No. 10-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.,*

Plaintiffs-Appellees,

v.

BARACK OBAMA, *et al.,*

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RESPONSE BRIEF OF PLAINTIFFS-APPELLEES

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1973

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Freedom From Religion Foundation, Inc. is a non-profit corporation. It has no parent corporation or stock.

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None

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JURISDICTIONAL STATEMENT

The district court exercised original federal question jurisdiction pursuant to 28 U.S.C. §1331. Appellate jurisdiction exists under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court correctly held that the plaintiffs have standing to challenge 36 U.S.C. §119, which requires the President to annually declare a National Day of Prayer on the first Thursday of May. The individual plaintiffs are non-believers who are exposed each year to the exhortations of this federally sponsored call to prayer. The district court concluded that the National Day of Prayer is directed at all Americans, including the plaintiffs, who are unavoidably made aware of this annual celebration of religion through media attention and accompanying religious events, as intended by the National Day of Prayer statute.

2. Whether the district court correctly held that the National Day of Prayer statute violates the Establishment Clause, which prohibits Congress from endorsing religion over non-religion. The district court concluded that the National Day of Prayer statute is intended to promote active participation in the inherently religious exercise of prayer. That is the purpose and effect of requiring the President to declare a National Day of Prayer each year. Unlike legislative prayer, and other occasions of ceremonial prayer, the National Day of Prayer promotes participation in patently religious exercises as its desired and distinguishing end.

STATEMENT OF THE CASE

The district court entered Final Judgment holding that the National Day of Prayer statute enacted by Congress violates the Establishment Clause. (R. 133.) The court issued two Memorandum Opinions, holding that the plaintiffs have standing to challenge the National Day of Prayer statute and that the statute violates the Establishment Clause. (SA at 1-114.)[1]

A. District Court Opinion On Standing.

The district court, by Judge Barbara Crabb, held that the plaintiffs have standing to challenge the Congressional statute establishing a National Day of Prayer. Judge Crabb rejected the defendants' argument that plaintiffs have suffered merely "psychological harm." The essence of standing in any Establishment Clause case is not likely to involve physical injury or pecuniary loss, but rather the distress and feeling of exclusion caused by the government's endorsement of religion. (SA at 3.)

Judge Crabb found that the plaintiffs' undisputed evidence establishes their "sense of exclusion and unwelcomeness, even inferiority, which they feel as a result of what they view as the federal government's attempt to encourage them to pray through a statute and a presidential proclamation." (SA at 16.) This injury is analogous to the injuries identified in previous religious speech cases; according to Judge Crabb, there is little difference between the type of injury alleged in this case and those recognized in the past. (SA at 3 and 16-17.)

Unlike a local religious display, this case involves a message established by federal statute, which message is proclaimed annually by the President, and directed at all United States citizens, including non-believers. A plaintiff need not be physically confronted with a religious exercise where the plaintiff is part of the community in which a religious message is directed by the government, stated Judge Crabb. "The injury in a case under the Establishment Clause is

[1] Citations to plaintiffs Supplemental Appendix are designated "SA at __."

inflicted when the plaintiffs receive an unwelcome message that is directed at them; it does not matter what form that message takes." (SA at 25.)

Ironically, according to Judge Crabb, to not recognize standing in this case because of the scope of the government's intended audience would allow the government unrestrained authority to promote religion at the highest levels of government without legal redress. (SA at 19.) "To deny standing to persons who are, in fact, injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." (SA at 19.)

B. District Court Opinion On The Merits

Judge Crabb rejected the defendants' argument that the legislation represents merely an acknowledgment of the historical role of prayer; National Day of Prayer Proclamations also do not constitute "ceremonial deism" that lacks religious effect. According to Judge Crabb, "government involvement in prayer may be consistent with the Establishment Clause when the government's conduct serves a significant secular purpose and is not a 'call for religious action on the part of citizens.'" (SA at 52.)

Judge Crabb concluded that the National Day of Prayer statute goes beyond mere acknowledgment of religion "because its sole purpose is to encourage all citizens to engage in prayer, an inherently religious exercise that serves no secular function in this context. In this instance, the government has taken sides on a matter that must be left to individual conscience." (SA at 53.) "When the government takes sides on questions of religious belief, a dangerous situation may be created, both for the favored and the disfavored groups." (SA at 64.)

In applying the endorsement test to the National Day of Prayer statute, Judge Crabb concluded that the National Day of Prayer gives the appearance that the government is endorsing religion. "The very nature of having a statute involving a 'national day' in recognition of a

particular act connotes endorsement and encouragement;" it "is a straightforward endorsement of the concept of turning to God in prayer." (SA at 72.) The facts regarding the enactment of the National Day of Prayer likewise point to a purpose to promote a religious practice that is not merely incidental to a valid secular purpose. (SA at 76.) Just as the government cannot establish a public holiday such as Christmas in order to "praise God for the birth of Jesus," so the enactment of a National Day of Prayer in order to facilitate prayer, rather than a secular objective, gives the appearance of religious endorsement. (SA at 77.)

The legislative history of the National Day of Prayer statute supports Judge Crabb's finding that "the purpose of the National Day of Prayer was to encourage all citizens to engage in prayer, and in particular the Judeo-Christian view of prayer." (SA at 79.) The history further indicates that prayer was to be celebrated as a supposedly distinguishing feature of the United States, in contrast to Communism, thereby disparaging people who do not pray by associating them with Communists. Identifying good citizenship with religious belief is precisely the type of message prohibited by the Establishment Clause. (SA at 80.)

The 1988 Amendment to the National Day of Prayer statute further adds to the appearance of endorsement. "It is clear that the sole purpose of the Amendment was to permit more effective long-range planning for religious groups that wish to celebrate the National Day of Prayer and to use it to mobilize their grass roots constituencies." (SA at 81.)

The National Day of Prayer statute is not an example of "ceremonial deism," such as the legislative prayer considered in Marsh v. Chambers, 463 U.S. 783 (1983). Proclaiming a National Day of Prayer every year is not similar to legislative prayer that is directed at legislators. The Supreme Court, moreover, has never construed Marsh in subsequent cases to justify other disputed governmental practices, nor is it a generally applicable test. (SA at 93.)

The reasoning underlying Marsh does not involve factors that are truly different from the endorsement test. "The key question is again whether a particular practice serves a secular purpose." (SA at 94.) Legislative prayer serves the ostensible function of solemnizing public deliberations, without encouraging or endorsing the act of prayer itself. Similarly, courts have found that examples like the Pledge of Allegiance primarily serve the secular purpose of instilling patriotism. The National Day of Prayer statute, however, cannot be justified on similar grounds because the statute does not use prayer to further a distinct secular purpose; it endorses prayer for its own sake. The National Day of Prayer, therefore, is different from legislative prayer because 'legislative prayer does not urge citizens to engage in religious practices.' (SA at 95.) Legislative prayer also is distinct because it is engaged in by the government for itself and is not imposed on the people. (SA at 95.)

The notion of "history and ubiquity" does not save the National Day of Prayer. Religious conduct that would otherwise violate the Establishment Clause may not be upheld for the sole reason that the practice has a long history. (SA at 96.) If this were not true, the government would be free to discriminate against all non-Christians. (SA at 97.) Bible reading and prayer in schools also had a long history of practice, but subsequently was held unconstitutional. (SA at 98.)

The history and ubiquity of a practice is only relevant to whether a reasonable observer would perceive that a challenged governmental practice conveys a message of endorsement. (SA at 99.) This does not mean that a practice gets a "free pass" under the Establishment Clause simply because it is old. (SA at 99.) If a long-standing practice retains its religious significance, explained Judge Crabb, and fails to acquire secular meaning, it impermissibly conveys a message of endorsement. In this case, unlike those involving legislative prayer, the National Day of Prayer "serves no purpose but to encourage a religious exercise, making it difficult for a

reasonable observer to see the statute as anything other than a religious endorsement." (SA at 99.)

The National Day of Prayer statute also does not embody a particular historical tradition. (SA at 100.) Judge Crabb recognized that no tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular day, which practice was not established legislatively until 1952, and it was not until 1988 that Congress made the National Day of Prayer a fixed, annual event. (SA at 100.)

Other proclamations cited by the defendants are distinct from the National Day of Prayer, according to Judge Crabb, because proclamations such as Thanksgiving and Memorial Day serve an obvious secular purpose, i.e., giving thanks or memorializing veterans. (SA at 100.)

