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)

PLAINTIFFS-APPELLANTS' PETITION FOR PANEL AND *EN BANC* REHEARING

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-2922

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

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[✓] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.** (Address & fax number updated)

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Doe 1, Doe 2, Doe 3, Doe 4, Doe 5, Doe 6, Doe 7, Doe 8, and Doe 9. For the parties' real names, see Sealed Version of Disclosure Statement, Doc. No. 8, filed Sept. 15, 2010. The Court has granted leave to maintain this document under seal. See Doc. No. 53 (Order, Mar. 16, 2011); Doc. No. 57 (Opinion, Sept. 9, 2011) at 31.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Americans United for Separation of Church and State; Hall Legal, S.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Alex J. Luchenitser Date: October 7, 2011

Attorney's Printed Name: Alex J. Luchenitser

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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Attorney's Signature: /s/ Ayesha N. Khan Date: October 7, 2011

Attorney's Printed Name: Ayesha N. Khan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☒

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N/A

Attorney's Signature: /s/ James H. Hall, Jr. Date: January 28, 2011

Attorney's Printed Name: James H. Hall, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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N/A

Attorney's Signature: /s/ F. Thomas Olson Date: January 28, 2011

Attorney's Printed Name: F. Thomas Olson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [ ] **No** [X]

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Introduction

The 2-1 decision of the panel — which allows a public school district to hold its high-school graduations in the intensely religious environment of a Christian church, where school officials give speeches and hand students their diplomas underneath a towering cross — conflicts with decisions of the Supreme Court and this Court that prohibit public schools from coercively imposing religion upon students or otherwise endorsing religion, including *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

This proceeding is also of exceptional importance. The use of churches for public-school graduations has become increasingly prevalent within this Court's jurisdiction and elsewhere around the country. The panel's opinion is the first federal appellate decision on the constitutionality of the practice. The opinion will therefore likely be quite influential. But it conflicts with the existing federal and state precedents concerning the use of religious venues for government events. Prior cases have either struck down government use of such venues, or upheld it in circumstances far different from those here: where religious iconography was covered for the public event, where no secular venue could accommodate the event, where the event was genuinely optional, or where the event only involved adults.

To maintain consistency with the Supreme Court's and this Court's precedents, and to prevent school districts from receiving a green light — one out of step with prior case-law — to hold school events in religious environments, the Court should grant panel or *en banc* rehearing.

Key Facts

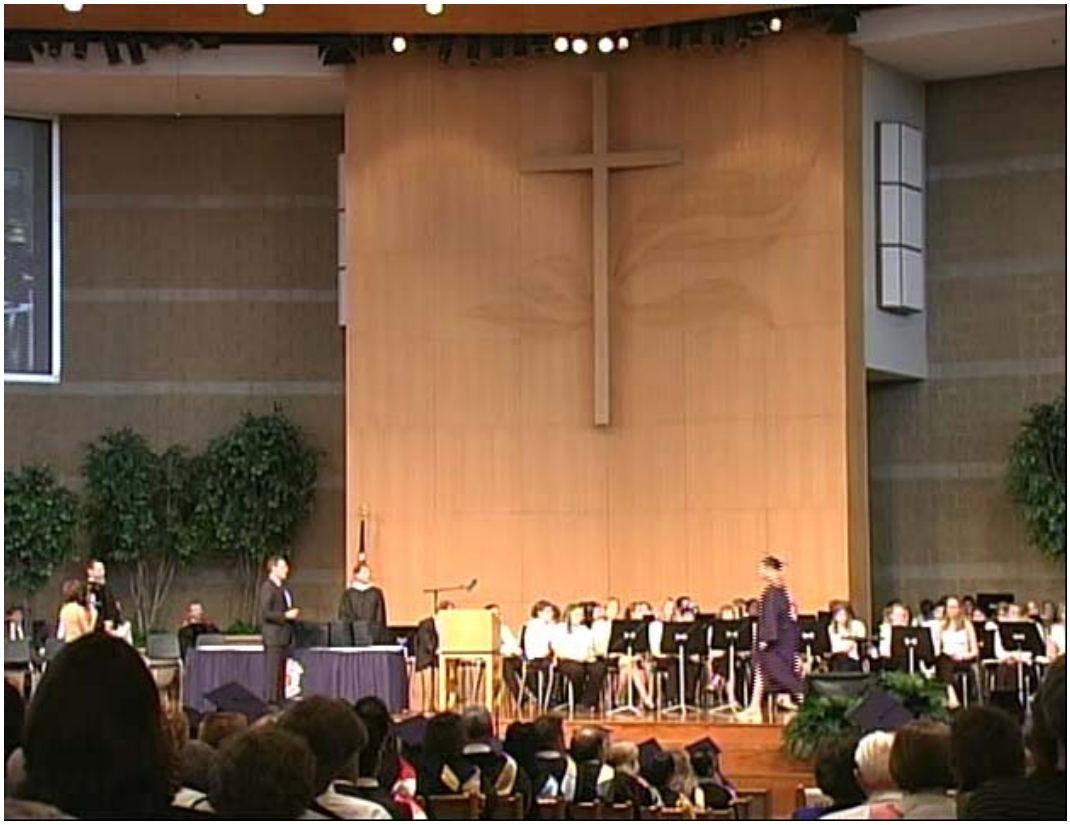
The plaintiff-appellant students, parents, and graduates of the defendant-appellee Elmbrook School District challenge the District's practice of holding its high-school graduations in the main sanctuary of Elmbrook Church, an evangelical Christian institution. Panel Opinion

