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

SEPARATE APPENDIX OF PLAINTIFFS-APPELLEES

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR,
DAN BARKER, PAUL GAYLOR, PHYLLIS ROSE
and JILL DEAN,

OPINION and ORDER

Plaintiffs,

08-cv-588-bbc

v.

President BARACK OBAMA,
White House Press Secretary ROBERT L. GIBBS
and SHIRLEY DOBSON, Chairman of the
National Day of Prayer Task Force,

Defendants.

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Under 36 U.S.C. § 119, the first Thursday of every May in the United States is designated as the "National Day of Prayer." The statute directs the President to issue a proclamation to commemorate the day, which President Barack Obama has done, following the precedent of many former Presidents. Defendant Shirley Dobson is the chairperson of the National Day of Prayer Task Force, which is a private organization that sponsors events celebrating the day.

Plaintiff Freedom from Religion Foundation is an organization of nonreligious

persons who object to what they view as the government's endorsement and encouragement of prayer. In this case brought under 42 U.S.C. § 1983, the foundation and several of its members are challenging the constitutionality of § 119 under the establishment clause. They seek an injunction prohibiting its enforcement. In addition, they want an order prohibiting the President from issuing "prayer proclamations" generally and prohibiting defendant Dobson from acting in concert with public officials in any way that would violate the establishment clause. The parties' cross motions for summary judgment are now before the court. Dkt. ## 79, 82 and 103.[1]

The threshold issue is standing. This requires the plaintiffs to show that they have suffered a "concrete" injury that is caused by each of the challenged actions and can be remedied through the relief they seek. "The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context . . . because [that clause] is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature." Vasquez v. Los Angeles ("LA") County, 487 F.3d 1246, 1250 (9th Cir. 2007).

Although the answer is not free from doubt, I conclude that, under the unique circumstances of this case, plaintiffs have standing to challenge the constitutionality of the

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[1] Plaintiffs did not file a separate document entitled a "motion" for summary judgment, only a brief in support of judgment in their favor. However, the parties have agreed that no trial is necessary and that the court may decide the case for either side on the current record. Dkt. #100.

National Day of Prayer statute. The primary injury plaintiffs allege is the feeling of unwelcomeness and exclusion they experience as nonreligious persons because of what they view as a message from the government that it favors Americans who pray. That injury is intangible, but it is no less concrete than the injuries in the many cases in which courts have recognized the standing of persons subjected to unwelcome religious speech. The only difference between those cases and this one is that plaintiffs have not come into physical or visual contact with a religious display. However, that difference has little significance in a case like this one involving a national message intended to reach all Americans. Although plaintiffs do not have to "pass by" the National Day of Prayer, they are confronted with the government's message and affected by it just as strongly as someone who views a religious monument or sits through a "moment of silence," if not more so. To find standing in those cases while denying it in this one would be an exercise in formalism.

With respect to plaintiffs' challenge to "prayer proclamations" issued by the President (other than one required by § 119), none of the plaintiffs has read or heard such a proclamation except when they expressly sought one out. Such a self-inflicted "injury" cannot establish standing. With respect to defendant Dobson, plaintiffs have failed completely to show that any of her actions has injured them.

Accordingly, I will deny defendants' motions for summary judgment and grant plaintiffs' motion with respect to the question of standing on plaintiffs' claim that the

National Day of Prayer statute violates the establishment clause. I will grant defendants' motions and deny plaintiffs' on the question whether plaintiff has standing to challenge the constitutionality of presidential prayer proclamations and any actions of defendant Dobson. I will address the merits of plaintiffs' challenge to § 119 in a separate opinion.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

In 1952, Congress enacted a statute establishing the National Day of Prayer. In 1988, Congress amended the statute so that it specified the day of the year the National Day of Prayer would take place. Under the current version of the statute, "[t]he President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer 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. Most presidents since 1952, including President Barack Obama and former President George W. Bush, have complied with this statute, issuing proclamations through their press secretaries.

Plaintiff Freedom from Religion Foundation is an organization founded in 1976 in Madison, Wisconsin and devoted to "promot[ing] the constitutional principle of separation of church and state" and "educat[ing] the public on matters of nontheism." It publishes the

newspaper Freethought Today, which reports on government conduct the foundation opposes as well as the views and activities of its members. Over the years, the foundation has responded to the National Day of Prayer in various ways, including by promoting secular proclamations for public officials to make, contacting public officials about their involvement and encouraging and publicizing efforts to protest the government involvement with the day. The foundation devotes staff time and resources to oppose the National Day of Prayer. Members of the foundation attend events related to the National Day of Prayer in order to monitor or protest them. At least 1500 members have read or seen media coverage of the National Day of Prayer and the presidential proclamations accompanying it.

Plaintiff Annie Laurie Gaylor is a co-founder of the foundation and is now its co-president. She "regularly reports" on the National Day of Prayer, writes press releases and letters of complaint about it and urges members to protest events celebrating the day. The complaints she receives from members about the National Day of Prayer have led her to believe that it creates much controversy and division. She "learned about" the 2008 proclamation from former President Bush by visiting the website of the National Day of Prayer Task Force, which she has "routinely monitored in the spring for many years." She corroborated the information she received using the "White House website." In 2009, she monitored both websites in advance of the proclamation. She learned that President Obama would be issuing a proclamation from "numerous prominent national news stories in the

Washington Post and over the wire." She "verified the wording" of the 2009 proclamation on the White House website. She "needed to see what [the President] was going to be saying because [she was] suing for it."

Plaintiff Annie Laurie Gaylor "does not believe in a god" and she does not believe in the efficacy of prayer. Members of the foundation share Gaylor's views. On the National Day of Prayer, she believes that the government is encouraging her to pray. She and other foundation members feel "excluded, disenfranchised, affronted, offended and deeply insulted."

Dan Barker is the co-president of the foundation. He "remembers seeing or hearing something on television (probably a news story) in the early 1980s when President Ronald Regan signed one of the NDP proclamations." He has been "watching" the National Day of Prayer "for years" and has "opposed" it publicly in writing. In early 2008, Barker read President Bush's National Day of Prayer proclamation after searching for it on the internet. The proclamation stated that

> America trusts in the abiding power of prayer and asks for the wisdom to discern God's will in times of joy and trial. As we observe the National Day of Prayer, we recognize our dependence on the Almighty, we thank him for the many blessings He has bestowed upon us, and we put our country's future in His hands. . . .[I] ask the citizens of our nation to give thanks . . . for God's continued guidance, comfort and protection.

In May 2009, Barker learned by watching the news on the internet that President Obama

had issued a National Day of Prayer proclamation. The President called upon "Americans to pray in thanksgiving for our freedoms and blessings and to ask for God's continued guidance, grace, and protection for this land that we love."

Plaintiff Barker "does not believe in 'God' or any god" and he does not pray. On the National Day of Prayer, Barker feels "excluded, like a second-class American."

Plaintiff Anne Nicol Gaylor is the president emeritus and co-founder of the foundation. She learned about the National Day of Prayer from media coverage of it. Other members of the foundation have complained to her about the National Day of Prayer, she has written press releases and letters about it and she has been contacted by the media to comment about it. She learned about the 2008 and 2009 presidential proclamations for the National Day of Prayer from plaintiff Annie Laurie Gaylor. She believes it is "shocking" to have such a day.

Plaintiff Paul Gaylor has been a member of the foundation for 33 years. He "read about" the National Day of Prayer in a newspaper "long ago." As a volunteer for the foundation, he has "encountered" complaints about the National Day of Prayer in letters from members. He learned about the 2008 prayer proclamation through plaintiff Anne Gaylor.

Plaintiff Jill Dean is a nonreligious person and a volunteer for the foundation. She "became aware" of the National Day of Prayer "by hearing news accounts." She is angered

and saddened by the National Day of Prayer because she believes that it "send[s] a message that some citizens are better than others" and that, "if a person doesn't pray, then they are un-American."

Plaintiff Phyllis Rose is a volunteer for the foundation. She is aware that the National Day of Prayer occurs every year and believes that prayer proclamations encourage all citizens to pray. Rose is "offended and disturbed" by the National Day of Prayer because she believes the government is taking the position that Americans "are a better people" because they pray.

Defendant Shirley Dobson is the chairperson of the National Day of Prayer Task Force, a private organization. The purpose of the task force is to "organiz[e] and promot[e] prayer observances conforming to a Judeo-Christian system of values." The task forces organizes many events in celebration of the National Day of Prayer. (Plaintiffs propose many additional facts about the task force, but I am not including them because plaintiffs fail to include any facts about their own involvement with any activities of the task force. Although some plaintiffs say that they have protested events relating to the National Day of Prayer, they do not say whether Dobson was involved with these events.)

OPINION

In any case brought in federal court, the plaintiffs' first hurdle is showing that the

court has jurisdiction to decide the merits of the case. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341-42 (2006); Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998). Among other prerequisites, jurisdiction requires plaintiffs who have standing to argue the claims they are advancing. Sprint Communications Co., L.P. v. APCC Services, Inc., 128 S. Ct. 2531, 2535 (2008). Under the Supreme Court's interpretation of the "Cases" and "Controversies" limitation on federal court jurisdiction in Article III of the Constitution, plaintiffs do not have standing to sue unless they show an "injury in fact" that is "concrete and particularized," "fairly traceable to the challenged action of the defendant" and "likely" to be "remedied by the relief plaintiff seeks in bringing suit." Summers v. Earth Island Institute, 129 S. Ct. 1142, 1148-49 (2009). See also Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970) (applying "injury in fact" standing test for first time). "At bottom, 'the gist of the question of standing' is whether [plaintiffs] have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" Massachusetts v. EPA, 549 U.S. 497, 517 (2007) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Both sides argue that precedent easily resolves the standing question in their favor. Defendants rely heavily on Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), in which the Court concluded

that the plaintiffs could not establish standing to challenge the government's land transfer to a religious institution through the "depriv[ation] of the fair and constitutional use of [their] tax dollar." Id. at 476-77. Plaintiffs rely primarily on a series of cases from the Court of Appeals for the Seventh Circuit in which the court concluded that "direct and unwelcome contact" with the government's religious speech or conduct is sufficient to show standing. E.g.,Books v. City of Elkhart, Indiana, 235 F.3d 292 (7th Cir. 2000) (Books I); Doe v. County of Montgomery, Illinois, 41 F.3d 1156, 1159 (7th Cir. 1994). Although the cases cited by the parties establish important principles that provide guidance, they do not provide obvious answers to the questions raised by this case. As commentators and even the Court have noted, precedent does not always provide a comprehensive theory for distinguishing the types of injuries that establish standing from ones that do not. Valley Forge, 454 U.S. at 475; Erwin Chemerinsky, Constitutional Law: Principles and Policies § 2.5.1 (3d ed. 2006).

One problem with the parties' discussion of standing is that they have treated it as an all-or-nothing issue, ignoring the different types of relief sought in the complaint. This is incorrect because "[a] plaintiff must demonstrate standing separately for each form of relief sought." DaimlerChrysler Corp., 547 U.S. at 352. Plaintiffs seek three types of relief: (1) a declaration that the statute creating the National Day of Prayer, 36 U.S.C. § 119, is unconstitutional and an injunction prohibiting its enforcement; (2) a declaration that all

"prayer proclamations" by the President are unconstitutional and an injunction prohibiting their publication; and (3) an injunction prohibiting Shirley Dobson from "acting in concert with state and federal officials, in joint action that violates the Establishment Clause." Am. Cpt. at 21, dkt. #38. I will address plaintiffs' standing with respect to each of these forms of relief.

A. National Day of Prayer Statute

The current version of the statute establishing the National Day of Prayer provides that "[t]he President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer 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. The question is whether plaintiffs have suffered an injury from the statute that "distinguish[es] [them as] person[s] with a direct stake in the outcome of [the] litigation" rather than "person[s] with a mere interest in the problem." United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 690 (1973).

1. Legal background

"In many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." Allen v.

Wright, 468 U.S. 737, 751-52 (1984). Unfortunately, neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has decided a case on all fours with this one. Cases in which plaintiffs assert injuries as tax payers make up most of the decisions in which the Supreme Court has engaged in substantial discussions of standing in the context of an establishment clause challenge. E.g., Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007); Valley Forge, 454 U.S. 464; Flast v. Cohen, 392 U.S. 83 (1968). Plaintiffs are not asserting such an injury in this case. In this circuit most of the cases have involved religious monuments or symbols. E.g., Books v. Elkhart County, Indiana, 401 F.3d 857 (7th Cir. 2005) (Books II) (Ten Commandments monument); Gonzales v. North Township, 4 F.3d 1412 (7th Cir. 1993) (cross); Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991) (city seal, emblem and logo containing Christian symbolism); American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) (cross).

Although the standing question in this case is one of first impression, some established principles provide a starting point for the analysis. Not surprisingly, cases involving "tangible" types of harm, such as physical injury or loss of property, are the easiest for establishing standing. 13A Charles Alan Wright, et al., Federal Practice & Procedure § 3531.4 (3d ed. 2008). "Abstract" or ideological injuries generally are not sufficient. Thus, a person may not obtain the right to sue the government simply because she disagrees with the government's conduct or believes that a public official is violating the law, even when

that law is a constitutional right, no matter how strongly that person holds those beliefs. Allen, 468 U.S. at 754; Valley Forge, 454 U.S. at 483; Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 n. 13 (1974); Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

However, defendants are incorrect to argue in their brief that "psychological harm does not confer Article III standing." Dfts.' Br., at 110, dkt. #114. The Supreme Court has made it clear that an injury may be "concrete and particularized" even if it cannot be quantified or observed. Rather, the Court has recognized a range of psychological injuries as well. These injuries include diminished use or enjoyment of a public space, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 173-74 (2000); stigma as a result of discriminatory treatment, e.g., Heckler v. Mathews, 465 U.S. 728, 739 (1984), or emotional distress caused by the loss of wildlife that one personally viewed. Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-67 (1992). Even when the primary impetus for a lawsuit may be ideological, "[a]n identifiable trifle is enough for standing to fight out a question of principle." SCRAP, 412 U.S. at 690.

More relevant to this case, the Supreme Court has held or assumed in a long string of decisions that a plaintiff has standing to sue for an establishment clause violation if she is "subjected to unwelcome religious exercises," Valley Forge, 454 U.S. at 487 n.22, such as prayer or even a "moment of silence," Santa Fe Independent School District v. Doe, 530

U.S. 290, 313-14 (2000) (prayer at public school football game); Lee v. Weisman, 505 U.S. 577, 584 (1992) (prayer at public school graduation); Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence in public school); Abington School Dist. v. Schempp, 374 U.S. 203, 224 n. 9 (1963) (Bible reading in public school classroom); Engel v. Vitale, 370 U.S. 421 (1962) (prayer in public school), or religious speech, such as a monument or sign. County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (crèche on public property); Lynch v. Donnelly, 465 U.S. 668 (1984) (crèche in public park); Stone v. Graham, 449 U.S. 39, 101 (1980) (copy of Ten Commandments in public school classrooms). Implicit in these cases is recognition of the fact that a plaintiff bringing an establishment clause claim

> is not likely to suffer physical injury or pecuniary loss. Rather, the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that noneconomic or intangible injury may suffice to make an Establishment Clause claim justiciable.

Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) (internal quotations and citations omitted).

I acknowledge that the Supreme Court did not expressly discuss the question of standing in many of the religious speech cases. Although defendants are correct that "assumptions—even on jurisdictional issues—are not binding," Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 478-79 (2006), that does not mean I should ignore those cases

in deciding whether plaintiffs have standing. It is telling that "the Court has not . . . appeared to be very concerned about the possibility that a nontaxpayer Establishment Clause plaintiff has not suffered the kind of individualized harm needed to support standing." Marc Rohr, Tilting at Crosses: Nontaxpayer Standing to Sue under the Establishment Clause, 11 Ga. St. U. L. Rev. 495, 505 (1995). Federal courts, including the Supreme Court, have an independent obligation to insure their own jurisdiction even when the parties do not raise the issue, Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006), including on questions of standing. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 230 (1990). If members of the Court believed that injuries caused by religious speech and symbolism were insufficient to confer standing, it is unlikely that they would have failed to raise this issue in any of the many opinions involving establishment clause challenges. See also Doe, 41 F.3d at 1159-60 (treating holdings on merits in Supreme Court's establishment clause cases as holdings that plaintiffs in those cases had standing). This view is supported by cases such as Lee, 505 U.S. at 584, and Schempp, 374 U.S. at 224 n.9, in which the Court dispatched the question of standing with only a sentence or two of discussion, concluding that it was present. Accordingly, I conclude that plaintiffs may not challenge the National Day of Prayer statute simply because they think it is unwise, offensive or unconstitutional, but they may challenge it if their injuries are analogous to those alleged in the religious speech cases.

2. Plaintiffs' injury

Defendants attempt to depict plaintiffs' injuries as identical to the purely ideological injury asserted in Valley Forge. Although plaintiffs make it clear that they disagree with the National Day of Prayer, that is not the only injury they assert. Some of them explicitly identify themselves as nonreligious individuals who do not believe in prayer. These plaintiffs emphasize the sense of exclusion and unwelcomeness, even inferiority, that they feel as a result of what they view as the federal government's attempt to encourage them to pray through a statute and a presidential proclamation. Although not all of the plaintiffs state explicitly that they do not pray and feel excluded, that would not affect the analysis if the injuries of the other plaintiffs are sufficient. "[O]nce a court determines the existence of one plaintiff with standing, at least when generalized equitable relief is sought, it need not consider whether other plaintiffs also have standing to assert that claim." 15 Moore's Federal Practice § 101.23 (3d ed. 2009) (citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 253, 264 (1977)). Further, if any of the individual plaintiffs has standing, the foundation would have standing as well. Friends of the Earth, 528 U.S. at 181 (organization has standing to sue when at least one of its members has standing on matter related to purpose of organization).

Plaintiffs' injury is not the same as the one asserted in Valley Forge, but is it analogous to the injuries identified in the religious speech cases? There is certainly little

difference between the *type* of injury alleged in this case and those recognized in the past. For those plaintiffs in other cases who did not alter their behavior to avoid the speech, the only possible injury was the emotional distress caused by being confronted with a government endorsement of religion. E.g., Books II, 401 F.3d at 861-62 (passing by religious display once a year); Doe, 41 F.3d at 1160 (walking under sign on courthouse stating, "THE WORLD NEEDS GOD"). See also Saladin v. City of Milledgeville, 812 F.2d 687, 693 (11th Cir. 1987) (concluding that plaintiffs were injured by city seal that used word "Christianity" because they claimed that seal "makes [them] feel like second class citizens"); Mather v. Village of Mundelein, 699 F. Supp. 1300, 1303 (N.D. Ill. 1988) (in case involving challenge to religious display, noting local resident's testimony that display "gives her a sense of inferiority. She feels that by the display the Village of Mundelein endorses Christianity, gives no credence to her religion and views her religion as far less important than the Christian religion.") However, defendants identify a number of differences between this case and those involving exposure to religious speech.

3. Comparing plaintiffs' injury with past injuries recognized by courts

First, defendants say that, to the extent courts have found a psychological injury sufficient to confer standing, they have done so only when the plaintiffs are required to come into contact with the religious speech in order to "fully engage as citizens or fulfill their civic

duties" Dfts.' Br., at 10-11, dkt. #114. This is simply wrong. Although the court of appeals has noted in some opinions that plaintiffs were fulfilling a legal obligation when they encountered religious speech, the court has never limited standing to those cases. For example, one of the injuries in Books I, 235 F.3d at 297, was viewing a religious monument on the way to a public library; in Books II, 401 F.3d at 861-82, the injuries included viewing a display before picking up a map in a public building. Further, most of the establishment clause challenges before the Supreme Court did not involve plaintiffs performing "civic duties." E.g., Santa Fe, 530 U.S. 290 (football game); Van Orden v. Perry, 545 U.S. 677 (public library). See also Mercier v. City of La Crosse, 276 F. Supp. 2d 961, 969 (W.D. Wis. 2003) (visitors to public park had standing to challenge religious monument there), rev'd on other grounds, 395 F.3d 693 (7th Cir. 2005). Two other differences emphasized by defendants are more substantial: (1) plaintiffs are part of a potentially much larger group of injured persons than the plaintiffs who viewed religious exercises in past cases; and (2) in past cases, the plaintiffs had to "pass by" a religious display or be in the same place that a religious exercise was occurring, but in this case plaintiffs' theory of injury does not involve that type of physical or visual contact.

a. Is plaintiffs' injury a "generalized grievance"?

With respect to the first point, defendants argue that the "national nature" of

plaintiffs' injury means that it is simply a "generalized grievance" that is "insufficient to support Article III standing." Dfts.' Br., at 14, dkt. #118. Defendants made the same argument in their motions to dismiss. Dkt. ##45 and 47. In the order denying those motions, dkt. #67, I pointed out the Supreme Court's holding that even "where an injury is widely shared [this] does not, by itself, automatically disqualify an interest for Article III purposes." Federal Election Commission v. Akins, 524 U.S. 11, 24, (1998). This point has been reiterated by the Supreme Court and the court of appeals. E.g., Massachusetts, 549 U.S. at 522 (plaintiff's "interest in the outcome of [the] litigation" not "minimize[d]" simply because it is "widely shared"); Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 422 F.3d 490, 496-97 (7th Cir. 2005) ("[T]he particularity requirement does not mean . . . that a plaintiff lacks standing merely because it asserts an injury that is shared by many people."). In SCRAP, the Court concluded that the environmental injury asserted by the plaintiffs was sufficient to establish standing even though the injury could extend to "all persons who utilize the scenic resources of the country, and indeed all who breathe its air." Defendants simply ignore these cases.

The reason that the Court has declined to adopt the standing rule proposed by defendants should be clear enough. "To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." SCRAP, 412 U.S. at

687-88. Thus, using defendants' logic, a federal statute requiring weekly church attendance for all citizens would be immune from judicial review because no plaintiff could distinguish her injury from anyone else's.

The question is not whether "too many" people share a particular harm; it is whether the harm is too abstract. Akins, 524 U.S. at 24. Again, the type of harm experienced by plaintiffs is the same as those in past cases. If diminished enjoyment of a public space for a few moments is sufficiently "concrete" for standing purposes, then it is difficult to argue that diminished enjoyment of an entire day is not.

b. Is plaintiffs' injury sufficiently "direct"?

This brings up defendants' second objection, which is that plaintiffs' injury is not sufficiently "direct" because they do not have to "pass by" a religious display or sit through a particular religious exercise. E.g., Books II, 401 F.3d at 861 (plaintiff has standing to challenge religious display if he comes into "direct" contact with display). This argument gives me the most pause, if only because many past cases have involved this type of limitation. However, those cases must be read in context. To the extent they imposed a requirement of "physical proximity," this was a result of the nature of the speech involved.

The injury caused by religious conduct of the government is largely expressive, meaning that the harm is caused by receiving a message from the government that his or her

views on religion are disfavored. Note, Expressive Harms and Standing, 112 Harv. L. Rev. 1313, 1314, 1325 (1999). Thus, in determining whether a plaintiff's injury is sufficiently "direct" in this context, the important question becomes whether the plaintiff is part of the government's intended audience for that message and whether the plaintiff actually received the message.

When the injury is viewed this way, it should not be surprising that standing jurisprudence in the context of establishment clause challenges has included a requirement of physical proximity to a religious exercise. A resident of Miami would have no business challenging a religious display in Anchorage because he is not part of the intended audience. Suhre v. Haywood County, 131 F.3d 1083,1086 (4th Cir. 1997) (in case involving challenge to religious monument, distinguishing plaintiff, a local resident, from someone living in another state); Washegesic v. Bloomingdale Public Schools, 33 F.3d 679, 683 (6th Cir. 1994) ("The practices of our own community may create a larger psychological wound than someplace we are just passing through."); St. Charles, 794 F.2d at 268 (discussing difference for standing purposes between "a plaintiff . . . complaining about the unlawful establishment of a religion by the city, town, or state in which he lives, rather than about such an establishment elsewhere").

Further, using a person's residence as a limiting principle for standing is consistent with establishment clause jurisprudence generally. Compare Lewis v. Casey, 518 U.S. 343,

350-51 (1996) (using substantive law of constitutional right to determine whether plaintiffs alleged sufficient injury for purpose of standing). As Justice O'Connor wrote, "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing *in the political community*." Lynch, 465 U.S. at 687 (O'Connor, J., concurring) (emphasis added). This is impermissible because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Id. at 688; see also Allegheny, 492 U.S. at 595 (adopting Justice O'Connor's rationale in Lynch). Thus, if a person is not part of the "political community" to whom a religious message is directed and he has not even visited that community, he has no standing to sue. Lynch, 465 U.S. at 671 (noting that plaintiffs were residents of city where religious display was located); Allegheny, 492 U.S. at 587 (same).

In this case the relevant political community is not a particular town. Rather, because the National Day of Prayer has been established by a federal statute and is proclaimed by the President, the message is directed at all United States citizens, making the relevant community the entire country. When a message is intended for and received by a national audience, it makes little sense to impose a geographic limitation for standing. A person's location within the country is irrelevant under those circumstances because the injury he suffers is the same regardless where he is. The court in Newdow v. Bush, 355 F. Supp. 2d

265, 278-79 (D.D.C. 2005), recognized this view in the context of a challenge involving the Presidential inauguration:

> A Presidential inauguration is certainly national, perhaps uniquely so. The entire country is invited to view the swearing in of the President. It is a day to celebrate the new presidency, and permits the country to unite after a potentially fractious election. It is also nationally televised live for all citizens to view. As such, there is an argument that all those who "participate" in a Presidential inauguration, whether by television, radio, or in person, have a personal connection to the event sufficient to create an injury-in-fact, if they were injured through that participation. Therefore, the unique nature of the Inauguration may create a personal connection for Newdow, either by physically attending or merely watching on television, sufficient to establish Article III standing.

Id. at 279 (footnotes omitted). As with the presidential inauguration, "[t]he entire country is invited" to participate in the National Day of Prayer.

However, this does not mean that recognizing plaintiffs' standing in this case would "unleas[h] hordes of litigants eager to joust with merely abstract judicial windmills." 13A Charles Alan Wright, et al., Federal Practice & Procedure § 3531.3 (3d ed. 2008) (noting theory that standing rules are way for courts to limit amount of litigation). To begin with, the unique nature of the National Day of Prayer as a ubiquitous statement from the government on religion provides an inherent limitation on the effect that recognition of standing in this case would have. Further, the widespread nature of a message does not mean that "everyone" has standing. In this case, some people may suffer no concrete injury because the message was not directed at them (because they are outside the United States)

or because they have not received the government's message (because they are not aware of the National Day of Prayer and the government's involvement with it). In addition, the many Americans who welcome and appreciate the National Day of Prayer or are indifferent to it suffer no injury. Finally, those Americans who personally believe in prayer but disagree with the government's role in declaring a national day in support of it might be in a similar situation to the plaintiffs in Valley Forge. However, individuals such as plaintiffs who do not pray and feel marginalized as a result of the government's message of prayer suffer a distinct harm. Note, 112 Harv. L. Rev. at 1315 ("[E]xpressive injuries are different from . . . ideological injury . . . because certain plaintiffs can claim to be directly injured by expressive harms and certain groups can claim to be more affected by them than others.")

Further, the absence of any physical manifestation of the message (such as a monument or a ceremony) does not mean that no one has standing to sue if the government's message is otherwise communicated to the plaintiffs. For example, in Arizona Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927 (D. Ariz. 2000), the plaintiffs challenged on establishment clause grounds a town's proclamation making the last week in November "Bible Week." The injury identified by the plaintiffs (who were Jewish) was that the Bible Week proclamation "made them feel excluded by the Town in which they reside and by its Mayor 'because [they are] not part of the Town's Christian majority.'" Id. at 932.

The district court held that two residents of the town had standing to challenge the

designation even though it did not involve a "visual display" and the plaintiffs learned about it through the media. The court discerned no basis for distinguishing between the plaintiffs' injury and the injury caused in other religious speech cases because the plaintiffs were "directly impacted by [their] residency in" the town. Id. at 932-33. The court rejected the argument that Valley Forge required a different result:

> The abstract injury in Valley Forge is the type of injury that would be suffered by a person residing hundreds of miles away who read about the Bible Week Proclamation issued in Gilbert and found it offensive to his or her beliefs about the Constitution's mandates. . . . Although the Sklars expressed a commitment to the principle of church-state separation, they also suffered the particularized injury of feeling unwelcome and excluded by the town wherein they reside.

Id. at 933 (citations omitted).

Dunham supports the view that a plaintiff need not be physically confronted with a religious exercise to have standing and that the important question is whether the plaintiffs are part of the community to which the religious message is directed. The injury in a case under the establishment clause is inflicted when the plaintiffs receive an unwelcome message that is directed at them; it does not matter what form that message takes. As another example, if a particular school declared an official "prayer day," teachers or students at that school would have standing to challenge it even if they were not subjected to a particular religious exercise. Cf. Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (assuming that public school teacher had standing to challenge state's designation of Good Friday as school

holiday).

This view is further supported by cases such as Santa Fe, 530 U.S. 290, and Wallace, 472 U.S. 38. In both of these cases, the Court considered the merits of school policies relating to prayer even before the policies were implemented. In Santa Fe, 530 U.S. at 316, the Court concluded that "the simple enactment of [the] policy, with the purpose and perception of school endorsement of student prayer" was enough to create a constitutional injury. In other words, the government had "sent the message" as soon as it enacted the policy and the damage was done. Like the plaintiffs in Dunham, Metzl, Santa Fe and Wallace, plaintiffs in this case have standing because they received a message of religious encouragement from the government in both the statute and the presidential proclamations.

Defendants note that many of the plaintiffs have not read or heard the particular language of presidential proclamations issued in conjunction with the National Day of Prayer, but that is irrelevant in the context of this claim. Section 119 does not require the President to use any particular language in his proclamation for the National Day of Prayer; it simply requires "a proclamation designating the first Thursday in May as a National Day of Prayer." Thus, the only harm that is "fairly traceable" to the statute is the harm caused by the simple fact of declaring a National Day of Prayer. Plaintiffs do not need to know the details of a proclamation to experience that harm; it is enough that they receive a message from the government that it supports the National Day of Prayer itself. That requirement

is satisfied whether plaintiffs read a proclamation in full or simply learn through the media that the President has proclaimed the National Day of Prayer.

In some cases, the Supreme Court has held that a person's knowledge or awareness of particular government conduct was not enough to establish standing. E.g., Lujan, 504 U.S. at 566-67 (knowledge that particular animal may be adversely affected by defendant does not establish standing if plaintiff has never observed that animal); Laird, 408 U.S. at 11 (knowledge of government's possible surveillance of third parties does not establish standing). However, the reason for the limitation in each of these cases was related to the Court's oft-cited rule that a plaintiff may not sue if she is a mere "concerned bystander." E.g., Arizonans for Official English v. Arizona, 520 U.S. 43, 64-65 (1997); Diamond v. Charles, 476 U.S. 54, 62 (1986). As stated by Judge Posner, "[t]he main contemporary reason for having rules of standing . . . is to prevent kibitzers, bureaucrats, publicity seekers, and 'cause' mongers from wresting control of litigation from the people directly affected." Illinois Dept. of Transportation v. Hinson, 122 F.3d 370, 373-74 (7th Cir. 1997).

For example, in Valley Forge, the plaintiffs were challenging a land transfer to which they were not a party that occurred in another state. In Allen, 468 U.S. at 755-56, the plaintiffs were challenging the government's decision to give tax exemptions to schools to which they had no relation. In Schlesinger, 418 U.S. at 210-11, private citizens wanted to force the Secretary of Defense to kick members of Congress out of the Armed Forces

Reserve. In Lujan, Laird and these other cases, the plaintiffs were challenging governmental conduct directed at *someone else* (or some*thing* else), where any harm to the plaintiffs could be resolved through the majoritarian process.

In this case, plaintiffs are not simply "concerned bystanders" aware of government conduct affecting other people; they are attempting to stop the government from encouraging *them* to engage in prayer. Lujan, 504 U.S. at 561-62 ("[When] the plaintiff is himself an object of the action . . . at issue . . . there is ordinarily little question that the action or inaction has caused him injury.") In fact, they are asking the court to serve what one justice views as the courts' "traditional . . . role of protecting . . . minorities against the imposition of the majority." Antonin Scalia, Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk L. Rev. 881, 894 (1983). It does not the alter the nature of the injury to plaintiffs whether the government sends its message by mailing a letter to each plaintiff individually or communicating *en masse* through the media.

