

No. 10-1973

**In the United States Court of Appeals
for the Seventh Circuit**

FREEDOM FROM RELIGION FOUNDATION, ET AL.,
Plaintiffs-Appellees,

v.

BARACK OBAMA, ET AL.,
Defendants-Appellants.

On Appeal from the Western District of Wisconsin (No. 08-cv-588-bbc)

**BRIEF OF THE STATES OF TEXAS, WISCONSIN, ALABAMA, ARKANSAS,
COLORADO, CONNECTICUT, FLORIDA, HAWAII, IDAHO, ILLINOIS,
INDIANA, IOWA, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI,
NEBRASKA, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO,
OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA,
UTAH, VIRGINIA, WASHINGTON AND WYOMING
AS AMICI CURIAE IN SUPPORT OF DEFENDANTS**

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**STATEMENT OF THE IDENTITY, INTEREST,
AND SOURCE OF AUTHORITY OF AMICI CURIAE**

Amici States file this brief pursuant to Federal Rule of Appellate Procedure 29(a). *See* FED. R. APP. P. 29(a) (“a State . . . may file an amicus-curiae brief without the consent of the parties or leave of court”).

Amici States have an interest in reversing the judgment below holding that the federal law providing for a National Day of Prayer, 36 U.S.C. § 119, violates the Establishment Clause. The ruling below casts doubt on state laws across the country that similarly provide for a day of prayer. Even in States that have not enacted such laws to date, proclamations providing for a day of prayer are traditionally issued by state officials in conjunction with the National Day of Prayer. In addition, States frequently issue proclamations acknowledging that their citizens may choose to pray together during special times of difficulty in the State. The ruling below calls into question this traditional state practice.

ISSUE PRESENTED

Whether 36 U.S.C. § 119, which provides for a National Day of Prayer, violates the Establishment Clause.

ARGUMENT

Prayer has played a significant role in public life in America since before the Nation's founding. The Founders declared our independence by "appealing to the Supreme Judge of the World for the Rectitude of our Intentions," and pledged to support the Declaration "with a firm Reliance on the Protection of divine Providence." THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Invocations have opened presidential administrations, legislative sessions, and judicial proceedings throughout our Nation's history. And government bodies and officials have offered specific prayers both to celebrate times of national prosperity and to solemnize times of national grief.

Prayer has also frequently been the subject of presidential proclamations. The First Congress urged President Washington "to proclaim a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God." *Lynch v. Donnelly*, 465 U.S. 668, 675 n. 2 (1984) (quotation omitted). President Washington obliged by issuing a proclamation setting aside November 26, 1789, as a day "to offer our prayers and supplications." *Id.* And since that time, every president (except Thomas Jefferson) has followed Washington's example by declaring a day of thanksgiving and prayer. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2113 & nn. 174-82 (1996).

The prominent role of prayer in American public life is unsurprising. As the Supreme Court has noted, “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The religion clauses of the First Amendment have long been understood to permit the government to acknowledge the religions and religious practices of the American people.

Statutes and proclamations providing for a day of prayer, such as 36 U.S.C. § 119, are entirely constitutional for one simple reason: Such laws do not require any citizen to engage in any religious activity of any kind. Nor do such laws require any governmental body to engage in any such activity. Such laws merely acknowledge the role that prayer has played in our Nation’s religious heritage—and permit those citizens who wish to do so to pray. Accordingly, both 36 U.S.C. § 119 and the presidential proclamations issued thereunder fit well within the governmental acknowledgments of religion the Supreme Court has previously upheld.

I. THE PRIVATE PRAYERS CONTEMPLATED BY THE NATIONAL DAY OF PRAYER STATUTE ARE LESS INTRUSIVE THAN THE PUBLIC PRAYERS ROUTINELY OFFERED BY EACH BRANCH OF THE FEDERAL GOVERNMENT.

Each branch of government has a tradition of beginning its sessions with prayer, and these public prayers have been recognized as consistent with the Establishment Clause. Federal and state legislative sessions open with prayers, often given by chaplains who are paid government employees. *Marsh v. Chambers*, 463

U.S. 783 (1983). Presidential and gubernatorial inaugurations have traditionally contained an opening prayer. See *Newdow v. Roberts*, 603 F.3d 1002, 1019-20 (2010) (Kavanaugh, J., concurring). And the United States Supreme Court and other federal and state courts open each session with the traditional prayer “God save the United States and this honorable court.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring). Government acknowledgments of religion such as these publically-offered prayers “serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring).

