CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Undersigned counsel certifies that the following persons may have an interest in the outcome of this case:

1. American Civil Liberties Union of Alabama, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard;
2. Americans United for Separation of Church & State, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard;
3. The Hon. Delores R. Boyd, United States Magistrate Judge, Middle District of Alabama;
4. Rhonda Brownstein, Attorney for Plaintiff-Appellee Stephen R. Glassroth;
5. Charles B. Campbell, Assistant Attorney General for the State of Alabama;
6. J. Richard Cohen, Attorney for Plaintiff-Appellee Stephen R. Glassroth;
7. Coral Ridge Ministries, a Christian evangelical organization;
8. Morris Dees, Attorney for Plaintiff-Appellee Stephen R. Glassroth;
9. John Eidsmoe, Attorney for Defendant-Appellant Chief Justice Roy S. Moore and Deputy Attorney General of the State of Alabama;
10. Nathan A. Forrester, Solicitor General for the State of Alabama;
11. Foundation for Moral Law, Inc.;
12. Stephen R. Glassroth, Plaintiff-Appellee;
13. Rich Hobson, Administrative Director of Courts for the State of Alabama;

14. Beverly Howard, Plaintiff-Appellee;
15. Phillip L. Jauregui, Attorney for Defendant-Appellant Chief Justice Roy S. Moore;
16. Ayesha Kahn, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard;
17. Dr. D. James Kennedy, President of Coral Ridge Ministries;
18. Danielle J. Lipow, Attorney for Plaintiff-Appellee Stephen R. Glassroth;
19. Melinda Maddox, Plaintiff-Appellee;
20. D. Stephen Melchior, Attorney for Defendant-Appellant Chief Justice Roy S. Moore and Deputy Attorney General of the State of Alabama;
21. William Z. Messer, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard;
22. Roy S. Moore, Chief Justice, Defendant-Appellant;
23. John "Jack" J. Park, Jr., Assistant Attorney General for the State of Alabama;
24. Thomas F. Parker, General Counsel for Unified Judicial System of Alabama;
25. Allison Pierce, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard;
26. Bill Pryor, Attorney General for the State of Alabama;
27. Bob Riley, Governor of the State of Alabama;

28. Southern Poverty Law Center, Attorney for Plaintiff-Appellee Stephen R. Glassroth;
29. The Hon. Myron H. Thompson, United States District Judge, Middle District of Alabama;
30. Herbert W. Titus, Attorney for Defendant-Appellant Chief Justice Roy S. Moore and Deputy Attorney General of the State of Alabama;
31. Robert J. Varley, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard; and
32. Robert W. Weinberg, Attorney for Plaintiffs-Appellees Melinda Maddox and Beverly Howard.

____

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* Defendant's Pre-trial Brief, R5-91-23-28 .... 3, 17-19

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STATEMENT OF THE ISSUE

I. DID THE DISTRICT COURT ERR IN HOLDING THE TEN COMMANDMENTS MONUMENT VIOLATES THE ESTABLISHMENT CLAUSE UNDER *MARSH V. CHAMBERS* WHEN CHIEF JUSTICE MOORE HAS DOCUMENT THREE LONG-STANDING TRADITIONS OF WHICH THE MONUMNET IS A PART?

INTEREST OF AMICUS

WallBuilders, Inc. is a 501c3 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.

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

SUMMARY OF THE ARGUMENT

Although the district court properly concluded that, even if the monument failed to pass constitutional muster under *Lemon v. Kurtzman*, the monument should still be analyzed under *Marsh v. Chambers* and should be held constitutional if it met Marsh's historical tradition test. However, the court mis-analyzed the monument under Marsh because it failed to give adequate consideration to three independent long-standing traditions of which the monument is a part, namely the traditions of judges acknowledging the moral foundation of the law, of public acknowledgment of God, and of adorning public property with "religious" language. The court compounded it error by claiming that Chief

Justice Moore's views are "unique," instead of recognizing them as views widely (and properly) disseminated by Congress.

ARGUMENT

I. THE COURT BELOW ERRED WHEN IT CONCLUDED THAT THE MONUMENT IS UNCONSTITUTIONAL UNDER *MARSH V. CHAMBERS* BECAUSE IT FAILED TO GIVE PROPER WEIGHT TO THREE HISTORICAL PRACTICES, EACH OF WHICH DEMONSTRATE THE CONSTITUTIONALITY OF THE MONUMENT.

The court below properly concluded that *Marsh v. Chamber*, 463 U.S. 783 (1983), provides an independent basis upon which to uphold a practice which has failed the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1305-06 (M.D. Ala. 2003). As the district court stated, "a practice that fails . . . the *Lemon* test may still be found constitutional under the *Marsh* exception to the *Lemon* test." *Id*. at 1306. Therefore, assuming *arguendo* that the trial court's *Lemon* analysis is correct, the monument could still be upheld under *Marsh*.

In reaching this conclusion, the court rejected the Plaintiffs' claim that *Marsh* should be limited to its narrow factual context, namely legislative prayer. Admittedly, some courts have erroneously argued that *Marsh* should be limited to legislative chaplain cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F.

Supp. 531, 535 (S.D. Iowa 1985).[1] However, other courts have not limited *Marsh* to its precise holding. *See, e.g., ACLU v. Capitol Square Review & Advisory Bd.*, 20 F. Supp. 2d 1176, 1180 (S.D. Ohio 1998). The court below was correct to reject the Plaintiff's argument and see *Marsh* as applicable in the instant case.

