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.,

Respondents.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.8, petitioner submits this supplemental brief to address the relevance of *Town of Greece* v. *Galloway*, No. 12-696, slip op. (May 5, 2014), which rejected an Establishment Clause challenge to a town's practice of opening its monthly meetings with prayer. *Greece* underscores how the decision below conflicts with this Court's decisions and highlights the need for plenary review.

ARGUMENT

In the decision below, a divided *en banc* Seventh Circuit held that a school district's decision to hold a high school graduation in a church containing "sectarian" symbols violated the Establishment Clause even though that choice was based entirely on secular considerations of convenience, cost, and comfort. The decision was based on the theory that it is unconstitutionally coercive to expose persons to sectarian symbols, and that this constitutes an unconstitutional endorsement of religion. Despite the fact that most courts have decided this issue the other way, the decision below is having serious practical effects on school districts throughout the nation.

In *Greece*, this Court granted certiorari to address the application of the endorsement test to government practices that are predicated on a neutral basis but might be misperceived as an endorsement. At the merits stage, the respondents apparently abandoned the endorsement theory on which the lower court decision had rested, and the Court's opinion primarily focused on coercion. *Greece* held that it is *not* unconstitutionally coercive to expose persons to sectarian prayers, where they are not required to participate in

the prayers. That holding cannot be squared with the Seventh Circuit's theory that it is unconstitutionally coercive to expose persons to inert religious symbols.

Since the Seventh Circuit's coercion analysis is fundamentally at odds with *Greece*, its decision must at the very least be vacated. But the Seventh Circuit decision was also premised on the theory that the graduation constituted an unconstitutional endorsement of religion. According to the Seventh Circuit, the coercion and endorsement analyses are interrelated and "two sides of the same coin," because "it is a mistake to view . . . coercion . . . as divorced from the problem of government endorsement of religion." App. 29a. Given the importance of the issue and the lingering confusion in the lower courts, the Court would be well-served to grant the petition now rather than allow the conflict and confusion to worsen.

A. *Greece* involved an Establishment Clause challenge to a town's practice of opening its monthly meetings with a prayer. The plaintiffs argued that the prayers were unconstitutional because they contained "sectarian content" and involved "subtle coercive pressures" to participate. *Greece*, Slip Op. 9.

This Court reversed. On the question of sectarian content, the Court held that once the government permits legislative prayer, it "must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian." *Id.* at 14. The government cannot "mandate a civic religion that stifles any but the most generic reference to the sacred." *Id.* at 13. This aspect of the holding conflicts with the Seventh Circuit's judgment that the furnishings of the church were too "pervasively Christian" to

permit the school to use that church as the venue for a civic event. App. 24a.

On the question of coercion, the plurality held that "[o]ffense . . . does not equate to coercion," and that legislative bodies generally "do not engage in impermissible coercion merely by exposing constituents to prayer they would rather not hear and in which they need not participate." Slip Op. 21-22. Justices Thomas and Scalia would have gone further, arguing that "to the extent coercion is relevant to the Establishment Clause analysis, it is actual legal coercion that counts—not the 'subtle coercive pressures' allegedly felt by respondents in this case." Opinion of Thomas, J., at 7. The Seventh Circuit's decision is squarely inconsistent with the reasoning in *Greece*.

B. *Greece* highlights the conflict between the decision below and this Court's cases. As explained in the Petition, this case implicates three important circuit splits: (1) a split over the use of church space for government functions, Pet. 11-14; Reply at 3-5; (2) a split over the scope of the "coercion" test, Pet. 17-18; Reply at 6; and (3) a split over the scope of the "endorsement" test. Pet. 25-29; Reply at 8-9. All three merit this Court's intervention, especially in light of *Greece*.

1. The decision below cannot be reconciled with *Greece*. Just as the government cannot "require chaplains to redact the religious content from their message in order to make it acceptable for the public sphere," Slip Op. 13, so also the government cannot require a church to redact the religious symbols from its walls to make it fit for public events. Otherwise, the government would be "mandat[ing] a civic religion that stifles any but the most generic reference to the sacred." *Ibid.* Yet that is precisely what the Sev-

enth Circuit would mandate in disqualifying the Elmbrook Church based on the "sheer religiosity of the space." App. 25a.

The decision below also conflicts with *Greece*'s admonition that "the Establishment Clause must be interpreted by reference to historical practices and understandings." Slip Op. 7-8 (internal quotation omitted). As noted in the Petition (at 34), local governments have used church property for secular public events like town meetings since the earliest days of the Republic. And local governments have used churches for graduation for at least 98 years. *State ex rel. Conway v. District Board of Joint School District No. 6*, 156 N.W. 477, 480 (Wis. 1916). By "sweep[ing] away what has so long been settled," the decision below serves only to "create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Greece*, Slip. Op. 8.

