

United States Court of Appeals
FOR THE
Third Circuit

DOCKET NO. 10-1819

JANE DOE and JOHN DOE,
individually and as parents and next
friend of JAMIE DOE,
Plaintiffs- Appellants,

v.

INDIAN RIVER SCHOOL DISTRICT,
et al.
Defendants- Appellees.

Appeal from the United States District Court
For the District of Delaware, No. 05-120

**BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW,
ON BEHALF OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

No. 10-1819

Doe v. Indian River School District

Amicus curiae Foundation for Moral Law, Inc., is a designated IRS Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*.

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Dated this 9th day of September, 2010.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (“the Foundation”) is a national, non-profit, public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country’s laws and justice system. To those ends, the Foundation has assisted in several cases concerning public prayer, the public display of the Ten Commandments and other public acknowledgments of God. The Foundation has filed several *amicus* briefs in federal circuits around the country defending the constitutionality of public prayer in legislative bodies.

The Foundation has an interest in this case because it believes that public prayer is one of the many constitutional ways in which government officials and entities may seek God’s providential guidance and may acknowledge Him as the sovereign source of law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the prayers offered at Indian River School Board meetings violate the Establishment Clause of the First Amendment to the United States Constitution.

SOURCE OF AUTHORITY TO FILE

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

SUMMARY OF ARGUMENT

It is the responsibility of this Court, and any court exercising judicial authority under the United States Constitution, to do so based on the text of the document from which that authority is derived and to which the oath of office is sworn. A court forsakes its duty and its oath when it rules based upon case “tests” rather than the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the “supreme Law of the Land.” U.S. Const. art. VI. Accordingly, the controlling “test” to be applied to the facts of this case is the text of the Establishment Clause, not simply judicial opinions.

The text of the Establishment Clause states that “Congress shall make no **law** respecting an **establishment** of **religion**.” U.S. Const. amend. I (emphasis added). When these words of the law are applied to the Indian River School Board prayers, it becomes evident that none of the prayers offered at Board meetings are laws, they do not dictate religion, and they do not respect an “establishment of religion.” While the opinion in *Marsh v. Chambers* compels the same result in this case, the supreme law of the land dictates that the prayers are constitutional because they do not violate the words of the Constitution.

ARGUMENT

*“We, therefore, the Representatives of the united States of America, in General Congress, Assembled, **appealing to the Supreme Judge of the world for the rectitude of our intentions**, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . . And for the support of this Declaration, **with a firm reliance on the protection of divine Providence**, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.”*

Declaration of Independence (1776) (emphasis added).

“God save the United States and this Honorable Court!”

Marshal, United States Supreme Court.

I. THE CONSTITUTIONALITY OF THE INDIAN RIVER SCHOOL BOARD PRAYER POLICY SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

Plaintiffs-Appellants claim that the Indian River School Board policy that allows prayer by Board members at the beginning of meetings is a violation of the Establishment Clause of the First Amendment. *Doe v. Indian River Sch. Dist.*, 685 F. Supp. 2d 524, 626 (D. Del. 2010). While the district court below initially quoted the words of the Establishment Clause—“Congress shall make no law respecting an Establishment of religion,” *id.* at 533—the court then pivoted with the doctrine that “the Establishment Clause ‘lacks the comforts of doctrinal absolutes.’” *Id.* (quoting *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005)). After deflecting the Plaintiffs’ assertion that “the Supreme Court’s other

Establishment Clause tests—*i.e.*, the *Lemon* test,¹ the “endorsement” test, or the “coercion” test—applies to this case,” the court concluded that “*Marsh* [*v. Chambers*]²] applies to the School Board’s Prayer Policy, and that the policy is constitutional under *Marsh*.” *Id.* at 537.

The district court did an admirable and thorough job of applying *Marsh* to this case and correctly concluded that the prayers offered at Board meetings and the relevant policy did not violate the Constitution, *id.* at 550. But the court never actually applied the Constitution to the case.³ *Amicus* submits that the constitutional analysis that is more faithful to the law and the judicial oath is the never-amended text of the Establishment Clause as it was understood at the time of its ratification.

A. The Constitution is the “supreme Law of the Land” and all judges are oath-bound to support it.

The Constitution itself and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* This Constitution and the solemn oath thereto should control, above all other competing powers and influences, the decisions of federal courts.

