No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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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.

RULE 14.1(b) STATEMENT

Petitioner is the Elmbrook School District (the "District"), a municipal public school district in Brookfield, Wisconsin. The District was defendant-appellee before the *en banc* court of appeals below.

Respondents (the "Does") are past and present District students and their parents. Respondents were plaintiffs-appellants below. Respondents were permitted to bring this litigation pseudonymously in the courts below. Petitioners' Appendix 111a ("App.").

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the *en banc* court of appeals appears at 687 F.3d 840. App. 1a. The panel opinion appears at 658 F.3d 710. App. 83a. The opinion of the district court is unpublished but electronically reported at 2010 WL 2854287. App. 146a.

JURISDICTION

The court of appeals panel rendered its decision on September 9, 2011. The court of appeals granted Respondents' petition for rehearing *en banc* and reversed the panel in an opinion dated July 23, 2012. On October 4, 2012, Justice Kagan extended the time for filing a petition for certiorari to and including December 20, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion * * * ." U.S. Const. amend. I.

STATEMENT

The *en banc* Seventh Circuit held that a school district violated the Establishment Clause by holding graduation events in a church auditorium, notwithstanding the undisputed facts that the graduation events were entirely secular and that the district selected the church auditorium because it regarded this

venue as the best and most cost-effective available. According to the *en banc* court, "[r]egardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive * * * a message of endorsement." App. 25a-26a. The court then determined that using church space was "religiously coercive" because "[o]nce the school district creates a captive audience, the coercive potential of endorsement can operate." App. 30a.

This ruling conflicts with the decisions of other circuits and state supreme courts upholding the use of churches for graduations and other public functions. If allowed to stand, it would unsettle longstanding practices in public schools across the country and expose governments to liability for a host of common practices. It also departs from this Court's precedents under the Establishment Clause. As Chief Judge Easterbrook and Judges Posner and Ripple explained (in separate dissents), the *en banc* court "'has decided an important federal question in a way that conflicts with relevant decisions' of the Supreme Court of the United States." App. 45a (Ripple, J., dissenting) (quoting S. Ct. R. 10(c)). The petition for a writ of certiorari should be granted.

1. The Elmbrook School District is a public school district centered around Brookfield, a suburb west of Milwaukee in Waukesha County, Wisconsin. App. 5a. The District operates two major high schools, Brookfield Central and Brookfield East. *Ibid.*

Before 2000, both high schools conducted graduations in the schools' gymnasia. In late 1999, the senior class officers at Brookfield Central wrote a letter

to the District superintendent, asking that graduation be moved to the auditorium of a local church, which was conveniently located and had ample parking, comfortable seating, and air conditioning.

The students made this request because they found the gymnasium to be hot, cramped, and uncomfortable. App. 6a. It lacked air conditioning and contained only folding chairs and wooden bleachers for seating, "caus[ing] the atmosphere to be very busy and perhaps even chaotic," with "the temperature in the Gymnasium [becoming] extremely hot in the month of June." App. 7a n.2.

The class officers observed that the auditorium of Elmbrook Church was much larger and had ample free parking. App. 6a. It also offered cushioned seating, air conditioning, and excellent handicapped facilities. *Ibid.* After presenting their proposal to the District superintendent, the class officers also presented the idea to the senior class, which voted overwhelmingly in favor. App. 6a-7a.

The ultimate decision to move graduation was made by the school principal and approved by the District superintendent. After considering several alternative venues, school officials chose the Church, because "no[] [other venue] is as attractive as the Church, particularly for the price." App. 15a. The Church charged a standard rental rate between $2,000 and $2,200 for each graduation and between $500 and $700 for each honors night. Students raised money to contribute to the cost of the rental, and the balance was paid from general District funds.

Two years later, in 2002, a similar process began at Brookfield East. App. 6a. After a majority of seniors voted to use the Church auditorium, the school

principal agreed. App. 7a. In every year that graduating seniors participated in an advisory vote, the students favored the Church auditorium overwhelmingly, with majorities as high as 90 percent. App. 8a n.4.

There is no dispute that the decision to rent the Church auditorium was motivated by a secular purpose. As the court below noted, Respondents "do not argue that the District had a non-secular purpose in choosing the Elmbrook Church for its graduation ceremonies." App. 21a n.16. Although the District superintendent and one member of the school board attended the Church, Respondents have not alleged that either attempted to benefit the Church. App. 8a.

2. Elmbrook Church is a non-denominational, evangelical Christian church. App. 6a. Evangelicals make up about 18% of the population of Waukesha County, greatly outnumbered by Roman Catholics (29%) and the unaffiliated (40%). See Ass'n of Religion Data Archives, County Membership Report, Waukesha County, Wisconsin: Religious Traditions, 2010, *available at* http://www.thearda.com/rcms2010/r/c/55/rcms2010_55133_county_name_2010.asp. The Church holds its weekly worship services in a space variously referred to as the "sanctuary," the "Sanctuary/Auditorium," or the "auditorium." App. 6a n.1.

Like many churches, the building incorporates a cross as a structural element of its roof; a second cross appears at the front of the auditorium. Hymnals and Bibles are available in the pews, and the lobby contains artwork and pamphlets bearing religious messages. Signs outside of the Church also contain crosses, as do some window etchings. App. 9a-12a.

