Case No. 13-5957

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN B. SMITH, DAVID KUCERA AND VICKIE F. FOGARTY,

Plaintiffs-Appellees

v.

JEFFERSON COUNTY BOARD OF SCHOOL COMMISSIONERS,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE SUPPORTING DEFENDANT-APPELLANT AND REVERSAL

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Amicus, American Center for Law and Justice, makes the following disclosures:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation?

ANSWER: No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

ANSWER: No.

/s/ Jay Alan Sekulow Date: October 28, 2013
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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus 1

Argument 2

I. The Establishment Clause Allows Religious Institutions To Receive Public Funding For Performing Secular Purposes, and the District Court's Decision that the Kingswood School's Religious Identity Disqualified It From Running the Alternative School Does Far Greater Damage to the Establishment Clause's Neutrality Principle than the Risk of Misperceived Endorsement of Religion. 3

II. The Reasonable Observer Understands the History and Context of the Relationship Between the Kingswood School and the School Board, as well as the Difference Between Private Speech And Government Speech. ...7

Conclusion 14

Certificate of Compliance 15

Certificate of Service 16

TABLE OF AUTHORITIES

Cases

ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289 (6th Cir. 2001) 11–13

Agostini v. Felton, 521 U.S. 203 (1997) 3–4

Aguilar v. Felton, 473 U.S. 402 (1985) 4

Am. Atheists Inc. v. City of Detroit Downtown Dev. Auth., 567 F.3d 278 (6th Cir. 2009) 2, 7

Ams. United for Separation of Church & State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) 11

Bd. of Educ. of Westside Cmty. Schs. v. Mergens, 496 U.S. 226 (1990) 7, 9

Bowen v. Kendrick, 487 U.S. 589 (1988) 3–7

Bradfield v. Roberts, 175 U.S. 291 (1899) 5

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 8–11

Doe v. Elmbrook Sch. Dist., 687 F.3d 840 (7th Cir. 2012) 7–8

Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1 (1947) 2, 9

Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) 9, 11

Kendrick v. Bowen, 657 F. Supp. 1547 (D.D.C. 1987) 6

Kucera v. Jefferson Cty. Bd. of Sch. Comm'rs, 2013 U.S. Dist. LEXIS 95108 (July 9, 2013) 3, 8

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2

McCreary County v. ACLU, 545 U.S. 845 (2005) 2

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) 1, 10

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 2, 13

Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) 4–5

Sherbert v. Verner, 374 U.S. 398 (1963) 2

Steele v. Indus. Dev. Bd. of Metro. Gov't of Nashville, 301 F.3d 401 (6th Cir. 2002) 12

Van Orden v. Perry, 545 U.S. 677 (2005) 1

Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (2003).....................................3

Zorach v. Clausen, 343 U.S. 306 (1952) 4

INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving the Free Speech and Establishment Clauses. *See, e.g., Pleasant Grove City v. Summum,* 555 U.S. 460 (2009) (counsel of record*); Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000) (counsel of record)*; Van Orden v. Perry*, 545 U.S. 677 (2005) (amicus curiae). The ACLJ has developed a special expertise in this area which would be of benefit to resolving the issues concerning the Jefferson County Board of School Commissioners' contract with Kingswood.

Amicus is concerned about the proper resolution of this case because it opposes the notion that the private speech of religious organizations must be deemed a governmental endorsement of religion whenever it is possible that some observers might misperceive it that way.

[1] Defendant-Appellant consented to the filing of this amicus brief but Plaintiffs-Appellees declined to consent. Amicus therefore is moving for leave to submit this brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The governing principle of the Establishment Clause is neutrality. *McCreary County v. ACLU*, 545 U.S. 845, 860 (2005); *Am. Atheists Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 288–89 (6th Cir. 2009). "'Neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation" under the Establishment Clause. *McCreary*, 545 U.S. at 876 (quoting *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting)); *see also Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) (cautioning that an "untutored devotion to . . . neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious"). Neutrality thus means that "some relationship between government and religious organizations is inevitable," *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), and that "the state is not required to be the adversary" of religious groups. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947).