Similarly, allowing plaintiffs to sue in this case does not conflict with the "important purpose of rules of standing . . . to identify the best-placed plaintiff and give him a clear shot at suit." North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242 (7th Cir. 1991); see also People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson, 727 F.2d 167, 172-73 (7th Cir. 1984) ("[T]he ability of the actual victim to protect his legal rights may be impaired by the activity of his self-appointed protectors."). As discussed above, people like

plaintiffs are the only ones adversely affected by the National Day of Prayer statute, so there is no "better plaintiff" waiting in the wings.

c. Other concerns

Another standing-related concern often noted by the Court is missing from this case as well. In many cases in which the Court finds that standing is lacking, the relief requested by the plaintiff would require the judiciary to become embroiled in the inner workings of another branch of government. In Allen, 468 U.S. at 761, the Court noted that the plaintiffs' request for relief was problematic because they were "seek[ing] a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." In Lujan, 504 U.S. at 576-77, the plaintiff was asking the Court to supervise "agencies' observance of a particular, statutorily prescribed procedure" that would "transfer from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" Id. at 576-77 (quoting U.S. Const., art. II, § 3). Justice Kennedy noted a similar concern in Hein, 551 U.S. at 617 (Kennedy, J., concurring in part and concurring in the judgment), in explaining why he believed that taxpayer standing should be limited to cases involving congressional appropriations: "The courts must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way the Executive Branch performs its duties."

In this case, declaring 36 U.S.C. § 119 unconstitutional and enjoining its enforcement would not interfere with the executive branch's ability to perform its job or require "intrusive and unremitting judicial management." In fact, relief on this claim would require no action by any of the defendants; it simply would prohibit a single act unrelated to the day-to-day activities of the executive branch.

Like the plaintiffs in Dunham, the plaintiffs in this case learned of the National Day of Prayer and the presidential proclamation through media reports and experienced emotional distress because of their perception that the government was encouraging them to pray and expressing favoritism for those who do. It is "formalistic in the extreme," Lee, 505 U.S. at 595, to suggest that any injuries suffered by plaintiffs in this case are less significant than those of a person who views a public emblem with religious imagery or sits through a "moment of silence" or that plaintiffs' injury would be qualitatively different if they had to walk by a sign declaring the National Day of Prayer.

If anything, plaintiffs' injury is more serious than someone who comes into unwanted contact with a monument because of the prominence of the National Day of Prayer and the fact that the message is coming from the highest level of government. Cf. Dunham, 112 F. Supp. 2d at 932 ("Feelings of unwelcomeness and subordinate status may be even greater in the action at bar because the Proclamation was issued by the Mayor, the Town of Gilbert's highest elected official."); Meghan Tomasik, Nothing to Stand On: Reading the Standing

Doctrine to Include Religious Proclamations through Arizona Civil Liberties Union v. Dunham 32 Ariz. St. L.J. 345, 358 (2000) ("[A]lthough a proclamation may not be as visible as a religious statue or display in a public square, it is, in fact, more insidious than such symbols, because it is a governmental promotion of religion that permeates throughout an entire community.") Further, a monument may be avoided by using a different entrance to the building it sits in front of; an emblem may be avoided by averting one's eyes. However, plaintiffs cannot "avoid" the National Day of Prayer by averting their eyes or using an alternate route. Tomasik, 32 Ariz. St. L.J. at 359 ("Bible Week [is not] confined [to a] building or park. Thus, even though an affront is intangible, conceptual, and atmospheric, it pervades society, and a plaintiff is left without recourse: he cannot avoid the injury.") It may be that the only way the plaintiffs could truly "avoid" the National Day of Prayer would be to leave the country every first Thursday in May.

In their brief, defendants emphasize the voluntary nature of the National Day of Prayer. Dfts.' Br., at 15-16, dkt. #83. The statute says that citizens "*may* turn to God in prayer," it does not require them to do so. That argument is a nonstarter because the Court has not required plaintiffs to prove coercion to show a violation of the establishment clause, let alone to prove an injury sufficient to confer standing. Lee, 505 U.S. at 618-19 (Souter, J., concurring) ("Over the years, this Court has declared the invalidity of many noncoercive state laws and practices conveying a message of religious endorsement."); Schempp, 374 U.S.

at 224 n. 9 (students had standing to challenge Bible reading in public school classroom even though they could be excused upon parental request).

Finally, I note that adopting defendants' view of standing would allow the government to have unrestrained authority to demean members of any religious group without legal consequence. The federal government could declare the "National Day of Anti-Semitism" or even declare Christianity the official religion of the United States, but no one would have standing to sue because no one would have to "pass by" those declarations. St. Charles, 794 F.2d at 268-69 (concluding that nontangible injuries must give rise to standing in establishment clause cases; otherwise, no one would have standing if city "conceived, proclaimed, organized—in a word, established—the 'Church of St. Charles' but appropriated no moneys for its support"). One could not argue plausibly that the disfavored groups in such cases would suffer no harm, even if that harm was intangible. Cf. United States v. Hays, 515 U.S. 737, 744 (1995) (concluding that being subject to racial classification is injury for standing purposes even if it does not lead to measurable harm because such classifications "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility").

4. Redressability

This leaves the question of redressability. Defendants argue that plaintiffs cannot

obtain a remedy even if they have been injured by the National Day of Prayer statute because this court does not have the authority to enjoin the President from doing anything.

Defendants are correct that the prospect of declaratory or injunctive relief against a sitting President is "extraordinary" and raises significant issues related to the separation of powers. However, they are wrong to suggest that the President is immune from injunctive or declaratory relief. The view they cite seems to be held by only one justice. Franklin v. Massachusetts, 505 U.S. 788, 827-28 (Scalia, J., concurring). On several occasions, the Court has considered the merits of lawsuits involving potential or actual court orders directed to sitting Presidents, sometimes without even commenting on concerns related to redressability. E.g., Clinton v. New York, 524 U.S. 417, 426 n.9 (1998) (granting declaratory relief that President may not exercise line item veto); id. at 453-469 (Scalia, J., concurring in part and dissenting in part) (concluding that some plaintiffs had standing to challenge constitutionality of Line Item Veto Act without noting problems related to redressability); Clinton v. Jones, 520 U.S. 681 (1997) (allowing civil case to go forward that would require President to sit for deposition and noting several other cases in which this had occurred); United States v. Nixon, 418 U.S. 683 (1974) (upholding order directing President to produce certain tape recordings of conversations with aids). In fact, the Court has "long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law." Jones, 520 U.S. at 703.

The concerns related to granting relief against the President are simply a heightened version of the general concern in standing jurisprudence regarding undue judicial interference with the executive branch. Franklin, 505 U.S. at 826 (Scalia, J., concurring) (noting danger that "[p]ermitting declaratory or injunctive relief against the President personally would . . . distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed'") (quoting U.S. Const., art. II, § 3). This is why the Court has recognized a distinction for a judicial injunction requiring the performance of a purely "ministerial" duty by a President. Franklin, 505 U.S. at 802; Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 498-499 (1866). In this case, "there is no possibility that [a decision invalidating 36 U.S.C. § 119] will curtail the scope of the official powers of the Executive Branch," Jones, 520 U.S. at 701, or otherwise interfere with the President's duties under Article II. As noted above, even if plaintiffs prevail on this claim, the President will not be directed to take any affirmative action. A judgment in plaintiff's favor would result in an order enjoining the President from enforcing an unconstitutional statute that involves a single, largely symbolic act that occurs once a year.

Defendants argue that enforcement of § 119 involves more than a ministerial act, which is demonstrated by the substantial differences in the language that Presidents have used in prayer proclamations. Like the argument that plaintiffs cannot have standing if they have not read a particular proclamation, this argument overstates the scope of this claim.

Section 119 simply requires the President to issue a proclamation designating a National Day of Prayer; it does *not* require the President to issue a separate statement regarding his own views on prayer. Thus, even if enforcement of the statute is enjoined, this would not prohibit the President from issuing "prayer proclamations" as a general matter (those are discussed in the next section), prohibit him from making references to prayer (or even encouraging it outside the enforcement of § 119) or restrict his speech in any manner except for designating a National Day of Prayer. Thus, any relief on this claim would be much less intrusive than orders approved in other cases such as Nixon and Clinton. See also Nixon v. Fitzgerald, 457 U.S. 731, 755 (1982) ("[T]his Court has recognized that the sphere of protected action must be related closely to the immunity's justifying purposes.") In fact, defendants' position on this issue is somewhat ironic because the effect of declaring § 119 unconstitutional would be to *relieve* the President of a duty imposed by Congress, not impose a new one.

In any event, I need not decide at this stage whether it is appropriate to enter declaratory or injunctive relief against the President in this case because plaintiffs have named the President's press secretary as a defendant as well. The Supreme Court has held that courts may enjoin the President's subordinates from carrying out an unconstitutional act instead of the President if doing so would be likely to redress the plaintiff's harm. Franklin, 505 U.S. at 803 (plurality); id. at 801 (citing Youngstown Sheet & Tube Co. v.

Sawyer, 343 U.S. 579 (1952); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935)).

In their reply brief, defendants argue that relief against defendant Gibbs would not redress plaintiffs' harm because the President "could have someone else disseminate his proclamation." Dfts.' Br., at 24, dkt. #118. This argument is not persuasive for two reasons. First, defendants do not deny that the President generally has implemented § 119 through his press secretary and they offer no reason for believing that will change. Second, in *any* case involving a potential injunction against an executive officer, the argument could be made that the President could direct another officer to perform the same act, but the Court has not suggested that it is a reason for dismissing a case. In Franklin, 505 U.S. at 803, the plurality went so far as to say that, even if a judicial order to a subordinate would require the cooperation of the President, "we may assume it is substantially likely that the President . . . would abide by an authoritative interpretation of [a] statute and constitutional provision by the District Court, even though [he] would not be directly bound by such a determination."

In sum, I conclude that plaintiffs have standing to challenge the National Day of Prayer statute because it has caused them a concrete and particularized injury that is likely to be redressed by their requested relief. Accordingly, plaintiffs' motion for summary judgment on this issue must be granted and defendants' motion for summary judgment must be denied.

B. Prayer Proclamations Generally

In addition to seeking an order declaring 36 U.S.C. § 119 unconstitutional and enjoining its enforcement, plaintiffs seek to enjoin the President from issuing "prayer proclamations" generally. I understand this part of plaintiffs' claim to mean that they are challenging certain statements the President makes about prayer above and beyond one limited to "designating the first Thursday in May as a National Day of Prayer" as required by the statute. This request faces multiple problems related to justiciability.

To begin with, it is not clear whether plaintiffs continue to assert this claim. In their reply brief, defendants cite deposition testimony of some of the plaintiffs suggesting that they are no longer challenging prayer proclamations, only the statute itself. Dfts.' Br., at 20-24, dkt. #118. However, plaintiffs have not moved to amend their complaint or otherwise filed anything with the court stating that they wish to withdraw this claim, so I will consider it.

It may be that reading a proclamation could qualify as direct and unwelcome exposure to religious speech under some circumstances. Compare Newdow, 355 F. Supp. 2d at 279 (viewing public prayer on television may be injury for standing purposes), with Caldwell v. Caldwell, 545 F.3d 1126, 1133 (9th Cir. 2008) (reading speech on website not necessarily injury for standing purposes). However, plaintiffs Anne Nicol Gaylor, Paul Gaylor, Phyllis Rose and Jill Dean do not say that they have read or heard any of the proclamations issued

by the President in the past or that there is any likelihood that they will do so in the future. Nor do they say that they have altered their behavior in order to avoid seeing or hearing the proclamations. These plaintiffs may be aware through media reports, complaints from foundation members or other sources that Presidents have issued statements regarding prayer, but that is not enough in the context of this claim.

With respect to plaintiffs' challenge to the National Day of Prayer itself, ignorance of the language in the proclamations is not a barrier to standing because plaintiffs are harmed any time they know that the President has enforced the statute by proclaiming the National Day of Prayer. However, plaintiffs cannot challenge the constitutionality of particular statements made by the President if plaintiffs do not even know the content of those statements. Plaintiffs fail to explain how their mere awareness of a proclamation in this context is distinguishable from the injury the Court deemed insufficient in Valley Forge.

Plaintiffs Annie Laurie Gaylor and Dan Barker have personally read some of the presidential statements accompanying proclamations designating the National Day of Prayer, but both admit that the only reason they did so was that they were *looking* expressly for the proclamations. They do not suggest that they happened upon the proclamations while watching the news or reading the newspaper. In fact, Gaylor and Barker emphasize that they closely monitored the websites of the task force and the White House for the purpose of reading the proclamations. Thus, to the extent that such conduct qualifies as an

injury at all, whatever distress plaintiffs experienced from reading the proclamations was "fairly traceable" to their own research efforts rather than anything defendants did. Just as plaintiffs could not establish standing for challenging § 119 by poring over the statute books looking for something to be offended by, they may not challenge prayer proclamations by "roam[ing] the country" in search for them. Valley Forge, 454 U.S. at 487. See also National Family Planning and Reproductive Health Association, Inc. v. Gonzales, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[E]ven if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct."); Regional Association of Concerned Environmentalists v. United States Dept. of Agriculture, 765 F. Supp. 502, 505 (S.D. Ill. 1990) (plaintiff's visit to environmental site did not establish standing because he made those visits not for recreational purposes but "as part of his ongoing crusade of environmental activism"). Cf. Pennsylvania v. New Jersey, 426 U.S. 660, 664 (1976) ("No State can be heard to complain about damage inflicted by its own hand.")

Plaintiffs cite Buono v. Norton, 212 F. Supp. 2d 1202 (C.D. Cal .2002), for the proposition that a plaintiff may have standing even if she could have avoided the injury. This is true, but unhelpful. As discussed in Section A, taking steps to avoid unwelcome religious speech is a common way to establish standing, e.g., Gonzales, 4 F.3d at1416-17 (avoiding park where monument is); Harris, 927 F.2d at 1404-09 (altering travel route), but it is not the only way. Books II, 401 F.3d at 861-62 ("[C]hanges in behavior, though

sufficient to confer standing, are not a prerequisite."). The Court of Appeals for the Seventh Circuit has made it clear that a plaintiff may have standing even if she chooses not to change her routine in order to avoid the offending speech. E.g., Books I, 235 F.3d at 300-01 (plaintiffs who passed religious monument in front of municipal building had standing to bring establishment clause claim even though they could have use different entrance or averted their eyes when passing by monument); see also Mercier, 276 F. Supp. 2d at 969 ("[E]ven if plaintiffs had not altered their behavior, being forced to view a monument that distresses them every time they visited [the park] is an injury in itself. Although plaintiffs could choose not to attend the park, a standing analysis inquires only whether a plaintiff has been injured, not whether a plaintiff could avoid the injury.").

Cases likes Books I do not help plaintiffs because the court has emphasized that the plaintiffs' contact with the speech must be incidental, that is, they must be exposed to the speech in the context of doing things they would have done regardless whether that speech existed. In Books I, 235 F.3d at 297, the plaintiffs had standing because they passed the religious monument when they went to the municipal building for other matters, such as paying a traffic ticket or attending city council meetings. In Doe, 41 F.3d at 1158, the plaintiffs had standing because they encountered a religious sign on the municipal building when they voted and performed jury duty. In distinguishing Freedom From Religion Foundation, Inc. v. Zielke, 845 F.2d 1463 (7th Cir. 1988), in which the court concluded

that the plaintiffs did not have standing to challenge a religious monument, the court explained that "[t]he plaintiffs in Zielke did not alter their behavior as a result of the monument and failed to demonstrate that they were exposed to the monument *during their normal routines or in the course of their usual driving or walking routes.*" Doe, 41 F.3d at 1161 emphasis added). Instead, the plaintiff went to the park so that she could see the monument. Zielke, 845 F.2d at 1466.

Even in Buono, 212 F. Supp. 2d at 1212, the court emphasized that the plaintiff had standing to challenge a religious monument in a public park because his "'enjoyment of the area' will be lessened due to the presence of the cross when he passes through the Preserve in the future *for reasons other than checking on the status of the cross.*" In other words, a plaintiff may establish standing by tolerating offensive speech she encounters through her normal routine or by altering her behavior to avoid exposure, but she *cannot* show standing by purposely altering her behavior so that she *is* exposed to the speech, which is what Gaylor and Barker did in this case.

Plaintiff cites Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), as an example of a case in which the Supreme Court concluded that the plaintiff had standing as a result of a self-inflicted injury. Havens involved a "tester" who was suing for violations of a provision in the Fair Housing Act that prohibits landlords from lying about the availability of an apartment. Id. at 373. The Court concluded that the plaintiff had standing even

though "'testers' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." Id. at 373. Thus, in a sense, the plaintiff in Havens was someone who "went looking" for an injury as Gaylor and Barker did.

Although Havens might seem to be in tension with the cases like Valley Forge, Zielke, Doe and Books I, I agree with defendants that Havens is not on point. In that case, the Court concluded that the tester had standing because it was the intent of Congress to create "a legal right to truthful information about available housing," regardless of the person's reasons for seeking the information. Havens, 455 U.S. at 373. The Court emphasized the authority of Congress to recognize injuries that otherwise would be nonjusticiable, suggesting that the tester's "injury" would not be sufficient to establish standing outside an area expressly authorized by Congress. See also Linda R.S. v. Richard D., 410 U.S. 614, 617 n. 3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.")

The Court of Appeals for the Seventh Circuit emphasized this point later in Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990), stating that "[t]he standing of the testers is, as an original matter, dubious" because "they suffer no harm other than that which they invite in order to make a case against the persons investigated." Without that statutory right, standing would not exist, as the court of appeals recognized in Kyles v. J.K.

Guardian Security Services, Inc., 222 F.3d 289, 302 (7th Cir. 2000), when it concluded that testers do not have standing to bring a discrimination claim under 42 U.S.C. § 1981 because the language in that statute does not recognize the rights of those not genuinely interested in making a contract. Because of the limited reach of the theory of standing in Havens, it comes as no surprise that plaintiffs fail to identify a single case in which a court relied on Havens outside the context of a statute using similar language. The case is ignored entirely in all of the cases the parties cite regarding standing in the context of challenges under the establishment clause. See also 13A Charles Alan Wright, et al., Federal Practice & Procedure § 3531.2 (3d ed. 2008) (noting several reasons Havens Realty has limited precedential value, including "the role of Congress" in recognizing claimed injury, plaintiffs' request for monetary damages rather than simply injunctive relief and lack of any separation of powers concerns because plaintiffs and defendants were private parties).

This leaves plaintiff Freedom from Religion Foundation. Because plaintiffs have not shown that any of the foundation's members has standing to challenge the President's statements on prayer, the foundation must prove its standing through another route. It attempts to do this by arguing that it has been injured through the expenditure of resources in counteracting presidential proclamations that it could have used for other purposes. In essence, plaintiffs' argument seems to be, "we have standing to challenge presidential prayer proclamations because we spend money and resources challenging presidential prayer

proclamations."

Assuming that it is reasonable to infer that the foundation devotes resources to counteracting particular prayer proclamations rather than the National Day of Prayer generally, this is another kind of self-inflicted "injury" that cannot provide the basis for standing. An immediate red flag raised by plaintiffs' argument is the fact that their theory of organizational standing would allow any group to file a lawsuit on any issue so long as the group could plausibly allege that it had expended a token amount of time or resources in opposition to whatever government action that is the subject of the lawsuit. That would give automatic standing to virtually every advocacy group in the country on any issue within its purview, a result that is inconsistent with the rule that a "setback to the organization's abstract social interests" is inadequate to establish standing. Havens Realty, 455 U.S. at 379. Under plaintiffs' test, even the plaintiff organization in Valley Forge would likely have standing.

The view of the Court of Appeals for the Seventh Circuit on this issue is clear: "[O]rdinary expenditures as part of an organization's purpose do not constitute the necessary injury-in-fact required for standing." Plotkin v. Ryan, 239 F.3d 882, 886 (7th Cir. 2001). See also Florida State Conference of NAACP v. Browning, 522 F.3d 1153, 1166 (11th Cir. 2008)("[P]laintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes."); Fair Employment Council of Greater Washington, Inc.

v. BMC Marketing Corp., 28 F.3d 1268, 1276-77 (DC Cir. 1994) (rejecting argument that "an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had 'deflected' it from pursuit of another"). The cases cited by plaintiffs involved matters that distracted the organization from its central purpose or made its purpose more difficult; they did not involve the very matters for which the organization was created to combat. E.g., Havens Realty, 455 U.S. at 378-39 (fair housing agency had standing to challenge realty company's racial steering practices because they "perceptibly impaired [agency's] ability to provide counseling and referral services for low-and moderate-income homeseekers"); Crawford v. Marion County Election Board, 472 F.3d 949, 951 (7th Cir. 2007) (Democratic party had standing to challenge photo ID requirement for voting because "the new law . . . compell[ed] the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote").

Even if any of the plaintiffs could show that they had been injured by a particular proclamation, I agree with defendants that plaintiffs would face problems related to ripeness and mootness. Because plaintiffs are not seeking damages, any injuries they might have sustained from *past* prayer proclamations are moot. St. John's United Church of Christ v. City of Chicago, 502 F.3d 616, 627-28 (7th Cir. 2007). With respect to future proclamations, one can only speculate as to the content of any particular proclamation, so

those claims are not ripe. Cf. Newdow, 391 F. Supp. 2d at 108 ("[T]his Court cannot now rule on the constitutionality of prayers yet unspoken at future inaugurations of Presidents who will make their own assessments and choices with respect to the inclusion of prayer.")

I also agree with defendants that grave concerns regarding separation of powers are raised by the prospect of granting relief on this claim. It is one thing to issue a narrowly circumscribed injunction regarding a single, ministerial act; it is quite another for a court to issue a broad ruling that dictates the particular language the President may use in any context. If I issued an injunction prohibiting the President from making any "prayer proclamations" (hardly a self-defining term), this would allow plaintiffs to seek an order of contempt against the President any time he made a statement they believed fell within the injunction. Hein, 551 U.S. at 611-12 (plurality opinion) (expressing concern over rule of standing that would require "the federal courts to superintend . . . the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials") That type of intrusive judicial oversight would not be consistent with the separation of powers doctrine.

C. Activities of the National Day of Prayer Task Force

Defendant Shirley Dobson is not a government employee. As plaintiffs acknowledge, a person may not be sued for a constitutional violation unless "the challenged action may

be fairly treated as that of the [government] itself." Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816, 823-24 (7th Cir. 2009) (internal quotations omitted). However, in this case, plaintiffs devote almost no argument in their briefs to showing that defendant Dobson's relationship with government officials is so close that is appropriate to treat her as if she were a public official. In fact, plaintiffs say nothing about Dobson's relationship with President Obama.

This lack of argument is problematic, particularly in light of plaintiffs' incredibly broad (and vague) request to enjoin Dobson from "acting in concert" with any public official in any manner that would violate the establishment clause. It is unlikely that such a sweeping injunction would be appropriate under any circumstances, but it certainly could not be justified through anecdotal evidence of Dobson's joint action with selected officials. A violation in New York would not mean that plaintiff was entitled to relief in California. Lewis, 518 U.S. at 357 (plaintiff's requested "remedy must of course be limited to the [violation] that produced the injury in fact that the plaintiff has established").

I need not reach the question whether any of Dobson's activities may be attributed to the government because plaintiffs have proposed no facts showing that any of her activities harmed them. Although plaintiffs argue generally about events related to the National Day of Prayer, they included no proposed findings of fact in which they say that they attended any events sponsored by the task force (except perhaps those they sought out

in order to protest), altered their behavior to avoid such events or were injured in any way by the events. To the extent that other information may be lurking in other evidentiary materials, it is not the court's obligation to "scour the record" in search of it. Johnson v. Cambridge Industries, Inc., 325 F.3d 892, 898 (7th Cir. 2003). See also Chelios v. Heavener, 520 F.3d 678 (7th Cir. 2008) ("Given the often daunting nature of motions for summary judgment, we have emphasized the importance of local rules and have consistently and repeatedly upheld a district court's discretion to require strict compliance with its local rules.") (internal quotations omitted). Accordingly, I must grant defendant Dobson's motion for summary judgment and dismiss the complaint as to plaintiffs' claims against her.

ORDER

IT IS ORDERED that

1. The motions for summary judgment filed by plaintiffs Freedom from Religion Foundation, Anne Nicol Gaylor, Annie Laurie Gaylor, Paul Gaylor, Dan Barker, Phyllis Rose and Jill Dean, dkt. #103, and by defendants Barack Obama and Robert Gibbs, dkt. #82, are GRANTED in part and DENIED in part:

(a) Plaintiffs' motion is GRANTED and defendants' motion is DENIED on the question whether plaintiffs have standing to challenge the constitutionality of 36 U.S.C. § 119;

(b) Defendants' motion is GRANTED and plaintiffs' motion is DENIED on the question whether plaintiffs have standing to challenge the constitutionality of prayer proclamations generally. Plaintiffs' complaint is DISMISSED as to that claim for plaintiffs' lack of standing.

2. Defendant Shirley Dobson's motion for summary judgment, dkt. #79, is GRANTED on the ground that plaintiffs have not shown they have standing to sue her. Plaintiffs' complaint is DISMISSED as to that defendant.

3. I will address the merits of plaintiffs' claim challenging the constitutionality of § 119 in a separate opinion.

Entered this 1st day of March, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

FREEDOM FROM RELIGION FOUNDATION, INC.,
ANNE NICOL GAYLOR, ANNIE LAURIE GAYLOR,
DAN BARKER, PAUL GAYLOR, PHYLLIS ROSE
and JILL DEAN,

OPINION and ORDER

Plaintiffs,

08-cv-588-bbc

v.

President BARACK OBAMA and
White House Press Secretary ROBERT L. GIBBS,

Defendants.

- -

The role that prayer should play in public life has been a matter of intense debate in this country since its founding. When the Continental Congress met for its inaugural session in September 1774, delegate Thomas Cushing proposed to open the session with a prayer. Delegates John Jay and John Rutledge (two future Chief Justices of the Supreme Court) objected to the proposal on the ground that the Congress was "so divided in religious Sentiments . . . that We could not join in the same Act of Worship." Eventually, Samuel Adams convinced the other delegates to allow the reading of a psalm the following day. Letter from John Adams to Abigail Adams (Sept. 16, 1774), available at

http://www.masshist.org/digitaladams. The debate continued during the Constitutional Convention (which did not include prayer) and the terms of Presidents such as George Washington, Thomas Jefferson and James Madison, each of whom held different views about public prayer under the establishment clause. It continues today. In recent decades, the Supreme Court has decided a number cases regarding the constitutionality of public prayer in various contexts, often generating controversy regardless of the outcome.

This case explores one aspect of the line that separates government sponsored prayer practices that are constitutional from those that are not. Brought under 42 U.S.C. § 1983, the case raises the question whether the statute creating the "National Day of Prayer," 36 U.S.C. § 119, violates the establishment clause of the United States Constitution. Plaintiff Freedom from Religion Foundation and several of its members contend that the statute is unconstitutional because it endorses prayer and encourages citizens to engage in that particular religious exercise. President Barack Obama, who is charged with enforcing the statute by issuing a proclamation each year, and his press secretary, Robert Gibbs, contend that the statute is simply an "acknowledgment of the role of religion in American life" and is indistinguishable from government practices that courts have upheld in the past.

The parties have filed cross motions for summary judgment. Dkt. ##82 and 103. The American Center for Law and Justice, representing some members of Congress, has filed an amicus brief in favor of defendants. Dkt. #59. In a previous order, I concluded that

plaintiffs have standing to challenge § 119, but not to challenge presidential prayer proclamations generally. In addition, I concluded that because plaintiffs had failed to show that Shirley Dobson, the chairperson for the National Day of Prayer Task Force, injured them, they had no standing to sue her. Accordingly, I dismissed the complaint as to Dobson. Dkt. #131.

Plaintiffs' challenge to § 119 arises at the intersection of two different lines of Supreme Court jurisprudence. On one hand, the Court has held on many occasions that the government violates the establishment clause when it engages in conduct that a reasonable observer would view as an endorsement of a particular religious belief or practice, including prayer. On the other hand, the Court has held that some forms of "ceremonial deism," such as legislative prayer, do not violate the establishment clause. In Van Orden v. Perry, 545 U.S. 677, 683 (2005) (a case challenging the placement of a Ten Commandments monument on public property), a plurality of the Court stated that its establishment clause cases were "Janus like, point[ing] in two directions."

Although there is tension among these cases, I do not believe they are irreconcilable; they simply show that context is important when applying the establishment clause. In my view of the case law, government involvement in prayer may be consistent with the establishment clause when the government's conduct serves a significant secular purpose and is not a "call for religious action on the part of citizens." McCreary County, Kentucky v.

American Civil Liberties Union of Kentucky, 545 U.S. 844, 877 (2005).

Unfortunately, § 119 cannot meet that test. It goes beyond mere "acknowledgment" of religion because its sole purpose is to encourage all citizens to engage in prayer, an inherently religious exercise that serves no secular function in this context. In this instance, the government has taken sides on a matter that must be left to individual conscience. "When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship." McCreary County, 545 U.S. at 883 (O'Connor, J., concurring). Accordingly, I conclude that § 119 violates the establishment clause.

It bears emphasizing that a conclusion that the establishment clause prohibits the government from endorsing a religious exercise is not a judgment on the value of prayer or the millions of Americans who believe in its power. No one can doubt the important role that prayer plays in the spiritual life of a believer. In the best of times, people may pray as a way of expressing joy and thanks; during times of grief, many find that prayer provides comfort. Others may pray to give praise, seek forgiveness, ask for guidance or find the truth. "And perhaps it is not too much to say that since the beginning of th[e] history [of humans] many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'" Engel v. Vitale, 370 U.S. 421, 433 (1962). However, recognizing the importance of prayer to many people does not mean that the government may enact a

statute in support of it, any more than the government may encourage citizens to fast during the month of Ramadan, attend a synagogue, purify themselves in a sweat lodge or practice rune magic. In fact, it is because the nature of prayer is so personal and can have such a powerful effect on a community that the government may not use its authority to try to influence an individual's decision whether and when to pray.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff Freedom from Religion Foundation is an organization founded in 1976 in Madison, Wisconsin. It is devoted to "promot[ing] the constitutional principle of separation of church and state" and "educat[ing] the public on matters of nontheism." Plaintiffs Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, Paul Gaylor, Phyllis Rose and Jill Dean are members of the foundation. Defendant Barack Obama is the President of the United States. Defendant Robert Gibbs is the President's press secretary.

B. The 1952 Statute

In 1952, evangelist Billy Graham led a six week religious campaign in Washington,

D.C., holding events in the National Guard Armory and on the Capitol steps. The campaign culminated in a speech in which Graham called for a national day of prayer:

> Ladies and gentlemen, our Nation was founded upon God, religion and the church . . . .
>
> . . .
>
> What a thrilling, glorious thing it would be to see the leaders of our country today kneeling before Almighty God in prayer. What a thrill would sweep this country. What renewed hope and courage would grip the Americans at this hour of peril.
>
> . . .
>
> We have dropped our pilot, the Lord Jesus Christ, and are sailing blindly on without divine chart or compass, hoping somehow to find our desired haven. We have certain leaders who are rank materialists; they do not recognize God nor care for Him; they spend their time in one round of parties after another. The Capital City of our Nation can have a great spiritual awakening, thousands coming to Jesus Christ, but certain leaders have not lifted an eyebrow, nor raised a finger, nor showed the slightest bit of concern.
>
> Ladies and gentlemen, I warn you, if this state of affairs continues, the end of the course is national shipwreck and ruin.

After Graham's speech, Representative Percy Priest introduced a bill to establish a National Day of Prayer. In addressing the House of Representatives, he noted that the country had been "challenged yesterday by the suggestion made on the east steps of the Capitol by Billy Graham that the Congress call on the President for the proclamation of a day of prayer."

In support of the bill, Representative Brooks stated that "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." Representative Peter W. Rodino, Jr., stated that "it is fitting and timely that the people of America, in approaching the Easter season, as God-fearing men and women, devote themselves to a day of prayer in the interest of peace."

Absalom Robertson introduced the bill in the Senate, stating that it was a measure against "the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is based." A committee report in the House of Representatives stated that the purpose of the bill "is to direct the President to proclaim a National Day of Prayer each year." A Senate report included the following statement:

> From its beginning the United States of America has been a nation fully cognizant of the value and power of prayer. In the early days of colonization, the Pilgrims frequently engaged in prayer. When the delegates to the Constitutional Convention encountered difficulties in writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions.[1] Today, both Houses of Congress are opened daily with prayer.
>
> Prayer has indeed been a vital force in the growth and development of

[1] This part of the report is not accurate. Marsh v. Chambers, 463 U.S. 783, 787 (1983) ("[P]rayers were not offered during the Constitutional Convention.")

this Nation. It would certainly be appropriate if, pursuant to this resolution, and the proclamation it urges, the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States.

