No. 17-12802

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 a Final Judgment of the
United States District Court for the Middle District of Florida
Case No. 8:16-cv-2753, Hon. Charlene E. Honeywell

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF FLORIDA; ANTI-DEFAMATION LEAGUE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; INTERFAITH ALLIANCE FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; MUSLIM ADVOCATES; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; SIKH COALITION; AND UNION FOR REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLEE AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to those listed in the parties' briefs, the following entities and persons have an interest in the outcome of this appeal:

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Amici are nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of any of them or has an interest in the outcome of the case or appeal.

Respectfully submitted,

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that represent diverse beliefs, experiences, and faith traditions but share a commitment to religious freedom and to ensuring that all Americans are free from religious coercion and governmental endorsement of religion.

Cambridge Christian School invokes the First Amendment's Free Speech and Free Exercise Clauses and the Florida Religious Freedom Restoration Act, FLA. STAT. § 761.01 *et seq.*, to attempt to compel a governmental entity to sponsor and broadcast prayer to students and families at state-sponsored events so that they will participate in that prayer. The rights to practice one's faith and to engage in religious speech are sacrosanct. But they do not entitle one to use the machinery of government to deliver religious messages or to impose religious practices on others. Rather, the Establishment Clause of the First Amendment ensures that families may decide for themselves whether, when, and how to worship, without governmental interference. *Amici* have a strong interest in ensuring that these protections are not undermined or watered down, lest we betray our constitutional commitment to religious freedom for all.

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- American Civil Liberties Union of Florida.
- Anti-Defamation League.
- Central Conference of American Rabbis.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Interfaith Alliance Foundation.
- Jewish Social Policy Action Network.
- Muslim Advocates.
- National Council of Jewish Women, Inc.
- Sikh Coalition.
- Union for Reform Judaism.

Detailed descriptions of the *amici* appear in the Appendix.

STATEMENT OF THE ISSUES

1. The Establishment Clause forbids government to sponsor, endorse, or coerce prayer at high-school sporting events. Cambridge Christian asserts free-speech and free-exercise rights to force the Florida High School Athletic Association to broadcast prayer during the opening ceremonies at the state high-school football championship. Did the district court correctly conclude

that the Athletic Association could decline to broadcast the prayer to avoid violating the Establishment Clause?

2. Under the Florida Religious Freedom Restoration Act, if a claimant demonstrates a substantial government-imposed burden on its religious exercise, the State must show that its actions were narrowly tailored to serve a compelling governmental interest. The Athletic Association did nothing to inhibit prayer, but merely complied with the Establishment Clause by refusing to broadcast prayer at its state-championship game. Did that refusal violate the Florida RFRA?

INTRODUCTION AND SUMMARY OF ARGUMENT

In recognition "that a union of government and religion tends to destroy government and to degrade religion" (*Engel v. Vitale*, 370 U.S. 421, 431 (1962)), "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (*Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948)). "'The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). The Religion Clauses thus work in tandem to protect the fundamental rights to believe, or not, and to pray, or not, according to the

dictates of conscience, without governmental interference or pressure to conform. But the ability "to express [one's] personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting [an] audience." *Chandler v. James* (*Chandler I*), 180 F.3d 1254, 1265 (11th Cir. 1999).

Cambridge Christian nonetheless asks this Court to recognize a private right to commandeer the Florida Athletic Association's microphone—literally, the machinery of the State—to broadcast prayer to stadiums of students and other spectators at state-run events, so that the audience will participate in the prayer. The Athletic Association is, however, a state actor. Its announcements over the public-address system are not private speech in a public forum, but instead are government speech. Hence, Cambridge Christian's free-speech and free-exercise interests do not and cannot override either the Athletic Association's authority to determine the content of its own announcements or its obligation to ensure that its program satisfies the Establishment Clause.

The Florida Religious Freedom Restoration Act does not alter that conclusion. Cambridge Christian did not meet the Act's prerequisite to demonstrate a substantial burden on its religious exercise because it was not forbidden to engage in conduct that its faith requires. And even if it had shown a substantial burden, the refusal to broadcast the prayer was narrowly

tailored to the compelling governmental interest of avoiding Establishment Clause violations. In all events, a state statute cannot require what the federal Constitution forbids. Hence, the state-RFRA claim fails as a matter of law.

