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
Case No. 08−CV−588
The Honorable Judge Barbara B. Crabb

BRIEF OF *AMICI CURIAE* AMERICAN HUMANIST ASSOCIATION, INSTITUTE FOR HUMANIST STUDIES, MILITARY RELIGIOUS FREEDOM FOUNDATION, SECULAR STUDENT ALLIANCE AND SOCIETY FOR HUMANISTIC JUDAISM IN SUPPORT OF APPELLEES, SEEKING AFFIRMANCE

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CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

1. The full name of every party that the attorneys represent in this case:

   American Humanist Association, Institute for Humanist Studies, Military Religious Freedom Foundation, Secular Student Alliance and Society for Humanistic Judaism. All *amici* are 501(c)(3) nonprofit corporations.

2. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear:

   Robert V. Ritter is counsel for *amici* and an attorney with the Appignani Humanist Legal Center of the American Humanist Association.

3. For all *amici* that are corporations:

   i. Identify all parent corporations for all *amicus* parties: None.

   ii. List any publicly held company that owns 10% or more of any *amicus* party's stock: None.

/s/ Robert V. Ritter
Robert V. Ritter
Counsel for Amici Curiae

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IDENTITY AND INTERESTS OF THE AMICI CURIAE

This *amici curiae* brief is being filed on behalf of the American Humanist Association, Institute for Humanist Studies, Military Religious Freedom Foundation, Secular Student Alliance and Society for Humanistic Judaism as advocates of religious liberty with a collective viewpoint concerning the history and nature of religious freedom in the United States of America. *Amici* feel that this case addresses core humanist concerns about whether government has any role in promoting religion, specifically, monotheism—the religion professed by the majority of adult Americans. *Amici* wish to bolster the principle of separation of religion from government in order to prevent their own disenfranchisement as well as to best preserve religious liberty in America. *See* Appendix A for statements of *amici curiae*.

All parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Prayer is the quintessential religious exercise through which a person of faith endeavors to communicate with a deity or other supernatural force. In that sense, the term "prayer" can be interpreted broadly. But the National Day of Prayer (NDP) statute, 36 U.S.C. § 119, at issue in this case encourages a very specific type of prayer—prayer to the God of the Bible, an all-powerful and omniscient

deity that intervenes in our personal lives and in the life of the nation. The NDP statute does not encourage private prayer. Instead, it urges Americans to participate in thousands of public prayer events all occurring on the first Thursday in May. These prayer events are planned, scheduled and coordinated by the NDP Task Force, the Task Force's volunteer workers and local clergy. The federal government has allowed the NDP Task Force to operate as the *de facto* "government contractor" through which the NDP statute is implemented.

At various times in the history of our nation—especially during wars—the President has urged Americans to pray privately. Under the NDP statute, by contrast, Americans are encouraged to pray at public NDP events, many of which take place on government property (including the Capitol and Pentagon) and almost all of which are planned by the NDP Task Force. The Task Force's ideology is that of conservative Bible-based Christianity. This ideology is hostile towards atheists, agnostics, humanists, liberal Christians, many Jews, Muslims and practitioners of many other faiths. The NDP statute inevitably results in an unconstitutional alliance between the federal government and whatever private entity (currently the NDP Task Force) is chosen to plan, schedule and coordinate the prayer events. More information about the NDP Task Force is included in footnote 29.

Under the Constitution of the United States of America, government is prohibited from engaging in acts "respecting an establishment of religion."[1] Government may not advance religion by promoting it, nor may government be hostile to religion or nonreligion. In order to realize this constitutional mandate, separation of church and state must be maintained.

The NDP statute and proclamations issued by presidents pursuant to the statute violate the Establishment Clause of the First Amendment[2] by endorsing and promoting religion. In simplest terms, the NDP statute and proclamations infringe upon the fundamental right of religious liberty by allowing the majority to use the machinery of the government to promote Judeo-Christian monotheistic beliefs.

The NDP statute and proclamations also violate the Fifth and Fourteenth Amendments by denying others, particularly nontheists, the equal protection of the laws.[3] The statute creates classifications of citizens on the basis of religion by endorsing the religious beliefs of the majority while excluding adherents of minority religions and nontheists.

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[1] U.S. CONST., amend. 1: "Congress shall make no law respecting an establishment of religion …"

[2] *Id.*

[3] The Fourteenth Amendment's Equal Protection Clause—"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws", U.S. CONST. amend. XIV, § 1—is made applicable to the federal government through the Fifth Amendment's Due Process Clause—"No person shall be…deprived of life, liberty, or property, without due process of law . . .", U.S. CONST. amend. V.

Under the Equal Protection Clause, discrimination on the basis of religion is presumptively invalid. The purpose of the NDP statute and proclamations was not only to favor belief in the monotheistic God, but to disfavor disbelief, as it was part of a series of anti-atheist statues passed during the Cold War. Because the NDP statute classifies people on the basis of their religious beliefs, those who are not favored by the statue are politically disenfranchised.

In addition, because there is no relationship between their disbelief in "God" and their ability to perform in society, atheists and adherents of non-monotheistic religions constitute a "suspect class." Consequently, the NDP statute is subject to strict scrutiny review, which it fails due to its arbitrary and discriminatory classification.

Finally, the state day of prayer statutes and proclamations, strongly influenced by the federal NDP statute, are unconstitutional for the same reasons and further marginalize atheists and adherents of non-monotheistic religions in America.

ARGUMENT

> [I]t is proper to take alarm at the first experiment on our liberties . . . We revere this lesson too much soon to forget it. Who does not see that the same authority, which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects?[4]
>
> — *James Madison*

I. THE NATIONAL DAY OF PRAYER VIOLATES RELIGIOUS NEUTRALITY MANDATED BY THE FIRST AMENDMENT.

A. The National Day of prayer violates the principle of neutrality.

The Supreme Court has never held that the majority can use the machinery of the state to practice its religious beliefs.[5] However, on a number of occasions the Court has used putative secular purposes,[6] such as "ceremonial deism," "acknowledgment" and "civic religion," to give a free pass to the use of the government's machinery to promote monotheism (Christianity preferred), such as inserting "under God" in the Pledge of Allegiance," placing "In God We Trust" on

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[4] James Madison, "A Memorial and Remonstrance on the Religious Rights of Man," *reprinted in* Mary C. Segars & Ted G. Jelen, *A Wall of Separation?: Debating the Public Role of Religion* 132, 133 (1998).

[5] *School Dist. of Abington Tp., Pa. v. Schempp,* 374 U.S. 203, 226 (1963); *See also, DeSpain v. DeKalb County Community School Dist. 428*, 384 F.2d 836 (7th Cir. 1967) (The First Amendment is a bulwark against those who wish to impose their religious beliefs upon others through governmental action).

[6] Under *Lemon* there must be "a secular . . . purpose," *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), which has to be genuine, not a sham. *See e.g., Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000).

the national currency and displaying religious monuments on public property.[7] These practices should plainly be seen as unconstitutional because our governments—federal, state and local—are prohibited from promoting one religion over another, or religion over non-religion, *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). Rather, the "First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers." *Everson v. Bd. of Educ.*, 330 U.S. 1,18 (1947).[8] Because "[t]he clearest command of the Establishment Clause" means "that one religious denomination cannot be officially preferred over another," *Larson v. Valente*, 456 U.S. 228, 244 (1982), the NDP statute and presidential proclamations violate the Establishment Clause. *See* Appendix B – 36 Supreme Court Majority Opinions Demonstrating Mandate For Religious Neutrality.

