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FIRST AMENDMENT—SEVENTH CIRCUIT EXPANDS ESTABLISHMENT CLAUSE IN HIGH SCHOOL GRADUATION CASE

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"Congress shall make no law respecting an establishment of religion."[1]

THE Establishment Clause is composed of but one half of a single sentence, yet it has culminated in an overwhelming body of jurisprudence fraught with misunderstanding and confusion. In the past several years, courts have further confounded the intended scope of the Establishment Clause, curiously permitting the government to mingle with religion in some instances,[2] but definitively forbidding it in others.[3] In response to this trend, many, including some Supreme Court justices, have agreed that the Establishment Clause jurisprudence is in need of a major overhaul and lacks any real meaningful direction or clarity.[4] The Seventh Circuit recently became the latest court to impermissibly expand the Establishment Clause when it held that a defendant school district could not hold graduation ceremonies at an unaffiliated, nondenominational church in *Doe v. Elmbrook School District*.[5]

The controversy surrounding *Elmbrook* began when the student body decided that the high school gym, which was small and lacked adequate seating and air-conditioning, was unsuitable to hold graduations for the growing classes of graduating seniors.[6] A large, nondenominational

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1. U.S. CONST. amend. I.

2. *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (upholding a state's right to display the Ten Commandments on a monument located on the grounds of the state capitol); Lynch v. Donnelly, 465 U.S. 668 (1984) (holding constitutional a city-erected nativity scene displayed at a park).

3. *See, e.g.*, Green v. Haskell Cnty. Bd. of Comm'rs, 568 F.3d 784 (10th Cir. 2009) (holding a display of the Ten Commandments at a county courthouse unconstitutional); County of Allegheny v. ACLU, 492 U.S. 573 (1989) (holding a nativity scene display at a county courthouse unconstitutional).

4. *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 132 S. Ct. 12, 21–22 (2011) (Thomas, J., dissenting) ("[O]ur Establishment Clause precedents remain impenetrable, and the lower courts' decisions . . . remain incapable of coherent explanation. It is difficult to imagine an area of the law more in need of clarity. . . .").

5. 687 F.3d 840 (7th Cir. 2012) (en banc).

6. *Id.* at 844.

church located nearby became an attractive, logical alternative.[7] The church offered a large air-conditioned space that could comfortably accommodate the graduates and their families.[8] Moreover, according to the school district, it was relatively inexpensive compared to other possible venues of similar quality.[9] From 2000 to 2006, each senior class held a vote to determine where the graduation would be held, and the church was always the clear winner.[10] The graduation ceremonies were held at the church without a vote beginning in 2007 and ceased altogether beginning in 2010 when the high schools began holding the ceremonies at a new facility built by the school district.[11] Nothing in the majority opinion or dissent indicates that the schools' graduation ceremonies themselves were anything but wholly secular in nature.

The ceremonies were held at the church for nearly a decade before the plaintiffs filed their lawsuit in the Eastern District of Wisconsin in 2009.[12] The plaintiffs (the Does) represent a group of three former students, one current student, and five parents of either the former or current students.[13] After their initial motion for a preliminary injunction was denied, the plaintiffs amended their complaint and requested to permanently enjoin the school district from using the church for any school events or, alternatively, permitting the school to use the church only if absolutely no religious symbols or materials were in view.[14] Shortly thereafter, the district court granted summary judgment for the defendant.[15] On appeal, the Seventh Circuit affirmed, holding that the case was justiciable even though the school was no longer using the church, the Does could remain anonymous, and the school district did not violate the Establishment Clause.[16] Subsequently, the Seventh Circuit agreed to rehear the appeal en banc.[17]

On en banc rehearing, the Seventh Circuit adopted the holdings of the panel's opinion with respect to justiciability and the Does' anonymity; however, it disagreed with the panel's holding that the school district did not violate Establishment Clause.[18] Relying primarily on a test fashioned by the Supreme Court in *Lemon v. Kurtzman*,[19] the majority held that, by holding the graduation ceremonies at the church, the school district was effectively endorsing religion in violation of the Constitution.[20] The majority further concluded that the school district's actions were "religiously

7. *Id.*
8. *Id.*
9. *Id.* at 848.
10. *Id.* at 844–45.
11. *Id.* at 845, 847.
12. *See id.* at 848.
13. *Id.* at 847–48.
14. *Id.* at 848.
15. *Id.*
16. *Id.* at 842.
17. *Id.* at 842–43.
18. *Id.*
19. 403 U.S. 602 (1971).
20. *Elmbrook*, 687 F.3d at 856.

coercive" in violation of the Constitution.[21]

The majority begins its analysis with a recitation of the three-pronged *Lemon* test. "Under the *Lemon* test, a governmental practice violates the Establishment Clause if it (1) lacks a legitimate secular purpose; (2) has the primary effect of advancing or inhibiting religion; or (3) fosters an excessive entanglement with religion."[22] Honing in on the second prong, the majority posits that an "endorsement approach" is best used to determine whether the "primary effect" test is satisfied.[23] The majority explains that the endorsement approach test questions whether a reasonable person, in light of the totality of surrounding circumstances, would understand a public institution to be endorsing religion.[24]

