No. 02-2444

In the

United States Court of Appeals
For the Eighth Circuit

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ACLU NEBRASKA FOUNDATION, *et al.*,
Plaintiffs-Appellees

v.

CITY OF PLATTSMOUTH, NEBRASKA,
Defendant-Appellant,

———————— ◆ ————————

ON APPEAL *EN BANC* FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

———————— ◆ ————————

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

———————— ◆ ————————

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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.

Because no rule governs the filing of *Amicus* Briefs at an *en banc* rehearing and pursuant to the instructions of this Court to file a motion rather than to seek the consent of the parties, the National Legal Foundation files this brief pursuant to the accompanying Motion for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

I. THE COURT BELOW SHOULD BE REVERSED BECAUSE IT ERRED WHEN IT IGNORED *MARSH V. CHAMBERS*, UNDER WHICH THE TEN COMMANDMENTS DISPLAY IS CONSTITUTIONAL.

By briefly addressing one part of the Appellant's argument, the three judge panel in the instant case correctly implied that *Marsh v. Chambers*, 463 U.S. 783 (1983), provides an independent basis upon which to uphold a practice that has failed the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test. *ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1042 (8th Cir. April 6, 2004). While *Amici* understand that the decision of the panel has been vacated and withdrawn, *Amici* briefly address the panel's opinion because the district court, unlike the panel, ignored *Marsh*. As this brief will demonstrate, the panel was incorrect to hold that *Marsh* is inapplicable and the district court erred by ignoring *Marsh* altogether.

Despite wide use of the *Lemon* test among courts in Establishment Clause cases, the Supreme Court has never considered *Lemon* the only possible Establishment Clause analysis. The panel acknowledged this fact in its discussion of whether to employ the *Lemon* test or a different analysis under *Larson v. Valente*, 456 U.S. 228 (1982). *Plattsmouth*, 358 F.3d at 1032-34. 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)(O'Connor, J., concurring)). Therefore, as will be demonstrated below, *Marsh* provides the proper test for the instant case.

In *Marsh*, the Supreme Court recognized a separate analysis from the three-pronged *Lemon* test when at issue are historical, religious-oriented practices. The Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. It declared that the practice of prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.*, and that it had "become part of the fabric of our society," *id*. at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court also stated that the First Congressmen's intent that prayers before legislatures not contravene the Establishment Clause is corroborated by their *actions*. *Id.* at 790.

This brief will examine, first, why the panel was correct to recognize the independence of the *Marsh* analysis when practices with historical pedigree are at issue; and second, why it was incorrect to conclude that *Marsh* was inapplicable to the instant case. Specifically, the panel considered the applicability of the *Marsh* test at the wrong level of abstraction. For the same reasons, the district court erred when it failed to analyze this case under *Marsh*. Had it done so, it would have concluded that the Ten Commandments monument passed constitutional muster.

A. The Panel was Correct to Acknowledge that *Marsh* Provides an Independent Establishment Clause Analysis Because Other Courts Have Acknowledged that *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 have used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); 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); the offering of an invocation and benediction at a public university graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); the reciting of the Pledge of Allegiance in a public school, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992); 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 panel was correct to imply that *Marsh* can provide an analysis independent of the *Lemon* test in the present context. Therefore, the district court erred when it ignored *Marsh*.

B. The Panel Incorrectly Held that *Marsh* is Inapplicable Here and the District Court Incorrectly Ignored *Marsh* Because They Both Ignored Two Long-Standing Traditions of Which the Display of the Ten Commandments is a Part.

Having realized that *Marsh* is a viable, independent Establishment Clause test, the panel incorrectly concluded that *Marsh* does not apply here. The panel conducted its analysis at the wrong level of abstraction by claiming that the public display of a Ten Commandments monument could not pass muster under *Marsh* because it is not a practice, like legislative prayers, that has unambiguously persisted for two hundred years. *Plattsmouth*, 358 F.3d at 1042.

Requiring a specific, historical practice to exhibit the same longevity of exercise that legislative prayers exhibit improperly narrows the *Marsh* analysis. The larger, historical tradition of which the practice is a part should be considered. The specific prayers at issue in *Marsh* had only been undertaken for sixteen years, but the Supreme Court looked to the larger history of legislative prayers in finding Nebraska's chaplaincy constitutional. 463 U.S. at 783.

For example, a case from the Seventh Circuit Court of Appeals is instructive here. In *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), the 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 employed *Marsh's* historical principles.) The reason that the *Sherman* Court 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's phrase "under God" 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.

On the other hand, the panel mistakenly focused on the display of "Ten Commandments monuments in public parks," *Plattsmouth*, 358 F.3d at 1042, rather

than looking 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,[1] we cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a longstanding, uninterrupted tradition that has enriched our nation, and one which should not fall under *Lemon's* unforgiving view of the Establishment Clause. Therefore, the panel should have applied *Marsh* appropriately and the historical evidence surrounding the meaning of the Establishment Clause should have been examined. In the same way, the district court erred by ignoring *Marsh*.

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[1] *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.'"

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).[2]

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

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[2] 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).

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. ACLU*, 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 Congress 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 panel, 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 City of Plattsmouth would somehow violate that same First Amendment by erecting a passive

monument 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 District Court Erred When it Ignored a Long-Standing Tradition of Government Publicly Acknowledging God and Our Religious Heritage Because the Ten Commandments Monument is Part of that Tradition.

We now turn to the first specific tradition of which the display of the Ten Commandments 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." [3]
- *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

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

"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." [4]
- *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. . . ."[5]
- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are." [6]
- *Abraham Lincoln* frequently made public expressions of religious

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

[5] *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. . . .").

> 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."[7]

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."[8]

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 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

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

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

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

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 for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs,[9] 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 ignored *Marsh* and the panel discussed *Marsh* at the wrong level of abstraction. After all, under the panel'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 panel applied *Marsh* at the wrong level of abstraction.

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[9] These practices, and others like them, are often characterized, and sometimes permitted by courts only because they are viewed as, "civil religion." Counsel for *Amici 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 the parties or other *amici*, due consideration.

2. The District Court Erred When it Ignored a Long-Standing Tradition of Inscribing Public Buildings with Religious Sentiments Because the Ten Commandments Monument 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 Plattsmouth's erecting its Ten Commandments monument on publicly owned grounds. Inscribing a building and erecting a monument ten blocks from a city hall are analytically identical for Establishment Clause purposes. If anything, the monument's distance from the Plattsmouth City Hall makes it less problematic.

For this tradition also examples abound, but the following list illustrates the point:[10]

- In the House of Representatives Chamber, in our nation's Capitol, directly above and behind the Speaker's Chair is the inscription, "In God We Trust."
- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, 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,

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

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 failing to analyze the Ten Commandments monument under *Marsh*. Once again, had the district court analyzed the monument and done so at the right level of abstraction, it would have upheld the constitutionality of the Ten Commandments monument.

CONCLUSION

For the foregoing reasons, the United States District Court for the District of Nebraska should be reversed. *Marsh*, as applied broadly in a variety of cases, should be used to uphold the constitutionality of this Ten Commandments monument.

Respectfully submitted,
this 26th 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 4,292 words. This total was calculated with the Word Count function of Microsoft Word 2000.

Pursuant to Eighth Circuit Rule 28A(d)(2) the undersigned certifies that the disk containing the digital version of this brief is virus free.

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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 *ACLU Nebraska Foundation v. City of Plattsmouth*, No. 02-2444, on all required parties by depositing two paper copies in the United States mail, first class postage, prepaid on July 26, 2004 addressed as follows:

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