The lower court's holding that the Establishment Clause forbids the Jefferson County Board of School Commissioners' (School Board) from contracting with Kingswood, a religious institution, for operation of the Alternative School violates the neutrality principle.

I. The Establishment Clause Allows Religious Institutions To Receive Public Funding For Performing Secular Purposes, and the District Court's Decision that the Kingswood School's Religious Identity Disqualified It From Running the Alternative School Does Far Greater Damage to the Establishment Clause's Neutrality Principle than the Risk of Misperceived Endorsement of Religion.

The district court held that "a reasonable observer would see the Board's decision to contract with a self proclaimed 'religious institution' as an unconstitutional message of religious endorsement." *Kucera v. Jefferson Cty. Bd. of Sch. Comm'rs*, 2013 U.S. Dist. LEXIS 95108 (July 9, 2013), at *18. Implicit in the court's holding is the premise that religious institutions,[2] or at least those that do not purge all evidence of their religious identity, are disqualified from collaborating with the government in operating educational and social welfare programs. The lower court adopted reasoning which the Supreme Court repudiated years ago in *Agostini v. Felton*, 521 U.S. 203, 217–18 (1997), and *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (2003) ("We have never said that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs.") (citation omitted).

[2]Amicus assumes for the sake of this discussion that Kingswood is a religious institution, and takes no position on the underlying factual issue presented in this case.

At issue in *Agostini* was a federally funded program providing remedial instruction to underprivileged children at religious schools. *Agostini* overruled the Court's companion decisions in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Of particular relevance to this case, the Court repudiated *Ball's* holding that providing federally funded educational services on sectarian school premises created a "symbolic link between government and religion" which "is sufficiently likely to be perceived by adherents of the controlling denomination as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." 473 U.S. at 390. The *Ball* Court indicated that had the same programs been conducted away from the religious school premises, they would have been upheld. *Id*. at 390–91 (citing *Zorach v. Clausen*, 343 U.S. 306 (1952)).

The *Agostini* Court rejected that reasoning as "neither sensible nor sound." 521 U.S. at 228.

> Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside.

Id. at 227–228.

Similarly, in *Bowen v. Kendrick*, the Court also rejected the *Ball* Court's reasoning that government endorsement of religion occurs whenever the government contracts with a religious institution to perform secular functions.

> To the contrary, in *Bradfield v. Roberts*, 175 U.S. 291 (1899), the Court upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a new building on the grounds of the hospital. In effect, the Court refused to hold that the mere fact that the hospital was "conducted under the auspices of the Roman Catholic Church" was sufficient to alter the purely secular legal character of the corporation, *id.*, at 298, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter. In the Court's view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was "wholly immaterial." *Id.*[3]

487 U.S. at 609.

Although *Bowen* did not arise in the context of a public school, it did involve a contractual relationship between religious organizations and government for the performance of social services to adolescent minors. The federal statute at issue in *Bowen* allocated funds to organizations that provided counseling and other social programs to deter adolescent sexual activity. *Id.* at 593–94. Some of the participating organizations were religious, and the recipients of the counseling and other social programs were primarily teenaged minors. *Id*. Relying on *Ball*, the

[3] Although not discussed in the opinion, it is of course highly unlikely that the Catholic hospital in *Bradfield* would have removed all crucifixes and other evidence of its identity as a Catholic institution.

district court in *Bowen* had ruled that allocating federal funds to religious organizations created a symbolic link between government and religion and thereby violated the Establishment Clause. *Kendrick v. Bowen*, 657 F. Supp. 1547, 1564 (D.D.C. 1987).

The Supreme Court rejected the district court's logic:

> If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible "symbolic link" could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a "symbolic link" between the hospital -- part of whose "religious mission" might be to save lives -- and whatever government entity is subsidizing the purely secular medical services provided to the patient.

487 U.S. at 613. Additionally, the Court held that Congress's "judgment [about] the important part that religion or religious organizations may play in resolving" the social problem of teen sexual activity did not have the effect of advancing religion. *Id*. at 607.

> It seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children. To the extent that this congressional recognition has any effect of advancing religion, the effect is at most "incidental and remote."

Id. The Court concluded that Congress had successfully maintained "'a course of neutrality among religions, and between religion and nonreligion.'" *Id*.

