No. 24-1261

In the Supreme Court of the United States

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Petitioner,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Respondent.

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

BRIEF IN OPPOSITION

LEONARD E. IRELAND, JR.
CLAYTON-JOHNSTON, P.A.
11129 NW 12th Place
Gainesville, Florida 32606

DANIEL MAHFOOD
Counsel of Record
HOLLAND & KNIGHT LLP
50 N. Laura St., Ste. 3900
Jacksonville, Florida 32202
(904) 353-2000
daniel.mahfood@hklaw.com

JUDITH M. MERCIER
HOLLAND & KNIGHT LLP
200 S. Orange Ave., Ste. 2600
Orlando, Florida 32801

October 14, 2025 *Counsel for Respondent*

QUESTIONS PRESENTED

To resolve this case, the Eleventh Circuit applied the same government-speech framework that applies in every circuit and that this Court reaffirmed in *Shurtleff v. City of Boston*, 596 U.S. 243 (2022). It concluded that every enumerated factor strongly supported finding that speech over the loudspeaker before a high school football championship game hosted by a state athletic association was government speech.

The court made this ruling after a threshold determination that, although Petitioner lacked standing to seek prospective relief, it had a retrospective claim for nominal damages that was not moot. Petitioner stated it did not seek monetary damages before the district court, but the Eleventh Circuit held that Petitioner's request for nominal damages on appeal—made only after Petitioner realized it lacked standing for prospective relief—was sufficient to avoid mootness.

The questions presented are:

1. Did the Eleventh Circuit correctly hold that a request for nominal damages made for the first time on appeal after disclaiming monetary relief in the trial court is sufficient to avoid mootness?

2. Did the Eleventh Circuit err in applying the framework from *Shurtleff* to determine that pregame speech over the loudspeaker at a football championship game hosted by a state athletic association was government speech?

CORPORATE DISCLOSURE STATEMENT

Respondent is a Florida corporation. Respondent has no parent corporation, and no publicly held company owns 10% or more of Respondent's stock.

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INTRODUCTION

This case concerns the Eleventh Circuit's application of the same framework for identifying government speech used in every circuit—one this Court reaffirmed as recently as 2022. That flexible framework identifies government speech in part by considering whether the speech at issue: (1) is a kind of speech that has traditionally communicated messages from the government (history); (2) is often closely identified in the public mind with the government (endorsement); and (3) is directly controlled by the government with respect to its content and meaning (control).

Using this framework, the Eleventh Circuit concluded that speech over the loudspeaker before a high school football championship final hosted by Respondent, the Florida High School Athletic Association, Inc. (the "**Association**" or "**FHSAA**") was government speech. The court found that the Association had traditionally used this type of speech to communicate directly with the public, delivering welcome messages and announcements, conducting patriotic rituals, and promoting its official sponsors. Other than a pregame prayer erroneously allowed in 2012, the Association had never permitted private speakers to use the loudspeaker before the events it hosted.

The court next concluded that the speech at issue, which came at the beginning of events organized and hosted by the Association at around the same time as the National Anthem, Pledge of Allegiance, and Presentation of Colors, would be closely identified with the government. Even sponsor messages during pregame were linked with the government because they recognized the Association's *official* television and merchandising partners and the game's *official* presenting sponsor.

Finally, with respect to control, the court observed that only the public-address announcer spoke over the loudspeaker during the entire event, and virtually every word he said was written down in a script prepared by the Association.[1] While the Association put language provided by its sponsors into its scripts, it did so only for those who entered into sponsorship agreements approved by its Executive Director and paid sponsorship fees. In this way, the Association used its control over the loudspeaker to convey messages that promoted its sponsors and encouraged financial support for high school athletics in Florida.

Petitioner, Cambridge Christian School, Inc. ("**CCS**"), does not argue the Eleventh Circuit applied the wrong rule, only that it applied the right rule badly. CCS argues, for example, that the Eleventh Circuit's "scope of inquiry" was too narrow because it focused on pregame speech at football championship games and did not give enough weight to "welcoming remarks" at other events. In fact, the Eleventh Circuit explained that, even if it considered those remarks, its conclusion would be the same because the examples CCS cited were introductions at weightlifting meets that were also given by state actors (*i.e.*, a city mayor or public-school principal). But, whether this reasoning is right or wrong, challenging the weight the court gave different facts amounts to garden-variety error correction that does not merit this Court's attention.

To elevate its asserted errors into something more than misapplication of a properly stated rule, CCS attempts to identify inter-circuit conflicts. But the cases CCS cites apply the same *framework*, only to different *facts*. There is little reason to believe other circuits

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[1] The exception was an announcement about halftime statistical leaders, which, of course, could not be fully scripted in advance.

would analyze *these* facts differently, and they would undoubtedly use the same test. Ironically, each of the purported conflicts CCS identifies actually bolsters the Eleventh Circuit's decision to focus primarily on the specific speech at issue (*i.e.*, pregame speech over the loudspeaker at football championship games) rather than a generalized history of all modes of speech during any part of the game or at any FHSAA event.

Predictably, the questions presented CCS crafted for its petition bear little connection to the issues that were actually raised and decided below. CCS first asks whether *Santa Fe Independent School District v. Doe* "compels a finding of government speech" here, but at no point in this case did any party argue or any court decide that *Santa Fe* controls the outcome. Thus, while the Association would welcome the Court overturning *Santa Fe*, this case is not an appropriate vehicle for doing so. Overturning *Santa Fe* would not make any difference to the Eleventh Circuit's ruling, nor would the Association be a suitable advocate for upholding *Santa Fe*.

CCS's second question presented is equally inapt. It asks whether the endorsement prong of the government-speech framework "resurrects" the discredited test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for violations of the Establishment Clause. CCS does not actually ask the Court to discard the endorsement factor, so it is unclear what an answer to CCS's second question would mean for this lawsuit. Moreover, because the Eleventh Circuit ruled that *all three* factors strongly support government speech in this case, discarding endorsement as a consideration also would not affect the outcome. Consequently, this case is also a poor vehicle for exploring a purported connection between the endorsement factor and *Lemon*.

