Nos. 05-4604 & 05-4781

In the
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTHONY HINRICHS, et al.,

Plaintiffs-Appellees,

v.

BRIAN BOSMA, in his official capacity
as Speaker of the House of Representatives
of the Indiana General Assembly,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.

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

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CORPORATE DISCLOSURE STATEMENT

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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*. No other law firm has appeared on behalf of *amicus* in this or any other case in which it has been involved.

Gregory M. Jones

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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 assisted in several cases concerning the public display of the Ten Commandments and other public acknowledgments of God.

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 Indiana House of Representatives' public prayer policy violates 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 sessions of the Indiana House of Representatives 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 to 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 legislative 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.

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) (emphasis added).

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

Marshal, United States Supreme Court.

I. THE CONSTITUTIONALITY OF THE PRAYERS OFFERED IN THE INDIANA HOUSE OF REPRESENTATIVES SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The primary question before the court below was a simple one: whether the prayers "in Jesus' name" given by invited clergy at the Indiana House of Representatives violate the Establishment Clause of the First Amendment of the United States Constitution. In its opinion below, the district court did not even quote the words of the Clause it purported to apply—the true law of the case—until the conclusion on page 58 of its 60-page opinion; and even then the constitutional words were offered in the midst of philosophical prose and historical generalities that added little to the legal analysis of the case at hand. *See Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1131 (S.D. Ind. 2005). Such was the afterthought the court below gave to the words of the Establishment Clause, a constitutional provision otherwise entirely ignored by the court in its analysis.

Instead, the district court began its analysis with the observation that "[t]he 'touchstone' of the Establishment Clause is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *Id.* at 1115 (citations omitted). This benchmark of supposed government neutrality concerning religion causes the court's analysis to be skewed from the outset. Thereafter, judicial opinions *about* the Establishment Clause get a thorough working-over by the court—majority opinions, dissenting opinions, concurring opinions, and even opinions about opinions—all leading to the delicately crafted conclusion that the Establishment Clause somehow forbids clergy members from praying in Jesus' name in the Indiana House of Representatives. *Amicus* urges this Court not to repeat 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, government body, or judicial opinion). *Id.* *Amicus* respectfully submits that this Constitution and the solemn 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, 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." J. Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *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). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

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). Instead of heeding these truths, the district court below evaluated the practice of prayer in the Indiana Legislature according to the examples of *Marsh v. Chambers*, 463 U.S. 783 (1983), and other opinions about *Marsh*, at the expense of the carefully crafted words of the Establishment Clause.

B. *Marsh* is an unnecessary exception to the language of the First Amendment that foments confusion and disarray in public prayer cases.

Ordinarily in a case concerning the Establishment Clause of the First Amendment courts apply the aptly named *Lemon* test, invented by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), to judge whether the practice in question is constitutionally permissible. The test provides that a government action does not violate the Establishment Clause only if it (1) has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. Since its inception, the *Lemon* test has been subjected to what this court has kindly referred to as "persistent criticism."[1] *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005).

[1] Courts of appeal have repeatedly expressed frustration with the difficulty in applying the *Lemon* test. For example, 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

Perhaps because of the noticeable shortcomings of *Lemon*, the Supreme Court has declined several times since its inception to follow the three-part test. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005) (upholding in part the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA)); *Larson v. Valente*, 456 U.S. 228 (1982) (holding unconstitutional state law imposing regulations upon certain religious organizations). The prime example of an exception to *Lemon* is *Marsh v. Chambers*, 463 U.S. 783 (1983).[2] As the district court below observed, "[t]he practice of any form of legislative prayer would probably not survive scrutiny under . . . the *Lemon* test." *Hinrichs*, 400 F. Supp. 2d at 1115 n.11. However, the Supreme Court recognized in *Marsh* that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. Consequently, it would have been strange indeed if the Court had determined such prayers to be unconstitutional. So, instead of stretching the *Lemon* test in some implausible manner to permit the practice of legislative prayer, the Supreme Court ignored it altogether and fashioned another rule for legislative prayer cases.

The Supreme Court has invented interchangeable, substitutionary Establishment Clause tests precisely because it has rejected the objective and plain

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Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). 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).