The National Day of Prayer statute and presidential NDP proclamations endorse and promote the monotheistic practice of praying to one "God"[9] that makes religious minorities, such as polytheists (e.g., Hindus, Shintos and Germanic Neopagans), and nontheists (e.g., secular humanists, atheists, agnostics, freethinkers, Taoists and most Buddhists) political outsiders. The statute and

[7] *Van Orden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument on state property); *Salazar v. Buono*, 559 U.S. __ (2010) (Christian cross on federal property).
[8] *See* Appendix A – Supreme Court Majority Opinions Demonstrating Mandate For Religious Neutrality.
[9] Referring to the god of the Abrahamic religions.

proclamations perpetuate a stereotype that was reinforced during the Cold War era[10] that atheists are "un-American" and not true citizens.[11]

Implicit in the language of 36 U.S.C. § 119, which calls for "people of the United States" to worship a monotheistic God, is the government's message that non-adherents can be disregarded and deemed un-American. Yet the protection of the First Amendment is not restricted to orthodox religious practices. *Follet v. Town of McCormick, S.C.*, 321 U.S. 573, 577 (1944). The Supreme Court expressly stated in *Wallace v. Jaffree*, 472 U.S. 38, 54 (1985), that the Constitution forbids intolerance of the disbeliever: "[T]he political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain." Thus, when Justice Scalia erroneously stated that "the Establishment Clause . . . permits the disregard of devout atheists," *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting), he evinced "nothing more than a marker of the Framers' wisdom in recognizing the immense power of religious prejudice."[12] As James Madison noted: "[T]hat the Civil Magistrate is a competent Judge of Religious

[10] The amendment adding 'under God' in the Pledge passed two years after the NDP, "would… serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual." H.R. REP. NO. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

[11] Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C.L. Rev. 1865, 1875 (2002-2003).

[12] Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics*, Cap. Univ. L. Rev. 1, 5 (2009). (Posted April 23, 2010) (Forthcoming. Available at http://ssrn.com/abstract=1594374. (Retrieved October 7, 2010.)

truth . . . is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages."[13] Madison stated at the Virginia Convention: "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."[14]

The NDP statute obviously facially differentiates among religions. It instructs the president to issue a proclamation on which the "people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119.[15] In *Torasco,* the Court listed several religions that do not profess a belief in god including "Buddhism, Taoism, Ethical Culture, Secular Humanism and others." *Torcaso v. Watkins,* 367 U.S. 488, 495 n. 11 (1961). Thus, by discriminating among religions by excluding those that do not adhere to monotheism, facial discrimination is glaringly evident.

B. Freedom from government-sponsored religion is a fundamental right.

The Establishment Clause protects religious freedom by prohibiting government from either advancing or inhibiting religion. *Lemon* at 612. As the

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[13] James Madison, "A Memorial and Remonstrance, Address to the Honorable the General Assembly of the Commonwealth of Virginia," in *The Complete Madison: His Basic Writings 302 (Saul K. Padover ed., 1971).*

[14] James Madison, "Address to the Convention of Virginia" (June 12, 1788), in 3 *Elliot's Debates,* at 330.

[15] The District Court correctly noted that the "inclusion of meditation seems to have been an afterthought," and that the statute assumes "meditation is a religious exercise directed toward God." *Freedom From Religion Found., Inc. v. Obama,* 2010 WL 1499451, 1, 13 (W.D. Wis. 2010).

Court declared in *Lee v. Weisman,* 505 U.S. 577, 592 (1992): "A state-created orthodoxy puts at grave risk that freedom of belief and conscience." When the government subjects its citizens to government-sponsored religious exercises, it "disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Id.* Ensuring the protection for the "free exercise" of religion was not sole purpose of "establishment" clause, as it was designed to guard against those tendencies to political tyranny and subversion of civil authority which, it was feared, might result from the establishment of religion. *McGowan v. State of Md.,* 366 U.S. 420, 430 (1961). Thus, the "Establishment Clause [is] a "coguarantor, with the Free Exercise Clause, of religious liberty." *Schempp,* 374 U.S. at 256 (Brennan, J., concurring).

The NDP statute singles out and promotes a particular religious belief tailored to the Jewish and Christian faiths,[16] which interferes with the fundamental "right of the individual . . . to worship God according to the dictates of his own conscience." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Through 36 U.S.C. § 119, the government's "religious expression" crowds "out private observance and distort[s] the natural interplay between competing beliefs." *McCreary County,* 545 U.S. at 883 (O'Connor, J., concurring). The government becomes "a mouthpiece

[16] *Cf., Stone v. Graham,* 449 U.S. 39, 41 (1980) (per curiam) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.").

for competing religious ideas," *Id.* at 879-81, and "provide[s] the Church with a legal weapon that no atheist or agnostic can obtain." *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring). Judeo-Christians use this instrument of the government to promote their own brands of religion,[17] which infringe upon the rights of religious minorities and nontheists. The constitutional protections of liberty and free conscience are "not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688-89 (1959); *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969).

C. The NDP statute is not justified by a compelling governmental interest.

The NDP statute infringes upon "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hebert v. State of Louisiana*. 272 U.S. 312, 316 (1926), that are "embodied in the concept of 'due process of law.'" *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936). When the government infringes upon a fundamental right, such as the liberty rights guaranteed by the First Amendment, or gives denominational preference towards a religious sect, strict scrutiny is required. *County of Allegheny v. ACLU Greater*

[17] The National Day of Prayer Task Force's mission explicitly seeks to use the government to sponsor their "Christian community", available at http://nationaldayofprayer.org/about/our-mission/. (Retrieved October 7, 2010.) *See also*, National Day of Prayer Coordinators' "School Prayer Event Guide: How to Successfully Hold National Day of Prayer Events in Your Community's Schools!" available at http://ndptf.org/wp-content/uploads/2009/12/School-Event-Guide.pdf. (Retrieved October 7, 2010.)

Pittsburgh Chapter, 492 U.S. 573, 608-609 (1989) ("Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference,' in keeping with 'the unwavering vigilance that the Constitution requires' against any violation of the Establishment Clause") (internal citations omitted). *See also, Harris v. McRae*, 448 U.S. 297, 312 (1980) ("It is well settled that, quite apart from the guarantee of equal protection, if a law impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional." (Internal quotations omitted.) Under strict scrutiny, a statute cannot be upheld unless it is "necessary" to achieve a "compelling" government interest and is carefully "tailored" so that rights are not needlessly impaired. *United Steelworkers of America, AFL-CIO-CLC, v. Sadlowski*, 457 U.S. 102, 111 (1982) ("First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired."); *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (Citing cases.)).

This statute lacks such a compelling interest since the transmission of religious beliefs and worship is committed to the private sphere. *Lee*, 505 U.S. at 589; *Santa Fe*, 530 U.S. at 310. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the Court declared: "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.[18] Because 36 U.S.C. § 119 prescribes "what shall be orthodox" in "religion", *id.*,—by instructing Americans to pray to one "God"—the statute serves no purpose other than to endorse monotheism in violation of the Establishment Clause. This clashes with the "understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens." *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting).

II. THE STATUE VIOLATES THE EQUAL PROTECTION CLAUSE BY DISCRIMINATING ON THE BASIS OF RELIGION.

The Equal Protection Clause secures every person against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through government agents. *Village of Willowbrook v. Olech*,

[18] *See also, Venters v. City of Delphi*, 123 F.3d 956, 969 (7th Cir. 1997), *U.S. v. Mohammed*, 288 F.2d 236 (7th Cir. 1961); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954).

528 U.S. 562, 564 (2000); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 352 (1918); *Bell's Gap R. Co. v. Com. Of Pennsylvania*, 134 U.S. 232, 237 (1890); *Harris*, 448 U.S. at 322.