¹ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

² 463 U.S. 783 (1983).

³ Likewise, Defendants/Appellees did an excellent job in their original brief of explaining why they should prevail under *Marsh* and other relevant cases.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). "The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself." *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

A textual reading of the Constitution, according to Madison, requires “resorting to the sense in which the Constitution was accepted and ratified by the nation” because “[i]n that sense alone it is the legitimate Constitution.” J. Madison, Letter to Henry Lee (June 25, 1824), in *Selections from the Private Correspondence of James Madison from 1813-1836*, at 52 (J.C. McGuire ed., 1853). The words of the Constitution are neither suggestive nor superfluous: “In expounding the Constitution . . . every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.” *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Justice Joseph Story succinctly summarized these thoughts on constitutional interpretation:

[The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

The U.S. Supreme Court reaffirmed this approach in *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008):

[W]e are guided by the principle that “[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.” *United States v. Sprague*, 282 U.S. 716, 731 (1931); see also *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

The meaning of the Constitution is not the province of only the most recent or most clever judges and lawyers: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.” *Heller*, 128 S. Ct. at 2821.

B. *Marsh v. Chambers*, like all Establishment Clause cases, is merely an opinion interpreting and applying the law, but it cannot supplant the law itself.

In most, but not all, cases concerning the Establishment Clause of the First Amendment, courts apply the aptly named *Lemon* test, crafted by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to judge whether the practice in question is constitutionally permissible. Perhaps because of the “persistent criticism”⁴ and noticeable shortcomings of *Lemon* and its progeny,⁵ the

⁴ *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005).

⁵ Courts of appeal have repeatedly expressed frustration with the difficulty in applying Establishment Clause jurisprudence. For example, this Court has observed that “[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays.” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435,

Supreme Court has declined several times since its inception to follow the three-part test. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding in part the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA)); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding high school graduation prayer unconstitutional because of “coercion” on students to attend and participate); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (upholding constitutionality of cross displayed by private entity on Ohio Capitol grounds); *Larson v. Valente*, 456 U.S. 228 (1982) (holding unconstitutional state law imposing regulations upon certain religious organizations). As the district court noted below, *Marsh v. Chambers* represents “the paradigm of a ‘special instance’ where governmental action has been held not to run afoul of the Establishment Clause despite the fact that ‘its manifest purpose [is] presumably religious.’” *Indian River Sch. Dist.*, 685 F. Supp. 2d at 533 (quoting *McCreary County*, 545 U.S. at 860). However, the Supreme Court recognized in *Marsh* that “[t]he opening of sessions of legislative and other deliberative public bodies with

1437 (3rd Cir. 1997). The Fourth Circuit has labeled it “the often dreaded and certainly murky area of Establishment Clause jurisprudence,” *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), “marked by befuddlement and lack of agreement,” *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a “vast, perplexing desert.” *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev’d sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Tenth Circuit opined that there is “perceived to be a morass of inconsistent Establishment Clause decisions.” *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

prayer is deeply embedded in the history and tradition of this country.” *Marsh*, 463 U.S. at 786. Consequently, it would have been strange indeed if the Court had determined such prayers to be unconstitutional. So, instead of stretching the *Lemon* test in some implausible manner to permit the practice of legislative prayer, the Supreme Court ignored it altogether and fashioned another test for “legislative prayer” cases.

Even though the *Marsh* test is much closer to the constitutional text, swapping one judicial rule (*Lemon* et al.) for another one still obscures the only law at issue. The Supreme Court has invented these interchangeable, substitutionary Establishment Clause tests precisely because it has rejected the idea that the constitutional text has a plain, objective meaning. In *Lemon*, the Supreme Court stated that it could “only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,” and that “[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines” delineating what is constitutionally permissible or impermissible. 403 U.S. at 612. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) (“[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed.”). It is the High Court’s penchant for “drawing lines” with no guiding criteria instead of following the words of the law

in the First Amendment that is the primary problem with Establishment Clause jurisprudence.

The judiciary's abandonment of "fixed, *per se* rule[s]" results in the haphazard application of judges' own complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow," "leav[ing] courts, governments, and believers and nonbelievers alike confused" ⁶ *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County*, 545

⁶ Not surprisingly, district courts also routinely observe that the Supreme Court's Establishment Clause jurisprudence is "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); and "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005).