("Op.") at 2-3, 14-15.[1] The panel majority acknowledged that "[t]he atmosphere of the Church, both inside and outside the sanctuary, is indisputably and strongly Christian." Op. at 6. "Crosses and other religious symbols abound on the Church grounds and the exterior of the Church building, and visitors encounter these symbols as they drive to the parking lot and walk into the building." Op. at 6. Graduation attendees congregate in and must walk through the Church's lobby before and after the ceremonies. Op. at 7. This "lobby contains tables and stations filled with evangelical literature, much of which addresses children and teens, and religious banners, symbols and posters decorate the walls." Op. at 7.

The graduation ceremonies take place on the dais at the front of the sanctuary. Op. at 8. "An enormous Latin cross, fixed to the wall, hangs over the dais and dominates the proceedings." Op. at 8. Students give their speeches, and school officials sit, beneath this cross:

[1] Although the District stopped holding graduations in the Church after this lawsuit was filed, the panel correctly held that this case is not moot, because the plaintiffs who attended past graduations in the Church have live claims for damages, and because the District has not ruled out returning graduations to the Church in the future. Op. at 18-22.

Op. at 8; Appendix of Plaintiffs-Appellants ("A") at A93(¶¶24-25), A395. Graduates walk underneath the cross to receive their diplomas:



A95(¶26); A215. As school officials give their speeches, their images appear on large "jumbotron" video-screens that hang next to the cross:

A94(¶30); A213. Also, school banners are displayed in the Church's sanctuary and lobby during the graduation ceremonies, and the high schools' names are displayed on the large screens next to the sanctuary's cross before the ceremonies start. A96(¶43); A431-32; A535(¶4).

Graduating seniors and their guests sit in the Church's pews. Op. at 9. Bibles and hymnal books remain in front of each seat, as do a yellow "Scribble Card for God's Little Lambs" and a Church promotional card that asks attendees whether they "would like to know how to become a Christian." Op. at 9; A125-27(¶¶57-64).

There are at least eleven local non-religious facilities that are able to host District graduations. A369-76. Five of those facilities have seating capacities greater than that of the Church. A142(¶134). And some of the secular facilities cost less than the Church, while most of the others cost only $1 to $4 per attendee more. *See* A100(¶70); A370-76; A383-84(¶¶10-13).

