

No. 10-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INCORPORATED, et al,
Plaintiffs-Appellees

v.

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

On Appeal from the United States District Court
for the Western District of Wisconsin, NO. 3:08-00588
The Hon. Barbara B. Crabb

**BRIEF OF *AMICUS CURIAE* NATIONAL DAY OF PRAYER TASK FORCE
IN SUPPORT OF DEFENDANTS-APPELLANTS**

Alan E. Sears, Esq.
Benjamin W. Bull, Esq.
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, Arizona 85260
Tel: (480) 444-0020
Fax: (480) 444-0025

Kevin H. Theriot, Esq.
Joel L. Oster, Esq.
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
Tel: (913) 685-8000
Fax: (913) 685-8001
joster@telladf.org

Attorneys for Amicus Curiae

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Appellate Court No: 10-1973

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Attorney's Signature: /s Joel L. Oster Date: July 8, 2010

Attorney's Printed Name: Joel L. Oster

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Address: Alliance Defense Fund 15192 Rosewood, Leawood, Kansas 66224

Phone Number: 913-685-8000 Fax Number: 913-685-8001

E-Mail Address: joster@telladf.org

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STATEMENT OF PARTIES CONSENT

All parties have consented to the filing of this amicus brief.

INTRODUCTION

The district court's order striking down the National Day of Prayer Statute¹ must be overturned as it contradicts controlling Supreme Court authority and ignores the long, unbroken history of official prayer proclamations in this country since its inception.

This case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Supreme Court held that a legislature can hire a person for the express purpose of giving a prayer. In *Marsh*, the Supreme Court rejected the same simplistic argument espoused by Plaintiffs here – that the government's involvement with prayer must violate the Establishment Clause because it implicates the state with a religious practice (prayer).

The Supreme Court has consistently rejected such a rigid, simplistic Establishment Clause jurisprudence. Instead, the Supreme Court adopted an historical analysis that focused on America's religious heritage. The Court concluded, "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."²

¹36 U.S.C. § 119 ("Public Law")

² *Id.*

In the same way, official prayer proclamations are deeply embedded in America's history. From the days of the Revolutionary War to today, public officials have regularly brought this nation together for a day of praying in accordance with each individual's tradition and beliefs. Calling the nation to prayer is not an establishment of religion, but rather, a tolerable acknowledgement of beliefs and practices widely held by Americans and practiced since its inception.³

INTERESTS OF AMICUS CURIAE

The National Day of Prayer Task Force ("NDP Task Force") is a private not-for-profit organization that seeks to protect and promote the United States' centuries-old tradition of publicly requesting the Almighty's guidance and assistance. Among other things, the NDP Task Force seeks to protect America's constitutional freedoms to gather, worship, pray and speak freely; to preserve America's religious heritage; to encourage and emphasize prayer, regardless of current issues and positions; and to respect all people, regardless of denomination or creed.

The NDP Task Force is uniquely interested in the factual and legal issues in this case as its chairperson, Shirley Dobson, was a defendant in the lawsuit below. While the district court ultimately dismissed the Plaintiffs' claims against Mrs.

³*Id.* at 792.

Dobson, she still participated in both the discovery and briefing of the issues in the district court. Thus, the NDP Task Force can provide a valuable perspective on the claims and arguments presented in this case.

ARGUMENT

I. OFFICIAL PRAYER PROCLAMATIONS ARE EMBEDDED IN AMERICAN HISTORY AND DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The legal issues concerning the merits of this case have already been settled by the Supreme Court in a much more difficult case – *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Nebraska Legislature asked a single chaplain to pray for its deliberations, and actually paid for such prayers. The plaintiffs made the same arguments that the Plaintiffs-Appellees are making here, and argued that seeking prayers for the state violated the Establishment Clause.⁴

The Court rejected this simplistic approach to Establishment Clause jurisprudence. In upholding legislative prayer, the Supreme Court stated, “*historical evidence* sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent.”⁵ The Court pointed out that the historical record shows that the “opening of sessions

⁴ *Id.* at 793.

