No. 05-30294

In the
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE, Individually and as next friend of his minor children James Doe and Jack Doe,

Plaintiff-Appellee,

v.

TANGIPAHOA PARISH SCHOOL BOARD, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANTS-APPELLANTS, IN SUPPORT OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

No. 05-30294

JOHN DOE, Individually and as next friend of his
minor children James Doe and Jack Doe,
Plaintiff-Appellee,
v.
TANGIPAHOA PARISH SCHOOL BOARD, et al.,
Defendants-Appellants.

The undersigned counsel of record certifies that no persons in addition to those listed by the parties to this case have an interest in the outcome of the case. *Amicus curiae* Foundation for Moral Law, Inc., is a designated IRS Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

_____
Benjamin D. DuPré

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national, non-profit public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has directly assisted in several cases concerning the public display of the Ten Commandments and filed *amicus* briefs in cases around the country.

The Foundation has an interest in this case because it believes that public prayer is one of the many ways in which government bodies may constitutionally acknowledge the sovereignty of God and seek His providential guidance. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the Tangipahoa Parish School Board's public prayer violates the words of the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to F.R.A.P. Rule 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Public prayers offered at the beginning of Tangipahoa Parish School Board meetings do not violate the Establishment Clause of the First Amendment because such prayers do not conflict with the text of that Amendment, particularly under the common understanding at the time of the Amendment's adoption. The district court's choice was not between *Lemon* or *Marsh* or another "test"—it was between the text of the law and judicially-contrived substitutes.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived and on which the oath of office is sworn. A court forsakes its duty and its oath when it rules based upon case tests rather than the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the "supreme Law of the Land." U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no **law** respecting an **establishment** of **religion**." U.S. Const. amend. I (emphasis added). When these words are applied to the School Board prayers at issue, it becomes evident that the prayers are not laws, they do not dictate religion, and they do not respect an establishment of religion. The First Amendment was intended to protect religious freedom, but the district court's departure from the constitutional

text has resulted in an unconstitutional and historically unfaithful decision hostile to religion and the public acknowledgment of God.

For these reasons, the decision of the district court should be reversed.

ARGUMENT

> *"We, therefore, the Representatives of the United States of America, in General Congress, Assembled,* ***appealing to the Supreme Judge of the world for the rectitude of our intentions****, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . . And for the support of this Declaration,* ***with a firm reliance on the protection of divine Providence****, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor."*

Declaration of Independence (1776).

> *"****God*** *save the United States and this Honorable Court!"*

Marshal, United States Supreme Court.

I. THE CONSTITUTIONALITY OF THE PRAYERS OFFERED AT TANGIPAHOA PARISH SCHOOL BOARD MEETINGS SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below boldly began its opinion by stating that this case "involves a First Amendment Establishment Clause challenge," but then retreated to ambivalence with the comment that "the legal standard to apply in this case is less than obvious." *Doe v. Tangipahoa Parish Sch. Bd.*, No. Civ.A. 03-2870, Slip op. at 1, 2 (E.D. La. Feb. 24, 2005). The court eventually quoted part of the relevant law, the Establishment Clause of the First Amendment, by stating that the Clause "prohibits government from making any laws 'respecting the [sic]

establishment of religion.'"[1] *Id.* at 7. Unfortunately, the court moved beyond the text to apply the Supreme Court's three-prong substitutionary test established in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The court never applied or even seriously considered the actual words of the Establishment Clause—the true law of the case—but nevertheless concluded that the Tangipahoa Parish School Board's prayers violated the Clause. *Amicus* urges this Court not to repeat either the district court's errors in conclusion or analysis.

A. The Constitution is the "supreme Law of the Land" and all judges are oath-bound to support it.

Our American constitutional paradigm dictates that *the Constitution itself* and all federal laws are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution itself* (and no person, office, or government body). *Id.* This Constitution and its oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed only twelve years after the First Amendment was ratified, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's

[1] More precisely, the Establishment Clause states: "Congress shall make no law respecting *an* establishment of religion . . . ." U.S. Const. amend. I (emphasis added). *Amicus* assumes the district court's slight misquotation is an oversight; but given the court's overarching disregard for the constitutional text, it is an ironic one.

fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803) (emphasis in original). It must remain true today that

> [i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added."

Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding this truth, the district court below evaluated the school board prayers at issue under the guise of the *Lemon* test at the expense of the actual words of the Establishment Clause.

