

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondent concedes that the “issues in this case are undoubtedly important” and does not defend the reasoning of the decision below, stating only that “whether this reasoning is right or wrong ... does not merit” certiorari. BIO.2, 31. Given those concessions, a summary reversal is, at the very least, warranted because the decision below exemplifies a “dangerous misuse” of the government-speech doctrine, *Matal v. Tam*, 582 U.S. 218, 235 (2017), and departs from this Court’s precedents in ways that split with other circuits, Pet.17-25, 29-33.

But the Court should go further and grant certiorari to address, in the context of religious speech, the interplay between the (i) demise of *Lemon*’s “endorsement test offshoot,” *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 534 (2022), and (ii) the government-speech doctrine, including whether *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000), has any continuing vitality in this regard. *See Shurtleff v. City of Boston*, 596 U.S. 243, 276, 284 (2022) (Gorsuch, J., concurring) (explaining that the “real problem” is not “the scope of the government speech doctrine” but that local officials keep “drag[ging] *Lemon* ... from its grave”). Even Respondent “fully supports overturning *Santa Fe*,” just in some theoretical future case. BIO.22. But this case took nearly a decade to reach this Court, and Respondent offers no valid reason to wait.

I. The Decision Below Is A Dangerous Expansion Of The Government-Speech Doctrine

1. The Eleventh Circuit offered a fulsome explanation of how, in its view, a prayer spoken over a loudspeaker

by two private Christian schools, at a stadium awash in private speech, nonetheless constitutes government speech—even under *Kennedy* and *Shurtleff*. Despite Respondent’s protestations, BIO.20, the questions presented flow directly from that consequential decision.

The first question is whether that conclusion transgresses this Court’s decisions in *Tam*, *Shurtleff*, and *Kennedy*—and, if so, whether the only decision that could support that conclusion, *Santa Fe*, should be overruled. Pet.26-27. Astonishingly, FHSAA now contends this case has nothing to do with *Santa Fe* and that it “never argued ... *Santa Fe* controls ... this case.” BIO.20. Yet *Santa Fe* defined this case from the outset:

- FHSAA cited *Santa Fe* as the *only* justification for its decision to ban loudspeaker prayer in 2015, Pet.9-10;
- the district court said *Santa Fe* answered “the same” question presented by this lawsuit, App.65a n.4;
- FHSAA in its appellate brief called *Santa Fe* “spot on” for the “same question” of “whether a pregame prayer broadcast over a PA system is government speech,” C.A. FHSAA Br.21; and
- the Eleventh Circuit viewed *Santa Fe* as defining the scope of the government-speech inquiry for loudspeaker prayer, App.35a.

Ten years later, and only when requested by this Court to respond to CCS’s Petition, FHSAA says it has seen the

light and calls for *Santa Fe*'s demise. But that concession now cannot erase that *Santa Fe* is the reason this case exists.

The second question is likewise squarely presented by the proceedings below. The Eleventh Circuit conducted a robust "endorsement inquiry" for religious speech. That analysis mirrored *Lemon*'s "endorsement test offshoot" that this Court in *Kennedy* said is inconsistent with free exercise. *Compare* App.44a n.10 ("the point of the endorsement inquiry ... is whether the *public* would consider the messages to be spoken or at least endorsed by the government"), *with Kennedy*, 597 U.S. at 534 (the *Lemon* "approach ... involve[d] estimations about whether a 'reasonable observer' would consider the government's challenged action an 'endorsement' of religion"). Merely relabeling the doctrine is surely not what this Court had in mind when it "abandoned *Lemon* and its endorsement test offshoot." *Kennedy*, 597 U.S. at 534.

Respondent claims CCS "does not actually ask the Court to discard the endorsement factor," BIO.3, but that is precisely what CCS asks in the context of determining whether religious speech spoken by a private actor is government speech, *see* Pet.18-19, 21-22, 34-36. There is simply no way to apply the "endorsement" factor in the context of religious speech without resurrecting *Lemon*'s "war[]" with free exercise. *Kennedy*, 597 U.S. at 533. *See Shurtleff*, 596 U.S. at 263 (Alito, J., concurring in judgment) (noting "[w]e did not set out a test to be used in all government-speech cases" and "courts must focus on the identity of the speaker.")).

2. FHSAA downplays the significance of the Eleventh Circuit's decision by presenting a different case than the one litigated below.

