**No. 05-30294**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**JOHN DOE**, ***et al.*****,**
*Plaintiffs-Appellees*,

v.

**TANGIPAHOA PARISH SCHOOL DISTRICT, *et al*.**
*Defendants-Appellants.*

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**ON REHEARING *EN BANC* ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA**

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# BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Defendants-Appellants.*
Supporting reversal

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae* The National Legal Foundation, are a corporation that issues shares of stock to the public. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

*Defendants:*
Tangipahoa Parish School Board;
Jimmie Richardson;
Robert Potts;
Leonard Genco;
Al Link;
Donnie Williams;
Robert Caves;
Maxine Dixon;
Sandra Bailey-Simmons;
Carl Bardwell; and,
Louis Joseph

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Benjamin DuPrè, Foundation for Moral Law
Roy Mongrue, Jr., State of Louisiana
Kenneth Sills, Louisiana School Boards Association

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## 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 a motion for leave to file a brief as required by Rule 29, and pursuant to the consent of both parties.

## ARGUMENT

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

The injunction in this case was sought pursuant to 42 U.S.C. § 1983 (2002). Because § 1983 does not give the federal courts jurisdiction in Establishment Clause cases, this case should be remanded with instruction to dismiss the injunction for lack of subject matter jurisdiction.[1] 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.

At least one federal court has directly raised—but not answered—the

[1] For the reasons that will be explained in Sections II and III, below, the declaratory relief was also erroneously granted.

question of the appropriateness of bringing Establishment Clause claims under § 1983. In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) resident taxpayers of Hawaii challenged the Hawaii law that made Good Friday a state holiday, alleging that it violated the Establishment Clause of the United States Constitution and the co-extensive Establishment Clause of the Hawaii Constitution. The Ninth Circuit upheld the district court's granting of summary judgment in favor of the government defendants. However, along the way, the Ninth Circuit questioned, without further addressing, the "efficacy" of bringing the Establishment Clause claim under § 1983:

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

Furthermore, the Supreme Court has often allowed certain types of claims to come before it on multiple occasions without comment and then, when a subsequent party squarely raised the jurisdictional issue, the Court has 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 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 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 original).

Therefore, 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 the question. However, *Amicus* is hereby squarely

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

raising the question,[3] and, for the reasons stated below, this Court should conclude that § 1983 does not cover Establishment Clause claims and that, therefore, the appeal should be dismissed.

Until the passage of 42 U.S.C. § 1988 (2002), 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 date of enactment is not a perfect dividing line (because of cases that were already "in the pipeline"), 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 (*i.e.*, in the entire period from § 1983's enactment in 1871 until § 1988's enactment in late 1976), 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 following

[3] This Court has previously stated that "We thus draw on [amicus] briefs where helpful in our consideration of other issues properly brought before this court by the parties." *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1208 (5th Cir. 1991). This is also the policy of the 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). Furthermore, *Amicus* is arguing that this Court and the district court lack subject matter jurisdiction. As this Court has said, "even where the parties have not raised the issue 'it is our duty to raise this issue *sua sponte*.' *Bridgmon v. Array Systems Corp*., 325 F.3d 572, 575 (5th Cir. 2003) (*quoting Gaar v. Quirk*, 86 F.3d 451, 453 (5th Cir. 1996)).

§ 1988's enactment 929 such cases can be found.[4]

Justice Powell 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]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. In other words, the statistics noted above do not begin to tell the whole story. Many lawsuits do not even get 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]

Were it not for one thing—congressional intent—all of this might be chalked up as the price of "doing business," *i.e.*, of erecting monuments that one knows

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[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. A LEXIS search was performed by selecting "Federal Court Cases, Combined" and searching for "'Section 1983' and 'Establishment Clause.'"

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

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

strict separationists object to. Ironically (given the uses to which § 1988 has been put), 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.

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). 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, not a civil rights case. Yet Congress' great 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 of the bill:

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

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

The emphasis throughout the debates remained single-minded: Americans who were the 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*, *Source Book* throughout; Fitschen, *supra*, throughout. One of the main proponents of the Act was Senator Edward Kennedy (D-Mass). Senator Kennedy repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination" in areas such as "jobs, housing, credit, or education" using the "civil rights laws." *Source Book* at 23.

