IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 17-12802-K

CAMBRIDGE CHRISTIAN SCHOOL, INC.

Plaintiff/Appellant,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Defendant/Appellee.

OPENING BRIEF OF PLAINTIFF/APPELLANT CAMBRIDGE CHRISTIAN SCHOOL, INC.

ON APPEAL FROM THE UNITED DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

Hiram S. Sasser, III
Texas Bar No. 24039157
Jeremiah G. Dys
Texas Bar No. 24096415
FIRST LIBERTY INSTITUTE
2001 W Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: 972.941.7585
Facsimile: 972.941.4457

Eliot Pedrosa
Florida Bar No. 182443
Adam Foslid
Florida Bar No. 682284
Julissa Rodriguez
Florida Bar No. 165662
Stephanie L. Varela
Florida Bar No. 70989
GREENBERG TRAURIG, P.A.
333 Southeast Second Avenue, Suite 4400
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717

Counsel for Plaintiff/Appellant Cambridge Christian School, Inc.

Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.
Case No. 17-12802-K

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, Plaintiff/Appellant submits this list, which includes all trial and magistrate judges, and all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case:

1. Abbazia, Lisa Brennan, Director of Admissions for Plaintiff/Appellant
2. Butler, Mark, Director of Athletics for Plaintiff/Appellant
3. Butterfield, Justin E., Counsel for Plaintiff/Appellant
4. Cambridge Christian School, Inc., Plaintiff/Appellant
5. Campbell, Anthony, Upper School Assistant Principal/Director of Institutional Technology for Plaintiff/Appellant
6. Chiles, Andy, Board Member to Defendant/Appellee
7. Clayton-Johnston, P.A., law firm representing Defendant/Appellee
8. Conner, Stewart, Board of Trustees, Secretary to Plaintiff/Appellant
9. Dearing, Roger, Executive Director to Defendant/Appellee
10. DeWeese, David, Board of Trustees to Plaintiff/Appellant
11. Dyal, Paul, Board Member to Defendant/Appellee
12. Dys, Jeremiah G., Counsel for the Plaintiff/Appellant
13. Edmonson, Kevin, Board of Trustees, Chairman, to Plaintiff/Appellant

Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.
Case No. 17-12802-K

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT
(Continued)

14. Euler II, Tim, former Head of School for Plaintiff/Appellant

15. Faris, Mark, Board of Trustees, Treasurer, to Plaintiff/Appellant

16. First Liberty Institute, law firm representing Plaintiff/Appellant

17. Florida High School Athletic Association, Inc., Defendant/Appellee

18. Foslid, Adam, Counsel for the Plaintiff/Appellant

19. Gibson, Cari, Upper School Principal to Plaintiff/Appellant

20. Greenberg Traurig, P.A., law firm representing Plaintiff/Appellant

21. Hillier, Marty, Director of Marketing and Alumni for Plaintiff/Appellant

22. Holland & Knight LLP, law firm representing Defendant/Appellee

23. Honeywell, The Honorable Charlene Edwards, United States District Court Judge, Middle District of Florida

24. Ireland, Jr., Leonard E., Counsel for Defendant/Appellee

25. Jackson, Barry, Board of Trustees to Plaintiff/Appellant

26. Johns, Bobby, Board Member to Defendant/Appellee

27. Lamb, Eugene, Board Member to Defendant/Appellee

28. Lyons, Hershel, Board Member to Defendant/Appellee

29. Marsala, Mark, Board Member, President to Defendant/Appellee

30. McCarty, Janelle, Board of Trustees to Plaintiff/Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (Continued)

31. McDaniel, Randy, Board Member to Defendant/Appellee

32. Meister, Scott, Board of Trustees to Plaintiff/Appellant

33. Mercier, Judith M., Counsel for Defendant/Appellee

34. Minks, Shawn, Head of School for Plaintiff/Appellant

35. Morris, Susie, Board Member to Defendant/Appellee

36. Moses, Jaimie Billotte, Counsel for Defendant/Appellee

37. Moss, Tracy, Lower School Assistant Principal and Early Childhood Director for Plaintiff/Appellant

38. Moultrie, Linda, Board Member to Defendant/Appellee

39. Nauman, Robin M., Counsel for Defendant/Appellee

40. Ochoa, Carlos, Board Member to Defendant/Appellee

41. Otero, Ken, Board Member to Defendant/Appellee

42. Otero, Lauren, Board Member to Defendant/Appellee

43. Pearson, Chris, Board of Trustees to Plaintiff/Appellant

44. Pedrosa, Eliot, Counsel for Plaintiff/Appellant

45. Pendergast, Frank, Board Member, President-Elect of Defendant/Appellee

46. Peral, Stephanie, Counsel for Plaintiff/Appellant

Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.
Case No. 17-12802-K

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT
(Continued)

47. Rey, Amy, Board of Trustees, Vice Chair to Plaintiff/Appellant

48. Rodriguez, Julissa, Counsel for Plaintiff/Appellant

49. Samuels, Paul, Board Member to Defendant/Appellee

50. Sansone, The Honorable Amanda Arnold, United States Magistrate Judge, Middle District of Florida

51. Sasser, Hiram S., Counsel for Plaintiff/Appellant

52. Sennett, Chuck, Board Member to Defendant/Appellee

53. Shears, Rick, Director of Operations for Plaintiff/Appellant

54. Shiver, Melody, Director of Guidance and College Placement for Plaintiff/Appellant

55. Sloan, Tony, Director of Institutional Advancement for Plaintiff/Appellant

56. Turk, Liana, Business Administrator to Plaintiff/Appellant

57. Valdez, Jonathan, Lower School Principal for Plaintiff/Appellant

58. Varela, Stephanie L., Counsel for Plaintiff/Appellant

59. White, Lori, Board Member to Defendant/Appellee

Cambridge Christian School, Inc. v. Florida High School Athletic Ass'n, Inc.
Case No. 17-12802-K

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT
(Continued)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the undersigned certifies that no publicly held company has an interest in the outcome of this appeal.

/s/ Stephanie L. Varela

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff/Appellant Cambridge Christian School, Inc. respectfully submits that oral argument would be of material benefit to this Court in marshaling the record and the law to address the important constitutional issues implicated in this appeal.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

Cases

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

TABLE OF CITATIONS
(Continued)

Statutes

TABLE OF CITATIONS
(Continued)

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

This is a case in which Plaintiff/Appellant Cambridge Christian School, Inc. ("Cambridge Christian") seeks, among other things, declaratory and injunctive relief from Defendant/Appellee Florida High School Athletic Association's ("FHSAA") decision to unlawfully censor the private speech of Cambridge Christian based solely on the religious viewpoint of that speech in violation of the Free Speech and Free Exercise Clauses of the First Amendment.

The district court had original, federal-question, subject matter jurisdiction over this action, pursuant to 28 U.S.C. § 1331, because this case arises under the United States Constitution and laws of the United States, specifically 42 U.S.C. § 1983, which provides a cause of action for violation of Cambridge Christian's rights by entities, like the FHSAA, a self-acknowledged State actor. The district court also had supplemental jurisdiction over the state law constitutional claims, pursuant to 28 U.S.C. § 1367, because these claims are so related to the federal law claims alleged in the action that they form part of the same case or controversy under Article III of the United States Constitution. The district court had authority to declare the rights and legal relations of the parties and to order further relief, pursuant to 28 U.S.C. §§ 2201-02, because this is a case of actual controversy within this Court's jurisdiction wherein Cambridge Christian suffered, and will continue to suffer, actual and irreparable injury to its constitutional rights as a direct consequences of the discriminatory policies implemented against Cambridge Christian.

