No. 06-7098

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMES W. GREEN, and AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA,
Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF HASKELL, and KENNY SHORT, in his official capacity,
Defendants-Appellees.

ON APPEAL FROM THE EASTERN DISTRICT OF OKLAHOMA

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Defendants-Appellees'* Petition for Rehearing *En Banc*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases: **Page(s)**

United States Court of Appeals Cases:

Federal District Court Cases:

State Cases:

Statutes:

Other Authorities:

INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, especially those in Oklahoma, 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 being submitted for receipt pursuant to Tenth Circuit Rule 29.1 rather than filed pursuant to Fed. R. App. P. 29. Therefore, pursuant to instructions from the Clerk's office, consent has not been obtained from the Parties, neither is the Brief accompanied by a motion.

SUMMARY OF THE ARGUMENT

Because a panel of this Court (the "Panel") erred in at least two ways when it decided the instant case, this Court should rehear the matter *en banc*. In particular, the Panel erroneously construed *Amicus's* Brief and incorrectly concluded that the court below had jurisdiction to hear an Establishment Clause claim under 42 U.S.C. § 1983. Further, the Panel erred in failing to evaluate *Amicus's* argument that, even if the monument at issue here is unconstitutional under the so-called *Lemon* test, the monument is constitutional under an exception to *Lemon*—namely the test set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983).

ARGUMENT

I. THIS COURT SHOULD REHEAR THE INSTANT CASE *EN BANC* AND REMAND WITH INSTRUCTIONS TO DISMISS FOR WANT OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

Your *Amicus* filed a brief before the Panel, arguing *inter alia*, that the court below lacked jurisdiction over the instant case because Establishment Clause claims cannot be properly brought under 42 U.S.C. § 1983 (2006). Because the Panel erred in concluding that § 1983 is a proper vehicle for litigating Establishment Clause claims, this case should be reheard *en banc*.

The Panel first erred by giving weight to the fact that courts have uncritically heard Establishment Clause cases under § 1983. *Green v. Haskell County*, No. 06-7098, 2009 WL 1579495, at *1 n.1 (10th Cir. June 8, 2009). The Panel's conclusion, however, is simply flawed. As *Amicus* had pointed out in its brief before the Panel, little is to be gained by the Supreme Court's silence on a matter that has never squarely be put before it. (Nat'l Legal Found. Br. at 3.) In particular, the Supreme Court has often allowed certain types of claims on multiple occasions without comment, and then, when the jurisdictional issue is squarely raised, the Court decided that such claims were not properly brought. The Court has even done this in the § 1983 context.

For example, the Court often accepted cases in which a state had been sued under § 1983 before deciding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), that a state is not a person for purposes of § 1983. *See, e.g.*, cases collected in *id.* at 9 n.4. Significantly, the *Will* Court specifically noted that the "'Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974)." *Id.* (brackets in original). Similarly, this Court need not be bound by prior *sub silentio* holdings wherein Establishment Clause cases were brought under § 1983. Because the question is now squarely before this Court, a full analysis of its jurisdiction under § 1983 is proper, leading to the ultimate conclusion that the court below lacked jurisdiction in the first place.

Having given inappropriate weight to *sub silentio* holdings of the Supreme Court, the Panel further erred in its expansive application of the holding in *Maine v. Thiboutot*, 448 U.S. 1 (1980). The Panel invoked *Thiboutot* for the proposition that the "Supreme Court has rejected the notion that § 1983's scope is limited to civil rights or equal protection laws." *Green*, 2009 WL 1579495, at *1 n.1. But *Thiboutot* simply answered the question whether deprivation of a statutorily created right (as opposed to a "civil right" or "equal protection" law) constituted a law for the purposes of § 1983. 448 U.S. at 4. The Court concluded that nothing in the plain language limited § 1983 to a particular "subset of laws." *Id.* Further,

because the statute at issue in *Thiboutot* created an individual right, § 1983 was an appropriate vehicle to vindicate a violation of that right. *Id.* at 5. What the *Thiboutot* Court did not do, because it did not need to, was analyze whether a constitutional limitation on *government* (like the Establishment Clause) creates a right, privilege, or immunity for the purposes of § 1983. As will be set out more fully below and as *Amicus* argued in its Brief before the Panel, the straightforward answer is "no," a restriction on government action does not create a right, privilege, or immunity within the purview of § 1983.

