No. 13-2502

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION; JOHN DOE, as parents and next friends of their minor child; JANE DOE, as parents and next friends of their minor child; JILL DOE,

Plaintiffs-Appellants,

v.

GREENVILLE COUNTY SCHOOL DISTRICT,

Defendant-Appellee,

and

JENNIFER GIBSON, in her individual capacity; BURKE ROYSTER, in his individual capacity,

Defendants.

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.01, Alliance Defending Freedom is a nonprofit corporation and makes the following disclosure statement:

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4. Is there any other publicly-held corporation or other publicly-held entity that has a direct financial interest in the outcome of the litigation? No.

5. Is party a trade association? No.

6. Does this case arise out of a bankruptcy proceeding? No.

s/ David A. Cortman

Alliance Defending Freedom

March 10, 2014

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INTEREST OF AMICUS CURIAE

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly in many cases before the United States Supreme Court, including: *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Many of these cases involve the Establishment Clause of the First Amendment. For example, Alliance Defending Freedom and its counsel are currently representing the Town of Greece in conjunction with counsel from Gibson, Dunn, & Crutcher in a significant Establishment Clause case that was heard by the Supreme Court this past fall. *See Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted* 133 S. Ct. 2388 (2013) (posing the question of whether a town's "legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity").

Recognizing that reversal of the district court's decision in this case would likely result in the Establishment Clause being interpreted to require government hostility to religion, Alliance Defending Freedom seeks to highlight the substantial flaws in Appellants' arguments. Alliance Defending Freedom also seeks to bring to this Court's attention several matters currently pending before the Supreme Court that may directly bear on the interpretation or continued validity of the endorsement test. *See Town of Greece v. Galloway*, S. Ct. No. 12-696 (argued Nov. 6, 2013); *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), *petition for cert. filed*, No. 12-755 (U.S. filed Dec. 20, 212), *available at* http://www.scotusblog.com/case-files/cases/elmbrook-school-district-v-doe/ (last visited Mar. 6, 2014) (asking, *inter alia*, "[w]hether the government 'endorses' religion when it engages in a religion-neutral action that incidentally exposes citizens to a private religious message").

Alliance Defending Freedom files this brief pursuant to Fed. R. App. P. 29(a). All parties to this case have consented to the filing of this brief.

RULE 29(c) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* states that no counsel for any party authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person or entity, other than *amicus* and its counsel, made a monetary

contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Every year, as the winds of spring give way to the summer's heat, tens of thousands of students, their families, and friends come together at graduation ceremonies in every town and city across the country to celebrate the achievements and advancement of the graduating class. For many students, graduation brings the additional honor of addressing the attendees to offer words of remembrance, reflection, hope, and encouragement. Some will share jokes, poems, or inspirational stories. Others will speak out on social injustice. They will quote from Lincoln, Gandhi, and Martin Luther King, Jr. They will call their classmates to action and challenge them to embrace the vast future ahead of them. They will thank their parents and teachers. And for some, they will also take a moment to thank God or to articulate the important influence that their religious beliefs—Christian, Muslim, Jewish, Buddhist, or otherwise—have played in their lives.

But according to Appellant American Humanist Association ("AHA"), it is not students speaking from behind the podium at graduation; it is the government. It is the government that made a joke about Miley Cyrus; it is the government that quoted JFK; and it is the government that said a prayer of thanksgiving to God. Thus, AHA cannot tolerate the decision of Appellee Greenville County School District to afford students speaking at graduation the freedom to select their own

message without interference. According to AHA, if a student chooses a religious message, it is attributable to the School District and a violation of the Establishment Clause.

This position eliminates the fundamental distinction between private and government speech. And ignores the Supreme Court's common sense ruling that "schools do not endorse everything they fail to censor." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). The School District's policy of respecting the private decisions of students as to the content of their graduation speeches and refusing to target religious viewpoints for censorship is the proper course. It satisfies the demands of the *Lemon* test by adhering to a secular purpose of respecting free speech, maintaining true neutrality towards religion, and avoiding the excessive entanglement that inevitably comes from deciding which religious speech to censor.

AHA attacks not only the content of graduation speeches, it also targets the ceremony's location. According to AHA, an auditorium owned by a religious organization—such as the one at North Greenville University used by the School District in this case—is a toxic location for a graduation ceremony. It matters not that the location is spacious, ensuring no limits on the number of people able to celebrate the festivities. Nor does it matter that there are no comparable venues offering the same affordability, ample parking, and unlimited seating within a

reasonable distance. AHA says that the School District employed these neutral, secular criteria in choosing a graduation venue is irrelevant, and demands that the School District maintain a position of complete and unwavering hostility towards any building owned by a religious organization.

