No. 17-12802-K

IN THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAMBRIDGE CHRISTIAN SCHOOL, INC. Plaintiff-Appellant, vs. FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC. Defendant-Appellee.	)	On appeal from the United States District Court for the Middle District of Florida District Court No. 8:16-cv-2753-CEH-AAS

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL

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Cambridge Christian School, Inc. v. Florida High School Athletic Association, Inc.

Eleventh Circuit No. 17-12802-K

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

1. American Center for Law and Justice (ACLJ), a public interest law firm which is a nonstock corporation. The ACLJ has no parent corporation, subsidiaries, or conglomerates and neither owns nor is owned by any affiliates. No publicly held company owns 10% or more of its stock.
2. Roth, Stuart J.
3. Sekulow, Jay Alan

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

/s/Jay Alan Sekulow
Jay Alan Sekulow

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS AND RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Whether a government agency's control over a speech platform converts all communications over that platform into government speech?

2. Whether a government agency's neutral allowance of private speech over a public address system violates the Establishment Clause?

INTEREST OF AMICI

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys regularly appear before the U.S. Supreme Court, federal courts of appeals (including this Court), and other courts, as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017), addressing a variety of issues of constitutional law, including the Establishment and Free Speech Clauses and the government speech doctrine. The ACLJ is dedicated, *inter alia*, to freedom of speech, including the right of religious speakers to be free from discriminatory censorship. ACLJ attorneys were responsible for drafting the briefs for the appellant school board in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler I*), *vacated*, *Chandler v. Siegelman*, 530 U.S. 1256 (2000), *reinstated on remand*, 230 F.3d 1313 (11th Cir. 2000) (*Chandler II*),

cert. denied, 533 U.S. 916 (2001). This brief is supported by members of the ACLJ's Committee to Stop Censorship of Christian School Prayer, which represents more than 65,000 Americans who stand against the viewpoint censorship at issue here.

The Association of Christian Schools International (ACSI) was founded in 1978 when several regional U.S. school associations joined, becoming a united voice to advance excellence in Christian education. The leaders' vision was to inspire, challenge, and resource educators and schools. First headquartered in La Habra, California, ACSI moved to an expanded facility in Colorado Springs, Colorado, in 1994. Today, ACSI serves nearly 24,000 schools in more than 100 countries. ACSI exists to strengthen Christian schools and equip Christian educators worldwide as they prepare students academically and inspire them to become devoted followers of Jesus Christ.

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

SUMMARY OF ARGUMENT

A pre-game prayer by two Christian football teams is private speech, not government speech. Merely allowing that speech to be transmitted over a public address system, on terms equal to any other private speaker of a secular message, does not change the nature of that private speech any more than would allowing a coach for one of the teams to deliver a brief secular call for sportsmanship over the same PA system change the nature of that private speech. Moreover, as the Supreme Court and this Court have clearly held, *allowing* private religious speech is not an Establishment Clause problem, even if *sponsoring* religious speech would be.

ARGUMENT

One would think that when two Christian football teams met in a match, and both teams wanted to broadcast their pre-game prayer over the loudspeaker to let their audience – fans and families of the two Christian school teams – listen or, if they so chose, join in, that would not be a problem. Yet the defendant athletic association in this case, Florida High School Athletic Association (FHSAA), had what might be characterized as the constitutional equivalent of a severe allergic reaction. According to the FHSAA, "to allowing [sic] an opening prayer at the start of the football game over the PA system"

(Cplt. Ex. E, p. 1 of 3) would be illegal. Why? Because of "'separation of church and state'" (*id.*) – i.e., because such a prayer would be religious, FHSAA said "No." There is, however, an enormous difference between *sponsorship* of student prayer and *censorship* of student prayer. *Chandler v. Siegelman*, 230 F.3d 1313, 1315 (11th Cir. 2000). By engaging in the latter, FHSSA has violated the right to Free Speech under the First Amendment.

The FHSAA seeks refuge in the counterfactual assertion that no one aside from FHSAA officials is allowed to use the loudspeaker. This defense must be set aside as legally irrelevant, factually incorrect, and procedurally improper.

First, FHSAA's assertion is legally irrelevant. "Government actors may not discriminate against speakers based on viewpoint, even in places or under circumstances where people do not have a constitutional right to speak in the first place." *Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004). That is, even if the government otherwise has the power to do something, it cannot do so in an unconstitutional manner, such as by engaging in viewpoint discrimination. *Id.* ("even if Holloman did not have the right to express himself in the manner he did, his rights were still violated if he was punished because

Allred disagreed or was offended by what he said").[1] *See generally R.A.V. v. City of St. Paul*, 505 U.S. 377, 384-86 (1992).

