No. 10-1973

In the

United States Court of Appeals

for the Seventh Circuit

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, *et al.*,
Plaintiffs – Appellees,

v.

BARACK OBAMA, President of the United States, *et al.*,
Defendants – Appellants.

On Appeal from the United States District Court
for the Western District of Wisconsin
Case No. 3:08-cv-00588-bbc
The Honorable Barbara B. Crabb, District Court Judge, Presiding

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL AND VACATUR

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CORPORATE DISCLOSURE STATEMENT

Appellate Court Number: 10-1973
Short Caption: Freedom from Religion Foundation, et al. v. Obama

(1) The full name of every party that the attorney represents in the case:

Justice and Freedom Fund

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

This is an amicus brief, so no appearances are made. Counsel of record for amicus, Justice and Freedom Fund, is listed below (Deborah J. Dewart., Attorney at Law).

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Deborah J. Dewart/mwc Date: July 8, 2010
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INTEREST OF AMICI[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the District Court should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens. JFF's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen has taught law school courses on constitutional law.

INTRODUCTION

The Religion Clauses of the First Amendment are complementary sides of the same coin. Together they form a shield guarding religion from government intrusion. Courts misinterpret the purpose and application of the Establishment Clause when they strike down practices, like the National Day of Prayer, that merely encourage the liberties the Constitution protects. Objectors are free to disregard public acknowledgments of the nation's religious heritage but have no iron-clad right to be free of all exposure to such references.

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

I. THE DISTRICT COURT MISCONSTRUES THE ESTABLISHMENT CLAUSE.

The District Court took an absolutist approach, "mechanically invalidating" the annual non-denominational NDP proclamation because of its religious overtones. But the proclamation does not "establish a religion...or tend to do so." *Van Zandt v. Thompson,* 839 F.2d 1215, 1221 (7th Cir. 1988); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). The First Amendment does not require us to purge the public square and sever America from its religious roots:

> The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society.... Rather, it leaves room to accommodate divergent values within a constitutionally permissible framework.
>
> *Salazar v. Buono*, 2010 U.S. LEXIS 3674, 32 (2010) ("*Buono*")
>
> [T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.... Such absolutism is not only inconsistent with our national traditions...but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.
>
> *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)

Absolute separation of church and state is not possible. *Lemon v. Kurzman*, 403 U.S. 602, 614, 672 (1974). The line is "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614; *Zorach v. Clauson,* 343 U.S. 306, 312 (1952). The "wall" should not be so high and thick that government callously disregards religion. Americans "are a religious people whose institutions presuppose a Supreme Being." *Id.* at 313. The Supreme Court refuses "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n,* 397 U.S. 664, 671 (1970).

The Court uniformly rejects an absolutist approach. *Lynch v. Donnelly, supra*, 465 U.S. at 678.

Seventh Circuit cases agree. *Harris v. City of Zion,* 927 F.2d 1401, 1410 (7th Cir. 1991). This Circuit rejects the use of *Lemon* criteria as "a formula into which the courts can insert measured values and derive dispositive results." *Van Zandt, supra,* 839 F.2d at 1220-1221 ("providing a convenient place for individual legislators to engage in private prayer or meditation does not seem to offend the spirit of *Lynch v. Donnelly*").

The Religion Clauses were designed to prevent an established national church like the Church of England, controlled and funded by government, and to prohibit governmental preference for any one Christian sect. *Harris v. City of Zion, supra,* 927 F.2d at 1410; *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 123 (7th Cir. 1987); *ACLU v. City of St. Charles,* 794 F.2d 265, 269-270 (7th Cir. 1986); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). In the "crucible of litigation," modern courts have acknowledged "the right to select any religious faith or none at all." *Wallace v. Jaffree,* 472 U.S. 3, 52-53 (1985); *Harris v. City of Zion, supra,* 927 F.2d at 1410.

The First Amendment respects all views but protects *religion*. The Religion Clauses were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely." *McCreary County v. ACLU,* 545 U.S. 844, 881 (2005). Government may neither compel nor prohibit religious exercise. "[T]he Constitution's authors sought to protect religious worship from the pervasive power of government." *Lemon v. Kurzman, supra*, 403 U.S. at 623. It frustrates this purpose—*to protect religion*—to erase it in the public realm.