Such hostility towards religious organizations is forbidden by our Constitution. And *Doe v. Elmbrook School District*, the Seventh Circuit case AHA relies upon to mandate that hostility, is under review by the Supreme Court and should not influence this Court's decision.

Rather, this Court should recognize that religion—whether in the words uttered by a student speaking at graduation or in a venue selected based solely upon secular considerations—is not something that must be scrubbed from public celebrations like graduation. *Amicus* therefore urges this Court to affirm the decision of the district court.

BACKGROUND

In 2012, Mountain View Elementary School ("MVES"), one of several elementary schools located within Greenville County School District (the "School District") made the decision to relocate its fifth grade "graduation" ceremony. (J.A. 98 ¶¶ 7-8.) The program had traditionally been held in the MVES cafeteria, a cramped location that was ill-suited for the event. (J.A. 98 ¶¶ 4-6.) Each student was limited to inviting only three family members (*id.*), meaning that if mom, dad,

and grandma came to celebrate the occasion, grandpa had to wait in the car. But given that the adults were forced to cram their large frames into tables and chairs designed for the petite bodies of elementary students (*id.*), those select family members granted access to the event probably found themselves envious of the generous legroom afforded grandpa in the family minivan.

Realizing that the growing size of the fifth grade class could no longer tolerate the tight confines of the cafeteria, MVES scouted out new locations for the program. (J.A. 98 ¶ 7.) MVES ultimately settled on the Turner Chapel and Music Building at North Greenville University. (J.A. 98 ¶¶ 7-8.) According to Principal Jennifer Gibson, Turner Chapel was chosen because (1) it offers nearly four times the seating available in the MVES cafeteria, (2) the seating was more comfortable, providing padded, stadium-style seating with excellent views to the stage—more like a concert facility than a cathedral, (3) the greater seating capacity encourages greater participation of parents and families in the event, something MVES found to benefit students both academically and socially, and (4) created a safer environment for students and their families through spacious facilities and plenty of parking. (J.A. 98 ¶ 8.) While Turner Chapel has a few religious decorations—no more than a student would encounter on a field trip to a local art museum or even in some of the books in the school's library—there were no religious materials or literature available in the Chapel during the graduation program. (J.A. 23.)

Shortly after the 2013 graduation, the School District received a demand letter from the AHA complaining of the decision to hold graduation in Turner Chapel and of a student-led prayer that occurred during the program. (J.A. 20-22.)

In response, the School District explained that it had important, secular motivations for moving the graduation to Turner Chapel—"to provide adequate capacity to ensure student and spectator safety for the event." (J.A. 23.) It further explained that it "will not endorse the use of prayer by students at any awards program or school-sponsored event in the future." (*Id.*) But the School District properly acknowledged that it has a constitutional obligation "to balance the Establishment Clause with the protected ability for individuals to express private religious speech." (J.A. 23.)

AHA was not satisfied with this response. In a subsequent e-mail, AHA's counsel claimed that it "is unacceptable to hold the graduation ceremony in a church, on the campus of a Christian college, even if particular pieces of religious iconography are covered up." (J.A. 25.) Ignoring the well-established constitutional right of students to engage in religious expression at school, AHA further demanded that the District adopt "an announced and enforced policy expressly prohibiting such prayers at future events." (*Id.*)

In reply, the School District again reiterated that it is "committed to neither advancing nor inhibiting religion through its policies and practices of neutrality."

(J.A. 28.) Students chosen to speak "based upon academic and/or citizenship criteria" will not have their messages subject to "prior review, censorship, or editing" by school officials. (J.A. 100 ¶ 17.) The School District properly acknowledged that it is bound the First Amendment and that it would not censor a student's religious message at a school event "as long as the prayer or message is student-led and initiated and does not create a disturbance to the event." (J.A. 27.)

ARGUMENT

I. The First Amendment Requires the School District to Tolerate Student-Initiated, Student-Led Religious Expression at School Functions.

The School District's response to AHA's demands was the right one. It acknowledged that students have well-established constitutional rights that limit the ability of school officials to censor religious expression. Such private, student-initiated speech is not government speech and thus must be given equal respect by school officials—even when uttered at school-sponsored events.

