No. 24-1261

In the
# Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

*Petitioner*,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

*Respondent*.

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

## BRIEF FOR *AMICI CURIAE* FORMER ATTORNEYS GENERAL IN SUPPORT OF PETITIONER

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*Amici curiae* are William P. Barr, Jefferson B. Sessions III, and Michael B. Mukasey, former United States Attorneys General whose terms spanned three presidential administrations. *Amici*'s service as chief law enforcement officer of the federal government, including the Justice Department's Civil Rights Division, gives them particular insight into the First Amendment's overlapping protections and the danger of governmental infringement on those protections.

## SUMMARY OF THE ARGUMENT

This Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) is an anachronism. While many thought it was wrong the day it was decided, *see id.* at 318 (Rehnquist, C.J., dissenting) (criticizing majority opinion as "bristl[ing] with hostility to all things religious in public life"), it is plainly out of step with virtually every decision interpreting the Religion Clauses in the decades since. The Court should grant certiorari and either overrule *Santa Fe* or, at a minimum, limit it to its facts, lest it continue to spawn the mistaken view that the only way for the government to satisfy the Establishment Clause is to display hostility to religion and give the non-religious the kind of "modified heckler's veto" that this Court interred with *Lemon*.

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[1] All parties were timely notified of the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

Much has changed since *Santa Fe* was decided in 2000. At that time, the Court was still grappling with *Lemon*'s failed attempt to provide a "grand unified theory for assessing Establishment Clause claims." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022). *Lemon*—and particularly its endorsement offshoot—had set the Establishment Clause on a collision course with the Free Exercise and Free Speech Clauses (not to mention practices, like legislative prayer, dating back to the founding), introducing doctrinal incoherence and inviting anti-religious discrimination under the guise of avoiding establishment.

In the years and decades following *Santa Fe*, this Court's Religion Clause jurisprudence repudiated *Lemon*, refocused on first principles, and rejected the notion that the Establishment Clause was inconsistent with a host of longstanding and novel government practices that recognized the important role of religion in private *and public* life without establishing religion. The evolution in this Court's cases started with simply ignoring *Lemon* where it was incompatible with longstanding practice and common sense. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 577-82 (2014). More recent decisions have made clear that *Lemon* and its progeny should have no further role in interpreting the First Amendment. *Kennedy*, 597 U.S. at 534. In other contexts, this Court began by rejecting the misguided notion that governments could not voluntarily include religious entities in neutral public programs. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). Now more recent cases recognize that the government cannot exclude religious entities from those programs

without violating the Free Exercise Clause. *See, e.g.*, *Carson ex rel. O.C. v. Makin*, 596 U.S. 767 (2022); *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). In that context, this Court has repeatedly rejected the notion that compliance with anti-establishment obligations, whether state or federal, justifies the exclusion of religious entities or the hostility toward religion inherent in such exclusion.

This Court's free speech cases have also ushered in significant change. *Santa Fe* was sandwiched between landmark viewpoint discrimination cases protecting religious expression (and rejecting antiestablishment justifications for that discrimination). *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). And *Santa Fe* arrived at a time when the government speech doctrine was not well-developed. This Court has since warned that the doctrine is "susceptible to dangerous misuse," *Matal v. Tam*, 582 U.S. 218, 235 (2017), and made clear that the safeguards against using the doctrine to "silence or muffle the expression of disfavored viewpoints," *id.*, are no less stringent when those viewpoints are religious. *Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

Neither *Santa Fe* nor the decision below can be squared with these later developments. *Santa Fe*'s government-speech holding asked not whether prayer over a stadium loudspeaker actually *was* the

government's speech, but whether an offended observer might perceive that prayer as "sponsored" by the government. This Court has long since abandoned the notion that the misperceptions of observers looking to take offense can trump the rights of religious people and schools to fully participate in public life. But that mistaken notion continues to underlie both the decision below and the decisionmaking of state and local officials, some of whom may be hostile to religion, but most of whom are simply trying to avoid being sued.

Until this Court overrules *Santa Fe*, it lurks as a dangerous remnant of *Lemon*'s grand unified theory. This Court clarified the law for local governments, lower courts, and religious adherents in *Kennedy* by giving *Lemon* "a tombstone no one can miss." *Buffington v. McDonough*, 143 S.Ct. 14, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari). The Court should finish the job and overrule *Santa Fe* or, at least, strictly limit it to its facts.

