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)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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Introduction

The District misconstrues what this case is about and what it is not about. The District contends that the Constitution's prohibition against religious coercion is inapplicable here, because it has not coerced any person to "participate" in an "overt religious exercise." Appellee's Brief at 17. But such a narrow interpretation of the anti-coercion rule is inconsistent with what the Supreme Court and this Court have said and what they have done. Indeed, if there is to be logic and consistency in the law, it cannot be unconstitutional for a school to coerce students to listen to a one-minute nonsectarian prayer at graduation, yet constitutional for a school to coerce students to enter a religious environment, sit in the pews of a church sanctuary with Bibles right in front of them, and watch a two-hour graduation ceremony while directly facing an immense Christian cross.

What this case is *not* about is whether the price and amenities offered by Elmbrook Church are more attractive than those of the many other facilities where the District can hold graduations. While that question may be relevant to what the District's purpose in selecting the Church was, the plaintiffs take issue not with the District's purpose but with the religious effects of the District's conduct. And not even a compelling government interest — much less an interest in finding a convenient yet inexpensive place to hold graduations — can justify government action that has the effect of advancing religion.

Nor can the District's church graduations be legitimized by the principles that government must not discriminate against religious speech in a public forum

and must be neutral with respect to religion in general. The selection of a graduation site is not a public forum, and the prohibition on discrimination against religious views in such fora does not give a public school license to subject a captive audience to religious messages. The principle of religious neutrality in fact *prohibits* schools from doing so — it *protects* religious minorities from unwanted impositions of religion by government bodies.

I. The District's use of the Church for graduations is unconstitutional.

A. The District coercively imposes religion on graduates and their families.

1. The coercion test prohibits the government not only from subjecting people to prayer, but also from forcing religion upon them in any manner.

The District contends that the Constitution's prohibition against religious coercion applies only to "forced participation in group prayer or other religious exercise." Appellee's Brief at 23. Both the Supreme Court and this Court have enunciated the anti-coercion principle in far broader terms, however, stating that the government may not:

- "coerce anyone to support *or* participate in religion *or* its exercise" (*Lee v. Weisman*, 505 U.S. 577, 587 (1992) (emphasis added));
- "force [or] influence a person to go to or to remain away from church" (*Everson v. Board of Education*, 330 U.S. 1, 15 (1947));
- "force him to profess a belief or disbelief in any religion" (*id.*);

- "force one or some religion on any person" (*Zorach v. Clauson*, 343 U.S. 306, 314 (1952));
- "thrust any sect on any person" (*id.*);
- "make a religious observance compulsory" (*id.*);
- "coerce anyone to attend church, to observe a religious holiday, or to take religious instruction" (*id.*);
- "impos[e] religion on an unwilling subject" (*Kerr v. Farrey*, 95 F.3d 472, 477 (7th Cir. 1996));
- "coerc[e] a person to conform her beliefs or her conduct to a particular set of religious tenets" (*Venters v. City of Delphi*, 123 F.3d 956, 970 (7th Cir. 1997)).

Likewise, the Supreme Court's and this Court's holdings have implemented the anti-coercion principle to prohibit much more than forced "participat[ion]" in an "overt religious exercise" (*cf.* Appellee's Brief at 17), finding unconstitutional religious coercion where:

- public schools caused prayers or Bible readings to occur in the presence of schoolchildren at graduations, football games, and classes — even when students had the options of remaining silent or leaving during the prayers (*see Santa Fe Independent School District v. Doe*, 530 U.S. 290, 297-98, 312 (2000); *Lee*, 505 U.S. at 583, 593, 596; *School District v. Schempp*, 374 U.S. 203, 206-07, 210-12 (1963); *Engel v. Vitale*, 370 U.S. 421, 423 & n.2, 430 (1962));

- a state allowed people to hold public office only if they declared a belief in God (*Torcaso v. Watkins*, 367 U.S. 488, 489, 495 (1961));

- a public school allowed private individuals to hand out Bibles to students in the classroom and give a short speech encouraging students to read the Bibles (*Berger v. Rensselaer Central School Corp.*, 982 F.2d 1160, 1164, 1170 (7th Cir. 1993));

- a public employee was "repeatedly subjected" by her supervisor "to workplace lectures . . . on his views of appropriate Christian behavior" (*Venters*, 123 F.3d at 970);

- a prison coerced an inmate to attend and observe — but not to participate in — meetings that had religious content (*Kerr*, 95 F.3d at 474, 479-80).

