

No. 10-2922

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DOES 1, 7, 8, and 9, individually,
DOES 2, 4, 5, and 6, individually and as taxpayers, and
DOE 3, a minor, by DOE 3's next best friend, DOE 2,
Plaintiffs-Appellants,

vs.

SCHOOL DISTRICT OF ELMBROOK,
Defendant-Appellee,

Appeal from the
United States District Court for the Eastern District of Wisconsin
District Judge Charles N. Clevert (No. 2:09-cv-00409-CNC)

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Appellate Court No: 10-2922

Short Caption: Does 1-9 v. School District of Elmbrook

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Introduction

Defendant-appellee School District of Elmbrook has been holding its high-school graduation ceremonies in the sanctuary of a church. Graduation speakers deliver their orations and seniors receive their diplomas beneath an immense Christian cross. Students and their family members watch all this from pews, with Bibles, hymnal books, and church literature directly in front of them.

The district court thought that there was nothing unconstitutional about this arrangement, primarily because no prayers are delivered during the ceremonies. The Constitution's Establishment Clause, however, prohibits the government from imposing religion on children and their parents as the price of partaking in a seminal school event such as graduation. Holding an entire graduation ceremony in a religious environment — where prominent sectarian symbols and items directly and continuously confront the audience — is a far more extensive imposition of religion than short and non-sectarian prayers, which the Supreme Court has specifically held may not be presented at school events. The church graduations violate the Establishment Clause in other ways, too: they communicate a message that the school district endorses the religious message of the church, and they put a public event and public funds in the service of the church's promotion of its theological doctrines. The district court's decision should be reversed.

Statement Concerning Oral Argument

No federal appellate court has considered whether it is constitutional to hold a public-school graduation in a church. Oral argument is particularly appropriate in a novel constitutional controversy such as this one.

Jurisdictional Statement

The district court had federal-question jurisdiction, under 28 U.S.C. §§ 1331 and 1343(a)(3), as this suit alleges that the school district's church graduations violate the Establishment Clause of the First Amendment of the U.S. Constitution. A(Appendix)76-77(¶¶224-35). This appeal is from a final judgment entered by the district court on July 19, 2010. A9(#78). The plaintiffs filed a timely notice of appeal on August 16, 2010. A9(#79). This Court thus has jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issues

1. Whether a school district coercively imposes religion on students and their families, in violation of the Establishment Clause, when it holds high-school graduation ceremonies beneath a giant Christian cross in the sanctuary of a church.
2. Whether such church graduations convey an unconstitutional message of endorsement of religion, where school banners are displayed alongside religious symbols, many secular facilities are available to host the graduations, and the school district's superintendent and school-board president are both members of the chosen church.

3. Whether such church graduations otherwise violate the Establishment Clause, including because the school district delegates to a religious institution authority over the physical setting of a school event, and because public funds are used to support graduations in a religious environment.

Statement of the Case

This case challenges the defendant-appellee School District of Elmbrook's practice of holding its high-school graduation ceremonies, as well as its senior honors ceremonies, in Elmbrook Church, a Christian house of worship. A37-38. The plaintiff-appellant District students, graduates, and parents/taxpayers filed this lawsuit on April 22, 2009 (A4(#1)), seeking a permanent injunction against the use of the Church for future school events, a declaratory judgment, and damages arising out of past graduations at the Church (A78-79(¶¶237-42)). Along with their complaint, the plaintiffs filed a motion for a preliminary injunction to prohibit the District from holding its June 2009 high-school graduations at the Church. A4(#4).

The district court denied that motion on June 2, 2009, and issued an opinion explaining the denial on September 15, 2009. A7(#35); A9(#71). Both parties moved for summary judgment on July 17, 2009. A7-8(##44,52). On July 19, 2010, the district court denied the plaintiffs' motion, granted the District's motion, and granted judgment for the District. A9(##77-78).

Statement of Facts

The Elmbrook School District

1. Defendant-appellee School District of Elmbrook is a municipal entity that serves residents from four cities and towns west of Milwaukee. A90-91(¶¶1-3). Brookfield Central High School and Brookfield East High School are the District's two main high schools. A91(¶5).

2. According to the District's promotional materials, "[t]he community [served by the District] is considerably above average economically," and "[t]he majority of parents are engaged in professional, managerial and business occupations." A114(¶5); A392. The District had a general operating budget of more than \$84 million and a projected budget surplus of \$315,113 in its 2009-10 fiscal year, has reserves of more than \$20 million, and has the fourth-largest tax base in Wisconsin. A114-15(¶¶6-9).

Graduations at Elmbrook Church

3. Brookfield Central held its graduation ceremonies at Elmbrook Church every year from 2000 through 2009; Brookfield East did so every year from 2002 through 2009. A92(¶17).

Elmbrook Church

4. Elmbrook Church is a Christian church located in the Town of Brookfield, Wisconsin. A93(¶18); A550. The Church has approximately 4,200 members, and approximately 7,000 to 8,000 individuals attend services each weekend. A118(¶26). According to the Church's Statement of Purpose, its goals include "[p]roclaiming

[God’s] Word in Evangelism” and “spread[ing] enthusiastically the message of Christ’s conquest.” A118(¶24); A390. A Church policy manual states, “It is our desire to bring children to Jesus.” A118(¶25); A476.

5. Elmbrook Church teaches that persons who do not subscribe to the Church’s Christian beliefs will suffer torment in hell for all eternity, proclaiming in its Statement of Faith that “unbeliever[s]” will be “judg[ed] and eternal[ly] separat[ed] from God.” A517; A573; A576. In articles posted on its website, the Church has attacked atheists as “fool[s]” who “do[n’t] want to have to be answerable to anybody”; has described homosexuality as “contrary to God’s will”; and has attacked Oprah Winfrey for allegedly abandoning true Christian teachings for non-Christian, New-Age-type teachings — a corruption to which, according to the Church, women are particularly vulnerable. A556; A558; A563; A568-70. The Church further teaches that wives should be submissive to their husbands, and has also taught that Roman Catholics are not true Christians. A576; A582(¶5).

The Sanctuary and the Cross

6. The District’s high-school graduation ceremonies — which are conducted by District officials — have been taking place in the Church’s sanctuary. A93(¶22); A97(¶53); A385; A459-60; A465-66; A554-55. A wide dais spans the front of the sanctuary and serves as the focal point of the graduation ceremonies. A93(¶23); A120(¶35). The dais is where speakers stand to deliver their remarks, where persons with official roles sit during the ceremonies, and where graduates are presented with their diplomas. A93-94(¶¶24-26); A212-17; A242-44; A395.

7. Directly behind and above the dais, a Latin cross — fifteen to twenty feet tall — is affixed to the wall. A122(¶¶42-43); A212-17; A242-44; A395; A431-33. During graduation ceremonies, the cross is illuminated by overhead floodlights or spotlights. A214; A217; A395-96; A405; A458; A522(¶4); A527(¶12). The cross appears directly in attendees' line of sight when they watch events upon the dais. A123(¶46). Many photographs taken at District graduation ceremonies have the cross in them. A261(¶6); A274(¶4); A276(¶5). Two very large “jumbotron” video screens showing closeups of graduation speakers and other events on the dais hang on each side of the cross. A94(¶30); A213; A242-44; A395; A405; A431-33.

8. It is physically feasible to cover the cross; it was in fact covered the first time that the District used the Church for a graduation, but not during subsequent graduations. A94(¶31). The Church has made a policy decision disallowing the covering of the cross during future graduation ceremonies. A124(¶51). The Church also is unwilling to remove or cover any other permanent religious symbols in the Church for graduations or for any other rental events. A124(¶52). The Church's senior associate pastor has explained that the Church wants to share its facilities without compromising its identity, and the Church's senior pastor has stated that covering the cross would be “an insult to the identity of the Church.” A57(¶79); A83(¶79).

The Pews Where Graduates and Guests Sit

9. During the graduation ceremonies, graduating seniors and their guests sit in the Church's pews. A94-95(¶33); A212; A396-405; A431-32. The graduates are

seated in the front, center rows of the sanctuary's main level, which are the seating sections that are closest to the cross and the sanctuary's dais, and which directly face the cross. A98(¶¶56-57); A398-99. The graduates remain seated throughout the ceremonies — which last between ninety minutes and two hours — except when they receive their diplomas or special recognition. A98(¶58); A522-23(¶8); A527-28(¶16). Some guests of graduates have genuflected as they entered their seats, and other guests have made the sign of the cross. A125(¶¶55-56).

10. Bibles and hymnal books remain in front of each seat in the pews, and some audience members have read them in the course of the ceremonies. A125-26(¶¶57-60); A212; A218-23; A397; A402-05; A431; A434-37; A456-57. During the June 2009 graduation ceremonies, in front of every set of two seats, between a Bible and a hymnal book, the Church's pews contained a yellow "Scribble Card for God's Little Lambs"; a pencil; a donation envelope entitled, "Home Harvest Horizon: offering to the work of Christ"; and one or more copies of a Church card entitled, "can we help?" A95(¶35); A434-35; A456-57; A471-74. The front of each "can we help" card stated, "Elmbrook Church welcomes you!" and contained blank lines and boxes attendees could fill in or check to obtain more information about the Church, including one stating, "I would like to know how to become a Christian." A126(¶62); A473. The back of each "can we help" card had the heading "care and prayer for you... at elmbrook"; stated, "[l]et us know how we can care for you"; and contained blank lines where attendees could fill in "Prayer requests." A126(¶63); A474.

Other Religious Aspects of the Church's Interior

11. Graduates and their guests walk through the Church's lobby to get to the sanctuary for the graduation ceremonies, and also congregate in the lobby after the ceremonies. A95(¶¶38-39). Religious items — such as religious banners, symbols, and posters — have been on display in that lobby during graduation ceremonies. A95(¶40); A212; A224-26; A406-10; A430; A438-43; A453-54. Religious phrases that have appeared on the banners include “Leading Children to a Transforming Life in Christ,” “Jesus,” “Lord of Lords,” “Knowing the Lord of Jubilee,” and “Sabbath Forgiveness.” A96(¶41); A224-26; A246. Some of the other religious items that graduates and family members have had to pass by on their way into the Church's sanctuary have been crosses (including crosses that are etched into all of the sanctuary's glass doors), religious paintings, quotations from the Bible, portraits of Jesus, a cart labeled “PRAYER,” religious books, and a poster advertising a “Summer Godsquad” for middle-school children. A128-29(¶¶72-74); A228-31; A245; A406-10; A430; A438-43; A453-54. At the same time, during each graduation ceremony, Brookfield Central and Brookfield East have displayed school banners in the Church's lobby and sanctuary. A96(¶43); A227; A458. For example, during one graduation, a “Brookfield East High School” banner appeared in the lobby across from banners reading, “Jesus” and “Lord of Lords.” A225-27; A269-70(¶11).

12. In the course of the ceremonies, religious literature and promotional literature about the Church has been displayed and available to graduates and their families in the Church's lobby — at information booths and desks staffed by

Church personnel wearing church insignia and at unattended tables and wallboards. A129(¶¶75-76); A212; A232-39; A247; A413-30; A444-47; A450; A455; A475-517; A601(¶4). During the 2009 graduations, the literature displayed in the Church's lobby included:

(a) pamphlets entitled, "middle school ministry," which stated, "We are calling students to live and love like Jesus." (A130(¶77); A481);

(b) pamphlets entitled, "high school ministry," which stated:

[P]lease come and join us as we are...

* sent to a broken world to live and speak the truth of Jesus.

* slowly being transformed into the likeness of Jesus.

* a part of a diverse people centered on Christ and his good news.

(A130(¶78); A484); and

(c) pamphlets entitled, "collegiate ministries," which stated, "We are learning what it means to love God with all of who we are and extending that love to others." (A130(¶80); A496).

13. Children of high-school age, middle-school age, and elementary-school age all attend the graduation ceremonies. A97(¶46). During the 2009 graduations, specific signs — such as "children and student connect" — directed youths to tables and wallboards that held religious literature aimed at children and students. A131(¶82); A426-29; A452. Some people attending graduation ceremonies have taken religious literature from the information booths or desks in the course of attendance. A131(¶84). During at least one graduation, Church members passed out religious literature in the lobby. A131-32(¶86). And, during at least one graduation,

members of the Church, instead of school employees, handed out graduation materials. A262(¶9).

The Church's Exterior

14. A large cross forms part of the Church building's roof structure. A132(¶88); A249; A252. This cross is easily seen from some of the Church's parking areas and access roads and, further beyond, from a busy intersection near the Church. A132(¶89). There are large signs emblazoned with crosses at that intersection and at each of the two driveway entrances to the Church complex. A250-52; A271(¶¶14-15). Likewise, at every doorway into the Church, a large sign emblazoned with a cross identifies the areas accessible through that entrance. A253-60; A271(¶16); A449. Thus, one cannot enter the Church without viewing at least two large, cross-emblazoned signs. A271(¶17).

Use of the Church for Senior Honors Nights

15. From 2003 through 2009, Brookfield Central annually held its award ceremony for seniors — “Senior Honors Night” — in the Elmbrook Church chapel. A98-99(¶¶60-61, 65); A451. A cross stands at the back of the chapel's stage, behind the podium. A99(¶64); A448.

16. Unlike Brookfield Central, Brookfield East has held its annual senior awards event — “Senior Recognition Night” — either in its gym or in the Sharon Lynne Wilson Center for the Arts, a secular facility. A99(¶¶66-68). The District has a twenty-year lease (running until 2022) with the Wilson Center that allows the District to use the facility for up to 100 nights per year for a flat annual payment of

\$157,000. A136(¶107). The District holds only approximately seventy events per year in the Wilson Center, however. A607. And attendance at Senior Honors Nights ranges between 500 and 600 — less than the Wilson Center’s capacity of 620. A99(¶¶62, 67).

Use of Property Taxes to Pay for Church Graduations

17. For each graduation ceremony held at Elmbrook Church, the District has paid rental fees to the Church. A99-100(¶69). In recent years, the fees have been approximately \$2,000 to \$2,200 for each school. A100(¶70). Brookfield Central has paid the entirety of the Church’s fees with funds obtained from property taxes, while Brookfield East has used property taxes to pay part of the fees each year. A100(¶¶71-72).

