No. 22-11222-J

In the United States Court of Appeals for the Eleventh Circuit

CAMBRIDGE CHRISTIAN SCHOOL, INC.,

Plaintiff-Appellant,

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida
No. 8:16-cv-02753-CEH-AAS

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FOURTH AMENDED CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, counsel for Appellant hereby certifies that the persons and entities listed below have or may have an interest in the outcome of this case.

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Amici Curiae

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ADL (Anti-Defamation League)

American Civil Liberties Union

Americans United for Separation of Church and State

Association of Christian Schools International

Central Conference of American Rabbis

Central Florida Freethought Community

Florida Department of Education

Freedom from Religion Foundation

Hindu American Foundation

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Methodist Federation for Social Action

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rule 28-1(b), Appellant certifies that Appellant is not a subsidiary or affiliate of a publicly owned corporation and that Appellant is not aware of any publicly owned corporation, not a party to the litigation, that has a financial interest in the outcome of this case.

Dated: December 5, 2022

Respectfully submitted,

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INTRODUCTION

Three years ago, this Court held that Cambridge Christian School (CCS) sufficiently pled that the Florida High School Athletic Association (FHSAA) violated the school's free-exercise and free-speech rights. Since then, there have been two developments confirming the merits of CCS's claims. First, discovery showed that FHSAA permits a significant amount of private speech over the loudspeaker at State Championship Series events and prohibited CCS's speech solely because it was religious. Second, the Supreme Court forcefully and repeatedly held that state actors cannot single out religious practice and speech for disfavored treatment and that misplaced concerns about Establishment Clause violations are no excuse. Try as it might, FHSAA cannot evade the facts or the law.

ARGUMENT

I. FHSAA'S PRAYER BAN VIOLATES CCS'S FREE-EXERCISE RIGHTS.

Policies "'specifically directed at … religious practice'" are impermissible unless justified by a compelling interest and narrowly tailored. *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421-22 (2022) (quoting *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990)). FHSAA offers no argument that its Prayer Ban is supported by a compelling interest or is narrowly tailored, thus conceding these issues. *See Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1564 n.16 (11th Cir. 1995). FHSAA is left to argue, wrongly, that free-exercise rights are

inapplicable here, to attack CCS's religious practice, and to claim that the Prayer Ban is a neutral policy.

1. FHSAA contends, in a single sentence, that the Free Exercise Clause does not apply because "the speech at issue is government speech." AB 36, 48. As support, FHSAA offers a lone, unexplained citation to *Gundy v. City of Jacksonville*, 50 F.4th 60 (11th Cir. 2022). But *Gundy* only held that "free exercise claims … fail … '***when members of a governmental body participate in a prayer for themselves*** and do not impose or prescribe it for the people.'" *Id.* at 71 (quoting *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 289 (4th Cir. 2005)) (emphasis added and removed). Here, the question is not (as in *Gundy*) whether FHSAA's prescribing the bounds of its *own* prayer violated CCS's free-exercise rights, but whether FHSAA's prohibiting *CCS*'s religious practice—which FHSAA disavows as its own[1]—violated free exercise. Accordingly, in this Court's earlier opinion in this case (which *Gundy* embraces), the free-exercise analysis is distinct from the government-speech analysis and contains no suggestion that CCS's free-exercise claims turn on the government-speech question. *See Cambridge Christian Sch. v. Florida High Sch. Athletic Ass'n*, 942 F.3d 1215, 1246-49 (11th Cir. 2019) ("*CCS I*"); *see also id.* at 1230 ("It is by now clear under the First Amendment that if all of the speech over the loudspeaker at the 2A Championship Game was government

[1] *See* A-11580 (Tr.81:8-11), A-11582 (Tr.88:5-17).

speech, [CCS's] case could not proceed ***under the Free Speech Clause***.") (emphasis added). Likewise, in *Kennedy*, the Supreme Court's free-exercise analysis in Part III.A is entirely distinct from the government-speech analysis in Part III.B. *See* 142 S.Ct. at 2421-25.

2. FHSAA continues its long-running contempt for CCS's religious exercise by asserting that CCS's "purported belief" in communal pre-game prayer is a lie. AB 48-51. Notably, Dearing himself—the official who imposed the Prayer Ban—testified he did *not* question CCS's sincerity. A-10860 (Tr.90:6-13). FHSAA can thus support its brazen, made-for-ligation assertion only by distorting the record and ignoring the law.

FHSAA contends that "CCS's longstanding practice is to defer to the host of games outside its home stadium and, thus, to routinely play football games without praying over the PA system." AB 48-49; *see also* AB 11. But the undisputed record shows that CCS's longstanding practice is to engage in communal prayer over the loudspeaker at *every* home game, at *every* game against a Christian school, and at *every* State Championship Series ("SCS") game, regardless of opponent or venue. Thus, in 2015 and 2020 (the last two seasons in which CCS qualified for the SCS), CCS engaged in prayer over the loudspeaker at *all* SCS games (*except* for the 2015

final game). Some of those SCS games were played at public-school fields,[2] *not* at CCS's home field (which, in any event, is a county-owned facility, just like the Citrus Bowl). Like the final game, these SCS playoff games: were specifically branded as FHSAA events, A-12197 (§3.1.7); were "not 'home contests'" for any school but maintained "an atmosphere of neutrality," A-12130 (§10.8.1); and were governed by the FHSAA-provided PA script and PA protocol, IB 7-8.

