UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

CAMBRIDGE CHRISTIAN SCHOOL, INC. Plaintiff, v. FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. Defendant.	Civ No. 8:16-cv-02753-CEH-AAS

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiff Cambridge Christian School, Inc. ("Cambridge Christian"), by and through undersigned counsel, and pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, hereby moves this Court for entry of an Order enjoining Defendant Florida High School Athletic Association, Inc. from violating Cambridge Christian's rights to freedom of speech and free exercise of religion protected by the United States and Florida Constitutions. In support of this Motion, Cambridge Christian submits the following memorandum of law.

INTRODUCTION

The right of private citizens and organizations to practice religion free from government censorship and suppression is fundamental. The right to be free from government discrimination on account of one's point of view is equally so.

This case is about the Florida High School Athletic Association's (the "FHSAA") unlawful censorship of private religious speech through a policy that discriminates against religious speech at high school sporting events. By prohibiting Cambridge Christian School ("Cambridge Christian") from leading its students and their families and fans in a communal prayer at the 2016 Division 2A Florida High School Championship Football Game, the FHSAA violated the Free Speech and Free Exercise Clauses of the First Amendment and Article I, Sections 3, and 4 of the Florida Constitution. The FHSAA's discriminatory policy prohibiting prayer, while allowing secular speech, creates a substantial threat of irreparable harm to Cambridge Christian unless this Court grants the injunctive relief requested herein.

Cambridge Christian and the students, parents, and faculty that make up its community incorporate prayer into all aspects of their daily life, from the chapel to the classroom, to the athletic fields. For years, at all of its home football games, Cambridge Christian has offered an opening prayer over the loudspeaker to allow the students on the field, parents, and other community members in the stands to pray together. This pre-game communal prayer is not only a long-standing tradition for Cambridge Christian, it is fundamental to its reason for being.

In December of 2015, Cambridge Christian's football team (the "Cambridge Christian Lancers") qualified for their first Florida Division 2A championship game against University Christian School ("University Christian"), another private Christian school with similar beliefs and traditions. The game was organized and administered by the FHSAA and was to be held at

Camping World Stadium (formerly known as the Citrus Bowl) (the "Stadium").

The week before the game, the schools jointly notified the FHSAA of their desire to use the Stadium loudspeaker to lead their communities in a pre-game prayer, as both schools traditionally do before each game and as University Christian did the last time it qualified for the championship game. Notwithstanding that before, during, and after each FHSAA championship series game, the Stadium's loudspeaker and other facilities at the Stadium were to be used to broadcast other private messages (including announcements, promotional messages and advertisements, commentary, and participating schools' halftime shows), the FHSAA denied Cambridge Christian and University Christian's request on account of its religious viewpoint, stating that the FHSAA would not permit use of the loudspeaker for a religious message and claiming that "based on federal law," it could not "legally permit or grant permission for such [religious] activity." In later correspondence, the FHSAA claimed that its announced policy (prohibiting use of the Stadium loudspeaker for religious speech) is required by *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) ("*Santa Fe*").

The FHSAA's application of federal law is wrong, its reliance on *Santa Fe* is misplaced, and its policy discriminating between religious and secular speech is unconstitutional.

STATEMENT OF FACTS

Cambridge Christian[1] has a clearly defined religious mission: "To glorify God in all that [it does]; to demonstrate excellence at every level of academic, athletic, and artistic involvement; to develop strength of character; and to serve the local and global community." Verified Amended Complaint [ECF No. 6] (cited as "Ver. Compl.") at ¶ 11. Since its founding in 1964,

[1] Cambridge Christian School, Inc. operates Cambridge Christian School, a private, independent Christian school located in Tampa, Florida. Ver. Compl. ¶ 5. Both Cambridge Christian School, Inc. and Cambridge Christian School are referred to herein collectively as "Cambridge Christian".

open, communal prayer has been an integral component of Cambridge Christian's mission and is offered daily at the school as well as at all of the school's events, including athletic events. Ver. Compl. ¶ 13.

Cambridge Christian's Athletic Department has its own mission statement that echoes the mission of Cambridge Christian: "The Cambridge Christian School Athletic Department's chief end is to glorify Christ in every aspect of [its] athletic endeavors while using the platform of athletics to: Teach the Principles of Winning; Exemplify Christian Morals and Values in our Community; Achieve Maximum Physical, Moral and Spiritual Character Development; and Mentor Young Men and Women to Deeper Walk with Jesus." Ver. Compl. ¶ 14.