If Congress could constitutionally decide that religious organizations have a role to play in addressing the social problems associated with teen sexual activity, the Jefferson County School Board could constitutionally decide that a religious organization has a role to play in providing educational services to children with behavioral problems. Of course, the School Board did *not* consider Kingswood's religious identity at all in the decision to contract with it for the Alternative School. The School Board's sole motivation was financial, and therefore it even more "successfully maintained a course of neutrality between religion and nonreligion." *Id*.

II. The Reasonable Observer Understands the History and Context of the Relationship Between the Kingswood School and the School Board, as well as the Difference Between Private Speech And Government Speech.

The District Court misapplied the reasonable observer test, first by attributing the private speech of Kingswood to the School Board, and second by ignoring that the reasonable observer would know that the School Board had contracted with Kingswood solely for economic reasons.

The Supreme Court and this Circuit have recognized that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.); *American*

Atheists Inc., 567 F.3d at 294.[4] Where the Supreme Court "has tested for endorsement of religion, the subject of the test was either expression by the government itself, or else government action alleged to discriminate in favor of private religious expression or activity." *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 764 (1995).

This case involves neither government speech nor governmental favoritism toward religion. The speech that evoked the District Court's conclusion that the School Board endorsed Kingswood's religious beliefs was indisputably the private speech of Kingswood. Notwithstanding that there were no religious symbols or messages in the building where the students were taught, the court found that a bible verse and a cross on certain Kingswood documents and occasional student assemblies in the school chapel suggested "'actual' or 'perceived' endorsement of

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[4] The District Court erred in relying so extensively on the Seventh Circuit's decision in *Doe v. Elmbrook Sch. Dist*., 687 F.3d 840 (7th Cir. 2012). In contrast to the Seventh Circuit, this Court has held that private speech should not be attributed to a neutrally acting government by the reasonable observer. *Am. Atheists, Inc.*, 567 F.3d at 294.

In any event, the Elmbrook School District has filed a petition for certiorari, *see* 81 U.S.L.W. 3371 (U.S. Dec. 20, 2012) (No. 12-755), and the Supreme Court is holding the Petition in *Elmbrook* pending its decision in *Town of Greece v. Galloway*, 133 S. Ct. 2388 (2013) (Petition for Cert. granted), another Establishment Clause case in which the parameters of the endorsement test may be addressed. If this Court determines that the Seventh Circuit's decision in *Elmbrook* bears on this case, it should stay the case until the Supreme Court rules in *Town of Greece* and takes further action on the *Elmbrook* Petition.

the Christian faith." 2013 U.S. Dist. LEXIS 95108 at *24. The implication is that the School Board's "unconstitutional endorsement" might have been cured had Kingswood purged or the School Board censored these expressions of Kingswood's religious identity. Requiring a religious organization to self-censor all evidence of its religious identity in order to collaborate with the government in providing social and educational services would manifest the very hostility toward religion that the Establishment Clause forbids. *See Everson*, 330 U.S. at 18.

Additionally, the Supreme Court has rejected the idea that the Establishment Clause forbids private speech endorsing religion on public school property. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (courts need not operate "under the assumption that any risk that small children would perceive endorsement should counsel in favor" of striking down a collaboration between a public institution and religious organization); *Mergens*, 496 U.S. at 250. Moreover, "[a]ttribut[ing] to a neutrally behaving government private religious expression has no antecedent in this Court's jurisprudence, and would better be called a 'transferred endorsement' test." *Pinette*, 515 U.S. at 764. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250.

Had the School Board selected Kingswood because of its religious identity, there might be a more plausible argument that Kingswood's private speech should

be attributed to the School Board. Kingswood's identity as a religious school was, however, irrelevant to the School Board's decision. There is no dispute that the School Board chose Kingswood as the only financially viable option for preserving the Alternative School.

