No. 06-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES W. GREEN, *et al.*,
Plaintiffs-Appellants

v.

HASKELL COUNTY, ***et al.*,**
Defendants-Appellees

ON APPEAL FROM THE EASTERN DISTRICT OF OKLAHOMA

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendants-Appellees
Supporting affirmance

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the interpretation of the Establishment Clause.

This brief is filed pursuant to the consent of both parties.

ARGUMENT

II. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS FOR WANT OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

This lawsuit was brought pursuant to 42 U.S.C. § 1983 (2006). Because § 1983 (and its jurisdictional counter part 28 U.S.C. §1343(3) (2006))[1] does not give the federal courts jurisdiction in Establishment Clause cases, this case should be remanded with instruction to dismiss for lack of subject matter jurisdiction. At first blush, this assertion may seem counterintuitive since plaintiffs have developed the habit of using § 1983 as a vehicle for Establishment Clause claims. However, as this Brief will demonstrate, Congress never intended this result.

[1] The United States Supreme Court explained the relationship between § 1983 and §1343 (3) in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). However, because some Supreme Court cases speak of jurisdiction under § 1983, this brief will follow suit and use this shorthand.

At least one federal court has directly 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 law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the Establishment Clause of the Hawaii Constitution. The Ninth Circuit upheld the district court's entry of summary judgment for the government defendants. However, the Ninth Circuit questioned, without 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). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (simply noting that establishment clause challenge was brought under § 1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

Cammack, 932 F.2d at 768, n.3.

Since *Cammack* additional cases, such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), have reached the Supreme Court in a similar posture to *Allegheny*, *i.e.*, the Establishment Clause claim has been brought under § 1983 without the Court acknowledging that fact. However, only two cases, besides *Marsh*, have been brought under § 1983 in which the Court has both acknowledged

that fact and decided the claim on the merits. *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v.Perry*, 545 U.S. 677 (2005).

Furthermore, the Supreme Court has often allowed certain types of claims on multiple occasions without comment and then, when a party squarely raised the jurisdictional issue, the Court decided that such claims were not properly brought. In fact, the Court has done this on several occasions in the § 1983 context. For example, the Court 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, e.g.*, cases collected in *id.* at 9 n.4. Significantly, the *Will* Court specifically noted that the "'Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974)." *Id.* (brackets in original).

This Court should follow the lead of the *Cammack* court and question whether § 1983 is a proper vehicle for bringing an Establishment Clause claim. The only reason that the *Cammack* court did not answer the question was because the parties did not raise it. However, *Amicus* is hereby squarely raising the question,[2] and, for the reasons stated below, this Court should conclude that § 1983

[2] This Court noted that it will address issues raised solely by *amici* if they raise jurisdictional, federalism, or comity issues. *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). This is also the policy of the

does not cover Establishment Clause claims and, therefore, the appeal should be dismissed.

Until the passage of 42 U.S.C. § 1988 (2006), The Civil Rights Attorney's Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under § 1983. Since the passage of that act, the number of cases has exploded. While the enactment date is not a perfect division (because of cases that were already litigating), it is a close proxy. For example, the number of opinions on Lexis, to the best of *Amicus*' ability to ascertain, show that prior to the enactment of § 1988 (*i.e.*, from § 1983's enactment in 1871 until § 1988's enactment in late 1976), only 34 opinions are available in which both § 1983 and "Establishment Clause" are mentioned. In contrast, in the less than thirty years following § 1988's enactment 929 such cases can be found.[3]

Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot*, 448

United States Supreme Court. *Davis v. United States*, 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion). *Amicus* argues that this Court and the district court lack subject matter jurisdiction. As this Court has held, "Federal courts 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,' and thus a court may sua sponte raise the question of whether there is subject matter jurisdiction 'at any stage in the litigation.'" *1Mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (quoting *Arbaugh v. Y & H. Corp.*, 126 S.Ct. 1235, 1244 (2006).

[3] Admittedly, not every opinion found with this technique will actually deal with an Establishment Clause claim brought under §1983. However, the statistical point is still valid. A LEXIS search was performed by selecting "Federal Court Cases, Combined" and searching for "'Section 1983' and 'Establishment Clause.'"