⁵ 463 U.S. at 790 (emphasis added).

of legislative and other deliberative public bodies with prayer is deeply embedded in the history and traditions of this country.”⁶ The *Marsh* Court determined that the First Congress “did not consider opening prayers as a proselytizing activity or as symbolically placing the government’s official seal of approval on one religious view,” but rather, “conduct whose ... effect ...[harmonized] with the tenets of some or all religions.”⁷ The Court concluded, “To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”⁸

A. Official Prayer Proclamations Have Been Issued Since America’s Beginning.

In the same way, national prayer dates back to the very beginning of our country. During the Revolutionary War, a time period contemporary with the drafting and ratification of our Constitution, there is record of at least 15 prayer proclamations that were issued by the Continental Congress.⁹ For example, on June 12, 1775, the Continental Congress issued a proclamation stating,

⁶ *Id.* at 786.

⁷ *Id.* at 792.

⁸ *Id.*

⁹ See Journals of the Continental Congress, June 12, 1775, Volume 2, p. 87, <http://lcweb2.loc.gov/cgi-bin/query/r?ammem/hlaw:@field%28DOCID+@lit%28jc0022%29%29>.

This Congress, therefore, considering the present critical, alarming and calamitous state of these colonies, do earnestly recommend that Thursday, the 20th day of July next, be observed, by the inhabitants of all the English colonies on this continent, as a day of public humiliation, fasting and prayer....¹⁰

On March 16, 1776, the Continental Congress again declared,

The Congress, therefore, considering the war-like preparations of the British ministry to subvert our invaluable rights and privileges, and to reduce us by fire and sword, by the savages of the wilderness, and our own domestics, to the most abject and ignominious bondage: Desirous, at the same time, to have people of all ranks and degrees duly impressed with a solemn sense of God's superintending providence, and of their duty, devoutly to rely, in all their lawful enterprises, on his aid and direction, do earnestly recommend, that Friday, the 17th day of May next, be observed by the said colonies as a day of humiliation, fasting, and prayer¹¹

This practice of calling the nation to prayer carried over to the new American government. In George Washington's very first address as president, the first address by *any* president to this nation, he called this nation to prayer.

[I]t would be peculiarly improper to omit in this first official act my *fervent supplications to that Almighty Being* Who rules over the universe, Who presides in the councils of nations, and Whose providential aids can supply every human defect – that His benediction may consecrate to the liberties and happiness of the

¹⁰*Id.*

¹¹See Library of Congress, *Religion and the Congress of the Confederation*, July 7, 2010, <http://www.loc.gov/exhibits/religion/rel04.html>. Thus, contrary to the district court's findings, the practice of a congressionally or legislatively ordered day of prayer enjoys the same rich history as the issuance of presidentially proclaimed days of prayer.

people of the United States a government instituted by themselves for these essential purposes....

In tendering this homage [act of worship] to the Great Author of every public and private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large less than either. *No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States.* Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of Providential Agency. . . . [and] we ought to be no less persuaded that the propitious [favorable] smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained. . . . Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall take my present leave – *but not without resorting once more to the benign Parent of the Human Race in humble supplication* [prayer] that . . . His Divine blessing may be equally conspicuous in the enlarged views, the temperate consultations, and the wise measures on which the success of this government must depend.¹²

In 1789, both the United States House and the Senate passed resolutions asking President Washington to issue an exhortation to the nation to pray and be thankful. They asked him to “recommend to the people of the United States a day

¹²John Woolley and Gerhard Peters, *The American Presidency Project*, July 7, 2010, <http://www.presidency.ucsb.edu/ws/index.php?pid=25800> (emphasis added). The American Presidency Project (americanpresidency.org), was established in 1999 as a collaboration between John Woolley and Gerhard Peters at the University of California, Santa Barbara. Their archives contain 88,159 documents related to the study of the Presidency. *See id.* at <http://www.presidency.ucsb.edu/index.php>.

of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favors of Almighty God.”¹³

President Washington then issued a proclamation setting aside November 26 as a day for the people to pray to God to give thanks for God’s protection and mercy. In his proclamation, he stated:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquility, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.¹⁴

President Adams called the nation to prayer on multiple occasions through official proclamations. For example, his 1798 national proclamation declared:

¹³ See *Van Orden v. Perry*, 545 U.S. 677 (2005) (citing 1 Annals of Cong. 90, 914 (internal quotation marks omitted)).

¹⁴ *Id.* at 687 (citing J. Richardson, Messages and Papers of the Presidents, 1789-1897, p. 64 (1899)). Indeed, almost all of the Presidents since Washington have issued similar Thanksgiving proclamations. See *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (Rehnquist, concurring in judgment).

