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

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Many of these cases involve the proper application of the Free Exercise and Establishment Clauses in the educational context. Religious individuals and bodies, like Elmbrook Church in this case, are often prevented from interacting with public school districts on an equal basis with their secular counterparts. Recognizing that the Seventh Circuit's analysis would justify their wholesale

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[1] The parties' counsel of record received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties granted mutual consent to the filing of *amicus curiae* briefs in support of and in opposition to the petition for certiorari filed in this case pursuant to S. Ct. R. 37.2(a). Documentation reflecting the parties' mutual consent agreement has been filed with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

exclusion, Alliance Defending Freedom seeks to ensure that the First Amendment's guarantee of religious free exercise is safeguarded in the public square.

SUMMARY OF ARGUMENT

In disallowing public schools from renting private church venues, the Seventh Circuit wrongly assumed that religious neutrality equates to endorsement and that students' hypothetical religious responses to secular government programs are constitutionally problematic. Neither of these propositions is true. Reasonable observers are well aware that churches' religious messages belong not to public schools, but to them. And this Court has consistently held that private religious conduct falls outside of the Establishment Clause's orbit.

The Seventh Circuit's contrary logic mandates government hostility towards religion, precludes government neutrality amongst sects, and puts the First Amendment rights of religious students at risk. It also severely compromises public schools' ability to rent private venues for secular purposes and threatens to derail valuable educational programs that depend upon religious neutrality for survival. Given the magnitude of the Seventh Circuit's legal errors and the significance of their real-world impact, this Court should grant review to vindicate the Establishment Clause's true intent.

BACKGROUND

Fearing a cramped, wooden-benched, and un-air-

conditioned gymnasium would ruin their big day, high school seniors in the Elmbrook School District (the "District") looked for an alternative venue in which to hold their graduation exercises. And they found one in the Elmbrook Church (the "Church") building that was close by, could easily accommodate all of their guests (even those with disabilities), and offered amenities like cushioned seating, free parking, and temperature control. *See Doe 3 v. Elmbrook Sch. Dist.*, 687 F.3d 840, 844 n.2 (7th Cir. 2012) (en banc) (explaining why class officers' requested the graduation ceremony be held at the Church). These amenities came at a generally-available rental price that was less expensive than holding the graduation ceremony in the school's antiquated gym. *See Doe 3 v. Elmbrook* Sch. Dist., 658 F.3d 710, 733 (7th Cir. 2011).

District officials were persuaded by the students' sound logic and rented the Church for graduation ceremonies until the completion of a public school facility that offered similar creature comforts. After that, graduations were held on school grounds. Respondents, current and former students and their parents, were offended by the District's rental of church facilities and filed suit to obtain damages and a permanent injunction against the practice or—in the alternative—an order requiring the District to cover or remove all "visible religious symbols" in the Church. *Id.* at 718.

Given the District's religious neutrality in considering the merits of non-school venues, the secular benefits of the Church's facilities, and the non-religious content of the District's graduation

ceremonies, Respondents' claims failed before the district court. The court held that renting Elmbrook Church to obtain "an adequate, convenient, cost-effective graduation venue" comported with the Establishment Clause, granted summary judgment in favor of the District, and dismissed the case. *Does 1, 7, 8, & 9 v. Elmbrook Joint Common Sch. Dist.*, No. 9-C-0409, 2010 WL 2854287, at *12 (E.D. Wis. July 19, 2010). A panel of the United States Court of Appeals for the Seventh Circuit affirmed, finding compelling the district's "utter lack of any religious purpose … and the overwhelming evidence that the District desired to make use only of the Church's material amenities." *Doe 3*, 658 F.3d at 733.

The Seventh Circuit granted rehearing en banc and reversed, determining that bringing "seminal schoolhouse events to a church" with various "proselytizing elements" *ipso facto* "conveys a message of endorsement." *Doe 3*, 687 F.3d at 851. In its analysis, the court painted a broad ban against the use of church facilities for school events based on what it termed "the sheer religiosity of the space." *Id.* at 853. A reasonable observer, in the court's view, could not fathom that such a rental arrangement would take place unless "the District approved of the Church's message" in an unconstitutional manner. *Id.* at 854.