Indeed, it was following many courts before it, which have applied *Marsh* in numerous contexts. 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*

[1] This citation represents the first time Amicus will rely upon the cases and general arguments used by Chief Justice Moore in his *Defendant's* Response *in Opposition to Plaintiffs' Motion for Summary Judgment*, R4-84-35-45, Appendix & Ex. K, and his *Defendant's* Pre-trial Brief, R5-91-23-28. Amicus' intent is to accentuate arguments that Amicus finds historically compelling and to point out the inadequacy of the district court's analysis of them. Because Chief Justice Moore marshaled nearly seventy cases and concisely summarized them in text or parentheticals, Amicus will frequently use those same summarizations so that this Court will not need to compare divergent descriptions of the same case. Where Amicus employs identical or nearly identical descriptions, no further attribution will be given, but Amicus hereby acknowledges the source of these descriptions. The same is true of Amicus' use of the Tables compiled by Chief Justice Moore in his Response, R4-84-Appendix.

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).

And within the Establishment Clause context, *Marsh* has not been limited to legislative prayer cases. 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 schools, *DeBoer v. Vill. Of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); and religious display cases, *e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986).

However, having recognized the applicability of *Marsh*, the court below *mis*applied the test, misconstruing this Court's guidance in *Jager v. Douglas County School District*, 862 F.2d 824, 829 (11th Cir. 1989). The court below noted this Court's statement that *Marsh* constitutes "'an exception to the *Lemon* test only for such historical practice[s] as those comparable to legislative prayer.'" *Glassroth,* 229 F. Supp. 2d at 1306 (citing *Jager*, 862 F.2d at 829). However, the

court failed to acknowledge that this Court's comments were designed to distinguish the prayers prior to public school football games then before it from the legislative prayers at issue in *Marsh*. *See, Jager,* 862 F.2d at 829. Therefore, the court begged the question of whether the monument was a comparable practice, simply stating that it was not.

As Chief Justice Moore ably argued below, the monument clearly is a "comparable practice." The real *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). This approach is the valid one. By comparison, asking, as the court below did, whether "members of the Continental Congress displayed the Ten Commandments in their chambers," *Glassroth*, 229 F. Supp. 2d at 1308, turns the *Marsh* test into a caricature of itself.

Indeed, Chief Justice Moore asserted three long-standing traditions that have become "part of the fabric of our society." Each of these, independently, is a sufficient basis upon which to uphold the monument, and thus, to demonstrate the district court's error.

A. The court below erred in holding that Chief Justice Moore's recognition of the moral foundation of the law has not become part of the fabric of our society when it summarily dispatched a nearly-two-hundred-year-old tradition of judges acknowledging the moral foundation of the law.

As Chief Justice Moore argued in his Response, the tradition of judicial acknowledgment of the moral foundation of the law "has been both continuous and ubiquitous throughout the nation's history." R4-84-39 As Chief Justice Moore noted, the opinions of these courts can be catalogued three different ways. (R4-84-40-41 & Appendix.)

First, Chief Justice Moore documented the chronological continuity of pronouncements about the moral foundation of law. As the court below acknowledged, Chief Justice Moore "point[ed] to an uninterrupted history, from as early as 1819 to today, in which courts 'interacted with, relied upon, or otherwise discussed the moral foundation of the law'." *Glassroth,* 229 F. Supp. 2d at 1306-07 (quoting Response, R4-84-40). As the cases in Table 1 illustrate, both Chief Justice Moore and the court were accurate in their description of this history as "unbroken." [2]

TABLE 1. CHRONOLOGICAL RECOGNITIONOF THE MORAL FOUNDATION OF THE LAW.

Year	Case
1819	*Wood v. Executors of Wood*, 7 N.C. 172, 172, 175 (1819).

[2] Subsequent history has not been indicated. None of the propositions for which these cases are cited was impacted by negative subsequent history.

1826	*Windsor v. China*, 4 Me. 298, 301 (1826).
1827	*Buchanan v. Deshon*, 1 H. & G. 280, 292 (Md. 1827).
1834	*Wheeler v. Hotchkiss*, 10 Conn. 225, 225 (1834).
1835	*Chew v. Comm'r of Southwark*, 5 Rawle 160, 162 (Pa. 1835).
1852	*Newcomer v. Keedy*, 2 Md. 19, 22 (1852).
1860	*Watkins v. Thornton*, 11 Ohio St. 367, 371 (1860).
1870	*Virginia v. State*, 32 Md. 501, ___ (1870).
1871	*Bottoms v. Corley*, 52 Tenn. 1, 8 (1871).
1889	*Todd v. Oviatt*, 20 A. 440, 444 (Conn. 1889).
1896	*Jennings v. Webb*, 8 App. D.C. 43, 53 (D.C. Cir. 1896).
1901	*State ex rel Attorney General v. Hobart*, 11 Ohio Dec. 166, 198 (Ct. Com. Pl. 1901).
1918	*Day v. Burgess*, 202 S.W. 911, 912 (Tenn. 1918).
1922	*Rieger v. Harrington*, 203 P. 576, 578 (Ore. 1922).
1941	*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 46 Cal. App 2d 684, 692 (1941).
1942	*Burch v. Mellor*, 43 Pa. D. & C. 597, ___ (Ct. Com. Pl. 1942).
1948	*Bates Chevrolet Corp. v. State*, 76 N.Y.S.2d 718, 724 (Ct. Cl. 1948).
1958	*Barton Trucking Corp. v. O'Connell*, 173 N.Y.S.2d 464, 466 (Ct. Cl. 1958).
1962	*State ex rel. Dept. of Highways v. Levy*, 136 So. 2d 35, 38 (La. 1962).
1966	*Commonwealth v. Robin*, 218 A.2d 546, 556 (Pa. 1966) (Musmano, J., dissenting).
1969	*United States v. Haughton*, 413 F.2d 736, 742 (9th Cir. 1969).
1970	*State Bd. of Educ. v. Bd. Of Educ. of Netcong,* 262 A.2d 21, 22 (N.J. Super. Ct. Ch. Div. 1970).
1971	*United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (Stewart, Harlan & Brennan, J.J., dissenting).
	United States v. Kaplan, 327 F. Supp. 1086, 1087-88 (D. Me. 1971).
1974	*United States v. Fuller*, 497 F.2d 551, 554 (6th Cir. 1974).
1978	*Berry v. Sch. Dist.*, 467 F. Supp. 695, 713 (W.D. Mich. 1978).
1980	*McRae v. Califano*, 491 F. Supp. 630, 700, (E.D.N.Y. 1980).
1981	*In re Atkinson's Estate*, 20 Pa. D. & C.3d 700, 721 (Ct. Com. Pl. 1981).
1984	*United States v. Byers*, 740 F.2d 1104, 1176 (D.C. Cir 1984) (*en banc*) (Bazelon, Wald, Mikva, & Edwards, J.J., dissenting).