As the safety and prosperity of nations ultimately and essentially depend on the protection and blessing of Almighty God, and the national acknowledgment of this truth is not only an indispensable duty which the people owe to Him but a duty whose natural influence is favorable to the promotion of that morality and piety without which social happiness cannot exist nor the blessings of a free government be enjoyed, . . . I do hereby recommend that. . . the citizens of these states, abstaining on that day from their customary worldly occupations, offer their devout addresses to the Father of Mercies. . . beseeching Him . . . through the Redeemer of the World freely to remit all our offenses and to incline us by His Holy Spirit to that sincere repentance and reformation which may afford us reason to hope for His inestimable favor and heavenly benediction.¹⁵

President Adam's 1799 national proclamation similarly acknowledged:

As no truth is more clearly taught in the Volume of Inspiration, nor any more fully demonstrated by the experience of all ages, than that a deep sense and a due acknowledgment of the governing providence of a Supreme Being and of the accountableness of men to Him as the searcher of hearts and righteous distributor of rewards and punishments are conducive equally to the happiness and rectitude of individuals and to the well-being of communities. . . I do hereby recommend . . . that the citizens . . . call to mind our numerous offenses against the Most High God, confess them before Him with the sincerest penitence, implore His pardoning mercy through the Great Mediator and Redeemer for our past transgressions, and that through the grace of His Holy Spirit we may be disposed and enabled to yield a more suitable obedience to His righteous requisitions in time to come.¹⁶

Throughout the War of 1812, James Madison called the nation to prayer on several occasions. For example, only three weeks after Congress had declared war

¹⁵Woolley and Peters, *The American Presidency Project*, July 7, 2010, <http://www.presidency.ucsb.edu/ws/index.php?pid=65661>.

¹⁶*Id.* at <http://www.presidency.ucsb.edu/ws/index.php?pid=65675>.

against Great Britain, President Madison declared a day of public humiliation and prayer, announcing:

I do therefore recommend . . . [a] day to be set apart for the devout purposes of rendering the Sovereign of the Universe and the Benefactor of Mankind the public homage due to His holy attributes – of acknowledging the transgressions which might justly provoke the manifestations of His Divine displeasure – [and] of seeking His merciful forgiveness and His assistance in the great duties of repentance and amendment.¹⁷

When the war finally ended in 1815, Madison called for a day of thanksgiving – a call that also included a review of God’s gracious involvement with America from its earliest historical beginnings. He then concluded:

No people ought to feel greater obligations to celebrate the goodness of the Great Disposer of Events and of the Destiny of Nations than the people of the United States. . . . And to the same Divine Author of Every Good and Perfect Gift [James 1:17] we are indebted for all those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land. . . . It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assemblies unite their hearts and voices in a freewill offering to their Heavenly Benefactor of their homage of thanksgiving and of their songs of praise.¹⁸

When President William Henry Harrison died, President John Tyler called America to prayer because:

¹⁷*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=65959>.

¹⁸*Id.* at <http://www.presidency.ucsb.edu/ws/index.php?pid=65984>.

When a Christian people feel themselves to be overtaken by a great public calamity, it becomes them to humble themselves under the dispensation of Divine Providence.¹⁹

On July 7, 1864, Abraham Lincoln issued a proclamation stating,

Now, therefore, I, Abraham Lincoln, President of the United States, cordially concurring with the Congress of the United States in the penitential and pious sentiments expressed in the aforesaid resolution and heartily approving of the devotional design and purpose thereof, do hereby appoint the first Thursday of August next to be observed by the people of the United States as a day of national humiliation and prayer.²⁰

On April 25, 1865, President Andrew officially acknowledged,

Whereas our country has become one great house of mourning, where the head of the family has been taken away, and believing that a special period should be assigned for again humbling ourselves before Almighty God, in order that the bereavement may be sanctified to the nation:

Now, therefore, in order to mitigate that grief on earth which can only be assuaged by communion with the Father in heaven, and in compliance with the wishes of Senators and Representatives in Congress, communicated to me by resolutions adopted at the National Capitol, I, Andrew Johnson, President of the United States, do hereby appoint Thursday, the 25th day of May next, to be observed, wherever in the United States the flag of the country may be respected, as a day of humiliation and mourning, and I recommend my fellow-citizens then to assemble in their respective places of worship, there to unite in solemn service to Almighty God in memory of the good man who has been removed, so that all shall be occupied at the same time in

¹⁹*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=67344>.