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

shifting in Establishment Clause cases.[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. Section 1983 started out as § 1 of that Act. As numerous courts and commentators 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.

The starting point for 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. *Id.* at 599 ff. He noted "murders, whippings, intimidation, and violence." *Id.* He also discussed the Klan's ability to protect its members from conviction for their crimes because other members would commit perjury as witnesses or refuse to vote to convict when serving on juries. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the

[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).

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 of judges who knew of incidents of perjury. *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 illustrative examples of the concerns that animated the passage of the Act. None raised any Establishment Clause concerns. The following example by Representative John Coburn is typical of the more extended 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 others, reminds us that one must never stray far from the historical context of Klan abuses if one wants 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.

Of course, this does not mean that governments can therefore willfully violate the Establishment Clause with impunity. Plaintiffs can sue directly under the Establishment Clause instead of under § 1983—as was routinely done prior to 1976. All that would be lost would be the "blackmailing"

effect of the § 1988 fees anticipated by Justice Powell.

Despite the force of the historical argument, some may believe that the position advocated here faces the problem of overcoming *Maine v. 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. After all, the Ninth Circuit 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), 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.

Various views existed as to what the Privileges and Immunities

Clause of the Fourteenth Amendment was meant to include and, indeed, each of the opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that Amendment. *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* (1997). These statements clearly demonstrate that the free exercise of religion was intended to be covered by the term "privileges and immunities" but that "freedom from establishment" was not.

Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect 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

the argument however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause. None of these lists mentions the Establishment Clause. *Id.*

Additionally, Antieau examined other evidence of the practice of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-285. 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, 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.

Thus, for the various reasons just described, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and it should remand the case with instructions to dismiss the injunction for want of subject matter jurisdiction.

## II. THIS COURT SHOULD APPLY *MARSH V. CHAMBERS* BECAUSE ITS ESTABLISHMENT CLAUSE PRINCIPLES ARE APPLICABLE IN A WIDE VARIETY OF SITUATIONS, INCLUDING THE INSTANT CASE OF SCHOOL BOARD PRAYERS.

The court below effused to apply the test from *Marsh v. Chambers*, 463 U.S. 783 (1983) to this case. *Doe v. Tangipahoa Parish Sch. Bd.*, 2005 U.S. Dist. LEXIS 3329, at *15 (E.D. LA, Feb. 24, 2005). The court claimed that other "courts have been unwilling to extend Marsh beyond its unique historical and factual context." *Id*. at *25. However, that claim is demonstrably false. Numerous courts, including the United States Supreme Court, have already applied *Marsh* very widely indeed. In fact, many courts have not even limited *Marsh* to the Establishment Clause context. Thus, the district court erred in refusing to apply *Marsh* in this case.

For example, in *benMiriam v. Office of Personnel Management*, 647 F. Supp. 84 (M.D.N.C. 1986), the court cited *Marsh's dissent* in upholding against a Free Exercise challenge the use of the abbreviation "A.D."[8] Other examples of

[8] Just as *benMiriam* cited *Marsh*'s dissent in the Free Exercise context, so other cases cite *Marsh's* dissent to uphold challenged practices in the Establishment Clause context. *See*, *e.g.*, *Sherman v. Cmty. Consol. Sch. Dist*., 980 F.2d 437, 447 (7th Cir. 1992). This case quotes Justice Brennan's discussion of ceremonial deism. Since some courts read *Marsh's* majority as supporting the constitutionality of practices that constitute ceremonial deism, *see*, *e.g.*, *Albright v. Bd. Of Educ*., 765 F. Supp. 682, 688-89 (D. Utah 1991) (upholding with restrictions graduation prayers (prior to Lee)), and since Brennan's *Marsh* dissent, while objecting to the prayers before the court, specifically addressed *other* practices as ceremonial deism; it is not surprising that both the *Marsh* majority and

applying *Marsh* outside the Establishment Clause context include the following: In *Bowsher v. Synar* a majority of the United States Supreme Court relied upon *Marsh* in deciding that Congress cannot remove executive officers. 478 U.S. 714, 723 (1986). In *Printz v. United States*, the Court used *Marsh* in evaluating "the constitutionality compelled enlistment of state executive officers for the administration of federal programs . . . ." 521 U.S. 898, 905 (1997).