B. The *Lemon* test is a constitutional counterfeit that foments a judicial policy of hostility toward religion.

In addition to being constitutionally unfaithful, using precedents such as *Lemon* and its progeny are always a poor substitute for the concise language of the Establishment Clause. Indeed, this Court in *Helms v. Picard* recognized the "vast, perplexing desert" that the Supreme Court has made of Establishment Clause jurisprudence. *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), *rev'd sub nom. Mitchell v. Helms*, 530 U.S. 793 (2000).

> When we view the deceptively simple words of the Establishment Clause through the prism of the Supreme Court cases interpreting

> them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling.[2]

Id. at 355-56 (citing *Lemon*, 403 U.S. at 612) (footnote omitted). The more courts forego the "simple words" of the Constitution (however seemingly "deceptive"), the more "dimly perceive[d]" Establishment Clause jurisprudence becomes. It is hardly surprising that the district court's view of the Establishment Clause was, like the *Helms* Court's, also less than "crystal clear": "The line between permissible relationships and those barred by the Clause can be no more straight and unwavering than due process can be defined in a single stroke or phrase or test." *Tangipahoa*, Slip op. at 8. Ultimately, it is the Supreme Court's textually bankrupt decisions, and the lower courts' attempts to follow those decisions, that have led Establishment Clause jurisprudence to its current enigmatic state.

1. *Lemon*'s constitutional bankruptcy

According to the Establishment Clause, the Constitution forbids only the following: "Congress shall make no law respecting an establishment of religion . . .

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[2] Other federal circuits share this Court's dread of modern Establishment Clause jurisprudence. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999). The Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

." U.S. Const. amend. I. But the Supreme Court in *Lemon*, to justify the creation of its three-prong test,[3] claimed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. However, rather than sharpening the focus, the High Court's jurisprudential experiments with various extra-textual "tests" have produced a continuum of disparate results. This is because attempting to draw a clear legal line without the straight-edge of the Constitution is simply impossible. The abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. *See e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed"). By purposefully abandoning the fixed rule of the text, *Lemon* is neither constitutional nor a true legal principle.

If the Constitution truly is the supreme law of the land, then no judicial decision should coerce this Court to abandon the text of the Constitution. It is true,

[3] The *Lemon* test, as reiterated by the district court, approves of a government act only if: "(1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement with religion." *Tangipahoa*, slip op. at 20-21 (citing *Lemon*, 403 U.S. at 612-13).

as this Court noted in *Helms*, that this Court is "bound by the High Court's commandments," but that is true only to the extent that the High Court's commandment is consistent with the law, *i.e.*, the text of the Constitution. The rule of law demands no less. Judge Easterbrook of the Seventh Circuit Court of Appeals, in a decision upholding a public display that included the Ten Commandments, recently challenged his court's blind adherence to *Lemon*:

> Our obligation to implement the Supreme Court's *holdings* does not require us to predict how an approach espoused by a few Justices, and applied unpredictably[4] under a decision (*Lemon v. Kurtzman* . . .) that a majority of sitting Justices has disavowed (though never at the same time), would deal with a situation the Court has yet to address. **We should use the Constitution's own language and rules.**

Books v. Elkhart County, Ind., 401 F.3d 857, 869-70 (7th Cir. 2005) (Easterbrook, J., dissenting) (bold emphasis added). *Lemon* not only demands the abandonment

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[4] The district court was mistaken in its assertion that *Marsh* was the only Establishment Clause case where the Supreme Court declined to rest its decision on *Lemon*. *Tangipahoa*, slip op. at 7. *See Larson v. Valente*, 456 U.S. 228 (1982). Since the district court's opinion, in fact, the Supreme Court expressly declined to apply *Lemon* in a case challenging the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA). *See Cutter v. Wilkinson*, 544 U.S. __, No. 03-9877, slip op. at 7 n.6 (May 31, 2005). The *Lemon* test was altered in *Lynch v. Donnelly* with the advent of the Endorsement test, and another new test—the Coercion test—was emphasized in *Lee v. Weisman*, 505 U.S. 577 (1992), and repeated in cases such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). The Court has emphasized its unfortunate "unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984). *Lemon* is not the problem in every Establishment Clause case because it is not resurrected in every case. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, 399 (1993) (comparing *Lemon* to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," spawning a "strange Establishment Clause geometry of crooked lines and wavering shapes").

of the Constitution's text, but it also fosters a judicial policy antithetical to the religious freedom that the First Amendment was designed to protect.