²⁰*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=69994>.

contemplation of his virtues and in sorrow for his sudden and violent end.²¹

On November 3, 1932, President Herbert Hoover stated,

Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor - and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness."

Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficent Author of all the good that was, that is, or that will be - That we may then all unite in rendering unto him our sincere and humble thanks²²

On May 22, 1950, President Harry Truman declared,

In recognition of this need, the Congress has fittingly provided, in a joint resolution which I approved on May 11, 1950, that Memorial Day, which has long been set aside for paying tribute to those who lost their lives in war, shall henceforth be dedicated also as a day for Nation-wide prayer for permanent peace.²³

²¹*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=72134>.

²²*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=72458>.

²³*Id.* at <http://www.presidency.ucsb.edu/ws/?pid=87248>; *see also id.* at <http://www.presidency.ucsb.edu/index.php> (Chronicling the following presidential prayer proclamations: George Washington (Oct. 3, 1789 & Jan. 1, 1795); John Adams (March 23, 1798 & March 6, 1799); James Madison (July 9, 1812; July 23, 1813 & Nov. 16, 1814); John Tyler (April 13, 1841); Abraham Lincoln (Aug. 12, 1861; March 30, 1863; July 15, 1863; July 7, 1864 & Oct. 20, 1864); Andrew Johnson (April 29, 1865 & Oct. 12, 1868); Ulysses S. Grant (Oct. 5, 1869; Oct. 14,

1873; Oct. 27, 1875; June 26, 1876 & Oct. 26, 1876); Rutherford B. Hayes (Oct. 29, 1877; Oct. 30, 1878; Nov. 3, 1879 & Nov. 1, 1880); Chester A. Arthur (Nov. 4, 1881 & Oct. 25, 1882); Grover Cleveland (Nov. 2, 1885; Nov. 1, 1886; Oct. 25, 1887 & Nov. 1, 1888); Benjamin Harrison- 3 (April 4, 1889; Nov. 1, 1889 & Nov. 8, 1890); Grover Cleveland (Nov. 1, 1894; Nov. 4, 1895 & Nov. 4, 1896); William McKinley (Oct. 29, 1897 & Oct. 25, 1899); Theodore Roosevelt (Sept. 14, 1901; Nov. 2, 1905; Oct. 22, 1906; Oct. 26, 1907 & Oct. 31, 1908); William Howard Taft (Nov. 5, 1910; Oct. 30, 1911 & Nov. 7, 1912); Woodrow Wilson (Oct. 2, 1913; Oct. 28, 1914; Oct. 20, 1915; Nov. 17, 1916; Nov. 7, 1917; May 11, 1918; Nov. 16, 1918; Nov. 5, 1918 & Nov. 12, 1920); Warren G. Harding (Oct. 31, 1921); Calvin Coolidge (Oct. 26, 1925; Oct. 30, 1926; Oct. 26, 1927 & Oct. 23, 1928)Herbert Hoover (Nov. 5, 1929 & Nov. 3, 1932); Franklin D. Roosevelt (Nov. 19, 1938; Aug. 7, 1940; Nov. 27, 1941 & Nov. 26, 1942); Harry S. Truman (April 13, 1945; May 8, 1945; Aug. 16, 1945; Aug. 2, 1946; Nov. 10, 1947; May 28, 1948; May 26, 1949; Nov. 10, 1949; May 22, 1950; Oct. 26, 1951; June 17, 1952 & Nov. 8, 1952); Dwight D. Eisenhower (Nov. 7, 1953; Nov. 6, 1954; Oct. 11, 1955; Nov. 12, 1956; Nov. 8, 1957 & Oct. 31, 1958); John F. Kennedy (April 24, 1961; Sept. 28, 1961; Oct. 28, 1961; May 18, 1962; Oct. 11, 1962; April 26, 1963; Oct. 8, 1963 & Nov. 5, 1963); Lyndon B. Johnson (April 23, 1964; Sept. 22, 1964; May 15, 1965; Nov. 6, 1965; May 26, 1966; May 22, 1967 & May 13, 1968); Richard Nixon (July 16, 1969; Nov. 17, 1972; Jan. 26, 1973 & Nov. 16, 1973); Gerald Ford (Dec. 5, 1974; May 22, 1975; June 12, 1975; Jan. 21, 1976; March 16, 1976 & May 19, 1976); Jimmy Carter (April 25, 1977; Oct. 13, 1977; May 19, 1978; Sept. 1, 1978; March 29, 1979; Sept. 19, 1979; May 1, 1980; Sept. 22, 1980 & Nov. 13, 1980); Ronald Reagan (March 19, 1981; April 24, 1981; Nov. 12, 1981; Feb. 12, 1982; April 16, 1982; Sept. 27, 1982; Dec. 10, 1982; Jan. 27, 1983; April 4, 1983; Sept. 15, 1983; Dec. 14, 1983; April 13, 1984; Oct. 19, 1984; Jan. 29, 1985; April 26, 1985; Nov. 15, 1985; Jan. 13, 1986; May 22, 1986; Oct. 13, 1986; Dec. 22, 1986; May 21, 1987; July 28, 1987; Feb. 3, 1988; May 20, 1988 & Aug. 4, 1988); George Bush (Jan. 29, 1989; March 17, 1989; May 22, 1989; Nov. 17, 1989; March 6, 1990; May 24, 1990; Nov. 2, 1990; Nov. 14, 1990; Feb. 1, 1991; March 7, 1991; April 25, 1991; May 14, 1991; Nov. 25, 1991; Dec. 16, 1991; March 5, 1992 & May 21, 1992); Bill Clinton (April 30, 1993; May 28, 1993; April 12, 1994; May 30, 1994; March 14, 1995; May 18, 1995; Nov. 9, 1995; April 2, 1996; April 5, 1996; May 24, 1996; Nov. 11, 1996; April 18, 1997; May 22, 1997; Nov. 21, 1997; April 29, 1998; May 22, 1998; Nov. 17, 1998; May 5, 1999; May 26, 1999; Nov. 20, 1999; May 4, 2000; May 26, 2000 & Nov. 17, 2000); George W. Bush (Jan. 20, 2001; April 27, 2001; May 25, 2001; Sept. 13, 2001; Nov. 16, 2001; April 26, 2002; May 21, 2002; Aug. 31, 2002; Nov. 21,

