No. 17-60

In The

Supreme Court of the United States

CITY OF BLOOMFIELD,
Petitioner,
v.

JANE FELIX & B.N. CONNE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION

in support of the *Petitioner.*

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Suite 204
Virginia Beach, VA 23454
(757) 463-6133

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

OTHER SOURCES

INTEREST OF *AMICUS CURIAE*[1]

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom, preserve America's Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places; and as such, it has an interest in the traditional acknowledgment, accommodation, and encouragement of religion implicated in the instant case. CPCF reaches across all denominational, socio-economic, political, racial, and cultural dividing lines. It diligently implements strategies that are both top-down, deploying the highest levels of national leadership, and bottom-up, mobilizing a broad base of motivated citizens. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states.

SUMMARY OF THE ARGUMENT

This Court should grant the Petition in order to clarify that, although Establishment Clause claims are now regularly brought under 42 U.S.C. §1983, Congress never intended this to be the case. An examination of the legislative history of §1983

[1] Counsel of Record for the Parties received timely notice of the intent to file this Brief. The parties have consented to the filing of this brief. A blanket letter of consent from Petitioner has been lodged with the Court. A copy of the consent from Respondent accompanies this brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, and their counsel.

and 42 U.S.C. §1988 will demonstrate this. Thus, this Court should grant the Petition and remand the case with instructions to dismiss the appeal for want of jurisdiction.

However, should this Court disagree, the Court should grant the Petition and hold that the passive Ten Commandments display at issue here does not establish religion. At most, the display acknowledges, accommodates, or encourages religion. Each of these practices is constitutionally permissible.

ARGUMENT

I. THIS CASE IS A GOOD VEHICLE FOR CLARIFYING THAT ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. §1983.

This lawsuit was brought pursuant to 42 U.S.C. §1983. Because §1983 (and its jurisdictional counterpart 28 U.S.C. §1343) does not give the federal courts jurisdiction in Establishment Clause cases, this case should be remanded with instruction to dismiss the appeal for want of subject matter jurisdiction.

At first blush, this assertion may seem counterintuitive since plaintiffs currently routinely use §1983 as a vehicle for Establishment Clause claims. However, as this Brief will demonstrate, Congress never intended this result.

Here, the Respondents invoked the jurisdiction of the district court *only* via §1983, not also un-

der federal question jurisdiction via 28 §1331.[2] Complaint 2. Further, they made no effort to explain how the putative Establishment Clause violation amounts to a deprivation of "rights, privileges, or immunities," as is required to invoke §1983.

These failures are problematic in light of the majority and concurring opinions in *Inyo County v. Paiute-Shoshone*, 538 U.S. 701 (2003). In *Inyo County*, an Indian tribe sued in federal court under *both* §1983 *and* 28 U.S.C. §1331, 28 U.S.C. §1337 (commerce jurisdiction), and the "'federal common law of Indian affairs,'" 538 U.S. at 706. Justice Ginsburg, writing for an eight-member majority, held that the tribe was not a "person" who could sue under §1983. *Id*. at 712. However, *because* the tribe had invoked the jurisdiction of the federal courts *via the other means*, the Court remanded the case for consideration of jurisdiction *vel non* on those bases. Here, since no other bases for jurisdiction were pled and since—as will be explained—§1983 does not provide jurisdiction, this Court should remand with instructions to dismiss the appeal.

Furthermore, Justice Stevens's concurring opinion is also problematic for the Respondents in the instant case. Justice Stevens believed that the tribe was a "person" under §1983. However, he opined that the tribe had alleged only a putative deprivation of a right, privilege, or immunity that was in fact no such thing. *Id*. at 713 (Stevens, J., concurring in judgment).

Of course, Respondents are not alone in such deficient pleading. This is currently common practice. However, at least one federal court has directly

---

[2] Respondents' invocation of other statutes and rules only address various types of relief. *See*, complaint 2.

raised—but not answered—the question of the appropriateness of bringing Establishment Clause claims under §1983. In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, as violative of the Establishment Clause. The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants. However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under §1983:

> Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under §1983. We note that this route has been traveled before without exciting controversy (or even comment.