[2] Though *Marsh* is certainly the most famous exception to *Lemon*, it is not the only one. The *Lemon* test itself was altered in *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984), with the advent of the Endorsement test. Another new test—the Coercion test—was emphasized in *Lee v. Weisman*, 505 U.S. 577, 640 (1992), and repeated in cases such as *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). A test often employed when speech and religion issues intersect is the neutrality test of *Rosenberger v. University of Virginia*, 515 U.S. 818, 839 (1995).

meaning of the constitutional text. In *Lemon*, the Supreme Court stated that it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," and that "[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. *See also 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."). It is the Court's penchant for "drawing lines" instead of following the words of the law in the First Amendment that is the primary problem with Establishment Clause jurisprudence.

The judiciary's abandonment of "fixed, *per se* rule[s]" results in the haphazard application of judges' own complicated substitutes for the law. 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,"[3] "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden v. Perry*, 545 U.S. __, 125 S.Ct. 2854, 2866 (2005) (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. __, 125 S.Ct. 2722, 2751 (2005) (Scalia, J., dissenting). *Marsh* and the district court's analysis, like all judicial tests that detract from the legal text, fail this indispensable requirement.

1. The *Marsh* analysis is incomplete and unhelpful.

"The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself . . . ." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Instead of using the opportunity to explicitly return to the text of the Constitution, the *Marsh* Court relied solely on history to bestow its constitutional blessing on legislative prayer. The Court in *Marsh* concluded:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making law is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of the country.

[3] Last year 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); "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); and "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n. 22 (E.D. Cal. 2005).

Marsh, 463 U.S. at 792. While it is true that American history helps *demonstrate* the constitutionality of public prayer, it is the First Amendment's text that *determines* it.

Marsh failed to offer the consistently applied principle of the text of the First Amendment and instead simply analogized by historical examples. Admittedly, *Marsh* arrives at the right result due to its reliance on the Founders' example for guidance concerning what does *not* constitute an "establishment" under the First Amendment. However, the analysis is fundamentally flawed because nowhere does the *Marsh* Court actually *define* an "establishment" of religion. By sidestepping the First Amendment definition, the *Marsh* Court neglected the principle at issue and thus failed to provide guidance to courts for future cases—like this one—involving legislative prayer. *Marsh's* recognition of our religious tradition is laudable[4] and its emphasis on history makes its analysis marginally more legitimate than *Lemon* and other judicially-fabricated tests. But its failure to ground its conclusions in the constitutional text has produced confusion and uncertainty regarding what kind of prayers are now permitted in deliberative bodies such as the Indiana legislature.

2. The neutrality myth

Following *Marsh's* lead, the district court below did not compare the Indiana Legislature's practice of opening sessions in prayer to the words of the First

[4] *See, e.g.*, *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 267 (1837) ("It is evident, that the meaning of the term used in our own constitution, is most naturally to be sought for, first, in our own history."); *Legal Tender Cases*, 79 U.S. 457, 465 (1870) ("looking at the public history of the times . . . has [been] established as a proper guide to the construction of the Constitution."); *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring in the judgment) ("Particularly when we are interpreting the Constitution, 'a page of history is worth a volume of logic.'" (Quoting New *York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

Amendment to see if the practice "establish[es] religion" as those terms were understood at the time of the Founding. Instead, the court simply compared the prayers to the practice of legislative prayer in Nebraska as described in *Marsh* and concluded that the prayers did not pass constitutional muster because of one simple fact: many of the Indiana prayers mention Jesus Christ.

However, the *Marsh* Court's comments on the content of legislative prayers can only be taken to prohibit prayers in Jesus' name if they are read with an eye toward the same misstatement of the law that produced the second prong of the *Lemon* test. The *Marsh* Court observed in a footnote that the Nebraska chaplain recited "non-sectarian" prayers and "removed all references to Christ after a 1980 complaint from a Jewish legislator." *Marsh*, 463 U.S. at 793 n. 14. The Court's reference is a factual statement: nowhere does the Court say that all legislative prayers must be "non-sectarian" to pass constitutional muster. The closest the Court came to such a rule was in its statement that "[t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95.