Indeed, even Justice Stevens, in his dissent in *Van Orden v. Perry*, 545 U.S. 677 (2005), recognized this nation's history of government officials seeking prayers by the public. He said, "Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents.... In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed."²⁴

In addition to presidential prayer proclamations, state governors have regularly called their constituents to prayer. Here are just a few examples of the thousands of gubernatorial prayer proclamations:

Let us offer . . . sincere and solemn prayers . . . that the Gospel of our Lord and Savior may be extended throughout all the habitations of men.²⁵ 1807, GOVERNOR JONATHAN TRUMBULL, CONNECTICUT

[A]bove all we are called upon now and at all times to renew the sentiments of our most profound gratitude to the God of all mercy and grace for the precious gift of Divine Truth, and for the consoling hope of life and immortality as brought to light by the blessed Redeemer,

2002; April 30, 2003; May 22, 2003; Sept. 4, 2003; Nov. 21, 2003; April 30, 2004; May 26, 2004; Sept. 10, 2004; May 3, 2005; May 20, 2005; Sept. 8, 3005; Sept. 9, 2005; May 3, 2006; May 16, 2006; Sept. 5, 2006; Nov. 16, 2005; April 20, 2007; May 15, 2007; Sept. 4, 2007; April 21, 2008 & May 22, 2008); and Barack Obama (May 7, 2009; May 22, 2009; Sept. 3, 2009; April 30, 2010)).

²⁴ 545 U.S. at 723 (emphasis added).

²⁵ Jonathan Trumbull, A Proclamation (Connecticut: 1807), for March 27, 1807.

