

No. 17-12802-K

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In the United States Court of Appeals for the Eleventh Circuit

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CAMBRIDGE CHRISTIAN SCHOOL, INC.,

*Plaintiff – Appellant,*

vs.

FLORIDA HIGH SCHOOL ATHLETIC  
ASSOCIATION, INC.

*Defendant – Appellee*

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On appeal from the United States District Court  
for the Middle District of Florida

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BRIEF AMICI CURIAE OF THE FREEDOM FROM  
RELIGION FOUNDATION AND CENTRAL FLORIDA  
FREETHOUGHT COMMUNITY IN SUPPORT OF DEFENDANT-  
APPELLEE AND AFFIRMANCE

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Counsel hereby certifies that, in addition to the parties and entities identified in the Certificates of Interested Persons which the parties have submitted, the following may have an interest in the outcome of the proceedings:

1. Freedom From Religion Foundation, Inc. (“FFRF”), a 501(c)(3) non-profit corporation. FFRF has no parent corporation, subsidiaries, or conglomerates and is not owned by any affiliates. FFRF has one affiliated organization, Non-Belief Relief, Inc. No publicly held company owns any percentage of FFRF.
2. Central Florida Freethought Community (“CFFC”), a 501(c)(3) non-profit corporation. CFFC has no parent corporation, subsidiaries, or conglomerates and neither owns, nor is owned by any affiliates. No publicly held company owns any percentage of CFFC.
3. Elliott, Patrick C.
4. Markert, Rebecca S.
5. McNamara, Colin E.

None of the foregoing is a publicly-traded company or corporation.

/s/ Rebecca S. Markert  
Rebecca S. Markert

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## **STATEMENT OF ISSUES**

1. Does a private actor have a Free Speech right to co-opt a government actor's public-address system for the purpose of a delivering a prayer at a government-sponsored event?
2. Does a prayer broadcast by a government actor over its public-address system at a government-sponsored event violate the Establishment Clause?

## **INTEREST OF AMICI**

The Freedom From Religion Foundation (“FFRF”) is a non-profit organization whose primary purposes are to protect the constitutional principle of separation between state and church and to represent the rights and views of nontheists and freethinkers. FFRF has more than 30,000 members nationally and more than 1,500 Florida members.

FFRF has been a litigant in approximately 70 First Amendment cases, which principally involve the Establishment Clause, but also have included challenges under the Free Speech Clause of the First Amendment. FFRF is committed to protecting the rights of conscience of students, including students who attend government-sponsored sporting events.

The Central Florida Freethought Community (“CFFC”) is a non-profit organization incorporated in Florida and headquartered in Oviedo, Florida. CFFC is a chapter of FFRF and has more than 300 members. CFFC's members include

people who characterize themselves as atheists, agnostics, or otherwise nonreligious. CFFC includes members who have children that participate in high school athletics.

The parties in this case have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part. No person or entity aside from the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

### **SUMMARY OF ARGUMENT**

Cambridge Christian School has sought to force the Florida High School Athletic Association to broadcast prayers over the public-address system at state championship competitions that the FHSAA hosts. Cambridge Christian's Free Speech claim fails because it has not established that a forum exists for private speech. Speech over the public-address system at FHSAA championship competitions is government speech under the First Amendment. FHSAA may conduct its broadcast of events as it wishes, including controlling what messages it sends over the public-address system at championship football competitions that it hosts. As a government entity, the FHSAA must comply with the Establishment Clause and cannot endorse prayer.

## **ARGUMENT**

### **I. The FHSAA has not violated the Free Speech Clause because its public-address messages are government speech.**

A private religious school does not have a constitutional right to commandeer the public-address system at a state-sponsored athletic competition. The Free Speech Clause of the First Amendment only protects *private* speech, it does not implicate *government* speech.

Cambridge Christian has failed to present a cognizable claim under the Free Speech Clause of the First Amendment. If FHSAA is “engaging in [its] own expressive conduct, then the Free Speech Clause has no application.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009). Because FHSAA controls its broadcast and public-address system at championship events that it hosts, an outside party does not have a legal right to deliver a prayer or other message.

#### **A. The Free Speech Clause only prohibits censorship of private speech, not government speech.**

There is a crucial difference between government censorship of private speech in a public forum and government-control of its own message. It is well settled that the Free Speech Clause does not regulate government speech, as a government entity has the right to “speak for itself” and select the views that it wants to express. *Pleasant Grove City*, 555 U.S. at 467 (citing *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000), *Rosenberger v.*

*Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). “This freedom includes ‘choosing not to speak’ and ‘speaking through the ... removal’ of speech that the government disapproves.” *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1074 (11th Cir. 2015), *cert. denied*, (U.S. Oct. 3, 2016) (quoting *Downs v. L.A. Unified Sch. Dist.*, 228 F.3d 1003, 1012 (9th Cir. 2000)).