The court also advances a second test, the "coercion test," garnered from the majority opinions in *Lee v. Weisman*[25] and *Santa Fe Independent School District v. Doe*.[26] *Lee* and *Santa Fe* both dealt with the issue of school prayer—at a graduation ceremony in *Lee* and at a football game in *Santa Fe*.[27] In both cases, the Supreme Court determined the Establishment Clause was indeed violated by the existence of religious *activity*, namely the recitation of a prayer during a school-sponsored event.[28] According to the *Elmbrook* majority, the coercion test is met when a public institution "applie[s] coercive pressure on an individual to support or participate in religion."[29] The majority appears unsure whether the "coercion test" is wholly relatable to the *Lemon* test and instead treats religious coercion as more of a per se test, considered in addition to religious endorsement, for determining whether a violation has occurred.[30]

Ultimately, the majority held that the school district violated the Establishment under both the endorsement test and the coercion test. Under the endorsement test, the majority concluded that a reasonable person—a high school student, according to the court—would believe that the school effectively endorsed religion merely by holding the ceremonies in a church where overtly religious figures and material were on display.[31] The majority likened the unconstitutional presence of religious displays in an actual classroom to the "pervasive displays of iconography

21. *Id.* at 854.
22. *Id.* at 849 (citing *Lemon*, 403 U.S. at 612–13).
23. *Id.* at 849–50.
24. *Id.* ("[W]e must 'assess[ ] the totality of the circumstances surrounding the display to determine whether a reasonable person would believe that the display amounts to an endorsement of religion.'" (quoting Books v. City of Elkhart, 235 F.3d 292, 304 (7th Cir. 2000))).
25. 505 U.S. 577 (1992).
26. 530 U.S. 290 (2000).
27. *Lee*, 505 U.S. at 580; *Santa Fe*, 530 U.S. at 294.
28. *See Lee*, 505 U.S. at 599; *Santa Fe*, 530 U.S. at 301.
29. *Elmbrook*, 687 F.3d at 850.
30. *See id.*
31. *See id.* at 851–54.

and proselytizing material" present at the graduations.[32] Additionally, the majority found that because (1) graduation ceremonies are "effectively obligatory," (2) the school was in a position of power and prestige, and (3) children are particularly vulnerable individuals, the school district exercised indirect religious coercion that violated the Establishment Clause.[33] However, the court repeatedly warned that its holding should be limited in scope and refused to rule out the possibility that the Establishment Clause would not be violated in similar, if not almost identical, circumstances.[34]

The three-judge dissent rejected the majority's attempt to limit its holding to factually analogous circumstances. Instead, the dissent cautioned that the majority was setting dangerous precedent equal to a form of reverse coercion: "the coercion of religious entities to conform to a judicially crafted notion of an acceptable 'civil religion.'"[35] The dissent also drew special attention to the majority's overbroad holding of religious coercion by pointing out that the holding essentially requires judges to determine whether a certain pervasive threshold of religiosity renders a religious entity unable to have any dealings whatsoever with a government institution.[36] Additionally, the dissent argued that the "incidental presence" of the church's religious material was hardly indicative of the school district's endorsement of religion.[37]

Unfortunately, even the dissenting judges were unable to corral the runaway train that the majority's opinion represents. Indeed, the majority opinion represents yet another unjustified departure from the First Amendment. More specifically, by failing to objectively view the facts of the case in its "religious endorsement" analysis and by misapplying Supreme Court precedent in its "religious coercion" argument, the court unnecessarily contributed to the perplexity of the Establishment Clause.

In its religious endorsement analysis, the majority failed to see the facts of the case in an objective light. In particular, the court failed to accord proper consideration to the pertinent facts that (1) the schools lacked adequate facilities for large graduation ceremonies, and (2) the church was not selected as a venue because it was a house of worship, but was favored because it offered a convenient, cost-effective forum. Consequently, the majority mistakenly concluded that because there was a certain amount of religious décor present, as is present in nearly every church, the school was effectively endorsing religion.

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32. *Id.* at 851–52 (comparing religious material and literature present at graduation ceremonies with an unconstitutional display of the Ten Commandments inside every classroom at a public school).

33. *Id.* at 854–56.

34. *Id.* at 843–44 ("[W]e [do not] seek to determine whether and when *this* sanctuary, or one akin to it, could be properly used as the setting for a graduation under other circumstances.").

35. *Id.* at 862 (Ripple, J., dissenting).

36. *Id.* at 866–67.

37. *Id.* at 864–65.