U.S. 1, 24 (1980)[4]: "There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought. . . . [I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."

Today this phenomenon has turned into a virtual "blackmail scheme" by strict separationists. The statistics above do not begin to tell the whole story. Many lawsuits are not even filed or are settled because public interest law firms threaten localities and state defendants with the prospect of paying enormous attorney fee awards. *See generally*, Steven W. Fitschen, *From Black Males to Blackmail: How the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most Historic Civil Rights Statutes* (forthcoming).[5]

Were it not for one thing—congressional intent—all of this might be chalked up as the price of "doing business," *i.e.*, erecting monuments that one knows strict separationists dislike. Ironically (given how § 1988 has been used), the legislative history of § 1988 gives us insight into the legislative history of § 1983, and these histories show that Congress never intended § 1983 to cover Establishment Clause claims.

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[4] The context of his remarks was different than that being addressed, however, the concern is transferable.

[5] A working draft of this article is available at http://www.nlf.net/articles/blackmail.pdf.

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

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

> [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 remained single-minded: Americans who were the victims of racial discrimination needed a fee-shifting provision to attract attorneys. Establishment Clause claims were not contemplated to fall under § 1988. *See generally*, *Source Book* throughout; Fitschen, *supra*, throughout. One of the main proponents of the Act, Senator Edward Kennedy (D-Mass), 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." *Source Book* at 23.

Furthermore, the legislative history is clear that only two additional provisions were added as part of the political compromise needed to pass the Act: The Title IX provision protecting against sex discrimination in education and the provision for the protection of taxpayers defending themselves against proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress did not intend to provide for fee-shifting in Establishment Clause cases.[6]

Secondly, the legislative history of § 1983 confirms that the drafters of § 1988 correctly understood the intended coverage of § 1983. Section 1983 was was originally a provision of the Ku Klux Act of 1871. Section 1983 was § 1 of that Act. Numerous courts and commentators have documented that § 1 was one of the least debated provisions. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658,

[6] Similarly, none of the subsequent amendments are in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

665 (1978). However, the meaning of "rights, privileges and immunities", which § 1983 was enacted to protect can be determined by examining the debate over the entire act.

The beginning of this process is to note that, as introduced, 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). After the Bill was introduced, Representative Stoughton (R-Michigan) spoke to set the stage. *Id.* at 599. He started with the activity of the Ku Klux Klan in North Carolina, noting "murders, whippings, intimidation, and violence." *Id.* at 599 ff. He also discussed how the Klan would protect its members by having other members commit perjury as witnesses or refuse to vote to convict as jurors. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee. *See generally, id.* at 600 ff. He read testimony of Blacks who had been victims of violence and of Whites who knew the inner workings of the Klan, as well as judges who knew of perjury incidents. *Id.* Near the end of his remarks, he summarized the need for the act:

> 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 context, 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 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 remarks:

> 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, reminds us that one must never stray far from the historical context of Klan abuses if one wants to understand § 1983's intent. Again, the close connection between the concepts of equal protection and of rights, privileges, and immunities is illustrated. The Establishment Clause was simply not intended to be covered.

Of course governments cannot therefore willfully violate the Establishment Clause with impunity. Plaintiffs can sue directly under the Establishment Clause instead of under § 1983—as was routine before 1976. All that would be lost would be the "blackmailing" effect of the § 1988 fees anticipated by Justice Powell.

Despite the historical support, some may believe that the position advocated here conflicts with *Thiboutot*. In that case, the Supreme Court held that statutory § 1983 claims should not be limited to civil rights statutes only.

However, that problem is not insurmountable. The Ninth Circuit was well aware of *Thiboutot* when it questioned § 1983 jurisdiction for bringing Establishment Clause claims (having, according to a Lexis search, cited or quoted it 28 times prior to issuing its *Cammack* opinion), yet it did not think that *Thiboutot*

foreclosed the question.

This Court can simply acknowledge that deciding that § 1983 covers all laws (which after all by definition implicate "rights, privileges and immunities") is analytically distinct 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.

