UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CAMBRIDGE CHRISTIAN SCHOOL, INC.

Plaintiff,

v. **Case No.: 8:16-cv-2753-T-36AAS**

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.

Defendant.

_____/

REPORT AND RECOMMENDATION

Before the Court is Cambridge Christian School, Inc.'s ("Cambridge Christian" or the "School") Motion for Preliminary Injunction and Incorporated Memorandum of Law in Support Thereof ("Motion for Preliminary Injunction") (Doc. 9), the Florida High School Athletic Association, Inc.'s (the "FHSAA") Motion to Dismiss Plaintiff's Verified Amended Complaint for Declaratory and Injunctive Relief and Incorporated Memorandum of Law in Support ("Motion to Dismiss") (Doc. 26), and responses thereto (Docs. 25, 39).[1] Both motions were referred to the undersigned to submit a report and recommendation as to their appropriate disposition. (Docs. 11, 29).

For the reasons stated below, the undersigned recommends that the FHSAA's Motion to Dismiss (Doc. 26) be **GRANTED** insofar as this case should be dismissed pursuant to Rule 12(b)(6), and Cambridge Christian's Motion for Preliminary Injunction (Doc. 9) be **DENIED.**

[1] In addition, with the undersigned's permission and with the consent of the parties, the Freedom From Religion Foundation and Central Florida Freethought Community submitted a brief *amici curiae* in opposition to Cambridge Christian's Motion for Preliminary Injunction. (Doc. 46).

I. PROCEDURAL HISTORY

On September 27, 2016, Cambridge Christian filed the instant action against the FHSAA. (Doc. 1). On September 30, 2016, Cambridge Christian filed a Verified Amended Complaint pursuant to the First Amendment to the United States Constitution, the Florida Constitution, and the Florida Religious Freedom Restoration Act. (Doc. 8). Cambridge Christian seeks declaratory and injunctive relief, as well as attorneys' fees and costs incurred as a result of bringing this action. (*Id.*). Contemporaneous with filing the Verified Amended Complaint, Cambridge Christian also filed its Motion for Preliminary Injunction and its Request for Oral Argument. (Docs. 9, 10). In response to Cambridge Christian's Verified Amended Complaint, the FHSAA filed its Motion to Dismiss. (Doc. 26). Cambridge Christian's Motion for Preliminary Injunction (Doc. 9) and the FHSAA's Motion to Dismiss (Doc. 26), to which responses have been filed (Docs. 25, 39), were referred to the undersigned for a report and recommendation as to their appropriate disposition. (Docs. 11, 29).

On November 2, 2016, the parties appeared by telephone before the undersigned for a scheduling status conference. (Doc. 37). At that time, the undersigned granted Cambridge Christian's request for oral argument.[2] (Doc. 38). In addition, in conformity with Local Rules 4.06(b)(1) and 4.05(b)(3)(iii), the undersigned directed Cambridge Christian to file a proposed order outlining the parameters of the injunctive relief sought in its Motion for Preliminary Injunction. (Doc. 38). Cambridge Christian filed its proposed order as directed. (Doc. 41).

[2] The parties agreed at the status conference that there were no material facts in dispute, and, thus, it was unnecessary for the undersigned to hold an evidentiary hearing on Cambridge Christian's Motion for Preliminary Injunction (Doc. 9). Therefore, the undersigned construed Cambridge Christian's Request for Oral Argument (Doc. 10) as requesting oral argument only and not requesting an evidentiary hearing. (Doc. 38, ¶ 2).

Also on November 2, 2016, the Honorable Charlene Edwards Honeywell, United States District Judge, entered an Order to Show Cause directing Cambridge Christian to show cause why the instant case should not be transferred to a different division with a greater nexus to the action.[3] (Doc. 36). In light of the Order to Show Cause, the undersigned suspended the scheduling of the hearing on Cambridge Christian's Motion for Preliminary Injunction and the FHSAA's Motion to Dismiss until the venue issue was resolved. (Doc. 38).

On November 4, 2016, Cambridge Christian filed a Response to the Order to Show Cause and posited that the Tampa Division of the Middle District of Florida has the greatest nexus to this case. (Doc. 40). On November 17, 2016, Judge Honeywell entered an order discharging the Order to Show Cause and finding that this action should remain in the Tampa Division. (Doc. 43).

On November 22, 2016, the undersigned entered an Order setting oral argument on Cambridge Christian's Motion for Preliminary Injunction and the FHSAA's Motion to Dismiss. (Doc. 45). On December 7, 2016, the undersigned heard oral argument on both motions. (Docs. 47, 48). Thus, as the motions have been fully briefed and both parties have orally argued the motions, this matter is ripe for a thorough judicial review of these important, weighty constitutional issues that are further complicated by varied and extensive jurisprudence.

[3] Local Rule 1.02(c), Middle District of Florida, requires civil proceedings to be "instituted in [the] Division encompassing the county or counties having the greatest nexus with the cause, giving due regard to the place where the claim arose and the residence or principal place of business of the parties."

II. FACTS[4]

Cambridge Christian is a private Christian school located in Tampa, Florida. (Doc. 8, ¶ 10). The FHSAA is a state actor and governs Florida's high school athletics. (*Id.* at ¶ 20). The FHSAA supervises and regulates interscholastic athletic programs for over 800 member schools. (*Id.* at ¶ 21). Any public, private, charter, virtual, or home education cooperative high school in Florida may become a member of the FHSAA by completing a membership application and agreeing to adopt and abide by the FHSAA's Bylaws and policies. (*Id.* at ¶ 23). The FHSAA organizes and oversees the championship games for all Florida high school athletics. (*Id.* at ¶ 27).

Cambridge Christian is a member of the FHSAA. (*Id.* at ¶ 25). For the 2015 season, Cambridge Christian's football team played in Division 2A and qualified for the final playoff game (the "Championship Game") against University Christian School ("University Christian"). (*Id.* at ¶¶ 25, 31, 34). The Championship Game was administered by the FHSAA and held at the Camping World Stadium (the "Stadium") in Orlando, Florida. (*Id.* at ¶¶ 2, 35).

In preparation for all of the Florida High School State Championship series games, representatives from the FHSAA, the finalist schools in each Division, and the Central Florida Sports Commission held a conference call on December 1, 2015. (*Id.* at ¶ 37). During that

[4] The facts presented in this section are as alleged in Cambridge Christian's Verified Amended Complaint and the attachments thereto. (Doc. 8). Ordinarily, the Court does not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). The Eleventh Circuit, however, recognizes that there is an exception to this limitation when the complaint references a document, that document is central to the plaintiff's claims, the contents of that document are undisputed, and that document is included in the record before the court. *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999); *Brooks*, 116 F.3d at 1368–69.

