No. 04-2075

In the

United States Court of Appeals
For the Seventh Circuit

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WILLIAM A. BOOKS,
Plaintiff-Appellee,

v.

ELKHART COUNTY, INDIANA,
Defendant-Appellant,

———————◆———————

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
Chief Judge Robert L. Miller, Jr.

———————◆———————

BRIEF AMICUS CURIAE OF WALLBUILDERS AND
THE NATIONAL LEGAL FOUNDATION,
in support of *Appellant*
Supporting reversal

———————◆———————

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 04-2075

Short Caption: Books v. Elkhart County

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INTEREST OF AMICI

WallBuilders, Inc. is a 501(c)3 organization, dedicated to the restoration of the moral and religious foundation on which America was built. As such, it has a direct interest in seeing the proper interpretation of the Establishment Clause employed in this case.

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 and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the interpretation of the Establishment Clause.

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

ARGUMENT

I. WHILE THE COURT BELOW PROPERLY RECOGNIZED THAT *MARSH V. CHAMBERS* PROVIDES AN INDEPENDENT ESTABLISHMENT CLAUSE ANYALYSIS, IT IMPROPERLY APPLIED THAT ANALYSIS TO THE TEN COMMANDMENTS DISPLAY AT ISSUE.

The court below properly concluded that *Marsh v. Chamber*, 463 U.S. 783 (1983), provides an independent basis upon which to uphold a practice which has failed the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order at 10 (N.D. Ind. Mar. 19, 2004). As 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)).[1] Therefore, assuming *arguendo* that the trial court's *Lemon* analysis is correct, the display could still be upheld under *Marsh*.

In *Marsh*, 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

[1] Although the district court's discussion of *Marsh* begins by noting that it was the County that "invoke[d]" *Marsh*, *id*., the description of *Marsh* as an exception to *Lemon* is the court's own description. The court wrote "the County invokes *Marsh v. Chambers*, 463 U.S. 783 (1983), which 'can be viewed as an exception to the

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.*, 463 U.S. at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

The district court below duly noted these *Marsh* principles. *Books*, No. 3:03-CV-233 RM, mem. order at 10-11. However, the court below incorrectly *applied* the principles. Specifically, the court applied the Marsh test at the wrong level of abstraction. This brief will examine, first why the district court was correct to consider *Marsh*; and, second, how it *mis*-applied the principles.

A. The Court Below Properly Examined the Ten Commandments Display Under *Marsh* Because, as this Court and Other Courts have Acknowledged, *Marsh* is Applicable Outside the Legislative Chaplaincy Context.

We note first that some courts have tried to limit *Marsh* to legislative chaplain cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, *Marsh* has never been properly so limited. For example, courts, including this Court, have used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F.

Lemon test.'" The court did not write 'the County invokes *Marsh*, which the County asserts can be viewed as an exception to the *Lemon* test."

Supp. 2d 1192, 1196 (C.D. Cal. 1998); 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); equal access to a public forum for prayers, *DeBoer v. Vill. Of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); and religious display cases, *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).

Indeed, *Marsh* has not even been limited 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); *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).

Thus, the district court was correct to see that *Marsh* can provide an analysis

independent of the *Lemon* test in the present context. In fact, this Court has previously used *Marsh* in exactly this way. It has either cited or applied *Marsh* in several different contexts. *See*, *e.g.*, *DeBoer v. Vill. Of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001) (upholding equal access to a public forum for prayer); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (approving religious expression in the form of an invocation and benediction at a public university annual graduation ceremony); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (upholding the constitutionality of the Pledge of Allegiance as recited in a public school).[2]

Of particular importance is this Court's opinion in *Van Zandt v. Thompson*, 839 F.2d 1215 (1988), in which this Court analyzed the constitutionality of a prayer room at the Illinois statehouse. This Court analyzed the case under *Marsh* first and only utilized *Lemon* as a fall back position, stating '[t]he central issue in this litigation has been whether the matter before us is governed by the three-pronged test of *Lemon v. Kurtzman* or by the principles of *Marsh v. Chambers*. We believe that *Marsh* properly governs this case." *Id.* at 1218 (citations omitted).

Therefore, the district court was correct to ignore the *dicta* in *Books v. City*

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[2] *See Mather v. Mundelein*, 864 F.2d 1291, 1293 (1989) (Coffey, J., concurring), for a valuable discussion of the 'true and accurate historical and policy concerns underlying th[e] [Establishment] Clause."

of Elkhart, 235 F.3d 292 (7th Cir. 2000), that *Lemon* must control Establishment Clause analysis. The *Books* Court wrote:

> Although various members of the Supreme Court of the United States have criticized it, the test first enunciated by the Court in *Lemon v. Kurtzman*, remains the prevailing analytical tool for the analysis of Establishment Clause claims. As an intermediate federal appellate court, we are obliged by the doctrines of *stare decisis* and precedent to employ that methodology unless instructed otherwise by the Supreme Court.

