No. 05-3451

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EUGENE WINKLER, *et al.*,

Plaintiffs-Appellees,

v.

DONALD H. RUMSFELD,

Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

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

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CORPORATE DISCLOSURE STATEMENT

No. 05-3451

EUGENE WINKLER, *et al.*,
Plaintiffs-Appellees,
v.
DONALD H. RUMSFELD,
Defendant-Appellant.

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 the Foundation in this or any other case in which it has been involved.

_____
Gregory M. Jones

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, & Regulations

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law, Inc. (the Foundation), is a national public-interest 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 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 maintains that the policies of the Boy Scouts of America (BSA) in issue constitute acknowledgments of God that are perfectly permissible under the Constitution's Establishment Clause, and thus congressional authorization of the Department of Defense's support of the BSA in no way violates that provision of the First Amendment. The Foundation believes that the government should encourage such acknowledgements of God because of the government's own rich history of doing the same. The ruling by the federal district court below has a chilling effect on such acknowledgements.

SOURCE OF AUTHORITY TO FILE

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

SUMMARY OF ARGUMENT

The congressional statute authorizing the Department of Defense to provide various services in support of the Boy Scouts of America's National Scout Jamboree—10 U.S.C. § 2554 (the Jamboree statute)—in no way violates the Establishment Clause of the First Amendment because the Jamboree statute 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.

It is the responsibility of this Court and any court exercising judicial authority under the U.S. Constitution to 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.

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 Jamboree statute, it becomes evident that the Jamboree statute's authorization of support to the BSA does not dictate religion to anyone and it does not represent a form of an establishment. Affirmance of the district court's reasoning would perpetuate the already inconsistent manner in which the Establishment Clause is applied and would result in unnecessary and unjust discrimination against an innocent private organization.

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. __, 125 S.Ct. 2854, 2865 (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE JAMBOREE STATUTE SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court in this case correctly began its analysis of whether the Jamboree statute is constitutional by quoting the Establishment Clause of the First Amendment to the United States Constitution. *See Winkler v. Rumsfeld*, No. 05-3451, __ F. Supp. 2d __, slip op. at 25 (N.D. Ill. March 16, 2005). However, the court quickly abandoned any pretext of examining the Jamboree statute's fidelity to those words by proclaiming that the Establishment Clause "'prevents the government from promoting or affiliating with any religious doctrine or organization.'" *Id.* (quoting *Freedom from Religion Foundation v. Bugher*, 249 F.3d 606, 610 (7th Cir. 2001)).

The district court made this leap by applying the aptly named *Lemon* test, which was invented by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The district court explained that "[a] statute does not violate the Establishment Clause under the *Lemon* test if (1) it has a secular legislative purpose, and (2) its principal or primary effect must be one that neither

advances nor inhibits religion." *Winkler*, slip op. at 25-26.[1] The plaintiffs did not contend, and by extension the district court did not dispute, that the Jamboree statute has a "secular" legislative purpose. *See id.*, slip op. at 21. Thus, the whole of the district court's analysis turned on its determination that the Jamboree statute advances religion, *i.e.*, that the military's support of the BSA National Jamboree, authorized by the Jamboree statute, "advances religion."

Having framed the issue in this light, the district court needed only to conclude that the BSA is a "religious" organization in order to find the Jamboree statute to be in violation of the Constitution. Thus, in two short paragraphs, the district court lowered the threshold for an Establishment Clause violation from a law "respecting an *establishment* of *religion*" to a mere *affiliation* with a *religious* organization.

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

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.

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[1] The district court did not address the third prong of *Lemon*—whether the statute creates an excessive government entanglement with religion—because of the determination by the U.S. Supreme Court in *Agostini v. Felton*, 521 U.S. 203, 233 (1997) that the entanglement prong is an "aspect of the inquiry into the statute's effect." *See Winkler*, slip op. at 26 n. 8.

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 Jamboree statute under the guise of the *Lemon* test at the expense of the carefully crafted words of the Establishment Clause.

B. The *Lemon* test and other constitutional counterfeits form a confusing labyrinth that contradicts the text of the Constitution and the history of our country.

By adhering to *Lemon* and 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 to judicial precedent. *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 *Lemon* Court claimed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. *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."). However, jurisprudential experiments with various extra-textual "tests" such as *Lemon* have produced a continuum of disparate results. [2] As Justice Thomas has recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application." *Van Orden*, 545 U.S. at __, 125 S.Ct. at 2867 (Thomas, J., concurring). This is because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. 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.