1989	*Armenia v. Dugger*, 867 F.2d 1370, 1373 (11th Cir. 1989).
	In re Virtual Network Servs. Corp., 98 B.R. 343, 353-53 (N.D. Ill. 1989).
1990	*Doe v. Crestwood*, 917 F.2d 1476, 1494 (7th Cir. 1990) (Coffey, J., dissenting).
	Moore v. Regents, 51 Cal. 3d 120, 160 (1990) (Broussard, J., concurring and dissenting).
1991	*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).
	Doe v. Small, 934 F.2d 743, 821 (7th Cir. 1991) (Coffey, J., dissenting).
1992	*In re Frankel*, 567 N.Y.S.2d 1018, 1022 (App. Div. 1991).
	Dunn v. HOVIC, 1992 U.S. App. LEXIS 22749, at *92-93 (3d Cir. Sept. 18, 1992) (Weis, J., dissenting).
	In re Inflight Explosion on Trans World Airlines, Inc., 778 F. Supp. 625, 631 (E.D.N.Y. 1992).
	Owens-Illinois, Inc v. Zenobia, 601 A.2d 633, 652 (Md. 1992).
1993	*Dunn v. HOVIC*, 1 F.3d 1371, 1400 (1993) (Weis, J., dissenting).
1994	*Flatt v. Superior Court*, 885 P.2d 950, 959 (Cal 1994).
	State v. Poole, 871 P.2d 531, 536-37 (Utah 1994) (Stewart, A.C.J., concurring).
1995	*United States v. Int'l Bhd. Of Teamsters*, 896 F. Supp. 1349, 1369-70 (S.D.N.Y. 1995).
	Commonwealth v. Power, 650 N.E.2d 87, 91-92 (Mass. 1994).
	Circle Chevrolet Co. v. Giodano, Halleran & Ciesla, 662 A.2d 509, 523 (N.J. 1995).
	In re Porter, 890 P.2d 1377, 1389 (Ore. 1995).
	State v. Garcia, 532 N.W.2d 111, 116, 120 (Wisc. 1995) (both the majority and a concurring opinion).
1996	*Citrin v. O'Hara*, 911 F. Supp. 673, 685 (S.D.N.Y. 1996).
1997	*United States v. Shannon*, 110 F.3d 382, 413-14 (7th Cir. 1997) (Coffey, J., dissenting in part).
1998	*Steans v. Combined Ins. Co. of Am.*, 1998 U.S. Dist. Lexis 7494, at *6 (S.D. Ala. Apr. 2, 1998).
	Tremel v. Reid, 45 Va. Cir. 364, 374, 380-81 (1998).
2000	*Jackson v. Johnson*, 217 F.3d 360, 362 (5th Cir. 2000).
2001	*Waite v. Waite*, 64 S.W.3d 217, 229 (Tex. App. 2001) (Frost, J., concurring and dissenting).

Furthermore, as Chief Justice Moore documented, these cases show that the recognition of the moral foundation of the law is not limited to a few isolated courts. As Table 2 shows, the United States Supreme Court has addressed the moral foundation of law, as have six federal Courts of Appeals and five federal district courts. Similarly, state courts, including the highest courts of fourteen states and lower courts of seven states, have addressed the moral foundation of the law.

TABLE 2. RECOGNITION OF THE MORAL FOUNDATION OF THE LAW BY COURT

Court	Case
United States Supreme Court	*United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (Stewart, Harlan & Brennan, J.J., dissenting).
	Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).
Federal Courts of Appeals:	
Third	*Dunn v. HOVIC*, 1992 U.S. App. LEXIS 22749, at *92-93 (3d Cir. Sept. 18, 1992) (Weis, J., dissenting).
	Dunn v. HOVIC, 1 F.3d 1371, 1400 (1993) (Weis, J., dissenting).
Fifth	*Jackson v. Johnson*, 217 F.3d 360, 362 (5th Cir. 2000).
Sixth	*United States v. Fuller*, 497 F.2d 551, 554 (6th Cir. 1974).
Seventh	*Doe v. Crestwood*, 917 F.2d 1476, 1494 (7th Cir. 1990) (Coffey, J., dissenting).
	Doe v. Small, 934 F.2d 743, 821 (7th Cir. 1991) (Coffey, J., dissenting).
	United States v. Shannon, 110 F.3d 382, 413-14 (7th Cir. 1997) (Coffey, J., dissenting in part).
Ninth	*United States v. Haughton*, 413 F.2d 736, 742 (9th Cir. 1969).
Eleventh	*Armenia v. Dugger*, 867 F.2d 1370, 1373 (11th Cir. 1989).