U.S. at 890-91 (Scalia, J., dissenting). With each new variation on amorphous judicial “tests,” court opinions only exacerbate the lack of “categorical absolutes” in Establishment Clause jurisprudence.

C. *Marsh* is unhelpful to the ultimate constitutional issue to the extent that it ignores the legal text and preserves legislative prayer simply as historical tradition.

“The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself” *Lake County v. Rollins*, 130 U.S. 662, 670 (1889). Instead of using the opportunity to explicitly return to the text of the Constitution, the *Marsh* Court relied solely on history to bestow its constitutional blessing on legislative prayer. 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 law 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 the country.

463 U.S. at 792. *Marsh* got it almost right: while it is true that American history helps *demonstrate* the constitutionality of public prayer, it is the First Amendment’s text that *determines* it.

Marsh failed to offer the consistently applied principle of the text of the First Amendment and instead simply analogized by historical examples. Admittedly,

Marsh arrives at the right result due to its reliance on the Founders’ example for guidance concerning what does *not* constitute an “establishment” under the First Amendment. *Marsh*’s recognition of our religious tradition is laudable⁷ and its emphasis on history makes its analysis more legitimate than *Lemon* and other judicially-fabricated tests. However, the analysis is fundamentally flawed because nowhere does the *Marsh* Court actually *define* an “establishment” of religion. By sidestepping the First Amendment definition, the *Marsh* Court failed to provide guidance to courts for future cases—like this one—involving prayer in legislative or other deliberative, policymaking bodies. By grounding the decision of whether Nebraska’s legislative prayer was constitutional on the basis that it was a longstanding historical tradition practiced by the Founders, the *Marsh* Court left more vulnerable any other public religious exercise or acknowledgment of God that is of more recent vintage than the first prayer in Congress. The existence of a practice at the time of the First Amendment was adopted is evidence that the Framers did not consider it unconstitutional, but the non-existence of a practice

⁷ See, e.g., *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 267 (1837) (“It is evident, that the meaning of the term used in our own constitution, is most naturally to be sought for, first, in our own history.”); *Legal Tender Cases*, 79 U.S. 457, 465 (1870) (“looking at the public history of the times . . . has [been] established as a proper guide to the construction of the Constitution.”); *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O’Connor, J., concurring in the judgment) (“Particularly when we are interpreting the Constitution, ‘a page of history is worth a volume of logic.’” (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

ultimately has no bearing on whether it is unconstitutional because we have no direct insight as to what the Framers would have thought of it.

The text of the Establishment Clause contains a definite and straight-forward meaning to which the judicial oath of office requires adherence in this case. *See Marbury*, 5 U.S. at 180. As Justice Thomas has observed, “When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” *Kelo v. New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting).

II. PRAYERS OFFERED AT INDIAN RIVER SCHOOL BOARD MEETINGS ARE CONSTITUTIONAL BECAUSE THEY ARE NOT “LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION.”

The First Amendment states, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. Prayers offered at meetings of the Indian River School Board, regardless of whether they mention Jesus Christ, are in no way “law[s] respecting an establishment of religion,”⁸ as those words were understood at the time of the First Amendment’s ratification.

⁸ *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only “Congress,” should not be “incorporated” against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

A. Public prayer and prayer policies are not “laws.”

About 25 years before the ratification of the First Amendment, Sir William Blackstone, in his influential commentaries, had defined a “law” as “a rule of civil conduct . . . commanding what is right and prohibiting what is wrong.”¹ William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster’s 1828 Dictionary stated that “[l]aws are *imperative* or *mandatory*, commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty.” N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

The Federalist No. 15 (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001).

The Indian River School Board in the instant case is certainly a type of legislating body, or at least a deliberative, “statutorily-created, popularly-elected deliberative body that conducts the business of the School District.” *Indian River Sch. Dist.*, 685 F. Supp. 2d at 537. The prayer policy at issue, however, is hardly a

“law” as defined above. The School Board’s policy provides that the Board “may choose to open its meetings with a prayer or a moment of silence” led by a member of the Board, “all in accordance with the freedom of conscience of the individual adult Board member.” *Id.* at 529. “Such prayer is voluntary, and it is among only the adult members of the Board.” *Id.* Moreover, no one else “shall be required to participate in any such prayer or moment of silence.” *Id.* To make it absolutely clear, a “disclaimer” is read at the beginning of every Board meeting that includes language similar to the above provisions. *Id.* at 530. Therefore, the prayer policy allows for voluntary, conscience-led prayer among willing members of the Board; it does not command any action from those in attendance, nor does it restrain attendees or citizens from any action or conduct that they wish to pursue. There is no threatened sanction, no “penalty or punishment for disobedience,” no rule of civil conduct. The prayer policy is simply not a law, but is more akin to an Internal Operating Procedure enacted by this Court.