Far from advancing religious freedom, Cambridge Christian's claims, if successful, would undermine that freedom. Were the Florida Athletic Association to broadcast prayer at championship games, it would become a partner in and sponsor of the religious exercise of a particular faith, showing official favoritism for, and pressuring the schoolchildren and others in the audience to participate in, a devotional act. The district court correctly concluded that the Athletic Association was right not to intrude on the students' and spectators' religious freedom and therefore that Cambridge Christian's claims fail. The judgment should be affirmed.

ARGUMENT

I. THE FIRST AMENDMENT NEITHER REQUIRES NOR PERMITS THE FLORIDA ATHLETIC ASSOCIATION TO BROADCAST PRAYER AT ITS STATE-CHAMPIONSHIP GAMES.

Cambridge Christian contends that the Athletic Association violated the Free Speech and Free Exercise Clauses by declining to broadcast prayer over the government-operated public-address system during the opening ceremonies of a state-sponsored, state-orchestrated, state-run high-school football game. Although the Clauses undeniably protect private religious

speech, the Establishment Clause forbids governmental sponsorship, endorsement, or coercion of religious exercise. *See, e.g.*, *Santa Fe*, 530 U.S. at 302, 311–12; *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989). Cambridge Christian and the students on its team exercised their right to pray collectively at the game; and members of the audience who wished to pray, individually or in groups, were unrestricted in doing so as well. As the district court concluded (slip op. 16–18), the Athletic Association's program broadcast over the public-address system was government speech, which is subject to the Athletic Association's control—and to the requirements of the Establishment Clause. The Athletic Association's refusal to make prayer part of its opening ceremonies violated no one's free-speech or free-exercise rights, because there is no private right to make government speech conform to one's private preferences (*see, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–70 (2009)).

A. Broadcast of the prayer would have been unconstitutional state endorsement and coercion of religion.

1. "It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Lee*, 505 U.S. at 587. As this Court has recognized, "'prayer is perhaps the quintessential religious practice.'" *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983) (quoting *Karen B. v. Treen*,

653 F.2d 897, 901 (5th Cir. 1981)), *aff'd*, 472 U.S. 38 (1985). And because "adolescents are often susceptible to pressure from their peers towards conformity" (*Lee*, 505 U.S. at 593), the courts must be "particularly vigilant in monitoring compliance with the Establishment Clause" at government-run functions for schoolchildren. *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987). Thus, prayer at those events violates the Establishment Clause if an objective student observer would perceive the State to be sponsoring or endorsing the prayer, or if the State's conduct otherwise has the effect of pressuring students to participate in the prayer. *Santa Fe*, 530 U.S. at 308, 311–12; *Lee*, 505 U.S. at 592.

Accordingly, the Supreme Court held in *Santa Fe* that even "student-led, student-initiated prayer" over the public-address system at high-school football games violated the Establishment Clause (530 U.S. at 301), both because students would perceive the school district to be endorsing the prayer and because students would feel pressure—even if only in the form of peer pressure—to join in (*id.* at 308, 311–12). The Court concluded that the "prayers b[ore] 'the imprint of the State'" (*id.* at 305 (quoting *Lee*, 505 U.S. at 590)), notwithstanding that students delivered them, because the school district had permitted solemnization of the games; "the invocation [was] then delivered . . . as part of a regularly scheduled, school-sponsored function conducted on school property"; "[t]he message [was] broadcast over the

school's public address system, which remain[ed] subject to the control of school officials"; and it was "fair to assume that the pregame ceremony [was] clothed in the traditional indicia of school sporting events." *Id.* at 306–08. "In this context," the Court reasoned, "the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration." *Id.* at 308.

More than a decade earlier, this Court reached a similar conclusion in *Jager* for student and invited-guest prayergivers at football games: The Court held that "[w]hen a religious invocation is given via a sound system controlled by [a state actor] and the religious invocation occurs at a [state]-sponsored event at a [state]-owned facility, the conclusion is inescapable that the religious invocation conveys a message that the [State] endorses the religious invocation." *Jager*, 862 F.2d at 831.

2. Prayer broadcast over the public-address system during the opening ceremonies of the Florida Athletic Association's state-championship game would have had all the same hallmarks of state approval, endorsement, and coercion as did the prayers in *Santa Fe* and *Jager*. As this Court has recognized, "government property is 'often closely identified in the public mind with the government unit that owns the land.'" *Mech v. Sch. Bd.*, 806 F.3d 1070, 1076 (11th Cir. 2015) (quoting *Summum*, 555 U.S. at 472). Here,

the prayer would have been delivered to more than 1800 students, family members, and spectators at a publicly owned facility, during a prominent annual state-sponsored athletic event for schoolchildren, using the government-controlled public-address system, in a program conducted by a state official.