This case features other vehicle problems as well. Most notably, to address the merits, this Court would first have to assure itself of jurisdiction, which would mean reviewing the Eleventh Circuit's ruling that the case is not moot. CCS lacks standing to seek prospective relief—a determination CCS does not challenge—so the case-or-controversy requirement of Article III can be satisfied only if CCS has a retrospective claim for damages. By the time CCS realized this, however, it had already expressly abandoned any claim for "monetary damages" in the district court. The Eleventh Circuit nevertheless held that CCS had a claim for *nominal* damages even though CCS never mentioned such damages until judgment had been entered and the case was on appeal. This issue is not without practical significance—had CCS disclosed that it was seeking only nominal damages, the Association could have ended the case by paying nominal damages. CCS does not discuss this thorny issue in its petition, but it is one the Court would be forced to resolve before it could address either of CCS's questions presented.

Finally, in addition to having no prospective impact on the parties, this case will also have minimal impact on anyone else in Florida because all participants in FHSAA championship games now have a statutory right to make a pregame statement of their choosing, including a prayer. The political branches have remedied the problem CCS brought this lawsuit to address without the need for judicial intervention. Thus, while this case involves issues that are important in the abstract, this Court's review would produce little real-world impact beyond a fact-intensive analysis of circumstances that no longer exist.

The petition should be denied.

STATEMENT OF THE CASE

I. Factual Background

1. CCS is a private Christian school in Tampa, Florida. (Pet.App.2a.) From 1989 to 2024, CCS participated in FHSAA football. (Pet.App.4a.)

Prayer is an important part of CCS's religious mission, but the record is less clear on CCS's practice of communal prayer before football games. While CCS conducted communal prayers over the loudspeaker at games it hosted, at other games CCS's practice was to defer to the home team's tradition. (Pet.App.4a, 89a.) If the host prayed over the loudspeaker, CCS joined in, but, before the events underlying this lawsuit, CCS had never asked to use a loudspeaker for pregame prayer outside its home stadium. (Pet.App.89a–90a.)

Consistent with CCS's regular practice of playing without pregame communal prayer, CCS's key employees were unaware that such prayers were necessary. CCS's cheerleading coach, for example, was never told to pray communally with parents or fans, only students. (Pet.App.91a.) And, even after the instant dispute arose, CCS's athletic director did not see why pregame communal prayer was a critical issue given that CCS had played two other games that year without such prayer. (C.A.App.A4173.) CCS testified that playing those games without communal prayer did not burden its religious beliefs. (Pet.App.89a.)

2. The Association oversees high school athletics in Florida. Fla. Stat. § 1006.20(1). With 25 full-time employees, the Association administers more than two dozen sports for more than 800 public and private schools. (Pet.App.4a.) The Association promulgates bylaws and administrative policies that govern all FHSAA sports, including football. (*Id.*)

In football, schools are divided into eight classes based on enrollment. (Pet.App.57a.) In each class, schools play regular-season games followed by single-elimination playoffs consisting of one or more "semifinal" rounds and a championship game (or "final"). (*Id.*)

Regular-season and semifinal playoff games are hosted by one of the participating schools at venues of their choosing (though playoff games are considered neutral and not "home contests" for the host school). (Pet.App.5a.) By contrast, finals are hosted by the Association and its partners at sites they select. (*Id.*) From 2007 to 2018, the Association partnered with the Central Florida Sports Commission to host football finals at the Citrus Bowl in Orlando. (*Id.*)

The Association lacks sufficient resources to monitor or attend most FHSAA events, including regular-season and semifinal football games. (Pet.App.38a, 69a.) However, FHSAA employees attend and actively monitor football finals, including intervening to stop inappropriate use of the loudspeaker. (Pet.App.47a.)

3. The Association's rules govern use of the loudspeaker at football games. They designate the PA announcer as a "bench official" who is required to maintain "completely neutrality." (Pet.App.6a.) For playoff games, the Association creates scripts that it expects announcers to follow. (*Id.*) Every word in the scripts is put there by an FHSAA employee. (Pet.App.46a–47a.) Other than announcing a game's statistical leaders at halftime, the announcer's speech is generally fully scripted by the Association. (*Id.*)

Control of the loudspeaker at football finals was particularly tight during pregame. Other than the single instance discussed below, there is no evidence that anyone had used the loudspeaker during the pregame

of a final besides the National Anthem performer and the PA announcer, whose speech during pregame is completely scripted and limited to welcome messages, promotion of official sponsors,[2] a sportsmanship message, scholar-athlete awards, patriotic rituals (*i.e.*, the National Anthem, Presentation of Colors, and Pledge of Allegiance), introduction of players and officials, and a weather report.[3] (Pet.App.9a, 36a–37a.)

To encourage financial support, the Association limits sponsor messages to those promoting entities that have paid a sponsorship fee and executed sponsorship agreements approved by the Association's Executive Director. (Pet.App.7a, 38a, 48a.) The Association's sponsors are familiar with appropriate promotional messaging, so the Association rarely has to reword or reject sponsor submissions. (Pet.App.49a.) The Association's regulation of sponsors typically involves avoiding conflicts (*e.g.*, requiring a sponsor to market its products as *uniforms* rather than *activewear* to avoid a conflict with another merchandiser) or rule violations (*e.g.*, approving flyers for post-season track-and-field events on the condition that the sponsor "emphasize that schools cannot participate in these events as a team"). (*See* C.A.App.A2765, A2770.)

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[2] By way of example, pregame sponsor messages during the game at issue here were for the Association's official merchandising partner (Team IP), television partner (Bright House Sports), and presenting sponsor (Champion). (C.A.App.A3210–16.)

[3] Arnold High School, a public school in Panama City Beach, hosted boys and girls weightlifting finals from 2018 to 2020. At some of those events, either the principal or the mayor, both state actors in their own right, gave an introduction. (C.A.App.A8558, A8802, A9227, A9427, A10204.) These are the "welcoming remarks" CCS refers to throughout the petition as having being given "periodically often." (Pet. at 2, 5, 7, 13, 15, 24.)

The Association makes the loudspeaker available for approximately seven-to-eight minutes per school for halftime performances. (Pet.App.47a, 102a, 108a–109a.) Participants, including CCS's cheer coach, understand the need to keep performances "G-rated," so although the Association has intervened to prevent inappropriate music from being played over the loudspeaker at other times, it has not had to so at halftime. (Pet.App.47a, 75a.) There is no evidence any school has used the loudspeaker at halftime to convey religious, political, or other messages that do not conform to traditional halftime performances. (Pet.App.75a.)