The record thus shows CCS has been entirely consistent in its pregame prayer practices. It is not for the state government or federal courts "to say that the line [CCS] drew was an unreasonable one." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). *See also Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014) ("[I]t is not for us to say that [plaintiff's] religious beliefs are mistaken….").

FHSAA further asserts "discovery did not reveal any document spelling out when and in what manner CCS believes it must pray." AB 11. As a matter of law, this assertion is meaningless because sincere religious practice does not require an instruction manual. *See CCS I*, 942 F.3d at 1247-48. Regardless, as a matter of record, this assertion is baseless. CCS explained below that the Bible is *the* document that directs its religious practice, and it is replete with teachings on the

[2] *See* A-11914-15 (¶16), A-13363 (¶17), A-11949 (¶¶20, 23), A-11899 (¶¶10-11), A-11955-56 (¶¶40-41).

importance of communal prayer. A-13411 & n.23. FHSAA's response was to claim that "[n]one of the Bible passages Plaintiff cites discuss *pregame* prayer," Doc. 155 at 10 n.23—a ludicrous attempt at mockery that further betrays FHSAA's hostility to CCS's religion. The point is that CCS interprets the Bible to require communal prayer to permeate all aspects of life, including large gatherings and momentous occasions. IB 4-5 (collecting record citations). In any event, if the Bible is not sufficient for FHSAA, it can also look to the 2015-16 CCS Coaches Manual, which specifically instructed coaches to "[p]ray before and after each practice and game." A-12638.

3. FSHAA contends that CCS "disclaim[ed] any burden" on its religious exercise, AB 49, but it elides the cited testimony, which was solely about regular-season away games and includes this explanation: "We haven't made the request." A-2696 (Tr.28:2-3). Here, CCS did request to pray in the SCS final game, consistent with its longstanding religious practice—i.e., to open all games against Christian schools, and all SCS games, in communal prayer over the loudspeaker. The 2015 final satisfied both categories, and FHSAA does not contend otherwise. While FHSAA may not like that CCS chooses to practice its faith in this way, that is a choice for CCS to make, not the government. *See Fulton v. City of Philadelphia*, 141 S.Ct. at 1876 ("'[R]eligious beliefs need not be acceptable, logical, consistent,

or comprehensible to others in order to merit First Amendment protection.'") (quoting *Thomas*, 450 U.S. at 714); *CCS I*, 942 F.3d at 1247-48.

4. FHSAA next offers a two-sentence argument that the Prayer Ban does not violate free exercise "as a matter of law" because "broadcast[ing] a prayer to a captive audience" is "constitutionally dubious." AB 51. As support, FHSAA cites *Kennedy*, but the cited passage merely distinguishes cases in which state actors were carefully coordinating or directing "prayer involving public school students." 142 S.Ct. at 2431-32 (citing *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). The facts of this case do not approach those in *Lee* and *Santa Fe*. In *Lee*, the "government involvement with religious activity … [was] pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school," and included requiring "an invocation and a benediction should be given," "cho[osing] the religious participant," and "direct[ing] and control[ing] the content of the prayers." 505 U.S. at 587-88. In *Santa Fe*, the school district entangled itself "in the selection of the speaker," "invite[d] and encourage[d] religious messages," dictated "requirements [of] the message," "failed to divorce itself form the religious content," and had a history of specifically seeking to require "the practice of prayer before football games." 530 U.S. at 305-06.

Here, CCS is a private, Christian school seeking nondiscrimination from a state athletic association. FHSAA was not asked to coordinate the prayer, choose

the person who would deliver the prayer, police or prescribe the content of the prayer, or require anyone to attend or listen to the prayer. Nor was FHSAA asked to endorse the prayer's message in any way or to refrain from distancing itself from that message. And the simple fact that the public might hear the prayer at an FHSAA event is not "constitutionally dubious" because high school students (and their parents, teachers, and friends) "are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand, and student-initiated, student-led religious speech on the other." *Board of Ed. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250-51 (1990). *See also Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) ("policy which tolerates religion does not improperly endorse it"). This is especially true when the students at issue attend *private Christian schools*.

Tellingly, FHSAA cannot bring itself to say that accommodating CCS's religious practice *would* violate the Establishment Clause. That means, at most, FHSAA is asserting an "interest in separating church and state 'more fiercely' than the Federal Constitution," which "cannot qualify as compelling." *Carson v. Makin*, 142 S.Ct. 1987, 1998 (2022) (quoting *Espinoza v. Montana Dep't of Revenue*, 140 S.Ct. 2246, 2260 (2020)).[3]

[3] FHSAA's amici thus seek to defend the Prayer Ban on a ground FHSAA waived—i.e., that permitting a Christian member of the association to practice its faith would violate the Establishment Clause. *See* Br. Amici Curiae Freedom from

4. Finally, FHSAA argues that the Prayer Ban is "neutral and generally applicable" because "schools were generally not given access to the PA system at FHSAA-hosted events for any pregame messages." AB 51-52; *see also* AB 52 ("FHSAA ***never*** gave a private speaker access to the PA system for a secular pregame message.") (emphasis added). This assertion (in either its "generally not" or "never" formulation) is false. FHSAA's executive director, as the corporate designee, testified:

> Q. How often does the FHSAA turn over the PA microphone to representatives of schools to offer welcoming remarks?
> A. I don't know. ***I can share that it's done periodically often***. I was just in Suwannee High School a month or so ago at the … girls weightlifting and the school athletic director/coach was making the announcements [about] what was going on that day and recognizing the girls who had won particular events in weight classes….
> …
> Q. When the FHSAA allows the representative of the school to make welcoming remarks, does the FHSAA review a copy of those remarks in advance?
> A. Not to my knowledge, no.
> Q. Does it approve those remarks in advance, the content of those?