Christ Jesus our Lord.²⁶ 1813, GOVERNOR AARON OGDEN, NEW JERSEY

[I]mplore His favor that, for the great Redeemer's sake, He would . . . send His Gospel to every nation on earth.²⁷ 1824, GOVERNOR DAVID MORRIL, NEW HAMPSHIRE

[A] higher or more delightful duty cannot present itself than . . . to seek His pardon and forgiveness through the merits and mediation of our Savior and Redeemer, Jesus Christ.²⁸ 1824, GOVERNOR WILLIAM EUSTIS, MASSACHUSETTS

Let us also beseech God to . . . vouchsafe to all mankind the . . . blessed hopes of the Gospel of His Son, our Savior.²⁹ 1839, GOVERNOR WILLIAM SEWARD, NEW YORK

Whereas it becomes all Christian nations to acknowledge at stated periods their dependence on Almighty God . . . [I appoint] a day of thanksgiving, humiliation, and prayer . . . to offer up their devotions to God their Creator, and His Son Jesus Christ, the Redeemer of the world.³⁰ 1844, GOVERNOR JAMES HAMMOND, SOUTH CAROLINA

²⁶Aaron Ogden, Governor, Captain General and Commander in Chief in and over the State of New Jersey, *A Proclamation* [for a day of thanksgiving and prayer], issued on December 15, 1812, to be observed on January 1, 1813, printed in the *National Intelligencer* [Washington, D. C.], December 15, 1812.

²⁷David Morril, *A Proclamation For a Day of Public Humiliation, Fasting and Prayer* (New Hampshire: 1824), for April 14, 1825.

²⁸William Eustis, *A Proclamation For a Day of Public Thanksgiving and Prayer*, for December 2, 1824, from *Boston Commercial Gazette*, Boston, Thursday, December 2, 1824.

²⁹B. F. Morris, *Christian Life and Character of the Civil Institutions of the United States* (Philadelphia: George W. Childs, 1864), p. 569.

³⁰Jewish-American History on the Web, *The Occident and American Jewish Advocate*, Volume II, No. 10, January 1845, <http://216.247.171.108/Occident/volume2/jan1845/churchstate.html>; see also *Allegheny v. ACLU*, 492 U.S. 573, 604 (1989).

[T]he people of this state recognize the obligations of a Christian nation publicly to acknowledge their dependence upon Almighty God.³¹ 1849, GOVERNOR DANIEL HAINES, NEW JERSEY

[L]et us thank Him for the gift of the Gospel of His Son Christ Jesus and implore His grace that we all may conform to its precepts and live as becomes His disciples.³² 1850, GOVERNOR CHARLES WILLIAMS, VERMONT

I invite the people of the State . . . to acknowledge before God our personal and national transgressions and ask His forgiveness of the same through Jesus Christ our Lord.³³ 1854, GOVERNOR WILLIAM CROSBY, MAINE

[Let citizens offer] thanks to God for “the wide-spread manifestations and presence of the Holy Spirit” and the “means of grace and the hope of glory still offered us in the religion of Jesus Christ.”³⁴ 1858, GOVERNOR ELISHA DYER, RHODE ISLAND

[Let citizens] offer fervent prayer to our heavenly Father that He may . . . secure to us and to our posterity the privileges and advantage which distinguish a Christian people.³⁵ 1861, GOVERNOR WILLIAM DENNISON, OHIO

³¹RootsWeb.com, Passaic County Historical Society Genealogy Club: 1849 Cholera Epidemic, Paterson, NJ, http://www.rootsweb.com/~njpchsgc/pce/cholera_epidemic1849.htm.

³²Charles Williams, *A Proclamation For a Day of Public Thanksgiving* (Montpelier: 1850), for December 5, 1850.

³³William G. Crosby, Governor, State of Maine, *A Proclamation for a day of public humiliation, fasting and prayer*, issued on March 13, 1854, to be observed on April 13, 1854.

³⁴B. F. Morris, *Christian Life and Character of the Civil Institutions of the United States* (Philadelphia: George W. Childs, 1864), p. 586.

³⁵B. F. Morris, *supra* note 30, at 580-581.

