No. 12-755

IN THE

# Supreme Court of the United States

ELMBROOK SCHOOL DISTRICT,
*Petitioner,*

v.

DOES 1–9,
*Respondents.*

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

## BRIEF FOR THE RESPONDENTS IN OPPOSITION


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## QUESTION PRESENTED

For a decade, petitioner Elmbrook School District held its graduation and honors ceremonies in a Christian church. Students received their diplomas and school officials gave their speeches underneath a towering cross. Students and their families sat in pews filled with Bibles, hymnals, "Scribble Card[s] for God's Little Lambs," and church promotional cards that asked them whether they "would like to know how to become a Christian." Before and after the ceremonies, students and family members congregated in a lobby filled with proselytizing banners and pamphlets, many of which were aimed at children. The school district chose this religion-saturated environment even though numerous nonreligious facilities were available to host the ceremonies.

The question presented is whether the en banc Seventh Circuit correctly held that, in these particular circumstances, the school district's use of a house of worship for important ceremonial events violated the Establishment Clause of the U.S. Constitution.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

## INTRODUCTION

It is premature for the Court to take up the issue this case presents, for this is the first and only federal appellate case to consider whether a public school may hold graduation ceremonies in a house of worship.

There is nothing resembling a circuit split here. The principal case that petitioner Elmbrook School District asserts is in conflict with the decision of the en banc Seventh Circuit—*Bauchman* v. *West High School*, 132 F.3d 542 (10th Cir. 1997)—did not even address whether a public-school graduation could be held in a church; it primarily considered whether a public-school choir could include religious songs in its repertoire. The School District also contends that three state-court cases conflict with the Seventh Circuit's decision, but those cases are 41, 61, and 97 years old, did not apply this Court's modern Establishment Clause jurisprudence, and dealt with circumstances quite different from those here.

Nor does the holding below conflict in any way with the decisions of this Court. Consistently with this Court's rulings that the Establishment Clause prohibits religious coercion, the en banc Seventh Circuit held that the School District could not constitutionally put high-school students to the choice of missing their graduation or attending that event in a religion-permeated environment. And consistently with this Court's rulings on religious endorsement, the court of appeals concluded that the School District's conduct unconstitutionally

promoted religion, in light of the importance of the events at issue, the intensely religious environment where the events where held, the juxtaposition of school and religious symbolism at the events, and the availability of numerous nonreligious facilities for the ceremonies. At most, the School District's arguments suggest that the en banc court's decision might not have been *compelled* by this Court's precedents, but that is a far cry from a conflict.

What is more, the en banc court was careful to limit the scope of its ruling. It held only that important public-school ceremonies ordinarily must not take place in a religion-permeated environment such as that of the particular church involved here. The court reserved judgment on situations in which a religious institution provides a nonreligious setting for an event or exigent circumstances make it necessary to use a religious facility; and the court distinguished uses of houses of worship for other purposes such as voting.

This Court should let other circuits consider the constitutionality of public-school events in religious venues, so that it may benefit from the views of different jurists on the question, observe how different factual scenarios may affect the results, and then determine whether this Court's involvement will ultimately be necessary.

## STATEMENT

1. From 2000 through 2009, the Elmbrook School District held high-school graduations in Elmbrook Church, an evangelical Christian institution. Pet. App. 6a. These graduation ceremonies took place on the dais at the front of the Church's main sanctuary. Pet. App. 11a. As depicted in the photographs in the

appendix, an enormous Latin cross hangs over the dais, and all the graduation rituals would occur in its shadow. Resp. App. 1a–5a, 9a–11a, 13a; Pet. App. 11a, 23a.

During graduation ceremonies, the cross is illuminated by overhead spotlights. Resp. App. 2a–5a, 13a; C.A. App. 527. Although the cross was covered at the first graduation held in the Church, the Church refused to allow the cross to be covered, or to cover or remove any other permanent religious symbols, at subsequent ceremonies. Pet. App. 11a.

Graduates walk underneath the cross to receive their diplomas. Resp. App. 3a–5a; C.A. App. 94. School officials sit on the dais beneath the cross. Resp. App. 10a; C.A. App. 93. The officials and graduates give their commencement speeches under the cross, and their images appear on large "jumbotron" video-screens that flank the cross. Resp. App. 1a–2a, 9a; C.A. App. 93–94.

Graduating seniors and their guests—who include children of high-school, middle-school, and elementary-school age—sit in the Church's pews. Pet. App. 12a; C.A. App. 97. The graduates are seated in the front, center rows of the sanctuary's main level, directly facing the cross. Pet. App. 12a; C.A. App. 98. The graduates stay seated there throughout the ceremonies—which last between ninety minutes and two hours—except when they receive their diplomas or special recognition. C.A. App. 98, 522–523.

In front of each seat in the pews, there is a Bible, a hymnal, a yellow "Scribble Card for God's Little Lambs," a donation envelope, and a Church promotional card that asks attendees whether they

"would like to know how to become a Christian." Resp. App. 11a–12a, 14a–17a; Pet. App. 12a, 24a; C.A. App. 125–127. At graduation ceremonies, audience members have read the Bibles, genuflected as they entered their seats, and made the sign of the cross. C.A. App. 125–126.

Graduation attendees congregate in and must walk through the Church's lobby before and after the ceremonies. Pet. App. 10a. The lobby's walls are decorated with religious symbols, posters, and banners, which have included proclamations such as "Leading Children to a Transforming Life in Christ," "Jesus," "Lord of Lords," and "Knowing the Lord of Jubilee," as well as quotations from the Bible, images of Jesus, and advertising of a "Summer Godsquad" for middle-school children. Resp. App. 6a–8a; Pet. App. 10a & n.9, 20a, 24a.

