No. 13-5957

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAVID KUCERA; VICKIE F. FORGETY,

Plaintiffs-Appellees,

and

STEVE B. SMITH,

Plaintiff,

v.

JEFFERSON COUNTY BOARD OF SCHOOL COMMISSIONERS,

Defendant-Appellant,

and

DOUGLAS R. MOODY, et al.,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Tennessee
Honorable Thomas W. Phillips
Case No. 3:03-cv-00593

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5957 Case Name: Kucera v. Jefferson Cnty. Sch. Bd.

Name of counsel: David A. Cortman, Kevin H. Theriot, Jeremy D. Tedesco, Rory T. Gray

Pursuant to 6th Cir. R. 26.1, Alliance Defending Freedom
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 28, 2013 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 placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ David A. Cortman
Alliance Defending Freedom

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

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 (formerly known as Alliance Defense Fund) 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 will be heard by the Supreme Court this fall. *See Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012), *cert. granted* 81 U.S.L.W. 3645 (U.S. May 20, 2013) (posing the question of whether a town's "legislative prayer practice violates the

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* states that no counsel for any party authored this brief in whole or in part, 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.

Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity").

Recognizing that affirmance in this case would undermine its efforts to ensure that the Establishment Clause is not interpreted in a manner that requires government hostility to religion, Alliance Defending Freedom seeks to highlight the substantial flaws in the district court's analysis. 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 (set for oral argument on Nov. 6, 2013); *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), *petition for cert. filed*, 81 U.S.L.W. 3371 (U.S. Dec. 20, 2012) (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, along with an accompanying motion seeking this Court's leave to do so, pursuant to Fed. R. App. P. 29(a).

INTRODUCTION

Faced with a severe budget shortfall in 2003, the Jefferson County Board of School Commissioners (the "Board") eliminated several "big ticket" programs to save the school district money. *See Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*,

641 F.3d 197, 202 (6th Cir. 2011); Findings of Fact & Conclusions of Law ("FFCL"), RE 182, Page ID #3. One of those programs was the district's alternative school, which served students who were suspended or expelled from regular schools within the district. *See Smith*, 641 F.3d at 202; FFCL, RE 182, Page ID #4. By contracting with Kingswood Academy ("Kingswood")—a private alternative school—to provide these secular services, the Board was able to save $171,423 in a single year, money that was reinvested to keep the district's essential programs afloat. *See Smith*, 641 F.3d at 203; FFCL, RE 182, Page ID #9.

"[T]he parties have conceded that the Board's decision did not have a religious purpose." FFCL, RE 182, Page ID #10 n.4. Nonetheless, the district court held that the Board's contract with Kingswood for secular, alternative-school services violated the Establishment Clause by endorsing Christianity. It reached this conclusion by misconstruing Supreme Court precedent and inappropriately expanding the endorsement test to preclude the government from utilizing secular services offered by religious providers. But the Supreme Court has rejected such an all-encompassing ban on government contracting with religious entities for the provision of secular services to the community. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (holding that cooperation between public school teachers and parochial schools to provide educational services does not "result[] in the

impermissible effect of state-sponsored indoctrination or constitute[] a symbolic union between government and religion.")

The district court further bolstered its holding by reference to the Seventh Circuit's erroneous decision in *Elmbrook*, which prohibits schools from exercising religious neutrality and requires them to affirmatively discriminate against religious actors. But the First Amendment prohibits such hostility to religious faith. *See, e.g.*, *Rosenberger*, 515 U.S. at 846 (noting the First Amendment forbids "a pervasive bias or hostility to religion"). And the Petition for Writ of Certiorari in *Elmbrook*, which the Supreme Court has held for over five months ostensibly in light of its upcoming consideration of the constitutionality of legislative prayer, *see Town of Greece*, S. Ct. No. 12-696 (set for oral argument on Nov. 6, 2013), is a demonstrably flimsy basis for the district court's ruling. This Court should reverse and remand for the entry of judgment in the Board's favor.