The undersigned has limited her analysis of this matter to the four corners of the Verified Amended Complaint and its attachments. But, in light of *Harris*, the undersigned could have considered those documents the parties submitted in relation to the Motion for Preliminary Injunction had they been necessary for her analysis of the Motion to Dismiss.

conference call, representatives from Cambridge Christian and University Christian requested permission to use the loudspeaker at the Stadium to lead their school communities in a joint pre-game prayer. (*Id.* at ¶ 38). A representative from the FHSAA denied the request. (*Id.* at ¶ 39).

The following day, on December 2, 2015, Tim Euler, Cambridge Christian's Head of School, sent an e-mail to Dr. Roger Dearing, the FHSAA's Executive Director, and again requested permission to deliver a prayer over the loudspeaker at the Championship Game. (Doc. 8, ¶ 41; Ex. C-1). The FHSAA again denied the request.[5] (Doc. 8, ¶ 43; Ex. D).

The FHSAA has an official administrative procedure that governs the use of the public-address system at all FHSAA-sponsored State Championship Series. (Doc. 8, ¶ 43; Ex. A, p. 15, 3.1.8). The administrative procedure, titled "Public-Address Protocol," states that there is to be a public-address announcer who makes announcements over the Stadium loudspeaker for all Florida High School State Championship series events. (Doc. 8, Ex. A, pp. 15–16, 3.1.8). There is no indication in the Public-Address Protocol that any person other than the public-address announcer may make announcements over the loudspeaker. The public-address announcer is considered a bench official and must follow specific parameters for announcements made at the Championship events. (*Id.* at p. 15, 3.1.8). According to the Public-Address Protocol, the public-address announcer "shall maintain complete neutrality at all times" and "will follow the FHSAA script for promotional announcements." (*Id.*). In addition to promotional announcements, player introductions, and award ceremonies, the public-address announcer may make other limited announcements, including, "[m]essages provided by host school management." (*Id.*).

[5] University Christian joined in Cambridge Christian's request to say a pre-game prayer over the Stadium loudspeaker at the Championship Game. (Doc. 8, ¶ 38). The FHSAA also denied University Christian's request. (*Id.* at ¶¶ 42, 43).

The Championship Game between Cambridge Christian and University Christian took place at the Stadium on December 4, 2015. (Doc. 8, ¶ 45). Approximately 1,800 people attended the event. (*Id.*). Before the start of the game, the two teams prayed together at the 50-yard line. (*Id.* at ¶ 50). Because of the Stadium's size, the students, parents, and other supporters in the stands could not hear the teams' 50-yard line pre-game prayer. (*Id.* at ¶ 52).

Before, during, and after the Championship Game, the public-address announcer delivered various messages over the loudspeaker at the Stadium, including advertisements, commentary, and other communications. (*Id.* at ¶ 48). In addition, Cambridge Christian's cheerleading squad had access to the Stadium loudspeaker to play music for its seven-minute half-time performance. (*Id.* at ¶ 53). Other than the allegation that the cheerleaders had access to the loudspeaker to play music at half-time, there are no allegations in the Complaint that anyone other than the public-address announcer had access to the loudspeaker during the Championship Game.

A few days after the Championship Game, Dr. Dearing sent an e-mail to Messrs. Euler and Nivens[6] reiterating the FHSAA's decision to decline the use of the Stadium loudspeaker for a pre-game prayer at the Championship Game. (*Id.* at ¶ 56; Ex. E, p. 2). In the e-mail, Dr. Dearing stated that the FHSAA is considered a "state actor" and, therefore, can neither endorse nor promote religion. (*Id.*). On January 27, 2016, the FHSAA posted a press release on its website stating that, according to state and federal law, it cannot legally permit or grant permission for the broadcast of religious prayer over the Stadium loudspeaker. (*Id.* at ¶ 57; Ex. F, p. 2). This suit followed eight months later.

[6] Heath Nivens is the Head of School for University Christian. (Doc. 8, ¶ 42).

III. ANALYSIS[7]

A. The FHSAA's Motion to Dismiss

The FHSAA moves to dismiss Cambridge Christian's Verified Amended Complaint for lack of subject matter jurisdiction, pursuant to Rule 12(b)(1), Fed. R. Civ. P., and for failure to state a claim, pursuant to Rule 12(b)(6), Fed. R. Civ. P. (Doc. 26). As a threshold matter, the FHSAA argues that the Court does not have subject matter jurisdiction because Cambridge Christian does not have standing to bring this lawsuit. (*Id.*). The FHSAA also argues that the First Amendment of the U.S. Constitution, the Florida Constitution, and the Florida Religious Freedom Restoration Act do not require the FHSAA to allow Cambridge Christian to use the Stadium loudspeaker to broadcast religious prayer at a state-sponsored sporting event. (*Id.*). The FHSAA further argues that because it did not prohibit Cambridge Christian, or its members, from engaging in prayer other than over the Stadium loudspeaker, Cambridge Christian has not suffered an injury and, therefore, cannot state a claim upon which relief can be granted. (*Id.*).

1. Standards of Review

A court considering a motion to dismiss must view the complaint in the light most favorable to the plaintiff. *See Murphy v. FDIC*, 208 F.3d 959, 962 (11th Cir. 2000) (citing *Kirby v. Siegelman*, 195 F.3d 1285, 1289 (11th Cir. 1999)). A defendant's argument that a court should dismiss a complaint for lack of subject matter jurisdiction because the plaintiff does not have standing requires the court to review whether a plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation

[7] As confirmed by the parties at the oral argument, Cambridge Christian had not qualified for the 2016 Championship Game, and, thus, time was no longer of the essence for a ruling on the Motion for Preliminary Injunction.

of issues upon which the court so largely depends for illumination of difficult constitutional questions[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962). The undersigned must address the Rule 12(b)(1) jurisdictional arguments first, as those arguments raise the threshold issue of whether the Court may hear the case.

If the jurisdictional requirements are met, then, the court turns to the substance of the claims alleged in a complaint. Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain a short and plain statement of the claim showing the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). Although Rule 8 does not require a plaintiff to set out in detail the facts upon which he bases his claim, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

To survive a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a complaint must allege sufficient facts, accepted as true, to state a plausible claim for relief. *Id.* If those well-pleaded facts "do not permit the court to infer more than the mere possibility of misconduct," the complaint stops short of showing the plaintiff is entitled to relief. *Id.* at 679. While a court must assume that all of the factual allegations in the complaint are true, that assumption is inapplicable to legal conclusions, *id.* at 678, and "a court may dismiss a complaint on a dispositive issue of law." *Acosta v. Campbell*, 309 F. App'x 315, 318 (11th Cir. 2009).