2. *Lemon*'s religious hostility

Even as the district court banished prayer from Tangipahoa Parish School Board meetings, it unblinkingly and without citation repeated a common refrain in Establishment Clause cases: "Government must remain neutral in matters of faith." *Tangipahoa*, slip op. at 7. Ironically, it is this extra-constitutional and historically inaccurate concept that is most often responsible for the sort of anti-religious judicial decision that is seen in this case. This jurisprudential experiment with the Establishment Clause was doomed to fail because federal courts have aimed to achieve a mythical "neutrality" concerning religion in the public square that does not exist and was never intended in our law.

Our United States were never, and were never intended to be, "neutral" toward religion or averse to public prayer and acknowledgment of God. The very day our country was founded, the signers of the Declaration of Independence, "appealing to the Supreme Judge of the world for the rectitude of our intentions," declared the Colonies "Free and Independent States," but "with a firm reliance on the protection of divine Providence." As long as there has been a United States of America, acknowledgments of God and "religion [have] been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*,

374 U.S. 203, 213 (1963). Specifically, *public prayer* has been a particular feature of that history.

> "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic *and ever since*, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."

Marsh v. Chambers, 463 U.S. 783, 786 (1983) (emphasis added). Judicial sessions, including this Court's, also begin with a prayer or invocation. *See Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416, 421 (5th Cir. 1991), *rev'd on other grounds*, 505 U.S. 1215 (1992). The United States Supreme Court Marshal's "opening proclamation concludes with the words '"God save the United States and this honorable Court."' *The language goes back at least as far as 1827*." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 2318 (2004) (Rehnquist, C.J., concurring in the judgment) (emphasis added). President George Washington and many presidents since have even declared public days of prayer and thanksgiving to God, and all have acknowledged God. *See id.* at 2317-18; *see also* William J. Federer, *Treasury of Presidential Quotations* (2004). "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). Tangipahoa School Board has simply followed in this excellent American tradition "[s]ince at least April 3, 1973." *Tangipahoa*, slip op.

at 3. Ultimately, however, while American history only *demonstrates* the constitutionality of public prayer, it is the First Amendment's text that *determines* it. It is *Lemon*'s departure from our religious tradition that is troubling and illogical, but it is its disregard and displacement of the constitutional text that makes it constitutionally bankrupt.

The first prong of the *Lemon* test, as the district court explained, holds that a government act violates the Establishment Clause if it is "subjectively intended to convey a message of endorsement or disapproval of religion," or if the court thinks that "its real purpose was religious." *Tangipahoa*, slip op. at 21. This prong draws the one bright line in the *Lemon* test—a stark separation between what is "religious" and what is "secular"—and ironically it does so in the one area where no such clear division exists. Religion has influenced culture and *vice versa* both directly and subtly in an untold number of ways almost since the beginning of history. *See generally*, Charles N. Cochrane, *Christianity and Classical Culture: A Study of Thought and Action from Augustus to Augustine* (Oxford University Press 1940); Richard Tarnas, *The Passion of the Western Mind* (Ballantine Books 1993). For the federal courts to demand the stripping away of all religious influence or thought in government action in hopes of yielding a sanitized secular purpose is not only unrealistic; it fosters the very hostility toward religion that government is supposed to avoid. *See School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S.

203, 225 (1963) ("the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe." *Quoting Zorach v. Clausen*, 343 U.S. 306, 314 (1952)).

The second prong of *Lemon* is equally flawed when it commands that a government-sponsored message's "principal or primary effect must be one that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612. Here the court "must make an objective determination about whether a reasonable observer would conclude that the opening invocations endorse a religious message or belief." *Tangipahoa*, slip op. at 23. *Lemon* thus authorized the court below to weed out "prayer references [with] decidedly Christian views and beliefs" that were "replete with invocations to 'God' and end with the affirmation 'Amen.'" *Id.* [at 23]. *Lemon*'s neutrality becomes hostile not just to religion in general but to Christianity in particular. As the nation's majority faith, Christianity is most prevalent and therefore most recognizable to citizens of any religion or none at all, as well as to the "reasonable observer." As evident in this case, the vast majority of cases that result in *Lemon*-enforced "neutrality" really has the effect (and sometimes the purpose) of eradicating public expressions of Christianity. As Justice Brennan once wrote, however, "[t]he Establishment Clause . . . may not be used as a sword to justify repression of religion or its adherents from any aspect of

public life." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Yet such is the legacy of the *Lemon* test's so-called neutrality requirement and Tangipahoa Parish School Board is one more victim of it.[5]