The lobby also contains tables and stations filled with evangelical literature. Pet. App. 10a–11a, 24a. Some of the tables and stations are staffed by Church personnel wearing church insignia. Pet. App. 11a, 24a; C.A. App. 601. Much of the religious literature is aimed at children and teens; indeed, the lobby has signs directing youths to tables and wallboards with proselytizing pamphlets that are specifically addressed to them. Pet. App. 10a–11a & n.9, 24a; C.A. App. 131. Some attendees of the ceremonies have taken religious literature from the lobby's tables and stations. C.A. App. 131. At one graduation, church members passed out religious literature in the lobby. Pet. App. 11a, 24a.

School banners are displayed during the graduations, both in the Church's lobby and the sanctuary, alongside the religious items there. Resp. App. 13a; Pet. App. 26a. School names are also

displayed on the large video-screens flanking the sanctuary's cross before the ceremonies start. Resp. App. 11a; Pet. App. 26a.

Crosses and other religious symbols are plentiful on the Church grounds and the exterior of the Church building. Pet. App. 9a. Visitors see these symbols as they drive into the Church parking lot and walk into the building. *Ibid.*

The School District used the Church for the ceremonies despite the availability of at least eleven local nonreligious facilities to host the events. C.A. App. 369–376. Five of those facilities have seating capacities greater than the Church does. C.A. App. 142. Some of the nonreligious facilities cost less to rent; and most of the rest cost just $1 to $4 more per attendee. C.A. App. 100, 370–376, 383–384.

In addition to holding its 2000 through 2009 graduations in the Church's sanctuary, one of the School District's high schools held its 2003 through 2009 senior honors ceremonies in the Church's chapel, which also has a prominent cross behind the podium. Pet. App. 6a, 11a–12a; C.A. App. 98–99, 448. That high school did so even though the District's other high school held its senior awards events at a nonreligious facility where both schools' events could have been held at no additional cost to the District. See Pet. App. 6a, 15a; C.A. App. 99, 136, 607.

The School District's use of the Church led to significant divisiveness in the school community and triggered many complaints from objecting students and parents. Pet. App. 12a; C.A. App. 64, 84, 151–154, 278, 281–313, 322, 336–338, 354, 357, 360, 540, 587, 596, 603–605. But the District's superintendent (a member of the Church) ratified and then defended

the use of the facility. Pet. App. 8a & n.5; C.A. App. 105, 296, 301–303, 312, 330–331. The president of the District's school board (also a member of the Church) likewise defended the District's actions. Pet. App. 8a; C.A. App. 578–580.

2. The plaintiffs-respondents—students, parents, and graduates of the School District—filed suit in April 2009 to challenge the School District's use of the Church. Pet. App. 15a. The district court ruled in favor of the School District, as did a divided panel of the court of appeals, over Judge Flaum's dissent. Pet. App. 3a, 17a.

On rehearing en banc, the court of appeals ruled by a seven-to-three vote that the School District had violated the Establishment Clause by holding ceremonies in the Church. Pet. App. 3a, 42a. Judge Flaum wrote the majority's opinion, joined by Judges Kanne, Wood, Williams, Sykes, Tinder, and Hamilton. Pet. App. 2a. In addition to joining the en banc court's opinion in full, Judge Hamilton wrote a concurring opinion. Pet. App. 33a–42a.

The en banc court concluded that the School District's practice conveyed a message of endorsement of religion given all the facts and circumstances at hand, including the iconic place that high-school graduations hold in American life, the religion-saturated and proselytizing environment of Elmbrook Church, the juxtaposition of school banners and emblems with sacred symbols and icons, the attendance of the ceremonies by children, and the availability of suitable nonreligious graduation sites. Pet. App. 25a–27a. The court also concluded that the School District's practice was religiously coercive: because high-school commencement is an effectively obligatory event (as this Court held in *Lee*

v. *Weisman*, 505 U.S. 577, 595 (1992)), the School District had in essence directed students to attend a religion-permeated environment, where they became a captive audience surrounded by proselytizing messages. Pet. App. 28a–31a.

The en banc majority emphasized "the limited scope of [its] opinion," however, making clear that its "holding is a narrowly focused one." Pet. App. 3a. The court cautioned that its "ruling should not be construed as a broad statement about the propriety of governmental use of church-owned facilities." *Ibid.* The court also emphasized that its opinion should not "be read as critical of the cases permitting governmental use, in the proper context, of certain church-owned facilities," citing decisions that permitted the use of churches as polling places and the lease by a charter school of church space that lacked religious iconography. Pet. App. 4a.

The court refused to "speculate whether and when the sanctuary of a church, or synagogue, or mosque could hold public school ceremonies in a constitutionally appropriate manner." Pet. App. 5a. Indeed, the court did not "seek to determine" whether even a facility as religious as Elmbrook Church might permissibly be used for a public-school event in exigent circumstances, explaining that "if a church sanctuary were the only meeting place left in a small community ravaged by a natural disaster, we would confront a very different case." *Ibid.* Rather, the court only "consider[ed] the set of facts before [it], and on those facts * * * conclude[d] that an unacceptable amount of religious endorsement and coercion occurred when the District held important civil ceremonies in the proselytizing environment of Elmbrook Church." *Ibid.*

Three judges dissented. Judge Ripple asserted that the en banc court's decision conflicted with decisions of this Court, but he did not explain what the alleged conflict was; instead, he argued only that this Court's precedents were distinguishable and did not compel the en banc court's conclusion. Pet. App. 45a–53a. Chief Judge Easterbrook acknowledged that the School District had "act[ed] inconsiderately" toward religious minorities, but he contended that this Court's Establishment Clause jurisprudence should be thrown out and that the Clause should instead be read to prohibit solely "taxation for the support of a church, the employment of clergy on the public payroll, and mandatory attendance or worship." Pet. App. 60a, 66a. And Judge Posner argued that the School District's practice was not religiously coercive because this Court was wrong—indeed, that this Court "was whistling in the dark" "in florid hyperbole"—when it held in *Lee*, 505 U.S. at 586, 595, that high-school graduation is not a truly voluntary event. Pet. App. 74a.

