No. 12-755

IN THE
Supreme Court of the United States

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

v.

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

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND FIVE OTHER EDUCATION ASSOCIATIONS IN SUPPORT OF PETITIONER

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List of Amici Curiae on Inside Cover

LIST OF *AMICI CURIAE*

American Association of School Administrators

Association of Wisconsin School Administrators

National Association of Elementary School Principals

National Association of Secondary School Principals

Wisconsin Association of School Boards

Wisconsin Association of School District Administrators

QUESTION PRESENTED

Whether the Establishment Clause requires public schools to evaluate the religiosity of a facility before entering into a short-term lease to use the space for public events such as high school graduations.

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The American Association of School Administrators (AASA), the Association of Wisconsin School Administrators (AWSB), the National Association of Elementary School Principals (NAESP), the National Association of Secondary School Principals (NASSP), the Wisconsin Association of School Boards (WASB), and the Wisconsin Association of School District Administrators (WASDA) respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are national and state associations that represent the interests of public school districts, their superintendents and administrators, and municipalities that fund and govern those districts. Each year, these governmental bodies and officials are charged with selecting the venue and allocating tax revenues for their high school graduation ceremonies and other events. Working with inadequate resources, many have long relied on buildings owned by religious groups for a variety of reasons, including that they are the nearest and lowest cost facilities capable of accommodating these events.

Amici share a common goal of supporting and celebrating effective, quality education. This objec-

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici*, its counsel, and its members made a monetary contribution to the preparation or submission of this brief. All parties were notified of *amici*'s intent to file this brief at least 10 days prior to its filing, and correspondence consenting to the filing of this brief by all parties has been submitted to the Clerk.

tive is furthered by ensuring that schools and school administrators can exercise their professional judgment in obtaining short-term leases for auditoriums and other facilities without regard to the religious or non-religious nature of the facilities or the lessors. The Seventh Circuit's decision undermines this objective by requiring school officials to either measure the religiosity of spaces for short-term rentals, or entirely forgo the use of religious facilities to the detriment of schools and their communities.

The American Association of School Administrators is the principal professional organization for over 10,000 school superintendents and aspiring superintendents across America. Founded in 1865, AASA's mission is to maintain the highest quality public education for all students and to develop and support local school system leaders.

The Association of Wisconsin School Administrators represents Wisconsin elementary- and secondary-school administrators. Founded in 1978, AWSA exists to coordinate the collective interests of school administrators and to enhance their professional growth and competency for the purpose of improving the quality of educational opportunities for the youth of Wisconsin.

The National Association of Elementary School Principals, founded in 1921, is a professional organization serving elementary and middle school principals and other education leaders throughout the United States, Canada, and overseas. As the representative of principals who server 33 million children from pre-kindergarten through eighth grade, the NAESP advocates for the support principals need to achieve the highest results for children, families and communities.

The National Association of Secondary School Principals promotes excellence in middle- and high-school leadership through research-based professional development, resources, and advocacy. Established in 1916, NASSP is the preeminent organization of middle school and high school principals, assistant principals, and aspiring school leaders from across the United States and more than 45 countries around the world. The mission of NASSP is to promote excellence in school leadership.

The Wisconsin Association of School Boards is dedicated to serving as an advocate for education and students in Wisconsin. Founded in 1921, the WASB represents approximately 70 of Wisconsin's 424 public school districts. The WASB is a source for ideas, advocacy, resources, and information.

The Wisconsin Association of School District Administrators is a professional organization for Wisconsin school superintendents. Founded in 1959, WASDA's mission is to serve Wisconsin school superintendents by providing professional support and expanding their capacity to be effective, innovative leaders.

