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

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans*, 576 U.S. 200 (2015). ACLJ attorneys regularly litigate in the area of free speech, including the scope of government speech. *E.g.*, *Pleasant Grove*; *Lamb's Chapel*; *Walker*.

SUMMARY OF ARGUMENT

This amicus brief makes two main points: (1) this Court needs to clarify that the proper application of the government vs. private speech doctrine must *analyze the particular components* of the activity or medium, rather than attempt to slap a single label over the entire package, and (2) exclusion of a particular message *because it is religious* is classic viewpoint discrimination.

1. Identifying speech as governmental or private can be obvious, but in some cases drawing the

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[1]Counsel of record for the parties received timely notice of the intent to file this brief, S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amicus or counsel for amicus made a monetary contribution intended to fund the preparation or submission of this brief.

distinction can seem daunting. When a particular instance of expression emerges from a mix of both government and private input – e.g., guest speakers at a government conference, or student expression at a public school event – proper analysis requires the Court *to analyze separately and precisely the component parts* of the activity in question, rather than attempt to attach a blanket label to the entire activity or medium, or some subpart thereof. The lower court here failed to embrace and apply the necessary close analysis. This error illustrates the need for this Court to step in and clarify the governing constitutional principles.

2. Viewpoint discrimination is generally the worst form of censorship under the First Amendment. Censorship of religious speech, precisely *because it is religious,* is unconstitutional viewpoint discrimination even in a nonpublic forum.

ARGUMENT

The speech to which FHSAA objects is the private, constitutionally protected speech of the petitioner school, not the government speech of the state. Moreover, the exclusion of prayer, *because it is prayer,* is classic viewpoint discrimination. That the court below got these fundamental matters wrong, while claiming to follow this Court's teachings, illustrates the need for this Court's review.

I. THE COURT BELOW FAILED TO USE THE CORRECT CONSTITUTIONAL ANALYSIS OF THE DISTINCTION BETWEEN PRIVATE SPEECH AND GOVERNMENT SPEECH.

A private entity's proposed prayer is obviously private speech. Where the government categorically bars such speech from access to a medium (here, a PA system), while by policy and practice conveying other private messages, the selective denial triggers First Amendment scrutiny. By contrast, where the government, unlike here, exerts monopoly control over the medium or activity in question, no First Amendment issue arises because the speech in question is "government speech."

A. The Distinction Between Government Speech and Private Speech is Crucial.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Hence, the classification of speech as "government" or "private" can be, and often is, decisive of a First Amendment claim. But while "[t]he line between a forum for private expression and the government's own speech is important," that line is "not always clear." *Shurtleff v. City of Boston*, 596 U.S. 243, 248 (2022). It is vital, therefore, that the distinction between the two categories of speech be drawn carefully.

This Court has explained that "we conduct a holistic inquiry designed to determine whether the government intends to *speak* for itself or to *regulate* private expression." *Id.* at 252 (emphasis added). The

relevant government *intent,* however, must be examined with appropriate specificity, not at some 30,000-foot level of generality. Thus, where, as in this case, the medium at issue (the PA system) features a mix of private and government messages, proper constitutional analysis *must* focus upon the particular, specific components of the activity or program at issue. Otherwise, the analysis would risk erroneously lumping government and private speech together under one, ill-fitting, blanket label.

B. To Draw the Line between Government Speech and Private Speech, a Court Must Analyze the Component Parts Separately.

Proper analysis of whether speech is government or private in nature requires a court to look, not at the activity, program, or medium as a whole, but rather at the particular aspect at issue. To do otherwise would make it impossible to distinguish between, for example, a city event in a park and a private event in a park. This Court has explained:

> Our past cases have looked to several types of evidence to guide the analysis, including: 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. *See Walker [v. Tex. Div., Sons of Confederate Veterans*,], 576 U.S. [200,] 209-214 [(2015)].

Shurtleff, 596 U.S. at 252. That test, while fine on its own terms, only works if the analytical aperture is the correct size. That is, courts must focus on the relevant portion of the program or medium at issue. "There may

be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Pleasant Grove*, 555 U.S. at 470. That difficulty only increases when a court attempts to force into a Procrustean analytical bed something which is best analyzed by its components.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter possibly raising Establishment Clause questions)? The best answer to this question is not found by asking the question, "Whose speech is the talent show, the school's or the participants'?" *Both* are speakers, so any blanket label will not fully correspond to reality. Rather than collapsing together the school's involvement and the student's role, a court should therefore examine the constituent parts separately. Thus, the school is the one that chooses to have a talent show; that determines which student grade levels are eligible to participate; that sets the date, time, and length of the program; and that sets the parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply.

But what about the song itself? It depends. If the school prescribes the song program, then yes, that content is government speech (though the student's manner or style of performing it is not). If the school provides a limited menu of song options (or identifies a theme), then the delineation of that list (or theme) is state action or government speech (though the student's voluntary selection within those parameters is a private choice). If the school leaves the choice

entirely to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the *student's speech,* even though it is situated in the midst of a *government program*. Separate, granulated analysis of the particular components of the program or activity thus trains in upon the identity of *the actor making the relevant content choice,* rather than attempting to make a global judgment about the entire production.

Another example would be a state college graduation ceremony. The college decides to have the ceremony, when and where to do so, and whether to have an outside speaker. That is all state action (and, to the extent it is expressive, is government speech). If the college officials select a guest speaker (as opposed to letting students pick one, for example), that selection is also government speech. The college may limit the speaker as to length or topic (with the speaker free, of course, to decline the invitation). But when the guest speaker then chooses what words to say, that is private speech, not government speech. To ask, "Is a graduation ceremony government speech?" is therefore to ask the wrong question. Instead, the analysis must focus upon what *part* of the program the government seeks to restrict, and who – the government or a private party – is responsible for formulating that part.