A. Private, Student-Initiated, Student-Led Religious Expression is Protected by the First Amendment.

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969), established over 40 years ago that students in public schools, including elementary and middle school students, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Courts across the nation, including the Fourth Circuit, have subsequently affirmed all students'

right to freedom of expression. *See, e.g.*, *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 257 (4th Cir. 2003) (holding that "*Tinker* … sets forth the legal framework that we will use" in a case involving restrictions on a middle school student's personal expression at school); *K.A. v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 109 (3d Cir. 2013) ("[T]he *Tinker* test has the requisite flexibility to accommodate the age-related developmental, educational, and disciplinary concerns of elementary school students"); *Morgan v. Swanson*, 659 F.3d 359, 404 (5th Cir. 2011) ("[T]he Supreme Court … has never limited the First Amendment rights of students due to age").

"In order for … school officials to justify prohibition of a particular expression of opinion, [they] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. A student's religious expression, whether in the classroom or at graduation, must be tolerated unless the school can show that the expression "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id*.

The School District must abide by the *Tinker* standard when regulating student expression at all school functions—including the MVES graduation ceremony. And the School District correctly identified *Tinker* in its final response

to AHA's demands, stating that it would not censor a student's personal message at graduation as long as the message "does not create a disturbance to the event." (J.A. 27.)

B. A Student's Genuinely Personal Expression at a School Event is Not Government Speech.

AHA cannot dispute that, under *Tinker*, a school must permit personal student expression unless it creates a material and substantial disruption. It thus seeks to characterize a student's personal message at graduation as "government speech" rather than "personal speech." According to AHA, "student prayers delivered at public school graduations are *governmental* speech." Appellants' Br. at 42. AHA further claims that "[s]tudent-delivered prayers at other school events, such as awards ceremonies, athletic events and assemblies, are deemed government speech as well." *Id*. at 25. But AHA's categorical proclamation that religious expression at school events is *de facto* government speech defies both relevant precedent and logic.

1. The Supreme Court Distinguishes Between Personal Student Expression and Speech Endorsed by The School.

In *Santa Fe Independent School District v. Doe*, after striking down a school's policy that allowed students to vote upon whether to have prayer at school football games—prayers that the Court concluded were "expressly endorsed" by a school policy—the Court warned that it's holding should not be read to imply that

all invocations at school events are governmental speech. 530 U.S. 290, 306 (2000). "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id*. at 302. "[N]ot every message delivered under such circumstances is the government's own." *Id*. The Court explained that the Establishment Clause does not "impose a prohibition on all religious activity in our public schools." *Id*. at 313. Rather, its protections for religious liberty are "abridged [only] when the State *affirmatively sponsors* the particular religious practice of prayer." *Id*. (emphasis added).

It is intentional sponsorship of prayer by a school, not the personal decision of a student to pray under circumstances where students are permitted to engage in the speech of their choice, that violates the Establishment Clause. A student's speech, whether to friends in the hallways or on stage at a school assembly, is the student's own absent evidence that the school has taken affirmative action to endorse or encourage it.

2. Personal Speech is Not Transformed into Government Speech Simply Because It Includes Religious Viewpoints.

Under AHA's view of student expression at school-sponsored events, a school inherently endorses speech merely by creating an opportunity for a student to publicly address his classmates. Such a conclusion is illogical, and federal appellate courts have, accordingly, rejected it. In *Chandler v. Siegelman*, the U.S.

Court of Appeals for the Eleventh Circuit reviewed "an injunction which assumed that virtually any religious speech in schools is attributable to the State." 230 F.3d 1313, 1316 (11th Cir. 2000). The injunction at issue restricted the school "from *permitting* any prayer in a *public* context at any school function." *Id*. It further "eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors." *Id*.

This is exactly what AHA seeks to accomplish in challenging the School District's new policy governing student expression at school events. In AHA's own words, "any prayers … delivered at a formal school-sponsored event … will inevitably advance religion and be stamped with the 'school's seal of approval.'" Appellants' Br. at 42. According to AHA, there are no circumstances where a student-initiated prayer (or other forms of religious expression) would be permissible at a school-sponsored event.

The *Chandler* court rejected this exact position. "The Establishment Clause does not require elimination of private speech endorsing religion in public places." 230 F.3d at 1316. To the contrary, "[t]he Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets." *Id*. The court correctly recognized that "[i]t is not the public context that makes some speech the State's. It is the entanglement with the State." *Id*. "So long as the prayer is *genuinely student-initiated*, and not the product of any school policy which

actively or surreptitiously encourages it, the speech is private and it is protected." *Id*. at 1317.