I appoint . . . a day of thanksgiving and praise to Almighty God and earnestly invite all good citizens to observe the same, as becomes a Christian people.³⁶ 1862, GOVERNOR CHARLES ROBINSON, KANSAS

Whereas it is meet . . . that the people . . . by a public act of Christian worship acknowledge their dependence as a community upon Him in Whose hands the kingdoms of the earth are but as dust in the balance [Isaiah 40:15].³⁷ 1862, GOVERNOR ALEXANDER RAMSEY, MINNESOTA

Most of all should we remember with ever fresh thanksgivings Him Who at this season came to take upon Himself our weaknesses and sins . . . that when he shall come again with power and great glory, we also may have part in His resurrection.³⁸ 1867, GOVERNOR JOSHUA CHAMBERLAIN, MAINE

[I] heartily invite the people . . . to praise God. . . for the redemption of the world by our Lord and Savior Jesus Christ [and] for His Holy Word.³⁹ 1877, GOVERNOR ALEXANDER RICE, MASSACHUSETTS

Faith in God is the foundation stone upon which our forefathers raised the superstructure of our free institutions. Succeeding generations should recognize this vital truth by humble acknowledgment of their dependence upon Him and by a conscientious observance of all other Christian duties.⁴⁰ 1886, GOVERNOR FREDERICK ROBIE, MAINE

In compliance with the time-honored Christian custom inherited from our fathers, and as a reminder of the Christian civilization of our

³⁶B. F. Morris, *supra* note 30, at 596.

³⁷B. F. Morris, *supra* note 30, at 591.

³⁸Joshua Chamberlain, Governor of the State of Maine, *A Proclamation for a day of Public Thanksgiving and Praise*, issued on October 25, 1867, to be observed on November 28, 1867.

³⁹Alexander Rice, *A Proclamation For a Day of Public Thanksgiving and Praise* (Boston: 1877), for November 29, 1877.

⁴⁰Frederick Robie, Governor of Maine, *A Proclamation* [of Fasting, Prayer and Humiliation], issued on March 23, 1886, to be observed on April 22, 1886.

former and far off homes, I have appointed. . . . a day of Thanksgiving and praise to God.⁴¹ 1894, GOVERNOR JAMES SHEAKLEY, ALASKA

May the people of this Christian state . . . keep the simple faith of this [Thanksgiving Day] appointment.⁴² 1922, GOVERNOR ALBERT BROWN, NEW HAMPSHIRE

There are thousands of similar declarations. In fact, by as early as 1815, over 1,400 such proclamations had been made,⁴³ with countless more since.

B. The History of Official Prayer Proclamations Puts This Case Squarely Within *Marsh*.

Regarding the history associated with legislative prayers, the Court in *Marsh* concluded,

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt 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 not, in these circumstances, an “establishment” of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.⁴⁴

⁴¹*Territory of Alaska, Executive Office. Thanksgiving Proclamation. 1894*, James Sheakley, Governor of Alaska, issued November 1, 1894, to be observed on November 29, 1894.

⁴²Albert Brown, *A Proclamation* (New Hampshire: 1922), for April 27, 1922.

⁴³Deloss Love, *The Fast and Thanksgiving Days of New England*, Houghton, Mifflin, and Company, 1895 (listing some 1,451 proclamations issued by civil authorities between 1620 and 1820, in a non-exclusive list. Of the civil proclamations, 1,028 were issued prior to July 4, 1776, and 413 from July 4, 1776 to 1820.)

⁴⁴*Marsh*, 463 U.S. at 792; see also *Elk Grove Unified School Dist.*, 542 U.S. at 26 (Rehnquist, concurring in judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound”); *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984) (“Our history is replete with official references to the value and invocation of Divine guidance”).

In the same way, the President is not establishing a national religion by asking Americans to pray according to their own traditions and beliefs. The practice of issuing prayer proclamations goes back to George Washington when he called this nation to a day of thanksgiving and prayer. It is simply a tolerable acknowledgement of American's history and traditions.

C. *Marsh* Is Still Controlling Law

The Supreme Court's Establishment Clause cases since *Marsh* show that *Marsh* is still controlling law in this area. Whenever a Court majority has addressed *Marsh*, it has defended the decision, even when applying a different Establishment Clause test. In *Lynch*, the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) . "[American] history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court even referred to the National Day of Prayer as another constitutional acknowledgment of America's religious heritage. *Id.* at 677. The Court concluded,

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused to construe the Religion Clauses with a literalness that would

undermine the ultimate constitutional objective as illuminated by history. In our modern, complex society whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Id. at 678 (citations omitted).

Likewise, the Court in *Allegheny* supported the reasoning in *Marsh* when it stated, “The concurrence [in *Lynch*] ... harmonized the result in *Marsh* with the endorsement principle in a rigorous way, explaining that legislative prayer is a [constitutional] form of acknowledgment of religion” 492 U.S. at 595 n.46 (citations omitted).