STATEMENT

This case presents a recurring question of national importance. Each year, hundreds of public schools across the country lease religious facilities for a variety of reasons including graduations, athletic events, musical performances, and theatric presentations. Schools enter into these short-term leases by reason of need, convenience, expense, and a variety of other religiously neutral reasons. The Seventh Circuit's decision requires school districts to abandon neutrality and gauge the religiosity of such facilities, or risk endorsing the lessor's religion in violation of the First Amendment. School districts are ill-suited to make such assessments and doing so impermissibly entangles them in determinations of what expressions of the lessor's religion are too religious or sufficiently muted.

Ultimately, the Seventh Circuit's analysis forces schools and school officials to navigate between Scylla and Charybdis. If a school concludes that the religiosity of a given facility is sufficiently bland, the school risks a court second-guessing that determination and imposing significant expense on not only the school for its own legal defense, but also the legal expenses of the civil-rights-action plaintiff. But if the school concludes that the religiosity of a given facility is too strident, a court may conclude that the school is disfavoring a particular sect based on its religious speech, which is equally a First Amendment violation. Nor can schools avoid this dilemma by simply choosing never to lease space in religious facilities. If a school elects such a course and yet does enter leases for space with secular organizations, it again risks claims that the school has sent a message of disapproval of religion, again

running afoul of the First Amendment. The Seventh Circuit's analysis strips school officials of the neutrality principle they have long relied upon and leaves them constitutionally rudderless.

The Seventh Circuit's decision has significant practical consequences for schools. Schools consider issues of cost, proximity, and accommodations when selecting a graduation venue. And not infrequently, these considerations lead schools to select religious facilities. The Seventh Circuit's decision effectively displaces schools' assessment of these factors leading to increased costs; greater travel for graduates and their families; and less comfortable seating. Perhaps the best example of this is another Wisconsin public high school that until the Seventh Circuit's decision, held its graduation at Elmbrook Church. The Mukwonago High School, like the District, also chose to use the Elmbrook Church for religiously neutral reasons. The Mukwonago school has moved its 2013 graduation to Miller Park, home of the Milwaukee Brewers. The baseball stadium was one of the few area venues that could hold 3,200 people for the ceremony and provide good sound and video equipment. The change has increased the cost of the graduation by $12,000, more than tripling the school's costs. Carol Spaeth-Bauer, *Mukwonago High School selects Miller Park for site of 2013 graduation*, LivingLakeCountry.com, (Dec. 18, 2012), http://www.livinglakecountry .com/mukwonago chief/ news/2013-graduation-at-miller-park-m982qbj-18395 2251.html (last visited Jan. 21, 2103). The school still considers the Elmbrook Church to be a better venue, and with the principal stating that "I think

we can all agree that we would love to return to Elmbrook if the facility is available."[2] *Ibid.*

Amici respectfully submit that no such evaluation of the "religiosity" of a facility is required by the Establishment Clause, that the Seventh Circuit's analysis is contrary to the decisions of this Court, and that schools and school officials cannot be deemed to have established a religion merely by entering into short-term leases to use religious facilities for specific events.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's decision requires school districts to abandon the First Amendment principle of neutrality and judge the "religiosity" and "proselytizing" nature of private speech.

Neutrality has long been the lodestar for the government in its frequent encounters with religious speech and religious institutions. "Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment." *Sch. Dist. of Abington Twp., Pa.* v. *Schempp*, 374 U.S. 203, 226 (1963). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," U.S. Const. amend. I. In general, these words mean "that we will not tolerate either governmentally established religion or governmental interference with religion," neither the

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[2] Ironically, under the Seventh Circuit's analysis, the Mukwonago school's decision could be interpreted by a reasonable observer as the school's endorsement of Miller Brewing Company's beer or beer drinking in general.

"advancement nor the inhibition of religion. . . neither sponsorship nor hostility." *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664, 672 (1970).

Neutrality does not mean that "in every and all respects there shall be a separation of Church and State." *Id.* at 669 (quoting *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952)). "[T]otal separation is not possible in an absolute sense." *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). "No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all other parts, much less from the government." *Lynch* v. *Donelly*, 465 U.S. 668, 673 (1984). "Some relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614 (citing *Zorach*, 343 U.S. at 312).