The standard on a Rule 12(b)(6) motion is not whether the plaintiff will ultimately prevail on his or her theories, but whether the allegations are sufficient to allow the plaintiff to conduct discovery in an attempt to prove the allegations. *See Jackam v. Hosp. Corp. of Am. Mideast, Ltd.*,

800 F.2d 1577, 1579–80 (11th Cir. 1986). The door to discovery will not open for a plaintiff "armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678–79. And dismissal is proper when "no construction of the factual allegations will support the cause of action." *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

2. The FHSAA's Rule 12(b)(1) Challenge to Cambridge Christian's Standing to Bring this Action

As an initial matter, standing is a necessary component of this Court's subject matter jurisdiction to preside over this lawsuit. *Clapper v. Amnesty Int'l USA*, __ U.S. __, 133 S. Ct. 1138, 1146 (2013). Thus, the undersigned must first address the threshold matter of whether Cambridge Christian has standing to bring this action. A corporate entity such as Cambridge Christian can establish standing to bring a civil rights action: "(1) to protect the rights of its members (associational standing); or (2) to protect its own rights as a corporate institution (traditional standing)." *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1328 (11th Cir. 2000) (quoting *Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1276 (5th Cir. 1981)). Cambridge Christian clarified at oral argument that it had both traditional standing and associational standing to bring its claims. Accordingly, the undersigned will address traditional standing and then associational standing.

a. *Traditional Standing*

To sue on its own behalf, Cambridge Christian must demonstrate that the standing requirements of Article III of the United States Constitution are satisfied and that Cambridge Christian has presented a justiciable controversy. The "irreducible constitutional minimum of standing" requires litigants in federal court to demonstrate the following:

(1) that they suffered an injury in fact, which is a concrete and particularized and actual or imminent legally cognizable harm;

(2) that a causal connection exists between the injury in fact and the opposing party's conduct; and

(3) that the injury will be redressed by a favorable decision.

See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–62 (1992) (citations omitted).[8] "[L]est free speech be chilled," courts apply the injury-in-fact requirement "most loosely" when First Amendment protections are implicated. *Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (quoting *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1253–57 (11th Cir. 2010)).[9]

Here, the FHSAA contends that Cambridge Christian cannot demonstrate the requisite injury in fact to establish standing to bring this action because Cambridge Christian was not denied the right to pray; rather, Cambridge Christian was denied the use of the Stadium loudspeaker. Indeed, immediately before the start of the game, the teams met at mid-field to pray together. In response, Cambridge Christian argues that the FHSAA's denial of the use of the Stadium loudspeaker for broadcasting the prayer deprived Cambridge Christian of a collective religious exercise that is an integral part of the School's mission.

[8] In *Lujan v. Defenders of Wildlife*, the Supreme Court held that the plaintiff environmental groups did not suffer the requisite injury in fact to establish standing because they did not sufficiently demonstrate that their members would be affected directly by a regulation limiting the geographic scope of Section 7(a)(2) of the Endangered Species Act. 504 U.S. 555 (1992).

[9] In *Dana's Railroad Supply v. Attorney General, Florida*, the Eleventh Circuit reversed the district court's dismissal of a 42 U.S.C. § 1983 action brought by four small business owners who alleged their free speech rights were violated by the Attorney General's criminalization of the act of levying a surcharge on a buyer for electing to use a credit card. 807 F.3d 1235 (11th Cir. 2015). The Eleventh Circuit held standing had been established because each business owner had been injured and because the likelihood of their free speech being chilled was sufficiently great. *Id.* at 1241.

The undersigned agrees with Cambridge Christian's contention that it suffered an injury in fact sufficient to establish standing under Article III. According to the Verified Amended Complaint, prayer is an integral component of the School's mission. (Doc. 8, ¶ 13). Specifically, Cambridge Christian's school mission is defined as follows:

> 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.

(*Id.* at ¶ 11). In addition, Cambridge Christian's Athletic Department has its own mission statement, which states:

> 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.

(*Id.* at ¶ 14).

According to the Verified Amended Complaint, since its founding in 1964, prayer has been an integral component of Cambridge Christian's mission and is offered throughout the school year to commission students, faculty, staff, administrators, buildings, and student trips and missions; before meals; around the flag pole; and at other events including chapel services, and parent and student gatherings. (*Id.* at ¶ 13). In addition, Cambridge Christian hosts chapel services for both its upper and lower schools, provides required coursework on religion, the Bible, and the Biblical worldview, and encourages teachers to begin class lectures with prayer. (*Id.* at ¶ 12). Moreover, Cambridge Christian provides a room next to its chapel where students, parents, and faculty are encouraged to pray in response to various requests for prayer posted on the room's walls. (*Id.*).

Cambridge Christian founded its football program in 2003. (*Id.* at ¶ 17). Since that time, the football team has participated in the tradition of pre-game prayer over the loudspeaker at each home game and at away games when possible. (*Id.*). As part of this tradition, before sporting events, student-athletes, their parents, and fans are led in a prayer of approximately 30–60 seconds by a parent, a student, or a member of the faculty or administration. (*Id.* at ¶ 16). Cambridge Christian intended to carry on its tradition of broadcasting a pre-game prayer over the loudspeaker at the Championship game on December 4, 2015. (*Id.* at ¶ 2). However, the FHSAA denied Cambridge Christian's request to use the Stadium loudspeaker for a pre-game prayer, and Cambridge Christian was unable to carry on in its tradition. (*Id.* at ¶¶ 2, 3).

In light of the foregoing, the undersigned concludes that the injury in fact requirement for Article III standing has been satisfied. There appears to be no dispute as to whether the remaining requirements of connection and redressability are met. The undersigned agrees with the concession that the FHSAA is the entity that refused to permit pre-game prayer over the Stadium loudspeaker and a decision favoring Cambridge Christian would prevent the claimed injury going forward.

Therefore, Cambridge Christian has pleaded and established the requisite elements for traditional standing. However, in an abundance of caution, the undersigned will proceed with analyzing whether associational standing also exists in this case.

b. *Associational Standing*

There is a three-part test for determining whether an association may sue on behalf of its members. Specifically, an association may bring suit on behalf of its members when: "[1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are

germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). [10]

As an initial matter, the undersigned concludes that members of Cambridge Christian would otherwise have standing to sue in their own right. As stated in the Verified Amended Complaint, before the start of the Championship Game, the players from both schools came together at mid-field to pray as a sign of fellowship. (Doc. 8, ¶ 50). Because of the Stadium's size, the students, parents, faculty, and other supporters in the stands could not hear the teams' midfield pre-game prayer. (*Id.* at ¶ 52). Thus, by denying access to the loudspeaker, the FHSAA denied the students, parents, faculty (including the Head of School, Mr. Euler, who requested the assistance of the loudspeaker), and other supporters in attendance the right to participate in the players' prayer or to otherwise come together in prayer as one Christian community. (*Id.*).

In addition, as explained above in the section analyzing traditional standing, the interests of Cambridge Christian's members in coming together in prayer are germane to the School's purpose. (*Id.* at ¶¶ 11–13). Further, neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit because Cambridge Christian fully represents the interests of the individual members, as their interests in this action are aligned.