The en banc majority and the dissenters did agree on one point: a decision by the School District to move the graduations to a newly built field-house on school property starting in 2010 did not render the case moot. Pet. App. 2a–3a, 99a–103a. The en banc court was unanimous in concluding that the plaintiffs' claims for injunctive relief remain live, because the School District has refused to foreclose returning graduations to the Church in the future, and considerations such as cost or student preferences could lead the District back to the Church. Pet. App. 3a, 14a, 101a–103a; C.A. App. 73, 85–86. All the judges also agreed that the plaintiffs who attended past graduations at the Church have

live claims for damages. Pet. App. 3a, 14a–15a, 99a; C.A. App. 79.

## REASONS FOR DENYING THE PETITION

### I. There is no conflict with the decisions of other circuits or of this Court.

#### A. There is nothing close to a circuit split over graduations in religious venues.

The decision below is the first and only federal appellate ruling to assess the constitutionality of holding public-school graduation ceremonies in a house of worship. In attempting to manufacture a split of authority (Pet. 11–14), the School District relies on a federal-court decision that did not even involve graduation ceremonies, and on three state-court decisions that are many decades old and did not apply modern Establishment Clause jurisprudence.

1. In the only circuit-court case raised by the School District that even concerned public-school events, *Bauchman*, 132 F.3d at 554–555, the Tenth Circuit held that religious songs could be constitutionally included in public-school choir instruction and performances, because such songs are "traditional and ubiquitous * * * in vocal music," and so are an important element of a complete academic choral curriculum. Although the court also approved the defendant school's use of religious venues for some choir concerts, its focus was on the choral repertoire question, and the court engaged in scant analysis of the venue question. See *id.* at 553–558.

The Tenth Circuit's brief references to the concert venues came within the court's applications

of the endorsement and coercion tests—the same tests that the Seventh Circuit applied below—but the Tenth Circuit unsurprisingly reached a different result on far different facts. The *Bauchman* court determined that the school's conduct sent no message of religious endorsement or favoritism because the choir performed at both secular and religious venues, and because the religious venues provided "an atmosphere conducive to the performance of serious choral music." *Id.* at 554–555. Here, by contrast, the graduations would take place in only one venue—a religious one—each year, and there is no intrinsic or artistic connection between religious venues and graduation ceremonies.

With respect to coercion, the Tenth Circuit conducted its analysis chiefly under the Free Exercise Clause, not the Establishment Clause, and held that the school's actions were not coercive because students could opt out—freely and without negative consequences—of singing religious songs and performing at religious venues. See *id.* at 557–558 & n.11. Here, an opt-out is no answer, for as this Court held in *Lee*, 505 U.S. at 595, "a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary.'"

Indeed, so inapposite is *Bauchman* that the School District never even cited it to the en banc court, the three-judge panel, or the district court. Nor was the case cited in any majority, concurring, or dissenting appellate opinion in these proceedings, in any opinion by the district court, or by any of the School District's amici before the court of appeals.

The second case that the School District holds up in asserting a split is *State ex rel. Conway* v. *District Board*, 156 N.W. 477 (Wis. 1916)—a century-old

state-court case that predated incorporation of the First Amendment and thus involved only a state-constitutional question. While *Conway* upheld the use of a church for public-school graduations, it also approved the giving of prayers at those graduations (*id.* at 481), a ruling that did not survive this Court's decision in *Lee*, 505 U.S. 577.

The School District's third case is *Miller* v. *Cooper*, 244 P.2d 520 (N.M. 1952), a six-decade-old state-court decision. *Miller*'s discussion of whether a public school could hold a graduation in a church was only six sentences long, and did not apply either an endorsement or a coercion analysis. See *id.* at 520–521. The sole ground for the court's ruling was that there was no secular facility in the community with sufficient seating. *Ibid.* Here, numerous alternative facilities exist. Pet. App. 27a; C.A. App. 369–376.

The last public-school case that the petition cites, *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 195 N.W.2d 161 (Neb. 1972), is a state-court ruling that did not even concern a graduation. *Hartington* approved a public school's leasing of property from a parochial school to hold special-education classes, but the lease required that "no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms." *Id.* at 162. (Nothing in *Hartington* supports the petition's speculation that students must have "encountered religious imagery as they attended class." Cf. Pet. 13.) Here, by contrast, the ceremonies take place in an environment festooned with sacred symbols and proselytizing messages. Moreover, the *Hartington* court did not apply an endorsement or coercion analysis, but considered only whether the lease resulted in unconstitutional

funding of or entanglement with religion (see 195 N.W.2d at 163–164), issues that the en banc court of appeals did not decide here (Pet. App. 21a n.15).

