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.

Appeal from the United States District Court
for the Western District of Wisconsin, No. 08-cv-588
Honorable Barbara B. Crabb

BRIEF OF *AMICUS CURIAE* AMERICAN JEWISH COMMITTEE IN SUPPORT OF PLAINTIFFS-APPELLEES

Eric A. Tirschwell, Esq.
Kimberly J. Ravener, Esq.
Jill N. Filipovic, Esq.
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
(212) 715-9100

Marc Stern, Esq.
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 891-1480

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Attorney's Printed Name: Eric A. Tirschwell

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Address: Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas, New York, NY 10036

Phone Number: (212) 715-8404 Fax Number: (212) 715-8000

E-Mail Address: etirschwell@kramerlevin.com

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INTERESTS OF AMICI

The American Jewish Committee ("AJC"), established in 1906 by a small group of American Jews deeply concerned about pogroms aimed at Russian Jews, seeks to protect Jewish populations in danger by working towards a world in which all peoples are accorded respect and dignity. In the decades since its founding the AJC has collaborated with other minority groups in shared strivings to realize fully the constitutional guaranties of protection for conscience and liberty. Some AJC members are religiously observant and some are not, some pray and some do not, and our membership – like the U.S. population at large – reflects a diverse and wide range of beliefs about God. But as a group, the AJC is committed to the ideas that government should not involve itself in encouraging or discouraging religious observances or practices, including prayer, and that our Constitution wisely leaves decisions concerning matters of individual conscience and belief, such as whether and when to pray, exclusively to individuals and the private religious community.

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

PRELIMINARY STATEMENT

In *Santa Fe Independent School District v. Doe*, the Supreme Court's most recent case dealing with state-sponsored prayer, the Court concluded that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." 530 U.S. 290, 313 (2000). The Court thus summed up decades of precedent, and stated the controlling rule in this case. While over the years the Supreme Court has upheld certain state practices that indirectly involve religion or invoke religious symbols, it has drawn a line at government efforts to promote prayer, and applied this principle, first

articulated fifty years ago in *Engel v. Vitale,* 370 U.S. 421 (1962) to strike down every law before the Court that has crossed that line.

The Court is presented here not simply with a local regulation or policy providing or allowing for recitation of prayer in a school classroom or prior to the start of a football game. What is at issue is a federal statute, requiring the President of the United States to issue a proclamation designating a day in celebration of prayer or meditation "to God." The proclamation is issued to all Americans, to adult and child, Christian, Jew, Muslim, atheist, and agnostic, alike. The National Day of Prayer ("NDP") is observed in schools and community centers around the country, suggesting to schoolchildren, among others, that the federal government supports and encourages prayer. Private religious groups have leveraged the federal government's imprimatur and cooperation to spread their own religious messages, sometimes even coordinating events with the White House itself. Predictably, the statute has generated discord and dissent. There is no precedent for such a law, which, given the rule in *Engel* and its progeny, is *a fortiori* a "law respecting an establishment of religion." U.S. Const. amend. I.

Accordingly, this case does not require this Court to delve into the various and sometimes controversial analytical frameworks developed by the Supreme Court during the last several decades to evaluate the range of state practices that have come before it under the Establishment Clause. Under the Supreme Court's prayer jurisprudence, discussed in detail below, a consistent proposition – not tied to any particular analytic framework – can be discerned: a statute that exhorts, urges, and encourages private citizens to engage in the religious practice of praying to God violates the letter and purpose of the Establishment Clause, just as would a local school board's decision to designate an annual district-wide day of prayer, with the

superintendent issuing a proclamation posted on the district's website calling on all students to pray to God.

The judgment below should be affirmed.

ARGUMENT

I. The National Day of Prayer Encourages the Citizenry to Engage in Prayer, an Inherently Religious Practice

The district court correctly found that the National Day of Prayer statute directly involves the government in "encourag[ing] all citizens to engage in prayer, an inherently religious exercise." (Slip Op. at 4.) By requiring the president to issue a proclamation each year designating a day "on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals," the statute does not simply allude to or "acknowledge" God or religion – it expressly indicates the support of the federal government for a particular religious practice and promotes engagement in that practice by the general populace. *Id*. at 8.