Over a century ago, Justice Harlan announced that our Constitution "neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S 537, 559 (1896) (Harlan, J., dissenting). "The Equal Protection Clause enforces this principle . . . today," *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citing *Plessy*) which requires the government to treat similarly situated people alike, *Vacco v. Quill*, 521 U.S. 793 (1997), and apply laws evenhandedly to all citizens. *New York Transit Authority v. Beazer*, 440 U.S. 568, 587-88 (1979) ("The [Equal Protection] Clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise.") The NDP statute treats similarly situated people differently and cannot be applied evenhandedly since some citizens are excluded from the statute altogether. The resulting injury makes non-monotheists outsiders and second-class citizens and, therefore, not equally American. Just as the Court reached its historically wrong conclusion in *Plessy*, the Court will reach a similarly erroneous conclusion in the present case if it allows

the government to condition the "enjoyment by citizens of their civil rights" *Plessy*, 163 U.S., at 559 (Harlan, J., dissenting), upon the basis of religion.

A. The Equal Protection Clause applies to the Federal Government.

The Equal Protection Clause of the Fourteenth Amendment applies to the federal government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and the "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). *See also, Schneider v. Rusk*, 377 U.S. 163, 168 (1964); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 105 (2001); *Shapiro v. Thompson*, 394 U.S. 618, 641-642, (1969); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971).

B. Discrimination based on a religious classification is unconstitutional under the Equal Protection Clause.

The Equal Protection Clause is violated when a "selection [is] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). In *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), the Court suggested that "a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage" is unconstitutional. If the

purpose or the effect of a law is to discriminate between religions, the law is constitutionally invalid. *Braunfeld v. Brown*, 366 U.S. 599, 607, (1961); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). Because this statute discriminates between religions, as well as between religion and non-religion, it is a clear violation of the Equal Protection Clause.

At the core of the Constitution's guarantee of equal protection lies the simple command that government must treat citizens as individuals rather than as components of racial, religious, sexual or national origin classes. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

Under the Equal Protection Clause, the Court has listed religion, along with race and national origin, as presumptively invalid grounds for discrimination. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).[19] By distinguishing citizens as components of religious classes rather than as individuals, the NDP statute privileges monotheists (Christianity preferred), marginalizes non-members of the majority religion and violates the Equal Protection command.

[19] *See also, Fowler v. Rhode Island,* 345 U.S. 67, 69-70 (1953) (Frankfurter, J., concurring, believing that the case should have been decided under the Equal Protection Clause rather than under the First Amendment).

C. The statute has the purpose and effect of discriminating against atheists.

(1) The "purpose" of the NDP statute.

The Court must consider the facts and circumstances behind the law and the interests of those who are disadvantaged by the classification. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 725 (1973); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626 (1969). Statements made by decision makers or referendum sponsors during the deliberation of the challenged statute may constitute evidence of a discriminatory intent for an equal protection challenge. *City of Cuyahoga Falls, Ohio, v. Buckeye Community Hope Foundation*, 538 U.S. 188, 196-197 (2003); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 471 (1982) (considering statements of initiative sponsors in subjecting enacted referendum to equal protection scrutiny). The Court held in *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 268 (1977), that "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decision-making body, minutes of its meetings, or reports." *See also, U.S. v. Salerno*, 481 U.S. 739, 747 (1987) (Court looks to legislative intent).

In support of the bill that was enacted in 1952 as the original NPD statute, Representative Brooks stated: "The national interest would be much better served

if we turn aside for a full day of prayer for spiritual help and guidance from the Almighty during these troublous times. I hope that all denominations, Catholics, Jewish and Protestants, will join us in this day of prayer." *Freedom From Religion Found., Inc. v. Obama*, 2010 WL 1499451, 1, 3 (W.D. Wis., 2010). Atheists and individuals other than Jews and Christians were intentionally excluded from this statute, as it was part of a series of legislation passed during the Cold War era's intolerance towards atheists. (*See* Appendix C – Selected Excerpts from the Congressional Record: "Atheists" as "Communists", Circa 1954.) The "Almighty" referred to by Representative Brooks is the God of the Bible and no other god. The NDP proclamations encourage prayer to the Biblical God in accordance with the intention of Representative Brooks. The Biblical God is understood as intervening in the affairs of nations and is all-powerful and omniscient. For this reason, presidents have sought the assistance of the Biblical God and encourage Americans to pray to Him for the good of the country.

Legislation passed during the 1950's purposefully discriminated against atheists, including: 4 U.S.C.A. § 4 (1954), in which the Pledge of Allegiance was interlarded with "under God"; 26 U.S.C. §107 (1954),[20] in which Congress amended the tax code to permit clergymen to exempt their housing costs from their income taxes; and 36 U.S.C. § 302 (1956), making "In God We Trust" the national

[20] Pub. L. No. 591, ch. 736, 68 A Stat. 3, 32.

motto. "The message conveyed by the Senate when it passed the 'under God' legislation, like that of the House, was overtly and nontrivially sectarian: Americans believe in God, Communists do not. Ergo, atheists are not real Americans."[21] As noted in Judge Crabb's opinion, *Freedom From Religion Found., Inc. v. Obama*, 2010 WL 1499451 at 18, citing 98 Cong. Rec. 771, A910 (1952), the NDP statute was enacted in response to Billy Graham's religious campaign to eliminate secularism from American politics.[22] While the professed purpose of 36 U.S.C. § 119 was to abolish "the corrosive forces of communism," 98 Cong. Rec. 976 (1952), atheists were typecast as communists, and thus the statute was also a measure against atheists. In February 1952, J. Edgar Hoover stated, "[s]ince Communists are anti-God, encourage your children to go to church."[23] Three months after this statement, Louis Rabaut (D-Mich.), introduced the bill to add "under God" in the Pledge of Allegiance, and subsequently sponsored a bill for a stamp endorsing the current national motto of "In God We Trust." He stated, "[t]his is an especially appropriate time to re-proclaim our adherence to this historic motto. . . . It strikes at the philosophical roots of

[21] Steven G. Gey, *"Under God," The Pledge of Allegiance, and Other Constitutional Trivia,* 81 N.C.L. Rev. 1865, 1880 (2002-2003).

[22] Reverend Billy Graham had announced, "Almost thirty or forty years ago we decided that we no longer needed God…And we substituted materialism, secularism, humanism, behavioralism and other isms. But since WW2 . . . we have come to realize that we need God." *American Legion Magazine*, "President Asks All Americans to Join Back to God Program." News of the American Legion. April 1955, Vol. 58 No. 4, pg 31-32 (1955).

[23] J. Edgar Hoover, quoted in William Lee Miller "Piety Along the Potomac," *Reporter*, 28, 17 August 1954.

communism, atheism, and materialism." Congress, House, *Congressman Rabaut of Michigan introducing H.R. 4308 to create a new postmark*, 83rd Cong., 1st sess., *Congressional Record* 99, pt. 2, 2540 (March 30, 1953). One representative affirmed: "the amendment . . . which inserted the words 'under God,'" was "significant [i]n an age in which our principal concern is with the spread of atheistic communism." *Memorial Addresses Delivered in Congress*, Louis C. Rabaut, 87th Cong. 2nd Sess., United States Government Printing Office Washington, 1, 45 (1962). Because "[r]easonable observers have reasonable memories," *McCreary County*, 545 U.S. at 866, upholding this statute will further governmental hostility towards atheists.

The Cold War era's anti-atheism has lasted through to the present because statutes like 36 U.S.C. § 119 perpetuate the false stereotype that atheists are un-American, which in turn, validates the exclusion of atheists from the political process. Historic notions of equality predicated on past discrimination are inconsistent with the Equal Protection Clause, which is not "shackled to the political theory of a particular era." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 669 (1966). In "determining what lines are unconstitutionally discriminatory," the Court has never "been confined to historic notions of equality." *Id.* Rather, "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." *Id.*

The Court has noted the dangers of failing to examine prevailing stereotypes in an equal protection analysis. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725-26 (1982). In *Hogan*, the Court warned against the use of "fixed . . . archaic and stereotypic" notions concerning the roles of classified individuals. *Id.* "Some classifications are more likely than others to reflect deep-seated prejudice," and governmental action "predicated on such prejudice is . . . incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

(2) The "effect" of the NDP statute.