Prayers and invocations are by nature words directed to God and not to those physically in attendance (although other listeners may certainly be edified—or even motivated to sue—because of it). One cannot obey or disobey another’s prayer. Similar to an executive Thanksgiving proclamation, the legislative prayer “has not the force of law, nor was it so intended.” *See Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) (“The proclamation . . . is but a recommendation. . . .

The duties of fasting and prayer are voluntary, and not of compulsion It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor”). In short, “[w]ords do not coerce.” *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). However effective or allegedly offensive the School Board meeting prayers may be to Appellants and others, they do not rise to the level of a law under the First Amendment.

B. Public prayer and prayer policies may foster a “religious” activity but they do not “respect[] an establishment of religion.”

Just as they do not constitute a law, prayer and prayer policies do not “respect[],” *i.e.*, concern or relate to, “an establishment of religion” under the Establishment Clause.

1. The Definition of “Religion”

The original definition of “religion” as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions’ proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and

his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).⁹ In each instance, “religion” was defined as:

The duty which we owe to our Creator, and the manner of discharging it.

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *The Founders’ Constitution* 82 (Phillip B. Kurland & Ralph Lerner eds. 1987); *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties “can be directed only by reason and conviction, and not by force or violence.” Va. Const. of 1776, art. I, § 16. Three states also included this definition of religion in their proposed amendments to the Constitution during ratification debates, demonstrating that Virginia’s definition was the prevailing definition of the term.

In *Reynolds*, the United States Supreme Court stated that the definition of “religion” contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed

⁹ The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of “religion.” *See Beason*, 133 U.S. at 342 (“[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will”). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,¹⁰ quoted from *Beason* in defining “the essence of religion.” *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Sixteen years later in *Everson*, the Supreme Court noted that it had

previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson’s 1785 Act for Establishing Religious Freedom].

Everson, 330 U.S. at 13.

The *Everson* Court emphasized the importance of Madison’s “great *Memorial and Remonstrance*,” which “received strong support throughout Virginia,” and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Madison’s *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776

¹⁰ *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

Virginia Constitution. *See* Madison, *Memorial and Remonstrance*, *supra*. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. *See id.* at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.

The Indian River School Board prayer policy and the prayers offered by Board members do not rise to the level of "religion" under the First Amendment. Although the prayers offered may be the discharge of a Board member's *religious* duty to God, one prayer is not itself a whole *religion*. "Any prayer has a religious component, obviously," noted the district court. *Indian River Sch. Dist.*, 685 F. Supp. 2d at 542. Various religious exercise and elements may together comprise a complete religion, but an independent exercise of one such element, however *religious* or *sectarian* or *Christian*, does not a religion make.

James Madison, the Chief Architect of the Constitution, in his Presidential Proclamation of 1812, recommended "a convenient day to be set apart, for the devout purposes of rendering the Sovereign of the Universe, and the Benefactor of Mankind." James D. Richardson, II *A Compilation of the Messages and Papers of the Presidents* 498 (1897). Indeed, on September 25, 1789, the very day that "final

agreement was reached on the language of the Bill of Rights,” the U.S. House of Representatives “resolved to request the President to set aside a Thanksgiving Day to acknowledge ‘the many signal favors of Almighty God.’” *Marsh*, 463 U.S. at 788 n.9 (citations omitted).

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. It has also been followed consistently in most of the states.

Id. at 788-89 (footnote omitted) (emphasis added).

Thus, textually *and* historically, it cannot be reasonably held that the School Board’s policy or prayers are an attempt to dictate the duties that citizens of the Indian River School District area owe to the Creator and the manner in which they should discharge those duties. Consequently, the challenged policy and prayers are not laws respecting an establishment of “religion.” U.S. Const. amend I.

