CAMBRIDGE CHRISTIAN SCHOOL, INC. V. FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, INC.: PRAYER IN HIGH SCHOOL ATHLETICS

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For Cambridge Christian School (Cambridge), prayer before football games is a "long standing tradition."[1] A student, parent, or school employee delivers a prayer over a loudspeaker at all home events and at away events when possible.[2] However, at the 2015 Florida Division 2A high school state championship game, against University Christian School (University), Cambridge was denied the use of the loudspeaker by the Florida High School Athletic Association (FHSAA).[3] This decision prompted Cambridge to bring a lawsuit, raising claims under the Free Speech and Free Exercise Clauses of both the United States and Florida Constitutions.[4]

The state championship was held at Camping World Football Stadium, a public facility with a capacity of 41,000.[5] During a conference call with FHSAA three days before the state championship, representatives from both Cambridge and University asked to use the stadium's loudspeaker to lead the attendees in a communal prayer before kickoff, as had been done in each of the three earlier rounds of the playoffs and at the 2012 championship game.[6] The FHSAA denied their request, explaining that the stadium was a public facility and that the FHSAA was a "state actor" and could not grant the schools' request to use the loudspeaker.[7] Just before the game began, both teams met at the 50-yard line "as a sign of fellowship" and prayed before a crowd of 1,800 without using the loudspeaker.[8] Because of the size of the stadium, the crowd was unable to hear the prayer.[9] The loudspeaker was used throughout the game to deliver "various messages,

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[1] Cambridge Christian Sch., Inc., v. Fla. High Sch. Athletic Ass'n, Inc., 942 F.3d 1215, 1224 (11th Cir. 2019).

[2] *Id.*

[3] *Id.* at 1222.

[4] *Id.*

[5] *Id.* at 1224.

[6] *Id.* at 1224.

[7] *Cambridge*, 942 F.3d at 1224–25. In its email to the school, the FHSAA referenced *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), stating that "[t]he issue was never whether prayer could be conducted. The issue was, and is, that an organization [like the FHSAA], which is determined to be a 'state actor' cannot endorse nor promote religion." *Id.* at 1225.

[8] *Id.* at 1225.

[9] *Id.*

including advertisements, commentary, and other communications" and Cambridge's cheerleading coach was permitted to play music from the loudspeaker during halftime without any apparent limitations.[10]

Cambridge brought suit in the United States District Court for the Middle District of Florida, alleging that its rights under the Free Speech and Free Exercise Clauses of the United States Constitution had been violated, and seeking declaratory judgment that FHSAA's policy was not required by the Establishment Clause of the United States Constitution.[11] Cambridge also brought claims under the Florida Constitution's coequal Free Speech, Free Exercise, and Establishment Clauses, as well as Florida's Religious Freedom Restoration Act (FRFRA).[12] The FHSAA moved to dismiss the complaint.[13] The district court granted FHSAA's motion to dismiss in all respects.[14]

In addressing Cambridge's free speech claim, the district court reasoned that all communication over the loudspeaker was government speech, eliminating any free speech claims.[15] Alternatively, the court noted that even if there was some private speech, excluding Cambridge's prayer was a content-based restriction, which is permissible in a nonpublic forum.[16] The district court dismissed Cambridge's free exercise claim, stating that denying Cambridge use of the loudspeaker did not hinder the school's ability to engage in communal prayer, as evidenced by the prayer that took place on the 50-yard line before the game.[17] The court then dismissed the claim for declaratory judgment that the Establishment Clause did not require that the FHSAA prevent prayer over the loudspeaker because there was "no actual controversy as to this claim" and because the arguments were better considered under the Free Speech and Free Exercise Clauses.[18] The court then dismissed the FRFRA claim because Cambridge alleged the prayer was "required by its religious *mission*," not its "religious belief," indicating that there was no substantial burden on Cambridge's religious beliefs.[19] Cambridge timely appealed to the Eleventh Circuit.[20]

The Eleventh Circuit identified four major issues to be resolved on appeal: (1) Was all speech on the loudspeaker at the state championship

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[10] *Id.*
[11] *Id.* at 1227–28.
[12] *Cambridge*, 942 F.3d at 1228.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 1228–29.
[18] *Cambridge*, 942 F.3d at 1229.
[19] *Id.* (emphasis in original).
[20] *Id.*

government speech?[21] (2) Did the FSHAA create a public forum?[22] (3) Did the FSHAA burden Cambridge's "sincerely held religious beliefs" under the Free Exercise Clause of the United States Constitution or its Florida Constitution counterpart?[23] (4) Did the FSHAA "substantially burden" Cambridge's "exercise of religion" under FRFRA?[24] After analyzing each of the claims, the Eleventh Circuit reversed the district court's decision regarding the Free Speech and Free Exercise claims, finding that Cambridge had plausibly alleged violations under both the United States and Florida Constitutions.[25] The Eleventh Circuit affirmed the dismissal of the FRFRA and Establishment Clause claims.[26]