By long-standing tradition, Cambridge Christian student-athletes, their parents, and fans are led in prayer by a parent, student, or member of the school faculty or administration before every Cambridge Christian sporting event. Ver. Compl. ¶ 16. Since the first year of Cambridge Christian's football program (2003), the Cambridge Christian Lancers have participated in Cambridge Christian's tradition of pre-game prayer over the loudspeaker prior to the kick-off of each home game and at away games when possible. Ver. Compl. ¶¶ 15; 17. Using the loudspeaker is important to Cambridge Christian's tradition of pre-game prayer because it allows the Cambridge Christian community to come together in fellowship as a single community sharing in religious observation. Ver. Compl. ¶ 18. At football games in particular, because of the size of the fields, the outdoor venues, and the noise generated by those in attendance, Cambridge Christian cannot engage in its tradition of a communal pre-game prayer without the use of a loudspeaker. Ver. Compl. ¶ 19.

The FHSAA, a self-acknowledged state actor, is the governing body for athletics in Florida public and private schools. Ver. Compl. ¶ 20. The FHSAA supervises and regulates

Florida high school interscholastic athletic programs pursuant to a statutory delegation by the Florida Legislature in Section 1006.20, Florida Statutes. Ver. Compl. ¶ 20–21. Under Article 2.7 of the FHSAA Bylaws, 2015–2016 Edition, the FHSAA pledges not to discriminate in its governance policies and programs on the basis of religion. Ver. Compl. 24. A true and correct copy of the FHSAA Bylaws, 2015–2016 Edition, is attached as **Exhibit A.** Cambridge Christian is a member of the FHSAA, and for the 2015 season, the Cambridge Christian Lancers played in the FHSAA's Division 2A, along with 19 other private, Christian schools. Ver. Compl. ¶¶ 25–26.

During the 2015 regular season, the Cambridge Christian Lancers had a 9-0 record that qualified them for the 2A Division playoff games administered by the FHSAA. Ver. Compl. ¶¶ 31; 35. Cambridge Christian hosted its first playoff game against Northside Christian School at Skyway Park, and before kickoff, the team prayed over the loudspeaker as it had prior to all other home and playoff games during the 2015 season. Ver. Compl. ¶ 33. The Cambridge Christian Lancers also prayed over the loudspeaker before kickoff during the next playoff games it hosted, against Admiral Farragut Academy and First Baptist Academy. Ver. Compl. ¶ 33. The Cambridge Christian Lancers dominated during the playoffs and ultimately qualified for the final playoff game (the "2015 2A Championship Game") against University Christian. Ver. Compl. ¶ 34. The Stadium where the 2015 2A Championship Game would be played has hosted a vast variety of events over the years from college football games, the World Cup, monster truck rallies, Wrestlemania, and religious revival meetings led by the Reverend Billy Graham. Ver. Compl. ¶ 29.

In preparation for the championship games in each FHSAA Division, representatives from the FHSAA, the various finalist schools in each Division, and the Central Florida Sports

Commission held a conference call on December 1, 2015. Ver. Compl. ¶ 37. During that conference call, the representatives of Cambridge Christian and University Christian asked to use the loudspeaker at the Stadium to lead their attending students, families, and fans in a joint pre-game prayer, as University Christian had done during the 2012 state championship game. Ver. Compl. ¶ 38. Cambridge Christian and University Christian expected that the FHSAA would permit them to convey their chosen message because, according to FHSAA Administrative Procedure 3.1.8, the stadium loudspeaker is available for broadcast of private messages provided by host school management during playoff football games. *See* Ver. Compl. ¶¶ 36; 38. However, during that conference call, a representative from the FHSAA denied the schools' joint request. Ver. Compl. ¶ 39.

The following day, on December 2, 2015, Tim Euler, Head of School for Cambridge Christian, sent an e-mail to Roger Dearing, Executive Director of the FHSAA, again requesting permission to deliver a prayer over the loudspeaker at the 2015 2A Championship Game. Ver. Compl. ¶ 41. A true and correct copy of the Mr. Euler's December 2, 2015, e-mail to Dr. Dearing is attached as **Exhibit B-1**. A short time later, Heath Nivens, Head of School of University Christian, sent a similar e-mail to Dr. Dearing joining in Cambridge Christian's request to deliver a pre-game prayer over the loudspeaker. Ver. Compl. ¶ 42. A true and correct copy of Mr. Nivens' December 2, 2015, e-mail to Dr. Dearing is attached hereto as **Exhibit B-2**.

That same day, Dr. Dearing, acting on behalf of the FHSAA, denied the requests via e-mail in which he admitted that the basis of the denial was the religious nature of the message the schools intended to deliver. *See* Ver. Compl. ¶ 44. A true and correct copy of Dr. Dearing's e-mail dated December 2, 2015, to Mr. Euler and Mr. Nivens is attached hereto **Exhibit C**. In his e-mail, Dr. Dearing articulated the motive and reasoning behind the FHSAA's decision:

> Although both schools are private and religious-affiliated institutions, the federal law addresses two pertinent issues that prevent us from granting your request.
>
> First is the fact that the facility is a public facility, predominantly paid for with public tax dollars, makes the facility 'off limits' under federal guidelines and precedent court cases.
>
> Second is the fact that in Florida Statutes, ***the FHSAA (host and coordinator of the event) is legally a 'State Actor,' we cannot legally permit or grant permission for such an activity.***
>
> I totally understand the desire, and why your request is made. However, ***for me to grant the wish could subject this Association to tremendous legal entanglements.***

Ex. C. (Emphasis added.)