For the graduations, the Church removed all non-permanent religious symbols from the dais at the

District's request. But the Church has a policy of not covering permanent religious symbols. App. 11a. During the first year that Brookfield Central rented the auditorium, the cross was covered, apparently inadvertently. In following years, the cross remained visible in keeping with Church policy. *Ibid.*

Students and school officials conducted the graduation exercises without participation by the Church. It is undisputed that the graduations themselves contained no religious content. No invocations or prayers were ever offered, and no religious references were ever made. App. 13a; App. 48a (Ripple, J., dissenting). During one graduation in 2002, some Church members offered religious literature in the lobby, but there is no evidence that this ever recurred. App. 11a. During other graduations, Church members staffed information booths containing religious literature in the lobby. One respondent alleged that church volunteers handed out "graduation materials" at one event, but these materials had no religious content. *Ibid.*

3. Respondents are nine current or former District students or their parents, some of whom have attended past graduations at the Church and assert that they "felt uncomfortable, upset, offended, unwelcome, and/or angry" because of the religious setting. App. 14a-15a. On April 22, 2009, Respondents filed suit in the United States District Court for the Eastern District of Wisconsin, App. 15a, arguing that holding graduation events in the Church auditorium violated the First and Fourteenth Amendments to the United States Constitution. In addition to compensatory and nominal damages, they sought a preliminary injunction against the District's holding its 2009 graduation at Elmbrook Church. App. 2a. The district court denied Respondents' motion for a preliminary

injunction.

Respondents then sought a permanent injunction barring the District from conducting future graduations, or any other school event, at Elmbrook Church or any other religious venue. App. 15a. In the alternative, they sought a permanent injunction barring the District from conducting school events at Elmbrook Church unless all visible religious symbols were covered or removed. They also sought a declaratory judgment, nominal and compensatory damages, and attorneys' fees.

Neither party contended that there were any disputed questions of material fact. On cross motions for summary judgment, the district court ruled in favor of the District. As the court explained, the "motivating factors for moving graduation to [the Church]" were "the shortcomings of the District's then-current facilities, along with the Church's modern amenities, close location, and reasonable cost." App. 171a. Although Respondents claimed that several alternative locations could have hosted the graduations, the district court concluded that "nothing in the record suggests that any of the alternative locations suggested by the plaintiffs are equal or superior to the Church in terms of amenities, convenience, and costs." App. 172a. Thus, the court held that "the reasonable observer would fairly understand that the District's use of the Church for these events is based on real and practical concerns, and not an impermissible endorsement of religion." App. 173a.

While the case was pending in the district court, the District stopped using the Church auditorium. App. 13a. As the District superintendent explained in a letter, "[t]he long term plan" had always been "to

construct gymnasiums that have the capacity and amenities to return our graduation exercises to their local campuses." App. 156a. That plan came to fruition in 2009, with the construction of a new, 3,500-seat, air-conditioned field house at Brookfield East, which became the site of both schools' graduations, and renovations to the gymnasia at both high schools. Brookfield Central, which had previously held its Senior Honors Night in the Church's chapel, moved that event to the school's new gymnasium.

4. A panel of the Seventh Circuit affirmed, concluding that renting the Church auditorium neither coerced religious practice nor endorsed religion. The Seventh Circuit held that the case is not moot. App. 99a-103a. Respondents "have live claims for damages" for past unconstitutional conduct, and the District "[ha]s not * * * rule[d] out using the Church in the future should the need arise." App. 99a, 102a. On the issue of coercion, the panel distinguished between cases involving coerced religious practice, see *Lee* v. *Weisman*, 505 U.S. 577 (1992), and those in which a person is merely exposed to religious symbols. App. 113a-122a. As the court explained, the religious symbols in this case were "purely passive and incidental to attendance at an entirely secular ceremony," and "the Establishment Clause does not shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe." App. 118a.

The panel also held that renting the Church auditorium did not endorse religion. Although a graduation attendee "undoubtedly would be aware of the religious nature of the setting," the panel reasoned, "an objective observer would understand the religious symbols and messages in the building and on Church grounds to be part of the underlying setting as the

District found it rather than as an expression of adherence or approval by the school." App. 126a. Judge Flaum dissented. App. 134a (Flaum, J., dissenting).

After Respondents petitioned for rehearing, the *en banc* court of appeals reversed. Although its opinion began by stressing the "limited scope" of its judgment and the importance of factual context, App. 3a, it adopted a legal analysis that broadly prohibits conducting government functions in church buildings. The court acknowledged that the District had a secular purpose in choosing the church auditorium as the graduation venue, App. 21a n.15, that the venue was chosen for reasons of secular convenience, and that the graduation itself conveyed no religious messages. Nonetheless, the court held that bringing "seminal schoolhouse events to a church * * * *necessarily* conveys a message of endorsement." App. 20a-21a (emphasis added). Thus, "[r]egardless of the purpose of school administrators in choosing the location, the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state." App. 25a (footnote omitted).

The court also held that "the District's decision to use Elmbrook Church for graduations was religiously coercive under *Lee* and *Sante Fe*." App. 28a. Although the court acknowledged that "*Lee* and *Santa Fe* focus on the problem of coerced religious *activity*," and "the school district did not coerce overt religious activity," App. 29a, the court nevertheless held that this distinction was not meaningful, because coercion and endorsement "are two sides of the same coin." *Ibid.* Because the graduating students were "a captive audience," the "message of endorsement carried an impermissible aspect of coercion." App. 30a, 32a. The

court also viewed the graduation exercise as religiously coercive because the District, by holding graduation at the Church, had "'force[d] * * * a person to go to or to remain away from church against his will.'" App. 30a (quoting *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947)).

Judge Ripple, Chief Judge Easterbrook, and Judge Posner each dissented. Judge Ripple argued that the *en banc* opinion "rests on [an] extension of the Supreme Court's decisions in *Lee* and *Santa Fe* beyond the boundaries of their rationales," and thus resolved "'an important federal question in a way that conflicts with relevant decisions' of the Supreme Court of the United States." App. 45a (Ripple, J., dissenting).

Chief Judge Easterbrook noted that the "only message a reasonable observer would perceive is that comfortable space is preferable to cramped, overheated space. * * * No reasonable observer believes that renting an auditorium for a day endorses the way the landlord uses that space the other 364 days." App. 61a-62a (Easterbrook, C.J., dissenting). He also criticized the majority for conflating endorsement and coercion. App. 63a.

Judge Posner explained that "[t]he idea that mere exposure to religious imagery, with no accompanying proselytizing, is a form of religious establishment has no factual support, as well as being implausible." App. 75a (Posner, J., dissenting). Rather, the District was "simply treating religious property owners like their closest secular counterparts." App. 72a.