The viewpoints of early Presidents regarding prayer proclamations also are conflicting. For example, as described by Judge Crabb, Thomas Jefferson and James Madison opposed giving Thanksgiving proclamations. (SA at 101.) Andrew Jackson, likewise, followed Jefferson's example and refused to issue Thanksgiving and prayer prayer proclamations. The fair inference is that there was no common understanding among the founding fathers about the limits of the Establishment prohibition. (SA at 102.)

Finally, Judge Crabb concluded that the Supreme Court has not already determined the constitutionality of the National Day of Prayer. On the contrary, in County of Allegheny v. ACLU, 492 U.S. 573, 603 n. 52 (1989), the Supreme Court expressly noted that practices like proclaiming a National Day of Prayer are distinguishable from legislative prayer, which does not urge citizens to engage in religious practices "and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct."

STATEMENT OF THE FACTS[2]

A. History Of 1952 National Day Of Prayer Legislation.

The district court carefully examined the evidence surrounding the enactment of the 1952 legislation [Public Law 82-324] mandating a National Day of Prayer, which bill was introduced in the Senate by Rev. Pat Robertson's father, Absalom Robertson. (SA at 79.) This followed weeks of public lobbying for a National Day of Prayer by Rev. Billy Graham. (SA at 78-79.) Judge Crabb found that the evidence indicates only a religious purpose behind the National Day of Prayer statute. (SA at 80.)

B. Subsequent Legislation In 1988 Was Intended To Better Facilitate Religious Organizing.

After passage of the 1952 legislation, the President annually called the nation to a day of prayer whenever he chose each year, with the exception of Sundays. (SA at 121.) This created planning problems for groups intending to utilize the National Day of Prayer to lobby public officials to encourage Americans to actively pray for the nation, its people and its leaders. (SA at 121-124.)

The National Prayer Committee and the National Day of Prayer Task Force (hereinafter "NDP Task Force"), by Chairman Vonette Bright, orchestrated efforts leading in 1988 to President Reagan signing a law requiring that the first Thursday in May of each year be designated as the National Day of Prayer. (SA at 121-122.) The legislative history of the 1988 Amendment again evidences a purpose to facilitate religious exercises, including comments by entertainer Pat Boone. (SA at 123.) Senator Thurmond also explained the actuating purpose: "Maximum participation . . . could be achieved, if, in addition to its [National Day of Prayer]

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[2] The defendants do not dispute the district court's factual findings. (<u>See</u> SA at 116-179, for full recitation of Plaintiffs' Proposed Findings of Fact.)

being proclaimed annually, it were established as a specific, annual, calendar day." (Congressional Record, June 17, 1987, at p. 16385.)

The change in the law in 1988 [Public Law 100-307], to make predictable the Day of Prayer, facilitates efforts by groups like the NDP Task Force to organize multitudes of prayer observances. (SA at 124.)

C. Presidential Proclamations Exhort Prayer.

Presidential NDP proclamations are released by the Office of the Press Secretary. (SA at 118.) The defendant Robert Gibbs is the Press Secretary for President Obama.

The National Day of Prayer statute provides encouragement for the American people to pray. (SA at 118.) National Day of Prayer Proclamations routinely include exhortations to American citizens to pray. (SA at 119.) Most Presidents have explicitly directed "all" Americans, "every" American or "each" American, without exception, to pray in their NDP Proclamations. Such explicit instructions by Presidents occurred in at least 44 official National Day of Prayer Proclamations. (SA at 119.)

President Reagan's 1983 National Day of Prayer Proclamation actually repudiated the assertion that there has been an "unbroken" line of prayer proclamations dating to the nation's inception. President Reagan noted that a National Day of Prayer was forgotten for “almost half a century, and then again for nearly a century until it was revived as an annual observance by Congress in 1952." (SA at 120.)

D. The NDP Task Force Uses The National Day Of Prayer To Mobilize Prayer Activities.

The National Day of Prayer is a rallying point for groups like the NDP Task Force, a virulently evangelical Christian organization, as a day for focusing on prayer, because it is declared as such by the President each year. (SA at 125.)

The NDP Task Force promotes and encourages the role of prayer by mobilizing around the National Day of Prayer. (SA at 125.) The NDP Task Force has become closely aligned with the President and other government officials in promoting the National Day of Prayer. (SA at 128-131.)

E. Presidential Proclamations Are Integral To Prayer Rallies.

The official proclamation issued by the President is an integral part of the annual National Day of Prayer observance. (SA at 126.) The President's support for the National Day of Prayer serves a crucial role in calling Americans to prayer. (SA at 126.)

It is symbolically important that the President proclaim a National Day of Prayer. (SA at 127.) Presidential Proclamations are seen as important symbols and affirmations of the annual National Day of Prayer observance, which the NDP Task Force incorporates into its promotional materials. (SA at 131.)

F. The National Day Of Prayer Succeeds With Official Participation By Government Officials.

All fifty governors now also issue National Day of Prayer Proclamations. (SA at 131-133.) The State proclamations acknowledge the federal designation of the Day of Prayer by Congress and the President in their own proclamations. (SA at 132 & 134.) Support for the National Day of Prayer by governors helps further efforts to call the nation to prayer. (SA at 134.)

The NDP Task Force also holds a prayer service in the Caucus Room of the Cannon Office Building each year on the National Day of Prayer. This service is attended by many federal officials. (SA at 135.) Participation in NDP Task Force observances of the National Day of Prayer by federal officials is viewed as "partnering in calling the nation to prayer." (SA

at 136.) The NDP Task Force values the participation of leaders and dignitaries in National Day of Prayer activities. (SA at 136.)

G. The National Day Of Prayer Is Highly Divisive.

The National Day of Prayer is highly divisive. It annually generates claims that it has been "hijacked" by fundamentalist Christian groups, like the NDP Task Force. (SA at 137.) The participation of public officials in National Day of Prayer observances, including at public government buildings in Washington D.C., and State Capitol buildings throughout the nation, fuels the understanding that the National Day of Prayer is intended to promote and encourage religion. (SA at 137.)

Rep. J. Randy Forbes, R-VA, head of the Congressional Prayer Caucus, describes the National Day of Prayer as a "monumental religious event." (SA at 178.)

H. Nonreligious Persons Are A Significant Part Of The Nation Excluded By The National Day Of Prayer.

The nonreligious are the fastest-growing segment of the United States population in religious identification polls. (SA at 138.) The nonreligious today represent a significant part of the American population, constituting approximately 15 percent or thirty-four million Americans, in a recent American Religious Identification Survey. (SA at 138.)

I. FFRF Members Suffer Injury As Result Of The National Day Of Prayer.

The plaintiffs, who are officers and directors of the Freedom From Religion Foundation ("FFRF"), and other FFRF members, are discretely injured when the President orders them to pray, or tells them to pray, or even simply suggests that they and all other citizens ought to pray. (SA at 141, 147, 169-170, 173-75 and 177.) When the President proclaims a National Day of Prayer, the plaintiffs and other FFRF members feel excluded, disenfranchised, affronted, offended and deeply insulted. (SA at 173-174.)

J. FFRF Members Are Widely Exposed To And Affected By National Day Of Prayer.

Nearly 1,500 FFRF members have indicated that they have been exposed to media coverage of National Day of Prayer events, and nearly 600 survey respondents reported exposure via participation by local or state officials in National Day of Prayer events. (SA at 177.) Over 1,500 FFRF members also reported that the message conveyed by National Day of Prayer proclamations is perceived as religious endorsement and that as non-believers they are outsiders. (SA at 177.)

SUMMARY OF ARGUMENT

Every year since 1952, the President of the United States issues an official Prayer Proclamation and dedicates a National Day of Prayer, as Congress has legislatively mandated that he do. The President has not hesitated to issue such Prayer Proclamations, which extol the virtues of prayer and exhort all Americans to engage in prayer--solely for the sake of encouraging prayer itself.

The National Day of Prayer is recognized as an annual call by the President for Americans to engage in prayer. The President's required proclamation of this quintessentially religious event constitutes explicit devotional government speech that violates the Establishment Clause. The Presidential Proclamation is as much a summons to pray as the Adhan that calls Muslims to prayer five times a day -- and more powerful, becomes it comes from the highest executive office.

The National Day of Prayer has never had a secular purpose, intent, or effect. The intent has always been to place government endorsement behind prayer and religious belief, and to call upon citizens to pray and express belief in God. The National Day of Prayer statute was adopted after intense lobbying by Rev. Billy Graham. Congress openly cited religious motives that are outside the purview of secular government, such as to "instill faith in an Almighty God," to exhort citizens "to unite in a day of prayer each year. . . reaffirming in a dramatic manner that deep religious conviction which has prevailed throughout the history of the United States."