18. Brookfield Central has also used funds obtained from property taxes to pay the Church fees ranging between approximately \$400 and approximately \$700 per year for the rental of the Church’s chapel for Senior Honors Nights. A100(¶73). Local property taxes provide the vast majority — approximately 84 percent in the 2008-09 fiscal year — of District revenues. A100(¶74). There are no written or other restrictions prohibiting the Church from using for religious purposes the fees the District pays to rent the Church. A137-38(¶¶114-17); A583-84(¶3).

History of the District’s Church Graduations

Inception of the Church-Graduation Practice

19. Prior to 2000, both Brookfield Central and Brookfield East held their commencement ceremonies in their gymnasiums every year. A101(¶76). In

September 1999, seeking a graduation location with more amenities, Brookfield Central's senior-class officers wrote to District Superintendent Matt Gibson to request that the 2000 ceremony be moved to Elmbrook Church. A101(¶79).

Brookfield Central's principal adopted this proposal. A101(¶80).

20. In 2001, a proposal was made to move Brookfield East's graduations to the Church, too. A101(¶82). Brookfield East officials wrote in school newsletters that "many people . . . would be opposed to a site other than the school, especially if it involved a move to a religious facility" and that "[o]ne of the first questions some people had was whether a church setting was considered appropriate for a public school graduation ceremony." A64(¶¶135-36); A84(¶¶135-36); A313; A322. But Brookfield East's principal eventually adopted the proposal, after a majority of seniors voted for it. A101(¶83).

21. Both high schools' graduations continued to take place at the Church every year, through 2009. A101(¶84). Rehearsals for the graduations also have annually taken place at the Church. A101(¶85).

Alternative Sites

22. Both Superintendent Gibson and Elmbrook Board of Education President Tom Gehl have been aware and have acknowledged that there are secular facilities that can accommodate the District's high-school graduations. A578; A580; A585 at 3:20-3:30. There are at least eleven secular facilities off school grounds in the Milwaukee area that are able to host District graduations, some of which are frequently used by other schools for their graduations. A369-76; *see also* A315;

A332; A335; A345. Five of these facilities have seating capacities greater than that of the 3,000-seat Elmbrook Church sanctuary. A142(¶134); A372; A375-76; A385. The remaining six facilities have attendance capacities of approximately 1,900 to 2,500. A142(¶135); A371-74. In most recent years, Brookfield Central's and Brookfield East's graduating classes have had between 300 and 350 students, and attendance at District graduation ceremonies has generally ranged between 1,500 and 2,000. A143-44(¶140); A325; A383-84(¶¶10-13); A535(¶6).

23. The District can alternatively hold graduations on its high-school football fields, each of which can accommodate more than 7,500 people if folding chairs are placed on the fields. A378-80(¶¶2-9); A381-82(¶¶2-7); A387(¶4); A389(¶¶3-4). Moreover, the District could have continued to hold graduations in its high-school gyms, each of which seated approximately 2,000 people (until construction on them began in 2009) when folding chairs were placed on the gym floors. A332; A335; A380(¶11). And, in 2010, the District held graduations in a newly constructed field house at Brookfield East with a seating capacity of 3,500 people. A109(¶¶132-34); A188(¶3); Israel DeBruin, *Graduations Come Back Home*, BROOKFIELD NOW, June 7, 2010, <http://www.brookfieldnow.com/news/95790014.html>.¹

¹ This Court should take judicial notice of where the 2010 graduations were held. *See* Federal Rule of Evidence 201(b), (f).

Student Votes

24. From the fall of 1999 through the fall of 2005 for Brookfield Central and from the fall of 2001 through the fall of 2005 for Brookfield East, school officials organized advisory votes by their senior classes on where to hold graduations. A102(¶86). School officials began their site-selection processes by compiling lists of seven to ten possible commencement sites, which included many of the facilities referred to above. A102(¶¶87-88); A315; A332; A335; A345.

25. But in at least most of the years in which student votes were held, instead of placing all of the facilities on these lists on student ballots, school officials and senior-class officers narrowed down the choices and allowed students to vote on only two or three options, one of which was always Elmbrook Church. A103(¶91). Indeed, some votes allowed students to choose between only the Church and their school gym. A103(¶92). And when they provided students with information about the characteristics of each facility, school officials emphasized various amenities of the Church that made it appear to be much more desirable than the other choices students were given. A145(¶145); A277(¶14); A315-20; A343.

26. The vast majority of the students in the District are Christians. A262(¶12). Students who spoke out against using the Church for graduations in connection with the votes were treated negatively by their peers in response. A278(¶15); A360(¶6). Likewise, parents who expressed opposition to the use of the Church at meetings held by school officials concerning potential graduation sites

met with anger and hostility from parents who supported using the Church. A354(¶11); A357(¶9); A540(¶24).

27. Not surprisingly, in each year for which data is available, clear majorities of the students voted for the Church. A103(¶93). Minorities representing up to a fifth of the senior class voted for secular options. A333; A341-42; A344. Each year, the principals of Brookfield East and Brookfield Central followed the results of the votes and held the schools' graduations in the Church. A103(¶94).

Church Graduations Established as a Custom of the District

28. In or about 2006, Brookfield East and Brookfield Central stopped holding the advisory student votes, as well as the meetings for parents concerning graduation sites. A103-04(¶¶96, 102). The principals of Brookfield East and Brookfield Central instead polled the schools' senior-class officers each fall to ask where they wished graduation to be held. A22(¶¶12-13); A30(¶¶11-12). Each of those years, both schools' senior-class officers chose the Church, and the school principals followed the class officers' preferences. A104(¶¶98-99). Indeed, over the last few years, Brookfield East and Brookfield Central officials booked the Church approximately one year before the graduation ceremonies, several months before talking to the senior-class officers. A104(¶101).

29. District Superintendent Gibson has known of, supported, and ratified the high-school principals' annual decisions to hold graduation ceremonies at the Church since the practice began. A105(¶105); A296; A301-03; A311-12; A329-31; A339-40. Similarly, throughout the time that graduations have been held at

Elmbrook Church, the Elmbrook Board of Education has been aware of the location of the graduations. A105(¶106). The Board has taken no action to stop the church-graduation practice, and its leadership has approved the practice and has authorized Superintendent Gibson to deal with the matter as he sees fit.

A105(¶¶107-08); A331; A578-80. The Board has also been aware that Brookfield Central has held Senior Honors Nights at Elmbrook Church, and the Board has taken no action to stop this practice either. A105(¶¶109-10). Superintendent Gibson and the Board allowed the District's church graduations to continue despite receiving and being aware of many complaints and legal objections from parents, community members, and civil-liberties groups about the practice. A151-54(¶¶173-85); A281-312; A336-38; A586-87(¶¶3-4); A596(¶2); A603-05.

30. Superintendent Gibson and Board President Tom Gehl are members of Elmbrook Church. A105(¶111). During Dr. Gibson's service as Superintendent, Elmbrook Church put up a page on its website that contained comments from five individuals on the issue of school violence — four Elmbrook Church pastors and Dr. Gibson, whose official position with the District was set forth on the page.

A150(¶171); A548-49. One of the ways to address school violence, stated Dr. Gibson, was “[c]onnections with Jesus.” A150(¶171); A549. While Superintendent, Dr. Gibson also served as a volunteer director of an Elmbrook Church children's choir. A150-51(¶172).

31. Although the District held its 2010 high-school graduation ceremonies in its newly-constructed field house at Brookfield East (A109(¶¶132-34); A188;

DeBruin, *supra*, at 13), the District is unwilling to foreclose using the Church for graduations or Senior Honors Nights in the future, or to make a binding commitment not to so use the Church. A73(¶¶213-16); A85-86(¶¶213-16).

The Plaintiffs

32. Plaintiff Doe 1 is a 2009 graduate of a District high school; Plaintiff Doe 2 is a parent of Doe 1; and Plaintiff Doe 3 is a minor child of Doe 2 who attends a District school and will graduate from a District high school no later than 2014. A158(¶201); A162-63(¶224); A168(¶247). Does 1, 2, and 3 attended the graduations of Doe 1 and an elder child of Doe 2, both of which were held by the District in Elmbrook Church. A109-10(¶¶136-39). Does 5 and 6 are the parents of Does 7 and 8, who graduated from a District high school in ceremonies held at Elmbrook Church in 2002 and 2005, respectively. A110-11(¶¶145-51). Does 5, 6, 7, and 8 attended both ceremonies, except that Doe 5 attended only a small portion of the 2005 one. A110-11(¶¶146-51). Does 4 and 9 are parents of children who attend District schools and who will graduate from Brookfield Central, in 2016 in the case of Doe 4's eldest child, and by 2015 in the case of Doe 9's eldest. A531(¶1); A546(¶1).

33. All the plaintiffs subscribe to a religious faith different from Christianity or are atheists or nontheistic. A109-11(¶¶137, 140, 143, 152, 154). The plaintiffs who attended past graduations at the Church (Does 1, 2, 3, 5, 6, 7, and 8) felt uncomfortable, upset, offended, unwelcome, and/or angry at the graduations, due to the Church's religious environment. A159-60(¶¶208-11); A163-66(¶¶230-31, 237-38); A168(¶¶248-49); A173(¶¶270-73); A176-77(¶¶288-89); A179(¶¶299-300); A182-

83(¶¶316-18). They further felt that the District endorsed and favored Christianity by holding graduations at the Church, and that they were coerced to enter a house of worship of a faith to which they do not subscribe in order to attend their own or their family members' graduations. A160-62(¶¶212-15, 219); A164-66(¶¶232-34, 240-41); A168(¶249); A174-75(¶¶278-79); A177(¶¶290-91); A180(¶¶303-06); A183(¶¶319-20). Moreover, Doe 2 felt that, by coercing Doe 2 to take Doe 2's children into the Church for the graduations, the District had interfered with Doe 2's ability to direct and control the religious upbringing of Doe 2's children. A529(¶24).

34. Some of the plaintiffs suffered substantial mental anguish or emotional distress, which continued for some time, as a result of attending graduations at the Church. A528-29(¶¶22-23); A540(¶25); A544(¶1). Indeed, Doe 5 was so uncomfortable and upset by memories of the 2002 graduation of Doe 5's child Doe 8 that Doe 5 missed almost all of the 2005 graduation of Doe 5's child Doe 7 — entering the Church only briefly to watch Doe 7 receive Doe 7's diploma — and the church location thus completely ruined Doe 5's ability to enjoy Doe 7's graduation. A173-74(¶¶274-77). Moreover, Doe 7 felt discriminated against based on Doe 7's religious views, both due to the church location of Doe 7's graduation and because Doe 7's classmates put down and ostracized Doe 7 after Doe 7 spoke out against the use of the Church when Doe 7's class voted on where to hold the graduation. A277-78(¶¶14-16); A360(¶¶6-7).

35. The plaintiffs who will graduate from District high schools in the future or whose children or siblings will do so (Does 1, 2, 3, 4, and 9) object to the holding of future graduations or Senior Honors Nights at the Church for reasons similar to those described above. A523(¶13); A529-30(¶¶25-27); A531-32(¶¶4-7); A546-47(¶¶3-7). They are threatened with coercive imposition of an unwanted religious environment as the price of attending graduation or honors ceremonies, as well as — in the case of the parents — with interference in their ability to direct the upbringing of their children with respect to religion. A529-30(¶¶25-27); A532(¶¶6-7); A547(¶¶6-7).

36. Does 2, 4, 5, and 6 also object as taxpayers to the District's use of the Church. These four plaintiffs pay property taxes to the District and have done so for at least the last several years. A167(¶244); A171(¶261); A175(¶282); A177(¶293). They object to and are offended by past and future use of their taxes to support the holding of graduations and Senior Honors Nights at the Church because such use of their tax payments supports the propagation of religious doctrines, the holding of graduation and honors ceremonies in a religious environment, and the coercion of students and their families to enter such an environment. A265(¶12); A272(¶24); A275(¶10); A530(¶¶29-30); A532-33(¶9); A540-41(¶¶27-28); A542-43(¶¶3-4).

Summary of Argument

The Supreme Court has held that the Constitution's Establishment Clause prohibits the government from imposing religion upon students and parents as a condition of attending public-school events. The district court thought that this anti-

coercion principle was inapplicable here, because students are not required to participate in any religious activity, stating, “a ceremony in a church is not necessarily a church ceremony.” Op. at 17. Though that may be a catchy refrain, the district court’s analysis cannot be squared with the Supreme Court’s precedents.

The Supreme Court has interpreted the anti-coercion principle broadly. The Court has ruled that public schools may not include prayers at graduation ceremonies or school sporting events, even when those prayers are short, are non-sectarian, are delivered by private parties, do not require students to actively join in, and result from student votes. *See Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). The government’s coercive imposition of religion here is far more extensive than in those cases, as here students and their families must spend hours immersed in the sectarian environment of a Christian church’s sanctuary, facing an immense Christian cross that looms over all events at the graduations, sitting in pews with Bibles and hymnals and church literature right in front of them. The church graduations therefore violate the constitutional bar against religious coercion.

The Establishment Clause also prohibits government bodies from endorsing or preferring religion. The court below believed that the District did not violate this rule, mainly because the District had non-religious reasons for using the Church. But government conduct can communicate a message of favoritism of religion even when that is not the government’s primary intent. The District’s actions here convey precisely such a message, through the symbolic conjunction of school and

religious displays at school events that take place in a house of worship, through the availability of numerous secular facilities that can host the events instead, and through the membership in the Church of the District's top two decision-makers.

The District's use of the Church for graduation and honors ceremonies violates the Establishment Clause for other reasons as well. The District has delegated to a religious institution control over the physical setting of public-school events, and that institution uses such control to promulgate its evangelical message, to impressionable children and others. The Church's propagation of its beliefs is further supported by tax funds that the District pays to the Church for rental fees. And the selection of the Church for graduations has resulted in divisiveness in the school community along religious lines, in part because the District has organized votes by senior-class members or officers on where graduations should be held, thereby empowering student majorities to subject students of minority religious views to an unwanted religious environment.

This Court should reverse the trial court's grant of summary judgment to the District, and should direct the trial court to instead enter summary judgment for the plaintiffs.