The Eleventh Circuit also upheld a school policy that permitted the graduating class to select a student to give a graduation speech. *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) ("*Adler II*"), *cert. denied* 534 U.S. 1065 (2001). Distinguishing *Santa Fe*, the court found that "the Santa Fe policy['s] expressed … preference for religious messages was a key factor in the Court's determination that student speech delivered pursuant to that policy would be viewed as state-sponsored." *Id.* at 1338. In contrast, Duval County's policy expressed no preference for a prayer or invocation, nor any restrictions against it. While it was possible that the student selected to speak would "choose[] *on his or her own* to deliver a religious message, that result is not preordained." *Id*. at 1339 (emphasis in original). "Rather, it would reflect the uncensored and wholly unreviewable decision of a single student speaker." [1] *Id*.

[1] While completely ignoring *Chandler*, AHA argues that *Adler II* "is distinguishable" from this case because MVES selects the student speakers, whereas in *Adler II* students voted on the speaker. Appellants' Br. at 45 n.31. But neither *Corder v. Lewis Palmer School District No. 38* nor *Workman v. Greenwood Community School*, the two cases AHA relies upon, support this proposition. In *Corder*, the Tenth Circuit held that its findings that the School selected the speaker and that the School's "policy requir[ed] submission of graduation speeches for prior review" distinguished the case from *Adler II*, 566 F.3d 1219, 1229 n.5 (10th Cir. 2009). And in *Workman*, the school district not only selected the student, but also "instigate[d] and endorse[d] a 'non-denominational prayer' and exercise[d] significant control over the ultimate message." No. 1:10-CV-0293, 2010 WL

The same is true under the School District's new policy. It is not "preordained" that a student selected to speak at the fifth grade graduation will pray. The student may reminisce on his experiences, thank the teachers for their hard work, or describe a personal hero who has inspired the student. Or the student may choose to thank God by offering a short prayer of gratitude. Whatever topic the student selects, his speech would reflect his own "uncensored" views and not those of MVES or the School District. "[T]he private speech delivered by a student pursuant to the [School District's new] policy does not become state-sponsored as a matter of law simply by virtue of the logic of *Santa Fe*." *Id*.

Under such circumstances, even the U.S. Department of Education has acknowledged that a student's decision to pray is not government speech. "Where student speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, … that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content." U.S. Dep't of Educ., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (Feb. 7, 2003), *available at* www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (last visited Mar. 5, 2014).

1780043, at *8 n.4 (S.D. Ind. Apr. 30, 2010).

3. The School District's Public Statements That It Will Neither Sponsor Nor Endorse Prayer at School Events Sufficiently Disassociates the School District From a Student's Message.

Finally, AHA claims that student-initiated prayers at future school events remain unconstitutional because the School District has not adopted a formal "policy prohibiting prayers at future graduations." Appellants' Br. at 41. But such a policy would plainly violate the First Amendment, as shown above. AHA complains that the School District's clear articulation, both in publicly available letters and in briefing before this and the lower court, that it will not sponsor or endorse prayer at future school events does not go far enough. But AHA is wrong. Case law demonstrates that the School District's statements actually ensure that no one will mistakenly attribute private religious expression that occurs at future graduation ceremonies to the District.

In *Doe v. School District of City of Norfolk*, a student sued a school district over its "scheduled prayers" at a graduation ceremony. 340 F.3d 605, 607 (8th Cir. 2003). Prior to the ceremony, the school district voted to remove the scheduled prayers, *id*., but it did not adopt a policy prohibiting prayers at future graduations. At graduation, one of the board members, who was also a parent of a graduate, addressed the audience and led them in the recitation of the Lord's Prayer. *Id*. at 608. The board member spoke pursuant to a long-standing, neutral policy that permitted any board member who was a parent of a graduating student to speak at

graduation. *Id*. at 608. The court found that the board member's prayer was not government speech; rather, "his remarks were private [speech]." *Id*. at 611.

While "no official made an attempt to disassociate the School District from the recitation," the district had provided public notice that "no [school-sponsored] prayers would be held at the ceremony." *Id*. at 612. "[T]he lack of involvement in [the board member's] conduct on the part of the School District require[d] a determination that the recitation of the Lord's Prayer constituted private speech." *Id*. at 613. "There being no affirmative sponsorship of the practice of prayer in th[at] case, no constitutional violation ha[d] occurred." *Id*.