4. In 2012, University Christian School ("**UCS**") played Dade Christian in the Class 2A final (the "**2012 Final**"). (Pet.App.8a.) The script for that game indicates the schools delivered a one-minute prayer over the loudspeaker between the Association's traditional sportsmanship announcement and presentation of scholar-athlete awards. (*Id.*; C.A.App.A4195.) It is unclear how the prayer came to be added to the script. (Pet.App.8a.) This is the only example of any private speaker or school representative delivering any kind of pregame message at a football final. (Pet.App.9a.)

5. The subject of this lawsuit is the Class 2A final between CCS and UCS played on Friday, December 4, 2015 (the "**2015 Final**"). On Tuesday, December 1, the Association held a pregame planning call with CCS and UCS, and UCS asked for permission to pray over the loudspeaker again. (Pet.App.10a.) The Association declined to grant the schools special access to the loudspeaker but said they could pray together on the field. (Pet.App.11a.) The next day, CCS emailed to join UCS's request for access to the loudspeaker for the schools to "honor their Lord." (*Id.*) An hour later, the Association's Executive Director, Roger Dearing, a

non-lawyer, responded that he believed granting the request would subject the Association to "tremendous legal entanglements" and reiterated the denial. (*Id.*)

UCS's head of school responded later that night thanking Dearing for his consideration and stating that "[t]he last thing either of our schools wish to do is bring a violation to the FHSAA." (C.A.App.A4168.) He stated that although he "[did] not like the decision," he "under[stood] it, respect[ed] it, and appreciate[ed] the timely communication." (C.A.App.A4167.)

UCS and CCS prayed together on the field before and after their game but did not pray over the loudspeaker. (Pet.App.11a.) The following Monday, Dearing emailed UCS and CCS elaborating on his decision. (Pet.App.200a–201a.) He explained that, in his view, the Association "was not legally permitted under the circumstances" to grant UCS's request, referencing this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). (*Id.*)

6. Effective July 1, 2023, the Florida Legislature created a statutory right for "each school participating in a high school championship contest . . . to make brief opening remarks . . . using the public address system." Ch. 2023-97, Laws of Fla. § 6 (codified at Fla. Stat. § 1006.185). Each school gets up to two minutes, and the Association "may not control, monitor, or review the [remarks'] content." *Id.* Section 1006.185 was enacted to address the issues raised in this lawsuit.[4]

The Association adopted an administrative policy to comply with section 1006.185 after its enactment.

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[4] *See* Fla. H.R. Comm. on Educ. & Emp't, Subcomm. on Educ. Quality, HB 225 (2023) Post Meeting Analysis 8–11 (May 18, 2023), https//www.flsenate.gov/Sesssion/Bill/2023/225/Analyses/ho225z1.EGQ.PDF [https://perma.cc/9UT2-79FX].

(C.A. Doc. 77.) The Association believes the Establishment Clause permits use of the loudspeaker for prayer under section 1006.185 for at least two reasons.

First, section 1006.185 transformed what, in 2015, would have been a special privilege that had never been granted for anything other than prayer into a right available to every participant in FHSAA championships. (*See* C.A. Doc. 86 at 7–9.) As this Court has instructed, allowing religious observers to participate in neutral government programs does not offend the Establishment Clause. (*Id.* at 2 (citing *Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 474 (2020)).)

Second, by prohibiting the Association from controlling the content of the opening remarks, section 1006.185 eliminates one of the primary factors that made speech over the loudspeaker government speech rather than private speech. (*Id.* at 9–10.) Thus, what would have been *government* speech restrained by the Establishment Clause in 2015 is now *private* speech protected by the Free Exercise Clause. (*Id.*)

For these reasons, the Association has faithfully complied with section 1006.185 and does not consider doing so inconsistent with its actions in 2015. (*Id.*; *see also* Pet.App.28a.)

II. Proceedings Below

1. CCS sued the Association in 2016, asserting violations of the Free Speech and Free Exercise Clauses of the Florida and federal Constitutions and Florida's Religious Freedom Restoration Act. (Pet.App.13a.) CCS also sought declaratory relief under the Florida and federal Establishment Clauses. (*Id.*)

The district court dismissed for failure to state a claim, finding, *inter alia*, that the speech at issue was

government speech. (Pet.App.96a–97a.) The Eleventh Circuit reversed in part, holding that CCS had plausibly alleged violations of the Free Speech and Free Exercise Clauses. (Pet.App.97a.) The court perceived "too many open factual questions" to resolve the "fact-intensive" government-speech inquiry on the pleadings. (*Id.*) The court proceeded to carefully delineate facts CCS could plausibly develop to prove that the speech at issue was private. (Pet.App.113a–127a.)

On the *history* factor, the court explained that the allegation that UCS prayed before the 2012 Final supported an inference that the Association "allowed the dissemination of prayer over the loudspeaker in the past." (Pet.App.118a.) The court also gave weight to prayers that allegedly took place at CCS's homefield during the playoffs, though it questioned how closely the Association monitored those games.[5] (*Id.*)

The court believed the *endorsement* factor weighed in favor of government speech but explained that this might change when more was known about the kinds of promotional messages read over the loudspeaker.[6] (Pet.App.120a–123a.)

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[5] Evidence later showed that the 2012 Final was the only time a private speaker delivered any kind of pregame message over the loudspeaker at any FHSAA championship final. (Pet.App.37a.) In addition, there was "no evidence that the FHSAA actively monitored [semifinal] playoff games or even knew that prayer was taking place at them." (Pet.App.38a.)

[6] The district court and Eleventh Circuit ultimately determined that promotional messages read over the loudspeaker did not weigh heavily in CCS's favor because the Association approved every word of the promotional messages, and the pregame messages were "closer to the recognition of official partners than . . . 'purely private advertising.'" (Pet.App.38a–39a, 43a.)