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[2] Several courts of appeal have 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 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). This Court also 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 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 . . . ."[4] *Van Orden*, 545 U.S. __, 125 S.Ct. at 2866 (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*

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[3] This year alone, courts have 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, 2005 WL 2401569, at *3, September 29, 2005 (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).

[4] If anything, the district court's opinion is even *more* complicated than the usual case applying *Lemon* because it employed the rarely invoked sub-three-prong test from *Agostini* which expounds upon the "effects" prong from *Lemon*. *See Winkler*, slip op. at 26. This sub-test evaluates whether government aid has the effect of advancing religion by asking: (1) whether the statute results in governmental indoctrination; (2) whether it defines its recipients by reference to religion; and (3) whether it creates an excessive government entanglement with religion. *See Agostini*, 521 U.S. at 234; *Mitchell*, 530 U.S. at 808. This sub-test suffers from internal confusion because the first two prongs use the same set of facts for their inquiry; the only apparent difference is that the second prong looks at whether the *criteria* for dispensing the aid is likely to lead to governmental indoctrination, while the first prong simply looks at how the aid is actually dispensed. *See Winkler*, slip op. at 37-39. Often this results in a distinction without difference, as in this case.

However, the district court itself appears to have been confused as to which test it was applying. While it initially stated that it was declining the DOD's invitation to apply the Endorsement test in this case and instead would use the *Agostini* test, *see Winkler*, slip op. at 26 n. 9, at a subsequent point in the opinion the court stated that "a *reasonable observer* would conclude that the Jamboree statute conveys a message of *endorsement* of religion." *Winkler*, slip op. at 39-40 (emphasis added). Such confusion is a prevalent danger when courts invent so many tests *in lieu* of the fixed standard of the actual law. Regardless, as with *Lemon*, the *Agostini* test has no direct grounding in the text of the Establishment Clause.

County, Ky., v. ACLU of Kentucky, 545 U.S. __, 125 S.Ct. 2722, 2751 (2005) (Scalia, J., dissenting). *Lemon* and the district court's analysis fail this requirement.

Despite complaining about the "morass of our Establishment Clause jurisprudence," *Winkler*, slip op. at 41, the district court applied a version of *Lemon* in this case, concluding that the BSA is a "religious" organization, and that "the principal or primary effect" of the Jamboree statute "advances religion" by authorizing the Department of Defense to provide aid to the BSA during their National Jamborees. However, the Jamboree statute does not violate the Establishment Clause because it is not a law "respecting an establishment of religion." U.S. Const. amend. I. Regrettably, the district court below chose the imprecise and extra-constitutional prongs of the *Lemon* test over the "bright-line" of the law.

The district court specifically employed *Lemon's* second prong, which commands that a government statute's "principal or primary effect must be one that neither advances nor inhibits religion," to strike down the Jamboree statute. *Lemon*, 403 U.S. at 612. The principle underlying this prong is that the federal government must aim to achieve a mythical "neutrality" concerning religion in the public square. Indeed, the district court emphasized that "a key determination in assessing the constitutionality of government aid under a particular program or statute is the neutrality of the program at issue." *Winkler*, slip op. at 26. However, such neutrality does not exist and was never intended in our law.

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). 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 Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to

> spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

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

"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)). Even the Supreme Court itself 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).

Yet 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), 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 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, as the judicial oath of office requires, should be followed in this case. *See Marbury*, 5 U.S. at 180.

II. THE JAMBOREE 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 Jamboree 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"

The district court labeled the BSA a "religious organization" without defining what makes an organization "religious" and then used this finding to conclude that the Jamboree statute's authorization of government support for the BSA represents a law respecting an establishment of "religion." Such reasoning conflates the terms "religious" and "religion," and it completely ignores the constitutional definition of the term "religion."

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the Virginia ratifying convention's proposed amendments to the Constitution in 1788, and 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). 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).[5] "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 *Founders' Constitution* at 82; *Virginia Ratifying Convention, Proposed Amendments*, June 27, 1788, *reprinted in* 5 *Founders' Constitution* at 89; *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 that term in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. The Court thereby found that the duty not to enter into a polygamous marriage was not religion—that is, a duty owed solely to the Creator—but was "an offense against [civil] society," and therefore, was "within the legitimate scope of the power of . . . civil government." *Id.* 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*

[5] 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).

character, and of obedience to his will. . . ." (emphasis added)). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[6] 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 Virginia *Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance*. *See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5 *Founders' Constitution*, at 84-85. 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

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[6] *See Girouard v. United States*, 328 U.S. 61 (1946).