Here, the School District is taking the same posture as that of the district in *Norfolk*. While the School District has not formally adopted a policy, it has publicly notified the community that it will neither sponsor nor endorse prayer at future school events. It has removed itself from having any involvement in dictating the content of a student's message at MVES's fifth grade graduation. *Adler II*, 250 F.3d at 1341 (noting that "[w]hat turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message"). If, in the future, a student voluntarily pens a religious message or recites a prayer at graduation, the School District's "lack of involvement" necessitates the finding of private, not government, speech.

C. The School District's Graduation Speech Policy Satisfies the *Lemon Test.*

The School District's well-publicized but unwritten policy that students will be permitted to "give messages of their own choosing without prior review, censorship, or editing by any teacher or administrator at the school" (J.A. 100 ¶ 17), does not violate the Establishment Clause. Under the test established by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), a government policy complies with the Establishment Clause if (1) it has a secular purpose, (2) its primary effect neither advances nor inhibits religion, and (3) it does not foster excessive entanglement with religion.

1. The School District's Policy Has the Secular Purpose of Respecting Students' First Amendment Rights.

First, the School District's policy has a secular purpose of respecting the First Amendment rights of students and permitting those students chosen through neutral criteria to commemorate the graduation celebration with a message of their own choosing. When explaining its policy to AHA, the School District's counsel articulated that the policy's "content and viewpoint neutral position respects student individuality and expression." (J.A. 27.) A student selected to speak at any school event "should have the same ability to decide to deliver a religious message or prayer as another student has the ability to decide to speak about an inspirational secular book or role model." (*Id.*)

In *Adler v. Duval County School Board*, 206 F.3d 1070 (11th Cir. 2000) ("*Adler I*"), *reinstated by* 250 F.3d 1330 (11th Cir. 2001), the Eleventh Circuit recognized that an identical purpose satisfied the *Lemon* test. "[T]he School Board's policy … evinces an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form." *Id*. at 1085. The Eleventh Circuit reaffirmed this purpose in *Adler II*, stating that "[t]he policy had a secular purpose, including … 'permitting student freedom of expression.'" *Adler II*, 250 F.3d at 1334 (quoting *Adler I*, 206 F.3d at 1334).

2. By Adopting a Position of Neutrality Regarding the Content of Student Graduation Messages, the School District's Policy Neither Advances Nor Inhibits Religion.

Second, the School District's policy that entrusts the content of the message solely to the student speaker neither advances nor inhibits religion. Rather, "the District is committed to not endorsing the use of … prayer by students." (J.A. 26.) In other words, the School District will not advance religion, but neither will it "create a policy that prohibits student-initiated and led prayers at future events" because such a policy would inhibit religion and "demonstrate an animus or hostility toward such prayer and private religious speech." (*Id*.)

Adler I found that a policy that "allows a student message on any topic of the student's choice … satisfies the second prong of *Lemon*." 206 F.3d at 1089.

> While it is undoubtably true that an autonomous student speaker could read a prayer at graduation under the policy, it is equally true that the same speaker may opt for a wholly secular message instead. It would require a strain of the term "primary" to suggest that a content-neutral forum policy, which accommodates private sectarian and secular speech on an equal basis, has the "primary" or "principal" effect of advancing religion.

Id.

Adler I follows the long line of Supreme Court cases establishing that "neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839; *see also Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding [opportunities] that [are] offered to a broad range of groups or persons without regard to their religion.").

Here, the School District's policy provides an equal accommodation to both religious and secular speech. A student speaker is free to select the content of his message free from influence by the School District. (J.A. 100 ¶ 17.) The policy provides the exact neutrality demanded by the First Amendment.

3. The School District's Policy Avoids Excessive Entanglement by Restricting Prior Review of Student Speeches.

Finally, the School District's policy does not create excessive entanglement

with religion. To the contrary, it maintains a proper hands-off approach by allowing the student alone to dictate the content of his or her private message at a school event. According to Principal Gibson, there will be no "prior review, censorship, or editing by any teacher or administrator at the school" of a student's graduation speech. (J.A. 100 ¶ 17.) The School District's policy thus follows the guidance of *Adler I*, which held that a policy that avoids "any review of the student message at all" avoids entanglement. 206 F.3d at 1090.