On these uncontroverted facts, an objective observer would perceive governmental approval of the prayer. *See Santa Fe*, 530 U.S. at 308; *Jager*, 862 F.2d at 831. And the inclusion of the prayer in the opening ceremonies, with the participation of the crowd, would have sent a strong message to the children in attendance that they ought to take part. *See Santa Fe*, 530 U.S. at 311–12; *Jager*, 862 F.2d at 831. Hence, as in *Santa Fe* and *Jager*, the prayer would have violated the Establishment Clause.

3. Cambridge Christian contends that the prayer here would not have had that effect because whereas in *Santa Fe*, as Cambridge Christian describes it, the state actor "push[ed] the private speaker to deliver a religious message," here the private actor was 'pushing' the State. Br. 36. That argument cannot be squared with *Santa Fe* and *Jager*. What mattered in those cases was that the presentation of the prayers over stadium public-address systems would be perceived by the audience to bear official imprimatur (*Santa Fe*, 530 U.S. at 307–08; *Jager*, 862 F.2d at 831), would show official favoritism toward one faith (*Jager*, 862 F.2d at 831), and would

pressure students to participate (*Santa Fe*, 530 U.S. at 311–12). That was so even though the prayers in *Santa Fe* were "student-initiated" (*id.* at 301) and the prayergivers in *Jager* included students and guests (*Jager*, 862 F.2d at 826 n.2, 827).

Here, the only person authorized to speak over the public-address system is the state official who announces the games (*see* slip op. 16; App. I:83); and the program for the games is orchestrated and controlled by the Athletic Association, *i.e.*, the State (*see, e.g.*, App. I:113–14). Thus, even if the prayer would have been delivered by someone selected by Cambridge Christian rather than by the Athletic Association's announcer, the State would be seen to have sponsored or endorsed the prayer by providing the special benefit of microphone use during the opening ceremonies that "otherwise [was] not accessible to private parties." Slip op. 17. In other words, the audience would have perceived the prayer to be part of the State's official program. As the Supreme Court made clear, what matters is not just actual but also perceived governmental endorsement, so the fact that Cambridge Christian had requested the prayer would be beside the point. *Cf. Santa Fe*, 530 U.S. at 305 (even school district's "hands-off" policy "b[ore] 'the imprint of the State and thus put school-age children who objected in an untenable position'" of having to miss the football games or be subjected to unwanted, state-endorsed religious exercise (quoting *Lee*, 505 U.S. at 590)).

4. It matters not that both teams here hailed from Christian religious schools or that both schools' administrators wanted prayer during the opening ceremonies. Cambridge Christian wanted prayer over the public-address system so that "students, parents, faculty, administration, coaches, and fans . . . throughout the entire venue" would "come together in prayer." App. I:22. The coercive nature of that government-endorsed prayer would not be cured by the fact that the schools and, possibly, a majority of the fans may agree with the religious message, for "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, . . . may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592; *see also Santa Fe*, 530 U.S. at 305 ("[A] majoritarian policy 'does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst [it] increases their sense of isolation and affront.'" (quoting *Lee*, 505 U.S. at 594)).

It would take extraordinary fortitude for any student to stand and sing the National Anthem with the crowd one moment, only to sit, leave, or otherwise abstain from the program of prayer the next. Thus, there would have been substantial coercive pressure to pray. *See Santa Fe*, 530 U.S. at 310–12; *Lee*, 505 U.S. 593–94. For a private religious school to ask its students to pray together is, of course, entirely permissible, precisely because

the school is private. To require the State ask the crowd to pray as part of its official program would severely intrude on the attendees' religious freedom. The schools here were and are free to conduct prayer in accordance with their religious mission, but they cannot appropriate the State's authority, facilities, and program to do so.

5. Finally, even if the Establishment Clause did not forbid prayer as part of the State's opening ceremonies—which it does—the Florida Athletic Association would still have had the authority to exclude it. The Association sponsors, hosts, and operates a state program for adolescents, so it must be especially sensitive to their religious-freedom rights by respecting the critical protections afforded to children and their families by the Establishment Clause. *See, e.g.*, *Lee*, 505 U.S. at 593–94. Because of the "heightened concerns with protecting [the students'] freedom of conscience from subtle coercive pressure" (*id.* at 592), the Athletic Association would therefore have been justified in erring on the side of regulation. For government cannot be so trapped between the prohibitions of the Establishment Clause, on the one hand, and the requirements of the Free Exercise Clause (and the Free Speech Clause), on the other, that it has no room to take reasonable steps to satisfy its constitutional obligations:

> [W]hen government endeavors to police itself . . . in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause and the limitations it imposes might restrict an individual's conduct that might well be protected by the Free Exercise Clause . . . .

