening standards submitted within the previous 5 years to meet any professional licensure requirements, provided:

a. The investigator has not had a break in service from a position that requires level 2 screening for more than 90 days; and

b. The investigator submits, under penalty of perjury, an affidavit verifying that the investigator has not committed any disqualifying offense listed in s. 435.04 and is in full compliance with this paragraph.

2. Be appointed as an investigator by the executive director.

3. Carry a photo identification card that shows the FHSAA name, logo, and the investigator's official title.

4. Adhere to the following guidelines:

a. Investigate only those alleged violations assigned by the executive director or the board of directors.

b. Conduct interviews on Monday through Friday between the hours of 9 a.m. and 7 p.m. only, unless previously agreed to by the interviewee.

c. Allow the parent of any student being interviewed to be present during the interview.

d. Search residences or other private areas only with the permission of the executive director and the written consent of the student's parent and only with a parent or a representative of the parent present.

(f) The FHSAA shall adopt bylaws that establish sanctions for coaches who have committed major violations of the FHSAA's bylaws and policies.

1. Major violations include, but are not limited to, knowingly allowing an ineligible student to participate in a contest representing a member school in an interscholastic contest or committing a violation of the FHSAA's recruiting or sportsmanship policies.

2. Sanctions placed upon an individual coach may include, but are not limited to, prohibiting or suspending the coach from coaching, participating in, or attending any athletic activity sponsored, recognized, or sanctioned by the FHSAA and the member school for which the coach committed the violation. If a coach is sanctioned by the FHSAA and the coach transfers to another member school, those sanctions remain in full force and effect during the term of the sanction.

3. If a member school is assessed a financial penalty as a result of a coach committing a major violation, the coach shall reimburse the member school before being allowed to coach, participate in, or attend any athletic activity sponsored, recognized, or sanctioned by the FHSAA and a member school.

4. The FHSAA shall establish a due process procedure for coaches sanctioned under this

paragraph, consistent with the appeals procedures set forth in subsection (7).

(g) The FHSAA shall adopt bylaws establishing the process and standards by which FHSAA determinations of eligibility are made. Such bylaws shall provide that:

1. Ineligibility must be established by a preponderance of the evidence;

2. Student athletes, parents, and schools must have notice of the initiation of any investigation or other inquiry into eligibility and may present, to the investigator and to the individual making the eligibility determination, any information or evidence that is credible, persuasive, and of a kind reasonably prudent persons rely upon in the conduct of serious affairs;

3. An investigator may not determine matters of eligibility but must submit information and evidence to the executive director or a person designated by the executive director or by the board of directors for an unbiased and objective determination of eligibility; and

4. A determination of ineligibility must be made in writing, setting forth the findings of fact and specific violation upon which the decision is based.

(h) In lieu of bylaws adopted under paragraph (g), the FHSAA may adopt bylaws providing as a minimum

the procedural safeguards of ss. 120.569 and 120.57, making appropriate provision for appointment of unbiased and qualified hearing officers.

(i) The FHSAA bylaws may not limit the competition of student athletes prospectively for rule violations of their school or its coaches or their adult representatives. The FHSAA bylaws may not unfairly punish student athletes for eligibility or recruiting violations perpetrated by a teammate, coach, or administrator. Contests may not be forfeited for inadvertent eligibility violations unless the coach or a school administrator should have known of the violation. Contests may not be forfeited for other eligibility violations or recruiting violations in excess of the number of contests that the coaches and adult representatives responsible for the violations are prospectively suspended.

(j) The FHSAA shall adopt guidelines to educate athletic coaches, officials, administrators, and student athletes and their parents of the nature and risk of concussion and head injury.

(k) The FHSAA shall adopt bylaws or policies that require the parent of a student who is participating in interscholastic athletic competition or who is a candidate for an interscholastic athletic team to sign and return an informed consent that explains the nature and risk of concussion and head injury, including the risk of continuing to play after concussion or head injury, each year before participating in interscholastic athletic competition or engaging in any practice,

tryout, workout, or other physical activity associated with the student's candidacy for an interscholastic athletic team.