Many 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. *See*, Fitschen, *supra*, Section IV. 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 as "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 from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth*

Amendment (1997). These statements 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 their free exercise rights. *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 this 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 which include the Establishment Clause. *Id.*

Additionally, Antieau examined practices 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, 282-285. This evidence includes state statutes, constitutions, and court decisions. Some states, *e.g.*, New Hampshire and Massachusetts still had vestiges of true establishment. *Id.* at 110. These states 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. Thus, *Thiboutot* is no obstacle to this argument.

Thus, for the reasons discussed, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and vacate the opinion of the District Court, remanding the case with instructions to dismiss the case for want of subject matter jurisdiction.

II. THE MONUMENT SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE IT FALLS WITHIN TWO PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

Should this Court disagree that it lacks jurisdiction, *Amicus* urges this Court to affirm the District Court's decision. While the court below was correct in its analysis of the monument under the various tests it employed, it also could have relied on the test articulated in *Marsh v. Chambers*, 463 U.S.783 (1983), an equally binding precedent. The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted).

Indeed, in its recent Ten Commandments case, *Van Orden v.Perry*, 545 U.S. 677 (2005) (one of the cases relied upon by the court below), the plurality specifically refered to *Marsh* as an example of how the recognition of the role of God in our nation's heritage is permissible under the Establishment Clause. *Van*

Orden, 545 U.S. at 688.

Writing for the plurality, Chief Justice Rehnquist noted that the constitutional analysis of the monument in *Van Orden* "is driven both by the nature of the monument and by our Nation's history," not the *Lemon* test. *Id*. at 686. He went on to say that "'[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Van Orden*, 545 U.S. at 866, *quoting Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

Rehnquist continued with a *Marsh*-like analysis, noting the deeply embedded practice of recognizing the role God in our Nation's heritage:

> Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," *School Dist. of Abington Township v. Schempp*, and that "the history of man is inseparable from the history of religion," *Engel v. Vitale*. This recognition has led us to hold that the *Establishment Clause* permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh v. Chambers.* Such a practice, we thought, was "deeply embedded in the history and tradition of this country."

Van Orden, 545 U.S. at 687-88 (footnote and citations omitted).

Rehnquist compared the monument outside the Texas State Capitol with other examples of Ten Commandments displays on government property, describing them as "acknowledgements of the role played by the Ten Commandments in our Nation's heritage," *id*. at 688, and not unconstitutional

establishments of religion. Thus, by rejecting the *Lemon* test and relying on the same analysis found in *Marsh*, the *Van Orden* plurality evaluated the Texas Ten Commandments display from a *Marsh* perspective.

This is consistent with the view of pre-*Van Orden* courts which had begun to realize that even when a practice fails the *Lemon* test it could be upheld if it passed the Marsh test. For example, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order at 10 (N.D. Ind. Mar. 19, 2004), the district court stated, "a practice that fails the *Lemon* test 'may still be found constitutional under the *Marsh* exception to the *Lemon* test.'" *Id*. (quoting *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002)).[7]

Furthermore, Justice Breyer's concurrence in *Van Orden* also recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Breyer distinguished *Van Orden* from *McCreary County*–the other Ten Commandments case decided the same day–by noting that the *Van Orden* display is "simply an effort primarily to reflect, historically, the secular impact of a religiously inspired text." *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

[7] It is true that some courts that have acknowledged *Marsh* as an exception have gone on to mis-apply it. However, this Brief will explain how the instant monument should be upheld under a *proper* application of *Marsh*.

Therefore, while it was proper to use *Van Orden* in its Establishment Clause analysis, the court below could also have decided the case under *Marsh*. *Van Orden*, then, does not present an obstacle to this argument since the two approaches are completely compatible. By emphasizing *Marsh* this brief adds an additional vantage point on the constitutionality of the instant monument.

Neither is *McCreary County* an obstacle. There, copies of the Ten Commandments were hung in the courthouse pursuant to an order from the county legislature. 545 U.S. at 851. In finding the display unconstitutional, the Court held that "the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose." *Id*. The Court failed to find a valid secular purpose or objective in the County's display. *Id.* at 881.