Second, FHSAA's allegation that no private parties could use the PA system *is not true* – or at best, is highly dubious. FHSAA admits that a private school's halftime program representative is permitted to borrow the PA system to broadcast its music, and does not dispute that on at least one prior occasion a pre-game prayer was broadcast. Moreover, had the FHSAA had such a policy, invoking it would have been the obvious, natural response to the request to broadcast the pre-game prayer. Yet FHSAA did not invoke any such policy. On the contrary, while repeatedly denying the two schools' requests to borrow the loudspeaker for a few moments for their prayer, *at no time* did FHSAA invoke a supposed policy that no one else gets to say anything over the speaker. Rather, FHSAA's sole objection was that a pre-game prayer would be *religious* speech, and *that* was not allowed. Apparently, handing over the microphone for a brief word of *secular* rah-rah inspiration from a coach or

[1]Perhaps a different example would help illustrate this point. No one has an affirmative constitutional right to jaywalk. But if police only ticket those jaywalkers wearing shirts supporting a particular political viewpoint, that would be unconstitutional.

team captain would have been perfectly fine. The problem FHSAA had was clearly with the *religious viewpoint*.

Third, FHSAA's claim about limits on use of the PA system is procedurally misplaced. FHSAA's allegation is a *factual* assertion, and at best a *disputed* factual assertion. But a defendant's attempt to create a factual dispute *cannot support dismissal at the pleadings stage*. "We review *de novo* the District Court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). A plaintiff's *allegations are accepted as true* and we construe his complaint in the light most favorable to him." *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319, 1324 (11th Cir. 2017) (emphasis added; citations omitted). Hence, the dismissal of the verified amended complaint cannot stand unless FHSAA would, as a matter of law, prevail on the facts as Cambridge Christian has alleged them in its verified amended complaint. That is, FHSAA must show that it acted constitutionally, even assuming that FHSAA rejected an *otherwise permissible request* briefly to use the PA system *solely* because FHSAA objected to the religious *perspective* that use would embody. That is a tall order.

To defeat Cambridge Christian's First Amendment viewpoint discrimination claim, FHSAA nevertheless proffered in the lower court two

central arguments: first, that all utterances over the PA system are "government speech"; and second, that shutting the door on religious speech is required to avoid violating the Establishment Clause. As discussed below, FHSAA cannot prevail on either assertion.

I. The Teams' Pre-game Prayer Would Not Have Been Government Speech.

FHSAA's recourse to the government speech doctrine is strategically understandable. That doctrine has great power: "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Attaching the label "government speech" to expression is *fatal* to any private free speech claims. The doctrine is thus "susceptible to dangerous misuse." *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). For this very reason, it is absolutely vital that the distinction between *private* and *government* speech be drawn correctly. Specifically, courts "must exercise great caution before extending our government-speech precedents." *Id.*

The prayer of two private Christian schools, as such, is plainly private speech. FHSAA does not dispute this. Indeed, FHSAA emphasizes that it exercises no editorial control whatsoever over the teams' prayers. FHSAA's

argument, then, must be that this admittedly private speech is somehow converted into government speech when it passes through the FHSAA's loudspeakers.

Mere broadcast of speech via electronic means, however, does not *ipso facto* change the nature of the speech. When, at a government function (school play, graduation ceremony, city council meeting, or here, a sporting event) the master of ceremonies hands the microphone to a private party to recognize that "Mr. and Mrs. Lopez, present in the audience, are celebrating their golden anniversary!" or "Mildred Jones, sitting in the front row, just turned 100!" or "Aaron Williams, my father, has just been named Sears Employee of the Year," everyone knows that the brief message was not a government proclamation. Likewise, when a guest speaker gives an address at a state college's graduation, *e.g.*, Sara Santora, "FSU alum Nancy McKay to speak at summer commencement," FSUNews.com (Aug. 3, 2016) (beauty industry CEO addressing Florida State University commencement ceremonies), no one thinks that every word the speaker utters necessarily reflects the school's official party line. The government speech doctrine is more sensible than that.

To be sure, a government can adopt or embrace private speech so as to

make that speech the government's own speech. When a city accepts a privately donated monument for display in a city park, for example, the city makes that monument its own – and hence, government speech. *E.g., Pleasant Grove*. But just as plainly, when a third party obviously speaks as a third party, and not as a government agent, that speech does not morph into the constitutional equivalent of a government agency press release. In other words, the mere fact that a speaker operates within a government platform or program does not require that all communications be deemed "government speech." Illustrations of this point are plentiful: the private entities seeking contributions from government employees (*Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)) or access to teachers (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) spoke within the scope of government programs (the Combined Federal Campaign and the school's internal mail system, respectively). All communications to and from prisoners take place within the scope of state penal programs. *Thornburgh v. Abbott*, 490 U.S. 401 (1989). The private speakers in the Supreme Court's "equal access" cases spoke within the scope of some facilities use program (*Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Central School*,

533 U.S. 98 (2001)) or educational program (*Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). Yet in none of these cases did the Supreme Court apply the government speech doctrine, which would have left the restricted speech devoid of First Amendment protection.

