No. 05-35996

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE CARD,
Plaintiff-Appellant

v.

CITY OF EVERETT, *et al.*
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Defendants-Appellees*
Urging affirmance

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ..... **ii**

INTEREST OF AMICUS **1**

ARGUMENT **1**

I. THIS CASE SHOULD BE REMANDED WITH INSTRUCTIONS TO DISMISS THE APPEAL FOR WANT OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983. ..... **1**

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." **13**

A. The Monument Should be Upheld Because it is Part of a Long-standing Tradition of Inscribing Religious References on Public Property. 22

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. 24

CONCLUSION **29**

TABLE OF AUTHORITIES

Cases: **Page(s)**

Abington v. Schempp, 374 U.S. 203 (1963).....14, 19, 29

ACLU v. Capitol Square Review & Advisory Bd.,
243 F.3d 289 (6th Cir. 2001) 20-22, 28

ACLU v. Wilkinson, 701 F. Supp. 1296
(E.D. Ky. 1988) 17

Allen v. Consol. City of Jacksonville, 719 F. Supp. 1532
1538 (M.D. Fla. 1989) 18

Alyeska Pipeline Service Corp. v. Wilderness Society,
421 U.S. 240 (1975).....6

Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.,
11 F. Supp. 2d 1192 (C.D. Cal. 1998).....17

benMiriam v. Office of Pers. Mgmt., 647 F. Supp. 84
(M.D.N.C. 1986).....18

Books v. Elkhart County, No. 3:03-CV-233 RM,
mem. order (N.D. Ind. Mar. 19, 2004) 15, 22

Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991)..... 2-3, 10

Card v. City of Everett, 386 F. Supp 2d 1171 (W.D. Wash. 2005).....16

Conrad v. Denver, 724 P.2d 1309, 1314 (Colo. 1986).....17

County of Allegheny v. ACLU, 492 U.S. 573.....2

Dornan v. Sanchez, 978 F. Supp. 1315
(C.D. Cal. 1997) 17

Glassroth v. Moore, 229 F. Supp. 2d 1290
(M.D. Ala. 2002) 15, 20, 22

Graham v. Cent. Cmty. Sch. Dist, 608 F. Supp. 531, (S.D. Iowa 1985).....16

Harmelin v. Michigan, 501 U.S. 957 (1991).....17

James v. Watt, 716 F.2d 71 (1st Cir. 1983).....17

Lee v. Weisman, 505 U.S. 577 (1992).....18-19

Lemon v. Kurtzman, 403 U.S. 602 (1971).....13-15

Lynch v. Donnelly, 465 U.S. 668, (1984).....13, 25

Lynch v. Household Finance Corp., 405 U.S. 538 (1972).....1

MacKay v. Pfeil, 827 F.2d 540 (9th Cir. 1987).....4

Maine v. Thiboutot, 448 U.S. 1, 24 (1980).....5, 10, 12

Marsh v. Chambers, 463 U.S. 783 (1983).....2-3, 13-22, 24-25, 28-29

McCreary County v. ACLU, 125 S. Ct. 2722 (2005).....3, 15-16

Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).....17

Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978).....8

Nat'l Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983).....17

Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang, 376 F.3d 831 (9th Cir. 2004).....4

Printz v. United States, 521 U.S. 898, (1997).....17

Sante Fe Ind. School District v. Doe, 530 U.S. 290 (2000).....2

Sherman v. Cmty. Consol. Sch. Dist. 21,
980 F.2d 437 (7th Cir. 1992) 18

Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).....11

State v. Freedom from Religion Found.,
898 P.2d 1013, 1029, 1043 (Colo. 1996) 17

Tanford v. Brand, 104 F.3d 982 (7th Cir. 1997).....18

Van Orden v.Perry, 125 S. Ct. 2854 (2005) 3, 13-16

Van Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988).....18

Wallace v. Jaffree, 472 U.S. 38, (1985).....13

Will v. Michigan Department of State Police,
491 U.S. 58 (1989).....3

OTHER SOURCES

28 U.S.C. §1343(3) 1

42 U.S.C. § 1983 1-12

42 U.S.C. § 1988 4-8

Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).....27

Catherine Millard, *God's Signature Over the Nation's Capital* (1988).....23

Chester Antieau, *The Intended Significance of the Fourteenth Amendment*..... 11-12