D.C.	*Jennings v. Webb*, 8 App. D.C. 43, 53 (D.C. Cir. 1896).
	United States v. Byers, 740 F.2d 1104, 1176 (D.C. Cir 1984) (*en banc*) (Bazelon, Wald, Mikva, & Edwards, J.J., dissenting).
Federal District Courts	
S.D. Ala.	*Steans v. Combined Ins. Co. of Am.*, 1998 U.S. Dist. Lexis 7494, at *6 (S.D. Ala. Apr. 2, 1998).
N.D. Ill.	*In re Virtual Network Servs. Corp.*, 98 B.R. 343, 353-53 (N.D. Ill. 1989).
D. Me.	*United States v. Kaplan*, 327 F. Supp. 1086, 1087-88 (D. Me. 1971).
W.D. Mich.	*Berry v. Sch. Dist.*, 467 F. Supp. 695, 713 (W.D. Mich. 1978).
E.D.N.Y.	*McRae v. Califano*, 491 F. Supp. 630, 700, (E.D.N.Y. 1980).
	In re Inflight Explosion on Trans World Airlines, Inc., 778 F. Supp. 625, 631 (E.D.N.Y. 1992).
S.D.N.Y.	*United States v. Int'l Bhd. Of Teamsters*, 896 F. Supp. 1349, 1369-70 (S.D.N.Y. 1995).
	Citrin v. O'Hara , 911 F. Supp. 673, 685 (S.D.N.Y. 1996).
Highest state courts	
Cal.	*Moore v. Regents*, 51 Cal. 3d 120, 160 (1990) (Broussard, J., concurring and dissenting).
	Flatt v. Superior Court, 885 P.2d 950, 959 (Cal 1994).
Conn.	*Wheeler v. Hotchkiss*, 10 Conn. 225, 225 (1834).
	Todd v. Oviatt, 20 A. 440, 444 (Conn. 1889).
La.	*State ex rel. Dept. of Highways v. Levy*, 136 So. 2d 35, 38 (La. 1962).
Maine	*Windsor v. China*, 4 Me. 298, 301 (1826).
Maryland	*Buchanan v. Deshon*, 1 H. & G. 280, 292 (Md. 1827).
	Newcomer v. Keedy, 2 Md. 19, 22 (1852).
	Virginia v. State, 32 Md. 501, ___ (1870).
	Owens-Illinois, Inc v. Zenobia, 601 A.2d 633, 652 (Md. 1992).
Mass.	*Commonwealth v. Power*, 650 N.E.2d 87, 91-92 (Mass. 1994).
N.J.	*Circle Chevrolet Co. v. Giodano, Halleran & Ciesla*, 662 A.2d 509, 523 (N.J. 1995).
N.C.	*Wood v. Executors of Wood*, 7 N.C. 172, 172, 175 (1819).
Ohio	*Watkins v. Thornton*, 11 Ohio St. 367, 371 (1860).

Oregon	*Rieger v. Harrington*, 203 P. 576, 578 (Ore. 1922).
	In re Porter, 890 P.2d 1377, 1389 (Ore. 1995).
Penns.	*Chew v. Comm'r of Southwark*, 5 Rawle 160, 162 (Pa. 1835).
	Commonwealth v. Robin, 218 A.2d 546, 556 (Pa. 1966) (Musmano, J., dissenting).
Tenn.	*Bottoms v. Corley*, 52 Tenn. 1, 8 (1871).
	Day v. Burgess, 202 S.W. 911, 912 (Tenn. 1918).
Utah	*State v. Poole*, 871 P.2d 531, 536-37 (Utah 1994) (Stewart, A.C.J., concurring).
Wisc.	*State v. Garcia*, 532 N.W.2d 111, 116, 120 (Wisc. 1995) (both the majority and a concurring opinion).
Lower state courts	
Cal.	*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 46 Cal. App 2d 684, 692 (1941).
N.J.	*State Bd. of Educ. v. Bd. Of Educ. of Netcong,* 262 A.2d 21, 22 (N.J. Super. Ct. Ch. Div. 1970).
N.Y.	*Bates Chevrolet Corp. v. State*, 76 N.Y.S.2d 718, 724 (Ct. Cl. 1948).
	Barton Trucking Corp. v. O'Connell, 173 N.Y.S.2d 464, 466 (Ct. Cl. 1958).
	In re Frankel, 567 N.Y.S.2d 1018, 1022 (App. Div. 1991).
Ohio	*State ex rel Attorney General v. Hobart*, 11 Ohio Dec. 166, 198 (Ct. Com. Pl. 1901).
Penns.	*Burch v. Mellor*, 43 Pa. D. & C. 597, ___ (Ct. Com. Pl. 1942).
	In re Atkinson's Estate, 20 Pa. D. & C.3d 700, 721 (Ct. Com. Pl. 1981).
Texas	*Waite v. Waite*, 64 S.W.3d 217, 229 (Tex. App. 2001) (Frost, J., concurring and dissenting).
Virginia	*Tremel v. Reid*, 45 Va. Cir. 364, 374, 380-81 (1998).