[10] In *Friends of the Earth, Inc.*, the Supreme Court held that a plaintiff (who, in that case, was seeking an injunction against a defendant who was discharging pollutants into a body of water) can establish an injury in fact by showing that the plaintiff uses an area "affected" by the defendant's "challenged activity" and that the defendant's actions have "lessened" the plaintiff's recreational or aesthetic enjoyment of the "affected" area. 528 U.S. at 181–85.

In light of the foregoing, the undersigned concludes that Cambridge Christian has pleaded and established the requisite elements for associational standing as well as traditional standing. Consequently, the undersigned recommends that the Court conclude that Rule 12(b)(1) is not grounds for dismissing the Verified Amended Complaint.

3. The FHSAA's Rule 12(b)(6) Arguments that Cambridge Christian Has Failed to State Claims upon which Relief Can Be Granted

a. *Federal Claims (Counts I–III)*

The First Amendment to the United States Constitution states, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." The first clause is referred to as the "Establishment Clause," the second clause is referred to as the "Free Exercise Clause," and the third clause is the "Free Speech Clause." U.S. Const. amend I. The Supreme Court long ago concluded that all three of these clauses apply to state action and not just the actions of Congress. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise Clause); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (Establishment Clause); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (Free Speech Clause). Cambridge Christian's federal claims (Counts I through III) address all three of these clauses.

In Count I of the Verified Amended Complaint, Cambridge Christian argues that the FHSAA's denial of the use of the loudspeaker to broadcast the teams' school prayer at the Championship Game violated the Free Exercise and Free Speech Clauses of the First Amendment. For that Count, in addition to damages, Cambridge Christian seeks an injunction prohibiting the FHSAA from enforcing its Public-Address Protocol and requiring the FHSAA, instead, to implement a protocol that would permit religious speech over the loudspeaker. In Count II of the

Verified Amended Complaint, Cambridge Christian seeks a declaration that the FHSAA's Public-Address Protocol violates the Free Speech and Free Exercise Clauses, plus injunctive relief similar to that requested in Count I, and damages. In Count III, the last of the federal counts, Cambridge Christian seeks a declaration that the Public-Address Protocol is not required by the Establishment Clause, plus injunctive relief similar to that requested in Counts I and II, and damages.[11]

Because the allegations in the Verified Amended Complaint do not state a violation of the Free Exercise Clause of the First Amendment, the undersigned recommends that Counts I, II, and III be dismissed to the extent that they purport to assert causes of action pursuant to that clause. In addition, because the Public-Address Protocol does not implicate the Establishment Clause, Count II fails to state a claim for which relief can be granted. Last, in conformity with binding case law, the undersigned finds that the entirety of the speech over the loudspeaker throughout the Championship Game is government speech and the loudspeaker itself is a nonpublic forum; therefore, Cambridge Christian cannot claim a violation of the Free Speech Clause, and those claims in Counts I and II fail and should be dismissed.

i. Free Exercise Clause

"The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) ("*Chandler II*"). "If it did, the exercise of one's religion would not be free at all." *Id.*

[11] Before delving into the analysis of the constitutional arguments at issue, the undersigned first must emphasize that she is in full agreement with the Supreme Court in "recogniz[ing] the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance." *Santa Fe. Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 (2000). That public worship, however, must comport with the First Amendment when taking place at a government-sponsored, school-related function like the Championship Game at issue in this case. *Id.*

Rather, the Free Exercise Clause "require[s] the State to *tolerate* genuinely student-initiated religious speech in schools." *Chandler v. James,* 180 F.3d 1254, 1258 (11th Cir. 1999) ("*Chandler I*"). However, while the FHSAA must tolerate genuinely student-initiated religious speech in schools and at school events, that speech may instead improperly constitute state action "if the State *participates in or supervises* the speech." *Id.* at 1264.

Nowhere in the Verified Amended Complaint is there a single allegation that Cambridge Christian or any of its members were deprived of their right to pray at the Championship Game. On the contrary, both Cambridge Christian's team and the opposing team were permitted to pray together at the most centrally focused and public area of the Stadium—the 50-yard line. (Doc. 8, ¶ 50). To be clear, the Verified Amended Complaint is silent as to any allegations that the players or others, including the fans, administrators, and teachers, were in any way discouraged from praying at any point before, during or after the Championship Game. There are no allegations that Cambridge Christian was prohibited from passing out flyers with pre-printed prayers or that the cheerleaders were prohibited from holding up large signs spelling out prayers for those in the stands to say in concert with the team.[12] Instead, Cambridge Christian's Free Exercise Clause claim rests on the FHSAA's decision to prohibit the use of the FHSAA-controlled loudspeaker to broadcast the prayer, thereby to deny "the students, parents, and fans in attendance the right to participate in the players' prayer or to otherwise come together in prayer as one Christian community." (Doc. 8, ¶ 52). Cambridge Christian argues that the FHSAA's prohibition against

[12] Indeed, at oral argument, the FHSAA's counsel indicated that Cambridge Christian could have passed out flyers or held up boards with a prayer for those in the stands; according to defense counsel, the FHSAA would not have stopped either action because those actions would not have implicated the Establishment Clause. (Doc. 48, Tr. 25:3–26:2).

praying over the loudspeaker "substantially burdened and adversely affected [Cambridge Christian's] freedom of religious exercise . . .." (*Id.* at ¶ 79).

Construing the allegations in the Verified Amended Complaint in the light most favorable to Cambridge Christian, the undersigned remains at a loss as to how the FHSAA's refusal to permit Cambridge Christian to utilize the FHSAA-controlled loudspeaker to broadcast the teams' pre-game prayer violated Cambridge Christian's or its members' rights under the Free Exercise Clause. While the spectators very likely could not hear the teams' prayers, given the size of the Stadium and the large number of people in attendance, every spectator had an opportunity to see that a pre-game prayer was taking place at the very center of the field. (Doc. 8, ¶ 50). The prayer was not banished to a broom closet. Further, the FHSAA did not stop Cambridge Christian from any attempts to use flyers, large boards or even megaphones to amplify its prayers. Every member of the Cambridge Christian community could have chosen to exercise their right to join in the teams' moment of prayer freely and without any government interference.

The FHSAA's Public-Address Protocol, by its terms, does not violate anyone's rights pursuant to the Free Exercise Clause. Additionally, the FHSAA's refusal to permit Cambridge Christian to utilize the FHSAA-controlled loudspeaker to broadcast Cambridge Christian's (or its members') prayer did not violate its rights pursuant to the Free Exercise Clause. No one stopped Cambridge Christian from exercising its rights to prayer, and the team did in fact pray in the most prominent part of the Stadium. Because the allegations in the Verified Amended Complaint do not state a violation of the Free Exercise Clause of the First Amendment, the undersigned recommends that Counts I and II be dismissed to the extent that they purport to assert causes of action pursuant to that clause.

ii. Establishment Clause

"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, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Santa Fe I*, 530 U.S. at 302 (quoting *Lee v. Weisman*, 505 U.S. 577, 587 (1992)). The Supreme Court in *Santa Fe* cautioned how case-specific a court's Establishment Clause analysis should be when it articulated that "[w]hether a government activity violates the Establishment Clause is in large part a legal question to be answered on the basis of judicial interpretation of social facts [and e]very government practice must be judged in its unique circumstances." *Id.* at 315.