Other courts have followed suit by turning to *Marsh*. *See, e.g.*, *Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming the constitutionality under *Marsh* of a rule of the House of Representatives that granted voting privileges to delegates in the Committee of the Whole); *National Wildlife Federation v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining the leasing of federal land for coal mining by citing *Marsh* in support of its historical analysis of Article IV, Section 3 of the Constitution); *James v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983) (interpreting the Indian Commerce Clause of the Constitution in light *Marsh's* historic approach); and *Finzer v. Barry*, 798 F.2d 1450, 1457 (D.C. Cir. 1986), *aff'd in part and rev'd in part by Boos v. Barry*, 485 U.S. 312 (1988) (upholding a Washington, D.C. statute that banned picketing without a permit outside embassies with an invocation of *Marsh* in support of its historical analysis

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the *Marsh* dissent are cited for the same proposition. Interestingly, in his opinion in *Lynch*, Brennan himself characterized *Marsh's* prayers as having been upheld as ceremonial deism. *Lynch v. Donnelly*, 465 U.S. 668, 697 (1984) (Brennan, J., dissenting).

of America's protection of foreign embassies). In *Sprint Communications Co. v. Kelly*, 642 A.2d 106, 110 (D.C. 1994), the court employed *Marsh's* historical principle in holding that the Council of District of Columbia had exercised a constitutionally permissible taxing power. In *United States v. Cohen*, 733 F.2d 128, 150 (D.C. Cir. 1984), the court upheld the District of Columbia's decision to automatically confine prisoners who claimed an insanity defense. The court invoked *Marsh* as support for its historical analysis that under-girded its holding. *Id.* In *In re Sealed Case*, the court, in deciding that the independent counsel was an inferior officer, relied upon *Marsh's* historic principles to decide, as an intermediate step of logic, that federal heads of departments were principle, not inferior, officers. 838 F.2d 476, 482 (D.C. Cir. 1988), *rev'd*, *Morrison v. Olson*, 487 U.S. 654 (1988). In *Evans v. Stephens*, 387 F.3d 1220, 1223 (11th Cir. 2004), the Eleventh Circuit cited *Marsh* as support for adding historical practice to the scales to tip the balance in favor of reading the Constitution's Recess Appointments Clause as reaching Article III judges. A final example also involved evaluating the Recess Appointments Clause but differs slightly from the rest of the examples in that the court invoked a different aspect of *Marsh's* reasoning. In *United States v. Woodley*, the Ninth Circuit upheld the President's right to appoint federal judges under the Recess Appointments Clause by invoking *Marsh*'s "fabric

of our society" language. 751 F.2d 1008, 1012 (9th Cir. 1985) (quoting *Marsh*, 463 U.S. at 791).

Based upon the cases presented so far, a skeptic could perhaps say that these courts were simply looking to history in general terms and in completely different, i.e., non-Establishment Clause, contexts and that *Marsh* was just cited as "cover."

However, numerous courts have also applied *Marsh* in a wide range of Establishment Clause contexts beyond the legislative chaplaincy setting. These contexts include both prayer and non-prayer contexts. For example, *Marsh* has been employed in analyzing a prayer room at the Illinois statehouse, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988); public proclamations with "religious" content, *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding day of prayer proclamation); the dating of government documents with "A.D.", *benMiriam*, 647 F. Supp. at 86; invocations and benedictions at public university events, *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); the Pledge of Allegiance recited in a public school, *Sherman*, 980 F.2d at 437; prayer in the courtroom context, *Huff v. State*, 596 So. 2d 16, 22 (Ala. Crim. App. 1991); *March v. State*, 458 So .2d 308, 310-11 (Fla. Ct. App. 1984); military chaplaincy *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985); the use of the

phrase "in the year of our Lord" on law licenses and on notary public commissions, *Doe v. La. Supreme. Ct.*, 1992 U.S. Dist. LEXIS 18803, *18-19 (E.D. La. Dec. 7, 1992); and prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001). Also, courts have applied *Marsh* in religious display cases.[9] *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); *ACLU v. Capital Square Review & Advisory Bd.*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (*en banc*); and *Murray v. Austin.* 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia).