"[C]ases arising under the Religion Clauses of the First Amendment have presented some of the most perplexing questions in constitutional law." *Harris v. City of Zion, supra,* 927 F.2d at 1410. These cases often require "delicate and fact-sensitive" examination. *Lee v. Weisman,* 505 U.S. 577, 597 (1992). Some church-state interaction is inevitable, and so is discomfort. Religious Americans will be angered if the public square is "sanitized" to remove religion. Others are offended at the slightest mention of God or a mere invitation to pray. But "[e]ven today, the establishment clause is not so strictly interpreted as to forbid conventional nonsectarian public invocations of the deity'.... The spirit of Scrooge does not inform the establishment clause." *ACLU v. City of St. Charles, supra,* 794 F.2d at 271-272.

"Separation" of church and state "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Ed.*, 333 U.S. 203, 212 (1948). NDP leaves them free. It does not refer to a particular kind of prayer, religious service, or religion, and it has minimal religious content—important factors to the architect of the "endorsement test." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 39, 42-43 (2004) (O'Connor, J., concurring).

NDP invites willing Americans to pray for their country as a people. All events are *privately* organized. All prayers are *private* speech. Government does not compose prayers, endorse religious beliefs, or finance events. NDP is no more an "endorsement" or "establishment" than other common acknowledgments of religion.

II. NO ONE HAS AN ABSOLUTE RIGHT TO BE FREE *FROM* RELIGION.

The District Court contended that "[t]he same law that prohibits the government from declaring a National Day of Prayer also prohibits it from declaring a National Day of Blasphemy." *Freedom from Religion Found., Inc. v. Obama*, 2010 U.S. Dist. LEXIS 37570, 89 (W.D. Wis. Apr. 15, 2010). Some legal rights include the converse. Free speech encompasses the right not to speak. *Wooley v. Maynard*, 430 U.S. 705 (1977). But the right to life does not hinge on the right to suicide. *Washington v. Glucksberg* (1997) 521 U.S. 702, 782-786 (1997) (Souter, J., concurring). The right to eat does not depend on the right to starve. *Planned Parenthood v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting). The right to defend another person's life does not include the right to endanger it. And the free exercise of religion does not imply the right to avoid religion altogether.

"The First Amendment guarantee[s] religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith....'" *Allegheny v. ACLU*, 492 U.S. 573, 590 (1989), quoting *Wallace v. Jaffree*, *supra*, 472 U.S. at 52. No one is compelled to affirm a belief, practice a religion, or financially support a church. "[L]eaders in this Nation cannot force us to proclaim our allegiance to any creed, whether it be religious, philosophic, or political." *Elk Grove v. Newdow*, *supra*, 542 U.S. at 44 (O'Connor, J., concurring).

But the First Amendment grants heightened protection to religious faith, "too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, *supra*, 505

U.S. at 589. The corollary is not true in every respect. Nonbelievers are entitled to deference, but the Religion Clauses protect *religion*. *Id.* at 589.

> No one can escape offense:
>
> > [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.
>
> *Elk Grove v. Newdow, supra*, 542 U.S. at 44 (O'Connor, J., concurring)
>
> Exposure to unwelcome ideas is the price of preserving American freedoms:
>
> > If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others.
>
> David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003)
>
> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.
>
> *United States v. Ballard*, 322 U.S. 78, 95 (1944)

Mere disagreement does not grant Plaintiffs veto power to quash the NDP—nor can they stifle the voluntary expression of Americans who organize prayer events.

> Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 780 (1995)).
>
> *Elk Grove v. Newdow, supra*, 542 U.S. at 35 (O'Connor, J., concurring)

The "endorsement test" is qualified: The reasonable observer "must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's

cultural landscape." *Elk Grove v. Newdow*, *supra*, 542 U.S. at 35 (O'Connor, J., concurring). Plaintiffs and the District Court brush aside the role of religion in American history and culture.

There is an interest in protecting religious minorities from feelings of exclusion *and* an "interest of the overwhelming majority of religious believers in being able to give God thanks and supplication as a people.... Our national tradition has resolved that conflict in favor of the majority." *McCreary County v. ACLU*, *supra*, 545 U.S. at 900 (Scalia, J., dissenting). Legislative prayer is "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). This is unremarkable because "a vast portion of our people believe in and worship God and...many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion...." *Sch. Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring, joined by Harlan, J.).