Standard of Review

The Court reviews grants of summary judgment *de novo*. *Goelzer v. Sheboygan County*, 604 F.3d 987, 992 (7th Cir. 2010). In so doing, the Court "view[s] all facts and draw[s] reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.* Thus, although the Court should resolve any

genuine disputes of facts in the plaintiffs' favor for purposes of the plaintiffs' request that the grant of summary judgment to the District be vacated, the Court should view the facts in the light most favorable to the District in deciding whether to go further and direct entry of summary judgment for the plaintiffs. *Cf. Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 544 (7th Cir. 1996).

Argument

I. The plaintiffs have standing and the case remains justiciable.

While the district court's analysis of the merits was flawed, the court correctly concluded that it had jurisdiction to decide the case. *Op.* at 10-12. The plaintiffs have three types of standing, each of which is sufficient to allow the case to proceed. First, personal contact with religion at a public-school event is an injury sufficient to confer standing, and all the plaintiffs have either attended graduations at the Church (Does 1, 2, 3, 5, 6, 7, and 8) or are threatened with future church graduation or honors ceremonies (Does 1, 2, 3, 4, and 9). *See Lee*, 505 U.S. at 594; *School District v. Schempp*, 374 U.S. 203, 225 n.9 (1963); *Berger v. Rensselaer Central School Corp.*, 982 F.2d 1160, 1164 n.4 (7th Cir. 1993); Statement of Facts ("Facts"), *supra*, ¶¶32, 35. Second, parents have standing to challenge their children's exposure to religion in public schools because such exposure "might inhibit [the parents'] right to direct the religious training of their children," and Does 2, 4, and 9 have been coerced to take their children into the Church for graduations (Doe 2) and/or are threatened with such coercion (Does 2, 4, and 9). *See Fleischfresser v. Directors of School District 200*, 15 F.3d 680, 683-84 (7th Cir.

1994); A529(¶¶24-25); A532(¶¶6-7); A547(¶¶6-7). Third, municipal taxpayers have standing to challenge “tax dollar expenditures that allegedly contribute to Establishment Clause violations,” and four of the plaintiffs (Does 2, 4, 5, and 6) are local taxpayers whose property-tax payments have been used to support graduation and honors ceremonies at the Church. *See Gonzales v. North Township*, 4 F.3d 1412, 1416 (7th Cir. 1993); Facts, ¶¶17-18, 36.

The plaintiffs have live claims for damages and injunctive relief. Does 1, 2, 3, 5, 6, 7, and 8 suffered mental anguish and emotional distress when they attended past graduations at the Church, and they accordingly are eligible for and seek compensatory damages. *See Horina v. Granite City*, 538 F.3d 624, 637-38 (7th Cir. 2008); *Avitia v. Metropolitan Club of Chicago*, 49 F.3d 1219, 1228-29 (7th Cir. 1995); A79(¶240); Facts, ¶¶33-34. Even if some of these plaintiffs are ultimately denied compensatory damages for that harm, they will be entitled to nominal damages if they prevail on the merits, because “at a minimum, a plaintiff who proves a constitutional violation is entitled to nominal damages.” *Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003); *accord Horina*, 538 F.3d at 638; *U.S. v. All Assets & Equipment of West Side Building Corp.*, 188 F.3d 440, 444 (7th Cir. 1999); *see* A79(¶241). And Doe 4, although not yet eligible for compensatory damages, is eligible for and seeks nominal damages for the unconstitutional past use of Doe 4’s tax payments to support graduation and honors ceremonies at the Church. *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1282 (11th Cir. 2008); A79(¶242); A532-33(¶¶8-9).

Does 1, 2, 3, 4, 5, 6, and 9 also seek and are eligible for injunctive relief prohibiting future use of the Church for graduation or honors ceremonies, as they or their children or siblings will graduate from District schools in the future (Does 1, 2, 3, 4, and 9) and their tax payments would support future church graduation and honors ceremonies (Does 2, 4, 5, and 6). A78(¶¶237-38); Facts, ¶¶32, 35-36. The District’s decision to hold its 2010 graduations at its new field house does not moot the plaintiffs’ request for injunctive relief, as a defendant’s “[v]oluntary cessation” of a challenged practice “does not moot a case or controversy” unless the defendant meets the “heavy burden” of demonstrating that “subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007) (quotation marks and citations omitted); accord *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). Far from meeting that burden, the District has admitted (in its answer to the plaintiffs’ amended complaint) that it is unwilling to foreclose using the Church for graduation and honors ceremonies in the future, or to make a binding commitment not to so use the Church. A73(¶¶213-16); A85-86(¶¶213-16). Indeed, many of the purported justifications professed by the District for selecting the Church over other facilities in the past — such as cost, students’ preferences, parking, and comfortable seating — could be used to explain picking the Church instead of the new field house in future years. *See* A157(¶196); A589(¶¶3-4); A592(¶3); A594(¶4); A599(¶4).

II. Holding public-school graduation and honors ceremonies in a religious environment violates the Establishment Clause.

The Establishment Clause prohibits government action that has the purpose or effect of advancing religion, or that creates excessive entanglement with religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002); *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The “effect” prong of this “*Lemon* test” can be violated in a number of ways, including by government conduct that coercively imposes religion on people, or endorses religion, or delegates public authority to a religious institution, or provides public funds for the support of religion, or subjects religious matters to a majoritarian vote. *See Cohen v. City of Des Plaines*, 8 F.3d 484, 491 (7th Cir. 1993) (coercion); *Gonzales*, 4 F.3d at 1422 (endorsement); *Larkin v. Grendel’s Den*, 459 U.S. 116, 125-26 (1982) (delegation, which also violates the “entanglement” prong); *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (funding); *Santa Fe*, 530 U.S. at 316-17 (vote). The District’s practice of holding graduation and honors ceremonies in Elmbrook Church violates the Establishment Clause in each of these five ways: it coercively imposes religion on graduates and their families; it communicates a message of governmental endorsement of religion; it confers control over the physical setting of public-school events to a religious entity; it directs tax funds to support propagation of religion; and it arises out of divisive student votes.

A. Graduation and honors ceremonies in a church transgress the Establishment Clause’s prohibition on governmental religious coercion.

“It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its

exercise. . . .” *Lee*, 505 U.S. at 587. For “[t]he design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.” *Id.* at 589. The Supreme Court has repeatedly applied these principles to invalidate the presentation of religious messages at public-school events. *See Santa Fe*, 530 U.S. at 310-12 (student-delivered prayer at high-school football games); *Lee*, 505 U.S. at 586-87 (clergy-delivered prayer at high-school commencement ceremonies); *Schempp*, 374 U.S. at 224-26 (Bible-reading at beginning of school day); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962) (prayer at beginning of school day).

The Supreme Court emphasized in *Lee* that there are “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” 505 U.S. at 592. The prohibition on religious coercion protects not only youths, however, but adults as well. *See, e.g., Venters v. City of Delphi*, 123 F.3d 956, 969-70 (7th Cir. 1997) (plaintiff was government employee); *Kerr v. Farrey*, 95 F.3d 472, 476-80 (7th Cir. 1996) (prisoner plaintiff). And the government is prohibited from coercively subjecting students and parents not just to religious messages it delivers itself, but also to the religious messages of private parties. *See Santa Fe*, 530 U.S. at 302, 310-12 (students delivered prayers); *Lee*, 505 U.S. at 587 (private rabbi delivered prayers); *Berger*, 982 F.2d at 1165-67, 1169-71 (private group distributed Bibles in school).

When religion is injected into a government-sponsored event, factors such as social pressure, the importance of the event, and the age of the audience can give

rise to unconstitutional coercion even when attendance at the event is not formally obligatory. For example, in *Santa Fe*, the Court found students' exposure to prayer at football games to be coercive because students felt "immense social pressure . . . to be involved in the extracurricular event that is American high school football." 530 U.S. at 311. Such coercive pressure is particularly strong with respect to graduation ceremonies: "Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions." *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,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Id.*

Accordingly, the Supreme Court has held that conditioning attendance at public-school graduations on exposure to unwanted expressions of religion is prohibited. *See id.* at 596. The same principle applies to honors ceremonies — where students receive special recognition for their accomplishments — for "the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *See Santa Fe*, 530 U.S. at 312 (quoting *Lee*, 505 U.S. at 596); *see also Doe v. Duncanville Independent School District*, 994 F.2d 160, 162 n.2, 165 (5th Cir. 1993) (preliminary injunction), *and* 70 F.3d 402, 404-06 (5th Cir. 1995) (permanent injunction) (applying *Lee*'s prohibition against religious coercion to bar inclusion of prayer at school awards ceremonies).

The Elmbrook School District exacts just such a “price” from students at Brookfield Central and Brookfield East, and the cost it imposes on their families is no less weighty. By holding graduation and honors ceremonies at Elmbrook Church, the District not only forces graduates and their families to enter and participate in ceremonies within a Christian house of worship, but also compels their exposure to unwanted sectarian symbols. Under the Establishment Clause, either of these “prices” alone would be far too high, but their combination here renders the violation especially egregious.

1. **The Establishment Clause prohibits schools from coercing students and parents to attend a house of worship for a seminal school event.**

The district court narrowly interpreted the Establishment Clause bar on religious coercion as only applying to compelled “religious exercise.” *See Op.* at 17. The Supreme Court has enunciated the anti-coercion principle in much broader terms, however. As noted above, in *Lee*, the Court affirmed that “government may not coerce anyone to support *or* participate in religion *or* its exercise.” 505 U.S. at 587 (emphasis added). In *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), the Court expounded upon the many facets of this prohibition: “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 attend church, to observe a religious holiday, or to take religious instruction.” And in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), the Court also specifically stated that no government entity “can force [or] influence a person to go to or to remain away from

church against his will.” Indeed, “[c]ompulsory church attendance was one of the primary restrictions on religious freedom which the Framers of our Constitution sought to abolish.” *Anderson v. Laird*, 466 F.2d 283, 286 (D.C. Cir. 1972) (op. of Bazelon, C.J.). *See also Engel*, 370 U.S. at 431 (“When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”).

This Court, too, has described the coercion test broadly, asking whether “the state is imposing religion on an unwilling subject.” *Kerr*, 95 F.3d at 477. This Court uses a three-part test to answer that question: “first, has the state acted; second, does the action amount to coercion; and third, is the object of the coercion religious or secular?” *Id.* at 479. By “object,” the Court does not mean the purpose of the government’s action, but rather whether what is coercively imposed upon the plaintiff is religious or secular. *See id.* at 479-80.

Holding important public-school events in a sacred space forces students and parents to enter a religious environment. Even when no formal religious worship service is underway, a church (and especially its sanctuary) remains an inherently religious setting — the physical embodiment of the faith community it shelters — and so, to many faiths, a house of worship and all its constituent parts are objects of veneration. “[T]he places where . . . worship takes place are . . . breaks in the homogeneity of the profane world” that “translate[] a system of belief into built form and announce[] to the world the existence of a religious community and its

history, traditions, and aspirations.” NICHOLAS W. ROBERTS, *BUILDING TYPE BASICS FOR PLACES OF WORSHIP 1* (2004).

For Catholics, for example, “a beautiful church is also . . . a place of spiritual feeding, and a catechism in stone,” because “the church building is an image of our Lord’s body.” Fr. George William Rutler, *Ten Myths of Contemporary Church Architecture* ¶ 5, *SACRED ARCHITECTURE* (Fall 1998), *available at* <http://www.catholicliturgy.com/index.cfm/FuseAction/ArticleText/Index/65/SubIndex/116/ArticleIndex/24>. “Church buildings and the religious artworks that beautify them are forms of worship themselves and both inspire and reflect the prayer of the community as well as the inner life of grace.” Guidelines of the National Conference of Catholic Bishops, *Built of Living Stones: Art, Architecture, and Worship* § 18 (Nov. 16, 2000), *available at* <http://www.usccb.org/liturgy/livingstones.shtml#preface>. *See also* LEONID OUSPENSKY & VLADIMIR LOSSKY, *THE MEANING OF ICONS* 60 (2d ed. 1982) (describing structural elements of Eastern Orthodox Churches as objects of worship); Anthony Batchelor, *The Hindu Temple* ¶3 (July 1997), <http://www.templenet.com/Articles/hintemp.html> (“The temple is designed to dissolve the boundaries between man and the divine. Not merely his abode, the temple ‘is’ God. God and therefore by implication the whole universe is identified with the temple’s design and actual fabric.”). Some believers thus see the act of entering a house of worship as a religious act in itself. *See* Fr. Nicolas du Chaxel, *The Kingdom of the Beloved Son*, *THE LATIN MASS SOCIETY OF ENGLAND AND WALES* (Aug. 2007), *available at* <http://www.latin-mass-society.org/2007/>

kingdom.html (“To pass through the door of a church already constitutes a religious act which signifies entry into the sacred. A church is the temple of God. It is not a meeting place of men but the place of worship of God.”).

For others, entering a Christian church is prohibited by their faith. According to one rabbi, “the rabbinic consensus . . . is that it is forbidden [for Jews] to enter a church,” because “[a] Christian house of worship . . . is a place where Christianity . . . pervades the very walls and space of the church,” and “by entering a church, one enters into a Christian religious experience.” Rabbi Naftali Brawer, *Is it forbidden for Jews to enter a church?*, THE JEWISH CHRONICLE ONLINE, Aug. 22, 2008, <http://www.thejc.com/judaism/rabbi-i-have-a-problem/is-it-forbidden-jews-enter-a-church>. Another rabbi has stated, “[i]t is forbidden [for Jews] to enter a church even for purposes that are not religious in nature,” due to “Judaism’s total opposition to anything that preserves elements of idolatry.” Rabbi Jonathan Blass, *Entering a church for non-religious purposes*, YESHIVA.ORG.IL, May 30, 2003, <http://www.yeshiva.org.il/ask/eng/print.asp?id=742>. See also Rabbi Chaim Tabasky, *Prohibition to be in a church*, YESHIVA.ORG.IL, May 27, 2008, <http://www.yeshiva.org.il/ask/eng/print.asp?id=3859> (“[i]t is forbidden to enter the sanctuary of a church, even when prayer is not conducted”).