In addition, and of special relevance here, *Marsh* has been applied in the context of deliberative bodies other than state legislatures. So for example, *Marsh* has been used to uphold such practices at the United States Congress, *Murray v. Buchanan*, 720 F.2d 689, 689-90 (D.C. Cir.); *Newdow v. Eagen*, 309 F. Supp. 2d. 29, 33, 36, 39-41 (D.C. 2004); at city council/board of supervisors meetings, *Snyder v. Murray City Corp*, 159 F.3d 1227, 1233-34 (10th Cir. 1998) (en banc)

[9] In addition to the cases compiled here, in which religious displays were upheld directly under *Marsh*, several courts, in upholding such displays have used *Marsh* to help explain why the displays should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v. City of Los Angeles,* 207 Cal. App. 3d 566, 576-77 (Cal. Ct. App. 1989); *Suhre v. Haywood County*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999)

(council can limit pray-ers); *Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867, 868 - 874 (2nd Dist. 2002) (instructing city to tell all pray-ers that prayers must be non-sectarian); *Simpson v. Chesterfield County Bd. of Sup'rs*, 404 F.3d 276, 278 (4th Cir. 2005); and even at a Beer Board meeting, *Gurkin's Drive-In Market v. Alcohol & Licensing Comm*., 2003 WL 1618086, 3, 4 (Tenn. Ct. App. 2003). Most significantly, *Marsh* has been used to analyze prayers at a school board meeting, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998) (upholding the prayers; the decision was reversed in an unpublished opinion payers because the prayers were *almost always* prayed *in Jesus' name*. *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355, 357 (9th Cir. 2001)). This Court should recognize that, contrary to the district court's assertion, *Marsh* has not been and should not be restricted to state legislatures. Marsh should be applied to the school board prayer in the instant case.

## III. THE SCHOOL BOARD PRAYERS SHOULD BE UPHELD BECAUSE THEY ARE NOT AN UNCONSTITUTIONAL FORM OF PROSELYTIZING.

The district court erroneously held that the school board prayer failed under the *Lemon* test because the school board prayer was an attempt to proselytize. *Tangipahoa*, 2005 U.S. Dist. LEXIS 3329 at *12, (referencing *Lemon v. Kurtzman*,

403 U.S. 602 (1971)). However, the instant prayers do not constitute proselytization either under *Lemon* or under *Marsh*.

The proper definition of proselytize has been a struggle for many courts. As demonstrated, for example, in the Chief Justice Moore Ten Commandments case, *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1307 (M.D. Ala. 2003); when a court is inclined to invalidate a practice under *Marsh*, the tool of choice is often *Marsh*'s proselytization language. All a judge need do is declare that the challenged practice proselytizes and *ispso facto*, the practice fails under *Marsh*.

Because Justice Kennedy's dissent in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) is one of the few opinions to more closely address proselytization, an analysis of the term can begin with that case. In fact, Justice Blackmun labeled that dissent the proselytization test. 492 U.S. at 608. Justice Kennedy's opinion is both helpful and confusing when it comes to understanding proselytization. First, it points out that "[i]t must be conceded that, however neutral the purpose of the city and county, the eager proselytizer may seek to use these symbols for his own ends. The urge to use them to teach or to taunt is always present." *Id.* at 678 (Kennedy, J., concurring in part and dissenting in part). The point, of course, is that the existence of such proselytizers should not be allowed to change the analysis of the constitutionality of the practice.

Justice Kennedy's opinion never actually defines the term proselytize. Perhaps he comes closest when he writes of "governmental exhortation to religiosity that amounts in fact to proselytizing." However, coming close to defining proselytizing and actually defining it are two different things. Thus, when Justice Kennedy also writes that

> [s]ymbolic recognition or accommodation of religious faith may violate the Clause in an extreme case. I doubt not, for example, that the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall. This is not because government speech about religion is *per se* suspect, as the majority would have it, but because such an obtrusive year-round religious display would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion[ ]

*Id.* at 662 (Kennedy, J., concurring in part and dissenting in part) (footnote omitted), Justice Blackmun justifiably criticizes this passage by pointing out that neither the permanency of the cross nor its exclusivity to one religion can account for why Justice Kennedy would strike the cross but allow various other hypothetical displays: In order to define precisely what government could and could not do under Justice Kennedy's "proselytization" test, the Court would have to decide a series of cases with particular fact patterns that fall along the spectrum of government references to religion (from the permanent display of a cross atop city hall to a passing reference to divine Providence in an official address). *Id.* at 607.

