No. 05-4604

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTHONY HINRICHS, *et. al*,
Plaintiff-Appellee

v.

BRIAN BOSMA, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE INDIANA GENERAL ASSEMBLY,
Defendant-Appellant

On Appeal From The United States District Court
For The Southern District Of Indiana, Indianapolis Division
Judge David F. Hamilton

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant-Appellant
Supporting reversal

Steven W. Fitschen
Counsel of Record for Amicus Curiae
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

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Appellate Court No: 05-4604

Short Caption: Hinrichs v. Bosma

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Address: NLF, 2224 Virginia Beach Blvd., St. 204, Virginia Beach, VA 23454

Phone Number: (757) 463-6133 Fax Number: (757) 463-6055

Email Address: nlf@nlf.net

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INTEREST OF AMICUS

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

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

At least one federal court has directly raised—but not answered—the question of the appropriateness of bringing Establishment Clause claims under § 1983. In *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991) 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.[1]

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 raising the question,[2] 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.

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

[2] This Court has previously stated that "[it] will reach issues raised solely by *amicus* filings in [its] discretion." *Kaczmarczyk v. INS*, 933 F.2d 588 (7th 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, "[s]ubject matter jurisdiction, however, cannot be waived," noting that "courts have [a] duty to raise [the] question of subject matter jurisdiction *sua sponte*." *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 179 (7th Cir. 1994).

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 § 1988's enactment 646 such cases can be found.[3]

Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot*, 448 U.S. 1, 24 (1980)[4]: "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 are not filed or are quickly settled because public interest law firms and others threaten localities and state defendants with the prospect of paying enormous attorney fee awards. *See generally*, Steven W. Fitschen, *From Black Males to Blackmail: How the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's*

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[3] 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.

Most Historic Civil Rights Statutes (forthcoming).[5]

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 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,*

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

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

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.[6]

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

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

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 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 vacate the opinion of the District Court and remand the case with instructions to dismiss the case for want of subject matter jurisdiction.

II. THE DISTRICT COURT ERRED WHEN IT HELD THAT APPELLEES HAVE TAXPAYER STANDING TO CHALLENGE THE INVOCATIONS, BECAUSE THE EXPENDITURES COMPLAINED OF DO NOT MEET THE REQUISITE ELEMENTS SET FORTH IN *DOREMUS* TO ESTABLISH TAXPAYER STANDING.

Additionally, the District Court erred when it held that Appellees have standing as Indiana taxpayers to challenge the invocations.

The district court cited wrongly cited three cases, *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983), *Murray v. Buchanan*, 232 U.S. App. D.C. 42, 720 F.2d 689 (D.C. Cir. 1983), and *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) to support its finding that the taxpayers in the present case have standing to challenge the invocations in the present case. The facts in these three cases are materially distinguishable from those involved in the present case, because each involves tax dollars directly funding religious activity (specifically state-paid chaplains in *Marsh*, and *Murray* and the state-funded construction of a prayer room in the state capital in *Van Zandt*).

The District Court cited three incidental expenditures related to the practice of having a minister give an invocation at the opening of a legislative session. *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1111 (S.D. Ind. 2005). Unlike the directly religious activities funded in *Marsh*, *Murray* and *Van Zandt*, the costs involved in the present case are related legislative customs and courtesies including: mailings, including confirmation letters and thank you notes to the

ministers; photographs of the ministers with various legislators; and video streaming to facilitate the prayers being broadcast over the Internet. *Id.* at 23.

The tax dollars identified in this case are not directly for religious activities and do not meet the requirements for taxpayer standing as set forth in *Doremus v. Board of Education*, 342 U.S. 429 (1952). In *Doremus*, a parent and other citizens sought to have a statute authorizing the daily reading of Old Testament scriptures declared unconstitutional. *Id*. at 430. In so doing, they sought standing as, *inter alia*, taxpayers. *Id*. at 432. The Court rejected this standing argument for several reasons.

The *Doremus* Court noted that the complaint did not "show a measurable appropriation or disbursement of . . . funds occasioned *solely* by the activities complained of." *Id*. at 434 (emphasis added). After noting that, in a case involving taxpayer standing, the injury complained of had to be a "direct pecuniary" one, *id*., and that the case itself had to be a "good-faith pocketbook action," *id*., the Court summed up its concern in this manner:

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here. If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

Id. at 434-35.

Other courts of appeals have expounded upon *Doremus*' requirements. In particular the Ninth Circuit's *en banc* opinion in *Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999) summarizes how various courts of appeals had applied *Doremus* up until that time. The *Doe* court identified four important aspects of the application of *Doremus*. First, the plaintiff

seeking state taxpayer standing must show that he is a taxpayer. *Id*. at 795 (quoting *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 408 (5th Cir. 1995)). Second, the taxpayer must show that the alleged funds are spent solely for the challenged activity, *i.e.*, that the funds would not otherwise be spent. *Id*. at 793-94. (The *Doe* court specifically mentioned that maintenance costs for an area around a crucifix that would have to be maintained absent the crucifix was not money spent solely on the cross. *Id*. at 795-96 (citing *Gonzales v. N. Township*, 4 F.3d 1412, 1416 (7th Cir. 1993))). Third, the plaintiff must show a specific amount of funds that have been expended. *Id*. at 794. Fourth, the expenditure must be significant and not merely incidental. *Id*. at 796.