Likewise, the remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion (even if the government conditions participation upon conferring intellectual property rights, e.g., to publication, to the government agency).

In all these examples, common sense – and sensible

constitutional interpretation – require distinguishing between what is truly governmental and what is truly private, even where both elements coexist in a larger program. Only a focused analysis of the component elements can ascertain that distinction faithfully, without mislabeling some portion of the program or medium.

Thus, here there is no necessity to apply a blanket "government" or "private" label to the entire bloc of pregame speech over the PA system. Rather, a court should *examine the component parts* of the speech or medium to determine whether the particular content in question is government or private speech. The Eleventh Circuit did not do that. Instead, the stated goal of the lower court was to figure out what blanket label to apply to "pregame speech over the PA system at FHSAA football championship games." Pet. App. 14a. That goal, as explained above, was misguided.

C. This Court Should Reject the Analysis of the Lower Court.

The record shows that the respondent FHSAA broadcast "promotional messages . . . often drafted by th[e] sponsor," Pet. App. 38a, i.e., advertisements. The Eleventh Circuit emphasized that FHSAA "approved" each such message. *Id.* But government approval does not *ipso facto* turn private speech into government speech. Such analysis would make government restrictions on speech self-justifying: Anytime the government censors a message, the government could simply argue that its very assertion of censorship power itself demonstrates that the government controls and approves (or disapproves) the message, rendering it government speech outside the scope of

First Amendment protection. This cannot be true, as it would largely nullify the Free Speech Clause and would require overruling a long list of First Amendment cases where speech enjoyed constitutional protection despite government disapproval, from *Cantwell v. Connecticut*, 310 U.S. 296 (1940), to *Snyder v. Phelps*, 562 U.S. 443 (2011), and everything in between.

The court below focused upon "how closely the FHSAA administered or monitored" the event. Pet. App. 38a. But the private speakers in this Court's "equal access" cases spoke within the scope of some government-run facilities use or educational program (as in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)). The private entities seeking contributions from government employees, *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985), or access to teachers, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), spoke within the scope of government programs (the Combined Federal Campaign and the school's internal mail system, respectively). All communications to and from prisoners take place within the scope of state penal programs. *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Yet in none of these cases did this Court apply the government speech doctrine, which would have left the restricted speech devoid of First Amendment protection.

This is not to say that private speakers always have a First Amendment right to access a government program that involves speech. Not so. The government, except in traditional public fora, itself decides how, and how much, to open a program or facility to private

messages. But the court below embraced the opposite error, exalting government control of the program at large over the obvious presence of purely private messages such as commercial advertisements.

The lower court leaned heavily on the fact that messages over the PA were almost entirely read by the same designated announcer, Pet. App. 40a, 46a, contending that this detail would make the public more likely to perceive any and all messages as coming from the same, governmental, source. But this reasoning does not stand up. The reasonable radio listener knows full well that an ad is an ad, whether read by a regular station broadcaster or played as a separately recorded, differently voiced item. The reasonable football fan would recognize the same distinction. That the "[m]ore traditional advertisements" broadcast over the PA system happened to come at a different point during the game, Pet. App. 43a-44a, does not magically have a totally different effect on the listener.

D. The Proposed Prayers are Private Speech.

The question is not whether "use of the PA system during championship games" as a whole is private or government speech – both are plainly involved – but rather whether the state's rejection of a proposed prayer is the rejection of private speech.

The history of this case – especially FHSAA's initial reliance upon an Establishment Clause defense – demonstrates that FHSAA rejected Cambridge Christian's proposed prayer, not because it was *private,* but because it was a *prayer*. FHSAA was free to try to prove that no private message of any kind would have been allowed, regardless of content or

viewpoint. Were that the case, such an argument would have been the obvious, immediate defense – like a teacher claiming to have the floor in a classroom despite a student's eagerness to interject. But given the mix of private and public messages transmitted over the PA system, FHSAA could prove no such thing. It was therefore incumbent upon FHSAA to show that this particular part of the program – pregame messages – were exclusively the domain of government communications. Not even the court below went that far.

That the government might reserve a veto prerogative does not change the *nature of the speech*. For example, a school's reservation of a right to veto the meeting of any particular student club, or to censor the content of a guest speaker at a graduation ceremony, would not convert such student meeting or guest speaker's address into government speech. Otherwise the challenged censorship power would be self-justifying, not just under First Amendment analysis, but by taking the case out of the First Amendment altogether.

Cambridge Christian's proposed prayer would have been completely the work of private speakers. *Compare Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (finding government speech where the "message . . . is from beginning to end the message established by the . . . Government"). That does not mean FHSAA was powerless to exclude *all* private speech from certain media or portions of the program by reshaping the program or by offering a constitutionally adequate justification. But by pretermitting such analysis, the lower court jumbled the government speech doctrine.

II. DISALLOWING PRIVATE SPEECH BECAUSE IT IS RELIGIOUS IS CLASSIC VIEWPOINT DISCRIMINATION.

Government prohibition of religious speech, *because it is religious,* is classic viewpoint discrimination. As this Court has long held, "discriminating against religious speech was discriminating on the basis of viewpoint." *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 832 (1995).

Certainly, a state might seek to forbid profanity or crudity, privacy violations, intellectual property violations, or messages likely to invite a violent response (i.e., fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). But barring a private speaker's religious message, professedly *because it is religious,* is not a constitutionally permissible option.

CONCLUSION

This Court should grant review to clarify the proper analysis of the distinction between government and private speech as outlined above. In addition, this Court should reiterate that the rejection of a religious message, because it is religious, is unconstitutional viewpoint discrimination.

Respectfully submitted,

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