The district court's recognition that the statute "encourages" religious activity, rather than merely "acknowledges" the role of religion in American life, is consistent the views with the views of the five-justice majority in *Allegheny v. ACLU*, 492 U.S. 573 (1989). In *Allegheny*, the Court said that the NDP statute constitutes "an exhortation from government to the people that they engage in religious conduct." *Id*. at 603 n. 52. And Justice Kennedy, in a separate opinion in *Allegheny*, while recognizing the self-evident reality that the NDP statute "does not require anyone to pray," similarly called it like it is – describing the statute as "a straightforward endorsement of the concept of 'turn[ing] to God in prayer.'" *Id.* at 672 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The manner in which presidents since 1952 have interpreted the NDP statute's mandate to issue a proclamation designating a day of prayer further underscores that the statute is hortatory, rather than passive. In recent years, presidential NDP proclamations have "call[ed] upon the citizens of our Nation to pray," and asked citizens to "give thanks . . . for God's continued guidance, grace, and protection." Proclamation No. 8514, 75 Fed. Reg. 25101 (Apr. 30, 2010); *see also* Proclamation No. 8012, 71 Fed. Reg. 26675 (May 3, 2006). In 1990, President Bush's NDP proclamation "invite[d] the people of the United States to gather together on that day in homes and places of worship to pray." Proclamation No. 6104, 55 Fed. Reg. 8439 (Mar. 6, 1990). And in 1997, President Clinton in his proclamation explained that Congress, in passing the NDP statute, had "called our citizens to reaffirm annually our dependence on Almighty God . . . ." Proclamation No. 6991, 62 Fed. Reg. 19663 (Apr. 18, 1997); *see also* Proclamation No. 7780, 69 Fed. Reg. 25291 (Apr. 30, 2004) ("The National Day of Prayer encourages Americans of every faith to give thanks for God's many blessings and to pray for each other and our Nation.")

In fact, the NDP statute is designed not simply to encourage and sanction prayer, but also to *facilitate* efforts by religious groups to organize activities surrounding its observance. As the district court found, the statute was amended in 1988 at the behest of religious groups so that the NDP would occur on a fixed date each year and thus accommodate planning of prayer-related events. (*See* Slip Op. at 8-9 (reviewing legislative history); *see also* Appellants' Brief at 8-9 (same).) Many of those events, in turn, seek to spread a religious message and proselytize in the general population by leveraging the federal government's support for prayer.

For example, as noted by the district court, the National Day of Prayer Task Force – which seeks, among other things, "to encourage participation on the National Day of Prayer"

and "[p]ublicize and preserve America's Christian heritage"[1] – has organized NDP events at the White House. (Slip. Op. at 60.) The Task Force uses an image from the official seal of the U.S government on its website and describes presidential proclamations issued pursuant to the NDP statute as "encouraging all Americans to pray [on the designated day]."[2] A "School Prayer Event Guide" published by the Task Force (attached hereto as Appendix A)[3] describes school events organized around the NDP, featuring one that displayed "Uncle Sam" posters with the words "I Want You To Pray" and another where "I Prayed" stickers were distributed to students attending school events. *See id*. at 14, 16. The School Prayer Event Guide also includes a sample press release to be issued in connection with school NDP events noting that "[g]atherings planned for [the NDP] include observances at the White House and the Cannon House Office Building in Washington, D.C." *Id*. at 22.

This is not to say that the government is accountable, as a constitutional matter, for all uses that private actors make of the federal statute establishing a National Day of Prayer. But – particularly in light of the NDP statute's amendment in 1988 – the manner in which groups like the NDP Task Force have been able to leverage government support for prayer further confirms that the statute was not designed to be, nor functions as, a purely neutral "acknowledgement" of religion.

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1 *See* NDP Task Force website, http://nationaldayofprayer.org/about/our-mission/.

2 *See* NDP Task Force website, http://nationaldayofprayer.org/wp-content/uploads/2010/02/2010ResourceManual.pdf, at 4.

3 *See* National Day of Prayer Coordinators' School Prayer Event Guide, Exhibit 19 to the Deposition of Shirley Dobson in *FFRF v. Obama*, 08-CV-588-BBC (W.D. Wis.) on November 10, 2009, discussed at 166-69 of the deposition transcript and attached hereto as Appendix A (current version *available at* http://ndptf.org/wp-content/uploads/2009/12/School-Event-Guide.pdf).