Consequently, "[t]he Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *Cnty. of Allegheny* v. *A.C.L.U. Greater Pittsburgh Chapter*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring). The Court has also refused to allow the Establishment Clause to become grounds for content-based discrimination against religious speech, *e.g.*, *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761–63 (1995), even in a context where "some passersby would perceive government endorsement thereof," *id.* at 779 (O'Connor, J., concurring). The "Amendment [only] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not

require the state to be their adversary." *Everson* v. *Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

Thus, charting a neutral course in public-school administration does not mean avoiding all contact with religion. Neutrality demands, for instance, that school districts give private organizations equal after-hours access to school property without regard to their religious or non-religious nature. See *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395–96 (1993). Neutrality also allows school districts to "accommodate the religious needs of the people" by releasing students for off-campus religious instruction. *Zorach*, 343 U.S. at 315.

Of course, neutrality also requires the school to avoid "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," or otherwise "promoting" one religion or religious theory over another. *Cnty. of Allegheny*, 492 U.S. at 593 (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 55–56 (1985)). For that reason, this Court held in *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 310 (2000), that student-led, student-initiated prayer at football games violated the Establishment Clause. Though the student body itself elected to hold the invocation, the election was school-sponsored and sanctioned, and the invocation was held during a school event, all of which sent an impermissible message of government approval.

The Establishment Clause also prohibits "coercion" to participate in a religious program. In *Lee*, this Court held that requiring students to remain silent during the invocation and benediction at a high-school-graduation ceremony was effectively "requiring participation in a religious exercise." *Lee*

v. *Weisman*, 505 U.S. 577, 594 (1992). Dissenters cannot be pressured to signify participation in or approval of the prayer through silence. *Id.* at 594.

In contrast, Elmbrook School District could not have acted in a more neutral fashion. The District chose to lease Elmbrook Church for purely secular reasons. See App. 6a–9a. The District needed a larger space, more comfortable seating, and air conditioning. *Ibid.* The symbols and literature present in the building were put there by the church for the use of the building as a church, and not specifically directed at graduation attendees. App. 12a. There is no evidence, for instance, that the cross on the wall and the "Scribble Cards for God's Little Lambs" were placed there for the ceremony. *Ibid.* The school did not use the church's symbols or literature in its ceremony, or call anyone's attention to them. See *ibid.* And there is no evidence in the record that the program prepared by the school contained any religious elements of its own. See App. 16a, 118a. There was no invocation, no official prayer, no benediction, no moment of silence, no religious exercise of any kind during the ceremony. See *Ibid.*

Other than selecting the venue in the first place—which it undisputedly did for secular purposes—the District did nothing that could even possibly convey a message of favoring or disfavoring the church's message, and did nothing to coerce or even encourage a religious exercise. In other words, its behavior was entirely neutral, as it must be under the First Amendment.

Notwithstanding this neutrality, the Seventh Circuit still found that the District "endorsed" reli-

gion and even "coerced" religious participation. The entire decision hinged on the following finding:

> *Regardless of the purpose of the 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. . . . True, the District did not itself adorn the Church with proselytizing materials, and a reasonable observer would be aware of this fact. But the same observer *could reasonably conclude the District would* ***only*** *choose such a proselytizing environment* aimed at spreading religious faith—despite the presence of children, the importance of the graduation ceremony, and, most importantly, the existence of other suitable graduation sites—*if the District approved of the Church's message*.

App. 25a–27a (emphasis added). The Seventh Circuit's analysis not only deepens the divide among the Circuits about how the endorsement test should be applied, its logic proves deeply troublesome. It implies that the District should have rejected the church as a venue to protect students and their younger siblings from exposure to the religious icons and messages. See App. 27a-28a. This ruling abandons any pretense of the neutrality between religion and non-religion required by this Court in *McCreary County, Kentucky* v. *A.C.L.U. of Kentucky*, 545 U.S. 884, 860 (2005). The decision instead calls upon school administrators to pass judgment on the "religiosity" and proselytizing

nature of a facility before selecting it as a venue for a school event, thereby violating the very principle of neutrality that the First Amendment requires.

