No. 12-755

In the Supreme Court of the United States

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

Petitioner,

v.

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

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Respondents nowhere dispute that the School District chose the Church auditorium for secular reasons, or that graduations lacked religious references. They admit that the Questions Presented are "important." BIO 30. And they admit that the decision below will expose school districts to liability for widespread, century-old practices.

They argue primarily that certiorari would be "premature," because this is "the first and only" decision striking down this common practice. BIO 1. While it is true the decision below stands alone in its startlingly broad Establishment Clause analysis, that is no reason to deny certiorari. The lower courts are split on whether churches may be used as venues for important public events, and even more deeply split on the proper "coercion" and "endorsement" analyses. The decision below deepens these splits.

Respondents also claim that the decision below is "narrow[]" and "fact-sensitive"—because the *en banc* court said so. BIO 27. But labeling an opinion "fact-sensitive" does not make it so. Respondents cannot evade the court's *holding*: Conducting "seminal" public events in a church "necessarily conveys a message of endorsement." App. 20a-21a. As Respondents admit, this rule prohibits holding *any* graduation at a church unless the church "lacks religious iconography" or the school faces "exigent circumstances." BIO 27.

Respondents repeatedly suggest that the District did not act neutrally, because graduation could have been held at "non-religious venues." BIO 17; see also BIO i, 2, 5-6, 31. But Respondents never allege that other venues were equal to the Church—only that

they were "availab[le]." BIO i, 2, 5-6, 17, 31. As the district court explained, other venues were not equal: "[T]he 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 [the] costs [of] * * * us[ing] [the District's] own facilities." App. 172a. Compared with these amenities, no "alternative locations suggested by the plaintiffs are equal or superior to the Church." *Id.* The *en banc* majority did not disagree. Cf. App. 15a ("[A]lthough other venues are available for graduation, none is as attractive as the Church, particularly for the price.").

Indeed, another nearby school has already been forced to abandon the Church because of the decision below. See American Association of School Administrators *Amici* Br. at 5-6. That school must now rent Miller Park—a 42,200-seat baseball stadium—at more than triple the price of the Church.

The Constitution does not require schools to conduct graduation in inferior, more costly venues. The petition for a writ of certiorari should be granted.

I. The Court Should Resolve the Conflict over the Constitutionality of Using Church Space for Government Functions.

Respondents argue that there is no conflict over the constitutionality of using church space for government functions, because the *en banc* decision is "the first and only *federal* appellate ruling" to strike down the longstanding practice of holding *graduation* in a church. BIO 9 (emphasis added). But they fail to distinguish cases upholding numerous government

uses of religious space.

1. In *Bauchman for Bauchman* v. *West High School*, 132 F.3d 542 (1997), the Tenth Circuit upheld high school choir performances at churches "dominated by crosses and other religious images." *Id.* at 555. Respondents concede that the court approved the "use of religious venues," BIO 9, but argue that choir performances differ from graduation, because students can "opt out," BIO 10. This Court, however, has rejected the idea of an opt-out from extracurricular events. *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 310-312 (2000). Nor did *Bauchman* rely on an opt-out; it relied on the absence of "religious activity" such as prayer. 132 F.3d at 552 n.8. Respondents also contend that "the choir performed at both secular and religious venues," and the religious venues were chosen only because they were "conducive" to choral music. BIO 10. But the same is true here: Graduation has been held in both secular and religious venues, and the Church was used only because it was "conducive" for secular reasons. Indeed, *Bauchman* was the *harder* case, because students both entered a religious venue and performed "Christian devotional music." 132 F.3d at 553. Here, graduations were entirely secular.

Respondents fare no better with the state Supreme Court cases. They concede that *State ex rel. Conway* v. *District Board of Joint School District No. 6*, 156 N.W. 477 (Wis. 1916), upheld graduation in a church on indistinguishable facts, applying a more stringent state constitutional standard, but claim that the case is dated and that another part of the ruling "did not survive this Court's decision in [*Lee* v. *Weisman*, 505 U.S. 577 (1992)]." BIO 11. That does not square *Conway* with the decision below. Respond-

ents claim that the graduation in *Miller* v. *Cooper*, 244 P.2d 520 (N.M. 1952), was different because there were no "alternative facilities" available. BIO 11. But *Miller* said there *was* an alternative facility "large enough to accommodate those who desired to attend"; the only problem was "sufficient seating." 56 N.M. at 356. The problem of "sufficient seating" in *Miller* is no different from the problems of sufficient parking, suitable handicap facilities, and adequate air conditioning here.