On December 4, 2015, Cambridge Christian played University Christian in the 2015 2A FHSAA Championship Game at the Stadium with approximately 1,800 people in attendance. Ver. Compl. ¶ 45. Before, during, and after the game, as well as at halftime, the FHSAA permitted various private messages (including announcements, promotional messages and advertisements, commentary, and participating schools' halftime shows) to be delivered over the Stadium's loudspeaker and other facilities. Ver. Compl. ¶ 48. Because the Stadium is such a cavernous venue, it was impossible for the Cambridge Christian and University Christian communities to join with one another in a communal prayer without the use of the loudspeaker. *See* Ver. Compl. ¶¶ 50–52. Although the players from both teams met at mid-field to pray together, fans in the Stadium could not hear the prayer, and both private school communities were denied the ability to come together in an open, communal prayer. Ver. Compl. ¶¶ 50–52.

Three days after the 2015 2A Championship Game, the FHSAA sent another e-mail to Cambridge Christian and University Christian elaborating upon and reiterating its decision prohibiting the use of the Stadium loudspeaker for a joint prayer. Ver. Compl. ¶ 56. A true and correct copy of the FHSAA's December 7, 2015, e-mail is attached as **Exhibit D**. The e-mail

reads in pertinent part:

> The issue of prayer over the PA system at the football game, [sic] is a common area of concern and one that has been richly debated – and decided in the courts of the United States.
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> ***
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> The fact of the matter is that both schools involved had prayer on the field, both before and after the football game. The issue was never whether prayer could be conducted. The issue was, and is, that an organization [the FHSAA], which is determined to be a 'state actor,' cannot endorse or promote religion. The issue of prayer, in and of itself, was not denied to either team or anyone in the stadium. It is simply not legally permitted under the circumstances, which were requested by Mr. Euler.

Ex. D. Then, on January 27, 2016, the FHSAA posted a press release on its website referencing *Santa Fe* and reiterating its decision to prohibit prayer over the Stadium loudspeaker. Ver. Compl. ¶ 57. A true and correct copy of the FHSAA's press release is attached hereto as **Exhibit E**.

The FHSAA's intention to deny any future requests to offer pre-game prayers is inherent in the FHSAA's stated position that it believes it "cannot legally permit or grant permission for such an activity," which amounts to a general policy prohibiting prayer over the loudspeaker (the "Policy"). Because it continues to participate in FHSAA-sanctioned sports (including not only football but other sports such as volleyball, basketball, and baseball), Cambridge Christian has a well-founded fear that it will continue to be prohibited from engaging in community prayer through the use of the loudspeaker as a result of the Policy. Ver. Compl. ¶ 59. With a full year of FHSAA championship series competition across all sports ahead, and championships beginning as early as November of 2016,[2] Cambridge Christian cannot wait to resolve the FHSAA's past and continuing constitutional violations inherent in the Policy.

[2] *See* a true and correct copy of a print-out from the FHSAA's website setting forth the schedule for championship series games for the 2016–2017 season, attached as **Exhibit F**.

PRELIMINARY INJUNCTION STANDARD

For this Court to grant a preliminary injunction, Cambridge Christian must demonstrate the following: (1) that there is a substantial likelihood that it will prevail on the merits; (2) that there is a substantial threat it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to the FHSAA; and (4) that granting the preliminary injunction will not disserve the public interest. *See Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1166 (11th Cir. 2001) (emphasis in original).

ARGUMENT

I. There is a substantial likelihood that Cambridge Christian will prevail on the merits of its Free Speech and Free Exercise claims.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ." U.S. Const. amend. I. "The Fourteenth Amendment makes this limitation applicable to the States." *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994). Likewise, Article 1, Section 3 of the Florida Constitution provides that "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof," and Article Section 4 states that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press."[3]

[3] Free Speech and Free Exercise claims under the Florida Constitution are analyzed similarly to claims under the Unites States Constitution. *See Cafe Erotica v. Florida Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002) ("The scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment. Thus, this Court applies the principles of freedom of speech as announced in the decisions of the Supreme Court of the United States.") (internal citations omitted); *see Toca v. State*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002) ("We have found no authority holding that Florida's Free Exercise Clause requires a different analysis or result [than the federal Free Exercise Clause]. For the most part, the courts

The FHSAA's decision and Policy imposes an unconstitutional, viewpoint-based restriction on private speech during FHSAA-sanctioned games. The FHSAA justifies its hostility toward religious speech based on a fundamental misreading of *Santa Fe* and the Establishment Clause. *Santa Fe* and the Establishment Clause do not require that the FHSAA banish all private religious speech over the loudspeaker during FHSAA-sponsored games; they merely require that the FHSAA remain neutral toward private religious speech. Indeed, "'there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Santa Fe*, 530 U.S. at 302 (quoting *Board of Ed. Of Westside Cmty. Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990)) (emphasis in original).