The 1988 Amendment, which codified the first Thursday[3] in May as the National Day of Prayer, was likewise the brainchild of evangelists. The stated purpose for changing the National Day of Prayer from a free-floating annual date to the first Thursday in May was to "help bring

[3] The defendants incorrectly state at p. 57 of their Brief that the National Day of Prayer may now sometimes fall on a Sunday.

more certainty to the scheduling of events related to the National Day of Prayer, and permit more effective long-range planning." (SA at 122.) National Prayer Committee Chairman Pat Boone, noted evangelical and entertainer, explained that the roving date "offered little advance notice to adequately inform the grass roots constituencies," but a "definite date will allow millions of citizens . . . who have explicit faith in a Prayer-hearing God to be informed about this significant date in our country." (SA at 123.)

The rationale for adoption of this unprecedented National Day of Prayer, compelling the executive power to beseech his constituents to pray in contradiction of the dictates of the Establishment Clause of the First Amendment, is based on a historic myth recited in the Senate record of the 1952 bill: The assertion that the nation's founders prayed at the Constitutional Convention which adopted the U.S. Constitution. In fact, there was no prayer at the Constitutional Convention. That lack of religious ritual reflected the deliberate intent of the founders to invent a new and secular government which separated the emotion of theology from the reason of government. That revolutionary and visionary act by the founders made the United States the first nation in the world to adopt a godless Constitution, which invested sovereignty not in a deity, but in "We, the People," and whose only references to religion in government are exclusionary.

A. The Defendants Misapprehend The Requirements For Standing.

The plaintiffs are an intended part of the audience at which the National Day of Prayer is directed. The intended audience of the National Day of Prayer statute is broader than for local religious displays on government property. The plaintiffs in this action are part of an intended audience, but they are differentially affected because they are non-believers.

The plaintiffs are not obligated to meekly avert their eyes and cover their ears when the government broadcasts unconstitutional speech promoting religion. The defendants' argument

suggests that these individual plaintiffs are obligated to forego being informed, so as to avoid objectionable speech, but as the Court understands, an informed Citizenry is a duty, and it is a strength of the Nation.

The Establishment Clause, to be violated, does not require forced or coercive exposure to religious endorsement. Coercion is not the touchstone of the Establishment Clause, which prohibits governmental endorsement of religion over non-religion. The expectation that nonbelievers should merely ignore or avoid objectionable governmental speech does not prevent the offense. On the contrary, this compounds the offense by emphasizing that religious believers are favored, while non-believers are political outsiders.

The defendants do not recognize their own deafness to the offence caused by exhorting each citizen to "reaffirm in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." Many Americans do not believe in God--or even believe that religion is useful or beneficent. Justice Black recognized this in Zorach v. Clauson, 343 U.S. 306, 318-19 (1952) (Black, J., dissenting):

> It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the Constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim, and kill those they branded "heretics," "atheists," or "agnostics." The First Amendment was therefore to ensure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now, as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all non-believers can be maintained.

President Jefferson, a prime source on the meaning of the Establishment Clause, refused to proclaim a National Day of Prayer precisely because of the implicit coercion of recommending such a religious practice:

> I consider the government of the U.S. as interdicted by the constitution from intermeddling with religious institutions, their doctrines, disciplines or exercises...Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government...But it is only proposed that I should recommend, not prescribe a day of fasting and prayer. That is, that I should indirectly assume to the U.S. an authority over religious exercises which the Constitution has directly precluded them from. It must be meant too that this recommendation is to carry some authority, and to be sanctioned by some penalty on those who disregard it; not indeed of fine and imprisonment, but of some degree of proscription perhaps in public opinion. And does the change in the nature of the penalty make the recommend the less a law of conduct for those to whom it is directed? . . . Fasting & prayer are religious exercises. The enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, & the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the constitution has deposited it . . . everyone must act according to the dictates of his own reason, & mine tells me that *civil powers alone have been given to the President of the U.S. and no authority to direct the religious exercises of his constituents*. (Thomas Jefferson: Writings, pgs. 1186-1187, Merrill D. Peterson, ed., New York: Library of America, 1994.) (Emphasis in original.)

The exhortations of an official National Day of Prayer cannot be justified by the presumed numerical insignificance of non-believers. Less than 70 percent of Americans believe in a traditional theological concept of a personal God, and the non-religious are the fastest-growing segment of the U.S. population, by religious identification. In any event, while it may be true that many Americans are religious in their personal lives, "we do not count heads before enforcing the Establishment Clause." McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844, 878 (2005) (O Connor, J., concurring). Being a member of the non-religious

community is not a self-inflicted injury, as the defendants imply; it is a matter of personal conscience protected as a fundamental right under the First Amendment.

B. The Defendants Misconstrue The Essence of Prayer Proclamations.

The defendants' suggestion that the Court abdicate any role in evaluating the National Day of Prayer statute is unsupported by precedent. It is emphatically the province and duty of the judiciary to say what the law is. Marbury v. Madison, 5 U.S. 137 (1803). Moreover, although the defendants suggest that the Supreme Court has already determined the constitutionality of Presidential Prayer Proclamations, that too is not true. The defendants also indulge and perpetuate historical inaccuracies in defending the National Day of Prayer, which is neither ubiquitous, nor without controversy and divisiveness.

The defendants ignore the legislative intent behind Congress' direction that an annual Day of Prayer be dedicated by the President. They misunderstand and distort the history of the Establishment Clause and the separation of church and state. The defendants also ignore the context and content of Day of Prayer Proclamations and Dedications, in which previous Presidents have closely aligned with the NDP Task Force, a messianic evangelical Christian organization, including by incorporating NDP Task Force scriptural references into official National Day of Prayer Proclamations. The alignment with the NDP Task Force provides important context for National Day of Prayer Proclamations, which is relevant to the reasonable observer test applied when determining improper endorsement.

Official dedications of a National Day of Prayer send an unequivocal message to a reasonable observer that the Government has a preference for religion. This cannot seriously be denied. Devotional government speech is tolerated under the Establishment Clause, however, only where no religious endorsement or exhortation occurs. Here, the purpose and effect of National Day of Prayer Proclamations are precisely the opposite; they intentionally encourage

and promote active participation in religious practices, and disparage or exclude millions of non-believing Americans.

ARGUMENT

I. THE PLAINTIFFS HAVE STANDING TO OBJECT TO GOVERNMENT SPEECH ENDORSING RELIGION THAT IS DIRECTED AT THEM.

A. Standard Of Review.

The parties submitted the present case in the district court on written submissions. The Court of Appeals reviews the district court's legal conclusions *de novo,* and reviews the court's factual findings and factual inferences, as well as its application of the law to the facts, for clear error. Hess v. Hartford Life & Accident Insurance Company, 274 F.3d 456, 461 (7th Cir. 2001). See also Fed. R. Civ. P. 52(a).

B. The Defendants' Proposed Test For Standing Improperly Requires Coercion Or Altered Conduct.

The defendants rely on a rejected test for standing that requires a plaintiff to have been coerced or forced to assume special burdens to avoid exposure to religious exercises. Without such coercion, according to the defendants, a plaintiff's injury is not "discrete and particularized."

The defendants do not dispute Judge Crabb's finding that the plaintiffs are part of the audience intended by the National Day of Prayer statute. The defendants also do not dispute that the plaintiffs are exposed to this intended message. That is not enough to provide Article III standing, however, according to the defendants, because such exposure "causes nothing more than psychological injury produced by the observation of conduct with which they [the plaintiffs] disagree."

The defendants advance an incorrect rule of standing that is not followed by the courts. The Establishment Clause neither requires coercion, nor a showing of a special burden or altered conduct, for injury to occur. Books v. Elkhart County, 404 F.3d 857, 862 (7th Cir. 2005). The Supreme Court recognizes that government speech endorsing religion is impermissible precisely because "it sends a message to nonadherents that they are outsiders, not full members of the

political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Allegheny, 492 U.S. at 594. Judge Crabb, therefore, correctly recognized that the injury in cases involving the Establishment Clause do not typically involve physical or economic injury. The defendants, however, would preclude standing precisely on the basis of the fundamental interests intended to be protected by the Establishment Clause.

The defendants misconstrue the requirement of a "discrete and particularized injury," which they claim requires complaining members of the intended audience to be differentially impacted by government speech endorsing religion. The defendants' notion of what constitutes a discrete and particularized injury has been rejected by the Supreme Court, even in cases involving taxpayer standing under the Establishment Clause.

In Flast v. Cohen, 392 U.S. 83 (1968), the Supreme Court allowed standing in an Establishment Clause challenge by federal taxpayers to Congressional action under Art. I, §8. In such cases, the plaintiff does not have to show an effect different from other taxpayers, or show that an injunction against improper spending would financially benefit the taxpayer-plaintiffs personally or as a group. DaimlerChrysler v. Cuno, 547 U.S. 332, 348 (2006).