## ARGUMENT

### I. This Court Has Transformed First Amendment Doctrine Since It Decided *Santa Fe.*

Over the past twenty-five years, this Court has fundamentally transformed its Religion and Free Speech Clause jurisprudence. When *Santa Fe* was decided in 2000, this Court was just starting a course correction concerning its suspicion of private religious expression in public fora—much of which was attributable to *Lemon*. Over the next quarter-century, this Court replaced that multi-factor jurisprudence that could not be faithfully squared with longstanding

practices—from legislative prayer to advertising our trust in God on our national currency—with a doctrine rooted in text and tradition. The "modified heckler's veto" that held sway under *Lemon* is no more. *Kennedy*, 597 U.S. at 534 (quoting *Good News Club*, 533 U.S. at 119). This Court now takes the measure of Establishment Clause claims, in general—and efforts to exclude religious voices based on Establishment Clause concerns, in particular—with a view to the First Amendment as a whole and our Nation's longstanding traditions.

### A. *Lemon* and Its Endorsement Offshoot Empower a Modified Heckler's Veto Over Religious Expression.

In *Lemon,* this Court thought it could formulate an all-purpose three-pronged inquiry for resolving Establishment Clause claims: government action must have a secular legislative purpose; must not have the principal or primary effect of advancing or inhibiting religion; and must not foster excessive entanglement between government and religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). That effort was doomed from the start, as those factors, applied faithfully, would have called into question numerous practices—some as old as the Republic, others as ubiquitous as the Pledge of Allegiance. That problem—not to mention the reality that these abstract factors were unmoored from text, history, and tradition—invited further innovation.

*Lemon*'s "effects" prong mutated, generating an "endorsement test offshoot." *Kennedy*, 597 U.S. at 534. This endorsement test asked whether a reasonable observer would perceive the challenged

action as an implicit endorsement of religion. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 592-93 (1989). But that subjective and perception-based question was easier posed than answered: the inquiry rarely got past the predicate question of "the knowledge that is properly attributed to the test's 'reasonable observer'" before fracturing the Court. *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring in part).

Lacking any grounding in constitutional text or tradition, the Court's Establishment Clause doctrine became more of a Rorschach test for individual judges than a basis for predictable outcomes. The doctrine raised the "concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring); *see also Shurtleff*, 596 U.S. at 278 nn.1-3 (Gorsuch, J., concurring in the judgment) (collecting cases). The inconsistency and unpredictability was not limited to the lower courts. For example, the doctrine as applied by the Court to Ten Commandment displays left the large display on the State Capitol grounds standing, *Van Orden*, 545 U.S. at 691-92 (plurality op.), while condemning far more discrete displays in ordinary school rooms, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 881 (2005). The notion that the former was less a state endorsement of religion than the latter is hard to fathom. And the correct instinct that tearing down a Ten Commandments display that had stood for decades would send an unmistakable message of hostility should have been an obvious signal that the

Court had taken a wrong turn, rather than the basis for a split decision.

Worse still, *Lemon* and its endorsement offshoot encouraged the conflation of private religious speech with government speech, which risked "exil[ing] private religious speech to a realm of less-protected expression." *Pinette*, 515 U.S. at 766 (plurality op.). By directing courts to ask whether an observer might perceive private religious speech to be "endorsed" by the government—not whether that speech was, in fact, the government's—the Court's cases invited governments to justify *actual* free exercise and free speech violations based on *perceived* government endorsement. *See Good News Club*, 533 U.S. at 119. A government predisposed to anti-religious hostility could thus "create[ ] its own 'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clauses on the other,' place[ ] itself in the middle, and then cho[o]se its preferred way out of its self-imposed trap." *Kennedy*, 597 U.S. at 533 (quoting *Pinette*, 515 U.S. at 768 (plurality op.)). And a government not predisposed to religious hostility, but simply wishing to avoid litigation, could throw up its hands in frustration at the lack of guidance and the near inevitability of being sued by either an offended observer or a religious speaker denied a forum.

### B. This Court Explains That Private Religious Use of Public Funds and Fora Should Not Be Treated With Hostility or Suspicion.

