2013 WL 267389 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

ELMBROOK SCHOOL DISTRICT, Elmbrook Joint Common School District No. 21, Petitioner,
v.
John DOE 3, A Minor, by Doe's Next Best Friend, Doe 2 et al., Respondents.

No. 12-755.
January 22, 2013.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

**Amicus Curiae Brief of Center for Constitutional Jurisprudence in Support of Petitioner**

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## *i QUESTIONS PRESENTED

1. Whether the Establishment Clause prohibits the government from conducting public functions such as high school graduation exercises in a church building, where the function has no religious content and the government selected the venue for reasons of secular convenience.

2. Whether the government "coerces" religious activity in violation of *Lee v. Weisman,* 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), where there is no pressure to engage in a religious practice or activity, but merely where unrelated religious symbols are present.

3. Whether the government "endorses" religion when it engages in a religion-neutral action in a location where unrelated religious symbols are present.

## *ii TABLE OF CONTENTS



## *iii TABLE OF AUTHORITIES

Cases

## *1 IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence,[1] is dedicated to upholding and restoring the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect religious liberties of all citizens and to encourage participation in religious activities as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry,* 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1 (2004); *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000).

The Center believes the issue before this Court is one of significance to the individual liberties and rights protected by the Constitution. The Establishment Clause was never meant to require government hostility toward religion. The First Amendment was meant to protect religious expression, not to outlaw it. The decision below, however, rules that a public school may have violated the Establishment Clause by renting a church building for ***2** a high school graduation ceremony, when the decision to rent was made on the basis of price, air conditioning, and the existence of comfortable seating. The school district's decision has no element of legal coercion of either the church or the students and thus lacks any semblance of an "establishment."

## SUMMARY OF ARGUMENT

As then Justice Rehnquist noted in his dissent in *Wallace v. Jaffree,* 472 U.S. 38, 92 (1985): "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." Yet, as several members of this Court have pointed out, current Establishment Clause law is constructed on the shaky edifice of at best a " mistaken understanding of constitutional history." The failure to come to terms with that history is why this Court's Establishment Clause jurisprudence is in such disarray and it is the reason that the court below came to such a fundamental mistaken conclusion.

Review is necessary to return to the understanding of the Establishment Clause as a protection of religious liberty rather than a tool for the eradication of religion and religious symbols. This requires some sense of what constituted "an establishment of religion" at the time the Establishment Clause was added to the Constitution and what the people intended to prohibit when they forbade Congress to make a "law respecting an establishment of religion." Religion was meant to be our first freedom. Modern Establishment Clause jurisprudence, however, treats religion as a national embarrassment - something to be hidden. At the very least, review should be granted in this case to put to rest any notion that religious ***3** symbols are themselves contrary to the Constitution.

## ARGUMENT

### I. THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE HAS NO BASIS IN THE ORIGINAL UNDERSTANDING OF THE FIRST AMENDMENT

The Court in *Everson v. Bd. of Educ. of the Twp. of Ewing,* 330 U.S. 1, 8 (1947), imagined that the terms of the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity." This view, however, is not supported by the historical record surrounding the adoption of the First Amendment.

A fair reading of the congressional proceedings concerning the Bill of Rights supports the conclusion that some of Madison's amendments, including those on religion, reflected Madison's understanding of what Professor Natelson terms "the Gentlemen's Agreement." Robert G. Natelson, The Original Meaning of the Establishment Clause, 14 Wm. & Mary Bill of Rts. J. 73, 86 (2005); Creating the Bill of Rights: The Documentary Record from the First Federal Congress 252 (Helen E. Veit et al. eds., 1991) (Letter from Tench Coxe to James Madison (June 18, 1789)). This is the

understanding that amendments would be proposed to the new federal constitution as a means of securing ratification. This so-called Gentlemen's Agreement is evidenced in newspaper articles, pamphlets, personal letters, and complete or partial transcripts of most of the state ratifying conventions ***4** documenting the roles of hundreds of actors expressing the concern that, among other things, the federal government would establish a religion contrary to those established by states. It became apparent that in order to secure ratification of the new Constitution over fears expressed by the anti-federalists and others, amendments would be required to make explicit that the new federal government could not exercise its powers in certain areas.