A. Government May Accommodate Religion Without Transgressing The Establishment Clause.

NDP accommodates the religious values that have strengthened and united Americans for decades. The District Court objects that "[t]he sole purpose of the [1988] amendment was to 'permit more effective long-range planning' for religious groups that wish to celebrate the [NDP]...." 134 Cong. Rec. H22761-02. *FFRF v. Obama, supra*, at 45. But as the Ninth Circuit observed:

> The original congressional resolution, Pub. L. No. 82-324 (1952), the 1988 amendment fixing the first Thursday in May as the National Day of Prayer, Pub. L. No. 100-307 (1988), codified at 36 U.S.C. § 119, and the Task Force all stress that the Day is meant as an opportunity for all Americans who wish to do so to pray according to their own faith, not to promote any particular religion or form of religious observance.
>
> *Gentala v. City of Tucson*, 244 F.3d 1065, 1067 n. 1 (9th Cir. Ariz. 2001) (overruled in part, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001))

It is questionable whether promotion of religion should ever "condemn an act of government...all of the accommodation-of-religion cases flunk this purpose inquiry." *Harris v. City of Zion, supra,* 927 F.2d at 1424 (Easterbrook, J., dissenting). Government may benefit religion: *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483* U.S. 327, 338 (1987) (religious employers exempt from religious discrimination law); *Walz v. Tax Comm'n, supra,* 397 U.S. at 673 (church property tax exemption); *Zorach v. Clauson, supra,* 343 U.S. at 308 (public school students allowed time off-campus for religious instruction).

This anomaly is best explained by observing two distinct meanings of "accommodation":

> - a measure that would violate the establishment clause if it were not compelled by the free exercise clause [or]
> - a measure that, while not compelled by free exercise, promotes free exercise values in ways that make it more acceptable under the establishment clause.
>
> *Van Zandt, supra,* 839 at 1223

Justice Stevens used the first meaning when he said "there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday; thus, there was no need to 'accommodate'...." *Wallace v. Jaffree, supra,* 472

U.S. at 58 n. 45. But "accommodation" is not so rigid that government may *only* accommodate religion to lift a burden on free exercise. Government may promote religious liberty—a high prized constitutional mandate. The legislators in *Van Zandt* faced no state obstacle to their liberty, yet the prayer room in the state capitol was acceptable under the second, more expansive sense of accommodation. *Van Zandt, supra,* 839 F.2d at 1224. The Seventh Circuit impliedly recognized both meanings in *Metzl v. Leininger,* striking down mandatory school closings on Good Friday while noting that school districts were "free to close their schools on the major holidays of other religions." *Id.* at 620. Schools were not obliged to close on any religious holidays, but their freedom to do so exemplifies the permissive accommodation discussed in *Van Zandt*.

The District Court cites *Gonzales v. North Township of Lake County,* 4 F.3d 1412 (7th Cir. 1993) as an example of "endorsement"—a crucifix used as a war memorial was ruled to be a religious symbol. This conflicts with the recent Supreme Court *Buono* decision—a striking example of accommodation. In *Buono*, Congress designated a cross as a "national memorial, ranking it among those monuments honoring the noble sacrifices that constitute our national heritage." 16 U.S.C. § 431; *Buono, supra*, at 29. The Ninth Circuit enjoined its display, creating a dilemma for Congress. Maintaining the cross would violate the injunction but removal would convey disrespect for fallen soldiers. Congress enacted legislation to transfer the land to a private organization. "The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of accommodation for a symbol that, while challenged

under the Establishment Clause, has complex meaning beyond the expression of religious views." *Id.* at 29-30.

Justice Alito was even more explicit:

> [T]he solution that Congress devised is true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance.
>
> *Id.* at 39-40 (Alito, J., concurring)

In keeping with time-honored precedent that government must avoid hostility or callous difference toward religion [*Zorach v. Clauson, supra,* 343 U.S. at 314; *Lynch v. Donnelly, supra*, 465 U.S. at 673], Justice Alito explained that:

> The demolition of this venerable if unsophisticated, monument would also have been interpreted by some as an arresting symbol of a Government that is not neutral but hostile on matters of religion and is bent on eliminating from all public places and symbols any trace of our country's religious heritage.
>
> *Buono, supra*, at 44-45 (Alito, J., concurring)

Striking down NDP conveys the message that government is determined to erase public recognition of America's religious roots—contrary to *Buono's* holding that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." *Id.* at 31-32.

B. The Establishment Clause Does Not Bar All Governmental Preference For Religion Over Irreligion.

The Establishment Clause has sparked fractured Supreme Court opinions, but the Court recently denied that "irreligion" is always on a par with religion:

> Despite Justice Stevens' recitation of occasional language to the contrary...we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.
>
> *Van Orden v. Perry, supra,* 545 U.S. at 684 n. 3

Justice Scalia's *McCreary* dissent foreshadows this pronouncement. "With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion....' Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words." *McCreary County v. ACLU,* 545 U.S. at 889 (Scalia, J., dissenting) (citing majority opinion, *id.* at 875-876).