That objectors need not engage in any religious act beyond entering and remaining in the Church does not exempt the District’s graduation and honors ceremonies from the Constitution’s prohibition against religious coercion. In *Lee*, the Supreme Court held that simply having a prayer at graduation was coercive,

even though students were not formally required to participate or even to attend at all. *See* 505 U.S. at 583, 593, 596. In *Santa Fe*, the Supreme Court found coercion where there was no indication that students had to do anything other than listen to a prayer at a football game. *See* 530 U.S. at 297-98, 312. In *Schempp*, 374 U.S. at 206-07, 210-12, and *Engel*, 370 U.S. at 423 & n.2, 430, the Court held that there was improper coercion in schools' presentation of Bible readings and prayers even though students were given the options of remaining silent or leaving the classrooms. *See also Kerr*, 95 F.3d at 474, 479-80 (inmate's rights were violated even assuming that he was only required to attend and observe religious meetings, but not to participate); *Berger*, 982 F.2d at 1170 (Bible distributions in classroom were coercive even though children did not have to take Bible, as children had to listen to short speech exhorting them to read Bible).

Recently, in *Does v. Enfield Public Schools*, __ F. Supp. 2d __, No. 3:10-CV-685, 2010 WL 2278658, at *24 (D. Conn. May 31, 2010), the court enjoined a school district from holding its high-school graduations in a church, noting, "To the extent that *Lee* and *Santa Fe* involved challenged action that required only passive observance — whereas [the school district] requires students to undertake the act of entering a place of religious worship — holding 2010 graduations at [the church] seem *more* coercive than the passive, silent observance of the benediction prayers of *Lee* and *Santa Fe*." Likewise, in *Lemke v. Black*, 376 F. Supp. 87, 89 (E.D. Wis. 1974), the court issued a preliminary injunction against the holding of a public-high-school graduation ceremony in a Catholic Church, explaining, "It is cruel to

force any individual to violate his conscience in order to participate in such an important event in the individual's life." *See also Reimann v. Fremont County Joint School District No. 215*, Civil No. 80-4059, 1980 WL 590189 (D. Idaho May 22, 1980) (enjoining public high school from having graduation in Mormon church).

2. **The constitutional violation here is especially egregious because the graduates must continuously face a large cross, and must encounter other sectarian iconography.**

The plaintiffs here have been coerced not only to enter a house of worship to attend their graduation ceremonies, but also to view prominent religious iconography within it, including a cross that continually looms above the dais where the ceremonies take place. Facts, ¶¶7-14. The district court, while acknowledging the Supreme Court's rulings that schools cannot coerce students to listen to prayers, thought that the constitutional prohibition on religious coercion should not apply to coerced exposure to religious symbols. *See Op.* at 16. The difference between forced aural exposure to a religious message and forced visual exposure to such a message cannot be of constitutional significance, however, for "[l]aw reaches past formalism." *Lee*, 505 U.S. at 595.

Religious symbols perceived with the eyes can exert coercive power equal to that of a religious entreaty heard with the ears. As the Supreme Court has noted, symbols often speak louder than words:

Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632 (1943).

Indeed, the Court has acknowledged the communicative potency of religious symbols in particular: “the church *speaks* through the Cross, the Crucifix, the altar and shrine, and clerical r[a]iment.” *Id.* (emphasis added).

This Court has recognized that religious coercion can occur not only through oral speech but also through visual messages. In *Kerr*, 95 F.3d at 478, the Court noted that some cases in which public displays of religious symbols were struck down “have significant elements of forcing religion on outsiders,” referencing *Harris v. City of Zion*, 927 F.2d 1401, 1414-15 (7th Cir. 1991), where the Court held unconstitutional a city seal that contained a cross and other religious imagery. And in *Berger*, 982 F.2d at 1167, ruling that Bible distributions in public-school classrooms are unconstitutionally coercive, the Court explained, “We do not expect young children to put cotton in their ears and *scrunch up their eyes* to avoid overtly religious messages by the state.” (Emphasis added.) *See also Cooper v. U.S. Postal Service*, 577 F.3d 479, 495-96 (2d Cir. 2009) (holding that private contractor operating unit of U.S. Postal Service violated Establishment Clause by displaying religious items in postal-unit space; and stating, “[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”).

What is more, the religious icon that is most prominently featured during graduations at the Church is the cross, which has powerful symbolic power. The cross is “the principal symbol of Christianity as practiced in this country today.”

ACLU v. City of St. Charles, 794 F.2d 265, 271 (7th Cir. 1986); *accord Gonzales*, 4 F.3d at 1418. The cross is a “pure religious object.” See Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1023-24 (2005). Indeed, it is “hard to think of a symbol more closely associated with a religion than the cross is with Christianity.” DOUGLAS KEISTER, *STORIES IN STONE: A FIELD GUIDE TO CEMETERY SYMBOLISM AND ICONOGRAPHY* 172 (2004).

Thus, for many believers, viewing the cross has great religious significance. A recent Episcopal sermon for the fourth day of Lent stated:

Every time we lift our eyes to the cross, we have a chance to hand over our fears, to confess our sins, and, through the grace of God, to begin to live no longer for ourselves alone, but for the one who lived and died and rose for us. . . . I invite us, as a spiritual practice, to turn to the cross whenever we feel afraid or overwhelmed, tempted or confused, whenever we need again to take in the healing love of God.

Rev. Margaret Bullitt-Jonas, Grace Church, Amherst MA, *Lift Up Your Eyes*, and Live 4 (Mar. 22, 2009), *available at* http://www.gracechurchamherst.org/worship/sermons/09%20and%2010/09-03-22_mbj_4th%20Sunday%20in%20Lent.pdf. A Methodist sermon delivered the same day, in a section entitled “Gazing at the Cross,” stated, “Look at Jesus and you will, without a doubt, find God. . . . May you gaze on Jesus, lifted high. May you spend your time looking into his eyes to see God . . . and, there, see your hope.” Rev. John H. Hice, First United Methodist Church of Royal Oak, Mich., *Gazing: “Look at Him”* 4 (Mar. 22, 2009), *available at* http://www.rofum.org/pdf_sermons/032209_gazing.pdf. The United States Conference of Catholic Bishops has said: “The cross with the image of Christ crucified is a reminder of Christ’s paschal mystery. It draws us into the mystery of

suffering and makes tangible our belief that our suffering when united with the passion and death of Christ leads to redemption.” Guidelines of the National Conference of Catholic Bishops, *Built of Living Stones: Art, Architecture, and Worship* § 91 (Nov. 16, 2000), available at <http://www.usccb.org/liturgy/livingstones.shtml>.

Christians have used the powerful symbolic impact of the cross to spread their faith to others. For example, some nineteenth-century Protestant leaders displayed the cross “with a hope” that “the passing traveler” would “be usefully reminded of the spiritual truths intended to be conveyed by [its] emblematical sign.” *Crosses and Weathercocks on Churches*, EPISCOPAL WATCHMAN, Apr. 2, 1827, at 14. In other words, they believed in “the power of the cross to impress the mind” with the “image of the dying Christ.” REV. GEORGE S. TYACK, *THE CROSS IN RITUAL, ARCHITECTURE, AND ART* 96 (1900). Recognizing the power of the cross, Elmbrook Church has refused to cover it for graduation ceremonies, stating that doing so “would be an insult to the identity of the Church.” A57(¶89); A83(¶89); A124(¶51).

The fact that the cross “is not only religious but also sectarian” compounds the constitutional violation here even further, for “the more sectarian the display, the closer it is to the original targets of the [Establishment] clause, so the more strictly is the clause applied.” *St. Charles*, 794 F.2d at 271; see also *Larson v. Valente*, 456 U.S. 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”). For example, in *Berger*, 982 F.2d at 1170, the court found distribution of

“unabashedly Christian” Gideon Bibles in fifth-grade classrooms to be a more egregious instance of unlawful religious coercion than the non-sectarian prayers in *Lee*, because “the schools affront[ed] not only non-religious people but all those whose faiths, or lack of faith, does not encompass the New Testament.”

The offense caused by the display of the cross is not even limited to non-Christians, for there are also some Christian sects that object to displays of the symbol. One Baptist sect believed that “allowing cross[es] to stand would have ‘evil consequences’ — for the godly it would be ‘smoake to our eyes, and thornes in our consciences . . . and scandalize our pure profession of religion,’ whilst for others ‘it would keep them from coming to look for Christ in an invisible way.’” JULIE SPRAGGON, *PURITAN ICONOCLASM DURING THE ENGLISH CIVIL WAR* 44 (2003) (quoting SAMUEL LOVEDAY, *AN ANSWER TO THE LAMENTATION OF THE CHEAPSIDE CROSSE*, clauses 1-3, 6 (1642)). Today, “[s]ome Protestant sects still do not display the cross.” *St. Charles*, 794 F.2d at 271. Jehovah’s Witnesses reject the cross because they believe both that Jesus died on an upright stake rather than on a cross, and that the cross was originally a pagan symbol of phallus worship associated with the false god Tammuz. *See* WATCHTOWER BIBLE AND TRACT SOCIETY, *WHAT DOES THE BIBLE REALLY TEACH?* 205 (2005); WATCHTOWER SOCIETY OF PA., *REASONING FROM THE SCRIPTURES* 92-93 (1985). And Mormons believe that the inclusion of the cross in Church architecture “is inharmonious with the quiet spirit of worship and reverence that should attend a true Christian’s remembrance of our Lord’s sufferings and death.” BRUCE R. MCCONKIE, *MORMON DOCTRINE* 172-73 (1966).

In *Enfield*, __ F. Supp. 2d __, 2010 WL 2278658, at *23, ruling that the constitutional ban against religion coercion prohibited a school district from holding high-school graduations in a church that displayed large crosses similar to those of Elmbrook Church, the court emphasized that the school district “[e]ffectively . . . has required . . . students . . . to enter a building dominated by a large white cross . . . , to pass under the large cross that marks its entrance, and to remain in the [church’s] sanctuary — and view the large cross that serves as the sanctuary’s focal point — for the duration of the graduation ceremonies.” Similarly, in *Musgrove v. School Board*, 608 F. Supp. 2d 1303, 1305 (M.D. Fla. 2005), the court concluded, “[T]o hold a graduation ceremony — four graduation ceremonies [—] in a religious institution that has displayed a giant cross is, in my view, contrary to Supreme Court precedent.”

Here, as they approach Elmbrook Church for graduations, seniors and their guests confront the enormous cross that forms part of the building’s roof structure, as well as large signs emblazoned with crosses leading up to the Church’s entrances. Facts, ¶14. Once inside, students and family members pass through a lobby where many kinds of religious items are on display, and where religious literature is visible at information booths staffed by Church members and at unattended tables and wallboards. Facts, ¶¶11-12. After entering the Church’s sanctuary through glass doors etched with crosses, graduates and guests sit down in pews where Bibles, hymnal books, and Church literature appear in front of them throughout the ceremony. Facts, ¶¶9-11. And as they watch the graduation

ceremony take place on the sanctuary's dais, the sanctuary's immense, illuminated cross looms over all activities. Facts, ¶¶6-7. In addition, Brookfield Central seniors and guests attending Senior Honors Nights at the Church must view the cross behind the stage of the chapel where those events occur. Facts, ¶15.

In sum, when seniors and their guests attend District ceremonies at the Church, they are immersed in an environment permeated with sectarian symbols and messages. And their exposure is far from brief, as the graduation ceremonies can last up to two hours. A98(¶58). The coercive imposition of religion is far more extensive and intrusive here than in the Supreme Court's school-prayer decisions, where the Court struck down short, non-sectarian, and avoidable prayers. *See Santa Fe*, 530 U.S. at 297-98, 312; *Lee*, 505 U.S. at 583, 593, 596; *Schempp*, 374 U.S. at 206-07, 210-12; *Engel*, 370 U.S. at 423 & n.2, 430.

B. The graduation and honors ceremonies in the Church convey a message of governmental endorsement of religion.

The Establishment Clause prohibits governmental entities from endorsing religion: government action must not convey the “message that religion or a particular religious belief is *favored or preferred*,” and the government must not “promote or affiliate itself with any religious doctrine or organization.” *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 572, 590, 593 (1989) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)); *accord Santa Fe*, 530 U.S. at 307-08. The court below rejected the plaintiffs' argument that the District's use of the Church endorses religion, focusing principally on non-religious reasons put forward by the District for choosing the

Church. *See* Op. at 21-23. But government action is unconstitutional if it has *either* a purpose *or* an effect of endorsement of religion. *See Milwaukee Deputy Sheriffs' Association v. Clarke*, 588 F.3d 523, 528 (7th Cir. 2009) (“[t]he *appearance* of endorsement of religion alone can send” an unconstitutional message of endorsement); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 993 (7th Cir. 2006) (endorsement test violated when, “*irrespective of the government’s actual purpose*, the practice under review in fact conveys a message of endorsement or disapproval” (quotation marks and citations omitted) (emphasis added)); *accord Allegheny*, 492 U.S. at 592-93. Indeed, courts have found violations of the endorsement test where only the effect, and not the purpose, of the government action was to endorse religion. *See, e.g., American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1157-60 (10th Cir. 2010); *Robinson v. City of Edmond*, 68 F.3d 1226, 1229 & n.6 (10th Cir. 1995).

Regardless of the District’s reasons for selecting Elmbrook Church, the holding of graduation and honors ceremonies there has an effect of endorsing religion. The ceremonies take place within a house of worship replete with religious iconography. Facts, ¶¶6-15. Yet the ceremonies are overseen and conducted by public-school officials. A97(¶53). During graduations, the officials speak and sit beneath the huge cross in the Church’s sanctuary, and their images appear on jumbotrons right next to the cross. *See* A213; A395; A522(¶6); A527(¶14). Within that same sanctuary, as well as in the Church’s lobby, Brookfield Central and Brookfield East display banners symbolizing their schools. A96(¶43). Indeed, during

one graduation, a “Brookfield East High School” banner appeared in the lobby across from banners reading, “Jesus” and “Lord of Lords.” A269-70(¶11).