Finally, as Chief Justice Moore documented, these cases can be catalogued topically. As Table 3 shows, courts have addressed the moral foundation of the following: agency law, the amount of an award, the claims of creditors, conscientious objectors' beliefs, the continuation of dower and/or elimination of

curtesy, contracts, criminal law, the entire judicial system, equitable contract claims against the state, individual communities, individual laws, the lawyer-client relationship, legal institutions, liens, marriage, the nation, opposition to discrimination, our polity, political rights, professional ethics, our public life, punitive damages, regulation of the legal profession and other businesses, tort law, and the Uniform Anatomical Gift Act. Again, Chief Justice Moore is well within the legal mainstream in his concern about the moral foundation of the law.

TABLE 3. TOPICAL RECOGNITION OF THE MORAL FOUNDATION OF THE LAW.

Moral foundation of/for various issues	Case
Agency law	*Tremel v. Reid*, 45 Va. Cir. 364, 374, 380-81 (1998).
Amount of an award	*State ex rel. Dept. of Highways v. Levy*, 136 So. 2d 35, 38 (La. 1962).
Claims of creditors	*Buchanan v. Deshon*, 1 H. & G. 280, 292 (Md. 1827).
Conscientious objector's beliefs	*United States v. Kaplan*, 327 F. Supp. 1086, 1087-88 (D. Me. 1971).
	United States v. Haughton, 413 F.2d 736, 742 (9th Cir. 1969).
	United States v. Fuller, 497 F.2d 551, 554 (6th Cir. 1974).
Continuation of dower and/or elimination of curtesy	*Todd v. Oviatt*, 20 A. 440, 444 (Conn. 1889).
	Watkins v. Thornton, 11 Ohio St. 367, 371 (1860).
	Rieger v. Harrington, 203 P. 576, 578 (Ore. 1922).
	Chew v. Comm'r of Southwark, 5 Rawle 160, 162 (Pa. 1835).
	Day v. Burgess, 202 S.W. 911, 912 (Tenn. 1918).
	Bottoms v. Corley, 52 Tenn. 1, 8 (1871).
Contracts	*Wood v. Executors of Wood*, 7 N.C. 172, 172, 175 (1819).

Criminal law	*United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971) (Stewart, Harlan & Brennan, J.J., dissenting).
	Armenia v. Dugger, 867 F.2d 1370, 1373 (11th Cir. 1989).
	United States v. Byers, 740 F.2d 1104, 1176 (D.C. Cir 1984) (*en banc*) (Bazelon, Wald, Mikva, & Edwards, J.J., dissenting).
	State v. Garcia, 532 N.W.2d 111, 116, 120 (Wisc. 1995) (both the majority and a concurring opinion).
Deciding whether to exercise judicial control over a trust	*Alphonzo E. Bell Corp. v. Bell View Oil Syndicate*, 46 Cal. App 2d 684, 692 (1941).
Entire judicial system	*Jackson v. Johnson*, 217 F.3d 360, 362 (5th Cir. 2000).
Equitable contract claims against the state	*Bates Chevrolet Corp. v. State*, 76 N.Y.S.2d 718, 724 (Ct. Cl. 1948).
Individual communities	*Barton Trucking Corp. v. O'Connell*, 173 N.Y.S.2d 464, 466 (Ct. Cl. 1958).
Individual laws	*McRae v. Califano*, 491 F. Supp. 630, 700, (E.D.N.Y. 1980).
Lawyer-client relationship	*Flatt v. Superior Court*, 885 P.2d 950, 959 (Cal 1994).
	Circle Chevrolet Co. v. Giodano, Halleran & Ciesla, 662 A.2d 509, 523 (N.J. 1995).
	In re Frankel, 567 N.Y.S.2d 1018, 1022 (App. Div. 1991).
Legal institutions	*State v. Poole*, 871 P.2d 531, 536-37 (Utah 1994) (Stewart, A.C.J., concurring).
Liens	*Virginia v. State*, 32 Md. 501, ___ (1870).
Marriage	*Jennings v. Webb*, 8 App. D.C. 43, 53 (D.C. Cir. 1896).
Nation	*United States v. Shannon*, 110 F.3d 382, 413-14 (7th Cir. 1997) (Coffey, J., dissenting in part).
	Doe v. Crestwood, 917 F.2d 1476, 1494 (7th Cir. 1990) (Coffey, J., dissenting).
	Doe v. Small, 934 F.2d 743, 821 (7th Cir. 1991) (Coffey, J., dissenting).
	Commonwealth v. Robin, 218 A.2d 546, 556 (Pa. 1966) (Musmano, J., dissenting).

Opposition to discrimination	*Citrin v. O'Hara*, 911 F. Supp. 673, 685 (S.D.N.Y. 1996).
	Newcomer v. Keedy, 2 Md. 19, 22 (1852).
Our polity	*In re Virtual Network Servs. Corp.*, 98 B.R. 343, 353-53 (N.D. Ill. 1989).
Political rights	*Berry v. Sch. Dist.*, 467 F. Supp. 695, 713 (W.D. Mich. 1978).
Professional ethics	*In re Atkinson's Estate*, 20 Pa. D. & C.3d 700, 721 (Ct. Com. Pl. 1981).
Public life	*State ex rel Attorney General v. Hobart*, 11 Ohio Dec. 166, 198 (Ct. Com. Pl. 1901).
Punitive damages	*Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).
	Dunn v. HOVIC, 1992 U.S. App. LEXIS 22749, at *92-93 (3d Cir. Sept. 18, 1992) (Weis, J., dissenting).
	Dunn v. HOVIC, 1 F.3d 1371, 1400 (1993) (Weis, J., dissenting).
	Steans v. Combined Ins. Co. of Am., 1998 U.S. Dist. Lexis 7494, at *6 (S.D. Ala. Apr. 2, 1998).
	Owens-Illinois, Inc v. Zenobia, 601 A.2d 633, 652 (Md. 1992).
Regulation of the legal profession and other businesses	*Burch v. Mellor*, 43 Pa. D. & C. 597, ___ (Ct. Com. Pl. 1942).
	United States v. Int'l Bhd. Of Teamsters, 896 F. Supp. 1349, 1369-70 (S.D.N.Y. 1995).
	Commonwealth v. Power, 650 N.E.2d 87, 91-92 (Mass. 1994).
	State Bd. of Educ. v. Bd. Of Educ. of Netcong, 262 A.2d 21, 22 (N.J. Super. Ct. Ch. Div. 1970).
	In re Porter, 890 P.2d 1377, 1389 (Ore. 1995).
	Waite v. Waite, 64 S.W.3d 217, 229 (Tex. App. 2001) (Frost, J., concurring and dissenting).
Tort law	*In re Inflight Explosion on Trans World Airlines, Inc.*, 778 F. Supp. 625, 631 (E.D.N.Y. 1992).
Uniform Anatomical Gift Act	*Moore v. Regents*, 51 Cal. 3d 120, 160 (1990) (Broussard, J., concurring and dissenting).