The District Court relied on *McCreary* to conclude that Establishment Clause requirements "revolve around principles of neutrality or equality, both among different religions and between religion and nonreligion." *FFRF v. Obama, supra*, at 23-24, citing *McCreary County v. ACLU, supra,* 545 U.S. at 875-76. *McCreary* looked back to *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) ("[t]he First Amendment mandates governmental neutrality...between religion and nonreligion"); *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 15 (1947) ("[n]either [state or federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another"); *Wallace v. Jaffree, supra,* 472 U.S. at 52-54 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"). *McCreary County v. ACLU, supra,* 545 U.S. at 860.

Even further back, the Supreme Court refused to resolve a religious dispute among church members, explaining that "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson v. Jones*, 13 Wall. 679, 728 (1872). *Watson* does not support absolute equality between religion and irreligion. On the contrary, it exhibits the Court's high regard for religion—refusing to resolve an intra-church conflict where it would not have hesitated to adjudicate a similar dispute in the secular sphere.

Yes, there is a right to select any religious faith—or none. "This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful." *Wallace v. Jaffree, supra,* 472 U.S. at 53. The Constitution protects conscience and mandates tolerance. But an invitation to pray does not bind any person's conscience. The District Court complains that "religious expression by the government that is inspirational and comforting to a believer may seem exclusionary or even threatening to someone who does not share those beliefs." *FFRF v. Obama, supra*, at 27. But eliminating even nominal support for the nation's religious heritage is "exclusionary or even threatening" to Americans who treasure that heritage.

C. NDP Has No Coercive Impact—The Hallmark Of Historical Establishments.

NDP is "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." *Lee v. Weisman, supra,* 505 U.S. at 630. *Lee* involved only a short invocation struck down because of "psychological coercion."

Id. 505 U.S. at 632 (Scalia, J., dissenting). But "[t]he coercion that was a hallmark of historical establishments...was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*" *Van Orden v. Perry, supra,* 545 U.S. at 693 (Thomas, J., concurring), citing *Lee v. Weisman, supra,* 505 U.S. at 640 (Scalia, J., dissenting).

The District Court strains the facts. NDP does not place "the power, prestige, and financial support of government behind a particular religious belief." *FFRF v. Obama, supra*, at 54, citing *Engel v. Vitale,* 370 U.S. 421, 431 (1962). NDP exerts no power, expends no state funds, and promotes no particular religion. Government officials do not compose or sanction official prayers. *FFRF v. Obama, supra*, at 54, citing *Engel v. Vitale, supra,* 370 U.S. at 435.

The Supreme Court has long held "that the religion clauses deal with governmental compulsion." *American Jewish Congress v. City of Chicago, supra,* 827 F.2d at 135 (Easterbrook, J., dissenting). *Cantwell v. Connecticut* paraphrased the Establishment Clause as "'forestal[ling] compulsion by law of the acceptance of any creed or the practice of any form of worship.' *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)." *Id.* "The establishments of Europe and the states were riddled with compulsion...to pay church taxes... to attend church...to accept the tenets of the chosen creed...." *Id.* "The Establishment Clause expunges...an 'establishment'...a relationship characterized by public funding and legal penalties." *Id.* at 140.

Seventh Circuit cases link establishment to coercion. The prayer room in *Van Zandt*, "while open to the public, need not impose any inconvenience on anyone who wishes to avoid it." *Van Zandt, supra,* 839 F.2d at 1219. It is even easier to avoid NDP. In *Tanford*, "[u]nlike *Lee*...there was no coercion—real or otherwise...the mature stadium attendees were voluntarily present and free to ignore the cleric's remarks." *Tanford v. Brand,* 104 F.3d 982, 985 (7th Cir. 1997) (university commencement invocations). Last year, the Seventh Circuit found an Establishment Clause violation where a sheriff imposed religion on deputies at a mandatory leadership conference. *Milwaukee Deputy Sheriffs' Association v. Clarke,* 588 F.3d 523, 530-531 (7th Cir. 2009). NDP has no comparable captive audience and is easily ignored.

The District Court inverts the Religion Clauses, insisting that coercion would give the Establishment Clause "little or no independent meaning apart from the Free Exercise Clause, which prohibits government from compelling conformity to any religious belief or practice." *FFRF v. Obama, supra*, at 53-54. Free Exercise guards the freedom *to* worship. It is the Establishment Clause that "prohibits government from compelling conformity...."