The NDP statute has the effect of subjecting atheists to the "kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish." *Plyler*, 457 U.S. at 217 n.14. Atheists do not fit in to the grand religious observances that the statute commemorates. References to God in political rhetoric serve a unifying function for perpetuating Judeo-Christian beliefs, but the rhetoric marginalizes atheists and perpetuates the stereotype that atheists are "un-American."[24] Indeed, former President George H. W. Bush said, "I don't know that atheists should be considered citizens, nor should they be considered patriots. This is one nation

[24] Christine H. Foust, "*An Alien in A Christian World:" Intolerance, Coping, and Negotiating Identity Among Atheists in the United States.* Wake Forest University, 7 (2009).

under God."[25] Such bigotry, implicit in statutes such as 36 U.S.C. § 119, draws boundaries that "clearly and sharply exclude atheists in both private and public life."[26] As a result, atheists have become the most "hated minority in America."[27] The statute, coupled with the work of the National Day of Prayer Task Force,[28] send a hostile message to atheists. For this reason, Judge Crabb, *Freedom From Religion Foundation v. Obama*, 2010 WL 1499451 at 13, correctly avowed that government-sponsored religion is often threatening to non-believers, and those seeking to uphold 36 U.S.C. § 119 may place "little or no value on the costs to religious minorities." *Lee*, 505 U.S. at 629-30 (Souter, J., concurring).[29]

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[25] Jennifer Gresock, *No Freedom From Religion: Marginalization of Atheists in American Society, Politics, and Law.* 1 Margins 569 (2001).

[26] Penny Edgell, Joseph Gerteis, Douglas Hartmann, *Atheists As "Other": Moral Boundaries and Cultural Membership in American Society,* Am. Soc. Rev. Vol 71, 211 (2006).

[27] *Id.*

[28] While the NDP Task Force is a private group, its web site (www.nationaldayofprayer.org) marks itself as the "official" web site of the National Day of Prayer. The web site explains the mission of the task force as follows: "In accordance with *Biblical truth*, the National Day of Prayer Task Force seeks to: Foster unity *within the Christian Church*, Protect America's Constitutional Freedoms to gather, worship, pray and speak freely, Publicize and preserve *America's Christian heritage*, Encourage and emphasize prayer, regardless of current issues and positions, Respect all people, regardless of denomination or creed, Be wise stewards of God's resources and provision, and Glorify the Lord in word and deed." (Emphasis added.) During the administration of President George W. Bush, the White House hosted an interfaith service each year, inviting Protestant, Catholic and Jewish leaders for an event in the East Room. Each such event was attended by Shirley Dobson, the Chairman of the NDP Task Force. These White House ceremonies stopped in the first year of the Obama Administration. *See* http://edition.cnn.com/2009/POLITICS/05/06/obama.prayer/index.html. (Retrieved October 7, 2010.) On May 1, 2008, President Bush invited Shirley Dobson and religious leaders to speak at the White House for the NDP. This event is described at http://georgewbush-whitehouse.archives.gov/news/releases/2008/05/20080501-1.html. (Retrieved October 7, 2010.)

[29] *Quoting* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty,* 60 Geo. Wash.L. Rev. 841, 844 (1992).

All laws challenged under the Equal Protection Clause must meet at least rational basis review, in which a law will be upheld if it is rationally related to a legitimate government purpose. *See e.g., Pennell v. City of San Jose,* 485 U.S. 1, 8 (1988). A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *Mathews v. Lucas,* 427 U.S. 495, 504 (1976).[30] Atheists are excluded from the statute and are implicitly deemed un-American, while similarly situated Judeo-Christian citizens are celebrated. This classification does not rest upon some fair "ground of difference" because there is no reason to typecast atheists as un-American. It's the very continuance of statutes born of the 1950's intolerance towards atheists that give the public the misguided perception that atheists are un-patriotic. For instance, "[w]ith the pledge, a devoutly patriotic American Atheist may appear to be unpatriotic when he was merely being ungodly."[31] Indeed, many atheists are patriotic and promote the loyal phrase: "One Nation Indivisible."[32] Thus, the statute's discrimination against atheists lacks a rational basis.

[30] The Court has found some laws to be so arbitrary and unreasonable that they failed rational basis review. *See e.g., Allegheny Pittsburgh Coal Co. v. County Commission,* 488 U.S. 336 (1989); *City of Cleburne, Tex., v. Cleburne Living Center, Inc.,* 473 U.S. 432, 488-449 (1985).
[31] Arnold H. Loewy, *Separating God and Country*, 41 Brandeis L.J. 544, 545 (2002-2003).
[32] Dan Harris and Enjoli Francis, *Billboard Battle in Bible Belt: One Nation 'Under God' or Not?* (July 19, 2010), ABC World News, available at http://abcnews.go.com/WN/evangelicals-respond-nation-billboards-nc/story?id=11197974. (Retrieved October 7, 2010.)

D. Atheists are a suspect class under the Equal Protection Clause.

In *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), the Court suggested that "a classification . . . drawn upon inherently suspect distinctions such as race, religion, or alienage" is unconstitutional. If the purpose or the effect of a law is to discriminate between religions, the law is constitutionally invalid. A classification based on religious belief, or its obvious reverse, the lack of religious belief (atheism), triggers the suspect classification.

This view is further bolstered by the considerations the Court has relied on in deciding whether to extend the strict scrutiny standard to other classes of citizens not immediately protected by the traditional formulation of race, religion or alienage. *See Harris*, 448 U.S. at 322 (1980)*; Frontero v. Richardson*, 411 U.S. 677 (1973). Among these considerations are: (1) a history of discrimination; (2) relative political powerlessness of the class; and (3) no relation between characteristic and ability to perform in society. *Id.* at 686.

(1) History of discrimination against atheists.

Strict scrutiny is warranted when members of a group have historically been subjected to "purposeful unequal treatment" because of the characteristic that defines them as a class. *Cleburne*, 473 U.S. at 441. Religious intolerance towards atheists dates back to our nation's founding. Throughout the colonies, denying the existence of God was a criminal offense. 4 William Blackstone, *Commentaries on*

the Laws of England: A Facsimile of the First Edition of 1765-1769, at 59 (1979).[33] During the presidential election of 1800, Thomas Jefferson's opponents attempted to use his religion[34] as a reason to vote against him. Two of the nation's leading newspapers published the following advertisement almost daily (in September and October, 1800): ". . . the only question to be asked by every American, laying his hand on his heart, is 'Shall I continue in allegiance to GOD-AND A RELIGOIUS PRESIDENT; or impiously declare for JEFFERSON-AND NO GOD!!!'"[35] Jefferson was considered atheistic because he was known to have such opinions as this: "[T]he day will come when the mystical generation of Jesus, by the Supreme Being as His Father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter." Letter from Thomas Jefferson to John Adams (April 11, 1823), *in* Alf J. Mapp, Jr., *The Faiths of Our Fathers: What America's Founders Really Believed* 19 (2003).

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[33] It wasn't until 1908 that D.C. invalidated its blasphemy law for denouncing God, "which punished a first offense with a fine plus boring through the tongue; a second offense with a doubling of the fine plus burning the letter 'B' into the forehead; and a third offense with death." *District of Columbia v. Robinson*, 30 App. D.C. 283, 289 (D.C. Cir. 1908).

[34] Thomas Jefferson declared, "I am of a sect by myself, as far as I know." Letter from Thomas Jefferson to Ezra Styles (June 25, 1819) *in* 15 *The Writings of Thomas Jefferson* 202, 203 (Andrew A. Lipscomb ed., 1903).

[35] Edward J. Larson, *A Magnificent Catastrophic: The Tumultuous Election of 1800, America's First Presidential Campaign* 173 (2007); James L. Golden and Alan L. Golden, *Thomas Jefferson and the Rhetoric of Virtue* 270 (2002). *See also*, *Newdow*, Cap. Univ. L. Rev. (2009).