Argument

I. The majority's decision conflicts with the decisions of the Supreme Court and this Court.

Despite finding that "the Church is indeed a highly religious and unmistakably sectarian setting" (Op. at 46), the panel majority upheld the use of the Church for public-school graduations. The plaintiffs appreciate the thoroughness and thoughtfulness of the majority's examination of the record and discussion of each side's arguments. We respectfully submit, however, that the results the majority reached are in conflict with the decisions of the Supreme Court and this Court, and that the legal distinctions the majority drew to distinguish those decisions are "overly formalistic" (as Judge Flaum pointed out in dissent, *see* Dissenting Opinion ("D. Op.") at 65) and would permit widespread infusion of proselytizing religious messages into public-school activities.

A. The District's church graduations coercively impose religion upon students and endorse religion.

The dissent correctly concluded that this case "cannot be meaningfully distinguished" (D. Op. at 56, 61) from the Supreme Court's decisions in *Lee*, 505 U.S. 577, and *Santa Fe*, 530 U.S. 290. In *Lee*, the Court held that it is unconstitutional for a public school to invite a clergyperson to deliver a prayer at graduation, explaining that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise," and that "in our culture high school graduation is one of life's most significant occasions" and so cannot properly be considered "voluntary." 505 U.S. at 587, 595. In *Santa Fe*, ruling that it is unconstitutional for a public school to facilitate student presentation of opening prayers at school football games, the Court clarified that governmental injection of religion into public-school events is improper not only because it coercively imposes religion upon students but also because it communicates a message of governmental endorsement of religion. *See* 530 U.S. at 308-12.

Other decisions of the Supreme Court, as well as decisions of this Court, have applied these principles to a variety of activities. In *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962), and *School District v. Schempp*, 374 U.S. 203, 224-26 (1963), the Supreme Court struck down public-school practices of leading children in classroom prayer, stating in the earlier case, "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." 370 U.S. at 431. In *Berger v. Rensselaer Central School Corp.*, 982 F.2d 1160, 1169-71 (7th Cir. 1993), this Court held that a public school violated both the coercion and the endorsement prohibitions by allowing a private group to enter the school to distribute Bibles to students. And the Supreme Court expressly stated in *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), that no government entity "can force [or] influence a person to

go to or remain away from church against his will," and then reiterated in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952), that "[g]overnment . . . may not coerce anyone to attend church."

Holding a public-school graduation in the "highly religious and unmistakably sectarian setting" (Op. at 46) of Elmbrook Church is directly contrary to the words of *Everson* and *Zorach*. The practice coercively imposes religion upon students and parents, for they must spend hours in the Church's religious environment, watching their graduation ceremony take place beneath an immense Christian cross, as they sit in pews filled with Bibles and hymnals and church literature, after entering through a lobby that abounds with proselytizing postings and pamphlets. And the practice communicates a strong message of governmental endorsement of religion, for a seminal school event is held in a religion-permeated space — where the Church sanctuary's towering cross is displayed in conjunction with school banners and above school speakers — despite the availability of numerous non-religious facilities to host the ceremony.

B. The distinctions drawn by the majority cannot be squared with the decisions of the Supreme Court and this Court.

To distinguish the above case-law, the majority drew lines that cannot be reconciled with the Supreme Court's and this Court's rulings. The majority's distinctions are "overly formalistic" (D. Op. at 65) and would lead to absurd results if faithfully applied in other contexts.

Passive exposure? The majority concludes that there is no religious coercion because "the encounter with religion here is purely passive." Op. at 38. The majority does not, however, take the position that the coercion bar is inapplicable to forced imposition of religious symbolism, correctly acknowledging, "[w]e do not doubt that symbols can be used to proselytize or that, in the appropriate circumstances, coerced engagement with religious iconography and messages might take on the nature of a religious exercise or forced inculcation of religion." Op. at 37. This acknowledgment is consistent with *Kerr v. Farrey*, 95 F.3d 472, 477-78 (7th Cir.

1996), where this Court held that the coercion test is violated when "the state is imposing religion on an unwilling subject," and noted that some cases in which public displays of religious symbols were struck down "have significant elements of forcing religion on outsiders."