These cases vary greatly in how and where religion was imposed upon the plaintiff, as well as whether the religious communication came from a government employee (*e.g.*, *Engel*, 370 U.S. at 422; *Venters*, 123 F.3d at 970) or a private individual (*e.g.*, *Santa Fe*, 530 U.S. at 294; *Berger*, 982 F.2d at 1164). What they all have in common is that a government body's conduct resulted in a coerced, significant imposition of religion upon a person in connection with a government event or function. Exactly that occurs here: the District's use of the Church for graduations coerces students and parents to spend hours in a religious environment and watch what should be a joyful and seminal event in their lives take place underneath an enormous Christian cross.

2. The coercion test — not just the endorsement test — applies here.

The District argues that because the plaintiffs are exposed to religious symbolism at the Church, and because cases addressing the display of religious symbols on public property typically focus on whether such displays endorse religion, the coercion test should not apply here. Appellee's Brief at 17, 29-30. Courts need not choose between the coercion test and the endorsement test in Establishment Clause cases, however, and instead often apply both, for a violation of either renders the government's conduct unconstitutional. *See, e.g.*, *Santa Fe*, 530 U.S. at 307-08, 310-12; *Berger*, 982 F.2d at 1169-71; *Ingebretsen v. Jackson Public School District*, 88 F.3d 274, 278-80 (5th Cir. 1996); *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1478-83, 1485-88 (3d Cir. 1996). The reason why cases concerning governmental religious displays generally focus on the endorsement inquiry instead of coercion is simple: there is no coercive imposition of religion, for either the plaintiff can avoid the religious symbols entirely (*see Books v. City of Elkhart ("Books I")*, 235 F.3d 292, 300 (7th Cir. 2000); *Gonzales v. North Township*, 4 F.3d 1412, 1416-17 (7th Cir. 1993); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 135 (7th Cir. 1987) (Easterbrook, J., dissenting); *ACLU v. City of St. Charles*, 794 F.2d 265, 268-69 (7th Cir. 1986)) or any contact with the symbols is brief and fleeting (*see Books v. Elkhart County ("Books II")*, 401 F.3d 857, 862 (7th Cir. 2005); *Doe v. County of Montgomery*, 41 F.3d 1156, 1158-59 (7th Cir. 1994)).

What is more, both the Supreme Court and this Court have recognized that visual symbolism — not just spoken words — *can* have a coercive effect. *See* Appellants' Brief at 33-34 and cases cited therein. Accordingly, in *Stone v. Graham*, 449 U.S. 39, 42 (1980), the Supreme Court struck down a statute requiring the Ten Commandments to be posted on the walls of public-school classrooms, and explained that the only effect the statute could have would be "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments" and that it was not "significant" that the Commandments were "merely posted on the wall, rather than read aloud." On the other hand, in *Van Orden v. Perry*, the Supreme Court upheld the display on the grounds of the Texas State Capitol of a monument containing the Ten Commandments — without even applying the endorsement test — noting that the monument was "a far more passive use of [the Commandments] than was the case in *Stone*, where the [Commandments] confronted elementary school students every day." 545 U.S. 677, 691 (2005) (four-Justice plurality opinion); *accord id.* at 702-03 (Breyer, J., concurring in the judgment).

Indeed, as the District points out (Appellee's Brief at 26-27), in a partial concurrence and partial dissent in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 659 (1989), Justice Kennedy and three other Justices took the position that the coercion test should be used to evaluate government displays of religious symbols. Justice Kennedy emphasized that such coercion need not rise to the level of direct compulsion, but may be "subtle" or "indirect," writing that the government's "[s]ymbolic recognition . . . of religious faith" could create

unconstitutional coercion in some cases, and citing "the permanent erection of a large Latin cross on the roof of city hall" as an example. *Id.* at 659, 661 & n.1. Justice Kennedy voted in *Allegheny* to uphold two displays containing a crèche and a menorah on public property because those displays were not coercive: "[p]assersby" were "free to ignore them, or even to turn their backs." *Id.* at 664. More recently, writing for a plurality in *Salazar v. Buono*, 130 S. Ct. 1803, 1816-17 (2010), Justice Kennedy suggested that Congress acted constitutionally by transferring to a private party a parcel of remote desert land that contained a cross erected by private citizens, noting that those citizens had put up the cross to honor fallen veterans and not to promote religion.