2. Nor does the en banc court's decision conflict with cases that have allowed use of houses of worship as polling places, as Judge Hamilton's concurrence explains in detail. See Pet. App. 39a–41a. Voting typically takes place in nonconsecrated areas in houses of worship, not on the chancel or altar of the main sanctuary. See *Otero* v. *State Election Board*, 975 F.2d 738, 741 (10th Cir. 1992). Voters who object to entering a church can ordinarily cast their ballots by mail or in a neighboring precinct, so there is no coercion. See *Berman* v. *Board of Elections*, 420 F.2d 684, 685 (2d Cir. 1969). And governments place polling stations in nonreligious as well as religiously affiliated venues, and in houses of worship for minority as well as majority faiths, thus avoiding any message of endorsement or favoritism. See *Otero*, 975 F.2d at 741; *Berman*, 420 F.2d at 685. Furthermore, voting involves adults, while this case involves the public schools, where this Court appropriately requires enforcement of the Establishment Clause in a "particularly vigilant" manner. See *Edwards* v. *Aguillard*, 482 U.S. 578, 583 (1987).

3. Finally, *Cooper* v. *U.S. Postal Service*, 577 F.3d 479 (2d Cir. 2009), supports the en banc court's decision. There, the Second Circuit held that a private, religiously affiliated contractor operating a unit of the U.S. Postal Service violated the Establishment Clause by displaying religious items in postal-unit space. *Id.* at 495–496. The Second Circuit explained that "[t]he gravamen of the complaint is that [the plaintiff postal customer] was

made to feel that he was an unwilling participant in a faith not his own when he entered [the] space." *Id.* at 496. The same is true here.

### B. There is no conflict with this Court's or other circuits' religious-coercion jurisprudence.

Neither the rulings of this Court nor the decisions of any circuit conflict with the en banc court's conclusion that the School District violated the constitutional ban against religious coercion by forcing students to choose between missing the momentous event of graduation and being immersed in the Church's religion-saturated environment. The School District contends that the en banc court's coercion analysis conflicts with this Court's decisions because, in the District's view, this case involves only "mere exposure to religious symbols," not "the use of government power to pressure or induce persons to engage in religious practices." Pet. 15. But that distinction is not supported by this Court's jurisprudence.

Contrary to what the School District argues (Pet. 16), this Court has never restricted the coercion test to situations in which government compels citizens to actively perform religious rituals. Rather, the Court has enunciated the constitutional prohibition against religious coercion broadly: "[G]overnment may not coerce anyone to support *or* participate in religion *or* its exercise." *Lee*, 505 U.S. at 587 (emphasis added). "Government may not * * * force one or some religion on any person," or "thrust any sect on any person," or "make a religious observance compulsory," or "coerce anyone * * * to observe a religious holiday, or to take religious instruction." *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). And no

governmental entity "can force [or] influence a person to go to or to remain away from church against his will." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); accord *Zorach*, 343 U.S. at 314.

The School District's assertion that applying coercion analysis to displays of religious symbols and texts conflicts with this Court's rulings (Pet. 15) likewise lacks support in the Court's precedents, which have considered whether religious displays appeared in a coercive context. In *Stone* v. *Graham*, 449 U.S. 39, 42 (1980), for example, the Court struck down a statute requiring the Ten Commandments to be posted on the walls of public-school classrooms, explaining that the displays could have the coercive effect of "induc[ing] the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments," even though the Commandments were "merely posted on the wall, rather than read aloud." In contrast, in *Van Orden* v. *Perry*, the Court upheld the display on the grounds of the Texas State Capitol of a monument containing the Ten Commandments, noting that the monument was "a far more passive use of [the Commandments] than was the case in *Stone*." 545 U.S. 677, 691 (2005) (four-Justice plurality opinion); accord *id.* at 702–703 (Breyer, J., concurring in the judgment). Similarly, in *Lynch* v. *Donnelly*, 465 U.S. 668, 686 (1984), the Court approved the inclusion of a crèche within a holiday display, noting that the item was "one passive symbol."

Indeed, recognizing the coercive potential of religious symbols, a partial concurrence and partial dissent of four Justices in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter* advocated that the coercion analysis should be the *primary* test used

to evaluate governmental displays of such symbols. 492 U.S. 573, 659 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part, joined by Chief Justice Rehnquist, Justice White, and Justice Scalia). That partial concurrence emphasized that coercion need not rise to the level of direct compulsion, but may be "subtle" or "indirect," noting that the government's "[s]ymbolic recognition * * * of religious faith" could create unconstitutional coercion in some cases. *Id.* at 659, 661 & n.1. As examples, the partial concurrence referenced "the permanent erection of a large Latin cross on the roof of [a government building]" and cited several decisions that had struck down governmental displays of crosses. *Id.* at 661. The partial concurrence would have upheld two displays of a crèche and a menorah on public property, however, because those displays were not coercive: "[p]assersby" were "free to ignore them, or even to turn their backs." *Id.* at 664.

The vacated majority opinion of the three-judge panel below (which was on behalf of two of the three judges who became dissenters at the en banc stage) likewise rejected the School District's contention that religious symbolism can never be coercive. Citing the partial concurrence in *Allegheny* with approval, the panel opinion acknowledged, "We do not doubt that symbols can be used to proselytize or that, in the appropriate circumstances, coerced engagement with religious iconography and messages might take on the nature of a religious exercise or forced inculcation of religion." Pet. App. 117a.

The en banc majority and the dissenters may have disagreed about the proper application of these principles to the specific facts before them. But nothing in the majority's analysis conflicts with the

decisions of this Court. The immersion of students in Elmbrook Church's religious environment—where students and families had to spend hours watching their graduation proceedings take place beneath an immense cross, in pews with Bibles and hymnals and church literature right in front of them, after congregating in a lobby replete with proselytizing banners and pamphlets—is a far cry from the passive, non-coercive displays that this Court upheld in *Van Orden*, 545 U.S. at 691, and *Lynch*, 465 U.S. at 686, or that the partial concurrence in *Allegheny*, 492 U.S. at 664, would have upheld.