Similarly, exposure to an unwanted government message endorsing religion does not require a member of the audience to differentiate her circumstances from those of other intended members of the audience. Judge Crabb correctly recognized that standing is not determined by the number of potential plaintiffs, but rather by whether the plaintiff is within the protected zone of interests affected by the government's speech. (SA at 20.) Judge Crabb also correctly recognized and respected that plaintiffs' "sense of exclusion and unwelcomeness, even inferiority" are not trivial consequences, as the defendants dismissively assert. This is precisely the type of injury that the Establishment Clause is intended to prevent.

In many instances, government speech endorsing religion is local, so that a requirement of proximity to the speech makes sense. In other instances, however, the intended audience for government speech includes all Americans, as with the National Day of Prayer statute. To prohibit standing whenever the intended audience is large would eviscerate the Establishment Clause when violated at the highest levels of government.

If Congress mandated that the President proclaim a national religion, the defendants in this case would find such conduct by Congress to be nonactionable. As long as such a proclamation did not coerce anyone to join a particular church, the defendants would find only psychological injury. Even if Congress required the President to declare Catholicism to be the national religion, the defendants would deny standing to members of other church groups, as well as to nonbelievers. Similarly, a proclamation denying the existence of God would be nonredressible. The defendants' test for standing closes the Courthouse door at the time of greatest need; the defendants propose a test that ignores the very purpose of the Establishment Clause.

The Establishment Clause is not violated only when government benefits are preferentially distributed or when coercion occurs. The Establishment Clause protects matters of conscience, which is not merely a curious "psychological" value. It is a protected interest that is particularly and discretely injured as to each member of the intended audience for government speech endorsing religion.

C. The Plaintiffs Have Constitutionally Sufficient Contact With The Objectionable Speech.

The defendants also argue that the individual plaintiffs do not "pass by" unwelcome Presidential Prayer Proclamations, such as occurs with a nativity scene at a county courthouse, and so the plaintiffs allegedly have not been injured. The defendants claim that unwelcome

exposure to government speech must have a pedestrian or "pass by" attribute, which allegedly is missing with respect to the National Day of Prayer.

A crucial difference exists between government and private speech that endorses religion: Government speech endorsing religion is forbidden by the Establishment Clause. Board of Education of West Side Community Schools (District 66) v. Mergens, 496 U.S. 226, 250 (1990). That difference undergirds the rule of standing in government speech cases.

The courts have routinely found standing for persons having unwelcome exposure to government speech endorsing religion. With regard to local monuments or displays, it is enough that a plaintiff allege unwelcome contact with the religious display, without showing any "special burden" or altered behavior. Books v. Elkhart County, 401 F.3d 857, 862 (7th Cir. 2005). See also Books v. City of Elkhart, 235 F.3d 292, 299-301 (7th Cir. 2000); Doe v. County of Montgomery, 41 F.3d 1156, 1160-61 (7th Cir. 1994). In cases of such displays, the intended and foreseeable audience for the government speech is local, and measurable by foot traffic near the display. Standing for such persons is not defeated by voluntarily passing by the display because involuntary or coerced exposure to government speech endorsing religion is not an essential element of an Establishment Clause violation. See Engel v. Vitale, 370 U.S. 421, 430 (1962).

Not all government speech endorsing religion is characterized by a physical presence in the public square. In fact, that is not a very effective way to communicate with large numbers of citizens. While the size of the intended audience may affect the means of communication, therefore, it does not reduce the number of persons who are exposed to such governmental speech. The contrary is true. That is certainly the case with the National Day of Prayer Proclamations here required by statute.

By contrast, the complaint in Valley Forge v. ACLU, 454 U.S. 464 (1982), did not involve government speech. That makes a difference because Prayer Proclamations are intended to be acted upon by all the citizens of the United States. A Presidential Proclamation without an intended audience would not be a proclamation at all. Unlike Valley Forge, and unlike cases involving local religious displays, the present case deals with government speech which the government intends to be broadcast and made known to the citizenry at large.

The defendants' reliance on cases such as Doe v. County of Montgomery, 41 F.3d 1156 (7th Cir. 1994), and Freedom From Religion Foundation v. Zielke, 845 F.2d 1463 (7th Cir. 1998), is misplaced because they involve government speech with a limited intended audience. The defendants' reliance on Zielke, moreover, notably ignores a later follow-up case in which the plaintiffs and the Freedom From Religion Foundation all had standing to complain. See Mercier v. City of LaCrosse, 395 F.3d 693 (7th Cir. 2005).

The intended audience for National Day of Prayer Proclamations also is different than the intended audience for legislative prayer. The Supreme Court has already recognized in Allegheny, 492 U.S.at 603 n. 52, that National Day of Prayer Proclamations stand on a different footing than "ceremonial deism" such as legislative prayer. The Supreme Court stated:

> It is worth noting that just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct.

The audience for legislative prayer is completely different than the audience for National Day of Prayer Proclamations. In Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 289 (4th Cir. 2005), Judge Niemeyer explained the significance of this difference, noting that "when a governmental body engages in prayer for itself and does not impose that

prayer on the people, the governmental body is given greater latitude than when the government imposes prayer on the people." Judge Niemeyer emphasized that "ever since Marsh, the Supreme Court has continued to recognize the distinction between prayer engaged in by the government for itself and prayer imposed on the people, subjecting the latter form of prayer to heightened scrutiny." Similarly, in Van Zandt v. Thompson, 839 F.2d 1215, 1218 (7th Cir. 1988), this Court viewed "a legislature's internal spiritual practices as a special case," warranting more deference than would be appropriate for government speech projected to an external audience.

Here, the evidence is undisputed that the individual plaintiffs have come in contact with National Day of Prayer Proclamations, through media reporting by newspapers and television, as well as from members and non-members of the Freedom From Religion Foundation reporting government-sponsored events. The defendants admit such exposure, but they question whether such exposure should matter for purposes of standing, at least without "something more."

D. Standing Does Not Require Exposure Plus Something More.

In cases involving government speech endorsing religion, exposure is sufficient to confer standing. The Seventh Circuit previously has rejected the defendants' same argument that unwelcome contact with religious speech is trivial and therefore not legally cognizable. Books, 401 F.3d at 861. In Books, the County argued that the plaintiff's injury was entirely psychological, and that such injuries, without more, do not confer standing. The Court rejected the defendant's argument, as other courts have done in government speech cases.

While the Supreme Court did state in Valley Forge that the psychological consequence produced by observation of conduct with which one disagrees is not an injury sufficient to confer standing under Article III, that was a taxpayer standing case which did not involve government speech. Since then, courts have consistently held that Valley Forge does not mean that

"psychological injury" is an insufficient basis for Article III standing. If this were not the case, then subsequent judicial precedents prohibiting government speech that endorses religion would have involved plaintiffs without standing, including the Supreme Court's decisions in County of Allegheny, and McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844 (2005). In cases involving unwelcome exposure to religious speech, "the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that non-economic or intangible injury may suffice to make an Establishment Clause claim justifiable." Suhre v. Haywood County, 131 F.3d 1083, 1087 (4th Cir. 1997).

The Establishment Clause prohibition on governmental speech endorsing religion is mandatory and self-executing; "assumption of risk" is not a defense. Nor is "coming to the injury" a proper basis to reject standing in a government speech case. Buono v. Norton, 212 F. Supp. 2d 1202, 1211 (C.D. Cal. 2002). In Buono, the district court rejected the argument that standing is precluded in government speech cases if the plaintiffs "could have avoided the harm," relying on this Court's own precedent in American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 268-69 (7th Cir. 1986). In Books v. City of Elkhart, 235 F.3d 292, 297 (7th Cir. 2000), this Court also concluded that plaintiffs had standing, even though their injury was based, at least in part, on the fact that they "know the [religious symbol] is there, whether [they] see it or not."

The decision in Newdow v. LeFevre, 598 F.3d 638 (9th Cir. 2010), cited by the defendants, further supports Judge Crabb's finding of standing to challenge the National Day of Prayer statute. In Newdow, the plaintiff challenged a federal statute that requires the inscription of the national motto on coins and currency. The Court of Appeals concluded that the "spiritual" harm resulting from contact with an allegedly offensive religious symbol is a legally cognizable

injury that is sufficient to confer Article III standing. Id. at 642. The Court also recognized that although encounters with the motto "are common to all Americans, this does not defeat his [Newdow's] standing." Id. Finally, the Court of Appeals concluded that Newdow had standing to challenge the statute requiring inscription of the motto on coins because the plaintiff's injury was "caused by the statutes requiring the placement of the motto on coins and currency and is redressible by an injunction ordering the removal of the motto from coins and currency. " Id. at 642.