Respondents say that the rental of classrooms in *School District of Hartington* v. *Nebraska State Board of Education*, 195 N.W.2d 161 (Neb.), *cert. denied*, 409 U.S. 921 (1972), is different because the lease required that religious objects be removed. BIO 11. But the court did not rely on that; instead, it broadly affirmed "[t]he right of a public school district to use or lease *all or a part of a church* or other sectarian building for public school purposes." 195 N.W.2d at 163 (emphasis added). If anything, *Hartington* was a harder case, because the students attended class in the religious building all year, rather than once for graduation.

2. Respondents cannot distinguish cases upholding voting in a church. See *Otero* v. *State Election Bd. of Okla.*, 975 F.2d 738 (10th Cir. 1992); *Berman* v. *Bd. of Elections*, 420 F.2d 684 (2d Cir. 1969) (*per curiam*). They claim that voting "typically" takes place in non-consecrated areas, and voters "ordinarily" can cast an absentee ballot. BIO 12. But that is not always true. Sometimes voting takes place with "a towering cross in the voting area," and sometimes citizens are "forced to cast their ballot in a house of worship" with no alternative. Rev. Barry W. Lynn, *Stop Using Churches as Polling Places*, CNN Belief

Blog (Nov. 6, 2012), *available at* http://religion.blogs.cnn.com/2012/11/06/my-take-stop-using-churches-as-polling-places. As Chief Judge Easterbrook said, "[a]ll of the objections the majority makes to graduation in a church apply to voting in a church." App. 65a.

II. The Court Should Resolve the Conflict over the Scope and Meaning of Religious "Coercion."

The *en banc* decision also dramatically expands the doctrine of "coercion" in conflict with decisions of this Court and other circuits. No court has ever held that exposure to passive religious symbols amounts to unconstitutional coercion. Pet. 15.

1. According to Respondents, this Court has said that private, passive religious displays can be coercive. But they cite no such case. *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), did not "consider[] whether religious displays appeared in a coercive context," BIO 14, but held that posting the Ten Commandments on schoolroom walls had a "plainly religious" purpose. 449 U.S. at 41. Nor did the "partial concurrence and partial dissent of four Justices" in *County of Allegheny* v. *ACLU*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring and dissenting), "recogniz[e] the coercive potential of religious symbols." BIO 14. It said the opposite: the religious displays were *not* coercive, because government speech "may coerce" only in "an extreme case," such as where the government makes "an obvious effort to proselytize"—drawing a sharp distinction between mere religious displays and government proselytization. 492 U.S. at 661 (Kennedy, J., concurring and dissenting); cf. *id.* at 606-609 (majority) (criticizing "'proselytiza-

tion' test"). Compare BIO 15 (claiming that vacated panel opinion said religious displays can be coercive) with App. 117a-118a (reasoning, like the *Allegheny* concurrence, that religious displays can violate coercion standard only if government also tries "to proselytize" or pressure students "to participate in any religious exercise").

2. Respondents fail to distinguish the opinions of four other circuits that have rejected coercion absent government-directed "religious exercise." Pet. 17. Respondents dismiss three of these cases because they involved references to God in the Pledge of Allegiance, which is "not religious." BIO 16-17. But that is the point: Each case found no relevant coercion absent *overt religious activity*. Respondents likewise fail to distinguish *Bauchman*'s coercion analysis. They say the court found no coercion "because the choir members could freely opt out." BIO 17. But that was what the court said in its *free exercise* holding. 132 F.3d at 557. In its *establishment clause* holding, it said that "coercion analysis is inapplicable," because there was no "religious activity analogous to that addressed in *Lee*." *Id.* at 552 n.8.

Under that rule, the District would have prevailed, because "the school district did not coerce overt religious activity." App. 29a. The Seventh Circuit applied a contrary rule to reach a contrary result.

