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, No. 08-cv-588-bbc

BRIEF OF AMICI CURIAE AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN, AND THE INTERFAITH ALLIANCE FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

Ayesha N. Khan
Legal Director
Americans United for Separation of Church and State
518 C Street, NE
Washington, DC 20002
(202) 466-3234

Daniel Mach
Heather L. Weaver
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005
(202) 675-2330

Evan M. Tager
Carl J. Summers
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

RULE 26.1 DISCLOSURE STATEMENT

Americans United for Separation of Church and State is a non-profit organization. It has no parent corporation and no publicly-held corporation owns ten percent or more of it.

The American Civil Liberties Union is a non-profit organization. It has no parent corporation and no publicly-held corporation owns ten percent or more of it.

The American Civil Liberties Union of Wisconsin is a non-profit organization. It has no parent corporation and no publicly-held corporation owns ten percent or more of it.

The Interfaith Alliance Foundation a non-profit organization. Its parent organization is The Interfaith Alliance, Inc., which also is a non-profit organization. No publicly-held corporation owns ten percent or more of The Interfaith Alliance Foundation or The Interfaith Alliance, Inc.

No other law firm has appeared or is expected to appear on behalf of the *amici* in this case.

TABLE OF CONTENTS

Page

RULE 26.1 DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE NATIONAL DAY OF PRAYER STATUTE PLAINLY FAILS THE STANDARD ESTABLISHMENT CLAUSE TESTS 4

A. The National Day Of Prayer Statute Does Not Have A Secular Purpose 5

B. The Primary Effect Of Section 119 Is To Advance Religion 9

C. Section 119 Fosters Divisiveness Caused By Excessive Entanglements Between Government And Religion 10

II. *MARSH* IS NOT THE SOLUTION TO APPELLANTS' PROBLEM 13

A. *Marsh* Is Not A Savings Clause For Government Acts That Flunk The *Lemon* Test 13

B. The Narrow Exception Recognized In *Marsh* Applies Only To The Internally Directed Traditions Of Governmental Institutions 18

III. THE HISTORY AND CONTEXT OF PRESIDENTIAL PRAYER PROCLAMATIONS IS BROKEN AND AMBIGUOUS 24

A. Early Presidents Did Not Uniformly Proclaim Days Of Prayer, And Several Firmly Concluded That Such Proclamations Are Unconstitutional 24

B. History Shows That Day-Of-Prayer Proclamations Were Intermittent, Ambiguous, And Often Linked To Secular Events 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Agnosti v. Felton, 521 U.S. 203 (1997) 11

Am. Jewish Cong. v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) 25

Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).....4

Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993) 4

Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000).....18, 20

Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005) 5, 6, 9

Brody ex rel. Sugzdinis v. Spang, 957 F.2d 1108 (3d Cir. 1992) 19

Brown v. Board of Education, 347 U.S. 483 (1954).....17

Card v. City of Everett, 520 F.3d 1009 (9th Cir. 2008).....19

Coles v. Cleveland Bd. of Educ., 171 F.3d 369 (6th Cir. 1999) 19

Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).....13

County of Allegheny v. ACLU, 492 U.S. 573 (1989).....*passim*

Cutter v. Wilkinson, 544 U.S. 709 (2005).....8

Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980).....10

Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188 (5th Cir. 2006),
vacated on other grounds, 494 F.3d 494 (5th Cir. 2007) 19

Edwards v. Aguillard, 482 U.S. 578 (1987) 6

Engel v. Vitale, 370 U.S. 421 (1962) 23

Everson v. Bd. Of Edu. Of Ewing Twp., 330 U.S. 1 (1947).....16, 25

Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980) 7

TABLE OF AUTHORITIES—(cont'd)

Page(s)

Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) 5

Hinrichs v. Bosma, 440 F.3d 393 (7th Cir. 2006).....18, 20

Holy Trinity Church v. United States, 143 U.S. 457 (1892).....16

Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005).....5

Kurtz v. Baker, 829 F.2d 1133 (D.C. Cir. 1987).....19

Lemon v. Kurtzman, 403 U.S. 602 (1971) .....*passim*

Lynch v. Donnelly, 465 U.S. 668 (1984) 6, 13

Marsh v. Chambers, 463 U.S. 783 (1983).....*passim*

McCreary County v. ACLU, 545 U.S. 844 (2005).....4, 7, 11, 25

Mellen v. Bunting, 327 F.3d 355 (4th Cir. 2003).....19

Milwaukee Deputy Sheriffs' Ass'n v. Clarke, 588 F.3d 523 (7th Cir. 2009).....5

N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991) 7, 21

Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008).....18

Plessy v. Ferguson, 163 U.S. 537 (1896) 17

Santa Fe I.S.D. v. Doe, 530 U.S. 290 (2000).....11, 23

Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 12

Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) 18

Van Orden v. Perry, 545 U.S. 677 (2005) 11, 12, 16

Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988) 19, 20, 21, 22

Vision Church v. Vill. of Long Grove, 468 F.3d 975 (7th Cir. 2006) 4

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 15, 25

TABLE OF AUTHORITIES—(cont'd)

Page(s)