2. *Greece* reaffirms the understanding of coercion rejected by the Seventh Circuit. Indeed, it holds that there might be no unconstitutional coercion *even when the government sponsors a religious activity*. *Id.* at 18-23. Here, where there is no religious activity at all, the result under the coercion test should be even easier. But see App. 29a (ruling against the school district, despite the fact that "*Lee* and *Santa Fe* focus on the problem of coerced religious *activity*," and "the school district did not coerce overt religious activity") (emphasis original).

3. More worrisome is the fact that the Seventh Circuit decision rested on endorsement as well as coercion, even though the analytical problem with the position is the same, regardless of the label. Because

the *Greece* respondents seemingly abandoned reliance on the endorsement logic on which they had prevailed below, and this Court therefore did not address the endorsement test except in passing, the Seventh Circuit may unjustifiably interpret *Greece* as leaving untouched its endorsement analysis. More broadly, because lower courts routinely analyze Establishment Clause questions involving exposure to religious symbols under the endorsement test of *County of Allegheny*, it is likely that the same misconceptions that produced the lower court decision in *Greece* will continue to dominate the field.

Notably, although the Second Circuit rested its decision squarely on the endorsement test, *Galloway* v. *Town of Greece*, 681 F.3d 20, 30 (2d Cir. 2012), this Court reversed the Second Circuit without applying it. When the Court briefly mentioned endorsement, it was only to note that that "[f]our dissenting Justices [in *County of Allegheny*] disputed that endorsement could be the proper test," and to repudiate "dictum in *County of Allegheny*" suggesting that the content of legislative prayer should be judged by the endorsement test. Slip Op. 11-12. Given the division over the endorsement test in the lower courts, and its cool reception in this Court (Pet. 22-24), the lower court's aggressive expansion of that test in this case is particularly troubling.

C. While the Seventh Circuit's decision must be vacated at the very least, petitioner respectfully submits that it would be more appropriate for this Court to grant plenary review rather than merely remand for further consideration in light of *Greece*. Plenary review is appropriate both because of the urgency and importance of the questions presented, and because of continuing division in the lower courts.

Respondents agree that the questions presented are important. BIO 30. So do at least fifteen states and six state and national education associations, which have explained how the decision below creates "significant practical and financial problems for school districts," American Association of School Administrators *Amici* Br. at 23, and "profound consequences for all levels of state and local government," Texas *et al. Amici* Br. at 2. Further delaying resolution of this case will only exacerbate these problems—particularly when local governments have a strong incentive to avoid litigating such issues to completion.

As we have explained, many school districts hold graduations in churches. Pet. 31; App. 228a; American Association of School Administrators *Amici* Br. at 17-22. But because of the cost of litigation and threat of attorneys' fees, local governments are quick to cave when threatened with lawsuits. Pet. 31-32 (citing multiple settlements); Reply at 12; see also *Greece*, Opinion of Alito, J., concurring at 7 ("Many local officials, puzzled by our often puzzling Establishment Clause jurisprudence and terrified of the legal fees that may result from a lawsuit claiming a constitutional violation, already think that the safest course is to ensure that local government is a religion-free zone."). Here, for example, Plaintiffs have informed the District that their attorneys' fees prior to the Supreme Court appeal already total $838,486.43—even though the case was resolved on cross-motions for summary judgment and "[n]o discovery was taken." App. 15a-16a.

After the decision below, school districts have only become more uncertain about the constitutional lines in this area. In response to threatened litigation, the

North Canton City Schools recently moved its 2014 graduation from a church auditorium to a civic center, over vehement student and parent complaints. Alison Matas, "*Moving Hoover High School graduation is best legal option*," CantonRep.com, Dec. 26, 2013, *available at* http://tinyurl.com/paal44o. The school superintendent says he is "waiting for the [Supreme Court's] definitive answer—if the court chooses to hear th[is] case." *Ibid.*

Similarly, shortly after the decision below, twelve high schools near Atlanta moved their graduation ceremonies from church auditoriums to different venues—even without facing any new threats of litigation. Ty Tagami & Nancy Badertscher, "*DeKalb shuns churches for all graduation ceremonies*," Atlanta Journal-Constitution, May 24, 2013, at B1. The district now says it will hold ceremonies in churches only if the churches do not "display[] symbols of worship," *id.*—thus discriminating against "pervasively religious" venues, just as the dissenters predicted. App. 58a (Ripple, J.); App. 78a (Posner, J.); Pet. 21.

Nor is the decision below limited to schools. As the States *amici* have explained, it invites litigation over the use of churches for "many government functions"—including "polling places," "government-sponsored public meetings," "emergency shelter[s]," "government food-distribution programs," and other "vital [social] services." Texas *et al. Amici* Br. at 7-9.

Lower courts continue to be confused and divided over the important constitutional questions presented by this case. There is no reason to allow the division to fester—especially when the practical consequences are already "profound," *ibid.* at 2, and local governments have a strong financial incentive to capitulate.

CONCLUSION

For these reasons, and those in the petition for certiorari and reply brief in support of certiorari, the petition for certiorari should be granted and set for plenary review. Alternatively, at a minimum, the petition should be granted so that the decision below may be vacated and the case remanded for further consideration in light of *Greece*.

Respectfully submitted,

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