No. 10-1973

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BARACK OBAMA, et al.,

Defendants – Appellants,

v.

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, et al.,

Plaintiffs – Appellees.

On Appeal from the United States District Court
for the Western District of Wisconsin.

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

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July 8, 2010

CORPORATE DISCLOSURE STATEMENT

No. 10-1973

FREEDOM FROM RELIGION FOUNDATION et al.,

Plaintiffs-Appellees

v.

BARACK OBAMA, et al.,

Defendants-Appellants

Amicus curiae Foundation for Moral Law is a designated Internal Revenue 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*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

s/ John A. Eidsmoe
John A. Eidsmoe
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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a 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 assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that the National Day of Prayer is one of the many public acknowledgments of God that have been espoused from the very beginning of the United States as a nation. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the National Day of Prayer violates the plain meaning of the Establishment Clause of the First Amendment as it was understood by the Framers.

SOURCE OF AUTHORITY

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

SUMMARY OF ARGUMENT

The National Day of Prayer, established by an Act of Congress in 1952 as amended in 1988, represents a tradition of public acknowledgment of God that was clearly endorsed by the Framers of the First Amendment in the 1789, and Congress was practiced by the Continental Congress, the various colonial legislatures, and other governmental bodies that predate the Constitution. It in no way violates the Establishment Clause of the First Amendment because it does not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption.

This Court exercises judicial authority under the United States Constitution, and it should do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *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). The National Day of Prayer statute does not establish a religion. It

provides no government funding; it compels no one to pray; it involves no loss of civic privileges of those who choose not to join in prayer.

The National Day of Prayer is simply an acknowledgment of God, because, as Presidents Washington and Lincoln recognized in their prayer proclamations, it is the duty of nations as well as of men and women to acknowledge God. The National Day of Prayer represents a philosophy of government held by the Framers and held by most Americans today, that in the words of the Declaration of Independence, our nation is entitled to independence by the "Laws of Nature and of Nature's God," that "all men are created equal," and that they "are endowed by their Creator with certain unalienable Rights . . . ." This acknowledgment of God and expression of this view of government is not an establishment of religion.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93, (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE NATIONAL DAY OF PRAYER SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court ruled that the statute creating the National Day of Prayer, 36 U.S.C. § 119, violates the Establishment Clause of the First Amendment. The court's first error, however, was that it based its ruling on

various court-created tests rather than on the plain meaning of the First Amendment.

A. The Constitution is the "supreme Law of the Land."

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself — not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto should control, above all other competing powers and influences, including the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's 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).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, in *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

As men whose intentions require no concealment, generally

> employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Thus, "[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).

And as the Court said in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008), constitutional "words and phrases were used in their normal and ordinary as distinguished from technical meaning."

B. The various and conflicting court-created tests create a confusing labyrinth that contradicts the text of the Constitution and the history of our country.

By adhering to court-created tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedents which are inconsistent with the First Amendment and with each other. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon v. Kurtzman* and *Lee v. Weisman* is a poor and improper substitute for the concise language of the Establishment Clause, because attempting to draw a clear legal line without the "straight-edge" of the

Constitution is simply impossible.

James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow,"[1] "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. 677, 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

The district court stated that "Although no one on the Court adheres to the view that the establishment clause is limited to prohibiting discrimination

[1] In the year 2005 alone, courts observed that the Supreme Court's Establishment Clause jurisprudence is: "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); and "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005).

among Christian sects, it seems that such a belief endured for many years." Somewhat surprisingly, the district court quoted *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471 (1892), as saying in a unanimous opinion, "this is a Christian nation." The district court then disposed of the *Holy Trinity* case by simply saying, "Thus, if history is controlling, it would require the Supreme Court to overrule much of its establishment clause jurisprudence of the last 50 years." *Freedom from Religion Foundation v. Obama,* No. 08-cv-588-bbc. Justice Frankfurter's concurring words in *Graves v. O'Keefe,* 306 U.S. 466, 491-92 (1939) are most timely and relevant: "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."

II. THE NATIONAL DAY OF PRAYER STATUTE IS NOT A LAW "RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The National Day of Prayer statute does not violate the Establishment Clause because it does not "respect," *i.e.*, concern or relate to, "an establishment of religion."

A. The Definition of "Religion"

It seems axiomatic that the courts cannot determine what is or is not an establishment of religion, without defining the term "religion" itself. And yet, in the courts' myriad establishment clause rulings, the courts have conspicuously skirted their obligation to define religion. Without that

definition, determining whether an action constitutes an establishment of religion is impossible.