The district court entered its dispositive order on June 7, 2017. (R:57). That order adopted, confirmed, and approved the Magistrate Judge's Report and Recommendation (R:50), overruled Cambridge Christian's Objections to the Magistrate Judge's Report and Recommendation (R:55), granted Defendant/Appellee's Motion to Dismiss Plaintiff's Verified Amended Complaint for Declaratory and Injunctive Relief and Incorporated Memorandum of Law in Support (R:26), and denied Plaintiff's Motion for Preliminary Injunction and Incorporated Memorandum of Law in Support Thereof. (R:9). The notice of appeal was timely filed on June 20, 2017. (R:58).

This Court has jurisdiction over the appeal from a final decision of the district court, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether viewpoint-based restrictions on private religious speech that FHSAA imposed on Cambridge Christian are unconstitutional;

2. Whether the district court erroneously dismissed Cambridge Christian's verified complaint for failure to state a claim; and

3. Whether the district court erroneously denied Cambridge Christian's motion for preliminary injunction.

INTRODUCTION

This is a viewpoint discrimination case that arose when a government actor decided wrongfully that it could not allow a private Christian school access to the public address system at a high school football game because of the religious nature of the proposed message, thereby imposing greater restrictions on religious

speech than secular speech. This disparate treatment was actually recognized, but then disregarded, by the courts below, and on that basis alone, the rulings are reversible.

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.

Back in December 2015, Cambridge Christian's football team qualified to play in a divisional state championship game against the team from University Christian School ("University Christian"), another private Christian school with beliefs and traditions similar to those of Cambridge Christian. Ahead of that game, both private schools asked the FHSAA, the state-appointed governing body for public and private high school athletics in Florida, to use the loudspeaker system at the stadium before the start of the championship football game to lead the players and their families and fans in a brief joint prayer, as both schools traditionally do before each game and as University Christian had done the last time it qualified to play at a state championship football game.

The FHSAA declined the schools' request to use the loudspeaker system based on the religious viewpoint of the proposed private speech, claiming that, "based on federal law," as a "State Actor," it could not "legally permit or grant

permission for such [religious] activity." The FHSAA later invoked *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), as legal authority for its policy against the use of a stadium loudspeaker to transmit religious speech in the form of a prayer.

When game day finally arrived, the FHSAA allowed others to use the loudspeaker system and other FHSAA facilities – before, during, and after the championship game – to deliver, broadcast, and amplify a host of private secular messages, including announcements, advertisements, and commentary, and to help facilitate the halftime show performed by each school's cheerleading squad. As for the football players, they prayed together on the field before the game began, but because the FSHAA prohibited the two Christian schools from using the loudspeaker system to join their respective communities together in prayer, families and fans alike were deprived of the ability to hear and participate in communal prayer along with the players they came to support.

By prohibiting Cambridge Christian from leading its students and their families and fans in a brief communal prayer, the FHSAA engaged in unconstitutional viewpoint discrimination in violation of the Free Speech and Free Exercise Clauses of the First Amendment of the United States Constitution, which prohibits State actors, like the FHSAA, from basing a decision to allow or disallow the use of State-controlled facilities for private speech based on the viewpoint expressed by the intended private speaker and prohibits such actors from imposing restrictions on private religious speech that are greater than the restrictions imposed on private secular speech. 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. For similar reasons, the FHSAA has also violated Cambridge Christian's state constitutional rights under Article I, Sections 3 and 4 of the Florida Constitution.

The FHSAA, as well as the magistrate court and district court that presided over this case, wrongly ignored the well-pleaded factual allegations of the verified complaint, as well as the FHSAA's own admission of its viewpoint-based reasons for taking the actions it did against Cambridge Christian. More specifically, the courts ignored the fact that the FHSAA's decision to deny Cambridge Christian access to the stadium loudspeaker was admittedly motivated solely by the religious viewpoint that Cambridge Christian intended to express. And, by ignoring those admissions and misapplying this Court's jurisprudence, both courts incorrectly denied Cambridge Christian's motion for preliminary injunction.

In this case, the disparate treatment between religious and secular speech was decidedly discriminatory. By muffling prayer, while amplifying all other speech, the FHSAA relegated religious viewpoints to second-class status. We have, as a society, long abandoned the sinister fiction that separate is equal when it comes to the protection of our civil rights, and we must remain eternally vigilant against even well-intentioned efforts to revive it.

For these reasons, the orders dismissing Cambridge Christian's complaint and denying Cambridge Christian's motion for preliminary injunction should be reversed.

STATEMENT OF THE CASE AND FACTS

I. THE PARTIES.

A. Cambridge Christian.

Cambridge Christian is a private Christian school located in Tampa, Florida, that offers daycare services and education from pre-kindergarten through twelfth grade. (R:8:2-3; R:50:4; R:57:2).[1] The school 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.

(R:8:3-4; R:51:11; R:57:2). Since its founding in 1964, 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 before the start of all athletic events. (R:8:4-5; R:50:11).

Cambridge Christian's Athletic Department has its own mission statement that echoes the school's mission:

> 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

[1] Cambridge Christian School, Inc. operates Cambridge Christian School, a private, independent Christian school located in Tampa, Florida. (R:8:2). Both Cambridge Christian School, Inc. and Cambridge Christian School are referred to herein collectively as "Cambridge Christian."

> Maximum Physical, Moral and Spiritual Character Development; and Mentor Young Men and Women to Deeper Walk with Jesus.

(R:8:4; R:50:11; R:57:2).

By long-standing tradition, Cambridge Christian student-athletes, their parents, and their fans are led in prayer by a parent, student, or member of the school faculty or administration before every Cambridge Christian sporting event. (R:8:4-5; R:57:2). Since the first year of Cambridge Christian's football program in 2003, the school's football team, the Cambridge Christian Lancers, and their families, coaches, and fans 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. (R:8:4-5; R:50:12; R:57:2). Using the loudspeaker system is essential 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. (R:8:5; R:57:2). 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 system. (R:8:5).

B. THE FHSAA.

The FHSAA is a self-acknowledged State actor headquartered in Gainesville, Florida, and, as the governing body for high school athletics in Florida public and private schools, it supervises and regulates Florida high school interscholastic athletic programs. (R:8:5-6; R:8-7:2; R:25-1:1; R:50:4; R:57:2); §

1006.20(1), Fla Stat. (2016) (designating the FHSAA as the governing nonprofit organization of school athletics). As part of its duties, the FHSAA organizes and oversees the championship games for all Florida high school athletics across all of its divisions. (R:8:6, 8; R:50:4); (R:9-1:14 (Article 4.3.2)). Dr. Roger Dearing serves as its executive director. (R:8:6; R:25-1:1).

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. (R:8:6; R:50:4; R:57:2).

The FHSAA has bylaws (the "FHSAA Bylaws") and Administrative Procedures to govern its operations. (R:8:8; R:8-1; R:9-1:2-40; R:9-1:14). 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:

> The FHSAA will promote an atmosphere of respect for and sensitivity to the dignity of every person. The Association will not discriminate in its governance policies, programs and employment practices on the basis of age, color, disability, gender, national origin, race, religion, creed, sexual orientation or educational choice. The FHSAA will promote diversity of representation within its governance structure and substructures. Each school is responsible to determine independently its own policies regarding nondiscrimination and diversity.

(R:8:6; R:9-1:8). Administrative Procedure 3.1.8 makes the loudspeaker available for the broadcast of private messages by host school management during playoff football games. (R:8:8; R:8-1:15-16).

II. THE EVENTS GIVING RISE TO THE PARTIES' DISPUTE.

A. The Cambridge Christian Lancers 2015 Football Season.

During the 2015 regular football season, the Cambridge Christian Lancers, played in the FHSAA's Division 2A. (R:8:6; R:57:2-3). Throughout the season, Cambridge Christian opened each home game, as well as away games whenever possible, with a prayer offered over a loudspeaker system. (R:8:7; R:57:2). By the end of the regular season, the Cambridge Christian Lancers had a 9-0 record that qualified them for the 2A Division playoff games administered by the FHSAA. (R:8:7; R:25-1:3; R:57:3).