Marchi v. Bd. of Coop. Educ. Servs., 173 F.3d 469, 476 (2d Cir. 1999). This "breathing space" for government to regulate its own conduct to ensure compliance with the Establishment Clause is itself a critical protection for students' religious liberty. *Id.*

Yet the Athletic Association did no more than was constitutionally required: It afforded Cambridge Christian and all the students, families, and other spectators ample and effectively unrestricted opportunity to pray and to observe prayer, both individually and in groups, while taking the simple step of not sponsoring religion in the official state program. To say that the Athletic Association's modest and necessary action was impermissible would stand the constitutional protection for individual conscience on its head.

B. Invocation of the Free Speech and Free Exercise Clauses does not alter that analysis because the football games are not public forums.

Cambridge Christian seeks to sidestep *Santa Fe* by contending that prayer over the public-address system to open the game would have been the school's private speech, and therefore that the Florida Athletic Association engaged in impermissible viewpoint discrimination by purportedly

suppressing that religious speech. *See* Br. 24–30, 34. To be sure, the State must not squelch religious speech in a public forum. *See, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001). But when the State does not open a public forum and instead devises and operates its own program, it is the speaker, and its program is government speech, not private speech. *See, e.g.*, *Summum*, 555 U.S. at 472–73; *Santa Fe*, 530 U.S. at 302–03. The First Amendment simply does not afford private parties the right to compel the State to broadcast their preferred messages, religious or otherwise, or to supply the machinery to deliver those private messages as part of the State's program. *See, e.g.*, *Summum*, 555 U.S. at 481; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Here, as the Athletic Association explains (Br. 20–29), it did not open a public forum, so it had the authority to control its own speech. Cambridge Christian had no right to compel it to do otherwise.

1. In *Santa Fe*, the Supreme Court held that even "student-led, student-initiated prayers" over the public-address system at football games were attributable to the school district. 530 U.S. at 301–02. A governmental entity opens a public forum only when it intends to do so; public forums do not spring to life accidentally—or even through provision of selective access. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). Indeed, even if private parties select the speakers and the content of their

messages, "'selective access does not transform government property into a public forum.'" *Santa Fe*, 530 U.S. at 303 (quoting *Perry*, 460 U.S. at 47); *see also Summum*, 555 U.S. at 468.

Here, the Florida Athletic Association authorizes no one except its announcer—a state actor—to speak over the public-address system; and it places specific, detailed constraints on the types of messages that may be delivered. *See* App. I:83–84. Because the Athletic Association is the speaker and carefully curates the messages that it delivers through its program, and because it has not even hinted at any intention to open a public forum, no such forum exists. The announcements broadcast for the opening ceremonies are government speech. And Cambridge Christian posseses no First Amendment right of access to speak or to insert its preferred message into the Athletic Association's speech. *See Perry*, 460 U.S. at 46.

2. Cambridge Christian attempts to forestall public-forum analysis (Br. 17; *see also* Br. 30 n.7), which would not advance its case, by arguing that the Athletic Association "engaged in unconstitutional viewpoint discrimination" that is barred under all circumstances (Br. 29). As support, Cambridge Christian principally relies on *Chabad–Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993), contending that this Court expansively and unqualifiedly held that "fear of violating 'the Establishment Clause cannot be

used as a justification for content-based restrictions on religious speech'" (Br. 33–34 (quoting *Chabad–Lubavitch*, 5 F.3d at 1395)).

What this Court actually held in *Chabad–Lubavitch* is this: "***In a true public forum***, such as the Rotunda [of the Georgia state capitol], the Establishment Clause cannot be used as a justification for content-based restrictions on religious speech." 5 F.3d at 1395 (emphasis added). For in that context the reasonable observer will generally know that the private speech is just that—private—as long as the government is not itself the speaker and does not act in ways that endorse the religious speech. *Id.* at 1393–95.

By omitting the qualifying condition in this Court's statement of the quoted rule, Cambridge Christian imagines a requirement that government must always include religious speech in its own programs if a private party asks it to do so. But when government speech is at issue, the State maintains control over its own message, even when it selectively allows private speakers to deliver that message; it cannot be compelled to include speech, religious or otherwise, that it does not wish to include. *See, e.g.*, *Summum*, 555 U.S. at 467–68; *Perry*, 460 U.S. at 47. The State's authority to craft its own message and not be forced to broadcast the messages of private parties must be all the more clear when, as here, the Constitution would forbid it to deliver those private messages. The argument that a state actor violates the Free Speech

or Free Exercise Clause by complying with its obligations under the Establishment Clause makes no sense either doctrinally or practically.