All three dissenters agreed that the majority's decision conflicted with the decisions of other circuits upholding the use of churches as polling places: "If graduation in a church is forbidden because renting a

religious venue endorses religion, * * * then renting a religious venue for voting must be equally unconstitutional." App. 65a (Easterbrook, C.J., dissenting); App. 78a (Posner, J., dissenting); App. 57a (Ripple, J., dissenting). They also agreed that "[t]he likely effects of [the majority's] decision" are to "depriv[e] [students and families] of the best site for their high school graduation" and "to initiate what federal law does not need: a jurisprudence of permissible versus impermissible rentals of church space to public schools and other public entities." App. 77a (Posner, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court has consistently maintained a distinction between the "coercion" test and the "endorsement" test under the Establishment Clause, reserving the coercion test for cases in which individuals are subjected to official pressure to engage in a religious practice or activity, and the endorsement test for cases in which the government itself favors or promotes a particular religious message to the detriment of others. The Seventh Circuit collapsed the distinction between the two lines of analysis by holding that mere exposure to passive religious symbols constitutes "coercion," and that entirely neutral government conduct constitutes unconstitutional "endorsement." The result is a rule against conducting public functions in a church building, even for reasons of secular convenience.

That holding conflicts with long-standing, practical, and entirely legitimate governmental practices and conflicts with federal appellate and state supreme court decisions governing both graduations in particular and governmental functions more general-

ly. Doctrinally, the decision contradicts this Court's "coercion" and "endorsement" jurisprudence and creates or widens splits in the circuits over how these doctrines operate.

I. The Decision Below Conflicts with Other Circuits and State Supreme Courts on the Constitutionality of Using Church Space for Government Functions.

The *en banc* majority held that the government "necessarily conveys a message of endorsement" by using a church for "seminal" public functions. App. 20a-21a. It also held that conducting a government function in a church building "force[s] [or] influence[s] a person to go to or to remain away from church against his will." App. 30a. Taken together, these holdings establish a broad rule against conducting government functions in a church building, regardless of the government's reasons for doing so.

These holdings conflict with the decisions of other circuits and state supreme courts, which have repeatedly upheld the use of church buildings for government purposes—including graduation venues, classrooms, polling places, and post offices. Contrary to the decision below, the coercion doctrine applies only to pressure to engage in religious practices, not to mere exposure to religious messages. And the prohibition on requiring a person to "go to church" is about compulsory attendance at religious worship services; it has no application to walking into a church building for secular reasons, such as voting or attending graduation.

1. In *Bauchman for Bauchman* v. *West High School*, 132 F.3d 542, 553 n.8 (10th Cir. 1997), the Tenth Circuit considered whether a public high

school violated the Establishment Clause by holding performances of the school choir "at sites dominated by crosses and other religious images." 132 F.3d at 555. Like Respondents here, the plaintiffs argued that conducting school events in a church constituted both "coercion" and "endorsement" in violation of the Establishment Clause. The Tenth Circuit, however, rejected both arguments. It rejected the coercion argument because the performances did not involve "a religious activity analogous to [the prayers] addressed in *Lee*." *Id.* at 552 n.8. And it rejected the endorsement argument because a reasonable observer would view the school's actions "in context and in their entirety," and would know that churches "often are acoustically superior to high school auditoriums or gymnasiums, yet still provide adequate seating." *Id.* at 554-555.

Two state supreme courts have also upheld the use of churches for graduations. In *State ex rel. Conway* v. *District Board of Joint School District No. 6*, 156 N.W. 477, 480 (Wis. 1916), the plaintiffs argued that the use of churches for graduation constituted a "preference" for religion and forced them to attend a church against their will and in violation of the Wisconsin Constitution, which gives the state less "flexibility" than the federal Establishment Clause. See *State ex rel. Reynolds* v. *Nusbaum*, 115 N.W.2d 761, 769-770 (Wis. 1962). The Wisconsin Supreme Court, however, rejected both arguments. It noted that "[o]ften in smaller places church auditoriums are more commodious and better calculated to take care of the overflow crowds that congregate at [graduation]," and that it would be "farfetched * * * to say that * * * [students] are [thus] compelled to attend a place of worship." *Conway*, 156 N.W. at 480. The New

Mexico Supreme Court reached the same result under the federal Constitution in *Miller* v. *Cooper*, 244 P.2d 520 (N.M. 1952).

In *School District of Hartington* v. *Nebraska State Board of Education*, 195 N.W.2d 161 (Neb.), *cert. denied*, 409 U.S. 921 (1972), the Nebraska Supreme Court upheld a school district's rental and use of classrooms in a Catholic school. Although the lease required religious objects to be removed from the classrooms, *id.* at 162, students doubtless encountered religious imagery as they attended class "amidst the daily affairs of [the] religious school," *id.* at 168 (White, C.J., dissenting). Nevertheless, the court reasoned that "[i]f the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation." *Id.* at 163; see also 409 U.S. at 925-926 (Brennan, J., concurring in denial of certiorari) (approving "an arrangement motivated solely by the lack of space in the public schools"). The *en banc* decision cannot be reconciled with these cases.

2. The *en banc* decision also conflicts with the decisions of other circuits upholding the use of churches as polling places. In *Otero* v. *State Election Board of Oklahoma*, 975 F.2d 738 (10th Cir. 1992), the Tenth Circuit considered whether a state violated the Establishment Clause by locating polling places inside churches. The plaintiff claimed that his beliefs did not permit him to enter a church to vote. *Id.* at 740-741. The Tenth Circuit, however, rejected the claim. It held that the use of churches furthered the secular purpose of providing "a conveniently located [polling] place." *Id.* at 740. Moreover, it held that the plaintiff failed to show "that an excessive rent is being paid for

these polling places or that the defendants are attempting to promote a particular religion or religion in general." *Id.* at 741.