Under the third prong of *Lemon*, the government must not be "excessively entangle[d]" in religion. *Tangipahoa*, slip op. at 24 (quoting *Lemon*, 403 U.S. at 615). To the district court, it was simply enough under this prong for the School Board to "include prayer in its public meetings" and have local religious members or school officials or students "compose and deliver the prayers to those in attendance." *Id.* The ambiguous third prong continues whatever religious purging is left to be done after the first two prongs have been unleashed. Well before *Marsh v. Chambers*, a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy explained that this disentanglement was never meant to be:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

S. Rep. No. 32-376 (1853).

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[5] Justice Thomas has also pointed out that, under the first two prongs of *Lemon*, "any accommodation of religion [] might well violate the [Establishment] Clause." *Cutter*, 544 U.S. at ___, slip op. at 1 n.1 (Thomas, J., concurring). Ironically, "[e]ven laws *disestablishing* religion might violate the Clause" under *Lemon* because disestablishment "might easily have a religious purpose" or "might well 'strengthen and revitalize' religion." *Id.*

Just as *Lemon* was used to sweep aside the School Board's public prayers, its three prongs could ultimately be used to exterminate all vestiges of God and religion from the public square. The text of the Establishment Clause, in contrast to *Lemon*, contains a definite and relatively straightforward meaning that should be followed in this case. *See Marbury*, 5 U.S. at 180. For too long, the "strict interpretation of the Constitution" has been abandoned, and "fixed rules" no longer govern Establishment Clause cases. Justice Thomas's words in a recently issued opinion are pertinent here: "When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. New London*, 545 U.S. ___, No. 04-108, slip op. at 19 (June 23, 2005) (Thomas, J., dissenting).

II. THE SCHOOL BOARD'S PUBLIC PRAYERS ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. In no way are the Tangipahoa Parish School Board's public prayers at the commencement of its meetings "law[s] respecting an establishment of religion."[6]

[6] *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only "Congress," should not be "incorporated" against the states and

A. Public prayer is not a "law."

A prayer, public or private, is not a "law" under the First Amendment. At the time of the ratification of the First Amendment, Sir William Blackstone had defined a "law" as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I W. Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster's 1828 Dictionary stated that "[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty." N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton also explained what is and is not a law in Federalist No. 15:

> "It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation."

The Federalist, No. 15, at 72 (Alexander Hamilton) (Garry Wills ed. 1982).

The School Board, of course, makes no law when it opens its meetings with a prayer. No matter how "strongly religious—indeed denominational—[the] tone

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local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

of the prayers" may be, *Tangipahoa*, slip op. at 22, the School Board does not thereby command any action from those in attendance, nor does it restrain them from any action or conduct that they wish to pursue. There is no threatened sanction, no "penalty or punishment for disobedience." One cannot obey or disobey another's prayer. As the district court noted, the prayers are "invocations to 'God,'" *id.* at 23, and as such are not even directed to those physically in attendance, although other listeners may certainly be edified by it (or motivated to sue). Under the proper meaning of "law," it is irrelevant whether students attend the School Board meetings. "Words do not coerce." *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). However effective or offensive the School Board's prayers may be, they do not rise to the level of a law.

Under Louisiana law, Tangipahoa Parish School Board certainly has governing authority over the schools in the Tangipahoa Parish School System, and as a "deliberative bod[y] constituted to act in the public interest," it issues policies accordingly. *Id.* at 3. Thus, the School Board has the power to issue "commands" or laws of a type within its school system purview, but it does not exercise that power when it opens its meetings with prayer. Similar to an executive Thanksgiving proclamation, a prayer "has not the force of law, nor was it so intended." *See Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) ("The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are

voluntary, and not of compulsion, *and holiday is a privilege, not a duty*. . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor"). Because the School Board prayers are not "law[s]," it does not violate the Establishment Clause.

B. The School Board prayers do not "respect[] an establishment of religion."

The School Board's prayers do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an establishment of religion."

1. The Definition of "Religion"

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[7] "Religion" was defined as: **"The duty which we owe to our Creator, and the manner of discharging it."** Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342;

[7] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

Macintosh, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as that term in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has *reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . . .*" (emphasis added)).

In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned[8] by the Supreme Court, quoted from *Beason* in defining what constitutes "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

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[8] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 Act for Establishing Religious Freedom].

Everson, 330 U.S. at 13. The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* that was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64. Thus, the United States Supreme Court has recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also*, *Cantwell v. Connecticut*, 310 U.S. 296, 303, (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship").