In *Santa Fe*, the Supreme Court granted certiorari limited to the following question: "Whether petitioner's policy permitting student-led, student initiated prayer at football games violates the Establishment Clause." *Santa Fe*, 530 U.S. at 301. The Eleventh Circuit Court of Appeals described *Santa Fe* as "reaffirm[ing] that the Establishment Clause of the First Amendment prohibits a school district from taking affirmative steps to create a vehicle for prayer to be delivered at a school function." *Chandler II*, 230 F.3d at 1315.

What is interesting here is the fact that the FHSAA's policy, the Public-Address Protocol, is not alleged to violate the Establishment Clause. Rather, Cambridge Christian alleges the FHSAA is being overly (and impermissibly) cautious of an Establishment Clause violation. Stated another way, Cambridge Christian takes the position that the FHSAA improperly inflates what the Establishment Clause prohibits, by using the Establishment Clause and its Public-Address Protocol to defend its refusal to permit Cambridge Christian to broadcast a prayer over the loudspeaker before the start of the Championship Game. Consequently, in Count III, Cambridge Christian

requests not only that the Court declare that the Public-Address Protocol is not required by the Establishment Clause and enjoin the FHSAA from enforcing the Public-Address Protocol, but it also requests that the Court *require* the FHSAA "to implement a content-neutral policy for use of the Stadium loudspeaker that does not discriminate against religious speech." (Doc. 8, p. 17). Thus, the issue central to the Establishment Clause analysis is not, in this case, whether the current Public-Address Protocol violated the Establishment Clause but, instead, whether Cambridge Christian's requested relief (implementation of "a content-neutral policy for use of the Stadium loudspeaker that does not discriminate against religious speech") would violate the Establishment Clause.

Courts utilize the three-pronged, much-criticized[13] *Lemon v. Kurtzman* test when evaluating whether state action (or, here, requested state action by way of changing the Public-Address Protocol to permit pre-game prayer) complies with the neutrality required by the Establishment Clause. This test requires that: (1) the policy must have a secular purpose; (2) the principal effect of the policy must be one that neither advances nor inhibits religion; and (3) the policy must not foster an excessive entanglement with religion. *Lemon v. Kurtzman ,* 403 U.S. 602, 612–13 (1971). As already noted above, Cambridge Christian does not argue that the Public-Address Protocol violates the Establishment Clause—and for good reason because, applying the *Lemon v. Kurtsman* test to the facts of this case, Cambridge Christian cannot make that argument.

Instead, Cambridge Christian argues that the FHSAA is using the Establishment Clause, and *Santa Fe*'s analysis of the Establishment Clause, as a shield to refuse to permit, in Cambridge

[13] The late Justice Scalia colorfully likened the *Lemon v. Kurtzman* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment).

Christian's view, private speech in a limited public forum. "The Establishment Clause does not require the elimination of private speech endorsing religion in public places." *Chandler II*, 230 F.3d at 1316. Importantly, however, there is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech, which the Free Speech and Free Exercise Clauses protect." *Santa Fe*, 530 U.S. at 302 (citation and internal quotation marks omitted).

Stated simply, the FHSAA's Public-Address Protocol does not implicate the Establishment Clause. Consequently, there is no live controversy in Count III, as Count III seeks a declaratory judgment "that the Policy is not required by the Establishment Clause" and related injunctive relief. Instead, Cambridge Christian's allegations in Count III and the related arguments are more appropriately addressed in the context of the Free Speech Clause claims in Counts I and II.[14] *Accord Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383 (1993) (plaintiff properly alleged violation of Free Speech Clause due to government's denial of a menorah display in the Capitol Rotunda out of concern that display would implicate the Establishment Clause). Thus, the undersigned

[14] Prior to turning to the Free Exercise Clause analysis, however, the undersigned must first address one remaining Establishment Clause-related issue. As already noted, Cambridge Christian repeatedly requests the following relief from the Court: "requiring the FHSAA to implement a content-neutral policy for use of the Stadium loudspeaker that does not discriminate against religious speech." (Doc. 8, pp. 14, 16, 17, 19, 20 & 22). While such relief seems to run headlong into an Establishment Clause violation in light of the *Lemon v. Kurtzman* factors and the Supreme Court's jurisprudence in *Lee* and *Santa Fe*, Cambridge Christian receded from this position in its response to the FHSAA's Motion to Dismiss. In that response, Cambridge Christian explained that it "has never sought and does not seek to change the FHSAA's Protocol to specifically list prayer as a permitted use of the loudspeaker, because no such change is needed." (Doc. 39, p. 11). Rather, according to Cambridge Christian, "[w]hat is required is for the FHSAA to apply its own protocol without discriminating against religious content and viewpoints. Cambridge Christian only seeks to enjoin the FHSAA from continuing to prohibit prayer over the loudspeaker while allowing private secular speech." (*Id.*).

recommends that the Court dismiss Count III for failure to state a claim pursuant to the Establishment Clause.

iii. Free Speech Clause

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009) (citations omitted). At issue, then, is "whether a government entity is speaking on its own behalf or is providing a forum for private speech." *Id.* at 470. The parties disagree about how the proposed prayer should be characterized. The FHSAA posits that all of the announcements, including a pre-game prayer, throughout the course of the Championship Game are government speech and that the Public-Address system is a nonpublic forum. Cambridge Christian posits that the proposed pre-game prayer and the announcements on behalf of sponsors (such as Gatorade, Sports Authority, and Spaulding) are private speech occurring in a limited public forum. In this section, the undersigned will address both the nature of the speech as well as the type of forum. Because the undersigned finds that the entirety of the speech over the loudspeaker throughout the Championship Game is government speech and that the loudspeaker itself is a nonpublic forum, the undersigned concludes that Cambridge Christian cannot claim a violation of the Free Speech Clause, and so those claims in Counts I and II fail and should be dismissed.

a. Nature of the Speech: Government or Private?

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, __ U.S. __, 135 S. Ct. 2239 (2015), the Supreme Court evaluated three factors to conclude that specialty license plates in the state of Texas are government speech. Those three factors are: (1) the history of the speech; (2) whether reasonable observers would conclude that the government endorses the speech; and

(3) whether the government exercises direct control over the messages. *Id.* at 2248–49. Considering these factors as "a useful framework," while recognizing that they are not exhaustive and may not be relevant in every case, the Eleventh Circuit has concluded that banners displayed on public school fences, which state support for private companies as public school sponsors, constitute government speech. *See Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1075–79 (11th Cir. 2015).