**B. Cambridge Christian fails to bring forth a plausible claim that FHSAA has a forum for private speech.**

Cambridge Christian puts the cart before the horse by asserting that FHSAA has engaged in viewpoint discrimination. First, Cambridge Christian must put forth a plausible claim that it has a right to speak in the manner that it desires.

Cambridge Christian fails to meet this initial hurdle.

In its brief, Cambridge Christian argues that FHSAA engaged in viewpoint discrimination without first establishing that any type of forum for private speech exists. Any rejection of program content by FHSAA does not violate the Free Speech Clause unless FHSAA restricted speech within a forum for private speech. The Supreme Court has said, “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others.” *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017). When FHSAA prepares for its broadcast of the game, it has no obligation to cede to the request of third parties to say certain things or to turn over its broadcast to these parties. A mere request for FHSAA to communicate something via the public-address system does not create a nonpublic forum.

The Supreme Court’s decisions related to viewpoint discrimination involve clearly-defined forums for private speakers. *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993) (Relating to use of school facilities by community groups for “social, civic, and recreational” purposes); *Rosenberger*, 515 U.S. 819, 822 (Relating to student group application for payments from the Student Activities Fund)); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001) (Relating to request to use school facilities pursuant to a community use policy); *Matal*, 137 S. Ct. 1744, 1758 (Relating to a trademark application to the Patent and Trademark Office).

A government agency is not mandated to turn its public-address system over to an event attendee to deliver a prayer or other message. A plaintiff asserting a free speech claim must point to both a medium of expression and the opportunity for expression (a defined policy or practice that allows private access). Where there is no opportunity for private speech, there is no forum at all. Cambridge Christian has not established, and is unable to assert, that the FHSAA turns its public-address system over to private speakers at the beginning of competitions to deliver their own message. In sum, it fails to allege that similarly situated persons were allowed to speak *in the same manner* that it requested.

Most direct forms of communication from the government do not implicate the Free Speech Clause. For example, an invited guest at a gubernatorial inauguration

does not have a constitutional right to address the audience via the public-address system. Naturally, the public-address system at such events is under the complete control of those who are putting on the event. The message that the guest sought to distribute, and the reasons for denial, are immaterial because the guest does not have a legal right to speak. Likewise, the reason that Cambridge Christian was not allowed to use the public-address system for a pre-game prayer is immaterial.

It is understandable why the FHSAA would decline to open up the public-address system to indiscriminate requests by third parties. Participating schools could have any number of messages that they would seek to deliver unrelated to the competition being played. Would FHSAA be required to allow a representative from a STEM high school to criticize anti-science policies of the federal government? Could public schools deliver a message about decreased funding from the state? Does FHSAA have to broadcast a Muslim call to prayer? If a public school played a Christian school, would it be allowed to disclaim endorsement of the prayer? In the absence of an established forum, the FHSAA cannot be required to turn over the public-address system to outsiders.

Without legal authority or factual allegations demonstrating that a forum for private speakers was created by the FHSAA, Cambridge Christian cannot meet its initial burden of establishing that it has a right to speak via the public-address system in the first place.

**C. FHSAA maintains control the public-address system and can broadcast what it wishes.**

Cambridge Christian’s Free Speech claim also must fail because Supreme Court and Eleventh Circuit cases establish that this type of communication is government speech.

The Supreme Court previously addressed whether messages delivered over the public-address system at government-sponsored football games are private speech. In *Santa Fe Indep. Sch. Dist. v. Doe*, the Supreme Court ruled that when speech occurs in a context that would lead an objective observer to believe a government entity is endorsing the speech, it “is not properly characterized as ‘private speech.’” 530 U.S. 290, 310 (2000). This included student-led, student-initiated speech where a reasonable observer would perceive it as government speech.

The Supreme Court in *Santa Fe* explicitly rejected an argument that the school district had created a forum for private speech: “Although the District relies heavily on this Court’s cases addressing public forums, *e.g.*, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, it is clear that the District’s pregame ceremony is not the type of forum discussed in such cases.” *Id.* at 290-91. This was because the school district did not “open its ceremony to indiscriminate use by the student body generally,” and instead allowed one student to deliver the invocation, “which is subject to particular regulations that confine the content and topic of the student’s message.” *Id.* at 291.