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. (R:8:7). 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. (R:8:7).

The Cambridge Christian Lancers dominated during the playoffs and ultimately qualified for the final playoff game (the "Championship Game") against University Christian, a private Christian school that shared with Cambridge Christian a similar mission and traditions, including prayer. (R:8:7-8; R:50:4; R:57:3).

B. The Venue for the Championship Game.

All FHSAA football championship games, including the Championship Game, were played at the Camping World Stadium (formerly known as the Citrus

Bowl) (the "Stadium"), located in Orlando, Florida. (R:8:1, 6-7; R:25-1:3; R:50:4; R:57:3). The Stadium has a seating capacity of 41,000 spectators for football games and has hosted a vast variety of events over the years, including high school and college football games, the World Cup, concerts and festivals, Wrestlemania, and religious revival meetings led by Reverend Billy Graham. (R:8:6-7).

C. The Requests for Communal Prayer with the Use of the Stadium Loudspeaker at the Championship Game.

The FHSAA administered the 2A Division playoffs, pursuant to Article 4.3.2 of the FHSAA Bylaws. (R:8:8; R:9-1:14; R:50:4). In preparation for the championship games in each FHSAA Division, each school participating in the post-season playoff games received a copy of the 2015 FHSAA Football Finals Participant Manual. (R:8:8; R:8-2). In addition, representatives from the FHSAA, the finalist schools in each division, and the Central Florida Sports Commission held a conference call on December 1, 2015. (R:8:8; R:25-1:3; R:50:4; R:57:3).

During that call, the representatives of Cambridge Christian and University Christian jointly requested to use the loudspeaker at the Stadium to lead their students, families, and fans in a joint pre-game prayer at the Championship Game, much like University Christian had done during the 2012 state championship game, which the FHSAA had also administered. (R:8:8; R:50:4-5; R:57:3). 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. (R:8:8; R:8-1:15-16; R:39:4). However, during that conference call, an FHSAA representative denied the schools' joint request. (R:8:8-9; R:25-1:3; R:50:5, 12; R:57:3). Due to the size of the venue, the FHSAA's denial of the schools' request deprived the schools' communities their ability to join in prayer, and Cambridge Christian was unable to carry on in its tradition. (R:8:9; R:50:12-13).

The day after the call, on December 2, 2015, Tim Euler, then-Head of School for Cambridge Christian, e-mailed Dr. Roger Dearing, Executive Director of the FHSAA, again requesting permission to deliver a prayer over the Stadium's loudspeaker at the Championship Game. (R:8:9; R:8-3:2; R:25-1:4; R:39-1:2; R:50:5; R:57:3). A short time later, Heath Nivens, the 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, noting "the core values of both institutions." (R:8:9; R:8-4:2; R:25-1:4; R:50:5 n.5; R:57:3).

That same day, Dr. Dearing, acting on behalf of the FHSAA, denied the schools' requests via e-mail:

> 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.***

(R:8:9-10; R:8-5:2) (emphasis added); (see also R:25-1:4; R:50:5 & n.5; R:57:3-4).

D. The Championship Game.

On December 4, 2015, Cambridge Christian played University Christian in the Championship Game at the Stadium with approximately 1,800 people in attendance. (R:8:10; R:25-1:4; R:50:6; R:57:4). Before, during, and after the game, as well as during halftime, the FHSAA permitted various private messages (including announcements, promotional messages and advertisements, commentary, music and participating schools' halftime shows) to be delivered over the Stadium's loudspeaker and other facilities. (R:8:10-11; R:25-1:14-17 (announcements on behalf of Gatorade, Pinch-A-Penny, Spalding, Sports Authority); R:48:39-41 (ads are private commercial speech); R:50:6; R:57:4).

Although the players from both teams met at mid-field to pray together before the game began, the Stadium is a cavernous venue, and fans in the Stadium could not hear the prayer; it was thus impossible for the schools' communities to join with one another in a communal prayer without the use of the loudspeaker. (R:8:9, 11; R:50:6; R:57:4); (see also R:50:13; R:57:4; R:48:21 ("it is part of this school's religious practice to pray together . . . as a community . . . [t]o pray out loud so that they can hear each other and participate in the same prayer; and . . . by denying use of the loud speaker, the [FHSAA] impeded the ability of those members in the stands and on the sidelines to hear what the students heard [at

midfield] and to participate in that exercise of religion through speech over the loud speaker").

E. The FHSAA's Continued Prohibition of Private Prayer over a Loudspeaker System.

Three days after the Championship Game, on December 7, 2015, Dr. Dearing sent another e-mail to Cambridge Christian and University Christian elaborating upon and reiterating the FHSAA's decision prohibiting the use of the Stadium loudspeaker for a joint prayer. (R:8:11-12; R:8-6:2; R:50:6; R:57:4). The e-mail reads in pertinent part:

> The ***issue of prayer*** over the PA system at the football game, is a common area of concern and one that has been richly debated – and decided in the courts of the United States.
>
> ***
>
> 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 nor 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.

(R:8:11-12; R:8-6:2) (emphasis added).

On January 27, 2016, the FHSAA posted a press release on its website, titled "FHSAA Statement ***Regarding Prayer*** Over PA System," invoking in all but name the United States Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000), and further reiterating its decision to

prohibit prayer based on its content, and not based on a protocol prohibiting all private speech, over the Stadium loudspeaker. (R:8:12; R:8-7:2 ("[t]he FHSAA, as a host and coordinator of the [Championship Game] is statutorily a 'State Actor[,]' and according to state and federal law, cannot legally permit or grant permission for [prayer] over the PA system"); R:50:6; R:57:5). At no point did the FHSAA attribute its reasons for denying Cambridge Christian's request to any protocol or anything other than the religious nature of the proposed speech.

The FHSAA's declared intention to deny any future requests to allow pre-game prayers to be offered over a loudspeaker system 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"). (R:8:12; R:39:6). Because it continues to participate in FHSAA-sanctioned sports (including sports other than football, 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 FHSAA's de facto Policy. (R:8:12-13; R:39-6).

In fact, Cambridge Christian's bowling team had qualified to play at the state bowling championship games held on November 2-3, 2016. (R:39-1:2). As it did with the Championship Game, Cambridge Christian asked the FHSAA for 30 seconds to provide a prayer to open the bowling championship game. (R:39-1:2). The FHSAA declined to respond to the request by Cambridge Christian to pray at the bowling championships, referring the request to counsel. (R:39-1:3).

III. THE LAWSUIT.

A. Cambridge Christian's Claims.

Cambridge Christian filed a verified complaint against the FHSAA in September 2016, for declaratory relief, preliminary and permanent injunctive relief, and damages, seeking to enjoin the FHSAA from unlawfully censoring Cambridge Christian's private religious speech through actions that discriminate between religious and secular speech at FHSAA-administered sporting events. (R:1; R8). The operative verified complaint alleges 7 counts as follows: (i) Count I – violation of the First Amendment of the federal constitution; (ii) Count II – declaratory judgment of the FHSAA's violation of the Free Speech and Free Exercise Clauses of the federal constitution; (iii) Count III – declaratory judgment of the Establishment Clause of the federal constitution; (iv) Count IV – violation of Article 1, Sections 3 and 4 of Florida's Constitution; (v) Count V – declaratory judgment of the Free Speech and Free Exercise Clauses of Florida's Constitution; (vi) Count VI – declaratory judgment of the Establishment Clause of Florida's Constitution; and (vii) Count VII – violation of Florida's Religious Freedom Restoration Act, Section 761.03, Florida Statutes. (R:8:13-23; R:57:5-6). In response, the FHSAA filed a motion to dismiss the operative complaint with prejudice, for failure to state a claim, which Cambridge Christian opposed. (R:26; R:57:6; R:39).[2]

[2] The FHSAA had also challenged Cambridge Christian's standing to bring its lawsuit, but later abandoned that challenge. (R:26:5-8; R:56; R:57:6-7 n.2).