(2) Relative political powerlessness of atheists.

The Court also considers whether members of a class have been "relegated to such a position of political callousness as to command extraordinary protection from the majoritarian political process." *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938); *Graham v. Richardson*, 403 U.S. 365, 367 (1971). The Court defines political powerlessness as the inability to attract the attention of lawmakers. *Cleburne*, 473 U.S. at 445. By this definition, atheists fit the bill. From colonial era blasphemy laws[36] through the Cold War, to the present, atheists are currently considered the most "hated minority in America."[37] Several state constitutions and statutes still declare that atheists are ineligible from holding public office. (*See* Appendix D – States with Anti-Atheists Laws.) Lawmakers protested atheist Newdow's challenge to 4 U.S.C.A. § 4, as "99 out of 99 Senators stopped what they were doing and went out on the front steps of the Capitol to say that they want under God there." Transcript of Oral Argument at 45-46, *Elk Grove Unified School Dist.*, 542 U.S. 1 (No.02-1624).

Anti-atheism seems to be the last remaining prejudice to which a majority of Americans are willing to confess, which makes it difficult for atheists to be elected to public office and thus forces atheist-candidates to conceal their atheism. Even after the September 11th terrorist attacks, a study revealed that while a significant

[36] *See e.g., Commonwealth v. Kneeland*, 37 Mass. 206, 1838 WL 2655 (Mass. 1838).
[37] Edgell and Gerteis, *supra*.

number of Americans would be reluctant to vote for a well-qualified candidate if he or she were Muslim (38%), many more expressed reservations about voting for an atheist (52%).[38] To date, only one member of Congress has openly expressed a disbelief in God, which wasn't until 2007 when Rep. Pete Stark (D-Calif.) declared he did not "believe in a Supreme Being." [39] The 111th Congress's religious makeup is 89.3% Christian, 8.4% Jewish and 0.4% Muslim, but only 0.9% as "unspecified" and 0% as "unaffiliated."[40] A 2005 poll indicated that the general adult population for Jewish individuals was only 1%. Conversely, 14% of the general population reported "no religion" (therefore atheist because there was a 'no-response' option), yet 0% of Congress was recorded as atheist.[41] This discrepancy is indicative that atheists and non-monotheist religions are underrepresented and require extraordinary protection from the majoritarian political process.

(3) No relationship between religion and ability to perform in society.

The Court also considers whether the trait defining the class affects an individual's ability to perform in society. *Cleburne*, 473 U.S. at 440. Some

[38] The Pew Forum on Religion & Public Life, *News Release, July 24, 2003: Many Wary of Voting For an Atheist or a Muslim,* 1, 10-14 (2003).
[39] Secular Coalition for America, *Congressman Comes Out as Nontheist, Wins Re-election! Secular Coalition Congratulates Rep. Pete Stark of California,* (November 5, 2008).
[40] Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey*, available at http://religions.pewforum.org/reports. (Retrieved October 7, 2010.)
[41] *Religious News poll and US Census Bureau***,** "Religious Makeup of 109th Congress vs. US Population," March 1, 2005.

"factors are so seldom relevant to the achievement of any legitimate state interest" that the statutory classifications "are deemed to reflect prejudice and antipathy." *Id.* at 440. In this statute, the "varying treatment of different groups or persons," is a reflection of prejudice that "is so unrelated" to achievement that the classification is irrational. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). In fact, some studies have found a negative relationship between intelligence and God-belief, which indicates that an atheist's ability to perform in society may actually be greater than that of those who believe in God. "Atheists scored 6 g-IQ equivalent points higher than the combined group of subjects professing to one or another of a large number of different religions. The difference in general intelligence among [A]theists and believers was significant."[42] This study is relevant because the Court has used IQ scores as a means for assessing ability. *See e.g.*, *Cleburne*, 473 U.S. at 433 n.9. Not surprisingly, some of the least religious countries (like Denmark and Sweden) have the highest adult literacy rates in the world (around 99 percent).[43] Many sociological studies show "that the more educated a person is, the less likely he or she is to accept supernatural religious beliefs." [44] Accordingly, the disfavored

[42] Richard Lynn, John Harvey, Helmuth Nyborg, *Average intelligence predicts atheism across 137 nations*, 37 Intelligence 1, 11-15(2009).
[43] United Nations Development Programme, *Human Development Report 2006*. available at http://hdr.undp.org/en/reports/global/hdr2006/. *See also* http://hdr.undp.org/en/media/HDR06-complete.pdf. (Both retrieved October 7, 2010.)
[44] Phil Zuckerman, *Society without God: What the Least Religious Nations Can Tell us about Contentment*, New York University Press, 1, 119 (2008).

treatment accorded atheists by the NDP statute is not based on any lack of ability to perform in society.

For the purposes of evaluating the constitutionality of 36 U.S.C. §119, atheists should be accorded suspect class status.

E. The statute fails strict scrutiny review.

Although the NDP statute does not pass constitutional muster under even the lowest threshold of review, *supra,* strict scrutiny review is warranted as it demonstrates just how unconstitutional the statute is. Statutes that discriminate on the basis of religion are subject to strict scrutiny and, thus, this statute's "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger,* 509 U.S. 306, 326 (2003).

The Court has stated "that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." *Engel v. Vitale,* 370 U.S. 421, 435 (1962). Since the government has no business "writing or sanctioning official prayers," it likewise lacks a "compelling" interest to encourage citizens to pray. *Id.* By definition, there is no prayer for atheists.

The Constitution "forbids . . . the prohibition of theory which is deemed antagonistic to a particular dogma . . . [as] 'the state has no legitimate interest in protecting any or all religions from views distasteful to them.'" *Epperson v. Arkansas*, 393 U.S. 97, 106-07 (1968), *quoting Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952); *Sherbert*, 374 U.S. at 402-403. *See also, Linnemeir v. Board of Trustees of Purdue University*, 260 F.3d 757, 759 (7th Cir. 2001). Thus the government's interest in combating atheistic "communism" through 36 U.S.C. § 119 is illegitimate because it targets a view (atheism) that is "distasteful" to the majority and is perceived by the government as antagonistic to Judeo-Christian dogmas.

This Court has held that a statute is narrowly tailored only if it targets and eliminates no more than the exact source of the "evil" it seeks to remedy. *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641 (7th Cir. 2006). The statute is not narrowly tailored since there is no longer the "evil" threat of "atheistic communism." The former Soviet Union is no longer a perceived threat to the United States,[45] and its citizens are hardly "atheistic" as the chief religion of Russia is Russian Orthodox Christianity, which is professed by about 75 percent of

[45] Zuckerman, supra (citing Paul Froese, *After Atheism: An Analysis of Religious Monopolies in the Post-Communist World*, 65 Sociology of Religion, 1, 57-75 (2004)).

its citizens,[46] while 96 percent of Romanians and Moldovans believe in God, as do 93 percent of Georgians and 87 percent of Lithuanians.[47]

Accordingly, the statute is unconstitutional for the reason that government has no reason, *no less a compelling reason*, to prefer monotheism over nonreligion.

III. STATE DAY OF PRAYER PROCLAMATIONS VIOLATE THE ESTABLISHMENT CLAUSE AND PERPETUATE DISCRIMINATION AGAINST ATHEISTS AND MINORITY RELIGIONS.