Religion Foundation et al. at 12-15; Br. Amici Curiae Americans United for Separation of Church and State et al. at 11-20. As just explained, the principal cases these amici rely upon—*Lee* and *Santa Fe*—addressed very different facts and are inapposite. The argument these amici really advance is that the Establishment Clause requires—or the Free Exercise Clause permits the state to require—religious actors to relinquish their faith in order to participate in government programs, such as an athletic association. This is the very argument the Supreme Court has repeatedly rejected in recent years. *See Carson*, 142 S.Ct. 1987 (2022); *Fulton*, 141 S.Ct. 1868 (2021); *Espinoza*, 140 S.Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (2017).

> A. No, sir, we generally do not get a printed script from someone doing a welcome.

A-11177 (Tr.99:16-25, 100:4-11). FHSAA pretends CCS cites only two examples where this occurred. AB 10. But it was FHSAA, upon being shown those two examples, that responded by saying such remarks occur "periodically often," providing a recent example, and noting that ***such remarks do not appear in prepared scripts***.

Incredibly, like the district court, FHSAA entirely ignores this critical fact, not quoting the testimony once in its brief. But "there is nothing neutral," *Carson*, 142 S.Ct. at 1998, about "periodically often" permitting schools to deliver unscripted, secular welcoming remarks over the loudspeaker while banning other schools from delivering religious remarks. It is a prohibition aimed specifically at religious practice precisely because it is religious. Indeed, in 2015, Dearing offered no other (or neutral) rationale for FHSAA's decision. *See* A-12607, A-12611.

In sum, FHSAA was "mistaken … that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination." *Kennedy*, 142 S.Ct. at 2433.

II. FHSAA'S PRAYER BAN VIOLATES CCS'S FREE-SPEECH RIGHTS.

A fully developed record demonstrates that FHSAA violated CCS's free-speech rights by denying the school's request to use the loudspeaker for a pre-game

prayer. IB 44-61. FHSAA's arguments to the contrary are mostly a recitation of the district court's faulty conclusions and likewise fall short.

A. The Court Should Reject FHSAA's Effort to Define the Forum Down to Nothing.

FHSAA's opening pitch is telling. It asks the Court to ignore the entire record except for the precise moment in 2015 when CCS sought to use the loudspeaker. AB 20-23. FHSAA likely advances this argument because the full record dooms the government-speech defense. Regardless, narrowing the frame in the way FHSAA desires has no basis in law, fact, or "common sense and sound policy." AB 22. And it would violate the Supreme Court's admonition that:

> the government-speech doctrine … is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

Matal v. Tam, 137 S.Ct. 1744, 1758 (2017).

1. As a matter of law, FHSAA cannot point to any case narrowing the inquiry in the way it proposes. First, FHSAA cites *CCS I*, but this Court framed the medium as "speech disseminated over a loudspeaker at an event" and held that announcements made "before, during, and after the game," and at other FHSAA events, are relevant. *CCS I*, 942 F.3d at 1225, 1232-33, 1235. *See also Mech v. School Bd. of Palm Beach Cnty., Fla.*, 806 F.3d 1070, 1075 (11th Cir. 2015)

(discussing "history of banners on school fences" generally, not at specific game or in a specific sport). FHSAA next cites *Shurtleff v. City of Boston*, but there the Supreme Court engaged in a "holistic inquiry" that examined the "general history" of flag flying as well as all the instances in which "Boston allowed private groups to raise their own flags," not just the one day during which the plaintiff sought to fly its flag. 142 S.Ct. 1583, 1590-91 (2022). *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470-71 (2009) (analyzing "long use[]"of monuments back to "ancient times" and in various contexts, not just particular monument at issue); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 210-12 (2015) (analyzing "the history of license plates," not just the specialty plate program or state at issue). Finally, FHSAA relies on *Santa Fe*, but that was an Establishment Clause case, not a free-exercise case, and did not feature the "holistic inquiry" and three-factor analysis that later cases like *Shurtleff*, *Walker*, and *Summum* require.

2. As matter of record, FHSAA's pitch also fails. First, FHSAA offers no factual reason to limit the scope of inquiry. FHSAA public-address policies govern "*all* … State Championship Series" events at *all* times. A-12197-98 §3.1.8 (emphasis added). Indeed, FHSAA insists that its PA "scripts are … virtually identical from season to season, division to division, sport to sport. It's the same messages that are repeated over and over again." Doc. 128-1 at 18:4-7. *See also* Doc. 121 at 2-3 ("exact same language" appears in PA scripts across sports); Doc.