The Seventh Circuit also deemed the District responsible for coercing non-Christian students religiously by requiring them to enter a church building and thereby creating a "subtle pressure" to "imitat[e]" their peers' hypothesized acts of worship. *Id.* at 855. Examples of private behavior which the

court found potentially problematic included Christian students "taking advantage of Elmbrook Church's offerings or meditating on its symbols (or posing for pictures in front of them) or speaking with its staff members."[2] *Id.* Although it cited no evidence that such events took place, were noticeable to third parties, or were in any way attributable to the District, the court deemed this situation unlawful because it ostensibly allowed "government [to] influenc[e] how [non-Christian students] relate[] to the universe." *Id.* at 856.

Three judges wrote dissenting opinions that warned of the threat the Seventh Circuit's en banc opinion poses to religious liberty. Judge Ripple's dissent noted that if "'pervasively religious'" institutions must be "excluded from any participation in the civil polity," those that wish to remain a part of public life will have to bow to government pressure and become "stripped-down," "vanilla version[s]" of their former selves. *Id.* at 866.

Chief Judge Easterbrook further explained that "*all* churches are 'pervasively religious,'" *id.* at 871, and that the majority's rationale required hostility to religion, thus prohibiting government from being "neutral between religion and non-religion." *Id.* at 870. In the same vein, Judge Posner's dissent recognized that the "[e]ffect[]" of the majority's

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[2] The Seventh Circuit did not explain how a non-Christian student would discover that a classmate was "meditating" on a religious symbol rather than simply staring at a wall. Nor did it elucidate how skimming a church pamphlet, using religious artwork as a photo backdrop, or chitchatting with church staff would constitute religious activities, let alone coercive ones.

decision is "hostil[ity] to religion." *Id.* at 877. He also observed that requiring government entities to assess the degree of religious meaning in private churches would preclude "governmental neutrality among sects." *Id.* at 878.

ARGUMENT

I. No Endorsement or Coercion Occurs When Schools Rent Church Facilities for Secular Reasons of Practicality and Convenience.

The Seventh Circuit's en banc opinion takes the District's practical solution to a real-world problem and manufactures a constitutional morass. But the realities of this case are straightforward and undisputed. School facilities in the District were inadequate to accommodate high school seniors and their guests comfortably during graduation exercises held once a year. *Doe 3*, 687 F.3d at 844. Research conducted by students indicated that the Church's facilities were superior, conveniently located, and generally available at a low rental cost. *Id.* at 844-45. So District officials agreed to rent the Church's auditorium for graduation ceremonies while its own construction plans were ongoing. *Id.* at 847.

This scenario is far from unusual. *See* Christine Rienstra Kiracofe, *Going to the Chapel, and We're Gonna…Graduate?*, 266 Ed. Law Rep. 583, 583 (June 23, 2011) ("[M]any school districts throughout the country routinely hold graduation ceremonies at off-campus locations."). Aging school buildings often prove inadequate for special events. School districts must then look elsewhere. Many important events

in the life of the school are consequently held off campus. *See id.* (recognizing some schools "prefer a more formal off-campus location for … important events[]").

Schools rent country clubs or hotel ballrooms to provide a touch of elegance to senior proms. Graduation ceremonies result in schools renting convention centers, college facilities, or churches with sufficient auditorium space to accommodate graduates' family and friends. Special classes are held in museums or art galleries where the surroundings enhance student learning. And important concerts are staged in performing arts centers or other theater venues that offer better sound, lighting, and stage arrangements. Of course, the choices available differ greatly based on the type of community a school serves. Schools in populous areas often have a variety of options, while in smaller communities only one private venue may exist. *See id.*

In such circumstances, schools are concerned with the building's proportions, its location, the amenities offered, and the rental price. *See id.* at 583-84. Parents and students may not subjectively agree on the best choice, but they fully understand the district's secular reasons for seeking out an alternative space. *See id.* at 583 (summarizing the most common rationales). That consideration is key in determining how any reasonable community member would interpret the short-term rental of a religious building for a wholly secular event.

A. No Reasonable Observer Would Construe the District's Rental of Church Facilities as an Endorsement of Christian Beliefs.