II. The Supreme Court Has Consistently Invalidated Government Efforts to Encourage Prayer

The controlling rule in this case, developed in decades of Supreme Court jurisprudence, is that the government cannot, consistent with the Establishment Clause, enact a law to sponsor, encourage, sanction, or otherwise promote prayer. Prayer is an inherently religious practice.[4] State promotion of prayer thus signals direct state support for religion over non-religion, alienates the growing number of citizens who are not religious, and engenders discord over religious matters. It strikes at the very core of the Establishment Clause. These considerations have guided the Supreme Court in invalidating government promotion of prayer in the past and should control the outcome in this case.

In *Engel v. Vitale*, the Supreme Court held unconstitutional the recitation of a prayer in the classrooms of a New York State public-school district. The Court found the practice "wholly inconsistent with the Establishment Clause," 370 U.S. at 424, concluding that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . ," *id.* at 430. While the Court said that a "showing of direct governmental compulsion" was not necessary to establish a violation of the Establishment

[4] In related contexts, the Supreme Court has repeatedly found government-sponsored prayer to be inherently religious conduct, even when the prayer in question is non-denominational and invoked outside a church, temple, or other explicitly religious environment. For example, in striking down recitation of the prayer at issue in *Engel*, which "acknowledge[d]" dependence on God and asked for God's blessings, the Court found the prayer to be "a religious activity," noting the trial court's finding that "[t]he religious nature of prayer was recognized by Jefferson and has been concurred in by theological writers, the United States Supreme Court and state courts and administrative officials . . . ." *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (internal quotation marks omitted); *see also Lee v. Weisman*, 505 U.S. at 598 (describing prayer at high school graduation as "an explicit religious exercise"); *Hall v. Bradshaw*, 630 F.2d 1018, 1020 (4th Cir. 1980) (prayer is "undeniably religious and has, by its nature, both a religious purpose and effect.")

Clause, it also observed that "[w]hen the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id*. at 430-31. Crucial to its decision were the purposes underlying the Establishment Clause, which the Court described as resting on, among other things, "the belief that a union of government and religion tends to destroy government and degrade religion" by fomenting "the hatred, disrespect, and even contempt of those who [hold] contrary beliefs." *Id*. at 431.

Nothing in the Court's decision in *Engel* limited its holding to the school context. Nor would such a limitation have made sense, given that the Court's holding was predicated on the principle that the government 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," *id*. at 435, rather than on any perceived effect that government-sponsored prayer might have on schoolchildren in particular. One year later, in *Abington School District v. Schempp*, the Court struck down state statutes providing for the reading of Bible verses and the Lord's Prayer in schools, in an opinion that cited the same principles articulated in *Engel* and similarly did not tie its holding to the schoolroom context. 374 U.S. 203, 223 (1963).

Since *Engel* and *Schempp*, the Supreme Court has several times reaffirmed that the controlling principle in its cases dealing with government promotion or encouragement of prayer is that such practices impermissibly aid religion over non-religion by suggesting government sanction of what is an inherently religious activity. In *Wallace v. Jaffree*, the Court invalidated an Alabama statute that authorized a one-minute period of silence in the public schools "for meditation or voluntary prayer." 472 U.S. 38 (1985). Five Justices joined an

opinion finding the statute unconstitutional because it constituted government "endorsement and promotion of religion and a particular religious practice." *Id*. at 57 n.45. Again, the Court did not limit its decision to the school context; nor did it find that the statue was unconstitutional because it was coercive, as is suggested by the government's brief. (See Appellants' Brief at 56). Justice Powell, in a concurring opinion, noted that the district court had found that the statute was an impermissible "effort on the part of the State of Alabama to encourage a religious activity." *Id*. at 65. And Justice O'Connor, in her own concurring opinion, found that that the Establishment Clause precluded the government "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred," and that the Alabama statute did not pass this test. 472 U.S. at 70. Significantly, in the course of her opinion, Justice O'Connor described *Engel* and *Schempp* as "expressly turn[ing] only on the fact that the government was sponsoring a manifestly religious exercise." *Id*. at 72.