Cong. Globe, 42 Cong., 1st Sess. 597 (1871).....8

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897) 25

Notes of Debates in the Federal Convention of 1787 Reported by James Madison

at 210 (W.W. Norton & Co. Pub. 1987).....27

Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).....27

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, 7, 11

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).....7

Thanksgiving Proclamation, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897).....27

Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).....26

INTEREST OF THE AMICUS CURIAE

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF is concerned about the outcome of this case because of its effect on Establishment Clause jurisprudence.

This brief is filed pursuant to the consent of the Plaintiff-Appellant and a Motion for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

I. 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. Because § 1983 (and its jurisdictional counter part 28 U.S.C. §1343(3))[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.

[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.

However, as this Brief will demonstrate, Congress never intended this result.

Indeed, this 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) taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the co-extensive Establishment Clause of the Hawaii Constitution. This Court upheld the district court's granting of summary judgment in favor of the government defendants. However, this Court questioned, without further addressing, the "efficacy" of bringing the 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.[2] Thus, no great body of Supreme Court case law stands for the proposition that Establishment Clause cases *should* or *can* be brought under § 1983.

Furthermore, the Supreme Court has often allowed certain claims to come before it without comment and then, when a subsequent party squarely raised the jurisdictional issue, the Court has decided that such claims were not properly brought. The Court has done this on several occasions in the § 1983 context. For example, the 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, e.g.*, cases collected in *id.* n.4. Significantly, the *Will* Court 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 original).

Therefore, this Court should follow *Cammack* and question whether § 1983 is a proper vehicle for bringing an Establishment Clause claim. This Court did not answer the question in *Cammack* because the parties did not raise the question.

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[2] *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v.Perry*, 125 S. Ct. 2854 (2005).

However, *Amicus* is hereby squarely raising the question,[3] and, for the reasons stated below, this Court should conclude that § 1983 does not cover Establishment Clause claims and dismiss the appeal.

Until the passage of 42 U.S.C. § 1988, The Civil Rights Attorney's Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under § 1983. Since then, the number of cases has exploded. While the date of enactment is not a perfect dividing line, it is a close proxy. For ease of demonstration, the number of opinions available on Lexis serves as an adequate indicator. To the best of *Amicus'* ability to ascertain, prior to the enactment of § 1988, only 34 opinions are available in which both § 1983 is cited and the term "Establishment Clause" is used. In contrast, in the less than thirty years subsequent to § 1988's enactment 802 such cases can be found.[4]

The reason for this dramatic increase seems obvious. Justice Powell

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[3] Although neither party raised this issue in the district court, *Amicus* properly raises it now as a matter of subject matter jurisdiction. Both this Court and the district court lack subject matter jurisdiction. As this Court has said, "[t]he existence of subject matter jurisdiction is a question of law reviewed de novo," *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 833 (9th Cir. 2004), and "[j]urisdictional issues must be raised by this court sua sponte." *MacKay v. Pfeil*, 827 F.2d 540, 542 (9th Cir. 1987).

[4] 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.

suggested the reason in his dissent in *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980)[5]: "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]ngenous 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. In other words, the statistics noted above do not tell the whole story. Many lawsuits are not filed or are quickly settled because public interest law firms and others 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).[6] As just one example, Indiana Civil Liberties Union attorney Kenneth Falk was interviewed in the *Indiana Lawyer* about Ten Commandments monuments. Falk stated, "If we prevail, we get fees, and they're going to pay the ICLU an enormous amount of fees." Cited in *id*.

Except for one thing, all of this might be chalked up as the price of "doing business," *i.e*., of erecting monuments that one knows strict separationists object

[5] The context of his remarks was different (*i.e*., possible abuse of pendant jurisdiction) than that being addressed, however, the concern is transferable.

to. That one thing is congressional intent. The legislative history of § 1988 gives us insight into the legislative history of § 1983, and these two histories show clearly that Congress never intended § 1983 to cover Establishment Clause claims.