First, whereas FHSAA contends “there is no evidence that anyone had used the loudspeaker during the pregame of a final,” BIO.6-7, in its corporate deposition FHSAA conceded it “periodically often” “turn[ed] over the PA microphone to representatives of schools to offer welcoming remarks,” App.196a. Contrary to FHSAA’s brazen mischaracterization, that concession was not limited to “a public high school in Panama City Beach.” BIO.7 n.3. Instead, that example was used to ask how often such welcoming remarks were permitted generally, and FHSAA’s answer was unequivocal: “periodically often.”

Second, FHSAA contends 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.” BIO.8. But that ignores the undisputed record: the halftime loudspeaker was relinquished to schools for music and speech of the schools’ choosing (without FHSAA preclearance); sometimes the schools’ self-selected PA announcers would be “speaking” the “whole halftime”; as a matter of *policy* FHSAA would permit religious songs and messages at halftime; and FHSAA considered this halftime speech (on the same loudspeaker at the same game) to be private. Pet.6; C.A. App.11036.

Third, FHSAA downplays private advertisements over the loudspeaker as “paid” and “appropriate.” BIO.7. What FHSAA does not say, however, is that these promotions were its own speech. Nor could it, because FHSAA repeatedly conceded below that this “promotional” messaging was the sponsor’s, not the government’s. Pet.6.

Fourth, FHSAA states it “is unclear how the prayer came to be added to the script” for the 2012 championship

game. BIO.8. It is crystal clear: a school requested its inclusion, FHSAA leadership expressly approved it, and FHSAA inserted a prompt for the prayer into the PA script. Pet.7.

Fifth, FHSAA claims it did not know loudspeaker prayer occurred at playoff games. BIO.11 n.5. Yet FHSAA admits it “create[d] [the] scripts” and its “rules govern[ed]” the playoff loudspeaker. BIO.6. And it is undisputed FHSAA knew of and permitted loudspeaker prayer at playoff games after 2015. Pet.10.

In sum, FHSAA cannot credibly claim it permitted only government speech on the loudspeaker. The “answer” to the question of whether FHSAA “actively controlled” private speech on the loudspeaker “is not at all.” *Shurtleff*, 596 U.S. at 256.

3. FHSAA recasts CCS’s Petition as arguing that the Eleventh Circuit applied the correct “framework” incorrectly. BIO.15-16. That is not what CCS argues or what the Eleventh Circuit did. Instead, the Eleventh Circuit transformed the government-speech inquiry into one the government will rarely lose, and in so doing set a dangerous precedent enabling future suppression of religious speech.

Take, for example, the Eleventh Circuit’s pronouncement that the scope of the government-speech inquiry focuses on the precise moment the private actor sought to speak. App.35a. That is not an application of “the correct legal standards.” BIO.16. It is a doctrinal change that contravenes this Court’s teachings. Pet.19-20.

The same is true for the Eleventh Circuit’s view of the endorsement factor. That court now holds, as a matter of law, that the identity of the speaker and a disclaimer cannot “tip[] the scales away from government endorsement.” App.42a. But this Court has held precisely the opposite. Pet.21. *See also Shurtleff*, 596 U.S. at 263 (Alito, J., concurring in judgment) (“courts must focus on the identity of the speaker”). Again, this is not an example of “factbound application of uncontested ... precedents.” BIO.16. It is the Eleventh Circuit *ignoring* this Court’s precedents to create a different, government-speech favoring test.

4. From the outset of this dispute, and through a decade of litigation, FHSAA vigorously defended its prayer ban—first under its view of the Establishment Clause and then, when that became legally untenable, under its repackaged but identical-in-theory government-speech defense. Along the way, FHSAA’s hostility to religious speech was palpable, Pet.10, and it refused to adopt a “local policy,” BIO.31, that would respect schools’ free-exercise and free-speech rights. Even now, FHSAA cannot resist belittling CCS’s lawsuit as “sour grapes” and a failure to understand what “high school athletics teaches.” BIO.30. So one can be forgiven for viewing with a jaundiced eye FHSAA’s sudden recoiling from *Santa Fe* and its newfound embrace of religious liberty.

But even putting that aside, there is little force to FHSAA’s minimization of the significance of the Eleventh Circuit’s decision. BIO.30-31. First, it took a statutory enactment to countermand FHSAA’s prayer ban precisely because FHSAA officials refused to relent even after *Kennedy* and a host of other cases eviscerated their

supposed Establishment Clause fears. That sequence highlights how bureaucrats hostile to religion will find reasons to discriminate, and why the government-speech doctrine cannot be calibrated to help them do so. *See Shurtleff*, 596 U.S. at 276-88 (Gorsuch, J., concurring). Second, the doctrinal points in the Eleventh Circuit’s decision extend far beyond stadium loudspeakers (and Florida), threatening the free-speech and free-exercise rights of religious actors across contexts and throughout the circuit.¹

II. The Circuit Split Is Not Resolved By FHSA’s Misrepresentations

The government-favoring, post-*Shurtleff* decision below splits doctrinally with the private-speech favoring, post-*Shurtleff* decisions of the Fifth, Sixth, and Eighth Circuits. Pet.30-33. Respondent fails to reconcile these approaches.

