No. 12-755

IN THE

Supreme Court of the United States

ELMBROOK SCHOOL DISTRICT,

Petitioner,

v.

DOES 1–9,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

There is no conflict between the decision of the en banc Seventh Circuit and this Court's decision in *Town of Greece* v. *Galloway*, No. 12-696, slip op. (May 5, 2014). *Greece* reaffirmed that the legislative-prayer context is far different from that of public-school graduations. The Court concluded that there was no religious coercion in *Greece* because the audience was composed of adults who could easily avoid the prayers; here, schoolchildren are the audience, and they have no way to avoid Elmbrook Church's religion-permeated environment without entirely missing their once-in-a-lifetime graduation ceremonies. The Court found that there was no religious favoritism in *Greece* because representatives of all faiths and even atheists could give prayers; here, the Elmbrook School District has used the same venue—an intensely Christian one—year after year. The Court determined that the practice upheld in *Greece* has been consistently followed by American governments since the inception of our Republic; public schools, on the other hand, did not even exist when our nation was born, much less consistently use churches for graduations. The petition should be denied.

ARGUMENT

Coercion. There is no conflict between *Greece* and the Seventh Circuit's en banc ruling that the School District's church graduations were unconstitutionally coercive. Cf. Pet'r's Supp. Br. 4. The Court found that there was no coercion in *Greece*

because audience members were mature adults, who could leave the room during the prayers without consequences. Slip op. 22–23 (plurality). Here, as in *Lee* v. *Weisman*, 505 U.S. 577 (1992), which struck down public-school graduation prayers delivered by private clergy, the audience members are impressionable schoolchildren, including younger siblings of graduating students. C.A. App. 97. And it is impossible for these youths to avoid the Church's religion-saturated environment without altogether missing their graduations—"one of life's most significant occasions." *Lee*, 505 U.S. at 595. Indeed, *Greece* itself made clear that the "limited context" (slip op. 10) of legislative prayer is far different from public-school graduations (*id.* at 22–23 (plurality)).

The School District emphasizes (Pet'r's Supp. Br. 3) *Greece*'s statement, "[o]ffense, however, does not equate to coercion." Slip op. 21 (plurality). But that statement was bookended by the observations that the legislative prayers did not cause the *Greece* plaintiffs to *do* anything and that the plaintiffs could easily avoid the prayers. *Id.* at 20–22 (plurality). *Greece* contrasted that situation with public-school graduations, "where school authorities maintain[ ] close supervision over the conduct of the students and the substance of the ceremony," rendering "a religious invocation * * * coercive as to an objecting student." *Id.* at 22 (plurality). Likewise, here the School District left schoolchildren no choice other than to enter an intensely religious environment, to watch their graduation proceedings beneath an immense Christian cross, and to sit for hours in pews filled with Bibles and church literature, after passing through a lobby replete with proselytizing displays and pamphlets. Indeed, the students in this case were immersed in proselytizing messages to a much

greater extent than the objectors to the brief and inclusive prayers struck down in *Lee,* 505 U.S. at 581–582.

Endorsement/favoritism. As the School District admits (Pet'r's Supp. Br. 5), the Court did not apply the endorsement test in *Greece*, for historical analysis was sufficient to decide the case. See slip op. 9–16. The Seventh Circuit's endorsement analysis thus cannot conflict with *Greece*. And like *Greece*, this case would be a poor vehicle for addressing the vitality of the endorsement test, because the Seventh Circuit's judgment can be affirmed on coercion grounds, as well as a number of other ones. See BIO 26.

In any event, the Court did consider in *Greece* a question related to endorsement: whether the prayer practice discriminated along religious lines. Slip op. 17–18. The Court concluded that there was no favoritism because a representative of any religion or an atheist was free to give an invocation, and non-Christians did in fact give a number of prayers. *Id.* at 2–4, 17–18. Here by contrast, despite the availability of numerous non-religious facilities that could host the graduations, the School District year after year used a single venue, which was permeated with the symbols and messages of a single faith.