Rather, the majority's position is that the students here are not forced to take any affirmative religious act. *See* Op. at 38. But in the Supreme Court cases that have struck down school prayer, students were not required to say the prayers, and could merely listen or even leave the room. *See Santa Fe*, 530 U.S. at 297-98, 312; *Lee*, 505 U.S. at 593, 596; *Schempp*, 374 U.S. at 205-07, 210-12; *Engel*, 370 U.S. at 423 & n.2, 430. Likewise, in *Berger*, 982 F.2d at 1170, this Court declared classroom Bible distributions unconstitutional even though students did not have to take a Bible.

What is more, when a school holds its graduations in a religious environment, it *does* pressure students to engage in religious acts. "Church buildings and the religious artworks that beautify them are forms of worship themselves . . . ." Guidelines of the United States Conference of Catholic Bishops, *Built of Living Stones: Art, Architecture, and Worship* 7 (2005). "To pass through the door of a church already constitutes a religious act which signifies entry into the sacred." Fr. Nicolas du Chaxel, *The Kingdom of the Beloved Son*, Mass of Ages (Aug. 2007), *available at* http://web.archive.org/web/20080509143332/http://www.latin-mass-society.org/2007/kingdom.html. And here, at graduation ceremonies in the Church, some attendees have genuflected when taking their seats, made the sign of the cross, read Bibles or hymnals in the pews, and taken religious pamphlets in the lobby. A125(¶¶55-56); A126(¶60); A131(¶84). As the dissent noted, when students observe their peers engaging in such acts, "'the law of imitation operates' and may create subtle pressure to honor the day in a similar manner." D. Op. at 63 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985)).

Indeed, the coercive imposition of religion here is far more extensive than in Supreme Court decisions that struck down prayers which were short and non-sectarian and which could be avoided without missing the rest of the relevant events or classes. *See Santa Fe*, 530 U.S. at 297-98, 312; *Lee*, 505 U.S. at 583, 593, 596; *Engel*, 370 U.S. at 422-24 & n.2, 430. Here, students and their family members must enter a church and its sanctuary, spend hours in the church's highly sectarian environment, and watch their entire graduation ceremonies take place beneath an immense cross that "[n]o one could fail to notice" (Op. at 46).

Incidental contact? The majority wrote that there is "no evidence that the District sponsors the Church's beliefs or mission" (Op. at 54) and that "the encounter with religion here is . . . incidental to attendance at an entirely secular ceremony" (Op. at 38). But the state cannot constitutionally impose religion on its citizens or create the appearance of closely associating itself with religion even when these are not the state's goals. For instance, in *Kerr*, 95 F.3d at 474, 479-80, this Court held that a prison's policy of requiring inmates to attend a religious drug-treatment program violated the coercion test, even though the prison used the program because it was free and successful, not for religious reasons. In *Berger*, 982 F.2d at 1162, 1165-66, 1170-1171, this Court concluded that a public school's practice of allowing a private group to distribute Bibles in classrooms violated both the coercion and endorsement tests, notwithstanding that the Court was "confident" — as the distributions took place pursuant to a general school policy allowing community members to hand out literature to students — that the school's conduct was "not aimed at promoting the religious values" of the group. And in *Harris v. City of Zion*, 927 F.2d 1401, 1411-12 (7th Cir. 1991), this Court struck down a cross on a city seal — even though the cross had been placed there for non-religious reasons — because the inclusion of the cross "br[ought] together church and state in a manner that suggest[ed] their alliance."

In the majority's view, "the District has in [no] way associated itself with [the Church's] symbols or with the beliefs expressed by the Church." Op. at 46. As the dissent points out, however, the District did associate itself with the Church and its symbols, by choosing to hold graduations there, and by placing school banners and images beside the Church's symbols and banners. D. Op. at 61, 64. The majority dismisses as speculative the plaintiffs' point that the District would not have held graduations in a local mosque regardless of how convenient the physical facility may have been. Op. at 48. It is far from fanciful, however, to posit that elected government officials would not allow a government event to take place in a religious venue that could make a majority of their constituents uncomfortable. When, as here, the government takes action that communicates its "approv[al]" of a particular faith, the government unconstitutionally endorses religion even if its purpose is not to "promote" that faith. *See Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 127-28 (7th Cir. 1987).