3. Cambridge Christian alternatively argues that forum analysis would support its claims because, it contends, the Athletic Association created a limited public forum by broadcasting certain third-party content over the public-address system at the game. *See* Br. 30 n.7. But the circumstances here are no different from those in *Santa Fe*, in which the Supreme Court held that selective private access was both insufficient to open a public forum and irrelevant to the Establishment Clause analysis. *See* 530 U.S. at 303.

First, Cambridge Christian cites the Athletic Association's authorization of messages from host-school management. Br. 30 n.7. But those messages are merely "provided by" the host schools (App. I:83). They would have to be ***delivered*** by the only authorized announcer—a state official. *See id*; slip op. 16. What is more, that some messages might initially be crafted by a private party does not thereby transmute a state actor's delivery of them into wholly private speech or turn quintessential government speech into a public forum. *See Summum*, 555 U.S. at 472. So it cannot vitiate the Establishment Clause's requirement that the State avoid delivering prayers.

Second, Cambridge Christian contends that because the Athletic Association broadcasts paid advertisements, it must also broadcast the

[unpaid] religious message that the school wants. *See* Br. 30 n.7. But paid messages do not convert the State's mode of delivering those messages into a public forum for any speech by any would-be speaker. Thus, in *Mech*, 806 F.3d at 1076–80, this Court held that advertisements posted on public-school property that thanked school sponsors were government speech because the school board exercised control over the advertisements' appearance and expressly associated itself with what was being advertised. Hence, the Free Speech Clause afforded the plaintiff no right to compel the school district to post, or to allow him to post, his own message. *Id.* at 1072.

As in *Mech*, advertisements at the Florida Athletic Association's football games are selected by, controlled by, and closely linked to a state actor. The Athletic Association approves the scripts in advance, has its own official read them over the public-address system, and charges a fee for that service. *See* App. I:83. The Athletic Association's exercise of editorial oversight and its direct presentation of the paid messaging places the State's imprimatur on the messages. As a result, the State must remain mindful of its Establishment Clause obligations. And beyond all of that, any listener in the stands would recognize the distinct difference between the paid messaging and prayer in the Athletic Association's opening ceremonies.

Third, Cambridge Christian asserts that the Athletic Association took on the obligation to include prayer in its opening ceremonies by permitting

school cheerleading squads to play music for half-time performances. *See* Br. 26. The Athletic Association, however, authorized the half-time shows to be part of the State's own program at the games. *See* App. I:114, 182. This selective access likewise does not create a public forum. *Cf. Santa Fe*, 530 U.S. at 303; *Perry*, 460 U.S. at 47.

4. For related reasons, even if the Florida Athletic Association had created a limited public forum for private speech at the games—which it did not—prayer over the public-address system for opening ceremonies still would be forbidden because objective observers would perceive it as government speech or as endorsed by the State. The Supreme Court "ha[s] never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause." *Santa Fe,* 530 U.S. at 303 n.13. Whatever view the students might have of advertisements or half-time music, allowing just one supposedly private speaker to use the microphone to deliver a prayer at opening ceremonies would afford the religious practice the pride of place that the Athletic Association reserves for the National Anthem, an official message about sportsmanship, and the official coin toss (*see* App. I:114), thus conveying a strong message of state support, endorsement, and favoritism (*see, e.g.*, *Santa Fe*, 530 U.S. at 302–03; *Jager*, 862 F.2d at 829–30).

5. Finally, Cambridge Christian argues, in effect, that *Chandler v. Siegelman* (*Chandler II*), 230 F.3d 1313 (11th Cir. 2000), and *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc), displace the Supreme Court's decision in *Santa Fe* and require the government to lend its microphone to religious speakers in every instance. *See* Br. 42. But both cases merely reinforce, and do not undermine, the rule that the State cannot censor private religious speech in public forums; neither in any way suggests that the State has a constitutional obligation to relinquish control of its own program and incorporate prayer whenever someone asks it to do so.