The Supreme Court's equal protection analysis in Allen v. Wright, 468 U.S. 737 (1984), is not relevant to this Establishment Clause case. The Allen decision did not involve government speech endorsing religion, but rather was a benefits case. Likewise, Winkler v. Gates, 41 F. 3d 977 (7th Cir. 2007), was a benefits case. This distinction has long had significance in the Supreme Court's standing analysis, which clearly distinguishes between speech and benefits cases.

In the case of expressive government speech, the nexus between a plaintiff's standing and her complaint is determined by the scope of the intended audience, as Judge Crabb correctly recognized. Depending upon the expressive government speech involved in a particular case, the intended audience may include many or few persons. Limiting standing in such cases to the intended audience, nonetheless, is a principled test, just as taxpayer standing to challenge congressionally ear-marked appropriations is limited to those persons who pay taxes.

The defendants ignore the distinction between government action that is expressive and government action that is distributive or regulatory. Although the defendants claim that "every statute can be said to express a message of approval for whatever it seeks to accomplish," that is not the test applied to determine standing in this case. Judge Crabb determined standing in the context of expressive government speech, in which standing is limited to the intended audience.

In cases involving distributive or regulatory statutes, by contrast, standing is limited to those persons within the zone of protection of the statute at issue, which limits standing differently than in cases of expressive government speech.

Judge Crabb correctly concluded that members of the intended audience for government speech endorsing religion have standing. In government speech cases, unlike the benefits cases cited by the defendants, the constitutional injury is caused by the speech directed at the intended audience. Just as each taxpayer incurs the harm of Congressional appropriations supporting religion, so too members of the intended audience for government speech experience a constitutional harm. This does not mean that standing would be the same in cases involving distribution of government benefits, or even in cases of localized government speech. But where Congress encourages the entire country to engage in religious exercises, the constitutional prohibition on the establishment of religion by Congress is redressible by those who receive this unwelcome message.

II. THE PLAINTIFFS' CLAIMS ARE REDRESSIBLE BY THE COURT AGAINST THE PRESIDENT AND HIS PRESS SECRETARY.

The defendants further contend incorrectly that plaintiffs' claims are not redressible against the President. Although Congress has directed the President by statute to declare a National Day of Prayer each year, the defendants assert that the President is absolutely immune from suit challenging the constitutionality of such legislation. If the President's dedication of a National Day of Prayer violates the Establishment Clause, the defendants claim that such acts cannot be prevented by the Federal courts.

The United States system of government is founded on the rule of law, which includes the necessary function of an independent judiciary. The judiciary, in a system of separated powers, has the right and the duty to determine the constitutionality of legislative and executive

acts. That is what courts do. The present action seeking a determination of the constitutionality of Congress' mandate requiring the President to declare a National Day of Prayer is not an unprecedented or questionable "usurpation" of power by the judiciary.

Although courts generally should not interfere with the exercise of Executive discretion, the Supreme Court has not held that the President may not be subject to a judicial injunction requiring the performance of a 'ministerial' duty. See Franklin v. Massachusetts, 505 U.S. 788, 802 (1992). The Supreme Court recognized in Franklin that judicial inquiry as to the constitutionality of a President's ministerial actions does not necessarily implicate separation of power concerns. If Congress prescribes a ministerial duty for the President, then judicial scrutiny of the constitutionality of that legislative mandate does not, in the first instance, require a court to evaluate the President's exercise of discretion. The defendants' argument to the contrary would mean that unconstitutional legislation directing the President to act could never be challenged.

The plaintiffs seek a determination of the constitutionality of a Congressional Act, which is something Federal Courts are not prohibited from issuing. Courts routinely decide the constitutionality of legislative actions taken by Congress. That means in this case that declaring the National Day of Prayer unconstitutional does not intrude upon the constitutional authority vested in the President. The President's actions certainly can be reviewed for constitutionality, even if they are not reviewable for abuse of discretion. Franklin, 505 U.S. at 801; Youngstown Sheet and Tube Company v. Sawyer, 343 U.S. 579 (1952); and Panama Refining Company v. Ryan, 293 U.S. 388 (1935).

Suit against the President's Press Secretary, moreover, does not implicate immunity issues involving the President, contrary to the defendants' claims. The plaintiffs have sued the President's Press Secretary, Robert Gibbs, seeking an injunction against his publication of

National Day of Prayer Proclamations. This relief does not implicate any immunity issues because the plaintiffs' alleged injury is likely to be redressed by declaratory relief against the Press Secretary. Franklin, 505 U.S. at 803; Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 75, n. 20 (1978); Allen v. Wright, 468 U.S. 737, 752 (1984).

Concern about confronting the elected head of a co-equal branch of government, while still ensuring the rule of law, can be successfully accommodated by injunctive relief against subordinate officials, which the defendants do not deny. Swan, 100 F.3d at 978. See also Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985) (Court upheld declaratory and injunctive relief to nullify President's attempted pocket veto). It is "substantially likely," moreover, that the President will abide by an authoritative directive to his Press Secretary, whether or not the President is directly bound by such a determination. See Franklin, 505 U.S. at 803.

Judge Crabb correctly held that the plaintiffs' action against the President and his Press Secretary is not barred by separation of powers principles. On the contrary, the defendants seek to eviscerate and limit the constitutional authority of the Federal courts, whose role is to interpret and apply the United States Constitution, including the requirements of the Establishment Clause. The prohibitions of the Establishment Clause are not discretionary; the Establishment Clause is a mandatory and self-executing limitation on the Federal government, and the role of the Court is to finally interpret and apply its proscriptions. The claim that the defendants are not subject to the rule of law misunderstands the necessary role of the courts in our system of government.

III. THE NATIONAL DAY OF PRAYER STATUTE GIVES THE INDISPUTABLE APPEARANCE OF RELIGIOUS ENDORSEMENT.

A. The District Court Correctly Applied The Supreme Court's Endorsement Test To Determine The Constitutionality Of The National Day Of Prayer Statute.

Arguing against the grain of precedent, the defendants claim that the constitutionality of the National Day of Prayer statute must be determined under the supposed "test" applied by the Supreme Court in Marsh. The defendants, however, unfairly fault Judge Crabb for applying the endorsement test to judge the National Day of Prayer statute. As the Supreme Court recognized in Allegheny, 492 U.S. at 606-07, Marsh does not articulate any general test, but instead really represents an application of the endorsement test to the particular circumstances of that case. The Court also noted in Allegheny that even the evaluation of legislative prayer requires a fact-dependent consideration of the context and circumstances of specific instances. Id. at 607. The Marsh decision by itself does not provide a litmus test that controls the Court's determination in the present case.

The defendants unpersuasively attempt to extend Marsh beyond the context of legislative prayer. Judge Crabb correctly recognized that Marsh has not been applied by courts, including the Supreme Court, other than to internally-directed speech, such as legislative prayer. See Van Zandt, 839 F. 2d at 1218 (legislature's internal spiritual practices represent a special case warranting more deference than government speech projected to an external audience).

The Supreme Court has expressly rejected the argument that Marsh supplants the "endorsement test" in judging the constitutionality of government speech that communicates a religious message. Instead, the Court's decisions "have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing'

religion, a concern that has long had a place in our Establishment Clause jurisprudence." Allegheny, 492 U.S. at 592.

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle in each remains the same: "The Establishment Clause, at the very least, prohibits government from appearing to take positions on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community." Id. at 594. To decide specific cases, the Court has consistently applied Justice O'Connor's "endorsement test," which Justice Blackmun described as providing "a sound analytical framework for evaluating governmental use of religious symbols." 492 U.S. at 595.

The Allegheny decision rejects any notion that the Supreme Court will tolerate "some" government endorsement of religion. Id. Any endorsement of religion is invalid because "it sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Id.

The effect of government speech "depends upon the message that the government's practice communicates: The question is 'what viewers may fairly understand to be the purpose of the display.'" Id. See also Books, 401 F.3d at 867, and Sante Fe Independent School District v. Doe, 530 U.S. 290, 308 (2000). Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion, as the Court explained in Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766, 771 (7th Cir. 2001). The government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context. Id. at 597.

The Allegheny decision specifically rejected the defendants' interpretation of Marsh. The Court recognized that not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with religion. "Marsh plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalent are constitutional today." Id. at 603. To read Marsh otherwise would "gut the core of the Establishment Clause, as this Court understands it." Id. at 604.