B. The Parties' Respective Motions.

Contemporaneously with its operative complaint, Cambridge Christian also moved for preliminary injunction, arguing that injunctive relief is warranted because: (i) the FHSAA's Policy constitutes a viewpoint-based restriction on speech and is thus unconstitutional; (ii) the FHSAA does not have a compelling interest to justify the Policy's viewpoint-based restrictions; (iii) the law does not require the FHSAA to censor Cambridge Christian's religious speech; (iv) there is a substantial threat that Cambridge Christian will suffer irreparable injury if the injunction is not granted; (v) the threatened injury to Cambridge Christian outweighs the threatened harm the injunction may cause the FHSAA; and (vi) granting a preliminary injunction will not disserve the public interest. (R:9; see also R:57:6). The FHSAA opposed Cambridge Christian's motion for preliminary injunction, denying that it had a Policy or procedure regarding prayer. (R:25; R:25-1:6; R:57:6).

C. The Hearing on the Parties' Respective Motions, and the Courts' Rulings.

The Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, Tampa Division, referred Cambridge Christian's motion for preliminary injunction and the FHSAA's motion to dismiss to the Honorable Amanda Arnold Sansone, United States Magistrate Judge for the same division. (R:11; R:29). Judge Sansone, in turn, held a hearing on the parties' respective motions on December 7, 2016. (R:48).

The magistrate court entered its Report and Recommendation (the "Recommendation") on February 3, 2017. (R:50). The magistrate recommended

that the district court deny Cambridge Christian's motion for preliminary injunction and dismiss the operative complaint, finding that Cambridge Christian did not sufficiently allege a basis for relief. (R:50). Cambridge Christian objected to the Recommendation, and the FHSAA responded. (R:55; R:56).

On June 7, 2017, the district court issued its order, adopting and approving the magistrate's Recommendation. (R:57). Cambridge Christian timely appealed. (R:58).

SUMMARY OF ARGUMENT

By imposing greater restrictions on private religious speech than on private secular speech – that is, by banishing private prayer out of the earshot of the families, friends, and supporters in attendance, while amplifying secular speech to be heard by all – the FHSAA engaged in unconstitutional viewpoint discrimination. Nothing justifies the violation of Cambridge Christian's rights and, under this record, there is no showing that the actions taken by the FHSAA are the least restrictive means of achieving a compelling state interest. And, because the FHSAA has stated that it intends to deny similar requests to pray over the loudspeaker in the future, based on its erroneous belief that its actions are constitutionally-mandated, the FHSAA's unconstitutional discrimination will likely recur.

To be sure, a forum analysis under the facts of this case is wholly irrelevant to the flagrant, viewpoint-based discrimination committed against Cambridge Christian. Viewpoint discrimination of a private, religious character is not permitted in any forum. Yet, as the verified operative complaint plainly reflects,

the FHSAA rejected Cambridge Christian's request to use the Stadium loudspeaker for a pre-game communal prayer solely because of the religious viewpoint that Cambridge Christian intended to express, and this proposed religious expression was treated less favorably than the secular speech the FHSAA allowed to be broadcast, using the same Stadium facilities at the same game.

Contrary to the findings below, the allegations contained in the operative complaint survive a motion to dismiss, and the record and law fully support the issuance of a preliminary injunction. The orders under review must, therefore, be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

This Court "review[s] de novo a dismissal for failure to state a claim upon which relief may be granted." *U.S. ex rel. Matheny v. Medco Health Sols., Inc.*, 671 F.3d 1217, 1221 (11th Cir. 2012). When considering a motion to dismiss, this Court must accept as true the facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor. *Id.*

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face' and thus 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). A court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone

is legally sufficient to state a claim for which relief may be granted. *See Twombly*, 550 U.S. at 563 n.8 ("when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder").

The record under review for a dismissal is ordinarily limited to the complaint and any attachments thereto, but in First Amendment cases, this Court "must make an independent examination of the whole record," *FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1297 (11th Cir. 2017); *see also Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999) (a document central to the complaint that the defense appends to its motion to dismiss is also properly considered, provided that its contents are not in dispute), and "is not bound by the 'clearly erroneous' standard of review." *Am. Civil Liberties Union of Florida, Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009).

A lower court's ruling on whether to issue a preliminary injunction is reviewed for abuse of discretion, and any legal conclusions upon which it is based are reviewed de novo. *FF Cosmetics*, 866 F.3d at 1297. A district court may abuse its discretion by applying the law in an unreasonable or incorrect manner. *See Woodard v. Fanboy, L.L.C.,* 298 F.3d 1261, 1268 n.14 (11th Cir. 2002) ("in [the] preliminary injunction context, a district court abuses its discretion where the decision rests upon a 'misapplication of the law to the facts'"). "A district court [also] abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that

are clearly erroneous." *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1336 (11th Cir. 2002) (quoting *Chicago Tribune Co. v. Bridgestone/Firestone Inc.*, 263 F. 3d 1304, 1309 (11th Cir. 2001)).

II. CAMBRIDGE CHRISTIAN SUFFICIENTLY PLED ITS CONSTITUTIONAL CLAIMS AGAINST THE FHSAA.

A. Applicable Law.

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).[3]

---

[3] There can be no serious dispute as to Cambridge Christian's standing, *see Dana's R.R. Supply v. Attorney Gen., Fla.*, 807 F.3d 1235, 1241 (11th Cir. 2015) (traditional standing requires a showing that (i) the complainant suffered an injury in fact, which is concrete, particularized, and actual or imminent, (ii) there is a causal connection between the injury and the opposing party's conduct, and (iii) the injury can be redressed in court), *cert. denied sub nom.*, *Bondi v. Dana's R.R. Supply*, 137 S. Ct. 1452 (2017); *White's Place, Inc. v. Glover*, 222 F.3d 1327, 1328−30 (11th Cir. 2000) (defining corporate entity's traditional and associational standing; recognizing relaxation of traditional rules of standing for First Amendment cases); *Beckwith Elec. Co. v. Sebelius*, 960 F. Supp. 2d 1328, 1334−35 (M.D. Fla. 2013) (traditional standing); (R:48:15-24; R:50:9-14), particularly given the FHSAA's abandonment of that argument. See *supra* note 2. Cambridge Christian suffered an injury-in-fact when the FHSAA rejected its request to use the Stadium loudspeaker for a pre-game prayer solely because of the religious viewpoint Cambridge Christian intended to express, and this proposed religious expression was treated less favorably than the secular speech the FHSAA allowed using the same Stadium facilities at the same game. (R:8:10-11); *see Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably (continued . . .)

The freedoms guaranteed in the First Amendment of the federal constitution are also guaranteed under Florida's Constitution. Article 1, Section 3 of the state constitution provides that "[t]here shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof," and Section 4 states that "[n]o law shall be passed to restrain or abridge the liberty of speech."