On April 17, 1952, Congress passed Public Law 82- 324:

The President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.

C. The 1988 Statute

In 1988, Vonette Bright, founder of the Campus Crusade for Christ, and the National Day of Prayer Committee lobbied Congress to amend the National Day of Prayer statute because Bright "believed that we should have a day in this country where we cover this nation in prayer and the leaders." When the bill was discussed in the House of Representatives in March 1988, Representative Tony Hall, the bill's sponsor, stated that its purpose was to "bring more certainty to the scheduling of events related to the National Day of Prayer and permit more effective long-range planning." He quoted the statement of Pat Boone, the co-chairperson of the National Prayer Committee, that the law in existence at the time "offered little advance notice to adequately inform the grassroots constituencies."

Strom Thurmond introduced the bill in the Senate. He stated that, because the

National Day of Prayer has "a date that changes each year, it is difficult for religious groups to give advance notice to the many citizens who would like to make plans for their church and community. Maximum participation in the public knowledge of this event could be achieved, if, in addition to its being proclaimed annually, it were established as a specific, annual, calendar day." Senator Jesse Helms stated that the bill would allow "Americans . . . to plan and prepare to intercede as a corporate body on behalf of the Nation and its leaders from year to year with certainty." He believed that "America must return to the spiritual source of her greatness and reclaim her religious heritage. Our prayer should be that—like the Old Testament nation of Israel—Americans would once again 'humble themselves, and pray, and seek God's face, and turn from [our] wicked ways' so that God in heaven will hear and forgive our sins and heal our land."

On May 5, 1988, Congress approved Public Law 100-307, "setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated." On May 9, 1988, President Ronald Reagan signed the bill into law. The current version of the statute provides:

> The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals.

D. The National Day of Prayer in Practice

All Presidents since 1952 have issued proclamations designating the National Day of Prayer each year. Since 1988 the National Day of Prayer has been held on the first Thursday in May. The President's proclamations are released by the Office of the Press Secretary.

In 2008, President Bush hosted an event in the East Room celebrating the National Day of Prayer. All 50 governors issued proclamations in support of the day. On May 7, 2009, President Obama issued a proclamation designating the day to be the National Day of Prayer.

The National Day of Prayer Task Force was created in 1989. It is a private organization with a mission to "communicate with every individual the need for personal repentance and prayer, mobilizing the Christian community to intercede for America and its leadership in the seven centers of power: Government, Military, Media, Business, Education, Church and Family." It offers "draft" proclamations for the President to consider and it chooses a theme each year with supporting scripture from the Bible. In 2001, the President incorporated the task force's theme of "One Nation under God"; in 2008 he adopted the task force's theme of "Prayer! America's Strength and Shield." The chairperson for the task force has spoken at eight White House prayer services on the National Day of Prayer.

The task force organizes between 30,000 and 40,000 prayer gatherings across the country in conjunction with the National Day of Prayer. Events sponsored by the task force are "specifically limited to the Judeo-Christian heritage and those who share that conviction as expressed in the Lausanne Covenant," which includes beliefs that the Bible is "the only written word of God, without error in all that it affirms" and that "there is only one Savior and only one gospel." Coordinators, volunteers and speakers at task force events must share these views in order to participate.

OPINION

As world history and current events around the globe show all too clearly, few topics inspire stronger opinions and emotions than religion. Perhaps because of the importance of the questions addressed by religion and the centrality of religious beliefs to a person's identity, disagreements about those beliefs and their role in society can be intense and heated. L. Scott Smith, Religion, Politics and the Establishment Clause, 10 Chap. L. Rev. 299, 300 (2006) (arguing that religion "constitutes the most fundamental fault line of the conflict" regarding "political worldviews"). Thus, it should come as no surprise that the federal judiciary's interpretations of the establishment clause are among its most controversial decisions of the last few decades. Regardless whether a decision has favored a more robust interpretation of the clause or a more permissive one, controversy has followed

any ruling from the Supreme Court on the appropriate relationship between the government and religion. Even when the questions involve symbolism rather than tangible benefits, parties on both sides may expend substantial resources to support what they view as the correct resolution of the matter and protest vigorously those decisions they believe came out wrong.

Decisions under the establishment clause are controversial and difficult in part because of the competing values at stake in each case. Religious freedom under the First Amendment contains two components, the right to practice one's religion without undue interference under the free exercise clause and the right to be free from disfavor or disparagement on account of religion under the establishment clause. All three branches of government engage in a constant struggle to balance these competing rights, to protect religious freedom without denigrating any particular religious viewpoint. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) ("While the two Clauses express complementary values, they often exert conflicting pressures.").

Reasonable minds often differ regarding the appropriate balance in a given case. However, unlike other branches of government, the federal courts may not avoid controversial decisions or rely on public opinion in making those decisions when the answer is not clear. Rather, courts must review the applicable law in each case and determine in good faith how that law applies to the facts. That general commitment to the rule of law

applies with equal force when a decision may conflict with the deeply held beliefs of many, or even a majority, of citizens.

A. Establishment Clause and the Executive Branch

The First Amendment states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., amend I. In her brief in support of her motion for summary judgment, former defendant Shirley Dobson argued that the establishment clause does not apply to the President because the executive branch is not included in the express language of the amendment, only Congress. Although the President himself does not deny that he is bound by the establishment clause and Dobson is no longer a defendant in this case, I will address the argument briefly for the sake of completeness.

An initial problem with Dobson's argument is that the only question remaining in this case is the constitutionality of 36 U.S.C. § 119, a statute enacted by Congress. However, even if the President's enforcement of the statute could be considered separately from the statute itself, it is far too late in the day to accept the argument Dobson advances. The First Amendment contains not only the establishment clause, but also the clauses regarding free speech, free exercise of religion, a free press and petitioning the government for redress of grievances. Thus, the logical conclusion of Dobson's argument is that the entire First Amendment is limited to legislative acts.

As courts and commentators have discussed, the framers used the word "Congress" in the First Amendment to make it clear that the Bill of Rights applied to the federal government and not the states, but there was no intention to limit the reach of the amendment to legislative acts. Shrum v. City of Coweta, Oklahoma, 449 F.3d 1132, 1140-43 (10th Cir. 2006); Akhil Amar, America's Constitution: A Biography 316 (2006). (The Supreme Court later concluded that the First Amendment applies to the states through the due process clause of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303(1940)). If the executive branch were free to disregard the First Amendment, it would mean that decades of Supreme Court decisions are invalid. Although it may be true that the Court has not held expressly that the First Amendment applies to executive acts, it has applied that amendment to the executive branch on many occasions. E.g., United States v. National Treasury Employees Union, 513 U.S. 454, 465 (1995); New York Times Co. v. United States, 403 U.S. 713 (1971); Lamont v. Postmaster General, 381 U.S. 301, 305 (1965). See also McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 877 (2005) ("To that end, we have held that the guarantees of religious freedom protect citizens from religious incursions by the States as well as by the Federal *Government.*") (emphasis added); School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203, 222 (1963) ("[T]he Establishment Clause prohibits . . . [the] official support of the State or Federal *Government* be[ing] placed behind the tenets

of one or of all orthodoxies.") (emphasis added).

Further, Dobson's argument is inconsistent with the Supreme Court's general view that constitutional rights should apply equally to different forms of government, even when a literal reading of the text would not support that conclusion. E.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995) (concluding that due process clause in Fifth Amendment should be construed to apply to federal government under same standard that equal protection clause is applied to state government, even though those two amendments employ dissimilar texts); Wallace v. Jaffree, 472 U.S. 38, 48-55 (1985) (rejecting argument that establishment clause should apply differently to state government). At this stage of the development of constitutional jurisprudence, it is not reasonable to believe that one branch of government is not bound by the the First Amendment.

B. Purpose and Effect: The Endorsement Test

The Supreme Court has noted often that the establishment clause is the result of the lesson learned from history that, when the government takes sides on questions of religious belief, a dangerous situation may be created, both for the favored and the disfavored groups. McCreary County, 545 U.S. at 876 ("The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of

religious debate.") (internal citations omitted); Lee v. Weisman, 505 U.S. 577, 591-92 (1992) ("The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."); Engel v. Vitale, 370 U.S. 421, 430 (1962) ("[The clause's] first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.")

Thus, although the Court has framed the requirements of the establishment clause in various ways, generally the tests revolve around principles of neutrality or equality, both among different religions and between religion and nonreligion. E.g., McCreary County, 545 U.S. at 875-76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Board of Education of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 703 (1994) ("[T]he government should not prefer one religion to another, or religion to irreligion."); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 590-91 (1989) ("[G]overnment may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.");

Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (government "may not . . . promote one religion or religious theory against another or even against the militant opposite").

The test applied most commonly by courts when interpreting the establishment clause was articulated first in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. Although individual justices have criticized the test, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); Tangipahoa Parish Board of Education v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari), the Supreme Court as a whole continues to apply it. E.g., McCreary County, 545 U.S. at 859-67. Further, it is the test the Court of Appeals for the Seventh Circuit has employed in recent cases brought under the establishment clause. E.g., Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523 (7th Cir. 2009); Vision Church v. Village of Long Grove, 468 F.3d 975, 991-92 (7th Cir. 2006).

The first two parts of the Lemon test are often described as the "endorsement test." E.g., Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 764 (7th Cir. 2001) (Lemon test requires courts to "determin[e] . . . whether [government action] constitutes an impermissible endorsement or disapproval of religion"); Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir.

2000) (purpose of Lemon test is "to determine whether government action constitutes an endorsement of religion"). This means that "Lemon's inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." Wallace, 472 U.S. at 69. See also Allegheny, 492 U.S. at 592 ("[W]e have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.")

To many, the idea of government endorsement of religion is not only acceptable, but also a desirable way to promote public morality and strengthen community bonds. E.g., Schempp, 374 U.S. at 223-24 (school's stated purpose in reading Bible passages to students was to "promot[e] moral values" and "contradic[t] the materialistic trends of our times"). To those people, the problem is that government does not promote religion *enough*. This view is demonstrated by Billy Graham in his speech calling for a National Day of Prayer and by former defendant Dobson in her deposition. She testified that "many people look to the President as the moral leader and sometimes even the spiritual leader. . . . [W]e would like to see him encourage people of all faiths to pray on that day. . . . I think it's critical that the leaders do support this nation's day of prayer because they're role models to their people." Dobson Dep., dkt. #124, at 82-83, 92. To those whose beliefs comport with the message sent by the government, it is difficult to understand why anyone would object to the

message.

However, 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. This is not simply a matter of being "too sensitive" or wanting to suppress the religious expression of others. Rather, as explained in a recent book by the Provost of Princeton University and the Dean of the University of Texas School of Law, it is a consequence of the unique danger that religious conduct by the government poses for creating "in" groups and "out" groups:

> Religious affiliation typically implicates an expansive web-of-belief and conduct, and individuals often feel and are seen as "in" or "out" of such webs. In a variety of ways the perceived and actual stakes of being within or without these webs of belief and membership can be very high: being fulfilled and redeemed or eternally damned; being welcomed as a member of the community or shunned. Moreover, it is in the nature of religion that persons outside a given faith will on occasion fail to understand or appreciate matters internal to that faith, and so will be inappropriately indifferent, suspicious, or even repelled and hostile to beliefs and practices central to that faith. These are matters of sociological fact, and they justify distinct constitutional concern that governmental conduct will valorize some beliefs at the cost of disparaging others, and further, that in the course of such conduct, government will valorize some citizens at the cost of disparaging others.

Christopher L. Eisgruber and Lawrence G. Sager, Religious Freedom and the Constitution 61-62 (2007).

As an example, Eisgruber and Sager ask the reader to imagine citizens who are erecting a large sign at the entrance to their town. One potential slogan is "Fineville: A

Nuclear-Free Community"; another possibility is "Fineville: A Christian Community." Although both signs could create heated disagreements among the citizens of the town, it is unlikely that the first sign would be construed as a message of *disparagement* by those who believe in nuclear power. In contrast, the second sign would almost certainly be viewed by non-Christians as a message that they are not welcome in the community or that they are simply a tolerated minority that does not have equal status to Christian residents of the town. Id. at 124-25.

Justice O'Connor has framed the problem concisely: "government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." Allegheny, 492 U.S. at 627 (O'Connor, J., concurring); see also Santa Fe, 530 U.S. at 309-10 ("[S]ponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.") (internal quotations omitted). She explained the problem more fully in McCreary County, 545 U.S. at 883:

> When the government associates one set of religious beliefs with the state and identifies nonadherents as outsiders, it encroaches upon the individual's decision about whether and how to worship. In the marketplace of ideas, the government has vast resources and special status. Government religious expression therefore risks crowding out private observance and distorting the natural interplay between

competing beliefs. Allowing government to be a potential mouthpiece for competing religious ideas risks the sort of division that might easily spill over into suppression of rival beliefs. Tying secular and religious authority together poses risks to both.

Defendants suggest that Lemon and the endorsement test may not apply in this case, citing the opinion in Van Orden v. Perry, 545 U.S. 677, 686 (2005), in which a plurality of the Court concluded that Lemon was "not useful" in assessing the constitutionality of a Ten Commandments monument and that "the nature of the monument and . . . our Nation's history" were the important factors. See also Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."). Although defendants are correct that the endorsement test under Lemon is not without its exceptions, it remains the predominant test of the Supreme Court and the Court of Appeals for the Seventh Circuit. Accordingly, I will apply the endorsement test to § 119, considering whether the purpose and effect of the statute is to convey a message of government endorsement of religion, and then consider possible alternatives to that test.

C. Applying the Endorsement Test to the National Day of Prayer

Under 36 U.S.C. § 119, "[t]he President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as

individuals." If the endorsement test is controlling, there can be little doubt that § 119 violates the establishment clause. I begin with the question whether the effect of § 119 is to convey a message that the government is endorsing religion.

1. Effect of the National Day of Prayer

In evaluating the "effect" of any particular governmental action, the focus is on whether a "reasonable observer" would view the government's conduct as endorsing religion. Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002); Santa Fe, 530 U.S. at 308; Books v. Elkhart County, Indiana, 401 F.3d 857, 867 (7th Cir. 2005). Defendants do not deny that prayer is an inherently religious exercise. North Carolina Civil Liberties Union Legal Foundation v. Constangy, 947 F.2d 1145, 1150 (4th Cir. 1991) (stating that prayer is "intrinsically religious"); cf. Stone v. Graham, 449 U.S. 39, 41-42 (1980) (in concluding that state's Ten Commandments display violated establishment clause, noting that display was "plainly religious in nature" and that the Ten Commandments are an "instrument of religion"). The statute itself defines prayer as a method of "turn[ing] to God."

Further, it is difficult to argue that the statute does not "endorse" prayer within the meaning of past Supreme Court cases. The National Day of Prayer is one of a select few days on the calendar that Congress has officially recognized in a statute. The other days are directly related to patriotism, e.g., 36 U.S.C. § 106 (Constitution Day and Citizenship Day);

36 U.S.C. § 124 (National Freedom Day); 36 U.S.C. § 110 (Flag Day), public health, e.g., 36 U.S.C. § 101 (American Heart Month); 36 U.S.C. § 103 (Cancer Control Month), family, e.g., 36 U.S.C. § 117 (Mother's Day), or a celebrated historical figure, e.g., 36 U.S.C. § 141 (Thomas Jefferson's Birthday); 36 U.S.C. § 143 (Wright Brothers Day). All of these statutes are in a section of the United States Code called "Patriotic and National Observances." In other words, these are all matters that the government is encouraging its citizens to celebrate and respect. (Thanksgiving and Christmas are recognized in another part of the code in a statute listing federal holidays. 5 U.S.C. § 6103. These holidays are discussed in the next section.)

Even if one were to ignore the other statutes surrounding § 119 in the United States Code, the very nature of having a statute involving a "national day" in recognition of a particular act connotes endorsement and encouragement. Justice Kennedy has acknowledged that the National Day of Prayer "is a straightforward endorsement of the concept of 'turn[ing] to God in prayer.'" Allegheny, 492 U.S. at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part). A reasonable observer of the statute or a proclamation designating the National Day of Prayer would conclude that the federal government is encouraging her to pray. Cf. Stone, 449 U.S. at 42 ("If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However

desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.")

In previous cases, the Supreme Court has made statements that seem to bear directly on the constitutionality of § 119. In Wallace, 472 U.S. at 59, the Court held that a statute providing a "moment of silence or voluntary prayer" in Alabama schools was unconstitutional because it "convey[ed] a message of state endorsement and promotion of prayer." In Santa Fe, 530 U.S. at 313, the Court was even more on point: "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." These statements, found in the majority opinions of the Court, seem to leave little room to argue that an official day of prayer sponsored by the federal government can survive a challenge under the establishment clause. See also Engel, 370 U.S. at 435 ("[E]ach 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."); Mellen v. Bunting, 327 F.3d 355, 375 (4th Cir. 2003) ("[T]he Establishment Clause prohibits a state from promoting religion by . . . promoting prayer for its citizens.")

One might argue that the National Day of Prayer does not violate the establishment clause because it does not endorse any one religion. Unfortunately, that does not cure the problem. Although adherents of many religions "turn to God in prayer," not all of them do.

McCreary, 545 U.S. at 879-81 (rejecting view that establishment clause allows government to prefer monotheistic faiths to other religions). Further, the statute seems to contemplate a specifically Christian form of prayer with its reference to "churches" but no other places of worship and the limitation in the 1952 version of the statute that the National Day of Prayer may not be on a Sunday. Even some who believe in the form of prayer contemplated by the statute may object to encouragements to pray in such a public manner. E.g., Matthew 6:5 ("You, however, when you pray, go into your private room and, after shutting your door, pray to your Father who is in secret; then your Father who looks on in secret will repay you.").

In any event, the establishment clause is not limited to discrimination among different sects. The First Amendment "guarantee[s] religious liberty and equality to 'the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'" Allegheny, 492 U.S. at 590 (quoting Wallace, 472 U.S. at 52). Even endorsement of "religion generally, 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.'" McCreary County, 545 U.S. at 860 (quoting Zelman, 536 U.S. at 718 (Breyer, J., dissenting)). Thus, the government's religious conduct cannot survive scrutiny under the establishment clause simply because it endorses multiple religions instead of just one. Lee, 505 U.S. at 590 ("The suggestion that government may establish an official

or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."); id. at 617 (Souter, J., concurring) ("Nor does it solve the problem to say that the State should promote a 'diversity' of religious views; that position would necessarily compel the government and, inevitably, the courts to make wholly inappropriate judgments about the number of religions the State should sponsor and the relative frequency with which it should sponsor each."); Allegheny, 492 U.S. at 615 ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone."); Engel, 370 U.S. at 430 ("[T]he fact that the prayer may be denominationally neutral [cannot] serve to free it from the limitations of the Establishment Clause"). As the Court pointed out in Lee, 505 U.S. at 594, and Santa Fe, 530 U.S. at 305, although the government may be attempting to help more people feel included by endorsing widespread religious practices, this may actually exacerbate the sense of isolation and exclusion felt by the relatively few who remain on the outside.

None of the parties suggest that the inclusion of the phrase "or meditation" has any effect on the establishment clause analysis, such as by including an alternative for adherents of nontheistic religions or nonbelievers. From its context within the statute, the inclusion of meditation seems to have been an afterthought. The statute does not create a "National Day of Prayer and Meditation," but only a National Day of Prayer. Further, the statute

seems to assume that even meditation is a religious exercise directed toward God because it is included in the awkward phrase "turn to God in . . . meditation." Finally, as will be discussed below, the legislative history of the statute includes no discussion of meditation, only a Judeo-Christian understanding of prayer.

2. Purpose of the National Day of Prayer

Sometimes a statute that may seem at first blush to promote a religious belief may survive scrutiny under the establishment clause if the benefit to religion is incidental and the government has a valid secular purpose for its conduct. Metzl v. Leininger, 57 F.3d 618, 620 (7th Cir. 1995) ("[A] law that promotes religion may nevertheless be upheld either because of the secular purposes that the law also serves or because the effect in promoting religion is too attenuated to worry about."). For example, in McGowan v. Maryland, 366 U.S. 420 (1961), the Court upheld a state's Sunday closing law because many employees would prefer not to work on Sunday regardless of their religion. Other commonly cited examples are the national observances of Christmas and Thanksgiving. E.g., Lynch, 465 U.S. at 675. Although these holidays have religious origins, their celebration by the government does not connote endorsement in the eyes of the reasonable observer because of the significant secular meaning the holidays now have. Metzl, 57 F.3d at 620.

The key question becomes whether the government can identify a secular purpose for

conduct that seems religious on its face. Id. at 622 (stating that government has burden to demonstrate secular purpose for holiday that is religious on its face). Thus, public recognition of a holiday may violate the establishment clause in one state but not another because of different showings made by the government. Compare Bridenbaugh v. O'Bannon, 185 F.3d 796, 800-01 (7th Cir. 1999) (upholding Indiana law closing government offices on Good Friday because purpose of law was not to celebrate holiday but to give employees day off when many schools are closed and many other employers recognize it as a holiday), with Metzl, 57 F.3d at 623 (concluding that Illinois statute recognizing Good Friday as state holiday violated establishment clause because government did not adduce sufficient evidence to show that statute served secular purpose), and Freedom From Religion Foundation, Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) (Wisconsin statutes establishabling Good Friday as state holiday for "the purpose of worship" and closing state government on afternoon of Good Friday violated establishment clause because express purpose of statutes was to favor Christianity). See also McCreary County, 545 U.S. at 861 ("[I]f the government justified [Sunday closing laws] with a stated desire for all Americans to honor Christ, the divisive thrust of the official action would be inescapable."); Allegheny, 492 U.S. at 601 ("The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.")

a. Legislative history

In this case, examining the purpose of the statute does not diminish the message of endorsement in the statute. Defendants point to the "official" purpose of the original statute in the Congressional Record: "to direct the President to proclaim a National Day of Prayer each year." S. Rep. No. 82-1389. However, that is simply a restatement of the language in the statute, so it is difficult to see how it provides any helpful insight.

Although there is little legislative history for the National Day of Prayer, several of its sponsors made statements that were placed in the Congressional Record. As discussed in the undisputed facts section, the bill proposing the National Day of Prayer was introduced at the conclusion of a "phenomenal evangelistic revival" in Washington, D.C. led by Billy Graham in which he gave a speech on the Capitol steps asking Congress to "call on the President for the proclamation of a day of prayer." 98 Cong. Rec. 771, A910 (1952). Graham stated that "men have come to believe that religion has no place in the affairs of the state . . . We have dropped our pilot, the Lord Jesus Christ, and are sailing blindly on without divine chart or compass . . . God is warning the American people, through the preaching of His word, to repent of sin and turn to God while there is time." Id. at A910-11. He wished "to see the leaders of our country today kneeling before the Almighty God in prayer." Id. at A910.

Percy Priest introduced a bill in the House of Representatives "embod[ying] the suggestions made . . . on the steps of the Capitol by the great spiritual leader, Billy Graham." 98 Cong. Rec. 771. Representatives made statements in support of the bill that "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," id., and that "it is fitting and timely that the people of America, in approaching the Easter season, as God-fearing men and women, devote themselves to a day of prayer in the interest of peace."

In the Senate, sponsor Absalom Robertson stated that a National Day of Prayer was a measure against "the corrosive forces of communism which seek simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is based." 98 Cong. Rec. 976 (1952). A Senate report concluded that

> Prayer has indeed been a vital force in the growth and development of this Nation. It would certainly be appropriate if, pursuant to this resolution, and the proclamation it urges, the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus 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 legislative history supports the view that the purpose of the National Day of Prayer was to encourage all citizens to engage in prayer, and in particular the Judeo-Christian view of prayer. One might argue that members of Congress voiced secular purposes: to

protect against "the corrosive forces of communism" and promote peace. That is true, but the references to these purposes do nothing to diminish the message of endorsement. If anything, they contribute to a sense of disparagement by associating communism with people who do not pray. A fair inference that may be drawn from these statements is that "Americans" pray; if you do not believe in the power of prayer, you are not a true American. Identifying good citizenship with a particular religious belief is precisely the type of message prohibited by the establishment clause. Allegheny, 492 U.S. at 593-94 ("The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief."); see also Frederick Mark Gedicks & Roger Hendrix, Uncivil Religion: Judeo-Christianity and the Ten Commandments, 110 W. Va. L. Rev. 275, 305 (2007) ("[L]inking patriotism and citizenship to civil religion in circumstances of religious pluralism will inevitably result in alienation of those portions of the population who cannot see themselves in the model citizen presupposed by the civil religion.")

Citing Board of Education of Westside Community Schools v. Mergens By and Through Mergens, 496 U.S. 226 (1990), defendants argue that it is improper to rely on the motive of individual legislators to find a religious purpose. The Supreme Court has not been completely consistent on this issue. Compare Mergins, 496 U.S. at 249 ("[W]hat is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law."), with Edwards v. Aguillard, 482 U.S. 578, 587 (1987) (relying on

statement of statute's sponsor in finding that statute had religious purpose), and Wallace, 472 U.S. at 57 (same). In any event, the point of reviewing the legislative history is not to show that the motives of individual legislators create a constitutional violation where one did not exist before; it is only to show that nothing in the legislative history serves to diminish the religious endorsement conveyed by the statute on its face.

The 1988 amendment to the statute creates an additional problem. It is clear that the sole purpose of the amendment was to "permit more effective long-range planning" for religious groups that wish to celebrate the National Day of Prayer and use it to mobilize their "grassroots constituencies." 134 Cong. Rec. H22761-02. In other words, the 1988 amendment does not serve any purpose for the government or the country as a whole, but simply facilitates the religious activities of particular religious groups. Although those groups undoubtedly appreciate that assistance, they are not entitled to it. "[T]he Establishment Clause prohibits precisely what occurred here: the government's lending its support to the communication of a religious organization's religious message." Allegheny, 492 U.S. at 601. See also Metzl, 57 F.3d at 621 ("[T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice their religion, unless there is a secular justification for the difference in treatment.")

b. Acknowledgment of religion

Defendants argue that the purpose and effect of the National Day of Prayer is to acknowledge the role of religion in American life, which is not objectionable. Lynch, 465 U.S. at 674 ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); Wallace, 472 U.S. at 70 (O'Connor, J., concurring) ("The endorsement test does not preclude government from acknowledging religion."). Certainly, the statute accomplishes that purpose. However, the line between "acknowledgment" and "endorsement" is a fine one. Because it is, "courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." Lynch, 465 U.S. at 694 (O'Connor, J., concurring).

Establishment clause values would be significantly eroded if the government could promote any longstanding religious practice of the majority under the guise of "acknowledgment." *Any* religious conduct by the government could be framed as mere "acknowledgment" of religion, including the public prayers the Court declared unconstitutional in Lee and Santa Fe and the religious displays in McCreary and Allegheny. It is notable that, in cases in which a majority of the Court finds an establishment clause

violation, justices in dissenting opinions often argue that the religious conduct is simply an acknowledgment of religion. McCreary, 545 U.S. at 906 (Scalia, J., dissenting); Lee, 505 U.S. at 631 (Scalia, J., dissenting); Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Court has been most likely to find "acknowledgment" of religion permissible when it is part of a larger secular message. Lynch, 465 U.S. at 679-80 (upholding display of crèche that was part of larger holiday display); Van Orden, 645 U.S. at 704 (upholding display of Ten Commandments that was part of larger display of monuments "all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time"). In McCreary, 545 U.S. at 877 n.24, the Court stated that the government crosses the line between acknowledgment and endorsement when it "manifest[s] [the] objective of subjecting individual lives to religious influence," "insistently call[s] for religious action on the part of citizens" or "expresse[s] a purpose to urge citizens to act in prescribed ways as a personal response to divine authority." This is exactly what § 119 does by encouraging all citizens to pray every first Thursday in May. If the government were interested only in acknowledging the role of religion in America, it could have designated a "National Day of Religious Freedom" rather than promote a particular religious practice.

c. Accommodating religion

Under some circumstances, religious conduct by the government may be justified by an interest in *accommodating* the free exercise rights of citizens. Cutter, 544 U.S. at 720 (holding that Religious Land Use and Institutionalized Persons Act, which prohibits government from imposing substantial burdens on prisoners' religious exercise except in narrow circumstances, is accommodation of religion); Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (holding that it is accommodation of religion to exempt religious organizations from Title VII's prohibition on religious discrimination). However, a government's ability to provide benefits to a religion is not without limit, even and perhaps especially when the majority of those in the community adhere to that religion. In a sense, "[a]ny [government action] pertaining to religion can be viewed as an 'accommodation' of free exercise rights." Amos, 483 U.S. at 347 (O'Connor, J., concurring in judgment). Thus, the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587.

Generally, religious accommodation is appropriate when it is necessary to alleviate government-imposed burdens on religion. Allegheny, 492 U.S. at 601; Wallace, 472 U.S. at 57. In that case, the government's goal is not to advance or endorse religion, but to engender equality by lifting burdens that members of other faiths do not face.

No such burden exists in this case. With or without a statute, private citizens are free

to pray at any time. Cf. Santa Fe, 530 U.S. at 313 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday."); Wallace, 472 U.S. at 57 ("[A]t the time of the enactment of [the 'moment of silence' statute], 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' or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause.") Private citizens are also free to join together to hold celebrations of their faith, including by proclaiming their own day of prayer.

The *only* way that § 119 "accommodates" religion is to communicate the message that the government endorses prayer and encourages its citizens to engage in it. That is not an accommodation under Supreme Court precedent; it is taking sides on a matter of religious belief. Because supporters of the National Day of Prayer "have no need for the machinery of the State to affirm their beliefs, the government's sponsorship" of that day in § 119 "is most reasonably understood as an official endorsement of religion and, in this instance, of theistic religion." Lee, 505 U.S. at 629-30 (Souter, J., concurring) (discussing whether allowing clergy-led prayer at public high school graduation could be described as "accommodation" of religion); see also Allegheny, 492 U.S. at 611-12 ("[S]ome Christians may wish to see the government proclaim its allegiance to Christianity in a religious

celebration of Christmas, but the Constitution does not permit the gratification of that desire."). "One may fairly say . . . that the government [enacted § 119] 'precisely because some people want a symbolic affirmation that government approves and endorses their religion, and because many of the people who want this affirmation place little or no value on the costs to religious minorities." Lee, 505 U.S. at 629-30 (Souter, J., concurring) (quoting Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841, 844 (1992)).

Because the National Day of Prayer does not have a secular purpose or effect, it cannot survive scrutiny under Lemon and the endorsement test. Under these circumstances, the National Day of Prayer is indistinguishable from the Good Friday holiday the court of appeals struck down in Metzl, 57 F.3d 618. Like Good Friday and unlike Christmas and Thanksgiving, one could say about the National Day of Prayer that it "has accreted no secular rituals. . . . It is a day of . . . religious observance, and nothing else, for believ[ers] . . . [T]here is nothing in [the National Day of Prayer] for [non-believers], as there is in the other holidays [such as Christmas and Thanksgiving] despite the Christian origin of those holidays." Id. at 620-21. And unlike the defendant government in Bridenbaugh, which permitted a day off for state employees on Good Friday because it made logistical sense, defendants have identified no purpose that § 119 serves other than to encourage and facilitate prayer.

C. Potential Limitations on *Lemon* and the Endorsement Test

Although a "straightforward" application of the endorsement test under Lemon supports a finding that the National Day of Prayer violates the establishment clause, defendants point out that the Supreme Court jurisprudence interpreting the establishment clause is not based exclusively on the endorsement test. Thus, they argue that the endorsement test should not apply to this case; instead, the court should look at factors such as the lack of coercion in the statute and the long history of presidential prayer proclamations.

1. Coercive effects and children as the primary audience

Defendants observe in both of their briefs that participation in the National Day of Prayer is voluntary. Dfts.' Br., dkt. # 83 at 36; Dfts.' Br., dkt. # 118, at 31. Although they do not explain why that observation is relevant to deciding this case, they cite two cases in which the Supreme Court discussed coercive elements of prayer at school graduations and football games. Santa Fe, 530 U.S. 290; Lee, 505 U.S. 577. They cite the same cases for the proposition that government sponsorship of prayer is not a problem under the establishment clause unless children are the primary audience. Dfts.' Br., dkt. #83, at 28.