It is a bedrock Establishment Clause principle that the Federal government may not demonstrate a preference for a particular faith, or even a preference for religion over non-religion, regardless of history. Id. at 605. Whether the line has been crossed requires an examination of the particular context in which the government employs religious symbols -- and Marsh is not an exception to this rule. Id. at 606. Marsh does not rubber stamp the constitutionality of all legislative prayer, but instead recognizes that promoting one religion, or for that matter, religion over non-religion, requires close factual analysis. Id.

The Supreme Court concluded that the line was not crossed in Marsh, but only in so far as guidance for a public body is involved as a "tolerable acknowledgement of beliefs widely held among the people of this Country." Marsh, 463 U.S. at 792. "Tolerable acknowledgment," of course, is far different than exhortations for all to pray, as in the present case, particularly when literally millions of Americans do not have deep religious convictions. The assumed belief in prayer is not as "widely held" today as in 1781, 1952 or 1983.

The question whether a particular practice would place the government's weight behind an effort to promote religion is essentially the same as determining whether a practice demonstrates the government's support, promotion or "endorsement" of religion. Id. at 608. As a practical matter, Marsh represents a specific application of the endorsement test in the limited context of legislative prayer.

B. Judge Crabb's Finding That The National Day Of Prayer Statute Has The Purpose And Effect Of Endorsing Religion Is Supported By The Evidence.

The defendants assert that the National Day of Prayer has "the primary purpose of acknowledging our nation's religious history and culture," but they cite no contemporaneous evidence for this proposition. The defendants' Proposed Findings of Fact, in fact, are notable for their absence for anything even remotely relating to the enactment of the National Day of Prayer statute itself. (R. 84.) The defendants instead merely assume their desired conclusion. Judge Crabb did not make this mistake. She considered the evidence and correctly concluded that the National Day of Prayer statute has the purpose and effect of endorsing religion.

The contemporaneous evidence supports Judge Crabb's findings of fact. The National Day of Prayer statute was enacted for the purpose of promoting and encouraging prayer for its own sake -- and it has this effect. These findings are supported by the overwhelming and undisputed evidence submitted by the plaintiffs. Even now, the defendants point to nothing that shows an intent to merely commemorate the historical significance of prayer, rather than to initiate a call to engage in prayer itself. Using the defendants' loose reasoning, a Congressional call to partake of Holy Communion would qualify as an "acknowledgment of the history of Catholicism."

Judge Crabb's findings are supported by the undeniable evidence showing the effect of the National Day of Prayer statute. The proof is in the pudding. The proclamation demanded by Congress is used as a rallying tool by religious groups to blatantly proselytize and promote religion for its own sake. By contrast, Thanksgiving and Memorial Day are marked by secular purposes, and they are not occasions of organized religious proselytizing. The proclamations demanded by the National Day of Prayer statute, however, have assisted broad scale religious proselytizing, with governmental endorsement, which is their intended effect. The resulting

celebrations of religion occasioned by the National Day of Prayer are not accidental outcomes. They are the intended result, and it is clear the groups like the NDP Task Force do not consider prayer by the government to have lost its religious significance due to a history of repetition.

The resulting divisiveness of the National Day of Prayer also is real and significant, as Judge Crabb found. The defendants again do not dispute this finding, but dismiss the evidence as irrelevant. The defendants suggest that only divisiveness within the government itself is relevant. The Supreme Court's discussions of divisiveness, however, have never considered the endorsement of religion as only being prohibited if divisive among elected officials.

Proclaiming a National Day of Prayer previously has been described by the Supreme Court, in Allegheny, 494 U.S. 603 n. 52, as "an exhortation from the government to the people that they engage in religious conduct." Justice Kennedy also has admitted that the National Day of Prayer "is a straightforward endorsement of the concept of turning to God in prayer." Id. at 603 n. 5 (Kennedy, J., concurring). That is certainly what it is. The National Day of Prayer, therefore, does clearly violate the purpose and effect of the "endorsement test."

In response, the defendants totally ignore the actual history of the National Day of Prayer statute adopted in 1952, at the instigation of Rev. Billy Graham, as well as the 1988 Act requiring that the first Thursday in May be fixed as the National Day of Prayer, again in response to lobbying by evangelical religious groups, like the NDP Task Force. The 1988 Act deliberately facilitates the mobilization of the religious viewpoints of the lobbyists behind the Act, but without removing any government-imposed burden on Free Exercise rights. The National Day of Prayer is not an accommodation of Free Exercise rights. Corporation of Presiding Bishop of Church of Jesus Christ v. Amos, 483 U.S. 327, 348 (1987). It is an establishment of religion.

The defendants also ignore the fact that prayer is quintessentially a religious practice, and that admonitions to pray inherently give the appearance of endorsement. Wallace v. Jaffree, 472 U.S. 38, 56 (1985). Promoting an intrinsically religious practice like prayer never satisfies the secular purpose requirement necessary for constitutionality. Jager v. Douglas County School District, 862 F.2d 824, 830 (11th Cir. 1989).

The constitutionality of the National Day of Prayer statute must be decided in its own contemporaneous context. In this respect, the reality is that the National Day of Prayer represents exactly what the Establishment Clause is intended to prevent: A battleground with the government deeply involved. As Judge Crabb specifically found, government officials are so aligned with exclusionary groups like the NDP Task Force that it is difficult to tell the difference between the government's message and that of private groups. Even when not directly involved in National Day of Prayer events, the Federal government's endorsement of the occasion creates understandable confusion about the sponsorship of events. (SA at 99.)

This is not a case of "benign ceremonial deism." The defendants are engaged in actions that give the undeniable appearance of government endorsement of religion. See Allegheny County, 492 U.S. at 598-600. Judge Crabb carefully and properly considered the evidence of such endorsement, and her findings are fully supported by the record.

C. Day of Prayer Proclamations Are Not Merely Ceremonial Speech Like That In Marsh.

The concept of "ceremonial deism" also is dependent upon whether a reasonable observer would view a specific religious display or government speech as having religious significance. "The constitutional value of ceremonial deism turns on a shared understanding of its legitimate non-religious purposes." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). This determination, like the endorsement test, involves evaluation of

context and content. Inscriptions of the national motto on coins and currency, or solemnizations of Court proceedings with invocations, may not communicate a message of endorsement in their particular circumstances, but that does not answer the question as to all government speech. Even legislative prayer is not constitutionally acceptable in all circumstances, as Justice Blackmun recognized in Allegheny, 492 U.S. at 604 n. 53. See also Hinrichs v. Bosma, 440 F.3d 393, 399 (7th Cir. 2006). Nor does one acquire a vested or protected right in violation of the Constitution, as Marsh also recognized. 463 U.S. at 790.

The defendants steadfastly avoid the essential analysis. They incorrectly equate the legislative prayer in Marsh with Presidential Prayer Proclamations which exhort participation in religious activity. They compare Thanksgiving and Memorial Day Proclamations to proclamations extolling and exhorting prayer for its own sake. The two situations are different, and the facts of record establish that the National Day of Prayer represents an endorsement of religion, and one that is highly divisive.

Finally, the defendants incorrectly claim that the National Day of Prayer supposedly reflects "an unbroken history of official acknowledgment of the role of religion in American life from at least 1789." This is patently not true, as Judge Crabb correctly recognized. Some Presidential Proclamations even contradict this claim. For instance, the 1987 National Day of Prayer Proclamation by Ronald Reagan acknowledged only intermittent Day of Prayer Proclamations before 1952:

> In 1952 the Congress of the United States, resuming a tradition observed by the Continental Congress from 1776 to 1783 and followed intermittently thereafter, adopted a resolution calling on the President to set aside and proclaim a suitable day each year as a National Day of Prayer.

In 1983, President Reagan's National Day of Prayer Proclamation similarly noted:

> Two hundred years ago in 1783, the Treaty of Paris officially ended the long, weary Revolutionary War during which a National Day of Prayer had been proclaimed every Spring for eight years. When peace came, the National Day of Prayer was forgotten.

Government speech, whether it involves legislative prayer, inscriptions on coins, government displays of Ten Commandments, or other religious symbols, must always be evaluated in its particular context in order to determine whether the speech impermissibly endorses religion. If there is not a "shared understanding of its legitimate non-religious purpose," then it cannot be merely ceremonial. Here, National Day of Prayer Proclamations plainly do not constitute "ceremonial deism." They have no non-religious purpose. On the contrary, they are intended to evoke mass participation in religious exercises. This is the antithesis of ceremonial deism.

D. Day of Prayer Proclamations Are Not Acknowledgments Of Religion And Its Historical Acceptability In Government Speech.