Cammack, 932 F.2d at 768 n.3 (citing *Marsh v. Chambers*, 463 U.S. 783, 785 (1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988), *aff'd in part and rev'd in part*, 492 U.S. 573, (1989).

Since *Cammack*, additional cases, such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), have reached this Court in a similar posture to *Allegheny*: the Establishment Clause claim has been brought under §1983 without the Court acknowledging that fact. However, to date, since *Marsh*, only two cases, *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU*, 545 U.S. 844 (2005), have been brought under §1983 in which the Court has both acknowledged that fact and de-

cided the claim.[3]

Furthermore, this Court has often allowed certain claims to come before it on multiple occasions without comment and then, when a subsequent party squarely raised the jurisdictional issue, has decided that such claims were not properly brought, including in the §1983 context. For example, this Court had often accepted cases in which a state had been sued under §1983 before deciding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) that a state is not a person for purposes of §1983. *See,* cases collected in *id.* n.4. Significantly, the *Will* Court specifically noted that "this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us." *Id.* (brackets original; internal quotation marks and citation omitted). Therefore, this Court should answer the *Cammack* court's question in the negative.

Until the enactment of 42 U.S.C. §1988, virtually no Establishment Clause cases were brought under §1983. Since the passage of that act, the number of cases has exploded. For example, the number of opinions available on WestLaw serves as an indicator. Prior to the enactment of §1988, only 35 opinions are available in which both §1983 is cited and the term "Establishment Clause" is used. In contrast, subsequent to §1988's enactment 1,708 such cases

---

[3] The Tenth Circuit has rejected the argument made here. *Green v. Haskell Cty. Bd. Of Comm'rs*, 568 F.3d 784, 788 n.1 (10th Cir. 2009); *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1112 n.4 (10th Cir. 2010).

can be found.[4]

The reason for this dramatic increase seems obvious: the lure of attorney's fees.

Today this phenomenon has turned into a virtual "blackmail scheme" by strict separationists. Many lawsuits are not filed or are quickly settled because public interest law firms and others threaten localities with the prospect of paying enormous attorney fee awards.

However, the legislative histories of §1988 and of §1983 before it, demonstrate that Congress never intended §1983 to cover Establishment Clause claims.

A. Legislative History of §1988.

Looking first at the legislative history of §1988, it is plain that the purpose of the Act was to restore the ability of plaintiffs to get attorneys' fees *in civil rights lawsuits only*. The Act was a response to this Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society,* 421 U.S. 240 (1975). In *Alyeska*, this Court declared that attorney's fees would no longer be available to plaintiffs in federal lawsuits unless Congress expressly authorized such fees. *Id.* at 269-71. *Alyeska* itself was an environmental case, not a civil rights case. Yet Congress's great concern was with restoring attorney's fees in traditional *civil rights* cases.

As Senator John Tunney, Chairman of the Senate Judiciary Subcommittee on Constitutional Rights noted when he introduced the original version

[4] Not every opinion found actually deals with an Establishment Clause claim brought under §1983. However, the statistical point is still valid.

of the bill:

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 94th Cong. 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, §1988, S. 2278, Source Book: Legislative History, Texts, and Other Documents* (1976) at 3. [Hereinafter, *Source Book*.]

The emphasis throughout the debates on the Act remained single-minded: victims of racial discrimination needed to be able to attract attorneys through a fee-shifting provision. There was simply no thought that Establishment Clause claims would fall under §1988 provisions. *See generally*, *Sourcebook* throughout. One of the main proponents of the Act was Senator Edward Kennedy (D-Mass.). Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination" in areas such as "jobs, housing, credit, or education" using the "civil rights laws."

Sourcebook at 23.

Furthermore, the legislative history is also abundantly clear that only two additional provisions were added as part of the political give and take needed to ensure passage of the Act: The Title IX provision protecting against sex discrimination in education, and the provision for the protection of taxpayers defending themselves against suits or proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress simply did not intend to provide for fee-shifting in Establishment Clause cases.[5]

B. Legislative History of §1983.

Secondly, the legislative history of §1983 itself confirms that the drafters of §1988 correctly understood the intended coverage of §1983. Section 1983 is one of the surviving provisions of the Ku Klux Act of 1871. Section 1983 started out as §1 of that Act. As numerous courts and commentators, including this Court, have documented, §1 was one of the provisions that Congress debated least. *See, e.g, Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665 (1978). However, the meaning of "rights, privileges and immunities" can be determined by examining the debate over the entire act.