"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.

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." For example, 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 congressmen and senators 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 as recently as this year has 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 __, 125 S.Ct. at 2863 (emphasis added).[7] The BSA may promote a message consistent with some religions, but it is not a "religion," and

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[7] Even *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).

so government association with the group does not implicate the Establishment Clause.

Despite this, the district court below, on the basis of certain facts concerning the BSA, concluded that the group is a "religious" organization. Those facts included: the Scout Oath and Scout Law which recognize God; the BSA's exclusion of atheists and agnostics from youth membership and adult leadership; and that approximately 63 percent of all Packs, Troops, and Crews are chartered to religious organizations. *See Winkler*, slip op. at 31.

The district court failed to define the term "religious," but even assuming, *arguendo*, that these facts make the BSA a "religious" organization, they still do not come close to constituting a "religion" under the First Amendment. The Scout Oath simply recognizes that members have a "duty to God"; it does not detail what that duty is or how members should discharge that duty. The district court itself noted that "[t]he BSA encourages its youth members to practice their religious beliefs as directed by their parents and religious and spiritual advisors," and quoted from the BSA Declaration of Religious Principle, which specifically provides that "[t]he Boy Scouts of America . . . recognizes the religious element in the training of the member, but it is *absolutely non-sectarian* in its attitude toward that religious training." *Winkler*, slip op. at 4 (emphasis added).

The BSA Declaration of Religious Principle comments that the Scout Oath represents a "recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of his favors and blessings are necessary to the

best type of citizenship." *Winkler*, slip op. at 4. In other words, the BSA as an organization acknowledges God, which is no different than what the federal government has done throughout the country's existence. "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, e.g.*, *Van Orden,* 545 U.S. __, 125 S.Ct. at 2861-63 (2005) (listing numerous examples of the "rich American tradition" of the federal government acknowledging God).

In fact, the language in the BSA's Declaration of Religious Principle is very reminiscent of President George Washington's first national Thanksgiving Proclamation in which he stated: "[I]t is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and to humbly implore His protection and favor." George Washington, *Proclamation: A National Thanksgiving*, October 3, 1789, *reprinted in* 5 *The Founders' Constitution*, at 94. Washington issued the proclamation in response to a Congressional request—made the day after the First Amendment was proposed—for a declaration of a day of thanksgiving in honor of the creation of the government under the Constitution. *See Lynch*, 465 U.S. at 675, n. 2. If the government itself is permitted to recognize God, it is absurd to suppose that the government cannot associate with or support an organization that does the same.

Moreover, the fact that a certain percentage of the BSA's Packs, Troops, and Crews are sponsored by religious organizations proves nothing. Obviously, if roughly 60 percent of BSA groups are sponsored by religious organizations, then 40

percent are not. If a "secular" organization such as the AFL-CIO, for example, supports some BSA groups, does that fact make the BSA a "labor organization?" Even within the percentage of "religious organizations" that sponsor BSA Packs, Troops, and Crews, the district court below did not indicate that only one or two religions were represented; indeed, the district court's finding that the BSA is not pervasively sectarian suggests that several religions support the BSA. *See Winkler*, slip op. at 35-36. Support from different actual "religions" demonstrates, as the Supreme Court has previously found, that "[t]he Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people" intended to be a general "positive moral code for living," not a replacement for its members' various religions. *Boy Scouts of America v. Dale*, 530 U.S. 640, 644, 650 (2000).

Likewise, the fact that the BSA excludes from membership atheists and agnostics is simply an exercise of the BSA's right as a private organization to set the terms of membership based on what it believes will promote the mission of the organization. *See Dale*, 530 U.S. at 650 ("It seems indisputable that an association that seeks to transmit such a system of values engages in [constitutionally protected] expressive activity."). The federal government in no way has adopted the same policy merely by supporting the National Scout Jamboree any more than organizations such as the AFL-CIO could be said to have adopted it by sponsoring various Packs, Troops, and Crews. The Department of Defense supports the BSA

because it agrees with the importance of instilling values in the youth that the BSA serves, not because of any disfavor toward atheists and agnostics.

Besides, "[w]ith respect to public acknowledgments of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *McCreary County*, 125 S.Ct. at 2753 (Scalia, J., dissenting). For example, prayers to God have been offered in Congress since its creation under the Constitution; 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, of course, the Pledge of Allegiance states that the United States is "one nation under God." *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; 4 U.S.C. § 4. Such acknowledgments "exclude" atheism and agnosticism, and yet are permissible under the Establishment Clause. Thus, congressional authorization of military support for an organization that makes such exclusions is not extraordinary, nor should it be considered unconstitutional.