The holding of graduation ceremonies in the Church thus creates the kind of “symbolic union of church and state” that this Court has found impermissible. *See Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 772 (7th Cir. 2001) (quotation marks and citations omitted); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987) (quotation marks and citations omitted). In *O’Bannon*, for instance, the Court ruled that a proposed display on the Indiana State Capitol grounds of a monument containing the Ten Commandments, the Bill of Rights, and the preamble of the Indiana Constitution would impermissibly link religion to law and government. *See* 259 F.3d at 772-73. And in *American Jewish Congress*, the Court held that the display of a creche in a city hall “brings together Church and State in a manner that unmistakably suggests their alliance” and sends a “message of endorsement . . . powerful on the symbolic level.” 827 F.2d at 128.

The symbolic message of endorsement is no less powerful in this case, where the District has brought the trappings and activities of government into a house of worship. “[T]he Establishment Clause does not limit only the religious content of the government’s own communications.” *Allegheny*, 492 U.S. at 600. “It also prohibits . . . the government’s lending its support to the communication of a religious organization’s religious message.” *Id.* at 600-01. Accordingly, in *Allegheny*, the Supreme Court struck down the display of a privately-owned creche in a public building, notwithstanding the display of a sign indicating that the creche was

owned by a religious organization. *Id.* In *Santa Fe*, 530 U.S. at 302-04, 307-08, the Supreme Court invalidated a policy that allowed prayers to be given at football games pursuant to student votes, notwithstanding that the prayers were to be given by students and not school officials. In *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000), this Court held that the presence of a religious statue in a public park sent an unconstitutional message of religious endorsement, even though the statue and the land on which it sat had been sold to a private party. And in *Enfield*, __ F. Supp. 2d __, 2010 WL 2278658, at *15, the court concluded that “[b]y choosing to hold graduations at [a church], [a school district] sen[t] the message that it is closely linked with [the church] and its religious mission, that it favors the religious over the irreligious, and that it prefers Christians over those that subscribe to other faiths, or no faith at all.” *See also Spacco v. Bridgewater School Department*, 722 F. Supp. 834, 842-43 (D. Mass. 1989) (holding public-school classes in church where religious symbols were visible to students impermissibly endorsed religion, sending message that church and school were linked).

Moreover, courts analyze whether a government action endorses religion from the standpoint of a hypothetical reasonable, objective observer, who is “‘deemed aware’ of the ‘history and context’ underlying a challenged program.” *Zelman*, 536 U.S. at 655 (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001)). The context and history of the District’s use of the Church exacerbate the message of endorsement and favoritism of Christianity that such use

sends. A reasonable observer will be presumed to know that the District's superintendent and school-board president are both members of Elmbrook Church. A105(¶111). Students and parents will therefore view the District's use of the Church as evidence of favoritism by the District's decision-makers of their own religion.

And even if the membership of District leaders in the Church was not the main reason the District's graduations were moved to the Church, surely those Church memberships make it difficult, if not impossible, for District leaders to be truly objective in assessing complaints about the use of the Church for the graduations. It is not surprising, therefore, that the District continued to hold graduations in the Church despite the receipt of many objections to the practice. Facts, ¶29. Very likely, if the graduations had been held in a mosque replete with Islamic symbols, and the complaints had come from the Christians who make up the vast majority of the school community (A262(¶12)), the District's leaders would have moved the graduations long before this litigation was filed. The repeated rejection by a religious majority of complaints from religious minorities communicates to those minorities "that they are outsiders, not full members of the political community." *See Santa Fe*, 530 U.S. at 309 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

The availability of numerous secular alternative venues for the graduation and honors ceremonies also reinforces the perception that holding the ceremonies at the Church conveys official favoritism and endorsement of Christianity. A

reasonable observer would know that — as the District’s superintendent and school-board president have conceded — there are many secular venues capable of hosting the District’s graduations. Facts, ¶¶22-23. The reasonable observer would also be aware that Brookfield Central has been paying the Church \$400 to \$700 per year to hold Senior Honors Nights there, even though the District could have saved that money by holding the event at the secular Wilson Center, for the District pays that facility a flat annual fee that allows the District to use the facility for up to 100 nights per year, a limit that the District does not come close to approaching. Facts, ¶¶15-16, 18. In *Enfield*, __ F. Supp. 2d __, 2010 WL 2278658, at *16-18, the court found the message of religious endorsement resulting from a school district’s use of a church for graduations to be strengthened by facts similar to those described above: many secular facilities were available to host the graduations; and the chair of the school board, a minister, worked closely with a religious organization to lobby the rest of the board to pick the church.

Here, the message of favoritism of Christianity associated with the District’s church graduations is further bolstered by the practice’s history. When school officials held student votes on the location of the graduations in the first half of the past decade, instead of letting students select between all of the ten or so potential venues the officials had considered, the officials allowed students to choose between only two or three venues each year, one of which was always the Church.

A103(¶91). In providing students information about the characteristics of the few venues among which they were allowed to pick, school officials emphasized various

amenities of the Church and made it appear to be much more desirable than the other options. Facts, ¶25. And, over the last few years, school officials have reserved the Church for graduations approximately a year in advance, consulting with senior-class officers about the graduation location only several months later. A104(¶101).

In sum, the marriage of public and religious symbolism at school events, the intensity of the religious message sent by and within the church building, the membership in that church of the District's top two leaders, the District leadership's continued use of that church — in the face of many complaints — despite the availability of numerous secular venues that could host the District's ceremonies, and the District's favorable treatment of the Church in conjunction with student votes all point to one conclusion: the District endorses Elmbrook Church and its religious doctrines.

C. The District has delegated governmental authority to the Church, and the Church uses that authority to solicit members and converts.

The Establishment Clause prohibits “delegation of state power to a religious body,” for such delegation has an effect of advancing religion and excessively entangles the government with religion. *See Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 696-97 (1989); *Larkin*, 459 U.S. at 125-27; *accord Allegheny*, 492 U.S. at 591. The District has violated this rule by giving a religious institution the authority to control the physical setting of public-school events. It is the Church, not the District, that decides whether to cover the cross in the Church's

sanctuary, as well as whether to cover or remove other religious items in the Church, for District graduation and honors ceremonies. A124(¶¶51-52); A302.

The court below thought that the prohibition on delegation should apply only to “much more enduring arrangements.” Op. at 24. The District’s relationship with the Church is a decade long, however. A92(¶17). And a principal reason for the constitutional ban on delegation of public authority to religious institutions is that the institutions may employ such authority to promote religious goals. *See Larkin*, 459 U.S. at 125. The Church here does exactly that, using its control over the environment of the graduation ceremonies to expose thousands of attendees per year — including numerous youths — to its religious message, and to further its goals of “[p]roclaiming [God’s] Word in Evangelism,” “spread[ing] enthusiastically the message of Christ’s conquest,” and “bring[ing] children to Jesus.” *See* A118(¶¶24-25).

The Church has expressly refused to cover its sanctuary’s cross or any other permanent religious symbols for school events, explaining that the cross is central to the Church’s “identity.” A57(¶79); A83(¶79); A124(¶¶51-52). And when seniors and their family members enter the Church for the District’s ceremonies, not only do they see the Church’s Christian symbols, but they also encounter a plethora of Church religious and promotional pamphlets, at no fewer than three staffed information booths, and at many unattended tables and wallboards. Facts, ¶¶11-12. Some of the pamphlets, tables, and wallboards are expressly aimed at children and students. Facts, ¶¶12-13. What is more, after graduates and their families sit down

in the pews in the Church’s sanctuary, Church literature visible directly in front of them tells children that they are “God’s Little Lambs,” and invites all attendees to return to the Church so that they can “know how to become a Christian.” A95(¶35); A126(¶¶62-63).

The constitutional problem would not be solved by the District assuming authority over what items remain on display in the church during the graduation and honors ceremonies. Unconstitutional governmental entanglement with religion can result not only from delegation of governmental power, but also from governmental intrusions in the affairs of religious organizations, such as inquiries into religious doctrine. *See Hernandez*, 490 U.S. at 696-97; *Lemon*, 403 U.S. at 618-22. If the District attempts to cleanse the Church of religious symbols and items in order to hold District events there, the District would have to decide which objects in the Church are religious and which are not — exactly the kinds of judgments government officials must not make. *See Hernandez*, 490 U.S. at 696-97; *Lemon*, 403 U.S. at 621-22. Such attempts to “sanitize” the Church of religion for graduations would necessarily compromise the Church’s religious mission. The Establishment Clause prohibits such governmental interference with religious institutions, for “[i]ts first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion,” as “religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate.” *Engel*, 370 U.S. at 431-32 (quoting *Memorial and Remonstrance Against Religious Assessments*, II WRITINGS OF MADISON 187). For

these reasons, the court in *Enfield*, __ F. Supp. 2d __, 2010 WL 2278658, at *20-21, held that a school district's plans to cover or remove certain religious items in a church in order to hold graduations there would have led to excessive governmental entanglement with religion.

D. The District is using tax funds to support the propagation of religion.

The Church's use of the graduation ceremonies to promote its faith is supported not only by the District's delegation of authority over the setting of the events, but also by public funds. The Establishment Clause prohibits the use of government funds to promote religious doctrines. *See, e.g., Mitchell v. Helms*, 530 U.S. 793, 857, 865 (2000) (O'Connor, J., concurring in the judgment);² *Bowen v. Kendrick*, 487 U.S. 589, 621-22 (1988); *Freedom From Religion Foundation v. Bugher*, 249 F.3d 606, 612-13 (7th Cir. 2001). Quoting the writings of Thomas Jefferson and James Madison, the Supreme Court has explained that it is "tyrannical" to "forc[e] an individual to contribute even 'three pence' for the 'propagation of opinions which he disbelieves.'" *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 305 (1986) (citations omitted); *accord Everson*, 330 U.S. at 12-13.

The District has been violating this principle by using funds obtained from local property taxes to pay the fees the Church charges for hosting graduation and honors ceremonies. Facts, ¶¶17-18. Tax funds thus support the holding of public-

² Federal appellate courts have agreed that Justice O'Connor's concurrence, and not the plurality opinion, represents the holdings of *Mitchell*. *See Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1058 (9th Cir. 2007); *Columbia Union College v. Oliver*, 254 F.3d 496, 504 n.1 (4th Cir. 2001); *DeStefano v. Emergency Housing Group, Inc.*, 247 F.3d 397, 418 (2d Cir. 2001); *Johnson v. Economic Development Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

school events in a religious environment, and advance the Church’s ability to promulgate its religious message — here, to District students and family members. As described above, the students and families are forcibly exposed not just to religious symbolism, but to numerous pamphlets and posters advertising the Church’s religious doctrines and activities. Facts, ¶¶6-14.

The court below viewed this expenditure of public money as “a common fee-for-use arrangement,” akin to situations where public funds are employed to pay a religious institution a market rental fee for the use of secular space it owns. *See* Op. at 26-27 (citing *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998)). But this is not such a case: here, the District is paying for the provision of *religious* space for public events. That a religious institution may be providing a service of some value to the government cannot justify payment of public funds for that service if the service is infused with religion. *See, e.g., Lemon*, 403 U.S. at 613, 625 (benefits provided by sectarian schools held not relevant in decision striking down public aid for such schools); *Americans United for Separation of Church & State v. Prison Fellowship Ministries*, 509 F.3d 406, 416-17, 424-25 (8th Cir. 2007) (state funding of religious treatment program for prisoners was unconstitutional notwithstanding that it would have cost state far more to provide substitute secular programming of its own).

E. The votes and divisiveness associated with the church graduations are further indicia of a constitutional violation.

The District compounded its violations of the Establishment Clause by holding senior-class votes in the first half of the past decade, and by polling senior-

class officers in later years, on whether to hold graduations at the Church. Facts, ¶¶24-28. In *Santa Fe*, where the school instructed students to vote on whether to have prayer at football games, the Supreme Court held, “Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred.” 530 U.S. at 317. The Court explained that the voting mechanism “empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages.” *Id.* at 316. The Court added, “The award of that power alone, regardless of the students’ ultimate use of it, is not acceptable.” *Id.*

The federal courts, both before and after *Santa Fe*, have struck down attempts to inject religion into graduations through student votes. *See, e.g., Cole v. Oroville Union High School District*, 228 F.3d 1092, 1101-03 (9th Cir. 2000) (holding that allowing student selected by student vote to give invocation at graduation would violate Establishment Clause); *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1474 (3d Cir. 1996) (striking down student-voted prayer at graduations). Where the voting was done by senior-class officers, instead of the whole class, courts have likewise found that the Constitution was violated. *See Deveney v. Board of Education*, 231 F. Supp. 2d 483, 484, 487-88 (S.D. W.Va. 2002); *Appenheimer v. School Board*, No. 01-1226, 2001 WL 1885834, at *6-7, *11 (C.D. Ill. May 24, 2001).

One reason that student votes on religious matters are improper is that they “encourage[] divisiveness along religious lines in a public school setting” and

“turn[] the school into a forum for religious debate.” *See Santa Fe*, 530 U.S. at 311, 316. More generally, when a government’s practice causes (or creates the risk of) community divisiveness along religious lines, this is an indicator that the practice is unconstitutional, though divisiveness is not sufficient by itself to render the practice invalid. *See, e.g., McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860-61, 863, 876 (2005); *Santa Fe*, 530 U.S. at 311, 316-17; *Lemon*, 403 U.S. at 622-23; *Decker v. O’Donnell*, 661 F.2d 598, 615-17 (7th Cir. 1980); *cf. Agostini*, 521 U.S. at 233-34. “The potential for divisiveness is of particular relevance” in the public-school context, due to the “subtle coercive pressures” that exist there. *Lee*, 505 U.S. at 588.

In this case, the votes and debates in the District’s schools about whether to hold the graduations in the Church have resulted in negative treatment of students and parents who spoke out against the practice by those who supported it. Facts, ¶26. Moreover, the church graduations have triggered a history of complaints in the school community. Facts, ¶29; *cf. Van Orden v. Perry*, 545 U.S. 677, 702-03 (2005) (Breyer, J., concurring in the judgment) (fact that religious monument stood for four decades without complaints showed that it was not divisive and weighed in favor of its constitutionality). The religious divisiveness engendered by the District’s church graduations further supports a conclusion that the graduations are unconstitutional.