Finally, the court deemed the *control* factor inconclusive because it was unknown whether the Association permitted people other than the PA announcer to speak over the loudspeaker. (Pet.App.124a.) The court was also interested in the reference in the FHSAA's Administrative Procedures to "[m]essages provided by host school management" and whether the announcer would "read *any* statement provided by a host school." (Pet.App.125a.) And the court "[did] not know if any limits were in place" on halftime performances and wondered whether schools "play[ed] songs with . . . religious or political messages." (Pet.App.125a–126a.) Answering these questions in the affirmative could plausibly tip the control factor in CCS's favor.[7] (*Id.*)

Applying the government-speech framework, the Eleventh Circuit thus held that CCS plausibly alleged that the speech at issue was private and provided examples of facts CCS could develop that would support an ultimate finding of private speech.

2. On remand, the parties conducted discovery, including production of more than six thousand pages of PA scripts from every FHSAA sport over more than a decade. (C.A.App.A4277.) With all the evidence in, the district court granted summary judgment to the Association, ruling that each relevant factor strongly supported a finding of government speech. (Pet.App.68a.)

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[7] The answer to all of these questions turned out to be *no*. No one other than the PA announcer spoke over the loudspeaker at 2015 Final or gave introductory remarks at any football final besides the 2012 Final. (Pet.App.37a, 46a.) There were no host-school messages at finals since schools did not host them. (Pet.App.6a, 76a.) And there is no evidence any school used the loudspeaker at halftime to play songs with political or religious messages—to the contrary, CCS's own cheerleading coach said she stuck to a standard list of songs published by the National Cheerleaders Association. (Pet.App.47a, 75a; C.A.App.A2677.)

The district court also determined that, even if the speech at issue were private, CCS's claims would still fail because (1) the Association engaged in reasonable content-based regulation of speech in a nonpublic forum (Pet.App.80a–87a), and (2) CCS itself testified that deferring to the host's tradition and not praying over the loudspeaker before football games away from its home stadium did not burden its religious beliefs. (Pet.App.87a–93a.)

3. CCS appealed, and the Eleventh Circuit reversed in part and affirmed in part.

The court reversed on CCS's claims for prospective relief, holding that these claims had to be dismissed for lack of standing. (Pet.App.23a.) The court also held that the case was not fully moot because CCS still had a retrospective claim for nominal damages to redress the alleged injury it suffered in 2015. (Pet.App.29a.) In making this holding, the court ruled that, in First Amendment cases, nominal damages are essentially automatic even if they are not requested until after judgment has been entered and the case is on appeal, and even if the plaintiff expressly stated it is not claiming "monetary damages." (Pet.App.30a–32a.)

The court affirmed summary judgment to the Association on CCS's retrospective First Amendment claims, agreeing with the district court that each relevant factor strongly supported a finding of government speech. (Pet.App.36a.) Because neither the Free Speech nor Free Exercise Clause applies to government speech, the court did not need to review the district court's ruling that CCS's claims failed even if the those provisions applied. (Pet.App.50a.)

CCS sought rehearing, which the Eleventh Circuit denied, and then filed the instant petition.

REASONS FOR DENYING THE PETITION

The petition should be denied for at least four reasons. *First*, CCS asserts, at most, a misapplication of a properly stated rule of law, not a real conflict. (*See* Part I, *infra*.) *Second*, the questions CCS asks the Court to answer were neither raised nor ruled on below. They would have no impact on the Eleventh Circuit's decision. (*See* Part II, *infra*.) *Third*, the case is at least partially—and perhaps entirely—moot, which presents additional vehicle problems and further undermines the need for Supreme Court review. (*See* Part III, *infra*.) *Finally*, CCS's claim that the Eleventh Circuit's approach is unduly slanted in the government's favor and portends dark days for religious freedom is unpersuasive. Courts in the Eleventh Circuit come out on both sides of the government-speech inquiry, and CCS's own counsel has recognized that there is no state where religious freedom is better protected than Florida. (*See* Part IV, *infra*.)

I. There is no conflict.

In 2022, this Court re-affirmed the framework for identifying government speech that the Eleventh Circuit used here. *See Shurtleff*, 596 U.S. at 252. Specifically, the Court said it uses a "holistic inquiry" driven by "context rather than the rote application of rigid factors" to "determine whether the government intends to speak for itself or to regulate private expression." *Id.* The Court identified three "types of evidence to guide the analysis":

> 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.

Id. (citing *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 209–14 (2015)).

Below, the Eleventh Circuit relied on *Shurtleff* and applied the exact same legal framework:

> Whether speech is government speech is inevitably a context specific inquiry. There is no precise test for determining whether speech is government or private speech, 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."

(Pet.App.34a (some quotation marks omitted) (quoting *Shurtleff*, 596 U.S. at 252).) Echoing *Shurtleff*, the court noted that these factors "are not exhaustive and may not all be relevant in every case" and that "the government speech analysis [is] a 'holistic inquiry' that is 'driven by a case's context rather than the rote application of rigid factors.'" (Pet.App.35a (quoting *Shurtleff*, 596 U.S. at 252).)

Unsurprisingly, each of the cases CCS uses to try to show a conflict applies the exact same standards. *See, e.g.*, *Brown v. Yost*, 133 F.4th 725, 734 (6th Cir. 2025) (quoting *Shurtleff*, 596 U.S. at 252); *Book People, Inc. v. Wong*, 91 F.4th 318, 336–37 (5th Cir. 2024) (same); *Cajune v. Indep. Sch. Dist. 194*, 105 F.4th 1070, 1079 (8th Cir. 2024) (same). This makes clear that a true conflict does not exist and that CCS is asserting, at most, "misapplication of a properly stated

rule of law"—an error that rarely justifies this Court's intervention.[8] Sup. Ct. R. 10.

Try as it might, CCS cannot seriously dispute that the Eleventh Circuit "applied all the correct legal standards"—it lifted those standards directly from this Court's last pronouncement. *Taylor v. Riojas*, 592 U.S. 7, 11 (2020) (Alito, J., concurring in the judgment). CCS "simply disagrees with the [Eleventh] Circuit's application of those tests to the facts in a particular record." *Id.* The claimed error "turns entirely on an interpretation of the record in one particular case"—"a quintessential example" of the kind of issue this Court "almost never review[s]." *Id.* Because this case involves nothing more that "the factbound application of uncontested . . . precedents," review should be denied. *Stanley v. City of Sanford, Fla.*, 145 S. Ct. 2058, 2075 (2025) (Thomas, J., concurring in part).

