No. 08-1847

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LONNEY ROARK, *et al.*,

Plaintiffs-Appellees,

v.

SOUTH IRON R-1 SCHOOL DISTRICT, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Missouri, Civil No. 4:06CV392CDP, The Honorable Catherine D. Perry, Judge

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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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July 3, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* states:

Amicus curiae Foundation for Moral Law 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Constitutions, Statutes, & Regulations

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law (the Foundation), is a national religious-liberties organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) 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 or filed *amicus* briefs in cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes the lower court ignored the original understanding of the Establishment Clause in its attempt to justify banning the distribution of Bibles by a private group at a public school. If allowed to stand, the lower court decision will further the myth that the First Amendment requires all things religious to be expunged from all things public.

SOURCE OF AUTHORITY TO FILE

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

SUMMARY OF ARGUMENT

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 plain and original text of the Constitution, the "supreme Law of the Land." U.S. Const. art. VI. Accordingly, the controlling "test" to be applied to the facts of this case is the text of the Establishment Clause as understood at the time it was adopted, not *Lemon v. Kurtzman*, *McCreary County v. ACLU*, or any other modern judicial gloss applied by the lower court.

The text of the Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. When these words of the law are applied to the past and present Bible distribution policies of South Iron R-1 School District it becomes evident that allowing Bibles to be distributed in schools is not an "establishment" of "religion," as those words were commonly understood in the founding era. Offering Bibles to schoolchildren does not coerce, legally compel, or otherwise establish an orthodoxy of religious belief or action, nor is the

Bible itself a religion. The supreme law of the land requires that the lower court's order blocking the distribution of Bibles at South Iron schools be reversed.

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 [Religion] Clauses.*

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

I. THE CONSTITUTIONALITY OF A SCHOOL DISTRICT POLICY ALLOWING BIBLE DISTRIBUTION TO STUDENTS SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below had before it a complaint alleging that South Iron R-1 School District's past and current policies "allow members of Gideons International to distribute Bibles to elementary school students during the school day," *Roark v. South Iron R-1 Sch. Dist.*, 540 F. Supp. 2d 1047, 1049 (E.D. Mo. 2008), and that such policies "violate the Establishment Clause of the First Amendment to the United States Constitution," *id.* at 1050. While the court ultimately held that "[t]he school policies violate the Establishment Clause," *id.* at 1049, the court reached that conclusion without ever applying or even quoting—not even in a footnote—the words of the law at issue.

Despite the fact that the ratified First Amendment at the top of the Bill of Rights remains un-amended, the court below simply ignored the text

with the dismissive assurance that "there is no doubt that the Establishment Clause 'lacks the comfort of categorical absolutes.'" *Roark*, 540 F. Supp. 2d at 1061 (quoting *McCreary County v. ACLU*, 545 U.S. 844, 860 n.10 (2005)). The court's own absolute of non-absolutism freed it to analyze this case not based upon what the Establishment Clause says, but upon what other courts have said it means. Thus, the lower court determined the constitutionality of South Iron's challenged policies under the judicial absolutes of "governmental neutrality" and the Supreme Court's on-again-off-again[1] three-part *Lemon* test.[2] *See id.* at 1056-59, 1060-65. The complete failure to apply the "supreme Law of the Land"—the Constitution—as controlling law was the court's most egregious and fundamental legal error.

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[1] *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 717 n.6 (2005) (noting, in an Establishment Clause case, the 3-part *Lemon* test relied on by the lower court but inexplicably "resolv[ing] this case on other grounds"); *ACLU Neb. Found. v. City of Plattsmouth, Neb.*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (*en banc*) (declining to apply the *Lemon* test).

[2] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

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

Our Constitution dictates that the Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All "judicial Officers" are "bound by Oath or Affirmation, to support *this Constitution*," *id.* (emphasis added), and not a person, office, government body, or judicial opinion. *See* 28 U.S.C. § 453 (oaths of justices and judges). *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). "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). A textual reading of the Constitution, according to Madison, requires "resorting to the sense in which the Constitution was accepted and ratified by the nation" because "[i]n that sense alone it is the legitimate Constitution." J. Madison, Letter to Henry Lee (June 25, 1824), *in Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853).

While the text of the Constitution is the only legitimate law, Chief Justice Marshall explained that the legitimate meaning of that text is simply the words as used in their ordinary sense:

> 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). Just last week, the U.S. Supreme Court reaffirmed the idea that the meaning of the Constitution was not solely the province of federal judges and lawyers:

> In interpreting this text,[3] we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning."

District of Columbia v. Heller, 554 U.S. ___, No. 07-290, Slip op. at 3 (June 26, 2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

Justice Joseph Story, an "important founding-era legal scholar[]," *id.* at 32, 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.