Since Chief Justice Moore filed his Response, this tradition has continued in two more opinions, one written by Chief Justice Moore himself discussing the moral foundation of child custody determinations, *Ex parte Brian Kevin Pankey*, 2002 Ala. LEXIS 317, at *59 (Ala. Oct. 18, 2002) (Moore, C.J., dissenting from denial of writ of *cert*.), and one issued by the New York Court of Claims discussing the moral foundation of a "private bill" claim against the state, *Chapman v. State*, 748 N.Y.S.2d 465, 468 (Ct. Cl. 2002).

The court below raised two objections to Chief Justice Moore's first proffered long-standing tradition. The court claimed, first, that Chief Justice Moore had not shown that other judges linked their concern with the moral foundation of the law with a belief in the sovereignty of the Judeo-Christian God, *Glassroth*, 229 F. Supp. 2d at 1307, and second, that "there is a significant difference between an obtrusive year-round religious display installed in the Alabama State Judicial Building in order to place the government's weight behind an obvious effort to proselytize on behalf of a particular religion and the discussion of the moral foundation of our laws in a court's opinion." *Id*. Both of these objections are flawed.

First, it is not true that Chief Justice Moore did not demonstrate that other judges have connected the moral foundation of the law to the sovereignty to the Judeo-Christian God. Chief Justice Moore included two lengthy quotations in his

Response (R4-84-42-44), which both address this connection, one of which—from a desegregation case—is reproduced in large part here:[3]

> Human rights are the foundation of equality, and through equality peace can be achieved. To base peace on human rights is to base it on justice. Peace is the work of justice; it is the indivisible life of the human family; it is the state of health of that family. Peace is a successful society.
>
> This same law of nature, and nature's God, that governs the life and conduct of individuals must also regulate the governments of peoples. Peace is not the effect of chaos. It is the sign and fruit of order, with everything that this word implies: permanence, stability, identity. The rights of the human person are "inviolable, inalienable." . . . . Hence there can be no racism, no segregation.
>
> This order manifests itself objectively through four essential criteria: truth, justice, love, and freedom, which are "the four pillars of the house of peace," open to all. By the fact that peace is order, it comes under the control of the intellect and will of man, who is able by science and technical skill to overcome physical or social obstacles and above all to control himself, conforming his conduct to God's eternal law, which is expressed in the natural law. The measure of our success will be the extent to which we can each link true peace with the dignity accorded human life.
>
> Our founding fathers converted these moral virtues into political rights as is evidence by the Declaration of Independence, the Preamble to the Constitution, and the Bill of Rights. If we consider these rights without considering the ingredients of their original moral foundation, we may drift from the truth and the justice intended by the founding fathers.

Berry v. School District, 467 F. Supp. 695, 713 (W.D. Mich. 1978).

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[3] To the extent the court below was claiming that Chief Justice Moore did not show that any other court has held the *exact same* view of the sovereignty of the Judeo-Christian God as he has, that objection is flawed in the same way as the court's second object and will be addressed immediately hereafter and in Section II.

Additionally, in both his Response (R4-84-Ex. K) and his Pre-trial Brief (R5-91-27), as he had at the unveiling ceremony, Chief Justice Moore quoted United States Supreme Court Justice William O. Douglas:

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator which government must respect. . . . The Declaration of Independence stated the now familiar theme; "We hold these truths to be self evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." . . . And the body of the Constitution as well as the Bill of Rights enshrined these principles.

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

The district court's second objection is as groundless as its first objection. Assuming *arguendo* that the contentions at the heart of the second objection are correct, they are simply irrelevant to a *Marsh* analysis. *Marsh* cannot serve as an exception to the *Lemon* analysis when the court below conflates the two tests. The court's contentions (valid or not) implicate *Lemon's* purpose prong, not the *Marsh* analysis. To hold otherwise would be to misapprehend the nature of exceptions.

Therefore, the monument is part of the long-standing tradition of judicial acknowledgment of the moral foundation of the law. Thus, the court erred when it held that the monument violates the Establishment Clause.

B. The court below erred in holding that Chief Justice Moore's recognition of the moral foundation of the law has not become part of the fabric of our society when it summarily dispatched a two-hundred-twenty-five-year-old tradition of public acknowledgement of God.

The court also failed to give credence to the second long-standing tradition proffered by Chief Justice Moore. The court summarized the Chief Justice's argument as being based upon "acknowledgements of God appearing on United States currency, in the United States motto, and at the beginning of court sessions." *Glassroth,* 229 F. Supp. 2d at 1307.