STATUTES

36 U.S.C. § 119 ..... *passim*

OTHER AUTHORITIES

3 LETTERS AND OTHER WRITINGS OF JAMES MADISON (1865) 27

11 THE WRITINGS OF THOMAS JEFFERSON (Monticello ed. 1903) (Andrew Lipscomb & Albert Bergh, eds.) 26

Irving Brant, *Madison: on the Separation of Church and State*, WM. & MARY Q. 13 (Jan. 1951, 3d ser.) 27

Thomas E. Buckley, *The Religious Rhetoric of Thomas Jefferson*, in THE FOUNDERS ON GOD AND GOVERNMENT 53 (Daniel L. Driesbach et al., eds., 2004) 26

Garrett Coyle, Note, *The Role of Tradition in Establishment Clause Jurisprudence*, 65 N.Y.U. ANN. SURV. AM. L. 137 (2009) 16

Elizabeth Fleet, *Madison's "Detached Memoranda,"* WM. & MARY Q. 534 (Oct. 1946, 3d ser.) 27

Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim about the Establishment Clause*, 26 VALPARAISO U.L. REV. 37 (1992). 11

James Madison, *Memorial and Remonstrance Against Religious Assessments*, 2 WRITINGS OF JAMES MADISON 183 (1901) 25

Jon Meacham, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE (2008) 27

Leo Pfeffer, CHURCH, STATE, AND FREEDOM (rev. ed. 1967) 17, 26

Presidential Proclamation 8100, 72 Fed. Reg. 1909 (Jan. 11, 2007) 6

Anson P. Stokes & Leo Pfeffer, CHURCH AND STATE IN THE UNITED STATES (rev. ed. 1964) 27

INTEREST OF *AMICI CURIAE*

Americans United for Separation of Church and State (Americans United) is a national, nonsectarian public-interest organization. Its mission is (1) to advance the free-exercise right of individuals and religious communities to worship as they see fit, and (2) to preserve the separation of church and state as a vital component of democratic government. Americans United has more than 120,000 members and supporters. Since its founding in 1947, Americans United has participated in many of the Supreme Court's leading church-state cases.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our Nation's civil rights laws. The ACLU of Wisconsin is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared on numerous occasions before the Supreme Court and the Courts of Appeals in a variety of Establishment Clause cases.

The Interfaith Alliance Foundation (Interfaith Alliance) celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has 185,000 members made up of 75 different faith traditions as well as from no faith tradition.

This brief is filed by consent of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case challenges the National Day of Prayer statute, which directs the President to proclaim the first Thursday each May as a day on which Americans "may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119. This Court should affirm the district court's judgment that Section 119 violates the Establishment Clause of the First Amendment. The statute is a plain endorsement of religion over nonreligion and of certain types of religious beliefs and practices over others.

As the district court correctly held, Section 119 fails ***all 3 prongs*** of the test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Each of these failings is an independently sufficient ground on which to invalidate a governmental action under the Establishment Clause. First, the statute has no secular purpose—by its very terms it is not a commemoration or accommodation of our religious heritage but an active encouragement to engage in religious practices. Second, and for the same reason, the primary effect of the statute is to advance religious practices and beliefs. Third, the entanglement between government and religion that Section 119 has fostered, in practice, has resulted in an unacceptable atmosphere of exclusion and divisiveness.

Implicitly acknowledging these obvious failings, appellants and their *amici* have urged this Court to bypass *Lemon* and instead to rely upon the narrow excep-

tion to Establishment Clause jurisprudence that the Supreme Court created for certain forms of legislative prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983). Their effort to stretch the *Marsh* exception to cover this entirely different context is misguided. As numerous courts, including this one, consistently have recognized, *Marsh*'s holding is limited to the context of institutional prayer—*i.e.*, the internally directed traditional practices of government institutions. The suggestion that *Marsh* created a new Establishment Clause rule that gives a free pass to any government practice with a sufficient historical pedigree, regardless of its context or purpose, finds no support in *Marsh* or in subsequent case law. Construing *Marsh* to create such a rule would be contrary to the fundamental tenets of the Establishment Clause and sound constitutional interpretation.

But even if *Marsh* were properly understood to provide the governing principles for deciding this case, the statute would remain constitutionally infirm. The history of presidential day-of-prayer proclamations is intermittent and ambiguous. Although several early Presidents issued such proclamations, two Presidents whose views on the Establishment Clause hold substantial weight in Supreme Court jurisprudence—Thomas Jefferson and James Madison—believed the proclamations to be flatly unconstitutional (as did President Andrew Jackson, who, though exceptionally pious, nonetheless felt that the Constitution could not have been clearer on this subject). In addition, throughout our history these proclamations have been

instituted only sporadically. Moreover, the day-of-prayer proclamations predating Section 119 almost uniformly had a primarily secular purpose: unifying the country in times of war, commemorating the deaths of presidents, and celebrating the mixed secular and religious tradition of Thanksgiving.

ARGUMENT

I. THE NATIONAL DAY OF PRAYER STATUTE PLAINLY FAILS THE STANDARD ESTABLISHMENT CLAUSE TESTS.

This Court has recognized that the Establishment Clause "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 991 (7th Cir. 2006) (quoting *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005)); *see also, e.g., Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[The] government should not prefer one religion to another, or religion to irreligion."); *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1168-69 (7th Cir. 1993) (similar). Although the United States has not always lived up to this constitutional mandate, the principle of neutrality remains central to the contemporary understanding of the Establishment Clause and the limits it places on governmental practices. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 604-05 (1989) ("There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command.").