BACKGROUND

Kingswood is a private, alternative school that offered a secular day program for public school students and a separate religious program for private residential students. FFCL, RE 182, Page ID #4-5. Not only is Kingswood licensed by the Tennessee Department of Mental Health and Developmental Disabilities, it has also been recognized by state authorities as a private institution that public schools could use to serve their at-risk students. *See Smith*, 641 F.3d at 203. Closing the

district's alternative school was thus a win-win situation: the Board made up a significant portion of its budget deficit, and alternative-students were able to attend a well-qualified institution focused on their particular needs. But the decision to close the alternative school was understandably unpopular with teachers and administrators who were forced to look for work elsewhere. *See id.*

Two former teachers and one administrator—Steve Smith, David Kucera, and Vickie Forgety—filed suit, claiming that the Board's closing of its alternative school and contract with Kingswood violated (1) the Establishment Clause of the First Amendment and the corresponding provision of the Tennessee Constitution, and (2) their procedural and substantive rights under the Due Process Clause of the Fourteenth Amendment and a related provision of the Tennessee Constitution. *See id.* at 202. The district court initially granted summary judgment to Defendants on all claims, concluding that Plaintiffs lacked standing to bring an Establishment Clause challenge and that the Board did not violate their procedural or substantive due process rights. *See* Order Granting Defendants' Motion for Summary Judgment, RE 76, Page ID #9, 13.

On appeal, this Court considered the case en banc, upheld the grant of summary judgment in Defendants' favor on Plaintiffs' due process claims, and accorded the individual Board members legislative immunity. *See Smith*, 641 F.3d at 219. But this Court reversed the district court's holding that Plaintiffs Kucera

and Forgety lacked standing to bring an Establishment Clause claim against the Board, concluding they had municipal taxpayer standing to do so. *See Smith*, 641 F.3d at 219. This Court consequently remanded the case for the district court to consider the merits of Kucera's and Forgety's Establishment Clause challenge in the first instance. *See id.*

On remand, the district court denied another summary judgment motion lodged by the Board because it concluded that a genuine issue of material fact existed as to whether Kingswood's day and residential programs were sufficiently distinct to avoid excessive entanglement. *See* Order Denying Defendants' Motion for Summary Judgment, RE 131, Page ID #8. The district court subsequently held a bench trial and issued findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a). *See* FFCL, RE 182, Page ID #2. In sum, the district court (1) ruled that the Board's contract with Kingswood violated the Establishment Clause, (2) awarded Plaintiffs Kucera and Forgety almost eighty thousand dollars in "lost wages," as well as additional attorneys' fees, and (3) permanently enjoined the Board "from contracting with Kingswood or any other religious entity for the operation of its alternative school." *See id.* at 22-23.

THE DISTRICT COURT'S FACTUAL FINDINGS

Although this Court reviews the district's court legal conclusions after a bench trial de novo, *Spurlock v. Fox*, 716, F.3d 383, 393 (6th Cir. 2013), it grants

substantial deference to the court's factual findings, *Barnett v. Dep't of Veterans Affairs*, 153 F.3d 338, 342 (6th Cir. 1998). The district court, in this case, found that Kingswood's day program, in which public school students participated, to be entirely secular in nature. Students enrolled in the program benefited from "educational and therapeutic components" that aided them in advancing through "a levels system" tied to "improvements in behavior and academics." FFCL, RE 182, Page ID #4-5. No religious instruction was offered to these students. *Id.* at 5. They were taught only "secular courses" by "state licensed teachers" in a school building that lacked any religious symbolism. *Id.* Indeed, the day program did not even include a so-called "moment of silence" for students' personal reflection. *Id.*

The public school students enrolled in Kingswood's day program thus received no pressure to engage in "prayer, reflection, or spirituality in any form." *Id.* Nor were they "required or encouraged to attend chapel or religious services." *Id.* at 7. They could voluntarily choose to attend a few, optional assemblies in Kingswood's on-site chapel—ostensibly the school's largest meeting space—but those assemblies were entirely secular in nature. *See id.* at 5, 7, 18. A minister, Steve Walker, was employed at Kingswood and performed intake duties for public school students. But the district court found no evidence that he "intermingled his religious background with his intake duties." *Id.* at 7.