The legislative history of § 1988 plainly illustrates 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). In *Alyeska*, the Court had declared that attorneys' fees would no longer be available in federal lawsuits unless Congress expressly authorized such fees by statute. *Id.* at 269-71. *Alyeska* itself was an environmental case, yet Congress' great concern was with restoring attorneys' fees in traditional *civil rights* cases.

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

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

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: 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; Fitschen, *supra*, throughout. One of the main proponents of the Act was Senator Edward Kennedy (D-Mass). He repeatedly emphasized his concern 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.

The legislative history is also clear that only two provisions were added to ensure passage of the Act: The Title IX provision protecting against sex discrimination in education and the provision protecting 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.[7]

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 (§ 1). As numerous courts 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" which § 1983 was enacted to protect can be determined by examining the debate over the entire act.

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 Klan in North Carolina and noted "murders, whippings, intimidation, and violence." *Id.* He also discussed the Klan's ability to protect its members from conviction by committing perjury as witnesses or refusing to vote to convict when serving on juries. *Id.* at 600. 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

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[7] Similarly, none of the subsequent additions and deletions is in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

> "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 illustrative examples of the concerns that animated the Act's passage. 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?

Id. at 619-20.

This quotation reminds us that one must never stray far from the historical context of Klan abuses to understand § 1983's intent. Here again, one sees a close connection between the concepts of equal protection and of rights, privileges, and immunities. The Establishment Clause was simply not intended to be covered.

Despite the force of the historical argument, some may believe that the position advocated here faces the problem of overcoming *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980). 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. After all, this Court was well aware of *Thiboutot* when it questioned whether § 1983 was a legitimate vehicle for bringing Establishment Clause claims (having, according to a Lexis search, cited or quoted it 28 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 (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.

Various views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include. 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 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 from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment*. 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. In addition, at least three important commentators, Senator Howard, Representative Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause. *Id.*

Antieau examined other state practices 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. Some states, *e.g.*, New Hampshire and Massachusetts still had vestiges of true establishment. *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. Thus, *Thiboutot* is no obstacle to the argument advanced here.

For the various reasons just described, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment

Clause claims and remand the case with instructions to dismiss the case for want of 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."

However, should this Court disagree, *Amicus* urges this Court to affirm the decision of the District Court. While the court below was correct that this case could be controlled by *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), the court 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, the four Justices in the *Van Orden* plurality specifically refer 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*, 125 S. Ct. at 2862.

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 2861. He went on to quote *Lynch v. Donnelly*, 465 U.S. 668 (1984): "[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." *Id*. at 674.

Rehnquist continued with a *Marsh*-like analysis, citing the deeply embedded practice of recognizing the role God has played 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, 374 U.S., at 212, 10 L. Ed. 2d 844, 83 S. Ct. 1560*, and that "the history of man is inseparable from the history of religion," *Engel v. Vitale, 370 U.S. 421, 434, 8 L. Ed. 2d 601, 82 S. Ct. 1261(1962)*. 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, 463 U.S., at 792, 77 L. Ed. 2d 1019, 103 S. Ct. 3330*. Such a practice, we thought, was "deeply embedded in the history and tradition of this country."

Van Orden, 125 S. Ct. at 2861-62.

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 2862, 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 they should also analyze the

practice under *Marsh* and uphold the practice if it passes that 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)).[8]

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*, 125 S. Ct. at 2869. Breyer distinguished *Van Orden* from *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005) – 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*, 125 S. Ct. at 2871. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

Therefore, even though the court below was correct in its Establishment Clause analysis under *Van Orden*, it could have decided the case under *Marsh*. *Van Orden*, then, does not present an obstacle to the argument advanced here since the two approaches are completely compatible. By emphasizing *Marsh*, this brief

[8] 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*.

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 in response to an order from the county legislature. 125 S. Ct. at 2728. In finding this 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.