The Supreme Court has articulated a three-prong test by which government actions must be measured to ensure compliance with this principle of neutrality. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). This Court consistently has applied the *Lemon* test in deciding claims under the Establishment Clause. *See, e.g.*, *Milwaukee Deputy Sheriffs' Ass'n v. Clarke*, 588 F.3d 523, 527 (7th Cir. 2009); *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005); *Books v. Elkhart County*, 401 F.3d 857, 862-63 (7th Cir. 2005) (*Books II*) ("Despite persistent criticism from several of the Justices, *Lemon* has not been overruled, and [this court is] compelled to follow the approach it established."); *cf. Hankins v. Lyght*, 441 F.3d 96, 112-13 (2d Cir. 2006) (Sotomayor, J., dissenting) (noting that *Lemon* unambiguously controls whether a practice "satisf[ies] the Establishment Clause").

Under *Lemon*, "[a] government policy or practice violates the Establishment Clause if (1) it has no secular purpose, (2) its primary effect advances or inhibits religion, or (3) it fosters an excessive entanglement with religion." *Kaufman*, 419 F.3d at 683 (citing *Lemon*, 403 U.S. at 612-13). Because the National Day of Prayer statute fails ***each prong*** of this disjunctive test, it is plainly unconstitutional.

A. The National Day Of Prayer Statute Does Not Have A Secular Purpose.

The government contends that Section 119 "has the primary purpose and effect of acknowledging our nation's religious heritage and culture, and continuing a

practice that goes back to the beginning of our republic."[1] Brief for Appellants at 50. But "[t]he government's articulation of a secular purpose is insufficient by itself to avoid conflict with the First Amendment." *Books II*, 401 F.3d at 863. Instead, this Court must "'ask[ ] whether the government's ***actual*** purpose is to endorse or disapprove of religion.'" *Id*. (emphasis added) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987)). And "[g]overnment practices that ***purport*** to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (emphasis added). Here, both common sense and context show that the secular purpose offered by the Government is not the actual purpose of the statute.

As the district court correctly noted, if acknowledgment of our religious heritage had been Congress's purpose, Congress could have created a National Day of Religious Freedom. Required Short Appendix (RSA) 83. *Cf*. Presidential Proclamation 8100, 72 Fed. Reg. 1909 (Jan. 11, 2007) (declaring Religious Freedom Day). In other words, the means that Congress has chosen reveals its true purpose. When the government resorts to an "intrinsically religious" means to ac-

---

[1] Of course, the contention that an act is merely "continuing a practice," no matter how longstanding that practice, is not a cure for constitutional infirmity. *See* Part II, *infra*. In any event, a close inspection of the historical record reveals that there is no consistent and uniform tradition of calling for a national day of prayer solely to promote the religious practice of prayer. *See* Part III, *infra*.

complish what it claims is a secular purpose, its actions violate *Lemon*'s purpose test. *N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149-50 (4th Cir. 1991); *see also McCreary*, 545 U.S. at 862 (noting that conduct has been held to fail the purpose test when "the government action itself bespoke the purpose" because it was "patently religious"). No one reasonably can dispute that prayer is an "undeniably religious" activity. *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980). The only plausible purpose for a National Day ***of Prayer*** is to encourage, and place the government's imprimatur on, the practice of prayer.

Appellants try to whitewash the religious purpose of Section 119 by comparing the National Day of Prayer statute to the practice of opening judicial sessions with "God Save the United States and this Honorable Court" (Brief for Appellants at 51), but the difference between the means adopted in these two contexts is obvious. The phrase used to open court sessions asks nothing of listeners and is so purely ceremonial (and transitory) that it has effectively lost any spiritual meaning. The proclamations mandated by Section 119, on the other hand, actively exhort listeners to have a personal religious experience. And, far from being so rote as to lack meaning, they are specifically intended to awake religious sentiments in their audience.

The narrowness of the means chosen by Congress also belies appellants' proffered secular purpose. If encouraging people to pray "acknowledge[s]" our re-

ligious heritage, it does so only in the same way that encouraging people to sing "Hail to the Victors" acknowledges our athletic heritage. The selection of a means that, by its very nature, divides and excludes much of what purportedly is being "acknowledged" confirms that the true purpose is to endorse a specific form of religious belief (or a specific team) rather than to acknowledge the varied and diverse range of religious expression (or athletic prowess) that makes up our heritage.

Inquiry into the statute's origins and legislative history also reveals an unambiguous religious purpose. *See* RSA54-58, 78-81. Indeed, some of the *amici* urging reversal are more candid than appellants concerning this purpose. *See* Amicus Br. of Dobson *et al*. at 19 ("Congress' calling for a National Day of Prayer … call[s] for willing Americans to seek divine guidance and favor.").