1. The neutrality myth

The Religion Clauses of the First Amendment require that religions be treated fairly, but our United States was never intended to be "neutral" toward religion. The idea that religion and law are entirely separate spheres is unworkable and utterly foreign to the thinking of the Framers of the Constitution, who intended an institutional separation of church and state but not a separation of law and government from religious values. Arlin M. Adams and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (University of Pennsylvania Press, 1999) 51-58ff.

The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." Thomas Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). The Declaration of Independence itself rests America's right to independence squarely on "the Laws of Nature and of Nature's God" and states that "all Men are created equal" and are "endowed by their *Creator* with certain unalienable Rights . . . ." *Declaration of Independence* para. 2 (1776) (emphasis added). Like Jefferson, George Washington declared that, "While just government protects all in their religious rights, true religion affords to government its surest

support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. . . . They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But . . . 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 send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; 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." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.

The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53 (Washington, D.C.: Robert Armstrong, 1853) pp. 1-4. Senate Rep. No. 32-376 (1853).

The acknowledgment of God is not an establishment of religion. President George Washington, who chaired the Constitutional Convention and served as President while the Bill of Rights was being considered, declared in his October 3, 1789 National Day of Thanksgiving Proclamation,

> "Whereas it is *the duty of all nations to acknowledge the providence of Almighty God*, to obey His will, to be grateful for his benefits, and humbly to implore His protection and favor. . . ." [emphasis added].

President Abraham Lincoln's March 30, 1863 *Proclamation Appointing a National Fast Day* explained the basis for the Proclamation:

> . . .[T]the Senate of the United States, devoutly recognizing the Supreme Authority and just Government of Almighty God, in all the affairs of men and of nations, has, by a resolution, requested the President to designate and set apart a day for National prayer and humiliation:
>
> . . .[I]t is the duty of nations as well as of men, to own their dependence upon the overruling power of God, to confess their sins and transgressions, in humble sorrow, yet with assured hope that

> genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord:
>
> . . .[W]e know that, by His divine law, nations like individuals are subjected to punishments and chastisements in this world. . . .

Presidents Washington and Lincoln both clearly stated, in the above-quoted official proclamations, that the nation as well as the individual has a duty to acknowledge God. If the Appellees' understanding of the Establishment Clause is correct, then both Washington and Lincoln must have misunderstood it.

Thomas Jefferson, whose "wall of separation" metaphor is often quoted and often misunderstood, declared in his Second Inaugural Address,

> I shall need . . . the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with His providence, and our riper years with His wisdom and power; and to whose goodness *I ask you to join with me in supplications,* that He will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.'

President Thomas Jefferson, Second Inaugural Address, 1805; *quoted in* M. Richard Maxfield, K. DeLynn Cook, and W. Cleon Skousen, *The Real Thomas Jefferson* (National Center for Constitutional Studies 1981, 1983) 403-04 (emphasis added). Like Washington and Lincoln, Jefferson in a very important public address to the nation acknowledged his need for God's favor, recognized God's past blessings upon this nation, and asked the nation to join him in prayers for God's continued guidance and blessings. If the appellees' and the

district court's understanding of the First Amendment is correct, then President Jefferson's understanding of it was wrong.

"The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). The Supreme Court has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963). In fact, "[t]here 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*, 465 U.S. at 674 (emphasis added); *see, e.g.*, *Van Orden*, 545 U.S. 686-90 (2005) (listing numerous examples of the "rich American tradition" of the federal government acknowledging God). *See also, Newdow 2004*, 542 U.S. 1, 26 (noting that "official acknowledgments of religion's role in our Nation's history abound," and providing examples) (Rehnquist, C.J., concurring in part and concurring in the judgment).

Understood with this background, the National Day of Prayer does not violate the Establishment Clause.

2. Distinguishing "religion" from the merely "religious"

To determine whether a statute or policy is "religious," it is necessary to define "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). "Religion" was defined as: **"The duty which we owe to our Creator, and the manner of discharging it."** (emphasis added). Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *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 its counterpart 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. . .). In *Macintosh*, Chief

Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[2] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). And in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court stated, "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."

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). From its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court recently stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

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

The National Day of Prayer is an acknowledgment of God and His integral role in the life of the nation. Neither the National Day of Prayer nor the prayers uttered pursuant thereto dictate *any* of the duties that people owe to God or explain how those duties should be carried out; likewise, they do not list articles of a religious faith or the forms of worship for any faith.[3]

Since the Judiciary Act of 1789, federal law has designated that all federal judges take their oaths "So help me God," as do the oaths for military personnel, civil servants, and for citizenship; the national motto is "In God We Trust"; and President Abraham Lincoln's "Gettysburg Address," delivered at a national dedication ceremony, expressed the hope that, "this nation, *under God*, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth." *See Marsh*, 463 U.S. at 786-789; 28 U.S.C. § 453; 10 U.S.C. § 502; 5 U.S.C. § 3331; 8 C.F.R. 337.1; 36 U.S.C. § 302; Abraham Lincoln, "The Gettysburg Address," Nov. 19, 1863, *reprinted in The Essential Abraham Lincoln* 300 (John G. Hunt, ed. 1993) (emphasis added). Such acknowledgments are inconsistent with atheism and agnosticism, and yet are permissible under the Establishment Clause.