The Second Circuit reached the same result in *Berman* v. *Board of Elections*, 420 F.2d 684 (2d Cir. 1969) (*per curiam*), rejecting a challenge by an Orthodox Jew to a law that required him to vote in a church or vote by absentee ballot. See also *Cooper* v. *U.S. Postal Serv.*, 577 F.3d 479, 496 (2d Cir. 2009) (noting that customers across the country patronize contract postal units in "churches or synagogues or monasteries or mosques" and in so doing encounter "ecclesiastical architecture, schedules of religious services, and religious iconography or statuary"), *cert. denied*, 130 S. Ct. 1688 (2010).

The *en banc* decision's logic would invalidate the common practice of locating polling places in a church. App. 65a (Easterbrook, C.J., dissenting); App. 78a (Posner, J., dissenting); App. 57a (Ripple, J., dissenting). In many residential areas, churches are the only facilities amenable to serving as polling places. Yet these churches are often just as "'pervasively religious' as Elmbrook Church," App. 65a (Easterbrook, C.J., dissenting) (quoting App. 31a), and "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." App. 65a. Indeed, as the dissenters explained, graduation presents an easier case than voting in a church, because "there is no more basic function of a civil community than the act of casting a ballot." App. 57a (Ripple, J., dissenting).

II. The Decision Below Conflicts with Decisions of This Court and Other Circuits on the Scope and Meaning of Religious "Coercion."

The *en banc* decision also dramatically expands the doctrine of religious "coercion" beyond governmental pressure to engage in religious practices, to encompass mere exposure to religious symbols. Establishment Clause jurisprudence distinguishes between "coercion," which is the use of government power to pressure or induce persons to engage in religious practices, and "endorsement," which involves governmental promotion of or favoritism toward some religious messages over other religious or secular perspectives. The former, it is widely agreed, implicates the core of the Establishment Clause. There has been significant disagreement both among Justices of this Court and in the academy over when, if ever, mere governmental endorsement is unconstitutional. No Justice of this Court has ever taken the position that mere exposure to religious symbols, on an episodic basis, amounts to coercion within the meaning of the Establishment Clause. The Seventh Circuit's decision collapses coercion into endorsement.

Although the *en banc* court acknowledged that "the school district did not coerce overt religious activity," it nevertheless held that incidental exposure to religious symbols constituted coercion, because coercion and endorsement "are two sides of the same coin." App. 29a. That analysis cannot be squared with *Lee* or *Santa Fe* or the decisions of other circuits.

1. Both *Lee* and *Santa Fe* involved government-sponsored religious activities. *Lee* involved school-sponsored prayer by clergy at a high school graduation. 505 U.S. 577. *Santa Fe* involved school-

sanctioned prayer by a student at a high school football game. 530 U.S. 290. In both cases, the Court explained that "the State affirmatively sponsor[ed] *the particular religious practice of prayer*." *Id.* at 313 (emphasis added); *Lee*, 505 U.S. at 586 ("These dominant facts mark and control the confines of our decision: State officials direct the performance of a *formal religious exercise* at [graduation].") (emphasis added).

Here, the graduations were devoid of prayer or any other religious activities. As the majority conceded: "*Lee* and *Santa Fe* focus on the problem of coerced religious *activity*," but "the school district did not coerce overt religious activity." Pet App. 29a. Nevertheless, the court held that some students might "observe[] classmates at a graduation event * * * meditating on [the Church's] symbols" and feel "subtle pressure to honor the day in a similar manner." App. 30a-31a. That remarkably overbroad holding threatens the constitutionally protected right of students and other private persons to engage in religious observances in a public context. If it is unconstitutionally coercive for students to observe their classmates meditating on religious symbols, it must be unconstitutionally coercive for students to see classmates saying grace before meals, praying before a test, reading the Bible during quiet reading period, or meeting after school for Bible study or prayer. But see *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98 (2001) (exclusion of religious club from meeting after school hours violated Free Speech Clause); *Board of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226 (1990) (upholding equal access for Christian club). This would be a revolution in First Amendment jurisprudence. It is fundamental that the Establishment Clause protects against govern-

mental power, not private speech in a public context. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (noting "the critical 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"); *Lee*, 505 U.S. at 598 ("The First Amendment does not prohibit practices * * * which do not * * * directly or substantially involve the state in religious exercises.") (quotation omitted).

2. The majority's analysis also creates a circuit split over the meaning of "coercion" under the Establishment Clause. Following *Lee* and *Santa Fe*, the Fifth, Ninth, Fourth, and Tenth Circuits have explained that impermissible coercion occurs only when "(1) the government directs (2) a *formal religious exercise* (3) in such a way as to oblige the participation of objectors." *Croft* v. *Perry*, 624 F.3d 157, 169 (5th Cir. 2010) (quotation omitted; emphasis added); accord *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038 (9th Cir. 2010) (reciting the Pledge of Allegiance does not coerce students to participate in a "religious exercise"); *Myers* v. *Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005) ("The indirect coercion analysis discussed in *Lee*, [*Sch. Dist of Abington Twp.* v.] *Schempp*, [374 U.S. 203 (1963)] and *Engel* [v. *Vitale*, 370 U.S. 421 (1962)] simply is not relevant in cases, like this one, challenging non-religious activities."); *Bauchman*, 132 F.3d at 553 n.8 ("[A] coercion analysis [under *Lee*] is inapplicable" absent "*a religious activity* analogous to that addressed in *Lee* or other school prayer cases.") (emphasis added).

Had the *en banc* court accepted the recognized de-

finition of coercion, it could not have held that conducting a graduation in a church auditorium coerces students. The opinion below acknowledges that "the school district did not coerce overt religious activity." App. 29a. Yet the same opinion determined that "[o]nce the school district creates a captive audience, the coercive potential of endorsement can operate," App. 30a, thereby watering down the concept of "coercion" in direct conflict with other circuits.

III. The Decision Below Conflicts with Decisions of This Court and Other Circuits on the Scope and Meaning of Religious "Endorsement."