III. The Court Should Resolve the Conflict over the Scope and Meaning of Religious "Endorsement."

The *en banc* decision conflicts with this Court's "endorsement" cases and widens two acknowledged circuit splits over the endorsement test.

1. Respondents first claim that *private* religious

speech *can* be attributed to the government, even when the government acts neutrally. BIO 18-19. But no case so holds; every case Respondents cite involved *government* speech conveying a government message. *Santa Fe*, 530 U.S. at 302, 306 (pre-game prayer policy "invites and encourages religious messages," which are "public speech," not "private student speech"); *Lee*, 505 U.S. at 588, 597 (graduation prayers were "state-imposed" religious exercise); *Allegheny*, 492 U.S. at 594 (holiday display was "the government's display"); *id.* at 664 (Kennedy, J., concurring and dissenting) (display was a "form of government speech"); *Pleasant Grove City* v. *Summum*, 555 U.S. 460, 472-473 (2009) (monuments "are meant to convey and have the effect of conveying a government message").

Here, it is undisputed that the Church's religious symbols are private speech, and that the District chose the Church on religion-neutral grounds. The majority's finding of endorsement thus attributes "*private* religious expression" "to a neutrally behaving government"—contrary to *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, 764 (1995) (plurality).

Next, Respondents argue that this Court's funding and forum cases are irrelevant, because the District "is [not] distributing public funds," and "there is no public forum here." BIO 19-21. But this argument misses the point. The broader question in those cases is whether government "endorses" religion when it treats religious and nonreligious institutions neutrally. The *en banc* majority said "yes." This Court's funding and forum cases uniformly say "no." Pet. 20-21.

Nor is this case meaningfully distinguishable from those cases. The District does not, as Respondents

suggest, "select[] one venue annually" for all outside events. BIO 20. Rather, it holds nearly 100 outside events each year at a variety of rented venues selected on a religion-neutral basis. See, *e.g.*, C.A. App. 136, 607. The fact that one venue out of a hundred is religious does not "endorse" religion any more than the fact that one funding recipient out of a hundred is religious. Cf. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652, 658 (2002) (no "endorsement" where 96% of voucher recipients attended religious schools).

Ultimately, the *en banc* decision would require the District to discriminate *against* religion. Pet. 21. The District would be required to place a thumb on the scale *against* any venue with religious imagery, even if it were objectively superior. Such discrimination is not, as Respondents claim, "the fundamental premise of the Establishment Clause." BIO 22 (quoting *Allegheny*). Rather, it "foster[s] a pervasive bias or hostility to religion," which "undermine[s] the very neutrality the Establishment Clause requires." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 845-846 (1995).

2. Lower courts are divided over when private religious speech can be attributed to the government. Contrary to the decision below, four circuits have held that a reasonable observer *cannot* attribute private religious expression to the government when the government treats religion neutrally. Pet. 25-26. Respondents do not dispute this characterization of the circuits; instead, they claim that the decisions are irrelevant because they involved "a public forum" or government "funding." BIO 20-21. But as explained above, this case is not meaningfully distinguishable from the forum or funding cases.

3. The decision also widens an "unresolved dispute * * * within various circuits * * * [over] the proper level of understanding to impute onto our mythical reasonable observer." *Freedom from Religion Found., Inc.* v. *City of Marshfield*, 203 F.3d 487, 495 n.2 (7th Cir. 2000). Respondents claim that this split is based on "outdated decisions," and that this Court recently "clarified" the issue by holding that the reasonable observer "'must be deemed aware of the history and context' of a challenged practice." BIO 23 (quoting *McCreary Cnty.* v. *ACLU of Ky.*, 545 U.S. 844 (2005)).

But this supposed "clarification" is nothing new. The endorsement test has *always* assumed that the reasonable observer is aware of the "history" and "context" of "a challenged governmental practice." *Allegheny*, 492 U.S. at 630 (O'Connor, J., concurring). The problem is that this test is "flawed in its fundamentals and unworkable in practice." *Id.* at 669 (Kennedy, J., concurring and dissenting).