2. The Definition of “Establishment”

The Establishment Clause does not broadly prohibit all legislative laws regarding religion or religious activity: it proscribes “laws[] respecting an *establishment* of religion.” *Id.* (emphasis added). Even if prayer policies or prayers could be considered “laws” or “religion” under the First Amendment—which they are not—the Indian River School Board prayers are still not an “establishment” of religion.

An “establishment” of religion, as it was widely understood at the time of the adoption of the First Amendment, involved “the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.” Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Justice Joseph Story explained in his *Commentaries on the Constitution* that “[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.” 2 Joseph Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he “apprehended the meaning of the [Establishment Clause] to be, that *Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.*” 1 *Annals of Cong.* 757 (1789) (Gales & Seaton’s ed. 1834) (emphasis added).

At the time of its adoption, therefore, “[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states.” Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). “[E]stablishment involved ‘coercion of religious orthodoxy and of financial

support *by force of law and threat of penalty.*” *Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (quotations and citations omitted). The House Judiciary Committee in 1854 offered a poignant summary of an “establishment” of religion in a report on the constitutionality of chaplains in Congress and the Army and Navy:

What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added).

Public prayers offered at government meetings do not amount to or even approach an “establishment” of religion. Prayers that open School Board meetings, regardless of to Whom they are directed, and regardless of the denominational affiliation of the praying Board member, do not set up a coercive religious orthodoxy. No one is compelled by policy or practice to offer, participate in, agree with, or attend the prayers—indeed, the policy and disclaimer expressly provide that no one is “required to participate in any such prayer.” *Indian River Sch. Dist.*, 685 F. Supp. 2d at 529, 530. There are no penalties for nonparticipation. No taxes have been levied to support one denomination or faith over another.

Appellants argue that the “sectarian” nature of some of the prayers given renders the prayer practice unconstitutional. “Sectarian” is almost always code for

“too Christian” or prayers that reference the name of Jesus Christ. But if the School Board must censor its members prayers of “sectarian” or other religious references then such a practice would ironically bring the Board *closer* to an establishment of religion than the current prayer policy. Under the current policy, a Board member may pray “in accord with the freedom of conscience of the individual adult Board member.” *Id.* at 529. Were the district court to enjoin any “sectarian references” during prayers, the Board would be forced to prevent prayers by certain Board members who reference Jesus Christ in their prayers or allow them to pray but forbid the inclusion of the name of Jesus. Such judicial censorship would smack more of an official religious orthodoxy of “non-sectarianism” than the current prayer practice and would require the School Board to “enforce the legal observation of it by law, [and] compel men to worship God in [a] manner contrary to their conscience.” 1 *Annals of Cong.* 757 (1789). No court should be so excessively entangled with religious expression that it becomes the gatekeeper of acceptable prayers.

In 2001, the 6th Circuit *en banc* upheld the state of Ohio’s motto, “With God All Things Are Possible,” against a claim that the motto was a violation of the Establishment Clause because it acknowledged God. *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289, 299 (6th Cir. 2001) (*en banc*). The Court rejected the claim:

[The state motto] involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

Id. at 299. The 6th Circuit upheld the Ohio motto using the definition of an “establishment” of religion consistent with the traditional understanding of the Establishment Clause as it was ratified. Likewise, acknowledging God and Jesus Christ through public prayers, directed not by the government but by the conscience of the praying Board member, is not a “law respecting an establishment of religion.”

CONCLUSION

As it is the responsibility of this Honorable Court to decide this case based on the text of the Constitution from which its authority is derived, this Court should affirm the district court’s ruling that the Indian River School Board’s prayer policy does not violate the Establishment Clause of the First Amendment because it does not violate the text of that clause: “Congress shall make no law respecting an establishment of religion.”

Respectfully submitted this 9th day of September, 2010.

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CERTIFICATIONS AND PROOF OF SERVICE

The undersigned counsel for *amicus* hereby certifies that:

1. I, Benjamin D. DuPré, am a member in good standing of the bar of this Court.

2. This brief conforms to the type-volume limitation of Fed. R. Civ. P. 32(a)(7)(B) because it contains 6,081 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman size 14.

3. On September 9, 2010, this brief was served electronically on counsel for all parties via CM/ECF.

4. The text of the electronic version of this brief is identical to the text in the paper copies submitted to the Court.

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s/ Benjamin D. DuPré _____

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Dated this 9th day of September, 2010.