The only religious influences at Kingswood that the district court identified were either wholly unrelated to its day program—and thus irrelevant to this case—or clearly *de minimis* in nature. Kingswood, for instance, incorporated "religious references" into its School Improvement Plan, and referred to itself as "a 'Christian environment" in certain documents unrelated to its day program. *Id.* at 5-6. But this fact is hardly surprising given that Kingswood's longstanding, residential program, in which public school students do not participate, "include[s] deliberate religious instruction." *Id.* at 5.

It is also wholly unremarkable that donors who support Kingswood's residential program received "fundraising correspondence that contain[s] Christian references and iconography." *Id.* Such documents were not tailored to Kingswood's day program for public school students and simply demonstrated that Kingswood's religious program appropriately relied on private support. In the same vein, the district court noted references on Kingswood's website to "the principals of a Christian education," *id.* at 6, that presumably relate to Kingswood's separate, residential program, which all agree is religious in nature and unavailable to public school students, *id.* at 4-5. *See also id.* at 13 ("[N]or do the facts establish that Kingswood's residential and day programs are not meaningfully distinct ….").

The only remaining evidence the district court found of religious influences at Kingswood were isolated Christian references with no substantive effect on the secular nature of the day program. Kingswood, for example, historically used "Let the little children come unto me" (Luke 18:16) as a school motto on certain documents, such as an Easter Letter and report cards, that are primarily intended for parents.[2] *See id.* at 6. But the sentiment that "all children are welcome here," regardless of their past circumstances or behavioral struggles, hardly seems inappropriate for a school dedicated to serving alternative students who—by definition—have been ousted from their regular school programs. Kingswood's only other use of the scripture/school motto was on "Family Feedback form[s]" that were intended for and "were required to be signed by … parent[s]," *id.* at 6, adults who were likely to conclude that Kingswood had simply reused its standard residential form to prevent unnecessary expense and duplication.

ARGUMENT

I. The District's Court's Opinion Misapplies Existing Establishment Clause Precedent and Inappropriately Expands the Endorsement Test, Which Recent Supreme Court Actions Have Called Into Doubt.

To identify an Establishment Clause violation in this case, the district court did not rely on an actual constitutional violation but a misperceived one. Rulings

[2] Although the district court stated that this phrase "could be interpreted as an invitation into the kingdom of God," it never indicated that a reasonable observer would reach that conclusion given this case's particular facts. FFCL, RE 182, Page ID #7.

of this type are a common result of the erroneous application of the endorsement test and its "reasonable observer." But the district court's legal construction of this case's facts is inherently unreasonable. And its expansion of the endorsement test to encompass the governmental use of secular services offered by religious providers is unjustified, particularly given recent actions by the Supreme Court calling that test into doubt.

A. Perceived Rather Than Actual Endorsement of Religion Lies at the Heart of the District Court's Establishment Clause Holding.

In this case, what the district court did not find is just as important as what it did. The district court did not conclude that Kingswood blended its religious, residential program with its secular, day program for public school students. *See* FFCL, RE 182, Page ID #13 ("[N]or do the facts establish that Kingswood's residential and day programs are not meaningfully distinct …."). It also did not find any evidence of religious instruction, the encouragement or requirement of religious activities, or even passive religious symbolism in classrooms. *Id.* at 5, 7; *see also id.* at 18 ("[T]he Plaintiff failed to produce any evidence whatsoever that Kingswood engaged in or embodied 'proselytizing elements.'"); *id.* at 19 ("Plaintiff offered no evidence of explicit religious activism."). Clearly, no actual endorsement of religion occurred in Kingswood's secular, day program.