Similarly, in *Santa Fe*, the Supreme Court concluded that the pre-game invocations at issue in that case were government speech because the invocations were "authorized by a government policy and [took] place on government property at government-sponsored, school-related events." *Santa Fe*, 530 U.S. at 302. However, the Supreme Court cautioned that not all public speech becomes government speech simply by virtue of being made using public facilities at government-sponsored events. *Id.*

In addressing the holding in *Santa Fe*, the Eleventh Circuit explained that the Supreme Court had four reasons for its holding that the pre-game invocations were government speech: "(1) the student's speech would be authorized by a government policy that explicitly and implicitly encouraged one particular kind of message[]; (2) it would take place on school property at a school event[]; (3) the government had broad power to regulate the content of the student's speech []; and (4) the electoral system would yield only a single speaker and would completely prevent dissenting viewpoints from being heard []." *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1335 (11th Cir. 2001) ("*Adler II*").

At least two of these reasons apply with equal force in the instant case. Like the pre-game prayer in *Santa Fe*, Cambridge Christian's requested prayer would be "delivered to a large

audience assembled as part of a regularly scheduled, [government]-sponsored function conducted on [government] property [and the] message [would be] broadcast over the [government's] public address system, which remains subject to the control of [government] officials." 530 U.S. at 307.

The undersigned will now return to the three factors for consideration identified in *Walker*—history, endorsement and control—and address each in turn. There is little history about the Public-Address Protocol in the record at this point because the matter is being considered on a motion to dismiss. The historical evidence here weighs in Cambridge Christian's favor in the overall government- versus private-speech analysis; however, as the Eleventh Circuit conceded in *Mech*, absence of historical evidence is not dispositive. 806 F.3d at 1075–76.

And the endorsement factor (*i.e.*, that the audience reasonably believes the government endorses the message) strongly favors the FHSAA. The requested prayer would be offered at the FHSAA's Championship Game over the FHSAA's loudspeaker, a forum that by policy and practice has been utilized by a public-address announcer (also a bench official for the Championship Game) who is employed by the State,[15] with the exception of halftime performances by cheerleaders when there is no school band and one alleged instance of unauthorized pre-game prayer in 2012.

Cambridge Christian argues that the requested prayer will not be considered endorsed by the FHSAA just as the FHSAA's sponsors' messages are not considered by the audience to be endorsed by the FHSAA. Cambridge Christian's argument is misplaced, however, because the Eleventh Circuit has already held that "such gestures of gratitude [for sponsorships] are a common

[15] According to the Public Address-Protocol, "[t]he public-address announcer shall be considered a bench official for all Florida High School State Championship Series events." (Doc. 8, Ex. A, p. 15, 3.1.8).

form of government speech." *Mech*, 806 F.3d at 1077 (collecting cases in which signs and acknowledgements thanking corporate sponsors and donors was held to be government speech by federal appellate courts). Here, not only are the sponsors' messages government speech according to binding precedent, but the messages themselves are, by policy and practice, read by an FHSAA official to a captive audience at a government-organized event.

The FHSAA's control over the message also militates in favor of finding that the requested prayer would be government speech. As just noted, under the Public-Address Protocol, the requested prayer, though provided by the host school management, would be delivered by an FHSAA official (who is considered a bench official for the Championship Game) on an FHSAA-controlled loudspeaker during an FHSAA-organized event. (Doc. 8, Ex. A, p. 15, 3.1.8). Before delivery, the requested prayer would have to be reviewed and approved by the FHSAA pursuant to the Public-Address Protocol and then included in the script that the FHSAA prepares for the game. (*Id.*). As written, the Public-Address Protocol is very limited as to what announcements are allowed, and the announcer is limited to following the FHSAA-prepared script. (*Id.* at pp. 15–16, 3.1.8). In sum, the Championship Game "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, Ex. A, p. 15, 3.1.1).

Considering these factors—especially the endorsement and control factors—and guided by binding jurisprudence, the undersigned reaches the inescapable conclusion that the nature of the entirety of the speech, including the proposed prayer, throughout the Championship Game over the loudspeaker is government speech. *Cf. Adler II*, 250 F.3d at 1331–32 (graduating student elected by her class to deliver an unrestricted message of her choice without any input from school

officials could not be considered government speech because decisional control over the message rested with the students and not the state); *Chandler II*, 230 F.3d at 1316 (private prayer of student, even if offered publicly at a school function, not always attributable to the government such that it becomes government speech; entanglement with the state is what converts the private speech into government speech and not the public context of the speech).

b. Nature of the Forum: Nonpublic or Limited Public?

Further, even if the speech at issue is instead characterized as private speech (which the undersigned finds it is not, for the reasons stated above), the undersigned must then consider whether the FHSAA's loudspeaker system is a public forum or nonpublic forum. The Supreme Court's decision in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), is instructive on this point. At one end of the forum analysis spectrum are traditional public fora (for example, streets and parks) and fora that the government has designated as places for expressive activity.[16] *Id.* at 45–46. At the other end of the spectrum falls government property that is "not by tradition or designation a forum for public communication," or, stated another way, a nonpublic forum. *Id.* at 46. For nonpublic fora, "[i]n addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.*

[16] For example, the Eleventh Circuit previously determined that the State of Georgia had designated the Capitol Rotunda (an open space under the dome in the center of the Capitol Building) "neutrally … as a public forum available to all speakers." *Chabad-Lubavitch*, 5 F.3d at 1389. "Its citizens may come and go, speak and listen, applaud and condemn, and preach and blaspheme as they please. Georgia neither approves nor disapproves such conduct, no matter how sordid or controversial it might be. Instead, the state remains aloof; it is neutral toward, and uninvolved in, the private speech." *Id.* at 1388–89.

In between public fora and nonpublic fora, courts have designated "limited" public fora. *Id.* at 48. A limited public forum exists when the government creates a forum "that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City*, 555 U.S. at 470. For limited public fora, "the constitutional right of access would in any event extend only to other entities of similar character." *Perry*, 460 U.S. at 48. Restrictions on speech in a limited public forum must be reasonable and viewpoint neutral. *Pleasant Grove City*, 555 U.S. at 470 (citation omitted).

The FHSAA argues that the loudspeaker system utilized by the FHSAA at the Championship Game is a nonpublic forum, and Cambridge Christian argues that it is a limited public forum. As an initial matter, there is no allegation in the Verified Amended Complaint that the FHSAA has opened the loudspeaker at the Championship Game to indiscriminate use by the general public. *Accord Perry*¸ 460 U.S. at 47 (finding that school district had not opened the school mail boxes and interschool delivery system to use by the general public even though it had permitted mailings by private non-school connected groups and unrestricted access by one teachers' union). Rather, just as in *Perry*, Cambridge Christian alleges that the FHSAA permits selective access instead of permitting access as a matter of course to all who seek to communicate a message via the loudspeaker. More specifically, Cambridge Christian alleges that the FHSAA permits the transmittal of commercial messages by Championship Game sponsors and the cheerleaders' music at halftime. (Doc. 8, ¶¶ 48, 53–54).