As for the en banc court's observation that, when students see their peers engaging in religious rituals or receiving proselytizing materials in a deeply religious setting during the capstone event of their school careers, "'[t]he law of imitation operates' and may create subtle pressure to honor the day in a similar manner" (Pet. App. 30a–31a (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 60 n.51 (1985))), the School District embarks on a flight of fancy in contending (Pet. 16) that the court has somehow threatened the constitutional right of students to engage in voluntary religious acts in an otherwise nonreligious public-school context. It is the School District's decision to hold graduations in the Church's religious setting that is responsible for the coercive pressure here.

Nor is there a conflict between the en banc court's application of the coercion test and the holdings of other circuits. Three of the four cases that the School District cites (Pet. 17) in arguing that such a conflict exists involved the recitation of the Pledge of Allegiance in public schools. Far from considering immersion in religious messages at

graduation, those cases concluded merely that the Pledge is patriotic, not religious, and so cannot be religiously coercive. See *Croft* v. *Perry*, 624 F.3d 157, 170 (5th Cir. 2010); *Newdow* v. *Rio Linda Union School District*, 597 F.3d 1007, 1038 (9th Cir. 2010); *Myers* v. *Loudoun County Public Schools*, 418 F.3d 395, 407–408 (4th Cir. 2005). The fourth case is *Bauchman*, the choir case where, as noted above, the court conducted its coercion analysis primarily under the Free Exercise Clause and held that the school's actions were not coercive because the choir members could freely opt out of singing religious songs and performing at religious venues. See 132 F.3d at 557–558 & n.11.

### C. There is no conflict with this Court's or other circuits' religious-endorsement jurisprudence.

Neither the rulings of this Court nor the decisions of any circuit conflict with the en banc court's conclusion that the School District unconstitutionally promoted religion by holding the grand spectacle of graduation in an intensely religious environment, where school officials gave speeches and passed out diplomas beneath a giant cross, as school symbols hung beside religious ones, while many non-religious venues were available to host the ceremonies.

On this issue, the School District's assertions of conflict are principally based on an argument that government cannot endorse a private party's religious messages, at least when doing so is not the government's goal. But this Court has ruled a number of times that government may in some circumstances bear responsibility for a private party's religious communications, even if the

government does not set out with the objective of promoting religion. The cases that the School District cites in support of the purported conflict are public-forum and public-funding cases, but there is no public forum here, and the en banc court did not rule on the funding issue.

The School District also contends that there is a conflict, both among opinions of this Court's Justices and between circuits, on who the endorsement test's "reasonable observer" is. The School District relies, however, on outdated cases for that proposition. This Court's more recent opinions have clarified the characteristics of the reasonable observer, and the circuits have followed those decisions.

**1. Government can endorse a private party's message.**

The petition's main ground of alleged conflict on religious endorsement rests on the School District's view that government cannot endorse the religious message of a private party, at least when doing so is not the government's intent. See Pet. 18, 25–26. This Court has held on a number of occasions, however, that the government did bear responsibility for private parties' religious messages, when official actions provided the private parties with a unique platform to disseminate those messages. And in some of those cases, the Court found a constitutional violation even though promotion of religion was not the government's purpose, as "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290, 307 n.21 (2000) (quoting *Capitol Square Review &*

*Advisory Board* v. *Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)).

In *Santa Fe*, for example, this Court held that a public-school policy permitting students to vote to have prayer over the loudspeaker at football games unconstitutionally endorsed religion, despite the fact that the prayers were "student-initiated" and "student-led." 530 U.S. at 301–302, 305. *Santa Fe* also explained that the school district in *Lee* had "endors[ed] * * * prayer" by allowing private clergy to deliver invocations at graduations (530 U.S. at 305), notwithstanding that there was no suggestion in *Lee* that the school had acted with a proselytizing purpose (see 505 U.S. at 585, 595). In *Allegheny*, 492 U.S. at 579, 600–601, the Court ruled that a county had endorsed the religious message of a crèche erected on county property by a private party, again without concluding that the county acted with a religious purpose. And in *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 468, 470–471 (2009), the Court confirmed that "privately financed and donated monuments that the government accepts and displays to the public on government land" "speak for the government" and therefore "must comport with the Establishment Clause." In all these cases, the Court determined, based on the totality of the circumstances before it, that the government was promoting the private messages at issue. And that is just what the en banc court determined here.

**2. The School District relies on public-forum and public-funding cases that have no bearing here.**

In claiming that the en banc court's endorsement analysis conflicts with decisions of this Court and some other circuits (Pet. 18–22, 25–27), the School

District relies primarily on cases that considered whether government can endorse private religious speech in a public forum that is open to a variety of secular and religious speakers. See *Pinette*, 515 U.S. at 763–764, 770 (plurality opinion), 772 (O'Connor, J., concurring); *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384, 394–395 (1993); *Peck* v. *Upshur County Board of Education*, 155 F.3d 274, 286–287 (4th Cir. 1998); *Chabad-Lubavitch of Georgia* v. *Miller*, 5 F.3d 1383, 1391, 1394 (11th Cir. 1993); *Kreisner* v. *City of San Diego*, 1 F.3d 775, 782–83 (9th Cir. 1993).

But any conflict that exists on that issue is not raised by this case, as there is no public forum here. The School District selects one venue annually to host its graduation ceremonies. It does not invite a variety of private organizations to speak at the ceremonies. Indeed, although the School District made a public-forum argument before the court of appeals (see School District C.A. Br. 53–55), it has prudently abandoned that argument at this level.