Conclusion

The District's church graduation and honors ceremonies coerce students and their families to submit to a religion-permeated environment as the price of attending seminal events in their lives. The ceremonies convey official favoritism of religion, as school banners and officials stand side by side with religious symbols and messages, as the school-district leaders who have supported the use of the chosen church are themselves members of it, and as there are many non-religious venues that can host the ceremonies. The District's practice is also fraught with other constitutional flaws: delegation of public power to a religious institution that uses that power to solicit members and converts, payments of public funds that support the same end, and votes and community divisiveness on whether a religious venue should be used for school events.

For these reasons, the plaintiffs-appellants respectfully request that this Court reverse the grant of summary judgment to the District. Further, this Court has authority to direct a district court to enter summary judgment for an appellant, where, as here, the appellant moved for summary judgment in the district court, there is no genuine issue of material fact, and the appellant is entitled to judgment as a matter of law. *See Swaback*, 103 F.3d at 543-44; *Glass v. Dachel*, 2 F.3d 733, 739 (7th Cir. 1993); *Morgan Guaranty Trust Co. v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972). The plaintiffs-appellants respectfully ask that this Court do so in this case.

Respectfully submitted,

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Dated: October 21, 2010

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,376 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Circuit Rule 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century font (11-point for footnotes).

Alex J. Luchenitser
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Dated: October 21, 2010

Certificate of Service

I hereby certify that I caused fifteen copies of the foregoing Brief of Plaintiffs-Appellants, as well as ten copies of the Appendix of Plaintiffs-Appellants, to be dispatched on October 22, 2010 by first-class U.S. mail to the Clerk of Court for the United States Court of Appeals for the Seventh Circuit. I further certify that I caused two copies of the Brief of Plaintiffs-Appellants, as well as one copy of the Appendix of Plaintiffs-Appellants, to be served on the below-listed counsel of record for the defendant-appellee by first class U.S. mail and, with respect to the brief, by e-mail:

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Appendix

Decision and Order Granting Defendant’s Motion for Summary Judgment,
Denying Plaintiffs’ Motion for Summary Judgment, and Dismissing Case,
Doc. 77, filed July 19, 2010 1a

Judgment in a Civil Case, Doc. 78, filed July 19, 2010 28a

Certificate that all required materials are included in appendix 29a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DOES 1, 7, 8, and 9, Individually;
DOES 2, 4, 5, and 6, Individually,
and as taxpayers; DOES 3, a minor,
by DOES 3's next best friend, DOE 2,

Plaintiffs,

v.

Case No. 09-C-0409

ELMBROOK JOINT COMMON SCHOOL
DISTRICT NO. 21,

Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT (DOC. # 44), DENYING PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT (DOC. # 52), AND DISMISSING CASE

The plaintiffs filed this action against defendant Elmbrook Joint Common School District No. 21 (hereinafter "the Elmbrook School District" or "the District"), on April 22, 2009, contending that the District's practice of holding graduation ceremonies and preparatory activities for two public schools at the Elmbrook Church violates the First and Fourteenth Amendments to the United States Constitution. Accompanying the complaint was a motion for preliminary injunction barring the graduation ceremonies set for June 6 and June 7, 2009, from being held at the Elmbrook Church (hereinafter "Church") or in any other house of worship.

After hearing from the parties and a full review of the materials submitted, this court denied the plaintiffs' motion for preliminary injunction on June 2, 2009.¹ Afterward, the plaintiff filed an amended complaint seeking a permanent injunction barring the District from conducting future commencement ceremonies or any other school event, in the

¹ On June 2, 2009, the court issued an oral decision denying the plaintiffs' motion for preliminary injunction. A summary written order followed that same day. On September 15, 2009, this court issued a Memorandum Decision further explaining the reasoning underlying the court's June 2, 2010, order.

Elmbrook Church or other religious venue. Alternatively, the plaintiffs seek a permanent injunction barring the District from holding school events at the Elmbrook Church unless all visible religious symbols are covered or removed. Additionally, the plaintiffs request monetary damages, attorneys fees, and a declaratory judgment that the practice of holding high school graduation ceremonies in a house of worship violates their rights under the U.S. Constitution. Cross motions for summary judgment on all claims are now before the court.

I. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, a court must view the evidence in the light most favorable to the nonmoving party. *Hicks v. Midwest Transit, Inc.*, 479 F.3d 468, 470 (7th Cir.2007). On cross motions, the court construes “all facts and inferences therefrom ‘in favor of the party against whom the motion under consideration is made.’” *In re United Air Lines Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2005)). Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

II. BACKGROUND²

Of primary concern to the plaintiffs are graduation exercises for two public high schools in the Elmbrook School District, Brookfield, Wisconsin, that have been held at the Elmbrook Church, a Christian facility, also in Brookfield, Wisconsin. Brookfield Central High School (“Brookfield Central”) has held its annual commencement exercises

² The parties have submitted set of stipulated proposed findings of fact, which this court has incorporated into the background section, as well as separate proposed findings of fact.

at the Church since 2000, and Brookfield East High School (“Brookfield East”) has done so since 2002.

The instant action was prompted by graduation ceremonies that were set for June 6 and June 7, 2009. The District contends that starting in 2010, graduation ceremonies are to be held in newly constructed, District-owned facilities. Relatedly, the plaintiffs complain of Brookfield Central’s past use of the Elmbrook Church for its annual Senior Honors Night.

The plaintiffs include students and parents of students at Brookfield East and Brookfield Central who have attended the schools’ graduation ceremonies and associated activities, or who plan to attend such events in future years. Doe 1 is a 2009 graduate of Brookfield East, and participated in the Brookfield East graduation ceremony at the Church. In addition, Doe 1 attended the graduation ceremony of an older sibling, which was held at the Church within the past four years. Moreover, Doe 1 subscribes to a religious faith other than Christianity and is offended by having to attend graduation ceremonies in a Christian church.

Doe 2 is a parent of Doe 1, and sues on Doe 2's behalf and as next best friend of Doe 2's younger (minor) child, Doe 3. Doe 2 and Doe 3 were family guests at Doe 1's 2009 graduation ceremony at the Church, as well as the graduation ceremony of Doe 1's older sibling. Both subscribe to the same religious faith as Doe 1. Also, Doe 2 pays property taxes to the District and objects to the use of public funds for District-sponsored events at the Church.

Does 4, 5, and 6 are District taxpayers who object to the use of their tax moneys to support the District-sponsored events at the Church. Doe 4 has children in the District school system, the oldest of whom is set to graduate in 2016. Doe 4 is a humanist

and does not subscribe to the religious beliefs of Elmbrook Church. Does 5 and 6 are the parents of Does 7 and 8 and attended the graduation ceremonies of Does 7 and 8, which were held at the Church in 2005 and 2002, respectively. Doe 9 is a parent of minor children who attend District schools, the oldest of whom is set to graduate in 2015. Doe 9 does not subscribe to the religious teachings of the Elmbrook Church.

The District is a municipal entity that may levy taxes, issue bonds, build, acquire, lease, and sell real property including structures, bring law suits and defend law suits. The Elmbrook Board of Education has delegated to the District's superintendent "the administration of the school system in all its aspects," "the authority to make rules, regulations, and practice statements to govern routine matters of District operation," and "control and supervision of all school buildings, grounds, and equipment." The Board has empowered the superintendent to delegate any of his responsibilities and duties to his subordinates, including school principals. School principals are "responsible for the planning, operation and evaluation of the instructional and extra-curricular programs" in their schools. This includes the authority to select the venue for graduation ceremonies.

Brookfield Central and Brookfield East are two of the three high schools in the District. The third school, Fairview South School, is a specialty school and its activities are not at issue in this case. The 2009 graduating class at Brookfield East included approximately 340 students. Brookfield Central's 2009 graduating class included approximately 360 students. The number of graduates at each school has fluctuated from nearly 290 to 360 students over the past several years.

The Church is approximately 4.5 miles from Brookfield Central and 9.5 miles from Brookfield East. It is air-conditioned, accessible to persons with disabilities, has abundant free parking, and well maintained landscaped grounds. Entrances to the Church

are marked by signs emblazoned with crosses, and a large cross is a structural element of the Church's roof.

The District's graduation ceremonies at issue take place in the Church's vast auditorium/sanctuary. There, speakers, including students and certain District officials, deliver orations from a podium on the wide dais that spans the front of the room, and the students proceed across the dias to receive their diplomas. Persons with official roles in the graduation ceremonies sit on the dias. Graduation exercises are organized and conducted by District personnel and students. No Church officials or employees have speaking roles. The ceremonies last approximately one to two hours.

A large wooden cross, approximately fifteen to twenty feet tall and seven to ten feet wide, is affixed to the wall behind the dias and towers over the proceedings. It is in the line of sight of persons viewing activities on the dias. Two large video screens flank the cross and show close-ups of the speakers and graduates receiving their diplomas. Bibles and hymnal books remain in the pews where graduating students and their guests sit. These pews, which seat about 3,000 persons, are padded and have backs.

During past graduations, religious banners, symbols, and posters have been on display in the Church lobby. Graduates and guests walk through the lobby on their way to the auditorium/sanctuary and often congregate there after the ceremonies. Banners in the lobby have included religious phrases such as "Leading Children to a Transforming Life in Christ," and "Jesus." Other religious items, such as crosses etched into windows and Bible quotes inscribed in wood have been present in the lobby and corridors of the Church. Religious literature is also displayed at information booths in the Church. While some of the religious effects inside the Church can be removed or covered during graduation ceremonies (in fact, the large cross was veiled for the first ceremony), the Church has been

unwilling to remove or cover permanent structures (as opposed to removable items) for the District or other entities renting its facilities.

As for Brookfield Central's annual Senior Honors Night, the school started holding this event in the Church's chapel in 2003. Senior Honors Night is an occasion recognizing certain students for outstanding performances. Approximately 500 to 600 people attend Senior Honors Night, including students and their family members. Attendance is considered voluntary by the school and many eligible seniors do not attend. The chapel is a smaller, more intimate space than the auditorium/sanctuary, and has a seating capacity of approximately 1,380. A cross stands in the chapel. Notably, Brookfield East held its annual senior honors event at the Sharon Lynne Wilson Center for the Arts in 2008 and 2009. The Wilson Center is a secular facility that seats approximately 620 people. None of the plaintiffs have attended Senior Honors Night at the Elmbrook Church. For 2010 and beyond, Brookfield Central intends that this event will be held in its newly renovated facilities.

The District provides payment to the Church for use of its facilities, as do other entities. Rental cost has consistently been between \$2000 and \$2200 for each school's graduation, and Brookfield Central has paid between \$400 and \$700 to rent the chapel for Senior Honors Night. While the senior class at Brookfield East has raised funds in the past to help cover a portion of these charges, the District pays rental fees for both schools with funds obtained from local property tax revenue, which accounts for approximately 84% of the District's annual revenue. There has never been a written agreement or lease between the Church and the District for use of the Church's facilities. At various times, District staff have had difficulty scheduling the Church for the graduation exercises due to high demand for the Church's facilities.

Brookfield East began using the Church for graduation ceremonies, including rehearsals, in 2002, and Brookfield Central started in 2000. Earlier, both schools held graduation ceremonies in their respective gymnasiums. However, the gymnasiums lacked air-conditioning, and seating was limited to folding chairs on the floor and bleacher seating against the walls.

In September 1999, Brookfield Central's senior class officers wrote to the District superintendent requesting that the 2000 ceremony be moved to the Church. Brookfield Central's principal adopted this proposal. A proposal was made in 2001, to move Brookfield East's graduation ceremony to the Church and a majority of Brookfield East's graduating seniors voted to adopt the proposal. The principal approved the request and made the final decision to move graduation to the Church.

Until 2005, both schools organized advisory votes by senior classes concerning where graduation should be held. In addition, school officials held meetings for interested parents and students. Suggested graduation related sites have included the schools' gyms and football fields, the Sharon Lynne Wilson Center for the Arts, Carroll University's Shattuck Auditorium, the Milwaukee Area Technical College's Cooley Auditorium, the Pabst Theater in Milwaukee, the Waukesha County Expo Center, the U.S. Cellular Arena in Milwaukee, the Midwest Airlines Center in Milwaukee, Miller Park, the Marcus Center for the Performing Arts in Milwaukee, Wisconsin State Fair Park, Wisconsin Lutheran College, and the Church. All but the latter two are entirely secular. Usually, the students were permitted to select among two or three options, and the Church always received a clear majority of the student vote, and the principals of both schools followed the voting results. This continued after 2005, when, in lieu of advisory votes, school officials simply consulted with senior class officers each fall to ask for their preferred

graduation venue. The Church was always favored, and the principals followed the preferences of the senior class officers.

The principals' decisions were not upset by the District superintendent or the school board. Notably, District Superintendent Matt Gibson and Elmbrook School Board President Tom Gehl are members of the Church.

Over the years, the District has received complaints from parents, civil-liberties organizations, and community members challenging the propriety of holding public school graduation ceremonies in the Church. In October 2001, a senior's parent asked that the senior's graduation not be held in Elmbrook Church, explaining that the "Church actively promotes the idea that people like me . . . are going to . . . a Hell-like place undergoing endless torments." The parent did not want to expose the senior to "this intensely hateful and violent position."

In August 2002, an individual wrote to Superintendent Gibson stating "If I were a student in the district, I could not attend my graduation if it was held in a Church. I have corresponded with other students who feel similar to me." In 2006, another parent requested that the District's commencements be moved out of the Church because "non-Christian graduates feel uncomfortable participating in ceremonies conducted in such an environment."

In addition, in November and December 2001, the Freedom From Religion Foundation asserted constitutional objections to the District's practice. In December 2001, the American Civil Liberties Union of Wisconsin asserted constitutional objections to the practice. In May 2002, the Anti-Defamation League urged the District to move its 2002 graduation exercises to a secular venue, writing that "[i]t is patently unfair to compel

non-believers . . . to attend graduation in a highly sectarian environment," and that the practice "violate[s] the Establishment Clause."