A. The Seventh Circuit's decision deepens the problematic divide over whether private religious speech may be imputed to school districts irrespective of their neutral conduct.

It has been said that the endorsement test asks "what viewers may fairly understand to be the purpose of the display." *Cnty. of Allegheny*, 492 U.S. at 595. As the District explains (Pet. 25–29), courts are deeply divided over how this seemingly simple test is to be applied: How much knowledge should be imputed to this hypothetical observer? What age should the observer be in the public school context? How sensitive or suspicious should the reasonable observer be? And—most pertinent here—can the observer mistake private speech for a government endorsement? Here, the Seventh Circuit assumed a "reasonable observer" would be a high school graduate or younger sibling, would know that the messages were part of the church facility and not added for the graduation ceremony, but "could" nonetheless leap to the conclusion that the school district selected the venue because it endorsed the messages. See App. 25a–27a.

The problems associated with identifying the reasonable observer are at their apex when addressing whether private speech can be mistaken for the government's. The Seventh Circuit agrees with the Second and Tenth Circuits that private speech can be imputed to the government by the reasonable observer, and that an Establishment Clause violation occurs when a court deems that to have happened. *Green* v. *Haskell Cnty. Bd. of*

Comm'rs, 574 F.3d 1235 (10th Cir. 2009); *Kaplan* v. *Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989). The Fourth, Sixth, Ninth, and Eleventh Circuits hold differently. Those circuits, like the plurality in *Pinette*, have concluded that private speech cannot be imputed to a neutrally acting government by the reasonable observer. See, *e.g., Am. Atheists, Inc.* v. *City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 294 (6th Cir. 2009); *Peck* v. *Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998); *Chabad-Lubabitch of Ga.* v. *Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993); *Kreisner* v. *City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993).

The reason for this split is not simply that the endorsement test itself invites "erratic, selective analysis," *Utah Hwy. Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting from denial of certiorari). It is that this Court has never applied the endorsement test in this context. "Where [this court] has tested for endorsement of religion, the subject of the test was either expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity." *Pinette*, 515 U.S. at 764 (citations omitted). "[T]here is a crucial 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." *Pinette*, 515 U.S. at 766 (quoting *Bd. of Educ. of the Westside Cmty. Schs. (Dist. 66)* v. *Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)). The test applied by the Seventh Circuit "which would attribute to a neutrally behaving government private religious expression, has no antecedent in [this Court's] jurisprudence, and would better be called a 'transferred

endorsement' test." *Pinette*, 515 U.S. at 764. This Court has never held that such a "transferred endorsement" test is allowed—much less required—by the Establishment Clause.

The problem with the specific "transferred endorsement" analysis adopted by the Seventh Circuit is unreasonable. The test "should [not] focus on the actual perception of individual observers" but rather "creates a more collective standard to gauge the objective meaning of the government's statement in the community."[3] *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). This "collective" observer knows religious neutrality is required, knows neutral justifications exist for the District's facility selection, and therefore could not reasonably conclude that the District endorses the messages that are part of the leased facility's primary use (here, religious worship)

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[3] Justice O'Connor's discussion of the endorsement test continued:

> Thus, "we do not ask whether there is *any* person who *could* find an endorsement of religion . . . or whether *some* reasonable person *might* think [the State] endorses religion." . . . There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

Capitol Square Review & Advisory Bd. v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) (quoting *Am. United for Separation of Church and State* v. *Grand Rapids*, 980 F.2d 1538, 1554 (6th Cir. 1992)) (en banc) (emphasis added).

simply because it selected that particular venue over others.