The defendants argue unpersuasively that the National Day of Prayer statute represents merely a benign acknowledgment of religion, rather than encouragement to pray. The facts tell a different story. In the first place, National Day of Prayer Proclamations are not just "honorary;" they are hortatory. On its face, the National Day of Prayer statute includes no language of "acknowledgement." Nor does it purport to solemnize any independent occasion or event. The statute creates its own event.

The Report of the Senate Committee on the Judiciary relating to the National Day of Prayer also belies the defendants' claim that the National Day of Prayer "is simply acknowledgment of a tradition." The claim that Congress intended the National Day of Prayer for the secular purpose of "acknowledging the role of faith" in the Nation's history also is not

true. Instead, the Senate Report describes the intent of Congress to encourage the people of this country to "reaffirm" the Nation's supposed deep religious conviction.

Significantly, the Senate Report on the National Day of Prayer Legislation also exposes a very troublesome historical inaccuracy relied on by the defendants. The Senate Report states that "when the delegates to the Constitutional Convention encountered difficulties in the writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." That statement is wrong, as Judge Crabb noted, but it lies at the core of the defendants' attempt to justify the National Day of Prayer statute adopted in 1952, more than 150 years after the signing of the United States Constitution. Leo Pfeffer, Church, State & Freedom (1967), describes the real facts at page 121-122, in his scholarly examination of the Establishment Clause:

> It is perhaps symbolic of the difference in the relationship of state and religion between the Continental Congress and the new government established by the Constitutional Convention of 1787, that whereas the Continental Congress instituted the practice of daily prayers immediately on first convening, the Convention met for four months without any recitation of prayers. After the Convention had been in session for a month, the octogenarian Franklin, who in earlier years had been pretty much of a Deist, moved "that henceforth prayers imploring the assistance of heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service." The motion was received politely though not without embarrassment. According to the records of the Convention, "After several unsuccessful attempts for silently postponing the matter by adjourning, the adjournment was at length carried, without any vote on the motion."
>
> More than symbolic, it is deeply significant that whereas there was scarcely a document or promulgation issued by the Continental Congress that did not contain an invocation to "God" or one of the numerous synonyms of the Deity, the Constitution emerging from the Convention contained no such invocation or reference. This omission was not inadvertent.

The different treatments of religion by the Continental Congress and the Constitutional Convention are significant in their implications about the supposed historical meaning of the Establishment Clause. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986), notes this significance, and the historical confusion still being perpetuated:

> The Constitutional Convention of 1787, which framed the Constitution of the United States, gave only slight attention to the subject of a Bill of Rights and even less to the subject of religion. In contrast to the Declaration of Independence and to many acts of the Continental Congress, the Constitution contains no references to God; the Convention did not even invoke divine guidance for its deliberations. Its finished product made no reference to religion except to prohibit a religious test as a qualification for federal office holders.
>
> There are no other references to the subject of religion at the Constitutional Convention, except for Benjamin Franklin's speech at a critical juncture of the proceedings on the reason that prayers should open its sessions. President Ronald Reagan, who sometimes reinvents history, mistakenly declared that as a result of Franklin's motion, "From that day on they opened all the Constitutional meetings with a prayer." Practical considerations - an unwillingness to let the public think the Convention was in trouble, lack of money to pay a minister, and deference to Philadelphia's Quakers - resulted in the death of the Franklin motion. The Convention, he noted, "Except three or four persons, thought prayers unnecessary."
>
> Id. at 63-64.

The delegates may have prayed at the Continental Congress, but they did not pray at the Constitutional Convention. That is a significant distinction because the Articles of Confederation adopted by the Continental Congress do not provide a litmus for the interpretation of the Establishment Clause of the United States Constitution. The Articles of Confederation were ratified on March 1, 1781, but they lasted only eight years. They were seriously defective. The Articles were subsequently replaced by the Constitution on June 21, 1789, and that Constitution has lasted more than 200 years. Whereas the Articles of Confederation hardly

recognized the separation between church and state, the Constitution subsequently incorporated that separation, with continuing success.[4]

The major architects of the Constitution vigorously opposed government meddling in religion, including the issuance of proclamations of prayer. Thomas Jefferson, for one, opposed such proclamations. "In his view, presidents should have nothing to do with Thanksgiving proclamations or days of prayer or times of devotion. These were religious matters falling into the exclusive province of religious, not political leaders; 'the right to issue such proclamations belong strictly to the former,' Jefferson declared, 'and this right can never be safer than in their own hands, where the Constitution has deposited it.'" Edwin S. Gaustad, Faith of Our Fathers: Religion in the New Nation, 45 (1987).

James Madison shared Jefferson's view regarding the issuance of prayer proclamations. Madison's views are particularly compelling because Madison is falsely cited as a proponent of the Constitutionality of dedicated days of prayer. He was not. Although Madison did stray from his convictions during a time of war, he did not believe his actions were constitutional. Pfeffer describes the Madison's reasoning:

> Madison was unable to resist the demands to proclaim a day of thanksgiving, but after retiring from the Presidency he set forth five objections to the practice: (1) an executive proclamation can be only a recommendation, and an advisory government is a contradiction in terms; (2) in any event, it cannot act in Ecclesiastical matters; (3) a Presidential proclamation implies the erroneous idea of a national religion; (4) the tendency of the practice is "to narrow the recommendation to the standard of the predominant sect," as is evidenced by Adams' calling for a Christian worship; and (5) "the liability of the practice to a subserviency to political views, to the scandal of religion as well as the increase of party animosities." (Pfeffer, Church, State of Freedom, at 266-67.)

[4] Similarly, the Declaration of Independence, severing the ties to the religiously intolerant England, does not define the resulting Constitutional rights of the citizens of the new nation. The eventual inclusion of the Establishment Clause in the First Amendment was deliberate, meaningful and momentous.

Just as the defendants' faulty history does not support the constitutionality of Day of Prayer Proclamations, neither does their interpretation of Supreme Court precedent, which directly questioned the constitutionality of such proclamations in Allegheny. Significantly, moreover, the Supreme Court's doubt about the constitutionality of Day of Prayer Proclamations in Allegheny came after the Court's decision in Lynch v. Donnelly, 465 U.S. 668, 675 (1984), upon which the defendants heavily rely. The Court concluded in Allegheny that Lynch teaches only that the government may celebrate holidays with religious significance in a way that does not endorse the religious doctrine or aspect of the holiday. Allegheny, 492 U.S. at 601.

Justice Douglas too recognized the importance of avoiding government endorsement of religion, despite his observation in Zorach, 343 U.S. at 313, that "we are a religious people whose institutions presuppose a Supreme Being." In McGowan v. Maryland, 366 U.S. 420, 563 (1961) (Douglas, J. dissenting), he clarified his statement in Zorach, which clarification the defendants studiedly ignore:

> But . . . if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples or practices of no religious group or sect are to be preferred over those of any others.

The Supreme Court's concern about religious endorsements has found voice in recent decisions as well. For example, in McCreary, 545 U.S. at 861, the Court noted that when the government designates Sunday closing laws, it advances religion only minimally because many working people would take the day off as one of rest regardless, "but if the government justified its decision with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable." As a result, the Supreme Court has upheld Sunday closing

statutes on secular grounds, after finding that the government had forsaken the religious purposes behind predecessor laws. Id.

The Supreme Court further noted in McCreary the difference between passive symbols and "insistent calls" for religious action. "Crèches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens." 545 U.S. at 877 n. 24.

The Supreme Court has not decided or implied that National Day of Prayer Proclamations are constitutional. Nor has the constitutionality of the National Day of Prayer statute been decided ancillary to any judicial recognition of holidays like Thanksgiving and Christmas. Judicial acknowledgment of such holidays has been limited to instances where the justification was based upon the secular aspects of such holidays. By contrast, courts have not sanctioned government recognition of holidays where the justification was based upon "religious connotations." For example, in Ganulin v. United States, F. Supp. 2d 824, 834-35 (S.D. Oh.1999), the Court concluded that the United States did not violate the Establishment Clause by giving federal employees a paid vacation day on Christmas because the government was not recognizing the religious significance of the holiday. According to the court, "the conclusion that Christmas has a secular purpose is supported by cases analyzing the constitutionality of school, office, and courthouse closings on other days traditionally celebrated as holy days by Christians," including Good Friday. Id., at 833.

In Granceier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999), the Court similarly summarized the law in regard to Good Friday closings, concluding that holiday closings are suspect "if the purpose for which they are instituted is religious." See also Freedom From Religion Foundation v. Thompson, 920 F. Supp. 696 (W.D. Wis. 1996); Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991); and Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

Government recognition of various holidays with supposed religious connotations has been upheld only so long as the recognition is not based on the religious significance of the holiday. That distinction lies at the heart of the Supreme Court's Allegheny decision regarding the symbolism of government speech. If government speech promotes religion as a preferred belief, then the government violates the Establishment Clause.

