No. 12-755

In the Supreme Court of the United States

ELMBROOK SCHOOL DISTRICT, ELMBROOK JOINT COMMON SCHOOL DISTRICT NO. 21, PETITIONER

v.

JOHN DOE, 3, A MINOR BY DOE 3'S NEXT BEST FRIEND DOE 2, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF TEXAS, ALABAMA, ARKANSAS, COLORADO, INDIANA, KANSAS, KENTUCKY, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Deputy Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
adam.aston@texasattorneygeneral.gov
(512) 936-0596

COUNSEL FOR AMICI CURIAE

[Additional Counsel Listed On Inside Cover]

LUTHER STRANGE
Attorney General of Alabama

DUSTIN MCDANIEL
Attorney General of Arkansas

JOHN SUTHERS
Attorney General of Colorado

GREGORY F. ZOELLER
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

JACK CONWAY
Attorney General of Kentucky

BILL SCHUETTE
Attorney General of Michigan

JIM HOOD
Attorney General of Mississippi

TIMOTHY C. FOX
Attorney General of Montana

JON BRUNING
Attorney General of Nebraska

MICHAEL A. DELANEY
Attorney General of New Hampshire

E. SCOTT PRUITT
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

J.B. VAN HOLLEN
Attorney General of Wisconsin

QUESTIONS PRESENTED

1. Whether the Establishment Clause prohibits the government from conducting public functions such as high school graduation exercises in a church building, where the function has no religious content and the government selected the venue for reasons of secular convenience.

2. Whether the government "coerces" religious activity in violation of *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), where there is no pressure to engage in a religious practice or activity, but merely exposure to religious symbols.

3. Whether the government "endorses" religion when it engages in a religion-neutral action that incidentally exposes citizens to a private religious message.

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INTEREST OF AMICI CURIAE[1]

The States' interest in this case is twofold. First, because the States and their political subdivisions frequently use privately owned facilities to conduct official business, they have a powerful interest in defending their ability to access facilities owned by a variety of civic-minded organizations, including those who are religious in character. And second, because the States are all too frequently defendants in cases raising Establishment Clause challenges, they have an especially strong interest in the development of a clear, workable Establishment Clause jurisprudence.

[1] Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Doe ex rel. Doe* v. *Elmbrook School Disrict*, 687 F.3d 840 (7th Cir. 2012), Pet. 1a-79a, the en banc Seventh Circuit held that a Wisconsin school district violated the Establishment Clause by using a nondenominational Christian church's facilities to conduct high-school graduations that contained no religious content, Pet. 13a, 25a-26a, despite the fact that the district's secular purposes for selecting the church were not disputed, Pet. 21a, 25a-26a. The en banc court held that the school district's secular purposes did not matter because "the sheer religiosity of the space" was both "religiously coercive" and likely to send "a message of endorsement" to the graduating students and their younger siblings. Pet. 25a-26a, 28a, 30a. That decision warrants review because it could have profound consequences for all levels of state and local government.

The school district's certiorari petition persuasively demonstrates the conflicts embodied in the Seventh Circuit's decision: it conflicts with this Court's "coercion" jurisprudence, which prohibits governmental pressure to engage in a religious exercise, not the incidental exposure to religious symbols, Pet. 15-18, and it deepens the existing conflicts regarding this Court's "endorsement" jurisprudence by "'attribut[ing] to a neutrally behaving government *private* religious expression,'" Pet. 20 (quoting *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 764 (1995)); Pet. 18-30. In the process, the Seventh Circuit has created unnecessary confusion as to whether (and to what

extent) the government may *ever* use facilities owned by religious organizations on par with other privately owned facilities. Pet. 11-14.

Amici States support the school district's arguments that the decision below warrants review because it creates additional conflicts with the Court's Establishment Clause jurisprudence, and the States do not re-argue those points here. Rather, the States will focus on the practical difficulties that will arise if this Court does not grant review and the Seventh Circuit's new Establishment Clause standards remain intact. First, government entities will find it difficult if not impossible to satisfy the Seventh Circuit's new Establishment Clause standards while maintaining the neutrality toward religion that this Court's cases require. Second, governmental entities will be impeded from providing many vital public services because the Seventh Circuit's new standards eliminate from government consideration the use of facilities owned by religious organizations.

ARGUMENT

I. THE SEVENTH CIRCUIT'S NEW ESTABLISHMENT CLAUSE STANDARDS WILL PROVE DIFFICULT FOR GOVERNMENT ENTITIES TO SATISFY.

The new Establishment Clause analysis articulated by the en banc Seventh Circuit does not provide government actors with clear, workable standards.