In fact, the *Adler I* Court warned that a policy like that proposed by AHA—one that censors all prayers or religious messages—would be far more constitutionally problematic. "Undoubtedly, the School Board would find itself far more entangled with religion if it attempted to eradicate all religious content from student messages than if it maintained a meaningful policy of studied neutrality." *Id*. One can only imagine the entanglement issues that would arise if MVES was forced to scour each and every word in a student's speech to remove any religious references. If a student quoted the Bible verse that says "I can do all things through Christ who strengthens me" (Philippians 4:13) to describe how he or she overcame personal obstacles, would MVES be required to censor the Bible verse? And what if a student, when thanking those who impacted his life, began by saying "First off, I want to thank God, 'cause that's who I look up to. He's graced my life with

opportunities that I know is not of my hand or any other human hand."?[2] Must MVES shut off the microphone and remove the student from the stage?

The School District's policy of neutrality is the right one. It gives equal dignity and respect to the private choices of students regarding the content of their speeches. Students selected for the honor of speaking put in hard work to earn academic and/or citizenship accolades. (J.A. 100 ¶ 17.) It would simply be unjust for the school to censure students from a religious background if they so much as reference the religious beliefs that drive many of their accomplishments.

II. AHA Inappropriately Relies on the Seventh Circuit's Decision in *Elmbrook*, Which Erroneously Prohibits Schools From Exercising Religious Neutrality and Requires Affirmative Discrimination Against Religious Actors.

AHA relies heavily upon the Seventh Circuit's en banc opinion in *Elmbrook.* Appellants' Br. at 46. But that decision wrongly prohibits schools from exercising religious neutrality and requires them to affirmatively discriminate against religious actors. This Court should not follow *Elmbrook's* erroneous reasoning, particularly as the petition for writ of certiorari in that case remains pending.

[2] This was actor Matthew McConaughey's opening line when accepting the 2014 Oscar for "Best Actor." Cherryl K. Chumley, Matthew McConaughey's speech, The Washington Times (Mar. 3, 2014), a*vailable at* http://www.washingtontimes.com/news/2014/mar/3/matthew-mcconaugheys-speech-first-i-want-thank-god/ (last visited March 5, 2014).

A. *Elmbrook* Wrongly Characterizes Religious Neutrality as Endorsement and Unconstitutionally Requires Schools to Affirmatively Discriminate Against Religious Actors.

In a situation reminiscent of that at MVES, students in the Elmbrook School District were faced with a cramped, wood-benched, and un-air-conditioned gymnasium in which to hold their graduation ceremony, so they searched for an alternative venue. They found one in the Elmbrook Church, which was close by, could easily accommodate all of their guests, and offered amenities like cushioned seating, free parking, and temperature control. *See Elmbrook*, 687 F.3d at 844 n.2. Hosting the ceremony at the rented church building saved the district money, so officials agreed to the students' plans. *See Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 733 (7th Cir. 2011). It was undisputed, as in this case, that the district "lack[ed] … any religious purpose" and "desired to make use only of the Church's material amenities." *Id.*; *see also Elmbrook*, 687 F.3d at 851 n.15. Nonetheless, the Seventh Circuit struck down the practice based on "the sheer religiosity of the space." *Elmbrook*, 687 F.3d at 853.

Absent any evidence of religious activity by the district, the *Elmbrook* Court thus disapproved of renting church facilities for secular purposes because of their religious nature. *See id.* at 845-86. And it reached this conclusion based on the implausible assumption that the district would only rent the church's objectively superior and less expensive facilities if it "approved of the [c]hurch's message."

Id. at 854. This misconception led the Seventh Circuit to approve of schools renting religious space for secular purposes only in the narrowest of circumstances, "[f]or example, if a church sanctuary were the only meeting place left in a small community ravaged by a natural disaster." *Id.* at 843-44.

AHA argues that the mere existence of possible secular venues is sufficient to "infer that the [School District's] objective in choosing the Turner Chapel was because of its religious nature." Appellants' Br. at 48. Thus, AHA urges that the School District must be hostile to religious venues, rejecting them unless there are *no alternatives* available. But Supreme Court caselaw forbids such blatant discrimination against religion. The Court has, for decades, characterized government neutrality toward religion as the key to Establishment Clause compliance. *See, e.g.*, *Rosenberger*, 515 U.S. at 839 ("[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."). The Fourth Circuit has similarly concluded that when religious individuals "seek[] nothing more than to be treated neutrally, i.e., to obtain equal access to a forum available to other[s]," a school would face "an uphill battle in arguing that the Establishment Clause compels it to exclude" the religious adherent. *C.E.F. of Md., Inc. v. Montgomery Cnty. Pub. Sch.*, 373 F.3d 589, 595 (4th Cir. 2004).