In fact, in two post-*Santa Fe* decisions, the United States Court of Appeals for the Eleventh Circuit held that *Santa Fe* and the Establishment Clause neither require nor permit state actors, like the FHSAA, to adopt policies that prohibit religious speech. To the contrary, what the Constitution requires is a policy of neutrality toward religious speech – that is, one that neither endorses nor censors religious speech. *See Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001) (*Adler II*); *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (*Chandler II*). Based on this binding precedent, and because the FHSAA's Policy censors and is not neutral toward religious speech, Cambridge Christian is likely to succeed on the merits of its Free Speech and Free Exercise Clause claims.

A. The Policy constitutes a viewpoint-based restriction on speech and is unconstitutional.

The Supreme Court has repeatedly held that state action prohibiting speech on account of

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have treated the protection afforded under the state constitutional provision as coequal to the federal one, and have measured government regulations against it accordingly.")

its religious character constitutes unconstitutional "viewpoint discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995) (holding that the University of Virginia's denial of a request for public funds from a religious newspaper on account of the religious character of the newspaper constituted unconstitutional viewpoint discrimination). *See also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (holding that New York statute permitting use of public school property for certain uses but prohibiting its use for religious purposes constituted unconstitutional viewpoint discrimination).

"The principle that has emerged from [Supreme Court] cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel,* 508 U.S. at 394 (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). *See also Rosenberger*, 515 U.S. at 828 ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.") (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). "Discrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641–43 (1994)).

"When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). "Viewpoint discrimination is thus an egregious form of content discrimination . . . [where] the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

The Supreme Court has expressly concluded that religion is a protected viewpoint for

First Amendment purposes. *Id.* at 832 (holding that denial of "on the ground that the contents of Wide Awake reveal an avowed religious perspective" was unlawful viewpoint discrimination); *Lamb's Chapel,* 508 U.S. at 394 (applying constitutional prohibition against viewpoint discrimination to school board decision to deny request to exhibit a film series at public school "solely because the series dealt with the subject from a religious standpoint").

Here, the FHSAA's Policy is a viewpoint-based restriction on speech because it censors speech due solely to its religious nature. As the FHSAA has repeatedly made clear, it refused Cambridge Christian's request to use the loudspeaker during the 2015 2A Championship game precisely because Cambridge Christian wished to offer a religious message. *See* Ex. C & D ("The issue of *prayer* . . . is simply not legally permitted under the circumstances, which were requested by Mr. Euler;" "we cannot legally permit or grant permission for such an *activity*.") (Emphasis added).

The Policy's viewpoint-based restrictions are all the more apparent given that the FHSAA permitted various forms of secular speech, including announcements, promotional messages and advertisements, commentary, and participating schools' halftime shows, over the loudspeaker during the 2015 2A Championship Game. Because the Policy distinguishes permitted speech from forbidden speech on the basis of its religious nature, it constitutes a viewpoint-based restriction on speech and is unconstitutional.[4]

[4] In correspondence, the FHSAA has taken the position that the Stadium does not constitute a "public forum," relying on *Perry Educ. Ass'n*, 460 U.S at 46–47 (holding that a school's mail system was not a public forum). This is an incorrect assertion and, more importantly, irrelevant. Viewpoint discrimination is constitutionally impermissible even in a wholly nonpublic forum. *See Lamb's Chapel*, 508 U.S. at 394 ("'Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum . . . or if he is not a member of the class of speakers for whose especial benefit the forum was created . . ., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.'") (quoting *Cornelius*

B. The FHSAA must demonstrate a compelling interest to justify the Policy's viewpoint-based restrictions.

Because viewpoint-based restrictions on speech are subject to the "most exacting scrutiny" and are presumptively invalid, the FHSAA would have the burden of demonstrating the Policy's constitutionality. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543–44 (2012) ("[T]he Constitution demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.") (Internal citations and quotations omitted). Under a strict scrutiny standard, the FHSAA must demonstrate that the Policy is the "least restrictive means of achieving a compelling state interest." *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

C. The FHSAA does not have a compelling interest to justify the Policy's viewpoint-based restrictions.

The FHSAA attempts to justify its Policy's viewpoint-based restrictions based on an argument that such discrimination is required by the Establishment Clause. However, "the Establishment Clause cannot be used as a justification for content-based restrictions on religious