Religious freedoms were among the issues of concern raised in state ratifying conventions. The antifederalists argued that the proposed Constitution would give the federal government enough power to interfere not only with the free exercise of religion, but also the power to abolish existing state establishments in favor of a new federal establishment. Jonathan Elliot, 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 191 (2d ed. 1836); Freeman's Journal, Jan. 23, 1788, reprinted in 2 The Documentary History of the Ratification of the Constitution 1557-58 (Merrill Jensen et al. eds., 1976).

The Establishment Clause was enacted as a measure of structural federalism to forbid the new federal government from encroaching on an area already addressed in state constitutions. Indeed, for this reason, we have previously argued that the Establishment Clause was not a good candidate for incorporation via the 14th Amendment. *See* Brief of Amicus Curiae Center for Constitutional Jurisprudence, *Zelman,* 536 U.S. 639. Justice Thomas comprehensively addressed the point in his concurring opinion in the case, and we continue to believe that his analysis is correct. While state constitutions ***5** generally had provisions relating to religion, those provisions differed markedly from state to state. *See Zelman,* 536 U.S. at 678 (Thomas, J., concurring).

The Massachusetts Constitution urged the state's citizens "to worship the Supreme Being" while at the same time prohibiting government interference with religious societies or the "subordination of any one sect or denomination to another." The Constitutions of the Several Independent States of America 38 (Rev. William Jackson ed., 2d ed. 1783) (Mass. Const. Part I, § 2, 3 (1780)). By contrast, the Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." *Id.* at 246 (Md. Const, of 1776, § 35). Officeholders in Pennsylvania and Delaware were also required to confess a particular religious belief as part of their oath of office. *Id.* at 191 (Penn. Const, of 1776, Ch. 2, § 10), 229 (Del. Const, of 1776, § 22), 233 (Del. Const, of 1776, § 29).

By contrast, the New York state constitution guaranteed free exercise of religion "to guard against spiritual oppression and intolerance" from "wicked Priests and Princes." *Id.* at 162 (New York Const, of 1777, § 38). The New Jersey Constitution included an explicit protection against the use of tax funds for "building or repairing any church … or places of worship." *Id.* at 175 (New Jersey Const, of 1776, § 18).

It was these provisions that the anti-federalist feared that the new federal government would be able to override with a national religious orthodoxy, backed by the coercive legal power of the new federal government. In response to this fear, Madison proposed, among other provisions, his "no establishment" ***6** clause. Natelson, *supra,* at 138. Madison stated in his proposal that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Congress 451 (Joseph Gales ed., 1834).

Justice Rehnquist's dissent in *Wallace* makes this clear. The initial objection to the proposed language of the First Amendment was that the federal courts may use the amendment to interfere with state-established churches in New England. *Wallace,* 472 U.S. at 96 (Rehnquist, J., dissenting). Madison suggested inserting the word "national" before "religion" to make the intent clear - but this was objected to by those who argued that the Constitution created a "federal" rather than a "national" government." *Id.* at 96-97. Nonetheless, the intent was clearly expressed that the prohibition on establishments was a federalist measure designed to protect states from federal government interference. *Id.*

  

Perhaps because the courts have largely forgotten the federalist purpose of the Establishment Clause, they have also done little to consider what actually constitutes an establishment. The concept of establishment was, however, well understood at the time of the First Amendment. Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2107 (2003).

Contrary to the court below, the question of religious establishment had nothing to do with "divisiveness." *Cf. Doe v. Elmbrook School District,* 687 F.3d 840, 858 (7th Cir. 2012). Nor did the Founders intend to outlaw the "subtle pressure" one might feel ***7** by observing others "meditating on" visible religious symbols. *Cf., id.* at 855. Instead, the hallmark of an establishment at the Founding was *legal* coercion.

First and foremost that coercion was exercised over the religious institution, with the government dictating church doctrine and selecting church officials. McConnell at 2132. (Using this definition, the Free Exercise violation found by this Court last term in *Hosanna Tabor* was also an Establishment Clause violation. *Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.,* __ U.S. __, 132 S.Ct. 694, 706 (2012).) Coercion over individuals included required attendance at the established church's services and a prohibition on attending services of alternative churches. McConnell at 2131. Without legal coercion of either the church or the individual, however, there is no establishment. *See Newdow,* 542 U.S. at 52-53 (2004) (Thomas, J., concurring in the judgment).