Elmbrook spurned that view, forcing schools to eschew any venues

belonging to religious providers or reap the penalties associated with religious endorsement. In characterizing a school's religious neutrality as religious endorsement, *Elmbrook* turned the First Amendment on its head. This Court should avoid such contortions.

B. The *Elmbrook* Court Wrongly Found Religious Endorsement Based on Private Religious Conduct That Bears No Relation to a School's Purely Secular Activities.

Rather than examining the self-evident, secular benefits of the church's facilities, *Elmbrook's* "reasonable observer" was transfixed on private religious conduct that bore no relation to the school activities at issue. The Seventh Circuit, for example, cataloged the church's religious elements, including obscure religious street names, stacks of religious literature, and a variety of religious decor. *See Elmbrook*, 687 F.3d at 845-46. But any reasonable person would expect to find such things in a church. Absent evidence to the contrary, any reasonable observer would conclude that these religious materials and elements were targeted at the church's members who regularly populate its halls, not at students temporarily visiting its facilities.

AHA follows the treacherous path cut by the *Elmbrook* decision. It catalogs the few religious icons located in and around Turner Chapel, namely, a small cross on top of the chapel, a cross in the University's logo, and eight stained glass windows depicting scenes from the Bible. Appellants' Br. at 5-6. Notably absent

from Turner Chapel is any religious literature. (J.A. 100 ¶ 14.) But AHA seizes upon the logo, artistic glass windows, and small cross and concludes that the School District "would only choose such a proselytizing environment aimed at spreading religious faith … if the District approved of the Church's message." Appellants' Br. at 51.

This is hardly a proselytizing environment. A student viewing a photograph of Michelangelo's frescoes in the Sistine Chapel would see more religious iconography than that present in Turner Chapel. Indeed, as the photo below illustrates, a student or parent entering into the auditorium would have trouble distinguishing it from any other standard civic auditorium or meeting space.

Photograph of auditorium in Turner Chapel, J.A. 125.

Schools searching for rental space, like any other customer seeking vendors for secular, commercial services, are focused on finding a facility that best meets

their immediate needs. They often do not know, and certainly do not necessarily support, the provider's philosophical beliefs. Here, there is no evidence that the School District endorsed the beliefs of North Greenville University. In fact, the sworn testimony is to the contrary. (J.A. 99 ¶ 9 (Principal Gibson testifying that her "decision had nothing whatsoever to do with NGU's status as a religiously-affiliated institution").) The most that can be said is that the School District "endorsed" Turner Chapel's location, size, comfortable seating, and ample parking. (J.A. 98-99 ¶ 8.) Nothing in the First Amendment forbids that.[3]

C. Requiring Government Hostility Toward Religious Entities and Their Private Expression Contravenes Basic Principles of the First Amendment.

The most troubling aspect of AHA's argument is that it paints religious spaces as toxic in a fundamental sense. Relying on *Elmbrook*, AHA argues that the mere existence of *potential* secular venues—ones that the sworn testimony shows were completely inadequate for MVES purposes (J.A. 100 ¶¶ 15-16.)—is sufficient to "infer" a religious motivation on behalf of the School District. Appellants' Br. at 48. Thus, a school may not even consider a venue owned by a religious

[3] Government use of religious facilities is prevalent in our country, namely as polling stations for elections. "At least two appellate courts have held that government may use churches as convenient polling places." *Elmbrook*, 687 F.3d at 871 (Easterbrook, J., dissenting) (citing *Otero v. State Election Board*, 975 F.2d 738 (10th Cir.1992); *Berman v. Board of Elections*, 19 N.Y.2d 750 (1967)). "A rule of neutrality between religious and secular sites permits government to use religious venues for graduation and voting alike …." *Id*.

organization unless it has first crossed out all secular options. And it appears that AHA's position is that *any* secular option, no matter how inferior or inconvenient in relation to space, comfort, parking, and other secular considerations, must be preferred over a religious option. But the Establishment Clause does not require government to treat religious institutions as the leper colonies of the modern American state.

D. AHA's Position Impermissibly Requires Hostility Towards Religion, a View That Would Trample Upon Student's Rights.

The Supreme Court has repeatedly held that the Establishment Clause forbids government hostility to religion just as strongly as it prohibits favoritism of religious faith. *See, e.g.*, *Good News Club*, 533 U.S. at 118 (recognizing government hostility toward religion is just as forbidden as religious endorsement); *Mitchell*, 530 U.S. at 827 (plurality opinion) (prohibiting "special hostility for those who take their religion seriously"); *Rosenberger*, 515 U.S at 846 ("[F]ostering a pervasive bias or hostility to religion … undermine[s] the very neutrality the Establishment Clause requires.").