In *Adler*, the en banc Court held that student prayer at graduation ceremonies did not violate the Establishment Clause, notwithstanding the Supreme Court's holdings in *Lee* and *Santa Fe*, because the school district there had a policy of allowing student speakers without placing any restrictions on what they said (250 F.3d at 1336–37); the policy mandated that students' remarks "'shall not be monitored or otherwise reviewed'" by school officials (*id.* at 1332 (quoting panel opinion)). In other words, the school opened its microphone to unregulated, indiscriminate use by the student speakers; and in that context, this Court held that the Establishment Clause did not bar prayer should a student happen to deliver one. *Id.* at 1336–39.

As for *Chandler*, this Court held (in *Chandler I*) that the injunction of an Alabama statute permitting student prayer in public schools was overbroad because it would affect not just school-sponsored or -endorsed religious activities (which are barred by the Establishment Clause) but also all "vocal prayer or other devotional speech" by students in school. *See* 180 F.3d at 1257, 1265–66. The Court held that the restrictions on students' religious speech "exceed[ed] those placed on students' secular speech" in circumstances in which there was no hint of governmental sponsorship or endorsement. *Id.* at 1266. After the Supreme Court vacated and remanded for reconsideration in light of *Santa Fe*, this Court reaffirmed that conclusion in *Chandler II*. *See* 230 F.3d at 1314.

In sum, *Adler* and *Chandler* hold only that when government preserves a sphere for private speech, it must not treat purely private religious speech any differently from private secular speech. But here, Cambridge Christian demands the special right to wrest the microphone from the announcer—a state official conducting a state program—to deliver a prayer as part of the State's opening ceremonies at that state program, when no similar opportunity is afforded to any other would-be speaker, secular or religious. Cambridge Christian thus asks this Court to convert the Athletic Association's own speech and its public-address system into a public forum (or perhaps just a forum for prayer), when the Athletic Association never

intended or acted in any way to create such a forum and was constitutionally barred from holding official prayer at the games. Neither free-speech law, nor free-exercise law, nor the Supreme Court's or this Court's Establishment Clause jurisprudence supports that view.

* * *

To recognize the new, expansive rights that Cambridge Christian asserts would not only upend settled constitutional law but also, thereby, substantially impair the rights of the students, families, and other spectators to decide for themselves whether, when, and how to pray, free from the heavy hand of government. The Florida Athletic Association wisely avoided that dangerous and ultimately unconstitutional path, and the district court properly held that it was right to do so. This Court should affirm that judgment.

II. THE FLORIDA RELIGIOUS FREEDOM RESTORATION ACT DOES NOT AUTHORIZE THE REQUESTED PRAYER AT OPENING CEREMONIES.

The Florida Religious Freedom Restoration Act provides that "government shall not substantially burden a person's exercise of religion" unless doing so "[i]s the least restrictive means of furthering [a] compelling governmental interest." FLA. STAT. § 761.03. In other words, the Act imposes heightened scrutiny on state action—but only if the RFRA claimant first demonstrates that its religious exercise has been substantially burdened by

that action. *See Warner v. City of Boca Raton*, 887 So. 2d 1023, 1034 (Fla. 2004) ("the plaintiff bears the initial burden of showing that a regulation constitutes a substantial burden on his or her free exercise of religion"). Here, Cambridge Christian failed to make the requisite showing, so it has not stated a colorable claim. But even if it had, the Athletic Association's actions were appropriately tailored to serve the compelling governmental interest of complying with the Establishment Clause and thereby protecting the religious-freedom rights of the students and families who attend state-sponsored championship games.

A. Cambridge Christian failed to demonstrate a substantial government-imposed burden on its religious exercise.

The Florida Supreme Court has interpreted the Florida RFRA to require that "a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires." *Warner*, 887 So. 2d at 1033. The court concluded as a matter of state law that defining "substantial burden" more loosely would be "inconsistent with the language and intent of the FRFRA" (*id.*), thus violating the canons of statutory interpretation and defeating the intent of the state legislature in enacting the law as written. In the thirteen years since *Warner*, neither the Florida Supreme Court nor the Florida legislature has altered that

interpretation—which therefore remains dispositive (*West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted."); *accord Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011); *Entrekin v. Internal Med. Assocs. of Dothan*, 689 F.3d 1248, 1251 (11th Cir. 2012) ("'The final arbiter of state law is the state supreme court, which is another way of saying that Alabama law is what the Alabama Supreme Court says it is.'" (citation omitted))). That rule forecloses the claim here.