While Appellees are Indiana taxpayers and have identified specific tax dollars that have been spent on activities that touched upon speakers being invited to give invocations at the opening of the State Legislature, they have not and cannot demonstrate that such monies "occasioned solely" for the challenged activities, as *Doremus* requires. 342 U.S. at 434.

The tax dollars spent in the present case are not "occasioned solely" for the challenged activities, and are, in fact, funds that would have been spent anyway. The District Court *did not* hold that the practices of inviting ministers to give invocations, cordially hosting them during their visits to the Capitol, thanking them through letters, photographing them with legislators or broadcasting their invocations via Internet streaming violated the Establishment Clause. Rather, the District Court issued an injunction requiring the House Speaker to inform any guest invited to give an invocation before the state legislature that the invocation must be non-sectarian and must not invoke the name of Christ or any other title with "denominational appeal." *Hinrichs*, 400 F. Supp. 2d at 1131. However, the same tax dollars would be spent on the above listed

incidental courtesies and practices, whether the speaker gave a sectarian or non-sectarian invocation.

The tax dollars involved in this case are analogous to those complained of in *Gonzales*. In *Gonzalez,* taxpayers claimed standing to challenge a memorial featuring a crucifix located in a public park. Taxpayers claimed that they had standing to challenge the memorial because public funds were used to maintain the park. However, the Seventh Circuit held that the taxpayers lacked standing because the funds identified would have been used to maintain the park grounds even if the crucifix were not present. *Id.* at 1416. Similarly, the funds Appellant identified in this case would be spent anyway, thus, the District Court erred when it held that Appellants had standing as taxpayers to challenge the invocations.

The fourth requirement the Court set forth in *Doremus*, that the expenditures be significant, not merely incidental, is related to the Court's second requirement that the expenditures be "occasioned solely" by the complained of activities. The expenditures in this case fail this requirement as well. In *Doe*, the Court clarified that the term "incidental" as applied in *Doremus* describes, "the type of indirect support that flows to an activity when the government does not spend 'a measurable appropriation or disbursement' solely on the challenged activity" 177 F.3d 789 at 796 (citations omitted). This definition succinctly describes the funds involved in this case. The amount spent on the practice was "obviously very modest" because the costs amounted to only a few hundred dollars over the span of the 2005 session. *Hinrichs*, 400 F.Supp.2d at 1111. This is indeed "modest" when one considers that the budget of the General Assembly was $25,425,452 for fiscal year 2005-06 (out of a total of $35, 990,737 for all legislative appropriations). The 2005 Indiana General Assembly for the Biennium July 1, 2005 to June 30, 2007, *The State of Indiana List of Appropriations*, at 88-87 (visited May 18,

2006) <http://www.in.gov/sba/budget/2005_budget/as_passed/pdfs/ap_2005_all_t.pdf#search='2005%20budget%20for%20the%20general%20assembly%20of%20indiana'>

Moreover and perhaps more importantly under *Doremus*, the District Court masked the incidental nature of the expenditure by aggregating it over the course of the entire year. *Id.* The small amount of money is properly understood when it is *disaggregated* over the fifty-three prayers assumed by the District Court. When viewed in this light it is seen as truly incidental ($8.46 per prayer).

Furthermore, not only are the expenditures not occasioned solely by speakers of a particular religion, they are expenditures incidental to *any* person invited to speak before the General Assembly. General administrative custom dictates the necessity of letters of invitation and those containing general logistical information pertaining to one's appearance before the Indiana General Assembly. Additionally, the Indiana General Assembly Website indicates that the entire legislative session is available for viewing via Internet streaming. Indiana General Assembly Website, *Watch Video of the General Assembly Online* (visted May 18, 2006) <http://www.in.gov/legislative/session/video.html>. Thus, *any* person speaking before the body would have his or her remarks streamed via the Internet. Because these expenditures are merely incidental, they fail the fourth requirement set forth under *Doremus*.

Because the expenditures cited by Appellant in this case fail to meet each of the four requirements the Supreme Court set forth in *Doremus* for determining taxpayer standing, the District Court erred when it held that Appellants have standing as Indiana taxpayers to challenge the invocations.

CONCLUSION

For the foregoing reasons, this Court should vacate the decision of the District Court and remand the case with instructions to dismiss for want of jurisdiction, and lack of taxpayer standing.

Respectfully Submitted,
this 18th day of May, 2006

_____
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 34545
(757) 463-6133

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 2003.

_____

Steven W. Fitschen

Counsel of Record for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Hinrichs v. Bosma, 05-4604* on all required parties by depositing the required number of paper and electronic copies in the United States mail, first class postage, prepaid on May 19, 2006, addressed as listed below. The required number of paper and electronic copies were filed in the same manner on the same date.

Counsel for Defendant-Appellant
Brian Bosma, in his official capacity as Speaker of the House of Representatives of the Indiana General Assembly

Thomas M. Fisher
Office of the Attorney General
302 W. Washington Street
Indiana Government Center South
Indianapolis, IN 46204-2770

Counsel for Plaintiff-Appellee
Anthony Hinrichs, et. al.

Kenneth J. Falk
Indiana Civil Liberties Union
1031 E. Washington Street
Indianapolis, IN 46202

_____

Steven W. Fitschen
Counsel of Record
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Boulevard, Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133