No. 02-1215 and 02-1267

In the

United States Court of Appeals
For the Fourth Circuit

———————◆———————

NEIL J. MELLEN AND PAUL S. KNICK,
Plaintiff-Appellees,

v.

JOSIAH BUNTING, III,
Defendant-Appellant,

———————◆———————

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

———————◆———————

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,
in support of *Appellant*

———————◆———————

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

OTHER SOURCES

INTEREST OF AMICUS

The National Legal Foundation (NLF) is a non-profit corporation 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 the parties in this case.

ARGUMENT

I. THE DISTIRCIT COURT ERRED WHEN IT REFUSED TO APPLLY *MARSH V. CHAMBERS* TO THE ESTABLISHMENT CLAUSE ISSUE PRESENT BY THIS CASE BECAUSE NONE OF THE CASES PURPORTING TO LIMIT *MARSH'S* REACH APPLY TO THE INSTANT CASE

The district court below rejected General Bunting's argument that it should apply the *Marsh* test in lieu of the *Lemon* test. . *Mellen v. Bunting*, 181 F. Supp. 2d 619, 623 (W.D. Va. 2002). In *Marsh v. Chambers,* 463 U.S. 783 (1983) the Supreme Court recognized a test for Establishment Clause purposes that is based on principles different from those that animate the three-pronged test formulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). This is not surprising, given that the Supreme Court has never considered *Lemon* the only possible Establishment Clause analysis, especially when the application of *Lemon* leads to results incompatible with history. As the Court pointed out in *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984), "[t]he Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." The Court in *Lynch* emphasized their refusal "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as *illuminated by history." Id.* at 678 (*quoting Waltz v. Tax Commission,* 397 U.S. 664, 671 (1970)) (emphasis added). The Court went on to point out that it has consistently "emphasized our unwillingness to be confined

to any single test or criterion in this sensitive area." *Id*. at 679 (citations omitted). And while the Court did recognize that they "have often found it useful" to apply the *Lemon* test, they specifically cited *Marsh* as *an example* of when *Lemon* had not proven useful. *Id*. Similarly, the analysis applied in *Marsh* is a more useful fit to the historical implications of prayer in the military and should therefore be the test used to decide this particular case.

Marsh upheld the Nebraska State legislature's "practice of opening sessions with prayers by a state-employed clergyman." *Marsh,* 463 U.S. at 786. In reversing the Court of Appeals' decision that these prayers violated the *Lemon* test, the Court started by recognizing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* The Court then went on to recognize that from "the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom." *Id.*

The Court did not indicate that it was carving out an *exception* to the Establishment Clause merely because the prayers were part of our history. On the contrary, the court very specifically pointed out that "*[s]tanding alone*, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ." *Id*. at 790 (emphasis added). However, the Court went on to say that history may sometimes give insight into the proper outcome of an Establishment Clause

challenge. *Id*. 'This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id*. at 791.

The District Court in *Mellen v. Bunting* construed *Allegheny County v. ACLU*, 492 U.S. 573 (1989), *Edwards v. Aguillard*, 482 U.S. 578 (1987), and this Court's decision in *North Carolina ACLU v. Constangy*, 947 F.2d 1145 (4th Cir. 1991) as limiting the application of *Marsh*. *Mellen v. Bunting*, 181 F. Supp. 2d 619, 624 (W.D. Va. 2002). However, in addition to the district court's failure to cite the Supreme Court's most recent (majority opinion) discussion of *Marsh* (in *Lee v. Weisman*, 505 U.S. 577 (1992)), all of the cases the district court cited can be distinguished from the present case.

A. None of the cases relied upon by the district court are controlling because each can be easily distinguished.

1. *Edwards* can be distinguished from the instant case because, unlike *Edwards*, this case does not arise in the public school context.