E. The National Day Of Prayer Is Not "Similar" To Other Proclamations Defendants Cite For Comparison.

The defendants argue unpersuasively that National Day of Prayer proclamations are "similar" to other proclamations that have included religious references. The defendants ignore the differing purposes and effects of such proclamations, however, while merely assuming the conclusion of "similarity."

In Marsh, the practice of solemnizing legislative sessions with invocations was similar in purpose and effect to the historical comparison being made. Without that similarity, however, the imputed perception of legislative prayer could not have been made.

Here, the defendants ignore an important historical difference between other proclamations and the National Day of Prayer statute. Unlike other proclamations in which prayer was used to solemnize various secular occasions, or to give thanks or to memorialize, the National Day of Prayer statute is intended to promote prayer for its own sake, as Judge Crabb found. It does not solemnize anything else. The impression this conveys to a reasonable observer, therefore, is different than the impression of other proclamations, such as Thanksgiving and Memorial Day proclamations, which do not extol prayer for its own sake.

There is no unbroken tradition of proclamations extolling prayer as its own intended subject. There is not even an unbroken history of proclamations that include prayer while solemnizing other secular occasions and subjects. With respect to Thanksgiving proclamations,

for example, the word "prayer" is contained in the title of such proclamations only nine times since 1789, and not at all after 1863.

The defendants' reliance on Memorial Day proclamations also is misplaced. The history of Memorial Day, previously known as Decoration Day, evidences an intent to engage in a patriotic exercise honoring those who died in defense of their country. The practice began as a patriotic tradition in 1866 and it became a nationwide tradition in 1868 in an order issued by the Commander-in-Chief of the Grand Army of the Republic. (SA at 181). The seminal proclamation cites no religious reasons for the holiday and does not mention prayer; in fact, the proclamation says that "no form of ceremony is prescribed." Following in the holiday's secular tradition, in a 1914 address at the Arlington National Cemetery, President Wilson described the solely secular purposes for the holiday, as did Calvin Coolidge in 1927 and 1928, and Herbert Hoover in 1929-31. (SA at 183-190). In 1966, President Johnson's Memorial Day proclamation recognized Memorial Day as a "patriotic tradition" begun 100 years ago.

The history and context of Memorial Day indicate a purpose and effect that are entirely different than in the case of the National Day of Prayer statute. Proclamations reflecting patriotic traditions such as Memorial Day do not give the appearance that religion is the subject that is being honored. The National Day of Prayer statute, by contrast, does not honor a secular tradition as its subject, but instead, the required proclamations are intended to promote prayer as its own honorific subject, including with invocations to engage in this inherently religious practice.

Proclamations of a National Day of Prayer do not share the same "historical pedigree" as the recent proclamations to which the defendants compare them. The purpose and effect of the National Day of Prayer is to promote prayer for its own sake, which is different than the purpose and effect of other proclamations like Thanksgiving and Memorial Day.

F. The National Day Of Prayer Has Neither An "Unambiguous" Nor "Unbroken History."

Regardless whether the National Day of Prayer statute gives the appearance of religious endorsement, including a preference for religion over non-religion, the defendants contend that the statute does not violate the Establishment Clause because of proclamations issued more than 200 years ago. The defendants imply that "some" endorsement of religion for its own sake is acceptable, if done long ago. The defendants' argument would represent a dramatic change in the understanding of the Establishment Clause.

The National Day of Prayer has neither an "unambiguous" nor "unbroken history of more than 200 years." After President Washington's 1789 proclamation, issued before Congress adopted the Establishment Clause, only seven proclamations between 1789 and 1860 set aside a day for prayer and fasting. For the past 145 consecutive years, presidents have simply proclaimed a day of thanksgiving, rather than a day of "Thanksgiving and Prayer." There simply is no "unbroken" history of National Day of Prayer Proclamations, as President Reagan acknowledged in his proclamations in 1983 and 1987. Day of Prayer Proclamations before enactment of the 1952 statute, were not only "intermittent," but effectively discarded as a practice.

The subject of Presidential Prayer Proclamations, moreover, even among the founding fathers of the country, has always been marked by controversy and disagreement, evidenced by such important historical figures as Thomas Jefferson and James Madison. By the standards of 1789, the National Day of Prayer statute would have been highly "unpopular" and politically dangerous, according to President John Adams as well. In that year, President Adams recommended a national fast, which he later claimed "turned me out of office." "Nothing is more dreaded than a national government meddling with religion." <u>The Spur of Fame:</u>

Dialogues of John Adams and Benjamin Rush, 1805-1813, edited by John A. Schutz and Douglas Adair (Indianapolis 2001).

The "coattails of history" do not support the defendants' argument in this case. The defendants rely almost exclusively upon the Supreme Court's decision in Marsh, which clearly treated legislative prayer as a practice that did not convey a message of religious endorsement. That is not the case, however, with the National Day of Prayer, as Judge Crabb found.

The Marsh decision itself recognizes that legislative prayer that proselytizes or conveys preference violates the Establishment Clause. That is a significant limitation on the use of past historical practice as a litmus test for constitutionality. Historical practice by itself, if determinative, even as to Presidential Proclamations, would justify preferences not just for religion, but for the specific religious traditions of early Americans. Supposed historical tradition, therefore, is clearly not a recognized test of the Establishment Clause, even under Marsh.

The defendants, however, misconstrue Marsh in a remarkable and dangerous way. They argue that Marsh merely prohibits prayer proclamations that include specific sectarian preference. From this conclusion, the defendants argue that the Establishment Clause does not prohibit a preference for religion over non-religion. This interpretation of Marsh defies the overwhelming and consistent recognition by the Supreme Court that the Establishment Clause prohibits more than just intra-religious preferences. The Supreme Court has consistently held that the Establishment Clause vigorously proscribes governmental preference for religion over non-religion.

The defendants are comfortable carrying water in this case because they quite apparently do not value and respect nonbelievers. That is why the defendants also are oblivious to the injury caused by National Day of Prayer Proclamations that encourage and promote the

inherently religious practice of prayer. The defendants characterize the plaintiffs' injuries as merely "psychological," whereas the injury in cases of intra-religious proselytization is supposedly more meaningful. As Judge Crabb correctly recognized, however, no law or logic supports this distinction.

In the end, the defendants are forced to argue that the Establishment Clause no longer prohibits governmental preference of religion over non-religion. That becomes the ultimate question presented in this case based on the defendants' interpretation of the Marsh decision. The defendants have no other recourse because National Day of Prayer Proclamations certainly are not examples of ceremonial deism; they do not have an unbroken history; they were not ubiquitous before the National Day of Prayer statute; they are not mere acknowledgements of the historical role of religion in the Nation's history; they are not passive; even 200 years ago, no consensus existed as to their acceptability; such proclamations are not self-directed at legislators themselves; and they are directed at all the citizens of the United States, including non-believers like the plaintiffs. Against this background, the defendants can only prevail if the Court accepts their plea to construe the Establishment Clause as no longer prohibiting governmental preference of religion over non-religion. That is not a course open to the Court, and it is a dangerous innovation for the defendants to even suggest.

CONCLUSION

The National Day of Prayer statute unequivocally constitutes a call to action. Day of Prayer Proclamations are issued in a context in which prayer is being promoted and extolled as a religious phenomenon. Prayer is being promoted solely for the sake of religion. There is no secular rationale for National Day of Prayer celebrations marked by Presidential Proclamations.

The district court correctly held that the National Day of Prayer statute communicates a message of religious endorsement, and therefore violates the Establishment Clause. The court's reasoning and conclusions are factually supported and legally compelling. The defendants' claim that the National Day of Prayer does not promote religion is not credible.

The defendants ultimately appeal to this Court to allow "some" endorsement of religion by the Federal government. The Supreme Court, however, has closed that door. All government speech that gives the appearance of endorsement is prohibited by the Establishment Clause, as the district court correctly held. Judge Crabb astutely recognized that "the government has taken sides [in this case] on a matter that must be left to individual conscience." (SA at 53.) "When the government takes sides on questions of religious belief, a dangerous situation may be created, both for the favored and the disfavored groups." (SA at 64.)

Dated this 30th day of September 2010.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,813 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B(iii).

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 Word 2007 in 12-point Times New Roman font in the body and 11-point Times New Roman Font in footnotes.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), this brief and all of the appendix items that are available in non-scanned PDF format.

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I certify that I have on this day served two copies of the foregoing Brief and Required Short Appendix of Plaintiffs-Appellants upon opposing counsel via federal express and e-mail to the following:

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