In *Marsh*, the *dissent* highlighted coercion. Legislative prayer allegedly "intrudes on the right to conscience by forcing some legislators...to participate in a 'prayer opportunity'" and "forces all residents of the State to support a religious exercise that may be contrary to their own beliefs." *Marsh v. Chambers, supra*, 463 U.S. at 808 (Stevens, J., dissenting). Coercion is not a rubber ball to be bounced around courtrooms, depending on the desired outcome, although the "coercion" in *Marsh* is far removed from

the penalties of historical establishments. NCP is even further removed—it forces no one to do anything.

D. The First Amendment Itself Endorses Religion.

The Framers "would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it." *McCreary County v. ACLU, supra,* 545 U.S. at 902-903 (Scalia, J., dissenting). Decades ago, the Supreme Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson, supra,* 343 U.S. at 313-314. Even the *Marsh* dissent acknowledged "that, in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not." *Marsh v. Chambers, supra*, 463 U.S. at 812 (Stevens, J., dissenting).

Indeed, the First Amendment grants preferential treatment to religion. "Religious expression holds a place at the core of the type of speech that the First Amendment was designed to protect. *See Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995). ... [G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *DeBoer v. Village of Oak Park*, 267 F.3d 558, 570-571 (7th Cir. 2001).

The District Court argued that NDP's statutory recognition "connotes endorsement and encouragement"—as if it is unconstitutional to promote the very values the Constitution protects. *FFRF v. Obama, supra*, at 32-33. This is illogical at best and "bristles with hostility" at worst. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting).

The irony is inescapable: Anything that smacks of religion must acquire a secular component, or lose its meaning through rote repetition, to survive the Establishment Clause.

- A holiday with religious origins must acquire an independent secular appeal. *FFRF v. Obama, supra*, at 39; *Metzl v. Leininger, supra,* 57 F.3d at 620.

- A religious display must be buried among secular symbols. *FFRF v. Obama, supra*, at 47; *Lynch v. Donnelly, supra*, 465 U.S. at 679-680; *Van Orden v. Perry, supra,* 545 U.S. at 704.

- Religious phrases—"In God We Trust" or "under God"—must "los[e] through rote repetition any significant religious content." *Lynch v. Donnelly, supra*, 465 U.S. at 716-717 (Brennan, J., dissenting); *Marsh v. Chambers, supra*, 463 U.S. at 818 (Brennan, J., dissenting); *Allegheny v. ACLU, supra*, 492 U.S. at 631 (O'Connor, J., concurring).

The Framers would hardly recognize the Constitution they drafted. Modern logic is flawed:

> Such an approach implies that phrases like "in God we trust" or "under God", when initially used on American coinage or in the Pledge of Allegiance, violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use.
>
> *Sherman v. Community Consolidated School District 21 of Wheeling Township,* 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring)

It is equally baffling that courts approve only the most remote, incidental, indirect, inconsequential benefit to religion. *Lynch v. Donnelly, supra*, 465 U.S. at 683; *Widmar v. Vincent,* 454 U.S. 263, 273 (1981); *Comm. for Public Educ. v. Nyquist,* 413 U.S. 756, 771 (1973); *Van Zandt, supra,* 839 F.2d at 1222; *Metzl v. Leininger, supra,* 57 F.3d at 620; *Tanford v. Brand, supra,* 104 F.3d at 986. There seems to be a pervasive paranoia that somehow, somewhere, someone might inadvertently confer a slight benefit on religion.

NDP confers only a nominal benefit on religion. Contrary to the District Court, NDP is hardly analogous to the Good Friday holiday struck down in *Metzl v. Leininger, supra,* 57 F.3d 618. *FFRF v. Obama, supra*, at 51-52. School districts were *forced* to close on a Christian holiday. NDP is not allied with any one religion, and those who do not wish to pray can easily go about their business. *All* NDP events are privately sponsored and funded. Although no secular ritual is associated with NDP, any "effect in promoting religion is too attenuated to worry about." *Metzl v. Leininger, supra,* 57 F.3d at 620.

III. ONLY THE PROCLAMATION ITSELF IS *GOVERNMENT* SPEECH. NDP EVENTS ARE ENTIRELY *PRIVATE* SPEECH.

Speech classification is crucial in religion cases. The First Amendment protects private expression but restricts government speech. *Board of Ed. of Westside v. Mergens,* 496 U.S. 226, 250 (1990); *Santa Fe Independent School Dist. v. Doe, supra*, 530 U.S. at 302.