Even the creator of the Endorsement test, Justice O’Connor, agreed that government acknowledgments of religion that date to the adoption of the Establishment Clause cannot properly be held to violate it. *See Wallace v. Jaffree*, 472 U.S. 38, 79-80 (1985) (O’Connor, J., concurring). In her concurring opinion in *Lynch*, she rejected the idea that legislative prayer violated the Establishment Clause. *See id.* at 688-90. Justice O’Connor stated that government acknowledgments of religion such as legislative chaplains and Thanksgiving Day proclamations

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.

Id. at 693 (O'Connor, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. at 79-80 (O'Connor, J., concurring) (“Whatever the provision of the Constitution that is at issue, I continue to believe that fidelity to the notion of constitutional – as opposed to purely judicial – limits on government action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was adopted are now constitutionally impermissible. ...As Justice Holmes once observed, ‘[i]f a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.’”) (citations omitted).

Specifically referring to the National Day of Prayer proclamations, Justice O'Connor opined that such proclamations would “probably withstand Establishment Clause scrutiny given their long history.” *Wallace*, 472 U.S. at 81 n.6. Consequently, even if the Endorsement Test were applicable, proclamations to pray easily pass the test. A reasonable observer, knowing the unique history of prayer proclamations in this country, would not perceive them to be anything more than toleration of religious practices that have been occurring in this nation for over 200 years. *See also Van Orden*, 545 U.S. at 677 (Breyer, J., Concurring) (“Neither can this Court’s other tests readily explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings, certain

references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.”); *id.* at 723 (Stevens, J., dissenting) (“Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents.... In this sense, although Thanksgiving Day proclamations and inaugural speeches undoubtedly seem official, in most circumstances they will not constitute the sort of governmental endorsement of religion at which the separation of church and state is aimed.”); *Elk Grove Unified School Dist.*, 542 U.S. at 26 (Rehnquist, C.J., concurring in judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound”); *Lynch*, 465 U.S. at 675 (“Our history is replete with official references to the value and invocation of Divine guidance”).

CONCLUSION

The district court erred by failing to follow *Marsh*. Presidential prayer proclamations enjoy the same rich history in this country as legislative prayers. Both practices were common occurrences at the time the constitution was drafted and ratified. Both practices have continued till today. Neither practice actually

forces Americans to participate in a religious practice or believe in a certain way. They are simply tolerable acknowledgements of beliefs and practices widely held by Americans.⁴⁵

Respectfully Submitted,

Alan E. Sears, Esq.
Benjamin W. Bull, Esq.
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, Arizona
Tel: (480) 444-0020
Fax: (480) 444-0025

/s Joel Oster
Kevin Theriot, Esq.
Joel Oster, Esq.
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, KS 66224
Tel: (913) 685-8000
Fax: (913) 685-8001
joster@telladf.org

Attorneys for Amicus Curiae

⁴⁵*Marsh*, 463 U.S. at 792.

**CERTIFICATE OF COMPLIANCE WITH
TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6564 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman.

Dated: July 8, 2010

/s Joel L. Oster
Joel L. Oster
Alliance Defense Fund
15192 Rosewood
Leawood, Kansas 66224
(913) 685-8000

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned attorney hereby certifies that I have provided a virus free digital version of the foregoing Motion for Leave to file an Amicus Brief and the related Amicus Brief in one Portable Document Format (.pdf) file, as found on the enclosed, labeled CD, pursuant to Circuit Rule 31(e).

Dated July 8, 2010

ALLIANCE DEFENSE FUND

/s Joel L. Oster

Joel L. Oster

15192 Rosewood

Leawood, Kansas 66224

(913) 685-8000

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 8, 2010, the Amicus Brief on behalf of the National Day of Prayer Task Force was sent in paper and digital form, in compliance with Circuit Rule 31(e)(1), via UPS, overnight mail to the following:

Richard L. Bolton
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
PO Box 927
Madison, WI 53701-0927
Attorney for Plaintiffs-Appellees

Robert M. Loeb
Lowell V. Sturgill Jr
Attorneys, Appellate Staff
Civil Division, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorneys for Defendants-Appellants

/s Joel L. Oster
Joel L. Oster