In reality, in his Pre-trial Brief, the Chief Justice noted that, while innumerable examples could be given, he would limit himself to citing those relied upon by the Sixth Circuit Court of Appeals, sitting *en banc*, in *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001). (R5-91-23-25.) As Chief Justice Moore noted, that case involved a challenge to the constitutionality of a "religious" display. In *Capitol Square*, the ACLU sued to enjoin the placement of the State motto of Ohio, "With God, All Things Are Possible," and the state seal in a large display in the plaza in front of the state Capitol. *Capitol Square,* 243 F.3d at. 292. In rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit 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.

Two points stand out about the Sixth Circuit's analysis. The first point, noted in Chief Justice Moore's Pre-trial Brief, is that 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.

However, a second point is now apparent. The Sixth Circuit did not consider historical evidence involving only "religious" displays. In fact, *none* of

its examples dealt with "religious" displays. Thus, the district court's analysis was flawed by being conducted at the wrong level of abstraction. Under the test articulated by the court below, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that the Continental Congress had displayed it in its chambers. Merely stating the test highlights its failings.

The district's court second objection is also flawed. That objection is identical to one discussed in Section I.A. The court complained that "there is a significant difference between an obtrusive year-round religious display installed . . . to place the government's weight behind an obvious effort to proselytize on behalf of a particular religion and . . . the ceremonial recognition of God on money or at the opening of court." *Glassroth*, 229 F. Supp. 2d at 1307.

As stated above, this argument conflates the *Lemon* analysis with the *Marsh* analysis. It renders the exception not an exception. Therefore, the court erred again in holding that the monument violates the Establishment Clause.

C. The court below erred in holding that Chief Justice Moore's recognition of the moral foundation of the law has not become part of the fabric of our society when it summarily dispatched a widespread tradition of adorning public property with "religious" language.

The court also missed the import of Chief Justice Moore's third proffered long-standing tradition. It claimed that Chief Justice Moore had argued that his display was part of a tradition of Ten Commandments displays on government

property. *Glassroth*, 229 F. Supp. 2d at 1307. However, the court misconstrued Chief Justice Moore's argument.

First, the court again operated at the wrong level of abstraction. While acknowledging the Ten Commandments displays that Chief Justice Moore brought to its attention, it ignored the other examples of adorning public property with "religious" language and images that Chief Justice Moore included in his Response. Chief Justice Moore documented the inscription, "In God We Trust" and a bas-relief of Moses in the House of Representatives' Chamber; the prayer room at the Capitol; inscriptions reading "What doth the Lord require of thee but to do justly, to love mercy, and to walk humbly with thy God?" (Micah 6:8) and "The heavens declare the glory of God and the firmament showeth His handiwork." (Psalm 19:1) and statutes of Moses and Paul the Apostle in the Library of Congress; "religious" inscriptions at the Lincoln Memorial including the Old Testament verse, "The Judgments of the Lord are righteous and true, altogether"; and the "religious" inscription at the Tomb of the Unknown Soldier. (Response R4-84-37-38.) Once again, the monument is well within this long-standing tradition.

Second, it was in response to this tradition that the district court wrote "the Chief Justice has not shown that members of the Continental Congress displayed

the Ten Commandments in their chambers . . . ." *Glassroth*, 229 F. Supp. 2d at 1308. As discussed previously, this simply cannot be the test demanded by *Marsh*.

The court combined several additional objections when it wrote: "public, governmental displays of the Ten Commandments, installed with the purpose of proselytization and having a religious effect, are not "deeply embedded in the history and tradition of this country"; indeed most date from the twentieth century." *Id*. (citation omitted). First, the court once again conflated the *Lemon* and *Marsh* analyses. A practice can fail the purpose and effect prongs of *Lemon* and still pass muster under *Marsh*. Second, even if "most" of the Ten Commandments displays date from the twentieth century, the other religious inscriptions go back much farther.

Finally, the court held that the monument fails to pass muster under *Marsh* because it "presents such an extreme case of religious acknowledgement, endorsement, and even proselytization." Again, the proselytization concern represents a conflation of the *Marsh* and *Lemon* tests. Similarly, the concern about endorsement represents a conflation of the so-called endorsement test with the *Marsh* test. Here too, an exception *is* an exception. Furthermore, the court's concern over acknowledgment cannot be taken seriously. It is clear that

acknowledging religion falls far short of establishing religion. *See generally, Zorach v. Clausen*, 343 U.S. 306 (1952).[4]

II. THE COURT BELOW ERRED WHEN IT CONCLUDED THAT CHIEF JUSTICE MOORE'S SUPPOSEDLY UNIQUE VIEW OF THE RELATIONSHIP BETWEEN THE SOVEREIGNTY OF GOD AND THE FIRST AMENDMENT AUTOMATICALLY RENDERS THE MONUMENT UNCONSTITUTIONAL BECAUSE CHIEF JUSTICE MOORE'S VIEW, FAR FROM BEING UNIQUE, IS ONE PROPERLY AND WIDELY DISSEMINATED BY CONGRESS.

As noted repeatedly, the court below conflated the *Lemon* and *Marsh* analyses. Because the court did so in that portion of its opinion with which this brief interacts, it is worth addressing another incorrect assertion that the court made in the process. The court called Chief Justice Moore's views on the relationship between the sovereignty of God and the First Amendment "unique." *Glassroth*, 229 at 1307. The court did not believe that others' understanding of "the moral foundation of our laws flows from [their] beliefs that the Judeo-Christian God is the source of the church, the state, and the separation of the two, and as a matter not only of Biblical text but American law, reigns over both." *Id*.