The School District also relies on some cases that allowed government-funded aid to benefit religious institutions under neutral governmental programs that broadly assisted both secular and religious entities. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 649, 653 (2002); *Mitchell* v. *Helms*, 530 U.S. 793, 829–830 (2000) (plurality opinion); *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1, 10 (1993); *American Atheists* v. *Detroit Downtown Development Authority*, 567 F.3d 278, 289–290 (6th Cir. 2009). But there is no conflict between the en banc court's decision and these cases, because the en banc court declined to rule on the respondents' argument that the School District was

unconstitutionally funding the Church. Pet. App. 21a n.15. In any event, this is not a case in which government is distributing public funds to a diverse group of secular and religious recipients as part of a neutral program; the School District contracted with the same facility to host its graduations year after year. Pet. App. 6a, 9a. Furthermore, the funding cases that the School District cites recognized that even neutrally distributed direct public funding of religious institutions can raise constitutional concerns when the money is actually used to advance religion. See *Mitchell*, 530 U.S. at 837–838 (O'Connor, J., concurring in the judgment); *Zobrest*, 509 U.S. at 12; *American Atheists*, 567 F.3d at 293–294; see also *Zelman*, 536 U.S. at 649, 661.

For similar reasons, the en banc court's application of the endorsement test does not conflict with this Court's decision in *Agostini* v. *Felton*, 521 U.S. 203 (1997), to partially overrule *School District of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). Cf. Pet. 24. Both *Agostini*, 521 U.S. at 222, and *Ball*, 473 U.S. at 381, considered the extent to which government may permissibly grant aid to religious schools. *Agostini* held that it was constitutional for public employees to provide special-education services to religious-school pupils within those schools, overruling *Ball* to the extent that it had reached a contrary conclusion. 521 U.S. at 234–235. But the services in *Agostini* and *Ball* were neutrally provided to both nonreligious and religious schools. See 521 U.S. at 209, 232; 473 U.S. at 375–376. The special-education classes were taught in classrooms that were kept entirely free of religious symbols. 521 U.S. at 211–212; 473 U.S. at 378. And no religious messages were conveyed to the students. See 521 U.S. at 210, 226–227; 473 U.S. at 388. For those

reasons, on those facts—facts far different from the ones at hand—the Court held in *Agostini* that there was no endorsement of religion. 521 U.S. at 235.

### 3. The en banc court's ruling does not "discriminate against religion."

The School District contends that the en banc court's decision requires it to "discriminate *against* religion" in selecting graduation venues. Pet. 21. That argument, however, "contradicts the fundamental premise of the Establishment Clause." *Allegheny*, 492 U.S. at 611. The Establishment Clause often requires government to treat religion differently from nonreligion, not out of hostility but out of respect for citizens' religious freedom, and in order to avoid religious coercion or endorsement. That was true in *Lee*, 505 U.S. 577, where the Court held that clergy cannot deliver prayers at public-school graduations, and in *Santa Fe*, 530 U.S. 290, where the Court prohibited student-given prayers over the loudspeaker at public-school football games. The en banc court's ruling does not "discriminate" against religion any more than the Establishment Clause itself does.

Nor would the School District have conveyed to its students any message of hostility toward religion by declining to hold graduations at the Church. Cf. Pet. 22. Rather, the students would have understood that the School District chose a secular venue to show respect for the sensitivities of religious minorities who may be uncomfortable with a Christian venue, and to avoid the religious divisiveness that picking a sectarian facility can generate.

### 4. The en banc court's ruling is consistent with this Court's and other circuits' definition of the reasonable observer.

In asserting that there is a conflict with respect to the proper characterization of the endorsement test's reasonable observer, the School District relies on outdated decisions and dissents. See Pet. 27–29. The petition cites disagreement among the Justices in the Court's 1994 decision in *Pinette*, 515 U.S. 753, over how much knowledge should be attributed to the reasonable observer, and the petition contends that this disagreement has generated disputes among the circuits. Since *Pinette*, however, this Court has clarified repeatedly that the reasonable observer "must be deemed aware of the history and context" of a challenged practice. See *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 866 (2005); *Zelman*, 536 U.S. at 655; *Good News Club* v. *Milford Central School*, 533 U.S. 98, 119 (2001); *Santa Fe*, 530 U.S. at 317 (all quoting *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring)); accord *Salazar* v. *Buono*, 130 S. Ct. 1803, 1819–1820 (2010) (plurality opinion). The circuits now consistently apply this standard. See, *e.g.*, *Borden* v. *School District*, 523 F.3d 153, 175 (3d Cir. 2008); *Vasquez* v. *Los Angeles County*, 487 F.3d 1246, 1257 (9th Cir. 2007); *Skoros* v. *City of New York*, 437 F.3d 1, 30 (2d Cir. 2006); *ACLU of Kentucky* v. *Mercer County*, 432 F.3d 624, 636–637 (6th Cir. 2005); *Lambeth* v. *Board of Commissioners*, 407 F.3d 266, 271–272 (4th Cir. 2005).

The School District further errs in contending that there is a conflict "over whether the reasonable observer would be a school child or a mature adult"

(Pet. 27–28) in the public-school context. The School District points to *Good News*, 533 U.S. at 117–119, in which the Court suggested that endorsement analysis should not be conducted from the viewpoint of misperceiving elementary-age children. But there, the question was the constitutionality of using school property for meetings of religious clubs that children could attend only with their parents' consent, so the Court concluded that it was the parents' perspective that was relevant, and the Court reaffirmed that the impressionability of children remains important if religious messages are conveyed to students at school events that are *not* voluntary. See *id.* at 115–117. When high-school students are *coerced* to attend school events, the Court has held that the reasonable observer is "an objective * * * [h]igh [s]chool student." *Santa Fe*, 530 U.S. at 308. In accordance with these rulings, the courts of appeals have recognized that although the reasonable observer cannot be a young child (because it does not make sense to presume that young children can have a full understanding of the history and context of a challenged practice), the reasonable observer in cases involving the public schools is cognizant of the school context and bears in mind the impressionability of children. See *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017, 1032 (10th Cir. 2008); *Skoros*, 437 F.3d at 22–25, 30; see also *Newdow*, 597 F.3d at 1037–1038.

