LIBERTY COUNSEL

DISTRICT OF COLUMBIA
109 Second Street NE
Washington, DC 20002
Tel 202-289-1776
Fax 407-875-0770
LC.org

FLORIDA
PO Box 540774
Orlando, FL 32854
Tel 407-875-1776
Fax 407-875-0770

VIRGINIA
PO Box 11108
Lynchburg, VA 24506
Tel 407-875-1776
Fax 407-875-0770
Liberty@LC.org

REPLY TO FLORIDA

May 16, 2023

By e-mail only to: mcduffieb@duvalschools.org
Brian K. McDuffie, Esq.
Executive Director, Policy & Compliance
And Ex Officio Agency Clerk
Duval County Public Schools—Office of Policy and Compliance
1701 Prudential Drive
Jacksonville, Florida 32207

Re: Use of Religious Facilities for Duval County Public Schools Events is Constitutional

Dear Mr. McDuffie:

Introduction

Liberty Counsel is a national non-profit litigation, education, and public policy organization with an emphasis on First Amendment religious liberty issues. We have been contacted by several concerned citizens in Jacksonville regarding the policy of Duval County Public Schools (DCPS) to prohibit the use of churches or other religious facilities for any DCPS event. Your recent communication of this policy to all DCPS principals has resulted in the abrupt cancelation of numerous school events scheduled to be held in community churches, including long-running and annually recurring events like graduation ceremonies. The policy announcement also jeopardizes numerous long-standing community partnerships between faith organizations and schools that directly benefit DCPS students and staff. As shown below, this DCPS policy is overly restrictive and out of line with binding Supreme Court precedent.

Discussion

In an e-mail communication to all DCPS principals dated May 12, 2022, you advised that it is the policy of the District that "schools should not use religious facilities for DCPS events" to avoid violating the Establishment Clause of the First Amendment to the United States Constitution. Though not identified by name, the offered legal justification for the DCPS policy is a 2012 case from the United States Court of Appeals for the Seventh Circuit, *Doe v. Elmbrook School District,* 687 F. 3d 840 (7th Cir. 2012), in which the court, according to your

e-mail, "adopted a particularly restrictive view of the Establishment Clause and the line between church and state." As you explained, even though the Elmbrook School District had decided to rent a church facility for its high school graduations for purely secular reasons (i.e., larger, air-conditioned building with comfortable seats instead of cramped school gymnasium with no air conditioning or other, more expensive offsite locations), the Seventh Circuit "[n]onetheless . . . decided that the environment compelled the conclusion that the district endorsed the religious message" of the church.

You rightly noted that the United States Supreme Court declined to review the Seventh Circuit's *Elmbrook* decision. The Supreme Court, however, did not give reasons for its denial of review, and such denials do not indicate the correctness of the lower court's decision. To be sure, in a dissent from the Supreme Court's denial of review, Justice Scalia, joined by Justice Thomas, explained that the Seventh Circuit's decision should be reversed because it was based on an "endorsement test" for Establishment Clause violations—a prong of the infamous *Lemon* test—which the Supreme Court had since abandoned in *Town of Greece v. Galloway*, 572 U.S. 565 (2014). *See Elmbrook Sch. Dist. v. Doe*, 573 U.S. 922, 922 (2014) (Scalia, J., dissenting).

Though Justice Scalia's *Elmbrook* dissent is not itself binding precedent, just last Term a majority of the Supreme Court vindicated Justice Scalia's view of the *Lemon* test and its derivative "endorsement test" in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). Writing for the *Kennedy* majority, Justice Gorsuch explained:

> To be sure, in *Lemon* this Court attempted a grand unified theory for assessing Establishment Clause claims. That approach called for an examination of a law's purposes, effects, and potential for entanglement with religion. In time, the approach also came to involve estimations about whether a reasonable observer would consider the government's challenged action an endorsement of religion.
>
> However . . . this Court long ago abandoned *Lemon* and its endorsement test offshoot. The Court has explained that these tests invited chaos in lower courts, led to differing results in materially identical cases, and created a minefield for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a modified heckler's veto, in which religious activity can be proscribed based on perceptions or discomfort. An Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor private religious speech. Nor does the Clause compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious. In fact, just this Term the Court unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test.

142 S. Ct. at 2427-28 (cleaned up).

The case Justice Gorsuch referred to, in which the Court had "unanimously rejected a city's attempt to censor religious speech based on *Lemon* and the endorsement test," was the Liberty Counsel case *Shurtleff v. City of Boston*, 142 S. Ct. 1583 (2022). In *Shurtleff*, the City of Boston had relied on *Lemon* to exclude a Christian flag from a public forum the city ostensibly had opened to "all applicants." The Court unanimously rejected Boston's *Lemon* rationale for its unconstitutional religious viewpoint discrimination. Foreshadowing his majority opinion in *Kennedy*, Justice Gorsuch's *Shurtleff* concurren eulogized *Lemon*:

> How did the city get it so wrong? To be fair, at least some of the blame belongs here and traces back to *Lemon* . . . . Issued during a bygone era when this Court took a more freewheeling approach to interpreting legal texts, *Lemon* sought to devise a one-size-fits-all test for resolving Establishment Clause disputes. That project bypassed any inquiry into the Clause's original meaning. It ignored longstanding precedents. And instead of bringing clarity to the area, *Lemon* produced only chaos. In time, this Court came to recognize these problems, abandoned *Lemon*, and returned to a more humble jurisprudence centered on the Constitution's original meaning. Yet in this case, the city chose to follow *Lemon* anyway. It proved a costly decision, and Boston's travails supply a cautionary tale for other localities and lower courts.[1]
>
> * * *
>
> To justify a policy that discriminated against religion, Boston sought to drag *Lemon* once more from its grave. It was a strategy as risky as it was unsound. *Lemon* ignored the original meaning of the Establishment Clause, it disregarded mountains of precedent, and it substituted a serious constitutional inquiry with a guessing game. This Court long ago interred *Lemon*, and it is past time for local officials and lower courts to let it lie.