When the government speaks for itself, it can freely "select the views that it wants to express."[27] Therefore, it is critical to any Free Speech claim to determine if the speech is government or private. In order to determine if speech is classified as government speech, three factors must be analyzed: history, endorsement, and control. [28] The history factor addresses whether the type of speech in question has "traditionally communicated messages on behalf of the government."[29] Because the complaint suggests that the state previously allowed prayer over the loudspeaker, the history factor weighed against finding that all speech over the loudspeaker was government speech.[30] The endorsement factor asks whether "observers reasonably believe the government has endorsed the message."[31] The court reasoned that because the game was held in a government-owned stadium, the game was organized by the State, and the prayer would have been close in time with the National Anthem and Pledge of Allegiance, speech over the loudspeaker that likely would be "closely identified in the public mind with the government."[32]

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[21] *Id.* at 1229–30.
[22] *Id.* at 1236.
[23] *Id.* at 1246.
[24] *Cambridge*, 942 F.3d at 1249.
[25] *Id.* at 1252.
[26] *Id.*
[27] *Id.* at 1231 (quoting Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1074 (11th Cir. 2015)) (internal quotation marks omitted).
[28] Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1074–75 (11th Cir. 2015). Prior to the present case, *Mech* was the most recent Eleventh Circuit decision which dealt with the issue of government speech. *Cambridge*, 942 F.3d at 1231. In this case, the Eleventh Circuit applied the factors from *Summum* and *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), solidifying the three-factor test for determining if speech is government speech or private speech. *Id.*
[29] *Cambridge*, 942 F.3d at 1232 (quoting Walker v. Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2248 (2015)) (internal quotation marks omitted).
[30] *Id.* at 1232.
[31] *Id.* at 1232–33 (quoting *Mech*, 806 F.3d at 1076) (internal quotation marks omitted).
[32] *Id.* at 1233–34 (quoting *Summum*, 555 U.S. at 472).

The control factor asks whether the government unit "maintains direct control over the messages conveyed."[33] The FHSAA controlled physical access to the microphone, but the record does not make clear if the FHSAA controlled the content of the speech.[34] On the contrary, the cheerleading coach for Cambridge did take control of the loudspeaker during halftime, and the limited record only establishes one restraint, a seven minute time limit.[35] Therefore, the court found that this factor did not point clearly in either direction.[36] Because the record did not contain enough information to clearly establish that all speech over the loudspeaker was government speech, the Eleventh Circuit sought to determine if the forum was public or nonpublic.[37]

In order to determine if the forum created by the FHSAA was public or nonpublic, the court asked "(1) what kind of forum the FHSAA created, (2) what type of restriction on access to the forum it enforced against Cambridge Christian, and, finally, (3) whether that restriction was constitutionally permissible."[38] Out of the four types of fora (traditional public forum, designated public forum, limited public forum, and a nonpublic forum), the court concluded that Cambridge "had not plausibly alleged that the FHSAA had created anything more than a nonpublic forum."[39] "A state actor 'does not create a public forum'—limited or otherwise—'by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'"[40] Because the complaint did not allege that the loudspeaker was open to 'public discourse,' the Eleventh Circuit found that the only forum the FHSAA created was a nonpublic forum.[41]

Speech in a nonpublic forum may be restricted "for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[42] So long as the government restricts access to a nonpublic forum based on content and not on the viewpoint of the speaker, it will generally be allowed.[43] The FHSAA restricted access to the loudspeaker in

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[33] *Id.* at 1234 (quoting *Walker*, 135 S. Ct. at 2249) (internal quotation marks omitted).
[34] *Id.* at 1235.
[35] *Cambridge*, 942 F.3d at 1235.
[36] *Id.* at 1236.
[37] *Id.*
[38] *Id.*
[39] *Id.* at 1237.
[40] *Id.* at 1237 (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).
[41] *Cambridge*, 942 F.3d. at 1240.
[42] *Id.* (quoting Minn. Voters All., v. Mansky, 138 S. Ct. 1876, 1885 (2018)).
[43] *Id.*

an effort to keep government and religion separate.[44] Therefore, the FHSAA's decision constituted a content-based restriction.[45]