But such is not the case here. The District found that the Commisioners were not involved with raising the monument, passing religious resolutions, exercising control, or disingenuous litigation tactics. *Green v. Bd. of Comm'rs*, 450 F.Supp. 2d 1273, 1291 (E.D. Okla. 2006). Since the purpose here is distinguishable from that in *McCreary County*, the District Court was correct to uphold the monument's constitutionality. However, to repeat, this Brief will show why the monument is constitutional under *Marsh.*

We note that some courts have incorrectly tried to limit *Marsh* to chaplaincy

cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, that has not been the Supreme Court's approach. Indeed, that Court has not even limited *Marsh* to Establishment Clause cases. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (evaluating history of federal use of state executives in law enforcement.

Lower courts have also applied *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez,* 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

Further, where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. Most importantly, courts have applied *Marsh* in religious display cases. *See e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986). Courts have also used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified School District Board of Education*, 11 F. Supp.

2d 1192, 1196 (C.D. Cal. 1998); the prayer room at the Illinois statehouse, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986); religious expression in the form of an invocation and benediction at a public university graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance in a public school, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

Of course, the most significant consideration here is that the Supreme Court has never overturned *Marsh*, either explicitly or *sub silentio*. The Court could have done just that in *Lee v. Weisman*, 505 U.S. 577 (1992), but instead chose merely to distinguish that case.

In *Weisman*, the Court noted *Marsh's* on-going viability and explained why it would not apply *Marsh*. *Weisman,* 505 U.S. at 596. The Court did not overturn, criticize, or even question *Marsh*; nor did it characterize *Marsh* as anomalous. The Court merely stated that "[i]nherent differences between the public school system and a session of a state legislature distinguish[ed] [*Weisman*] from *Marsh v. Chamber*s." *Id*. (citation omitted). The Court then noted that, while the invocation and benediction at issue in *Lee* were similar to the issues considered in *Mars*h,

there were obvious differences. *Id*. at 597. Those differences were the age of the people hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id*. The Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added). Relying primarily on the age of the school children, the Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* The Court also noted that the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id.*

In the instant case, all of the differences in *Weisman* are absent. At the basic level, this is a *display* case, not a school prayer case. Additionally, significant differences as to context, setting, and audience exist in this case distinguishing it from *Weisman*. Simply put, *Marsh* controls this case.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislative sessions. 463 U.S. at 786. The Court declared that prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.,* and that it had "become part of the fabric of our society," *id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court

stated that the *actions* of the First Congressmen corroborated their intent that prayers before legislatures not contravene the Establishment Clause. *Id*. at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

Some courts have been willing to consider a challenged practice under *Marsh*, but have applied it at an improper level of abstraction. One of the most egregious examples is provided by the district court in *Glassroth v. Moore,* 229 F. Supp. 2d 1290, (M.D. Ala. 2002), the case in which the Ten Commandments monument in the Alabama Judicial Building was challenged. This is best understood by comparing that court's opinion with the opinion of the Sixth Circuit sitting *en banc* in *ACLU v. Capitol Square Review & Advisory Board,* 243 F.3d 289 (6th Cir. 2001), which approved the display of the state motto containing a religious inscription.

In *Capitol Square*, the ACLU sued to enjoin the placement of the Ohio State motto, "With God, All Things Are Possible," in the plaza facing the state Capitol. *Id.* at 292. Rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit specifically noted the following: President Washington's congressionally-solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine

state constitutions to God or religion, Thanksgiving Proclamations by presidents other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our currency. *Id*. at 296-301.

Two points stand out about the Sixth Circuit's analysis. First, the *Capitol Square* court took one of *Marsh's* most cited principles and applied it to a display case. Tracing acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display was constitutional under *Marsh*:

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

Second, none of the Sixth Circuit's historical examples even addressed religious displays. Thus, the Sixth Circuit understood that the *Marsh* analysis must be done at the proper level of abstraction.

In comparison, the *Glassroth* court's analysis was conducted at the wrong level of abstraction. It asked whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 229 F. Supp. 2d

at 1308.[8] Under this misapplication of the test, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that the Continental Congress had displayed it in its chambers. Merely stating this approach highlights its failings.

Similarly, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." Here again, the *Capitol Square* court's approach is superior—displays containing religious content are part of a larger tradition that *does* have an adequate historical pedigree. Indeed as will be demonstrated below, these monuments are part of *two* important traditions.