Assuming, *arguendo*, that the School Board prayers in this case are in some sense "law[s]," they cannot rise to the level of "religion" because although prayer may represent the discharge of one's religious duty to God and the demonstration

thereof, it is not itself a whole religion. Acknowledging God is not synonymous with "religion." At the very least, public prayer acknowledges the God to Whom the prayers are directed. The constitutional definition of religion itself acknowledges "our Creator," so it can hardly follow that acknowledging God is "religion" or a constitutional violation. At the most, public prayer is a religious exercise, and the district court below made much of the prayers' *religious* elements. *See Tangipahoa*, slip op. at 22, 23. Various religious elements may comprise a complete religion, but an independent exercise of one such element, however *religious*, does not. Never did the district court below demonstrate that these religious elements of the School Board prayer amounted to the definition of "religion" under the First Amendment.

Madison, the Chief Architect of the Constitution, saw no conflict between that great document and public prayer when in his Presidential Proclamation of 1812 he recommended "a convenient day to be set apart, for the devout purposes of rendering the Sovereign of the Universe, and the Benefactor of Mankind." James D. Richardson, II *A Compilation of the Messages and Papers of the Presidents* 498 (1897). Indeed, on September 25, 1789, the very day that "final agreement was reached on the language of the Bill of Rights," the U.S. House of Representatives "resolved to request the President to set aside a Thanksgiving Day to *acknowledge*

'the many signal favors of Almighty God.'" *Marsh*, 463 U.S. at 788 n.9 (citations omitted) (emphasis added).

> "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and *opening prayers* as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states."

Id. at 788-89 (footnote omitted) (emphasis added).

Historically and textually, under no version of the facts presented to the district court could it be said that the School Board prayers are an attempt to dictate the duties that meeting attendees owe to the Creator and the manner in which they should discharge those duties. Consequently, the public prayer is not a law respecting an establishment of "religion." U.S. Const. amend I.

2. The Definition of "Establishment"

Even if the School Board prayers are a "law[s]" under the First Amendment—which they are not—and even if it is assumed that the prayers amount to "religion" under the Establishment Clause—which they do not—the prayers do not constitute an "establishment" of religion.

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*,

213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II J. Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, 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 Cong*. 757 (1789) (Gales & Seaton's ed. 1834). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. There never was an established religion without all these.

H.R. Rep. No. 33-124 (1854).

At the time of its adoption, therefore, "[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states." Michael W. McConnell, *Accommodation of Religion: An Update and*

Response to the Critics, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). "[E]stablishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter*, 544 U.S. at ___, slip op. at 3 (Thomas, J., concurring) (quotations and citations omitted).

Public prayers at School Board meetings do not amount to an "establishment" of religion. Louisiana, like all states, does not have a state religion that can be enforced at School Board meetings in Tangipahoa Parish or elsewhere. The School Board has levied no taxes to support one denomination or faith over another, and these prayers do not lend tangible government aid of any kind to one faith or denomination over another. Furthermore, the prayers by themselves, however "Christian" in tone or to Whomever they are directed, do not set up a coercive religious orthodoxy. No one is compelled by the School Board to participate in, agree with, or attend the prayer. There are no penalties beyond feelings of discomfort and disagreement for those of non-Christian faiths who are present at School Board meetings.

Even an express endorsement of Christianity by the School Board would not constitute an establishment. "'Endorsement' differs from 'establishment.' A government does not 'establish' milk as the national beverage when it endorses milk as part of a sound diet." *Books*, 401 F.3d at 869 (Easterbrook, J., dissenting).

In short, acknowledging God through public prayer at a school board meeting does not respect an "establishment of religion." U.S. Const. amend. I.

CONCLUSION

Similar to the Sixth Circuit's conclusion in *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289, 299 (6th Cir. 2001) (*en banc*), concerning the Ohio Motto ("With God All Things are Possible"), this Court should realize that the Tangipahoa School Board's practice of opening meetings with prayer

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

Id. at 299. In other words, the School Board prayer is not a "law," it does not concern or relate to an "establishment," and it does dictate "religion" to the attendees of School Board meetings. As it is the responsibility of this Court to decide this case based on the text of the Constitution, from which it derives its authority, and not based on extra-constitutional tests that obscure rather than clarify the issues at stake, this Court should find that the Establishment Clause of the First Amendment was not violated by the School Board prayers at issue.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision and order below should be reversed, and this Court hold that the

School Board's practice of public prayer does not violate the text of the Establishment Clause of the First Amendment.

Respectfully submitted this 28th day of June, 2005.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, in paper and electronic form, by certified mail, and that seven copies of this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the Fifth Circuit, by first-class U.S. Mail, on this 28th day of June, 2005.

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