I am not persuaded that Santa Fe or Lee supports a view that government endorsement of prayer violates the establishment clause only when participation in a

religious exercise is "forced" or when children are the only subjects of the religious exercise. To begin with, as a number of Justices have recognized, incorporating an element of "coercion" into the establishment clause would give it little or no independent meaning apart from the free exercise clause, which prohibits the government from compelling conformity to any religious belief or practice. Lee, 505 U.S. at 621 (Souter, J., concurring with Stevens, J. and O'Connor, J.). Further, the "coercion" discussed in Santa Fe and Lee was not a requirement to act, but the relatively mild social pressure felt when one listens to a prayer at a public event. Lee, 505 U.S. at 592 (describing pressure as "subtle and indirect"). In Engel, 370 U.S. at 431, the Court went so far as to suggest that any government endorsement of religion has the potential to be coercive in that way: "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."

In any event, the Court has explicitly rejected the argument that religious conduct of the government "does not violate the Establishment Clause unless [it is] shown to be 'coercive.'" Allegheny, 492 U.S. at 579. For example, in Engel, 370 U.S. at 430, the Court stated that the "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce

nonobserving individuals or not." In Wallace, 472 U.S. at 60, the Court held that the "addition of 'or *voluntary* prayer' [to a statute calling for a 'moment of silence'] indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." See also Lee, 505 U.S. at 618-19 (Souter, J., concurring) (collecting cases in which Court has found government conduct to violate establishment clause without relying on coercion). Although the Court noted potentially coercive forces contributing to an establishment clause violation in Lee and Sante Fe, it did not state that coercion was required or otherwise call into question Engel, Allegheny, Wallace or any other case involving endorsement without coercion.

Defendants are on stronger footing when they argue that religious conduct by the government in the school setting has received greater scrutiny from the Court than similar conduct elsewhere. Many of the cases discussed in this opinion originated in schools and in some of those the Court emphasized the "impressionable" nature of children. Lee, 505 U.S. at 593 ("[A]dolescents are often susceptible to pressure from their peers towards conformity, and that . . . influence is strongest in matters of social convention."); Wallace, 472 U.S. at 81 (O'Connor, J., concurring) ("This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more

likely to result in coerced religious beliefs."). Taking its cue from Lee, in Tanford v. Brand, 104 F.3d 982, 985-86 (7th Cir. 1997), the court of appeals went so far as to conclude that a "University's inclusion of a brief non-sectarian invocation and benediction" at graduation did not violate the establishment clause, relying in part on the fact that college graduates are more "mature" than high school students. But see Mellen, 327 F.3d at 368 (supper prayers at Virginia Military Institute violate establishment clause); Coles ex rel. Coles v. Cleveland Board of Education, 171 F.3d 369, 381 (6th Cir. 1999) (opening school board meetings with prayer violates establishment clause).

Although these cases suggest that the standard under the establishment clause is sensitive to context, including the age of the audience, I cannot conclude that the Supreme Court or the court of appeals has implied that the endorsement test is limited to schools and students. If that were the case, the Supreme Court could not have found establishment clause violations in Allegheny and McCreary, which involved religious displays that were not directed at children and had no element of coercion beyond the act of endorsement. Similarly, the court of appeals has held in numerous cases that religious symbolism outside the school context violated the establishment clause simply because it represented a religious endorsement. E.g., Indiana Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001); Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000); Gonzales v. North Township of Lake County, 4 F.3d 1412 (7th Cir. 1993); Harris v. City of Zion, 927 F.2d 1401 (7th

Cir. 1991); American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986).

Even in Tanford, the court did not suggest that it was abandoning the endorsement test. Rather, the court held that the invocation survived constitutional scrutiny because it did "not have a primary effect of endorsing or disapproving religion." Tanford, 104 F.3d at 986. In particular, the court concluded that the invocation was merely "ceremonial" and "serve[d] [the] legitimate secular purpos[e] of solemnizing [a] public occasio[n]." Id. Under Tanford, religious messages directed at adults may be different because adults are less likely to construe a "ceremonial" religious reference as an endorsement. Thus, the question for this case is whether the National Day of Prayer is akin to a ceremonial religious reference rather than a true endorsement. I address that question in the next section.

2. *Marsh v. Chambers*: "ceremonial deism"

In one instance, the Supreme Court rejected an establishment clause challenge against what has since been called an example of "ceremonial deism." In Marsh v. Chambers, 463 U.S. 783 (1983), the Court upheld a longstanding practice in the Nebraska legislature to open sessions with a prayer. The Court wrote that "the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is . . . simply a tolerable acknowledgment

of beliefs widely held among the people of this country." Id. at 792.

In addition to the invocation in Tanford, the Court of Appeals for the Seventh Circuit has concluded that the phrase "under God" in the Pledge of Allegiance does not violate the establishment clause because it is a "ceremonial referenc[e] to God" rather than a supplicatio[n] for divine assistance." Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 446 (7th Cir. 1992). Thus, "reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address" or other historical documents that contain "allusion[s]" to God. Id. at 447; see also Elk Grove Unified School District v. Newdow, 542 U.S. 1, 42-43 (2004) (O'Connor, J., concurring in judgment) (stating that "it is a close question" whether Pledge of Allegiance violates establishment clause, but concluding ultimately that it does not).

Defendants and *amici* rely heavily on Marsh, arguing that, if legislative prayer is an acceptable practice under the establishment clause, the National Day of Prayer statute must be constitutional as well. However, answering questions under the establishment clause requires more than simply comparing practices in different cases at a high level of generality. The Court found the government's display of a crèche permissible in Lynch, but unconstitutional in Allegheny. Similarly, in Stone and McCreary, the Court found that a display of the Ten Commandments violated the establishment clause, but declined to find a violation in Van Orden. These cases prove Justice O'Connor's observation in Lynch, 465

U.S. at 694, that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." See also Lee, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one."). This requires a determination regarding whether the reasons for allowing ceremonial deism such as legislative prayer apply equally to the National Day of Prayer statute.

Case law does not necessarily provide clear guidance for determining the types of practices that fall into the category of ceremonial deism and the reason those practices survive constitutional scrutiny. The Court did not employ any particular test or theory for its decision in Marsh, 463 U.S. at 791 , instead relying on the "unique history" of legislative prayer. Although the Court has discussed Marsh in subsequent cases, it has not relied on it to justify similar practices. Coles, 171 F.3d at 381 ("As far as Marsh is concerned, there are no subsequent Supreme Court cases. Marsh is one-of-a-kind.") In McCreary, 545 U.S. at 860, the Court simply stated without elucidation that Marsh was a "special instanc[e] in which we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." One judge observed recently that ceremonial deism is a "hazily defined" concept and suggested that it "represents mainly the judiciary's less than courageous response" to certain longstanding religious practices. Newdow v. Rio Linda Union School District, 597 F.3d 1007, 1110 (Reinhardt, J., dissenting) (9th Cir.

2010).

Although the Court's explanation of the holding and scope of Marsh is less than clear, Justice O'Connor provided a helpful discussion in her concurrence in Lynch. She explained that the legislative prayer at issue in Marsh is similar to other practices such as the

> government['s] declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Lynch, 465 U.S. at 693 (O'Connor, J., concurring); see also Elk Grove, 542 U.S. at 35 (O'Connor, J., concurring in the judgment) (ceremonial deism "speak[s] in the language of religious belief, [but it is] more properly understood as employing the idiom for essentially secular purposes"). The obvious appeal of Justice O'Connor's interpretation is that it harmonizes Marsh with Lemon and the endorsement test, resolving what otherwise seems to be an irreconcilable conflict in the cases. In Allegheny, 492 U.S. at 495, the Court acknowledged Justice O'Connor's view and seemed to adopt it. Since Allegheny, no majority of the Court has repudiated it.

Under this view, the key question is again whether a particular practice serves a secular purpose. A brief invocation opening certain public functions may serve to remind

the audience of the importance of their task without encouraging or endorsing the act of prayer itself. Similarly, the Pledge of Allegiance serves the obvious secular purpose of instilling patriotism. Newdow, 597 F.3d at 1012 ("We hold that the Pledge of Allegiance does not violate the Establishment Clause because Congress' ostensible and predominant purpose was to inspire patriotism and that the context of the Pledge—its wording as a whole, the preamble to the statute, and this nation's history—demonstrate that it is a predominantly patriotic exercise.")

Section 119 cannot be justified on similar grounds. The statute does not use prayer to further a secular purpose; it endorses prayer for its own sake. Further, as the Court recognized in Allegheny, 492 U.S. at 603 n.52, the National Day of Prayer is different from legislative prayer because "[l]egislative prayer does not urge citizens to engage in religious practices." More recently, in McCreary, 545 U.S. at 877 n.24, the Court reaffirmed a similar view when it stated that the government's conduct cannot be described as mere "acknowledgment" of religion if it "call[s] for religious action on the part of citizens." See also Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 289-90 (4th Cir. 2005) ("Ever since Marsh, the Supreme Court has continued to recognize the distinction between prayer engaged in by the government for itself and prayer imposed on the people, subjecting the latter form of prayer to heightened scrutiny."); Van Zandt v. Thompson, 839 F.2d 1215, 1219 (7th Cir. 1988) ("Based on Marsh we are inclined to view a legislature's

internal spiritual practices as a special case.").

3. *Marsh v. Chambers*: "history and ubiquity"

Defendants rely on a second aspect of Marsh, 462 U.S. at 783, unrelated to the nature of the religious practice, in which the Court noted that opening legislative sessions with prayer had an "unambiguous and unbroken history of more than 200 years." In particular, the Court noted that the first Congress had authorized such prayers: "Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." Id. at 788. Defendants and *amici* argue vigorously that the National Day of Prayer should be upheld because its roots may be traced back to 1789 when the first Congress requested President Washington to issue a thanksgiving proclamation. I disagree for several reasons.

First, neither the Supreme Court nor the court of appeals has ever held that religious conduct that would otherwise violate the establishment clause may be upheld for the sole reason that the practice has a long history. "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." Walz v. Tax Commisson of City of New York, 397 U.S. 664, 678 (1970); see also Allegheny, 492 U.S. at 630 (O'Connor, J., concurring)

("Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment.") Even in Marsh, 463 U.S. at 790, the Court stated that, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees." Some even have argued that the longstanding nature of a practice may exacerbate the constitutional injury rather than ameliorate it because "religious outsiders [must] tolerate these practices . . . with the awareness that those who share their religious beliefs have endured these practices for generations." Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2164 (1996).

If one were to read the establishment clause as permitting any practice in existence around the time of the framers, this would likely mean that the government would be free to discriminate against all non-Christians:

> [H]istory shows that the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses. Justice Story probably reflected the thinking of the framing generation when he wrote in his Commentaries that the purpose of the Clause was "not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."

McCreary County, 545 U.S. at 880; see also Allegheny, 492 U.S. at 590 ("Perhaps in the

early days of the Republic [the establishment clause was] understood to protect only the diversity within Christianity."). Although no one on the Court adheres to the view that the establishment clause is limited to prohibiting discrimination among Christian sects, it seems that such a belief endured for many years. Holy Trinity Church v. United States, 143 U.S. 457, 471 (1892) (in unanimous opinion, stating that "this is a Christian nation"). Thus, if history is controlling, it would require the Supreme Court to overrule much of its establishment clause jurisprudence of the last 50 years. E.g., Garrett Coyle, The Role of Tradition in Establishment Clause Jurisprudence, 65 N.Y.U. Ann. Surv. Am. L. 137, 171 (2009) (noting that Court declared public school Bible reading in Schempp unconstitutional despite long history of practice). In many of the cases in which the Supreme Court or the court of appeals concluded that a particular act violated the establishment clause, the dissenting justices argued that the majority was disregarding history. Santa Fe, 530 U.S. at 318 (Rehnquist, C.J., dissenting) ("Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of 'public thanksgiving and prayer'"); Lee, 505 U.S. at 633 (Scalia, J., dissenting) ("The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."); Wallace, 472 U.S. at 85 (comparing "moment of silence" statute to practices in place "since 1789") (Burger, C.J., dissenting).

As Justice Souter has noted, even "leaders who have drafted and voted for a text are eminently capable of violating their own rules." Van Orden, 545 U.S. at 726 (Souter, J., dissenting). This is shown by the fact that "the Congress that proposed the Fourteenth Amendment also enacted laws that tolerated segregation, and the fact that 10 years after proposing the First Amendment, Congress enacted the Alien and Sedition Act, which indisputably violated our present understanding of the First Amendment." Id.

For these reasons, "the early Congress's political actions" are "relevant" rather than "determinative . . . evidence of constitutional meaning." Lee, 505 U.S. 577 at 626 (Souter, J., concurring). Under the endorsement test, the "history and ubiquity of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." Allegheny, 492 U.S. at 630-31 (O'Connor, J., concurring). However, this does not mean that a practice gets a "free pass" under the establishment clause simply because it is old. If a longstanding practice retains its religious significance and fails to acquire secular meaning, it may convey a message of endorsement. Id. Again, unlike legislative prayer or the Pledge of Allegiance, the National Day of Prayer serves no purpose but to encourage a religious exercise, making it difficult for a reasonable observer to see the statute as anything other than a religious endorsement.

However, even if I were to assume that history could be dispositive, it would be

important to determine the extent to which § 119 embodies a particular historical tradition. Defendants rely on individual presidential thanksgiving proclamations to show an "unambiguous and unbroken history," but the constitutionality of such proclamations is no longer at issue in this case. Although plaintiffs sought a declaration that all presidential "prayer proclamations" violate the establishment clause, I dismissed this claim because plaintiffs failed to show they had standing to raise it. Dkt. #131. The only remaining question in this case is whether 36 U.S.C. § 119 is unconstitutional.

No tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date. It was not until 1952 that Congress established a legislatively mandated National Day of Prayer; it was not until 1988 that Congress made the National Day of Prayer a fixed, annual event. Defendants identify no other instance in which Congress has endorsed a particular religious practice in a statute.

The thanksgiving proclamations are distinct from § 119 in at least three important ways. First, thanksgiving proclamations serve an obvious secular purpose of giving thanks. Of course, one can be thankful without subscribing to any particular religious belief. Other presidential proclamations mentioning prayer often were issued during war or other times of crisis. Derek H. Davis, Religion and the Continental Congress, 1774-1789 83-91 (2000). Thus, these proclamations were more about taking notice of particular events rather than prayer, making them similar to the ceremonial religious references in other cases. Second,

a President's statements of his *own* beliefs about prayer are less likely to be viewed as an official endorsement than a permanent statement from the government in the form of a statute encouraging all citizens to pray. Van Orden, 545 U.S. at 723 (Stevens, J., dissenting) (contrasting "Thanksgiving Day proclamations and inaugural speeches," which "have embedded within them the inherently personal views of the speaker as an individual member of the polity" with "permanent" messages that "amalgamat[e] otherwise discordant individual views into a collective statement of government approval"). Third, unlike § 119, thanksgiving proclamations are not an attempt to help particular religious groups organize.

Finally, even if I were to consider as relevant the actions of early Presidents, that tradition does not point in one direction. Although George Washington may have supported thanksgiving proclamations, Thomas Jefferson and James Madison did not. "President Jefferson . . . steadfastly refused to issue Thanksgiving proclamations of any kind, in part because he thought they violated the Religion Clauses." Lee, 505 U.S. at 623 (Souter, J., concurring). Jefferson explained that "[e]very religious society has a right to determine for itself the times for [prayers] and the objects proper for them according to their own particular tenets; and this right can never be safer than in their own hands where the Constitution has deposited it . . . [C]ivil powers alone have been given to the [federal government], and no authority to direct the religious exercises of [its] constituents." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904), quoted in Wallace, 472 U.S. at

103 (Rehnquist, J., dissenting).

Madison objected to thanksgiving proclamations because they "seem to imply and certainly nourish a *national* religion," 3 The Papers of James Madison 560 (1962), quoted in Davis, supra, at 90 (emphasis in original), and, more specifically, they tend "to narrow the recommendation to the standard of the predominant sect." Madison's Detached Memoranda, quoted in Lee, 505 U.S. at 617 (Souter, J., concurring). Although Madison "gave in to demands to proclaim days of thanksgiving" during the War of 1812, Davis, supra, at 90, he later regretted it, McCreary, 545 U.S. at 879 n. 25, which simply shows how difficult it can be as an elected official to resist popular opinion, even if it violates one's own principles.

A few years later, Andrew Jackson followed Jefferson's example and refused to issue thanksgiving prayer proclamations. Although he personally believed in "the efficacy of prayer," he also believed that such proclamations might "disturb the security which religion now enjoys in this country in its complete separation from the political concerns of the General Government." Correspondence of Andrew Jackson (1929), quoted in John Meacham, American Gospel 111 (2006).

"The fair inference is that there was no common understanding [among the framers] about the limits of the establishment prohibition," McCreary County, 545 U.S. at 879, or prayer proclamations specifically. Thus, defendants cannot rely on history to overcome the

endorsement test.

4. Justice Breyer's concurrence in *Van Orden*

Justice Breyer provided the fifth vote in Van Orden to uphold the display of the Ten Commandments monument on the grounds of the Texas state capitol. He did not join the opinion of Chief Justice Rehnquist in which a four-justice plurality concluded that the monument was consistent with the establishment clause because of "the nature of the monument and . . . our Nation's history." Van Orden, 545 U.S. at 686; id. at 704 (Breyer, J., concurring in the judgment) ("I cannot agree with today's plurality's analysis.") Instead, he concurred in the judgment, providing his own reasons for upholding the display in "a borderline case." Id. at 700.

First, Justice Breyer stated that "no exact formula can dictate a resolution to such fact-intensive cases"; he preferred "the exercise of legal judgment" that takes into account "the underlying purposes of the Clauses [and the] context and consequences measured in light of those purposes." Id. He proceeded to consider a number of factors to support his conclusion that "the State itself intended the . . . nonreligious aspects of the tablets' message to predominate [and] that that has been its effect." Id. at 701. For example, he noted the secular nature of the organization that donated the monument and the physical setting of the monument, which included numerous other monuments and markers "all designed to

illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." Id. at 702. He concluded by noting that the "display is unlikely to prove divisive" because it has "stood apparently uncontested for nearly two generations." Id. at 704.

Because no single opinion in Van Orden garnered five votes, it provides little guidance for lower courts. The Court of Appeals for the Seventh Circuit has described what to do in this situation:

> [When] [n]o single opinion [speaks] for the Court[,] we thus must strive to discern what exactly the decision requires. Marks v. United States, 430 U.S. 188, 193 (1977) provides the general rule for dealing with this kind of outcome: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds" (internal quotation marks omitted). When, however, a concurrence that provides the fifth vote necessary to reach a majority does not provide a "common denominator" for the judgment, the Marks rule does not help to resolve the ultimate question. . . . In a situation like [that], it is risky to assume that the Court has announced any particular rule of law.

United States v. Heron, 564 F.3d 879, 883-85 (7th Cir. 2009).

The parties do not discuss whether they believe that Justice Breyer's opinion is controlling under Marks. His opinion is so dissimilar to that of the plurality that it is difficult to say with certainty whether his opinion provides the "common denominator" for the outcome. The Court of Appeals for the Seventh Circuit has not considered this question

and other courts have provided varying answers. Compare Card v. City of Everett, 520 F.3d 1009, 1018 (9th Cir. 2008) ("[T]he controlling opinion in Van Orden is, of course, that of Justice Breyer."), and Staley v. Harris County, Texas, 485 F.3d 305, 309 (5th Cir. 2007) ("Justice Breyer's concurrence is the controlling opinion in Van Orden"), with O'Connor v. Washburn University, 416 F.3d 1216, 1224 (10th Cir. 2005) ("[After Van Orden,] [t]his court will therefore continue to apply the Lemon test as modified by Justice O'Connor's endorsement test, while remaining mindful that there is 'no test-related substitute for the exercise of legal judgment.'"), and Myers v. Loudoun County Public Schools, 418 F.3d 395, 402 (4th Cir. 2005) (citing Justice Breyer's statement that there is "no single mechanical formula that can accurately draw the constitutional line in every case," but not discussing directly extent to which Justice Breyer's reasoning controls).

To the extent that Justice Breyer's opinion in Van Orden is controlling, it is consistent with a conclusion that § 119 violates the establishment clause. Arguably, Justice Breyer's opinion remains faithful to the endorsement test. W. Jesse Weins, A Problematic Plurality Precedent, 85 Neb. L. Rev. 830, 849-50 (2007) ("Justice Breyer claimed to rely on abstract 'legal judgment' rather than the Court's traditional tests, but he essentially applied the traditional endorsement test."). He considered the purpose of the display and the effect it had, concluding that "the monument conveys a predominantly secular message." Van Orden, 545 U.S. at 702. Because I have concluded that the National Day of Prayer does not

serve a secular purpose, Justice Breyer's concurrence does not suggest a different result in this case.

The only new factor that Justice Breyer incorporated into his analysis was that the display did not have a "divisive" history before the lawsuit was filed. Id. at 704. To the extent this is a relevant factor in this case, it does not seem to favor defendants. At least in recent years, the National Day of Prayer has sparked a number of controversies around the country, demonstrating the sense of exclusion that religious endorsement by the government can create:

- In 2008, a national Jewish organization complained that the National Day of Prayer has been "hijacked by Christian conservatives," who are "excluding and dividing us on religious lines. Dkt. #93-43;

- In Plano, Texas, a multicultural group and a group of Christians held "dueling prayer services" on the National Day of Prayer after fighting over the right to hold their events at the city council building and threatening to file a lawsuit. Theodore Kim, "After threat of suit, city steps aside in prayer," Dallas Morning News, May 2, 2008, at 16B;

- In San Antonio, Texas, a local resident threatened to file a lawsuit over the mayor's involvement in National Day of Prayer events. "Day of Prayer Lawsuit Dropped," San Antonio Express-News, November 29, 2008, at 5B;

- In Richmond, Virginia, a Jewish organization criticized a National Day of Prayer event attended by various state officials at the state capitol because the event's sponsor excluded non-Christians. Robin Farmer, "Diverse gathering marks day of prayer: Christian-oriented event leaves some feeling excluded," Richmond Times Dispatch, May 2, 2008, at B1;

- In Anniston, Alabama, a church pastor complained that the National Day of Prayer has been "hijacked by evangelical Christians" because the National Day of Prayer Task Force has "establish[ed] a policy of excluding not only those of other faiths but also moderate and mainline Christians." Brett Buckner, "A Nation Divided?" The Anniston Star, May 1, 2008;

- In Bakersfield California, a Christian group created controversy when its coordinator stated that "[t]he National Day of Prayer is actually all about the Lord. So we're representing the Christian community." A local rabbi stated that "I think the National Day of Prayer, if it was ever inclusive—which I'm not sure it ever was entirely—has morphed into something else." Louis Medina, "Day of Prayer spawns Christian event that some call divisive," The Bakersfield Californian, May 1, 2008;

- In Buffalo, New York, Jewish and Muslim groups complained that the local National Day of Prayer events are "more about politics than prayer" and that the day is more accurately called the "Christian National Day of Prayer." Jay Tokasz, "Prayer Day events spur complaints of co-option by evangelicals," The Buffalo News, May 1, 2008;

- In Memphis, Tennessee, local groups complained that the National Day of Prayer "mak[es] members of minority religions feel that unless they adhere to Christianity they are unpatriotic" and that "[p]eople of minority faiths are very alarmed by" the exclusively Christian nature of the events. Lindsay Melvin, "National Day of Prayer is controversial—Some find it divisive and unconstitutional," Memphis Commercial Appeal, May 1, 2008;

- In Victorville, California, local residents complained that "Hindus, Buddhists, Muslims and Sikhs are being excluded" from the National Day of Prayer event at the town hall. The organizer responded, "this entire nation was founded on Christian faith. The reason we are a great county is because we're Christian. In the Muslim countries, you can get shot if you're Christian." Brooke Edwards, "Faiths clash over Day of Prayer," Daily Press, April 27, 2008;

- In Springfield, Illinois, organizers of a National Day of Prayer event at the state capitol were criticized after saying that event is "only about Jesus and Jesus the Savior alone"; they had "no problem having [members of other

religions] participate, though not in speaking roles." Steven Spearie, "National Day of Prayer returns to Capitol," Springfield State-Journal Register, April 30, 2006, at 19;

- In Troy, Michigan, a Christian group and an interfaith group fought over access to city hall to hold an event on the National Day of Prayer, both sides threatening law suits. When the mayor announced that she would attend the interfaith event, she was accused of promoting "witches and Satanists." An effort to recall the mayor was started later. "Troy prayer day stirs recall effort," Detroit News, May 23, 2005, at B1; "Day of Prayer splits Troy," Detroit News, May 4, 2005, at K15;

- In 2004, religious leaders and nonprofit groups accused the "White House of using prayer for political purposes" after the President broadcast National Day of Prayer remarks "over several Christian and television and radio networks as part of an evangelical concert." Dkt. #93-39;

- In Salt Lake City, Utah, Mormons were excluded from National Day of Prayer of events because they are not "in accordance with the evangelical principles [of] the task force," including a belief in the "Holy Trinity" and that the Bible is the "only written word of God." Travis Reed, Associated Press, May 4, 2004;

- In Muncie, Indiana, the organizer of National Day of Prayer event denied requests to speak by Unitarian, Muslim and Jewish leaders, "sharply divid[ing]" city residents. Stephanie Simon, "Dispatch from Muncie, Indiana," Los Angeles Times, May 1, 2003;

- A federal judge ruled that a school district violated the establishment clause by sponsoring National Day of Prayer events. Doe v. Wilson County School System, 564 F. Supp. 2d 766, 801-02 (M.D. Tenn. 2008);

See also Opinion, "Wasted prayers?" Deseret Morning News, Oct, 20, 2009, at A18 (letter to editor from Mormon reader stating that she "didn't think [she] was allowed to participate" in the National Day of Prayer because she "pray[s] to the wrong God"); Matt

Cherry, "Using day of prayer to divide us," Albany Times Union, May 12, 2007 (editorial stating that National Day of Prayer has "become a symbol of division, not unity"); dkt. #93-55 (news report of Baptist group protesting National Day of Prayer). These incidents suggest that James Madison's prediction seems to have come true: in many instances, the National Day of Prayer has "narrow[ed] the recommendation [to pray] to the standard of the predominant sect."

It is true that much of the controversy has been generated by events of private organizations such as the National Day of Prayer Task Force. However, government officials, including former Presidents, have sometimes aligned themselves so closely with those exclusionary groups that it becomes difficult to tell the difference between the government's message and that of the private group. E.g., Dkt. #93-39 (President hosts National Day of Prayer event with National Day of Prayer Task Force in 2008); dkt. #93-61 (task force organizes National Day of Prayer event at White House in 2006); dkt. #93-65 (article stating that task force "often schedules its events at government buildings and seeks endorsements and participation by governors, mayors and other elected officials"). Even when the federal government is not directly involved in an event, its general endorsement of the National Day of Prayer may create confusion about its role in prayer events. If the National Day of Prayer was not a public observance, members of minority religious groups or secular groups would have less reason to be concerned about being excluded from events

celebrating the day.

On the other hand, last year, some groups, including the task force, criticized the President because they believed he did not celebrate the National Day of Prayer *enough*. Manya A. Brachear, "National Day of Prayer: Evangelical Christians are upset that White House isn't doing more," Chicago Tribune, May 6, 2009. These disputes support a view that governmental involvement in the National Day of Prayer may be inherently problematic.

D. References to the National Day of Prayer in Case Law

Finally, defendants argue that, regardless how the National Day of Prayer fares under any particular establishment clause test, this court should uphold the constitutionality of the statute because the Supreme Court and the Court of Appeals for the Seventh Circuit "have both discussed the constitutionality of the National Day of Prayer in favorable terms." Dfts.' Br., dkt. #83, at 26. Defendants acknowledge that no court has actually held that the National Day of Prayer is constitutional, but they believe that the indications in case law are strong enough to control the outcome of this case.

Defendants rely primarily on Lynch, 465 U.S. 668. The question in that case was whether a city's display of a crèche in the context of a larger holiday display violated the establishment clause. In the midst of that discussion, the Court provided a list of "illustrations of the Government's acknowledgment of our religious heritage and

governmental sponsorship of graphic manifestations of that heritage." Id. at 677. Included in the list was the National Day of Prayer. The Court did not address the constitutionality of the National Day of Prayer or discuss it any further.

I cannot conclude that such an isolated reference to the National Day of Prayer is instructive or that it requires this court to disregard the endorsement test. Even if the passage in Lynch seemed to provide a hint regarding the Court's view of § 119, the Court made it clear in Allegheny that the constitutionality of the National Day of Prayer remained an open question:

> It is worth noting that just because Marsh sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality.

Allegheny, 492 U.S. at 603 n.52 (citations omitted). After Allegheny, any mention of the National Day of Prayer is conspicuously absent from Supreme Court opinions listing examples of "tolerable acknowledgments" by the government of religion, such as the "In God We Trust" motto and using "So help me God" to make an oath.

Defendants argue that Allegheny may be ignored because the Court's discussion of the National Day of Prayer "was nothing more than a legal aside" while the discussion in Lynch was a "necessary part" of the result. Dfts.' Br., dkt. #118, at 25. This argument is

puzzling because, in both cases, the Court was considering the constitutionality of religious displays, not the National Day of Prayer, so neither discussion can be described as "necessary" to the result. In fact, neither discussion could be described even as *dicta* because the Court did not give an opinion about the constitutionality of the National Day of Prayer statute in either case.

The other opinions defendants cite are not helpful. In Van Zandt, 839 F.2d at 1221, the court did not discuss the National Day of Prayer, but simply quoted the passage from Lynch in the context of a discussion about a legislative prayer room. In DeBoer v. Village of Oak Park, 267 F.3d 558, 561 (7th Cir. 2001), the question was whether the village could prohibit a private organization from celebrating the National Day of Prayer, not whether the government could hold such a celebration. The others are *dissenting* opinions in which the author argues that the majority opinion implies the invalidity of the National Day of Prayer. Books, 235 F.3d at 325 (Manion, J., dissenting); American Jewish Congress v. City of Chicago, 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting). These opinions seem to undermine defendants' argument rather than help it.

E. Conclusion

As this case shows, "it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the Civil authority." Letter from James

Madison to R. Adams (1832), quoted in McCreary County, 545 U.S. at 876. The duty of this court is to review the relevant case law and determine how it applies in a particular case. Although the law does not always point in the same direction on matters related to the establishment clause, my review of that law requires a conclusion that 36 U.S.C. § 119 is unconstitutional.

I understand that many may disagree with that conclusion and some may even view it as a criticism of prayer or those who pray. That is unfortunate. A determination that the government may not endorse a religious message is not a determination that the message itself is harmful, unimportant or undeserving of dissemination. Rather, it is part of the effort to "carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society." McCreary County, 545 U.S. at 882 (O'Connor, J., concurring). The same law that prohibits the government from declaring a National Day of Prayer also prohibits it from declaring a National Day of Blasphemy.

It is important to clarify what this decision does *not* prohibit. Of course, "[n]o law prevents a [citizen] who is so inclined from praying" at any time. Wallace, 472 U.S. at 83-84 (O'Connor, J., concurring in the judgment). And religious groups remain free to "organize a privately sponsored [prayer event] if they desire the company of likeminded" citizens. Lee, 505 U.S. at 629 (Souter, J., concurring). The President too remains free to discuss his own views on prayer. Van Orden, 545 U.S. at 723 (Stevens, J., dissenting). The

only issue decided in this case is that the federal government may not endorse prayer in a statute as it has in § 119.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by plaintiffs Freedom from Religion Foundation, Inc., Anne Nicol Gaylor, Annie Laurie Gaylor, Dan Barker, Paul Gaylor, Phyllis Rose and Jill Dean, dkt. #103, is GRANTED with respect to plaintiffs' claim that 36 U.S.C. § 119 violates the establishment clause; the motion for summary judgment filed by defendants Barack Obama and Robert Gibbs, dkt. #82, is DENIED with respect to that claim.

2. It is DECLARED that 36 U.S.C. § 119 violates the establishment clause of the First Amendment to the United States Constitution.

3. Defendants are ENJOINED from enforcing 36 U.S.C. § 119. The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of

defendants' deadline for filing an appeal, whichever is later.