By the mid-2000s, the Court dealt with these problems and the incompatibility of *Lemon* with longstanding practices by ignoring *Lemon* while

rescuing longstanding practices from condemnation by lower courts. In lieu of focusing on *Lemon* or the reasonable observer, the Court looked to the Nation's traditions and policed coercion of religious observance. *See, e.g.*, *Town of Greece*, 572 U.S. at 591; *see id.* at 590 (distinguishing the coercion in *Lee v. Weisman*, 505 U.S. 577 (1992)). Recognizing that the lower courts and litigants were less free to simply ignore *Lemon*, this Court finally made clear that *Lemon* was dead and buried, *Kennedy*, 597 U.S. at 534, and had long been "discredited," *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 78 (2019) (Thomas, J., concurring in the judgment). And as *Lemon*'s Establishment-Clause remit receded, this Court issued landmark free exercise and free speech cases protecting religious use of public programs and fora.

1. In the years since *Santa Fe,* this Court has held—and then repeatedly reaffirmed—that the Establishment Clause does not require the exclusion of an entity from public benefits because of its religious character or activity. Just two years after *Santa Fe* this Court issued its landmark school-choice decision in *Zelman v. Simmons-Harris*. In a 5-4 decision, the Court sustained a state law that affirmatively allowed private religious schools to participate on an equal footing with non-religious schools in a school-choice program. 536 U.S. at 652-53.

The transformative change in this Court's First Amendment jurisprudence is underscored by subsequent cases holding that the equal participation of religious schools is not just permissible under the Establishment Clause, but constitutionally required

by the Free Exercise Clause. *See, e.g.*, *Trinity Lutheran*, 582 U.S. 449; *Espinoza*, 591 U.S. 464; *Carson*, 596 U.S. at 786. Those cases make clear beyond cavil that exaggerated fears of establishment, even if grounded in state constitutional provisions, are no excuse for discrimination against religious people, institutions, or uses.

2. The Religion Clauses are complemented by the First Amendment's free-speech component. The Free Exercise Clause works "in tandem" with the Free Speech Clause, which "provides overlapping protection for expressive religious activities." *Kennedy*, 597 U.S. at 523. Religion, after all, "constitutes a viewpoint." *Shurtleff*, 596 U.S. at 273 (Alito, J., concurring). A trio of cases culminating in *Good News Club* held that governments cannot deny religious groups access to school resources because those groups would address "otherwise permissible subjects … from a religious viewpoint." 533 U.S. at 111-12; *see Rosenberger*, 515 U.S. at 832-33; *Lamb's Chapel*, 508 U.S. at 393. More recent cases have emphasized that religious speakers enjoy robust free speech rights, such that cases implicating free-exercise rights could be resolved on free-speech grounds instead. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570, 596 (2023).

The contemporary Court's solicitude for free speech has naturally bolstered the Free Speech Clause's "overlapping protection" for religious expression, including in the context of government speech. In particular, this Court has carefully policed the lines of the government speech doctrine to ensure that the government's prerogative to speak as it

pleases does not license censorship. *Matal v. Tam* warned that the doctrine "is susceptible to dangerous misuse" and so must be tightly cabined. 582 U.S. at 235.

That principle has great significance for religious-speech protection. As the ability of governments to use misplaced endorsement concerns as a justification for squelching private religious speech wanes, there is an inevitable temptation for governments to try to label what is in fact private religious speech the government's own (and since it is the government's own speech, it must be non-religious to avoid Establishment Clause concerns). That government-speech two-step is not materially different or materially better, from a constitutional perspective, than the discredited effort to root out private religious speech in the name of avoiding endorsement. Either way, the underlying "Establishment Clause concerns made me do it" excuses are insufficient. *See Shurtleff*, 596 U.S. at 258. Both justifications misunderstand the First Amendment, which "was never meant … to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Pinette*, 515 U.S. at 767 (plurality op.).

*Shurtleff* was an important milestone for the principle that the government speech doctrine is narrow and not an excuse to disfavor religion. As in so many Free Exercise cases, *Shurtleff* arose out of an official's mistaken belief that "the City would violate the Establishment Clause" unless it treated "religious speech as second-class." 596 U.S. at 261 (Kavanaugh, J., concurring). The city's paranoia about committing

an imagined First Amendment violation via government speech led it to commit a real one via government suppression: this Court unanimously held that Boston violated the First Amendment by refusing to allow a Christian flag in a public forum open to flags raised by civic groups. Applying *Tam* and other government speech cases, *Shurtleff* reasoned that the history of the flagpole program suggested government speech and that a group's flag flying alongside the city's might, or might not, be perceived as a government message. *Id.* at 254-57. But critically, Boston exercised no editorial control over the flags it allowed; this was enough to foreclose the city's government-speech defense to a viewpoint-discriminatory exclusion of religious symbols. *Id.* at 256-57. The Court never suggested that the inquiry was different, or more forgiving of censorship, because of the religious character of the petitioner's speech.