But such is not the case here. The District Court recognized that the monument was donated "in an attempt to inspire young people and curb juvenile delinquency by providing children with a moral code of conduct to govern their actions." *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1174 (W.D. Wash. 2005). The court found that the display had "a number of secular points in its favor," and that the physical setting "also supports a finding that the display was not intended to advance religion." *Id*. at 1176. Since the purpose in *Card* is distinguishable from that in *McCreary County*, the District Court was correct to see this case as more like *Van Orden* than *McCreary County*. Again, this brief emphasizes the compatibility of *Van Orden* and *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, such an approach is not that of the Supreme Court. 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); *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) (evaluating whether punishment was cruel and unusual).

Lower courts have also engaged in *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. Of chief importance, 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 Found.*, 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 Sch. Dist. Bd. of Educ.*, 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 annual graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance recited 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 had every opportunity to do so in *Lee v. Weisman*, 505 U.S. 577 (1992), and instead chose merely to distinguish the 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 went on to note that, while the invocation and benediction at issue in *Lee* were in many regards 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 noted in *Weisman* are absent. At the most 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. These differences distinguish *Card* from *Weisman*. Simply put, *Marsh* controls this case.

Returning to *Marsh*, we note that the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Court declared that the practice of 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 Bd.,* 243 F.3d 289 (6th Cir. 2001), which approved the display of the state motto containing a religious inscription.

In that case, the ACLU sued to enjoin the placement of the State motto of Ohio, "With God, All Things Are Possible," in the plaza in front of 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. The first point is that the *Capitol Square* court took one of *Marsh's* most cited principles and applied it directly to a display case. Having traced acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display which also acknowledges God 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.

The second point is that the Sixth Circuit did not consider historical evidence involving only religious displays. In fact, *none* of its examples dealt with 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.[9] Under this 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 the better one—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 actually 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

[9] Admittedly, *Glassroth* involved other factually unique aspects. Nonetheless, the statement quoted above was given as another reason why the monument violated the Establishment Clause.

list illustrates the point:[10]

- In the House of Representatives Chamber, in our nation's Capitol, directly 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 two statues, one of Moses, and one of "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 directly 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 city grounds is in no

[10] Examples are from Catherine Millard, *God's Signature Over the Nation's*

way 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 longstanding tradition that has enriched our nation, and one which should not fall under Mr. Card'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. At the time the First Amendment was drafted, officials of our new government took part 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.

In *Marsh*, the Supreme 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 sessions of Congress with prayer, the same Congress reached final agreement on the language of the First Amendment. *Id.* at 788. The Framers clearly saw no

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Capital (1988).

conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true, moreover, 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 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, in fact, set aside November 26, 1789 as a day on which the people could "unite in most humbly offering [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 acknowledging religion's role in American life. They directly acknowledge God Himself. The display of the Commandments is perfectly consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty in our nation's affairs. Examples too numerous to mention could be cited, but the following brief 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."[11]
- *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

[11] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).

Babel."[12]

- *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. . . ."[13]
- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[14]
- *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 bring down plentiful blessings upon our country."[15]

Thus, this nation enjoys a long tradition of public officials acknowledging

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[12] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

[13] *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.

[14] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

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

God and his sovereignty in our nation's affairs that continues to this day. [15]

Therefore, whether the instant monument be characterized as acknowledging the role of religion in American life generally, or as acknowledging God, it is well within a long-standing tradition validated by *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 indeed constitutional.

A decision supporting Mr. Card'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 our nation's history our government has openly declared its faith in, and reliance upon, God.

This Court should decide this case in the light of that history. The City'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.

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

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

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 Everett 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 remand the case with instructions to dismiss for want of subject matter jurisdiction. In the alternative, this Court should analyze the monument under *Marsh* and affirm the decision of the District Court.

Respectfully Submitted,
this 17th day of March, 2006

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 05-3996

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Card v. City of Everett*, 05-35996 on all required parties by depositing the required number of paper and electronic copies in the United States mail, first class postage, prepaid on March 17, 2006, addressed as listed below. The required number of paper and electronic copies were filed in the same manner on the same date.

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