Finally, the Panel erred in concluding that "[t]he Supreme Court's application of the Establishment Clause to the states through the Fourteenth Amendment implicitly determined that individual rights were at stake." *Green*, 2009 WL 1579495, at *1 n.1 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)). However, as was the case in *Thiboutot*, the *Cantwell* Court was not addressing what constitutes a right, privilege, or immunity for § 1983 purposes. In fact, *Cantwell* was not even a § 1983 case. Rather, the plaintiff sought redress of his free exercise rights by way of the Fourteenth Amendment. 310 U.S. at 303. The *Cantwell* Court discussed "liberties guaranteed by the First Amendment," and in particular that the religion clauses *read together* protected the "freedom to believe and [the] freedom to act." *Id.* This fuller reading of the First Amendment, however, is different from the question before this Court—namely, whether a

purported Establishment Clause violation standing alone implicates a right, privilege, or immunity under § 1983. Again, as will be set out more fully below, the answer is "no," and the court below lacked jurisdiction to hear the matter.

For this Court's convenience, *Amicus* will summarize below the heart of the argument the Panel erred in not adopting.

A. The Legislative History of 42 U.S.C. §§ 1983 and 1988 Show that the Establishment Clause was Never Intended to be Included within the Purview of § 1983 Jurisdiction.

Nothing in the legislative history of or scholarship about § 1983, 42 U.S.C. § 1988 (2006), nor the Fourteenth Amendment indicates that Establishment Clause challenges were intended to be brought under §1983.[1] Rather, § 1983 was enacted to vindicate violations of individual rights. Furthermore, the history of the Fourteenth Amendment shows that the Establishment Clause was not intended to be included within the purview of Fourteenth Amendment Privileges and Immunities. Thus, because Establishment Clause violations are not a deprivation of any "rights, privileges, or immunities secured by the Constitution and laws" for which § 1983 provides redress, § 1983 does not give the federal courts jurisdiction in Establishment Clause cases.

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[1] A comprehensive treatment of this history is available at *Paying Your Own Way: Creating a Fair Standard for Attorney's Fee Awards in Establishment Clause Cases*: *Hearings on S. 109-756 Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the Comm. on the Judiciary*, 109th Cong. 67-92 (2006) [hereinafter *Hearing*] (statement of Steven W. Fitschen, President, National Legal Foundation).

Until the passage of § 1988, 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, however, the number of cases has exploded. Although not a perfect division (because of cases that were already being litigated), the enactment date for § 1988 is a close proxy. For example, the number of opinions on LEXIS, to the best of *Amicus*' ability to ascertain, show that prior to the enactment of § 1988 (*i.e.*, from § 1983's enactment in 1871 until § 1988's enactment in late 1976), only 44 opinions are available in which both § 1983 and the "Establishment Clause" are mentioned. In contrast, in the just over thirty years following § 1988's enactment 1086 such cases can be found.[2]

Justice Powell suggested the reason in his dissent in *Thiboutot*:

> 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.

448 U.S. at 24 (Powell, J., dissenting).[3]

Today strict separationists have turned this phenomenon into a virtual

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[2] Admittedly, not every opinion found using this search 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.'"

[3] The context of his remarks was different than that being addressed, however, Justice Powell's concern is transferable.

"blackmail scheme." And the statistics above do not begin to tell the whole story. Many lawsuits are not even filed or are settled because public interest law firms threaten localities and state defendants with the prospect of paying enormous attorney fee awards. *See generally*, *Hearing*, *supra* at 67.

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

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

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

version:

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

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

The emphasis throughout the debates remained single-minded: Americans who were the victims of racial discrimination needed a fee-shifting provision to attract attorneys. One of the main proponents of the Act, Senator Edward Kennedy (D-Mass), repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight "discrimination" in areas such as "jobs, housing, credit, or education" using the "civil rights laws." *Source Book* at 23. Establishment Clause claims were simply not contemplated to fall under § 1988. *See generally*, *Source Book* throughout; *Hearing*, *supra* at 67-92.

Furthermore, the legislative history is clear that only two additional provisions were added as part of the political compromise needed to pass the Act:

the Title IX provision protecting against sex discrimination in education and the provision for the protection of taxpayers defending themselves against proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress did not intend to provide for fee-shifting in Establishment Clause cases.[4]

Secondly, the legislative history of § 1983 confirms that the drafters of § 1988 correctly understood the intended coverage of § 1983. Section 1983 was originally a provision of the Ku Klux Act of 1871 (the "Act"). Numerous courts and commentators have documented that § 1983 (called § 1 at the time the Act was passed) was one of the Act's least debated provisions. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665 (1978). Despite the paucity of debate on § 1, the meaning of the phrase "rights, privileges and immunities" is rather simple to discern when one considers the debate over the entire act.