Governmental involvement with religion. The en banc Seventh Circuit's ruling does not conflict (cf. Pet'r's Supp. Br. 3–4) with the conclusion in *Greece* that governmental bodies and courts would become improperly involved in religious matters by attempting to render the content of invocations nonsectarian. See slip op. 12–14. Nothing in the Seventh Circuit's ruling requires any governmental body to somehow attempt to render a house of

worship's interior "nonsectarian" or to "supervise[ ] and censor" (cf. *id.* at 13) private religious speech. To the contrary, the Seventh Circuit expressly stated that "[n]one of [its analysis] is to suggest that school officials should have exercised a higher degree of control over the Church's environment, scrubbing it of religious symbols or working to tailor its message to a secular audience," for "[s]uch a course would have run afoul" of the prohibition on "excessive entanglement." Pet. App. 27a n.18. To implement the Seventh Circuit's ruling, school officials need only make an up-front, yes-or-no judgment on whether a facility is appropriate for a public-school graduation, a much simpler inquiry than the analysis required by *Greece* of whether a prayer practice "denigrate[s] nonbelievers or religious minorities, threaten[s] damnation," "preach[es] conversion," or otherwise "'proselytize[s] or advance[s] any one, or * * * disparage[s] any other, faith or belief.'" See slip op. 14–15 (quoting *Marsh* v. *Chambers*, 463 U.S. 783, 794–795 (1983)).

History. The Seventh Circuit's en banc ruling is not in conflict (cf. Pet'r's Supp. Br. 4) with *Greece*'s reliance on legislative-prayer traditions that date back to the founding of our Republic. See slip op. 7–8, 10–11, 15–16. As the Court has previously observed, such historical analysis is not helpful in the public-school context because public schools were virtually nonexistent when our Constitution was enacted and remained uncommon in many areas by the time the Fourteenth Amendment was adopted. See *Edwards* v. *Aguillard*, 482 U.S. 578, 583 n.4 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 80 (1985) (O'Connor, J., concurring in the judgment). What is more, a historical analysis would only lead us astray: from the time public schools came into being, morning

prayers, Bible readings, and graduation prayers long were commonplace. See, *e.g.*, Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 Miss. L.J. 127, 129–130 (2013); *Stein* v. *Plainwell Community Schools*, 822 F.2d 1406, 1410 (6th Cir. 1987) (Milburn, J., concurring). That did not stop the Court from invalidating all those practices. See *Lee*, 505 U.S. 577; *School District of Abington Township* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962).

In any event, the School District presents no significant evidence of a pervasive historical practice of schools using churches for graduations. While some towns had meetinghouses that were used for both civic and religious events in early American history, this practice declined in colonial times and had become quite rare by 1850. Kevin M. Sweeney, *Meetinghouses, Town Houses, and Churches: Changing Perceptions of Sacred and Secular Space in Southern New England, 1720–1850*, 28 Winterthur Portfolio 59, 59 (1993). That stands in sharp contrast to the unbroken tradition of legislative prayer that dates back to the founding era. See *Greece*, slip op. 7.

No circuit split. The School District presents no citation for its assertion that "[l]ower courts continue to be confused and divided over the important constitutional questions presented by this case." Pet'r's Supp. Br. 7. In fact, the Seventh Circuit's decision remains the only federal appellate ruling to address the issue of public-school use of churches for graduations. Nor have there been any new federal appellate rulings on uses of houses of worship for other governmental events or activities—uses that

the en banc Seventh Circuit made clear it was not questioning anyway. See BIO 29; Pet App. 4a; see also Pet. App. 39a–41a (Hamilton, J., concurring).

Indeed, the only new development (other than *Greece*) cited by the School District consists of reports that two school districts—out of the more than 13,500 across the country (*see* Center for Education Reform, *K-12 Facts*, http://www.edreform.com/2012/04/k-12-facts/ (May 7, 2014))—recently stopped holding their commencement ceremonies in churches. Pet'r's Supp. Br. 6–7. Of course school districts may pay attention to legal developments in setting policies, but that is not a reason for the Court to prematurely use its scarce resources to review an issue in the absence of a circuit split. The Court would benefit greatly by waiting to see how other circuits analyze the matter, as the Court did before granting review on the topic considered in *Greece*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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