Appellants also defend the statute as a permissible accommodation of religion. But "[g]overnment efforts to accommodate religion are permissible when they ***remove burdens on the free exercise of religion***." *Allegheny*, 492 U.S. at 601 n.51 (emphasis added); *see also Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005) (holding that statute was "a permissible legislative accommodation of religion … because it alleviates exceptional government-created burdens on private religious exercise"). Here, there was no preexisting burden on prayer. Religious adherents would "remain free to [pray] in their homes and churches" on the first Thursday in May with or without the statute. *Allegheny*, 492 U.S. at 601 n.51. Nor is the 1988

amendment defensible as an accommodation to "assist the planning of events by religious groups" (Brief for Appellants at 54). Religious groups can coordinate without government assistance (indeed, numerous denominations promulgate religious calendars worldwide without any government aid). It does not reflect "hostility" to religion (Amicus Br. of Dobson *et al*. at 24) to allow religious groups, like all other civic groups, to schedule their own events.

B. The Primary Effect Of Section 119 Is To Advance Religion.

An animating principle of modern Establishment Clause jurisprudence is that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief." *Allegheny*, 492 U.S. at 593-94. Courts have thus understood the second prong of the *Lemon* test as prohibiting government actions that appear to endorse religion from the standpoint of a reasonable observer. *See, e.g.*, *Books II*, 401 F.3d at 867. As the district court found, the National Day of Prayer statute cannot satisfy the reasonable-observer endorsement test. *See* RSA70-86.

Appellants suggest that Section 119's "primary purpose and effect … is to acknowledge this country's religious heritage and culture" and that it only tangentially "***recognizes*** the act of prayer." Brief for Appellants at 55 (emphasis added). But no reasonable observer could fail to see the difference between commemorating religious heritage and encouraging active participation in religious practices. It

is the difference between a statute that sets aside a day to celebrate the role of the labor movement in our country's history and a statute that sets aside a day on which employees are encouraged to picket their employers. A national day of picketing, like a national day of prayer, might commemorate our history incidentally, but the primary effect of both statutes is to incite action.

The distinction between commemoration and incitement to action also explains the difference between those "acknowledgments of religion" that have been allowed by the Supreme Court (*see* Brief for Appellants at 56) and the "attempts by the government to promote prayer" that appellants concede "fall outside this constitutional tradition" (*id*.). The first category involve mere ceremonial ***references*** to religion; the second type of practice ***actively encourages*** people to have a religious experience. Section 119 plainly falls on the wrong side of that line.

C. Section 119 Fosters Divisiveness Caused By Excessive Entanglements Between Government And Religion.

Although the district court did not expressly address the excessive-entanglement prong of the *Lemon* test, it did assess the related and overlapping question whether national day-of-prayer proclamations have been divisive in practice. RSA106-110. Divisiveness is, of course, one of the core concerns underlying the entanglement prong of the *Lemon* test. *See, e.g.*, *Lemon*, 403 U.S. at 622-23; *Decker v. O'Donnell*, 661 F.2d 598, 617 (7th Cir. 1980). While the Supreme Court has noted that divisiveness is not sufficient by itself to invalidate a governmental

practice (*Agnosti v. Felton*, 521 U.S. 203, 233-34 (1997)), the Court has continued to recognize divisiveness as a factor weighing against the constitutionality of a practice (*see, e.g.*, *Santa Fe I.S.D. v. Doe*, 530 U.S. 290, 311, 317 (2000); *McCreary*, 545 U.S. at 860-61, 863, 876; *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

As the district court correctly found, the National Day of Prayer has become a divisive event, in part because of the entanglement it has fostered between the government and religion. RSA106-110. An exhortation from the government that promotes the practice of prayer is most divisive for minority religious adherents who may not recognize a practice such as prayer, for individuals whose religions prescribe the appropriate times and venues for prayer, and for those who are atheists, agnostics, or otherwise do not adhere to a religion.[2]

The statute has proven particularly divisive because the government has placed its imprimatur on the activities of the National Day of Prayer Task Force. RSA59-60, 109. Indeed, a sense of exclusion and divisiveness is unavoidable when planning and coordination for a government-endorsed religious observance

[2] The statute creates division between "[t]hose who would not pray at all, those who would pray only in private, those who would pray only after ritual purification, those who would pray only to Jesus, or Mary, or some other intermediary, those who would pray in Hebrew, or Arabic, or some other sacred tongue." Douglas Laycock, *"Noncoercive" Support for Religion: Another False Claim about the Establishment Clause*, 26 VALPARAISO U.L. REV. 37, 64 (1992).

are dominated by a sectarian organization that acts with the express purpose of advocating a specific religious belief system. It is well settled that First Amendment values cannot support a regime in which "a majority could use the machinery of the State to practice its beliefs." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 226 (1963). Yet that is precisely what has happened in practice under Section 119.

Appellants contend that this divisiveness should be ignored because it does not involve "government … promoting a particular religion or demeaning another religion" and because it allegedly does not matter "how some groups have chosen to commemorate [the National Day of Prayer]." Brief for Appellants at 58. But appellants ignore the entanglement that has resulted between the government and the National Day of Prayer Task Force and fail to acknowledge that many of the events described by the district court ***do*** involve entanglements with government officials or institutions. *See, e.g.*, RSA106-108 (debate over use of town hall for denominational prayer services and controversy over mayor's choice to attend one service). Regardless, divisiveness among private religious groups and traditions is precisely what is at issue under the third prong of the *Lemon* test. Indeed, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Lemon*, 403 U.S. at 622; *see also, e.g.*, *Van Orden*, 545 U.S. at 698 (Breyer, J., concurring) (the Free Exercise and Estab-

lishment Clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike"); *Lynch*, 465 U.S. at 702 (Brennan, J., dissenting) ("'[C]ompeting efforts [by religious groups] to gain or maintain the support of government' may 'occasion[] considerable civil strife.'") (quoting *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 796 (1973)).