The starting point for this process is to note that, as a bill, the Act was entitled "A Bill to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." *Cong. Globe*, 42 Cong., 1st Sess. 597 (1871). In that context, it is significant that after

---

[5] None of the subsequent amendments is in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

Representative Shellabarger (R-Ohio) reported the bill on behalf of the Select Committee, Representative Stoughton (R-Mich.) spoke to set the stage. *Id.* at 599. He started with the activity of the Ku Klux Klan in North Carolina. *Id.* at 599 ff. He noted "murders, whippings, intimidation, and violence." *Id.* He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries. *Id.* at 600.

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to §five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

Id. at 606.

With this background, it is readily understandable that the most common view of "rights, privileges, and immunities" was one that equated it with life, liberty, and property. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). However, some Congressmen gave extended comments with illustrative examples of the concerns that animated the passage of the Act. None raised any Establishment Clause concerns. The following example by Representative John Coburn is typical of the more extended re-

marks:

> Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it.

Id. at 619-20.

This quotation, typical of many others, reminds the modern student of the Act that one must never stray far from the historical context of Klan abuses if one wants to understand Congress's intention. Again, one sees a close connection between the concepts of equal protection and of rights, privileges, and immunities. Moreover, one also finds some specific rights mentioned, *i.e.*, "the right[s] to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms." *Id.*

Furthermore, during the debates over the meaning of "rights, privileges, and immunities" a distinction was made between civil rights and political rights. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 635-36 (1871). While the meaning of those terms was not fixed even then, *see id.*, and while the use of these terms has changed to some extent today, civil rights were generally seen as those fundamental rights spelled out in the nation's charter, the Declaration of Independence, and to which all persons were entitled by the law of nature. At a minimum, the debates indicate, *see id.*, that Congress understood, and if anything, more sharply drew, the modern black letter law distinction:

> [political rights and civil rights] are differentiated in that a political right is a right exercisable in the administration of government, or a right to participate, directly or indirectly, in the establishment or management of government, while civil rights have no relation to the establishment or management of government. Political rights have also been distinguished on the ground that a civil right is a right ac-

> corded to every member of a distinct community or nation, which is not necessarily true with regard to political rights.

15 Am. Jur. 2d Civil Rights §2 (citations omitted).

With this distinction very much in the forefront of debate, Congress intended §1983 to cover only civil rights. The Establishment Clause is relevant to the "establishment or management of government." Does that mean that governments can therefore willfully violate the Establishment Clause with impunity? Certainly not. Anyone with standing could sue directly under the Establishment Clause instead of under §1983—as was routinely done prior to 1976—by invoking federal question jurisdiction. All that would be lost would be the "blackmailing" effect of §1988 fees.

Despite the force of the historical argument, some might suggest that this Court's opinion in *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980) is an obstacle to the view asserted above. In *Thiboutot*, this Court held that statutory §1983 claims should not be limited to civil rights statutes only.

However, the obstacle is not insurmountable. This Court could simply decide that the *Thiboutot* minority had the better of the argument over the legislative history of §1983 and overturn *Thiboutot* to the extent necessary. However, this Court *need not* do so to decide that Establishment Clause claims are not properly brought under §1983. After all, the Ninth Circuit in the Good Friday *Cammack* case was well aware of *Thiboutot* when it questioned whether §1983 was a legitimate vehicle for bringing Establishment Clause claims (having, according to a WestLaw search, cited or quoted it 26 times prior to issuing its *Cammack* opinion) and it did not think

that *Thiboutot* foreclosed the question.

This Court can simply acknowledge that deciding that §1983 covers all "laws" is an analytically distinct question from deciding that the Establishment Clause encompasses any "rights, privileges, [or] immunities" at all. While the validity of this distinction is arguably demonstrable from the legislative history of the Ku Klux Act, it is even clearer when one looks at the legislative history of and scholarship about the Fourteenth Amendment itself.