Id. at 301. (footnote and citation omitted).

This passage must be *dicta* since any statement about the analytical framework for analyzing all Establishment Clause claims is, under any definition, *dicta*. See, e.g., Black's Law Di ctionary 454 (6th ed. 1990). Therefore, the district court was free to go beyond *Lemon* and analyze the Ten Commandments display under *Marsh* as well.

Indeed, to be true to the spirit of the *Books dicta*, although obviously not its letter, the district court was no freer to ignore *Marsh* than it was to ignore *Lemon*—both are binding precedents of the Supreme Court. Furthermore, as Justices O'Connor and Souter have noted, there is no Grand Unified Theory in Establishment Clause Jurisprudence. *Mitchell v. Helms*, 530 U.S. 793, 884 (2000) (Souter, J., dissenting) (citing *Rosenberger v. Rectors & Visitors of Univers. of Va.*, 515 U.S. 819, 852 (1995)). Therefore, it was prudent for the district court to consider the constitutionality of the display under *Marsh*.

It is worth noting that should this Court disagree and decide that the district court was bound by the *Books* Court's pronouncement (and therefore should not have analyzed the display under *Marsh*), this Court is free to overturn the *Books* panel under Seventh Circuit Rule 40. Indeed, should this Court consider the *Books* pronouncement binding, *i.e.*, not *dicta*, that pronouncement arguably violates this Court's rules. Rule 40(e) requires any opinion that overturns a prior panel opinion to carry a footnote so indicating. Yet the *Books* opinion carried no footnote indicating that its *Lemon*-only mandate overturned in part *Van Zandt v. Thompson*, 839 F.2d 1215 (1988), and arguably also in part the other *Marsh*-reliant cases cited above. To come full circle, the footnote probably did not appear because the *Books* pronouncement is, in fact, *dicta*.

B. The Court Below Erred When it Held the Ten Commandments Display Unconstitutional Under *Marsh* Because it Ignored Two Long-Standing Traditions of Which the Ten Commandments Display is a Part.

Having admirably realized that it could and should analyze the Ten Commandments display under Marsh, the district court unfortunately *mis*-analyzed the display. The court made two interrelated mistakes: First, it claimed that a practice dating only to the 1940s could not pass muster under *Marsh*; and, second, it conducted its analysis at the wrong level of abstraction.

As to the first mistake, it stated that, because the tradition of erecting Ten Commandments displays only began in the 1940s, it could not be meet the *Marsh*

standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." *Books*, No. 3:03-CV-233 RM at 11. This assertion flies in the face of this Court's analysis in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992). There, this Court noted that the words "under God" had been added to the Pledge of Allegiance only in 1954, yet still found it nonviolative of the Establishment Clause. (While both the *Sherman* majority and concurring opinions cited *Marsh*, neither directly analyzed the Pledge under *Marsh*. Nonetheless, they both seemed to employ *Marsh* principles, especially the majority opinion which used the same image of practices woven into the fabric of our society that the *Books* district court used to encapsulate the *Marsh* principles. *Sherman*, 980 F.2d at 447.[3])

The reason that this Court, in *Sherman*, could decide that a practice first adopted in 1954 properly fit under the *Marsh* rubric is because it understood the proper level of abstraction at which to conduct its analysis. It understood that it was not necessary for the Pledge itself to have existed since the Founding era. Rather, the Pledge could pass constitutional muster if it was part of a tradition that went that far back. After all, the specific prayers at issue in *Marsh* had only been undertaken for sixteen years, 463 U.S. at 783, but the court looked to the larger

[3] The *Sherman* Court was actually quoting Justice Brennan in S*chool District of Abington Township v. Schempp*, 374 U.S. 203, 288 (Brennan, J., concurring), but

history of legislative prayers in finding the Nebraska's chaplaincy constitutional.

So here, the district court erred by looking back only to the 1940s when Ten Commandments display began to proliferate, rather than back to the larger traditions of which Ten Commandments displays are a part—traditions that are traceable to the Founding era. Specifically, the Ten commandments display is a part of the tradition of governmental acknowledging of religion and of the tradition of inscribing public building with religious sentiment. After noting a few general points about how the Supreme Court has indicated that history should be utilized in Establishment Clause analysis, this brief will examine each of those traditions in turn.