The Attorneys General's *Amicus* Brief correctly notes "the judgment below casts doubt on the practices of the states." *Brief for Attorneys General, et al., as Amici Curiae Supporting Appellants, Freedom From Religion Foundation v. Obama et al.*, (7th Cir. 2010) (No. 10-1973) at 8. The issuance of proclamations by the governors of all fifty states designating May 1, 2008 as "a day of prayer," *Freedom From Religion Found., Inc.,* 2010 WL 1499451 at 5, illustrates the pervasiveness of the NDP statute's influence and its effect on marginalizing atheists and adherents of minority religions. Because the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment,[48] the states have no more authority than the federal government in promoting religion

[46] U.S. Library of Congress, Country Studies: Russia, *Religion,* available at http://countrystudies.us/russia/37.htm. (Retrieved October 6, 2010.)
[47] *Id.*; Zuckerman.
[48] *Twining v. New Jersey*, 211 U.S. 78, 99 (1908); *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Fiske v. Kansas*, 274 U.S. 380 (1927).

contrary to the prohibitions of the Establishment Clause. *Everson v. Board of Ed.*, 330 U.S. 1 (1947); *Wallace v. Jaffree*, 472 U.S. 38 (1985).

For the same reason that the Nation Day of Prayer statute and presidential proclamations are unconstitutional—because they deny their citizens equal protection of their laws (as more fully discussed with respect to the federal government in Part II, above)—state day of prayer statutes[49] and proclamations are also unconstitutional.

Additionally, *amici* would like to inform the court that state day of prayer proclamations (like presidential NDP proclamations) are sectarian in their references to "God," "God Almighty," "Lord," "Him" and "His" and inclusion of Bible verse. Significantly, the proclamations are like "it is appropriate to turn to God," "acknowledge our dependence upon God," "it is appropriate that we acknowledge God is sovereign," "ask God to guide our leaders" and "it is fitting and proper to give thanks to God" in the 2008 gubernatorial proclamations are directive, rather than passive. These quotations[50] from gubernatorial proclamations issued in 2008 show a clear and unequivocal endorsement and promotion of Judeo-Christian monotheism with the concomitant effect of offending, stigmatizing and disenfranchising atheists and adherents of minority religions.

[49] Five states have "day of prayer" statues: Alaska – Alaska Stat. § 44.12.072 (adopted 1997); Illinois – 5 Ill. Comp. Stat. 490/110 (1999); New Jersey – N.J. Stat. § 36:2-34 (1994); Pennsylvania – 44 Pa. Stat. § 40.8 (1996); and Virginia – Va. Code § 2.2-3305 (1997).

[50] *See* "2008 Presidential Proclamation & all 50 2008 gubernatorial proclamations" available at http://www.ffrf.org/uploads/news/whitehousePrayer.pdf. (Retrieved October 7, 2010.)

IV. NATIONAL DAY OF PRAYER OBSERVANCES IN THE MILITARY EXCLUDE NON-CHRISTIANS AND VIOLATE MILITARY REGULATIONS.

Each year, countless National Day of Prayer events are held on U.S. military installations. While some of these events are inclusive of all religions, far more are not only exclusively Christian, but organized as National Day of Prayer Task Force (NDPTF) events in violation of the U.S. military's Joint Ethics Regulation (DoD 5500.7-R), prohibiting the endorsement of a private organization ("non-federal entity").

Holding these events in accordance with NDPTF requirements also excludes all non-Christian service members from participating. The coordinators of these events, usually military chaplains, agree, by subscribing to the following statement, to restrict any participation beyond simply attending to Christians only: "I commit that NDP activities I serve with will be conducted solely by Christians while those with differing beliefs are welcome to attend."

All NDPTF volunteers must also subscribe to the following "Statement of Belief," which not only excludes all non-Christians, but members of many Christian denominations:

> I believe that the Holy Bible is the inerrant Word of The Living God. I believe that Jesus Christ is the Son of God and the only One by which I can obtain salvation and have an ongoing relationship with God. I believe in the deity of our Lord Jesus Christ, his virgin birth, his sinless life, his miracles, the atoning work of his shed blood, his resurrection and ascension, his intercession and his coming return to

> power and glory. I believe that those who follow Jesus are family and there should be unity among all who claim his name.

In addition to military National Day of Prayer events, there is widespread military participation in civilian NDPTF events across the country, including the main event on Capitol Hill. This participation includes military color guards, military bands and military speakers appearing in uniform.

This year's NDPTF Capitol Hill event was opened by the Joint Armed Forces Color Guard had an ensemble from the U.S. Army Band and two U.S. military officers in uniform as speakers.

The numerous violations at the NDPTF Capitol Hill event and other events around the country included the violation of the Joint Ethics Regulation (DoD 5500.7-R), prohibiting the endorsement of a non-federal entity (Section 3-209); DoD Instruction 5410.19, prohibiting the providing of a selective benefit or preferential treatment to any private organization (Sections 6.7.1 and 6.7.2); as well as various branch specific regulations on uniform wear and endorsements of private organizations. The Army's prohibition on endorsement of private organizations (AR 360-1, Section 3-2.b.), for example, states: "Public affairs activities will not support any event involving (or appearing to involve) the promotion, endorsement, or sponsorship of any individual, civilian enterprise, religious or sectarian movement, organization, ideological movement, or political campaign." The section on "selective benefit" lists "religion, sect, religious or

sectarian group, or quasi-religious or ideological movement" among the types of entities that "Army participation must not selectively benefit (or appear to benefit)."

The favoritism of one religion by the military is by no means a new problem. In the mid-1800s, Episcopalians were favored, and the military was forcing non-Episcopalians to conform. The result was hundreds of petitions to Congress, signed by thousands of Americans, including military officers and religious leaders, calling for an end to the military chaplaincy and all other government-paid chaplains.

Those today who argue in favor of the National Day of Prayer selectively cite passages from reports of the congressional judiciary committees from 1853 and 1854 as evidence that nobody at that time would have objected to such things as days of prayer, omitting that the very reason for these reports began with the national outrage over the hijacking of the military chaplaincy by one religious denomination.

Likewise, outrage over presidential proclamations for days of prayer is nothing new. While those in favor of national days of prayer cite endless examples of historical proclamations for days of prayer, they selectively omit any inconvenient historical facts, such as the armed riot sparked by the 1798 prayer day proclamation by John Adams. That proclamation, seen by many Americans as a

political maneuver, resulted in a riot in Philadelphia that forced Adams to have to hide inside his house for his own safety on the prayer day designated by his proclamation.

See also Appendix E – Historical Arguments Against a National Day of Prayer.

CONCLUSION

The National Day of Prayer and state day of prayer statutes and presidential and gubernatorial day of prayer proclamations violate the Constitution's mandates of religious neutrality and equal protection of the laws.

Accordingly, *amici* ask the Court to affirm the decision of the district court below.

Respectfully submitted,

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October 7, 2010

CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the accompanying Brief is composed in Times New Roman typeface, with 14-point type, in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b). The Brief contains 6,981 words, according to the word count provided by Microsoft Office Word 2007.

Dated: October 7, 2010

/s/ Robert V. Ritter
Robert V. Ritter
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SEVENTH CIRCUIT RULE 31(e) CERTIFICATION

I hereby certify that the electronic copy of the brief that counsel has filed with the Court by use of the Court's CM/ECF system has been scanned for viruses with the most recent version of Microsoft Security Essentials and is virus free.

Counsel further certifies that: (1) required privacy redactions have been made in compliance with FED. R. APP. P. 25(a)(5) and FED. CIV. P. 5.2; and (2) the electronic submission is an exact copy of the paper document in compliance with Seventh Circuit Rule 25.2.1.

Dated: October 7, 2010

/s/ Robert V. Ritter
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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010, I electronically filed a copy of the foregoing *Amici Curiae* Brief using the ECF System for the Court of Appeals for the Seventh Circuit, which will send notification of that filing to all counsel of record in this litigation.

I also certify that on October 7, 2010, I caused to be sent to the Clerk's Office fifteen (15) copies of the foregoing Amici Curiae Brief by first-class U.S. mail, postage prepaid.

Dated: October 7, 2010

/s/ Robert V. Ritter
Robert V. Ritter
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APPENDICES

APPENDIX A – Identification of Amici Curiae

The American Humanist Association advocates for the rights and viewpoints of humanists. Founded in 1941 and headquartered in Washington, D.C., its work is extended through more than one hundred local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity.