110 at 19 (characterizing all PA scripts as "consistent"). Moreover, FHSAA offers no reason to distinguish the pregame period from halftime, when the same supposedly "captive audience" is sitting in the same stands, at the same game, looking at the same FHSAA-branded field, and listening to messages from the same loudspeaker. Indeed, FHSAA asserts that it "speaks directly to the public" throughout the game. AB 8.

Second, even if the frame of reference is restricted to the pregame, FHSAA ignores its own testimony that schools "periodically often" provide unscripted "welcoming"—i.e., pregame—remarks at SCS events. A-11177 (Tr.99:16-20, 100:4-11).[4] Likewise, FHSAA effectively concedes that sponsor promotional speech is private, AB 32, but ignores that such speech is conveyed over the very same loudspeaker during the pregame, A-4309-15. Thus, even artificially narrowing the frame of reference to the pregame would not save FHSAA's government-speech defense.

Moreover, the pregame is a long period and the "pre-game ceremony," AB 22—by which FHSAA presumably means the presentation of the colors and the National Anthem—encompasses only a small fraction of that time. For example, at the 2012 Class 2A final game, the pregame lasted an hour, A-12575, and the PA

[4] FHSAA suggests only football games are relevant but offers no explanation as to how football differs, in a legally significant way, from any other sport. And, in any event, FHSAA's testimony had no football carveout.

script started with "35:00 on the clock." A-4292. The first two announcements (spanning two minutes) were promotional, A-4292, followed by a sportsmanship announcement. For the next two minutes, there was silence over the loudspeaker. *Id*. Next, with "30:00 on the clock" came the prayer by University Christian and Dade Christian. *Id.* Next, with "28:00 on the clock" was a "special presentation" of awards that the Junior Orange Bowl (a private organization) "was proud to present." A-4293. Then, with "20:00 on the clock"—some ten minutes after the prayer, and with the Junior Orange Bowl intervening—the PA announcer welcomed the crowd and provided another sportsmanship announcement. A-4294. Two minutes later—twelve minutes after the prayer—the announcer introduced the color guard. *Id.* After the color guard and national anthem, which took four-and-half-minutes, the PA announcer introduced the teams, with "13:00 on the clock." A-4295. First was the "visiting team"—University Christian—and the PA announcer listed the starters names as they ran out of the FHSAA-branded endzone and through an on-field banner that prominently displayed the team's religious message: "One God." IB 16. Next was the "home team," and Dade Christian took the field. A-4296. The Class 2A game in 2015 was similar but had the added feature of corporate promotional announcements on both sides of the presentation of colors and National Anthem. A-4309-15.

3. Finally, FHSAA appeals to "common sense and sound policy." AB 22. But it is FHSAA's theory that defies both. If the government can narrow the frame of inquiry to the precise moment it suppresses speech, then parties will never be able to show history or context, and state actors, like FHSAA, will always be able to discriminate against religious speech with impunity and mask hostility toward religion by appealing to the Establishment Clause. *See Tam*, 137 S.Ct. at 1758 ("[T]he government-speech doctrine … is susceptible to dangerous misuse."); *Kennedy*, 142 S. Ct. at 2432 ("[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."). FHSAA frets that in order to banish religion it might have to "abolish halftime shows and police schools' home fields." AB 22. But it need do no such thing. It simply need follow the dictates of free exercise and not subject religious speech to special disfavor, just as it showed it was capable of in 2012 and throughout the 2015 and 2020 SCS playoffs.

B. The Loudspeaker Is Not a Forum for Only Government Speech.

FHSAA contends that so long as it used the loudspeaker to convey "some message" from the government, that is enough to deem all loudspeaker speech as government speech. AB 23-24 n.12. Yet FHSAA cannot point to a single case that so holds. To the contrary, in *CCS I*, this Court held: "It is by now clear under the First Amendment that if *all* of the speech over the loudspeaker at the 2A

Championship Game was government speech, [CCS's] case could not proceed under the Free Speech Clause," but if "at least some private speech was disseminated over the public-address system," then a free-speech claim is cognizable. 942 F.3d at 1230. The Supreme Court's most recent case on the government-speech doctrine is in accord. In *Shurtleff*, the Court found that "on a typical day," "flags on Boston's City Hall Plaza usually convey the city's messages," but "20 or so times a year" private groups engaged in private speech by flying their own flags. 142 S.Ct. at 1591-93.

The factors identified in *CCS I* and *Shurtleff* as relevant to this inquiry—history, endorsement, and control—all show that private speech is regularly conveyed over the loudspeaker at FHSAA events. Nothing in FHSAA's brief alters this conclusion.[5]

[5] FHSAA briefly cites *Dean v. Warren*, 12 F.4th 1248 (11th Cir. 2021), and *Leake v. Drinkard*, 14 F.4th 1242 (11th Cir. 2021). But in each case, the evidence pointed much more directly to a finding of government speech. *See Dean*, 12 F.4th at 1265 (op. of W. Pryor, C.J.) (concluding public university's *own* cheerleading squad engaged in government speech because of history of conveying school-endorsed message and because plaintiff did not allege school had relinquished control); *Leake*, 14 F.4th at 1248-50 (concluding city's military parade was government speech based on long history of such parades, specific endorsement evidence, and direct control by requiring participants to describe message in advance).