By failing to look at the original meaning of the Establishment Clause, courts have been left to guess about its purpose and meaning. As demonstrated by the opinion below, those guesses are often mistaken. *See generally, Doe,* 687 F.3d at 856 (Establishment Clause was intended to prevent divisiveness), 861 (Hamilton, J., concurring) (Establishment Clause enacted in light of religious wars and was designed to protect against "division, exclusion, and worse.").

Based on this mistaken assumption of original meaning, many courts have supposed that the Establishment Clause was meant to prohibit religious activity in public buildings or secular activity on religious property. That supposition, of course, requires that we ignore more than two centuries of actual ***8** practice. As the members of the court below acknowledged, many communities use church property as voting stations and there is no concern that this use triggers Establishment Clause scrutiny. *Id.* at 860 (Hamilton, J., concurring); 868 (Ripple, J., dissenting); and 871 (Easterbrook, C.J., dissenting). This Court starts each session with a plea that "God save this Honorable Court." *Newdow,* 542 U.S. at 29 (Rehnquist, C.J., concurring). Congress continues to employ chaplains that open sessions with a prayer (*Wallace,* 472 U.S. at 84-85 (Burger, C.J., dissenting) and the President of the United States takes the oath of office by placing his hand on a Bible (*Myers v. Loudoun County Public Schools,* 418 F.3d 395, 404 n.10 (4th Cir. 2005)). None of these are new practices.

The founding generation viewed religion as necessary to civil society and a properly functioning government. Zabdiel Adams, the cousin of both John and Samuel Adams, declared that "religion and morality among the people, are an object of the magistrate's attention. As to religion, they have no farther call to interpose than is necessary to give a general encouragement." Zabdiel Adams, An Election Sermon, Boston, 1782, in 1 Charles S. Hyneman & Donald S. Lutz, American Political Writing During the Founding Era, 1760-1805, 556 (1983). George Washington's Farewell Address cautioned the country from erroneously thinking the government could function without religion among the people, and urged politicians and citizens alike "to respect and to cherish" religion. George Washington, Farewell Address, Sept. 19, 1796, 35 The Writings of George Washington From the Original Manuscript Sources 229 (John C. Fitzpatrick ed., 1931). And Daniel ***9** Shute, an advocate of the new federal constitution at Massachusetts' ratifying convention, presented that era's views on religion's link to the public good when he stated:

> The great advantages accruing from the public social worship of the Deity may be a laudable motive to civil rulers to exert themselves to promote it … there is indeed such a connection between them [church and state], and their interest is so dependent upon each other, that the welfare of the community arises from things going well in both; and therefore both, though with such restrictions as their respective nature requires, claim the attention and care of the civil rulers of a people, whose duty it is to protect,

> and foster their subjects in the enjoyment of their religious rights and privileges, as well as civil, and upon the same principle of promoting their happiness.

Daniel Shute, An Election Sermon, Boston, 1768, in 1 Charles S. Hyneman & Donald S. Lutz, *supra,* at 120.

The Founders' actions matched their words. Benjamin Franklin recalled that the First Continental Congress held daily prayer. 1 The Records of the Federal Convention of 1787, at 451-52 (Max Farrand ed., 1911). During the War of Independence General Washington sought funds to hire military chaplains of every denomination for his troops, and was upset when the Continental Congress planned to appoint chaplains at the brigade rather than the smaller regimental level because it "in many instances would compel men to a mode of Worship which they do not ***10** profess." Letter from George Washington to the President of Congress, June 8, 1777, in 8 Fitzpatrick, supra, at 203.

In the early republic, the Halls of Congress were used for worship services on Sundays, and there are chapels in the Capitol where Members of Congress can offer a prayer. *Wallace* 472 U.S. at 85 (Burger, C.J., dissenting). Thomas Jefferson attended weekly church services that were held in the House of Representatives. James H. Hutson, Church and State in America (Cambridge Univ. Press (2008)) at 185. Further, President George Washington and nearly every other president issued a Thanksgiving proclamation encouraging prayers of thanks. *Lee v. Weisman,* 505 U.S. 577, 635 (1992) (Scalia, J., dissenting). "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history." *Wallace,* 472 U.S. at 92 (Rehnquist, J., dissenting). Yet the Court's doctrine in this area more often than not ignores that history.

Instead of looking to this history, courts are asked to focus on the "unusually informed observer" to determine if some message of religious favoritism might be perceived. *Van Orden* 545 U.S. at 696 (Thomas, J., concurring). The court below did just that, noting that high school graduates and their "younger siblings" would understand that the Latin Cross in the church was, according to Thomas Aquinas in the Summa Theologica, intended to "invite veneration by adherents." *Doe,* 687 F.3d at 852.

