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 OF MEMBERS OF CONGRESS AS *AMICI CURIAE* SUPPORTING PETITIONER

ANDREW C. LANG-REYES
MCDERMOTT WILL & EMERY
The McDermott Building,
500 N. Capitol Street, NW
Washington, D.C. 20001
(202) 756-8681
alangreyes@mwe.com

RICHARD D. SALGADO
Counsel of Record
LUCAS J. HALE
MCDERMOTT WILL & EMERY
2801 N. Harwood Street
Suite 2600
Dallas, TX 75201
(214) 210-2797
richard.salgado@mwe.com
lhale@mwe.com

Counsel for Amici Curiae *Members of Congress*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

INTEREST OF *AMICI CURIAE*

Amici are United States Members of Congress who share a strong interest in upholding Congress's long tradition of protecting religious liberty.[1] Amici believe that the decision below threatens individual religious expression of anyone who participates in events at public schools, parks, civic centers, or other government facilities and seeks to express a religious viewpoint. Those affected include both amici and millions of the amici's constituents, potentially depriving them of their fundamental rights.

Amici are:

United States Senators

Mike Lee (Utah)
Ted Budd (North Carolina)
John Cornyn (Texas)
Kevin Cramer (North Dakota)
Ted Cruz (Texas)
Josh Hawley (Missouri)
James Lankford (Oklahoma)
Ashley Moody (Florida)
Eric Schmitt (Missouri)
Rick Scott (Florida)
Tim Scott (South Carolina)

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made any monetary contribution intended to fund the preparation or submission of this brief. The parties were given timely notice under Rule 37(2).

Members of the House of Representatives

Lauren Boebert (CO-04)
John McGuire (VA-05)
Andy Ogles (TN-05)
Keith Self (TX-03)
Daniel Webster (FL-11)

INTRODUCTION AND SUMMARY OF ARGUMENT

Two Christian schools prepared to face off in the pinnacle of high school athletics: a state championship football game. But before their clash on the field, they sought to share a moment of faith by offering a prayer over the loudspeaker.

The Florida High School Athletic Association ("FHSAA") refused their request because it believed that allowing the prayer could "be viewed as endorsing or sponsoring religion." That is objectively false under this Court's precedent.

But FHSAA switched its theory in court, claiming that—regardless of whether the prayer would have violated the Establishment Clause—FHSAA still had the right to shut it down as "government speech."

The Eleventh Circuit's acceptance of FHSAA's argument warps the government-speech doctrine, blows a gaping hole in this Court's important recent precedents, and even creates a potential backdoor to revive the dead-and-buried *Lemon* test.

. . .

The danger of the Eleventh Circuit's decision cannot be overstated. This Court has made it abundantly clear that private speech in government forums receives robust protection. But there is a potential blind spot that can be exploited: such protections don't apply to government speech. The government must survive strict scrutiny to restrict private religious speech, but it can restrict government speech—or at least what it *classifies* as government speech—without any scrutiny at all.

If cautiously applied, the government speech doctrine is not a problem and is even essential. But applied loosely, it creates a dangerous blind spot. The Eleventh Circuit's decision allows—and in fact, endorses—FHSAA's exploitation of that blind spot.

As a result, there presents tremendous danger. Courts' misclassifications of private speech as government speech have the power to strip away constitutional protection entirely, allowing government actors to engage in otherwise unconstitutional viewpoint discrimination—*i.e.*, prohibiting speech *because* it is religious. This is what happened here. As the Eleventh Circuit itself stated, "if the speech at issue here is government speech, Cambridge Christian's free speech claims necessarily fail." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 115 F.4th 1266, 1288 (11th Cir. 2024). This is why the government speech doctrine 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). The Eleventh Circuit's decision fails to exercise that caution. In so doing, it sets a dangerous new precedent.

At risk is the rich historical tradition of allowing private individuals to publicly practice their faith. Americans do not lose that right when on public property, using public equipment, or even when working for the government. This tradition includes the right to pray in public.