The Institute for Humanist Studies (IHS), a humanist think tank, whose mission is to promote greater public awareness, understanding and support for humanism. In its efforts to support humanism it seeks to defend the constitutional rights of religious and secular minorities by directly challenging clear violations of the law where it relates to the First Amendment guarantee that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." As a non-membership organization IHS is able to complement and support other humanist organizations to ensure that no member of society is discriminated against because of religion or lack thereof.

The Military Religious Freedom Foundation (MRFF), a non-profit foundation whose mission is to protect and defend the religious freedom of the men and women serving in all branches of the United States military. MRFF represents service men and women of all religions as well as non-theists. The

overwhelming majority (96%) of MRFF's clients are Christians, both Catholic and various Protestant denominations. The remaining 4% are of minority religions, agnostic or atheist. Each year, MRFF receives numerous complaints from active duty military personnel regarding the nature of the U.S. military's activities and participation in the National Day of Prayer.

The Secular Student Alliance (SSA) is a network of over 200 atheist, agnostic, humanist and skeptic groups on high school and college campuses. Although it has a handful of international affiliates, the organization is based in the United States with the vast majority of its affiliates at high schools and colleges. The mission of the Secular Student Alliance is to organize, unite, educate and serve students and student communities that promote the ideals of scientific and critical inquiry, democracy, secularism and human-based ethics. Secular students who belong to the SSA view National Day of Prayer proclamations as the federal government's endorsement of religion, specifically monotheism, and that those who do not share that belief are less American.

The Society for Humanistic Judaism (SHJ) mobilizes people to celebrate Jewish identity and culture, consistent with humanistic ethics and a nontheistic philosophy of life. Humanistic Jews believe each person has a responsibility for their own behavior, and for the state of the world, independent of any supernatural authority. The SHJ is concerned with protecting religious freedom for all, and

especially for religious, ethnic and cultural minorities such as Jews, and most especially for humanistic Jews, who do not espouse a traditional religious belief. The Society's members want to ensure that they, as well as people of all faiths and viewpoints, will not be discriminated against by government favoring of any one religion over another or theistic religion over humanistic religion.

APPENDIX B ─ Supreme Court Majority Opinions Demonstrating Mandate For Religious Neutrality

1. *Van Orden v. Perry*, 125 S. Ct. 2854, 2860 (2005) – discussing "the very neutrality the Establishment Clause requires." [51]

2. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005) – "The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'"

3. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) – courts "must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths"

4. *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) – "[W]here a government aid program is neutral with respect to religion … the program is not readily subject to challenge under the Establishment Clause."

5. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) – "[W]e have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."

6. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) – "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality."

7. *Agostini v. Felton*, 521 U.S. 203, 234 (1997) – "We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause ..."

8. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) – "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."

[51] This appendix was originally prepared by Michael Newdow and appeared as Exhibit A in Document 4-2 filed on January 5, 2009 in *Newdow v. Roberts* (D. D.C., 1:08-cv-02248-RBW). Minor formatting changes have been made. All internal citations are omitted in this listing.

9. *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) – "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."

10. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) – referencing "government programs that neutrally provide benefits."

11. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) – "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context."

12. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) – "[T]he total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral."

13. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251 (1990) – Government act is constitutional if it "evinces neutrality toward, rather than endorsement of, religious speech."

14. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384 (1990) – noting "the constitutional requirement for governmental neutrality."

15. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 (n.2) (1989) – referencing "the policy of neutrality."

16. *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) – recognizing the requirement that "the challenged statute appears to be neutral on its face."

17. *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) – "*Lemon*'s 'purpose' requirement aims at preventing the relevant governmental decisionmaker—in this case, Congress—from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."

18. *School Dist. v. Ball*, 473 U.S. 373, 382 (1985) – "The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to

the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.")

19. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) – recognizing "the established principle that the government must pursue a course of complete neutrality toward religion." *Cf.* "the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all." At 53.

20. *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) – "a program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."

21. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) – upholding "policy … founded on a 'neutral, secular basis.'"

22. *Larson v. Valente*, 456 U.S. 228, 246 (1982) – "This principle of denominational neutrality has been restated on many occasions."

23. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) – denying challenge because "the University's policy is one of neutrality toward religion."

24. *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 720 (1981) – noting "the governmental obligation of neutrality in the face of religious differences."

25. *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) – noting the Establishment Clause's "command of neutrality."

26. *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) – requiring "that auxiliary teachers remain religiously neutral, as the Constitution demands."

27. *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) – "A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion."

28. *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) – noting "the constitutional requirement for governmental neutrality."

29. *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) – approving of "facilities that are themselves religiously neutral."

30. *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) – recognizing the mandate for "remaining religiously neutral."

31. *Gillette v. United States*, 401 U.S. 437, 449 (1971) – "[W]hat is perhaps the central purpose of the Establishment Clause [is] the purpose of ensuring governmental neutrality in matters of religion."

32. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) – "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. … The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

33. *Sherbert v. Verner*, 374 U.S. 398, 409 (1963) – noting "the governmental obligation of neutrality in the face of religious differences."

34. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 215 (1963) – "examining this 'neutral' position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government."

35. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) – "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality."

36. *Epperson v. Bd. of Education of Ewing Township*, 330 U.S. 1, 15 (1947) – "Neither [a state nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." Also, "[The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them." At 18.

APPENDIX C – Selected Excerpts from the Congressional Record: "Atheists" as "Communists", Circa 1954 [52]

"[T]he fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God."[53]

"From the root of atheism stems the evil weed of communism."[54]

"An atheistic American … is a contradiction in terms."[55]

"[W]e recognize the spiritual origins and traditions of our country as our real bulwark against atheistic communism."[56]

"[I]n times like these when Godless communism is the greatest peril this Nation faces, it becomes more necessary than ever to avow our faith in God and to affirm the recognition that the core of our strength comes from Him."[57]

"[W]hen Francis Bellamy wrote this stirring pledge, the pall of atheism had not yet spread its hateful shadow over the world, and almost everyone acknowledged the dominion of Almighty God."[58]

"[N]ow that the militant atheistic Red menace is abroad in our land, it behooves us

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[52] These quotations were originally used in Michael Newdow's challenge to "under God" in the Pledge of Allegiance. *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004). They reveal that the political climate of the 1950s was permeated with (Judeo-Christian) monotheism, and Congress's anti-atheist agenda.

[53] 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance).

[54] *Ibid.*

[55] *Ibid.*

[56] 100 Cong. Rec. 17 (Appendix), A2515-A2516 (Apr. 1, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance).

[57] 100 Cong. Rec. 5, 5915 (May 4, 1954) (Milwaukee Sentinel editorial printed in the Congressional Record—with the unanimous consent of the Senate—as requested by Sen. Alexander Wiley in support of Sen. Ferguson's resolution to insert the words "under God" into the previously secular Pledge of Allegiance).

[58] 100 Cong. Rec. 18 (Appendix), A3448 (May 11, 1954) (Letter entered into the record by Rep. George H. Fallon. This was "[p]assed without a single dissenting vote, and later adopted by the DAR, the Flag House Association, the VFW, the DAV, sections of the American Legion . . . , incorporated in the pledge at the 'I Am An American Day' . . . etc., etc.").

to remind the free people of these United States that they are utterly at the mercy of God."[59]

"One thing separates free peoples of the Western World from the rabid Communist, and this one thing is a belief in God. In adding this one phrase to our pledge of allegiance to our flag, we in effect declare openly that we denounce the pagan doctrine of communism and declare 'under God' in favor of free government and a free world."[60]

"[O]ne of the greatest differences between the free world and the Communists [is] a belief in God. The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon."[61]

"To insert these two words in the pledge … would be the most forceful possible defiance of the militant atheism and 'dialectical materialism' that are identified with Russian and international communism."[62]

"[T]he need now is for the Christian ideas to neutralize the preponderance of material knowhow. … We cannot afford to capitulate to the atheistic philosophies of godless men – we must strive to ever remind the world that this great Nation has been endowed by a creator."[63]

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[59] *Ibid.*

[60] 100 Cong. Rec. 6, 7758 (June 7, 1954) (Statement of Rep. Brooks in support of the joint resolution to amend the previously secular Pledge.)