The majority notes that "there is no indication . . . that the District directed students to look at the [Church's religious] images or that the District even pointed out the images." Op. at 39. But, as the majority concedes, "[n]o one could fail to notice the giant cross that hangs over the [Church's] dais and 'appears in attendees' line of sight when they watch' the ceremony." Op. at 46 (quoting A94(¶29)). The District effectively directed students to look at the symbols of the Church by deciding to hold graduations there. *See* D. Op. at 64.

Private property? The majority emphasizes that the events here took place on private property. Op. at 47-48. It is well-established, however, that the Establishment Clause prohibits the government from coercively subjecting citizens to, or endorsing, a private party's religious message. *See, e.g.*, *Santa Fe*, 530 U.S. at 302 (prayers given by students); *Cnty. of Allegheny v. ACLU*, 492 U.S. 572, 600-01 (1989) (crèche provided by private entity); *Berger*, 982 F.2d at

1165-66 (Bibles distributed by private group). The Supreme Court has, moreover, specifically confirmed that the coercion prohibition extends to private property, stating that the government must not "coerce anyone to attend church, to observe a religious holiday, or to take religious instruction." *Zorach*, 343 U.S. at 314. This Court has confirmed the same for the endorsement bar, holding in *Freedom From Religion Foundation v. City of Marshfield*, 203 F.3d 487, 496 (7th Cir. 2000), that the government endorsed a religious statue even after selling it, and the land beneath it, to a private party.

The Supreme Court and this Court have explained that the prominence and importance of the governmental location where a religious item is displayed — for example, when a display is at city hall — strengthens the message of endorsement communicated by the display. *See Allegheny*, 492 U.S. at 599-600; *Am. Jewish Cong.*, 827 F.2d at 128. Similarly, "[h]igh school graduations enjoy an iconic place in American life," and holding these "important ceremonial events" in a religious venue communicates a message of governmental endorsement. *See* D. Op. at 60-61, 65. As the dissent stated, just as "well established doctrine prohibit[s] school administrators from bringing church to the schoolhouse . . . [t]he same result should obtain when administrators bring seminal schoolhouse events to a church." D. Op. at 56.

Standard fare? The majority also found important the lack of evidence that the religious items displayed in the Church during graduations "were placed there especially for the graduations rather than being standard fare for the Church's own activities." Op. at 46. The religious elements of the privately delivered Narcotics Anonymous program in *Kerr*, 95 F.3d at 474, 479-80, were also the program's standard fare, yet this Court ruled that it was unconstitutional to coerce prisoners to take part in the program. Likewise, the Supreme Court held in *Allegheny*, 492 U.S. at 600-01, that the display of a crèche at a city hall unconstitutionally

endorsed religion, notwithstanding that the same crèche may have otherwise been displayed on the private property of the religious group that provided it. *See* 492 U.S. at 600-01 & n.51.

Indeed, the majority suggests that it may have ruled the other way if Church officials had actively distributed religious literature or proselytized from information booths in the Church lobby. *See* Op. at 52 n.21. Yet that, too, may well be the Church's standard practice for its own events. In any event, to the extent the question is whether the Church intended to spread its faith to attendees of the graduations, that surely was the case here, for the Church refused to allow the cross in its sanctuary to be covered for the ceremonies — even though concealing this powerful symbol had been proved feasible, as the cross was covered at the first graduation held at the Church — and to remove the religious pamphlets in its lobby, including ones displayed on racks labeled as being for children. *See* D. Op. at 58-60, 64; *see also* Op. at 7-9.

Finally, the majority points out that "[s]tudents, indeed all citizens in a pluralistic society, encounter religion and religious symbols in myriad ways in the course of daily life." Op. at 40. This is true not just of religious symbolism, however, but also of prayer and other forms of proselytization, which people may meet in streets and parks, on television, or at social events. Although the state is not required to "shield citizens from encountering the beliefs or symbols of any faith to which they do not subscribe" (Op. at 37), the Constitution prohibits the state from taking affirmative action that coercively imposes religion upon its citizens or closely associates itself with religion, regardless of whether the religion is presented in the form of oral prayer or, as here, an intensely religious environment full of sectarian icons, postings, and pamphlets. *See, e.g.*, *Lee*, 505 U.S. at 587; *Allegheny*, 492 U.S. at 590, 593; *Everson*, 330 U.S. at 15.