C. Legislative History of the Fourteenth Amendment.

Various views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include and, indeed, each of the opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that Amendment. However, all of those views have one thing in common: none sees the term "privileges and immunities" as implicating the Establishment Clause—even were it to be restated in terms of "a right to be free from establishment of religion."

Chester Antieau, a leading §1983 expert, collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment and which the Fourteenth Amendment was designed to "constitutionalize") and from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment*. These statements clearly demonstrate that the free exercise of religion was intended to be

covered by the term "privileges and immunities" but that "freedom from establishment" was not.

Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect it. *Id.* at 91. By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment." *Id.* at 108 ff. There is more than mere silence to the argument however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause. *Id.*

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-85. This evidence includes state statutes, constitutions, and court decisions. Some states still had vestiges of true establishment. For example, both New Hampshire and Massachusetts still provided constitutional preferences for Protestant Christianity. *Id.* at 110. These states, as Antieau points out, would not have ratified the Fourteenth Amendment if they thought it would endanger their establishments.

Therefore, there is no right, privilege or immunity implicated by the Establishment Clause. Therefore, *Thiboutot* is no obstacle to the argument advanced here.

Thus, this Court should grant the Petition, recognize that §1983 does not give federal courts ju-

risdiction over Establishment Clause claims, and remand the case with instructions to dismiss the appeal for want of jurisdiction.

II. IN THE ALTERNATIVE, THIS CASE IS A GOOD VEHICLE FOR DISTINGUISHING BETWEEN ACKNOWLEDGMENT, ACCOMMODATION, ENCOURAGEMENT, AND ESTABLISHMENT OF RELIGION.

Your *Amicus* agrees with the City of Bloomfield that the display at issue here is private speech, since the City has opened a forum. Cert. Pet. 25-27. However, whether the display is analyzed as private or government speech, it does not establish religion. This is so because the Framers of the Constitution and of the First Amendment distinguished between the acknowledgment, accommodation, encouragement, and establishment of religion, and enshrined in that amendment the principle that only the last should be forbidden. This case represents a good vehicle for this Court to address this constitutional reality.

A. A Proper Understanding of the Establishment Clause Protects the Rights of the Majority and the Minority.

The Respondents are "Wiccans ...[who] object to the Monument on the ground that it conflicts with their religious beliefs and causes them to feel excluded." Cert. Pet. 9. Thus, the Respondents are claiming status as a religious minority. The Framers were well aware of disputes between majorities and minorities.

As the Framers understood, balancing of the

rights of the majority and the minority must never be a matter of "either/or"; it must always be a matter of "both/and." Thus, *The Federalist Papers* reflect the concern about the tyranny of the majority over the minority. *Federalist 51* explains, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. *Federalist 22* states that the "fundamental maxim of republican government ... requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). The only exception occurs when that sense violates a constitutional provision put in place to protect the minority.

However, the Framers balanced the religious rights of the majority and the minority and protected each against the tyranny of the other. They did so by taking into account the four concepts mentioned above: the acknowledgement, accommodation, encouragement and establishment of religion. In deciding how to balance the rights of, and protect against the tyranny of, majorities and minorities, the Framers determined that acknowledgment, accommodation, and encouragement of religion would be permitted. Only establishment would be forbidden.

B. True Establishment of Religion is Prohibited.

Because of present day confusion, it is important to understand the original concept of establishment. The Framers understood religion could be established three ways, as explained by Justice Joseph Story:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* §1866 (Arthur E. Sutherland ed. 1970) (1833). This definition makes it easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand.

C. Acknowledgment of Religion is Permitted.

One of the most famous explications of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). It is helpful to review some of the historical examples he used:

> On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a

> Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (citation omitted). Justice Rehnquist then documented the debate over the resolution, including objections on what today would be called establishment grounds. *Id*. at 101. This shows that the First Congress did not simply engage in inconsistent action. Rather, it entertained objections and rejected them.

Justice Rehnquist then quoted the Thanksgiving proclamation ultimately issued by President Washington:

> George Washington responded to the Joint Resolution which by now had been changed to include the language 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 and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." The Presidential Proclamation was couched in these words:
>
> > 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 tranquillity, 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.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly

> and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (citations omitted).