[61] 100 Cong. Rec. 6, 7762-7763 (June 7, 1954) (Statement of Rep. Wolverton in support of the joint resolution to amend the previously secular Pledge.)

[62] 100 Cong. Rec. 6, 7763-7764 (June 7, 1954) (Statement of Rep. Peter W. Rodino, Jr. in support of the joint resolution to amend the previously secular Pledge. Amazingly, included in this statement were the words "I am firmly of the opinion that our Founding Fathers … meant to prevent … any provision of law that could raise one form of religion to a position of preference over others.")

[63] 101 Cong. Rec. 6, 8156 (June 14, 1955) (Rep. Louis C. Rabaut's statement during the 1955 Flag Day ceremonies.)

APPENDIX D ─ States with Anti-Atheists Laws

Each of the below have clauses that hold that people who don't believe in "God" or alternatively, a "Supreme Being," can't hold public office and in some cases can't testify in court.

1. **Arkansas**:
    - Article 19, Section 1: "No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court."

2. **Maryland:**
    - Declaration of Rights, Art. 36: "... nor shall any person, otherwise competent, be deemed incompetent as a witness, or juror, on account of his religious belief; provided, he believes in the existence of God ..."

    - Declaration of Rights, Art. 37: "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution."

3. **North Carolina:**
    - Article 6, Section 8: "The following persons shall be disqualified for office:
      First, any person who shall deny the being of Almighty God."

4. **Pennsylvania**
    - Article 1, Section 4: "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."

5. **South Carolina**
    - Article 6, Section 4: "No person who denies the existence of the Supreme Being shall hold any office under this Constitution."

6. **Tennessee**

- Article 9, Section 2: "No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State."

7. **Texas**
    - Article 1, Section 4: "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."

    - Article 4, Section 2: "No person shall be eligible to the office of Governor who denies the existence of the Supreme Being ..."

    - Article 6, Section 2: "No person who denies the existence of the Supreme Being shall hold any office under this Constitution."

APPENDIX E - Historical Arguments Against a National Day of Prayer

Arguments in favor of the National Day of Prayer frequently cite the long history of presidential proclamations calling for such a day. An important fact omitted from these arguments, however, is that when the Continental Congress and the early congresses under the Constitution called for days of prayer, they did so as non-binding resolutions, not laws.

In accordance with the First Amendment, which states that "Congress shall make no *law* respecting an establishment of religion," these resolutions calling upon the president to issue a proclamation were not laws, but merely requests, and as such gave the president the choice to comply or not comply in the exercise of what is undeniably a religious act.

The current National Day of Prayer statute, on the other hand, is a law. It *requires* that the president engage in a religious act, regardless of the president's religious beliefs or opinion on the constitutionality of such an act. In effect, the statutes passed in 1952 and 1988 are an unconstitutional infringement on the religious freedom of the president. So, the question is: Does one congress or president have the right to bind all future presidents to the execution of a religious act? The obvious answer would be an unequivocal "NO." Yet this is exactly what the 1952 statute and subsequent 1988 statute have done.

In their historical justifications of a National Day of Prayer, *amici* in support of the Defendants-Appellants have employ a variety of historical inaccuracies and half-truths, many of which would be completely irrelevant to the case at hand even if they were true and accurate.

Oddly, this plethora of irrelevant historical quotes used to assert that we are a "Christian nation" would tend to bolster the current objections to the National Day of Prayer, and not the arguments of the *amici* for the Defendants-Appellants, in that they argue that one religion, Christianity, should be favored by the government above all others. Given that, in addition the issue of the government promoting any religion at all, one of the primary objections to the National Day of Prayer is that it not only favors religion over non-religion, but has become a vehicle to promote Christianity over any other religion.

Two examples of historical inaccuracies in *Amici Curiae* filed on behalf of the Defendants-Appellants

"The primary author of the Declaration of Independence, Thomas Jefferson, observed that, 'No nation has ever existed or been governed without religion. Nor can be.'" *Amicus Curiae* Brief of the Foundation for Moral Law, at 8.

This alleged quote from Thomas Jefferson, purportedly uttered to a Rev. Ethan Allen by President Jefferson as he was walking to church, has no historical veracity. Even in the story that the quote comes from, it was not Rev. Allen who Jefferson allegedly said it to. In a manuscript titled *Historical Sketch of*

Washington Parish, Washington City, written in 1857, Rev. Allen, who was a child at the time of Jefferson's presidency, merely recorded the recollections of two other men, who were also both children at the time of Jefferson's presidency. These two men who told Rev. Allen the story weren't even who Jefferson supposedly talked to. They were merely relating a story they had heard as children about Jefferson saying this to an unnamed friend. So, what we have here is the account of two men who heard a story as children about an encounter between Jefferson and an unnamed friend, recalling this story over fifty years later and telling it to yet another party—hardly a reliable source. Even the source cited by the *amicus* Foundation for Moral Law for this alleged quote is clearly introduces the story as merely *"an anecdote the Reverend Allen recorded."*

Several *amici* (Foundation for Moral Law, at 8; American Center for Law and Justice, at A42; Wallbuilders, at 13) include the Northwest Ordinance among their historical justifications for the National Day of Prayer, citing Article III of the Ordinance.

> The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law declared that: "Religion, Morality and knowledge [are] necessary to good government."

Amicus Curiae Brief of the Foundation for Moral Law, at 9.

This, of course, is actually the beginning of the education provision on the Ordinance, which states, in full, "Religion, Morality and knowledge being

necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged," a provision that was demanded by a Massachusetts man named Manasseh Cutler. Dr. Cutler, a minister and former army chaplain, was one of the directors of the Ohio Company of Associates, a land speculating company comprised mainly of former army officers. In the summer of 1787, the Ohio Company was negotiating with the Continental Congress to buy a large amount of land in the Northwest Territory, a sale that was essential to pay off the large public debt from the Revolutionary War.

Although the education provision in Article III was written by Dr. Cutler, the Continental Congress made some changes to it. Cutler's wording clearly gave the government of the Northwest Territory the authority to promote religion. As much as Congress had to go along with the demands of the Ohio Company, this apparently went too far. The original language, which began, "Institutions for the promotion of religion and morality, schools and the means of education shall forever be encouraged ... ," was changed to the language that appears in the Ordinance, keeping enough of the original wording to appease Dr. Cutler, but stripping the provision of any actual authority to promote religion or religious institutions. The final language of Article III only gave the government authority to encourage education. The first part of the sentence was turned into nothing more than an ineffectual opinion of what was necessary to good government.

In addition, Article III of the Northwest Ordinance was never even used. It was replaced in the enabling act for the state of Ohio, the very first state to be admitted under the ordinance. The substituted education provision in the 1802 enabling act for Ohio was similar to that in the 1785 Ordinance for ascertaining the mode of disposing of lands in the Western Territory, the ordinance that was replaced in 1787 by the Northwest Ordinance. The 1785 ordinance provided land grants for schools in lieu of the vague statement about encouraging schools in Article III of the Northwest Ordinance. The same provision was made for subsequent states. Far from being considered the "organic law" that it is considered by many today, the early congresses considered the Northwest Ordinance to carry no more force than any other statute, subject to amendment or repeal by future congresses just like any other law. In no way did they place this ordinance on the same level as the Declaration of Independence or other founding documents.

The historical arguments used by all of the *amici* for the Defendants-Appellants should not be taken at face value, but should be carefully examined for historical accuracy and, even in the cases where accuracy is not an issue, their relevance, or lack thereof, to the issue of the National Day of Prayer should be considered.