The district court cited a footnote in *Edwards v. Aguillard* in which the Supreme Court noted that a *Marsh* analysis would not be helpful in its Establishment Clause analysis in the context of a public school since public schools did not exist as a wide-spread institution at the time of the drafting of the Bill of Rights. *Mellen,* 181 F. Supp. 2d at 625 (*citing* 482 U.S. at 583 n.4). From this simple assertion the district court went on to claim that

> [t]he same can be said of public universities and colleges. American universities in the 18th century were almost exclusively non-secular-—created to educate the next generation of clerics and religious scholars. The distinction between public and private universities did not begin to develop until 1819, with the Supreme Court's ruling in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819).

181 F. Supp. 2d at 625 (citations omitted).

However, the district court proves too little. VMI is both a military and an educational institution. As for the latter, the district court seemed to miss the implication of its own words. The American universities of the eighteenth century were the common ancestors of the universities of today, *both public and private*. There can be no doubt that those ancestors of VMI were shot through with religious elements. For confirmation, this Court need look no farther than the very source cited by the district court. In Sarah Howard Jenkins, et al., *God Talk by Professors Within the Classrooms of Public Institutions of Higher Education: What is Constitutionally Permissible?*, 25 Akron L. Rev 289, 292-93 (the very pages cited by the district court) one reads:

> In almost all of the early institutions of higher education in the United States, 'religion was the strongest determinant of purpose and content."
>
> The cleavage between public and private education began with the Dartmouth College case in 1819. This decision guaranteed private ownership of institutions of learning and guarded such institutions from encroachment by the state. Since that time, there has been a gradual secularization of higher education to the extent that the present professorate and student body are generally unaware of the religious heritage and foundation of colleges and universities.

As for VMI's character as a military institution, the practice of prayer certainly has the historical pedigree required by the *Marsh* test. Indeed, the easiest application of *Marsh* occurs when the historical practice gives insight into the intent of the drafters of the First Amendment. If *Marsh* itself was the easiest case of all, the instant case is not far behind: In *Marsh* the Court put much stock in the fact that the very Congress that proposed the Bill of Rights also approved legislative chaplains. Relevant to the case at bar, the Congresses of 1799 and 1800, composed in part of members who had submitted the Bill of Rights to the states, both passed acts establishing full-blown worship services for the country's naval forces. *Anderson v. Laird*, 466 F.2f 283, 310 (D.C. Cir. 1973) (MacKinnon, J., dissenting). The VMI prayers are in the same historical tradition.

To argue that the prayers at VMI have existed for an insufficient period of time, *Mellen*, 181 F. Supp. 2d at 625, is to argue at the wrong level of abstraction. In *Marsh*, prayer in the Nebraska legislature constituted a tradition only half as old as the tradition of the United States Congress. 463 U.S. at 790. But that was immaterial. The Court focused on the practice itself. So here, the practice at issue goes back to the days of the drafters of the Bill of Rights.[1]

For all these reasons, the Court's invocation of the *Edwards* footnote does

[1] Indeed to limit the analysis to prayers in a military context, a higher education context or both may present a further level of abstraction problem. As General Bunting has argued, these prayers may properly be seen as a part of a larger national tradition. (Opening Brief of Appellant at 1-214-15).

not validate its refusal to apply *Marsh*.

2. *Allegheny* can be distinguished from the instant case because the VMI prayers are a practice with a long historical pedigree, not a modern "equivalent" practice.

As mentioned above, the district court also cited *Allegheny v. ACLU. Mellen*, 181 F. Supp. 2d at 624. The *Allegheny* Court's discussion of *Marsh* is, in effect, an appendix to its opinion, in which Justice Blackmun attacked what he saw as the desire of Justices Kennedy, White, and Scalia, and Chief Justice Rehnquist to extend *Marsh* to all practices with an adequate historical pedigree *and their modern equivalents.* 492 U.S. at 603. However, that argument has not been made in the instant case. As has just been demonstrated, the VMI prayers are squarely within the educational and military traditions reaching back to the earliest days of our nation. Thus, Justice Blackmun's concern that *Marsh* not be expanded beyond its proper bounds is not implicated by the VMI prayers.

3. *Constangy* can be distinguished for the instant case because the district court ignored important aspects of the *Constangy* Court's analysis.