Perhaps the best example of this is Mukwonago High School which, as noted above, also held its graduation ceremony at Elmbrook Church before the Seventh Circuit's *en banc* decision. In 2013, the school moved its graduation ceremony to Miller Park, home of the Milwaukee Brewers. Carol Spaeth-Bauer, *Mukwonago High School selects Miller Park for site of 2013 graduation*, LivingLake Country.com, (Dec. 18, 2012), http://www.livinglake country.com/mukwonagochief/news/2013-graduation-at-miller-park-m982qbj-18395 2251.html (last visited Jan. 21, 2103). Miller Park is named after the Miller Brewing Co., is adorned with numerous signs promoting the drinking of beer, and is the home of a professional sports team named for the guild of craftspeople who make beer. No reasonable person would assume that Mukwonago High School is endorsing Miller beer, beer consumption generally, or the under-aged beer-drinking by its graduates and their younger siblings. Yet that must be what the Seventh Circuit's observer "could" conclude, namely, that the school district "would only choose" Miller Park "if the District approved of" Miller Park's beer-consumption message. Otherwise, the observer's perception of government approval turns solely on the content of the private party's speech.

The Seventh Circuit's analysis creates great uncertainty for school districts and their administrators. The only way to be certain that some "reasonable observer" does not attribute private religious speech to the school district is for the district to distance itself as far as possible from such speech and such institutions in the conduct of its

affairs. But that, of course, creates the opposite and equally unconstitutional impression that religious speech and religious institutions are disfavored. The positions of the Second, Seventh, and Tenth Circuits make it exceedingly difficult, if not impossible, for school districts to find any constitutional ground to stand on.

B. Worse, the Seventh Circuit's decision calls for school districts to abandon neutrality and entangle themselves in religion by judging and disfavoring overly "religious" and "proselytizing" speech.

The Seventh Circuit's analysis has implications beyond the endorsement test itself, as it negates the principle of neutrality altogether. Under the Seventh Circuit's analysis, the "sheer religiosity" of a private space and the "proselytizing" nature of its available literature are factors relevant to evaluating whether holding a school event in that space violates the Establishment Clause. Thus, the Seventh Circuit's reasoning essentially demands that school districts pass judgment on the religious messages and icons at the facility before selecting it as a venue for a school event. This is hardly the "government neutrality between religion and religion, and between religion and nonreligion" that the First Amendment requires. *McCreary Cnty., Ky.*, 545 U.S. at 860. In fact, this kind of "evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids." *Lemon*, 403 U.S. at 620. Far from promoting neutrality, the Seventh Circuit's decision requires nothing less than for school districts to disfavor religions that employ "proselytizing" messages or display large crosses or other religious

symbols. This cannot be the analysis that the Establishment Clause requires or even allows.

The Seventh Circuit majority itself seemed to recognize that this analysis has at least a tendency to invite entanglement when it said:

> None of this is to suggest that school officials should have exercised a higher degree of control over the Church's environment scrubbing it of religious symbols or working to tailor its message to a secular audience. Such a course would have run afoul of *Lemon*'s excessive entanglement prong. See *Bowen* v. *Kendrick*, 487 U.S. 589, 615–18 (1988).

App. 27a. n.18. Avoiding such "scrubbing" does not avoid the entanglement problem. As the primary dissent notes, the majority's Establishment Clause analysis requires that institutions determined to be "pervasively religious" be "excluded from the civil polity because their 'religiosity' would amount to coercive endorsement on the part of the government." App. 54a. The probable end result of the majority's new direction is "the functional equivalent of a judicially created 'civil religion', as the only 'authorized' religious participant in any aspect of American life." App. 55a.

Ultimately, the Seventh Circuit's analysis creates an impossible dilemma for school districts. The only way to avoid the entangling effects and unconstitutional favoritism among religions required by the Seventh Circuit's analysis is to eliminate religious facilities altogether as a graduation venue. But that choice does not avoid the unconstitutional disfavoring of religion as against nonreligion. The

Seventh Circuit's analysis leaves the school districts in a no-win situation. Either abandon neutrality as between religions, or abandon neutrality as between religion and nonreligion. Neither is acceptable under the First Amendment.