142 S. Ct. at 1603–04, 1610 (Gorsuch, J., concurring) (cleaned up).[2]

With *Lemon* retired, and exactly as Justice Scalia had previously explained in his *Elmbrook* dissent, the *Kennedy* Court confirmed that the *Town of Greece* decision provides the correct constitutional test under the Establishment Clause:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully

[1] Boston paid Liberty Counsel $2.1 million in prevailing party attorney's fees and costs.

[2] In addition to its successful advocacy overcoming *Lemon* in *Shurtleff*, Liberty Counsel filed an amicus brief in *Kennedy* urging the overruling of *Lemon*. Liberty Counsel summarizes the effects of its successful advocacy against *Lemon* at LC.org/lemon.

> reflect the understanding of the Founding Fathers. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.

Kennedy, 142 S. Ct. at 2428 (cleaned up) (citing, *inter alia*, *Town of Greece*).

Returning, then, to Justice Scalia's *Elmbrook* dissent, which *Kennedy* now cements as the correct view of the Establishment Clause, it is clear that a church's hosting a public school graduation ceremony accords perfectly with historical practices and understandings under the Establishment Clause and, thus, does not violate the constitution:

> As the Supreme Court of Wisconsin explained in a 1916 case challenging the siting of public high-school graduations in local churches:
>
> > A man may feel constrained to enter a house of worship belonging to a different sect from the one with which he affiliates, but if no sectarian services are carried on, he is not compelled to worship God contrary to the dictates of his conscience, and is not obliged to do so at all.

Elmbrook Sch. Dist., 573 U.S. at 922 (Scalia, J., dissenting) (cleaned up).

Conclusion

The Seventh Circuit's *Elmbrook* decision was wrong when decided—as explained then by Justice Scalia, and confirmed now by the Supreme Court's binding decision in *Kennedy*. Under the correct constitutional test, holding a DCPS event in a church building does not, in and of itself, violate the Establishment Clause. It is neither endorsive nor coercive for a school to hold an event in a church for reasons unrelated to the religious mission of the church (e.g., cost, space, comfort, availability, tradition, etc.). Moreover, the sudden banning of long-running and annually recurring DCPS events *solely* because they are located on curch properties—and the resulting jeopardy for valuable, long-standing community partnerships—is hostile to religion in the eyes of community members for whom these events have become familiar and important traditions for nonreligious reasons.[3] The same rules that apply to the

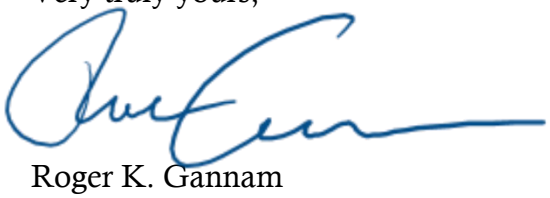
[3] *See, e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2084–85 (2019) ("When time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. Militantly secular regimes have carried out such projects in the past, and for those with a knowledge of history, the image of monuments being taken down will be evocative, disturbing, and divisive." (cleaned up)).

conduct and content of a DCPS event in a school or secular offsite facility (e.g., regulating graduation prayer[4]) can be applied to a DCPS event in a church or other religious facility. Thus, a blanket policy allowing no DCPS events in religious facilities is unnecessarily restrictive and out of line with the binding constitutional precedent of the Supreme Court.

Liberty Counsel hopes this analysis persuades DCPS to align its policies with current law and discard its unnecessarily restrictive policy based on outdated precedent. DCPS should restore schools' abilities to hold events—especially long-running and annually recurring events like graduation ceremonies—in the facilities of churches or other religious organizations that have been and remain eager to provide the benefit of free or low-cost space to the schools in their communities. The Establishment Clause does not prohibit such community cooperation, and, as you observed, there are "compelling" reasons to allow it.

Please let me know if we can be of any further assistance.

Very truly yours,



Roger K. Gannam
Asst. Vice President of Legal Affairs
LIBERTY COUNSEL

c: The Honorable Dr. Kelly Coker| cokerk@duvalschools.org
The Honorable April Carney| carneya1@duvalschools.org
The Honorable Cindy Pearson| pearsonc1@duvalschools.org
The Honorable Darryl Willie| willied@duvalschools.org
The Honorable Warren A. Jones | jonesw2@duvalschools.org
The Honorable Charlotte Joyce | joycec@duvalschools.org
The Honorable Lori Hershey | hersheyl@duvalschools.org

[4] In *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), Liberty Counsel joined DCPS in successfully defending a graduation prayer policy against an Establishment Clause challenge.