Read apart from *Lemon*, the above statement cannot be said to prevent prayer in Jesus' name because simply mentioning his name cannot rationally be understood as "proselytizing" or "advancing" the Christian religion. It is only when "advanc[ing a] faith or belief" is modified to mean what *Lemon* defines as

"advanc[ing] religion" that the mere mention of Christ's name could be perceived as favoring (to say nothing of "establishing") Christianity.

Lemon's command that the "principal or primary effect" of a government action "must be one that neither advances nor inhibits religion" stems from the concept that government must take a "neutral" position concerning religion in the public square. Ironically, it is this extra-constitutional and historically inaccurate concept that is most often responsible for the sort of anti-religious (or at least anti-Christian) 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, as *Marsh* itself acknowledged. *See Marsh*, 463 U.S. at 786. 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, 29 (2004) (Rehnquist, C.J., concurring in the judgment) (citation omitted). President George Washington and many presidents since have even declared public days of prayer and thanksgiving to God; all have acknowledged God. *See id.* at 27-29; *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*, 465 U.S. at 674. This specific religious foundation was so fundamental to the country that the United States Supreme Court in *United States v. Macintosh*, 283 U.S. 605 (1931), recognized that Americans were a "Christian people . . . according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God." 283 U.S. at 625 (citation omitted). The Indiana Legislature has simply followed in this excellent American tradition "each meeting day with an invocation for the last 188 years." *Hinrichs*, 400 F. Supp. 2d at 1105.

The lower court's employment of *Lemon's* historically and philosophically false neutrality in its reading of *Marsh* causes it to require that "any official prayers be inclusive and non-sectarian, and not advance one particular religion." *Hinrichs*,

400 F. Supp. 2d at 1104. But this "neutrality" principle from *Lemon* winds up being hostile toward religion in general and Christianity in particular. As the nation's majority faith, Christianity is most prevalent and therefore most recognizable to citizens of this country, 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 the Indiana House of Representatives is one more victim of it.[5]

When the "brain-spun '*Lemon* test' that embodies the supposed principle of neutrality between religion and irreligion," *McCreary County*, 545 U.S. __, 125 S.Ct. at 2751 (Scalia, J., dissenting), is read into *Marsh's* commentary on the content of legislative prayers, it turns a blind eye to these observations about the foundation of our government in favor of ever-shifting criteria which raise the specter that "either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections." *Van Orden*, 545 U.S. at __, 125 S.Ct. at 2867 (Thomas, J., concurring) (citations omitted). For too long, the strict interpretation of the

[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*, 125 S. Ct. at 2125 (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.*

Constitution has been abandoned, and fixed rules no longer govern Establishment Clause cases.

The text of the Establishment Clause contains a definite, relatively straightforward meaning that the judicial oath of office requires adherence to in this case. *See Marbury*, 5 U.S. at 180. As Justice Thomas recently observed, "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. __, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting).

II. THE PRAYERS OFFERED IN THE INDIANA HOUSE OF REPRESENTATIVES ARE CONSTITUTIONAL BECAUSE THEY 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. Prayers offered in the Indiana House of Representatives by clergy members or legislators, whether or not given "in Jesus' name," are in no way "law[s] respecting an establishment of religion."[6]

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

[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 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.

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 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 (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001).

The Indiana House of Representatives is, of course, a law-making body; but no legislature is making a law when it opens its meetings with prayer. No matter how "explicitly Christian in content" or "expressly and consistently sectarian" those prayers may be, *Hinrichs*, 400 F. Supp. 2d at 1106, 1121, no matter how many times Jesus Christ is addressed or referenced therein, *see id.* at 1106-1108 (counting 29 of 45 prayers that refer to Jesus and quoting a number of them), the Indiana House does not thereby command any action from those voluntarily in attendance, [7] nor

[7] Even during Rev. Clarence Brown's April 5, 2005 prayer and praise song, while some "legislators, staff, and visitors present in the chamber stood, clapped, and sang along," "at least some members of the House . . . walk[ed] out because they believed the sectarian religious display during the legislative session was inappropriate," demonstrating the freedom attendants have to either agree or

does it restrain them from any action or conduct that they wish to pursue. One cannot obey or disobey another's prayer. There is no threatened sanction, no "penalty or punishment for disobedience."