Whether CCS's cases even present conflicting applications of *Shurtleff* is itself doubtful. All three are easily reconcilable on their facts.

- ***Cajune v. Indep. Sch. Dist. 194***

CCS spends most of its time on *Cajune* but fails to identify a conflicting application (much less holding). For example, CCS says *Cajune* conflicts in its analysis of the history factor because it recognized that:

(1) "*Shurtleff* requires paramount attention to 'specific history,'"

(2) "'a mirror image historical analogy is not required,'" and

[8] The Association also observes that the conflicts CCS attempts to show do not match the "questions presented" asserted in the petition. (*Compare* Pet. at *i–ii with id.* at 29–33.) If any conflict exists, it is not on the questions CCS asks the Court to answer.

(3) "a single instance of private speech [is] sufficient to weigh[ ] in favor of the plaintiffs."

(Pet.App.30a (quoting *Cajune*, 105 F.4th at 1079–80).)

Point (1) is, surprisingly, the opposite of what CCS argued to the Eleventh Circuit. Specifically, after the Association cited *Shurtleff* to support a focus on specific history,[9] CCS protested, urging the court to "examine[ ] the 'general history'" and insisting there was "no . . . reason to limit the scope of inquiry."[10] Consistent with this wide-ranging approach, CCS pressed the court to consider not only speech over a loudspeaker at every point of the game and at other events, but also entirely different kinds of speech, like social media posts.[11] But, just as the Eighth Circuit (in CCS's words) gave "paramount attention to 'specific history,'" (Pet. at 30), so too did the Eleventh Circuit, relying on *Shurtleff*, "focus" "primarily" on the specific kind of speech CCS wanted to participate in—"pregame speech over the PA system at FHSAA football championship games." (Pet.App.35a.) There is no conflicting application on point (1).

Similarly, on point (2), neither the Eighth nor the Eleventh Circuit required a "mirror image." Despite focusing on specific history, the Eleventh Circuit did not ignore other history, pointing out that, "[e]ven looking at PA speech at *all* playoff games for *all* FHSAA sports, as [CCS] would have us do," its decision would be the same. (Pet.App37a.)

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[9] C.A. FHSAA Br. at 21.

[10] C.A. CCS Reply Br. at 11.

[11] C.A. CCS Br. at 17–18 (Twitter and Facebook posts), 28–29 (post-game interviews), 29–30 (fan signs and banners); *see also, e.g.*, Pet. at 2, 5, 13 (referencing "welcoming remarks" given at weightlifting meets).

Finally, on point (3), it is unclear where the Eighth Circuit said what CCS claims, but, even if *Cajune* found a single instance of private speech sufficient to weigh in the plaintiffs' favor *at the pleading stage*, so, too, did the Eleventh Circuit *at the pleading stage*. (*See* Pet.App.118a.) It was only on summary judgment, which *Cajune* did not reach, that the Eleventh Circuit deemed one instance of private speech in more than a decade's worth of championship games insufficient to tip the history factor in CCS's favor.

On endorsement, CCS faults the Eleventh Circuit for considering the Association's "final approval authority" (Pet. at 31), but the court did so when assessing *control*, not *endorsement*. (*See* Pet.App.49a (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).) Approval authority is clearly relevant to control, *Summum*, 555 U.S. at 473; *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005), though the Association had more than approval authority here—it created most of the scripts on its own and incorporated sponsors' messages only after they entered into approved agreements and paid fees. (Pet.App.49a.)

Finally, on control, CCS says *Cajune* conflicts because it found that the government's "passive" role negated meaningful control. (Pet. at 31.) But the *Cajune* court was describing the government as "passive" in the *entire* eight-poster "Inclusive Poster Series." 105 F.4th at 1081–82. In the entire program, the district's "sole involvement" was to change a blonde girl to a blonde boy. *Id.* at 1082. Here, by contrast, the Association writes the majority of the speech in hundreds of scripts and merely incorporates elements (*i.e.*, sponsor messages) created by pre-screened private parties. No similar facts were present in *Cajune*, and this is enough to explain the courts' differing conclusions.

- ***Book People Inc. v. Wong***

CCS spends less time on *Book People*. CCS again attempts to conjure a conflict from the emphasis on *specific* over *general* history (Pet. at 32), but, as shown above, the Eleventh Circuit also focused on specific history (over CCS's objection). CCS also briefly tries to find a conflict on endorsement, but the kinds of speech at issue are so plainly distinct that the effort falls flat. (*Id.*) The Fifth Circuit's analysis of vendor book ratings posted on a government website simply sheds no light on how it would assess the public's perception of oral statements over a loudspeaker at a football game.

- ***Brown v. Yost***

CCS devotes three sentences to *Brown*, claiming it conflicts because it found a disclaimer effective to negate a perceived link between the speech at issue and the government. (Pet. at 33.) But the speech in *Brown* was a summary of a proposed constitutional amendment to be shown on a petition, and the Sixth Circuit's analysis was driven primarily by that context: "The public is not likely to conclude that the summary on a petition seeking legal change can be attributed to the government." 133 F.4th at 735. The context here is plainly different, so, again, factual differences account for the different outcomes.

* * *

CCS asserts what is, at worst, a misapplication of a properly stated rule of law. This kind of error does not justify Supreme Court review, so the petition should be denied. *See* Sup. Ct. R. 10.

II. CCS's questions presented were not raised by any party or ruled on by any court.

The straightforward questions presented by this case are whether the Eleventh Circuit correctly ruled that it had jurisdiction and, having done so, whether it correctly applied the settled framework for government speech to the summary-judgment record before it. (*See ante* at *i*.) But CCS knows it is unlikely to earn a writ certiorari on these questions, *see Taylor*, 592 U.S. at 11 (Alito, J., concurring in the judgment), so it concocts alternative questions it considers more worthy of the Court's attention. The problem is neither of the questions CCS proposes had anything to do with the decision below, so they are not properly before the Court, and this case is not a suitable vehicle to answer them. This is "a court of review, not of first view" *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

A. Question 1: Does *Santa Fe* "compel" a finding of government speech here?

CCS first asks the Court to decide whether *Santa Fe* "compels a finding of government speech" here and should, for that reason, be overruled. (Pet. at *i–ii*.) However, the Association never argued (and no court ever decided) that *Santa Fe* controls the outcome of this case. Unsurprisingly, the Eleventh Circuit cited *Santa Fe* only twice in its legal analysis, and neither citation indicates *Santa Fe* is controlling.