* * *

This Court's First Amendment doctrine has changed dramatically, and for the better, since *Santa Fe*. Whereas *Zelman* cautiously concluded that religious entities could be included in neutral programs without violating the Establishment Clause; *Trinity Lutheran*, *Espinoza*, and *Carson* make clear religious entities may not be excluded from the same programs thanks to the Free Exercise Clause. And while the government speech doctrine as it is now understood was "recently minted" in 2005, *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (Stevens, J., concurring); by 2017, this Court had warned that it is "susceptible to dangerous misuse"

and should be extended only with "great caution." *Tam*, 582 U.S. at 235.

## II. *Santa Fe* Is Out Of Step With Modern Free Speech And Religion Clause Jurisprudence, Invites Discrimination Against Religion, And Continues To Sow Confusion.

Before *Zelman* and *Good News Club*—and long before *Carson*, *Shurtleff*, and *Kennedy*—this Court decided *Santa Fe*. *Santa Fe*'s special disfavor for religious speech in public fora cannot be reconciled with the Court's intervening cases. Yet it continues to provide grist for discrimination against religious speech. Indeed, in an era that has directed a renewed focus on history and tradition, *Santa Fe* carves out a slice of Americana that is particularly rich in tradition and far removed from concerns about endorsement—high school football games—for especially disfavored treatment. The notion that a two-ton Ten Commandment display on the capitol grounds—or a prayer to begin a legislative session or "In God We Trust" on the national coinage—is a permissible accommodation of the reality that we are a religious people, yet having two religious schools begin a football game with a prayer is an establishment, beggars all belief.

### A. *Santa Fe*, Which Applied the Now-Abandoned *Lemon* Test and Its Endorsement Progeny, Is an Anachronism Inconsistent With This Court's Modern Doctrine.

*Santa Fe* "bristles with hostility to all things religious in public life." *Santa Fe*, 530 U.S. at 318 (Rehnquist, C.J., dissenting). It "applie[d] the most

rigid version of the oft-criticized test of *Lemon*," *id.* at 319, to hold out religious speech for special disfavor. And its reasoning is impossible to square with all the history that preceded it and all this Court's cases that followed it.

*Santa Fe* held that student invocations offered before football games were government speech, reasoning that a school district policy allowing an elected student speaker to offer such an invocation "involves both perceived and actual endorsement of religion." *Id.* at 305 (majority op.). The Court perversely treated the religious nature of the speech—something that one would expect from an individual student but not from a government institution—as weighing in favor of endorsement. "In cases involving state participation in a religious activity," the Court reasoned, "one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.'" *Id.* at 308.

Despite the reality that the school policy ensured the prayer was a product of individual student choice, the Court concluded that "the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id.* Having generated a risk of endorsement from ignorance of how the program actually worked, the Court then conjured coercion out of the need to endure a minute of private religious speech before enjoying an entirely secular sporting event. The Court thought students

who might equally be subjected to the Pledge of Allegiance or a rendition of God Bless America that would be actual government speech would be coerced by being put to "the choice between attending these games and avoiding personally offensive religious rituals." *Id.* at 312. Thanks to this heckler's veto, religious speech (at least before football games) enjoyed *less* protection than secular speech.

*Santa Fe*'s reasoning has been thoroughly repudiated by this Court's more recent cases. It asks the wrong questions to determine whether religious speech is the government's; it sets complementary First Amendment protections against one another; and it singles out religious expression for disfavor when the whole point of protecting both free exercise and free speech is to give religious speech special protection.