During the graduation ceremonies at issue in this case, the permanent religious symbols contained in the church remained uncovered, consistent with the church's policy, but non-permanent symbols were

removed from the dais. Pet. 11a-12a. The Seventh Circuit held that bringing government events to a place of worship "with the proselytizing elements present in this case * * * necessarily conveys a message of endorsement." Pet. 20a-21a. This was so, according to the Seventh Circuit, "[r]egardless of the purpose of school administrators in choosing the location,"[2] Pet. 25a, and even though "a reasonable observer" would know that the District did not select or place the religious symbols in the church, because that observer "could reasonably conclude that the District would *only* choose such a proselytizing environment * * * if the District approved of the Church's message," Pet. 26a-27a (emphasis added).

1. At the outset, the statement that a government entity would choose to use private facilities *only* if the government affirmatively endorsed the messages and views of the owners is simply untrue. And for the Seventh Circuit to base its endorsement-prong decision on this factor when the uncontested evidence demonstrates that a number of secular purposes—and only secular purposes—drove the school district's decision defies logic. Moreover, the Seventh Circuit's suggestion that the so-called "reasonable observer" is one who willfully ignores the actual purposes motivating

[2] The church was initially selected at the request of the senior officers of Central High's class of 2000, who believed that the church's seating capacity, air-conditioning, and ample parking were preferable to the school gymnasium's wooden bleachers, cramped space, and lack of air-conditioning. Pet. 6a-8a. Central High began holding graduations in the Church in 2000, and East High followed suit in 2002. Pet. 6a. The plaintiffs did not argue that the school district acted with a non-secular purpose in selecting the church. Pet. 21a n.15.

government actions cannot be reconciled with this Court's precedents. See, *e.g.*, *McCreary Cnty.* v. *Am. Civil Liberties Union*, 545 U.S. 844, 866 (2005) ("[R]easonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose.") (quotation omitted).

2. The Seventh Circuit's requirement that the government altogether avoid private facilities in which religious symbols are "pervasive," lest the government engage in religious coercion, Pet. 30a-31a, will serve as a de facto prohibition on the use of religiously owned facilities. As a result of this limitation, "institutions determined to be 'pervasively religious' will be excluded from any participation in the civil polity because their 'religiosity' would amount to coercive endorsement on the part of the government." Pet. 54a, 54a-55a (Ripple, J., dissenting). The en banc Seventh Circuit urged that its decision "should in no way be viewed as expressing hostility toward Elmbrook Church," Pet. 31a, but the state and local governments who would be forced to avoid using the local religiously owned facilities will likely not be viewed so charitably.

3. This Court should thus grant certiorari, reverse the Seventh Circuit's judgment, and uphold the constitutionality of a government entity making the secular decision to conduct non-religious government activities in facilities owned by a religious organization. At a minimum, this Court should do so because the erroneous decision below casts serious doubt upon a longstanding tradition of government entities using the facilities of religious

groups on equal footing with the facilities of non-religious civic groups.

Yet the Court should go further because the Seventh Circuit's decision is merely another symptom of a lingering problem that only this Court can solve: Establishment Clause jurisprudence remains in "hopeless disarray," *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring in the judgment), and is in need of "[s]ubstantial revision," *County of Allegheny* v. *Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part); see also *Mount Soledad Mem'l Ass'n* v. *Trunk, et al.*, 132 S. Ct. 2535, 2535 (1012) (Alito, J., statement respecting the denial of the petitions for writs of certiorari) (noting that "Establishment Clause jurisprudence is undoubtedly in need of clarity"); *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 13, 14 (2011) (Thomas, J., dissenting from the denial of certiorari) (acknowledging that Establishment Clause jurisprudence is "in shambles" and "provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply"); *Lee* v. *Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., dissenting) ("Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test."). This case offers an appropriate vehicle for the Court to provide a much-needed solution to that problem.

II. LIMITING THE GOVERNMENT'S USE OF PRIVATELY OWNED FACILITIES TO THOSE OWNED BY NON-RELIGIOUS ORGANIZATIONS WOULD ELIMINATE A VITAL AND CUSTOMARILY USED RESOURCE.

As the petition explains, *e.g.*, Pet. 10, the practical consequence of the Seventh Circuit's decision is a rule precluding the government's use of non-secular buildings and facilities.[3] That rule would significantly hinder many government functions.