Elsewhere in its opinion, the court expounded this view:

> The Chief Justice maintains that this understanding of the relationship between God and the state is dictated not only by Biblical text but by the First Amendment itself . . . [and] that the recognition of

[4] This is so despite the court's reliance upon an opinion that used the word "acknowledgment" loosely. *Glassroth*, 229 F. Supp. 2d at 1301, 1308 (quoting and referring to *County of Allegheny v. ACLU,* 492 U.S. 573, 660 (1989) (Kennedy, J., concurring in part and dissenting in part)).

> the sovereignty of God is the very source of the principle of the separation of church and state.
>
> . . . it is the Judeo-Christian God, . . . who gives Americans the freedom of conscience to believe in whatever faith they chose.
>
> . . . [T]he court disagrees with the Chief Justice to the extent that it understands him to be saying that, as a matter of American law, the Judeo-Christian God must be recognized as sovereign over the state, *or even that the state may adopt that view*.

Id. at 1309-10 (emphasis added). The court also opined it did not believe that any Supreme Court Justice had ever embraced Chief Justice Moore's view. *Id*. at 1311.

Whether or not any Supreme Court justice has ever embraced this view, this is precisely the view embraced by the United States Congress. Furthermore, it is a view widely disseminated by Congress to the American people. As just one example, on November 3, 1977, by Concurrent Resolution, the United States Congress authorized a revised edition of a book entitled *The Capitol* to be published as House Document 95-260, under the direction of Congress' Joint Committee on Printing. H. Con. Res. 222, 95th Cong., 91 Stat. 1692 (1977) (enacted). In addition, the Concurrent Resolution authorized the printing of 548,800 "additional copies" beyond the "usual number" of copies for the use of Congress. Undoubtedly, Congress "used" these books by disseminating them to the American people.

That book states:

> Flag Day, June 14, 1954, President Dwight D. Eisenhower stood on the steps of the Capitol Building and with his fellow citizens, for the first time, recited the revised pledge to the flag which by Public Law 83-396 henceforth would include the phrase, "one nation under God".
>
> This pledge attests what has been true about America from the beginning. Faith in the transcendent, sovereign God was in the public philosophy—the American consensus. America's story opens with the first words of the Bible, "In the beginning God . . .". "We are truthfully one nation 'under God' and our institutions 'presuppose a Divine Being'" wrote Associate Justice William O. Douglas in 1966. Only a nation founded upon theistic pre-suppositions would adopt a first amendment to ensure the free exercise of all religions or of none. The government would be neutral among the many denominations and no one church would become "the state church". But America and its institutions of government could not be neutral about God.

H.R. Doc. No. 95-260 at 24.

This view exactly matches the view that the court said government could not adopt. Yet Congress had no problem stating this historical truth. And, even discounting the "usual number" of copies, Congress printed enough "additional" copies to supply one out of every 136 American households with this truth—a very wide distribution indeed.[5]

However, there is another relevant point. It is *because of* this history that government officials are motivated to—and that it is appropriate for them to—

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[5] In 1977 there were 74,142,000 households in America. U.S. Census Bureau, *Families & Living Arrangements*, Table HH-1, http://www.census.gov/population/socdemo/hh-fam/tabHH-1.xls (last visited Mar. 18, 2002).

adorn public property with displays acknowledging the sovereignty of God. As House Document 95-260 goes on to explain, '[i]t is appropriate, then, that in the Capitol Building a room was set aside by the Eighty-third Congress to be used exclusively for the private prayer and meditation of the Members of Congress." H.R. Doc. No. 95-260 at 24. House Document 95-260 then goes on to describe the room in detail. In pertinent part the description states:

> The history that gives this room its inspirational lift is centered in the stained glass window. George Washington kneeling in prayer . . . is the focus of the composition. . . . . The phrase "*E Pluribus Unum*" conveys the meaning of America. In religion it signifies America's faith in tolerance and mutual respect.
>
> . . . Behind Washington a prayer is etched: 'Preserve me, O God, for in thee do I put my trust", the first verse of the sixteenth Psalm.
>
> There are upper and lower medallions representing the two sides of the Great Seal of the United States. On these are inscribed the phrases: *annuit coeptis*—"God has favored our undertakings"—and *novus ordo seclorum*—"A new order of the ages is born." Under the upper medallion is the phrase from Lincoln's immortal Gettysburg Address, 'This Nation under God". . . . The two lower corners of the window each show the Holy Scriptures, an open book and a candle, signifying the light from God's law, 'Thy Word is a lamp unto my feet and a light unto my path."
>
> . . . In front of each candelabrum is a prie-dieu or prayer bench where those who desire to do so may kneel.
>
> . . . It is . . . a shrine at which the Nation's lawmakers may worship God, each in his or her own way.

H.R. Doc. No. 95-260 at 25.

It is clear that in authorizing this Document, Congress saw no Establishment Clause problems in either setting forth at public expense the legal view that the

First Amendment is derived from an acknowledgment of God's sovereignty, nor in Congress appropriately adorning government property with acknowledgments of God and His sovereignty. Nor did they see any incompatibility with these practices and a commitment to religious tolerance.

These views identically match the views which motivated Chief Justice Moore to acknowledge the moral foundation of the law.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

This 19th day of March, 2003

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.A.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.A.7(B). Exclusive of the exempted portions, this Brief contains 6,996 words. This total was calculated with the Word Count function of Microsoft Word 97.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *Glassroth v. Moore*, No. 02-16708-DD and No. 02-16949-DD, on all required parties by depositing same in the United States mail, first class postage, on March 19, 2003 addressed as follows:

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