Courts have only begun to analyze the interaction between the emerging "government speech doctrine" and Establishment Clause principles. *Pleasant Grove City*

v. Summum, 129 S.Ct. 1125, 1141 (2009) (Souter, J., concurring). But the Establishment Clause does not entirely suppress religious speech by state and federal governments, which "have engaged in religious speech since the founding of the Republic"—established chaplaincies, military and prison chapels, the national motto and anthem, the Pledge, and religious proclamations—including NDP, Memorial Day, and the "Year of the Bible" (1983). *American Jewish Congress v. City of Chicago, supra,* 827 F.2d at 133 (Easterbrook, J., dissenting). Such speech leaves Americans as free as they were before. "The holder of a nickel need not trust in God, no matter what the coin says." *Id.*

Some cases present classification dilemmas because public and private speech intersect, e.g., *Wooley v. Maynard, supra,* 430 U.S. 705 (license plates are owned by the state but displayed on private vehicles). This is not one of those cases. Other than the initial Proclamation, NDP speech is wholly private, and the Task Force is a *private* organization. *FFRF v. Obama, supra*, at 16.

Case law confirms that NDP events implicate private speech. The Seventh Circuit once considered whether a village could prohibit a *private* organization from celebrating NDP, not whether the *government* could hold such an event. *DeBoer v. Village of Oak Park, supra,* 267 F.3d at 561. The Court acknowledged the NDP assembly as a civic event giving citizens an opportunity to pray for their country. *Id.* at 570. Three Tennessee cases presuppose private speech at NDP events: *Doe v. Wilson County Sch. Sys.,* 524 F. Supp. 2d 964, 981 (M.D. Tenn. 2007) (constitutionality of NDP events arose only because school officials actively participated); *Doe v. Wilson County Sch. Sys.,* 564 F. Supp. 2d 766, 778, 796 (M.D. Tenn. 2008) (students could make and distribute NDP

fliers); *Gold v. Wilson County, supra*, 632 F. Supp. 2d at 775 (preliminary injunction granted to parents wanting to post NDP event announcements, because school policy allowed unbridled discretion for officials to engage in "blatant viewpoint discrimination and hostility toward religion").

Even the Proclamation may not be entirely government speech. "[W]hen public officials deliver public speeches...their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity." *Van Orden v. Perry, supra,* 545 U.S. at 723 (Stevens, J., dissenting). The implications are important:

> [A]lthough Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed.
>
> *Id.*

Moreover, the Proclamation does not transform the character of the speech at NDP events. Plaintiffs advanced the novel argument that foreseeable private speech could be attributed to government. Plaintiffs' Brief, 47. But every one of their citations is a defamation case: *Weaver v. Beneficial Finishing Co.*, 98 S.E. 687, 690 (V.A. 1957) (libelous letter to plaintiff's employer); *Blueridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 689 (4th Cir. 1989) (newspaper published financial information about plaintiff bank); *Wright v. Backmurski*, 29 P.3d 979, 984-985 (Kan. App. 2001) (inaccurate report that losing litigant committed tax evasion/fraud); *Ringler Associates, Inc. v. Maryland Casualty Co.*, 80 Cal.App.4th 1165, 1180 (2000) (false statements about annuity sales)

("[r]eprinting or recirculating a libelous writing has the same effect as the original publication"). This is tort law—not constitutional analysis. Plaintiffs do not cite one Establishment Clause case where *private* religious speech is attributed to government on a "republication" theory.

A permissive proclamation that citizens *may* pray mirrors the First Amendment. When people exercise their liberties, their words do not morph into state speech, nor does the invitation violate the Constitution. "Mere receipt of an invitation to a religious activity does not rise to the level of support for, or participation in, religion or its exercise to create an Establishment Clause problem." *Gold v. Wilson County, supra*, 632 F. Supp. 2d at 793; *see also Board of Educ. of Westside v. Mergens, supra,* 496 U.S. at 247 (school could require students to hear announcement inviting them to after-school religious club).