[3] We need not exclude the possibility that individuals who pray pursuant to National Day of Prayer events may exceed these parameters. If that happens, courts or other branches of government may address those situations on a case-by-case basis. The possibility that someone may abuse the statute is not a basis for declaring the statute itself unconstitutional.

B. The Definition of "Establishment"

Even if it is assumed that the National Day of Prayer is an event that pertains to a "religion" under the First Amendment—which it is not—Congress cannot be said to have "establish[ed]" a religion by adopting the National Day of Prayer statute.

"[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (citation omitted). Use of government force to coerce belief in particular religious tenets or participate in the worship of a particular ecclesiastical denomination is characteristic of a government establishment of religion.

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). Justice 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 Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy. They noted that the Framers' understanding of the term "establishment of religion" was based upon the establishment of religion that they had experienced in the mother country, England, where King Henry VIII broke away from the Catholic Church in 1534 and formally declared himself "the only supreme head in earth of the Church of England." The House Judiciary Committee declared that any 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) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

The National Day of Prayer does not constitute coercion in this historically accepted sense, *i.e.*, force of law and threat of penalty. This court should not change the meaning of government coercion from the use or threat of actual force or the imposition of penalties to the subjective influences of "social pressure" and psychological coercion. Social pressure and psychological coercion are beyond the courts' ability to adjudicate with expertise, and they are

beyond the scope of the First Amendment.

"Establishment," like "religion," clearly has been expanded far beyond its original context. *Amicus* urges this Court to interpret and apply the term "establishment" in its "just and natural" meaning and thus recognize that the National Day of Prayer does not even remotely entail an "establishment" of religion.

III. THE NATIONAL DAY OF PRAYER IS NOT A "PURELY RELIGIOUS" FUNCTION; RATHER, IT IS A RECOGNITION OF THIS NATION'S HISTORIC DEPENDENCE UPON GOD.

Amicus contends that the National Day of Prayer phrase is not "purely religious;" rather, it expresses this nation's historic dependence upon God and this nation's historic belief that God blesses those nations who acknowledge Him.[4] It further recognizes a philosophy of government based upon God-given natural rights that the Framers held and that most Americans have affirmed throughout history and today.

The phrase "one nation under God" is a recognition that the state is not the supreme entity. Rather, in the words of the Declaration of Independence, this nation is entitled to its independence by "the Laws of Nature and of Nature's God," "all men are created equal," and "they are endowed by their Creator with certain unalienable Rights . . . ." The Supreme Court has

[4] Most of the Founders of this nation believed that God really does exist, that He really does hear prayers, and that He really does bless those nations who acknowledge Him. Most Americans still believe that. Does the First Amendment really preclude this nation from seeking His blessing?

sanctioned this philosophy in *Zorach v. Clauson,* 292 U.S. 306 (1952), stating, "We are a religious people whose institutions presuppose a Supreme Being." *Id*. at 314. Dissenting in *McGowan v. Maryland,* 366 U.S. 420 (1961), Justice Douglas quoted the Declaration of Independence and stated, "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *Id.* at 563. Professor Robert J. Barth has further articulated his view that such phrases are an expression of a philosophy of government in "Philosophy of Government vs. Religion and the First Amendment," *[Oak Brook] Journal of Law and Government Policy* V:71-88 (2006).

The world crisis at the time the National Day of Prayer statute was adopted demonstrates that this is the true purpose behind the statute. The statute was adopted in 1952, at the very height of the Cold War. Earlier this year, the Ninth Circuit upheld the inclusion in 1954 of the phrase "under God" in the Pledge of Allegiance, *Newdow v. Rio Linda Union School Dist.*, Nos. 05-17257, 05-17344, 06-15093 (9th Cir., March 11, 2010), and much of the court's reasoning applies equally to the National Day of Prayer. Americans at that time considered themselves to be locked in a life-and-death struggle with the Communist Bloc nations. Communism, often referred to as "godless

Communism,"[5] was identified with the Marxist philosophy of dialectical materialism, which held that there is no spiritual reality, that the State is the highest authority, that man was not created in the image of God and therefore has no intrinsic worth except insofar as he is useful to the State, and that man has no God-given rights but only such privileges as the State chooses to extend to him. Americans at that time believed that Communist ideology was spreading across the world, including within the United States. To counter the spread of Communism, Americans wanted to proclaim, both within our land and to the rest of the world, that the American philosophy of law and government is that man is created in the image of God, and therefore he possesses God-given rights that the state has no authority to take away. As the Ninth Circuit stated in *Rio Linda* at 3903:

> The words "under God" were added to the Pledge of Allegiance in 1954 in response to the oppressive governments forming around the World. Congress wanted to emphasize that in America, the government's power is limited by a higher power.

