No. 22-11222

In the United States Court of Appeals for the Eleventh Circuit

CAMBRIDGE CHRISTIAN SCHOOL, INC.,
Plaintiff-Appellant,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division

BRIEF FOR AMICUS CURIAE THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Association of Christian Schools International ("ACSI") states that it is a non-profit, tax-exempt organization incorporated in Colorado. ACSI has no parent corporation, and no publicly held company has 10% or greater ownership in ACSI. Counsel further certifies that, in addition to the persons listed in the briefs of Plaintiff-Appellant and Defendant-Appellee, the following persons may have an interest in the outcome of this case:

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Dated: August 15, 2022

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Association of Christian Schools International ("ACSI") is the world's largest Protestant school association.[1] Founded in 1978, ACSI advances excellence in Christian education by strengthening Christian schools and equipping Christian educators worldwide to prepare students academically and inspire them to live as devoted followers of Jesus Christ. Headquartered in Colorado Springs, Colorado, ACSI supports over 5,000 member schools throughout the United States and around the world, has member schools in every state across America, supports eighteen global member offices around the world, and collectively serves over 1.2 million students. Its members include early education programs and schools, K-12 schools, international schools, higher education schools, and individuals. ACSI's services to members include teacher and administrator certification, school accreditation, legal and legislative updates, curriculum, and textbook publishing.

Consistent with the First Amendment's guarantee of religious freedom, ACSI advocates for government neutrality towards religious individuals and organizations, including respect for a religious institution's freedom to

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Counsel for Appellants and Appellees do not oppose the filing of this amicus brief. *See* Fed. R. App. P. 29(a)(2).

exercise its faith without the threat of exclusion from public programs, benefits, and the like.

STATEMENT OF THE ISSUE

Whether a state actor violated free-exercise and free-speech rights by denying a religious school access to a stadium loudspeaker to engage in a communal pregame prayer at a championship football game between two Christian schools.

SUMMARY OF THE ARGUMENT

The district court's decision in this case commits the same error the Supreme Court corrected in two recent decisions issued after the judgment below: *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022); and *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022). Those two decisions underscore what the Court has reiterated many times in recent years: (1) "a government does not violate the Establishment Clause merely because it treats religious persons, organizations, and speech equally with secular persons, organizations, and speech in public programs, benefits, facilities, and the like"; and (2) "a government *violates* the Constitution when . . . it *excludes* religious persons, organizations, or speech because of religion from public programs, benefits, facilities, and the like." *Shurtleff*, 142 S. Ct. at 1594 (Kavanaugh, J., concurring) (emphasis in original) (citing *Espinoza v. Montana Dep't of Rev.*, 140 S. Ct. 2246 (2020); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001);

McDaniel v. Paty, 435 U.S. (1978)). Religious persons, organizations, and speech may not be treated as "second-class." *Id.* at 1595.

Yet that is what the Florida High School Athletic Association ("FHSAA") did here. Despite Cambridge Christian School's sincerely held belief and standing practice of praying before games, and despite the agreement of the two participating schools, the FHSAA denied the request. FHSAA operated under the mistaken belief that, as a state actor, it was required to discriminate against religious speech. Appellant Br. at 41. As the district court noted, the FHSAA made its public-address ("PA") system available for a broad array of messages, including paid private sponsor messages, but refused to let two religious schools use that same PA system for religious speech. *Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc.*, 2022 WL 971778, at *3, *9 (M.D. Fla. Mar. 31, 2022).

That is no different from the City of Boston's wrongful refusal to let a Christian group fly a Christian flag at Boston City Hall, or the Bremerton School District's instruction to Coach Kennedy not to spend his post-game free time in prayer. *See Shurtleff*, 142 S. Ct. at 1588; *Kennedy*, 142 S. Ct. at 2417. Just like the state actors in those cases, the FHSAA here violated the Free Speech and Exercise Clauses in the name of advancing an incorrect view of the Establishment Clause. This Court should reverse.

ARGUMENT

I. The Supreme Court has repeatedly held that government may not discriminate against religious speech.

This case typifies a common mistake highlighted in two recent Supreme Court decisions: state actors wrongly believe that they can (or must) discriminate against religious speech. They cannot. When the FHSAA chose to open its PA system to a broad variety of messages, it took on a duty to treat religious messages the same as any other messages. To categorically ban prayer in that context violates the Free Exercise and Free Speech Clauses.