The *en banc* decision also exacerbates widespread confusion and division over the endorsement test. Although the majority acknowledged that the District chose the Church on a religion-neutral basis, it nevertheless held that "the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive * * * a message of endorsement." App. 25a. This holding conflicts with decisions of this Court and other circuits. The "religiosity" of the church building is a matter of private choice, protected by the Free Exercise Clause. The Establishment Clause protects against *governmental* conveyance of religious messages and *governmental* favoritism or promotion of religion. If the government has conveyed no religious messages (as is undisputed here) and the government chose the graduation venue on entirely secular and neutral grounds (as is also undisputed here), the fact that a church is imbued with "religiosity" is unexceptional and beside the point.

A. The Decision Below Conflicts With This Court's Decisions on the "Endorsement" Test.

1. The *en banc* court's analysis started off on the wrong foot because the "endorsement" test applies only when there is (a) government religious expression or (b) government favoritism toward religion. In *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753 (1995), a plurality of this Court determined that "'[e]ndorsement' connotes an expression or demonstration of approval or support"; accordingly, the Court's cases have "equated 'endorsement' with 'promotion' or 'favoritism.'" *Id.* at 763 (citing The New Shorter Oxford English Dictionary 818 (1993); Webster's New Dictionary 845 (2d ed. 1950)). The plurality explained that it was "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the *same access* to a public forum that all other displays enjoy." *Id.* at 763-764 (emphasis added). "[A]s a matter of Establishment Clause jurisprudence, we have consistently held that it is no violation for government to enact neutral policies that happen to benefit religion." *Id.* at 764. By contrast, "[w]here we have tested for endorsement of religion, the subject of the test was either expression *by the government itself*, *Lynch* [v. *Donnelly*, 465 U.S. 668 (1984)], or else government action alleged to *discriminate in favor* of private religious expression or activity." *Ibid.* Thus, the plurality rejected use of the endorsement test, because it "would attribute to a neutrally behaving government *private* religious expression." *Ibid.* Such a test "has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Ibid.*

The *en banc* court applied just such a "transferred

endorsement" test here. Although it acknowledged that the District chose the venue for purely secular reasons and "did not itself adorn the Church," it nevertheless held that students would attribute the religious symbols to the District due to a combination of the "religiosity" of the Church and "the importance of the graduation ceremony." App. 27a. Thus, it "attribute[d] to a neutrally behaving government *private* religious expression." *Pinette*, 515 U.S. at 764. Because religious institutions are typically imbued with "religiosity" and governmental functions are typically important, the Seventh Circuit's holding is essentially that governmental functions may never be conducted in a religious building—even for reasons of secular convenience, where no reasonable observer would attribute the building's displays to the government.

Contrary to the decision below, this Court has repeatedly held that neutral policies do not "endorse" religion. Government may treat religious persons or institutions on a neutral basis, alongside secular persons or institutions. Thus, this Court has upheld programs that provide aid to both religious and nonreligious institutions on a neutral basis. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649 (2002); *Mitchell* v. *Helms*, 530 U.S. 793 (2000) (plurality); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). It has also upheld religious speech in a government forum that is open to religious and nonreligious speech on a neutral basis. See, *e.g.*, *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993). In these cases, if the Court even mentioned "endorsement" at all, it was only to note in passing that treating religious and nonreligious entities in a neutral fashion does not constitute endorsement. *Zobrest*,

509 U.S. 1 (no mention of endorsement); *Mitchell*, 530 U.S. 793 (plurality) (same); *Pinette*, 515 U.S. at 764 (plurality) (rejecting endorsement); *Zelman*, 536 U.S. at 652 ("[W]here a government aid program is neutral with respect to religion, * * * the perceived endorsement of a religious message * * * is reasonably attributable to the individual recipient, not to the government."); *Lamb's Chapel*, 508 U.S. at 395 ("no realistic danger [of endorsement]" where "[t]he District property had repeatedly been used by a wide variety of private organizations").

Although the *en banc* court paid lip service to this neutrality principle, App. 19a (quoting *McCreary Cnty.*, 545 U.S. at 860), its analysis has precisely the opposite effect. As the three separate dissents pointed out, after the *en banc* court's decision, a school district can no longer compare religious and nonreligious venues on a neutral basis and choose the venue that best meets its needs; rather, it must "assess the iconography of the churches that compete to rent space," App. 78a (Posner, J., dissenting), and "avoid[] any association with a 'pervasively religious' organization," App. 58a (Ripple, J., dissenting). Thus, contrary to this Court's cases, the lower court's ruling requires the government to discriminate *against* religion.

When the government has behaved neutrally, as is undisputed here, it is a great leap to claim that it has "endorsed" religion. The foundation of the "endorsement" concept is Justice O'Connor's observation that governmental endorsement of a particular religious position "sends a message to non-adherents that they are outsiders, not full members of the political community." *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). That is true only when the government conveys a message that a

particular religious persuasion is preferred or "favored" and that others are "disfavored." *Id.* at 688 n.1. The Seventh Circuit's notion that an entirely *neutral* position could "endorse religion" is baffling. No venue has a constitutional right to be selected for graduations. But to choose one on account of being religious, or to exclude another on account of being religious, would equally convey a message of favored or disfavored status. The Seventh Circuit's categorical exclusion of religious venues "partake[s] not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (1963) (Goldberg, J., concurring). Such results, as Justice Goldberg presciently insisted in the first school prayer decision, "are not only not compelled by the Constitution, but, it seems to me, are prohibited by it." *Ibid.* A posture of "benevolent neutrality"—the message that religion is a worthy and commendable part of our pluralistic culture—does not offend the First Amendment. The government does not have to treat religious venues as if they were diseased and uniquely unsuitable for public functions.

2. The *en banc* court's expansive interpretation of the endorsement test is all the more troubling because that test has been repeatedly criticized as "flawed in its fundamentals and unworkable in practice." *Allegheny*, 492 U.S. at 669 (Kennedy, J., dissenting). Five Justices have called for its rejection—Justices Kennedy, Scalia, Thomas, and White, and Chief Justice Rehnquist. See *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment and dissenting in part, joined by Rehnquist, C.J., White and

Scalia, JJ.) ("The uncritical adoption of [the endorsement test] is every bit as troubling as the bizarre result it produces in the cases before us."); *Pinette*, 515 U.S. at 768 n.3 (plurality opinion, Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.) ("[The endorsement test] supplies no standard whatsoever * * * * It is irresponsible to make the Nation's legislators walk this minefield.").