The facts in this case even more strongly demonstrate that the messages delivered over the public-address system at FHSAA championship events are government speech. Unlike the school system in *Santa Fe*, FHSAA has not even sought to allow a speaker to deliver an invocation or other private message. The public-address system is not only closed to “indiscriminate use” by speakers, but also to all speakers other than the public-address announcer. The FHSAA has adopted a “Public-Address Protocol,” which addresses statements made by the “public-address announcer.” See Doc 8-1, pp. 15-16.

Statements by the public-address announcer are attributable to the FHSAA, which directly controls what the public-address announcer says. The public-address announcer is considered a bench official for all FHSAA Championship Series events. Doc. 8-1, pp. 15. FHSAA’s Public-Address Protocol limits the announcements to the FHSAA script for promotional announcements and a limited number of other announcements designated by FHSAA. *Id.* at 15-16. Any observer of the game would understand that messages over the public-address system carried the stamp of approval of FHSAA.

In addition to *Santa Fe*, the Supreme Court’s recent government speech jurisprudence confirms that messages over the public-address system constitute government speech. While “[t]he Supreme Court has not articulated a precise test for separating government speech from private speech,” *Mech*, 806 F.3d at 1074,

the Court’s decision in *Walker v. Tex. Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2251 (2015), utilized three factors in concluding that specialty license plates for vehicles in Texas were government speech. These factors—history, sponsorship, and control—were also considered when the Supreme Court decided whether monuments on government property constitute government speech. *Sumnum*, 555 U.S. at 470–72. In *Walker*, the Supreme Court first considered history and whether the government historically used the particular media to speak. Second, the Court considered whether the message would be viewed as coming from the government. Third, it considered the extent of government control over the message.

This Court used the *Walker* factors in analyzing whether a public-school district’s removal of a sponsor’s banners on school fences violated the free speech clause. *Mech*, 806 F.3d 1070. Each factor strongly supports the conclusion that messages over the FHSAA public address system constitutes government speech.

**1. No historical evidence suggests that the PA system is used for private speech.**

First, while historic evidence was not presented in *Mech*, the Court determined that its absence was not decisive. *Id.* at 1075-76. The Court also noted “a particular medium may be government speech based solely on present-day circumstances.” *Id.* (citing *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005)).

There is little in the Amended Complaint related to the history of announcements at state championship competitions. However, any claimed prior instance of pre-game prayer is not determinative of the present-day circumstances. Cambridge Christian has not offered adequate allegations that there is a historical practice of allowing school participants to commandeer the public-address system at state-sponsored athletic events.

**2. PA messages are, and are viewed as, sponsored by FHSAA.**

The court in *Mech* said that the advertising banners were essentially “thank you” messages on behalf of the school, which included the school’s initials and identified the sponsor as a “partner.” *Mech*, 806 F.3d at 1077. The court said, “Observers would reasonably interpret them as ‘conveying some message on the [school’s] behalf.’” *Id.*, quoting *Walker*, 155 S. Ct. at 2252.

Messages delivered at FHSAA championship events come from FHSAA. The 2015 Division 2A Championship Game was not hosted by one of the participating schools, but was held at Camping World Stadium. Doc. 8, pg. 1. Messages about the game were delivered by the designated FHSAA public address announcer, who is considered to be a bench official of the FHSAA. Doc. 8-1, p. 15. A reasonable viewer of the game would understand that messages over the public-address system carry the endorsement of the FHSAA.

**3. The government has exclusive control over the PA messages.**

The control by schools in *Mech* over the messages “strongly suggests that the banners are government speech.” 806 F.3d at 1078. Schools had control over the design of the banners, their size and location. *Id.* The banners were required to include the school’s initials and the message “Partner in Excellence.” While the bulk of information on the banners came from the sponsor, “[t]he fact that private parties take part in the design and propagation of a message does not extinguish [its] governmental nature.” *Id.* at 1078-79, quoting *Walker*, 135 S. Ct. at 2251.

The FHSAA has extensive control over the public-address system. This includes selecting a single speaker, the public-address announcer, and then limiting what that announcer may say pursuant to the Public-Address Protocol. The announcer is tasked with maintaining neutrality and is required to follow an FHSAA script for promotional announcements. Doc. 8-1, pp. 15-16. Not only were the public announcements subject to FHSAA control, but numerous aspects of the game were controlled by detailed FHSAA policies and regulations. See generally, Doc 8-1; Doc. 8-2. This includes that the event “shall be conducted in accordance with the policies established by the Board of Directors and shall be under the direction and supervision of the FHSAA Office.” Doc. 8-1, p. 15.

In sum, the context of the game and FHSAA control puts this case squarely within the rulings of the Supreme Court in *Santa Fe* and the Eleventh Circuit in

*Mech.* Cambridge Christian wants to force a state agency to promote its Christian message through a mechanism limited to conveying government speech. FHSAA has rightly declined to do so because it would violate the Establishment Clause of the First Amendment.