Free Speech, Free Exercise, and Establishment claims under the Florida Constitution are analyzed similarly to claims under the federal constitution. *See Cafe Erotica v. Fla. Dep't of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002) ("[t]he scope of the Florida Constitution's protection of freedom of speech is the same as required under the First Amendment"; thus, courts apply "the principles of freedom of speech as announced in the decisions" of the United States Supreme Court) (citations omitted); *Toca v. State of Florida*, 834 So. 2d 204, 208 (Fla. 2d DCA 2002) ("[w]e have found no authority holding that Florida's Free Exercise Clause requires a different analysis or result [than the federal Free Exercise Clause]"; courts generally "treat[] the protection afforded under the state

---

(. . . continued)
constitutes irreparable injury"). Moreover, communal prayer lies at the core of Cambridge Christian's mission, its members would otherwise have standing to sue in their own right, and neither the claim asserted nor the relief requested requires the participation of individual members. (R:48:15-24). Additionally, the injury Cambridge Christian suffered is likely to be repeated in the future, given the FHSAA's declared intention to deny future requests. (R:8:9-12; R:8-5:2; R:8-6:2; R:8-7:2); *see Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (exception to mootness doctrine exists where "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again").

constitutional provision as coequal to the federal one, and have measured government regulations against it accordingly"); *Atheists of Florida, Inc. v. City of Lakeland, Fla.*, 779 F. Supp. 2d 1330, 1341 (M.D. Fla. 2011) (Florida's Establishment Clause "is duplicative . . . of the Federal Constitution's Establishment Clause").

B. The FHSAA Engaged in Unconstitutional Viewpoint Discrimination by Denying Cambridge Christian's Request to Deliver a Message over the Stadium's Loudspeaker Based Solely on the Religious Viewpoint of the Proposed Message.

1. The FHSAA's Policy constitutes a viewpoint-based restriction on speech and is unconstitutional.

a. The Free Speech Clause.

The United States Supreme Court has repeatedly held that State action prohibiting speech on account of its religious character constitutes unconstitutional "viewpoint discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995) (university's denial of a request for public funds from a religious newspaper on account of the religious character of the newspaper constitutes unconstitutional viewpoint discrimination); *see also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (New York statute permitting use of public school property for certain uses but prohibiting its use for religious purposes constitutes unconstitutional viewpoint discrimination).[4]

[4] The courts below erred in finding that Cambridge Christian's proposed prayer over the loudspeaker is "government speech" by misapplying *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), and this Court's decisions in *Mech v.* (continued . . .)

"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 (citation omitted); *see also Rosenberger*, 515 U.S. at 828 ("[i]t 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." *Rosenberger*, 515 U.S. at 828 (emphasis added) (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641−43 (1994)).

(. . . continued)
Sch. Bd. of Palm Beach Cty., Fla., 806 F.3d 1070 (11th Cir. 2015), *Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001) (*Adler II*), and *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (*Chandler II*); (R:50:21-25; R:57:11-18). The speech at issue here is clearly private in nature. And, contrary to the magistrate's conclusion, *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070 (11th Cir. 2015), does not stand for the proposition that all government sponsors' messages are government speech. (R:50:16-17). In *Mech*, the School Board of Palm Beach County adopted a program by which the "principals of each school must 'use their discretion in selecting and approving business partners that are consistent with the educational mission of the School Board, District and community values, and appropriateness to the age group represented at the school.'" *Mech*, 806 F.3d at 1072. The advertisements themselves were printed in school colors, subject to uniform design requirements imposed by the schools, bore the initials of the school, and identified the sponsor as a "partner" with the school. *Id.* at 1077. Thus, because of the government's substantial involvement in the selection and endorsement of corporate advertisers, this Court held that the ads at issue in *Mech* were "distinguishable from purely private advertising" and were in fact government speech. *See id.* at 1077−79. The facts here are different, namely because Cambridge Christian did not seek to have the FHSAA endorse or otherwise approve of its prayer.

"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." *Rosenberger*, 515 U.S. 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." *Rosenberger*, 515 U.S. at 829.

The Supreme Court has expressly concluded that religion is a protected viewpoint for First Amendment purposes. *Rosenberger*, 515 U.S. at 832 (holding that denial "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 FSHAA suggests, after the fact, that its decision was justified by its Public-Address Protocol (the "Protocol"). But the sum and substance of the FSHAA's Protocol is entirely immaterial because the FHSAA's decision to deny Cambridge Christian's request was — ***by the FHSAA's admission*** — based, not on that Protocol, but on the religious viewpoint of Cambridge Christian's proposed message. The courts' reliance on the FHSAA's Public-Address Protocol to justify

the FHSAA's conduct completely ignores the actual reason the FHSAA denied Cambridge Christian's request.[5]

Cambridge Christian has alleged (and the FHSAA has actually stated), that the FHSAA engaged in exactly this type of viewpoint discrimination by regulating private speakers' use of Stadium facilities in ways that favored some viewpoints (namely, secular viewpoints) at the expense of others (namely the proposed religious viewpoint Cambridge Christian intended to convey). Both the magistrate and district courts ignored this well-pleaded and undisputed allegation, instead crediting the FHSAA's *ex post* attempt – made for the first time in its motion to dismiss – to rationalize its actions by claiming that a content-neutral Public-Address Protocol prohibits use of the Stadium loudspeaker by anyone for any purpose. (R:26:2-4, 9-18; R:50:5, 17, 20; R:57:5, 16-21).[6] But the Protocol is unavailing for multiple reasons.

---

[5] It is worth noting that, despite the magistrate's suggestions to the contrary, Cambridge Christian never requested that the public address announcer, or any FHSAA official, deliver Cambridge Christian's prayer over the loudspeaker. Instead, Cambridge Christian, a private entity, requested that a private citizen, Tim Euler, be allowed to broadcast a private prayer on Cambridge Christian's behalf over the loudspeaker. It was not until Cambridge Christian initiated this lawsuit that the FHSAA even mentioned its Public-Address Protocol and any supposed prohibition on third party use of the loudspeaker. Again, there is no suggestion in any of the undisputed evidence before this Court that the Protocol played any role in the FHSAA's decision to deny Cambridge Christian's request to pray over the loudspeaker. At best, these facts indicate that the FHSAA failed to follow its own Protocol, adopting instead a Policy hostile to the religious viewpoint of Cambridge Christian.

[6] The magistrate appears to have confused the Public-Address Protocol with the FHSAA's discriminatory Policy of denying access to the loudspeaker based on the

(continued . . .)

First, the courts are obligated to accept the allegations that Cambridge Christian's intended religious viewpoint was, in fact, the FHSAA's reason for denying its request to use the Stadium loudspeaker. (R:8:2, 13, 18, 22; R:55:9). The FHSAA's attempt to engage in *ex post* rationalizations about whether its existing Public-Address Protocol barred all uses of the loudspeaker for all purposes is wholly irrelevant when the FHSAA has admitted in e-mails, and later in a press release, that the reason it denied Cambridge Christian's request to use the loudspeaker is because Cambridge Christian intended to espouse a religious viewpoint. (R:8:9-12; R:8-5:2; R:8-6:2; R:8-7:2; R:55:10).

Second, the FSHAA allowed Cambridge Christian to access the loudspeaker for its school halftime show. This undermines any claim that the entirety of the use of the loudspeaker was government speech only. It is only government speech when "the government sets the overall message to be communicated and *approves every word that is disseminated*." *Johanns v. Livestock Mktg., Assoc.*, 544 U.S. 550, 562 (2005) (emphasis added). There is no evidence in the record that the FHSAA picked the music the cheerleaders would dance to, approved how the show was announced, or was involved in any way in the halftime show's production. The absence of such evidence in the record is fatal to the FHSAA's claim that the loudspeaker was reserved for exclusively government speech.

(. . . continued)
religious viewpoint that Cambridge Christian intended to express. Cambridge Christian does not challenge the Protocol, only the FHSAA's Policy of applying it in a discriminatory fashion based on viewpoint.