(*l*) The FHSAA shall adopt bylaws or policies that require each student athlete who is suspected of sustaining a concussion or head injury in a practice or competition to be immediately removed from the activity. A student athlete who has been removed from an activity may not return to practice or competition until the student submits to the school a written medical clearance to return stating that the student athlete no longer exhibits signs, symptoms, or behaviors consistent with a concussion or other head injury. Medical clearance must be authorized by the appropriate health care practitioner trained in the diagnosis, evaluation, and management of concussions as defined by the Sports Medicine Advisory Committee of the Florida High School Athletic Association.

(m) The FHSAA shall adopt bylaws for the establishment and duties of a sports medicine advisory committee composed of the following members:

1. Eight physicians licensed under chapter 458 or chapter 459 with at least one member licensed under chapter 459.

2. One chiropractor licensed under chapter 460.

3. One podiatrist licensed under chapter 461.

4. One dentist licensed under chapter 466.

5. Three athletic trainers licensed under part XIII of chapter 468.

6. One member who is a current or retired head coach of a high school in the state.

(3) Governing structure of the FHSAA.—

(a) The FHSAA shall operate as a representative democracy in which the sovereign authority is within its member schools. Except as provided in this section, the FHSAA shall govern its affairs through its bylaws.

(b) Each member school, on its annual application for membership, shall name its official representative to the FHSAA. This representative must be either the school principal or his or her designee. That designee must either be an assistant principal or athletic director housed within that same school.

(c) The FHSAA's membership shall be divided along existing county lines into four contiguous and compact administrative regions, each containing an equal or nearly equal number of member schools to ensure equitable representation on the FHSAA's board of directors, representative assembly, and appeals committees.

(4) Board of directors.—

(a) The executive and legislative authority of the FHSAA is vested in its board of directors, which is

composed of 13 members, 8 of whom are appointed by the Governor and confirmed by the Senate, as follows:

1. Two public member school representatives elected from among its public school representative members. Each elected representative must be from a different administrative region.

2. Two nonpublic member school representatives elected from among its nonpublic school representative members. Each elected representative must be from a different administrative region that is also different from the public member school representatives elected under subparagraph 1.

3. Two public member school representatives appointed from different administrative regions.

4. Two nonpublic member school representatives appointed from different administrative regions that are also different than those represented by the public member school representatives appointed under subparagraph 3.

5. Two representatives, one appointed from the two northernmost administrative regions and one appointed from the two southernmost administrative regions.

6. One district school superintendent appointed from the northernmost administrative region.

7. One district school board member appointed from the southernmost administrative region.

8. The commissioner or his or her designee from the department executive staff.

(b) A quorum of the board of directors shall consist of nine members.

(c) The board of directors shall elect a president and a vice president from among its members. These officers shall also serve as officers of the FHSAA.

(d) Members of the board of directors shall serve terms of 3 years and are eligible to succeed themselves only once. A member of the board of directors, other than the commissioner or his or her designee, may serve a maximum of 6 consecutive years. The FHSAA's bylaws shall establish a rotation of terms to ensure that a majority of the members' terms do not expire concurrently.

(e) The authority and duties of the board of directors, acting as a body and in accordance with the FHSAA's bylaws, are as follows:

1. To act as the incorporated FHSAA's board of directors and to fulfill its obligations as required by the FHSAA's charter and articles of incorporation.

2. To establish such guidelines, regulations, policies, and procedures as are authorized by the bylaws.

3. To employ an FHSAA executive director, who has the authority to waive the bylaws of the FHSAA in order to comply with statutory changes. The hiring of the executive director must be ratified by the State Board of Education.

4. To levy annual dues and other fees and to set the percentage of contest receipts to be collected by the FHSAA.

5. To approve the budget of the FHSAA. The budget adopted by the board of directors must be ratified by the State Board of Education.

6. To organize and conduct statewide interscholastic competitions, which may or may not lead to state championships, and to establish the terms and conditions for these competitions.

7. To act as an administrative board in the interpretation of, and final decision on, all questions and appeals arising from the directing of interscholastic athletics of member schools.

8. To approve, reject, or amend any legislative recommendations from the representative assembly. Approval of such recommendations requires a majority vote of the board.

(5) Representative assembly.—

(a) The representative assembly may make legislative recommendations to the board of directors.