The District Court also cites *North Carolina ACLU v. Constangy,* as recognizing the "narrow reach of *Marsh*." *Mellen*, 181 F. Supp. 2d at 625. *Constangy* does contain language that suggests a narrow reading of *Marsh*. For example, this Court wrote that "the Supreme Court sees the holding of Marsh to be predicated on the particular historical circumstances presented in that case." 947 F.2d at 1148. However, the *Constangy* Court also made it clear that other

historical circumstances may warrant application of Marsh. If it were true that only legislative prayers could be analyzed under Marsh, there would never be a need for any historical analysis: either the issue before the Court is legislative prayer or it is not—end of analysis. This, of course, was not the approach of the *Constangy* Court. Rather, this Court took nearly three pages to consider whether Judge Constangy's courtroom prayers should be analyzed under *Marsh*. *Id*. at 1147-49. Only when this Court determined that judicial prayers lacked an adequate historical pedigree did it decline to apply *Marsh*. Id.

As has been pointed out repeatedly, religious practices and influences in educational institutions and in military institutions have a long-standing tradition in this country. Thus, nothing in this Court's opinion in *Constangy* militates against application of *Marsh* in the instant case.

B. In the Supreme Court's *Lee v. Weisman* decision, the Court indicated that it was only the unique facts of the case that militated against applying *Marsh*; none of those facts are present here.

To the extent that *Edwards*, *Allegheny*, or *Constangy* may suggest a narrow application of *Marsh*, those suggestions must fall to the most recent decision in which a Supreme Court majority opinion has discussed *Marsh*. In *Lee v. Weisman* the Court explained why it would not apply *Marsh. Lee v. Weisman,* 505 U.S. 577, 596 (1992). The Court did not apply *Mar*sh in *Lee* because '[i]nherent differences between the public school system and a session of a state legislature

distinguish[ed] [*Lee*] from *Marsh v. Chambers*." *Id*. (citation omitted). The Court went on to note that, while the invocation and benediction at issue in *Lee* were in many regards similar to the issues considered in *Marsh*, there were obvious differences. *Id*. at 597. Those differences were the age of the people hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id*. The Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added).

The Court, by implication, gave credence to *Marsh*, and merely explained why *Marsh* would not be applied in the particular case of secondary school graduations. *Id*. The Court twice described the case in *Lee* as *different* than that in *Marsh*. *Id*. Relying primarily on the young age of the school children, the Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id*. And the court observed, the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id*. In the instant case all of the differences noted in *Lee* are absent. Here, where adults in a military educational institution are free to decline participation or absent themselves entirely, none of the *Lee* differences are present and all of the *Marsh* similarities are. Simply put, *Marsh* controls this case.

Finally, it is worth noting that it is *Lee,* not Marsh that is self-limiting. At the outset of the opinion, Justice Kennedy very specifically stated: "These dominant facts mark and control the *confines* of our decision: State officials direct the performance of a formal religious exercise at *promotional and graduation ceremonies for secondary schools*." *Id.* at 587 (emphasis added). The court's refusal then to apply *Marsh* to state-sponsored prayers at high school graduations, even though there were similarities to the arguments considered in *Marsh*, was because of the *inherent* differences between official direction of prayers at a middle school graduation and the prayers at issue in *Marsh*. *Id*. at 597.

The dominant facts under which *Lee* was decided do not exist in the present case. VMI is not a secondary school. VMI Supper Roll Call (SRC) is not a promotional or graduation ceremony. And even though at VMI state officials do direct the performance of the prayers, this was also the case in *Marsh* where state officials directed the performance of the prayers. A major factor in the decision in *Marsh* that the prayers did not constitute a real danger of "establishment" of religion was that the persons being "subjected" to the prayers were all adults "presumably not readily susceptible to 'religious indoctrination . . . .'" *Marsh,* 463 U.S. at 792 (citation omitted). The same is true with the prayers at VMI. The cadets are adults capable of disregarding the prayers or not going into SRC if they do not want to hear the prayer. *Mellen*, 181 F. Supp. 2d at 623. In addition, as

mentioned previously, the atmosphere is more aptly compared to that of the military than to the public high school in *Lee*. *See Mellen v. Bunting* 181 F. Supp. 2d at 622 (pointing out that VMI is actually "more restrictive and more austere than the regular military.")