A. The Monument Should be Upheld Because it is Part of a Long-Standing Tradition of Inscribing Religious References on Public Property.

This nation has a long-standing tradition of placing religious sentiments and scriptural references on government property. Examples abound, but the following list illustrates the point:[9]

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[8] Admittedly, *Glassroth* involved other factually unique aspects. Nonetheless, the statements above were given as another reason why the monument violated the Establishment Clause.

[9] Examples are from Catherine Millard, *God's Signature Over the Nation's Capital* (1988).

- In the House of Representatives Chamber, in our nation's Capitol, above and behind the Speaker's Chair is the inscription, "In God We Trust."

- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, it is the most prominent.

- In the Capitol is a private room dedicated for use by members for prayer and meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.

- In the main reading room of the Library of Congress are statues of Moses and "Paul, Apostle to the Gentiles."

- The Lincoln Memorial, on its north wall, bears the words of Lincoln's Second Inaugural Address, in which he uttered a number of religious sentiments and quoted from scripture, including the verse from the Old Testament: "The Judgments of the Lord are righteous and true, altogether."

Displaying the Ten Commandments on a monument on county property is not constitutionally different from these practices.

Though some would expunge our history of all things religious, they cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a long-standing tradition that has enriched our nation and should not fall under Mr. Green's unforgiving view of the Establishment Clause.

B. The Monument Should be Upheld Because it is Part of a Long-Standing Tradition of Governmental Acknowledgement of the Role of Religion in Society and of God.

The monument is also part of a long-standing tradition of governmental acknowledgement of the role of religion in American life. When the First Amendment was drafted, officials of our new government participated in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

The *Marsh* Court found this history relevant in holding that legislative prayer was a constitutional practice. That Court noted that just three days after the First Congress authorized appointment of paid chaplains to open Congressional sessions with prayer, the same Congress finalized the language of the First Amendment. *Id.* at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true for the executive as well. George Washington, in his first inaugural address, also acknowledged America's religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government . . . .

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897).

> In fact, it was the First Congress that urged President Washington
>
> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the many . . . favors of Almighty God. . .

Id. at 56.

As the Supreme Court has noted, this resolution was passed by Congress on the *same day* that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788, n. 9; *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). President Washington did set aside November 26, 1789 as a day for people to "unite in most humbly offering [of their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions. . . ." I *Messages and Papers* at 56.

Furthermore, many of these acknowledgements go beyond recognizing religion's role in American life. They directly acknowledge God Himself. The display of the Commandments is consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty. Examples too numerous to mention could be cited, but the following list illustrates the wealth of this tradition:

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[10]

- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."

- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[11]

- *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[12]

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[13]

- *Abraham Lincoln* frequently made public expressions of religious belief. One example is found in a Proclamation he issued August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and

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[10] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).
[11] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).
[12] *Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Six other examples, from Washington can be found at *id.* at 43, 47, 131, 160, 191, 213.
[13] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

bring down plentiful blessings upon our country."[14]

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs that continues to this day.[15]

Therefore, whether the instant monument is characterized as acknowledging the role of religion in American life generally, or as acknowledging God, it is well within a long-standing tradition in *Marsh*. As noted above, the historical acceptability and longevity of a practice should mean that we, today, begin our analysis with the presumption that these practices, or those sufficiently similar, are constitutional.

A decision supporting Mr. Green's view would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations. Throughout America's history our government has openly declared its faith in, and reliance upon, God.

This Court should decide this case in light of that history. The county's display of the Ten Commandments will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell, or the national motto on our coins.

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[14] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

[15] Furthermore, the above examples show that when the *Capitol Square* court ordered the New Testament attribution be removed from the Ohio motto display, 243 F.3d at 310, it need not have done so.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored devotion to the concept of neutrality," *Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny the citizens of Haskell County this moral code of conduct and simple acknowledgement of the role of religion in our nation's heritage.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully Submitted,
this 22nd day of March 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 6,989 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of National Legal Foundation in the case of *Green v. Haskell County Board of Commissioners*, No. 06-7098, on all required parties by sending one electronic copy and by depositing two paper copies in the United States mail, first class postage, prepaid on March 22, 2007 addressed as follows:

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