(b) The representative assembly shall be composed of the following:

1. An equal number of member school representatives from each of the four administrative regions.

2. Four district school superintendents, one elected from each of the four administrative regions by the district school superintendents in their respective administrative regions.

3. Four district school board members, one elected from each of the four administrative regions by the district school board members in their respective administrative regions.

4. The commissioner or his or her designee from the department executive staff.

(c) The FHSAA's bylaws shall establish the number of member school representatives to serve in the representative assembly from each of the four administrative regions and shall establish the method for their selection.

(d) No member of the board of directors other than the commissioner or his or her designee can serve in the representative assembly.

(e) The representative assembly shall elect a chairperson and a vice chairperson from among its members.

(f) Elected members of the representative assembly shall serve terms of 2 years and are eligible to succeed themselves for two additional terms. An elected member, other than the commissioner or his or her designee, may serve a maximum of 6 consecutive years in the representative assembly.

(g) A quorum of the representative assembly consists of one more than half of its members.

(h) Other than making legislative recommendations as authorized by paragraph (a), the authority of the representative assembly is limited to its sole duty, which is to consider, adopt, or reject any recommended proposed amendments to the FHSAA's bylaws.

(i) The representative assembly shall meet as a body annually. A two-thirds majority of the votes cast by members present is required for passage of any proposal.

(6) Public liaison advisory committee.—

(a) The FHSAA shall establish, sustain, fund, and provide staff support to a public liaison advisory committee composed of the following:

1. The commissioner or his or her designee.

2. A member public school principal.

3. A member private school principal.

4. A member school principal who is a member of a racial minority.

5. An active athletic director.

6. An active coach, who is employed full time by a member school.

7. A student athlete.

8. A district school superintendent.

9. A district school board member.

10. A member of the Florida House of Representatives.

11. A member of the Florida Senate.

12. A parent of a high school student.

13. A member of a home education association.

14. A representative of the business community.

15. A representative of the news media.

(b) A member of the board of directors or the committee on appeals may not serve on the public liaison advisory committee.

(c) The public liaison advisory committee shall elect a chairperson and vice chairperson from among its members.

(d) The authority and duties of the public liaison advisory committee are as follows:

1. To act as a conduit through which the general public may have input into the decisionmaking process of the FHSAA and to assist the FHSAA in the development of procedures regarding the receipt of public input and disposition of complaints related to high school athletic and competition programs.

2. To conduct public hearings annually in each of the four administrative regions during which interested parties may address issues regarding the effectiveness of the rules, operation, and management of the FHSAA.

3. To conduct an annual evaluation of the FHSAA as a whole and present a report of its findings, conclusion, and recommendations to the board of directors, to the commissioner, and to the respective education committees of the Florida Senate and the Florida House of Representatives. The recommendations must delineate policies and procedures that will improve the implementation and oversight of high school athletic programs by the FHSAA.

(e) The public liaison advisory committee shall meet four times annually. Additional meetings may be called by the committee chairperson, the FHSAA president, or the FHSAA executive director.

(7) Appeals.—

(a) The FHSAA shall establish a procedure of due process which ensures each student the opportunity to appeal an unfavorable ruling with regard to his or her eligibility to compete. The initial appeal shall be made to a committee on appeals within the administrative region in which the student lives. The FHSAA's bylaws shall establish the number, size, and composition of each committee on appeals.

(b) No member of the board of directors is eligible to serve on a committee on appeals.

(c) Members of a committee on appeals shall serve terms of 3 years and are eligible to succeed themselves only once. A member of a committee on appeals may serve a maximum of 6 consecutive years. The FHSAA's bylaws shall establish a rotation of terms to ensure that a majority of the members' terms do not expire concurrently.

(d) The authority and duties of a committee on appeals shall be to consider requests by member schools seeking exceptions to bylaws and regulations, to hear undue hardship eligibility cases filed by member schools on behalf of student athletes, and

to hear appeals filed by member schools or student athletes.

(e) A student athlete or member school that receives an unfavorable ruling from a committee on appeals shall be entitled to appeal that decision to the board of directors at its next regularly scheduled meeting or called meeting. The board of directors shall have the authority to uphold, reverse, or amend the decision of the committee on appeals. In all such cases, the decision of the board of directors shall be final.