The sole pillar on which the court's Establishment Clause holding rests is a perceived or hypothetical endorsement of religion (and a misperceived one at that,

see infra Part I.B). Indeed, the district court went to great pains to make this point clear, explaining that: (1) "a 'reasonable observer' would see the Board's decision to contract with a self-proclaimed 'religious institution,' conveys [sic] a message of religious endorsement, *id.* at 12, (2) "[r]egardless of the Board's actual intent, the Establishment Clause is violated when government action, 'conveys a message of [governmental] endorsement' of religion," *id.* at 13, and (3) "endorsement, whether real or perceived, violates the Establishment Clause," *id.* at 16.

No other legal grounding explains the district court's ultimate determination that the Board's contract with Kingswood resulted in "[t]he *appearance* of governmental endorsement of the Christian faith [being] too pronounced and non-believers, or students of a different faith, … likely *feel[ing]* divorced from Kingswood, a well-intentioned, but overtly-Christian school." *Id.* at 20 (emphasis added). Perceptions of religious favoritism and sensations of exclusion are, after all, the standard arguments of those who seek to transform the endorsement test from a guarantee of equal treatment into a barrier against religious entities' even-handed participation in secular government programs. The proper application of that test, as demonstrated below, shows that the district court erred in finding an impermissible endorsement of religion.

B. Existing Supreme Court Precedent, Which Accounts for the History and Context of the Board's Decision to Utilize Kingswood, Does Not Justify A Finding of Religious Endorsement.

Although the district court's opinion aptly summarizes the fact-specific and context-intensive inquiry into how a reasonable observer would interpret events, it regrettably fails to put those principles into practice. The court's opinion, for instance, rightly notes that "[t]he Constitution does not call for total separation between church and state." FFCL, RE 182, Page ID #10 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)); *see also ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 624, 638 (6th Cir. 2005) (characterizing "'the separation of church and state'" as an "extra-constitutional construct [that] has grown tiresome"). It also explains that courts must "examine carefully the particular context and history of [the government action in question] before concluding what effect [it] would likely have on the reasonable observer." FFCL, RE 182, Page ID #10 (quotation omitted). Both of these propositions are indisputably correct, as under the endorsement test "'[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.'" *Id.* at 10 n.5 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring)).

But there is nothing fact-specific or context-intensive about the district court's Establishment Clause analysis. Instead, its reasoning is both broad and

linear: a public school district's decision to "contract with a self-proclaimed 'religious institution,' [for secular services necessarily] conveys a message of religious endorsement, running afoul of the Establishment Clause." *Id.* at 12; *see also id.* at 20 ("[T]he facts plainly establish that Kingswood is a religious institution—a fine institution—but an institution that should have never sought to operate a public alternative school as part of its ministry."). Under the district court's logic, the government impermissibly endorses religion *any* time it uses services offered by religious entities, *regardless* of the secular nature of the services or the benefits provided.

Existing Supreme Court precedent simply does not support such an all-encompassing ban against the government utilizing secular services offered by private religious actors. *See, e.g.*, *Agostini*, 521 U.S. at 224 (recognizing that "'[s]uch a flat rule, smack[s] of antiquated notions of 'taint,' [and] would indeed exalt form over substance'" (quoting *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13 (1993)). No Justice has ever suggested that religious endorsement necessarily follows from the government's failure to flee headlong from any association with a private religious organization, such as Kingswood. In fact, the Supreme Court and the courts of appeals have upheld many kinds of cooperation between private, religious actors and government entities pursuing secular goals. *See Bowen v. Kendrick*, 487 U.S. 589, 593 (1988) (upholding a federal program

providing grants to private nonprofits, including several religious entities, for services related to pregnancy and adolescent sexuality), *Glassman v. Arlington Cnty.*, 628 F.3d 140, 150 (4th Cir. 2010) (upholding government assistance to, and cooperation with, a church in the development of a low-income housing facility with private, church space located on the first two floors).

Indeed, Justice O'Connor's foundational concurrence in *Lynch* clearly explained that such "disapproval of religion" is just as problematic under the Establishment Clause as religious "endorsement." 465 U.S. at 694; *see also id.* at 690 (inquiring whether the government "practice under review in fact conveys a message of endorsement or disapproval").