In *Warner*, residents of Boca Raton claimed that a city ordinance prohibiting vertical grave markers violated the Florida RFRA. 887 So. 2d at 1025–26. The Florida Supreme Court held, however, that "'restrictions on the manner in which religious decorations may be displayed merely inconvenience the plaintiffs' practices of marking graves and decorating them with religious symbols'" and do not constitue a legally cognizable substantial burden under the Florida RFRA because the residents could still place horizontal grave markers. *Id.* at 1035 (quoting trial court). Thus, the court concluded that the residents had not made the required threshold showing under the Act, and their claim failed.

Cambridge Christian's claim fails in just the same way: The school contends that not having prayer over the public-address system to open the game prevented it from partaking in its tradition of having collective prayer with the entire school community over stadium loudspeakers "when possible." App. I:21–22, 46–47; Br. 7; *see also* Br. 3, 11, 31, 46. Cambridge Christian did not allege and does not argue that it has been "forbid[den] . . . to engage in conduct that [its] religion requires" (*see Warner*, 887 So. 2d at 1033), for it does not say that amplified prayer is a requirement of its faith any more than vertical grave markers were a religious requirement in *Warner*; and it tacitly concedes that it has amplified prayer "when possible"—*i.e.*, not all the time (*see* App. I:22, 47; Br. 7).

Accordingly, not only is there no allegation of any religious requirement here (*see Warner*, 887 So. 2d at 1035[2]), but under Florida law there is also no substantial burden—just "'mere[ ] inconvenience'"—because there are multiple other ways that Cambridge Christian could (and did) pray and involve its students in prayer (*see id.* (quoting trial court)). That it may favor amplification because it would like for all attendees to participate together in

[2] *See also, e.g.*, *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001).

collective prayer does not elevate denial of use of the State's microphone into a legally cognizable substantial burden under *Warner*.[3]

What is more, the Athletic Association did accommodate Cambridge Christian's tradition of communal prayer. The teams prayed together at midfield at the start of the game, without interference from the Athletic Association. *See* App. I:53. And as the district court found, nothing prevented other attendees—be they cheerleaders, siblings, parents, or fans—from observing those prayers or themselves praying, individually or collectively, at any point before, during, or after the game. *See* slip op. 23.

If, as a matter of Florida law, being forbidden to mark the graves of loved ones, at one's own expense, using the method favored by one's religious denomination is not a cognizable substantial burden on religious exercise, then neither is praying without the aid of the State's microphone during opening ceremonies at a state-sponsored, state-run event.

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[3] *Cf., e.g.*, *Mahoney*, 642 F.3d at 1120–21 (federal RFRA did not afford right to draw on White House sidewalk because plaintiff described no religious belief that required him to make the drawings); *Henderson*, 253 F.3d at 16 (federal RFRA did not protect selling of T-shirts on National Mall, in violation of ban on peddling, because plaintiffs "d[id] not claim to belong to any" "religious group that has as one of its tenets selling [T]-shirts on the National Mall"); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397–98 (4th Cir. 1990) (under earlier constitutional free-exercise jurisprudence on which federal RFRA is based, Fair Labor Standards Act's requirement of equal pay for women did not substantially burden church school's decision to pay men more than women because "church members testified that the Bible does not mandate a pay differential based on sex").

B. The Athletic Association's refusal was the least restrictive means to satisfy a compelling governmental interest.

Even if Cambridge Christian had demonstrated a substantial burden—which it has not—its Florida RFRA claim would still fail because the Athletic Association's action was narrowly tailored to serve a compelling governmental interest (*see* FLA. STAT. § 761.03).

As a matter of law, state actors have a compelling interest in avoiding Establishment Clause violations. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995); *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Cambridge Christian's apparent argument to the contrary is simply incorrect. As explained above (at page 16), the law of this Circuit is that adherence to the Establishment Clause, though a compelling interest, does not justify silencing private religious speech in a true public forum. In other words, complying with the Establishment Clause, and thereby protecting the rights of citizens to be free from coerced religious practice, is always a compelling state interest, though governmental action to advance that interest should not unnecessarily suppress private religious speech in a public forum.

Here, as already explained, the State's announcements over the public-address system at the state championship were not a public forum, and the Florida Athletic Association took the action needed to avoid violating the

Establishment Clause while allowing private religious exercise and religious speech, both on and off the field, to flourish. The only fault that Cambridge Christian finds is that the Athletic Association forbade what the Establishment Clause also forbids—namely, transforming the State's public announcements into a worship service.