*If* a Latin cross on top of city hall would violate the Establishment Clause, it is not because it proselytizes—or at least not in any way that Justice Kennedy demonstrated. He baldly asserted that merely placing the cross on city hall would constitute an "obvious effort to proselytize." *Id.* at 662 (Kennedy, J., concurring in part and dissenting in part). The term "obvious" must be in the eye of the beholder, because numerous other plausible reasons for placing a cross on city hall can be imagined with out too much trouble. Therefore, while agreeing with Justice Kennedy that challenged practices could be used for proselytization purposes by citizens and while agreeing that such a possibility should not lead to a finding of unconstitutionality, we must look elsewhere for a helpful definition of proselytization.

It is important to note as a preliminary matter that many (perhaps all) courts seem to read the *Marsh* passage as standing for the proposition that if a prayer—or whatever practice is being adjudicated—were to proselytize, it would be unconstitutional under *Marsh*. However, that is really what *Marsh* says. The *Marsh* Court wrote

> [t]he content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

*Marsh,* 463 U.S. at 794-95. Therefore, taking *Marsh* at face value, the result of a finding of proselytization would lead to a second step of evaluation—for which the *Marsh* Court provided absolutely no guidance—not an automatic declaration of unconstitutionality. Nonetheless, neither interpreting *Marsh* as it is usually interpreted nor interpreting it as proposed here gets one any closer to a definition of proselytization.

For that, one must look to one of the only cases that has ever wrestled with the definition of proselytize, *Snyder,* 159 F.3d at 1234 n.10. In that case, a citizen was validly denied permission to pray at a city council meeting because the prayer proselytized and did not meet the *Marsh* requirements. *Id.* The *Snyder* court's analysis started at the right place—a dictionary definition of the word proselytize. The definition that the court used was "to convert from one religion, belief, opinion, or party to another." *Id*. To the extent that prayer in various public settings is truly prayer*,* i.e.*,* speech addressed to God, it cannot be proselytizing even if it invokes the name of a specific deity. To proselytize, one must address another person and attempt to persuade. Thus, those courts that have claimed exactly that—that prayers could both be prayed to specific deities and be non-proselytizing, *e.g*., *Doe v. Santa Fe Ind. Sch. Dist.,* 530 U.S. 290, 296 (2000) (citing district court's interim order), have not been playing fast and loose. Rather they have understood the heart of the concept of proselytization.

The court below even noted that proselytization was associated with "convert[ing] others of different faiths." *Tangipahoa,* 2005 U.S. Dist. LEXIS 3329, at *7. Similar to proselytizing, the idea of "convert[ing someone] from one religion . . . . to another," *Snyder*, 159 F.3d at 1234 n.10 ( 10th Cir. 1998) (quoting Websters Third New International Dictionary (Unabridged) 1826 (1986)), clearly implies interaction, discussion, debate, or persuasion. Other dictionaries use words such as "recruit" and "induce" in defining proselytizing. *See, e.g.,* the Merriam-Webster Dictionary. The court below even applied the terms of converting and proselytizing with negative connotations of persecution and imprisonment in order to convert those of differing beliefs. *Tangipahoa*, 2005 U.S. Dist. LEXIS 3329, at *8. Unfortunately, the opinion below went on to be internally inconsistent by not understand the implications of its own definition.

Such interaction is hardly possible in a short prayer before a meeting. The prayers in this case, while they did *sometimes* mention the name of Jesus Christ, *id*. at *5, did not interact with those present for the school board meetings by addressing them directly. Further, those praying did not attempt to intimidate or coerce or even merely persuade non-Christians to convert to the Christian faith in the words of their prayers. Thus, the language of those prayers did not reach the level of conversion that was problematic in *Snyder*.

Even though some who might pray at a meeting *could potentially* use the prayer as a means to coerce, as Justice Kennedy might point out, that would not deem the prayers unconstitutional in this case. Only in an "extreme case" should a religious display or prayer be found in violation of the Establishment Clause. *Allegheny,* 492 U.S. at 662.

## Conclusion

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

Respectfully Submitted,
this 21st day of March, 2007

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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 *Doe v. Tangipahoa Parish School Board*, No. 05-30294 on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on March 21, 2007 addressed as follows:

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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 6,184 words as calculated by Microsoft Word 2003.

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