IV. IF AMERICAN LIBERTIES ARE SEVERED FROM THEIR ROOTS, THEY WILL WITHER AND DIE—AND NO ONE WILL BE FREE.

The Constitution protects certain inalienable rights because the Framers were convinced that all persons are "endowed by their Creator with certain unalienable Rights" (Declaration of Independence). "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself...." *Sch. Dist. of Abington Twp. v. Schempp, supra,* 374 U.S. at 213; quoted in *Van Orden v. Perry, supra,* 545 U.S. at 683. The Founders recognized religion as both a human right

and "a duty towards the Creator." *Wallace v. Jaffree, supra*, 472 U.S. at 54 n. 38, citing James Madison's "Memorial and Remonstrance Against Religious Assessments."

If you sever these rights from their roots, they will wither and die. They will no longer be inalienable but will hang by the thread of human whim. No one will be free—not even the atheists who proclaim the "separation of church and state." Thomas Jefferson cautioned against discarding America's religious roots:

> And can the liberties of a nation be thought secure when we have removed their only firm basis--a conviction in the minds of the people that these liberties are the gift of God?
>
> Thomas Jefferson, *Notes on the States of Virginia* (Philadelphia: Mathew Carey 1794), p. 237, Query XVIII.

The American judicial system is inescapably linked to religion:

> We have no government armed with power capable of contending with human passions unbridled by morality and religion.... Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.
>
> Letter (Oct. 11, 1798), reprinted in 9 *Works of John Adams* 229 (C. Adams ed., 1971)

The District Court skirts the deeper issues, reminding readers that "religious groups remain free to organize a privately sponsored [prayer event]." *FFRF v. Obama, supra*, at 89. Yes, private organizations could continue the NDP tradition. But it is dangerous to sever American liberties from their roots:

> It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.... It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

Elk Grove v. Newdow, supra, 542 U.S. at 35-36, 44-45 (O'Connor, concurring)

A. The District Court Overlooks Federal Decisions Extending *Marsh*.

The District Court minimizes *Marsh*, citing a lone Sixth Circuit case. *Coles ex rel. Coles v. Cleveland Board of Education,* 171 F.3d 369, 381 (6th Cir. 1999) ("As far as Marsh is concerned, there are no subsequent Supreme Court cases. Marsh is one-of-a-kind.") Even though the Supreme Court has not yet extended *Marsh*, other federal courts have: *Newdow v. Bush*, 355 F. Supp. 2d 265, 286 (D.D.C. 2005) (Presidential Inauguration); *Murray v. Buchanan*, 720 F.2d 689, 689 (D.C. Cir. 1983) (en banc) (paid legislative chaplain at the U. S. Congress); *Newdow v. Eagen,* 309 F. Supp. 2d 29, 39-40 (D.D.C. 2004) (same); *Katcoff v. Marsh,* 755 F.2d 223, 232 (2d Cir. 1985) (prayer by military chaplains at Army bases); *Doe #2, et al, v. Tangipahoa Parish School Board, et al,* 631 F.Supp.2d 823, 838-9 (E.D. La. 2009) (school board meetings); *Van Zandt, supra,* 839 F.2d at 1219 (prayer room in state capitol); *Tanford v. Brand, supra,* 104 F.3d at 986 (university commencement invocation).

Atheist Michael Newdow challenged prayer at the Presidential Inauguration, seeking "to prohibit a practice that has existed for almost seventy years through invited clergy, and that arguably can be traced back to the Inauguration of President George Washington in 1789." *Newdow v. Bush, supra*, 355 F. Supp. 2d at 268. The court eschewed *Lemon* and relied on *Marsh* to uphold the tradition. *Id.* at 285-286. The Seventh Circuit reversed a ruling that "viewed *Marsh* as...a one-time departure from the Court's consistent application of the *Lemon* criteria.'" *Van Zandt, supra,* 839 F.2d at 1219. Like NDP, the *Van Zandt* prayer room imposed no inconvenience on anyone who

wished to avoid it. Similarly, this Circuit relied on *Marsh* to uphold a university's commencement invocation and benediction—a practice dating back 155 years. *Tanford v. Brand, supra,* 104 F.3d at 986.

NDP follows a comparable pattern firmly grounded in American history and tradition.

B. Religion Is A Vital Element Of American History.

"'[R]eligion has been closely identified with our history and government,'" *Van Orden v. Perry, supra,* 545 U.S. at 687, quoting *Sch. Dist. of Abington Twp. v. Schempp, supra,* 374 U.S. at 212. America's religious history extends far beyond bare acknowledgment:

- When George Washington swore his oath of office on a Bible and gave his inaugural address, he said:

  "It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe...." Inaugural Addresses of the Presidents of the United States, S. Doc. 101-10, p. 2 (1989).