Here, unlike in governmental religious-display cases such as *Allegheny* and *Salazar*, students and families are coercively subjected to an extensive imposition of religion when graduation ceremonies are held at the Church. We are in the public-school context, where the Supreme Court has "heightened concerns" about religious coercion. *Lee*, 505 U.S. at 592. Students and families face great coercive pressure to attend graduation ceremonies. *Id.* at 595. In the Church, students and families are immersed in a religious environment for the duration of the approximately two-hour ceremonies. Appellants' Brief, Statement of Facts ("Facts"), ¶¶6-14; A98(¶58). They cannot avoid viewing the huge cross that hangs right above the dais upon which the ceremonies take place, directly in their line of sight, in between the two jumbotron video-screens that show closeups of the ceremonies. Facts, ¶7. And the message conveyed by the cross and the other religious materials students and families

encounter is unambiguously religious, for the religious items are displayed by the Church, whose goals include "[p]roclaiming [God's] Word in Evangelism" and "spread[ing] enthusiastically the message of Christ's conquest." A118(¶24); A390.

3. The coercion test does not require a showing that the government acted with a purpose of promoting religion.

The District's reasoning — that the question here should be whether the District is endorsing religion (Appellee's Brief at 29-30), and that the District is not doing so because it had non-religious reasons for selecting the Church (*id.* at 33-37) — is tantamount to an argument that a government body can coercively impose religion on citizens so long as it is not acting with a *purpose* of advancing or endorsing religion. But the case law refutes this proposition. Government conduct is unconstitutional if *either* its purpose *or* its effect advances religion. *E.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 770 (7th Cir. 2001). And, as noted above, a violation of *either* the coercion test *or* the endorsement test is sufficient to show an unconstitutional effect of advancing religion. *See supra* p. 5.

Thus, in *Kerr*, 95 F.3d at 474, 479-80, this Court held unconstitutional — solely under the coercion test — a prison's policy of requiring inmates to attend a religious drug-treatment program, even though the prison used the program because it was free and successful, and there was no suggestion that the prison picked the program for religious reasons. In *Berger*, 982 F.2d at 1162, 1171, this Court concluded that a public school's practice of allowing a private group to distribute Bibles in classrooms was unconstitutional under the coercion test,

notwithstanding that the Court was "confident" — because 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 *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979, 981, 984-85 (9th Cir. 2003), the court ruled that a school district could not constitutionally permit a student to give a proselytizing religious speech at graduation because allowing the speech would have coercively imposed religion upon a captive audience, even if a disclaimer could have removed any message of endorsement of the speech, and even though the student was selected to give the speech based solely on his high academic standing. *See also Goluba v. School District*, 45 F.3d 1035, 1040 (7th Cir. 1995) (suggesting that school districts have a constitutional obligation to prevent students from "temporarily converting graduation into a prayer meeting").

The District therefore cannot justify coercively subjecting students to a religious environment at graduations on the grounds that imposing religion on students was not the District's goal and that purportedly the District only wanted a cheap and convenient graduation facility. If such reasoning could support imposing religion upon students, then a public school could use in the classroom religiously proselytizing social-studies textbooks obtained from a religious group, so long as the only reason the textbooks were selected was because they were free. Or a public school could allow its math classes to be taught by parochial-school math teachers — who are only willing to serve there when they are allowed to open their classes by

leading the public-school students in prayer — if those teachers teach math better and for a lower price than the ones previously employed by the school. A public school could even allow a church to run the school's graduation ceremony and include a religious service within the ceremony on the grounds that the church agreed to conduct the ceremony for free and thereby saved the school from incurring substantial expenses!

4. The District's other contentions on the coercion issue lack merit.

The District argues that the Court should ignore the fact that young siblings of graduating seniors attend the graduation ceremonies, because those children do not have to go. Appellee's Brief at 28. In *Lee,* however, the Supreme Court recognized that, because of the importance of high-school graduation, graduating students' family members are coerced to attend the event, and that injection of religion into the event violates the family members' rights. *See* 505 U.S. at 594-96. Making a parent choose between taking a young child into an unwanted religious environment and preventing that child from watching their elder sibling's graduation is no more constitutional than placing objecting seniors themselves in the position of having to decide whether to go — a position "where the student ha[s] no real alternative." *See id.* at 588.

That the Church sometimes uses the term "auditorium" to refer to the space where graduation ceremonies are held and at other times refers to the space as the "sanctuary" or the "sanctuary/auditorium" (A385; A519; A552; A554-55; *cf.* Appellee's Brief at 7) does not somehow render the space a non-religious one: the

space is used for the Church's weekend worship services (A385; A552), and a large cross, Bibles, hymnal books, and Church promotional cards are on display there during graduations (Facts, ¶¶6-10). That the Church has removed some "non-permanent" religious items from view during recent graduations (Appellee's Brief at 7) also makes no difference, for numerous religious objects — including the cross above the sanctuary's dais; the Bibles, hymnals, and promotional cards in the sanctuary's pews; and various religious items in the Church's lobby — remained on display during recent graduations. A270(¶12); A384(¶14); A395-97; A402-58; A521-22(¶¶2-5); A524-27(¶¶2-12); A534-38(¶¶1-3, 7-17). That objections to entering that religious environment could have been made under the Free Exercise Clause in addition to the Establishment Clause (*cf.* Appellee's Brief at 30 n.7) is likewise of no moment, for both Clauses prohibit the government from imposing a religion on persons who do not subscribe to it. *See Venters*, 123 F.3d at 970.