1. The Eleventh Circuit’s treatment of the endorsement factor is incompatible with the approach of the Fifth and Sixth Circuits. They hold that the ability to “see” the speaker is private, or a disclaimer, means the public will not attribute the speech to the government. *Book People, Inc. v. Wong*, 91 F.4th 318, 337 (5th Cir. 2024); *Brown v. Yost*, 133 F.4th 725, 735 (6th Cir. 2025). The Eleventh Circuit deems these facts legally inconsequential. App. 41a-42a.

1. Respondent suggests the petition in *Little v. Llano County*, No. 25-284 (U.S. Sept. 9, 2025) presents a “superior vehicle” if the Court “wishes to reexamine its government-speech framework.” BIO.28 n.15. But that petition does not mention *Santa Fe* or *Kennedy* and presents no opportunity for this Court to address whether *Lemon* survives under the guise of government speech.

Respondent effectively concedes the doctrinal difference, claiming only that the “plainly distinct” Fifth Circuit facts, and “plainly different” Sixth Circuit facts, render the split acceptable. BIO.19. But, of course, the Fifth and Sixth Circuit cases are themselves factually different and yet apply the same rule of law. The split is based on doctrine, not facts. The Fifth and Sixth Circuits are faithful to this Court’s cases holding that identity of the speaker matters for endorsement. Pet.21. The Eleventh Circuit is not.

This split is especially meaningful in the context of religious speech, where the government’s ability to claim the speech as its own—and therefore censor it—has serious implications for free exercise. Hence, the second question presented in the Petition is one this Court should resolve immediately.

2. There also exists an important circuit split on the legal import of mere approval authority, which is always present when the government owns or operates the speech platform. The Eighth Circuit, faithfully applying *Tam*, holds that mere approval authority is insufficient to transform private speech into government speech, whether considered under the endorsement or control factor. *See Cajune v. Independent School District 194*, 105 F.4th 1070, 1081-82 (8th Cir. 2024) (citing *Tam*, 582 U.S. at 235). The Eleventh Circuit, conversely, holds that even unexercised approval authority is significant under both factors. App.44a, 48a-49a.

FHSAA’s main rejoinder is to claim the Eleventh Circuit did not consider approval authority as part of the endorsement analysis. BIO.18. That is wrong, *see*

App.44a (focusing on what “FHSAA ... would ... allow” on the loudspeaker), but also inconsequential because the issue nonetheless features prominently in the decision below, App.48a-49a, and the government-speech inquiry is “holistic,” not a “rote application of rigid factors,” *Shurtleff*, 596 U.S. at 252.

FHSAA’s only other response is to say “the majority of the speech” over the loudspeaker is government created. BIO.18. But the issue is whether the speech created by private actors is nonetheless government speech because of the government’s ultimate approval authority. The Eleventh Circuit, analyzing *only* that privately created speech, says yes, whereas the Eighth Circuit and this Court say no. The split on this point of law is reinforced by the Eleventh Circuit’s decision in *McGriff v. City of Miami Beach*, 84 F.4th 1330 (11th Cir. 2023), which, like *Cajune*, concerned art installations in a government space. There, too, the Eleventh Circuit treated approval authority as significant, *id.* at 1334, splitting from the Eighth Circuit’s factually similar case. Tellingly, Respondent fails to mention *McGriff*.

3. Finally, the decision below elevated the general history of the speech platform (i.e., the Eleventh Circuit’s understanding of stadium loudspeakers generally) over the specific history of the particular platform at issue (i.e., the loudspeaker at FHSAA events). App.36a. That approach departs not only from *Shurtleff*, 596 U.S. at 253-55, but also from the Eighth and Fifth Circuits in post-*Shurtleff* cases, see *Cajune*, 105 F.4th at 1079-80 (assigning primary importance to the “specific history” of the program at issue); *Book People*, 91 F.4th at 337 (focusing on the history of specific “media ratings” at issue

and the “important ways” in which they were different from general history). Respondent claims the Eleventh Circuit did consider “pregame speech over the PA system at FHSAA football championship games.” BIO.17. But that carefully constructed formulation (pregame only, football only, championships only) is just another way of saying the court ignored most of the specific history regarding the FHSAA’s loudspeaker (full game, other sports, playoffs).² Pointing out the Eleventh Circuit’s blinders does not resolve the split; it reinforces it.