Entered this 15th day of April, 2010.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

FREEDOM FROM RELIGION FOUNDATION, INC.; ANNE NICOL GAYLOR; ANNIE LAURIE GAYLOR; PAUL GAYLOR; DAN BARKER; PHYLLIS ROSE, and JILL DEAN,

Plaintiffs,

v. **Case No: 08-CV-588**

PRESIDENT BARACK OBAMA; WHITE HOUSE PRESS SECRETARY ROBERT GIBBS; WISCONSIN GOVERNOR JIM DOYLE; and SHIRLEY DOBSON, CHAIRMAN OF THE NATIONAL DAY OF PRAYER TASK FORCE,

Defendants.

PLAINTIFFS' PROPOSED FINDINGS OF FACT-WITH TOPICAL HEADINGS

The plaintiffs submit the following Proposed Findings of Fact.

A. History Of 1952 National Day Of Prayer Legislation.

1. The National Day of Prayer is a day set aside by Congress for prayer. (Ex. 123 at 63.)[1]

2. The impetus for an annual National Day of Prayer, by legislation, came from the Reverend Billy Graham, who suggested it in the midst of a crusade in the nation's Capitol in 1952. (Ex. 55 at 1 and Ex. 56 at 2.)

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[1] Record cites are to the exhibits submitted with the Affidavits of Richard L. Bolton.

3. The resolution mandating an annual National Day of Prayer was described as a measure against "the corrosive forces of communism which seeks simultaneously to destroy our democratic way of life and the faith in an Almighty God on which it is placed." (Ex. 55 at 1 and Ex. 56 at 2.)

4. On April 2, 1952, the Committee on the Judiciary issued a Report to Accompany H.J. Res. 382 to create a National Day of Prayer, noting the Purpose "is to direct the President to proclaim a National Day of Prayer each year." (Ex. 53.)

5. The Report to Accompany H.J. Res. 382 to create a National Day of Prayer Statement claimed: "When the delegates to the Constitutional Convention encountered difficulties in the writing and formation of a Constitution for this Nation, prayer was suggested and became an established practice at succeeding sessions." (Ex. 53.)

6. The Statement encouraged the people of this country "to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner that deep religious conviction which has prevailed throughout the history of the United States." (Ex. 53 at 1.)

7. In fact, the members of the Constitutional Convention did not pray at any session before adopting the entirely godless and secular U.S. Constitution, as noted by Constitutional Convention Secretary Benjamin Franklin. Franklin had suggested prayer on one occasion, but instead the Constitutional Convention adjourned for the day and never prayed at any time during the Constitutional Convention. (Pfeffer, Church, State & Freedom, at 121-122 (1967).)

8. Public Law 324, a Joint Resolution, was approved on April 17, 1952: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President shall set aside and proclaim a suitable day each year, other than a

Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation in churches, in groups, and as individuals. (Ex. 53.)

9. Contemporaneous reporting of President Truman's signing of the Prayer Day Bill, in the New York Times on April 18, 1952, recognized that "the purpose of the resolution is to have the public assemble in churches, synagogues, and other places of worship to offer prayers for world peace." (Ex. 54 at 1.)

10. Public Law 324 was signed by President Harry Truman on April 17, 1952. (Ex. 54.)

B. Presidential Proclamations Exhort Prayer.

11. Presidential NDP proclamations are released by the Office of the Press Secretary, including in 2008 and 2009 by the press secretary for Presidents Bush and Obama. (Ex. 12 at 1-3.)

12. The National Day of Prayer legislation passed by Congress is an encouragement for the American people of all faiths to pray. (Ex. 123 at 14.)

13. This year, President Obama announced in advance that he too would release a Presidential Proclamation declaring May 7, 2009, to be the National Day of Prayer. (Ex. 96 at 11.)

14. Wikipedia describes the National Day of Prayer as being "designated by the United States Congress as a day when people are asked to come together and pray, especially for their country." (Ex. 56 at 1.)

15. In fact, Presidential NDP Proclamations routinely include exhortations to American citizens to pray. (Ex. 10 at 4-27.) (Ex. 116.)

16. Most Presidents have explicitly directed "all" Americans, "every" American or "each" American, without exception, to pray in their NDP Proclamations. These explicit instructions by Presidents occurred in at least 44 official Presidential NDP Proclamations during the years: 1952, 1953, 1954, 1955, 1956, 1957, 1961, 1962, 1964, 1965, 1966, 1967, 1970, 1972, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1983, 1986, 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2001, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. (Ex. 116.)

17. Presidential NDP Proclamations not only have directed Americans to pray, but have dictated subjects, issues or specific items about which Americans ought to pray. For example, in 1959, President Dwight D. Eisenhower called "upon my fellow Americans and all who may be visitors in our country . . . to join in prayer for our Nation . . ." and specified five items over which to pray, including "that we may have Divine guidance in our efforts to lead our children." (Ex.116.)

18. Some Presidential NDP Proclamations have included pious laundry lists, including the 1960 proclamation by President Eisenhower, who directed "my countrymen" to "ever place our trust in the keeping of God's commandments." (Ex. 116.)

19. In 1961, President John F. Kennedy listed five matters about which he directed Americans to explicitly pray, including "divine guidance in our efforts to lead our children in the ways of the truth." (Ex. 116.)

20. In 1962, President Kennedy listed four items in his annual NDP Proclamation about which Americans were to pray, after expressing the idea that "Almighty God was a dominant power in the lives of our Founding Fathers; and . . . they expressed this faith in prayer." (Ex. 116.)

21. On Sept. 25, 1970, several months after ordering the invasion and bombing of Cambodia, President Richard Nixon, in his NDP Proclamation, specifically invited "all Americans to pray that the scourge of war be lifted from the earth." (Ex. 116.)

22. In 1979, President Jimmy Carter, in proclaiming Oct. 3, 1979 to be the National Day of Prayer, asked "all Americans to join with me on that day to recommit ourselves to God." (Ex. 116.)

23. In 1980, President Carter, in designating Oct. 6, 1980 as the National Day of Prayer, said: "I further ask that all who so desire make this a Day of Fast as well." (Ex. 116.)

24. In 1980, President Jimmy Carter's Presidential NDP Proclamation additionally made comments critical of unbelievers or Americans who do not pray or have a "close relationship" with a deity: "As a nation we cannot but hope that more of our citizens would, through prayer, come into a closer relationship with their maker." (Ex. 116.)

25. In January 1983, President Ronald Reagan declared May 5 a National Day of Prayer, in an effort to "bring renewed respect for God." (Ex. 58 at 1.)

26. The 1983 NDP Proclamation by President Reagan belies the assertion that there has been an "unbroken" line of prayer proclamations dating to the nation's inception. President Reagan acknowledge that a national day of prayer was "forgotten" for "almost half a century, and then again for nearly a century until it was "revived as an annual observance by Congress in 1952." (Ex. 116.)

27. Many Presidential NDP Proclamations have included scriptural references, as for example in 1984 when President Reagan quoted II Chronicles 7:14 from the New Testament in his NDP Proclamation: "If my people, who are called by my name, will humble themselves and

pray and seek my face and turn from their wicked ways, then I will hear from heaven and will forgive their sin, and will heal their land." (Ex. 116.)

28. Presidential NDP Proclamations not infrequently have included Christian references, as for example in 1986 when President Reagan's NDP Proclamation said: "Christ enjoins us to 'pray without ceasing.' "(Ex. 116.)

29. The 1987 NDP Proclamation by President Ronald Reagan chided Americans for "being too proud to make, or too prone to forget" an acknowledgment to deity. (Ex. 116.)

30. In 1988, President Reagan in his NDP Proclamation said that the first step of the American government was "humble, heartfelt prayer." (Ex. 116.)

C. Legislation In 1988 Intended To Facilitate Religious Organizing.

31. Prior to 1988, the President would call the nation to a day of prayer whenever he chose each year, with the exception of Sundays. (Ex. 60 at 1.)

32. Nonetheless, according to the National Prayer Committee, the National Day of Prayer was established by an Act of Congress in 1952 to encourage Americans to pray for our nation, its people and its leaders. (Ex. 57 at 2.)

33. The National Prayer Committee exists to provide collective leadership to the National Prayer Movement. (Ex. 51 at 1.)

34. The NDP Task Force is a project of the National Prayer Committee, the purpose of which is to mobilize prayer. (Exhibit 2 at 34.)

35. The National Prayer Committee and the first NDP Task Force Chairman, Vonette Bright, directed the efforts leading in 1988 to President Reagan signing into law the requirement that the first Thursday in May of each year be designated the National Day of Prayer. (Ex. 60 at 1.)

36. Mrs. Vonette Bright promoted legislation for a Day of Prayer on a specific day each year because she believed in the power of prayer; she believed that there should be a day in this Country in which the Nation is covered in prayer; and she wanted to facilitate that, if possible. (Ex. 123 at 31-32.)

37. Mrs. Bright, cofounder with Dr. Bill Bright of Campus Crusade for Christ, told Shirley Dobson how the first Thursday in May amendment in 1988 came about: Mrs. Bright got up at 5 a.m. one day to phone some Congressmen about setting aside a [specific] day for the National Day of Prayer. A committee was formed and the first Thursday of May change came from that. (Ex. 123 at 43-44.)

38. The Campus Crusade for Christ website biography of Vonette Bright credits her with the achievement of introducing legislation that was approved by both houses of Congress to make the first Thursday of May a permanent date for The National Day of Prayer. (Ex. 117 at 3.)

39. Congressman Tony P. Hall, while introducing the 1988 National Day of Prayer bill on March 16, 1988, remarked that designating each first Thursday in May as the annual date on which the National Day of Prayer is celebrated, would "help bring more certainty to the scheduling of events related to the National Day of Prayer, and permit more effective long-range planning." (Ex. 118 at 2.)

40. "The annual observance would be so much easier to celebrate if its occurrence was not subject to the issuance of an annual proclamation. The event has a tradition of some consequence for increasing our nation's awareness of the need for divine assistance," said Rev. Msgr. Joseph F. Rebman, Chancellor, Diocese of Wilmington, Delaware, in urging passage of the bill. (Ex. 118 at 3.)

41. Pat Boone, Co-Chairman of the National Prayer Committee, complained that having a different day proclaimed each year "had offered little advance notice to adequately inform the grass roots constituencies. I believe a definite date will allow millions of citizens within our nation who have explicit faith in a Prayer-hearing God to be informed about this significant day in our country." (Ex. 119 at 3.)

42. S.1378, "An act to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated," was approved by the Senate on May 5, 1988, and signed into law by President Ronald Reagan on May 9, 1988. (Ex. 120.)

43. After signing the 1988 law, President Reagan encouraged people of all faiths to participate in the National Day of Prayer. (Ex. 123, at 28-29.)

44. Groups like the NDP Task Force would have trouble mobilizing a National Day of Prayer if it didn't know well in advance when it was going to take place. (Ex. 123 at 29-30.)

45. The change in the law in 1988, to make predictable the Day of Prayer, on the first Thursday in May, facilitated efforts by the NDP Task Force to organize prayer observances. (Ex. 123 at 29.)

46. The law in 1988 mandating that the first Thursday in May of each year be designated as a National Day of Prayer was more meaningful than the 1952 legislation because people of faith wanted to have a day that they could know was going to be a day of prayer, instead of just letting it be at the whim of the President. (Ex. 123 at 163-64.)

47. Since the 1988 legislation mandating the designation of a specific day, the National Day of Prayer is now even included on commercial calendars. (Ex. 123 at 140 & 164.)

48. Groups like the NDP Task Force have been successful in mobilizing Christians to engage in prayer in part because it unifies people of faith and it is beneficial to have a central event that people can gather around. (Ex. 123 at 85-86.)

49. Having a designated day of prayer, as adopted in 1988, was important to people of faith who wanted to have a day that they could predictably know was going to be a day of prayer, instead of just leaving it up to the President to choose. (Ex. 123 at 164.)

D. Mrs. Dobson Is The Voice And Face Of The NDP Task Force.

50. Campus Crusade for Christ of which Vonette Bright is a founder and still affiliated, boasts 25,000 employees and is a major international evangelical force. It's purpose: "Helping to fulfill the Great Commission in the power of the Holy Spirit by winning people to faith in Jesus Christ, building them in their faith and sending them to win and build others; and helping the Body of Christ do evangelism and discipleship." (Ex 121.)

51. Campus Crusade for Christ uses a lot of their staff as part of the Task Force to promote the National Day of Prayer, according to Mrs. Dobson. (Ex. 123 at 25.)

52. When Mrs. Bright asked Mrs. Dobson to become co-chair of the NDP Task Force, Mrs. Dobson told her she would pray about it and talk to her husband and get back to her. (Ex. 123, at 8-9.)

53. Shirley Dobson's husband, James Dobson, is the founder of Focus on the Family. (Ex. 66 at 4.)

54. Once Shirley Dobson became chair of the NDP Task Force, Focus on the Family provided startup money for the NDP Task Force: $100,000 the first year; $50,000 the second, $25,000 the third. (Ex. 123 at 7-8.)

55. Shirley Dobson accepted Mrs. Bright's overture and became cochairman of the NDP Task Force in 1989, and she has been the chairman since 1991. (Ex. 123 at 4.)

56. Mrs. Dobson is now the recognized voice and the face of the National Day of Prayer. (Ex. 123 at 42.)

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

57. One of the goals of the NDP Task Force is to encourage prayer. (Exhibit 2 at 4.)

58. The NDP Task Force promotes and encourages the role of prayer by mobilizing around the National Day of Prayer. (Ex. 123 at 10.)

59. The National Day of Prayer is a rallying point, as a day for focusing on prayer, because it is declared as such by the President each year. (Ex. 123 at 62.)

60. The National Day of Prayer is a rallying point for the NDP Task Force in focusing on prayer for the country. (Ex. 123 at 62.)

61. The National Day of Prayer is set aside by Congress, so it's a day when Americans pray for their country and for its leaders, and a day that symbolizes the country, which is why the NDP Task Force chose to make the American flag a prominent part of its logo. (Ex. 123 at 47.)

62. Mrs. Dobson's initial understanding of the National Day of Prayer was that it is a special day set aside specifically for prayer. (Ex. 123 at 63.)

F. The NDP Task Force Is Exclusively Christian In Perspective.

63. The NDP Task Force was created by the National Prayer Committee for the express purpose of organizing and promoting prayer observances conforming to a Judeo-Christian system of values. (Ex. 44 at 1.)

64. The Judeo-Christian expression of the National Day of Prayer involves praying to the God of the Bible. (Ex. 123 at 67.)

65. The NDP Task Force expression of the National Day of Prayer is based on the Bible, which says that God is the one and only, and his son, Jesus Christ, is the way to salvation, which is the belief of the Christian church. (Ex. 123 at 69.)

66. Mrs. Dobson understands the National Day of Prayer to involve proclaiming reliance on an Almighty God in calling Americans to come before Him on behalf of the Nation. (Ex. 123 at 106.)

67. The NDP Task Force's annual theme, including in 2009, represents an effort to point Americans to the eternal source of encouragement and help, i.e., the God of the Bible. (Ex. 123 at 121-22.)

G. Presidential Proclamations Are Integral To Prayer Rallies.

68. The official proclamation issued by the President is an integral part of the yearly national observance. (Ex. 13 at 1.)

69. The President's support for the National Day of Prayer serves a crucial role in calling Americans to prayer. (Ex. 14 at 1.)

70. Because the President is the leader of the Country, and people look to the President as the moral leader, and sometimes even the spiritual leader of the Nation, Mrs. Dobson would like to see the President encourage people of all faiths to pray. (Ex. 123 at 92.)

71. The NDP Task Force actually offers draft proclamations for the President to consider. (Ex. 14 at 1-2.)

72. Mrs. Dobson would like for the President to encourage prayer and she believes that Congress encourages prayer by designating a National Day of Prayer. (Ex. 123 at 82-83.)

73. Most recently, Mrs. Dobson was pleased with the NDP proclamation issued by President Obama, which encouraged people to pray. (Ex. 123 at 91.)

74. It is important to the NDP Task Force that the President sign a proclamation because he is the leader of the nation and many people look to the President as the moral and spiritual leader of the country, and since Congress has set aside the National Day of Prayer, and because the President is the leader of the American people, the NDP Task Force likes to see the President encourage people of all faiths to pray. (Ex. 123 at 92.)

75. Mrs. Dobson acknowledges that the intended audience for proclamations by the President is the people of the Nation, and in the case of proclamations by governors, the people of each state. (Ex. 123 at 134.)

H. Participation By Government Officials Is Key.

76. Mrs. Dobson understands the National Day of Prayer to be about calling Americans to come before Almighty God. (Ex. 123 at 106.)

77. NDP proclamations by state governors also lend support to the National Day of Prayer. (Ex. 123 at 107.)

78. Support by the nation's leaders is critical to the NDP Task Force's efforts. (Ex. 123 at 108-109.)

79. People look to their leaders in giving them direction, so it is critical that the leaders support the National Day of Prayer because they are role models. (Ex. 123 at 109.)

80. The NDP Task Force, therefore, hopes that leaders of the country will call the nation to prayer, including by issuing proclamations. (Ex. 123 at 110.)

I. The NDP Task Force Promotes Active Christian Prayer.

81. The NDP Task Force promotes the National Day of Prayer as a means to encourage prayer, which involves establishing a relationship with God. (Exs. 45-47.)

82. The NDP Task Force represents the Judeo-Christian expression of the national observance, based on the belief that this country was birthed in prayer and in reverence for the God of the Bible. (Ex. 44 at 1.)

83. According to Mrs. Dobson, the United States was founded on the Judeo-Christian system of values, and birthed in prayer, and founded on the God of the Bible. (Ex. 123 at 11.)

84. The NDP Task Force promotes only a Judeo-Christian expression of the National Day of Prayer. (Ex. 123 at 11-12, 14, 67.)

85. The NDP Task Force believes that for true Christians, prayer is communion with God, through which individuals actually experience a relationship with God. (Ex. 47 at 1.)

86. The NDP Task Force chooses an annual theme for each year's National Day of Prayer. (Ex. 123 at 56.)

87. The NDP Task Force chooses an annual theme purportedly as a way to bring "unity to the Nation." (Ex. 123 at 61.)

88. The NDP Task Force desires that its annual theme and supporting scripture be incorporated into official proclamations by government officials. (Exs. 25-39.)

89. Shirley Dobson supposedly goes before the Lord every year in prayer, and asks him what is in his heart for our nation, and through prayer God usually gives Mrs. Dobson a theme for that year. (Ex. 123 at 56-57.)

90. The Bible is the handbook of the NDP Task Force. (Ex. 123 at 64.)

91. Prayer from the perspective from the NDP Task Force is related to the relationship with the God of the Bible. (Ex. 123 at 64.)

92. The supporting scripture for each National Day of Prayer theme is exclusively chosen from the Bible, a source that is readily recognizable. (Ex. 123 at 57.)

J. Presidential Proclamations Promote Active Prayer.

93. Presidential proclamations advance the cause of prayer and inspire others to get involved. (Ex. 15 at 2.)

94. The NDP Task Force solicits proclamations from the President, which are then read by some 40,000 Task Force coordinators at events around the country, and the presidential proclamations "underscore the need for corporate and personal intercession [that] will lend tremendous prestige and credibility to these gatherings." (Ex. 15 at 1.)

95. In his 1991 official NDP Proclamation, President George H.W. Bush told all Americans, including all unreligious Americans that "we owe constant praise to God." Bush added: "Giving humble thanks for His mercy, let us vow to fulfill not only our responsibilities but also our potential as one Nation under God. Most important let us make our prayers pleasing to Him. . . ". (Ex. 116.)

96. President George W. Bush in his NDP public comments lauded the Dobson's and the NDP Task Force and promoted the role of prayer at exclusive annual NDP prayer observances in the East Room of the White House. (Ex. 63 at 1-4.)

97. Mrs. Dobson has attended ten White House prayer services for the National Day of Prayer and she has spoken at eight of these events. (Ex. 123 at 72 and 74.)

98. Mrs. Dobson, as Chairman of the NDP Task Force, even received personal "thank-you's" from President George W. Bush as a result of the Task Forces' NDP observances in Washington. (Ex. 40 at 1-2.)

99. The NDP Task Force bound all the state National Day of Prayer proclamations by governors into a presentable package and presented it as a unique gift to President Bush on the National Day of Prayer. (Ex. 123 at 52.)

100. The NDP Proclamation by President Bush in 2001 expressly included the NDP Task Force annual theme and supporting scriptural reference. "The theme of the 2001 National Day of Prayer is 'One Nation under God.' In a prayer written specially for the occasion, Americans are asked to pray for 'a moral and spiritual renewal to help us meet the many problems we face.' Special observances are scheduled for all 50 States, with local volunteers planning a variety of activities including prayer breakfasts, concerts, rallies, and student gatherings." (Ex. 10 at 1-3)

101. In his 2004 NDP Proclamation, President Bush used the NDP Task Force scriptural theme, "the Lord is near to all who call upon Him . . . He also will hear their cry, and save them." (Ex. 116.)

102. In 2008, President Bush also adopted the NDP Task Force theme and scripture verse: "This year's theme, 'Prayer! America's Strength and Shield,' is taken from Psalm 28:7, "The Lord is my strength and my shield; my heat trusts him, and I am helped.' " (Ex. 10 at 1-3.)

103. President Obama's 2009 NDP Proclamation concluded with a "call upon Americans to pray in thanksgiving for our freedoms and blessings and to ask for God's continued guidance, grace, and protection for this land that we love." (Ex. 12 at 2-3.)

104. The Presidential Proclamation is an important symbol and affirmation of the annual National Day of Prayer observance, which the NDP Task Force incorporates into its promotional materials. (Ex. 30 at 1.)

K. The NDP Task Force Coordinates a Christian Celebration of the National Day of Prayer.

105. The National Day of Prayer stands as a memorial to our nation's supposed Christian heritage. (Exs. 33-34.)

106. The NDP Task Force considers "foundational to our country the understanding that God is the Source of freedom," including the Christian God of the Bible. (Ex. 35 at 1.)

107. A tremendous outpouring of prayer and repentance encompasses the nation at the time of the National Day of Prayer as hands join together to cry out to God and hearts are allegedly changed and hope restored. (Ex. 36 at 1.)

108. The NDP Task Force hopes that its annual theme and supporting scripture will draw Americans closer to God. (Ex. 37 at 1.)

109. The NDP Task Force promotes, publicizes and provides resources to "constituents" to help them celebrate the National Day of Prayer. (Ex. 123 at 16.)

110. The NDP Task Force limits participation by coordinators and volunteers to persons holding a Judeo-Christian perspective. (Ex. 44 at 1.)

L. Governors Issue Proclamations In Conjunction With The National Day of Prayer.

111. The NDP Task Force, led by Mrs. Dobson writes to each state governor on an annual basis requesting a prayer proclamation, while referencing the NDP Task Force annual theme and supporting scriptural reference. (Exs. 21-24.) (Ex. 123 at 21, 23, 50, 585, 115 and 121.)

112. Letters written by the NDP Task Force to governors requesting proclamations are signed by Shirley Dobson, who reviews such letters before signing them. (Ex. 123 at 23 and 148.)

113. The NDP Task Force requests state governors to designate the same day as the day set aside by the President for the National Day of Prayer. (Ex. 123 at 28.)

114. The NDP Task Force considers it desirable if governors incorporate the NDP Task Force's annual theme and scriptural reference in their official proclamations. (Ex. at 86.)

115. All state governors issued NDP Proclamations in 2009, including proclamations from the Governors of Arkansas, Florida, Iowa, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Mississippi, Nebraska, New Mexico, South Dakota, Texas, Utah, Virginia, Wisconsin and Wyoming, which all included references to the NDP Task Force annual theme and supporting scripture. (Ex. 3 at 1-17.)

116. All state governors also issued NDP Prayer Proclamations in 2008, including proclamations by the governors of Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, New Jersey, Utah, Virginia, Wisconsin and Wyoming, which proclamations included the NDP Task Force annual theme and supporting scripture. (Ex. 4 at 1-14.)

117. All state governors likewise issued NDP Prayer Proclamations in 2007, including proclamations by the governors of Colorado, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Nebraska, Utah, Virginia, Wisconsin and Wyoming, which included the NDP Task Force annual theme and supporting scripture. (Ex. 5 at 1-16.)

118. All state governors issued NDP Prayer Proclamations in 2006, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Indiana,

Louisiana, Nebraska, Utah, Wisconsin and Wyoming which included the NDP Task Force annual theme and supporting scripture. (Ex. 6 at 11.)

119. All state governors issued NDP Prayer Proclamations in 2005, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Nebraska, North Carolina, Texas, Utah, Virginia and Wisconsin, which included the NDP Task Force annual theme and supporting scripture. (Ex. 7 at 1-17.)

120. All state governors issued NDP Prayer Proclamations in 2004, including proclamations by the governors of Arkansas, Colorado, Florida, Idaho, Illinois, Louisiana, Massachusetts, Missouri, Nebraska, New York, North Carolina, Texas, Virginia, Wisconsin and Wyoming, which included the NDP Task Force annual theme and supporting scripture. (Ex. 8 at 1-15.)

121. Annual NDP proclamations by Wisconsin Governor James Doyle for 2004-2009 included the NDP Task Force annual theme and/or scriptural reference. (Ex. 11 at 1-6.)

122. The NDP Task Force considers it especially vital to enlist the support and affirmation of national leaders, including proclamations by state governors. (Ex. 16 at 1.)

123. The NDP Task Force considers it "critical" to garner the support of our nation's leaders for the NDP efforts, including by obtaining the written proclamations from governors. (Ex. 17 at 1.)

M. Recalcitrant Governors Pressured.

124. If governors do not issue proclamations, the NDP Task Force asks coordinators to set up an appointment at the governor's office and follow up, as well as inviting all governors to

actively participate in the National Day of Prayer observance, most appropriately on the steps of the Capitol Buildings to give visibility to the National Day of Prayer. (Exs. 17-20.)

125. In 2007, pressure was put on New York Governor Eliot Spitzer, to issue a NDP Proclamation. (Ex. 64 at 1-6.)

126. James Dobson, head of Focus on the Family, and husband of Shirley Dobson, Chairman of the NDP Task Forces, was instrumental in publicly pressuring Governor Spitzer to issue a NDP proclamation. (Ex. 64 at 1, 3 and 5-6; Ex. 123 at 54-54.)

127. Minnesota Governor Jesse Ventura also was criticized in 1999 for refusing to issue a NDP proclamation. (Ex. 65 at 1.)

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

128. The NDP Task Force considers it significant that all fifty governors issue NDP Proclamations. (Ex. 61 at 1.)

129. The State NDP proclamations acknowledge the federal designation of the Day of Prayer by Congress and the President in their own proclamations. (Exs. 3-9.)

130. Millions of individuals participate in the NDP call to prayer by the NDP Task Force, supported by 30-40,000 NDP Task Force volunteers across the country. (Ex. 62.)

131. Mrs. Dobson is pleased when governors use the theme of the NDP Task Force because it was given to her by the Lord. (Ex. 123 at 58.)

132. Support for the National Day of Prayer by governors helps further efforts to call the nation to prayer. (Ex. 24 at 1.)

133. The NDP Task Force holds a prayer service in the Caucus Room of the Cannon Office Building each year on the National Day of Prayer as an observance, which is attended by many federal officials and seeks their annual participation. (Exs. 25-28, 31, 33-39, and 41-43.)

134. The Cannon Office Building observance by the NDP Task Force is symbolic of thousands of others that take place throughout the country, and overflow crowds each year fill the Cannon Caucus Room and adjoining hallways. (Ex. 25 at 5.)

135. The use of the Cannon Office Building for an annual NDP service is free to the NDP Task Force and is approved yearly by the Speaker of the House. (Ex. 123 at 81-82.)

136. The Cannon Office Building is chosen in particular because it represents the seat of government and provides easy access to Congressmen. (Ex. 123 at 77.)

137. God TV now webcasts the Cannon Office Building NDP event. (Ex. 123 at 80.)

138. Representatives of all three branches of government are invited to attend the Cannon Office Building event. (Ex. 123 at 77-78.)

139. The federal representatives attend a prayer service, and are invited to speak and often do speak; invited speakers have included members of the judiciary. (Ex. 123 at 78.)

140. The NDP Task Force requests that federal officials speaking at the Task Force observance in Washington include a description of the significant role that prayer has played in their personal and professional lives. (Ex. 26 at 1-2.)

141. More Republicans than Democrats typically attend the Cannon Building prayer service conducted by the NDP Task Force, which says something about their prayer life, jokes Mrs. Dobson. (Ex. 123 at 124-125.)

142. Participation in NDP Task Force observances of the National Day of Prayer by federal officials is viewed by Mrs. Dobson as "partnering in calling the nation to prayer." (Ex. 25 at 4.)

143. The NDP Task Force values the participation of leaders and dignitaries in National Day of Prayer activities. (Exs. 25-39.)

144. Official statements from the President and governors constitute statements of support of the NDP Task Force observance. (Ex. 29 at 1.)

145. The NDP Task Force has students gather around flagpoles on the National Day of Prayer, including little children. (Ex. 123 at 85-86.)

146. The NDP Task Force even has a school prayer event guide put together by a prayer warrior. (Ex. 123 at 167.)

147. Regional coordinators also may ask mayors, city council members or school board members to participate in the National Day of Prayer. (Ex. 123 at 24.)

148. The mission of the NDP Task Force is to encourage personal repentance and prayer, while mobilizing the Christian community. (Ex. 44 at 1.)

149. Mrs. Dobson considers the National Day of Prayer important in part because she believes before the founding fathers came over here, they prayed, and so did people who came over here from every land, and when they landed safely the first thing they did was pray again. (Ex. 123 at 11-12.)

150. Participation in NDP Task Force observances by public officials is noteworthy and the participants in such observances number in the millions. (Exs. 49 and 61-62.)

151. The NDP Task Force organizes between 30,000 to 40,000 prayer gatherings across the Nation in conjunction with the National Day of Prayer. (Ex. 123 at 26.)

152. The Alliance Defense Fund has used the present lawsuit challenging the National Day of Prayer as a vehicle to solicit donations, including via a video presentation. (Ex. 94 at 1.)

153. The NDP Task Force, for its part also seeks "generous contributions to extend its efforts to bring the name of Christ out from behind church walls and into the public front-lines in all fifty states." (Ex. 52 at 1.)

O. The National Day Of Prayer Is Highly Divisive.

154. The National Day of Prayer, however, is highly divisive, amid concerns that it has been hijacked by fundamentalist Christians, including the NDP Task Force. (Exs. 66-92.)

155. The participation of public officials in NDP observances, including at public government buildings in Washington D.C., and State Capitol buildings throughout the nation, fuels the perception that the National Day of Prayer is intended to promote and encourage religion. (Exs. 66-92.)

P. The NDP Task Force Is Particularly Exclusionary.

156. The NDP Task Force subscribes to the Lausanne Covenant, which was adopted by fundamentalists and other Evangelical Protestants from over 150 nations during the International Congress on World Evangelization at Lausanne, Switzerland in 1974. (Ex. 50 at 3.)

157. The Lausanne Covenant includes such beliefs as the inspiration and inerrancy of the Bible, the Trinity, the Second Coming of Jesus Christ, the Anti-Christ, etc. (Ex. 50 at 3 and 66 at 4-5.)

158. The adherence of the NDP Task Force to the Lausanne Covenant has the effect of excluding even traditional Jewish groups, or any other non-Christian organization or inter-faith groups. (Ex. 50 at 3 and Ex. 66 at 5.)

159. The NDP Task Force, in effect, is an exclusively Evangelical Christian non-profit organization recognizing only those NDP events which are organized by Evangelical groups. (Ex. 50 at 3.)

160. The NDP Task Force prays to the God of the Bible, who is perceived as the only "correct God." (Ex. 123 at 15.)

161. The current budget of the NDP Task Force is about $1.2 million. (Ex. 123 at 45.)

Q. Nonreligious Are A Significant Part of the Nation Excluded By The National Day of Prayer.

162. The nonreligious are the fastest-growing segment of the United States population. (Ex. 97.)

163. Nonbelievers today are reported to represent a significant part of the American population, constituting approximately 15 percent or thirty-four million Americans, in a recent American Religious Identification Survey. (Ex. 97.)

R. The Plaintiffs Have Had Exposure to Presidential Proclamations, Which Have Caused Particularized Harm That FFRF Has Long Opposed.

164. The Plaintiff, Anne Gaylor, learned about the National Day of Prayer from publicity in newspapers and/or on television, making it pretty hard to avoid knowing about the National Day of Prayer. (Ex. 1 at 2.)