Unless the Court's purpose is to outlaw all public expressions of faith and religious symbols, our Establishment Clause jurisprudence cannot stand on the supposition that a high school student's younger ***11** sibling has read the Summa Theologica and that they will take offense at a Latin Cross. Such a "view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history." *County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573, 655 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part). This Court should grant review in order to begin to build a sound constitutional doctrine for the Establishment Clause - one that is based on the correct understanding of constitutional history.

## II. THE CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE FAILS TO GUIDE LOWER COURTS

This Court's Establishment Clause jurisprudence has been described as being "in hopeless disarray." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 861 (1995) (Thomas, J., concurring). In the court below, Chief Judge Easterbrook noted: "If the current establishment-clause doctrine had been announced by Congress or an administrative agency, the Supreme Court would declare it unconstitutionally vague." *Doe,* 687 F.3d at 869 (Easterbrook, CJ, dissenting).

Judge Easterbrook went on to note that the tests that this Court has handed to the lower federal courts are "hopelessly open-ended." *Id.* In a similar vein, Judge Posner complained: "The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance." *Id.* at 872 (Posner, J., dissenting). Aside ***12** from being

  

contrary to the original meaning of the Establishment Clause, the Establishment Clause jurisprudence of *Lemon* and the "endorsement" test are simply of no help to lower courts.

Members of this Court have expressed dissatisfaction with *Lemon* and the so-called "endorsement" test. Justice Kennedy cited some of the major criticism more than two decades ago in his opinion concurring in the judgment in part and dissenting in part in *Allegheny.* 492 U.S. at 655-56 (Kennedy, J. concurring in the judgment in part and dissenting in part) (noting that "persuasive criticism of *Lemon* has emerged."). In that opinion, Justice Kennedy noted that he dissented from the view that the Establishment Clause required government hostility to religion. Yet, as the decision below demonstrates, little has changed in the near quarter-century since *Allegheny.*

Justice Kennedy returned to this criticism in his opinion concurring in part and concurring in the judgment in *Lamb's Chapel v. Center Moriches Union School Dist.,* 508 U.S. 384 (1993). There he noted that the majority's citation to *Lemon,* as well as its examination of government conduct to ferret out endorsement of religion, was "unsettling." *Id.* at 597 (Kennedy, J. concurring in part and concurring in the judgment). Justice Scalia in an opinion in that same case referred to *Lemon* as "ghoul in a late-night horror movie that repeatedly sits up in its grave." *Id.* at 398 (Scalia, J., concurring in the judgment).

The problem, as Chief Justice Rehnquist noted, is that the Court's precedent fails to provide sufficient guidance. The *Lemon* test, in particular, is not particularly "useful" in judging passive displays. ***13** *Van Orden,* 545 U.S. at 685. Any attempt to apply a test forbidding government "endorsement" of religion must ultimately fail in light of the nation's " 'unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.' " *Id.* at 686. Just last term, Justice Thomas noted that both the *Lemon* and the endorsement tests "are so utterly indeterminate that they permit different courts to reach inconsistent results." *Utah Highway Patrol Association v. American Atheist,* __ U.S. __, 132 S.Ct 12, 17 (2011) (Thomas, J. dissenting for denial of certiorari). Justice Thomas went on to document those different results for what appeared to be the same display.

If the Court's rulings are meant to guide the lower courts in their consideration of Establishment Clause claims, the members of this Court have acknowledged the failure of that purpose. If we strip away the purported reliance on *Lemon* and the endorsement test, we have a classic split in the circuits in how to apply the Establishment Clause - a split that has existed for far too long. It is past time for this Court to return the Establishment Clause to its historical purpose of prohibiting government coercion of churches or individuals. This case is the perfect vehicle to begin that task.

## *14 CONCLUSION

The school district rented this facility at the request of the students because it had comfortable seating and air conditioning. No one should expect that church to hide all religious symbols or books, nor should a government that purports to respect religious freedom even consider such a requirement. This Court should grant the Petition for Writ of Certiorari.

Footnotes

1 Pursuant to this Court's Rule 37.2(a), all parties have filed blanket consents with the Clerk. All parties were given notice of this brief more than 10 days prior to filing.
Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.