The Act was first 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), and, after the Bill's introduction, Representative Stoughton (R-Michigan) spoke to set the stage. *Id.* at 599. He started with the activity of the Ku Klux Klan in North Carolina, noting "murders, whippings, intimidation, and violence." *Id.* at 599 ff. He also discussed the Klan's protection of its members by having other members commit perjury as

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

witnesses or refuse to vote to convict as jurors. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee. *See generally, id.* at 600 ff. He read testimony of Blacks who had been victims of violence and of Whites who knew the inner workings of the Klan, as well as judges who knew of perjury incidents. *Id.* Near the end of his remarks, he summarized the need for the act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

Id. at 606.

With this context, it is readily understandable that the most common view of "rights, privileges, and immunities" was one that equated it with life, liberty, and property. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). Although one may attempt to recast "Establishment of Religion" as a liberty interest, to do so only begs the question. More persuasive is the fact that some Congressmen gave extended comments with examples of the concerns that animated the passage of the Act, but 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 and others like it demonstrate that one must never stray far from the historical context of Klan abuses if one wants to understand § 1983's intent. Furthermore, the close connection between the concepts of equal protection and of rights, privileges, and immunities is illustrated. The Establishment Clause was simply not intended to be covered.

None of this is to say that governments may therefore willfully violate the Establishment Clause with impunity. Plaintiffs can sue directly under the Establishment Clause and 28 U.S.C. § 1331 instead of under § 1983—as was routine before 1976. *See, e.g., Flast v. Gardner*, 267 F. Supp. 351, 352 (S.D.N.Y. 1967) (ultimately reaching the Supreme Court on other grounds, *Flast v. Cohen*, 392 U.S. 83 (1968)). All that would be lost would be the "blackmailing" effect of the § 1988 fees anticipated by Justice Powell.

B. Legislative History Shows that the Establishment Clause was Never Intended to be a Privilege or Immunity for the Purposes of the Fourteenth Amendment.

Despite the compelling Legislative history surrounding §§ 1983 and 1988 that the Establishment Clause was not within their purview, as discussed above, the Panel erroneously rejected this position. The Panel further erred by ignoring *Amicus's* discussion of the legislative history of the Fourteenth Amendment. (Nat'l Legal Found. Br. at 11-13.) As argued more fully below, the Establishment Clause simply does not create a right, privilege, or immunity to bring it under the purview of § 1983.

Many views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include and, indeed, each of the opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that Amendment. *See*, *Hearing*, *supra* at 90.

However, all of those views have one thing in common: none sees the term "privileges and immunities" as implicating the Establishment Clause—even were it to be restated as "a right to be free from establishment of religion."

Chester Antieau, a leading § 1983 expert, collected writings and statements from various Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment) and from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment* (1997). These statements demonstrate that the free exercise of religion was intended to be covered by the term "privileges and immunities" but that "freedom from establishment" was not.

Antieau cites Representative Ralph Buckland's statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect their free exercise rights. *Id.* at 91. By contrast, Antieau could find no evidence of any Senator or Representative mentioning "freedom from establishment." *Id.* at 108 ff. There is more than mere silence to this argument, however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack, all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause—none of which included the Establishment Clause. *Id.*

Additionally, Antieau examined practices of the states that ratified the Fourteenth Amendment and determined that it is highly unlikely that they believed that the Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-285. This evidence includes state statutes, constitutions, and court decisions. Some states, for example New Hampshire and Massachusetts, still had vestiges of true establishment. *Id.* at 110. It seems highly unlikely that these states would 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, and such a conclusion casts serious doubts on the applicability of *Thiboutot* to the instant case. As discussed more fully above, *Thiboutot* simply addressed whether a statute that created an individual right constituted a "law" for § 1983 purposes. The Court noted that the text of § 1983 itself supports the view that "law" was not restricted to a specific type of law and that the *right* created by the statute fit squarely within the bounds of § 1983. 448 U.S. at 4-6. *A propos* the instant case, however, *Thiboutot* had no occasion to address what is or is not a right, privilege, or immunity, but the legislative history discussed above plainly shows the Establishment Clause is none of them. Thus, *Thiboutot* is no obstacle to this argument.

Therefore, for the reasons discussed, this Court should recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and due to the Panel's error should grant Haskell County's Petition for Rehearing *En Banc*.

II. THIS COURT SHOULD REHEAR THE CASE *EN BANC* AND EVALUATE THE MONUMENT UNDER *MARSH V. CHAMBERS* BECAUSE THE MONUMENT FALLS WITHIN TWO PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

Amicus also offered the Panel alternate grounds for reversing the court below on the merits of the Establishment Clause claim. (Nat'l Legal Found. Br. at 13-28.) The Panel erred by simply not addressing *Amicus's* argument that even if the monument did not pass constitutional muster under the *Lemon* test, the monument is constitutional under an exception to *Lemon*—namely under 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). Importantly, in its recent Ten Commandments case, *Van Orden v. Perry*, 545 U.S. 677 (2005), the Supreme Court specifically referred 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. 545 U.S. at 688 (plurality).