The court first cited *Santa Fe* to support its decision to focus "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." (Pet.App.35a.) The court observed that, in *Santa Fe*, this Court "focus[ed] its analysis on speech during the pregame ceremony."

(*Id.*) Ironically, CCS now faults the Eleventh Circuit for failing to give "paramount attention" to specific history (despite telling it do the opposite below) (Pet. at 30), so, although there are good reasons to overturn *Santa Fe* (*see* Br. of Fla. *et al.* as Amici Curiae in Supp. of Pet'r at 3–7), this is not one of them. Even if the Court did overturn *Santa Fe*, it would not be because *Santa Fe* focused too much on the pregame ceremony rather than halftime or on football rather than other sports. Overturning *Santa Fe* therefore would not alter this part of the Eleventh Circuit's opinion.

The Eleventh Circuit cited *Santa Fe* only once more, this time for the proposition that the Free Exercise clause does not apply to the government's own speech. (Pet.App.51a–52a.) This is another issue CCS does not challenge in its petition and on which there is widespread agreement. Again, there are reasons to overturn *Santa Fe*, but not on this issue or any other issue that affected the Eleventh Circuit's analysis.[12]

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[12] At first blush, it may seem that this case would at least be a suitable vehicle to consider whether granting UCS's request to access the loudspeaker at the 2015 Final would have violated the Establishment Clause, as Dearing feared. But it isn't. As the Association explained several times below, even if *contra Santa Fe* the Establishment Clause *permitted* the Association to grant UCS's request, that does not mean the Free Speech or Free Exercise Clauses *required* it. (*See, e.g.*, C.A. Doc. 86 at 10 n.31.) This is because the Association treated CCS *the same* as other speakers in denying special pregame access to the loudspeaker, not *worse*. In other words, the Association did not engage in viewpoint discrimination (Pet.App.85a, 141a), so it did not need to show a compelling justification for its decision, such as that the decision was required by the Establishment Clause. It had only to show that its decision was reasonable. (Pet.App.142a.) The only court to adjudicate this question found that the Association met this forgiving standard. (Pet.App.85a–87a.)

The Association emphasizes that, as a state actor that faces potential liability under the Establishment Clause, it fully supports overturning *Santa Fe* in an appropriate case. The State of Florida's brief compellingly demonstrates how this Court's evolving jurisprudence has undermined *Santa Fe*'s application of the Establishment Clause. (*See* Br. of Fla. *et al.* as Amici Curiae in Supp. of Pet'r at 3–7.) But those issues simply were not a factor in the Eleventh Circuit's opinion, so this case is not a proper vehicle for this Court to address them. *Stanley*, 145 S. Ct. at 2075 (Thomas, J., concurring in part) ("That no court has decided this question is reason enough for us to decline to do so.").

B. Question 2: Does the endorsement factor "resurrect" *Lemon*?

CCS's second question presented fares no better. For one thing, it is framed entirely in abstract terms and not "in relation to the circumstances of the case." Sup. Ct. R. 14.1(a). CCS does not even go so far as to say that, if the answer is *yes*, the Court should overturn *Shurtleff* and its forebearers and prohibit courts from considering endorsement when identifying government speech. Consequently, answering CCS's second question would not affect this case in any way.

Even re-writing question two to ask whether the endorsement factor should be discarded would not solve the problem. No party argued that, due to some amorphous connection to *Lemon*, endorsement is not

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Regardless, CCS did not ask the Court to consider whether granting it access to the loudspeaker at the 2015 Final would have violated the Establishment Clause, so the Court need not consider these issues. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition . . . will be considered . . . .").

a proper consideration when attempting to identify government speech, so this question, too, is not properly before the Court, and this case is not a suitable vehicle to consider it. On this basis alone, the petition should not be granted on question two, even if rewritten to bear a relation to the this case. *See Stanley*, 145 S. Ct. at 2075 (Thomas, J., concurring in part).

In addition, this case does not suitably frame an interrogation of the endorsement factor because both the district court and the Eleventh Circuit held that *every* relevant factor strongly supported a finding of government speech. (Pet.App.36a.) Therefore, even ignoring *endorsement* entirely, the Association would still prevail on *history* and *control*, and the result would be the same. If the Court wishes to scrutinize whether endorsement is a permissible consideration when identifying government speech, it should do so in a case where the endorsement factor makes a difference to the outcome.[13]

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[13] To briefly address the merits of CCS's "resurrection" question, apart from the fact that both use the term *endorsement*, it is unclear how the government-speech framework could operate to "resurrect" *Lemon*. True, under *Shurtleff*, endorsement is sometimes a factor, but it is only one factor of three (or more) and not the *sine qua non* that endorsement tended to be under *Lemon*. Even here, the Eleventh Circuit found in the first appeal that the speech at issue would be perceived as endorsed by the government but still held that CCS had plausibly alleged private speech in light of the other two factors. (*See* Pet.App.126a–127a.)

And, even if speech is found to be that of the government in part due to a perception of endorsement—and, thus, a proper subject for an Establishment Clause inquiry—the Establishment Clause inquiry would still have to be performed, and endorsement alone would not dictate the outcome as it may have done under *Lemon*. So, for example, a plaintiff may prove that the Bladensburg Cross is government speech in part because it is perceived as endorsed

III. This case is at least partially (and perhaps entirely) moot.

Apart from failing to identify a conflict or frame "questions presented" that were actually ruled on, the petition also ignores another significant vehicle problem—the possibility that the Court lacks jurisdiction. This is a threshold issue that the Court would have to adjudicate before it could consider any of the questions CCS raises in the petition. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023).