The court continued:

> In the early 1950s America became involved in the war waged between North and South Korea. North Korea was aided by the communist regimes of the Soviet Union and China, while South Korea was aided by the United Nations, including the United

[5] *Amicus* recognizes that some today would dispute this characterization of Communism and of the Cold War. *Amicus* believes the characterization is largely accurate. Of paramount importance, however, is the fact that Americans at that time believed the characterization was accurate, and this motivated their desire to include the words "under God" in the Pledge. *Amicus* notes that what some call "anti-Communist hysteria," the Ninth Circuit describes as "response to the oppressive governments forming around the World." *Rio Linda* at 3903.

States, Australia, and Great Britain. This was just one of many times when the West opposed the spread of communism. . . .

The words "under God" were added as a description of "one nation" primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government. In adding the words "under God" to the Pledge, Congress reinforced the belief that our nation was one of individual liberties granted to the people directly by a higher power:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. [O]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

*19 H.R.Rep. No. 83-1693, 1954 U.S.C.C.A.N. 2339, 2340 (May 28, 1954). The House Report adopted this statement from Representative Rabaut:

> By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.

Id. at 2341.

Speaking in support of the bill, Congressman Rabaut said the addition of the words "under God" in the Pledge would "strike at the philosophical roots of communism, atheism and materialism" and that he hoped it would bring about "a deeper understanding of the real meaning of patriotism." He further stated,

> You may argue from dawn to dusk about differing political, economic, and social systems, but the fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God. From the root of atheism stems the evil weed of communism and its branches of materialism and political dictatorship. Unless we are willing to affirm our belief in the existence of God and His creator-creature relation to man, we drop man himself to the significance of a grain of sand and open the floodgates to tyranny and oppression.

83rd Congress 1st Sess., *Congressional Record* 99, pt. 10 (21 April 1953) A2063.

In the case at hand, the National Day of Prayer statute was adopted around the same time period, 1952, and with the same concerns in mind. As the district court acknowledged, U.S. Senator Absalom Willis Robertson (D-VA) introduced the bill in the Senate and said it was a measure against

> . . . the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it was based.

The Senate report concerning the bill noted that "From the beginning the United States of America has been a nation fully cognizant of the value and power of prayer," that "Prayer has indeed been a vital force in the growth and development of this Nation," and that "It would certainly be appropriate if, pursuant to this resolution, and the proclamation it urges, the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." *Freedom From Religion Foundation, Inc. v. Obama*, No. 08-cv-588-bbc.

The district court also noted that a purpose of the 1988 bill setting a

definite date for the National Day of Prayer, according to U.S. Rep. Tony Hall (D-OH), was to "bring more certainty to the scheduling of events related to the National Day of Prayer and permit more effective long-range planning." *Id.* U.S. Senator Strom Thurmond (R-SC) introduced the bill in the Senate, saying that because the National Day of Prayer has "a date that changes each year, it is difficult for religious groups to give advance notice to the many citizens who would like to make plans for their church and community. Maximum participation in the public knowledge of this event could be achieved, if, in addition to its being proclaimed annually, it were established as a specific, annual, calendar day." *Id.*

This is an entirely legitimate purpose. In *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. . . .*When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.* For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. [emphasis added]
>
> *Id*. at 313-14.

The National Day of Prayer is in our best constitutional tradition: the majority may pray together and the minority is not required to join in the prayer. The National Day of Prayer expresses and protects the constitutional rights of all.

CONCLUSION

"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, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting). When a clash exists between court-created tests and the plain language of the First Amendment, the proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be reversed and the National Day of Prayer be upheld as consistent with America's time-honored tradition of religious freedom.

Respectfully submitted this 8th of July, 2010.

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Dated this 8th day of July, 2010.

SEVENTH CIRCUIT RULE 31(e) CERTIFICATION

I hereby certify that the electronic copy of the brief that counsel has filed with the Court has been scanned for viruses and is virus free.

s/ John A. Eidsmoe
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) 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 first-class U.S. mail, and that fifteen (15) copies of the same have been dispatched to the Clerk of the United States Court of Appeals for the Seventh Circuit, by first-class U.S. Mail, on this 8th day July, 2010. On the same day, I provided the Court with an electronic copy of the Brief by CD-ROM.

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