II. *MARSH* IS NOT THE SOLUTION TO APPELLANTS' PROBLEM.

Recognizing that Section 119 cannot survive analysis under *Lemon*, appellants and their *amici* urge this Court to ignore *Lemon* and instead to analyze this case under *Marsh*, which upheld certain types of legislative prayer because of that practice's long historical pedigree. Their effort to cast *Marsh* as a free-standing alternative to *Lemon* is mistaken. *Marsh* is not a constitutional savings clause for otherwise invalid governmental actions, and the factors that caused the Supreme Court to uphold legislative prayer there are absent here.

A. *Marsh* Is Not A Savings Clause For Government Acts That Flunk The *Lemon* Test.

In *Marsh*, the Supreme Court upheld Nebraska's practice of beginning each day's legislative session with a prayer, reasoning that "[t]he opening of sessions of ***legislative and other deliberative public bodies*** with prayer is deeply embedded in the history and tradition of this country." 463 U.S. at 786 (emphasis added). Appellants and their *amici* urge this Court to read *Marsh* as permitting any modern

governmental practice relating to religion if (1) the founders engaged in a similar practice and (2) the "history and tradition of this country" support the practice. The Supreme Court's more recent decisions, however, have rejected that broad interpretation of *Marsh* and have instead made clear that it is a virtually *sui generis* decision that created a narrow exception for certain internal practices of government bodies.

In *Allegheny*, for example, Justice Kennedy proposed a broader interpretation of *Marsh*, but the majority of the Court explicitly rejected that understanding. Justice Kennedy read *Marsh* as

> stand[ing] for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.

Allegheny, 492 U.S. at 670 (Kennedy, J., concurring) (footnote omitted). The majority disagreed, stating: "*Marsh* plainly does not stand for the sweeping proposition Justice [Kennedy] would ascribe to it, namely, that all accepted practices 200 years old and their equivalents are constitutional today." *Id*. at 603. The Court rejected that "reading of *Marsh*" because it "would gut the core of the Establishment Clause." *Id*. at 604-05. The *Allegheny* majority's conclusion is consistent with the Court's warnings in *Marsh* that, "[s]tanding alone, historical patterns cannot justify

contemporary violations of constitutional guarantees" and that "'no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'" *Marsh*, 463 U.S. at 790 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)); *see also id.* at 791 (emphasizing reliance on the "unique history" of legislative prayer).

To be clear, although the *Marsh* Court purported to "accept ***the interpretation*** of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged" (463 U.S. at 791 (emphasis added)), it neither articulated that "interpretation" nor explained how the interpretation should be applied in other contexts. In other words, the Court did not rework its general Establishment Clause jurisprudence to offer a coherent theory that can rationally be applied to future cases; it simply granted safe harbor to the "unique" practice of legislative prayer.

Indeed, construing *Marsh* as a broad rule that would save from invalidation any practice with a long pedigree would represent a sea change in our constitutional jurisprudence. As Justice O'Connor has explained, "[h]istorical acceptance of a practice does not in itself validate that practice …, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment." *Allegheny*, 492 U.S. at 630

(O'Connor, J., concurring); *see also Marsh*, 463 U.S. at 816 (Brennan, J., dissenting) (the Supreme Court has "recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee"); *see generally* Garrett Coyle, Note, *The Role of Tradition in Establishment Clause Jurisprudence*, 65 N.Y.U. ANN. SURV. AM. L. 137, 171 (2009). That is only logical because the "leaders who have drafted and voted for a text are eminently capable of violating their own rules. The first Congress was—just as the present Congress is—capable of passing unconstitutional legislation." *Van Orden*, 545 U.S. at 726 n.27 (Stevens, J., dissenting).

For example, in the context of the Establishment Clause, a reflexive deference to history would permit such absurd results as distribution of federal money to Christian sects while withholding aid from non-Christian sects. *Compare Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) ("[T]his is a Christian nation."), *with Everson v. Bd. Of Edu. Of Ewing Twp.*, 330 U.S. 1, 15 (1947) (Establishment Clause forbids government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another"). As the Supreme Court has explained, "[t]he history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically. Some of these examples date back to the Founding of the Republic, but this heritage of

official discrimination against non-Christians has no place in the jurisprudence of the Establishment clause." *Allegheny*, 492 U.S. at 604-05 (citation and footnote omitted). Contemporary decisions have "rejected the proposition that the Establishment Clause is to be interpreted in light of any favoritism for Christianity," even though such favoritism "may have existed among the Founders of the Republic." *Id*. at 605 n.55.

If the interpretive rule advocated by appellants were extended to the other protections of the First Amendment, the tally of undesirable outcomes would increase. For example, "[t]he Congress that framed the First Amendment's ban on laws abridging freedom of speech or press was pretty much the same Congress that enacted the Alien and Sedition Laws." Leo Pfeffer, CHURCH, STATE, AND FREEDOM 171 (rev. ed. 1967); *see also Van Orden*, 545 U.S. at 726 n.27 (Stevens, J., dissenting). Yet today those laws are considered to be patently, indeed paradigmatically, incompatible with First Amendment guarantees.