This Court took the same approach in *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler I*), *vacated*, *Chandler v. Siegelman*, 530 U.S. 1256 (2000), *reinstated on remand*, 230 F.3d 1313 (11th Cir. 2000) (*Chandler II*), *cert. denied*, 533 U.S. 916 (2001). At issue in that case was the constitutionality, under the First Amendment, of an injunction that forbade a school even from "'permitting' vocal prayer or other devotional speech in its schools" including "over the public address system, or as part of the program at school-related assemblies and sporting events," *Chandler I*, 180 F.3d at 1257. This Court recognized the "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." *Id.* (emphasis in original; citations and internal quotation marks omitted). The plaintiffs (Chandlers) "contend[ed] that when the State permits students to speak religiously in situations that are not purely private, the State lends its imprimatur to the speech," meaning that "purportedly 'private' speakers at

school events" are actually government actors. *Id.* at 1260. This Court squarely rejected the assertion that the students' prayers would be government speech:

> Under the Chandlers' theory, student religious speech is attributable to the State thereby violating the constitutional requirement of neutrality. Students, therefore, cannot be permitted to speak freely in school if religion is the topic; the State has a positive duty to censor student speech if it is religious. We disagree.

Id. at 1260-61.

Nor does the FHSAA's desire to avoid associating itself with the religious message in this case change the calculus. Third-party speech on the grounds of a shopping mall does not become the speech of the mall owners just because the owners might object to being associated with the message. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980). A protest on government property does not become government speech just because the government fears being associated with the message. *United States v. Grace*, 461 U.S. 171 (1983) (speech activity on perimeter of Supreme Court grounds). And the desire of a public school or university to distance itself, as here, for anti-establishment purposes, from the religious message of private users, as in *Widmar*, *Lamb's Chapel*, *Good News Club*, etc., does not transform the private speech into government speech. Merely *allowing* private speech does not make that speech government speech: "The proposition that [government bodies] do

not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality). The government's desire to disassociate itself from a private message goes to the asserted *justification* for the restriction on private speech, not the *nature* of the speech itself.

Indeed, the notion that the government speech doctrine applies whenever communication takes place over a government platform aims a dagger at the heart of free speech. Public parks and sidewalks are "government platforms." A government-sponsored event like a graduation or a panel on climate change can literally provide a "government platform." After-school facilities and university meeting rooms are "government platforms." This does not mean any speaker in such a context utters "government speech" subject to unlimited government censorship.

In sum, to claim that the pre-game prayer of two private Christian high schools is government speech, or that it becomes such simply by virtue of its broadcast over a government-managed public address system, flies in the face of reality as well as precedent. The pre-game prayer was not government speech, and would not have been government speech had the speaker's voices been enhanced by electronic means.

II. The Establishment Clause Does Not Require Censorship of the Pre-game Prayers.

FHSAA's assertion that it had to disallow the speech because it was religious, in order to avoid running afoul of the Establishment Clause, is an admission that it was the religious nature of the speech that prompted the prohibition. In other words, in this context, an Establishment Clause defense is precisely a viewpoint-based rationale for censorship. "Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship." *Chandler I*, 180 F.3d at 1265.

FHSAA nevertheless insists that even viewpoint discrimination is permissible here because to allow prayer over the public address system would be to violate the Establishment Clause. But this Court has already confronted, and rejected, that very argument in the *Chandler* litigation discussed above. As this Court explained, "The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one's religion would not be free at all." *Chandler II*, 230 F.3d at 1316. As this Court clarified: "It is not the public context that makes some speech the State's. It is

the entanglement with the State. What the [Supreme] Court condemned . . . was not private speech endorsing religion, but the delivery of a school-sponsored prayer. Remove the school sponsorship, and the prayer is private." *Id.*

> Therefore, if "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," *Santa Fe* [*ISD v. Doe*, 530 U.S. 290, 313 (2000)], then it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other purpose. . . . So long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected[.]

Chandler II, 230 F.3d at 1316-17.

Here, the FHSAA obviously did not initiate or surreptitiously encourage the pre-game prayer broadcast – quite the contrary, it forbade it. Hence, there was no government "sponsorship," and the Establishment Clause did not forbid the broadcast. FHSAA's resort to the Establishment Clause provides no defense to its viewpoint censorship.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted this 27th day of October, 2017.

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