II. This case presents practical issues of national importance.

A. The practice of holding graduation ceremonies in religious facilities is widespread.

Amici agree with the parties that this case presents a recurring question of exceptional importance to schools and school officials throughout the nation. Pet. 30–32; App. 228a. Numerous public schools throughout the country hold graduation ceremonies in churches, including the following:

- Some Alabama schools. Melanie Patterson, *F'dale churches consider merger*, N. Jefferson News, Oct. 1, 2010, *available at* 2010 WLNR 19540301; *Schools ponder weather-related graduation changes*, Anniston Star, May 26, 2011, *available at* 2011 WLNR 10558366.
- At least one school in Alaska. *In brief: Mat-Su*, Anchorage Daily News, May 14, 2010, *available at* 2010 WLNR 9981487.
- Various California schools. See Natasha Lindstrom, *Grads celebrate overcoming the odds*, Daily Press (Victorville, Cal.), June 3, 2009, *available at* 2009 WLNR 106185 30; *Events*, Vida en el Valle (Fresno, Cal.), June 21, 2011, *available at* 2011 WLNR 12403197.

- At least one Colorado school district. See Electa Draper, *Ire over New Life for grad events*, Denver Post, May 12, 2011, *available at* 2011 WLNR 9581544 (Colorado Springs-area school moves graduation from the Air Force Academy to a church because of cumbersome security measures after Operation Neptune Spear).
- Various Florida schools. See, *e.g.*, *Class of 2006*, Vero Beach Press J., May 22, 2006, *available at* 2006 WLNR 8859079; *Letters to the Editor*, Fla. Today (Melbourne, Fla.), May 19, 2005, *available at* 2005 WLNR 27124602 (noting that Palm Bay High School was hosting its graduation in a church).
- Many Atlanta and Macon, Georgia-area schools. See, *e.g.*, Christopher Quinn, *School events at a church flagged*, Atl. J. & Const., Dec. 4, 2010, *available at* 2010 WLNR 24065986; Candice Hannigan, *Graduations live and online Woodstock church hosts commencements for 9 schools*, Atl. J. & Const., May 5, 2005, *available at* 2005 WLNR 7921807; *Congratulations to DeKalb Schools' Graduating Class of 2012!*, Dekalb County School District, http://www.dekalb.k12.ga.us/teaching-and-learning/graduation-schedule (last visited Jan. 15, 2013) (listing several area schools that hosted graduation ceremonies in churches).
- Many Illinois schools. See, *e.g.*, *Images: Wacunda High School Graduation*, Daily Herald, May 20, 2012, *available at*

http://www.dailyhearld.com/article/20120520/news/705209736/photos/AR/; Manya Brachear, *Graduations at church cause unease*, Chi. Trib., May 30, 2010, available at 2010 WLNR 11108875; Dawn Trice, *Pomp is muted, but opinions of readers aren't*, Chi. Trib., June 9, 2004, available at 2004 WLNR 19837732; Cathy Bayer, *This year's graduation will be in a church*, Rockford Reg. Star, Jan. 29, 2011, at D1 (Rockford, Ill. school).

- Various Kentucky schools. See Dariush Shafa, *92 Beacon Central grads celebrate success*, Messenger-Inquirer (Owensboro, Ky.), June 7, 2009, *available at* 2009 WLNR 10910079); Nola Sizemore, *School calendar amendments approved*, Harlan Daily Enter., Apr. 15, 2011, *available at* 2011 WLNR 7387120; Jim Warren, *Graduation dates set at area high schools*, Lexington Herald-Leader, May 5, 2011, *available at* 2011 WLNR 8731444.

- A number of Louisiana schools including some in the New Orleans and Baton Rouge areas. See *George Washington Carver High School graduates*, New Orleans Picayune, June 9, 2011, *available at* 2011 WLNR 13998424; *Graduates and Valedictorians: Doyle High School*, Baton Rouge Advoc., June 5, 2009, *available at* 2009 WLNR 10822582; *Graduates and Valedictorians: Live Oak High School*, Baton Rouge Advoc., June 19, 2009, *available at* 2009 WLNR 11784642; *Graduates and Valedictorians: Walker High*

School, Baton Rouge Advoc., May 5, 2010, *available at* 2010 WLNR 10772589.