1. The certiorari petition correctly notes that the practice of using non-secular buildings as polling locations is a common one. Pet. 14. For example, in Texas, with few exceptions, every election precinct must be served by a polling location. TEX. ELEC. CODE § 43.001. Texas law requires the selection of a publicly owned or controlled building "if practicable," TEX. ELEC. CODE §§ 43.031(a), (c), but in a State with 254 counties (many in rural areas), securing polling locations for election day can be a significant

[3] To be sure, the Seventh Circuit disclaimed establishing any broad rule in deciding this case: "The ruling should not be construed as a broad statement about the propriety of governmental use of church-owned facilities." Pet. 3a. But given the broad scope of the prohibition announced by the court below, see *supra*, Part I; see also Pet. 10-11, 13-14, 33-34, any promise of a limited rule from this decision rings hollow, see, *e.g.*, Pet. 64a-65a (Easterbrook, C.J., dissenting) ("[W]e cannot disavow the logical implications of our decisions. * * *. If graduation in a church is forbidden because renting a religious venue endorses religion, and if endorsement is coercive, then renting a religious venue for voting must be equally unconstitutional.").

challenge.[4] Indeed, on election day in 2012, Texans cast their ballots at approximately 8,000 polling locations. Government buildings played a crucial role in providing polling locations, but so did VFW halls, neighborhood businesses, and more than 700 buildings owned or operated by churches or other religious organizations. In predominantly rural States, such as New Hampshire, the largest meeting spaces available in many communities (some of which do not have a school) are religiously owned facilities. These buildings are often used to serve as polling places and for other government-sponsored public meetings.

A rule that precludes the election-day use of facilities owned by religious organizations would severely hinder the government's ability to provide adequate polling locations for all citizens. Yet the Seventh Circuit's rule precluding government activities in private facilities that are maintained as "pervasively religious," Pet. 31a, would do just that.

2. Election day and school graduations are far from the only times that the government might need to use privately owned buildings for government-sponsored programs. Often, religious organizations provide cost-effective options that enable governments at all levels to meet critical community needs.

The White House Office of Faith-based and Neighborhood Partnerships serves the "critical"

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[4] It is also critical to ensure that all polling places are accessible to senior citizens and those with disabilities, TEX. ELEC. CODE § 43.034, and that important requirement can further limit the available options.

function of "strengthen[ing] the ability of faith-based and other neighborhood organizations to deliver services effectively in partnership with Federal, State, and local governments and with other private organizations * * *." Exec. Order No. 13,498, 3 C.F.R. 219 (2009). The President has directed that office to "empower[] faith-based and neighborhood organizations to deliver vital services in our communities, from providing mentors and tutors to school children to giving ex-offenders a second chance at work and a responsible life to ensuring that families are fed." *Ibid.* Surely the faith-based organizations tasked with carrying out these government functions may do so in buildings that bear the hallmarks of their faith.

State and local governments likewise partner with religious organizations to provide vital services. The City of Austin, Texas, for example, recently partnered with private donors and the Religious Coalition to Assist the Homeless to provide emergency shelter for single, homeless women. The pilot program, called Safe Sleep Shelter for Women, involved five Austin churches providing overnight shelter in church-owned buildings. Andrea Ball, *Pilot Program Means Safe Shelter for Homeless Single Women*, AUSTIN AMERICAN-STATESMAN, Sept. 27, 2012, at B1. See also *Guatay Christian Fellowship* v. *County of San Diego*, 670 F.3d 957, 962 (9th Cir. 2011) (noting that one church opened its facilities for non-religious purposes, including for use as polling stations, government food-distribution programs, town meetings, and water department meetings). It cannot be that these programs violate the Establishment Clause, but under the Seventh

Circuit's new standards, countless programs like these would be jeopardized.

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As Justice Goldberg first explained:

> [t]he First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. * * * [T]he measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Sch. Dist. of Abington Tp., Pa. v. *Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring). The Seventh Circuit's failure to recognize that "[h]ere, we have only the shadow," *Van Orden* v. *Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring), will have practical consequences for the States sufficient to warrant certiorari review in this case. Worse still are the consequences for Establishment Clause jurisprudence. The Seventh Circuit has produced yet another unworkable framework for States and their political subdivisions to labor under in an attempt to satisfy an ever-evolving jurisprudence. As Judge Ripple correctly noted in dissent:

> There has been, in recent times, a great deal of judicial and academic discussion about the continued viability of *Lemon v. Kurtzman* and of the "endorsement test" in particular. Today's decision * * * adding a

> new dimension to the intrusiveness of judicial decision-making into the decisions of local government officials, supports significantly the voices of those who urge the need for reassessment.

Pet. 58a (citations omitted). Amici States respectfully urge the Court to take this opportunity to provide a clear, workable Establishment Clause jurisprudence.

CONCLUSION

The Court should grant the certiorari petition.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Deputy Solicitor General
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
adam.aston@texasattorneygeneral.gov
(512) 936-0596

COUNSEL FOR AMICI CURIAE

January 2013