The Court applied its rule against state-sponsorship of prayer in the two school-prayer cases that followed *Wallace – Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). While the Court ultimately decided *Lee* on the narrower ground that the prayer at issue, performed at a school graduation, had a socially coercive effect on students, it did not discard the broader rule. Rather, it reiterated the "timeless lesson" that "if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." 505 U.S. at 592; *see also id*. at 589 ("preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.") The Court further noted that the kind of social coercion present in *Lee* "may not be limited to the context of schools," but found it enough to decide the case that such

coercion was "pronounced" where students were in attendance at a graduation ceremony. *Id*. at 592.

In *Santa Fe* – which struck down a Texas school district policy that permitted students "to deliver a brief invocation and/or message" during football games – the Court summed up decades of precedent in concluding that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Santa Fe*, 530 U.S. at 313; s*ee also McCreary Cty. v. ACLU*, 545 U.S. 844, 877 n. 24 (2005) (Establishment Clause prevents government from "insistently call[ing] for religious action on the part of citizens" or "urg[ing] citizens to act in prescribed ways as a personal response to divine authority").

There is no ground for limiting the application of the principle developed in the Supreme Court's prayer jurisprudence to the school context. As noted, the language and logic of these decisions reaches more broadly. The same dangers of discord and alienation warned of in the decisions attend the National Day of Prayer, as is evidenced by the sampling of reported incidents cited in the district court's opinion. (Slip. Op. at 57-60.) And as the number of non-believers in the United States continues to increase and the nation becomes ever more diverse, the disparity between the statute and the purposes undergirding the Establishment Clause will only grow starker.[5]

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[5] The number of adult Americans who identify themselves as not subscribing to any particular religion has more than doubled from 14.3 million in 1990 (8% of population) to 29.4 million in 2001 (14% of the population). Twelve percent of Americans are atheist or agnostic, and another 12 percent are deistic, believing in a higher power but no personal God. *See* Barry A. Kosmin and Ariela Keysar, AMERICAN RELIGIOUS IDENTIFICATION SURVEY (2009), http://b27.cc.trincoll.edu/weblogs/AmericanReligionSurvey-ARIS/reports/ARIS_Report_2008.pdf.

Moreover, permitting the federal government to encourage prayer among the general populace, while prohibiting government support of prayer in public schools, would produce inconsistent and untenable results. The NDP statute requires the president to deliver a religious message on behalf of the government to all citizens, including schoolchildren. The fact that a call to prayer is issued from the White House rather than the principal's office does not eliminate its influence on students; and a message from the President of the United States encouraging prayer can be at least as socially coercive as one from a teacher or school headmaster.

This is particularly true given that, as already noted, *supra* page 5, private religious groups use government support for the National Day of Prayer to proselytize in schools. The courts have just begun to wrestle with the constitutional implications of school events centered on the National Day of Prayer. *See Doe v. Wilson Cty. Sch. Sys.*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) (finding violation of Establishment Clause where, *inter alia*, public school principal and teachers permitted religious group to organize National Day of Prayer event on school grounds); *see also Lee v. York Cty. Sch. Div.*, 484 F.3d 687, 690, 695 (4th Cir. 2007) (no First Amendment free speech violation where school principal removed National Day of Prayer poster advertising presidential proclamation and other religious items from bulletin board in plaintiff teacher's classroom). Of course, any direct effort by a teacher or school administrator, rather than a private group, to observe the National Day of Prayer in state-funded schools during the school day – by, for instance, asking students to pray on that day – would almost certainly be struck down by the Supreme Court under its school-prayer jurisprudence. If observation of a federally designated day of prayer in the public schools is plainly unconstitutional, it cannot be that the statute requiring designation of that day by the president survives constitutional scrutiny.

Finally, the inconsistency between what the government argues for in this case and the rule of the Supreme Court's prayer cases is made plain by the fact that private religious groups have seized on the NDP statute as an opportunity to effectively nullify *Engel* and its progeny. The NDP Task Force's "School Prayer Event Guide," which was "specially prepared to help National Day of Prayer Coordinators throughout America to hold prayer events in their community's schools," advises students how to best leverage the National Day of Prayer to proselytize in schools.[6] The guide opens with the following prayer: "With this National Day of Prayer School Prayer Guide, we humbly ask you Lord to help us reclaim American Schools and all schools throughout the world for You, and to save our present and future generations of young Americans." *Id.* In an express reference to *Engel*, the guide is dedicated "to all the children who in the Fall of 1962, returned to their classrooms, and were told that there would no longer be a time of prayer before classes began." *Id.* The Task Force thus uses the NDP statute as part of an effort to undermine the decades of Supreme Court precedent removing government-sanctioned prayer from our schools. *Cf. Wallace,* 472 U.S. at 57 (noting legislative history that school-prayer statute at issue was an "effort to return voluntary prayer to the public schools.").