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v. NAACP Legal Defense and Ed. Fund, Inc., 473 U.S. 788 (1985)); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) ("Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place."); *Adler v. Duval County Sch. Bd.,* 206 F.3d 1070, 1081 (11th Cir. 2000) (*Adler I*) ("The Supreme Court has consistently held that in nonpublic fora the government may not engage in viewpoint discrimination."). Moreover, forum analysis is irrelevant where, as here, the speaker is already an authorized participant in the subject activity and only the specific speech being offered is prohibited. *See Gilio ex rel. J.G. v. School Bd. of Hillsborough County, Fla.*, 905 F.Supp.2d 1262, 1271 (M.D. Fla. 2012) ("[T]he School Board's argument for a forum analysis is not persuasive because that approach typically is employed when an outside group claims it is being treated differently by school officials in gaining access to student events or school facilities that are open to other organizations. Here, where the speaker is a student who is entitled to be on school property, a forum analysis is not relevant.") (Internal citation omitted). Finally, upon opening the Stadium facilities up to private speech, including using the loudspeaker for school messages and halftime shows and use of other Stadium facilities for other messages, *see supra* at pp. 7 &12, the FHSAA created a limited public forum. *See Rosenberger*, 515 U.S. at 829.

speech." *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1395 (11th Cir. 1993). "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302 (internal citations and quotations omitted) (emphasis in original). As a result, "[p]ermitting [private persons] to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved." *Chandler II*, 230 F.3d at 1317 (quoting *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999) (*Chandler I*)).

In *Chandler I and II*, the Eleventh Circuit held that a lower court's injunction – entered as an attempt to remedy a perceived Establishment Clause violation – was itself a violation of the Free Speech and Free Exercise Clauses. *See Chandler I*, 180 F.3d at 1265; *Chandler II*, 230 F.3d at 1317. In the district court, the plaintiffs sought to invalidate an Alabama statute that purported to permit student-initiated prayer in public schools. *Chandler v. James*, 958 F. Supp. 1550, 1553 (M.D. Ala. 1997). The court sided with the plaintiffs and entered summary judgment holding that the statute violated the Establishment Clause on its face. *Id.* at 1565–66. In so doing, the court fashioned an injunctive remedy, which purported to enjoin, among other things, the DeKalb County School Board and its members from "aiding, abetting, commanding, counseling, inducing, ordering, procuring, participating in, **or permitting**," various forms of religious expression in various settings, including "over any public-address system during the instructional day (including the home room period) or in connection with any school-sponsored event, including, but not limited to, assemblies and sporting events." *Chandler v. James*, 985 F. Supp.

1062, 1063–64 (M.D. Ala. 1997) (emphasis added).

The DeKalb County School Board did not appeal the portion of the injunction that prohibited it from "aiding, abetting, commanding, counseling, inducing, ordering, or procuring" religious speech, but did appeal the part of the injunction that purported to prohibit it "from '**permitting**' vocal prayer or other devotional speech in its schools . . . such as aloud in the classroom, **over the public address system**, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony." *Chandler I*, 180 F.3d at 1257 (emphasis added). The Eleventh Circuit, therefore, reviewed the District Court injunction solely to determine "the issue of whether the district court may constitutionally enjoin DeKalb from permitting student-initiated religious speech in its schools." *Id*. at 1258.

The Eleventh Circuit held that the District Court injunction was itself a violation of the Free Speech and Free Exercise Clauses because it purported to require public officials to suppress religious speech in the schools. *Id*. at 1265–66 (". . . DeKalb cannot constitutionally prohibit students from speaking religiously and the Permanent Injunction cannot require it to. . . . [T]he Permanent Injunction may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech."). As the court explained:

> [S]uppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.
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> ***
>
> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's—either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved."
>
> Because genuinely student-initiated religious speech is private speech endorsing

> religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution.

Id. at 1261.

Here, as in *Chandler* the FHSAA made the "all too uncommon attempt to live up to its constitutional obligation to avoid establishment of any religion," *Verbena United Methodist Church v. Chilton Cty. Bd. of Educ.*, 765 F. Supp. 704, 707 (M.D. Ala. 1991), and instead created a Policy that violates the Free Speech and Free Exercise Clauses by suppressing religious speech. "The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Chandler II*, 230 F.3d at 1316.

Despite the FHSAA's well-intentioned motives, the FHSAA's fear of violating the Establishment Clause is not a compelling justification for suppressing religious speech and does not satisfy the strict scrutiny analysis under the Free Speech and Free Exercise Clauses. *See Chabad-Lubavitch of Georgia*, 5 F.3d at 1395–96 (holding that the state of Georgia would not violate the Establishment Clause by permitting the display of a menorah on public property and thus Georgia did not survive strict scrutiny under the Free Speech Clause); *Verbena United Methodist Church*, 765 F. Supp. at 716 (granting plaintiff's motion for preliminary injunction where the plaintiffs demonstrated a likelihood of success on the merits that defendant violated their Free Exercise rights by refusing church permission to rent its auditorium for baccalaureate services even though defendant refused permission due to fear of violating the Establishment Clause).