Justice Rehnquist also noted the views of the eminent constitutional authority, Thomas Cooley:

> [T]he American constitutions [sic] contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encour-

> aged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse ....

472 U.S. at 105-06 (Rehnquist, J., dissenting) (citation omitted). Cooley was addressing the acknowledgment of God Himself. It naturally follows that if government can acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to quote Cooley's discussion of the "public recognition of religious worship." *Id.* at 106 (citation omitted).

Acknowledgement is not a hard concept. It meant then exactly what it means now—to recognize. Government—including local governments—can recognize the reality of God and the importance of religion.

D. Accommodation of Religion is Permitted.

Governments can go a step beyond acknowledging religion. It may accommodate various sects' religious views and acts. This approach was discussed by George Washington. "[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit." Letter from George Washington to the Religious Society Called Quakers (Oct. 1789),

in George Washington on Religious Liberty and Mutual Understanding 11 (E. Humphrey ed.1932).

Importantly, this very passage was quoted by Justice O'Connor in her dissent in *City of Boerne v. Flores*, 521 U.S. 507, 562 (1997) (O'Connor, J., dissenting). In *Flores*, Justices O'Connor and Scalia debated whether accommodation is constitutionally *required*. *Cf. id.* at 560-64 (O'Connor, J., dissenting) with *id.* at 541-44 (Scalia, J., concurring in part). However, that is not the concern of this Brief. Rather, the point is that both Justices agreed that many historic practices (that continue to the present day) constitute an accommodation of religion, and that such accommodation is constitutionally *permitted*.

Like acknowledgement, accommodation is not a hard concept. It simply means that the government changes what it otherwise might do. It can take the form of granting exceptions or other adjustments to governmental action.

E. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest Ordinance, which states: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Available at* http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html (last visited Aug. 10, 2011).

However, the Founders did not just talk about encouraging religion; they actually did so. Here again then-Justice Rehnquist's *Wallace v. Jaffree* dissent is

instructive:

> [a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools

Wallace, 472 U.S. at 103-04 (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson's treaty and its background, which documented that the United States gave significant amounts of money to both the Catholic Church and the Society of the United Brethren during the Washington, Adams, and Jefferson administrations. *Id*. at 104 n.5.

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sects' request for an exception or other alteration of government action. It involves looking for ways to encourage the population to engage in religious pursuits. The Framers truly believed that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind ...." Therefore, government could encourage religion. Funding whichever denomination had "boots on the ground" did not establish that denomination.

F. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated far from some of these last examples, the historical record sets the stage for an important reality: even though watered down, the concepts of acknowledgement, accommodation, and even encouragement have not fallen out of the Supreme Court's Establishment Clause jurisprudence.

For example, the acknowledgement of both God and the role of religion in society continues to be addressed. For example, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Court upheld Nebraska's legislative chaplaincy program. In so doing, the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not ... an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Id*. at 792. This same point was made by the plurality in *Van Orden* when it quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.'" 545 U.S. at 684.

The *Van Orden* plurality also discussed accommodation: "'When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates the public service* to their spiritual needs.'" 545 U.S. at 684 (citation omitted).

And of course, that same quotation addresses encouragement: "When the state *encourages* religious instruction ... it follows the best of our traditions." *Id.* at 684. These words first appeared in *Zorach v. Clauson*, 343 U.S. 306, 313-14. Since then, the words have been quoted in whole or in part in eleven other opinions of this Court, garnering the support of numerous justices.[6]

In light of all the above permissible *active* interactions between religion and government, the instant passive display cannot possibly establish religion. Assuming this Court concludes the lower courts had jurisdiction, it should grant the Petition and declare that passive monuments—even to the extent that they acknowledge, accommodate, or encourage religion—do not establish religion.

CONCLUSION

For these reasons, this Court should grant the Petition and remand with instructions to dismiss the appeal for want of jurisdiction. In the alternative, this Court should grant the Petition and hold that the display does not violate the Establishment Clause.

Respectfully submitted,
August 10, 2017,

[6] Per Keyciting WestLaw's Supreme Court database, including the appropriate phrase. These opinions include plurality, concurring and dissenting opinions.

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133
nlf@nlf.net