The private nature of venues schools commonly rent for special occasions is well known. *See id.* at 583-84 (recognizing schools rent "for-profit arenas such as sporting or fine arts venues, or large religiously-affiliated buildings like churches"). Reasonable members of the community would not associate such private spaces—or the messages found therein—with the school district. Their family, friends, and colleagues populate these institutions on a regular basis. Thus, reasonable community members might draw some conclusions about *private* citizens regularly associated with these *private* spaces. But they would not consider a temporary, non-school venue reflective of a public school's own values or tastes.[3]

In this case, the District's secular need for a comfortable and easily-accessible graduation venue was well known, so much so that graduating seniors took it upon themselves to find an alternative space. *See Doe 3*, 687 F.3d at 844. And the whole point of short-term rentals is to gain use of a property that belongs to someone else and is designed to suit a primary purpose different from one's own.

For example, a school may rent an auditorium in a museum promoting an exhibit of medieval

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[3] The Seventh Circuit's observer is a "reasonable nonadherent[]," 687 F.3d at 858 (Hamilton, J., concurring), who appears to be prejudiced against private religious conduct and is thus inherently unreasonable in fact.

illuminated manuscripts. Signs and banners throughout the building may display calligraphed pages from altar Bibles that contain scriptural text. But no reasonable person traipsing their way to the school's event would think that it was endorsing the Catholic Church. After all, the school's reasons for being there are clear: it requires the unique qualities of the physical space.

This distinction is even more apparent when the rented facility is a church. Reasonable members of the Elmbrook community would know quite well that the Church is a non-governmental organization governed by a private body, not the District. They would also be aware that the Church—like all successful organizations—promotes its beliefs and values to its members on a regular basis. *See id.* at 865 (Ripple, J., dissenting) ("[T]he graduates knew well that the iconography belonged to the landlord church ….").

Absent proof to the contrary, reasonable community members would thus conclude that the Church's permanent fixtures, banners, and other religious messaging were targeted at Church members, not at them. *See id.* ("[T]he iconography represents the beliefs of those who use the space, on another day, as a place of worship, not a place of graduation."). This impression would be confirmed when they noted the Church's removal of all transitory religious elements from the stage on which the District's graduation ceremony actually

took place.[4] *Id.* at 846. For reasonable observers would know that the Church's auditorium is generally available for third-party use. *See Does 1*, 2010 WL 2854287, at *3. They would thus find nothing suspicious about the District's rental of this high-quality space, particularly when it saved money by doing so. *See Doe 3*, 658 F.3d at 733.

Nothing in the record supports a contrary view. In fact, Respondents have established no connection whatsoever between the District and the Church's teaching, *i.e.*, any instance in which the District explicitly or implicitly endorsed the Church's religious beliefs or practices. All they point to is a brief overlapping of physical space designed to serve secular purposes that are both undisputed and universally understood.[5] *Doe 3*, 687 F.3d at 851 n.15 ("The Does do not argue that the District had a non-secular purpose in choosing the Elmbrook Church for its graduation ceremonies ….").

In striking down this practice, the Seventh Circuit ignored the practical realities of the case. Schools searching for rental space, like any other customer who turns to private vendors in pursuit of secular services, are doing just that. *See id.* at 870

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[4] In most sizeable places of worship, the time and expense required to remove or obscure—and thereafter restore—all religious messaging and symbols would likely render leasing space to third parties a losing venture.

[5] Judge Hamilton's indignation at the intermingling of schools and "the sacred worship space of *any* faith," *Doe 3*, 687 F.3d at 857, falls flat given this Court's longstanding approval of churches renting public school buildings for religious activities. *See, e.g.*, *Good News Club*, 533 U.S. at 109-10.

(Easterbrook, C.J., dissenting) ("The District needed a large, air-conditioned auditorium for graduation. It rented one for the day."). They often do not know, and certainly do not necessarily support, the vendor's philosophical beliefs.

For example, no apartment-dweller believes that signing a one-year lease represents an endorsement of the landlord's views. The renter's only concern is the product obtained. Hence, the most that can be said is that the District "endorsed" the Church's convenient location, large auditorium, comfortable seating, climate-control technology, handicap accessibility, and free parking. *See id.* (recognizing the District communicated only "that comfortable space is preferred to cramped, overheated space"). Nothing in the First Amendment forbids that.

B. Unconstitutional Coercion Requires More than Private Religious Responses to Secular Government Conduct.

The Seventh Circuit's coercion analysis is similarly flawed. It suggests that any secular event the District hosts in a religious space violates the First Amendment because Respondents have a constitutional right to "remain away from church." *Id.* at 855 (quoting *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947)). This takes *Everson* completely out of context. Plainly, that case never considered secular functions held in a rented church facility. *See Doe 3*, 658 F.3d at 728 ("Entering a church … is not an inherently religious activity ….").