III. The Precedents Cited in the Government's Brief are Not Controlling Here

A. *Marsh v. Chambers* Involved an Internal Legislative Practice with a Long History

The government argues that this case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983), rather than the decisions cited above. But as the Court itself observed in *Allegheny*, the legislative prayer upheld in *Marsh* did not "urge citizens to engage in religious practices," and is for that reason different from the sort of prayer promoted by the NDP statute, which the Court in *Allegheny* described as "an exhortation from government to the people" to

[6] *See* Appendix A.

pray. 492 U.S. at 603 n.52; *see also North Carolina Civ. Liberties Union v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991) (finding unconstitutional prayer recited by judge in court and distinguishing it from legislative prayer at issue in *Marsh*, stating that "[i]n contrast to legislative prayer, a judge's prayer in the courtroom is not to fellow consenting judges but to the litigants and their attorneys.") The prayer in *Marsh* was a practice that the Nebraska Legislature had adopted to govern its own internal proceedings, not a proclamation by the president of the United States, issued pursuant to federal statute, urging the general populace to "turn to God in prayer." *See Van Zandt v. Thompson*, 839 F.2d 1215, 1218-19 (7th Cir. 1988) (describing *Marsh* as dealing with a State legislature's "internal religious practices" and "a legislature's ordering of its own internal affairs"). Indeed, *Marsh* itself characterized the legislative prayer at issue as "simply a tolerable acknowledgment of beliefs widely held among the people of this country." 462 U.S. at 792.[7]

Nor does the Court's finding in *Marsh* regarding the "unambiguous and unbroken history" of legislative prayer validate the NDP statute, as the government claims in its brief. First, as *Marsh* itself recognized, an otherwise unconstitutional practice cannot be saved by its historical pedigree. *See* 463 U.S. at 790 ("'It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'" (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)). Second, as set forth below, there is no "unambiguous and unbroken history" with respect to the NDP statute.

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[7] *See also McCreary*, 545 U.S. at 905-806 (suggesting that the legislative prayer at issue in *Marsh* was properly understood as an "acknowledgment of the contribution that religion ha[s] . . . made to our Nation's legal and governmental heritage." (Scalia, J., dissenting, joined by Rehnquist, *C*.J., Thomas, J., and Kennedy, J.)).

It is true, as the government and *amici* point out, that prior to enactment of the NDP statute in 1952, some presidents – but not all – issued proclamations calling for prayer, "humiliation," fasting, or similar conduct associated with religion.[8] But it is misleading to take these proclamations out of the context in which they were issued and to cast them simply as forerunners to the National Day of Prayer. None of these proclamations was issued pursuant to a statute celebrating and recommending prayer for its own sake, detached from any event of secular significance and solely as a means to promote religious activity by the citizenry.

For example, in September 1789, following approval by Congress of the Bill of Rights (but prior to ratification by the States in 1791) it was proposed at the first Congress that President Washington commemorate the formation of the new government by calling for a day of national thanksgiving. *See* Derek Davis, Religion & the Continental Congress, 1774-1788, 89 (2000). The Congressional resolution requested that the president "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." George Washington, Proclamation – Day of National Thanksgiving (Oct. 3, 1789), *available at* http://www.presidency.ucsb.edu/ws/?pid=65502. Washington accepted Congress's invitation to do so, and issued a proclamation calling for a "day of national thanksgiving" on Thursday, November 26, 1789. *Id*. While Washington's proclamation used religious language and offered

[8] As the district court noted, Thomas Jefferson refused to issue proclamations recommending prayer during the eight years of his presidency because he believed them to be prohibited by the Constitution. Anson Phelps Stokes, Church & State in the United States, Vol. I, 489-90 (1950); Leonard W. Levy, The Establishment Clause, Religion, and the First Amendment, 248 (2d Ed. 1994). Andrew Jackson expressed similar reservations and did not issue proclamations calling for prayer. Jon Meacham, American Gospel, 110-12 (2006); Correspondence of Andrew Jackson, Vol. IV, 447 (John Spencer Bassett ed. 1929).