165. Anne Gaylor also knew about the NDP from complaints by members who phoned FFRF when they picked up on violations of the separation of church and state. (Ex. 1 at 2.).

166. The National Day of Prayer was and is truly shocking to Anne Gaylor, who grew up at time when state/church separation was really respected. One did not expect to find people

praying in government meetings or on government property, much less having government telling people to pray, according to Mrs. Gaylor. (Ex. 1 at 2-3.)

167. Annie Laurie Gaylor has known and been concerned about the National Day of Prayer since at least shortly after 1976, when she, at age 21, with her mother Anne Gaylor, co-founded the Freedom From Religion Foundation as a regional group dedicated to work for state/church separation in Madison, Wisconsin. (Ex. 1 at 3.)

168. Annie Laurie Gaylor has served as a volunteer, an officer, a Board Member, and/or staff member since the group went national in 1978, and she became Co-President in 2004. (Ex. 1 at 3.)

169. Annie Laurie Gaylor joined the staff as editor of FFRF's newspaper, in 1985. Freethought Today not only reports on FFRF actions but chronicles state/church violations around the country, as well as the views and activism of FFRF membership toward prayer, religion and religion in government. (Ex. 1 at 3.)

170. Annie Laurie Gaylor has regularly reported on the National Day of Prayer, federal, state or local incidents, as well as reporting on activism by members over the National Day of Prayer and government-sponsored prayer. She has also highlighted violations in articles she has written or edited. (Ex. 1 at 3.)

171. FFRF exists to correct violations of the separation between church and state, so it hears complaints about NDP violations yearly, says Annie Laurie Gaylor. (Ex. 1 at 3.)

172. FFRF's office has received phone calls about violations each year since at least 1978. Since 1988, after the change in the law making the first Thursday in May the annual National Day of Prayer, complaints by members have increased. (Ex. 1 at 3.)

173. The complaints FFRF receives each year about the NDP have made Annie Laurie Gaylor very aware of how much division and controversy the proclamations create, and how so many FFRF members have wished FFRF to take action against the practice. (Ex. 1 at 3.)

174. FFRF members and members of the public are in continual contact with the FFRF office over countless violations of the Establishment Clause. Prominent violations and federal violations, such as enactment of the 1952 law establishing the NDP, are of special concern to FFRF members. (Ex. 1 at 3-4.)

175. Paul Gaylor, FFRF member for 33 years, volunteer, longtime Board member, and former Officer, read about the NDP in the newspapers so long ago he doesn't recall the first time. (Ex. 1 at 4.)

176. Dan Barker heard of the NDP before the 1980s, when he was a minister, but he distinctly remembers seeing or hearing something on television (probably a news story) in the early 1980s when President Ronald Reagan signed one of the NDP Proclamations. (Ex. 1 at 4.)

177. Jill Dean became aware of the National Day of Prayer over time by hearing news accounts, although she cannot recall the very first time she heard or saw such a report. (Ex. 1 at 4.)

178. Ms. Dean was distinctly aware of the National Day of Prayer in 2008, prompted by news accounts of an NDP prayer breakfast sponsored by the Burnett County Sheriff, in Wisconsin, at which event Wisconsin's newly elected Supreme Court Justice, William Gableman, appeared as the key note speaker. (Ex. 1 at 4.)

179. Ms. Dean has been a volunteer worker for the Freedom From Religion Foundation since her retirement, in part because opposing governmental endorsement of religion is an important, but unpopular cause. (Ex. 1 at 4.)

180. Ms. Dean considers opposition to the establishment of religion to be important because events like the National Day of Prayer send a message that some citizens are better than others; such events like the National Day of Prayer categorize and distinguish between individuals who are supposedly better than others, while making no reference or acknowledgment of non-believers. (Ex. 1 at 5.)

181. According to Ms. Dean, events like the National Day of Prayer essentially make nonreligious persons invisible, which both saddens and angers Ms. Dean. (Ex. 1 at 5.)

182. The government sends a message through events like the National Day of Prayer that if a person doesn't pray, then they are un-American; such persons are devalued and made to feel like they are outside the norm of good citizenship, according to Ms. Dean. (Ex. 1 at 5.)

183. Ms. Dean also is quite concerned that promotions like the National Day of Prayer send a message about religion that is untrue. (Ex. 1 at 5.)

184. The premise of government officials who promote religion is that the United States is a Christian nation, defined by a very conservative variety of Christianity, according to Ms. Dean. (Ex. 1 at 5.)

185. That depiction of the United States as a conservative Christian nation is historically inaccurate, according to Ms. Dean, who notes that many of the immigrants to the United States left their home countries because of religious intolerance, while the United States now ironically tries to define itself as a Christian nation characterized by religious intolerance. (Ex. 1 at 5.)

186. Ms. Dean, in short, is aware of and she is personally opposed to government promotion of religion, such as through the National Day of Prayer, because it has the effect of disenfranchising nonreligious persons, like Ms. Dean, while favoring religious conservatives. (Ex. 1 at 5.)

187. The 2008 NDP Proclamation by President Bush was brought to Anne Gaylor's attention by her daughter, Annie Laurie Gaylor, because FFRF has monitored this activity, while putting up with it for so many years. (Ex. 1 at 6.)

188. Annie Laurie Gaylor reports on Establishment Clause violations to Anne regularly since Anne is the principal founder and president emeritus of the national state/church watchdog FFRF, and Anne is still officially a consultant with the Foundation, and remains on the Board of Directors. (Ex. 1 at 6.)

189. Annie Laurie Gaylor first learned about the 2008 proclamation from the National Day of Prayer Taskforce website before the event itself, which she has routinely monitored in the spring for many years. (Ex. 1 at 6.)

190. Annie Laurie Gaylor also corroborated the 2008 proclamation at the White House website. (Ex. 1 at 6.)

191. Annie Laurie Gaylor routinely has also checked the NDP Taskforce website every year to see how many governors capitulate to the NDP Taskforce, and what the NDP Taskforce dictates for the annual theme and selected Bible verse. (Ex. 1 at 6.)

192. Annie Laurie Gaylor has reported on governors who refused to issue proclamations in the past, such as Connecticut Governor Lowell Weicker (1991-1995), and Minnesota Governor Jesse Ventura. (Ex. 1 at 6.)

193. Annie Laurie Gaylor was also aware of the public pressure put on New York Governor Eliot Spitzer to issue an NDP proclamation in 2007. (Ex. 1 at 6.)

194. Dan Barker, while working at FFRF, also has been watching the NDP for years. (Ex. 1 at 7.)

195. In early 2008, Barker anticipated President Bush's signing and had been to the National Day of Prayer Taskforce website to see what wording they were recommending. (Ex. 1 at 7.)

196. Barker was at Harvard University for a debate on April 22, 2008, and on that day or the next, April 23, he heard by telephone from FFRF staff, including co-president Annie Laurie Gaylor, that President Bush had issued the proclamation. (Ex. 1 at 7.)

197. On April 22 or 23, 2008, Barker learned, and soon after confirmed by looking on the internet, that President Bush had incorporated the "Prayer! America's Strength and Shield". (Ex. 1 at 7.)

198. Annie Laurie Gaylor monitored both the White House website and the National Day of Prayer Taskforce in advance of the 2009 proclamation. (The NDP Taskforce website was stripped of much of its archives and did not do its usual detailed announcements prior to the event.) (Ex. 1 at 7-8.)

199. Annie Laurie Gaylor learned that President Obama would be issuing a proclamation from numerous prominent national news stories in the Washington Post and over the wire, which reported extensively on the expected proclamation. (Ex. 1 at 8.)

200. Annie Laurie Gaylor was also able to verify the wording of Obama's proclamation at the White House official website by the first Thursday in May 2009. (See links to referenced news stories: http://tinyurl.com/djmw9x; http://tinyurl.com/c999z6; and http://tinyurl.com/c3547g.) (Ex. 1 at 8.)

201. Barker learned by watching the news on the internet on May 7 or 8, 2009, that President Obama had issued a NDP Proclamation on May 7. (Ex. 1 at 8.)

S. The Plaintiffs Have Acted On Their Sincere Objection To The National Day of Prayer.

202. Anne Gaylor picketed the First Annual Wisconsin Prayer Breakfast, outside the Concourse Hotel in Madison, Wis., Friday, March 20, 1992, where she leafleted 600 participants and passersby. (Ex. 1 at 9.)

203. The first-ever "Wisconsin Prayer Breakfast" event in 1992 was an offshoot of the National Day of Prayer. (Ex. 1 at 9.)

204. Anne Gaylor also formally protested the misuse of the Great Seal of the State of Wisconsin by the Madison Kiwanis-West, who were the private sponsors of the prayer breakfast, but who advertised and promoted the event as the "Wisconsin Prayer Breakfast" using the state seal of Wisconsin. (Ex. 1 at 9.)

205. The main guest speaker at the prayer breakfast in 1992 was U.S. Senate Chaplain Rev. Richard C. Halverson, who had previously denied FFRF and its staff member (now President) Dan Barker, an ordained minister, the ability to present a message to open the U.S. Senate instead of a prayer. (Ex. 1 at 9.)

206. During the picketed prayer breakfast, Halverson made such attacks as: "Atheism has no room for human rights." In speaking about the dissolution of the Soviet Union, Halverson said, "It was not the failure of politics or economics but it was because of atheism." (Ex. 1 at 9-10.)

207. Anne Gaylor has talked with innumerable FFRF members from 1978 until her retirement in 2004, which members have called to see if there was something as an organization that FFRF could do about the NDP. (Ex. 1 at 10.)

208. FFRF has responded in various ways, over the years, including by contacting various offending public officials; by promoting secular proclamations for government officials to make; by publicizing violations after FFRF began publishing a newspaper in 1983 ten times a year; by periodically alerting members to ongoing violations; and by encouraging and publicizing efforts to protest the National Day of Prayer and local and regional off-shoots. (Ex. 1 at 10.)

209. Anne Gaylor has studied the NDP proclamations by various public officials, and contacted officials to protest the violation of a basic constitutional principle, sometimes releasing a statement to media. (Ex. 1 at 11.)

210. In the case of the picket of the Wisconsin Prayer Breakfast in 1992, Anne Gaylor carried a sign, helped compose a press release and leaflet, phoned area members to interest other protesters, and contacted media about FFRF's counterpicket and complaint about the misuse of the Great Seal of Wisconsin. (Ex. 1 at 11.)

211. Anne Gaylor has been contacted by various media for comment about the NDP Proclamations and government-fostered prayer over the many years. (Ex. 1 at 11.)

212. Since 1978, when Anne Gaylor was asked to take FFRF national, as an organization, she received countless complaints from FFRF members and members of the public about NDP-related violations, including comments by public officials, use of public facilities, and prayer breakfasts that had the appearance of public sponsorship. (Ex. 1 at 11.)

213. As president of FFRF, in November 1993, Anne Gaylor authorized the filing of a lawsuit in Denver, Colorado, with the FFRF Denver chapter, to enjoin the mayor's office from cosponsoring a National Day of Prayer. As a result, Judge John N. McMullen, District Court, enjoined the mayor from "any further endorsement, promotion, sponsorship or support of the

Day of Prayer." (*FFRF v. Wellington Webb, Mayor of Denver*, Case No. 93 CV 6056, District Court, City and County of Denver, Colo.) (Ex. 1 at 11.)

214. Anne Gaylor's many activities include writing press releases and letters, as well as being quoted in Freethought Today and by other media, about her objections to the National Day of Prayer and related violations. (Ex. 1 at 12.)

215. Prior to the National Day of Prayer each year, the Freethought Radio show has included commentary about the NDP, promoted a National Day of Reason, played part of the song by Dan Barker "Nothing Fails Like Prayer," and also provided other timely commentary on government prayer throughout the year. (Ex. 1 at 12.)

216. FFRF also monitors published news under Annie Laurie Gaylor's direction, and looks for updates at the White House website, NDP Task Force website and various governor websites. The National Day of Prayer violations occur every year, and therefore, they are not hard to find referenced, according to Annie Laurie Gaylor. (Ex. 1 at 13.)

217. FFRF also has issued news releases critical of National Day of Prayer activities, sometimes asking for secular alternatives aimed at expressing the point of view of FFRF members and in some instances, asking members to take action. (Ex. 1 at 13-14.)

218. Annie Laurie Gaylor further has been responsible for writing and disseminating press releases from 1985 to present. FFRF press releases include the following:

- **State/Church Watchdog Objects to Largo Mayor's Prayer Breakfast, April 29, 2009** (http://ffrf.org/news/2009/largo.php)
- News Release e-mailed to various Florida media, and emailed to News e-list and posted online.
- **National Day of Prayer Dishonors Our Secular Constitution: Pious Politics Inappropriately Push Prayer, May 1, 2007**

- (http://ffrf.org/news/2007/prayerday.php)

- Freedom From Religion Foundation, the largest national association of atheists and agnostics, which reached 10,000 members last month, says public officials should not issue proclamations of prayer or direct citizens to worship. . . ."

- **Acts of Terrorism the Ultimate "Faith-based Initiative?", September 13, 2001** (http://ffrf.org/news/2001/sept11.html)

- "Bush's proclamation of Friday, September 14 as a "National Day of Prayer and Remembrance" shows the pitfalls of the "God is on our side" mentality, and the dangers of religious patriotism.

- "While it may be natural for religious persons to turn to religion or prayer for solace, it is not the role of the President of the United States, or his spokespersons, to urge citizens to pray, to go to church, to turn to faith, or to observe a National Day of Prayer with worship."

- **State/Church Watchdog Protests "Days of Prayer" Proclamations, Asks Governors to Balance with "Day of Reason?, May 4, 2005**

- (http://ffrf.org/action/2005/noprayday.php)

219. "Prayer proclamations by public officials convey to nonreligious Americans that we are expected to believe in a god, and in the suspension of the natural laws of the universe through wishful thinking," according to Foundation co-president Annie Laurie Gaylor.

220. Annie Laurie Gaylor has reported on National Day of Prayer violations in Freethought Today, from January 1985 to present, and on the FFRF website. (Ex. 1 at 14.)

221. Annie Laurie Gaylor has written, solicited or edited, typeset (and, for at least 7 years, pasted up) many articles regarding prayer and government including the following:

- **Freethought Today, June 1985, p. 5:**

  Prayer Day Proclaimed. New item reports: "President Ronald Reagan proclaimed May 2, 1985 'National Prayer Day' at the behest of the NDP Task Force, an independent nonprofit group set up to publicize the event."

- **Freethought Today, June/July 1985, p. 2:**

  Letter published - "Public Prayer Panders to Vocal Few" by a Wisconsin Member.

- **Freethought Today, December, 1985, p. 2:**

  Letter published, "Evangelist in Chief," in which the Louisiana member noted that "Evangelist in Chief, the Right Rev. Reagan," made at least half a dozen references "to God and prayer" in a public speech.

- **Freethought Today, March 1986, p. 7:**

  Column by David Cobb (a Nashville radio personality), "Miracles and Answered Prayers," a typical intellectual examination of the lack of proof of "divine intervention in the affairs of humanity."

- **Freethought Today, June/July 1986, p. 4:**

  News item, "Meese, Read It & Weep" written by Annie Laurie Gaylor reports on the fact that two dozen protesters picketed U.S. Attorney General Edwin Meese's appearance at a prayer breakfast in Sacramento on May 1, "formerly a pagan and labor rights holiday which the Administration dubbed 'National Day of Prayer.' "

- **Freethought Today, June/July, 1986, p. 5:**

  "FFRF Complains to Utah Attorney General." Annie Laurie Gaylor reported in part that "Commissioners in six Utah counties asked citizens to set aside May 4h as a day of prayer and fasting." Quoted was Plaintiff Anne Nicol Gaylor, saying: "We recognize the absolute right of individuals on a personal level to engage in such activities, but we also know that it is a blatant violation to state/church separation for elected or appointed government officials to make such public proclamations in their official capacity. From a practical point of view, it does seem somewhat naive that Utah county commissioners would expect that the laws of nature are somehow going to be modified or set aside because someone prays to a deity. Realistically, nothing fails like prayer," Gaylor added.

- **Freethought Today, June/July, 1986, p. 15:**

  In an editorial written and signed by Annie Laurie Gaylor, she wrote:

  "It is a sad travesty that what was once a festive pagan holiday celebrated with flowers and May baskets has been turned, by our Administration, into an occasion to violate the spirit of religious freedom and the First Amendment.

It is not the business of our secular government to proclaim any day 'National Day of Prayer' as Reagan proclaimed this past May 1.

Thomas Jefferson, father of religious liberty, refused to issue Thanksgiving proclamations on prayer during the eight years of his presidency.

In a letter to the Rev. Mr. Miller, he explained his position: 'I consider the Government of the United States as interdicted by the Constitution of the United States from meddling with religious institutions, their doctrines, discipline, or exercises . . . [C]ivil powers alone have been given to the President of the United States, and no authority to direct the religious exercises of his constituents.'

Aside from the legal impropriety of our civil president telling citizens to pray is the intellectual objection. How absurd to suppose that events and natural forces can be supernaturally altered. 'Nothing fails like prayer.'

Would that we had a person of the genius and caliber of Thomas Jefferson in the Oval Office today."

- **Freethought Today, November 1986, pp 7- 10:**

This is a transcript of the speech delivered at the Freedom From Religion Foundation's Ninth Annual Convention in Madison, Wis., on Oct. 11, 1986, by Prof. Michael Hakeem, who became Chair of the Foundation's governing body for many years. The speech, "The Clergy and Other Obstacles to Freethought," in part lambasted the efficacy of prayer and specifically mentioned the NDP:

"We have national days of prayer . . . We have legislative bodies . . . beginning every session with a prayer . . . Why can't religionists discern that, despite any number of prayers they utter, the overwhelming proportion—in fact all but an insignificant number—are not fulfilled? Why can't they recognize that when their prayer is seemingly fulfilled it is coincidence, something they could confirm every easily? Why can't they realize that the cemeteries are filled with people who prayed for life?" (This phrase is also pulled out on the page, and has been often quoted and repeated by Annie Laurie Gaylor and other Foundation staff and members.) The speech goes on to point out in great detail that prayer does not work, and is intellectually bankrupt.

- **Freethought Today, December 1986, p. 11:**

Critical news item headlined "Nothing Fails like Prayer," quoting deputy agriculture secretary Peter Myers telling 1000 members of the National Grange at a convention in Madison, Wisconsin, to pray about their agricultural woes.

- **Freethought Today, December 1986, p. 14:**

Unsigned editorial (written by Annie Laurie Gaylor), headlined, "Noting Failed Like Prayer," concluding: "True peace on earth will be achieved only when the human species realizes that peace, justice and equality will never come from above, but from ourselves, in this our only world. Once again, nothing failed like prayer."

- **Freethought Today, 1987, Page 5:**

"One Flaw in Washington Tale: It Never Happened." Annie Laurie Gaylor was sent a clipping of an op-ed by Andrew Prouty, Ph.D., a Seattle resident who wrote the op-ed for a Seattle newspaper, which debunked the myth that George Washington engaged in prayer in the snow at Valley Forge. The article was written in response to a proclamation by President Reagan which referenced the supposed event in which "George Washington [went] on his knees in the snow in Valley Forge." Annie Laurie Gaylor contacted Mr. Prouty, taking some trouble to locate him, to ask for permission to reprint, because this myth has been invoked in NDP proclamations (See NDP Proclamation Richard Nixon, 1972; Reagan 1983, 1984 and 1986, George H. Bush, 1992, Clinton, 1987 and George W. Bush, 2001), and to excuse government prayer in many other instances. The legend, made up by a Quaker many years after the reputed event, has been widely disseminated, including in a painting by Leydendecker, "Washington Kneeling in Prayer" (1935) which was on the cover of the Saturday Evening Post twice, and once used as a Christmas stamp. Prouty cites historian William E. Woodward, who called the story a "myth of exceptional vitality." Prouty concludes: "The picture, a disinformation, if not exactly a deliberate fabrication, certainly perpetuates a falsehood."

- **Freethought Today, March 1988:**

"Proclamation Sought for State/Church Separation Day"

"The Freedom From Religion Foundation has asked Wisconsin Governor Tommy G. Thompson to proclaim April 5, 1988 State/Church Separation Day.

"Foundation President Anne Gaylor asked for the proclamation to coincide with the tenth anniversary of the founding of the Foundation on April 5, 1987. . . and requested a public signing 'as befits this time-honored constitutional principle.' "The wording for the proclamation, promoting separation between church and state, was provided along with other secular rationale.

Court: Prayer Room as "Secular Purpose"" reports that a 3-judge federal panel of the U.S. 7th Circuit Court of Appeals in Chicago ruled on Jan. 29, 1988, that a prayer room proposed by Rev. Pat Robertson in the Illinois State Capitol Building in Springfield had a "secular purpose." The case was brought by an Illinois FFRF member and FFRF as plaintiffs. The decision overturned the district court ruling that a prayer room was a violation of separation between church and state. The news story reported Plaintiff and

then-President Anne Nicol Gaylor as reacting: "The Appeals Court seems to be saying that government approval of Christianity may not be acceptable, but government approval of religion and aid to religion is. The wall of separation is tumbling down."

The article quoted District Judge Marvin Aspen, that "the actual creation of a Capitol prayer room, aside from the enactment of the enabling legislation, would have the tendency and effect of promoting the practice of religion in the seat of the state government. . . it is unlikely that the presence of such a room in the Capitol would have any effect but to endorse religion.

"Governmental action which extends beyond the mere facilitation of religious practice goes beyond the concept of accommodation and represents hostility to the members of the unfavored group. . . this is not a nation of any particular religion but a nation of free choice and gracious tolerance with respect to the extremely personal matters involving religion. Whether or not to believe is a personal decision. The Establishment Clause was crafted to protect freedom of choice by preventing the government from making that choice for individual citizens. That practice must, by definition, include the freedom to choose not to practice any religion as well as the freedom to practice a particular religion. For the guarantees of freedom in the First Amendment would indeed be empty ones if the government somehow imposed on citizens the requirement that they must choose to practice any religion, so long as they practice one. . . ."

- **Freethought Today, April 1988:**

  State/Church Separation Day Nixed

  (Asked then-Wisconsin Governor Tommy Thompson to issue a proclamation for State/Church Separation Day, to balance the religious proclamations, including the NDP.)

- **Freethought Today, May/June 1988, p. 2:**

  Letters by FFRF members criticizing a public official for not issuing a State/Church Separation Day.

- **Freethought Today, June/July 1989, p. 18:**

  News Item written by Annie Laurie Gaylor under State/Church Bulletin: "Bush Proclaimed May 4 'National Day of Prayer.' " The item recited the 1952 law requiring the proclamation, and the change requiring that the proclamation be issued on the first Thursday in every May, and editorialized: "His proclamation is full of platitudes and outright distortions. Bush writes; 'Calling for daily prayer at the Constitutional Convention, a number of delegates expressed their conviction that only with divine

guidance would the new democracy be true and successful.' He fails to mention that Ben Franklin was only one of 3 or 4 to call for prayers, thus prayer was rejected."

- **Freethought Today, April 1990, p. 16 (back page):**

  Major story headlined, "Protest National Day of Prayer," which also reprinted the National Day of Prayer Taskforce logo with the flag and the words "National Day of Prayer: The First Thursday in May."

  The article, written by Annie Laurie Gaylor, recounts the history of the National Day of Prayer and the change in 1988 to make it the first Thursday in May and that, "The National Prayer Taskforce plans a major media blitz - involving President and Barbara Bush as its honorary co-chairs. It reports that the Taskforce has put pressure on all governors to issue NDP proclamations, and that in 1988, more than two-thirds of all governors issued such proclamations. Included in promotions by the Taskforce was this gas-guzzling suggestion, Annie Laurie Gaylor noted, of doing a "Jericho Run." "Take a trip around your city, praying as you drive" for 7 days in a row.

  The article includes a headline, "Target For Letter-Writing," followed by a lengthy article dedicated to criticizing the National day of Prayer and quoting Plaintiff Anne Nicol Gaylor calling the NDP "most distressing in a country that was founded on the principle of freedom of conscience."

  In the article, A.N. Gaylor is quoted saying, "We ask all Foundation members and concerned freethinkers to monitor state/church abuses in their area related to the National Day of Prayer, and to respond promptly to them." Gaylor also urged members to write letters to the editor, and provides substantial legal and freethought arguments against a NDP.

- **Freethought Today, March 1991, p. 2:**

  Letter by California member (originally printed in a daily newspaper), titled, "Nothing Fails like Prayer" which specifically castigates President Bush for calling for a "national day of prayer."

- **Freethought Today, March, 1991, p. 3:**

  The War Prayer, by Mark Twain with his photo, is reprinted in full, introduced by an editorial note about "Pious President Bush" declaring a "national day of prayer" and FFRF wondering what Twain would have thought.

- **Freethought Today, April, 1991, p. 4:**

  Impassioned article by FFRF officer Catherine Fahringer, titled "Nothing Fails Like a Prayer Breakfast," in which Catherine laments the fact that Lila Cockrell, then mayor of

San Antonio, held a press conference in her office in City Hall to announce an upcoming prayer breakfast. Fahringer attended and chronicled the prayer breakfast, which the mayor attended and which was opened by a prominent pastor urging "the deepening of commitment to the unification of God and government." The page also included a graphic, which read: "Nothing Fails like Prayer."

- **Freethought Today, June/July 1991:**

  Article by Meyer Rangell entitled, "Religion, War and Prayer" which lambasted prayer by government officials and clergy used to promote war.

- **Freethought Today, October 1991, p. 12:**

  Florida Foundation member John Donner, in "A Lay Skeptic's Guide to Probability and Statistics," analyzes and critiques Dr. Randolph Byrd's infamous study on the supposed therapeutic effects of prayer on coronary patients to debunk the claims of prayer.

- **Freethought Today, October 1991, p. 14:**

  Letter, "Look What Prayer Wrought," complaining about President Bush's war prayers.

- **Freethought Today, November 1991, p. 16:**

  Headline in news item: "Prayer Breakfast Entangles County," about the ACLU complaining about the Sheriff's Department organizing the "Sheriff and Police Chief's Sunrise Prayer Breakfast."

- **Freethought Today, April 1992, p. 3:**

  Boxed and featured: "Protest National Day of Prayer. Congress passed a law in 1988 designating the first Thursday in every May as 'National Day of Prayer.' Formerly, it was observed annually, but as a floating holiday.

  "The National Prayer Task Force always gears up to entangle church and state. Watch for violations in your area, write educational letters on the subject, and contact the Foundation in a timely fashion if a major violation is scheduled, such as observances in public schools."

- **Freethought Today, April 1992 (front page, cont. p. 11):**

  Two photos showing FFRF protesters leafleting and holding picket signs (including plaintiffs Annie Laurie Gaylor, Dan Barker and Annie Laurie Gaylor). Headline: "Senate Chaplain Draws Protest." The photos were taken by plaintiff Paul Gaylor. The story is

about the complaint over the U.S. Senate Chaplain being paid to lead prayers in Congress, and appearing at the "First Annual Wisconsin Prayer Breakfast." The article complains about government prayer, including by chaplains and also reports on the Foundation's exposure of the fact that the private sponsors of the event unlawfully used the "Great Seal of the State of Wisconsin" in their news releases and on their program. The Foundation's complaint resulted in a letter from the Secretary of State's office determining this use was illegal and ordering it to desist. The article also noted that at least one Wisconsin legislator inappropriately solicited attendance using his letterhead. The leaflets called attention to the fact that James Madison opposed government prayer and tax-paid chaplains.

- **Freethought Today, May 1992, p. 1:**

  The top of the fold headline, "Freethinkers Ask for Equal 'Prayer' Time," reports that the Foundation asked the U.S. Senate and House to permit staff member Dan Barker, an ordained minister who has become an atheist, to give a "freethought homily" before the Senate and House in place of the 2-minute daily prayer. Anne Gaylor, in the news story, pointed out that for "two centuries there has never been two minutes for freethinkers to address these governmental bodies." The story called on Foundation members to write the Office of the chaplain.

- **Freethought Today, June/July 1992, p. 18:**

  A letter, "A State-Church Conflict," by George James of California specifically complains about the designation of May 7, 1992, as National Day of Prayer. George James recounted how he went to the courthouse to protest observances on public property, and how, when he complained at the police station that NDP participants were blocking the entrance to the courthouse, an officer threatened to arrest him if he did not leave.

- **Freethought Today, June/July 1992, p. 4:**

  A major new story, "Anti-National Day of Prayer," by Florida Foundation member Scott Owens, recounted his personal protest of NDP observances on May 7 in Tallahassee. The story included a photo of him by posters promoting the separation of church and state. Owens distributed leaflets opposing the president's NDP proclamation. Posters read: "Hands that help are better than lips that pray" and "No government prayer proclamations." He and cohorts were interviewed on the local TV news affiliates ABC and CBS.

- **Freethought Today, June/July 1992, p. 5:**

  "October 12 Named 'Freethought Day,' " announced a day to commemorate freethought and state/church separation, since Oct. 12, 1992, marked the 300th anniversary of the

date on which it was declared that "spectral evidence" would be no longer admissible during the infamous Salem Witch Trials.

- **Freethought Today, November 1992, p. 3:**

  "Historic Proclamations" was the headline of a news story in which the Foundation announced that several mayors and city councils proclaimed "Freethought Week. "There have been many holidays for saints and superstition, but never one commemorating reason, freethought and state/church separation," the proclamations noted.

- **Freethought Today, December 1992, p. 16:**

  Reprints full-size a Freethought Week proclamation in Baltimore by Mayor Kurt Schmoke, as requested by FFRF member Roy Torcaso, who won the *Torcaso v. Watkins Supreme Court* decision barring religious tests for public office.

- **Freethought Today, March 1993:**

  "Culture of Disbelief" Spells Trouble for Unbelievers," a book review of Stephen L. Carter's book, by Annie Laurie Gaylor, noted his support of a White House Prayer Breakfast, and how President Clinton plugged Carter's book in remarks at the National Day of Prayer Breakfast.

- **Freethought Today, May 1993 (front page, banner headline):**

  Foundation Pursues Congressional Prayer. "Following a rebuff by Wisconsin Senator Herbert Kohl, the Wisconsin-based Freedom From Religion Foundation has requested that new Wisconsin Senator Russ Feingold sponsor Dan Barker to present a 'freethought homily' before the U.S. Senate." (The article notes that FFRF is opposed to government prayer, chaplaincies, etc.)

- **Freethought Today, December 1993, p. 1:**

  The top of the fold news article reported: "Foundation Victory in the Courts! Denver Mayor Must Disclaim 'Day of Prayer.' "The Foundation, its Denver chapter and Foundation members, in a case brought by FFRF member and attorney Robert Tiernan, went to court in November asking that Mayor Wellington Webb be enjoined from using his mayoral office to promote, endorse or support a day of prayer. Denver District Court Judge John McMullen ruled on Nov. 24 that Mayor Webb had to issue a news release by Dec. 2 with a disclaimer that the Day of Prayer on December 5th was not sponsored, endorsed or supported by the city. Webb had called a press conference on Nov. 9 using city stationery, to announce the prayer and the city also had waived rent. After the suit was filed, the city voluntarily agreed to charge a ministerial association $4,400 for rent.

Said Foundation President Anne Gaylor: "The suit was filed to stop the city of Denver from sponsoring and endorsing a day of prayer."

- **Freethought Today, January/February 1994, p. 12:**

  Denver Court Ruling Creates Important Precedent: Mayor Enjoined From Proclaiming Day of Prayer. The decision by Judge John M. McMullen is reprinted on 2 full pages. The pullout quotation: "Since prayer is exclusively a religious act, the endorsement of a Day of Prayer would logically be interpreted by a reasonable person as an endorsement of religion."

- **Freethought Today, March 1994, p. 3:**

  Three news stories are reported, under the banner heading: "Nothing Fails State/Church Separation . . . Like Government Prayer." The three stories: National Prayer Breakfast Entangles Church & State; U.S. Senate Pushes Prayer, and Mississippi House Engages in Prayer Double-Speak.

- **Freethought Today, March 1994, p. 14:**

  A news item, written by Annie Laurie Gaylor, reported on "Gubernatorial Prayer Hijinks."

- **Freethought Today, April 1994, p. 1:**

  The banner story, "Prayer Conflict Moves to Appeals Court," reports on the Foundation's appeal to the Colorado Court of Appeals of a challenge in which the Foundation, the Denver chapter and individual Colorado plaintiffs sought an injunction to stop Colorado government officials from hosting and speaking at a prayer luncheon. Defendants were Governor Roy Romer, legislator Chuck Berry, of the Colorado legislature and Speaker of the House, Mayor Wellington Webb, and Bill Ritter, Jr., Denver District Attorney. All used their offices to host and participate in a prayer activity. Although District Court Judge Larry J. Naves denied the injunction, he agreed that the defendants were giving the appearance of government endorsement.