(f) The FHSAA shall expedite the appeals process on determinations of ineligibility so that disposition of the appeal can be made before the end of the applicable sports season, if possible.

(g) In any appeal from a decision on eligibility made by the executive director or a designee, a school or student athlete filing the appeal must be permitted to present information and evidence that was not available at the time of the initial determination or if the determination was not made by an unbiased, objective individual using a process allowing full due process rights to be heard and to present evidence. If evidence is presented on appeal, a de novo decision must be made by the committee or board hearing the appeal, or the determination may be suspended and the matter remanded for a new determination based on all the evidence. If a de novo decision is made on appeal, the decision must be made in writing, setting forth the findings of fact and specific violation upon which the

decision is based. If a de novo decision is not required, the decision appealed must be set aside if the decision on ineligibility was not based on clear and convincing evidence. Any further appeal shall be considered on a record that includes all evidence presented.

(8) **Amendment of bylaws.—**Each member school representative, the board of directors acting as a whole or members acting individually, any advisory committee acting as a whole to be established by the FHSAA, the commissioner, and the FHSAA's executive director may propose amendments to the bylaws. Any other individual may propose an amendment by securing the sponsorship of any such individuals or bodies. All proposed amendments must be submitted directly to the representative assembly for its consideration. The representative assembly shall provide a recommendation to the board of directors to either adopt, reject, or revise any proposed amendments.

APPENDIX F — EXCERPT OF THE DEPOSITION OF THE FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC., DATED MARCH 30, 2021

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO.: 8:16-CV-02753-CEH-AAS

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff,

vs.

FLORIDA HIGH SCHOOL ATHLETIC
ASSOCIATION, INC.,

Defendant.

DEPOSITION VIA WEB CONFERENCE OF FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC., GEORGE TOMYN

Tuesday, March 30, 2021
9:02 a.m. - 2:03 p.m.

VIA WEB CONFERENCE

* * *

Appendix F

[97] Q. All right. Let's look at Tab 42, please. This is a composite exhibit of two scripts. FHSAA 37159 is the Bates number on the first page, one of the scripts, FHSAA 37167 is another of the scripts. Can you look at, please, the two scripts and identify them? This is the first one.

* * *

A. I can tell it's the 2020 FHSAA girls weightlifting state championship held at Arnold High School in Panama City.

Q. If we could go to 37167, does this appear to be the boys weightlifting state championship?

A. This is the 2019 boys weightlifting state championship. I'd have to look at my calendar. I'm not sure if the 2020 girls weightlifting state championship occurred. It would have been in January so I believe it did. This was a script for 2019 for the boys championship.

Q. I'm sorry. You're right. We have the [98] 2019 boys championship and 2020 girls championship here, correct?

A. That's what it appears to be, yes.

Q. Let's mark this as Exhibit 144.

(Thereupon, the document was marked as Exhibit 144.)

BY MR. PANUCCIO:

Q. At the very top of each script, we'll go to each page, let's look again. Right now we're on boys 2019. At the top says: Introduction of mayor/principal to welcome fiance to PCB shall precede festivities. See that?

A. Yes, sir.

Q. Can we go to the girls 2020, that same language appears?

A. Yes, sir, not looking side-by-side but I believe that is the same thing.

Q. Does this mean the FHSAA turned over the PA system to someone other than the PA announcer to give remarks?

A. It means the principal of the school in both instances welcomed everyone there. It was being held at Arnold High School, the principal was given the microphone to welcome everyone there to say how proud he was Arnold High School was able to [99] host the event.

Q. Can you explain how this came about? How did this get into the script that the principal made these remarks?

A. I cannot specify, no. I can speculate we communicate with the athletic director because Panama City had agreed to host, they hosted in 2018, 2019 and

agreed to do it in 2020 also. This was the first instance in which we had a state championship in west Florida.

They were proud to be able to do that and we were at a school site. A school actually was in session so the school made some changes in schedules and things like that to accommodate us and the principal spoke to thank everyone for being there.

Q. How often does the FHSAA turn over the PA microphone to representatives of schools to offer welcoming remarks?

A. I don't know. I can share that it's done periodically often. I was just in Suwannee High School a month or so ago at the time girls weightlifting and the school athletic director/coach was making the announcements what was going on that day and recognizing the girls who had won particular events in weight classes. I don't think it's [100] necessarily something we customarily do, no, sir.