thanks to God, it did so as part of a message with the secular goal of rallying the nation around its newly formed government. Washington called on the nation to give thanks for, among other things, "the great degree of tranquility, union, and plenty which [we] have [enjoyed since the Revolution]," and "the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness." *Id.*[9]

Similarly, President John Adams issued two proclamations calling for prayer, one in 1798 and one the following year. The first was occasioned by the growing tensions with France during the years following the French Revolution, including the French government's refusal to negotiate with U.S. emissaries. Stokes, Church & State in the United States, Vol. I, 488-89; *see also* David McCullough, John Adams (2001) 483-514 (background on "quasi-war" with France). Adams's 1798 proclamation noted that the

> United States are at present placed in a hazardous and afflictive situation by the unfriendly disposition, conduct, and demands of a foreign power, evinced by repeated refusals to receive our messengers of reconciliation and peace, by depredations on our commerce, and the infliction of injuries on very many of our fellow-citizens, while engaged in their lawful business on the seas.

Stokes, Church & State in the United States, Vol. I, 488 (quoting proclamation). Under these circumstances, Adams wrote that "it has appeared to me that the duty of importing the mercy and benediction of Heaven on our country demands at this time a special attention from its inhabitants." *Id.*

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[9] In 1795, Washington issued another proclamation calling for a day of "public thanksgiving and prayer," to recognize, among other things, the nation's "exemption hitherto from foreign war, an increasing prospect of the continuance of that exemption, the great degree of internal tranquility we have enjoyed, the recent confirmation of that tranquility [sic] by the suppression of an insurrection which so wantonly threatened it [the so-called "Whiskey Rebellion"], the happy course of our public affairs in general, [and] the unexampled prosperity of all classes of our citizens." George Washington, Proclamation 6 – Day of Public Thanksgiving (Jan. 1, 1795), *available at* http://www.presidency.ucsb.edu/ws/?pid=65500.

Adams' second proclamation was occasioned again by agitation from the French ("the hostile designs and insidious acts of a foreign nation"), as well as by an outbreak of yellow fever ("those awful pestilential visitations under which [our cities and towns] have lately suffered so severely"). John Adams, Proclamation – Recommending a National Day of Humiliation, Fasting, and Prayer (Mar. 6, 1799), *available at* http://www.presidency.ucsb.edu/ws/?pid=65675; *see* Stokes, Church & State in the United States, Vol. I at 489. The proclamation called for a "National Day of Humiliation, Fasting, and Prayer," noting the importance of "public religious solemnities" in "circumstances of great urgency and seasons of imminent danger." *Id*.

Proclamations calling for prayer were subsequently issued by, among others, President Madison during the War of 1812,[10] Tyler upon the death of President William Henry Harrison, Andrew Johnson upon the death of Lincoln, Grant in commemoration of the nation's Centennial, and Wilson during World War I. (*See* Appendix B). Additionally, proclamations containing allusions to religion or prayer have been issued in connection with certain national holidays – for example Thanksgiving and Memorial Day.

But, as is set forth in the appended summary chart, none of these proclamations can be considered precedent for a statute that requires the annual issuance of a proclamation celebrating the act of prayer for its own sake. If they stand for anything as a matter of

[10] While, at the request of Congress, Madison issued prayer proclamations during the War of 1812, following his presidency he questioned the propriety of doing so on the ground that it was likely unconstitutional. In his "Detached Memoranda," Madison listed five objections to the practice, including that proclamations recommending prayer "seem to imply and certainly nourish the erron[e]ous idea of a national religion." Madison's "Detached Memoranda," in William & Mary Quarterly 3d Series at 558-60 (Elizabeth Fleet ed., 1946). Madison's views as to the constitutionality of presidential prayer proclamations are of special significance, given his role in drafting the First Amendment. *See, e.g., Wallace*, 472 U.S. at 97-98 (Rehnquist, J., dissenting) ("James Madison was undoubtedly the most important architect among the Members of the House [of Representatives] of the Amendments which became the Bill of Rights . . . .").

constitutional precedent, it is that our presidents have in the past used the language of religion and prayer to communicate to, and rally, the nation in times of national grief, celebration, or similar consequence. Invocation of prayer has always been incident to that central, secular purpose.