- At least one high school in Springfield, Massachusetts. See Jeanette DeForge, *For MacDuffie grads, year of drama, horror*, The Republican (Springfield, Mass.) June 6, 2011, *available at* 2011 WLNR 11627280 (highlighting seniors graduating from high school after tornadoes hit their town and mentioning the ceremony would take place in a church).
- A number of schools in the Grand Rapids, Michigan area. See*, e.g.*, *Creston moves graduation due to Rain*, WZZM, http://www.wzzm13.com/rss/article/168479/14/Creston-moves-graduation-due-to-rain (last visited Jan. 10, 2013); *Ada to Zeeland*, Grand Rapids Press, May 15, 2008, *available at* 2008 WLNR 9285563; *Commencement to stay at church*, Grand Rapids Press, July 10, 2011, *available at* 2011 WLNR 13936614; *Graduation gets new location*, Grand Rapids Press, Sept. 27, 2009, *available at* 2009 WLNR 19195304.
- At least one Missouri high school. *Fair Grove classes moving over break*, Springfield News-Leader, Oct. 20, 2009, *available at* 2009 WLNR 20726613.
- Schools in Minnesota. See, *e.g.*, *MHS Class of 2013*, Minnetonka Public Schools, http://www.minnetonka.k12.mn.us/SCHOOLS/MINNETONKAHIGHSCHOOL/GRADUATION/Pages/Graduation.aspx (last

visited Jan. 15, 2013) (stating that graduation for MHS will be held at Grace Church in Eden Prairie, MN); *Chaska High School Graduation for Class of 2012*, Media District 112, http://media.district112.org/CHS/Students/GradInfo.pdf (last visited Jan. 15, 2013) (noting that graduation will also be held at Grace Church in Eden Prairie, MN).

- Many Cincinnati-area schools. See *Schools see graduations in churches as practical, not religious*, Cincinnati Enquirer, May 16, 2010, *available at* 2010 WLNR 10189049.
- Several schools in Pennsylvania. See Katy Hopkins, *'Your Mountain is Waiting,' 438 Grads Reminded at Manheim Twp. High Rites*, Lancaster New Era, June 10, 2009, *available at* 2009 WLNR 11257770; Brian Wallace, *Manheim Township graduation mix-up irks parents*, Lancaster Online, http://lancasteronline.com/article/local/711133_Manheim-Township-graduation-mix-up-irks-parents.html (last visited Jan. 17, 2013) (implying that several different school districts use the same church for graduations).
- At least one South Carolina School. See Rob Novit, *Presenting the class of 2011*, Aiken Standard, June 3, 2011, *available at* 2011 WLNR 11081674.
- Schools in the Memphis and Nashville, Tennessee region. See *Parent questions school's graduation event at church*, Tennessean, May 10, 2010, *available at* 2010

WLNR 9657501; *2012 High School Graduation Schedule*, Shelby County Schools, http://www.scsk12.org/SCS/pages/hsgrad_dates12.html (last visited Jan. 15, 2013) (listing eight public schools, all of which hosted graduation ceremonies at a church).

- Some districts in Texas. See Jim Hardin, *Rockwall-Heath High School Graduation*, Rockwall Cnty. Herald-Banner, June 7, 2010, *available at* 2010 WLNR 12008442; Schools in Austin, Texas; *Events Calendar*, Shoreline Ministries, http://www.shoreline.net/hutto-high-school-graduation (last visited Jan. 15, 2013) (noting that the 2011 Hutto High School Graduation was to take place at the church); *Events Calendar*, Shoreline Ministries, http://www.shoreline.net/lake-travis-high-school-graduation, (last visited Jan. 15, 2013) (noting that the 2011 Lake Travis High School Graduation was to take place at the church).
- At least one school in Washington. *Freeman High School*, Spokesman-Rev. (Spokane, Wash.), June 3, 2010, *available at* 2010 WLNR 11667045.