Acceptance of the district court's contrary holding would not only contravene this well-established precedent, but also require a wholesale refashioning of government relations with private religious actors. For example, the Office of Faith-based and Neighborhood Partnerships has existed in the White House for over a decade. One of its primary goals is to encourage private religious entities to provide secular social services on behalf of the government, such as job training, prisoner rehabilitation, foster care, and food and shelter for the homeless. *See, e.g.*, *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 594 (2007).

The Board's contract with Kingswood, a private religious organization that provided secular educational services, is substantively indistinguishable. And

Kingswood's secular day program complied with the basic government requirements designed to ensure that public funds flowing to religious organizations comport with the First Amendment. *See, e.g.*, Exec. Order No. 13,559, 75 Fed. Reg. 71319 (Nov. 17, 2010) (explaining that a religious organization that receives federal funds "may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs" as long as it does not use federal funds to "support or engage in any explicitly religious activities"). If this association "with a self-proclaimed 'religious institution,' conveys a message of religious endorsement," FFCL, RE 182, Page ID #12, it is hard to see how any of the aforementioned federal programs—or their state and local counterparts—could stand.

Happily, Supreme Court precedent does not require such a draconian result. The observer envisioned by the district court's opinion focused on "what an unreasonable person *could* think of the display, rather than what a reasonable person *would* think." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1550 (6th Cir. 1992). He or she views any government involvement with a "self-proclaimed 'religious institution,'" FFCL, RE 182, Page ID #12, in a distinctly negative light. *See, e.g.*, *id.* at 15 (identifying the constitutional problem as "Kingswood's overt affiliation with the Christian Faith"). But that hardly reflects the unbiased view of "a personification of a

community ideal of reasonable behavior, determined by the [collective] social judgment." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring); *see* Exec. Order No. 13,559 (allowing a faith-based organization participating in government-funded social welfare programs to continue "carry[ing] out its mission, including the definition, development, practice, and expression of its religious beliefs").

Faced with the knowledge of the school district's serious budget shortfall, the high-quality nature of Kingswood's secular, day program for alternative students, and the program's relatively low cost, a reasonable person would not be inherently suspect of the Board's decision to contract with Kingswood. He or she would consider that decision to be in the best educational interests of alternative students, *Smith*, 641 F.3d at 203 (noting that the State identified Kingswood as a private provider of alternative school services that public school districts could use), and the best financial interests of the school district, FFCL, RE 182, Page ID #9 (recognizing that "the Board's contract with Kingswood … save[d] money for the school district"). Neither of these secular considerations is related to Kingswood's religious moorings; thus, they raise no First Amendment concerns.

What is more, a reasonable person—aware of Kingswood's efforts to ensure that its secular, day program remained separate from its religious, residential program and that the former entailed no religious instruction, encouragement of

religious activities, or even passive religious symbolism in the classroom—would perceive no religious endorsement. He or she would conclude that alternative students at Kingswood received no religious instruction and experienced no pressure to engage in religious activities. Consequently, a reasonable observer would identify the Board's contract with Kingswood as an exercise in neutrality toward religion, rather than an effort to promote it.

Nor would sporadic religious references to Kingswood's Christian identity, environment, or principles in documents unrelated to its day program change this conclusion. *See* Exec. Order No. 13,559 (allowing a religious grant recipient to "include religious references in its … mission statements and other chartering or governing documents"). A reasonable person would be fully aware of the religious basis for Kingswood's mission, its longstanding Christian identity, and the practical need for it to advertise and raise funds for its private, residential program. Because none of these factors compromised the secular nature of Kingswood's day program, a reasonable observer would not view them as suspect.