And, if it were recognized to be a ***general*** rule of constitutional interpretation that practices with long historical pedigrees are immune from constitutional scrutiny, then the Supreme Court would have been compelled to reach a very different outcome in *Brown v. Board of Education*, 347 U.S. 483 (1954), acceding to this country's ugly history of state-sponsored racial discrimination and segregation. *Cf. Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (upholding racial segregation

law and noting that, in crafting social policy, the legislature could rely on "the established usages, customs and traditions of the people").

In short, reading *Marsh* to freeze in place any practice with a sufficient historical pedigree simply is un tenable as a doctrine of constitutional interpretation.

B. The Narrow Exception Recognized In *Marsh* Applies Only To The Internally Directed Traditions Of Governmental Institutions.

The *Marsh* Court was concerned only with the history of the internal customs and practices of ***governmental*** bodies. In evaluating the propriety of legislative prayer, it relied exclusively on the longstanding use of chaplains by legislative bodies and the traditional phrase used to open sessions of the Court: "God save the United States and this Honorable Court." *See* 463 U.S. at 786-92. The Court made no reference to history, tradition, or customs outside this very narrow context.

Unsurprisingly, lower courts—including this one—have almost uniformly understood *Marsh* as being limited to the internal institutional traditions and rituals of government bodies. *See, e.g.*, *Pelphrey v. Cobb County*, 547 F.3d 1263, 1277 (11th Cir. 2008) ("We are bound to apply *Marsh* faithfully to 'legislative and other deliberative public bodies.'"); *Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) (opening prayers in state legislature); *Books v. City of Elkhart*, 235 F.3d 292, 321-22 (7th Cir. 2000) (*Books I*) (distinguishing between legislative prayer and school prayer); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1232 (10th Cir. 1998) (noting that post-*Marsh* cases have held "that the constitutionality of legislative

prayers is a *sui generis* legal question" or "a kind of religious genre" that is exempt from the normal Establishment Clause inquiry); *id*. at 1237 (Lucero, J., concurring) (noting that "*Marsh* involves, and should be limited to, *established chaplaincies*"); *Van Zandt v. Thompson*, 839 F.2d 1215, 1217 (7th Cir. 1988) (prayer room in state legislature); *see also Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) (noting that *Marsh* is a "narrow opinion"); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 199 (5th Cir. 2006) (explaining that *Marsh* is "a narrow exception for nonsectarian legislative invocations"), *vacated on other grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc); *Mellen v. Bunting*, 327 F.3d 355, 369 (4th Cir. 2003); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999); *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1121 n.6 (3d Cir. 1992); *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987).

Limiting the exception created by *Marsh* to the internal practices of governmental institutions makes sense for two related reasons, both of which demonstrate that *Marsh* cannot be applied to Section 119.

1. *The nature of an enduring governmental institution*. This Court's Establishment Clause precedents offer ***no*** support for the strikingly broad assertion that "*Marsh* controls the constitutionality of ***national traditions reflecting the nation's religious heritage***" (Amicus Br. of A.C.L.J. at 3 (emphasis added)). On the contrary, this Court has applied *Marsh* ***only*** in the context of the internal institu-

tional practices and traditions of governmental bodies—specifically, "legislative and other deliberative bodies." *Marsh*, 463 U.S. at 786. *See Hinrichs*, 440 F.3d at 399; *Van Zandt*, 839 F.2d at 1217; *Books I*, 235 F.3d at 322.

In *Van Zandt*, for example, this Court upheld the Illinois state legislature's decision to designate a room in the state capitol as a legislative prayer space. 839 F.2d at 1219. The *Van Zandt* panel expressly limited its analysis to "a legislature's ***internal spiritual practices***" and "defer[red] to the legislature's ordering of ***its own internal affairs***," which it deemed a "special case." *Id*. (emphasis added).

This reading of *Marsh* reflects the fact that certain governmental bodies—notably courts and legislatures—maintain their identity over time (in part) through the continuity of their rituals and traditions. Such traditions include not only religious observances, but also such prosaic matters as the assignment of desks in the Senate (*see generally* http://www.senate.gov/reference/Sessions/Traditions/index.htm) and the placement of quill pens on the counsel tables at the Supreme Court (*see generally* http://www.supremecourt.gov/about/traditions.aspx). These historical practices take on a type of definitional value for the institution itself quite apart from their content, spiritual or otherwise.

The same cannot be said for National Day of Prayer proclamations. They simply do not serve the same type of internal role in maintaining the identity of a governmental institution over time. Because these proclamations are directed at

the general populace, and the general populace is not an enduring institution in the same way as a legislature or a court—let alone an institution that ensures its continuity through rituals and traditions—applying *Marsh* to Section 119 would be fundamentally erroneous.[3] In fact, the National Day of Prayer proclamations are diametrically opposed to the practices that have been upheld under *Marsh*. They do not govern the "internal spiritual practices" of a government body (*Van Zandt*, 839 F.2d at 1219) but project the government's recommendation and imprimatur onto the external spiritual practices of individual private citizens.