The District's assertion that it "makes reasonable accommodations" for graduating seniors who have religious objections (Appellee's Brief at 8) also does not help it. As the graduations take place in a religious environment where an enormous cross continually hangs above the proceedings, there is no way to "accommodate" religious objectors at the ceremonies. And alternative, separate graduation ceremonies for religious objectors neither have been held by the District (A613(¶3); A614(¶1); A616(¶1); A618(¶1)) nor would render the District's use of the Church constitutional. Holding alternative ceremonies would make attending students stand out as religious objectors, which is something that a public school

cannot constitutionally do — for instance, a school cannot render constitutional a prayer at a school event by allowing students to leave during the prayer. *See Lee*, 505 U.S. at 596; *Schempp*, 374 U.S. at 224-25; *Engel*, 370 U.S. at 430. Alternative commencements would also deprive students and families of a principal benefit of graduation ceremonies — celebrating their accomplishments together with their peers (*see Lee*, 505 U.S. at 595; A613(¶4); A616(¶1); A618(¶1)) — but "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" (*Lee*, 505 U.S. at 596).

B. The church graduations have an effect of endorsing religion.

The District acknowledges that government action is unconstitutional when it has *either* the purpose *or* the effect of endorsing religion (Appellee's Brief at 31-32; *see also* Appellants' Brief at 40), but the District then ignores this principle by arguing that its church graduations do not have an *effect* of religious endorsement primarily because the District had non-religious *purposes* in selecting the Church (*see* Appellee's Brief at 33-37). The District's analysis would have the question of purpose swallow up the question of effect.

Such an approach would be contrary to this Court's precedents, which have found an effect of endorsing religion where there was no religious purpose. In *American Jewish Congress*, 827 F.2d at 127-28, the Court struck down the display of a crèche in Chicago's city hall, notwithstanding that Chicago had no improper purpose, because the crèche "unavoidably fostered the inappropriate identification

of the City of Chicago with Christianity." In *Harris v. City of Zion*, 927 F.2d 1401, 1411-12 (7th Cir. 1991), the Court held unconstitutional 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." And in *Berger*, 982 F.2d at 1165-66, 1170-71, the Court found that although a school did not have a religious purpose in allowing Bible distributions in the classroom, the distributions communicated an endorsement of religion, as they took place during school activities. Here, the holding of a school event in a church sanctuary, where an immense cross is displayed in conjunction with school banners and above school speakers, sends an unmistakable message of union between religion and government. *See* Appellants' Brief at 40-41.

That the religious symbols at the Church are those of a private party on private property does not carry the day for the District (*cf.* Appellee's Brief at 37, 39), for government can unconstitutionally endorse the religious message of a private party, as well as a religious message delivered on private property. *See* Appellants' Brief at 41-42 and cases cited therein. That the District takes narrow-angle graduation videos and photographs to minimize the visibility of religious symbols (*see* Appellee's Brief at 38) does not change anything, because the Church's religious icons are plainly visible to attendees during the ceremonies themselves. That some of the photographs in the plaintiffs' appendix were taken outside the statute-of-limitations period does not preclude those photographs from being relevant (*cf.* Appellee's Brief at 38 n.9), as evidence about a long-running practice is

admissible even if it was gathered prior to the limitations period (*see, e.g.*, *Oest v. Illinois Department of Corrections*, 240 F.3d 605, 613 n.4 (7th Cir. 2001)), and the District waived any objections to these photographs by failing to make them below (*see, e.g.*, *United States v. Cassell*, 452 F.2d 533, 536 (7th Cir. 1971)). And the fact that graduation ceremonies only take place once a year and last approximately two hours also does not help the District (*cf.* Appellee's Brief at 39), as this Court has previously found unconstitutional endorsement of religion in the context of short, annual events. *See Berger*, 982 F.2d at 1164, 1171; *Doe v. Village of Crestwood*, 917 F.2d 1476, 1477-79 (7th Cir. 1990).