Here, jurisdiction hangs on the slender thread of a claim for nominal damages that CCS not only failed to mention at any point before judgment was entered, but also expressly disclaimed by telling the trial court "[n]either party claims monetary damages in this action." (C.A. Doc. 72-1 at 14.) This Court has held that

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by the government, but he still could not prove a violation of the Establishment Clause under this Court's precedents. *See generally Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29 (2019). The same is true of government-facilitated prayer, which may be seen as endorsed by the government yet still be permitted under the Establishment Clause if the prayers are non-coercive and consistent with the historical purposes of legislative prayers. *See, e.g.*, *id.* at 61; *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 582–83 (2014). The answer to CCS's second question thus appears to be *no*, but, again, this conclusion does not have any impact on the Eleventh Circuit's decision.

On a more basic level, while the problems with defining the scope of the Establishment Clause by reference to the reactions of hypothetical onlookers have become clear, it is less clear why a perception of endorsement would not be relevant to determining when the government is speaking. A basic purpose of communicating is to convey one's approval of the things being said. If the government's purported communication fails to do this, it makes sense to question whether the government is actually speaking.

nominal damages can satisfy the redressability element of Article III standing, *see Uzuegbunam v. Preczewski*, 592 U.S. 279, 292 (2021), but it has not held that a request for nominal damages can be automatically imputed to a plaintiff who has never mentioned them or that nominal damages can never be disclaimed or abandoned, *see id.* at 284 (noting that the plaintiffs "sought nominal damages").

The Eleventh Circuit previously appeared to hold that nominal damages *could* be waived:

> Several other courts, in a variety of cases, have held that a plaintiff may waive nominal damages. . . . We find these cases persuasive and conclude that the request for nominal damages is not automatic in an Eighth Amendment excessive force case. The plaintiff must seek such damages, and if he fails to do so, he waives entitlement to [them].

Oliver v. Falla, 258 F.3d 1277, 1281 (11th Cir. 2001). Here, however, the court held that a different rule applies to First Amendment cases and declined to read a disclaimer of "monetary damages" to disclaim "nominal damages" (notwithstanding that nominal damages, like all damages, are monetary). (Pet.App.32a.)

Apart from undermining the prospective impact review of this case might yield, these mootness issues mean that, if the Court were to grant the petition, it would have to carefully consider whether and how a party can waive nominal damages. This question is not purely academic. As THE CHIEF JUSTICE, Justice ALITO, and Justice KAVANAUGH have pointed out, a claim solely for nominal damages can be mooted by paying nominal damages. *See Uzuegbunam*, 592 U.S.

at 293–94 (Kavanaugh, J., concurring) (agreeing that, in a case for nominal damages "a defendant should be able to accept the entry of a judgment for nominal damage against it and thereby end the litigation without a resolution of the merits"); *Uzuegbunam*, 592 U.S. at 303 (Roberts, C.J., dissenting) ("Where a plaintiff asks only for a dollar, the defendant should be able to end the case by giving him a dollar . . . ."); *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 182–83 (2016) (Roberts, C.J., dissenting) ("If the defendant is willing to give the plaintiff everything he asks for, there is no case or controversy to adjudicate, and the lawsuit is moot."); *Campbell-Ewald*, 577 U.S. at 188 (Alito, J., dissenting) ("[A] defendant may extinguish a plaintiff's personal stake in pursuing a claim by offering complete relief on the claim, even if the plaintiff spurns the offer."). To give this principle teeth, the Court should require plaintiffs who want to keep a case alive purely on the basis of nominal damages to be upfront about it throughout the case.

Better still, if the Court wishes to address the First Amendment issues that are the petition's exclusive focus, it should do so in a case that is not compromised by this independent jurisdictional issue. Accepting this case could produce fractured holdings and split decisions on the jurisdictional and merits issues, which would make it difficult for lower courts to derive a clear holding on either front and ultimately create more confusion than clarity.[14]

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[14] The Association further notes that, even if the Court were to assure itself of jurisdiction and reverse on the issue of government-speech, CCS's claims would still fail under the Free Speech and Free Exercise Clauses. (*See* Pet.App.80a–93a.) This further counsels against the Court's intervention.

IV. CCS's doomsaying is unpersuasive.

This brief focuses on the reasons certiorari should not be granted rather than the merits of the Eleventh Circuit's opinion, which is thorough and capable of standing up to scrutiny on its own. In this section, the Association shows that, right or wrong, the Eleventh Circuit's decision is not having the disastrous effects CCS describes in the petition.

A. The Eleventh Circuit's approach does not invariably favor the government.

In attacking the Eleventh Circuit's ruling, CCS claims it "will nearly always result in a finding of government speech." (Pet. at 33.) Decisions by courts bound by the Eleventh Circuit's holdings show that this is not true. Indeed, a subsequent Eleventh Circuit panel only recently reversed a district court's finding that ballot questions on a Georgia primary ballot were government speech. *Catoosa Cnty. Republican Party v. Catoosa Cnty. Bd. of Elections & Voter Registration*, No. 24-12936, 2025 WL 1662455, at *1 (11th Cir. June 12, 2025). The panel, which was bound by the decisions below, found that *none* of the enumerated factors favored a finding of government speech, *id.* at *5, suggesting the finding here that *every* factor strongly supported the Association was not somehow preordained.

District courts in the Eleventh Circuit also regularly deem contested speech private using the same framework. In fact, the same district judge who decided this case later rejected a government-speech defense in *McGill v. MacFarlane*. 727 F. Supp. 3d 1268, 1284–85 (M.D. Fla. 2024) (Honeywell, J.) (denying summary judgment because the defendant failed to show certain speech at town council meetings was government speech). Similarly, in *PEN American Center,*

Inc. v. Escambia County School Board, the court stated it "[was] not persuaded that decisions regarding the content of school libraries is 'government speech,'" further demonstrating that the framework employed in the Eleventh Circuit does not invariably favor the government.[15] 711 F. Supp. 3d 1325, 1331 (N.D. Fla. 2024). And another judge in a similar case likewise rejected a government-speech defense, specifically recognizing that identifying government speech is a "difficult" and "'fact-intensive'" inquiry, not one that always has the same answer. *Parnell v. Sch. Bd. of Lake Cnty., Fla.*, 731 F. Supp. 3d 1298, 1314 (N.D. Fla. 2024) (quoting Pet.App.97a).