In the end, Cambridge Christian's Florida RFRA claim is a red herring. The Supremacy Clause, U.S. CONST. Art. VI, cl. 2, mandates that state law can never override the U.S. Constitution. *See, e.g.*, *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 271–72 (1977). Cambridge Christian would have this Court hold that a state statute compels a governmental actor to do what the U.S. Constitution forbids. That cannot be. Thus, while Cambridge Christian's state-law claim fails at every step of the RFRA analysis as a matter of Florida law, this Court can also dispose of it more simply by reminding that what the Establishment Clause disallows, Florida's RFRA cannot, and therefore does not, require.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6367 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word 2013 in Century Schoolbook, a proportionally spaced typeface, in a size measuring at least 14 points.

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Dated: December 11, 2017

CERTIFICATE OF SERVICE

I certify that on December 11, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*
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APPENDIX OF *AMICI CURIAE*

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and the separation of church and state. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an *amicus curiae* in the leading church–state cases decided by the Supreme Court, this Court, and federal and state courts throughout the country. Americans United has long fought to uphold the guarantees of the First Amendment that forbid government to support or endorse religion or to coerce anyone to pray or participate in religious exercises, because acts of conscience are constitutionally committed to individuals and families, not to the state.

American Civil Liberties Union and ACLU of Florida

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the Constitution and our nation's civil-rights laws. The ACLU of Florida is a state affiliate of the national ACLU. For nearly a century, the ACLU has been at the forefront of efforts

nationwide to protect the full array of First Amendment guarantees, including the freedom of speech and the right to religious liberty.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America and to the protection of minority religions and their adherents. Of particular concern to ADL is the proper role of religion in our nation's public schools, where attendance is mandatory and impressionable children are particularly vulnerable to government-sponsored religious coercion.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates, and supporters

nationwide. While traditionally know for its role in developing and supporting health care and other initiatives in Israel, Hadassah has a proud history of protecting the rights of women and the Jewish community in the United States. Hadassah is a strong supporter of the strict separation of church and state as critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Interfaith Alliance Foundation

Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual rights, promoting policies to protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation's members belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure that religious freedom is a means of safeguarding the rights of all Americans and is not misused to favor the rights of some over others.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. For most of the last two thousand years, Jews lived in countries in which religion and state

were one, and in which the organs of government were often co-opted by religious groups to spread a proselytizing message. In Europe, especially, Jews and minority Christian faith communities faced discrimination, persecution, expulsion, or worse. Those who emigrated to America in the nineteenth and twentieth centuries found that here one could shed being treated as a second-class citizen and could be both a Jew and an American, a Catholic and an American, even an atheist and an American. JSPAN believes that the gift of church-state separation bestowed on us by the Founding Fathers is essential to all our fundamental freedoms and therefore that great care must be taken that there be no erosion of the separation of church and state principles embodied in the Establishment Clause. JSPAN has filed *amicus curiae* briefs in Establishment Clause cases regularly since it was formed in 2003, including in *Pleasant Grove City v. Summum*, 555 U.S. 290 (2009), one of the Supreme Court decisions that the lower court found to be controlling in this case.

Muslim Advocates

Muslim Advocates is a national legal-advocacy and educational organization that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement,

and civic education. Muslim Advocates also serves as a legal resource for the American Muslim community, promoting the full and meaningful participation of Muslims in American public life. The issues at stake in this case relate directly to Muslim Advocates' work fighting for civil-rights protections for American Muslim communities.

National Council of Jewish Women, Inc.

The National Council of Jewish Women is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "Religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society." NCJW resolves to work for the enactment, enforcement, and preservation of laws and regulations that protect civil rights and individual liberties for all. Consistent with our Principles and Resolutions, NCJW joins this brief.

Sikh Coalition

The Sikh Coalition is the largest community-based Sikh civil-rights organization in the United States. Since its inception on September 11, 2001,

the Sikh Coalition has worked to defend civil rights and liberties for all people, to empower the Sikh community, to create an environment in which Sikhs can lead a dignified life unhindered by bias or discrimination, and to educate the broader community about Sikhism in order to promote cultural understanding and diversity. The Sikh Coalition has vindicated the rights of numerous Sikh Americans subjected to bias and discrimination because of their faith. Ensuring the rights of religious and other minorities is a cornerstone of the Sikh Coalition's work. The Sikh Coalition joins this *amicus* brief in the belief that the Establishment Clause is an indispensable safeguard for religious minority communities.

Union for Reform Judaism and Central Conference of American Rabbis

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, and the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry, as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else

throughout history. Government-endorsed prayer threatens the principle of separation of church and state, which is indispensable for the preservation of that spirit of religious liberty which is a unique blessing of American democracy.