The en banc court's endorsement analysis was consistent with these standards. The court explained that it would "assess[ ] the totality of the circumstances * * * to determine whether a reasonable person would believe that the [School District's conduct] amounts to an endorsement of religion." Pet. App. 19a (quoting *Books* v. *City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2000) (first

alteration in original)). The court recognized the case law's "special concern with the receptivity of schoolchildren to endorsed religious messages." Pet. App. 21a. The court accordingly concluded that "a reasonable observer would be aware" of the history and context of the School District's graduation practice, including that "the District did not itself adorn the Church with proselytizing materials," of "the existence of other suitable graduation sites," and of "the presence of children" at the ceremonies. Pet. App. 26a–27a; accord Pet. App. 34a–37a (Hamilton, J., concurring).

**5. This Court should not abandon the endorsement test, and this case does not present a good vehicle to consider whether to do so.**

The Court should decline the School District's invitation (Pet. 22–24) to abandon the endorsement test. The Court has regularly applied endorsement analysis in its recent Establishment Clause decisions. See, *e.g.*, *Salazar*, 130 S. Ct. at 1819–1820 (plurality opinion); *McCreary*, 545 U.S. at 866; *Zelman*, 536 U.S. at 654–655; *Good News*, 533 U.S. at 118–119; *Mitchell*, 530 U.S. at 835 (plurality opinion); *Santa Fe*, 530 U.S. at 305–308, 315–316; *Agostini*, 521 U.S. at 235. Establishment Clause cases typically are not easy ones—cases involving fundamental constitutional rights seldom are—but the endorsement inquiry has served as a helpful guidepost for this Court's analyses and for the lower courts' applications of the Clause.

Even if the Court were inclined to consider whether the endorsement test should be jettisoned, this case does not present a good vehicle for addressing that question. The en banc court's

judgment can be sustained solely on the grounds that the School District's practice was religiously coercive, which would make it unnecessary to reach the endorsement issue.

The en banc court's judgment can also be sustained on a number of other grounds which the en banc court did not adjudicate (see Pet. App. 21a n.15), but which the respondents raised below and would anticipate presenting were certiorari to be granted. First, the School District allowed a publicly funded school event (see Pet. App. 9a) to serve a religious institution's promulgation of its faith, contrary to this Court's decisions prohibiting the use of public funds to promote religious doctrines. See, *e.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589, 621–622 (1988). Second, by allowing the Church to dictate significant religious aspects of the graduation setting (see Pet. App. 11a), the School District violated the Establishment Clause's prohibition against delegating to a religious institution governmental authority that can then be used to advance the institution's religious mission. See, *e.g.*, *Larkin* v. *Grendel's Den*, 459 U.S. 116, 125–127 (1982). Third, the School District's relationship with the Church created the risk of excessive governmental intrusion into the affairs of religious organizations. See, *e.g.*, *Hernandez* v. *Commissioner*, 490 U.S. 680, 696–697 (1989). Fourth, the School District's practice generated considerable divisiveness (Pet. App. 12a) in the school community. See, *e.g.*, *Santa Fe*, 530 U.S. at 311, 316–317. Fifth, the School District compounded that divisiveness by holding unconstitutional majoritarian votes of the student body (Pet. App. 7a–8a) on whether to have graduations in the Church. See *Santa Fe*, 530 U.S. at 316–317.

## II. The School District greatly exaggerates the practical effect of the en banc court's limited, fact-sensitive decision.

The School District dramatically overreaches when it contends that the en banc court's decision "broadly prohibits conducting government functions in church buildings." See Pet. 8; see also Pet. 30–35. The en banc court emphasized "the limited scope of [its] opinion" and that its "holding is a narrowly focused one." Pet. App. 3a. The court specifically cautioned that its "ruling should not be construed as a broad statement about the propriety of governmental use of church-owned facilities." *Ibid.*

The en banc court therefore did not decide whether public-school graduations can be held in the sanctuary of a house of worship if the facility lacks religious iconography or covers or removes religious items for the event. Although Judge Hamilton's concurrence advocated that no public-school graduation be permitted "in the sacred worship space of any faith, absent unusual and extenuating circumstances such as a temporary emergency" (Pet. App. 34a), no other member of the court joined his opinion.

Instead, the en banc majority refused to "speculate whether and when the sanctuary of a church, or synagogue, or mosque could hold public school ceremonies in a constitutionally appropriate manner." Pet. App. 5a. Nor did the court "seek to determine" whether even a facility as religious as Elmbrook Church could be used for a public-school event in exigent circumstances, explaining that "if a church sanctuary were the only meeting place left in a small community ravaged by a natural disaster, we would confront a very different case." *Ibid.* Rather,

the court only "consider[ed] the set of facts before [it], and on those facts * * * conclude[d] that an unacceptable amount of religious endorsement and coercion occurred when the District held important civil ceremonies in the proselytizing environment of Elmbrook Church." *Ibid.*