  See Lee v. Weisman, supra, 505 U.S. at 633 (Scalia, J., dissenting). Thomas Jefferson and James Madison also prayed at their inaugural addresses. *Id.* at 634.

- [B]oth Houses passed resolutions in 1789 asking President George Washington to issue a Thanksgiving Day Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer...." 1 Annals of Cong. 90, 914 (internal quotation marks omitted).

  Van Orden v. Perry, supra, 545 U.S. at 686

- This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President.

  Lee v. Weisman, supra, 505 U.S. at 635 (Scalia, J., dissenting)

- President Lincoln designated April 30, 1863, as a *National Day of Prayer* and Humiliation.

  See McCreary County v. ACLU, supra, 545 U.S. at 910 n. 13 (Scalia, J., dissenting) (emphasis added)

- In 1931, Congress adopted the "The Star Spangled Banner"—with the words "In God We Trust"—as the national anthem. 36 U.S.C. § 301.

- The House Report that accompanied the insertion of the phrase "under God" in the Pledge stated: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954).

  Elk Grove v. Newdow, supra, 542 U.S. at 7 (Rehnquist, C.J., concurring)

- In 1998, Congress designated the last Monday in May as Memorial Day, requesting a Presidential Proclamation "calling on the people of the United States to observe [the day] by praying, according to their individual religious faith, for permanent peace." 36 U.S.C. § 116(b)(1)

History alone cannot create a vested right that violates the Constitution, but "an unbroken practice...is not something to be lightly cast aside." *Walz v. Tax Comm'n, supra,* 397 U.S. at 678. Even opposition does not "weaken the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly...." *Marsh v. Chambers, supra*, 463 U.S. at 791. Moreover, "history and ubiquity" is the lens through which a "reasonable observer" looks to evaluate endorsement. *Allegheny v. ACLU, supra*, 492 U.S. at 630 (O'Connor, concurring). Such an observer should be aware that "prayers and

the invocation of divine guidance have been accepted as part of American political discourse throughout the history of this Republic." *DeBoer v. Village of Oak Park, supra*, 267 F.3d at 569-570.

> If a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid? We've been assured in the sacred writing that, "Except the Lord build the house, they labor in vain that build it."
>
> James Madison, *The Papers of James Madison* (Henry Gilpin, ed., Washington: Langtree and O'Sullivan 1840), Vol. II, p. 185, June 28, 1787.

Madison had no difficulty proclaiming "days of religious fasting and thanksgiving" because these were "merely recommendatory." *American Jewish Congress v. City of Chicago, supra,* 827 F.2d at 132-133 (Easterbrook, J., dissenting). So is NDP. NDP does not "help particular religious groups organize" any more than Thanksgiving or Memorial Day proclamations help churches organize religious services on those days. *FFRF v. Obama, supra*, at 72. NCP is well within the contours of American history.

C. The National Day Of Prayer Acknowledges The Deep Religious Convictions That Have Characterized America Since Its Founding.

When NDP legislation was introduced in 1952, a Senate report concluded that "[p]rayer has indeed been a vital force in the growth and development of this Nation," and thus an annual day of prayer would be an appropriate way of "reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." S. Rep. No. 82-1389.

This reaffirmation is comparable to acknowledgments approved by courts, which must balance the government's obligation to neither "press religious observances upon [its] citizens...nor evince a hostility to religion by disabling the government from in some

ways recognizing our religious heritage." *Van Orden v. Perry, supra,* 545 U.S. at 683-684. NDP is similar to *Van Zandt's* prayer room resolution, which contained "direct references to God and the desirability of seeking God's help in the legislative process." *Van Zandt, supra,* 839 F.2d at 1221.

There is a fine line between acknowledgment and endorsement. *FFRF v. Obama, supra*, at 46. But contrary to the court's conclusions (*id.* at 48):

- The easily avoided NDP does not "subject individual lives to religious influence."
- The Proclamation *invites* Americans to pray according to conscience—it does not "*insistently* call for religious action" or "*urge* citizens to act in prescribed ways" (emphasis added).

CONCLUSION

"A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Buono, supra*, at 32, quoting *Lee v. Weisman, supra,* 505 U.S. at 598. That is a fitting description of the outcome of this litigation if the District Court decision is not reversed. NDP does not establish a national religion. It does not even involve government in the act of prayer as permitted in *Marsh*. It is merely an invitation for willing Americans to pray for their nation. In *Marsh*, even the dissent "recognized that government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Marsh v. Chambers, supra*, 463 U.S. at 810-811 (Stevens, J., dissenting).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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