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

Chief Justice 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," *Van Orden*, 545 U.S. at 688 (plurality), and not unconstitutional establishments of religion. Thus, by rejecting the *Lemon* test and relying on the same analysis found in *Marsh*, the *Van Orden* plurality evaluated the Texas Ten Commandments display from a *Marsh* perspective.

This is consistent with the view of pre-*Van Orden* courts which had begun to realize that even when a practice fails the *Lemon* test it could be upheld if it passed the Marsh test. For example, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order at 10 (N.D. Ind. Mar. 19, 2004), the district court stated, "a practice that fails the *Lemon* test 'may still be found constitutional under the *Marsh*

exception to the *Lemon* test.'" *Id*. (quoting *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002)).[5]

Therefore, although it was proper to use *Lemon* in its Establishment Clause analysis, albeit with "Justice O'Connor's endorsement patina," *Green*, 2009 WL 1579495, at *22, upon finding that the monument violated the *Lemon* test, the Panel should have gone on to evaluate the case under the *Marsh* exception. Failure to do so resulted in the failure to perceive the constitutionality of the instant monument.

We note that some courts have incorrectly tried to limit *Marsh* to chaplaincy cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, that has not been the Supreme Court's approach. As *Amicus* pointed out in its Brief before the Panel, (Nat'l Legal Found. Br. at 17), the Supreme 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). Also, as similarly pointed out in *Amicus's* Brief, (Nat'l Legal Found. Br. at 17), lower courts have applied *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote

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

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, *Amicus's* Brief noted that even where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. (Nat'l Legal Found. Br. at 17.) Significantly, courts have applied *Marsh* in religious display cases. *See e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986). Courts have also used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified School District Board of Education*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); the prayer room at the Illinois statehouse, *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986); religious expression in the form of an invocation and benediction at a public university graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance in a

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

Of course, the most significant consideration here is that the Supreme Court has never overturned *Marsh*, either explicitly or by implication. The Court could have done just that in *Lee v. Weisman*, 505 U.S. 577 (1992), but instead chose merely to distinguish that case.[6] In the instant case, all of the differences in *Weisman* are absent. At the basic level, this is a *display* case, not a school prayer case. Additionally, as pointed out in *Amicus's* Panel Brief, significant differences as to context, setting, and audience exist in this case distinguishing it from *Weisman*. (*See* Nat'l Legal Found. Br. at 18-19.) Simply put, *Marsh* controls this case. The Panel's failure to analyze the instant case under *Marsh* was error, thus warranting rehearing by the full Court.

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

[6] The *Weisman* Court stated that these cases were distinguished by the inherent differences between a public school and a state legislature. *Weisman,* 505 U.S. at 596.

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.

As will be demonstrated below, this monument is part of *two* important traditions. The Panel erred by failing to consider either of them.

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

This nation has a long-standing tradition of placing religious sentiments and scriptural references on government property. Examples abound, but the following list illustrates the point:[7]

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

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

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

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

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

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

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

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

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

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

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

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[8]

- *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."

- *George Washington* frequently acknowledged God in his addresses,

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

executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[9]

- *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."[10]

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs that continues to this day. The Panel's failure to consider the appropriate deference to Haskell County under *Marsh* was error, and warrants this case being reheard *en banc*.

Furthermore, whether the instant monument is characterized as acknowledging the role of religion in American life generally, or as acknowledging God, it is well within a long-standing tradition in *Marsh*.

This Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored devotion to the concept of neutrality," *Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny the citizens of

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[9] *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.

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

Haskell County this moral code of conduct and simple acknowledgement of the role of religion in our nation's heritage.

CONCLUSION

For the foregoing reasons, this Court should grant Haskell County's Petition for Rehearing *En Banc*.

Respectfully Submitted,
this 30th day of June 2009

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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 5,856 words.

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CERTIFICATION UNDER GENERAL ORDER
DATED MARCH 18, 2009

I further certify, as required by the General Order dated March 18, 2009, on the same day an electronic copy of Brief *Amicus Curiae* in Support of Petition for Rehearing *En Banc* was transmitted to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, via ECF system in Portable Document Format (PDF) generated from an original word processing file, (1) that all required privacy redactions have been made, (2) that every document submitted in digital form is an exact copy of the written document filed with the Clerk, and (3) that the digital submission have been scanned for viruses with Norton Internet Security Virus Scan, updated June 29, 2009, and found free from viruses.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of National Legal Foundation in the case of *Green v. Haskell County Board of Commissioners*, No. 06-7098, on all required parties by filing the Brief with the Tenth Circuit Court of Appeals via ECF on June 30, 2009.

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