Furthermore, the infrequent use of Kingswood's religious motto on documents primarily intended for parents, such as report cards and Family Feedback forms, is not of sufficient moment to justify a finding of religious endorsement. The reasonable observer would not find this fact troubling in light of the day program's wholly secular activities, particularly as it likely resulted from

the recycling of old forms to avoid additional work and expense. "[A] personification of a community ideal of reasonable behavior," *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring), would not morph such a minor and isolated concern into a violation of the First Amendment. *See, e.g.*, *Washegesic v. Bloomingdale Pub. Sch.*, 33 F.3d 679, 685 (6th Cir. 1994) (Guy, J., concurring) (warning against "trivializing the Constitution").

C. The District Court's Opinion Inappropriately Relies on Supreme Court Precedent Addressing School-Sponsored Religious Activities With No Factual Similarities to the Present Case.

The district court's opinion makes much of Supreme Court precedent discussing "subtle coercive pressure" being placed on students to participate in school-sponsored religious activities. FFCL, RE 182, Page ID #15. But the district court explicitly found *no evidence* that such encouragement or religious practices occurred in this case. *See id.* at 5 (identifying "no evidence [of] religious instruction at Kingswood"); *id.* (finding "no evidence of Kingswood requiring, or encouraging, prayer, reflection, or spirituality in any form"); *id.* (ascertaining "no evidence that Kingswood ever conducted or provided time for a 'moment of silence,' or any similar exercise"); *id.* at 7 (concluding that "students were not required or encouraged to attend chapel or religious services"). Relying on these widely dissimilar cases to identify an Establishment Clause violation here is plainly inappropriate.

Without exception, the Supreme Court precedent cited by the district court dealt with school-sponsored religious activities. This is true whether one examines *Lee v. Weismann*, which considered "a state-sponsored and state-directed" prayer at a graduation ceremony, 505 U.S. 577, 587 (1992), *School District of Abington v. Schempp*, which analyzed whether "States [could] requir[e] the … reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer," 374 U.S. 203, 223 (1963), *Edwards v. Aguillard*, which reviewed a state effort "to endorse a particular religious doctrine"—creationism, 482 U.S. 578, 594 (1987), or *Santa Fe Independent School District v. Doe*, which considered a policy intended "to preserve [prayer before football games,] a popular state-sponsored religious practice," 530 U.S. 290, 309 (2000) (quotation omitted).[3]

Religious activities sponsored by public schools, like those discussed in *Lee*, *Schempp*, *Edwards*, and *Santa Fe*, may well place "subtle coercive pressure" on students. FFCL, RE 182, Page ID #15. The same cannot be said of a private school's passive "affiliation with the Christian Faith" when absolutely no school-sponsored, religious activity occurs. *Id.* Supreme Court precedent has never identified "subtle coercive pressure" being placed on students under even remotely similar facts, and Plaintiffs have produced no compelling evidence to justify such

[3] The same is true of the district court's reference to Justice Kennedy's concurrence in *Board of Education of Westside Community Schools v. Mergens*, which discusses a hypothetical concern regarding a school "impos[ing] pressure upon a student to participate in a religious activity." 496 U.S. 226, 261 (1990).

an innovation here. All they may cite in support of this conclusion is the district court's opinion, which suffers from substantial flaws.

For instance, the district court's only extended analogy between this case and existing Supreme Court precedent is to the decision in *Santa Fe*. The argument goes that "[l]ike the district in *Santa Fe*, Kingswood, the Board, [sic] took a 'hands-off' approach toward the impermissible intermingling of church with state." FFCL, RE 182, Page ID #16. But the Supreme Court in *Santa Fe* made exactly the opposite point, identifying an Establishment Clause violation based on the fact that rather than adopting "a 'hands-off' approach," *i.e.*, a neutral forum for student speech, the district's pregame prayers bore "the imprint of the State" and thus constituted the "actual endorsement of religion." *Id.* (quoting 530 U.S. at 305). No *actual* endorsement of religion occurred in this case. *See supra* Parts I.A & B (establishing the district court's reliance on a misperception of endorsement). Thus, in relying on *Santa Fe* and similar matters to find an Establishment Clause violation here, the district court plainly missed the mark.