Three more Justices have questioned the endorsement test's validity—Chief Justice Roberts and Justices Breyer and Alito. See *Salazar* v. *Buono*, 130 S. Ct. 1803, 1819 (2010) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) ("Even if [the endorsement test] were the appropriate one, but see [criticism of the endorsement test in *Allegheny* and *Pinette*] * * *"); *id.* at 1824 (Alito, J., concurring) ("Assuming that it is appropriate to apply the so-called 'endorsement test,' this test would not be violated [here]."); *Van Orden* v. *Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the endorsement test and stating that "I see no test-related substitute for the exercise of legal judgment").

Indeed, a majority of this Court has relied on the endorsement test to invalidate government action in only two cases, both of which have been subsequently reversed or undermined. *Sch. Dist. of City of Grand Rapids* v. *Ball*, 473 U.S. 373, 391 (1985) (applying endorsement test), *overruled by Agostini* v. *Felton*, 521 U.S. 203 (1997); compare *Allegheny*, 492 U.S. at 592-597 (applying endorsement test), with *Van Orden*, 545 U.S. 677 (ignoring endorsement test); see *Buono*, 130 S. Ct. at 1819 (plurality) (citing criticism of the endorsement test); cf. *Santa Fe*, 530 U.S. at 308, 312 (stating that "endorsement" is "one of the relevant questions" but relying primarily on "impro-

per effect of coercing those present to participate in an act of religious worship"). In recent years, this Court has ignored or rejected the endorsement test far more often than it has applied it. See*, e.g.*, *Pinette*, 515 U.S. at 764 (plurality) (rejecting endorsement test); *Van Orden*, 545 U.S. 677 (ignoring endorsement test); *Lee*, 505 U.S. at 577 (same); *Zobrest*, 509 U.S. 1 (same); *Mitchell*, 530 U.S. 793 (plurality) (same); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687 (1994) (same); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (same).

Rather than following these cases, the Seventh Circuit employed an analysis almost identical to the analysis in *Ball*, 473 U.S. 373, which has been overruled. There, the school district authorized public school teachers to teach secular classes in "leased" classrooms in religious schools. *Id.* at 375. Although the classes were purely secular, and aid was made available on religion-neutral terms, the Court held that the performance of "important educational services" in the "pervasive [religious] atmosphere" would be perceived by schoolchildren as endorsement of religion. *Id.* at 388, 391. Here, similarly, the *en banc* majority held that the "importance of the graduation ceremony" combined with the "sheer religiosity of the space" created a message of endorsement. App. 25a. But this mode of analysis was rejected in *Agostini*, which held that secular instruction provided "on a neutral basis * * * on the premises of sectarian schools * * * cannot reasonably be viewed as an endorsement." 521 U.S. 234-235. The decision below is a throwback to the repudiated reasoning of *Ball*.

B. The Decision Below Exacerbates Acknowledged Circuit Splits Over the "Endorsement" Test.

The *en banc* decision also widens two acknowledged circuit splits over the endorsement test.

1. First, circuits have divided over when the "reasonable observer" would misattribute the actions of third parties to the government. This conflict surfaced in *Pinette*, which involved a private group's placement of a cross in a public forum on the statehouse lawn. A plurality of the Court would have held that private speech in a neutral public forum cannot be attributed to the government and cannot be perceived as endorsement of religion. 515 U.S. at 770. But the concurring and dissenting opinions maintained that a reasonable observer could "mistake" private religious speech for "government speech endorsing religion." *Id.* at 785 (Souter, J., concurring); *id.* at 807 (Stevens, J., dissenting) ("[I]t is enough that *some* reasonable observers would attribute a religious message to the State.").

Like this Court in *Pinette*, lower courts have divided over when the reasonable observer can attribute private conduct to the government. The Fourth, Sixth, Ninth, and Eleventh Circuits have sided with the *Pinette* plurality, concluding that the reasonable observer *cannot* attribute private conduct to the government, as long as the government is treating all forms of private conduct neutrally. See, *e.g.*, *Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 294 (6th Cir. 2009) (rejecting "'any mistaken impression' that the City endorsed any one message" in a neutral funding program); *Peck* v. *Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287

(4th Cir. 1998) (reasonable observer would not "believe that the schools were endorsing or favoring religion" merely because the government permitted private religious expression during school hours); *Chabad-Lubavitch of Ga.* v. *Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (refusing to adopt the perspective of an "uninformed or unreasonable" observer, who would make "an erroneous attribution of private religious speech to the State"); *Kreisner* v. *City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) ("private speech in a traditional public forum" is not "government endorsement of religion").

The Second and Tenth Circuits, by contrast, have sided with the *Pinette* concurrence and dissent, concluding that a reasonable observer *can* mistake private conduct for government endorsement. See, *e.g.*, *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1246 (10th Cir. 2009) (Gorsuch, J., dissenting from denial of rehearing *en banc*) (the majority's reasonable observer "erroneously attributes [private] remarks to the county government") (emphasis omitted); *Kaplan* v. *Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989) (striking down display of private menorah in a public forum because "the City was perceived as fulfilling the role of sponsor").

Here, the *en banc* court sided with the *Pinette* dissent, concluding that students would mistake the Church's private religious message for that of the District. Although the court agreed that "the District did not itself adorn the Church with proselytizing materials," it held that children would attribute the religious symbols to the District because of "the importance of the graduation ceremony" and "the existence of other suitable graduation sites." App. 27a. By contrast, the dissenters sided with the circuits that

have followed the *Pinette* plurality, emphasizing that "the graduates knew well that the iconography belonged to the landlord church, not to their school"; thus, "it would be totally unreasonable for any student to attribute to the District any endorsement of the message of the iconography." App. 50a-51a (Ripple, J., dissenting).