1. History Cuts Against a Finding of Government Speech.

FHSAA contends that history cuts against a finding of government speech only when the forum at issue "ha[s] never been a medium for government speech." AB 24. That is plainly wrong. In *Shurtleff*, for example, the Supreme Court examined Boston's "flag-raising program." 142 S.Ct. at 1589. It found that "flags on Boston's City Hall Plaza usually convey the city's messages," but "20 or so times a year" the flags convey "private, not government, speech." *Id.* at 1591-93. Thus, the fact that FHSAA "uses the PA system to speak to the public" does not preclude a finding that the loudspeaker is *also* used to convey private messages.

Next, FHSAA attempts to explain away all the private speech that has been permitted over the loudspeaker at its events, but each explanation is belied by the record. First, FHSAA again mischaracterizes its own testimony, AB 26-27, which was—without qualification—that FHSAA "periodically often" "turn[s] over the PA microphone to representatives of schools to offer" unscripted "welcoming remarks." A-11177 (Tr.99:16-20).

Second, FHSAA says the 2012 prayer was aberrational. AB 25. But that is the only other time a request to pray has been made, and the record is clear that FHSAA carefully considered the request and then approved it. IB 9-11.

Third, FHSAA asks the Court to ignore the prayers at SCS playoff games because it "hardly at all" administers or monitors those games. AB 26. But

Dearing—the very person who implemented the Prayer Ban—saw no difference in FHSAA's role in SCS playoffs and finals, testifying:

> Q. All playoff games are regulated by the FHSAA, correct?
> A. Regulated and promoted, yes.
> Q. All championship games are regulated by the FHSAA, correct?
> A. Regulated and promoted, yes.

A-10849 (Tr.49:5-10). Indeed, FHSAA: has extensive policies that govern intricate details of *all* SCS games, A-4236 (¶16 & n.8), with "pretty serious consequences" for any deviation, A-10980 (Tr.65:12-16); requires playoff games to be branded as FHSAA events, A-12197 (§3.1.7); directs schools to follow FHSAA's "Playoff Host Procedures" while ensuring "there is an open line of communication … throughout" the playoffs, A-12693; and drafts detailed PA scripts for every SCS playoff game, IB 8, AB 6, requiring the PA announcer to "follow the FHSAA script," A-12197 (§3.1.8).

Fourth, FHSAA does not dispute that sponsor messages constitute private speech over the loudspeaker, arguing only that "[t]hey do not show that the PA system is traditionally available for private messages during the pregame period." AB 27. Yet, the 2015 Class 2A final script shows sponsor messages were conveyed over the loudspeaker during the pregame period, A-4309-15, as do many other PA scripts. *See, e.g.*, A-4386, A-4600, A-5780, A-6310, A-6810, A-7367.

Fifth, FHSAA does not dispute that, at halftime, the loudspeaker is used for extensive private speech, AB 27, but dismisses this significant history because it is

not the "pregame." Yet FHSAA offers no explanation as to how the pregame period differs from the halftime period in a way that meaningfully distinguishes use of the loudspeaker.

2. Endorsement Evidence Cuts Against a Finding of Government Speech.

FHSAA tries to spin the endorsement factor as conclusively decided by *CCS I*, AB 28, even though this Court stated that a final conclusion would turn on the "develop[ment] of more facts as the litigation proceeds." 942 F.3d at 1234. FHSAA proceeds as if those facts never materialized, relying instead on now disproven assumptions made at the motion-to-dismiss stage. For example, FHSAA relies on the name of the game as the "State Championship" but cannot explain why loudspeaker prayer at the "State Semifinal" is not therefore equally endorsed by FHSAA. It argues the Citrus Bowl is "state owned" but cannot explain why the loudspeaker prayers at the government-owned stadiums used for CCS's playoff games are not therefore equally endorsed by FHSAA. And FHSAA continues to insist the National Anthem and Pledge of Allegiance were performed "alongside," or "around the same time[,] the prayer would have occurred," AB 28 n.14, 30, even though the evidence conclusively shows the pregame period is an hour long, A-12301, and the prayer in 2012 occurred twelve minutes prior to the color guard being introduced, with a private party's lengthy awards ceremony interceding, A-4292-94.

Next, FHSAA argues there is "no evidence" showing that the public would not associate the prayer with FHSAA. AB 28-29. FHSAA discounts the many statements of its own officials denying such endorsement, so it is not clear what kind of evidence FHSAA thinks would suffice. Perhaps polling evidence? No court has ever announced such a requirement to prove a free-speech claim. In any event, FHSAA clearly *does* think the testimony of its own officials is competent evidence because it makes much of Dearing's response to the question of whether he considered "everything broadcast over the loudspeaker" at SCS events "to be officially endorsed by the FHSAA." AB 29. FHSAA reports the start of his answer ("Generally, I would say yes…"), but fails to include the rest:

> … that's a pretty broad question to ask. For the general regulations and operations of the sport, for the sport itself, I would say yes during post season…. What is an official speech, you know, so the general rules and regulations for the operation and conducting of the event, answer is yes. You're asking me everything. That's too broad of a picture, I think.