D. The District Court's Expansion of the Endorsement Test to Preclude the Government from Utilizing Secular Services Offered by Religious Providers is Particularly Inappropriate Given The Supreme Court's Recent Actions Calling That Test Into Doubt.

The continued validity of the endorsement test is increasingly in doubt. For decades, Justices have criticized the endorsement variant of the *Lemon* test. *See, e.g*, FFCL, RE 182, Page ID #11 n.6. And the Supreme Court has agreed to

resolve a case this term regarding a town's prayer practice, *Town of Greece*, S. Ct. No. 12-696 (set for oral argument on Nov. 6, 2013), that may well turn on the soundness of that test, *see Galloway*, 681 F.3d at 34 (finding a neutral prayer practice unconstitutional because it "conveys to a reasonable objective observer … an official affiliation with a particular religion").

Indeed, the Petitioner in *Town of Greece*, who we co-represent, has argued in its merits brief that the endorsement test is contrary to a proper understanding of the Establishment Clause and should be overruled. *See* Brief for Petitioner at 48-50, *Town of Greece*, S. Ct. Docket No. 12-696, *available at* http://www.scotusblog.com/case-files/cases/town-of-greece-v-galloway (last visited Oct. 28, 2013). If this Court desires further guidance on the Establishment Clause's application to this case, which bears legal similarities to *Town of Greece*, it has the discretion to hold this matter until the Supreme Court has issued a decision on the merits.

II. The District Court's Opinion 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.

Unable to find pertinent Supreme Court caselaw to support its holding, the district court turned to the United States Court of Appeals for the Seventh Circuit's en banc opinion in *Elmbrook*. *See* FFCL, RE 182, Page ID #17-19. 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.

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

Faced with a cramped, wood-benched, and un-air-conditioned gymnasium in which to hold their graduation ceremony, students in the Elmbrook School District searched for an alternative venue. And 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 [sic] the only meeting place left in a small community ravaged by a natural disaster." *Id.* at 843-44.

Although the district court approved of requiring such government hostility to religion here, Supreme Court caselaw does not. 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."); *Gillette v. United States*, 401 U.S. 437, 450 (1971) (requiring government activity to "be secular in purpose, evenhanded in operation, and neutral in primary impact"). *Elmbrook* rejected that view, forcing schools to eschew utilizing any secular services offered by religious providers or reap the penalties associated with religious endorsement. *See, e.g.*, 687 F.3d at 851 (suggesting a different result may obtain if a church is not overtly religious but failing to explain how courts may permissibly weigh such religiosity).

Indeed, the Seventh Circuit went so far as to prohibit a school district's complete neutrality toward religion from informing the judicial "analysis of the likely effect of [its] actions," *i.e.*, the all-important question of religious

endorsement. *Id.* at 853 n.16. But the Supreme Court has consistently held the opposite. *See, e.g., Zelman*, 536 U.S. at 655 ("[N]o reasonable observer would think a neutral program … carries with it the *imprimatur* of government endorsement."); *Good News Club*, 533 U.S. at 114 (allowing secular and religious clubs "to speak on school grounds would ensure neutrality, not threaten it"). That is reason enough for this Court to reject *Elmbrook's* holding.

Supreme Court caselaw does not support reflexively treating a school district's decision to interact with a religious actor for self-evident, secular purposes as religious endorsement. To the contrary, prohibiting schools from comparing the merits of partnering with religious and non-religious groups for wholly secular purposes on an equal basis would necessarily show hostility towards religion. *See, e.g.*, Exec. Order No. 13,559 ("No organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social service programs."). This the Establishment Clause does not allow. *See, e.g., Good News Club*, 533 U.S. at 118 (recognizing that students' perception of government hostility toward religion is just as forbidden as their perception of religious endorsement); *Mitchell v. Helms*, 530 U.S. 793, 827 (2000) (plurality opinion) (prohibiting "special hostility for those who take their religion seriously.").