  The story also reported that the Foundation had asked the Wisconsin State Ethics Board to investigate a complaint that state Rep. Susan Vergeront had used her official stationery, office, and state-paid assistant to promote a prayer breakfast in Madison.

  The Foundation also complained that the Cape Girardeau (Mo.) Mayor had used his official stationery to invite everyone to attend his Mayor's Prayer Breakfast, the seventh such prayer breakfast.

- **Freethought Today, April 1994, p. 2:**

Letter, "A Day of Prayer in Maryland Panned," by a Foundation member, remonstrated against a Senate Joint Resolution concerning "A Day of Prayer in Maryland."

- **Freethought Today, April 1994, p. 10:**

  Editor's Notebook, by Annie Laurie Gaylor, featured a photo of the cover of Life Magazine, showing a girl in prayer under the words, "The Power of Prayer." The column criticized the article, and specifically referenced "National Days of Prayer," and other religious actions by public officials.

- **Freethought Today, April 1994, p. 4:**

  "Lips, Lunch & Prayer," an article by Lora Attwood, a Colorado member, featured her account of attending the Colorado Prayer Luncheon, the subject of a second lawsuit taken by the Freedom From Religion Foundation over government prayer in Colorado. That account included religious remarks by various public officials, including the mayor, who called himself "a Baptist before he was Mayor." She analyzed the vacuous nature of prayer and said politicians like to pray publicly because it makes them look like the "good guy."

- **Freethought Today, June/July 1994, p. 21:**

  A large photo is featured, sent in by Foundation member Mike Crutchfield, showing a group of people holding anti-NDP signs outside a NDP observance. The headline: "Protesting National Day of Prayer, California Style." The caption: "Foundation member Mike Crutchfield (third from right) helped to organize a protest of National Day of Prayer activities at Redding City Hall, where about 250 people had gathered for a noontime observance. The Atheists, Humanists & Freethinkers of the Redding Area counter-demonstrated, holding such signs as 'Praying is Begging,' and 'Freedom From Religion.' The protest received coverage in the Redding Record Searchlight. Prayer speakers included the local sheriff, an ordained minister, and several public officials."

- **Freethought Today, December 1994, p. 8:**

  The transcript of oral arguments by Foundation attorney Robert Tiernan before the Colorado Court of Appeals was reprinted (two pages), "Governor's Prayer Luncheon Goes to Court: Officials Must not Host, Promote, Endorse or Further a Prayer Meeting." The pullout quotation: "It is our constitution, Your Honor, that makes us free, not religion or Jesus Christ." Another quotation pullout: "The fact that prayer is being offered to reduce crime rate or for any other desirable public policy does not make it secular."

- **Freethought Today, October 1995:**

"Puzzling Day of Prayer," a letter by a South Dakota member which was also published in a daily newspaper, criticized "the National Day of Prayer, May 4, proclaimed by Mayor Hauschild. If there's a God who knows and controls everything, isn't prayer unnecessary and presumptuous? Jesus says in Matthew 6:8, 'your Father knows what you need before you ask him.' "

- **Freethought Today, January/February 1996:**

Annie Laurie Gaylor, in Editor's Notebook, wrote about, "Family Values - Brought to You by James C. Dobson." The column ran over the entire page and half of it, with a subheading, was about "National Day of Prayer Update." The piece pointed out that Dobson is behind the annual "national day of prayer fuss." It recounted the history of the NDP, and how it became the first Thursday in May under Reagan. It recounted Mrs. Shirley Dobson's role, and how the NDP Taskforce had bragged that in 1995, it had "achieved its goal of bullying every governor in the United States, plus the governors of Puerto Rico and the Virgin Islands, into declaring a 'national day of prayer'." Gaylor recounted how this was possible because Lowell Weicker was no longer governor of Connecticut and how it refused to make such proclamations. She recounted how the NDP Taskforce claimed observances were held on the Capitol steps in more than 40 states in 1995, and how Education Secretary Richard Riley and Air Force Chief of Staff General Ronald Fogleman were among the speakers at a Capitol Hill observance. The NDP Taskforce claimed a "tiny little staff of five." Gaylor also reported that the Sixth Annual Coordinator's Conference met for 3 days in January in Colorado to plan for the 1996 Day of Prayer. Tactics include an "Adopt-a-Leader Kit," including cards for writing politicians, prayer reminders and a journal to track responses, for only $12. Gaylor termed it "harassment-in-the-guise of prayer."

Gaylor concluded by urging members to contact members of Congress on behalf of secularism, and to ask politicians to make secular proclamations as well.

- **Freethought Today, May 1996, p. 14:**

"The Futility of Prayer," a letter by a Pennsylvania member, philosophically analyzes the inefficacy of prayer.

- **Freethought Today, May 1996, p. 18:**

A news item in State/Church Bulletin, "Prayer Day Pushed," reports that a bill to inaugurate a "Commonwealth Day of Prayer" on the first Thursday in May was introduced in Pennsylvania, influenced by the National Day of Prayer. "Letters sent by the Foundation to all daily newspapers in Pennsylvania pointed out that the bill is unconstitutional."

- **Freethought Today, June/July 1996, front page:**

  Front page top of the fold photo showing three men, including Oklahoma FFRF activist Dan Nerren, holding up a three-part large sign over an overpass in Tulsa on May 2, 1996, reading: "Nothing Fails Like Prayer." They were protesting government-sponsored National Day of Prayer. A full story appeared on page 5.

- **Freethought Today, June/July 1996, p. 5:**

  Story: "National Day of Prayer: Prayer Just Doesn't Work," by activist Foundation member Dan Nerren, reported on his activism against the NDP specifically. The story was accompanied by a second photo of the men at an overpass. The story centered on Nerren's philosophical objections to prayer and its exhortations by government.

- **Freethought Today, September 1996, p. 13:**

  A sample mayoral proclamation, "Give Thanks for State/Church Separation Week," was run. The caption under it read: "Tired of religious proclamations by government officials? Ask your mayor or governor to sponsor a secular Thanksgiving proclamation this year."

- **Freethought Today, October 1996, p. 16:**

  "San Antonio Celebrates 'Freethought Month,' " is the caption by a photo of the Mayor of San Antonio with his secular proclamation, requested by Foundation member and Officer Catherine Fahringer to counter religious proclamations.

- **Freethought Today, May 1997, p. 14:**

  "God and the Governor," a letter, warns: "There is no greater danger to society than public officials using the powers of government to impose their particular theological views and ideals of personal morality on everyone else." The letter by Ohio Foundation member Joe Sommer also appeared in the Columbus Monthly.

- **Freethought Today, June/July 1997, p. 15:**

  An article, "Ohio Activist Exposes 'Day of Prayer,' " recounts the activism of Foundation member Art Hites of Ohio, and runs his photograph. His letter to the Dayton Daily News on March 28, 1997 (Good Friday), resulted in a full investigation and exposé of the "one-faith" prayer breakfast by that newspaper. His letter criticized the annual prayer breakfast coordinated by the mayor's office, which has been beset with religious division, died out in 1981, then was resurrected in 1997.

- **Freethought Today, August 1997, 12:**

  "Officials Pray for Help," reports on officials in Hillsboro, Ala., turning to prayer to heal the town's financial woes.

- **Freethought Today, August 1997, p. 16:**

  In "Newt's Religious Agenda," Freethought Today editor Annie Laurie Gaylor reported on his speech before the National Religious Broadcasters during a prayer breakfast in Washington, D.C., on May 8.

- **Freethought Today, September 1997, p. 12:**

  "Washington Governor Proclaims 'Freethought Week', " a news item, reports on Governor Gay Locke proclaiming Oct. 6-12 to be "Freethought Week." The proclamation was proposed by the Foundation to counter religious proclamations by public officials.

- **Freethought Today, December 1997, p. 15:**

  "Prayer Breakfast Name Changes," a news item, reports that the Annual Governor's and Mayor's Prayer Breakfast has been renamed the Hawaii Prayer Breakfast, following a complaint by the Hawaii Citizens for the Separation of State and Church.

- **Freethought Today, January/February 1998, p. 6:**

  "Denver Chapter Protests Legislative Prayer," is a news article about a chapter protest against tax-paid chaplains and their prayers.

- **Freethought Today, March 1998, p. 12:**

  "Prayer Divisive in Maryland House," recounts a story in the Washington Post about a "House divided by prayer."

- **Freethought Today, March 1998, p. 18:**

  "Help Topple House of Cards," a letter by a Michigan member, rebuts efficacy of prayer.

- **Freethought Today, May 1998, p. 6:**

  A news item, "Las Vegas Prayers Protested," reports on divisive government prayer.

- **Freethought Today, June-July 1998, p. 18:**

A major story, "National Day of Prayer Is Protested," by Foundation member Larry Judkins, reports how he and a small group of secularists protested the annual National Day of Prayer event at Redding City Hall, Calif., on the first Thursday in May. "Five courageous supporters of the Constitution met near the prayer gathering to express their opposition to Shasta County's and the federal government's mixing of church and state." The article recounted the history of the NDP, that it violated the Constitution, reported on what picket signs protesters carried, and said the NDP "helps to create a climate of prejudice against citizens who do not accept the concept of prayer."

- **Freethought Today, August 1998:**

  Three typeset newspaper pages were devoted to reprinting Francis Galton's famed essay of Aug. 1, 1872 from Fortnightly Reviews (England), recounting his scientific and rationalistic analysis of the inefficacy of prayer.

- **Freethought Today, January/February 1999:**

  State/Church Bulletin reported an item, "Maryland Political Prayer Cabal?" about the 11th annual prayer breakfast, which the Washington Post called "an effort by county officials to bring the religious community into the political fold."

- **Freethought Today, June/July 1999, pp. 14-15:**

  An article, "Setting the Record Straight: No Prayers at Constitutional Convention," by Gerald L. Pence, Sr., thoroughly debunked the myth that the founders prayed at the Constitutional Convention, a myth repeated in many Presidential prayer proclamations.

- **Freethought Today, June/July 1999, p. 16:**

  State/Church Bulletin, in "Ventura: No Prayer Proclamation," reported that the Minnesota governor had refused to proclaim the first Thursday in May a day of prayer: "I believe in the separation of church and state." Annie Laurie Gaylor added the address, fax number and e-mail of Gov. Ventura so Foundation members could thank him.

- **Freethought Today, August 1999, p. 2:**

  A large photograph ran of five freethinkers, led by Foundation member Lee Helms, holding signs against the National Day of Prayer during the NDP observance by the government of Troy, Mich. in May 1999. The mayor had urged "citizens to join in prayer." The freethinkers, holding signs such as, "National Day of Prayer Violates Matthew 6:1, 5 &6," and "Troy NDP Proclamation Violates Church-State Separation," quietly stood as 70 people gathered at the City Council lawn praying. The protest was covered and pictured in two local daily newspapers.

- **Freethought Today, September 1999, p. 6:**

  "House Rejects Day of Prayer," a news item in State/Church Bulletin, reported that the U.S. House defeated a resolution calling for a "national day of prayer, fasting and humiliation before God." The article also reprinted a quote by Washington Post Writers Group columnist E.J. Dionne, criticizing the proposal.

- **Freethought Today, September 1999, p. 15:**

  "Illinois Gets Day of Prayer," a news item, reported that Illinois will observe an official day of prayer every year under legislation signed by Gov. George Ryan, to coincide with the NDP. The law urges Illinoisans "to observe the day in ways appropriate to its importance and significance."

- **Freethought Today, October 1999, p. 4:**

  "Public Prayer - A Christian Sin," an article by attorney Charles Cheves, began: "The most recent 'National Day of Prayer' was celebrated in communities across this nation on May 6, 1999." The full-page opinion piece recounted many arguments against the NDP, and also Cheves' efforts to educate his mayor not only about the constitutional objection, but the religious. Cheves wrote the mayor and sent copies to ministers, citing the Sermon on the Mount, where Jesus, in Matthew 6:5-6 tells people to pray secretly in a closet and cautions against public prayer, calling it vanity.

- **Freethought Today, November 1999, p. 2, 13:**

  A letter, "Nuts-and-Guts Award," in part recounts the Illinois Foundation member's experience protesting the Wheaton Leadership Prayer Breakfast and its official connection to the Mayor's office.

- **Freethought Today, April 2000, p. 6:**

  "Partisan Politics," by Charles Cheves, recounts the rancor that occurs with government-fostered prayer.

- **Freethought Today, June/July 2000, p. 17:**

  "Lots of DC Prayer," a news item, recounts how D.C. Mayor Anthony A. Williams, in kicking off the 25th annual prayer breakfast in April, promised churches financial subsidies.

- **Freethought Today, October 2000, p. 14:**

"Olympics Atheistic?", a letter by a Texas member, praises the Olympics for not having a single prayer at either opening or closing.

- **Freethought Today, September 2000, p. 2:**

  "We CAN Make a Difference," a letter by a Pennsylvania member, urges against governmental prayer.

- **Freethought Today, August 2000, p. 6:**

  "Let Us Prey," an article by Texas member and Officer Catherine Fahringer, argues against governmental prayer and enforced public prayer, citing good manners, the Sermon on the Mount and the separation of church and state.

- **Freethought Today, August 2000, p. 15:**

  A news item with a photo reports that Richard Sloan has authored an article, "Should Physicians Prescribe Religious Activities?" in the New England Journal of Medicine, answering "no." Sloan addressed the 1999 convention of the Freedom From Religion Foundation (reprinted in the Jan/Feb 2000 issue).

- **Freethought Today, January/February 2001, p. 1:**

  Separation of Church and State to be Bush-Whacked?

  Annie Laurie Gaylor reported on various state/church violations by President Bush, and chronicled the prayer services, public prayers, and inaugural "religious ad libs" that offended state/church separation advocates.

- **Freethought Today, November 2001, p. 15:**

  A news item, "Prayers Fill City Stadium," recounts how a city-sponsored public memorial at Yankee Stadium on Sept. 23, 12 days after 9-11, was billed as "A Prayer for America." A Muslim leader had the temerity to blame atheism for the terror attacks.

- **Freethought Today, October 2001, p. 2:**

  "Cringing over 'Day of Prayer,'" was the lead letter in Freethought Today's Letter Box, written by a New York member.

- **Freethought Today, 2002**

  A secular proclamation signed by Marc H. Morial, of New Orleans, was reprinted in full.

- **Freethought Today, April 2003:**

  Concluding an article, "Congress sells out Constitution," about Congressional reaction to the Ninth Circuit decision in the Michael Newdow case over the Pledge of Allegiance, was mentioned in the passage of House Resolution 153 on March 27, urging the President to issue a proclamation "designating a day for humility, prayer, and fasting for all people of the United States." Noted the article:

  "This is offensive not just to nonbelievers, but to practitioners of many diverse beliefs, including Christians who do not follow 'fasting' traditions of supplication," Annie Laurie Gaylor added. She quipped, "Of course, I think it might be a good idea if Rep. Sensenbrenner fasted.

  "It is insufferable ego to imagine that, if there were a god, it would respond to these demeaning supplications. It is primitive to imagine that the natural laws of the universe could be suspended or altered by group wishful thinking. Ironically, as Congress entertains these meaningless motions, the Iraqi people and their supporters are praying to their God for the opposite result!"

- **Freethought Today, June/July 2003, p. 9:**

  "National Day of Discord," a news item, reports that an organizer of an annual NDP service in Indianapolis barred Jews, Muslims and other non-Christians are participating in the prayer service outside City Hall. "This is a Christian event that we have done for years," Church of Nazarene Rev. William Keller told the Indianapolis Star on May 2, 2003.

- **Freethought Today, June/July 2003:**

  In Annie Laurie Gaylor's workshop speech at the American Humanist Association on May 8, 2003, she chronicled a whole series off disturbing entanglements between church and state, including:

  "May 1. Ashcroft participated in a National Day of Prayer rally at Capitol Hill. According to Associated Press: 'Attorney General John Ashcroft says President Bush commands America's armed forces,' but 'understands that it is faith and prayer that are the sources of this nation's strength.' "

  AP also reported:
  "An organizer of the event on Capitol Hill asked God to make the United States a righteous example as Iraqis struggle to establish their own democracy."

  What's wrong with this picture?

If I had a chance, I would remind Ashcroft and National Day of Prayer organizer Shirley Dobson of Focus on the Family what everyone in this room knows:

We are a secular, democratic republic, governed by the rule of law, not the bible. Our constitution is godless and our sovereignty rests in 'We, the People,' not in a divinity. Ours was the first godless constitution ever adopted, and it is no coincidence that it is the longest-lived constitution in history."

- **Freethought Today, August 2003, p. 2:**

"What's Happening in Your Town," a letter by a Wisconsin member, recounted how he learned about his Mayor's Prayer Breakfast, held in conjunction with the National Day of Prayer, "led by Mrs. Dobson," and wrote a letter that it was inappropriate.

- **Freethought Today, September 2003, p. 15:**

Freethought Today reported approvingly that Wisconsin Governor Jim Doyle did not attend a "Governor's Prayer Breakfast" called by religious civic leaders for May 22.

- **Freethought Today, January/February 2004:**

"America - Not a Christian Nation," an article by Prof. Brian Bolton originally published in the Northwest Arkansas Times, debunks government prayer, Mayor's Prayer Breakfasts and so-called Christian Heritage Weeks.

- **Freethought Today, May 2004, State/Church Bulletin:**

"Bush's National Day of Prayer," news item, read: "President Bush proclaimed May 6 National Day of Prayer and appealed to his base constituency by holding an afternoon ceremony that was later broadcast by religious networks during primetime. Bush invited a coterie of evangelicals to a gathering in the East Room of the White House, including the House and Senate chaplains, Oliver L. North, Shirley Dobson, and James C. Dobson, who represent the National Day of Prayer Committee. Their website asserts that the United States is doing God's work in Iraq and Afghanistan, urges prayers to return 'Judeo-Christian' values to schools, and warns that kindergarten classes are teaching 'homosexual propaganda.' "

- **Freethought Today, June/July 2004:**

Catherine Fahringer's "The Fundies Are Coming! The Fundies Are Coming! The Fundies are Here" is in part about how she joined the Foundation and became an activist, and fought the NDP observances in San Antonio starting in 2003, and her frustrations with public officials promoting prayer.

- **Freethought Today, August 2004, p. 9:**

  Half of the page is devoted to a "Celebrate Church/State Separation" proclamation from the New Orleans mayor, and reprinting a secular invocation by Foundation member Harry Greenberger, which he delivered to the City Council on Jan. 8, 2004.

- **Freethought Today, January/February 2005:**

  "Religion at the Inauguration" reported in detail about the prayers, bible reading, religious services, etc., attending the 2005 presidential inauguration.

- **Freethought Today, October 2005, p. 3:**

  "Foundation Blasts Government Prayers, FEMA's Promotion of Operation Blessing: Nothing Fails Like Prayer (and 'Faith-Based' FEMA?)," in an article written by Annie Laurie Gaylor about her letters and press releases.

- **Freethought Today, May 2005, p. 13:**

  "Govs Asked to Balance 'Day of Prayer,' " is a new story detailing how the Foundation asked all 50 U.S. governors to reconsider proclaiming a "National Day of Prayer" and balance gubernatorial actions. The article recapped the history of the NDP, and the work of Focus on the Family to pressure governors and local executives to issue NDP proclamations. In addition to sending a letter to all governors, the Foundation sent them sample proclamations, including a "Freethought Week," "Give Thanks for State/Church Separation," and suggesting a simple "Day of Reason" would be very welcome. Freethinkers believe in deeds, not creeds, the governors were told. "Freethinkers may wish to contact their own local executives or governor to promote freethought proclamations." The news article gave links to the online proclamations at FFRF's website.

- **Freethought Today, March 2006, pp. 8-10:**

  "Ernie Chambers: Hero of the First Amendment," reprinted the speech by Nebraska Sen. Ernie Chambers before the 27th annual convention of the Freedom From Religion Foundation. Chambers was honored for his lawsuit taken to the Supreme Court to rid the Nebraska Senate of paid chaplains and their prayers. He recounted his objections to government-hosted and sponsored prayer.

- **Freethought Today, March 2006, p. 19:**

  "The Failure of Prayer," a letter by a Florida Member, analyzes the inefficacy of prayer and the irrationality of seeking a deity's intervention. Prayer "is an utter waste of time."

- **Freethought Today, April 2006, p. 13:**

  Supreme Court Judge Samuel Day Alito is pictured and quoted thanking the Focus on the Family for their "help and support" and prayers. He vowed as "long as I serve on the Supreme Court . . . to keep in mind the trust that has been placed in me (and expressed a wish to have a personal meeting with James Dobson)." Source: The New York Times, March 2, 2006.

- **Freethought Today, April 2006, p. 8:**

  "Does God Answer Prayer," is a 2-page newspaper piece by Prof. Brian Bolton, an FFRF lifetime member, in which he examines the so-called evidence for answered prayer and concludes: "The god of religionists does not answer intercessory prayer."

- **Freethought Today, October 2006, p. 16:**

  " 'God' Invoked Often in Congress," is a news item recounting that on a recent day in Congress, lawmaker's invoked god on the floor of the House 182 times.

- **Freethought Today, November 2006 p. 6-7:**

  The newspaper reprinted the acceptance speech of the first "Atheist in Foxhole" award by the Foundation to Philip Paulson, a state/church litigant and Vietnam vet. In his speech, Paulson noted: "I have seen people pray during a firefight, putting their buddies' lives at risk by wasting precious time with their superstitious gibberish and psychobabble."

- **Freethought Today, December 2006, p. 12-13:**

  In "Thank Goodness," bestselling author Prof. Daniel C. Dennett, now an FFRF lifetime member, writes about nearly dying but surviving thanks to modern medicine. He then recounts how often acquaintances told him they were praying for him, and analyzes what's wrong with that, and what's what with wasting time and effort in prayer, and why it is problematic to inflict prayer on others.

- **Freethought Today, May 2007, p. 4:**

  "What's Wrong with the National Day of Prayer," a full-page article by Texas activist Catherine Fahringer, recounted the history of the NDP, cited Thomas Jefferson opposing national days of prayer, quoted James Madison against a union of government and religion, cited the Constitution, cited the Sermon on the Mount, and pictured Catherine, then in her mid-80s, picketing the San Antonio NDP held on the steps of City Hall on the National Day of Prayer with other friends. One sign said, "This loathsome combination of church & state," quoting Jefferson. Another quoted President Ulysses S. Grant, 'Keep

the Church and state forever separated.' Catherine consulted a Catholic monsignor who agreed with her that prayer should be quiet and private.

- **Freethought Today, November 2007, p. 10:**

  "Secularists Chide Gov. Perdue for His Prayer Service to Pray for Rain," is the headline of a news story about Georgia Foundation members protesting a rally held by Gov. Sonny Perdue at the Georgia State Capitol. The article includes three photos, including of a poster reading "Nothing Fails like Prayer, ffrf.org." The Foundation, with the Atlanta Freethought Society, endorsed a protest of the religious service on Tues. Nov. 13. The article recounted how Annie Laurie Gaylor wrote a letter to the governor saying, "Our hearts go out to everyone affected" by the crisis drought, yet this "does not excuse the use of a government office to sponsor a prayer service." "You have a history of making prayer proclamations," Gaylor wrote Perdue. "It is time to quit confusing the office of governor with that of 'state preacher.' "

- **Freethought Today, May 2008, p. 3:**

  "FFRF Objects to Sheriff Department-Sponsored Prayer Breakfast" is the major article, recounting the Foundation's complaint to the Sheriff of Burnett Co., Wis., whose office was hosting and arranging its eighth annual prayer breakfast. The Foundation also asked Wisconsin Supreme Court Justice-Elect Michael Gableman to cancel his acceptance to speak, although he did not.

- **Freethought Today, October 2008, p. 1-3:**

  "FFRF Sues Bush, Dobson, Doyle over National Day of Prayer," is the page-one banner story. On p. 3, Freethought Today reprinted in full President Bush's NDP 2008 Proclamation. It also put online all 50 gubernatorial proclamations.

- **Freethought Today, November 2008, 1-5:**

  "FFRF Sues Gov. Ritter over Prayer Proclamations," reports on the Foundation's second NDP lawsuit, filed in state court in Colorado, and reprints the Legal Complaint. Governor Ritter's 2008 proclamation is reprinted in full on p. 5.

- **Freethought Today, January/February 2009:**

  An obituary for Catherine Fahringer, 1922-2008, noted her activism for secular government, including how she organized a 1994 "Rally for Reason" to protest the National Day of Prayer. (Ex. 1 at 8-37.)

222. Annie Laurie Gaylor has tirelessly observed and participated in protesting the NDP by monitoring violations, often reporting on violations or FFRF protests of the violations, writing press releases or letters of complaint and urging members to protest violations at local, regional or national levels. (Ex. 1 at 37.)

223. Paul Gaylor participated in and took photographs and was security for the "first annual Wisconsin prayer breakfast" counterpicket, at the Concourse Hotel, 1 W. Dayton St., Madison, Wis., Friday, March 20, 1992. (Ex. 1 at 37.)

224. As an FFRF volunteer, Paul Gaylor also helped to open the heavy volume of mail for FFRF for at least 10 years, and he encountered letters or clippings related to complaints about the National Day of Prayer and governmental prayer and prayer breakfasts, etc., and he discussed these violations and strategies to deal with them with his wife, Anne Gaylor, and other members of the FFRF Executive Council and Board of Directors. (Ex. 1 at 37.)

225. Dan Barker too has opposed the National Day of Prayer, in written comments that have been published over the years. (Ex. 1 at 38.)

T. The National Day of Prayer Is Exclusionary Of The Plaintiffs.

226. Phyllis Rose, for her part, has become aware that the National Day of Prayer occurs every year, at which time the President issues a proclamation encouraging all citizens to pray. (Ex. 1 at 38.)

227. Ms. Rose is offended and disturbed by the government asking persons to pray. (Ex. 1 at 38.)

228. Ms. Rose is offended by the government taking a position regarding religion, including the position that Americans are a better people because of their religious convictions. (Ex. 1 at 38.)

229. Ms. Rose, in fact, began volunteering with the Freedom From Religion Foundation because she found the government's promotion of religion to be harder and harder to ignore. (Ex. 1 at 38.)

230. Ms. Rose is opposed to the government's promotion of religion and the false insinuation that Americans are better because of prayer. (Ex. 1 at 38.)

231. Ms. Rose believes that her views regarding the separation of church and state are not being represented in government. (Ex. 1 at 38-39.)

232. The assumption that the United States is a better country and that individuals are better persons as a result of prayer is not shared by Ms. Rose. (Ex. 1 at 39.)

233. The superiority of prayerfulness seems to have become mainstream view in the United States government, however, as reflected by the National Day of Prayer, according to Ms. Rose. (Ex. 1 at 39.)

234. Ms. Rose feels that persons who profess religious beliefs are, in fact, accorded greater political influence. (Ex. 1 at 39.)

U. FFRF Devotes Substantial Resources To Combat National Day of Prayer.

235. Staff time and staff efforts have been dedicated by FFRF opposing the National Day of Prayer, including by individual plaintiffs, as well as by staff attorney, Rebecca Kratz. (Ex. 1 at 39-40.)

236. In Anne Gaylor's 28 years as president of FFRF, the repetition of National Day of Prayer violations, along with the accelerating local and regional violations and increased publicity about them all, and increased pressure by the religious right to involve public officials

at all levels and to dictate the content of prayer proclamations, made Anne's work harder. (Ex. 1 at 40.)

237. One cannot separate church and state when the highest office holder in the country is telling everybody to pray, according to Anne Gaylor. (Ex. 1 at 40.)

238. State and local officials imitating the NDP Proclamation and events have made the work of FFRF all the harder. (Ex. 1 at 40.)

239. FFRF's membership has urged FFRF to continue to protest the National Day of Prayer, and the members expect FFRF to show leadership and represent the views of the nonreligious who are excluded by NDP proclamations and events. (Ex. 1 at 40.)

240. The National Day of Prayer law weakens the Establishment Clause, creates a bad example, and encourages public officials to promote their personal religious convictions on public time and dime and with their imprimatur of support. (Ex. 1 at 41.)

241. The National Day of Prayer law clearly has produced countless similar violations, which the proclamations are intended to do, according to Anne Gaylor. (Ex. 1 at 41-42.)

242. Because the purpose of FFRF is state/church separation, it is destructive to its organization to have an illegal and unconstitutional law promoted year after year all across the country by public employees and politicians, notes Anne Gaylor. (Ex. 1 at 42.)

243. It has been a continual burden on FFRF just replying to complaints about the National Day of Prayer, dealing with members who are impatient and urging FFRF to do something about it. (Ex. 1 at 43.)

244. According to Annie Laurie Gaylor, the 1952 law establishing a National Day of Prayer has long impeded the ability of the Freedom From Religion Foundation to protect the constitutional principle of the separation between church and state. (Ex. 1 at 43.)

245. When FFRF members have phoned the office, irate over the existence of the National Day of Prayer, Annie Laurie Gaylor, as a co-founder, Board Member, longtime staff member and now co-president and officer, has felt her hands were tied in addressing the fallout from the National Day of Prayer law, given the apparent government sanction of the event. (Ex. 1 at 43-44.)

246. It is clear to Annie Laurie Gaylor that the 1952 law has spawned a whole host of other violations, at the national, state and local levels around the country. These violations include the National Prayer Breakfast (put on by a private Christian fundamentalist entity, but attracting almost every member of Congress, the President and international dignitaries every February and ample media coverage). The violations also include annual gubernatorial proclamations. They include NDP involvement by many mayors and county executives and other public officials, including sheriffs, who make proclamations or host official prayer breakfasts or who allow prayer breakfasts to use their official position in the title. In fact, there are now many state or local prayer breakfasts spawned by the National Day of Prayer. (Ex. 1 at 44.)

247. FFRF members have attended NDP or related prayer breakfast events to monitor them, have written letters to public officials about such events, have sometimes picketed events held on courthouse steps or municipal buildings, but it is impossible to get to the heart of the problem--that it is unconstitutional and unconscionable for a public official to direct "the religious exercise of his constituents" (in Thomas Jefferson's words). (Ex. 1 at 44.)

V. FFRF Members Suffer Injury As Result Of National Day of Prayer.

248. FFRF members also are injured when the President and the Governors order them to pray, or tell them to pray, or even simply suggest that they and all other citizens ought to pray. (Ex. 1 at 45.)

249. Annie Laurie Gaylor does not believe in a god. She does not believe that prayer can suspend the natural laws of the universe. She considers the very concept of prayer to be absurd. This intellectual aversion to prayer is shared by the membership of the Freedom From Religion Foundation and by rationalists, who by definition reject the idea of the supernatural. (Ex. 1 at 45.)

250. When the President proclaims a National Day of Prayer, Annie Laurie Gaylor and other FFRF members feel excluded, disenfranchised, affronted, offended and deeply insulted. (Ex. 1 at 45.)

251. When the President tells "all" Americans to pray, as most of them have exhorted in their Proclamations since 1952, this admonishment disenfranchises "all" who do not pray or believe in prayer or believe in a deity who answers prayer. (Ex. 1 at 45.)

252. Annie Laurie Gaylor feels as excluded as most Christians would feel if the President or their Governor were to issue a prayer proclamation to Allah, pointing out that Mohammed is his Prophet, or as they would feel if Vishnu were referenced, or Jehovah. (Ex. 1 at 45.)

253. No so-called civil religion or prayer to a deity can possibly include atheists, agnostics and other self-identified "nonreligious." (Ex. 1 at 45.)

254. Annie Laurie Gaylor feels deeply embarrassed by governmental displays of faith, religion or worship, but when they are directed at her, the feeling of being coerced and told how to think about religion is magnified. (Ex. 1 at 45.)

255. Annie Laurie Gaylor considers being told to pray, or even being encouraged to pray, by a President or Governor to be a tyrannical act, which robs her of freedom of conscience. (Ex. 1 at 46.)

256. Reading the 2008 Proclamation, by President Bush, Dan Barker was told by his President that "America trusts in the abiding power of prayer and asks for the wisdom to discern God's will in times of joy and of trial. As we observe this National Day of Prayer, we recognize our dependence on the Almighty, we thank Him for the many blessings He has bestowed upon us, and we put our country's future in His hands." (Ex. 1 at 46.)

