Written by **Jack Kenny** on June 17, 2014

High Court Won't Hear Appeal of Ban on School Graduation in Church

Does holding a public high school graduation in a church building violate the First Amendment ban on an establishment of religion? It's a question the U.S. Supreme Court chose not to answer, announcing Monday it would not hear an appeal from the Elmbrook School District in Wisconsin of a court order banning the holding of its commencement ceremony in Elmbrook Church, home of an evangelical Christian congregation. The decision lets stand a 2012 ruling by the Seventh Circuit court of Appeals in Chicago that the arrangement established an unconstitutional "link" between church and state.

School administrators said they chose the church for the event because of its comfortable seats, air conditioning, and ample parking. But a 10-judge panel of the Seventh Circuit Court said the intent of the school officials was outweighed by the heavy presence of religious symbols in the church, including a large cross and the presence of Bibles and hymnals in the pews. Writing for the seven-judge majority, Judge Joel M. Flaum found "the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state."

The Supreme Court did not say why it would not take the case, but Justice Antonin Scalia, joined by Justice Clarence Thomas, filed a dissent saying the court should have either heard the appeal or remanded the case for reconsideration in light of last month's Supreme Court decision allowing prayers at town board meetings. Scalia gave a strong indication of how he would have voted on the case, saying he could understand how some attending a school graduation in a church might find the religious symbols offensive.

"I can understand that attitude: It parallels my own toward the playing in public of rock music or Stravinsky," he wrote. "And I, too, am especially annoyed when the intrusion upon my inner peace occurs while I am part of a captive audience, as on a municipal bus or in the waiting room of a public agency." But, Scalia said, that does not make the intrusion a constitutional issue.

"It is perhaps the job of school officials to prevent hurt feelings at school events," he wrote. "But that is decidedly not the job of the Constitution."

Concerning religion, the First Amendment says only: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…" Over time the Supreme Court has ruled that the Fourteenth Amendment guarantee that states shall provide due process and equal protection of the laws makes the First Amendment and other guarantees in the Bill of Rights binding on state and local governments as well. And while the Amendment does not speak of "separation," the Court has at times substituted Jefferson's metaphor of a "wall of separation" between church and state

for the amendment's "establishment of religion." Jefferson, who was not part of the Constitutional Convention (He was in Paris as ambassador to France at the time), used the phrase in an 1802 letter he wrote as president to the Danbury Baptist Association of Connecticut in response to the ministers' distress over the establishment of the Congregational religion in their state. Connecticut disestablished the church in 1818.

Legal battles over what "separation" requires and what constitutes an unconstitutional "entanglement" of religion and state have produced frequently conflicting decisions by the Supreme Court and lower federal courts since at least 1947, when the Supreme Court ruled in *Everson v. Board of Education* that the use of tax dollars for the transportation of children to parochial schools was unconstitutional. While Justice Hugo Black wrote for the Court majority of a First Amendment "wall between Church and State which must be kept high and impregnable," Justice William Douglas wrote for the Court five years later that the establishment clause does not require such a barrier in all matters. "Otherwise the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly," Douglas wrote in *Zorach v. Clauson*, finding that allowing "released time" for public school students to leave school for religious instruction elsewhere did not violate the First Amendment.

"We are a religious people whose institutions presuppose a Supreme Being," wrote Douglas, one of the Court's leading liberals. Government, he added, "respects the religious nature of our people and accommodates the public service to their spiritual needs."

Though each session of the Supreme Court begins with a public prayer, the Court ruled in *Engel v. Vitale* (1962) that a non-denominational prayer, authorized by the New York Board of Regents for voluntary recitation in the public schools, violated the ban on an establishment of religion. A year later the court ruled that Bible reading as part of the school day was unconstitutional. Later court rulings banned ceremonial prayers at public school graduations and athletic events. Supreme Court rulings triggered decisions by federal and state courts, or in some cases, by school officials themselves, to ban school Christmas pageants and concerts. Litigation over Nativity scenes in public places has become an annual event.

In one New Jersey community, public school students gathered five minutes before school time to read aloud from the *Congressional Record* prayers recited in the U.S Senate and House of Representatives. A state court ruled that that, too, violated church-state separation. In 2002, the Ninth Circuit Court of Appeals in San Francisco ruled that the words "under God" made the congressionally approved Pledge of Allegiance unconstitutional in a decision later reversed by the Supreme Court.

In the *Elmbrook* case, Frank Easterbrook, then the chief justice for the Seventh Circuit Court, wrote a spirited dissent to his colleagues' opinion that holding a school graduation in a church building constitutes a government endorsement of religion. "No reasonable observer believes that renting an auditorium for a day endorses the way the landlord uses that space the other 364 days," Judge Easterbrook wrote, while offering the following comparison:

> Suppose the school district had rented the United Center, home of the Chicago Bulls and the Chicago Blackhawks. A larger-than-life statue of Michael Jordan stands outside; United Airlines' logo is huge. No one would believe that the school district had established basketball as its official sport or United Airlines as its official air carrier, let alone sanctified Michael Jordan.

Judge Easterbrook appears to have expressed the common-sense judgment of the situation. Alas, the Constitution nowhere requires — nor could it require — that either our laws or our judges'

interpretations of them reach the level of common sense.

Photo: U.S. Supreme Court building