If the circuits "now consistently apply this standard," BIO 23, that fact has been lost on them. They continue to lament the "[c]onfounded" state of "'Establishment Clause purgatory,'" *Card* v. *City of Everett*, 520 F.3d 1009, 1016 (9th Cir. 2008), and the "judicial morass resulting from the Supreme Court's opinions," *Green* v. *Haskell Cnty. Bd. of Comm'rs*, 574 F.3d 1235, 1235 n.1 (10th Cir. 2009) (Kelly, J., dissenting from denial of rehearing *en banc*). Even two of the four decisions held up by Respondents as models of clarity (BIO 23) lament that courts "remain in Establishment Clause purgatory," *ACLU of Ky.* v. *Mercer Cnty.*, 432 F.3d 624, 636 (6th Cir. 2005), and that "splintered" decisions and "divided precedent" force courts "to rely on 'little more than intuition and a tape measure.'" *Skoros* v. *City of N.Y.*, 437 F.3d 1,

13, 15 (2d Cir. 2006).

4. The lower court's expansion of the "endorsement" test is particularly troubling given that several Justices have called for rejecting that test, and the Court has relied on it to invalidate government action only twice, both times in cases later undermined or overruled. Pet. 22-24. Respondents argue that "this case does not present a good vehicle" for considering the endorsement test, because they assert a hodgepodge of other Establishment Clause theories. BIO 25-26. But Respondents' coercion theory is incorrect, and any alternative theory, if still live (doubtful) or meritorious (even more doubtful), can be addressed on remand. The validity of the endorsement test is squarely presented.

IV. This Case Presents a Recurring Question of National Importance.

Respondents concede that the issue presented is "important," BIO 30, and that school districts across the Nation will now face liability for holding "important ceremonial events," BIO i, in churches. Yet Respondents nonetheless insist that the *en banc* decision was "limited" and "fact-sensitive," BIO 27, because the majority described its holding as "narrowly focused" on "the set of facts before [it]," App. 3a-5a.

But merely labeling a decision "narrow" does not make it so, because a court "cannot disavow the logical implications of [its] decisions." App. 65a (Easterbrook, C.J., dissenting). The *en banc* court broadly held that conducting "seminal" public events in a church "necessarily conveys a message of endorsement." App. 20a-21a.

Even Respondents admit that this holding sweeps well beyond the facts of this case. In their view, the

decision forbids *any* "important ceremonial event" in a church unless (1) "the facility lacks religious iconography or covers or removes religious items," or (2) there are "exigent circumstances" such as "a natural disaster." BIO i, 27. Because almost all churches have "religious iconography" and schools routinely use them absent "exigent circumstances," that rule would prohibit a vast array of common practices. See Pet. 30-31.

Moreover, as Respondents admit, the logic of the opinion extends beyond graduations to encompass "important ceremonial events," BIO i—a formulation that would certainly implicate voting in churches. Indeed, the *en banc* majority refused to rule out challenges to voting, saying only that voting in "certain church-owned facilities" would be permissible "in the proper context." App. 4a. But if voting occurs in the "[]consecrated parts of the church," or "there are [no] ready alternatives," it is now constitutionally suspect. App. 40a. This rule has "profound consequences for all levels of state and local government." Texas *et al. Amici* Br. at 2.

To the extent that the decision below *could* be considered fact-sensitive, that makes matters worse. What if the cross appeared only in the lobby? Or only atop the steeple? What if there were fewer banners or brochures? Such a "jurisprudence of minutiae" forces courts to decide important constitutional questions based on "little more than intuition and a tape measure." *Allegheny*, 492 U.S. at 674-679 (Kennedy, J., dissenting).

Ultimately, Respondents' arguments come down to this: It is too early to say "what the decision's impact might be" and unclear "whether other circuits

[will] even agree with it at all." BIO 30. But the impact of the decision is *already* "profound." Texas *et al. Amici* Br. at 2. Other circuits are *already* in disarray over the legal standards. Percolation will not clarify this pure question of law. Besides, after the decision below, only a rare school district would risk $400,000 in attorneys' fees to save $15,000 in graduation costs. Cf. Kristen Stoller, *Board to Pay Legal Fees in Settlement*, Hartford Courant (July 24, 2012) (settlement required $469,610.50 in attorneys' fees).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 6, 2013