If public prayers opening sessions of the federal and state governments are permissible as acknowledgments of our Nation’s heritage—and they surely are—than the private prayers contemplated by 36 U.S.C. § 119 also pass constitutional muster. The National Day of Prayer serves to recognize the role that prayer has played in our Nation’s religious heritage. To that end, it contemplates that those citizens who choose to pray will do so, either individually or with like-minded citizens. No citizen is required to participate in any religious activity, and no government body or official is directed to conduct any religious activity. Citizens who wish to exercise their First

Amendment right to pray are permitted to do so, and those who wish to exercise their First Amendment right not to pray are permitted to do so as well.

II. PRAYER PROCLAMATIONS ENJOY THE SAME HISTORICAL PROVENANCE CLAIMED BY OTHER GOVERNMENTAL ACKNOWLEDGMENTS OF RELIGION ALREADY UPHeld BY THE SUPREME COURT.

When reviewing the constitutionality of a government practice that acknowledges our Nation's religious heritage, courts consider the "history and ubiquity" of the practice, *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), because they provide "context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion," *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring).

For example, in *Marsh*, the Supreme Court noted that legislative prayer had an "unambiguous and unbroken history of more than 200 years." 463 U.S. at 783. Likewise, when the Court upheld the constitutionality of a Ten Commandments monument on the grounds of the Texas Capitol, Justice Breyer's controlling opinion noted that the monument had stood without challenge for four decades. *See Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (explaining that "those 40 years suggest . . . that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect [or] primarily to promote religion over

nonreligion”). *See also Lynch*, 465 U.S. at 693 (O’Connor, J., concurring) (“It is significant . . . that the creche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the creche in its annual Christmas display for some years.”).

Prayer proclamations in general, and the National Day of Prayer in particular, share similar pedigrees. In 1789, President Washington issued, at the First Congress’s request, the first presidential proclamation setting aside a day for prayer and thanksgiving. *Lynch*, 465 U.S. at 675, 675 n. 2. Nearly every subsequent president has issued proclamations setting aside a day for the people to pray and give thanks to God. *Id.* Presidential proclamations acknowledging the citizens’ right to pray for the country thus share a 200-year tradition, similar to the legislative prayers upheld in *Marsh*.

The National Day of Prayer statute was enacted in 1952, and presidents have issued proclamations each year since. *Freedom From Religion Found., Inc. v. Obama*, No. 08-cv-588-bbc, 2010 WL 1499451, *3, *5 (W.D. Wis. April 15, 2010). The National Day of Prayer statute thus pre-dates the Texas Ten Commandments monument upheld in *Van Orden*. The National Day of Prayer also pre-dates the 1954 act of Congress adding the phrase “under God” to the Pledge of Allegiance. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 7 (2004).

Given the history of the National Day of Prayer statute, and prayer proclamations generally, it is unsurprising that the National Day of Prayer has been treated favorably by both the Supreme Court and the Seventh Circuit. In *Lynch*, the Supreme Court described the National Day of Prayer statute as one of the “countless . . . illustrations of the Government’s acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage.” *Lynch*, 465 U.S. at 677. *See also County of Allegheny*, 492 U.S. at 672 (Kennedy, J., concurring) (explaining that the National Day of Prayer statute “does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of turning to God in prayer”) (internal quotation omitted). *But see id.* at 603 n. 52. By using the National Day of Prayer as an example of what the Establishment Clause permits, the Supreme Court has provided a strong signal that, if ever presented with the issue, it would uphold the National Day of Prayer.

Accordingly, this Court has likewise indicated that the National Day of Prayer is constitutional, describing it as one of the “generally accepted and constitutionally permissible acknowledgments of the role of religion in American life.” *Van Zandt v. Thompson*, 839 F.2d 1215, 1221 (7th Cir. 1988). *See also DeBoer v. Village of Oak Park*, 267 F.3d 558, 569, 570 (7th Cir. 2001); *Books v. City of Elkhart*, 235 F.3d 292, 323, 325 (2000) (Manion, J., concurring in part and dissenting in part); *Am.*

Jewish Cong. v. City of Chicago, 827 F.2d 120, 133 (7th Cir. 1987) (Easterbrook, J., dissenting).