A. Start with *Shurtleff*. As Justice Kavanaugh recently put it, that "dispute arose only because of a government official's mistaken understanding of the Establishment Clause." *Shurtleff*, 142 S. Ct. at 1594 (Kavanaugh, J., concurring). The City of Boston has erected three flagpoles outside its city hall. One flies the flag of the United States, and the second flies the flag of the Commonwealth of Massachusetts. *Id.* at 1588 (maj. op.). The third usually flies the flag of the City of Boston, but over the past two decades, the city has allowed private groups to fly their own flags on that third flagpole while holding events on the city hall's plaza. *Id.* From the inception of its flag-raising program in 2005, the City of Boston permitted over "50 unique flags" to fly on the third flagpole outside of City Hall. *Id.* The messages on the flags varied widely—from the "Pride Flag raised annually to commemorate Boston Pride Week" to the "Metro Credit Union Flag" to celebrate "a local community bank." *Id.* at 1592. The city was happy

to open that flagpole on a "come one, come all" basis—until a religious group called Camp Constitution showed up and asked to fly what it called a "Christian flag" during its event. *Id.* at 1588. Suddenly, the city changed its tune, and what had been a government resource open to all quickly became off-limits to a pro-Christian message. *Id.*

The Supreme Court unanimously agreed that the city's conduct violated the First Amendment. While the Justices didn't fully agree with one another on the reasoning, they all reached the same result: a government cannot open a resource to anyone who wants it year after year, only to close off that resource to religious speakers. *Id.* at 1593. Or, as Justice Kavanaugh's concurrence put it, the Constitution does not allow the government to "exclude[] . . . [religion] because of religion." *Id.* at 1594 (emphasis omitted).

That result is hardly a surprise. It echoes countless decisions stretching back decades faulting governments for disfavoring religious speech. Take, for example, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). There, a public university denied funding to a student organization publishing a newspaper with a Christian editorial viewpoint while offering the same funding to secular publications. *Id.* at 824-27. The Court held that approach violated the First Amendment. *Id.* at 837. Or consider *Good News Club*, decided six years after *Rosenberger*. There, a public school denied an after-school Christian club access to the school's facilities solely because the club was religious in nature. 533 U.S. at 103-04. Once again, the Court ruled against the state actor and chided it for disfavoring religion. *Id.* at 120.

Yet this error keeps recurring. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the Court again ruled against a state that denied a church-owned playground a grant for rubber playground surfaces because of its policy of denying grants to religiously affiliated applicants. *Id.* at 2017-18, 2025. And just this year, in *Carson v. Makin*, 142 S. Ct. 1987 (2022), the Court ruled against a state's tuition assistance program that denied benefits to religious schools and only religious schools, just because they were religious. *Id.* at 1994, 2002.

There is no mistaking the clear import of all these cases: the government cannot make a resource available to everyone except religious groups.

B. *Kennedy* is yet another illustration of the equal treatment required for religion in public spaces. And, like this case, it arises in the context of school sporting events. Coach Kennedy was a public high school football coach who had a practice of kneeling at midfield after games to pray. *Kennedy*, 142 S. Ct. at 2415. He prayed to "express gratitude for what the players had accomplished and for the opportunity to be part of their lives through the game of football." *Id.* at 2416 (cleaned up). At times, players from his team or the opposing team, or members of the community would join him; other times he prayed alone. *Id.* at 2416, 2418. When the school learned of this practice, it reprimanded Coach Kennedy and instructed that "any religious activity on Mr. Kennedy's part must be 'nondemonstrative (*i.e.*, not outwardly discernable as religious activity).'" *Id.* at 2417. This, the school reasoned, was because of "direct tension between the Establishment Clause

and a school employee's right to freely exercise his religion." *Id.* (cleaned up).

Meanwhile, the school allowed coaches and other school officials to engage in other secular activities, such as "visit[ing] with friends or tak[ing] personal phone calls" after football games, and did not apply "any sort of postgame supervisory requirement." *Id.* at 2423. Only Coach Kennedy's religious activity was "single[d] out . . . for special disfavor." *Id.* at 2416.