On June 7, 2007, Americans United for Separation of Church and State ("Americans United")—now, counsel for the plaintiffs—wrote to the District, citing constitutional objections to the practice of holding graduation ceremonies at the Church, and asking that the exercises be moved to secular venues. Superintendent Gibson responded the same day, explaining that the District would not move the 2007 graduations out of the Church. He added: "Regarding your question of future years, each graduating class reviews available venues and makes its majority decision. The long term plan for the District is to construct gymnasiums that have the capacity and amenities to return our graduation exercises to their local campuses. The District held a referendum to include these spaces on April 3, 2007, and it was defeated by a 60-40 vote of the electorate."

New construction commenced at Brookfield East and Brookfield Central. This included remodeling of the existing gymnasiums and creation of a new 3,500 seat field house at Brookfield East. The new field house is air-conditioned and has ample parking. It is also accessible to persons with disabilities. Both schools anticipate that the new field houses will be the venues for all future graduations of the schools. And, the District intends that Brookfield Central's renovated gymnasium will be the venue for future Senior Honors Nights.

A subsequent referendum passed in April 2008, and on February 11, 2009, Americans United again wrote to the District, requesting that the 2009 graduation ceremonies be moved to a secular venue. Superintendent Gibson responded on February 26, 2009, explaining that the District would not move the graduation exercises from the Church. He advised: "[T]he District does not consider the usage of the Elmbrook Church

Auditorium to be a permanent venue. In fact, as a result of passage of a \$62.2 million referendum in April 2008, both Brookfield East and Brookfield Central High Schools are undergoing significant renovations, which includes the construction of new, larger air-conditioned gymnasiums that will likely be able to accommodate future graduations upon completion.”

II. DISCUSSION

A. STANDING

At the outset, the court must consider whether the plaintiffs have standing to bring suit. “The United States Constitution requires that federal courts resolve only cases and controversies.” *Gonzales v. North Twp. of Lake County, Ind.*, 4 F.3d 1412, 1415 (7th Cir. 1993) (citing U.S. Const. art. III). “Only a plaintiff with a personal stake in that case or controversy has standing.” *Id.* “The general rule is that to have standing to sue in federal court a ‘plaintiff must allege (1) that he has suffered an injury in fact (2) that is fairly traceable to the action of the defendant and (3) that will likely be redressed with a favorable decision.’” *Books v. Elkhart County, Ind. (Books II)*, 401 F.3d 857, 861 (7th Cir. 2005) (quoting *Books v. City of Elkhart (Books I)*, 235 F.3d 292, 299-301 (7th Cir. 2000)). “An ‘injury in fact’ is an ‘invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.’” *Id.* (quoting *Books I*, 235 F.3d at 299).

“The party that is invoking federal jurisdiction . . . bears the burden of establishing Article III standing.” *Freedom From Religion Found., Inc. v. Nicholson*, 536 F.3d 730, 737 (7th Cir. 2008). “At the summary judgment stage, the plaintiff must produce evidence in the form of . . . affidavits or documents that support the injury allegation.” *Gonzales*, 4 F.3d at 1415-16.

Upon review of the materials submitted, the court is satisfied that it has jurisdiction in this case and will proceed to the merits of the claims at bar. Does 1, 2, 3, 5, 6, 7, and 8 submit that they were “forced” to attend graduation ceremonies at the Church. In doing so, these plaintiffs maintain that they were exposed to unwelcome religious symbols, which caused them mental anguish and distress. These claims are sufficient to establish standing to challenge the District’s practice, and the District does not contend otherwise. See *Books II*, 401 F.3d at 861-62 (concluding that plaintiff had standing to sue based on allegation that he was forced to have unwelcome exposure to Ten Commandments display at county administration building); *Doe v. County of Montgomery, Ill.*, 41 F.3d 1156, 1159 (7th Cir. 1994) (“[The plaintiffs] allegations of direct and unwelcome exposure to a religious message cannot be distinguished from the ‘injuries’ of other plaintiffs who have had standing to bring claims under the Establishment Clause.”); see also *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 224 n.9 (1963) (holding that school children and their parents had standing to challenge laws requiring Bible reading in public schools, even though a student could be absent from the classroom or not participate in the reading); see generally *Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 684 (7th Cir. 1994) (noting that “parents have standing to raise their claim alleging a violation of the Establishment Clause because the impermissible establishment of religion might inhibit their right to direct the religious training of their children”).

In addition, Does 2, 4, 5, and 6 assert that they pay local property taxes to the District and challenge the expenditure of such tax moneys by the District to the Church as unconstitutional. This too is sufficient for standing purposes. As the Seventh Circuit has noted, “[m]unicipal taxpayers have standing to challenge tax dollar expenditures that allegedly contribute to Establishment Clause violations.” *Gonzales*, 4 F.3d at 1416

(discussing municipal taxpayer standing to sue municipality regarding crucifix display in public park (citing *Flast v. Cohen*, 392 U.S. 83, 88 (1968)); *Freedom From Religion Found., Inc. v. Zielke*, 845 F.2d 1463, 1470 (7th Cir. 1988) (noting that allegation that plaintiff is a municipal taxpayer and allegation that municipality used taxpayer funds for unconstitutional activity are “two threshold criteria for establishing municipal taxpayer standing”); see generally *Hinrichs v. Speaker of House of Representatives of Ind. Gen. Assembly*, 506 F.3d 584, 600 (7th Cir. 2007) (noting that municipal taxpayer challenges to municipal actions are not subject to the same stringent standing requirements as state and federal taxpayers seeking to challenge state and federal actions).³

B. ESTABLISHMENT CLAUSE CHALLENGE

“The first Clause in the First Amendment to the Federal Constitution provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ The Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000). “[T]he purpose of the Establishment and Free Exercise Clauses . . . is ‘to prevent, as far as possible, the intrusion of either the church or

³ While agreeing this court has jurisdiction over the plaintiffs' claims, see *County of Montgomery*, 41 F.3d at 1161 (“The case-or-controversy requirement of Article III is satisfied if one plaintiff has standing to bring the suit.” (citing *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981))), the District asks that the claims of Doe 9 be dismissed. The District contends primarily that Doe 9 alleges no “injury in fact” and asserts claims that are not ripe. Doe 9 does not seek damages based on past injury. Instead, Doe 9 pursues relief based the fact that Doe 9's children are students in the District who are scheduled to graduate in 2015, and the District may return graduation ceremonies to the Church at some future point. If Doe 9 were the only plaintiff, concerns regarding ripeness may be appropriate. Injury to Doe 9 is contingent on the anticipated achievements of Doe 9's children, and a return of District ceremonies to the Church, which has become less likely given the newly constructed District facilities. See *Texas v. United States*, 523 U.S. 296, 300 (1998) (“A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81(1985))). However, as pointed out by the plaintiffs, at the time this litigation was initiated, the District had been holding graduation ceremonies at the Church for nearly a decade based on alleged concerns of comfort and cost, which remain constant. In any event, further discussion on this point is unnecessary inasmuch as the plaintiffs have established standing to proceed on the merits.

the state into the precincts of the other." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)). "At the same time, however, the [Supreme] Court has recognized that 'total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.'" *Id.* Thus, courts are routinely faced with attempting to reconcile "the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that . . . total separation of the two is not possible." *Id.*

For the most part, it is understood that the religion Clauses bar state and federal governments from, among other things, "aid[ing] one religion, aid[ing] all religions, or prefer[ing] one religion over another[;] . . . forc[ing] [or influenc[ing] a person to go to or to remain away from church against his will[;] and. . . lev[ying tax] to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15-16 (1947). With this in mind, the Supreme Court established three "tests" in *Lemon v. Kurtzman*, 403 U.S. at 612-13, "for determining whether a government practice violates the Establishment Clause." *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 592 (1989). Ordinarily, these tests guide a court's consideration of such claims. See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 859 (2005) (reaffirming *Lemon's* "three familiar considerations for evaluating Establishment Clause claims"). Under the *Lemon* test, a government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. See *Vision Church v. Village of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006); *Books II*, 401 F.3d at 862 ("Government action violates the First Amendment if it fails any one of these three inquiries." (citing *Edwards v. Aguillard*, 482

U.S. 578, 583 (1987))). However, the Supreme Court has noted that “the factors identified in *Lemon* serve as ‘no more than helpful signposts.’” *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 731 (1973)). Moreover, the Court has sidestepped *Lemon* in several Establishment Clause cases. See e.g. *Van Orden*, 545 U.S. at 686 (finding the *Lemon* test “not useful” for consideration of Ten Commandments monument on State Capitol grounds, and relying instead on “the nature of the monument and . . . our Nation’s history”); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (relying on past precedent in considering challenge to government aid provided to private schools); *Lee v. Weisman*, 505 U.S. 577 (1992) (relying on “controlling precedents” in school prayer and religious exercise cases and finding Establishment Clause violation); *Marsh v. Chambers*, 463 U.S. 783 (1983) (relying on historical acceptance of salaried legislative chaplains and of prayer opening legislative sessions). In any event, the court’s charge is “delicate and fact intensive . . . and is of necessity one of line drawing, of determining at what point a dissenter’s rights of religious freedom are infringed by the State.” *Lee*, 505 U.S. at 597-98; see also *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993).

The plaintiffs’ challenge rests on four interrelated grounds. First, they argue that holding graduation ceremonies at the Church violates the Establishment Clause’s bar against governmental religious coercion, as discussed in *Lee v. Weisman*. Second, they contend that holding graduation ceremonies at the Church constitutes governmental endorsement of religion. Third, they submit that the District’s arrangement with the Church leads to excessive entanglement between government and religion. And finally, they maintain that the District is using taxpayer funds impermissibly to promote religion. (See Pls.’ Br. in Supp. Mot. for Summ. J. 8.) These assertions are addressed in turn.

1. COERCION

As an initial matter, the plaintiffs' contend that the District is engaging in government-sponsored religious coercion by essentially forcing students and their guests to attend a Christian house of worship and, therein, exposing the students and their guests to Christian iconography. The essence of the plaintiffs' argument is the District's actions are akin to school-sponsored prayer, respecting which, under certain circumstances, the Supreme Court has found unconstitutional.

To this end, the plaintiffs point to *Lee v. Weisman*, 505 U.S. 577, in which the Supreme Court held that a prayer delivered by clergy at a public school graduation ceremony violated the Establishment Clause. The Court cited to two "dominant facts" that indicate improper "state-sponsored and state-directed religious exercise in a public school": (1) "State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies," and (2) "[e]ven for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory." 505 U.S. at 586-87. As to the former, the Court observed that not only did the state's role include deciding to insert a prayer into the ceremony and choosing the clergy member (in that case, a rabbi), but also providing the rabbi guidance on crafting a prayer appropriate for the "civic occasion." *Id.* at 588. It was unimportant that the school made a good faith attempt to remove sectarianism; the Court's concern centered on the goal of "produc[ing] a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend." *Id.* at 589. Additionally, the Court mentioned "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592. It observed that a dissenter is nonetheless pressured by the school to stand silently during

the prayer, an act that for many constitutes participation (as opposed to respectful protest) in that exercise: “The injury caused by the government’s action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise.” *Id.* at 594. The school setting was distinguished from other forums, such as a statehouse, because the “influence and force of a formal exercise in a school graduation” was deemed clearly different from an atmosphere in which adults are free to enter and leave without comment. *Id.* at 596-97.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290, the Court reaffirmed the principles set forth in *Lee*. At issue in that case was the constitutionality of prayers drafted and approved by students who voted whether invocations should be given, and if so, which students should deliver them over the public address system prior to school football games. The School District argued that *Lee* was inapplicable inasmuch as the prayer was a student driven initiative without active involvement by school officials, and that extracurricular activities like football games lack the coercive environment of a graduation ceremony. The Court rejected these arguments, finding that the prayer was attributable to the District despite being student led, and that the nature of the football games, including compelled attendance by many students (athletes, cheerleaders, band members), was insufficiently distinguishable from the situation in *Lee*. 530 U.S. at 311. In the court’s view “the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.” *Id.* at 312.

As pointed out by the District, the cases relied on by the plaintiffs speak to coerced religious participation as opposed to exposure to religious symbols. See, e.g., *Lee*, 505 U.S. at 598 (“[T]he state has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every

student, one the objecting student had no real alternative to avoid."); *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290; *Schempp*, 374 U.S. 203(holding unconstitutional the daily reading of Bible verses in public schools); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1170-71 (7th Cir. 1993) (comparing *Lee v. Weisman* and finding improper coercion where public school elementary students were compelled to sit through religious presentation and receive Bibles individually from a religious organization); *see also Tanford v. Brand*, 104 F.3d 982, 985 (7th Cir. 1997) (distinguishing *Lee v. Weisman* because, while the case involved a benediction at a university graduation, the circumstances revealed that "there was no coercion—real or otherwise—to participate"). However, the plaintiffs insist that their situation is sufficiently similar because it involves "exposure to unwanted expressions of religion." According to the plaintiffs, "[b]y holding the graduations and honors ceremonies at Elmbrook Church, the District not only forces graduates and their families to enter and participate in a ceremony within a Christian house of worship, but also compels their exposure to unwanted sectarian symbols." (Pls.' Br. in Supp. Mot. for Summ. J. 5.) The plaintiffs bolster their comparison through reference to various cases, articles, and scholarly works discussing generally the spiritual meaning that Christian houses of worship and symbols have to some observers.

In looking to the "dominant facts" of *Lee*, however, the court cannot conclude that obligatory participation in a secular graduation ceremony, albeit in a church, is sufficiently similar to obligatory participation, even through silence, in religious prayer. In other words, a ceremony in a church is not necessarily a church ceremony. Indeed, there is simply no religious exercise at issue in this case, let alone one attributable to the District, that students are arguably compelled to participate in despite objection.

No controlling authority cited by the plaintiffs encourages such a significant expansion of the “coercion” analysis. Indeed, the Supreme Court has cautioned against reading *Lee* too broadly:

The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

505 U.S. at 598 (quoting *Schempp*, 374 U.S. at 307(Goldberg, J., concurring))). In this case, the allegations of unconstitutional coercion are undermined by the lack of District involvement in a religious exercise likely to influence religious identity or induce participation. See *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395, 406-07 (4th Cir. 2005) (“The indirect coercion analysis discussed in *Lee*, *Schempp*, and *Engel*, simply is not relevant in cases, like this one, challenging non-religious activities.”). The plaintiffs unease and offense at having to attend graduation ceremonies at the Church and face religious symbols, while in no way minor, is not enough. See *Lee*, 505 U.S. at 597. (“People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation.”). *But see Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974) (Reynolds, C.J.) (enjoining school from holding graduation ceremony at a church given that, among other things, some graduates could not attend without violating their consciences⁴).