III. This Case Is An Excellent Vehicle to Resolve These Important Questions

Having conceded the importance of the issues presented by this case, and that *Santa Fe* should be overruled, Respondent is left to argue this Court may “lack[] jurisdiction” because CCS’s nominal-damages claim is a “slender thread.” BIO.24. But this Court has firmly established that even if claims for prospective relief drop from a case, a nominal-damages claim avoids mootness. *See Uzuegbunam v. Preczewski*, 592 U.S. 279 (2021). CCS pleaded damages claims. C.A. App.219, 221, 225. The parties cross moved for summary judgment on *those claims*, *id.* at 2631, 4271, and this is an appeal of the resulting summary-judgment decision on *those claims*, *id.* at 13498-99. Thus, there is no “threshold issue that the Court would have to adjudicate.” BIO.24.

2. Despite Respondents’ misleading description, BIO.17, this was the point CCS made in its reply brief below, C.A. CCS Reply Br.10-11.

FHSAA briefly argues that, in the pretrial statement, CCS waived entitlement to nominal damages. BIO.25. The Eleventh Circuit easily and correctly rejected this argument. App.30a-32a. First, in the Middle District of Florida, a pretrial statement “govern[s] ... trial” only, M.D. Fla. R. 3.06(b), and is binding only after the pretrial conference, *Misabec Mercantile, Inc. de Panama v. Donaldson, Lufkin & Jenrette ACLI Futures, Inc.*, 853 F.2d 834, 840 (11th Cir. 1988) (pretrial stipulation did not govern because summary judgment entered before trial).³ No pretrial conference occurred here. C.A. App.19 (Doc. 163). Instead, as noted, it is the summary judgment order under review, and FHSAA moved for summary judgment on CCS’s damages claims without asserting waiver. C.A. App.2598-2631. Respondent thus cannot raise waiver now. *United States v. Morgan*, 384 F.3d 439, 443 (7th Cir. 2004) (“A waiver argument, after all, can be waived”). Second, even if the pretrial statement had become effective, it is, again, a vehicle to “govern the trial”—i.e., the presentation of evidence and resolution of disputed facts. *See* Fed. R. Civ. P. 16(e) (the “trial plan ... facilitate[s] the admission of evidence”). Unsurprisingly, the pretrial statement indicated neither party intended to present evidence concerning “monetary damages” because nominal damages require no proof once liability is found. They are “awarded by default,” “as a matter of law.” *Uzuegbunam*, 592 U.S. at 290.⁴

3. *See also Tate v. Potter*, 2008 WL 11400757, at *5 (S.D. Fla. Mar. 25, 2008) (“parties only become bound by ... pretrial stipulation after the pretrial conference”).

4. *Oliver v. Falla* (cited at BIO.25) held only that failure to request a nominal-damages *jury* instruction waives entitlement.

Finally, FHSAA complains that “had CCS disclosed that it was seeking only nominal damages, the Association could have ended the case by paying nominal damages.” BIO.4. But FHSAA could not have “ended the case” by doing so because, throughout the district court proceedings, CCS’s claims for prospective relief were live. And, in any event, FHSAA was on notice of CCS’s damages claims from day one and had every opportunity to take discovery on their scope. Yet FHSAA *never* offered to pay, or paid, nominal damages. Instead, FHSAA vigorously litigated the case in the district court for six years, through an initial appeal, discovery, and summary judgment. FHSAA had its reasons for doing so, but one of them surely was the risk of significant attorneys’ fees that would accompany “accept[ing] the entry of a judgment for nominal damage[s] against it.” BIO.26 (quoting *Uzuegbunam*, 592 U.S. at 293-94 (Kavanaugh, J., concurring)). See *Lackey v. Stinnie*, 604 U.S. 192, 202 (2025) (“a plaintiff may qualify as a ‘prevailing party’” [under 42 U.S.C. § 1988(b)] based on an award of nominal damages”) (citing *Farrar v. Hobby*, 506 U.S. 103, 112, 113 (1992)).

258 F.3d 1277, 1280-82 (11th Cir. 2001). *Oliver* is “not applicable” where the “complaint ... requested monetary damages” and the case “never went to trial” once the court “granted summary judgment.” *Virdi v. Dekalb County School District*, 216 F. App’x 867, 873 (11th Cir. 2007). See also *Keybank Nat’l Ass’n v. Fairpoint, LLC*, 2008 WL 4613648, at *3 (N.D. Ga. Oct. 14, 2008) (the “Eleventh Circuit has limited *Oliver* to cases that actually go to trial”).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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