The message of religious endorsement communicated by the use of Elmbrook Church for the graduations is bolstered by the availability of numerous secular facilities that could host the events. *See* Facts, ¶¶22-23. Contrary to what the District contends (Appellee's Brief at 35), virtually all of the facilities cited by the plaintiffs (including most of those with seating capacities larger than that of the Church) are within easy driving distance of the high schools — fifteen miles or less — and some are at similar or shorter distances than the Church itself, which is 9.5 miles from one of the schools. *See* A93(¶20); A370-76; A385; A595(¶5). In addition, some of the secular facilities cost about the same or less than Elmbrook Church, and most of the others cost only $1 to $4 per attendee more than the Church, a minute amount compared to the District's overall revenues and reserves. *See* A100(¶70); A114-15(¶¶6-8); A370-76; A383-84(¶¶10-13); A535(¶6).

Even if the Church could prevail over all the other facilities in some sort of cost-benefit analysis, the District's treatment of marginal financial or convenience considerations as more important than respect for the concerns and feelings of religious minorities signals to such 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)). And while it is correct that the endorsement test examines the views of objective and not hypersensitive observers (*cf.* Appellee's Brief at 40), the test is violated *either* if the government's conduct leaves the reasonable *adherent* of the relevant religion with the impression that the government favors his or her religious choices *or* if the reasonable *nonadherent* would perceive disapproval of his or her choices. *See Harris*, 927 F.2d at 1412 n.12; *Black Horse Pike*, 84 F.3d at 1486-87.

What is more, regardless of how the Church compares with other options, District leaders surely would not have approved use of the Church if they had been uncomfortable with its religious nature or message themselves. Of course, as members of the Church (A105(¶111)), the District's superintendent and school-board president were comfortable with the venue. Though the superintendent did not initiate the decision to hold graduations at the Church (*cf.* Appellee's Brief at 36-37), he ratified, supported, and defended the use of the Church, personally handling objections to the venue. A105(¶105); A296; A301-03; A312; A329-31; A339-40. The school-board president likewise defended the District's church-graduation practice. A578-80; *cf.* Appellee's Brief at 37. Indeed, the school board took no action

to stop the practice despite being long aware of it, and the board's leadership approved the practice and authorized the superintendent to deal with the matter as he saw fit. A105(¶¶106-08); A331; *cf.* Appellee's Brief at 37. For District students and parents, the Church membership of the superintendent and school-board president can only strengthen the perception of District favoritism of the Church.

C. The Church is using a school event to advance its religious mission.

The District argues that the constitutional prohibition against delegation of public authority to religious institutions is inapplicable here. Appellee's Brief at 40-41. But a principal purpose of that prohibition is to prevent those institutions from using such authority to promote their religious goals. *See Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982). The Church does exactly that here by utilizing its control over the environment of the graduation ceremonies to expose thousands of attendees per year to its religious symbols and promotional materials. *See* Appellants' Brief at 46-47.

The District relies on several cases that upheld leases by public schools of space from religious entities. Appellee's Brief at 40. In those cases, however, lease provisions prohibited the display of religious items in the school's space, or such items were not actually displayed. *See Porta v. Klagholz*, 19 F. Supp. 2d 290, 303 (D.N.J. 1998); *Thomas v. Schmidt*, 397 F. Supp. 203, 207 (D.R.I. 1975), *aff'd mem.*, 539 F.2d 701 (1st Cir. 1976); *State ex rel. School District v. Nebraska State Board of Education*, 195 N.W.2d 161, 162 (Neb. 1972); *see also Taetle v. Atlanta Independent School System*, 625 S.E.2d 770, 771 (Ga. 2006) ("environment" used by school was

"non-sectarian"). Here, there is no written lease, and religious items are prominent. A100(¶75); Facts, ¶¶6-14.

The District also errs in contending (Appellee's Brief at 42 n.10) that the plaintiffs lack standing to argue that the District would excessively entangle itself with religion by attempting to cleanse the Church of religious items for graduations. In *Lemon v. Kurtzman*, 403 U.S. 602, 608, 611, 615-22 (1971), the Supreme Court accepted an analogous entanglement argument made by taxpayers, concluding that pervasive surveillance by the state of how religious institutions spent state funds would be unconstitutional.

D. The District's payments to the Church are unconstitutional.

Although the Establishment Clause allows government bodies to pay religious institutions public funds that are distributed on a religion-neutral basis when the funds are used in a secular manner, the case-law continues to prohibit payment of even neutrally-allocated funds to support or purchase what is in itself religious. *See Mitchell v. Helms*, 530 U.S. 793, 837-41, 857 (2000) (controlling concurrence (*see* Appellants' Brief at 48 n.2) of O'Connor, J.); *Bowen v. Kendrick*, 487 U.S. 589, 621-22 (1988); *cf.* Brief of American Center for Law and Justice ("ACLJ") at 5. *Zelman*, 536 U.S. at 649, did not alter this principle (*cf.* Appellee's Brief at 44-45) — it did not address the law governing direct payments from government bodies to religious organizations, but only dealt with voucher-style programs where the government provides aid to numerous individuals who are then free to use the aid at both secular and religious entities.