Without a compelling reason to justify the Policy's restrictions on religious speech, the Policy violates the Free Speech and Free Exercise Clauses of the United States and Florida Constitutions, and Cambridge Christian is likely to succeed on its Free Speech and Free Exercise

claims.

D. The Establishment Clauses of the United States and Florida Constitutions do not require the FHSAA to censor Cambridge Christian's religious speech.

Contrary to the FHSAA's repeated assertions, the Establishment Clauses of the United States and Florida Constitutions do not require the FHSAA to suppress private, religious speech at sporting events that the FHSAA administers. To the contrary, what the Establishment Clause requires is a policy of neutrality toward religious speech – one that neither endorses nor suppresses it – as the United States Supreme Court and the Eleventh Circuit have held.[5]

i. *Santa Fe* does not require state actors to censor private, religious speech at public events.

The FHSAA's reliance on *Santa Fe* as the basis for its Policy is misplaced. In *Santa Fe*, the Supreme Court analyzed whether the Santa Fe Independent School District's policy requiring an election for a student speaker to deliver an invocation before home varsity football games violated the Establishment Clause. The policy at issue in *Santa Fe* stated in relevant part:

> The *board has chosen to permit students* to deliver a brief *invocation* and/or message to be delivered during the pre-game ceremonies of home varsity football games to *solemnize* the event . . .
>
> *Upon advice and direction of the high school principal*, each spring, the high school student council shall conduct an election . . . to determine whether such a statement or *invocation* will be a part of the pre-game ceremonies and if so, shall *elect* a student . . . to deliver the statement or invocation. . . .
>
> The board has *chosen to permit students to deliver a brief invocation* and/or message to be delivered during the pre-game ceremonies of home varsity football games to *solemnize* the event. . . .

Santa Fe, 530 U.S. at 298 n.6. (Emphasis added).

[5] The Florida Establishment Clause, Article I, Section 3 of the Florida Constitution, states that "[t]here shall be no law respecting the establishment of religion. . . ." and "is duplicative . . . of the Federal Constitution's Establishment Clause." *See Atheists of Florida, Inc. v. City of Lakeland*, *Fla.*, 779 F. Supp. 2d 1330, 1341 (M.D. Fla. 2011).

In finding that the policy violated the Establishment Clause, the Court focused on the high degree of entanglement between the school district and the content of the pregame invocation, noting that although the policy called for the invocation to be delivered by a student, school officials were the ones determining the religious nature of the content:

> Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good sportsmanship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an "invocation"—a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. ***Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy.***

Id. at 306–07. (Emphasis added).

But the Court further cautioned that its holding does not extend to every circumstance where a private speaker delivers a prayer "on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own." *Id.* at 302. Put simply, "[t]he Establishment Clause does not require the elimination of private speech endorsing religion in public places." *Chandler II*, 230 F.3d at 1316.

A pair of cases originally decided by the Eleventh Circuit before *Santa Fe*, and then reconsidered by the Eleventh Circuit after *Santa Fe*, help illustrate the degree to which the result in *Santa Fe* was based on its particularized facts. *See Adler II*, 250 F.3d 1330; *Chandler II*, 230

F.3d 1313.

In *Adler*, the U.S. District Court for the Middle District of Florida considered the constitutionality of a Duval County School Board policy[6] that permitted, but did not require, a student speaker to lead a prayer over the loudspeaker at graduation exercises. *Adler v. Duval Co. School Bd.,* 851 F. Supp. 446 (M.D. Fla. 1994). The court found that Duval's neutral policy permitting student speakers to offer a prayer at graduation did not violate the Establishment Clause. *Id.* at 456. The plaintiffs appealed, and a three-judge panel of the Eleventh Circuit initially reversed the district court's judgment. *Adler v. Duval Cty. Sch. Bd.*, 174 F.3d 1236, 1251 (11th Cir. 1999). When the entire Eleventh Circuit took up the case on rehearing *en banc*, however, the *en banc* court reversed the decision of the panel and affirmed the district court's judgment. *Adler I*, 206 F.3d at 1091 (*Adler I*). Within months after the Eleventh Circuit's *en banc* opinion in *Adler I*, the Supreme Court decided *Santa Fe*. A few months later, when *Adler* reached the Supreme Court on a petition for certiorari, the Supreme Court remanded the case to the Eleventh Circuit for further consideration in light of its newly-minted decision in *Santa Fe*. *See Adler v. Duval Cty. Sch. Bd.*, 531 U.S. 801 (2000).

On remand, the entire Eleventh Circuit, again sitting *en banc* (and this time specifically

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[6] The Duval County's policy stated in relevant part:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;
2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees;

The purpose of these guidelines is to allow students to direct their own graduation message without monitoring or review by school officials.