Third, a plain reading of the FSHAA's Public-Address Protocol belies the FHSAA's attempted *ex post* rationalization:

> **3.1.8 Public-Address Protocol.** The public-address announcer shall be considered a bench official for all Florida High School State Championship Series events. He/she shall maintain complete neutrality at all times and, as such, shall not be a "cheerleader" for any team. The announcer will follow the FHSAA script for promotional announcements, which are available from this association, player introductions and awards ceremonies. ***Other announcements are limited to:***
>
> - Those of an emergency nature (e.g., paging a doctor, lost child or parent, etc.);
> - Those of a "practical" nature (e.g., announcing that a driver has left his/her vehicle lights on);
> - Starting lineups or entire lineups of both participating teams (what is announced for the home team must be announced for the visiting team); and
> - **Messages provided by host school management**; and
> - Announcements that FHSAA souvenir merchandise, souvenir programs and concessions are on sale in the facility. During the contest, the announcer:
> - Should recognize players about to attempt a play (e.g., coming up to in baseball, punting, kicking or receiving a punt or kick in football, serving in volleyball, etc.);
> - Should recognize player(s) making a play (e.g., "Basket by Jones" in basketball, "Smith on the kill" in volleyball, etc.);
> - Should report a penalty as signaled by the referee;
> - Should report substitutions and timeouts;
> - Must not call the "play-by-play" or provide "color commentary" as if he/she were announcing for a radio or television broadcast;
> - Must not make any comment that would offer either competing team an unfair advantage in the contest; and
> - Must not make any comment critical of any school, team, player, coach or official; or any other comment that has the

> potential to incite unsporting conduct on the part of any individual.
>
> The announcer should be certain of the accuracy of his/her statements before making them. When in doubt, the announcer should remain silent.

(R:8-1:15-16) (emphasis added). Nowhere does the Public-Address Protocol state "that the only authorized user of the public-address system is the public-address announcer." (R:26:10). Nothing in the Protocol purports to preclude use of the loudspeaker by someone other than the official announcer or to prohibit any use of the loudspeaker by participating schools at an FHSAA-administered championship game. (R:8-1:15-16).

To the contrary, the Public-Address Protocol specifically contemplates that among the permitted uses of the loudspeaker are for "other announcements," which include "[m]essages provided by host school management." (R:8-1:15). Moreover, Cambridge Christian has alleged that, in fact, the loudspeaker was used – with the FHSAA's permission – to broadcast music for each school's halftime show, which was played by each school and *not* by the announcer. (R:8:11). And, other Stadium facilities were also used to broadcast private speech by advertisers, sponsors, and others. (R:8:10). The Policy's viewpoint-based restrictions are all the more apparent given these various forms of secular speech that the FHSAA permitted over the loudspeaker during the Championship Game.

The FHSAA's straw-man assertions that it "cannot be forced to change its Protocol so that Cambridge Christian can broadcast a prayer" or that "if the Protocol included pre-game prayer in its list of allowed announcements, it would

clearly violate the Establishment Clause" are similarly unavailing. (R:26:11-12). Cambridge Christian has never sought and does not seek to change the FHSAA's Public-Address Protocol to specifically list prayer as a permitted use of the loudspeaker, because no such change is needed. What 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 its Policy of prohibiting prayer over the loudspeaker while allowing private secular speech.

In sum, at all times up to and including the filing of this lawsuit, the FHSAA acknowledged that the basis of its decision was the religious viewpoint Cambridge Christian sought to express. As the FHSAA has repeatedly made clear, it refused Cambridge Christian's request to use the loudspeaker during the Championship Game precisely because Cambridge Christian wished to offer a religious message. (R:8:9-12; R:8-5:2 ("we cannot legally permit or grant permission for such an *activity*"); R:8-6:2 ("[t]he issue of *prayer* . . . is simply not legally permitted under the circumstances, which were requested by Mr. Euler"); R:8-7:2) (emphasis added). By distinguishing permitted speech from forbidden (or disfavored) speech on the basis of its religious nature, the FHSAA engaged in unconstitutional viewpoint discrimination. Such "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828 (citing *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641–43 (1994)). Accordingly,

Cambridge Christian sufficiently pled its claim based on violation of the Free Speech Clause.[7]

b. The Free Exercise Clause.

"To plead a valid free exercise claim, [a plaintiff] must allege that the government has impermissibly burdened one of [its] 'sincerely held religious

[7] 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) ("the 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"; "where the speaker is a student who is entitled to be on school property, a forum analysis is not relevant") (citation omitted). It bears noting, however, that 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, the FHSAA created a limited public forum. *See Rosenberger*, 515 U.S. at 829. Regardless, viewpoint discrimination is constitutionally impermissible even in a wholly nonpublic forum. *See Lamb's Chapel*, 508 U.S. at 394 ("[a]lthough 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 v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985))); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) ("[g]overnment 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*) ("[t]he Supreme Court has consistently held that in nonpublic fora the government may not engage in viewpoint discrimination"). For that reason, the magistrate and the FHSAA's reliance on *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46−48 (1983) (holding that a school's mail system was not a public forum), for the proposition that the FHSAA has not created a public forum, is misplaced.

beliefs.'" *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007). That is the situation we have here.

The courts' rulings below, which incorrectly found that the FHSAA's restrictions did not amount to a "ban on communal prayer," are tantamount to a judicial admission of viewpoint discrimination. (R:57:22-23) (see also R:50:16). Critically, viewpoint discrimination does not only occur when the government bans one from speaking on a religious viewpoint. Such discrimination also occurs when the government imposes greater restrictions on religious speech than the restrictions imposed on secular speech. *See, e.g.*, *Chandler II*, 230 F.3d at 1316. Here, in ruling as it did, the district court *admitted* that the FHSAA placed greater restrictions on religious speech than on secular speech. On this premise alone, the ruling is reversible.

The facts are clear and undisputed: communal prayer is integral to Cambridge Christian's religious mission, and the Cambridge Christian community was unable to engage in its tradition of communal pre-game prayer due to the FHSAA's denial of its request to use the loudspeaker to express a religious viewpoint. (R:8:8, 11). That denial substantially burdened and adversely affected Cambridge Christian's freedom of religious exercise. The magistrate acknowledged that "the spectators very likely could not hear the teams' prayers, given the size of the stadium and the large number of people in attendance," but nevertheless "remain[ed] at a loss as to how" this impeded Cambridge Christian's free exercise because "every spectator had an opportunity to see that a pre-game

prayer was taking place." (R:50:17); (*see also* R:57:22) (district court finding that schools "were permitted to pray at the most central location of the stadium").

Again, both courts failed to accept Cambridge Christian's allegations as true, by substituting their own judgments that *seeing* others praying should be just as good as participating in the prayer by actually *participating* with the prayerful words expressed over the loudspeaker. This fundamentally misunderstands the nature of prayer as a religious experience at Cambridge Christian (in disregard of the well-pled and undisputed facts), and it runs roughshod over the Free Exercise Clause by allowing government officials (the courts and the FHSAA) to decide what elements of a religious practice are important and which ones the government may abridge.

The Free Exercise Clause simply does not permit the government to impose its views about how Cambridge Christian should practice its religion. *See Lindh v. Warden, Fed. Corr. Inst., Terre Haute, Ind.*, No. 2:09-CV-00215-JMS, 2013 WL 139699, at *11 (S.D. Ind. Jan. 11, 2013) (finding that an individual's Free Exercise rights were violated when he was prohibited from engaging in his sincerely held religious belief of group prayer). Nor does it "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. Thus, Cambridge Christian sufficiently pled a cause of action for a violation of the Free Exercise Clause.