Thus, while a government body would not run afoul of the Constitution by purchasing secular textbooks from a religious institution for use in schools, paying public funds for religious textbooks would violate the Establishment Clause. *See Board of Education v. Allen*, 392 U.S. 236, 245 (1968). Similarly, while purchasing secular coffee for a government office from monks would be perfectly constitutional (*cf.* ACLJ Brief at 3-4), a public employer could not constitutionally purchase soft drinks for its staff from a church if those drinks came only in cans that had "WORSHIP JESUS" printed all over them in large letters. Here, by using public funds to rent a *religious* space for graduations, the District is violating the Establishment Clause.

E. The District's use of the Church has engendered substantial divisiveness in the school community.

Contrary to what the District contends (Appellee's Brief at 46), a significant number of parents, students, and community members have objected to the District's church graduations. *See* A281; A293-95; A308-11; A313; A322; A587(¶¶3-4); A593(¶1); A596(¶2); A603-05. To be sure, it was a minority of the school community that opposed the use of the Church, but the foremost purpose of the First Amendment is to protect minority rights. *See, e.g.*, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). If the District had rejected proposals to hold graduations at the Church, such a decision would not have resulted in greater divisiveness (*cf.* Appellee's Brief at 46), for it could have been explained and understood as protecting minority rights and respecting the Constitution. And the fact that the student votes that contributed to the

divisiveness were not on whether to have a prayer does not render them constitutional — here, as in the votes struck down in *Santa Fe*, 530 U.S. at 316-17, the District "entrust[ed] the inherently nongovernmental subject of religion to a majoritarian vote," "undermin[ed] the essential protection of minority viewpoints," "turn[ed] the school into a forum for religious debate," and "empower[ed] the student body majority with the authority to subject students of minority views to constitutionally improper messages."

F. The District's use of the Church for honors ceremonies is unconstitutional.

The points made above are equally applicable to Brookfield Central's use of Elmbrook Church's chapel — which, like the Church's sanctuary, features a cross at its stage (A99(¶64); A448; *cf.* Appellee's Brief at 47) — for Senior Honors Nights. The constitutional prohibition against religious coercion does apply (*cf.* Appellee's Brief at 48) to occasions such as sporting events and honors ceremonies that are voluntary but important to many students and families. *See* Appellants' Brief at 27; *see also* A588(¶1); A591(¶2); A598-99(¶2). With respect to endorsement of religion, the District does not even respond to the plaintiffs' point that it could have held the Senior Honors Nights at the secular Wilson Center at less expense. *See* Appellants' Brief at 44.

While none of the plaintiffs have attended Brookfield Central's Senior Honors Nights in the past (*cf.* Appellee's Brief at 48), the plaintiffs' tax funds have been used to pay the Church's rental fees for the events, and some of the plaintiffs' children will graduate from Brookfield Central in the future. *See* Facts, ¶¶18, 32,

35-36. And though the District intended to move the Senior Honors Nights to its new field house in 2010, there is no assurance that the District will not return the events — as well as its graduations — to the Church upon victory in this litigation. *See* A73(¶¶213-16); A85-86(¶¶213-16); Appellants' Brief at 24; *cf.* Appellee's Brief at 11, 16, 48.

II. The District's defenses fail.

A. This case is not about which graduation facility is most luxurious or least expensive.

Much of the District's brief is focused on emphasizing the amenities and low cost of Elmbrook Church. The issue in this case, however, is not whether Elmbrook Church is superior from a cost-benefit perspective to other facilities that can host District graduations, but whether the use of the Church violates the constitutional prohibition (*see, e.g.*, *Lemon*, 403 U.S. at 612) on government conduct that has an effect of advancing religion. And to show a constitutional violation, it is sufficient to demonstrate that the government's actions "'in part have the effect of advancing religion'" — a court should *not* attempt to determine whether the religious effect of government conduct predominates over any secular benefits (such as those that may be associated with using the Church) the conduct may have. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 783 n.39 (1973) (quoting *Tilton v. Richardson*, 403 U.S. 672, 683 (1971)).