C. The majority's legal rules would permit unprecedented and extensive imposition of religion upon schoolchildren.

The legal distinctions that the majority used to distinguish this case from the above-cited

precedents — that the exposure to religion is "passive," "incidental" (in that it was not the government's goal), involves private property, and reflects the religious institution's standard fare — would, if applied faithfully, lead to absurd results. For example, a public school could hire a religious bus company to transport its children to school daily, on the grounds that the service is cheap and reliable, even if the busses are covered — inside and out — with proselytizing religious advertisements. Or a public school could purchase from a religious institution soft drinks that come in cans with "WORSHIP JESUS" printed on them in large letters, for resale to students in its cafeteria and on field trips, if the school does so only because the soft drinks are inexpensive. And a public school could even hold all its classes in a church building replete with religious iconography in classrooms and hallways, if the school district leases the building because it is the cheapest option. As it would countenance such extraordinary results, the majority's decision should be reconsidered.

II. This case is exceptionally important: public-school graduations in churches are increasingly common, this is the first appellate decision concerning the practice, and the majority's opinion is much more permissive of the practice than are prior precedents.

In recent years, many public schools within this Court's jurisdiction have held their graduations in churches.[2] Numerous public schools elsewhere around the country have done so

[2] These include many Chicago-area high schools (Manya Brachear, *Graduations at church cause unease*, Chi. Trib., May 30, 2010, *available at* 2010 WLNR 11108875; Scott Ray, *Wauconda to change venue for graduation*, Chi. Daily News, Oct. 22, 2005, *available at* 2005 WLNR 26285563); some Chicago-area middle schools (*id.*; *District 204 board adds a school day*, Chi. Trib., Apr. 24, 2002, *available at* 2002 WLNR 12595783); at least one Chicago elementary school (Dawn Trice, *Pomp is muted, but opinions of readers aren't*, Chi. Trib., June 9, 2004, *available at* 2004 WLNR 19837732); a Rockford high school (Cathy Bayer, *This year's graduation will be in a church*, Rockford Reg. Star, Jan. 29, 2011, at D1); and an Indiana kindergarten (*'Force 2010' celebrates 10 years of ministry*, Paladium-Item (Richmond), Oct. 22, 2010, *available at* 2010 WLNR 21163477). Indeed, at least one Milwaukee-area school district that is not a party to this case continues to hold its graduations at Elmbrook Church itself. *Mukwonago High School graduation*, Living Lake Country, http://www.livinglakecountry.com/multimedia/123492199.html (June 8, 2011).

too.[3] The increasing prevalence of this practice has resulted from the growth in recent decades of large megachurches that have spacious and comfortable facilities. *See* Warf, et al., *Geographies of megachurches in the United States*, J. Cultural Geography, Feb. 1, 2010, *available at* 2010 WLNR 16922996; *see also* Casey Banas, *Growth with the Gospel*, Chi. Trib., Apr. 17, 1994, *available at* 1994 WLNR 4281016.