Even this case shows that the Eleventh Circuit's government-speech analysis is not one-sided. For one thing, in its first opinion, the court reversed dismissal of CCS's claims, holding that CCS plausibly alleged private speech. (Pet.App.126a–127a.) In doing so, the court described numerous facts that CCS could prove to establish private speech. For example, the court indicated that finding additional instances when the loudspeaker was used for prayer or by private speakers at events the FHSAA hosted would weigh in favor of private speech (Pet.App.118a–119a), but CCS found none (Pet.App.37a). Similarly, CCS could have helped itself by showing that schools used access to the

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[15] Notably, a seven-judge plurality of the Fifth Circuit reached the opposite conclusion in *Little v. Llano County*, 138 F.4th 834, 851–65 (5th Cir. 2025) (en banc), *petition for cert. filed*, No. 25-284 (Sept. 9, 2025). To the extent the Court wishes to reexamine its government-speech framework, the petition pending in *Little* offers a superior vehicle for doing so because it presents an acknowledged conflict between the Fifth and Eighth Circuits on an issue that will directly impact multiple ongoing disputes. *See* Pet. for a Writ of Certiorari at 27–33, *Little v. Llano County*, No. 25-284 (U.S. Sept. 9, 2025), 2025 WL 2632012, at *27–*33.

loudspeaker at halftime to transmit political or religious messages (Pet.App.125a–126a), but, again, the proof was not there (Pet.App.47a). Numerous other examples of facts CCS might have but ultimately failed to prove emerge from the Eleventh Circuit's opinions (*e.g.*, that the Association monitored playoff games CCS hosted, that the PA announcer would read any messages provided by host school management, that purely promotional sponsor messages were read during pregame, *etc.*). It is therefore entirely plausible that CCS could have won on government-speech—as other plaintiffs have—had the facts been different.

The main aspect of the Eleventh Circuit's framework that CCS says systematically favors the government is its focus on the specific speech at issue. (Pet. at 20 (referring to the "government-favoring bias inherent in artificially constricting the scope of inquiry").) But there is no reason that a narrower focus would always favor the government. It did so here, but in other cases it has had the opposite effect.

For example, in *Shurtleff*, the Court explained that, if it were "to consider only [the] *general* history" of flag raising, it would rule in the government's favor. 596 U.S. at 253 (emphasis added). It was only by "examin[ing] the details of *this* flag-flying program" that the Court determined that the speech at issue was private. *Id.* at 255. Similarly, in *Cajune*, the *general* history of posters on school walls favored the school district, but the "*specific* history" of the program the plaintiff wanted to participate in "[told] another story." 105 F.4th at 1079 (emphasis added). The defendant school district, just like CCS does here, "contend[ed] [that the court's] inquiry into specific history [was] too 'narrow'" and would "require courts to find a 'mirror image historical analogy,'" implicitly rejecting

CCS's view that a focus on the specific over the general always favors the government. *Id.* at 1080. These cases show that focusing on the specific speech at issue does not systematically favor either side of the government-speech analysis.[16] It is simply the proper way to implement an inquiry that is supposed to be "driven by a case's context." *Shurtleff*, 596 U.S. at 252.

One thing high school athletics teaches is that, after coming up short, the temptation to say the game was rigged or impossible is hard to resist. Here, CCS's insistence that, if its attempt to prove private speech failed every other plaintiff's will, too, sounds more like sour grapes than a fair reading of the Eleventh Circuit's opinion.

B. Religious freedom thrives in Florida.

Finally, CCS's suggestion that the decision below spells doom for religious freedom falls flat given its own counsel's recognition that "the Sunshine State is the national leader in protecting religious liberty."[17] This recognition is due in part to the Legislature's

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[16] An unduly broad focus would also have the undesirable effect of motivating state actors that wish to speak for themselves to stamp out as much private expression as possible, lest it be used against them to argue they have unwittingly created a forum for private speech. Here, for example, CCS attempted to use everything from halftime performances to fan-made signs to try to gain control of the loudspeaker during pregame. (*See* C.A. CCS Br. at 23–24, 29.) A state actor should not have to abolish every trace of private speech or religious expression from its venues to retain the ability to speak for itself, but that is what an overly broad scope of inquiry would require.

[17] Emma Sumlin, *Which States are the Best (and Worst) at Protecting Religious Liberty?*, FIRST LIBERTY INST. (July 18, 2025), https://firstliberty.org/news/which-states-are-the-best-and-worst-at-protecting-religious-liberty/ [https://perma.cc/3CJX-QUA9].

passage and Association's implementation of a statute creating a public right to make opening remarks—including prayers—at FHSAA championship games. *See* Fla. Stat. § 1006.185. The problem CCS brought this case to address has thus been solved in the Constitutionally preferred way—not through a uniform national policy handed down by a politically insulated Court, but through a local policy crafted by a responsive legislature and an energetic executive. *See, e.g.*, *Shurtleff*, 596 U.S. at 252 (explaining that the Constitution "relies first and foremost on the ballot box, not on rules against viewpoint discrimination, to check the government when it speaks"). Admittedly, there are times when courts have no choice but to intervene due to inert legislatures that would rather pass the buck than fulfill their essential role in the Constitutional order. But that is not the case in Florida.

Put simply, religious freedom is well protected in Florida and will continue to be protected regardless of the outcome of this purely retrospective lawsuit. The issues in this case are undoubtedly important in the abstract, but the case's outcome will not have any practical, forward-looking impact on the parties or the State of Florida. For these reasons, this should not be one of the vanishingly few cases without a direct conflict that the Court deems so urgent as to merit its third-level review.

CONCLUSION

The petition should be denied.

Respectfully submitted,

DANIEL MAHFOOD
Counsel of Record
HOLLAND & KNIGHT LLP
50 North Laura St., Ste. 3900

Jacksonville, Florida 32202
(904) 353-2000
daniel.mahfood@hklaw.com

JUDITH M. MERCIER
HOLLAND & KNIGHT LLP
200 S. Orange Ave., Ste. 2600
Orlando, Florida 32801

LEONARD E. IRELAND, JR.
CLAYTON-JOHNSTON P.A.
11129 NW 12th Place
Gainesville, Florida 32606

Counsel for Respondent, the Florida High School Athletic Association, Inc.

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