2. The Establishment Clause does not justify the FHSAA's unconstitutional viewpoint discrimination.

Because viewpoint-based restrictions on speech are subject to the "most exacting scrutiny" and are presumptively invalid, the FHSAA has the burden of demonstrating the constitutionality of its decision to prohibit Cambridge Christian's use of the Stadium loudspeaker and its intention to deny similar, future requests. *See Turner Broad. Sys., Inc.*, 512 U.S. at 642; *see also United States v. Alvarez*, 132 S. Ct. 2537, 2544 (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") (citation and internal quotation marks omitted). The FHSAA must also show that its actions are the "least restrictive means of achieving a compelling state interest." *See McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

The FHSAA claims that its Policy is mandated by the Establishment Clause. (R:26:8-18).[8] However, this Court has held that fear of violating "the

[8] By confusing the Public-Address Protocol with the FHSAA's discriminatory decision to deny Cambridge Christian access to the loudspeaker (referred to as the "Policy" throughout Cambridge Christian's case papers), the magistrate misconstrued Cambridge Christian's request for relief. *See supra* note 6. Cambridge Christian has never sought a declaration that the Protocol is unconstitutional on its face. (R:8; R:50:14-15, 18). It merely seeks to prevent the FHSAA from using the Establishment Clause as an excuse to apply its Protocol in a discriminatory manner in violation of the Free Speech and Free Exercise Clauses. In this regard, Cambridge Christian seeks a declaration that no Establishment Clause violation would have occurred had the FHSAA permitted Cambridge Christian to use of the loudspeaker. Alternatively, even if the Establishment Clause could serve as a compelling state interest justifying differential treatment of Cambridge Christian's request, the burden would shift to the FHSAA to (continued . . .)

Establishment Clause cannot be used as a justification for content-based restrictions on religious speech." *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1395 (11th Cir. 1993). This is because "[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*); *see supra* note 4.

As the courts and the FHSAA acknowledge, 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." (R:26:9) (emphasis added) (quoting *Santa Fe*, 530 U.S. at 302 (internal citations and quotations omitted)). Despite this acknowledgment, however, the FHSAA insisted that the Establishment Clause obligates it to discriminate against private religious speech by imposing greater restrictions on the use of Stadium facilities than what the FHSAA imposes for private secular speech based on an erroneous reading of *Santa Fe*.

(. . . continued)
demonstrate that it adopted the least restrictive means necessary to avoid the purported Establishment Clause, which burden the FHSAA cannot meet in this case.

> 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. . . .

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

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 pre-game 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:

> **[*T*]*he 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. . . . ***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.***

Sante Fe, 530 U.S. at 306−07 (emphasis added).

The Court cautioned, however, 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.

This case is entirely distinguishable. *Santa Fe* held only that a State actor could not adopt a policy that allowed a purportedly private speaker at high school football games to offer a pre-game message, while pushing the private speaker to deliver a religious message. Here, there is no suggestion that the FHSAA has attempted to prescribe a message for Cambridge Christian to deliver. No Policy of the FHSAA purports to require or even encourage an invocation or other religious speech. To the contrary, the message Cambridge Christian sought to deliver would have been entirely of its own initiation and choosing. *Santa Fe* bars State actors from ***prescribing*** a religious message for private speakers to deliver; it does not create immunity for State actors from ***proscribing*** private speakers from delivering their own, private religious messages in public places.

The error in the FHSAA's sweeping interpretation of the Supreme Court's decision in *Santa Fe* is demonstrated in two post-*Santa Fe* decisions issued by this Court, which make clear that *Santa Fe* and the Establishment Clause neither require nor permit State actors, like the FHSAA, to adopt policies that prohibit religious speech. *See Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1342 (11th Cir. 2001) (*Adler II*); *Chandler II*, 230 F.3d at 1316. To the contrary, these decisions reiterate that what the Constitution requires is a policy of neutrality towards religious speech – that is, one that neither endorses nor censors religious speech.

In *Adler*, the district court considered the constitutionality of a Duval County School Board policy that permitted, but did not require, a student speaker to lead a

prayer over the loudspeaker at graduation exercises. *Adler v. Duval Cty. School Bd.,* 851 F. Supp. 446 (M.D. Fla. 1994).[9] 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 this Court initially reversed the district court's judgment. *Adler v. Duval Cty. Sch. Bd.*, 174 F.3d 1236, 1251 (11th Cir. 1999). When this Court 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 v. Duval County Sch. Bd.,* 206 F.3d 1070, 1091 (11th Cir. 2000) (*Adler I*). Within months after this Court's *en banc* opinion in *Adler I*, the Supreme Court decided *Santa Fe*. A few months later, *Adler* reached the Supreme Court on a petition for certiorari, and the Court remanded the case 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).

---

[9] 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.

On remand, this Court, again sitting *en banc* (and this time specifically considering and applying *Santa Fe* as directed), 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. 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," and (2) the policy, "by its terms, invites and encourages religious messages". ***Those two dispositive facts are not present here, and that makes all the difference***.

Id. at 1336. (citations omitted) (emphasis added).

Accordingly, *Adler* stands for the proposition that the Establishment Clause does not require a State actor to prohibit private speakers from delivering a prayer at a public event using a public loudspeaker. Permitting Cambridge Christian to use the Stadium loudspeaker, here, would not convert Cambridge Christian's

message into State speech any more than allowing a student speaker to include a prayer at graduation (over the school loudspeaker) would have in *Adler*.

In *Chandler*, this Court held that a lower court's injunction – entered as an attempt to remedy a perceived Establishment Clause violation – violated 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 1564. 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, 1064 (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 1257−58. (emphasis added). This Court, 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.

This Court held that the injunction violated the Free Speech and Free Exercise Clauses because it purported to require public officials to suppress religious speech in the schools and restrict student access to school facilities (including the loudspeaker) to allow their use for secular speech only. *Id*. at 1265–66. The Court concluded, "the 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***." *Id*. at 1266 (emphasis added). 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.
>
> ***
>
> 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. See Argument, Point II, B.1.

Chandler I was also decided by this Court 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, this Court – 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.

Put simply, this Court in *Chandler II* (as in *Adler II*) expressly recognized that "[t]he Establishment Clause does not require the elimination of private speech endorsing religion in public places." *Id.* at 1316.

Here, like the student-initiated speech in *Chandler*, speech initiated by Cambridge Christian remains protected private speech even when sought to be offered over facilities (like the loudspeakers at issue here and in *Chandler*) controlled by a State actor. Moreover, under *Chandler II*, a State actor does not violate the Establishment Clause by permitting access to its facilities for private religious speech on equal terms and conditions as private secular speech; to the contrary, such equal access is mandated by the Free Exercise and Free Speech Clauses.

The FHSAA's attempt to distinguish *Chandler* and *Adler* on the grounds that those cases do not "compel the enlistment of state actors, like the FHSAA to engage in proselytization of audience members attending state-sponsored sporting events," is spurious. No "enlistment" of the FHSAA is sought or required; what is required is that the FHSAA refrain from continuing to apply a discriminatory policy that restricts private speech intended to express a religious viewpoint in ways that are more onerous than it applies to secular speech. This is precisely the proposition that *Chandler* and *Adler* stand for. *See Chandler I*, 180 F.3d at 1265–66 (holding that the district court injunction could not constitutionally "apply restrictions on the time, place, and manner of that [religious] speech which exceed those placed on students' secular speech"); *Adler I*, 206 F.3d at 1078 (11th Cir.) ("[I]t is worth emphasizing that while the state must be neutral and cannot advance

or endorse religion, similarly, it need not, indeed it cannot, act in a hostile manner in the face of private religious speech publically uttered.").

Instead of applying the indistinguishable and binding precedent created by *Chandler* and *Adler*, the courts below looked to the Supreme Court's decision in *Walker*. 135 S. Ct. 2239. In *Walker*, the Supreme Court outlined three factors to determine whether certain speech constitutes government or private speech: (i) the history of the speech, (ii) whether individuals would reasonably interpret the government as endorsing the speech, and (iii) the extent of the government's control over the speech. *See id.* at 2247. Contrary to the court findings below, here all three of these factors weigh in favor of finding that Cambridge Christian's requested prayer over the loudspeaker is private speech.