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[3] These include many Atlanta-area schools (Christopher Quinn, *School events at a church flagged*, Atl. J. & Const., Dec. 4, 2010, *available at* 2010 WLNR 24065986); many Cincinnati-area schools (*Schools see graduations in churches as practical, not religious*, Cincinnati Enquirer, May 16, 2010, *available at* 2010 WLNR 10189049); a number of schools in the Grand Rapids area (*Ada to Zeeland*, Grand Rapids Press, May 15, 2008, *available at* 2008 WLNR 9285563; *Ada to Zeeland*, Grand Rapids Press, May 13, 2008, *available at* 2008 WLNR 9082877; *Commencement to stay at church*, Grand Rapids Press, July 10, 2011, *available at* 2011 WLNR 13936614; Editorial, *Different School of Thought*, Grand Rapids Press, June 19, 2007, *available at* 2007 WLNR 11559555; *Graduation gets new location*, Grand Rapids Press, Sept. 27, 2009, *available at* 2009 WLNR 19195304); a Florida elementary school (Carmen Paige, *Schools ordered to stop prayer*, Pensacola News J., Jan. 13, 2009, *available at* 2009 WLNR 20714932); California and Kentucky schools for troubled children (Natasha Lindstrom, *Grads celebrate overcoming the odds*, Daily Press (Victorville, Cal.), June 3, 2009, *available at* 2009 WLNR 10618530; Dariush Shafa, *92 Beacon Central grads celebrate success*, Messenger-Inquirer (Owensboro, Ky.), June 7, 2009, *available at* 2009 WLNR 10910079); other California schools (*e.g.*, *Events*, Vida en el Valle (Fresno), June 21, 2011, *available at* 2011 WLNR 12403197); other Kentucky schools (Nola Sizemore, *School calendar amendments approved*, Harlan Daily Enter., Apr. 15, 2011, *available at* 2011 WLNR 7387120; Jim Warren, *Graduation dates set at area high schools*, Lexington Herald-Leader, May 5, 2011, *available at* 2011 WLNR 8731444); a number of Louisiana schools (*George Washington Carver High School graduates*, New Orleans Picayune, June 9, 2011, *available at* 2011 WLNR 13998424; *Graduates and Valedictorians: Doyle High School*, Baton Rouge Advoc., June 5, 2009, *available at* 2009 WLNR 10822582; *Graduates and Valedictorians: Live Oak High School*, Baton Rouge Advoc., June 19, 2009, *available at* 2009 WLNR 11784642; *Graduates and Valedictorians: Walker High School*, Baton Rouge Advoc., May 5, 2010, *available at* 2010 WLNR 10772589); and schools in Alaska (*In brief: Mat-Su*, Anchorage Daily News, May 14, 2010, *available at* 2010 WLNR 9981487), Alabama (Melanie Patterson, *F'dale churches consider merger*, N. Jefferson News, Oct. 1, 2010, *available at* 2010 WLNR 19540301; *Schools ponder weather-related graduation changes*, Anniston Star, May 26, 2011, *available at* 2011 WLNR 10558366), Colorado (Electa Draper, *Ire over New Life for grad events*, Denver Post, May 12, 2011, *available at* 2011 WLNR 9581544), Missouri (*Fair Grove classes moving over break*, Springfield News-Leader, Oct. 20, 2009, *available at* 2009 WLNR 20726613), Pennsylvania (Katy Hopkins, *'Your Mountain is Waiting,' 438 Grads Reminded at Manheim Twp. High Rites*, Lancaster New Era, June 10, 2009, *available at* 2009 WLNR 11257770), South Carolina (Rob Novit, *Presenting the class of 2011*, Aiken Standard, June 3, 2011, *available at* 2011 WLNR 11081674), Tennessee (*ACLU files lawsuit against school system*, Tennessean, May 2, 2011, *available at* 2011 WLNR 8752287; *Parent questions school's graduation event at church*, Tennessean, May 10, 2010, *available at* 2010 WLNR 9657501), Texas (Jim Hardin, *Rockwall-Heath High School Graduation*, Rockwall Cnty. Herald-Banner, June 7, 2010, *available at* 2010 WLNR 12008442; Katherine Unmuth, *Irving ISD moving graduations out of Potter's House church next year*, Dall. Morning News, May 16, 2011, *available at* 2011 WLNR 9710880), Washington State (*Freeman High School*, Spokesman-Rev. (Spokane), June 3, 2010, *available at* 2010 WLNR 11667045), and West Virginia (Amber Marra, *Civic Center hopes graduations run smoothly*, Charleston Daily Mail, May 26, 2011, *available at* 2011 WLNR 10539723).

The majority opinion is the first federal appellate decision to specifically address the constitutionality of this practice. As such, the opinion is likely to be quite influential. Yet it is out of step with prior federal district-court and state court precedents directly addressing the constitutionality of the practice, as well as prior decisions — including federal appellate ones — concerning government use of religious venues in other contexts.