Prayers and invocations are by nature words directed to God and not to those mortals physically in attendance, although other listeners may certainly be edified, or even motivated to sue, because of it. Similar to an executive Thanksgiving proclamation, the legislative 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"). In short, "[w]ords do not coerce." *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). However effective or offensive the Indiana House's prayers may be, they do not rise to the level of a law under the First Amendment.

B. The prayers in the Indiana House of Representatives do not "respect[] an establishment of religion."

Just as it does not constitute a law, prayer in the Indiana House of Representatives does not "respect," *i.e.*, concern or relate to, "an establishment of religion" under the Establishment Clause.

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disagree, to attend or to leave. *Hinrichs*, 400 F. Supp. 2d at 1107. Ironically, it is now the *federal district court*, under color of law, that is mandating censorship of the content of prayers in the Indiana House.

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).[8] "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; *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

[8] 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).

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,[9] quoted from *Beason* in defining "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
>
> > 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* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64. Thus, the United States Supreme Court has repeatedly 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.*

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

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").

The district court below never refuted or even addressed this constitutional definition of religion, nor did the court offer any definition whatsoever. Even if, *arguendo*, the prayer in the Indiana House is in some sense a "law," it cannot be one rising to the level of "religion" because although the prayer may be the discharge of one's religious duty to God and the demonstration thereof, it is not itself a whole religion. [10] The duties one owes to God may include offering or listening to prayer, but a prayer does not constitute the whole of any 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 an entire "religion."

The district court made much of the fact that many of the prayers were in Jesus' name and too "explicitly Christian," but never demonstrated that the prayers did anything more than "endorse" Christianity or "send[] the message" that non-Christians are "outsiders." 400 F. Supp. 2d 1108. Christians giving Christian prayers in the name of Christ are indeed performing a *religious* exercise, but such prayers—even 29 of them—will never constitute a religion. Various religious elements may comprise a complete religion, but an independent exercise of one such element, however *religious* or *sectarian* or *Christian*, does not.

[10] A law requiring prayer certainly would violate the Free Exercise Clause of 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).

> "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 Indiana House's prayer is an attempt to dictate the duties that 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 prayers in the Indiana House of Representatives are a "law" 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 are not an "establishment" of religion.

An "establishment" of religion, as it was widely 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 rites; 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, "[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*, 125 S. Ct at 2126 (Thomas, J., concurring) (quotations and citations omitted).

Just as it offered no definition of religion, the court below neither gave nor considered a definition of the First Amendment's use of "establishment." The court repeatedly employed terms such as "endorsement," "message of non-inclusion," and "sectarian"; but it never bothered to demonstrate whether the prayers in the Indiana House amounted to a constitutionally proscribed establishment.

Public prayers before legislative bodies do not amount to an "establishment" of religion, and the Indiana House's invocations, whether in Jesus' name or not, are no exception. Indiana, like all states, does not have a state religion that can be enforced at the Indiana House or elsewhere. Prayers that open the legislative day, however "Christian" in tone or content, and regardless of to Whom they are directed, do not set up a coercive religious orthodoxy. No one is compelled by Speaker Bosma or the Indiana House to participate in, agree with, or attend the prayers. There are no penalties beyond feelings of discomfort and disagreement for

those of non-Christian faiths who are present. The Indiana House has levied no taxes to support one denomination or faith over another.

Indeed, even if the House were to pass a resolution "endorsing" Christianity, it 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 2001, the 6th Circuit *en banc* upheld the Ohio's State Motto, "With God All Things Are Possible," against a claim that the Motto was a violation of the Establishment Clause because it acknowledged God. *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289, 299 (6th Cir. 2001) (*en banc*). The Court rejected the claim and focused in part upon the fact that the Motto

> 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. The Ohio Motto was not an establishment of religion. Likewise, acknowledging God through public prayer at a legislative meeting, even when done "in Jesus' name," does not respect an "establishment of religion."

CONCLUSION

As it is the responsibility of this Court to decide this case based on the text of the Constitution, from which its authority is derived, this Court should find that the prayers offered in the Indiana House of Representatives do not violate the

Establishment Clause of the First Amendment because they are not "law[s] respecting an establishment of religion."

Respectfully submitted this 15th day of May, 2006.

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Dated this 15th day of May, 2006.

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 certified mail, and that fifteen (15) copies of this Brief of *Amicus Curiae* 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 15th day of May, 2006.

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