These examples demonstrate the wide-spread nature of the First Amendment problem.[4]

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[4] In addition to graduation ceremonies, schools also use church facilities for other purposes, including arts programming and anti-tobacco programs. See *Education Briefs*, Lincoln Star

[Footnote continued on next page]

B. The Seventh Circuit's conclusion creates practical difficulties for school districts and school officials.

If the Seventh Circuit's decision stands, it will cause significant practical and financial problems for school districts, school officials, students, and their families.

First, schools not uncommonly choose to lease religious facilities for graduations or other events because the schools themselves do not own facilities that are large enough to accommodate the number of people who wish to attend. See, *e.g.*, Patterson, *F'dale churches consider merger*, Jefferson News, Oct. 1, 2010 (church venue has biggest auditorium in the city); *Fair Grove classes moving over break*, Springfield News-Leader, Oct. 20, 2009, *available at* 2009 WLNR 20726613 ("The decision to move graduation off campus is mainly driven by capacity issues."); *Schools see graduations in churches as practical, not religious*, Cincinnati Enquirer, May 16, 2010 ("the old high school gym couldn't accommodate everyone"). Thus, requiring schools to forego the use of religious facilities will, in some instances, decrease the number of family members and friends who can attend graduation.

Second, as is true of the District here, it is also not unusual for schools to choose religious facilities for graduations and other formal events because the religious facilities are more comfortable and have

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[Footnote continued from previous page]
Journal, Dec. 1, 2003, available at 2003 WLNR 18581371; *ACLU-TV* v. *Sumner Cnty. Bd. Of Educ.*, Case No. 3-11-0408, 2011 WL 1675008 (M.D. Tenn. May 3, 2011).

better seating than any facility owned by the school. Brachear, *Graduations at church cause unease*, Chicago Trib., May 30, 2010 (reporting one school official's comment that Willow Creek Community Church's auditorium "fits the kind of ceremony we have . . . [i]t's not like bleachers at the stadium."); *Schools see graduations in churches as practical, not religious*, Cincinnati Enquirer, May 16, 2010; *Irving ISD moving graduations out of Potter's House church next year*, 2011 WLNR 9710880.

Third, the cost to use religious facilities is frequently less than the cost to use other facilities in the community. See Brachear, *Graduations at church cause unease*, Chicago Trib., May 30, 2010; See *Schools see graduations in churches as practical, not religious*, Cincinnati Enquirer, May 16, 2010. *Enfield Bd. of Ed. in Connecticut agrees to end graduations at church*, Huffington Post, July 19, 2012, http://www.huffingtonpost.com/2012/07/19/conn-town-agrees-to-end-g_n_1686045.html (last visited Jan. 10, 2013). Thus, the Seventh Circuit's analysis will increase the expense of holding graduations and other events at a time when the downturn in the national economy and reduced property values have reduced funding available for schools. Cf. Brian Wallace, *Manheim Township graduation mix-up irks parents*, Lancaster Online, http://lancasteronline.com/article/local/711133_Manheim-Township-graduation-mix-up-irks-parents.html (last visited Jan. 17, 2013) (holding graduation at the school or another venue would cost $10,000–$14,000 more than at the church facility at a time when the school district has cut $11 million from its budget).

* * *

The Seventh Circuit's analysis in reality has little to do with the endorsement, coercion, or lack of neutrality on the part of the District. Rather, in the guise of its reasonable observer analysis, the Seventh Circuit has improperly constitutionalized a dispute about judgment and taste in the selection of graduation venues. School officials, like other governmental officials, frequently make decisions based on their best religiously neutral judgment that draw the ire of at least one or more members of the public who question the wisdom or taste of the choice. But as Justice O'Connor observed, "[a] state has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

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