Nothing in AHA's Brief, or the *Elmbrook* decision on which it relies, grapples with this essential fact. Instead, AHA agonizes over the existence of a few stained glass windows and a cross on the University's logo, claiming that these simple decorative items "indicat[e] to everyone that the religious message is favored." Appellants' Br. at 49. Such reasoning smacks more of religious

phobia than legitimate Establishment Clause concerns. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (rejecting the "presumption" that cooperation between public schools and religious institutions "constitutes a symbolic union between government and religion").

This impression is heightened by AHA's claim that endorsement is "even stronger" because of the potential that "prayers" may be "delivered at the MVES ceremony" by a student's private choice. Appellants' Br. at 50. But it is beyond dispute that the Establishment Clause's strictures do not apply to individual students acting in their private capacities. *See Good News Club*, 533 U.S. at 115 (recognizing this Court's "Establishment Clause jurisprudence" does not "foreclose private religious conduct").

In its Guidance on Constitutionally Protected Prayer, the U.S. Department of Education explains that a student has a right to incorporate a prayer into a class assignment. "[I]f a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example, a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content." Under AHA's logic, a student's decision to incorporate a prayer into a poem would transform the public school classroom into a "sectarian venue." Its position mandates hostility to religion and puts the free exercise rights of students at risk.

The most likely victims of AHA's analysis are not public schools, but private students, community groups, and student clubs. Students have always been free to pray at school, convey religious ideas, and read religious texts. *See Rosenberger*, 515 U.S. at 834 (recognizing government "may not discriminate based on the [religious] viewpoint of private persons"). Moreover, the First Amendment's command of viewpoint neutrality has allowed religious groups to access schools' communicative forums on an equal basis with their secular counterparts. *See id.* at 842.

If neutrality equates to endorsement and private persuasion violates the Establishment Clause, however, school districts must extinguish this expression to avoid tainting their secular pursuits. Nothing in the Constitution allows such hostility to religious speech. Indeed, those who proposed and ratified the First Amendment clearly had opposing goals in mind. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("[H]istorical instances of religious persecution and intolerance … gave concern to those who drafted the Free Exercise Clause.") (quotation omitted).

E. Following *Elmbrook's* Holding Would Be Premature Given the Pending Petition for Writ of Certiorari In That Case.

The Seventh Circuit's decision in *Elmbrook* is not final, as the school district in that case has filed a petition for writ of certiorari, supported by Alliance Defending Freedom and other *amici*, that remains pending. *See* Petition for Writ of

Certiorari at i, *Elmbrook Sch. Dist. v. Doe*, No. 12-755 (U.S. filed Dec. 20, 212), *available at* http://www.scotusblog.com/case-files/cases/elmbrook-school-district-v-doe/ (last visited Mar. 6, 2014) (asking, *inter alia*, "[w]hether the government 'endorses' religion when it engages in a religion-neutral action that incidentally exposes citizens to a private religious message").

After considering the petition no less than seven times, the Supreme Court has now held it for over nine months. *See Elmbrook*, S. Ct. Docket No. 12-755, *docket available at* http://www.scotusblog.com/case-files/cases/elmbrook-school-district-v-doe/ (last visited March 5, 2014). Commentators presume that the Supreme Court is holding the *Elmbrook* petition until it reaches a decision in *Town of Greece*. *See* John Elwood, SCOTUSblog Relist Watch (May 21, 2013), *available at* http://www.scotusblog.com/2013/05/relist-watch-16/ (last visited Mar. 5, 2014). Given the obvious uncertainty of *Elmbrook*'s fate, it would be premature for this Court to rely on its analysis.

CONCLUSION

In this case, the district court properly denied AHA's request to enjoin private student expression at graduation and to restrict the ability of the School District to consider venues owned by religious organizations for the ceremony. This Court should affirm that ruling in the School District's favor. But if the Court desires further guidance on the essential First Amendment principles at play, it

should exercise its discretion to hold this case pending the Supreme Court's final resolution of *Elmbrook* and *Town of Greece*.

Respectfully submitted this 10th day of March, 2014.

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This *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 6,979 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 Fed. R. App. P. 32(a)(5) 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 Times New Roman 14-point font.

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I certify that on March 10, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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