Everson merely summarized the well-recognized principle that government cannot compel or cajole attendance at a religious service or force the profession of a religious belief of any kind. *See* 330 U.S. at 8-10 (summarizing Europeans' contrary experience with established churches). Because the District's graduation exercises were wholly secular in nature, these facets of the Establishment Clause simply do not apply.

Nor is the District's rental of the Church's facilities forestalled by this Court's traditional coercion analysis, which depends upon schools' explicit encouragement of a religious practice. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 587-88 (1992) (hinging on a principal's invitation to a rabbi to give a nonsectarian prayer at graduation); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306 (2000) (relying on a school policy that "invites and encourages religious messages"). There is no evidence that the District encouraged any religious activity—explicitly or implicitly—here.

In short, the Constitution says nothing about schools' neutral rental of church facilities for wholly secular events. *See Doe 3*, 687 F.3d at 869, 872-73 (Easterbrook, C.J. & Posner, J., dissenting). Whether such rentals are a good idea is consequently left to the discretion of local school authorities. This Court should grant review to establish that such benign arrangements do not invariably contravene the First Amendment.

II. The Seventh Circuit Prohibited Schools From Exercising Religious Neutrality and Required Affirmative Discrimination Against Religious Institutions.

Absent any evidence of religious activity, the Seventh Circuit disapproved the District's rental of Church facilities based solely on their religious nature. Its analysis consists of a painstaking catalog of the Church's religious elements, including streets named "Agape" and "Barnabas," stacks of "evangelical literature," a lobby decorated with "religious banners, symbols and posters," a "large Latin cross" in the auditorium, and more "[c]rosses and other religious symbols" outside. *Doe 3*, 687 F.3d at 845-46.

Of course, any reasonable person would expect to find such things in a Christian church. *See id.* at 865 (Ripple, J., dissenting) (recognizing "[s]uch material is found in most churches"). And the First Amendment fully protects the way in which religious associations choose to express their philosophical ideals. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (acknowledging the right "to advocate [one's] cause" and select "the most effective means for so doing").

Consequently, the Seventh Circuit's rather myopic "parade of horribles" cannot tell the whole Establishment Clause story. That a church looks like a church via the display of religious symbols, acts like a church by promoting its beliefs, and serves hundreds of citizens—many of whom are children—on its own time is not breaking news. *See*

Doe 3, 687 F.3d at 865 (Ripple, J., dissenting). What is notable is the Seventh Circuit's disregard for the only aspect of the Church building that played a role in the District's rental considerations—the suitability of its auditorium space.

For decades, this Court has characterized government neutrality towards religion as the key to Establishment Clause compliance. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437, 450 (1971) (requiring government activity "be secular in purpose, evenhanded in operation, and neutral in primary impact"). The Seventh Circuit's opinion explicitly rejects that view. The court dismissed the "secular motivations underlying the District's choice" as relevant only to "*Lemon's* purpose inquiry," which has "rarely proved dispositive." *Doe 3*, 687 F.3d at 853 n.16. And it banned considerations of neutrality from impacting the more significant "analysis of the likely effect of the District's actions." *Id.* In short, the Seventh Circuit held that "the favorable features of the church, such as its space and comfort, do not drive the ultimate inquiry into the constitutionality of its use as a high school graduation venue." *Id.*

Neutrality towards religion may not be dispositive in every case, but this Court has long employed it as the primary means of gauging whether the Establishment Clause's requirements are met. *See, e.g.*, *Rosenberger*, 515 U.S. at 839 ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). The Seventh Circuit's determination that neutrality is *irrelevant* to the analysis of government action's "likely effect"

simply cannot be reconciled with this Court's precedent. Indeed, this Court's cases hold exactly the opposite. *See, e.g.*, *Zelman*, 536 U.S. at 655 ("[N]o reasonable observer would think a neutral program of private choice … carries with it the *imprimatur* of government endorsement."); *Good News Club*, 533 U.S. at 114 (determining that allowing a religious club "to speak on school grounds would ensure neutrality, not threaten it"). That is reason enough for this Court to grant review.