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[3] By "this text" the *Heller* Court meant the Second Amendment to the United States Constitution, although the principle articulated here is hardly limited to that Amendment: *e.g.*, the *Sprague* case quoted dealt with Article V of the Constitution.

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 and the carefully crafted words of the Establishment Clause, however, the district court below evaluated the South Iron school policies under the judicially constructed *Lemon* test.

B. The *Lemon* test and other constitutional counterfeits form a confusing labyrinth that contradicts the text of the "supreme Law of the Land."

In the present case, the district court chose to apply the Supreme Court's three-part *Lemon* test and its more recent incarnation in *McCreary County v. ACLU*, 545 U.S. 844 (2005). By adhering to *Lemon* and any other "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 only to certain judicial precedents. *See Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance

upon precedents such as *Lemon* and its progeny is a poor and improper substitute for the concise language of the Establishment Clause.

The Supreme Court has resorted to interchangeable, substitutionary Establishment Clause tests like *Lemon* precisely because it has rejected the idea that the constitutional text has a plain, objective meaning. The *Lemon* test itself was born out of the Supreme Court's obfuscating claim 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. "[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." *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984). Jurisprudential experiments with various extra-textual "tests" such as *Lemon* have produced no clear delineations, only a continuum of disparate results.[4]

[4] Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test in particular and Establishment Clause jurisprudence in general. The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually

The abandonment of "fixed, *per se* rule[s]" in favor of line-drawing results in the unpredictable application of judges' complicated substitutes for the law. It is "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent [that] leaves it incapable of consistent application." *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J.,

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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), "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The 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 Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that *Lemon* has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). 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).

District courts have likewise observed that the Supreme Court's Establishment Clause jurisprudence is: "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); "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005); and "hardly Paradise," but "more akin to Limbo" than Purgatory, *Green v. Bd. of County Comm'rs of the County of Haskell*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006).

concurring). 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," "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Id.* at 694 (Thomas, J., concurring).

Attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible. "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, Slip op. at 63.[5] 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). "What distinguishes the rule of law from the

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[5] Likewise, with constitutional *rights*, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, Slip op. at 63.

dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting). *Lemon* and its shifting progeny are neither "grounded" nor "consistent," and any legal analysis that attempts to find its way therein is bound to be constitutionally deficient.

The district court's opinion below is no exception. Although feigning a rejection of "categorical absolutes" for Establishment Clause purposes, the court laid down a few absolutes of its own:

(1) that the Establishment Clause "*mandates* governmental neutrality between religion and religion, and between religion and non-religion," *Roark*, 540 F. Supp. 2d at 1056 (quoting *McCreary County*, 545 U.S. at 860) (emphasis added);

(2) that "a government practice is permissible for purposes of Establishment Clause analysis *only if*" it passes all three *Lemon* test prongs, *id.* at 1056-57 (emphasis added); and

(3) that there is "*no doubt* that the Clause still means that a government cannot take actions for the purpose of promoting Christianity," *id.* at 1061 (emphasis added).

Having so drawn its "lines in the sand," the court found that South Iron's past and present policies regarding Bible distribution in its schools crossed every one of them. *See id.* at 1059, 1065.

Amicus will not dwell upon the particular outcome that it believes *Lemon* or *McCreary* or the so-called "neutrality" principle should have yielded in this particular case—arguments competently addressed in Appellants' brief—because *Amicus* contends that the *Lemon* test and its progeny are constitutionally bankrupt and irrelevant. The text of the Constitution should control the outcome of these cases and, as explained in Section II, *infra*, would yield just the opposite result in this one.

C. The primary effect of *Lemon* and other judicial tests is to contradict the historically important role religion has always played in our country.

Lemon and its progeny have yet again produced another judicial opinion with the "primary effect" of advancing hostility toward religion in

general and religious texts in particular.[6] Even by the lower court's standard of "neutrality" the court's order fails because it singles out for discrimination only the distribution of Bibles by Gideons International when, at least under the new policy, other groups are free to distribute other religious and non-religious material in the South Iron schools. By court order, therefore, South Iron must be hostile to the distribution of Bibles—and only Bibles—in its schools. Neither this anti-religious posture, nor even the "neutral" stance, was ever the purpose of the First Amendment.

Our nation's history is inextricably entangled with religion and our laws, including the Constitution, are supposed to protect, not oppose,

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[6] The Supreme Court has noted that not even *Lemon* was supposed to be so hostile to religion:

> [*Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

religion. Even 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).