Id. at 449.

considering and applying *Santa Fe* as directed by the Supreme Court), reaffirmed its prior holding that Duval County's policy granting high school students the discretion to deliver a message at high school graduation exercises, including permitting prayers and other religious messages, did not violate the Establishment Clause. *Adler II*, 250 F.3d at 1342. Writing for an *en banc* Court, Judge Marcus explained:

> **The Court in *Santa Fe* did not attempt to sweep with a broad brush; rather, it found based on the facts then before it** that Santa Fe's policy allowing students to elect a speaker to give a "statement or invocation" of plainly religious bent, at every single home football game, subject to content review by school officials and potential state censorship of non– or anti-religious messages, violated the Establishment Clause. The facts of this case are fundamentally different, and in our view require exactly the same result today as they did at the time of our prior opinion.
>
> Critical to the Supreme Court's conclusion was its finding that the speech delivered by students pursuant to the *Santa Fe* policy was state-sponsored rather than private. In reaching that conclusion, the Court relied in substantial part on two facts: (1) the speech was "subject to particular regulations that confine the content and topic of the student's message," *Santa Fe*, 120 S.Ct. at 2276; and (2) the policy, "by its terms, invites and encourages religious messages," *id*. at 2277 (emphasis added). **Those two dispositive facts are not present here, and that makes all the difference**.
>
> *Id*. at 1336 (emphasis added).

Thus, *Adler* stands for the proposition that the Establishment Clause does not require a state actor to prohibit private speakers at a public-sponsored event from engaging in prayer or other religious speech but rather that a state actor in those circumstances remain neutral as to religious speech. Likewise, as discussed *supra* Section I.C, in *Chandler I* the Eleventh Circuit held that a lower court's injunction that purported to enjoin a school board and its members from "permitting vocal prayer or other devotional speech in its schools" violated the Free Exercise and Free Speech Clauses. 180 F.3d at 1257; 1265–66. *Chandler I* was also decided by the Eleventh Circuit before *Santa Fe* and then reached the Supreme Court on a petition for certiorari, on

which the Supreme Court remanded the case with instructions to reconsider in light of its decision in *Santa Fe*. *See Chandler v. Siegelman*, 530 U.S. 1256 (2000). On remand, the Eleventh Circuit – considering and applying *Santa Fe* – reaffirmed its original ruling:

> We have completed our review of *Chandler I* and have concluded that it is not in conflict with the Supreme Court's decision in *Santa Fe*.
>
> ***
>
> *Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer. In their view of the proper relationship between school and prayer, the cases are complementary rather than inconsistent.

Chandler II, 230 F.3d at 1314–15 (emphasis in original). In sum, *Chandler II* clarifies that *Santa Fe* merely condemns state sponsorship of religion but that any restriction on private speech based on its religious nature is unconstitutional censorship. *Id.* at 1316–17.

Overall, *Santa Fe*, *Adler II*, and *Chandler II* demonstrate that the Establishment Clause requires state actors to remain neutral toward religion and that, contrary to the FHSAA's beliefs, the Establishment Clause does not require that state actors approach religious speech with hostility.

II. There is a substantial likelihood that Cambridge Christian will prevail on its Florida Religious Freedom Restoration Act Claim.

The "protection afforded to the free exercise of religiously motivated activity under [the Florida Religious Freedom Restoration Act ("FRFRA")] is broader than that afforded by the decisions of the United States Supreme Court" regarding the right to free exercise of religion. *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1032 (Fla. 2004).

FRFRA provides that a state actor "shall not substantially burden a person's exercise of religion" unless the state actor demonstrates that the burden "is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling

governmental interest." Fla. Stat. § 761.03(1)(a)–(b). A substantial burden compels one 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. Once Cambridge Christian demonstrates that the FHSAA placed a substantial burden on its exercise of religion, the burden shifts to the FHSAA to demonstrate that there was a compelling governmental interest justifying that burden and that the burden is the least restrictive means of furthering that interest. *See id.* at 1034.

Here, the FHSAA has substantially burdened Cambridge Christian from exercising its religious beliefs and engaging in pre-game prayer over the loudspeaker at the 2015 2A Championship Game. As discussed previously, prayer is essential to Cambridge Christian's reason for being, and pre-game prayer is a vital component of Cambridge Christian's traditions. Moreover, as discussed *supra* Section I.C, the FHSAA does not have a compelling interest to justify the FHSAA's policy of forbidding pre-game prayer over the loudspeaker. Thus, Cambridge Christian is likely to succeed on its FRFRA claim.

III. There is a substantial threat that Cambridge Christian will suffer irreparable injury if the injunction is not granted.