So the Court provided corrective instruction: "An Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor private religious speech. Nor does the Clause compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious. " *Id.* at 2427 (cleaned up; citations omitted).

The Court distinguished *Kennedy* from previous cases where prayer in a public school was been deemed "problematically coercive." *Id.* at 2431. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court determined that the school had "in every practical sense compelled attendance and participation in a religious exercise." *Kennedy*, 142 S. Ct. at 2431 (cleaned up). And in *Santa Fe Independent School District v. Doe*, 530 U.S 290 (2000), the Court explained that a prayer over a PA system before a football game might be coercive to students like cheerleaders and members of the band who were required to attend games. *Kennedy*, 142 S. Ct. at 2431-32. But in *Kennedy*, the Court noted that any elements of coercion were absent. *Id.* at 2432.

Taken together, *Shurtleff* and *Kennedy* both cautioned against an erroneous view of the Establishment Clause that "compel[s] the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious." *Id.* at 2427 (cleaned up). This incorrect view has created a false "vise" between the Establishment Clause on the one side and the Free Exercise and Free Speech Clauses on the other. *See id.* (citation omited). And these mistaken government officals are operating under the incorrect belief that government neutrality towards religion requires suppression of religious speech and practice. But the Supreme Court has explained, over and over again, that this is not the case. Rather, *Shurtleff* and *Kennedy* show that the Establishment, Free Exercise, and Free Speech clauses have "complementary purposes, not warring ones." *Id.* at 2426 (cleaned up).

II. This case demonstrates the same error corrected in previous Supreme Court cases.

This case matches the patterns demonstrated in *Shurtleff* and *Kennedy*. As in *Shurtleff*, a religious viewpoint was denied equal acess to a public space. And religious speech and exercise was singled out for suppression, like in *Kennedy*. In both cases, the Supreme Court vindicated religious speech and practice in public spaces.

Here, the FHSAA denied Cambridge Christian's request to lead a communal prayer because the FHSAA believed it would violate the Establishment Clause to allow it. Appellant's Br. at 41 ("[T]he government

may not engage in activities that can be viewed as endorsing or sponsoring religion.") (cleaned up). The FHSAA was primarily concerned with "the religious nature of the message." *Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1241 (11th Cir. 2019).

And while Cambridge Christian's prayer request was denied, the FHSAA allowed paid sponsors to communicate messages over the PA system. Appellant Br. at 45 (PA system used for prayer at State Championship in 2012); 46 (PA system used for prayer at playoff games); 48 (PA system used by school officials for "unscreened and unscripted welcoming remarks"); 50 (PA system used for "promotional messages from private sponsors"); 56 (PA system used for halftime music and announcements); s*ee also Cambridge Christian Sch.*, 2022 WL 971778, at *12 & n.15. The FHSAA permitted these sponsor messages with minimal supervision. *Id.* at *10. To put it bluntly, the secular, sponsor-related speech was allowed without issue, but the religious speech was not.

The district court (and the FHSAA official responsible for denying Cambridge Christian's request) also likened this case to *Santa Fe Independent School District*. *Id.* at *1, *5 & n.4. But this case, like *Kennedy*, lacks any indicia of coercion. It is well established that students "are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand, and student-initiated, student-led religious speech on the other." *Bd. of Ed. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250-51 (1990); *see also* Appellant Br. at 52-53 (citing cases). In fact, when their request

to pray over the PA system was denied, both teams gathered to pray at the middle of the field anyway. *Cambridge Christian Sch.*, 2022 WL 971778, at *3.

"[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Kennedy*, 142 S.Ct. at 2432 (collecting cases). Not only does it not violate the Establishment Clause to give religion equal treatment, it violates the Constitution to exclude religion because of religion. *Shurtleff*, 142 S. Ct. at 1594 (Kavanaugh, J., concurring). The FHSAA violated these bedrock principles. Because the district court refused to correct the FHSAA's unlawful conduct, this Court should reverse.

CONCLUSION

The district court's order granting Defendant's motion for summary judgment and denying Plaintiff's motion for summary judgment should be reversed.

Dated: August 15, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 15, 2022, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,375 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface and type style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

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