In short, the BSA in no way explains or dictates the duties that its members owe to God nor the ways in which those duties ought to be carried out. Unlike any "religion," there is no suggestion by the BSA of what articles of faith or forms of worship its members should hold. Because the BSA does not fall under the definition of a "religion," the district court erred in concluding that the Jamboree

Statute's authorization of financial and other support for the BSA National Jamboree is a law respecting an establishment of "religion." U.S. Const. amend. I.

B. The Definition of "Establishment"

Even if it is assumed that the Jamboree Statute is a law that pertains to "religion" under the First Amendment—which it does not—Congress cannot be said to have "establish[ed]" a religion through the statute.

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment."[8]

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[8] *See, e.g.*, Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

> We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 124 S.Ct. 2301, 2331-32 (2004) (Thomas, J., dissenting). 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 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

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effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

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

H.R. Rep. No. 33-124 (1854) (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. __, 125 S.Ct. 2113, 2126 (2005) (Thomas, J., concurring) (citations omitted).

The Department of Defense's support of the BSA National Scout Jamboree does not in any fashion represent the setting up of a state-sponsored church, it does not involve the government's power of coercion to force anyone to believe in any particular religion's beliefs or to join any particular religion, and it does not in any way lend government aid to one religion over another. In short, the Jamboree statute does not create, involve, or concern an "establishment of religion."

Instead of addressing whether congressionally authorized support for the BSA constitutes an "establishment," the district court combined *Agostini's* expansion of *Lemon's* "effects" prong with the Endorsement test. With regard to the latter, it is difficult to see, through the eyes of the "reasonable observer," what religion Congress is endorsing in the Jamboree statute. The statue merely authorizes aid to an organization that aims to instill certain values in its members without exclusively associating with or espousing one religion. Regardless,

"[e]quating 'endorsement' with 'establishment' is a novelty with neither linguistic nor historical provenance." *Books v. Elkhart County, Indiana*, 401 F.3d 857, 869 (7th Cir. 2005) (Easterbrook, J., dissenting).

Indeed, were it not for the fact that the courts have so readily accepted the morphing of "establishment" into "endorsement," one would think it obvious that something may be endorsed without it actually becoming the practice of the government. "A government does not 'establish' milk as the national beverage when it endorses milk as part of a sound diet." *Id.* If "'[n]o principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of the state government,'" then surely an "establishment" is not created through government support of a private organization like the BSA that neither professes nor inculcates a specific religion.[9] *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985) (Rehnquist, J., dissenting) (*quoting* Thomas M. Cooley, *Treatise on Constitutional Limitations* 470, 471 (1874)).

[9] Probably an even closer analogy to the aid provided to the Boy Scouts contemporaneous with the passage of the First Amendment was the repeated congressional appropriation in the 18th and 19th centuries of "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*, 472 U.S. at 103 (Rehnquist, J., dissenting). If even direct sectarian financial support for education did not trigger an Establishment Clause violation, it would seem incontrovertible that aid to a non-sectarian youth education organization could not constitute an "establishment" either.

"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, in authorizing support for the BSA, the Jamboree statute does not even remotely entail an "establishment" of religion. U.S. Const. amend. I.

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.*, __ U.S. __, 125 S.Ct. 2655, 2687 (2005) (Thomas, J., dissenting). Such a clash exists in this case between *Lemon* and its progeny and the words of the Establishment Clause. The proper solution is to fall back to the foundation, the text of the Constitution.

Both the legal definitions of the First Amendment's words and "[h]istorical practices . . . demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of religion." *McCreary County*, 125 S.Ct. at 2753 (Scalia, J., dissenting). The BSA as an organization acknowledges God, and it is perfectly consistent with the history of this country and the Establishment Clause of the First Amendment for Congress to authorize financial and logistical support for such an organization. Simply put, the Jamboree statute does not violate the First Amendment to the United States Constitution because it does not concern or relate to an "establishment," and it does not dictate "religion" to anyone.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision and order below should be reversed, and this Court hold that the Jamboree statute does not violate the text of the Establishment Clause of the First Amendment.

Dated this 7th day of November, 2005.

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Dated this 7th day of November, 2005.

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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 this Brief of *Amicus Curiae* have been dispatched to the Clerk of the United States Court of Appeals for the 7th Circuit, by first-class U.S. Mail, on this 7th day of November, 2005.

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