Conversely, the NDP statute does not seek or serve merely to solemnize an existing public occasion; it creates a new one – unprecedented in our history – which is centered upon approval, encouragement, and performance of an intrinsically religious practice. Thus, there is no "historical tradition," as the government claims (Apellants'Brief at 2), for the NDP statute. And *Marsh* cannot save a law that – rather than codifying a preexisting tradition – moves the government further toward what Madison called a "the erron[e]ous idea of a national religion" (*see supra* note 10) and across the line separating the constitutional from the unlawful.

B. The National Day of Prayer Statute is Not a Mere "Acknowledgment" of Religion

Unlike other government actions touching religion that have been upheld by the courts, the NDP statute does not merely evoke an "act of recognition or accommodation." *Allegheny*, 492 U.S. at 662. Constitutionally permissible "acknowledgments" of religion by the government are characteristically "passive and symbolic." *Id.; see Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (**"**The crèche, like a painting, is passive."); *Van Orden v. Perry*, 545 U.S. 677, 686, 691 (2005) (upholding "passive monument" against Establishment Clause challenge). Unlike a crèche or monument, the NDP statute does not observe or accommodate the celebration of a religious holiday, tradition, or any other pre-existing practices arising from among the citizens. *Cf. Lynch*, 465 U.S. at 680-81. The holiday is purely a creation of statute, intended to encourage popular belief in prayer and the practice of prayer. *See Santa Fe*, 530 U.S. at 310 ("the 'preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.'") (quoting *Lee*, 505 U.S. at 589).

Nor is establishment of a National Day of Prayer analogous to "practices [such] as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance to the flag" that have arguably "lost through rote repetition any significant religious content." *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting); *id.* at 676 (majority opinion); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 31-32 (2004) (Rehnquist, J., concurring) (defending the constitutionality of these references). Such practices, like the historical presidential proclamations surveyed above, arguably serve "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" and primarily represent "a patriotic exercise, not a religious one." *Newdow*, 542 U.S. at 36 (O'Connor, J., concurring); *id*. at 31 (Rehnquist, C.J., concurring). The NDP statute has no such secular link; its singular context is the encouragement of prayer alone.

CONCLUSION

To be clear, we do not argue for, and affirming the district court would not mean, banishing prayer from the public sphere or that elected officials could not, on their own initiative, organize voluntary gatherings such as prayer breakfasts or similar events designed to promote dialogue with the religious community and commemorate the role of religion in American life rather than promote a religious practice among the general populace. But we do submit that the NDP statute crosses the vitally important line separating permissible acknowledgment from unconstitutional sponsorhip and encouragement of religion. Accordingly, and for the foregoing reasons, the Court should affirm the district court's decision.

Dated: October 6, 2010

KRAMER LEVIN NAFTALIS & FRANKEL LLP

s/ Eric Tirschwell
Eric Tirschwell*
Kimberly J. Ravener
Jill Filipovic
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 715-9100

Attorneys for Amicus Curiae
American Jewish Committee

Of Counsel:

Marc D. Stern
American Jewish Committee
165 East 56th Street
New York, NY 10022
(212) 891-1480

*Lead counsel admitted to practice in the Seventh Circuit Court of Appeals

CERTIFICATE OF COMPLIANCE

I certify that this Brief of Amicus Curiae complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because this Brief contains 5,515 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that 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, 12-point Times New Roman font in the body and in the footnotes.

This 6th day of October, 2010.

s/ Eric Tirschwell
Eric Tirschwell
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 715-9100

CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), this brief and all of the appendix items that are available in non-scanned PDF format.

This 7th day of October, 2010.

s/ Eric Tirschwell
Eric Tirschwell
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 715-9100

CERTIFICATE OF SERVICE

I certify that I have caused a true and correct copy of the foregoing brief to be served upon the following counsel by Federal Express:

Lowell V. Sturgill, Jr.
Department of Justice
Civil Division – Appellate Staff
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3427

Richard L. Bolton
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P.O. Box 927
Madison, WI 53701
(608) 257-9521

This 7th day of October, 2010.

s/ Eric Tirschwell
Eric Tirschwell
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036-2714
(212) 715-9100