2. *The audience for internal practices of governmental institutions.* The second (and closely related) factor that precludes extending *Marsh* to the wholly different context of a National Day of Prayer proclamation is that *Marsh* involved speech or acts directed primarily at the members of governmental institutions, not the general populace. *See, e.g.*, *Constangy*, 947 F.2d at 1149 ("legislative prayer is primarily directed at the legislators themselves, who have decided to have prayer"). The Supreme Court itself has articulated this distinction, explaining:

> [J]ust 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

[3] Even if, contrary to fact, these proclamations were internally directed practices of the presidency, no one could seriously suggest that they are integral to the way that presidents ensure the continuity of their office over time. That is particularly so given the irregular timing, purposes, and use of day-of-prayer proclamations throughout the history of the executive branch of government. *See* Part III, *infra*.

> 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.

Allegheny, 492 U.S. at 603 n.52 (citation omitted). *Amici* do not concede that the nature of the audience for legislative prayer justifies an exception to traditional Establishment Clause jurisprudence. Acknowledging that *Marsh* created an exception for certain internal religious practices directed at the members of government institutions, however, there are a number of reasons for refusing to extend that exception to practices directed at private citizens.

a. The audience's role in choosing the conduct. Legislative prayer is personally adopted by the very individuals who make up its primary audience. The members of Congress have collectively, through their internal rules of governance, affirmed their personal interest in providing this religious observance for themselves. This Court recognized this aspect of *Marsh* in *Van Zandt* when it "defer[ed] to the legislature's ordering of ***its own internal affairs***." 839 F.2d at 1219 (emphasis added). The same cannot be said of National Day of Prayer proclamations. The citizenry, which makes up the nationwide audience for such proclamations (i) has not personally chosen this practice, (ii) does not have a reasonable claim to need these proclamations to accommodate their personal religious practices (*see* page 8, *supra*), and (iii) includes children and others who cannot be said

to have acceded to being the target of this government-sponsored religious practice.

b. Composition of the audience. The Supreme Court repeatedly has noted that "[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The primary audience for internal government practices such as legislative prayer consists of men and women who are, relative to the average citizen, more able to resist those coercive effects. The audience for a National Day of Prayer proclamation, by contrast, includes many highly impressionable individuals—for example, children (*cf. Santa Fe I. S. D.*, 530 U.S. at 310 (invalidating government-encouraged prayer at school because minors are impressionable)), the emotionally or mentally challenged, and recent immigrants.

c. The hierarchical dynamic between the audience and the speaker. Third, the power dynamic between the speaker and the audience is completely inverted in the cases of legislative prayer and National Day of Prayer proclamations. The legislative chaplain is employed by his or her audience and has no authority over the legislature's members. In contrast, the President's words necessarily convey a strong sense of both official and personal authority over the citizenry, the intended audience for National Day of Prayer proclamations.

For all of these reasons, the narrow exception to standard Establishment Clause jurisprudence created in *Marsh* is inapplicable to Section 119. National Day of Prayer proclamations play no role in preserving the internal identity of tradition-bound governmental institutions. And the stark contrast between the intended audience for legislative prayers and National Day of Prayer proclamations confirms that, while an exception to normal constitutional analysis might be justified for certain types of legislative prayer, a law that requires the President to use his bully pulpit to encourage the general populace to engage in a specific religious practice must be subject to uncompromising constitutional scrutiny under *Lemon*.

III. THE HISTORY AND CONTEXT OF PRESIDENTIAL PRAYER PROCLAMATIONS IS BROKEN AND AMBIGUOUS.

Even if *Marsh* were properly construed as creating a safe harbor for practices of long standing, the National Day of Prayer statute cannot be defended on this basis, for day-of-prayer proclamations lack the "unique" historical pedigree of legislative prayer.

A. Early Presidents Did Not Uniformly Proclaim Days Of Prayer, And Several Firmly Concluded That Such Proclamations Are Unconstitutional.

In *Marsh*, the Supreme Court upheld the Nebraska state legislature's chaplaincy and the practice of opening legislative sessions with prayer largely on the basis of Congress's "'unbroken practice'" of establishing its own chaplaincy,

which had "continued without interruption ever since" the first Congress. 463 U.S. at 788, 790 (quoting *Walz*, 397 U.S. at 678). There is no such "unbroken practice" with respect to day-of-prayer proclamations. Indeed, Presidents Jefferson and Madison determined that such proclamations violated the Establishment Clause. The views of these two founding-era Presidents are especially significant because the Supreme Court's Establishment Clause jurisprudence has relied heavily on their theories of church-state neutrality. *See, e.g.*, *Everson*, 330 U.S. at 16 (quoting Jefferson's view that the Establishment Clause "was intended to erect 'a wall of separation between Church and State'"); *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring) (quoting James Madison, *Memorial and Remonstrance Against Religious Assessments*, 2 WRITINGS OF JAMES MADISON 183, 184 (1901)); *see also Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 124 (7th Cir. 1987) (quoting *Memorial and Remonstrance*).

Jefferson refused a preacher's request to issue day-of-prayer proclamations on the ground that the Constitution forbids such practices. He explained that the

> government of the United States [is] interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. … [I]t is only proposed that I should recommend not prescribe a day of fasting and prayer. That is, that I should indirectly assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from. … I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrine; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or manner among them.

> Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for [prayers], and the objects proper for them, according to their own particular tenets; and the right can never be safer than in their hands, where the Constitution has deposited it.

11 THE WRITINGS OF THOMAS JEFFERSON 428-30 (Monticello ed. 1903) (Andrew Lipscomb & Albert Bergh, eds.); *see also* Thomas E. Buckley, *The Religious Rhetoric of Thomas Jefferson*, in THE FOUNDERS ON GOD AND GOVERNMENT 53, 73-74 (Daniel L. Driesbach et al., eds., 2004).

During his presidency, Madison succumbed to political pressure and issued several day-of-prayer proclamations, but after leaving office he expressed a strong belief that such proclamations are unconstitutional. Leo Pfeffer's commentary notes that

> Madison was unable to resist the [political] 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's calling for a Christian worship; (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, *supra*, at 266-67. As Madison wrote, "[w]hilst I was honored with the Executive trust, I found it necessary on more than one occasion to follow the example of predecessors. … I have no doubt that every new example [of a day-of-prayer

proclamation] will succeed, as every past one has done, in [showing] that religion and Government will both exist in greater purity the less they are mixed together." Anson P. Stokes & Leo Pfeffer, CHURCH AND STATE IN THE UNITED STATES 89 (rev. ed. 1964) (quoting 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 275 (1865)); *see also* Elizabeth Fleet, *Madison's "Detached Memoranda,"* WM. & MARY Q. 534, 561 (Oct. 1946, 3d ser.); Irving Brant, *Madison: on the Separation of Church and State*, WM. & MARY Q. 13, 17 (Jan. 1951, 3d ser.).

A third early president—Andrew Jackson—was similarly convinced that the Establishment Clause prohibited presidents from declaring a national day of prayer. Though a devout Christian, Jackson was prepared to veto a proposal by Senator Henry Clay to declare a day of prayer and fasting. His veto message would have explained that, although he personally was convinced of the "efficacy of prayer in all times," the Constitution "carefully separated sacred from civilian concerns," and accordingly he believed it his "duty to preserve this separation and to abstain from any act which may tend to an amalgamation perilous to both." Jon Meacham, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 207 (2008) (quoting draft veto message). Once his opposition was made known, the proposal died without the need for him to veto it. *Id.*

B. History Shows That Day-Of-Prayer Proclamations Were Intermittent, Ambiguous, And Often Linked To Secular Events.

Although, as appellants and their *amici* have emphasized, there are superficial similarities between the history of day-of-prayer proclamations and the history of legislative prayer (*see, e.g.*, Amicus Br. of A.C.L.J., App. A), a closer inspection reveals substantial differences (*see, e.g.*, Amicus Br. of Am. Jewish Comm., App. A). At least two lines of distinction appear.

First, day-of-prayer proclamations became less regular after the first few presidents. If such proclamations can be described as a "tradition" at all, that tradition did not become firmly rooted until it was mandated by Section 119. *See, e.g.*, Amicus Br. of Am. Jewish Comm., App. A.

Second, the vast majority of proclamations identified by the parties and *amici* were not intended to promote prayer for the sake of prayer. Rather, the majority are linked explicitly to other non-religious events or purposes. Among the proclamations made before 1955, only two focused on prayer per se. Most related to the mixed and evolving religious and secular tradition of the Thanksgiving holiday.[4] And the others related to war, national tragedy, or patriotism. Among the

[4] The secular aspects of a holiday like Thanksgiving permit the government to recognize it officially without violating the Establishment Clause, because "despite its religious origins, [it] is now generally understood as a celebration of patriotic values rather than particular religious beliefs." *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring); *see also id*. at 579 n.3 (majority op.) ("It has been suggested that the cultural aspect of Christmas in this country now exceeds the theo-

164 proclamations made during modern times (1955-present), 42 focused on prayer per se (as mandated by the National Day of Prayer statute); 54 focused on Thanksgiving; 36 focused on peace on Memorial Day; and the remainder focused on war, national tragedy, patriotism, or other secular issues. (Two hard-to-categorize proclamations celebrated the National Saint Elizabeth Seton Day and the Year of the Bible.) Accordingly, most of the links in the (somewhat) unbroken historical chain that appellants and their *amici* attempt to forge simply do not connect with the proclamations issued under Section 119, which advocate prayer for its own sake.

In sum, until the passage of Section 119, there was ***no recognizable historical tradition*** of calling for a national day of prayer solely to promote the religious practice of prayer. Indeed, if there really had been a firmly rooted, unbroken, and unqualified history of such proclamations, there would have been no outcry from religious leaders for a statute mandating them and no incentive for Congress to accede to that outcry with Section 119.

CONCLUSION

The judgment of the district court should be affirmed.

---

logical significance of the holiday."); *id*. at 612 ("To be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the 'logic of secular liberty' it is the purpose of the Establishment Clause to protect.") (internal quotation marks omitted).

Respectfully submitted,

_____

Evan M. Tager
Carl J. Summers
MAYER BROWN LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae

Ayesha N. Khan
Legal Director
Americans United for Separation of Church and State
518 C Street, NE
Washington, DC 20002
(202) 466-3234

Daniel Mach
Heather L. Weaver
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20005
(202) 675-2330