A-1516. In other words, even the very official who implemented the Prayer Ban testified that context matters in determining whether speech transmitted over the loudspeaker is endorsed by FHSAA and that there is no wholesale answer for "everything" that is said.

FHSAA next contends that the person delivering the prayer is immaterial to endorsement. AB 29. But in its most recent case on the government-speech defense (decided after *CCS I*), the Supreme Court noted that the public might well associate

speech with the actual speaker, not the government, even when the speech is conveyed on government property. *Shurtleff*, 142 S.Ct. at 1591. FHSAA relies on *Santa Fe*, but there the Court relied on a long list of facts that demonstrated "perceived and actual endorsement," none of which are present here. *See supra* p.6.[6]

FHSAA next complains that CCS seeks "privileged PA system access," not "mere tolerance." AB 31. But FHSAA again ignores that it "periodically often" provides pregame access to the loudspeaker for unscripted welcoming remarks. A-11177 (Tr.99:16-20, 100:4-11). Regardless, the "privilege" CCS seeks is that guaranteed by the constitutional right of free exercise, which requires the state not to burden a religious practice unless that burden "is the least restrictive means of achieving some compelling state interest." *Thomas*, 450 U.S. at 718. FHSAA does not even attempt to make this showing.

Finally, FHSAA concedes, as it must, that the loudspeaker is extensively used for third-party promotional speech and that this Court in *CCS I* held such speech would cut against a finding of endorsement. AB 32 (citing *CCS I*, 942 F.3d at 1234). Indeed, FHSAA essentially admits that it had a program for private speech over the loudspeaker, and merely complains that CCS did not pay to participate. But FHSAA

[6] FHSAA states CCS "recogni[zes] a disclaimer would be needed." AB 30-31. CCS has said no such thing and, in fact, none of the many prayers that have been broadcast over the loudspeaker at SCS events have had such a disclaimer. Yet FHSAA's Director of Athletics still readily concluded FHSAA has not endorsed such prayers. A-11580, A-11582 (Tr.81:8-11, 88:1-17, 97:2-9).

did not reject CCS's request because the school failed to offer to pay a tax on religious speech; it rejected the request because the proposed speech was religious.[7]

3. Control Evidence Cuts Against a Finding of Government Speech.

FHSAA contends that the "control" questions raised in *CCS I* have now been resolved in its favor, but again FHSAA ignores or distorts the record.

First, FHSAA claims that someone other than the PA announcer "almost never" spoke over the loudspeaker, but FHSAA then goes on to concede many times this occurred. AB 34. As already repeatedly noted, FHSAA admitted it "periodically often" turns the loudspeaker over to schools for unscripted welcoming remarks at SCS events, A-11177 (Tr.99:16-20, 100:4-11),[8] and, as a matter of written policy, it permitted schools to have their own halftime announcers, A-12317 (2015 FHSAA Football Finals Participant Manual inviting schools to use a "half time announcer").

Second, FHSAA tries to downplay the discretion schools had to convey messages of their choosing during halftime, but FHSAA itself testified that songs

[7] FHSAA claims no sponsor had access to the loudspeaker during the "critical pregame period," but that contention is belied by the 2015 Class 2A script (and many other scripts), which features sponsors' promotional speech during the pregame. *See supra* p.17.

[8] There is no suggestion in the testimony that this is limited to weightlifting, *supra* p.12 n.4, a distinction in sports that FHSAA oddly, and without explanation, deems legally significant.

with explicitly religious messages are permitted, and the evidence is unrebutted that "sometimes the whole halftime show [a school's announcer] would be speaking" without any editorial control exercised by FHSAA. IB 23-24. FHSAA is thus left to argue that schools "knew" they could not engage in obscenity over the loudspeaker. AB 35. But this minimal control—if it can be called that—is hardly the kind that transforms private speech into government speech. *See, e.g.*, *Shurtleff*, 142 S.Ct. at 1592 (minimal controls, lack of preapproval of message, and lack of record of denying requests tilted control factor against finding of government speech even if city agreed with messages conveyed and exercised some basic oversight of venue).

Third, FHSAA claims the fact that it never rejected or altered any script copy from sponsors is meaningless because "control doesn't require a minimum rejection rate." AB 36. Yet in *Shurtleff* it was significant that the city "had no record of denying a request" by a private entity to fly a flag, whereas "'direct control'" is indicated by "reject[ing]" at least some proposed speech. 142 S.Ct. at 1592 (quoting *Walker*, 576 U.S. at 213).