Though some would expunge our history of all things religious,[4] we cannot escape the fact that our nation's past is rep lete with public proclamations of our belief in God and His sovereignty. This type of public expression is a longstanding, uninterrupted tradition that has enriched our nation, and one which should not fall under *Lemon's* unforgiving view of the Establishment Clause.

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the court below was correct to use this image is an accurate view of the spirit of *Marsh*.

[4] *See Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting, quoting in part the majority opinion) (ellipses in the original), for Justice Scalia's trenchant criticism of those who are so "oblivious to our history as to suggest that the Constitution restricts 'preservation and transmission of religious beliefs . . . to the private sphere.'"

Therefore, the district court should have applied *Marsh* appropriately and the historical evidence surrounding the meaning of the Establishment Clause should have been examined.

The maxim that "'a page of history is worth a volume of logic'" should be applied with 'particular force in our Establishment Clause jurisprudence." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting) (citation omitted). As stated above, the Supreme Court has, with respect to Constitutional interpretation, declared that, '[a]ny deviation from [the Framers'] intentions frustrates the permanence of that Charter and will only lead to . . . unprincipled decision making . . . ." *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).[5]

Reflection upon the history surrounding the adoption of the First Amendment shows that acknowledgment and observance of America's religious heritage by government is not the type of activity the Framers intended the Establishment Clause to forbid.

At the time the First Amendment was drafted and ratified, officials of our new government took part in, or were witness to, numerous instances of government acknowledging God in explicitly religious terms. These

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[5] James Madison, arguably the chief architect of the First Amendment, stated that the proper approach to the Constitution was to 'resort[ ] to the sense in which the Constitution was accepted and ratified by the nation." Letter from James Madison to Henry Lee (June 25, 1824), *in* IX The Writings of James Madison, at 191(Gaillard Hunt, ed. 1910).

acknowledgments were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

In *Marsh*, the Supreme Court cited much of this history in support of its finding that legislative prayer was a constitutional practice, and found this history relevant to its analysis. That Court noted, for instance, 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. *Marsh*, 463 U.S. at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true, however, for the executive as well as the legislative branch. 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).

Moreover, it was the first Congress that urged President Washington,

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the

many . . . favors of Almighty God. . . .

Id. at 56.

As the Supreme Court has noted, this Thanksgiving resolution was passed by the 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.

Many more examples could be cited but, suffice it to say, the Framers of the First Amendment frequently engaged in the public acknowledgment of God It would seem a safe assumption that the framers of the First Amendment would not have stood by silently, had they observed frequent violations of their own handiwork for which they had risked so much. Nor would they violate that handiwork themselves. Any interpretation of the Establishment Clause that "sweeps away the practices of the Framers themselves . . . is implausible as well as inappropriate. We should not treat [the Framers] as hypocrites about their own handiwork." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

Moreover, as those who best knew the intentions behind that Amendment, it is their understanding, as revealed by their actions that should guide us today in deciding such cases. The historical acceptability and longevity of a practice lend to it a certain presumption of constitutionality. *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions *cannot* be a proper reading of the Clause"; "the meaning of the Clause is to be determined by reference to *historical practices and understandings*.") (Emphasis added).

On that basis, the Supreme Court has noted on two occasions that the Congress that drafted the First Amendment "was a Congre ss whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-5 (1926), *cited in Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

The *conduct* of the Framers therefore makes it abundantly clear that they also never intended the Establishment Clause to forbid the government from publicly acknowledging our nation's religious heritage. The court below, however, believed that while the very authors of the First Amendment publicly and directly

invoked God's blessings, called for days of national thanksgiving, and urged the nation to seek God's "pardon" for its "transgressions," the County of Elkhart would somehow violate that same First Amendment by erecting a passive display of the Ten Commandments. This in the words of Judge Easterbrook quoted above is "implausible." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 140 (7th Cir. 1987) (Easterbrook, J., dissenting).

1. The Court Below Erred When it Ignored a Long-Standing Tradition of Government Publicly Acknowledging God and Our Religious Heritage Because the Ten Commandments Display is Part of that Tradition.