Dating back to the founding of the nation, all three branches of government have readily embraced the public prayers of private individuals. George Washington began his first inaugural address—given on government property at Federal Hall in New York City—with "fervent supplications" to God and ended

the address in prayer for God's "divine blessing." George Washington, First Inaugural Address (Apr. 30, 1789), reprinted in The American Presidency Project (John Woolley & Gerhard Peters eds.).

The First Continental Congress established the tradition of opening legislative sessions with a prayer in 1774—a practice that Congress has followed without interruption and on government property, using government equipment, to this day. *See Marsh v. Chambers*, 463 U.S. 783, 787 (1983).

And this Court, following a tradition that began under Chief Justice John Marshall, opens its sessions by praying: "God save the United States and this Honorable Court." *Engel v. Vitale*, 370 U.S. 421, 448 (1962) (Stewart, J., dissenting). Both Houses of Congress continue to open each legislative day with a prayer, and the President speaks at a National Prayer Breakfast each February.

In short, this country has an "unambiguous and unbroken history of more than 200 years" of public prayer. *See Marsh*, 463 U.S. at 787.

. . .

The Eleventh Circuit erred by misclassifying private speech as government speech. At least three consequences flow from the Eleventh Circuit's decision.

First, private speakers and the government alike will lack clarity on when and how the Government Speech Doctrine prohibits prayer in public spaces. This lack of clarity will chill free speech by creating fear of costly litigation, fear of career consequences, and fear of reprisal by the government.

Second, ambiguity in the law will enable and embolden bad actors to exploit the law to stifle speech and push religion out of public life.

Finally, if left uncorrected, the ambiguity created by the Eleventh Circuit will fail to give the government, courts, litigants, speakers, or audiences the tools needed to effectively govern themselves and resolve disputes.

The Eleventh Circuit's decision is an unconstitutional step toward driving religious expression out of public life. This Court should reverse the Eleventh Circuit's decision before yet another private expression of faith is banished from the public square.

ARGUMENT

I. THE ELEVENTH CIRCUIT ERRONEOUSLY APPLIED THE GOVERNMENT SPEECH DOCTRINE, CREATING A LOOPHOLE IN THIS COURT'S PRECEDENTS

FHSAA's original reason for refusing to allow the prayer was fear of violating the Establishment Clause. *Cambridge Christian*, 115 F.4th at 1278. The FHSAA thus conceded that it prohibited that speech *because it was religious*.

Unscripted, secular pre-game remarks? Fine.

Music? Fine.

Private advertisements? Fine.

Prayer? No.

FHSAA's concession raises a Free Exercise problem because this Court's Free Exercise jurisprudence makes clear that when government actions "target the

religious for 'special disabilities' based on their 'religious status,'" they trigger "the strictest scrutiny." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993)).

That is, such targeted prohibitions on religious rights "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi Babalu Aye*, 508 U.S. at 531–32. Put simply, the government cannot prohibit prayer—especially not *because* it is prayer—without satisfying strict scrutiny.

Nevertheless, the Eleventh Circuit tossed these protections aside by misapplying the government-speech doctrine and classifying Cambridge Christian's requested prayer as government speech—even though it would have been offered by a private citizen, apart from any other official announcements over the PA system. The Eleventh Circuit's approach cannot be right. It would potentially treat all private speech delivered through government equipment, or any speech by private speakers delivered in public facilities as automatically governmental. This error directly conflicts with this Court's analytical framework established in *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), and *Shurtleff v. City of Boston*, 596 U.S. 243 (2022), both of which emphasized careful, context-specific analysis before concluding that speech constitutes government expression.

In *Kennedy*, this Court's main consideration was whether Coach Joe Kennedy was speaking in his official capacity incident to his coaching duties. But this Court also considered additional factors including whether the government's actions in suppressing Coach Kennedy's speech were "neutral [and] generally

applicable," whether he sought to convey a government-sponsored message, whether he was engaged in any of his official duties during the contested speech, and the general "timing and circumstances" of his speech in context with how other coaches and players would have perceived it. *Kennedy*, 597 U.S. at 508–09.