Indeed, not even a compelling government interest can justify a violation of the Establishment Clause. In *Nyquist*, the Supreme Court declared

unconstitutional a state program that aided religious schools, despite recognizing that the program was supported by state interests in preventing the state's public school system from becoming overburdened, promoting a healthy and safe educational environment for schoolchildren, promoting pluralism and diversity in schools, and promoting the free exercise of religion. *See* 413 U.S. at 773-74, 788-89. The Court explained that "secular objectives, no matter how desirable . . . cannot . . . justify . . . a direct and substantial advancement of religion." *Id.* at 783 n.39. Likewise, in *Church of Scientology Flag Service Organization v. City of Clearwater*, 2 F.3d 1514, 1539 (11th Cir. 1993), the court stated that the purpose, effect, and entanglement proscriptions established by *Lemon*, 403 U.S. at 612-13, "are absolute in themselves, and a law that fails to meet any of them is per se invalid."

B. The District misapplies the principle that government must be neutral with respect to religion.

The District recognizes that government must be neutral with respect to religion (*see, e.g.*, *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005)), but it misinterprets that principle as justifying the use of the Church for graduations if the Church is selected for religion-neutral reasons. *See, e.g.*, Appellee's Brief at 16, 30-31, 54. The Supreme Court explained in *Schempp*, 374 U.S. at 222, 225-26, that the neutrality principle in fact prohibits the government from coercively subjecting people to any religion or from otherwise advancing religion. The Court noted that "[t]he wholesome 'neutrality' of which this Court's cases speak . . . stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions

or a concert or dependency of one upon the other," and that the neutrality principle also protects "the right of every person to freely choose his own course with reference [to religion], free of any compulsion from the state." *Id.* at 222. These values are threatened here, where a large and powerful (*see* A385) local church obtains an opportunity to promote itself and its faith by providing its facilities to a school district that, in exchange for the convenience and relatively low cost of the facilities, coercively subjects students and parents to a religious environment.

What is more, "'the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'" *Santa Fe*, 530 U.S. at 307 n.21 (quoting *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)). Thus, a school's use of religion-neutral criteria to select a graduation speaker cannot overcome the religious coercion that results when that speaker presents a proselytizing speech to a captive graduation-ceremony audience. *See Lassonde*, 320 F.3d at 981, 984-85. Similarly, "[a] public school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech." *Berger*, 982 F.2d at 1168. And the government cannot provide public funds for religious uses even if the funds are neutrally distributed. *See Mitchell*, 530 U.S. at 837-41, 857 (controlling concurrence of O'Connor, J.).

C. Selection of a graduation site is not a "public forum," so refraining from using the Church for graduations would not be "viewpoint discrimination."

The District's argument that not using the Church for graduations would constitute unconstitutional "viewpoint discrimination" against the Church is wholly without merit. *Cf.* Appellee's Brief at 48-55. When the government establishes a forum for speech, the prohibition on viewpoint discrimination bars the government from denying individuals access to that forum based on their viewpoints. *See, e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 106-07 (2001). The selection of a graduation site is not a speech forum, however, so the prohibition on viewpoint discrimination is inapplicable.

No public forum exists just because the District selects a venue that receives public funding in the form of a rental fee. *Cf.* Appellee's Brief at 51-53. When the government provides funds to pay for services or items of value to the public, and not for the purpose of encouraging expression of private views, no public forum has been created, and the government can constitutionally deny funding to religious applicants. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 779-80 (7th Cir. 2010); *Eulitt ex rel. Eulitt v. Maine Department of Education*, 386 F.3d 344, 356 (1st Cir. 2004).

The District's reliance on *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995), is misplaced. In that case, the Supreme Court held that a university's payment of printing expenses for student-group publications constituted a "metaphysical" limited public forum. *Id.* at 830. But a forum existed in *Rosenberger*

only because the purpose of the funding was "to encourage a diversity of views from private speakers." *See id.* at 834; *accord Locke*, 540 U.S. at 720 n.3; *Eulitt*, 386 F.3d at 356-57. In deciding where to hold graduations, schools seek a single suitable location; their objective is not to promote a diversity of speakers.

The District's contention that the graduation ceremonies themselves are a public forum (*see* Appellee's Brief at 53) likewise cannot support holding the ceremonies at the Church. The issue in this case is *where* graduation ceremonies should take place, not what can be said at the ceremonies. And public-forum law gives religious groups the right to access government property that is available for speech, not to access or "impose their views upon" a "captive audience" at a government event. *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 530-31 (7th Cir. 2009); *accord Berger*, 982 F.2d at 1166-67. Moreover, there is no evidence that persons attending graduation ceremonies are free to engage in unregulated expression there.