We now turn to the first specific tradition of which the Ten Commandments display is a part, namely public governmental acknowledgment of God and of our religious heritage. The preceding discussion on the use of history in Establishment Clause analysis has largely foreshadowed the discussion of this tradition. However, the following brief list of additional historical examples further documents 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." [6]

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

- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."
- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[7]
- *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. . . ."[8]
- *Thomas Jefferson*, in his second inaugural address, invited the nation

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

[8] *See Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Other examples, include: (1) First Inaugural Address, April 30, 1789 (acknowledging "the Almighty Being who rules over the Universe"), *Id.* at 43; (2) Message to the Senate, May 18, 1789 (seeking a "divine benediction. . . ."), *Id.* at 47; (3) Fifth Annual Address to Congress, December 3, 1793 ("humbly implor[ing] that Being on whose will the fate of nations depends. . . ."), *Id.* at 131; (4) Sixth Annual Address to Congress, November 19, 1794. *Id.* at 160 ("imploring the Supreme Ruler of Nations to spread his holy protection over these United States. . . ."); (5) Eighth Annual Address to Congress, December 7, 1796, *Id.* at 191 (expressing "gratitude to the Ruler of the Universe. . . ."); and (6) Farewell Address, September 17, 1796, *Id.* at 213 (invoking "Providence. . . .").

to join him in "supplications" to "that Being in whose hands we are."[9]

- *Abraham Lincoln* frequently made public expressions of religious belief. One of many examples 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."[10]

Lincoln apparently saw no conflict between the First Amendment and his very public exhortations to the citizens that they should "humble [themselves] before [God] and . . . pray for His mercy" and that they should "bow in humble submission to His chastisements."[11]

Furthermore, the linkage between the type of acknowledgments listed above and the acknowledgment that a religious display constitutes has been explained by the Sixth Circuit's decision in *ACLU v. Capitol Square Review and Advisory Bd.*, 243 F.3d 289 (6th Cir. 2001). There, the Sixth Circuit upheld the Ohio state motto, "With God, All Things Are Possible," under *Marsh*. Ohio had adopted the motto

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

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

[11] VII *Messages and Papers of the Presidents* 3237.

in the 1950s and in 1996 had proposed to embed a replica of the state seal along with the motto outside the statehouse. *Id.* at 292. The projected dimensions for the seal and motto were quite large–twelve feet, four inches, by ten feet, nine inches. *Id.* This action was challenged by the ACLU.

The Sixth Circuit engaged in an in-depth discussion of the history of the Establishment Clause and applied this history to the motto through a *Marsh* analysis. *See id.* at 293-99. The Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The court 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, court decisions calling for the veneration of religion, the upholding of blue laws, 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.

Again, in light of this history and applying *Marsh*, the Sixth Circuit found the motto, and consequently the large replica of the state seal, "obviously" constitutional. *Id.* at 300.

The *Capitol Square* court took one of *Marsh's* most cited principles and applied it directly to a display case. Having traced acknowledgments 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 fo r 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.

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs,[12] and the tradition continues to this day. As the Sixth Circuit so ably demonstrated, that tradition can include religious displays. Therefore, the district court erred when it declared that Elkhart's Ten Commandments display does not pass muster under *Marsh*. After all, under the district court's reasoning, the Ohio motto display would have to fall because there is no long-standing tradition of inscribing public squares with mottoes that contain religious sentiment. Merely to state the position is to demonstrate that the court

[12] These practices, and others like them, are often characterized, and sometimes permitted by courts only because they are viewed as, "civil religion." Counsel for *Amicus Curiae* does not endorse the notion of "civil religion" and, therefore, will not raise it here, but would urge this Court to give such an argument, if raised by other counsel, due consideration.

applied Marsh at the wrong level of abstraction.

2. The Court Below Erred When it Ignored a Long-Standing Tradition of Inscribing Public Building with Religious Sentiments Because the Ten Commandments Display is Part of that Tradition.

This nation also has a long tradition of inscribing religious sentiments and scriptural references on government buildings, a practice nearly identical to Elkhart's display. Inscribing a building and hanging framed documents on its walls are analytically identical for Establishment Clause purposes. If anything, the documents' less permanent nature make them less problematic.

For this tradition also examples abound, but the following list illustrates the point:[13]

- 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, this one has the most prominent position.
- 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."
- In Arlington National Cemetery, at the Tomb of the Unknown Soldier, these words appear: "Here lies in Honoured glory, An American soldier known but to God."

This second tradition shows once again that the district court erred in asserting that The Ten Commandments display does not pass muster under *Marsh*. Once again, had the district court conducted its analysis at the right level of abstraction, it would have upheld the Ten Commandments display.

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

CONCLUSION

Therefore, the United States Court for the Northern District of Indiana should be reversed and *Marsh*, as applied broadly in a variety of cases, should be used to uphold the display of the Ten Commandments.

Respectfully submitted,
this 16th day of July, 2004,

_____
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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 4,771 words. This total was calculated with the Word Count function of Microsoft Word 97.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief Amicus Curiae of WallBuilders and the National Legal Foundation in the case of *Books v. Elkhart County*, 04-2075 on all required parties by depositing two paper copies in the United States mail, first class postage, prepaid on July 16, 2004 addressed as follows:

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