As the Supreme Court instructed in *Perry*: "This type of selective access does not transform government property into a public forum." 460 U.S. at 47. Relying on *Perry*, the Supreme Court conducted a forum analysis for the pre-game ceremony at issue in *Santa Fe*. *See* 530 U.S. at 303.

Because the government in *Santa Fe* permitted only selective access to the pre-game ceremony and did not evince by policy or practice any intent to open the pre-game ceremony to indiscriminate use by the student body, the Supreme Court concluded that the pre-game ceremony had not been transformed into a public forum. *Id.*

Cambridge Christian urges the Court to decide that the FHSAA has created a limited public forum. In making this argument, Cambridge Christian relies on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). The nature of the speech and the forum in each of those cases, however, is readily distinguishable from the nature of the speech and forum in this case.

In *Lamb's Chapel*, the school district offered its school facilities for "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment, and uses [were required by state law to be] non-exclusive and . . . open to the general public." 508 U.S. at 386 (citation and internal quotation marks omitted). Similarly, in *Rosenberger*, a Supreme Court decision following two years behind the *Lamb's Chapel* decision, the limited public forum was again of the government's own creation. 515 U.S. at 829. As the Supreme Court stated in *Lamb's Chapel* and repeated in *Rosenberger*: "[t]here is no question that the [government], like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated." *Id.* (quoting *Lamb's Chapel*, 508 U.S. at 390). Further, in both of these cases, the speech at issue was private speech—an organization established to publish a magazine of philosophical and religious expression in *Rosenberger*, 515 U.S. at 826, and an evangelical church in *Lamb's Chapel*, 508 U.S. at 387. As

addressed above, binding case law requires the undersigned to conclude that Cambridge Christian's requested prayer would have constituted government speech in a public forum.

Nonetheless, even if the FHSAA had created a "limited public forum" by virtue of the FHSAA official reading sponsor advertisements over the loudspeakers, and even if the government's sponsored advertisements were private speech instead of government speech, "the constitutional right of access would in any event extend only to other entities of similar character." *Perry*, 460 U.S. at 48. Simply put, "when government property is not dedicated to open communication the government may—without further justification—restrict use to those who participate in the forum's official business." *Id.* at 53. Earlier in the *Perry* decision, the Supreme Court elaborated as follows:

> Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves.

Id. at 49.

It is beyond dispute that the purpose of the FHSAA's loudspeaker at the Championship Game was to broadcast the game. This broadcast was by the public-address announcer, who is considered a bench official for the FHSAA Championship Series events, and his or her announcements are limited to a pre-approved script and a narrow list of topics. (Doc. 8, Ex. A, pp. 15–16, 3.1.8).

Thus, because Cambridge Christian did not have a First Amendment right of access to broadcast what Supreme Court precedent considers to be government speech over the nonpublic

forum of the FHSAA's loudspeaker at the Championship Game,[17] the undersigned recommends that Cambridge Christian's claims in Counts I and II pursuant to the Free Speech Clause be dismissed.

b. *Florida Law Claims (Counts IV–VII)*

In its Verified Amended Complaint, Cambridge Christian alleges a violation of Article 1, sections 3 and 4 of the Florida Constitution (Count IV). It also seeks a declaratory judgment as to the Free Speech and Free Exercise portions of the Florida Constitution (Count V) and the Establishment portion of the Florida Constitution (Count VI). Lastly, it alleges a claim for violation of Florida's Religious Freedom Restoration Act, Florida Statute § 761.03 (Count VII).

i. Claims Pursuant to the Florida Constitution (Counts IV–VI)

Counts IV, V, and VI of the Verified Amended Complaint assert claims for relief under Article I, sections 3 and 4 of the Florida Constitution. The Florida Constitution provides:

> There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

Fla. Const. art. I, § 3. It also provides that "[n]o law shall be passed to restrain or abridge the liberty of speech or of the press." Fla. Const. art. I, § 4.

"The Florida Constitution not only closely replicates the U.S. Constitution's [First Amendment] clause[s], but also imposes additional restrictions on state sponsorship of religious

[17] Because the undersigned has concluded that that the speech at issue is government speech in a nonpublic forum, the undersigned does not reach Cambridge Christian's argument that the FHSAA violated the First Amendment by engaging in viewpoint discrimination of private speech within a public forum.

activities through the 'no aid' provision." *Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 779 F. Supp. 2d 1330, 1341 (M.D. Fla. 2011); *see also Bush v. Holmes*, 886 So. 2d 340, 344 (Fla. 1st DCA 2004) ("For a court to interpret the no-aid provision of article I, section 3 as imposing no further restrictions on the state's involvement with religious institutions than the Establishment Clause, it would have to ignore both the clear meaning and intent of the text and the unambiguous history of the no-aid provision."); *Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 119 (Fla. 1st DCA 2010) (explaining that the first sentence of the Florida Establishment Clause is consistent with the federal Establishment Clause but that the no aid provision imposes further restrictions on state actors within Florida by not permitting tax revenues to aid any church, sect, or religious denomination or any sectarian institution directly or indirectly).

Here, the no-aid provision included in Florida's establishment clause is inapplicable to this case, and both Cambridge Christian and the FHSAA acknowledge that free exercise and free speech claims under Article I, sections 3 and 4 of the Florida Constitution, respectively, are analyzed consistent with claims made pursuant to the First Amendment to the United States Constitution. (Doc. 26, pp. 17–18, Doc. 39, p. 8); *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]."); *Cafe Erotica v. Fla. 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." (internal citations omitted)).

Therefore, given that the undersigned has concluded that Cambridge Christian's federal constitutional claims cannot survive the FHSAA's Motion to Dismiss, it necessarily follows that Cambridge Christian's Florida constitutional claims also should be dismissed.

ii. Florida's Religious Freedom Restoration Act (Count VII)

The last count in Cambridge Christian's Verified Amended Complaint is a claim that the FHSAA violated Florida's Religious Freedom Restoration Act. Florida's Religious Freedom Restoration Act, codified as Florida Statute § 761.03(1)(a)-(b), provides in pertinent part:

> (1) The government shall not *substantially burden* a person's exercise of religion . . . except that the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:
>
> (a) Is in furtherance of a compelling government interest; and
>
> (b) Is the least restrictive means of furthering that compelling governmental interest.

Fla. Stat. § 761.03(1)(a)-(b) (emphasis added). "[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 v. City of Boca Raton*, 887 So. 2d 1023, 1033 (Fla. 2004).