For this reason, the district court's reliance on *Santa Fe*, 530 U.S. 290, is misplaced. The fatal flaw in *Santa Fe* was that the School District did not act neutrally with respect to religious speech. The Court concluded that the history and context of the School District's policy, as well as the policy itself, demonstrated that the School District encouraged prayer at the high school football games. The Court held that the reasonable observer, who would be aware of the history and context of the School District's policy, would have perceived an endorsement of religion. *Id.* at 308–09. By contrast, there is no policy at issue here. The School Board did nothing to encourage or promote the de minimus religious speech on some of Kingswood's property. Rather, as the Establishment Clause requires, the School Board maintained neutrality, neither promoting nor censoring the message.

But even assuming that the endorsement test may be applied to private religious speech, the test requires the court to focus not on the "actual perceptions of individual observers" but on a "more collective standard to gauge the objective

meaning of the government's statement in the community." *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). As the architect of the endorsement test explained:

> "[W]e do not ask whether there is *any* person who *could* find an endorsement of religion . . . or whether *some* reasonable person *might* think [the State] endorses religion." . . . There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.

Id. (quoting *Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1554 (6th Cir. 1992)) (en banc) (emphasis added). Instead, the Court's concern is for "the political community writ large," and it has refused to "employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious speech can be proscribed on the basis of what the youngest members of the audience might misperceive." *Milford*, 533 U.S. at 119. Thus, the reasonable observer is deemed aware of the history and context of the location where the religious speech occurs. *Id.* (citing *Pinette*, 515 U.S. at 779-80 (O'Connor, J., concurring)).

This Court has correctly held that the reasonable observer is not the ill-informed citizen who perceives a governmental endorsement wherever religious speech occurs on government property. Rather, the reasonable observer has a very high level of knowledge of the history and context of the speech in question as well as other areas that may bear on the issue. *ACLU of Ohio v. Capitol Square Review &*

Advisory Bd., 243 F.3d 289, 300 (6th Cir. 2001). In holding that the reasonable observer would not see a governmental endorsement of religion in the state motto, "With God, all things are possible," this Court said:

> As a matter of law, . . . it may well be that the reasonable observer ought to be deemed to know about Secretary Brown's press releases and other official literature identifying the source of the motto, as well as being credited with detailed knowledge of the text of the New Testament, plus some familiarity with the religious and philosophical traditions of the various peoples, ancient and modern, who have contributed to the religious, cultural and philosophical heritage of the State of Ohio.

Id. at 303; *see also Steele v. Indus. Dev. Bd. of Metro. Gov't of Nashville*, 301 F.3d 401, 416–17 (6th Cir. 2002) (stating that the reasonable observer was familiar with the history and context of the program and would view it as an "undertaking to finance economic development, not as an endorsement of religious schooling in general").

In this case, the reasonable observer would know that religious neutrality is required, and that the School Board's decision was based solely on a desire to preserve the Alternative School at the cheapest available venue. The reasonable observer would also know that the School Board's programs carried out by Kingswood were kept distinct from Kingswood's religious mission, that only state teachers taught secular courses to the students, and that there were no religious messages or symbols in the students' classrooms. The reasonable observer would not attribute Kingswood's religious speech to the School Board any more than she

would have thought that the School Board endorsed French cuisine had the Alternative School been moved to a Cordon Bleu school for strictly financial reasons.

The district court's decision reflects "a brooding and pervasive devotion to the secular," which this Court has recognized as a "pervert[ion] of our history." *ACLU of Ohio*, 243 F.3d at 300 (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)). The Supreme Court's Establishment Clause cases support certain relationships between government and religious institutions where, as here, the religious institution provides purely secular services. When students are not compelled to take part in religious activity or subject to religious indoctrination, and are only minimally exposed to evidence of Kingswood's religious identity, an informed reasonable observer would not see the School Board's contract with Kingswood as an endorsement of religion.

CONCLUSION

For the foregoing reasons, Amicus respectfully asks this Court to reverse the District Court's judgment.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Amicus Curiae Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that, relying on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 3,133 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned counsel also certifies that the foregoing Amicus Curiae Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) in that the brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

/s/ Jay Alan Sekulow
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CERTIFICATE OF SERVICE

In compliance with Fed. R. App. P. 25 and 6 Cir. I.O.P. 25, I hereby certify that on this 28th day of October, 2013, I electronically filed the foregoing Amicus Curiae Brief with the Clerk of the Court by using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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