Q. But it is done periodically, you said?

A. Yes.

Q. When the FHSAA allows the representative of the school to make welcoming remarks, does the FHSAA review a copy of those remarks in advance?

A. Not to my knowledge, no.

Q. Does it approve those remarks in advance, the content of those?

A. No, sir, we generally do not get a printed script from someone doing a welcome.

* * *

APPENDIX G — FHSAA EMAIL OF 12/2/2015

From: Roger Dearing <rdearing@fhsaa.org>
To: Tim Euler; heathnivens@ucsjax.com
CC: FrankCiresi@ucsjax.com, Shawn Minks; Chad Goebert; Leonard Ireland; Linda Robertson; Justin Harrison; Jamie Rohrer; Craig Damon
Sent: 12/2/2015 9:15:37 PM
Subject: Re: 2A State Football Championship

Dear Mr. Euler and Mr. Nivens:

Thank you very much for your note. After consulting the Association attorney, and his review of 18 pages of case summaries, I'm afraid I am not able to comply with your wish.

Although both schools are private and religious-affiliated institutions, the federal law addresses two pertinent issues that prevent us from granting your request.

First is the fact that the facility is a public facility, predominantly paid for with public tax dollars, makes the facility 'off limits' under federal guidelines and precedent court cases.

Second, is the fact that in Florida Statutes, the FHSAA (host and coordinator of the event) is legally a 'State Actor', we cannot legally permit or grant permission for such an activity.

Appendix G

I totally understand the desire, and why your request is made. However, for me to grant the wish could subject this Association to tremendous legal entanglements.

I'm sorry, and I hope you can understand.

/s/ Roger Dearing

Dr. Roger Dearing
Executive Director
(352) 372 – 9551, Ext. 110
"Building leaders through teamwork, sportsmanship and citizenship"
[LOGO]

APPENDIX H — FHSAA EMAIL OF 12/7/2015

Subject: **Re:** 2A State Football Championship
Date: Monday, December 7, 2015 at 1:40:19 PM Central Standard Time
From: Roger Dearing
To: Heath Nivens, Tim Euler, Frank Ciresi

Mr. Nivens:

Thank you very much for your response. I am going to send a note to both you and Mr. Euler regarding the decision:

The issue of the prayer over the PA system at the football game, is a common area of concern and one that has been richly debated – and decided in the courts of the United States.

The issue is commonly referred to as the 'separation of church and state'. The First Amendment to the United States Constitution contains a provision that prohibits the government from 'establishing' a religion. This has historically come to mean much more than just the federal government officially recognizing a religion, like the country of England does with the Christian Anglican Church or the country of Cambodia does with Buddhism. Rather, courts have interpreted this provision to generally mean that the government may not engage in activities that can be viewed as endorsing or sponsoring religion. For example, in 2000, the U.S. Supreme Court told a Texas high school that it cannot allow its football team members to lead a prayer on the field before the start of the game where the school allowed the team to use the stadium's PA system to broadcast the prayer to the spectators. While

no school employee was involved in the actual prayer, the Court said the school gave the impression that it was endorsing the prayer by allowing the use of its PA system and allowing the prayer as part of the pre-game ceremonies.

This incident involving the request for the FHSAA, which is determined to be a 'State Actor' by the Florida Courts, to allowing an opening prayer at the start of the football game over the PA system is directly on point with the decision which was handed down by the Supreme Court of the United States in 2000.

The fact of the matter is that both schools involved had prayer on the field, both before and after the football game. The issue was never whether prayer could be conducted. The issue was, and is, that an organization, which is determined to be a 'state actor,' cannot endorse nor promote religion. The issue of prayer, in and of itself, was not denied to either team or anyone in the stadium. It is simply not legally permitted under the circumstances, which were requested by Mr. Euler

Whether we agree with the decision of the United State Supreme Court or not, is of little consequence. The issue is that we will obey and uphold the law of the land.

[cid:73211284-2093-4995-94E3-95A4F7F5470B]
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Executive Director
(352) 372 – 9551, Ext. 110
"Building leaders through teamwork, sportsmanship and citizenship"
[cid:107F2AD3-2013-440B-9405-8957CA0DCFB5]