But the Seventh Circuit's troubling logic does not end there. The en banc court not only deemed the District's religious neutrality irrelevant to the key Establishment Clause question, but also considered that neutrality to be decisive evidence of a constitutional violation. Specifically, the court held that a reasonable observer could conclude the District "would only choose" to utilize the Church, which it described as "a proselytizing environment," notwithstanding "the presence of children, the importance of the graduation ceremony, and, most importantly, the existence of other suitable graduation sites," if it "approved of the Church's message."[6] *Doe 3*, 687 F.3d at 854.

In other words, the Seventh Circuit determined that the District endorses any private religious expression that it fails to censor. *But see Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S.

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[6] Far from being readily impressionable, the "children" in question are either high school seniors—the vast majority of whom are already adults—or minor friends and family members who are unlikely to attend graduation without their parents or other adult relations.

226, 250 (1990) (plurality opinion) (rejecting this notion). The court stated that its conclusion might change if a "natural disaster" occurred and the District had no other rental choice.[7] *Doe 3*, 687 F.3d at 843-44. But the District's religious neutrality condemned it in the eyes of the court because failure to turn to any available secular venue—no matter how inferior or expensive—and eschew contact with a space the court painted as polluted by religious meaning established an irrebuttable presumption of unlawful endorsement.

Such reasoning may suit those hostile to religion, but it is not the law. This Court has, time and again, explained that benevolent government neutrality towards religion fulfills the First Amendment's highest calling. *See, e.g.*, *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (quotation omitted)). And its precedent makes clear that different First Amendment rules apply to private and governmental speech. *See, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (explaining private "free-speech protections" apply to "religious proselytizing" and "acts of worship"). Otherwise, government would no longer serve as the guardian of individual liberty but as the despotic enforcer of a secular state.

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[7] Banning the District from renting church property unless all other venues have burned to the ground manifests a clear hostility towards religious faith.

Much of the Seventh Circuit's confusion stems from its holding that cases prohibiting the District from creating "a pervasively religious environment in the classroom"—or in other on-campus venues—apply in full force "when it acts through a short-term lessee." *Doe 3*, 687 F.3d at 856. This logic fails to account for the differences any reasonable observer would recognize between a public school, which is used full time by the government and is entirely under its control, and a private church, which is not. *See id.* at 874-75 (Posner, J., dissenting).

As previously explained, reasonable members of the community would not attribute the Church's religious furnishings to the District. They would know that those items were put in place by the Church well before the District rented the facilities and would remain there long after the District left. The same cannot be said of school buildings' decor, which is under the District's exclusive control and which students encounter on a regular basis.

Thus, it is reasonable to hold the District responsible for religious speech that it sponsors in the school setting. But the Constitution applies differently to private religious expression that occurs in the same venue. *See Rosenberger*, 515 U.S. at 841 (citing "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" (quotation omitted)). These private speech principles also apply to the Church's religious messaging, which is solely Church sponsored, appears in a facility the Church owns and operates,

and which the District simply rented for a few hours to meet secular concerns of space and convenience.

III. Requiring Government Hostility Toward Religious Entities and Their Private Expression Contravenes Basic Principles of the First Amendment.

The most troubling aspect of the Seventh Circuit's decision is that it paints religious spaces as tainted in a fundamental sense. Indeed, the District's only alleged fault was not mechanically rejecting use of a church until all inferior secular options were crossed out. *See Doe 3*, 687 F.3d at 851 (concluding this "necessarily conveys a message of endorsement"). But the Establishment Clause does not require government to treat religious institutions as the leper colonies of the modern American state.

A. The Seventh Circuit Impermissibly Required Hostility Towards Religion.

This Court has repeatedly held that the Establishment Clause forbids government hostility to religion just as strongly as it prohibits favoritism of religious faith. *See, e.g.*, *Good News Club*, 533 U.S. at 118 (recognizing government hostility toward religion is just as forbidden as religious endorsement); *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (prohibiting "special hostility for those who take their religion seriously"); *Rosenberger*, 515 U.S. at 846 ("[F]ostering a pervasive bias or hostility to religion … undermine[s] the very neutrality the Establishment Clause requires.").