Contrary to the majority's approach, however, the Supreme Court has affirmatively rejected placing all focus on the religious component in Establishment Clause analyses.[38] Instead, the court encourages a totality of circumstances approach, which directs courts to look at the *overall* circumstances behind the meeting of the government and the religious entity.[39] Yet the majority persists in taking great pains to describe in meticulous detail nearly every religious aspect of the church without ever showing the school district's purported endorsement.[40] In fact, it seems that the majority is so overly concerned with painting a picture of the church that it glazes over the absence of *any* actual religious conduct or activity on the part of the school district. Failing to point to any actual examples of outright endorsement, the majority attempts to solidify its position by loosely comparing the present case with cases involving in-school religious displays.[41] What the majority fails to recognize, however, is that this is not a case of a school using a classroom to encourage religious displays; rather, it is a case of a school using a private building, which happens to be a church, to facilitate a completely secular school experience. The building is nothing but a shell. If the ceremonies were held at a movie theater, as the dissent argues, no reasonable person would understand the school district to be endorsing the theater or the box office hits.[42] Nevertheless, the majority completely disregards this argument. Only near the end of its analysis does the majority finally concede that "the District did not itself adorn the Church with proselytizing materials, and a reasonable observer would be aware of this fact."[43] In essence, this single important concession almost wholly renders the majority's faulty religious endorsement argument moot.

In addition to its failed religious endorsement argument, the majority's reliance on the holdings in *Lee* and *Santa Fe* is misplaced. The majority contends that the same type of unconstitutional religious coercion present in *Lee* and *Santa Fe* exists in the present case.[44] However, *Lee* and *Santa Fe* both involved *direct* action on the part of school officials and can be easily distinguished from this case. Indeed, the facts of *Lee* may appear similar at first glance, but further examination reveals a glaring difference in the actions of the school administrators. Like the case at bar, *Lee* involved a public school's graduation ceremony; however, the central issue in *Lee* was the constitutionality of an invocation and benediction given during a graduation ceremony by a rabbi selected by a school principal.[45] Here, there is no evidence that the school district included any type of

38. Lynch v. Donnelly, 465 U.S. 668, 680 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.").
39. *See id.* at 694 (O'Connor, J., concurring).
40. *See Elmbrook*, 687 F.3d at 845–47.
41. *See id.* at 851–52.
42. *Id.* at 865 (Ripple, J., dissenting).
43. *Id.* at 853–54 (majority opinion).
44. *Id.* at 851.
45. Lee v. Weisman, 505 U.S. 577, 580 (1992).

religious invocation or benediction. Moreover, no student was asked to stand or "maintain respectful silence" during the graduation ceremony due to a religious activity, which is precisely what the Court found objectionable in *Lee*.[46] Unlike in *Lee*, students attending any Elmbrook school graduation, at most, had to walk past religious materials. They certainly were never asked to kneel at the cross. Indeed, the only activity students were coerced to participate in was a secular graduation ceremony, not a religious ceremony. "[A] student who attends graduation in [a church] no more attends a religious ceremony than the cleaning crew when it sweeps the church's aisles."[47]

The distinguishable facts of *Santa Fe* also present an obstacle to the majority's flawed analysis. First, although *Santa Fe* did involve a student vote like the present case, the student vote concerned a blatant religious activity—the recitation of a student-led prayer before a school football game.[48] It was not about a choice of forum for a school activity, but a choice of an actual religious exercise endorsed by both school leaders and students. Second, unlike the student-led prayer involved in *Santa Fe*, neither the students nor the administrators in the case made any religious remarks directed toward the student body or the audience during the graduation ceremonies. Third, the Supreme Court made clear in *Santa Fe* that "religious rituals" are off-limits during school functions.[49] The lack of any type of school-initiated "religious ritual" in the graduation ceremonies is precisely what makes the chosen forum in *Elmbrook* entirely permissible.

The Seventh Circuit's faulty analysis will have far-reaching negative implications. Public schools are often plagued with assessing the delicate balance of the inevitable meeting between religion and students.[50] Holding that a school district effectively endorses religion and violates the Establishment Clause, by merely holding a completely secular graduation ceremony at a convenient venue outside the school further belies Establishment Clause jurisprudence. Moreover, finding "religious coercion" where a school district has not asked students to do anything more than attend their graduation ceremony constitutes an ill-advised departure from Supreme Court precedent. Put simply, where school administrators make absolutely no reference to religion nor request any student to engage in any religious ritual whatsoever, the Establishment Clause is not violated, which the Seventh Circuit should have undoubtedly recognized.

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46. *See id.* at 593 (stating that a high school student would be pressured into effectively participating in a religious ceremony by observing the social norms of standing or remaining silent during a religious exercise).

47. *Elmbrook*, 687 F.3d at 876 (Posner, J., dissenting).

48. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 297–98 (2000).

49. *Id.* at 312 (explaining that a school may not force a student to choose between attending a school function and participating in an "offensive religious ritual" permitted by the school).

50. *See, e.g.*, *Texas High School Cheerleaders Barred From Using Bible Verses on Football Banners*, CBSNEWS (Sept. 20, 2012), http://www.cbsnews.com/8301-201_162-57517189/texas-high-school-cheerleaders-barred-from-using-bible-verses-on-football-banners/.