In *Warner*, owners of plots in a public cemetery brought an action against the City of Boca Raton. *Id.* at 1025. The cemetery plot owners alleged that Boca Raton's prohibition on vertical grave decorations violated their rights under state and federal constitutions as well as the Florida Religious Freedom Restoration Act. *Id.* Specifically, Boca Raton permitted individuals to place only ground-level stone or bronze markers on cemetery plots and demanded the removal of any non-compliant vertical grave decorations. *Id.* The Florida Supreme Court adopted the above-

stated narrow definition of "substantial burden" (the definition also adopted by the Eleventh Circuit Court of Appeals). Applying the requirement that the burden is substantial only when it compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires, the Florida Supreme Court concluded that Boca Raton's regulations regarding grave markers did not violate Florida's Religious Freedom Restoration Act. *Id.* at 1033, 1036.

Similarly, in *Williams Island Synagogue, Inc. v. City of Aventura*, the district court held that the City of Aventura's denial of a synagogue's conditional land use application did not substantially burden the members' ability to worship according to their beliefs and thus did not violate Florida's Religious Freedom Restoration Act. 358 F. Supp. 2d 1207, 1214 (S.D. Fla. 2005). In reaching its conclusion, the court stated that Florida's Religious Freedom Restoration Act "does not protect religious assemblies from being distracted while observing their religious reliefs;" rather, it protects religious assemblies from "substantial burdens, *i.e.*[,] pressures that force [them] to forego their religious beliefs." *Id.* at 1215.

Here, Cambridge Christian alleges that the FHSAA placed a substantial burden on its exercise of religion by denying the use of the Stadium loudspeaker to permit the school community to come together in prayer. (Doc. 8, ¶ 124). Under the language of the statute, as well as the case law cited above, the undersigned concludes that Cambridge Christian cannot demonstrate that the FHSAA's actions rose to the level of placing a substantial burden on Cambridge Christian's exercise of religion because the FHSAA's actions did not forbid or deny Cambridge Christian, or any of its members, from engaging in prayer.

Because Cambridge Christian cannot demonstrate that the FHSAA placed a substantial burden on its exercise of religion, the undersigned recommends that Cambridge Christian's claim under the Florida Religious Freedom Restoration Act be dismissed.

B. Motion for Preliminary Injunction

A preliminary injunction "is an extraordinary and drastic remedy that should not be granted unless the movant clearly establishe[s] the burden of persuasion." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citation and internal quotation marks omitted). A party seeking entry of a preliminary injunction must clearly establish the following: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury to the movant outweighs the harm an injunction may cause the opposing party; and (4) that granting the injunction is in the public interest. *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994). As an extraordinary and drastic remedy, a preliminary injunction is aimed at preserving the status quo pending a final determination of the merits of the case.

In light of the undersigned's recommendations regarding Defendant's Motion to Dismiss (Doc. 26), the undersigned recommends that the Court deny Plaintiff's Motion for Preliminary Injunction (Doc. 9) as moot. Due to the procedural posture of the undersigned's consideration of these motions as a referral for a Report and Recommendation, however, the undersigned will also report and recommend a ruling on Plaintiff's Motion for Preliminary Injunction.

1. Substantial Likelihood of Success

The likelihood of success on the merits is generally considered the most important of the four factors. *Garcia–Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). A failure to meet this

first element can defeat the party's request for a preliminary injunction, regardless of its ability to establish any of the other elements. *Haitian Refugee Ctr. v. Christopher*, 43 F.3d 1431, 1432 (11th Cir. 1995). Because the undersigned recommends dismissal of this action for the reasons stated above, the undersigned cannot recommend that the Court find Plaintiff has met its burden of showing a substantial likelihood of success on the merits. However, because the reviewing Court may disagree with the undersigned's recommendation concerning the merits, the undersigned will turn to the remaining three factors.

2. Irreparable Harm

The second element of the preliminary injunction analysis requires the moving party to show that irreparable harm will result if an injunction is not issued. *Church*, 30 F.3d at 1337. "A showing of irreparable injury is 'the sine qua non of injunctive relief.'" *Siegel*, 234 F.3d at 1176 (quoting *N. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). As such, "the asserted irreparable injury 'must be neither remote nor speculative, but actual and imminent.'" *Id.* Notably, because a preliminary injunction serves to forestall future violations, a party seeking a preliminary injunction must show that irreparable harm will occur in the future. *See Alabama v. U.S. Army Corps of Eng'rs*., 424 F.3d 1117, 1133 (11th Cir. 2005) (emphasizing the preliminary injunction's purpose of preventing irreparable harm in the future).

"[L]oss of First Amendment freedoms, even for brief periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burms*, 427 U.S. 347, 373 (1976). Thus, had the undersigned concluded that Cambridge Christian had indeed met its burden of showing a

substantial likelihood of success on the merits, then the undersigned would have been compelled to conclude that Cambridge Christian had met its burden of demonstrating irreparable harm.

3. Balancing of Harm

In balancing the harm the issuance of a preliminary injunction may cause either party, "the harm considered by the district court is necessarily confined to that which might occur in the interval between ruling on the preliminary injunction and trial on the merits." *United States v. Lambert*, 695 F.2d 536, 540 (11th Cir. 1983). Here, Cambridge Christian did not play in the 2016 FHSAA championship game, and it is unknown which championship games, if any, it will play in the interval between this ruling and a trial on the merits. Thus, the undersigned cannot conclude that Cambridge Christian will in fact suffer harm during this limited time period. However, requiring the FHSAA to turn over its public-address system at state-sponsored events may expose the FHSAA to potential lawsuits and/or abuse. Therefore, this factor weighs in favor of the FHSAA and against the entry of a preliminary injunction.

4. Public Interest

"[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to support religious orthodoxy." *Santa Fe*, 530 U.S. at 312 (alteration in original) (citation and quotation marks omitted). Thus, even if Cambridge Christian could clearly establish the first three factors of the preliminary injunction analysis, the undersigned, in light of the Supreme Court's cautionary words in *Santa Fe*, cannot conclude that Cambridge Christian can clearly establish that a preliminary injunction is in the public's interest.

IV. CONCLUSION

Accordingly, and after due consideration, the undersigned respectfully **RECOMMENDS** that:

(1) The FHSAA's Motion to Dismiss Plaintiff's Verified Amended Complaint (Doc. 26) be **GRANTED** as provided in the body of this Report and Recommendation; and

(2) Cambridge Christian's Motion for Preliminary Injunction (Doc. 9) be **DENIED**.

Date: February 3, 2017

Amanda Arnold Sansone

AMANDA ARNOLD SANSONE
United States Magistrate Judge

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of this service shall bar an aggrieved party from attacking the factual findings on appeal. *See* 28 U.S.C. § 636(b)(1).

Copies to:

Counsel of Record
District Judge