*First*, *Santa Fe*'s confused government-speech musings aimed at the wrong mark. *Shurtleff* teaches that there is no special, religion-skeptical test for whether a private speaker's expression is attributable to the government. The government-speech test is no more forgiving for religious flags than for irreverent trademarks. *See Shurtleff*, 596 U.S. at 252-53.[2] While "whether the public would tend to view the speech at issue as the government's" is one factor this Court sometimes uses in deciding whether speech is the government's, *id.*; *but see id.* at 266 (Alito, J., concurring in the judgment) (explaining why this

[2] When the speaker is a government employee, the test is *at least* as protective of religious speech as it is of other speech on matters of public concern. *See Kennedy*, 597 U.S. at 528, 531 & n.2.

factor is "an uncertain guide to speaker identity"), that factor does not dominate the analysis as the "perceived endorsement" test did in *Santa Fe*. And this Court's government speech cases are ultimately concerned with "whether the government is *speaking* instead of regulating private expression." *Id.* at 262 (Alito, J., concurring in the judgment). *Santa Fe* was concerned with something different and more manipulable: whether the government "sponsored" a religious message and thereby "invade[d] t[he] private sphere" to which religion is supposedly relegated. *Santa Fe*, 530 U.S. at 309-11. Any time a government provides a forum for private speech it could be perceived as sponsoring that speech. Just because the government allows the speech to occur does not mean the government is sponsoring it, let alone the speech is the government's own. As this Court has repeatedly held, that is a basic lesson any school student should be able to grasp. And the notion that religion is relegated to some private sphere is entirely antithetical to our traditions. The currency circulates in public; the Pledge is recited openly; prayers that begin legislative sessions are broadcast far and wide.

*Second*, *Santa Fe* rests on the discredited notion that the Establishment Clause is set in opposition to the Free Exercise and Free Speech Clauses. The Religion Clauses both protect religious liberty, the *Santa Fe* Court explained—but the Establishment Clause is nonetheless offended by a private speaker's exercise of prayer if the circumstances suggest government "sponsors[hip]." *See id.* at 313. But it would be more than passing strange if the framers included multiple provisions in a single amendment that worked at cross-purposes. As this Court has since

explained, this equipoise theory of the Religion Clauses—in which free exercise and free speech must be tempered to avoid establishment—presents a false conflict. "[T]here is no conflict," only the "mere shadow of a conflict, a false choice premised on a misconstruction of the Establishment Clause." *Kennedy*, 597 U.S. at 543.

*Third*, *Santa Fe* singled out religious speech for disfavored treatment. If anything, the First Amendment provides a double protection for religious speech. *Id.* at 523. The First Amendment does not countenance excluding religious activity or speech from programs and fora open to nonreligious use. *See, e.g.*, *Carson*, 596 U.S. at 780; *Good News Club*, 533 U.S. at 111-12.

### B. *Santa Fe* Invites Officials to Discriminate Against Religious Exercise and Speech Out of Misguided Concerns About Endorsement.

*Lemon* is dead, but it still "shuffle[s] abroad" and haunts lower courts in its *Santa Fe*/government-speech incarnation. *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring in judgment). As discussed *supra*, *Lemon* and its endorsement offshoot invited officials to use Establishment Clause concerns to justify excluding religious exercise and speech. In the years since *Santa Fe*, this Court has brushed those arguments back time and again. *See, e.g.*, *Kennedy*, 597 U.S. at 543; *Carson*, 596 U.S. at 781; *Good News Club*, 533 U.S. at 112-19. But so long as *Lemon* remained on life support, lower courts—duty bound not to overrule this Court's precedents, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477,

484 (1989), had little choice but to continue to indulge them. *See, e.g.*, *Trinity Lutheran Church of Columbia, Inc. v. Pauley,* 788 F.3d 779, 784 (8th Cir. 2015), *rev'd*, 582 U.S. 449. Indeed, "these spurious Establishment Clause concerns embolden[ed] government officials to treat religion with hostility even when they [did not] rely on *Lemon* by name." *Shurtleff*, 596 U.S. at 280 n.4 (Gorsuch, J., concurring in the judgment).

Likewise, until this Court overrules (or strictly limits) *Santa Fe*, that case's dubious notions of what private religious speech is attributable to the government can readily be used to extend *Lemon*'s reign and "as a cover for censorship." *Id.* at 263 (Alito, J., concurring in the judgment). That is exactly what happened in this case. *See* Pet. 17-26.[3]

[3] As the Petition explains (at 29-33), recent decisions of the Fifth, Sixth, and Eighth Circuits are properly cautious in applying the government speech doctrine and conflict with the Eleventh Circuit's government speech analysis.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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