C. The Prayer Ban Constitutes Illegal Viewpoint Discrimination.

FHSAA does not challenge that, regardless of forum,[9] viewpoint discrimination is prohibited. AB 37. FHSAA further concedes that once the state decides to "make benefits (like … PA system access) available, … it cannot exclude people 'solely because they are religious.'" AB 38 (quoting *Espinoza*, 140 S.Ct. at 2261). FHSAA is thus left with one argument: that "schools … were never allowed to make pregame statements over the PA system." AB 39. Again, that contention ignores FHSAA's admission that it "periodically often" turns the PA system over to schools during the pregame to deliver unscripted welcoming remarks, and that it allows private, promotional speech during the pregame. And it ignores the legally indistinguishable halftime use of the PA system by private speakers. If FHSAA truly had a uniform no-access policy, Dearing simply would have said so in 2015 (or in 2012, when a request to pray over the loudspeaker was considered and granted). Instead, he sent two emails explaining that the sole reason for FHSAA's denial was

[9] FHSAA complains CCS did not provide enough argument to show a limited public forum. But the Initial Brief cites this Court's statement that a "limited public forum … exists where a government has reserve[ed a forum] for certain groups or for the discussion of certain topics," IB 60 (quoting *CCS I*, 942 F.3d at 1237), and spends pages explaining the schools and sponsors that are permitted, in policy and practice, to use the loudspeaker for private messaging at SCS events, IB 9-12, 22-28.

the religious nature of the speech. A-12607, A-12611. Nothing more is needed to conclude that the Prayer Ban constitutes illegal viewpoint discrimination.

FHSAA contends that because this Court knew of Dearing's emails in *CCS I*, it "can't be right" to now conclude that FHSAA engaged in illegal viewpoint discrimination. AB 37-38. But that argument ignores *CCS I's* repeated statements that its conclusions were based on the pleadings and subject to revision upon a full record. *See, e.g.*, *CCS I*, 942 F.3d at 1242 n.8. It also ignores the Supreme Court's intervening decision in *Shurtleff*, which explains that once a government-speech defense is rejected, denying speech because it "could violate the Establishment Clause" necessarily means the "refusal discriminated based on religious viewpoint and violated the Free Speech Clause." 142 S.Ct. at 1593.

Beyond Dearing's contemporaneous explanation that the sole reason for the prohibition was the religious nature of CCS's proposed speech, the record also contains ample evidence that the loudspeaker was used for the same "topic[s]" covered by typical CCS prayers but "discussed in a nonreligious way." *CCS*, 942 F.3d at 1242 n.8; *see also* IB 58-59. FHSAA responds by trying to define for CCS what its prayer "was … intended to speak on," AB 40-41, but to do so FHSAA must ignore the unrebutted testimony of CCS witnesses, IB 5. As for FHSAA's argument that the comparator "messages all involve the FHSAA (or another state actor) speaking on its own behalf," AB 41, that is simply a repeat of its contention that

loudspeaker speech is solely government speech. If the Court rejects that premise, then the topics addressed by *all* speakers are relevant to whether some speech is being targeted solely for its religious nature. One need only read the MSDS High School moment of silence—included in the pregame section of *dozens* of PA scripts in 2018—to comprehend that FHSAA had no problem with solemnizing speech *unless* it was religious in nature. IB 20.

D. The Prayer Ban Constitutes an Arbitrary and Unreasonable Regulation of Speech.

CCS I held that even content-based restrictions must be examined for reasonableness. 942 F.3d at 1243. FHSAA selectively quotes the Court's formulation of that test, AB 42, forgetting to note that "the government must avoid the haphazard and arbitrary enforcement of speech restrictions in order for them to be upheld as reasonable," 942 F.3d at 1243. CCS's Initial Brief explains the many ways in which FHSAA's ban on religious speech was haphazard and arbitrary. IB 60-61. FHSAA ignores much of that, and what argument it does provide is easily rebutted.

FHSAA relies on concerns over violating the Establishment Clause—concerns that had disappeared at the summary judgment stage but now find new life on appeal.[10] As already explained, accommodating private religious speech does not

[10] FHSAA cites its reply brief below, in which it mentioned the Establishment Clause rationale in a single, conclusory sentence. AB 43 (citing Doc. 155 at 10).

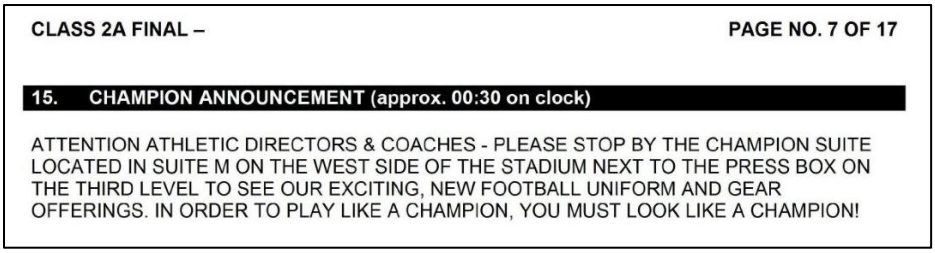
violate the Establishment Clause, *supra* pp.7-8, and FHSAA tellingly cannot bring itself to say it would. FHSAA cannot say so because it would then have to explain why it has allowed so much other religious activity without fear of constitutional violation. As its Answer Brief demonstrates, FHSAA has no convincing explanation for this arbitrary enforcement of its fear of "legal entanglements."