2. The courts of appeals have also divided over how much knowledge to attribute to the reasonable observer. As the *Pinette* plurality observed, it is unclear whether the reasonable observer should be defined as "any beholder (no matter how unknowledgeable), or the average beholder, or * * * the 'ultra-reasonable' beholder." *Pinette*, 515 U.S. at 768 n.3 (emphasis omitted). Because of this ambiguity, "[an] unresolved dispute * * * exists within various circuits and within the Supreme Court as to the proper level of understanding to impute onto our mythical reasonable observer." *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 496 n.2 (7th Cir. 2000).

Particularly in the public school context, there is a division over whether the reasonable observer would be a school child or a mature adult. Cf. *Good News Club*, 533 U.S. at 117 (declining to consider "possible misperceptions of schoolchildren"); *id.* at 142-143 (Souter, J., dissenting) (emphasizing "particular impressionability of schoolchildren"). In *Newdow*, 597 F.3d 1007, the Ninth Circuit considered an Establishment Clause challenge to the recitation of the Pledge of Allegiance. The dissent would have struck down the Pledge using a reasonable observer akin to a young student unfamiliar with the history of the Pledge. *Id.* at 1094 (Reinhardt, J., dissenting). The majority, by contrast, held that "a child's understand-

ing cannot be the basis for our constitutional analysis"; the reasonable observer would be "aware of the history and origins of the words in the Pledge [and] would view the Pledge as a product of this nation's history and political philosophy." *Id.* at 1037-38.

Here, the majority emphasized that the reasonable observer would be "high school students and their younger siblings." App. 23a; see also App. 25a; App. 21a ("special concern with the receptivity of schoolchildren to endorsed religious messages"); App. 24a ("children in attendance"); App. 27a ("presence of children"). According to this analysis, "children in particular" would perceive endorsement based on the "iconic place [of graduation] in American life" and the "sheer religiosity of the space." App. 26a, 31a. The dissents, however, criticized the majority for deeming the reasonable observer to be an uninformed child: "The graduating students, now by virtue of their graduation, must be considered capable of exercising the judgment expected of all reasonable citizens of a democratic polity." App. 51a (Ripple, J., dissenting). Thus, the graduates would understand that the iconography "symbolizes the landlord's view, not the District's view." *Ibid.*

Many cases have involved similar disputes, with circuits sharply dividing over how much knowledge to impute to the reasonable observer. See, *e.g.*, *Modrovich* v. *Allegheny Cnty.*, 385 F.3d 397, 416 (3d Cir. 2004) (Gibson, J., dissenting) (reasonable observer "reads local newspapers as well as local history books," "attend[s] the Allegheny County Council meeting[s]," and would be aware of deposition testimony); *Am. Civil Liberties Union of Ohio Found., Inc.* v. *Ashbrook*, 375 F.3d 484, 504 (6th Cir. 2004) (Batchelder, J., dissenting) (reasonable observer would

know more about "the overall context"); *Ind. Civil Liberties Union* v. *O'Bannon*, 259 F.3d 766, 776 (7th Cir. 2001) (Coffey, J., dissenting) (majority erred by assuming "that a reasonable observer will glance only at a single side [of the monument] or glance only at the side bearing the larger letters"); *Doe* v. *Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 308-309 (5th Cir. 1999) (Garza, J., dissenting) (reasonable observer should have known about "the pertinent legislative text, the legislative history, and the interpretation of the legislation by a responsible administrative agency, as well as about the history and context of the community in which the case has arisen"), *on reh'g en banc*, 240 F.3d 462 (5th Cir. 2001); *Elewski* v. *City of Syracuse*, 123 F.3d 51, 59 n.6 (2d Cir. 1997) (Cabranes, J., dissenting) (majority wrongly assumed "an omniscient observer, whose experience sweeps in not just what is visible to the naked eye * * * but the unseen closed-door meetings of local retailers and politicians"); *Ams. United for Separation of Church & State* v. *City of Grand Rapids*, 980 F.2d 1538, 1558 (6th Cir. 1992) (*en banc*) (Lively, J., dissenting) (reasonable observer "might be a passer-through," who "does not have to be familiar with [the city's] religious demographics, the city's regulations regarding use of the plaza, or past uses to which it has been put").

These disputes further demonstrate the "formless, unanchored, [and] subjective" nature of the endorsement test. App. 66a (Posner, J., dissenting). Courts have flexibility to impute any amount of knowledge to a reasonable observer and to make the reasonable observer draw any inferences about private conduct. Thus, the endorsement test "fails to provide a judicial standard capable of principled application." Jesse H. Choper, *The Endorsement Test: Its Status and Desi-*

rability, 18 J.L. & Pol. 499, 535 (2002).

IV. This Case Presents a Recurring Question of National Importance.

The *en banc* decision threatens to upend a variety of longstanding governmental practices. Most obvious is the practice of hosting public school graduations in rented church facilities—a practice that has been common for decades. But the *en banc* decision also threatens a variety of *other* longstanding government uses of church property—including the use of churches for charter schools, food distribution programs, town meetings, or polling places. As Judge Posner observed, the decision promises a new "jurisprudence of permissible versus impermissible rentals of church space." App. 77a.

1. Public schools often hold graduations in rented space. Because it is common for each graduate to have many guests, "a high school with a relatively small graduating class of 200 students might need to accommodate an audience of more than 2,000." Christine Rienstra Kiracofe, *Going To The Chapel, And We're Gonna . . . Graduate?: Do Public Schools Run Afoul Of The Constitution By Holding Graduation Ceremonies In Church Buildings?*, 266 Ed. L. Rep. 583, 583 (2011). Thus, many graduations occur "in larger, off-campus venues." *Ibid.*; see also *Lee*, 505 U.S. at 583 ("In the Providence school system, most high school graduation ceremonies are conducted away from the school.").