"The loss of First Amendment freedoms, for even minimal periods of time, *unquestionably constitutes irreparable injury*." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (internal citation omitted) (emphasis added); *see also Royalty Network, Inc. v. Harris*, 756 F.3d 1352, 1357 (11th Cir. 2014) (immediate appellate review of a denial that implicates First Amendment protections is warranted under *Elrod*); *Eternal Word TV Network, Inc. v. Sec'y, United States HHS*, 756 F.3d 1339, 1350 (11th Cir. 2014) (the violation of even statutory rules that are designed to protect "First Amendment freedoms, even if temporary, 'unquestionably constitutes irreparable injury.'") (quoting *Elrod*, 427 U.S. at 373) (Pryor, J., concurring); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (noting that a violation of a

plaintiff's free speech rights is automatically irreparable harm because "chilled free speech . . . because of [its] intangible nature, could not be compensated for by money damages; in other words, plaintiffs could not be made whole.") (quoting *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)).

Here, Cambridge Christian has suffered irreparable injury for the loss of its Free Speech and Free Exercise freedoms during the 2015 2A Championship Game due to the FHSAA's Policy prohibiting religious speech but allowing secular speech. Moreover, with a full school year of FHSAA championship series games ahead, the Policy creates a substantial threat of irreparable harm to Cambridge Christian. This irreparable injury can only be prevented if this Court grants Cambridge Christian's request for injunctive relief. *See Gilio ex rel. J.G.*, 905 F. Supp. 2d at 1275 (holding that injunctive relief was warranted where plaintiff demonstrated irreparable injury due to the defendant's enforcement of policies that likely violated plaintiff's First Amendment rights); *Verbena United Methodist Church*, 765 F. Supp. at 714–15 (same).[7]

IV. The threatened injury to Cambridge Christian outweighs the threatened harm the injunction may cause the FHSAA.

The loss of First Amendment freedoms to Cambridge Christian greatly outweighs any possible harm to the FHSAA. With championship games for the 2016–2017 season beginning as early as November (*see* Ex. F), if the Court does not grant the injunctive relief requested herein,

[7] Cambridge Christian's past injury and threat of future injury are also sufficient to satisfy the standing requirement under Article III of the United States Constitution. The Article III requirements for standing are that (i) the plaintiff has suffered an injury in fact of a judicially cognizable injury that is concrete and particularized, (ii) there is a causal connection between the injury and the conduct complained of and (iii) there is likely chance that the injury will be redressed by a favorable decision. *See Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1334–35 (M.D. Fla. 2013). Here, Cambridge Christian has been injured, and stands to be injured again, by FHSAA's violation of its constitutional rights of free speech and free exercise of religion; and, an injunction enjoining the FHSAA from enforcing the Policy would redress Cambridge Christian's injury.

Cambridge Christian's private religious speech will likely continue to be censored pursuant to the Policy. Such injury to Cambridge Christian outweighs whatever harm an injunction would cause the FHSAA. *See Verbena United Methodist Church*, 765 F. Supp. at 715 ("The court is similarly persuaded that, because the loss of first amendment freedoms for even minimal periods of time constitutes irreparable injury, the threatened injury to plaintiffs clearly outweighs whatever harm the injunction might cause the School Board.") Indeed, entry of an injunction by this Court would not harm the FHSAA at all; to the contrary, an injunction would provide much-needed guidance to the FHSAA enabling it to exercise its duties in compliance with the Constitution. Because both the FHSAA and Cambridge Christian would benefit from the Court's decision on these constitutional issues, the Court should grant the injunctive relief requested.

V. Granting the preliminary injunction will not disserve the public interest.

"Injunctions protecting First Amendment freedoms are always in the public interest." *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012) (internal citations and quotations omitted). Cambridge Christian, the FHSAA, and other schools that may have an interest in using the loudspeaker at future FHSAA-sponsored games to deliver a private, religious message stand to gain from the Court's decision regarding the constitutionality of the Policy.

CONCLUSION

For the foregoing reasons, Cambridge Christian respectfully requests that this Court grant its preliminary injunction motion. Also, Cambridge Christian requests that the Court waive Rule 65(c) of the Federal Rules of Civil Procedure's bond requirement because Cambridge Christian's constitutional freedoms are at stake. *See Johnston v. Tampa Sports Auth.*, No. 8:05CV2191T-

27MAP, 2006 WL 2970431, at *1 (M.D. Fla. Oct. 16, 2006) (granting plaintiffs' motion to vacate bond because "imposing a financial burden on a plaintiff as a condition to protecting fundamental constitutional rights would create an unfair hardship on that plaintiff.")

Date: September 30, 2016

Respectfully submitted,

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*Application for *pro hac vice* forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on this the 30th day of September, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all parties of record. I further certify that I have e-mailed the foregoing document to counsel for defendant: Leonard E. Ireland, Jr., lireland@clayton-johnston.com.

/s/ Eliot Pedrosa
ELIOT PEDROSA, ESQ.