Nothing in the Seventh Circuit's opinion grapples with this essential fact. Instead, the court ignored actions attributable to the District and delved into the dictionary to describe religious minutiae that no reasonable observer would view as significant, *see Doe 3*, 687 F.3d at 846 (explaining street names' religious meaning); agonized over private religious practices related to crosses that are denomination specific and clearly beside the point, *see id.* at 852 (citing the *Summa Theologica* in concluding the cross "invites veneration by adherents"); critiqued the Church's private "sectarian message," *id.*; and suggested it should have voluntarily "modified [its speech] to render the space more inviting to others," *id.* at 854.

Such reasoning smacks more of religious phobia than legitimate Establishment Clause concerns. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (rejecting the "presumption" that cooperation between public schools and religious institutions "constitutes a symbolic union between government and religion"). And this impression is heightened by the Seventh Circuit's coercion analysis. The court correctly refrained from suggesting that the District's own actions encouraged students to participate in religious conduct. It held instead that the speculative behavior of "classmates at … graduation" would have this effect. *Doe* 3, 687 F.3d at 855. But it is beyond dispute that the Establishment Clause's strictures do not apply to individual students acting in their private capacities. *See Good News Club*, 533 U.S. at 115 (recognizing this Court's "Establishment Clause jurisprudence" does not "foreclose private religious conduct").

Individual students may, for example, read the final stanza of Father Mapple's beautiful hymn in Chapter 9 of *Moby Dick*, which concludes "I give the glory to my God, His all the mercy and the power," and be moved to meditate privately upon their own desire to "give the glory to [their] God." This does not turn the secular study of *Moby Dick* into an endorsement of religion. Private religious responses to non-religious activities, such as graduation exercises held at a church, cannot transform the nature of government action from secular to sacred. By suggesting otherwise, the Seventh Circuit's opinion mandates hostility to religion and puts the free exercise rights of students at risk.

For if government is required to exclude religion in order to evade endorsement, it is not clear how any private religious practice in public schools could stand. Government toleration of private religious behavior means that students may see others support religious messages and perform religious acts. *See Doe* 3, 687 F.3d at 867 (Ripple, J., dissenting). Such exposure might lead some students to follow suit. If this private persuasion violated the Establishment Clause, faith would be banished to broom closets and the Free Exercise Clause would be dead. The Constitution permits no such thing.

The most likely victims of the Seventh Circuit's analysis are religious students, community groups, and student clubs. Students have always been free to pray at school, convey religious ideas, and read religious texts. *See Rosenberger*, 515 U.S. at 834 (recognizing government "may not discriminate

based on the [religious] viewpoint of private persons"). And the First Amendment's command of viewpoint neutrality has allowed religious groups to access schools' communicative forums on an equal basis with their secular counterparts. *See id.* at 842.

But if neutrality is no longer relevant and private persuasion violates the Establishment Clause, school districts must extinguish this expression to avoid tainting their secular pursuits. Nothing in the Constitution allows such hostility to religious speech. Indeed, those who proposed and ratified the First Amendment clearly had opposing goals in mind. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[H]istorical instances of religious persecution and intolerance … gave concern to those who drafted the Free Exercise Clause." (quotation omitted)).

B. The Seventh Circuit Graded the Religiosity of Private Church Space, Thus Unconstitutionally Requiring Discrimination Amongst Religious Sects.

Not only does the Seventh Circuit's opinion contravene the Establishment Clause by mandating antagonism towards religion, it also requires school districts to discriminate amongst religious sects. The court suggested the District might be allowed to host a ceremony in a church that lacked "the proselytizing elements present in this case," *Doe 3*, 687 F.3d at 851, which it described as an environment not so "pervasively Christian." *Id.* at 853. In other words, the court's conclusion might have been different if the Church had adopted a

style that it considered more secular and less "pervasively religious." *Id.* at 856.

What the Seventh Circuit failed to consider is that neither public schools nor federal courts may grade the "religiosity" of private church space. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (noting courts cannot "determine which words and activities fall within 'religious worship and religious teaching'"). Every church is "pervasively religious" to a certain extent. *Doe 3*, 687 F.3d at 871 (Easterbrook, C.J., dissenting). Any variation in this regard requires the theological interpretation and comparison of religious elements, *i.e.*, distinctions the government is simply incompetent to make. *See, e.g.*, *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 714 n.8 (1976) (acknowledging judges "do not have the competence of ecclesiastical tribunals").