First, as the magistrate observed, history "weighs in [Cambridge Christian]'s favor" because there is little history regarding prayer over the loudspeaker at FHSAA-sponsored events. Since the inception of its football program, Cambridge Christian has held pre-game prayers over the loudspeaker prior to the kick-off of each home game and, whenever possible, at away games. (R:8:5).

Second, the endorsement factor also strongly favors Cambridge Christian. "It is beyond imagination to say that everyone on [a state] platform . . . is a state speaker merely because the state has provided the platform, onto which private individuals may be invited to share their privately-held views. Such views do not become the state's views merely by being uttered at a state event on a state platform." *Adler I*, 206 at 1080. Cambridge Christian's proposed prayer, which was to be led by Tim Euler, over the loudspeaker would not constitute the

FHSAA's speech merely because it was to be projected over the loudspeaker at the Championship Game. To be sure, throughout that game, the official announcer broadcast several corporate advertisements, ranging from advertisements by Sports Authority to Gatorade. Just because the FHSAA announcer read these advertisements, does not mean that spectators automatically interpreted such advertisements as being the FHSAA's own speech. Likewise, if a representative of Cambridge Christian prayed over the loudspeaker during the Championship Game, that prayer would have been associated solely with Cambridge Christian. Any spectator would not have reasonably interpreted such prayer to be the FHSAA's speech.

Third, and finally, the control factor also weighs in favor of finding that Cambridge Christian's requested speech is private speech. Cambridge Christian did not seek — nor would it have accepted — a circumstance in which the FHSAA would exercise control over its message. To the contrary, it sought merely to utilize the loudspeaker for its Head of School to deliver a private message entirely composed and delivered by him.

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.

3. The FHSAA similarly violated Cambridge Christian's state constitutional claims.

Cambridge Christian's state constitutional claims are similar to its federal constitutional claims. For the reasons set forth above, Cambridge Christian sufficiently pled its claims under Florida's Constitution.

III. CAMBRIDGE CHRISTIAN SUFFICIENTLY PLED ITS CLAIM BASED ON FLORIDA'S RELIGIOUS FREEDON RESTORATION ACT.

Florida's Religious Freedom Restoration Act ("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." § 761.03(1)(a)–(b), Fla. Stat. (2016).[10] A

[10] The "protection afforded to the free exercise of religiously motivated activity under 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).

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.

As set forth in the operative complaint, an essential part of the exercise of religion by Cambridge Christian's members involves praying *together*. (R:8:4-5). Prayer is essential to Cambridge Christian's reason for being, and pre-game prayer is a vital component of Cambridge Christian's traditions. By denying use of the Stadium loudspeaker, the FHSAA has substantially burdened Cambridge Christian's religious exercise in violation of the FRFRA, without any compelling State interest. *See* Argument, Point II.

The FHSAA cannot advance a compelling state interest for prohibiting the loudspeaker prayer because the FHSAA's Protocol allowed for the use of the loudspeaker for secular school management announcements and school hosted halftime entertainment. Whenever the government provides exceptions to an otherwise restrictive policy, it is, by definition, no longer seeking to protect a compelling governmental interest. The exceptions in the Protocol "fatally undermine[] the Government's broader contention that [there is some policy that] establishes a closed . . . system that admits of no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 434 (2006); *see*

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) ("a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited") (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment)). As such, the exceptions in the FHSAA's Protocol is, in fact, fatal to any claim of a compelling governmental interest.

Even if the FHSAA could advance a compelling State interest sufficient to justify its substantial burden upon Cambridge Christian's religious exercise, it has not acted in the least restrictive means to further that compelling interest. "The least-restrictive-means standard is exceptionally demanding and is not satisfied here." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

IV. THE ISSUANCE OF A PRELIMINARY INJUNCTION IS WARRANTED IN THIS CASE.

For this Court to grant a preliminary injunction, Cambridge Christian must demonstrate that: (1) there is a substantial likelihood that it will prevail on the merits; (2) there is a substantial threat it will suffer irreparable injury if the injunction is not granted; (3) the threatened injury to it outweighs the threatened harm the injunction may do to the FHSAA; and (4) 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).

A. There Is a Substantial Likelihood that Cambridge Christian Will Prevail on the Merits of its Free Speech and Free Exercise claims.

For the reasons stated in Argument, Point II, based on the well-pled, verified, and undisputed facts of this case, the law fully supports Cambridge

Christian's First Amendment claims, and Cambridge Christian has, therefore, demonstrated a substantial likelihood of success on the merits. The FHSAA violated Cambridge Christian's Free Exercise and Free Speech rights under the federal and state constitutions, as well as the FRFRA, by engaging in viewpoint discrimination when it denied Cambridge Christian's request to use the Stadium loudspeaker solely on the basis of the religious viewpoint Cambridge Christian intended to deliver. See Argument, Point II & III.

B. 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) (emphasis added) (citation omitted); *see also Royalty Network, Inc. v. Harris*, 756 F.3d 1352 (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'") (Pryor, J., concurring) (quoting *Elrod*, 427 U.S. at 373); *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (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 *Ne. Fla.*

Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)).

Here, the FHSAA's viewpoint discrimination is, *ipso facto*, irreparable harm, which will recur when the FHSAA denies future requests to use Stadium facilities for prayer as it has promised to do. This ongoing 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).

C. 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. If the Court does not grant the injunctive relief requested herein, 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 ("[t]he 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. Both the FHSAA and Cambridge Christian would benefit from the Court's decision on these constitutional issues.

D. 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

Based on the foregoing, Cambridge Christian respectfully requests the Court to reverse the orders under review in their entirety.

Respectfully submitted,

Hiram S. Sasser, III
Texas Bar No. 24039157
Jeremiah G. Dys
Texas Bar No. 24096415
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: 972.941.7585
Facsimile: 972.941.4457
jdys@firstliberty.org
hsasser@firstliberty.org

Eliot Pedrosa
Florida Bar No. 182443
Adam Foslid
Florida Bar No. 682284
Julissa Rodriguez
Florida Bar No. 165662
Stephanie L. Varela
Florida Bar No. 70989
GREENBERG TRAURIG, P.A.
Wells Fargo Center, Suite 4400
333 Southeast Second Avenue
Miami, Florida 33131
Telephone: 305.579.0500
Facsimile: 305.579.0717
pedrosae@gtlaw.com
foslida@gtlaw.com
rodriguezju@gtlaw.com
varelas@gtlaw.com
miamiappellateservice@gtlaw.com

/s/ Stephanie L. Varela

Counsel for Plaintiff/Appellant Cambridge Christian School, Inc.

CERTIFICATE OF SERVICE

I certify that, on October 20, 2017, I electronically filed the foregoing brief with the Clerk of Court using CM/ECF and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

Judith M. Mercier
Robin M. Nauman
Jamie Billotte Moses
Holland & Knight LLP
200 South Orange Avenue, Suite 2600
Orlando, Florida 32801
judy.mercier@hklaw.com
robin.nauman@hklaw.com
Jamie.moses@hklaw.com
Counsel for Respondent

I also certify that, on October 20, 2017, the foregoing document is being served via registered-email to counsel listed below.

Leonard E. Ireland, Jr.
Clayton-Johnston P.A.
18 NW 33rd Court
Gainesville, Florida 32607
LIreland@clayton-johnston.com
Counsel for Respondent

/s/ Stephanie L. Varela

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,711 words, excluding the parts of the brief exempted by Local Rule 32-4.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Word 2010 in Times New Roman, 14-point font.

/s/ Stephanie L. Varela