The district court erred when it departed from these rulings and struck down the National Day of Prayer statute. As this Court once noted, “an inferior court had best respect what the majority [of a higher court] says rather than read between the lines. If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.” *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992).

What’s more, the ruling below not only condemns the federal Day of Prayer law, it also casts doubt on the federal law that provides for the observance of Memorial Day. That statute designates Memorial Day as the last Monday in May and requests that the president issue a proclamation “calling on the people of the United States to observe Memorial Day by praying, according to their individual religious faith, for permanent peace.” 36 U.S.C. § 116(b)(1). If the district court is correct, and Congress may not enact laws that require the president to issue a proclamation inviting those who wish to pray to do so, then the statute providing for the observance of Memorial Day would presumably be unconstitutional as well. The Court should reverse the erroneous judgment below and reaffirm that statutes acknowledging the

role that prayer has played in the religious traditions and heritage of this Nation are consistent with the Establishment Clause.

III. THE JUDGMENT BELOW CASTS DOUBT ON THE PRACTICES OF THE STATES.

States frequently issue prayer-day proclamations, typically in conjunction with the presidential proclamations designating the National Day of Prayer.

For example, in 2008, the governors of all fifty States issued proclamations designating the day of prayer in their respective States. *Freedom From Religion Found., Inc.*, 2010 WL 1499451, at *5. In a number of States, the governors issued these proclamations pursuant to state statute. *See* ALASKA STAT. § 44.12.072; 5 ILL. COMP. STAT. 490/110; N.J. STAT. § 36:2-34; 44 PA. STAT. § 40.8; VA. CODE § 2.2-3305.

No court has ever invalidated these provisions. But if plaintiffs are correct, then these state statutes are presumably unconstitutional as well. Moreover, the actions of the governors of all fifty States will likewise be called into doubt, for doing nothing more than acknowledging our Nation's religious heritage, consistent with our Nation's customs and traditions.

What's more, the National Day of Prayer is far from the only occasion on which States issue prayer proclamations. For example, States often issue proclamations recognizing that citizens may choose to commemorate particular

events through prayer. Just recently, Sunday, June 27, 2010, was designated a day of prayer by officials in the States along the coast of the Gulf of Mexico due to the recent oil spill. *See, e.g., Gov. Riley Declares Sunday an Oil Spill Day of Prayer in Alabama*, PRESS-REGISTER, June 23, 2010 available at http://blog.al.com/live/2010/06/gov_riley_declares_sunday_an_o.html; *La., Texas Declare Day of Prayer for Gulf Spill*, HOUSTON CHRON., June 24, 2010 available at [http://www.chron.com/disp/story.mpl/ap/nation/7078431.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+houstonchronicle%2Fapnation+\(HoustonChronicle.com+--+National+news\)](http://www.chron.com/disp/story.mpl/ap/nation/7078431.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+houstonchronicle%2Fapnation+(HoustonChronicle.com+--+National+news)). Similarly, Governor Barbour declared April 27, 2010, as a day of prayer in Mississippi to commemorate the oil spill in the Gulf and Mississippi citizens killed in tornadoes the previous week. *See Barbour Declares Day of Prayer*, JACKSON FREE PRESS, April 27, 2010 available at http://www.jacksonfreepress.com/index.php/site/comments/barbour_declares_day_of_prayer_042710/. The ruling below casts unnecessary doubt on this traditional state practice.

CONCLUSION

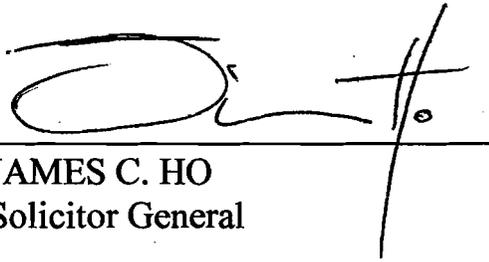
The Court should reverse the judgment of the district court.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'J. Ho', is written over a horizontal line. The signature is stylized with a large 'J' and a vertical stroke for the 'H'.

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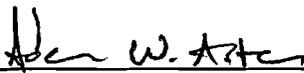
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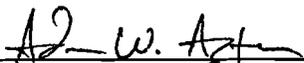
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