First, the only explanation FHSAA provides about the 2012 prayer was that it was "broadcast in error." AB 46. But the record shows it was not an "error": a direct request was made, carefully considered by FHSAA leadership and approved, and then specifically coordinated among the schools, FHSAA, and the Central Florida Sports Commission ("CFSC"). IB 9-11. Second, FHSAA tries to waive off the many prayers broadcast at SCS playoff games "because the FHSAA didn't even know about them." AB 45. But the record shows the prayers continued in 2020, long after this litigation began and FHSAA had full awareness and could have prohibited them. Third, FHSAA simply ignores that it routinely broadcasts prayers and religious messages over its social-media accounts with no fear of Establishment Clause "legal entanglements."[11]

Finally, FHSAA states that other rationales—manufactured for this appeal and never articulated in 2015—justify the Prayer Ban. First, FHSAA claims

[11] FHSAA also ignores that it allowed a religious banner on the field during the 2012 SCS final pregame introductions and, as a matter of policy, allows use of the loudspeaker at halftime for religious songs. IB 23, 29-30.

allowing the prayer would pose "logistical burdens." AB 47. Yet the approved prayer in 2012 was easily incorporated. IB 9-11. Second, FHSAA claims it "focuses on promoting patriotism and a shared sense of national unity at events it hosts" and suggests that accommodating the constitutional right of free exercise would detract from that. AB 47. Left unexplained, however, is how—to take just the 2015 Class 2A game as an example—the following messages in the PA script do not equally detract from FHSAA's supposed focus on national unity:



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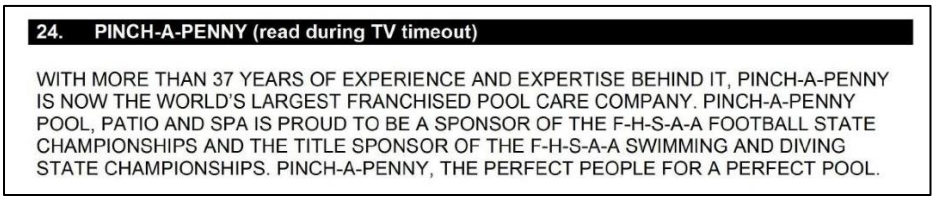
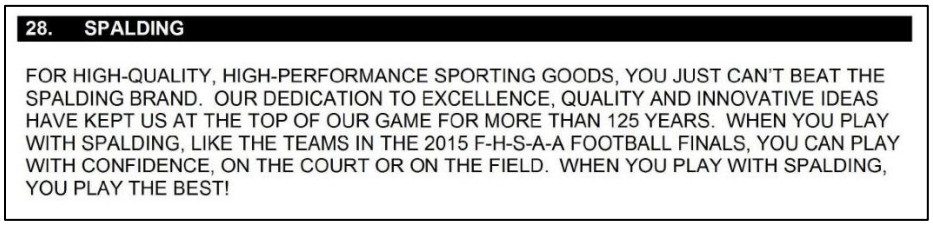
15. CHAMPION ANNOUNCEMENT (approx. 00:30 on clock)

ATTENTION ATHLETIC DIRECTORS & COACHES - PLEASE STOP BY THE CHAMPION SUITE LOCATED IN SUITE M ON THE WEST SIDE OF THE STADIUM NEXT TO THE PRESS BOX ON THE THIRD LEVEL TO SEE OUR EXCITING, NEW FOOTBALL UNIFORM AND GEAR OFFERINGS. IN ORDER TO PLAY LIKE A CHAMPION, YOU MUST LOOK LIKE A CHAMPION!



24. PINCH-A-PENNY (read during TV timeout)

WITH MORE THAN 37 YEARS OF EXPERIENCE AND EXPERTISE BEHIND IT, PINCH-A-PENNY IS NOW THE WORLD'S LARGEST FRANCHISED POOL CARE COMPANY. PINCH-A-PENNY POOL, PATIO AND SPA IS PROUD TO BE A SPONSOR OF THE F-H-S-A-A FOOTBALL STATE CHAMPIONSHIPS AND THE TITLE SPONSOR OF THE F-H-S-A-A SWIMMING AND DIVING STATE CHAMPIONSHIPS. PINCH-A-PENNY, THE PERFECT PEOPLE FOR A PERFECT POOL.



28. SPALDING

FOR HIGH-QUALITY, HIGH-PERFORMANCE SPORTING GOODS, YOU JUST CAN'T BEAT THE SPALDING BRAND. OUR DEDICATION TO EXCELLENCE, QUALITY AND INNOVATIVE IDEAS HAVE KEPT US AT THE TOP OF OUR GAME FOR MORE THAN 125 YEARS. WHEN YOU PLAY WITH SPALDING, LIKE THE TEAMS IN THE 2015 F-H-S-A-A FOOTBALL FINALS, YOU CAN PLAY WITH CONFIDENCE, ON THE COURT OR ON THE FIELD. WHEN YOU PLAY WITH SPALDING, YOU PLAY THE BEST!

A-4315-18.

In short, after years of litigation, extensive discovery, and many rounds of briefing, "FHSAA still hasn't told us why" religious speech was prohibited at a single football game 2015 but not at other times. *CCS I*, 942 F.3d at 1244. Nor has

it told us why some private speech is permissible while religious speech is not. The 2015 Prayer Ban was arbitrary and violated CCS's free-speech rights.

CONCLUSION

The judgment below should be reversed, and summary judgment should be entered in CCS's favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ Jesse Panuccio
Jesse Panuccio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on December 5, 2022, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and served on counsel of record either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically generated notices of filing.

/s/ Jesse Panuccio
Jesse Panuccio