A restriction is constitutionally permissible so long as it is reasonable, not arbitrarily and haphazardly applied, and consistently enforced.[46] Furthermore, the Supreme Court noted that a "restriction on speech is reasonable when it is wholly consistent with the [government's] legitimate interest in preserv[ing] the property . . . for the use to which it is lawfully dedicated."[47] The restriction of prayer was inconsistently applied between the State Championship game in 2012, and the three previous playoff games in 2015 and the State Championship game in 2015.[48] Due to the inconsistency in the restriction of speech and the lack of evidence that the restriction was "wholly consistent" with preserving the purpose of the forum, the Eleventh Circuit ruled that Cambridge had plausibly alleged that FHSAA violated its Free Speech rights.[49]

To plead a claim for relief under the Free Exercise Clauses of the U.S. and Florida Constitutions, a plaintiff must allege that "(1) the plaintiff holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular; and (2) the law at issue is some way impact the plaintiff's ability to either hold that belief or act pursuant to that belief."[50] The court noted "a 'sincerely held belief' is not a probing inquiry" and the Supreme Court has repeatedly refused to question the sincerity or validity of particular beliefs.[51] The reluctance of the court to drill into the sincerity of belief led the Eleventh Circuit to conclude that Cambridge plausibly plead a sincerely held belief.[52] The court noted prayer at the 50-yard line was not an acceptable substitute for Cambridge's communal prayer over the loudspeaker and thus satisfied the burden prong of the Free Exercise test.[53] Because prayer with the teams was not the same as a communal prayer with all in attendance, the Eleventh Circuit reversed the district court, holding Cambridge sufficiently pled a claim under the Free Exercise Clause.[54]

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[44] *Id.* at 1241.
[45] *Id.* at 1242.
[46] *Id.* at 1243.
[47] *Cambridge*, 942 F.3d at 1244 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 50–51 (1983)) (internal quotation marks omitted).
[48] *Id.* at 1244.
[49] *Id.* at 1245–46.
[50] *Id.* at 1246 (quoting GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1256–57 (11th Cir. 2012)).
[51] *Id.* at 1247.
[52] *Id.* at 1248–49.
[53] *Cambridge*, 942 F.3d at 1249.
[54] *Id.*

Cambridge's claim under FRFRA is evaluated on a two-prong test which is strikingly similar in language to the test articulated for the Free Exercise Clause. The plaintiff must show that "(1) the government has placed a substantial burden on a practice (2) motivated by a sincere religious belief."[55] The belief prong of FRFRA is actually broader than its Free Exercise Clause counterpart which requires a "sincerely held belief."[56] Because Cambridge's pleadings were sufficient to satisfy the Free Exercise Clause's belief prong, it therefore satisfied the belief prong of the FRFRA.[57] The burden prong on the other hand is a "much more stringent standard for what constitutes a 'substantial burden.'"[58] Under this standard a substantial burden on the free exercise of religion "is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires."[59] Therefore, laws that merely inconvenience a religion, and even those that constitute a "significant" burden on the practice of religion do not violate the FRFRA.[60] The Eleventh Circuit found nothing in the complaint that rose to this level of burden and affirmed the district court's dismissal of the claim.[61]

Finally, the Eleventh Circuit affirmed the district court's dismissal of the complaints which sought declaratory judgments under the Establishment Clause of the United States Constitution and the Florida Constitution.[62] Overturning a district court's decision to decline declaratory relief, even at the motion to dismiss stage, can only be done for abuse of discretion.[63] The district court decided that there was no actual controversy to this claim and that the claim was more appropriately addressed in the context of the Free Exercise and Free Speech Clauses.[64] The Eleventh Circuit did not need to address the constitutionality of the holding because the district court acted well within its discretion, and it affirmed the district court's dismissal of these claims.[65]

The court in *Cambridge* made no ruling as to the constitutionality of any of the claims it heard. Rather, it stated only that Cambridge's Free Speech and Free Exercise claims were dismissed too early. While this is in

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[55] *Id.* (quoting Warner v. City of Boca Raton, 887 So. 2d 1023, 1032 (Fla. 2004)) (internal quotation marks omitted).
[56] *Id.* at 1249.
[57] *Id.* at 1250.
[58] *Id.*
[59] *Cambridge*, 942 F.3d at 1250.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1250–52.
[63] *Id.* at 1251.
[64] *Id.* at 1251.
[65] *Cambridge*, 942 F.3d at 1251.

large part due to the early stage at which these claims were dismissed, it also speaks to the nature of Free Speech and Free Exercise Claims. The claims are particularly fact sensitive, and the court could not decide the validity of the claims without a fully developed record. In the future, courts should hesitate to dismiss Free Speech and Free Exercise claims when the record does not contain sufficient facts.