Finally, the District's interest in complying with the Establishment Clause is a compelling one that overrides any free-speech interests that the Church may have here. *See, e.g.*, *Capitol Square*, 515 U.S. at 761-62; *Berger*, 982 F.2d at 1168; *May v. Evansville-Vanderburgh School Corp.*, 787 F.2d 1105, 1114 (7th Cir. 1986). In any event, the plaintiffs do not seek to suppress the Church's views: while the intolerant teachings of the Church — teachings that condemn the plaintiffs for *their* beliefs (Facts, ¶5) — are one reason that some of the plaintiffs are uncomfortable attending graduations there, this is not the primary reason for any plaintiff's objections, and

the plaintiffs oppose the holding or funding of graduations in any religious environment. *See* A384(¶16); A386(¶1); A388(¶1); A531-32(¶4); A596(¶1); A599(¶3); *see also* A274-75; A279-80; A529(¶26).

D. The cases that upheld church graduations are based on pre-modern law and involved significantly different facts.

The District cites three cases that allowed graduations to take place in churches. Appellee's Brief at 19-20. *State ex rel. Conway v. District Board*, 156 N.W. 477, 480-81 (Wis. 1916), a nearly century-old state-court case, considered only the Wisconsin constitution, and — contrary to the Supreme Court's decision in *Lee*, 505 U.S. at 593-96, 599 — treated high-school graduations as non-coercive settings and upheld the giving of prayers at graduations. *Miller v. Cooper*, 244 P.2d 520, 520-21 (N.M. 1952), also preceded *Lee* and did not recognize *Lee*'s anti-coercion principle; moreover, in *Miller*, unlike here, there was no secular facility with sufficient seating to host the graduations. The unreported decision in *Lolo v. School Board*, Case No. 89-250-Civ-FM-21B (M.D. Fla. Oct. 18, 1991), likewise was decided before *Lee*, did not consider *Lee*'s anti-coercion principle, and, in contrast to *Lee*, treated high-school students as mature adults. *Compare Lolo*, R. 46-2 at 14, *with Lee*, 505 U.S. at 593. In addition, unlike the District, the school in *Lolo* covered or removed most of the religious iconography in the church for the graduations. *See* R. 46-2 at 5, 13.

On the other hand, the recent decision in *Does v. Enfield Public Schools*, 716 F. Supp. 2d 172, 187-93, 199-201 (D. Conn. 2010), prohibiting the use of a church for graduations is based on a persuasive analysis of current law, and the minor factual differences between that case and this one are relevant neither to that court's

coercion analysis nor to the heart of its endorsement analysis. And the eloquent and incisive opinion in *Lemke v. Black*, 376 F. Supp. 87, 89-90 (E.D. Wis. 1974), reached a similar result based on a coercion analysis akin to that later used by *Lee*.

E. Other government uses of houses of worship are not analogous to this case.

The District attempts to draw parallels between the situation at bar and other government uses of houses of worship that have been or could be deemed permissible, but its authorities and hypotheticals have critical differences from this case. In decisions that have upheld the use of churches as polling places (*cf.* Appellee's Brief at 25), 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 Board*, 975 F.2d 738, 741 (10th Cir. 1992); *Berman v. Board 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. An executive order that allows federally-funded social services to be delivered in spaces where religious icons are on display gives beneficiaries of the service programs the right to an alternative, non-religious service provider if they object to the religious venue. *See* Exec. Order No. 13,559, 75 Fed. Reg. 71,319, 71,320-21, § 1(b) (amendment to § 2(h)) (Nov. 17, 2010); *cf.* Appellee's Dec. 7, 2010 Notice of Supplemental Authority.

Holding school choir or band concerts at religious sites involves optional extracurricular activities, and objecting students can be given the right to opt out of individual events. *Cf.* Appellee's Brief at 48. The same is true of school sporting

events, which are even less analogous to graduations, because an opposing team's stadium is expected to be a hostile environment. *Cf. id.* at 22, 48. Reading texts or viewing films about various religions during a comparative-religion class is nothing like being coercively and physically immersed in a single religion's environment during what should be a joyful celebration of one's accomplishments. *Cf. id.* at 30. Finally, an adult attorney viewing statues of religious lawgivers like Moses among a display that contains many secular lawgivers is a situation that is even further removed from the controversy here. *See Allegheny*, 492 U.S. at 652-53 & n.13 (Stevens, J., concurring in part and dissenting in part); *cf.* Appellee's Brief at 30.

Conclusion

For the foregoing reasons, the plaintiffs-appellants respectfully ask this Court to reverse the judgment of the district court and direct it to enter summary judgment in their favor.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,989 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.

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Certificate of Service

I hereby certify that I caused fifteen copies of the foregoing Reply Brief of Plaintiffs-Appellants to be dispatched on December 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 Reply Brief of Plaintiffs-Appellants to be served on the below-listed counsel of record for the defendant-appellee by first class U.S. mail and by e-mail:

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