Likewise, in *Shurtleff* this Court considered whether the government "inten[ed] to speak for itself," the history of the contested expression in context, and "the public's likely perception as to who (the government or a private person) is speaking." *Shurtleff*, 596 U.S. at 244.

In neither case did this Court *only* focus on whether the speech at issue involved government facilities or equipment; that was just one factor this Court considered among many.

The Eleventh Circuit's error has consequences beyond the bounds of this case, which are addressed below. But, at minimum, the litigants in this case deserve the same thorough analysis that this Court has established through a long line of free speech and religious liberty cases.

II. MISCLASSIFYING PRIVATE SPEECH AS GOVERNMENT SPEECH CHILLS FREE EXPRESSION

The negative consequences of the Eleventh Circuit's reasoning are twofold. *First*, the decision creates confusion and does not provide private actors or the government with clear guidelines about speech in government venues. *Second*, the decision allows bad actors to suppress constitutionally protected religious

speech by intentionally misclassifying it as government speech.

A. Likelihood of Confusion.

Confusion about the law creates fear; fear leads to self-censorship.

Self-censorship of speech is on the rise, and all indications are that the uniquely American culture of free speech is diminishing. A 2020 study of attitudes towards speech asked Americans if they feel as free to speak their mind as they used to, and 46% of respondents said they did not. James L. Gibson & Joseph L. Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship in the United States,* 138 Pol. Sci. Q. 361, 362 (2023).

A contemporaneous poll by the Cato Institute found that "[n]early two-thirds—62 percent—of Americans say the political climate these days prevents them from saying things they believe because others might find them offensive." Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They're Afraid to Share*, Cato Inst. (2020), https://www.cato.org/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share (last visited June 7, 2025). That number has risen since a similar poll was conducted in 2017, when 58% of respondents agreed with that statement. *Id.* Regardless of the precise percentage, the lesson is the same: self-censorship is widespread, and worsening.

A 2023 study analyzing these results found that fear of reprisal from a repressive government was a statistically significant contributing factor to self-censorship. James L. Gibson & Joseph L. Sutherland, *Keeping Your Mouth Shut: Spiraling Self-Censorship*

in the United States, 138 Pol. Sci. Q. 361, 370–371 (2023). While not the primary factor (which was fear of reprisal from friends and family) "perceived government constraints on individual freedom" provided a measurable contribution toward self-censorship. *Id.*

Confusion about the limits of free speech creates fear of costly and time-consuming lawsuits. This very case serves as a recent example; fear of litigation was the first documented reason given by FHSAA for denying Cambridge Christian's request to pray over the PA system. *Cambridge Christian*, 115 F.4th at 1278 ("Dr. Dearing [FHSAA's Executive Director] feared that allowing prayer over the loudspeaker would subject the FHSAA to 'tremendous legal entanglements.'"); *see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 963 (9th Cir. 1999) (school district declined to place advertisement with religious content on baseball field fence due to fear of "disruption, controversy and expensive litigation"). Government entities may choose to limit speech or prohibit it entirely hoping to avoid legal challenges.

Ambiguity in the law also permits shifting standards that do not allow private actors or the government to effectively govern themselves. For example, the FHSAA previously allowed private actors to express their faith in ways similar to broadcasting a prayer over a PA system. During the 2015 football playoffs, the FHSAA allowed a Cambridge Christian representative to pray while using the PA system at three different football playoff games. Plaintiff's Summary Judgment Motion at 11–12, *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n.*, No. 8:16-cv-02753 (M.D. Fla. March 31, 2022), ECF No. 137.

In 2018, FHSAA's television broadcaster televised football players and coaches praying. *Id.* at 9. The FHSAA broadcast that prayer on its Facebook page. *Id.* Thus, not only did FHSAA abruptly change course and reject Cambridge Christian's request to pray over its PA system, but FHSAA then changed course again and allowed prayer over an internet broadcast—a medium far more wide-reaching than a PA system.