⁴ Chief Judge Reynold’s brief opinion in *Lemke* is not particularly helpful to the plaintiffs because, while speaking to similar issues, it lacks discussion of the applicable constitutional framework as most recently set forth by the Supreme Court.

2. ENDORSEMENT

The plaintiffs next contend that holding graduation ceremonies at a church constitutes state endorsement of religion in violation of the Establishment Clause. And it is well observed that the Constitution “mandates governmental neutrality between religion and religion, and between religion and nonreligion.” See *McCreary County*, 545 U.S. at 860 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). “When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.” *Vision Church*, 468 F.3d at 991 (quoting *McCreary County*, 545 U.S. at 860).

The starting point for this analysis remains the criteria established by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, and the cases that have built on and interpreted that case. As discussed earlier, under the *Lemon* test, a government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion. “The Supreme Court has refined the analysis under the first two prongs of *Lemon*, focusing on ‘whether the challenged governmental practice either has the purpose or effect of endorsing religion, a concern that has long had a place in [the Supreme Court's] Establishment Clause jurisprudence.’” *Cohen*, 8 F.3d at 489 (citing *Allegheny County*, 492 U.S. at 592)).

For present purposes, the plaintiffs do not contend that holding graduation ceremonies and Senior Honors Night at the Church lacked a secular purpose. Instead, the plaintiffs submit that holding District events, such as graduation ceremonies, at the Church has the primary *effect* of endorsing religion. “The effect prong asks whether, irrespective

of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.” *Books II*, 401 F.3d at 866 (quoting *Freedom from Religion Found. Inc. v. City of Marshfield, Wis.*, 203 F.3d 487 (7th Cir. 2000)). Courts evaluate the effect of the challenged government action by “assessing the totality of the circumstances” surrounding the event to determine whether an “objective, reasonable observer, aware of the history and context of the community and forum” would fairly understand the event to be a government endorsement of religion. *Books II*, 401 F.3d at 866-67 (citations omitted); *Vision Church*, 468 F.3d at 993 (“In this prong, our focus is not on the intent of the City, but on whether a reasonable person, apprised of the circumstances surrounding the sale, would conclude that the sale amounted to an endorsement of religion.” (quoting *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005))).

Endorsement, according to the plaintiffs, is an inherent consequence of holding public school ceremonies in a church replete with religious symbols and messages, regardless of the purported secular purpose. They point to the large cross, banners, and other items that are present in the Church auditorium/sanctuary during graduation ceremonies, which are presided over by District officials. The same applies to Senior Honors Night held in the Church chapel. The plaintiffs add that the schools have held graduation ceremonies at the Church for several consecutive years, and that the District's superintendent and the president of the school board are members of Elmbrook Church. Moreover, the plaintiffs note that numerous secular venues are available—a point illustrated by Brookfield East's use of the Wilson Center for its senior honors event. The plaintiffs also assert that when student votes were held regarding the graduation venue, District officials “allowed students to choose between only two or three venues, one of which was always the Church,” as opposed to presenting “all of the ten or so potential

venues.” (Pls.’ Br. in Supp. Mot. for Summ. J. 22.) According to the plaintiffs, this scenario would lead a hypothetical reasonable person to view the District’s selection and use of the Church for graduation ceremonies and Brookfield Central’s Senior Honors Night as an endorsement of religion.

The court, however, cannot reach the same conclusion under the circumstances. While it is unquestioned that the plaintiffs are offended by utilization of the Church as a venue for District events, “the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of faith to which they do not subscribe.” See *Books II*, 401 F.3d at 867 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O’Connor, J., concurring)). Here, the “history and context of the community and the forum” reflect that secular concerns directed the move away from school facilities toward an adequate, convenient, cost-effective graduation venue—an objective that, according to the District, is fulfilled by the Church more completely than the alternative venues suggested.

The record indicates that the shortcomings of the District’s then-current facilities, along with the Church’s modern amenities, close location, and reasonable cost, were motivating factors for moving graduation to that location initially and remained so through 2009. The secular purpose underlying the move is reaffirmed by the lack of any long-term arrangement between the District and the Church respecting use of the site. See *Milwaukee Deputy Sheriffs’ Ass’n v. Clarke*, 588 F.3d 523, 527-28 (7th Cir. 2009) (noting that “the government lacks a secular purpose under *Lemon* only when “there is no question that the statute or activity was motivated wholly by religious considerations” (quoting *Books II*, 401 F.3d at 863)).

Prior to 2010, the schools' facilities lacked air conditioning, provided inadequate space, and were not handicap friendly. In contrast, the Church is located within a few miles of the schools, is handicap accessible, includes ample, free parking, has large video screens for close-up viewing, permits the District to record and replay the ceremonies on public access television, and requires payment of user fees consistent with costs (including energy use and custodial services) that would be incurred by the schools if they attempted to use their own facilities. Further, nothing in the record suggests that any of the alternative locations suggested by the plaintiffs are equal or superior to the Church in terms of amenities, convenience, and costs. Moreover, the graduation ceremonies at issue are secular and devoid of religious activity or involvement of clergy. Also, the Church is used once a year for each schools' graduation ceremony and for Brookfield Central's Senior Honors Night—events that require large and accessible (preferably indoor) venues—and there is no agreement between the District and the Church that suggest that the Church may exercise control over either activity.

Further, that students voted on the location for their graduation activities does not reveal a constitutional violation. The plaintiffs' reliance on *Santa Fe Independent School Dist v. Doe* for such a proposition is misplaced inasmuch as the Court focused on policy behind the student election at issue in that case and the resulting "expressive activities." See 530 U.S. at 317 n.23 ("We have concluded that the resulting religious message under this policy would be attributable to the school, not just the student For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored prayer violates the Establishment Clause.").

On its face, the District's decision to hold graduation ceremonies and the senior honors event in a house of worship holds symbolic force. However, considering the totality of circumstances, the reasonable observer would fairly understand that the District's use of the Church for these events is based on real and practical concerns, and not an impermissible endorsement of religion. *Cf. Clarke*, 588 F.3d at 529 (finding impermissible endorsement "where an authority figure invited a Christian organization that engaged in religious proselytizing to speak on numerous occasions at mandatory government employee meetings"). This conclusion is reinforced by the District's stated intent to hold future graduation ceremonies and other events in newly constructed District-owned facilities.

3. EXCESSIVE ENTANGLEMENT

Moving on, the plaintiffs assert that by holding graduation ceremonies and Senior Honors Night at the Church, the District has entangled itself excessively with religion in violation of the Establishment Clause. "The general rule is that, to constitute excessive entanglement, the government action must involve 'intrusive government participation in, supervision of, or inquiry into religious affairs.'" *Vision Church*, 468 F.3d at 995 (quoting *United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000)); see also *Agostini v. Felton*, 521 U.S. 203, 232-33 (1996) (concluding that "excessive entanglement" is to be treated as an aspect of the inquiry into "effect"). Courts have recognized that excessive entanglement may occur through "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Vision Church*, 468 F.3d at 995 (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 393 (1990)).

Here, the plaintiffs contend that the District is impermissibly delegating to the Church "the authority to control the physical setting of public-school events," and in turn,

the District is impermissibly interfering with the Church's operations. As to the former, the plaintiffs submit that the physical setting for graduation activities permits the Church "to expose thousands of graduation attendees per year—including numerous youths—to its religious message." (Pls.' Br. in Supp. Mot. for Summ. J. 23.) As to the latter, the plaintiffs hypothesize that "[i]f the District attempts to cleanse the Church of religious symbols and items in order to hold District events there, the District would have to decide which objects in the Church are religious and which are not—exactly the kinds of judgments government officials must not make." (*Id.* at 23-24.) Relatedly, the plaintiffs argue the arrangement increases the risk of community divisiveness along religious lines.

However, as to each position, the plaintiffs rely primarily on a patchwork of dicta from several First Amendment cases that have touched on "excessive entanglement" but otherwise have little relation to the situation here. See *e.g.*, *Lemon*, 403 U.S. 602 (state statute providing aid to teachers in nonpublic schools); *Agostini*, 521 U.S. 203 (New York City program sending public teachers into private schools); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (state statute vesting governing bodies of churches with power to veto applications for liquor licenses); *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680 (1987) (rejecting petitioner's argument that a tax code provision governing charitable contributions to religious organizations results in excessive entanglement in that the IRS is required to ascertain information from religious institutions regarding services and commodities). Such cases concern much more enduring arrangements linking the state to religious entities and religious activities.

The district court decision in *Spacco v Bridgewater School Department*, 722 F. Supp. 834 (D. Mass. 1989), which the plaintiffs rely on, is also distinguishable. In that case, the school district conducted elementary school classes in a Parish Center owned

by the Roman Catholic Church. Of particular concern to the court was the underlying lease agreement, which provided that “the Church could terminate the lease if, in its view, anything being continuously taught to children attending school at the Parish Center conflicted with Roman Catholic doctrine.” 722 F. Supp. at 845. According to the court, this provision “gives the Church the power to influence the elementary school curriculum.” *Id.* Here, there is no agreement (written or otherwise) through which the District could be said to have impermissibly delegated its authority to the Church, and no legal authority pointed to by the plaintiffs indicates that periodic rental of a religious venue for secular public school related functions qualifies as excessive entanglement. As discussed earlier, District high school graduation activities at the Church are controlled by the District, and the record suggests that non-permanent religious items may be removed. Thus, it appears the entities have made some effort to avoid entanglement, and given the limited nature of the District’s event specific rental arrangements with the Church, *excessive* entanglement of the type proscribed by the Establishment Clause is lacking. See *Agostini*, 521 U.S. at 233 (“Entanglement must be “excessive” before it runs afoul of the Establishment Clause.”)

As to the plaintiffs’ concerns respecting political divisiveness, it is understandable that cases such as this touch on strongly held beliefs within the community. The plaintiffs indicate that over the years several groups and individuals have expressed their views to the District regarding graduation exercises at the Church. However, as the plaintiffs concede, the possibility that a program may increase the dangers of political divisiveness is insufficient to indicate “excessive entanglement,” see *Agostini*, 521 U.S. at 206, and without more, the plaintiffs are unable to demonstrate that divisiveness in the District is of such extent that it adds materially to their claim. See also *Lynch*, 465 U.S. at 684 (noting that the Supreme Court “has never held that political

divisiveness alone was sufficient to invalidate government conduct”). *But see Lemke*, 376 F. Supp. 87 (indicating that increased religious politicization was a factor in enjoining school from holding graduation ceremony at a church).

4. USE OF TAXPAYER FUNDS

Plaintiffs next contend that the use of local property taxes to pay fees charged by the Church for rental of its facilities violates the Establishment Clause. Specifically, they assert that tax receipts that are paid to the Church by the District advance the Church’s ability to promulgate its religious message to graduation attendees, and that the absence of restrictions on the use of those funds leaves the Church free to spend the money for religious purposes.

At the outset, it is significant that the challenged arrangement is far from the government funded, statutorily authorized school aid programs or tax exemptions addressed in cases such as *Mitchell v. Helms*, 530 U.S. 793 (2000) (federal funds channeled through state program to private schools), *Lemon v. Kurtzman*, 403 U.S. 602 (state aid, in the form of salary supplements, to certain private school teachers), *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 668 (1970) (property tax exemption for religious entities), and *Freedom from Religion Foundation, Inc. v. Bugher*, 249 F.3d 606, 613 (7th Cir. 2001) (state program providing “cash grants to private, sectarian schools” with “no real restrictions on the use of the grant money by the religious schools.”). In contrast, the record reflects that the taxpayer funds paid to the Church for use of its facilities during graduation is akin to a common fee-for-use arrangement that mirrors rental arrangements between the Church and other entities. Moreover, the secular purpose of the arrangement undercuts the plaintiffs’ contention that the funds have the effect of aiding religion. See *Agostini*, 521 U.S. 203 (discussing criteria for determining

whether government aid has the effect of advancing religion); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998) (addressing the entanglement prong of *Lemon*, and finding a public school's lease of Church space "no different from the normal interface between landlord and tenant in leased space; money is paid for services received subject to conditions of use articulated in the lease and course of conduct."). And given that the Supreme Court has repudiated "the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends," *Hunt*, 413 U.S. at 743, the plaintiffs cannot succeed in establishing a constitutional violation. Now, therefore,

IT IS ORDERED that the defendant's motion for summary judgment on all claims (Doc. # 44) is granted.

IT IS FURTHER ORDERED that the plaintiffs' motion for summary judgment (Doc. # 52) is denied.

IT IS FURTHER ORDERED that this case is dismissed.

Dated at Milwaukee, Wisconsin, this 19th day of July, 2010.

BY THE COURT

/s/ C. N. Clevert, Jr.
C. N. CLEVERT, JR.
CHIEF U. S. DISTRICT JUDGE

United States District Court

EASTERN DISTRICT OF WISCONSIN

DOES 1, 7, 8, and 9, Individually;
DOES 2, 4, 5, and 6, Individually,
and as taxpayers; DOES 3, a minor,
by DOES 3's next best friend, DOE 2,

Plaintiffs,

v.

JUDGMENT IN A CIVIL CASE
Case No. 09-C-0409

ELMBROOK JOINT COMMON SCHOOL
DISTRICT NO. 21,

Defendant.

This action came before the court, the issues have been decided and a decision has been rendered. Now, therefore,

IT IS ORDERED AND ADJUDGED that this case is dismissed.

APPROVED:

s/ C. N. CLEVERT, JR.
C. N. CLEVERT, JR.
Chief U. S. District Judge

JON W. SANFILIPPO
Clerk

7/19/10
Date

s/C. Fehrenbach
(By) Deputy Clerk

Certificate that all required materials are included in appendix

Pursuant to Circuit Rule 30(f), I hereby certify that all materials required by Circuit Rules 30(a) and (b) have been included in the plaintiffs-appellants' appendices.

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Dated: October 21, 2010