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" remains transfixed on private religious conduct that bears 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. This conclusion would be confirmed when the reasonable observer noted that the church made its facilities generally available for rental, *Does v. Elmbrook Joint Common Sch. Dist.*, No. 9-C-0409, 2010 WL 2854287, at *3 (E.D. Wis. July 19, 2010), and removed transitory religious elements from the stage where the district's graduation ceremony actually took place, *Elmbrook*, 687 F.3d at 846.

Because the plaintiffs in *Elmbrook* failed to produce any evidence that the district explicitly or implicitly endorsed the church's religious beliefs, the Seventh Circuit should have rejected any suggestion of an Establishment Clause violation. Its failure to do so ignores the practical realities of the case. Schools searching for rental space, like any other customer seeking vendors for secular, commercial services, are doing just that. They often do not know, and certainly do not necessarily support, the provider's philosophical beliefs. No reasonable observer would suggest, for instance, that by signing a one-year lease an apartment-dweller endorses a landlord's political views. The renter's only concern is the product obtained. Hence, the most that can be said is that the district in *Elmbrook* "endorsed" the church's location, size, comfortable seating, climate-control technology, and free parking. Nothing in the First Amendment forbids that.

C. Adopting *Elmbrook's* Holding Would Not Only Further Strain Limited School Resources, But Also Put Valuable Educational Programs at Risk.

Following *Elmbrook's* lead and requiring that schools treat religious actors as subject to some form of constitutional taint that prohibits any cooperation with them would not only strain schools' limited financial resources, but also put a bevy of valuable educational programs at risk. Whether schools are concerned with finding a graduation venue or providing alternative education services to students, utilizing religious providers of secular services—who rarely seek extensive

profit—often makes sound financial sense. *See, e.g.*, Kiracofe, Christine, *Going to the Chapel, and We're Gonna…Graduate?*, 266 Ed. Law. Rep. 583, 583-84 (June 23 2011) (noting that religious facilities often charge lower rental rates than their secular counterparts). Those hostile to church-state interaction like to paint such decisions as "endorsing" choice. The practical reality in an age of burgeoning expenses and shrinking budgets is that, in some instances, schools face a decision between using the secular services of religious charities or foregoing those services altogether.

The Seventh Circuit's equation of government neutrality with religious endorsement is also likely to scuttle valuable educational opportunities, such as school-sponsored, community-service projects. Churches and schools are not the only forms of private, religious institutions. Religiously-affiliated hospitals, childcare facilities, homeless shelters, and food banks abound. In light of *Elmbrook's* open hostility to religious spaces, it is a rare school indeed that would take students to volunteer or perform at these locations.

Students' potential religious reaction to the secular study of religious texts or even field trips to a historic synagogue, church, or mosque would also likely rule these activities out. *See, e.g.*, *Elmbrook*, 687 F.3d at 855 (basing a determination of religious endorsement, in part, on students viewing their "classmates at a graduation event taking advantage of "Elmbrook Church's offerings or meditating

on its symbols … or speaking with its staff"). Performance of broad swathes of the classical music repertoire and study of many pre-modern works of art would also likely fall under such a broad Establishment Clause ban. This Court should reject *Elmbrook's* stilted reasoning and preserve schools' ability to implement secular, educational programs that expose students to religious places and concepts.

D. 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 Oct. 28, 2013) (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 five months. *See Elmbrook*, S. Ct. Docket No. 12-755, *docket available at* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-755.htm (last visited Oct. 28, 2013). 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 Oct. 28, 2013). 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's opinion not only misapplies existing Establishment Clause precedent and inappropriately expands the endorsement test, but also relies heavily on the Seventh Circuit's erroneous decision in *Elmbrook*, which requires public schools to affirmatively discriminate against religious actors. This Court should reverse and remand for the entry of judgment in the Board'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 28th day of October, 2013.

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CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 6,573 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 hereby certify that on October 28, 2013, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY #	DESCRIPTION	PAGE ID #
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182	Findings of Fact and Conclusions of Law	2-7, 9-13, 15-19, 22-23
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131	Order Denying Defendants' Motion for Summary Judgment	8