Unclear and inconsistent standards deprive government officials—the majority of whom try their best to do the right thing by the people they serve—of the ability to make correct decisions regarding private speech in government forums. See *Kennedy*, 597 U.S. at 543–44 ("the only meaningful justification the government offered for its reprisal ***rested on a mistaken view*** that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech.") (emphasis added). Nor do they give speakers the ability to know what speech is appropriate, and what speech may put them in legal or career jeopardy.

Clarifying the law will empower government officials to make confident and constitutionally correct decisions about speech that respect the First Amendment and religious liberty rights of speakers and audiences alike.

B. Potential for Speech Suppression.

Under the Eleventh Circuit's holding, any government entity could classify private speech as government speech because it occurs on public property or uses public resources—effectively creating an unconstitutional veto over private speech.

This is one reason that "courts must be . . . careful when a government claims that speech by one or more private speakers is actually government speech. When that occurs, it can be difficult to tell whether the government is using the doctrine as a subterfuge for favoring certain private speakers over others based on viewpoint." *Shurtleff*, 596 U.S. at 262 (Alito, J., concurring).

The Eleventh Circuit's decision exemplifies this misuse of the doctrine. The sad reality is that some government officials are hostile to religion and will exploit the law in service of that hostility. By providing clear boundaries for the Government Speech Doctrine, this Court can limit the reach of those bad actors and protect the constitutional rights of those they target.

III. COURTS NEED AN ANALYTICAL FRAMEWORK TO EFFECTIVELY RESOLVE DISPUTES

This Court can help address the widespread problem of self-censorship—as discussed in Section II—by clarifying the relevant analytical framework. Federal courts need a clear analytical framework to resolve disputes related to government speech. Here, the Eleventh Circuit limited its analysis to only considering what speech existed *immediately* before and after the desired speech's occurrence. *See Cambridge Christian*, 115 F.4th at 1289 ("[W]e conclude that *pregame speech* over the PA system at football finals has traditionally constituted government speech." (emphasis added)). As a result, the Eleventh Circuit limited its inquiry to an approximately five-minute window when the prayer would have taken place, a window that was thirty minutes before kickoff. *See id.* at

1276–77. This Court has the opportunity to correct that error and establish clear guidelines for how to analyze speech in its proper context.

In an earlier decision in the same case, the Eleventh Circuit conducted a more appropriate historical analysis. At that time, the Eleventh Circuit examined PA system use "before, during, and after the game," including during the "halftime show," "all of the speech over the loudspeaker," and "speech disseminated over a loudspeaker at an event." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n.*, 942 F.3d 1215, 1225, 1235, 1230, 1233 (11th Cir. 2019). The Eleventh Circuit's first decision conducted the correct analysis. The court analyzed PA system announcements at sporting events generally rather than limiting its analysis to pregame PA system speech. *See id.* at 1232.

The Court should clearly articulate the analysis and scope of time relevant for the government-speech analysis. *Shurtleff*, *Galloway,* and *Walker* are instructive.

In *Shurtleff*, Boston permitted private groups access to its flagpoles "20 or so times a year." 596 U.S. at 255. In analyzing whether this activity constituted government speech, this Court said that it must "conduct a holistic inquiry," and that its review was "not mechanical" but "driven by a case's context." *Id.* at 252. This Court first analyzed the history of flying flags and then reviewed the details of Boston's specific flag flying program. *Id.* at 253–55.

If the Eleventh Circuit conducted the correct analysis here, it would have looked at the history of both announcements over a PA system at sporting events and announcements over a PA system at FHSAA

football games. Instead, the Eleventh Circuit erred and conducted a narrow analysis of pregame speech at FHSAA football state championship games. *See Cambridge Christian*, 115 F.4th at 1289–90.

Galloway is also instructive. There, this Court determined that having a prayer at the beginning of a city council meeting did not violate the First Amendment. *Town of Greece v. Galloway*, 572 U.S. 565, 591–92 (2014). During its analysis, this Court looked at history "to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." *Id.* at 577. After that inquiry, this Court then recognized that the desired speech occurred during the ceremonial portion of the town's meeting. *Id.* at 591. Much like *Shurtleff*, this Court conducted a two-step historical analysis where it analyzed the history of the desired speech in a general manner—the history of praying at legislative sessions—and then analyzed the speech in the context of its specific placement—at the beginning of a city council meeting in Greece, New York. *Id.* at 587–89. The Eleventh Circuit failed to conduct its analysis in a manner consistent with *Shurtleff* and *Galloway*.