**II. As a government entity, the FHSAA cannot endorse religion.**

If the FHSAA is forced to broadcast prayers at its events, it will violate the constitutional rights of thousands of families. The Establishment Clause of the First Amendment prohibits the FHSAA from endorsing or advancing religion.

The Supreme Court has explained that “the prohibition against governmental endorsement of religion ‘preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.’” *Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989). The goal of this endorsement test is to ensure that the government does not “appear to take a position on questions of religious belief.” *Id.* at 594.

It is well settled by the Supreme Court that the government may not include prayer at activities for school-age children. *See Santa Fe*, 530 U.S. 290; *Lee v. Weisman*, 505 U.S. 577 (1992) (ruling prayers over the public address system at public school graduations are an impermissible establishment of religion); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (overturning law requiring daily “period of silence not to exceed one minute . . . for meditation or daily prayer.”); *Sch. Dist. Abington*

*Twp. v. Schempp*, 374 U.S. 203 (1963) (declaring unconstitutional devotional Bible reading and recitation of the Lord’s Prayer in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (finding prayers in public schools unconstitutional).

Any students who participate in FHSAA athletic championship competitions or who attend the competitions cannot be the subjects of publicly-broadcast prayer by FHSAA. This is especially concerning when public schools are participating in the events, but it remains true even when private Christian schools participate.

Under the Establishment Clause, the government may not endorse religion. There is no exception even if most of the audience would be receptive to the religious message. “[W]e do not count heads before enforcing the First Amendment.”

*McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 884 (2005) (O’Connor, J., concurring). FHSAA cannot be the mouthpiece of religious organizations or be used to gather event attendees to engage in a communal expression of Christian religious worship.

Even beyond the circumstances of this case, public school students have a right to attend athletic events that their school participates in without being coerced into prayer. As the Supreme Court has said, the Constitution “demands” that schools may not force students to decide “between attending these games and avoiding personally offensive religious rituals.” *See Santa Fe*, 530 U.S. at 312. FHSAA and individual public schools have an obligation to ensure that the First

Amendment rights of students are protected. Thus, public schools and the FHSAA cannot allow public prayer broadcasts at any FHSAA competitions that involve public school students.

Courts have protected parental and student rights where government actors have subjected public school students to prayers, regardless of whether the school itself is broadcasting the prayer. For example, a public school coach's participation in a team's prayer circle is unconstitutional. *Borden v. Sch. Dist. of the Township of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009) (declaring the coach's organization, participation, and leading of prayers before football games unconstitutional); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995) (declaring basketball coach's participation in student prayer circles an unconstitutional endorsement of religion).

A public school has an affirmative duty to avoid advancing and endorsing religion, even if that endorsement does not occur on public school property. *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (finding school district's practice of holding graduation ceremonies and related events at a Christian church violated Establishment Clause by conveying message of religious endorsement that carried with it an aspect of coercion). This obligation to avoid endorsing religion extends to all athletic contests that are school-sponsored events.

It is no defense to the Establishment Clause to claim that publicly broadcast prayers at school events are merely “voluntary.” The Supreme Court has highlighted the problem with forcing students to opt-out of such activities: “To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.” *Lee*, 505 U.S. at 596 (citations omitted); *See also, Jager v. Douglas County Sch. Dist.*, 862 F.2d 825, 832 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (“ . . . whether the complaining individual’s presence was voluntary is not relevant to the Establishment Clause analysis . . . The Establishment Clause focuses on the constitutionality of the state action, not on the choices made by the complaining individual.”).

Forcing FHSAA to broadcast religious messages also forces an objecting student to violate his right of conscience, or else to “forfeit his . . .rights and benefits at the price of resisting conformance to state-sponsored religious practice.” *Lee*, 505 U.S. at 596. This “sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community and accompanying message to adherents that they are insiders, favored members of the political community.’” *Santa Fe*, 530 U.S. at 309-10 (citations omitted).

**CONCLUSION**

Messages over the FHSAA-controlled public address system constitute government speech. Cambridge Christian does not have a Free Speech right to take over a public-address system that is used for government speech and to use it for its own religious purposes. As a government entity, the FHSAA cannot endorse prayer in violation of the Establishment Clause. The District Court decision should be affirmed.

Dated: December 11, 2017

Respectfully submitted,

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**STATEMENT OF COMPLIANCE**

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, this brief contains 3,474 words.

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 in a proportionally spaced typeface using Microsoft Word for Mac Version 15.40 in 14 point Times New Roman font.

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**CERTIFICATE OF SERVICE**

I certify that, on December 11, 2017, I electronically filed the foregoing brief with the Clerk of Court using CM/ECF and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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