A number of federal district courts have ruled unconstitutional the use of churches for public-school graduations. *See Does v. Enfield Pub. Sch.,* 716 F. Supp. 2d 172 (D. Conn. 2010); *Musgrove v. Sch. Bd.*, 608 F. Supp. 2d 1303, 1305 (M.D. Fla. 2005); *Reimann v. Fremont Cnty. Joint Sch. Dist. No. 215*, Civil No. 80-4059, 1980 WL 590189 (D. Idaho May 22, 1980); *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974). Moreover, in *Spacco v. Bridgewater School Department*, 722 F. Supp. 834, 842-43 (D. Mass. 1989), the court struck down the holding of public-school classes in a church where religious symbols were visible to students. In *Lilly v. State*, 337 S.W.3d 373, 381-84 (Tex. App. 2011), *review granted* (Tex. June 29, 2011), the court ruled that it was unconstitutional to hold court proceedings in a prison chapel. And in *Cooper v. U.S. Postal Service*, 577 F.3d 479, 496-97 (2d Cir. 2009), the Second Circuit held that a unit of the U.S. Postal Service could not constitutionally be located in a private, church-operated building so long as religious items were displayed in the postal-unit space.

In modern cases that have allowed churches to be used for graduations, either there was no secular facility with sufficient seating to host the graduations (*see Miller v. Cooper*, 244 P.2d 520, 520-21 (N.M. 1952)) or the religious iconography in the church was largely covered or removed for the graduations (*see Lolo v. Sch. Bd.*, No. 89-250-CIV-FtM-21B (M.D. Fla. Oct. 18, 1991), R. 46-2 at 5, 13). Similarly, when courts have allowed schools to use churches for other school activities, the facilities used by students were free of religious items (*see ACLU-TN v.*

Sumner Cnty. Bd. of Educ., No. 3-11-0408, 2011 WL 1675008, at *2 (M.D. Tenn. May 3, 2011); *Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998); *Thomas v. Schmidt*, 397 F. Supp. 203, 207, 211-12 (D.R.I. 1975), *aff'd mem.*, 539 F.2d 701 (1st Cir. 1976); *State ex rel. Sch. Dist. of Hartington v. Neb. State Bd. of Educ.*, 195 N.W.2d 161, 162 (Neb. 1972)), or students were allowed to opt out of events at religious venues (*see Bauchman v. West High Sch.*, 132 F.3d 542, 557-58 & n.11 (10th Cir. 1997) (choir concerts)). And although courts have upheld the use of churches as polling places, in such cases voters could vote absentee or at non-religious polling locations, churches used non-consecrated portions of their buildings for the voting areas, and only adults — not youths — were affected by the practice. *See Otero v. State Election Bd.*, 975 F.2d 738, 741 (10th Cir. 1992); *Berman v. Bd. of Elections*, 420 F.2d 684, 685 (2d Cir. 1969); *Rabinowitz v. Anderson*, Case No. 9:06-cv-81117 (S.D. Fla. July 31, 2007), R. 59-2 at 2, 11 n.5.

In this case, on the other hand, the majority has allowed a seminal government event — which is put on for youths and is not truly voluntary (*see Lee*, 505 U.S. at 587, 595) — to take place in a "highly religious and unmistakably sectarian setting" (Op. at 46) where religious icons are not covered, despite the existence of many non-religious sites that can host the event. The plaintiffs are aware of only one other case that has allowed a government event to be held in a religious venue in such circumstances: *State ex rel. Conway v. District Board*, 156 N.W. 477, 480-81 (Wis. 1916), a century-old state-court case that upheld not only the use of a church for a public-school graduation, but also the giving of a prayer at the graduation. That ruling, of course, is contrary to current precedent. *See Lee*, 505 U.S. 577.

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The majority's opinion, too, is out of step with modern church-state jurisprudence. For the foregoing reasons, the plaintiffs respectfully ask that panel or *en banc* rehearing be granted.

Respectfully submitted,

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Dated: October 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing Plaintiffs-Appellants' Petition for Panel and *En Banc* Rehearing. I further certify that I caused a copy of the Petition to be served on October 7, 2011 on the below-listed counsel of record for the defendant-appellee via ECF and email:

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