And *Galloway* is important for an additional reason: it recognizes that audiences can distinguish whether religious speech is endorsed by the government. Whether the government endorses the desired speech is a factor of the Eleventh Circuit's analysis. *Cambridge Christian*, 115 F.4th at 1290 (explaining that the endorsement factor "asks whether observers reasonably believe the government has endorsed the message." (quotation marks omitted)).

Galloway recognized that audiences could understand "the central place that religion, and religious

institutions, hold in the lives of those present" at an event without some audience members being unconstitutionally "exclude[d]" from the event or "coerce[d]" into following a religion. *Galloway*, 572 U.S. at 591–92. *Galloway* also recognized that prayers offered at public events often have themes that are not entirely religious. *See id.* at 583 ("It is thus possible to discern in the prayers offered to Congress a commonality of theme and tone. . . . [T]hey often seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws."). Thus, *Galloway* recognizes that reasonable observers can distinguish whether the government endorses a prayer at a public event or if the prayer is part of the pomp and circumstance that often accompanies such events.

Confining the analysis to such a narrow sliver of time—as the Eleventh Circuit does—enables local government officials to unconstitutionally determine that private speech is government speech. Rather than determining whether announcements at a sporting event are generally viewed by onlookers as government speech, the Eleventh Circuit ignored the historical inquiry and limited its analysis to the narrow circumstances surrounding the desired speech.

Under this narrow focus, the court erroneously compared the requested prayer to other events occurring immediately before and after the prayer's intended placement. As a result, the Eleventh Circuit compared the prayer to the pledge of allegiance, remarks from a government official, and the star-spangled banner; and the court then concluded that the audience would have associated the prayer with government speech. *See Cambridge Christian*, 115 F.4th at

1289 ("The national anthem, presentation of colors, and pledge of allegiance are inseparably associated with ideas of government." (quotation marks omitted)).

But as made clear in *Shurtleff* and *Galloway*, audiences do not listen to speech using such an artificially constrained analytical window. The constitutionally correct results in these cases could easily have gone the other way if this Court had artificially constrained the analysis the way the Eleventh Circuit has here.

Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 201 (2015) is another example of this Court applying a broad and intuitive frame of reference to the government speech question. In *Walker*, this Court considered whether license plates issued by the state of Texas constituted government speech. *Walker*, 576 U.S. at 208. The analysis did not focus only on the state of Texas—nor only on the very recent history of Texas's license plate program. Instead, it took note that "[s]tates, including Texas, have long used license plates to convey government speech." *Id.* at 201.

Had the Court instead looked only to license plates approved by the state over the past six months, or only from a particular office, the result might have been different, but that frame of reference would have been illogical. The intuitive question was "what would the audience believe this speech to be?" and that question required a broader analysis of how license plates are typically used.

Just as with governments and private actors, federal courts need clear standards in order to effectively manage disputes involving free speech and religious

expression. The alternative is the sort of backtracking and unpredictability that has plagued this case from the start. By clarifying the law, this Court can ensure that future cases don't suffer the same fate.

CONCLUSION

For these reasons, and those advanced by the Petitioner, this Court should grant the petition for writ of certiorari.

July 10, 2025

Respectfully submitted,

ANDREW C. LANG-REYES
MCDERMOTT WILL & EMERY
The McDermott Building,
500 N. Capitol Street, NW
Washington, D.C. 20001
(202) 756-8681
alangreyes@mwe.com

RICHARD D. SALGADO
Counsel of Record
LUCAS J. HALE
MCDERMOTT WILL & EMERY
2801 N. Harwood St.
Suite 2600
Dallas, TX 75201
(214) 210-2797
richard.salgado@mwe.com
lhale@mwe.com

Counsel for Amici Curiae *Members of Congress*