257. It appeared to Mr. Barker that President Bush was assuming that he, as an American, was also "observing," "recognizing," and "thanking God." (Ex. 1 at 46.)

258. Reading further, Mr. Barker was informed that President Bush asked "the citizens of our nation to give thanks . . . for God's continued guidance, comfort, and protection." (Ex. 1 at 46.)

259. Mr. Barker is a citizen of the United States, but he does not believe in "God" or any god, so he felt excluded by that wording and concluded that President Bush considered only believers to be part of "we, the people." (Ex. 1 at 46-47.)

260. Similar to President Bush the year before, Mr. Barker read that President Obama called upon "Americans to pray in thanksgiving for our freedoms and blessings and to ask for God's continued guidance, grace, and protection for this land that we love." (Ex. 1 at 47.)

261. Because Mr. Barker does not believe in God, or pray, he wondered how his president could ask him, an American, to "ask for God's guidance." Mr. Barker felt excluded, like a second-class American. (Ex. 1 at 47.)

W. FFRF Responds To Pervasive National Day of Prayer Observances.

262. The FFRF office has received countless complaints over the years by members, and members of the public, critical of the National Day of Prayer, at the federal, state or local level. (Ex. 1 at 47.)

263. FFRF has had several major campaigns to encourage public officials to balance NDP Proclamations and religious proclamations with secular proclamations. They are identified at FFRF's website: http://ffrf.org/timely/proclamations. (Ex. 1 at 48.)

264. To balance or respond to the National Day of Prayer and its related spawns, FFRF and its members have asked governors, mayors and county executives to issue "Celebrate State/Church Separation Month," "Freethought Week," and Give Thanks for State/Church Separation Week." (Ex. 1 at 48.)

265. FFRF has also suggested a "National Day of Reason" for the first Thursday in May (2005 news release). (Ex. 1 at 48.)

266. FFRF, in the late 1980s, also sent letters to all mayors of cities of 30,000 or more, asking them not to issue religious proclamations and suggesting secular alternatives. (Ex. 1 at 48.)

267. In 2005, the Freedom from Religion Foundation wrote to each of the state governors complaining about the public observance of the National Day of Prayer and requesting issuance of secular proclamations. (Ex. 98.)

268. FFRF has been actively involved in opposing the establishment of religion by government, including long opposition to the National Day of Prayer. (Exs. 98-114.)

269. In 2008, FFRF vigorously opposed an NDP Prayer Breakfast hosted by the Sheriff of Burnett County in Wisconsin, to which observance the Sheriff invited participants on his official letterhead. (Ex. 103.)

270. The Burnett County NDP observance featured newly-elected Wisconsin Supreme Court Justice Michael Gableman, who espoused a creationist philosophy and the need for public prayer. (Ex. 103 at 3-4.)

X. The Dedicated National Day of Prayer Detrimentally Affects FFRF Goal Achievement.

271. Media coverage of local governmental observances of the National Day of Prayer have become pervasive and they have been opposed by FFRF. (Exs. 103-105.)

272. The exposure to, awareness of, and reactions of FFRF members to the National Day of Prayer are reported in many of their survey comments. (Ex. 126.)

273. The Freedom from Religion Foundation is an educational group working for the separation of church and state; its purposes are to promote the constitutional principle of separation of church and state and to educate the public on matter of nontheism. (Ex. 112 at 3 and Ex. 122.)

274. FFRF tries to fulfill its purpose by acting on violations of separation of church and state on behalf of members and the public, including by filing successful law suits that have ended a variety of First Amendment violations. (Ex. 113 at 1 and Ex. 122.)

275. FFRF also publishes the only freethought newspaper in the United States, Free Thought Today; sponsors annual high school and college Free Thought essay competitions with

cash awards; conducts annual national conventions; promotes freedom from religion with educational products, bumper stickers, literature, etc.; publishes useful free thought books; provides speakers for events in debates; and has established a free thought book collection at the University of Wisconsin Memorial Library. (Ex. 113 at 1 and Ex. 122.)

276. FFRF's challenge to the National Day of Prayer in this court action is merely referenced as one of many activities of the Foundation in its 2008 Year In Review. (Ex. 114.)

277. FFRF's opposition to the National Day of Prayer via the pending litigation does not represent the Foundation's first public opposition, which has been a constant in FFRF actions; FFRF has publicly expressed its objection to the National Day of Prayer for many years. (Exs. 103-111.)

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

278. FFRF recently surveyed its members regarding their exposure to and reaction to the National Day of Prayer. (Ex. 124.)

279. Nearly 1,500 respondents indicated they were exposed to media coverage of local or National Day of Prayer events and nearly 600 respondents reported exposure via participation by local or state officials in National Day of Prayer events. (Ex. 125.)

280. Over 1,500 respondents also reported that the message conveyed by National Day of Prayer proclamations constitutes religious endorsement and that as non-believers they are outsiders. (Ex. 125.)

281. The exposure to, awareness of, and reactions of FFRF members to the National Day of Prayer are reported in many of their survey comments. (Ex. 126.)

282. FFRF raises national awareness of the need to keep state and church separate, including by generating "significant publicity through its legal and educational challenges, free thought activities and the accomplishments of individual members." (Ex. 112 at 5.)

283. Rep. J. Randy Forbs, R-VA, head of the Congressional Prayer Caucus, describes the National Day of Prayer as a "monumental religious event." (Ex. 127 at 2.)

284. FFRF members, including the individual plaintiffs, and also other members, are exposed to, and have opposed, the National Day of Prayer activities, including Linda Allewalt, in Kentucky. (Allewalt Declaration.) Ms. Allewalt specifically has objected to Kentucky Governor Beshear's proclamations which offend her and make her feel like an outsider as a result of her non-belief. (Allewalt Declaration.)

Dated this 11th day of December 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2009, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification electronically to all attorneys of record.

/s/Rosalie G. Stapleton
Rosalie G. Stapleton

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The following is the entire text of General Order No. 11, mandating the creation of the first Memorial Day, May 30, 1868:

HEADQUARTERS GRAND ARMY OF THE REPUBLIC

General Orders No.11, WASHINGTON, D.C., May 5, 1868

I. The 30th day of May, 1868, is designated for the purpose of strewing with flowers or otherwise decorating the graves of comrades who died in defense of their country during the late rebellion, and whose bodies now lie in almost every city, village, and hamlet church-yard in the land. In this observance no form of ceremony is prescribed, but posts and comrades will in their own way arrange such fitting services and testimonials of respect as circumstances may permit.

We are organized, comrades, as our regulations tell us, for the purpose among other things, "of preserving and strengthening those kind and fraternal feelings which have bound together the soldiers, sailors, and marines who united to suppress the late rebellion." What can aid more to assure this result than cherishing tenderly the memory of our heroic dead, who made their breasts a barricade between our country and its foes? Their soldier lives were the reveille of freedom to a race in chains, and their deaths the tattoo of rebellious tyranny in arms. We should guard their graves with sacred vigilance. All that the consecrated wealth and taste of the nation can add to their adornment and security is but a fitting tribute to the memory of her slain defenders. Let no wanton foot tread rudely on such hallowed grounds. Let pleasant paths invite the coming and going of reverent visitors and fond mourners. Let no vandalism of avarice or neglect, no ravages of time testify to the present or to the coming generations that we have forgotten as a people the cost of a free and undivided republic.

If our eyes grow dull, other hands slack, and other hearts cold in the solemn trust, ours shall keep it well as long as the light and warmth of life remain to us.

Let us, then, at the time appointed gather around their sacred remains and garland the passionless mounds above them with the choicest flowers of spring-time; let us raise above them the dear old flag they saved from dishonor; let us in this solemn presence renew our pledges to aid and assist those whom they have left among us a sacred charge upon a nation's gratitude, the soldier's and sailor's widow and orphan.

II. It is the purpose of the Commander-in-Chief to inaugurate this observance with the hope that it will be kept up from year to year, while a survivor of the war remains to honor the memory of his departed comrades. He earnestly desires the public press to lend its friendly aid in bringing to the notice of comrades in all parts of the country in time for simultaneous compliance therewith.

III. Department commanders will use efforts to make this order effective.

By order of

JOHN A. LOGAN,
Commander-in-Chief

N.P. CHIPMAN,
Adjutant General

Official:
WM. T. COLLINS, A.A.G.

Benjamin Harrison
Remarks During Decoration Day Ceremonies at Laurel Hill Cemetery in Philadelphia
May 30, 1891

Commander, Comrades of the Grand Army of the Republic and Fellow-Citizens:

I have neither the strength nor the voice adequate to any extended speech to-day. I come to you as a comrade, to take part in the interesting exercises of this Memorial Day. It gives me special pleasure to combine with that tribute, which I have usually been able to pay since this day was instituted, to the dead of all our armies, a special mark of respect to that great soldier who won Gettysburg. It is impossible to separate some impressions of sorrow from the exercises, for they bring to memory comrades who have gone from us. How vividly come to my memory many battle scenes; not the impetuous rush of conflict, but the cover of sadness that followed victory. Then it was our sad duty to gather from the field the bodies of those who had given the last pledge of loyalty. There is open to my vision more than one yawning trench in which we laid the dead of the old brigade. We laid them elbow touching elbow in the order in which they had stood in the line of battle. We left them in the hasty sepulcher and marched on. Now we rejoice that a grateful Government has gathered together the scattered dust of all of these comrades and placed them in beautiful and safe places of honor and repose. I can not but feel that if they could speak to us to-day they would say put the flag at the top of the mast. I have recently returned from an extended tour of the States, and nothing so impressed and so refreshened me as the universal display of this banner of beauty and glory. It waved over every school; it was in the hands of the school children. As we speeded across the sandy wastes at some solitary place, a man, a woman, a child, would come to the door, and wave it in loyal greeting.

Two years ago I saw a sight that has ever been present in my memory. As we were going out of the harbor of Newport, about midnight, on a dark night, some of the officers of the torpedo station had prepared for us a beautiful surprise. The flag at the depot station was unseen in the darkness of the night, when suddenly electric search lights were turned on it, bathing it in a flood of light. All below the flag was hidden, and it seemed to have not touch with earth, but to hang from the battlements of heaven. It was as if heaven was approving the human liberty and human equality typified by that flag. Let us take on this occasion a new draught of courage, make new vows of consecration, for, my countrymen, it was not because it was inconvenient that the rebel States should go, not that it spoiled the autonomy of the country, but because it was unlawful that all this sacrifice had to be made to bring them back to their allegiance. Let us not forget that as good citizens and good patriots it is our duty always to obey the law, and to give it our loyal support, and insist that everyone else shall do so. There is no more mischievous suggestion made than that the soldiers of the Union Army desire to lay any yoke on those who fought against us, other than the yoke of the law. We can not ask less than that in all relations they shall obey the law, and they shall yield to every other man his full rights under the law.

I thank you for the pleasure of participating in these exercises with you to-day, and give you a comrade's best wishes, and a comrade's good-bye.

Benjamin Harrison
Remarks During Decoration Day Ceremonies in Independence Hall, Philadelphia
May 30, 1891

Mr. Mayor, Comrades of the Grand Army of the Republic, and Fellow-Citizens:

I esteem it a great pleasure to stand in this historic edifice, in this historic city, to take part to-day as a comrade of the Grand Army of the Republic in these instructive and interesting exercises, which have been instituted to keep alive in our hearts the memories of patriotic devotion and sacrifice. It is eminently appropriate that we should stand for a little before we go to the graves of our dead in this edifice where the foundation declarations of independence and of civil government were made and put into that course of development which has brought our nation to its present position of prosperity and of influence among the nations of the earth.

I have recently, in an extended trip, been able to see what the flower is of the seed that was planted here. We are here, in Philadelphia, a community instituted upon the principles of peace and good will among men; and yet, in a community that had given conspicuous illustration of the fact that the fruits of peace may sometimes be made to be defended by the valor of soldiers, you did not at all depart from the great lessons which were taught by the founders of this great colony, when, uniting with your comrades from all the States, you went out into the field to hold up this banner; to maintain a peace which should be perpetual and pervading in all the States. Obedience to law is the first element of domestic peace and social order. You went out to maintain, and have established, as I believe, again in the affections of all our people, the old flag of our fathers, and have settled perpetually the question of loyal submission to the Constitution and the law in all the States. It has been settled to the great contentment and happiness of all our people, and brought what any other nation could have brought, prosperity to every section and every State.

I appreciate most highly this generous welcome which you extend to me, and shall take part in these exercises of the day with a sense of their fitness and of the great events which they commemorate.

I have never been able to think of the day as one of mourning; I have never quite been able to feel that half-masted flags were appropriate on Decoration Day. I have rather felt that the flag should be at the peak, because those whose dying we commemorate rejoiced in seeing it where their valor placed it. We honor them in a joyous, thankful, triumphant commemoration of what they did. We mourn for them as comrades who have departed, but we feel the glory of their dying and the glory of their achievement covers all our great country, and has set them in an imperishable roll of honor.

Woodrow Wilson
Memorial Day Address
May 30, 1914

Ladies and Gentlemen:

I have not come here to-day with a prepared address. The committee in charge of the exercises of the day have graciously excused me on the grounds of public obligations from preparing such an address, but I will not deny myself the privilege of joining with you in an expression of gratitude and admiration for the men who perished for the sake of the Union. They do not need our praise. They do not need that our admiration should sustain them. There is no immortality that is safer than theirs. We come not for their sakes but for our own, in order that we may drink at the same springs of inspiration from which they themselves selves drank.

A peculiar privilege came to the men who fought for the Union. There is no other civil war in history, ladies and gentlemen, the stings of which were removed before the men who did the fighting passed from the stage of life. So that we owe these men something more than a legal reestablishment of the Union. We owe them the spiritual reestablishment of the Union as well; for they not only reunited States, they reunited the spirits of men. That is their unique achievement, unexampled anywhere else in the annals of mankind, that the very men whom they overcame in battle join in praise and gratitude that the Union was saved. There is something peculiarly beautiful and peculiarly touching about that. Whenever a man who is still trying to devote himself to the service of the Nation comes into a presence like this, or into a place like this, his spirit must be peculiarly moved. A mandate is laid upon him which seems to speak from the very graves themselves. Those who serve this Nation, whether in peace or in war, should serve it without thought of themselves. I can never speak in praise of war, ladies and gentlemen; you would not desire me to do so. But there is this peculiar distinction belonging to the soldier, that he goes into an enterprise out of which he himself cannot get anything at all. He is giving everything that he hath, even his life, in order that others may live, not in order that he himself may obtain gain and prosperity. And just so soon as the tasks of peace are performed in the same spirit of self-sacrifice and devotion, peace societies will not be necessary. The very organization and spirit of society will be a guaranty of peace.

Therefore this peculiar thing comes about, that we can stand here and praise the memory of these soldiers in the interest of peace. They set us the example of self-sacrifice, which if followed in peace will make it unnecessary that men should follow war any more.

We are reputed to be somewhat careless in our discrimination between words in the use of the English language, and yet it is interesting to note that there are some words about which we are very careful. We bestow the adjective "great" somewhat indiscriminately. A man who has made conquest of his fellow-men for his own gain may display such genius in war, such uncommon qualities of organization and leadership that we may call him "great," but there is a word which we reserve for men of another kind and about which we are very careful; that is the word "noble." We never call a man "noble" who serves only himself; and if you will look about through all the nations of the world upon the statues that men have erected—upon the inscribed tablets where they have wished to keep alive the memory of the citizens whom they desire most to honor—you will find that almost without exception they have erected the statue to those who had a splendid surplus of energy and devotion to spend upon their fellow-men. Nobility exists in America without patent. We have no House of Lords, but we have a house of fame to which we elevate those who are the noble men of our race, who, forgetful of themselves, study and serve the public interest, who have the courage to face any number and any kind of adversary, to speak what in their hearts they believe to be the truth.

We admire physical courage, but we admire above all things else moral courage. I believe that soldiers will bear me out in saying that both come in time of battle. I take it that the moral courage comes in going into the battle, and the physical courage in staying in. There are battles which are just as hard to go into and just as hard to stay in as the battles of arms, and if the man will but stay and think never of himself there will come a time of grateful recollection when men will speak of him not only with admiration but with that which goes deeper, with affection and with reverence.

So that this flag calls upon us daily for service, and the more quiet and self-denying the service the greater the glory of the flag. We are dedicated to freedom, and that freedom means the freedom of the human spirit. All free spirits ought to congregate on an occasion like this to do homage to the greatness of America as illustrated by the greatness of her sons.

It has been a privilege, ladies and gentlemen, to come and say these simple words, which I am sure are merely putting your thought into language. I thank you for the opportunity to lay this little wreath of mine upon these consecrated graves.

Note: Delivered at the National Cemetery, Arlington, Va., May 30, 1914.

Calvin Coolidge
Address at the Memorial Exercises Arlington National Cemetery, Arlington, Va.
May 30, 1927

Fellow Countrymen:
In accordance with long-established custom we gather here on this returning Decoration Day to pay the tribute of respect and reverence due from their Government to those who have borne arms in defense of the flag of our Republic. In no other country could the people feel, in performing a like ceremony, that they were engaged in a more worthy purpose. When this Nation has been compelled to resort to war, it has always been for a justifiable cause. The pages of its history are not stained with the blood of unprovoked conflict. No treachery has ever exposed our sister nations to unwarranted attack. No lust or conquest, no craving for power, no greed or territory, no desire for revenge has ever caused us to violate the covenants of international peace and tranquillity.

We have robbed no people of their independence, we have laid on no country the hand of oppression. When our military forces have taken the field it has been to enlarge the area of self-government, to extend the scope of freedom, and to defend the principles of liberty. We have established our independence, resisted encroachment upon our sovereignty, maintained our national union, rescued afflicted people from their oppression, and brought victory to the cause of liberty in a world convulsion. To all of our departed dead who, on land and on sea, have offered their blood in the support of this holy and triumphant cause, America to-day brings its affectionate garlands of honor and acclaim.

We can not contemplate these graves which are all about us, we can not recall the history which they symbolize, without a deep consciousness that they have placed upon us an obligation to take a firmer resolution that their sacrifices are to have an influence on our conduct. The place which these heroic figures hold in history is forevermore secure. They did not hesitate, they did not yield, they met their duty squarely. For its fulfillment they were prepared to give their fortunes and their lives. It ought never to be forgotten that it was out of this spirit, supported by these sacrifices, that our country was established, its Constitution adopted and supported, its institutions formed, and its progress and prosperity created, with all that these have meant to the success and happiness of our own people and to the advancement of human welfare all over the world.

Reverence for the dead should not be divorced from respect for the living. If we hold those who have gone before in high estimation, it will reflected in our conduct toward those who are still with us. It would be idle to place a wreath on the grave of the dead and leave ungarlanded the brow of the living. Our devotion to the memory of those who have served their country in the past is but a symbol of our devotion to those who are serving their country at present. Although fortunate circumstances have placed us in the position where we do not need to maintain large and burdensome military forces, although we are a people peculiarly devoted to the arts of peace, yet these are no reasons why we should withhold anything of the just appreciation that is due to those who are devoting their lives to the profession of arms. These men stand ready to respond at any moment to the order of our Government to proceed to any point within our own country or to any portion of the globe where disorder and violence threaten the peaceful rights of our people. Their post is always the post of danger and their lives are spent in service and sacrifice to promote the welfare of their country. America has a just right to satisfaction and pride in the personnel and purpose of its Army and Navy. We can not be loyal to the flag if we fail in our admiration for the uniform.

However much we wish to pursue the paths of peace, however much we are determined to have on terms of good will both at home and abroad, we can not escape the fact that there are still evil forces in the world which all past experience warns us will break out from time to time and do serious damage to

lawful rights and the progress of civilization unless we are prepared to meet such situations with armed intervention. We could no more dispense with our military forces than we could dispense with our police forces. While we are firmly convinced that it is altogether practical and possible by international covenants to limit them in size, to consent to their abolition could be to expose ourselves first to aggression and finally to destruction.

If we are sincere in our expressed determination to maintain tranquility at home and peace abroad, we must not neglect to lay our course in accordance with the ascertained acts of life. We know that we have come into possession of great wealth and high place in the world. There is scarcely a civilized nation which is not our debtor. We are sufficiently acquainted with human nature to realize that we are oftentimes the object of envy. Unless we maintain sufficient forces to be placed at points of peril when they arise, thereby avoiding for the most part serious attack, there would be grave danger that we should suffer from violent outbreaks, so destroying our rights and compromising our honor that war would become inevitable. It is to protect ourselves from such danger that we maintain our national defense. Under his policy it is perfectly apparent that our forces are dedicated solely to the preservation of peace.

Although we are well aware that in the immediate past, and perhaps even now there are certain localities where our citizens would be given over to pillage and murder but for the presence of our military forces, nevertheless it is the settled policy of our Government to deal with other nations not on the basis of force and compulsion, but on the basis of understanding and good will. While the wish for peace everywhere, it is our desire that it should be not a peace imposed on American, but a peace established by each nation for itself. We want our relationship with other nations based not on a meeting of bayonets, but on a meeting of minds. We want our intercourse with them to rest on justice and fair dealing and the mutual observance of all rightful obligations in accordance with international custom and law. We have sufficient reserve resources so that we need not be hasty in asserting our rights. We can afford to let our patience be commensurate with our power.

As Americans we are always justified in glorying in our own country. While offensive boastfulness may be carried to the point of reproach, it is much less to be criticized than an attitude of apologetic inferiority. Not to know and appreciate the many excellent qualities of our own country constitutes an intellectual poverty which instead of being displayed with pride ought to be acknowledged with shame. While pride in our country ought to be the American attitude, it should not include any spirit of arrogance or contempt toward other nations. All people have points of excellence and are justly entitled to the honorable consideration of other nations. While this land was still a wilderness there were other lands supporting a high state of civilization and enlightenment. On the foundation which they had already laid we have erected our own structure of society. Their ways may not always be our ways, and their thoughts may not always be our thoughts, but in accordance with their own methods they are attempting to maintain their position in the world and discharge their obligations to humanity. We shall best fulfill our mission by extending to them all the hand of helpfulness, consideration, and friendship. Our own greatness will be measured by the justice and forbearance which we manifest toward other.

It is because of our belief in these principles that we wish to see all the world relieved from strife and conflict and brought under the humanizing influence of a reign of law. Our conduct will be dictated, not in accordance with the will of the strongest, but in accordance with the judgments of righteousness. It is in accordance with this policy that we have thought to discontinue the old practice of competition in armaments and cast our influence on the side of reasonable limitations. We wish to discard the element of force and compulsion in international agreements and conduct and rely on reason and law. We recognize that in the present state of the world this is not a vision which will be immediately realized, yet little by little, step by step, in a very practical way, we should show our determination to press on toward this mark of our high calling.

Our Government has recently been attempting to proceed in accordance with these principles in its relations with China, Nicaragua, and Mexico, and in inviting Japan and Great Britain to participate in a three-power naval imitation conference.

While the foreign relations of this country are becoming more and more important, and constitute a field to which it will be necessary for our Government and our people to give much more attention than is now realized, yet it is our domestic affairs that must always assume the first rank. Nations which are worn by dissension and discord, which are weak and inefficient at home, have little standing or influence abroad. Even the blind do not choose the blind to lead them. Foreign peoples are certainly going to seek assistance only from those who have demonstrated their capacity to maintain their own affairs efficiently. If we desire to be an influence in order and law, tranquillity and good will in the world, we must be determined to make sufficient sacrifices to live by these precepts at home. We can be a moral force in the world only to the extent that we establish morality in our own country.

This day had its inception in the desire to do honor to those who had followed the flag in our great domestic struggle for the preservation of the Union and the supremacy of the Constitution. Like all principles expressive of a great truth, it has gradually broadened in its aspects to include within its sacred domain all of those who have followed our flag. But we should never permit this 30th day of May to go by without some expression of our peculiar debt of gratitude to those who offered their lives to their country under the leadership of Abraham Lincoln. When that great conflict was ended, when it was apparent that our Federal Union was to be perpetual, that our Constitution was to be supreme, that all our people were to be free, America spoke with a new authority in the affairs of the world.

The questions at issue in those days were decided with all the finality which can attach to human affairs. Those who had taken a leading part in their decision were the prominent exponents of a policy of reconciliation. General Grant pled for "Harmony and good feeling between the sections," while General Lee declared "Restoration of peace should be the sole object of all." The people of our generation have seen these admonitions needed and these hopes realized.

The advocates of secession were not confined in our history to any one section. They had appeared in the hills of Pennsylvania, they had met in convention in New England, they had adopted resolutions in Kentucky, they had taken up arms in South Carolina. That issue has been decided. It has no advocates now. But it has left its heirs and successors in all the different brands of sectionalism with their special pleaders who are oftentimes extremely vocal. In the eyes of our National Government all parts of our country are equally important and entitled to equal consideration. They are all parts of one common whole, which must succeed or fail together. All efforts to set one part against another part, to advance one section at the expense of another section, are a species of disloyalty to the spirit of the Union. It is only a small nature that wishes to divorce himself and his locality from the rest of the Nation. The true American contemplates the shore, the mountain, and the plain, and instead of desiring to withdraw himself from many of them rejoices in his realization that they are all his country.

The integrity of the Union rests on the Constitution. Unless that great instrument is to be the supreme law of the land, we could have no Union worthy of our consideration. In its original inception it was the product of prayerful consideration by the best endowed minds that were ever turned to political deliberation. Although it was drafted in convention, it represented the mature thought of the country. Into it went the genius of Adams and Jefferson, of Franklin and Madison, of Hamilton and Washington. It has been expounded by Webster and other statesmen in the Congress, and adjudicated by Marshall and other magistrates on the bench. With its three independent departments, the executive, legislative, and judicial, it established a republican form of government incomparable in the guaranties of order and liberty with which it has endowed the American people. As a charter of freedom and self-government it is unsurpassed by any political document which ever guided the destinies of a people.

We have made our place in the world through the Union and the Constitution. We have flourished as a people because of our success in establishing self-government. But all of these results are predicated upon a law-abiding people. If our own country should be given over to violence and crime, it would be necessary to diminish the bounds of our freedom to secure order and self-preservation. In whatever direction we may go we are always confronted with the inescapable conclusion that unless we observe the law we can not be free. Unless we are an industrious, orderly nation we can neither minister to our own requirements or be an effective influence for good in the world. All of these things come from the hearts of the people. So long as they have the will to do right and the determination to make sacrifices, our institutions will stand secure at home and respected abroad. It is to those had that will, who showed that determination, that we to-day do honor.

We can not leave this hallowed ground, decorated as it is to-day with all the flowers which loving memory has brought, without realizing anew that it was the spirit of those who rest here which gave us our independence, our Constitution, who Union, and our freedom. They have bequeathed to us the rarest, richest heritage which was ever bestowed upon any people. Their memory speaks to us always, reminding us to what we have received from them and of our duty to dedicate ourselves to its preservation and perfection.

Herbert Hoover
Memorial Day Address at Arlington National Cemetery.
May 30, 1929

Fellow countrymen:

Over the years since the Civil War the Grand Army of the Republic have conducted this sacred ceremony in memoriam of those who died in service of their country. The ranks of their living comrades have been steadily thinned with time. But other wars have reaped their harvest of sacrifice and these dead too lie buried here. Their living comrades now join in conduct of this memorial, that it may be carried forward when the noble men who today represent the last [p.163] of the Grand Army shall have joined those already in the Great Beyond.

This sacred occasion has impelled our Presidents to express their aspirations in furtherance of peace. No more appropriate tribute can be paid to our heroic dead than to stand in the presence of their resting places and pledge renewed effort that these sacrifices shall not be claimed again.

Today, as never before in peace, new life-destroying instrumentalities and new systems of warfare are being added to those that even so recently spread death and desolation over the whole continent of Europe. Despite those lessons every government continues to increase and perfect its armament. And while this progress is being made in the development of the science of warfare, the serious question arises--are we making equal progress in devising ways and means to avoid those frightful fruits of men's failures that have blotted with blood so many chapters of the world's history?

There is a great hope, for since this day a year ago, a solemn declaration has been proposed by America to the world and has been signed by 40 nations. It states that they

"Solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." They

"Agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." That is a declaration that springs from the aspirations and hearts of men and women throughout the world. It is a solemn covenant to which the great nations of the world have bound themselves.

But notwithstanding this noble assurance, preparedness for war still advances steadily in every land. As a result the pessimist calls this covenant a pious expression of foreign offices, a trick of statesmen on the [p.164] hopes of humanity, for which we and other nations will be held responsible without reserve. With this view I cannot agree.

But, if this agreement is to fulfill its high purpose, we and other nations must accept its consequences; we must clothe faith and idealism with action. That action must march with the inexorable tread of commonsense and realism to accomplishment.

If this declaration really represents the aspirations of peoples; if this covenant be genuine proof that the world has renounced war as an instrument of national policy, it means at once an abandonment of the aggressive use of arms by every signatory nation and becomes a sincere declaration that all armament hereafter shall be used only for defense. Consequently, if we are honest we must reconsider our own naval armament and the armaments of the world in the light of their defensive and not their aggressive use. Our Navy is the first and in the world sense the only important factor in our national preparedness. It is a powerful part of the arms of the world.

To make ready for defense is a primary obligation upon every statesman and adequate preparedness is an assurance against aggression. But if we are to earnestly predicate our views upon renunciation of war as an instrument of national policy, if we are to set standards that naval strength is purely for defense and not for aggression, then the strength in fighting ships required by nations is but relative to that of other powers. All nations assent to this--that defensive needs of navies are relative. Moreover,

other nations concede our contention for parity. With these principles before us our problem is to secure agreement among nations that we shall march together toward reductions in naval equipment.
Despite the declarations of the Kellogg Pact, every important country has since the signing of that agreement been engaged in strengthening its naval arm. We are still borne on the tide of competitive building. Fear and suspicion disappear but slowly from the world. Democracies can only be led to undertake the burdens of increasing naval construction by continued appeal to fear, by constant envisaging of possible conflict, by stimulated imaginings of national dangers, by glorification [p.165] of war. Fear and suspicion will never slacken unless we can halt competitive construction of arms. They will never disappear unless we can turn this tide toward actual reduction.
But to arrive at any agreement through which we can, marching in company with our brother nations, secure reduction of armament, we must find a rational yardstick with which to make reasonable comparisons of their naval units with ours and thus maintain an agreed relativity. So far the world has failed to find such a yardstick. To say that such a measure cannot be found is the counsel of despair, it is a challenge to the naval authorities of the world, it is the condemnation of the world to the Sisyphean toil of competitive armaments.
The present administration of the United States has undertaken to approach this vital problem with a new program. We feel that it is useless for us to talk of the limitation of arms if such limitations are to be set so high as virtually to be an incitement to increase armament. The idea of limitation of arms has served a useful purpose. It made possible conferences in which the facts about national aspirations could be discussed frankly in an atmosphere of friendliness and conciliation. Likewise the facts of the technical problems involved and the relative values of varying national needs have been clarified by patient comparison of expert opinions.
But still the net result has been the building of more fighting ships. Therefore, we believe the time has come when we must know whether the pact we have signed is real, whether we are condemned to further and more extensive programs of naval construction. Limitation upward is not now our goal, but actual reduction of existing commitments to lowered levels.
Such a program, if it be achieved, is fraught with endless blessings. The smaller the armed force of the world, the less will armed force be left in the minds of men as an instrument of national policy. The smaller the armed forces of the world, the less will be the number of men withdrawn from the creative and productive labors. Thus we shall relieve the toilers of the nations of the deadening burden of unproductive expenditures, and above all, we shall deliver them from [p.166] the greatest of human calamities--fear. We shall breathe an air cleared of poison, of destructive thought, and of potential war.
But the pact that we have signed by which we renounce war as an instrument of national policy, by which we agree to settle all conflicts, of whatever nature, by pacific means, implies more than the reduction of arms to a basis of simple defense. It implies that nations will conduct their daily intercourse in keeping with the spirit of that agreement. It implies that we shall endeavor to develop those instrumentalities of peaceful adjustment that will enable us to remove disputes from the field of emotion to the field of calm and judicial consideration.
It is fitting that we should give our minds to these subjects on this occasion; that we should give voice to these deepest aspirations of the American people, in this place. These dead whom we have gathered here today to honor, these valiant and unselfish souls who gave life itself in service of their ideals, evoke from us the most solemn mood of consecration. They died that peace should be established. Our obligation is to see it maintained. Nothing less than our resolve to give ourselves with equal courage to the ideal of our day will serve to manifest our gratitude for their sacrifices, our undying memory of their deeds, our emulation of their glorious example.