That is why this Court has consistently prohibited government from favoring some religious sects over others. *See, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 (1982) (requiring government "effect no favoritism among sects" (quotation omitted)). Accordingly, the permissibility of renting church space cannot depend on whether government bureaucrats deem it sufficiently free of religious taint. In holding otherwise, the Seventh Circuit flouted one of the Establishment Clause's most basic commands. *See Doe 3*, 687 F.3d at 878 (Posner, J., dissenting) (explaining "a jurisprudence of church furnishings" will "inevitably favor[] iconoclastic churches").

This Court should grant review to reject the notion that "pervasively religious" places and people imbue a sort of communicative disease that government must fight to suppress. Religious messages are not more inherently coercive than their secular counterparts. They have no hypnotic qualities. And the Establishment Clause does not concern them unless they are bolstered by the state.

IV. The Seventh Circuit's Ruling Will Deplete Limited School Resources and Put Valuable Educational Programs at Risk.

Public schools in the Seventh Circuit are now banned from renting religious facilities unless no other option exists. But charitable institutions' rental fees are well below those of commercial establishments. Kiracofe, 266 Ed. Law Rep. at 583-84. And in many communities churches are the only non-profits with spaces readily available for schools to rent. *See id.* The effect of the Seventh Circuit's decision will thus be a crippling strain on public school budgets. In practical terms, the choice for many school districts is not between a religious and secular private rental—it is between a religious venue or none at all.

The Seventh Circuit's equation of government neutrality with religious endorsement also puts many valuable educational programs at risk. Religious institutions are not confined to traditional worship activities. They operate many community service organizations that form beneficial partnerships with public schools. For example, it is not uncommon for school districts to institute a

community service requirement and sponsor service projects for students at local charities. But Christian hospitals, childcare facilities, homeless shelters, nursing homes, and food banks often display crosses and other religious messaging. In light of the Seventh Circuit's holding, school districts will likely shun these religious institutions as well.

Field trips to important religious sites will also likely end. If a school district's failure to keep away from "pervasively religious" buildings violates the Establishment Clause, how can schools visit a historic synagogue, church, or mosque? Furthermore, some students of Native American heritage may find trips to ancient burial mounds to be a spiritual experience; likewise for Christian students on a trip to St. Patrick's Cathedral. If the influence their private religious devotion could have on other students is of constitutional significance, as the Seventh Circuit suggests, schools must eschew this type of activity.

Similar problems arise with the objective study of religious texts. Many times, this Court has acknowledged the educational value of religion's objective study. *See, e.g.*, *Stone v. Graham*, 449 U.S. 39, 42 (1980) ("[T]he Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963) (noting the "study of comparative religion['s]" educational value). But, according to the Seventh Circuit, it is insufficient that school-sanctioned instruction regarding the Torah, Bible, or Koran is wholly secular. Students may interpret those texts

in a religious manner and communicate those principles to their classmates. Under the court's logic, failing to prevent such "coercion" renders the program void under the Establishment Clause.

But, in the end, the Seventh Circuit's reasoning is likely to be most detrimental to the arts. School choirs and orchestras regularly perform in religious venues, from acoustically-refined churches to the lonely corridors of faith-based nursing homes. And the traditional works they perform often have religious content that individual students may translate into worship.

The cultural enrichment these groups provide will be sorely missed if the Seventh Circuit's decision takes effect. Not only will school districts likely black list large swathes of the classical repertoire, they will also likely avoid any physical interaction with institutions that could be regarded as "pervasively religious." After all, such service opportunities might constitute "coercion" under the court's errant interpretation of our fundamental law.

Teaching students about pieces of artwork from the pre-modern period, which often brim with religious meaning, carries the same risks. Future generations of students will thus study the banal subjects of Jeff Koons, but miss the sublime works of Michelangelo. This is obviously not what the originators of the Establishment Clause intended. But schools are unlikely to take chances given the challenges associated with Establishment Clause litigation, including the threat of paying out

hundreds of thousands of dollars in attorneys' fees to their own lawyers and those hired by plaintiffs.

The Seventh Circuit's doctrinal errors in this case will have considerable real-world impact. This Court should grant review to preserve schools' ability to rent private facilities for special events, as well as their freedom to implement valuable educational programs that expose students to religious concepts.

CONCLUSION

This Court should grant review to uphold the true meaning of the Establishment Clause and reject government-mandated hostility towards religion in our nation's public schools.

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