"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; *see also Van Orden*, 545 U.S. at 686-88 (listing numerous examples of the "rich American tradition" of the federal government acknowledging God); *City of Plattsmouth*, 419 F.3d at 777-78 (echoing *Van Orden* and the "role of religion in our country's history"). 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, specifically links religion with good government and, apropos here, schools:

> Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).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." T. Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). George Washington similarly 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).

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 an 1853 Senate Judiciary Committee report concerning the constitutionality of the congressional and military chaplaincies:

> [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.

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

Moreover, the Bible has played an immeasurable role in the development of our country and its schools. In *McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203 (1948), the United States Supreme Court observed:

> Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the Bible, and its chief purpose inculcation of piety. . . . The emigrants who came to these shores brought this view of education with them.

Id. at 213-14. In *Schempp*, the Court acknowledged that, "it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities." 374 U.S. at 225. Justice Powell's concurrence in *Edwards v. Aguillard*, 482 U.S. 578 (1987), noted that "[t]he [Bible] is, in fact, 'the world's all-time best seller' with undoubted literary and historic value apart from its religious content." *Id*. at 608 (Powell, J., concurring) (citation omitted).

Judicial "line-drawing" has steadily warped and gerrymandered the brilliant handiwork of the Founders into a completely different body of law, one they would hardly recognize. Current Establishment Clause jurisprudence now works to steadily subvert the historical relationship that religion has always enjoyed in this land and its schools. So long as constitutionality is adjudged based on consistency with *court opinions* rather than consistency with the *constitutional text*, the ever-shifting criteria that characterizes this area of the law will continue to 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 697 (Thomas, J., concurring).

The text of the Establishment Clause contains a definite and straight-forward meaning to which the judicial oath of office requires adherence in this case. *See Marbury*, 5 U.S. at 180. As Justice Thomas has 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. 469, 523 (2005) (Thomas, J., dissenting).

II. SOUTH IRON'S POLICIES ALLOWING BIBLE DISTRIBUTION IN ITS SCHOOLS ARE NOT "LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress[7] shall make no law respecting an establishment of religion." U.S. Const. amend I. South Iron R-1 School District's former policy allowed Gideons International to offer Bibles to fifth-graders in the classroom, while the current policy permits the Gideons (and any other group) to distribute Bibles in front of the administrative offices or in the school cafeteria. Neither policy violates the Establishment Clause because neither is a "law[8] respecting an establishment of religion."

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[7] *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 arguments raised in this section.

[8] At the time of the ratification of the First Amendment, "law" was defined as "a rule of civil conduct . . . commanding what is right and prohibiting what is wrong." I William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765); *see also* N. Webster, *American Dictionary of the English Language* (Found. for Am. Christian Educ. 2002) (1828) (defining "law" as "*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").

A. The Definition of "Establishment"

The Establishment Clause does not broadly prohibit all governmental activity regarding religion: it proscribes "laws[] respecting an *establishment* of religion." *Id.* (emphasis added). 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). 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

> 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). Although the South Iron policies are not acts of "Congress" for First Amendment purposes, as rules of conduct promulgated by a deliberative body they are arguably within the proper understanding of the term "laws," at least for the South Iron schools.

(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) (emphasis added). The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the Army and Navy:

> What is an establishment of religion? It 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*, 544 U.S. at 729 (Thomas, J., concurring) (quotations and citations omitted).

Having failed to quote the words of the First Amendment it is hardly surprising that the court below neither gave nor considered a definition of "establishment" in the Clause of the First Amendment which bears that name. Instead, the court stated that the question of "[w]hether governmental activity results in a prohibited *establishment* of religion" is answered by the *Lemon* test. *Roark*, 540 F. Supp. 2d at 1056 (emphasis added). In light of the original definition of "establishment," the court plainly erred.

Whether in the South Iron classrooms or cafeterias, permitting a private organization merely to offer Bibles to students does not approach an establishment of religion. Under the old policy, the Gideons made a brief presentation in the fifth-grade classrooms and "then invited the children to take a Bible off the table in front of them." *Id.* at 1052. After this litigation was instigated, the school district changed its policy to allow any outside group to distribute literature (with exceptions not relevant here) in front of the administrative offices or in the cafeteria. "The policy states that no student can be compelled or coerced by anyone to accept literature that

has been approved for distribution under the policy." *Id.* at 1053. There is no evidence in this case that, for the 30 years or more that Bibles have been distributed at South Iron schools, either the Gideons or school officials ever compelled or coerced any student to take, read, or obey a Bible. There was never a penalty for refusing what was always a voluntary offer. Thus, the specific practice of Bible distribution by the Gideons does not approach an "establishment."