Not uncommonly, the most convenient off-campus venue is a church. As in this case, churches often provide more space, better facilities, and more flexible scheduling for a better price. Kiracofe, *supra*, at 584. In many cases, renting a church costs less than hold-

ing the event on school grounds. Thus, school districts around the country frequently hold graduations in churches. See, *e.g.*, 2012 High School Graduation Schedule, *available at* http://www.scsk12.org/SCS/pages/hsgrad_dates12.html (Tennessee county held all eight high school graduations in churches); *Graduations*, Arkansas Democrat-Gazette, May 6, 2012, *available at* http://www.arkansasonline.com/news/2012/may/06/graduations-20120506-00/?f=rivervalley (listing Arkansas high schools holding graduations at off-site venues including churches); *Images: Wacunda High School Graduation*, Daily Herald, May 20, 2012, *available at* http://www.dailyherald.com/article/20120520/news/705209736/photos/AR/ (Illinois high school held graduation in a church); Soulsville Charter School to Hold First-Ever Graduation With A Bang, *available at* http://www.staxmuseum.com/events/news/view/soulsville-charter-school-to-hold-first-ever-gradu (Tennessee charter school held graduation in a church). Indeed, in their petition for rehearing, Respondents argued that "[t]his case is exceptionally important" precisely because "[n]umerous public schools * * * around the country" hold their graduations in churches. App. 228a.

Nor is this a new practice. As noted above, state supreme courts have consistently upheld it since at least 1916. See *Conway*, 156 N.W. at 480; *Miller*, 244 P.2d 520.

Because of the cost of litigation and threat of attorneys' fees under Section 1988, local governments rarely defend against lawsuits challenging these graduations, however meritless they might ultimately be. Instead, they typically settle. See Americans United for Separation of Church and State, Gradua-

tion Ceremonies in Religious Buildings, *available at* http://www.au.org/tags/graduation-ceremonyreligious-buildings (noting threatened litigation against schools in New York, Georgia, Wisconsin, California, Maryland, and Pennsylvania, and that these schools were unwilling to litigate); Kristen Stoller, *Board to Pay Legal Fees in Settlement*, Hartford Courant, July 24, 2012 (noting $469,610.50 settlement); David Drury, *Graduation Planned at Comcast Theater,* Hartford Courant, Feb. 25, 2010, at B5 (noting selection of new venue after litigation threat); Joan Hellyer, *Tech School Moves Graduation Ceremony*, Bucks County Courier Times, at 5 (same); Laurin Sellers, *Brevard Alters Graduation Sites After Church-State Suit*, Orlando Sentinel, May 14, 2006, at B1 ("After being sued last year, the School Board agreed not to have commencement exercises in churches * * * ."); Kasi K. Addison, *Newark Schools Settle Religious Bias Lawsuit*, NJ.COM, June 9, 2008, *available at* http://www.nj.com/newark/index.ssf/2008/06/newark_schools_settle_religiou.html (noting settlement). Thus, while the question is recurring and important, with dramatic financial consequences for school districts across the country, it rarely gets litigated to completion.

This case presents an excellent vehicle for addressing this vital and recurring question. The material facts are undisputed, and the constitutional question was fully litigated and squarely presented below. Although the District moved graduations to its new field house in 2010, the Seventh Circuit panel rightly held that the case was not moot because Respondents "have live claims for damages," Pet App. 99a, and the District has "refused to state that it would never again hold a graduation in Elmbrook

Church," App. 14a. Thus, as Respondents argued in their petition for rehearing, "this case is not moot." App. 214a n.1.

2. The *en banc* decision calls into question other common government uses of church property—such as for charter schools, town meetings, or polling places on Election Day. See Shelley Ross Saxer, *Government and Religion as Landlord and Tenant*, 58 Rutgers L. Rev. 409 (2006); *Porta* v. *Klagholz*, 19 F. Supp. 2d 290 (D.N.J. 1998) (upholding use of church premises for a charter school). While the *en banc* court sought to stress the "limited scope of this opinion," App. 3a, it also broadly claimed that students were "religiously coerced" because "'[n]either a state nor the Federal Government * * * can force nor influence a person *to go to or to remain away from church* against his will," App. 30a (citation omitted; emphasis added). According to the court, this principle was violated here because the District "direct[ed] students to attend a pervasively Christian, proselytizing environment." *Ibid.* That principle would apply, *a fortiori*, to voting, as well as other public functions, in churches.

As Chief Judge Easterbrook explained in dissent, the *en banc* court "cannot disavow the logical implications of [its] decisions." App. 65a (Easterbrook, C.J., dissenting). "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," since "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." *Ibid.*; see also App. 64a (Posner, J., dissenting). The mere fact that cases involving the Establishment Clause are necessarily "fact-intensive," *Van*

Orden, 545 U.S. at 700 (Breyer, J., concurring), does not mean that principles established in one case would not invalidate similar practices in another.

3. The *en banc* decision is particularly mistaken given the long American tradition of government use of church property. Since the early days of the Republic, local governments have rented property from churches for secular public activities. Indeed, only a "minority of New England towns [had] erected town houses before the American Revolution." 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, 78 (1993). As a result, in most towns, the religious "meetinghouse continued to be the center of activity, serving both for worship and for secular assembly." Edmund W. Sinnott, *Meetinghouse & Church in Early New England* 23 (1963).

Over the course of the Nineteenth Century, towns gradually built separate structures for official business, such that, "[b]y 1850, in a majority [of Massachusetts towns] the town meeting had found a permanent home in a town house." Sweeney, *supra*, at 88. Nevertheless, even in 1850—more than a decade after disestablishment in Massachusetts—over twenty towns "entered into agreements providing for the joint occupancy of a meetinghouse with a religious society, usually by renovating the basement for town meetings." *Ibid.* The *en banc* decision conflicts with this long and established tradition.

* * * * *

The *en banc* decision cannot be reconciled with the decisions of this Court or of other circuits. It also promises to upend longstanding governmental prac-

tices and to initiate a new "jurisprudence of permissible versus impermissible rentals of church space." App. 77a (Posner, J., dissenting). Such a result is both unnecessary and has profound practical and doctrinal consequences warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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