These limitations on the court's decision matter. When public-school graduations are held in churches, the events often occur in the kinds of circumstances that the en banc court declined to address. Religious symbols are frequently removed or covered for the events, or the graduations occur in spaces that lack such symbols in the first place. See, *e.g.*, Christopher Quinn, *School Events at a Church Flagged*, Atlanta J. & Const., Dec. 4, 2010, at A1 ("religious objects and literature are temporarily removed from the church" during graduations); Manya A. Brachear, *Graduations at Church Cause Unease: Illinois Escapes Protests Over Places of Worship Hosting Schools' Commencements*, Chi. Tribune, May 30, 2010, at 13 (church hosting graduation ceremonies "doesn't have to cover crosses or other religious symbols because there aren't any in the auditorium"); *Schools See Graduations in Churches as Practical, not Religious*, Cincinnati Enquirer, May 16, 2010 (school holds graduation in church gathering space with "no permanent religious imagery"); Editorial, Lake Zurich Courier, May 6, 2004, at 24 ("School and church officials have agreed that there will be no religious symbols visible during graduation * * *."). And recently, a graduation was held in a church when a natural disaster damaged the school's campus shortly before the ceremony. See Jeannette DeForge, *For MacDuffie Grads, Year of Drama, Horror*, The Republican (Springfield, Mass.), June 6, 2011, at A5.

The en banc court also refrained from opining on the use of houses of worship for other kinds of governmental events. The court noted that its opinion should not "be read as critical of the cases permitting governmental use, in the proper context, of certain church-owned facilities." Pet. App. 4a. The court specifically stated that it was not "question[ing] the vitality" of case law that has allowed public schools to hold classes in space which is leased from religious institutions but is free of religious iconography. *Ibid.* (citing *Porta* v. *Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998)); see also *Thomas* v. *Schmidt*, 397 F. Supp. 203, 207, 211–212 (D.R.I. 1975), aff'd mem., 539 F.2d 701 (1st Cir. 1976).

Likewise, the en banc court expressly confirmed that it was not casting doubt on decisions that allowed voting to take place in houses of worship. Pet. App. 4a (citing *Otero*, 975 F.2d 738); accord Pet. App. 39a–41a (Hamilton, J., concurring). As explained above, this use of religious facilities is far different from the situation at bar: voting typically takes place in non-consecrated portions of houses of worship; objecting voters are ordinarily permitted to cast their ballots absentee or in a neighboring precinct; governments place polling stations in both nonreligious and religiously affiliated venues, avoiding any message of endorsement; and voting involves adults, not schoolchildren. See Section I(A)(2), *supra*.

Nor does the use of church meetinghouses for town meetings in New England in the eighteenth and nineteenth centuries support review in this case. Cf. Pet. 34. There is no suggestion that this practice continues today. Indeed, when churches were used

that way, the practice led to religious strife: in Connecticut, for example, the meeting halls became so closely tied to their particular religious denominations that "the town meeting-house had given place to a cluster of rival meeting-houses." See Richard J. Purcell, *Connecticut in Transition, 1775–1818*, at 97 (1918).

Ultimately, the School District cannot evade the fact that the decision below is the first and only federal appellate ruling to address the issue of public-school use of churches for graduations. It is premature to speculate on what the decision's impact might be without first seeing how courts apply its principles to different circumstances, or whether other circuits even agree with it at all. To be sure, the issue is important, but that only underscores the value of obtaining input from other appellate judges on the matter, and weighs against the Court wading in hastily and perhaps needlessly.

**III. The en banc court's decision was correct.**

Finally, review is unnecessary here because the en banc court reasonably and faithfully applied this Court's precedents in ruling that the School District's actions violated the constitutional prohibitions against religious coercion and endorsement.

*Coercion.* Because "high school graduation is one of life's most significant occasions," "attendance and participation" in graduation "are in a fair and real sense obligatory." *Lee*, 505 U.S. at 586, 595. By holding commencements at Elmbrook Church, the School District coerced students and parents to enter an intensely sectarian environment, to watch their graduation proceedings beneath an immense Christian cross, and to sit for hours in pews filled

with Bibles and hymnals and church literature, after passing through a lobby replete with proselytizing displays and pamphlets.

Students were thus coercively immersed in religious messages here to a much greater extent than in the school-prayer cases where this Court found unconstitutional religious coercion. In those decisions, the Court struck down the recitation of prayers that were short, that were non-sectarian, and that students could avoid by temporarily leaving the room. See *Santa Fe*, 530 U.S. at 297–298, 312; *Lee*, 505 U.S. at 583, 593, 596; *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 205–207, 210–212 (1963); *Engel* v. *Vitale*, 370 U.S. 421, 423 & n.2, 430 (1962).

*Endorsement*. The School District's conduct communicated a message of religious endorsement, in view of the totality of the circumstances. The School District annually held seminal school events in a religion-permeated space, where school officials gave speeches underneath a giant cross as their images were displayed on jumbo video-screens next to the cross, while school banners hung alongside numerous religious objects. The School District chose that space despite the availability of many nonreligious venues that could host the graduations. And the School District leaders who rejected objections to the use of the religious facility were themselves members of the Church.

The School District's actions thus communicated that the District approves of the Christian religion of Elmbrook Church, and that adherents of minority faiths who are uncomfortable with such a venue "are outsiders, not full members of the political community." See *Santa Fe*, 530 U.S. at 309 (quoting

*Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). If a mosque had been available to host the ceremonies, it is hard to imagine that School District leaders would have given serious consideration to using it, for fear of the outcry that would have come from the District's Christian (C.A. App. 262) majority. It is not surprising that none of the many articles about uses of religiously affiliated venues for graduations cited or referenced by the School District or its amici concerns a graduation in a non-Christian house of worship. See Pet. 30–32; Pet. App. 228a–230a; Brief of Amici Curiae American Association of School Administrators, et al. 17–24.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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