Bibles in school, even if distributed by school officials themselves, are not an establishment of religion. The Bible is undoubtedly an important and essential *part* of the Christian religion (and of other faiths)—it is "religious literature" which Christians believe "contain[s] the word of God," *Roark*, 540 F. Supp. 2d at 1063—but to hand out that Book is not to officially establish that entire religion. "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). Milk is undoubtedly served at South Iron school cafeterias, and may even be promoted as part of a healthy lunch, but most likely no student is forced to drink the milk offered him. Milk is a part of the menu, but it is not established as the official drink of South Iron schools.

In 2001, the U.S. Court of Appeals for 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. *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289 (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. Similarly, offering Bibles to South Iron students, even with the implied or express encouragement that they read them, does not thereby establish creeds, rites, and ministers[9] or any official "South Iron religion" or denomination[10] under the First Amendment's proscription.

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[9] In the 18th and 19th centuries, Congress appropriated "public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church." *Wallace v. Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting). Public funds appropriated by Congress for Indian education, religious and otherwise, did not trigger an Establishment

B. The Definition of "Religion"

Just as it is important to properly define "establishment," a court must define "religion" before it may determine whether a law respects an establishment of it. The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution; it was quoted by James Madison in his *Memorial and Remonstrance* in 1785; it was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions' proposed amendments to the Constitution; and it was 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). This definition 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

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Clause concern, so neither should permitting a private organization to distribute Bibles in schools.

[10] According to Justice Story, "The real object of the amendment was . . . to exclude all rivalry among *Christian* sects." Story, *Commentaries* § 1871 (emphasis added).

Amendment was emphasized in *Everson v. Board of Education*, 330 U.S. 1 (1947).[11] In each instance, "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 (emphasis added); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 The Founders' Constitution 82 (Phillip B. Kurland & Ralph Lerner eds. 1987); *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *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. Three states also included this definition of religion in their proposed amendments to the Constitution during ratification debates, demonstrating that Virginia's definition was the prevailing definition of the term.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same

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[11] 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).

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,[12] 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.

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

In 1947, 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. *See* Madison, *Memorial and Remonstrance*. 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* 330 U.S. 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.

Even if, *arguendo*, the distribution of religious texts like Bibles were somehow an "establishment," it would not rise to the level of an establishment of "religion" under the First Amendment. Distributing Bibles may be, for some, a religious act to promote a religion (not necessarily just Christianity), but it does not constitute the whole of any religion. The Bible is not a religion: it is not the duties we owe to the Creator and the manner

of discharging them—although it contains some of both. While the Bible "has undeniable religious significance, '[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.'" *City of Plattsmouth*, 419 F.3d at 778 (quoting *Van Orden*, 545 U.S. at 690).

The first congresses can help illustrate the point. On September 11, 1777, recognizing that "the use of the Bible is so universal, and its importance so great," Congress ordered the Committee of Commerce to import 20,000 Bibles from Europe into "the different ports of the States of the Union." 8 *Journals of the Continental Congress, 1774-1789*, 733-35 (Washington, D.C.: Worthington C. Ford ed. 1904). In 1782, Congress went further and gave its official imprimatur to an American printing of the Bible by Rev. Robert Aitken, "recommend[ing] this edition of the Bible to the inhabitants of the United States." 23 *Journals of the Continental Congress* 572-74. Whether facilitating the distribution of Bibles into the country or officially endorsing a certain printing, Congress was certainly legislatively supporting a *religious* text but was not establishing Christianity or any other *religion* nationwide. South Iron, far from affirmatively importing or endorsing Bibles, has for decades allowed an outside group to freely

distribute them, a far cry from the First Congress's actions or the proscriptions of the Establishment Clause.

Thus, textually *and* historically, it cannot be reasonably held that South Iron is dictating to its students the duties that they owe to the Creator and the manner in which they should discharge those duties. Consequently, the Bible distribution practice and policies do not respect an establishment of "religion."

CONCLUSION

As it is the responsibility of this Court to decide this case based on the Constitution from which it derives its authority, this Court should reverse the lower court and hold that South Iron R-1 School District's past and current policies allowing Bible distribution in its schools do not violate the Establishment Clause of the First Amendment because they are not "law[s] respecting an establishment of religion." U.S. Const. amend. I.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 6,550 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in *Book Antiqua*, size 14.

3. Pursuant to 8th Cir. R. 28A(d), all CD's submitted to the Court and counsel have been scanned for viruses and are virus-free.

Dated this 3rd day of July, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief of *Amicus Curiae* has been served on counsel listed below, in paper and electronic form, by first-class U.S. Mail, and that an original and ten (10) copies of this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the 8th Circuit, by first-class U.S. Mail, on this 3rd day of July, 2008.

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