The prayers said at SRC are also very similar to those at issue in *Marsh*. The Court in *Marsh* found that invoking divine guidance on a body entrusted with making the law was not an "establishment" but was "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 793. By analogy, it should be no different for a body of cadets who could possibly be called upon to give their lives to uphold the principals embodied in those laws to invoke divine guidance as a "tolerable acknowledgment of beliefs widely held among the people of this country."

II. EVEN SHOULD THIS COURT DECIDE THAT *LEMON* CONTROLS THIS CASE, THE DISTRICT COURT COMMITTED TWO ERRORS IN ITS *LEMON* ANALYSIS WHEN IT MISAPPLIED THE ACCOMODATION STANDARD AND WHEN IT HELD THAT THE VMI PRAYERS ARE ANALOGOUS TO THE PRAYERS IN *ENGEL V. VITALE*.

Should this Court decide that the *Lemon* test controls this case, it should still recognize two significant errors committed by the district court in its analysis. In deciding that the prayers went beyond military accommodation, the district court asserted that *any* sort of affirmative support of religion is synonymous with establishing religion. The district court also equated the prayers said at SRC with

the officially state-adopted prayers at issue in *Engel*. The two are distinguishable.

A. Encouragement, Or Affirmative Support, Does Not Necessarily Imply An Establishment Of Religion.

The drafters of the Bill of Rights were familiar with four possible relationships between the government and religion: acknowledgement, accommodation, and encouragement, as well as establishment. As Justice Kennedy wrote for four justices, "Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The district court did not discuss acknowledgement, but it admitted that even accommodation of religion is proper. For example, the district court quoted this Court's discussion of accommodation in *Brown v. Gilmore*, 258 F.3d 265, 274 (4th Cir. 2001): "'Not only is the government permitted to accommodate religion without violating the Establishment Clause, at times it is *required* to do so'." *Mellen,* 181 F. Supp. 2d at 631-32. However, the district court seemed to vacillate between ignoring encouragement and conflating it with establishment.

For example, continuing to discuss this Court's decision in *Brown*, the district court wrote that this Court found Virginia's moment of silence law to be "'a minor and *nonintrusive* accommodation that does not establish religion.'" Id. at 632 (*quoting* Brown, 258 F.3d at 278). Here, the district court appears to be

ignoring the possibility of constitutionally permissible encouragement of religion. Later, the district court seems to be *conflating* encouragement with establishment when it writes '[h]ere VMI not only places its stamp of approval on prayer, but goes further and actively encourages cadets to contemplate the specific religious subject of each night's prayer." *Id.*

Neither ignoring encouragement nor conflating it with establishment is proper constitutional analysis. Indeed, the *Brown* Court itself discussed encouragement. Ironically, it may be that the *Brown* Court's discussion of encouragement led the district court astray. The *Brown* Court compared the Virginia moment-of-silence law with the Alabama moment-of-silence law declared unconstitutional in *Wallace v. Jaffree*, 472 U.S. 38 (1985). In the course of this discussion, the *Brown* Court noted the Supreme Court's remarks about *impermissible* encouragement of prayer. Brown, 258 F.3d at 279-80. However, two things must be remembered. The point of this passage in *Brown* was to demonstrate the difference between the Virginia and Alabama laws. Second, and most importantly here, the *Wallace* Court only discussed *impermissible* encouragement but remained silent as to *permissible* encouragement.

The following words have appeared in no less than ten Supreme Court opinions by the following justices: "When the state encourages religious instruction . . . it follows the best of our traditions." *Lamb's Chapel v. Center*

Moriches Union Free Sch. Dist., 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ.,); *Allegheny*, 492 U.S. at 657 (Kennedy, White & Scalia, J.J., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part) *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, (1986) (Burger, C.J., & White & Rehnquist, J.J., dissenting); *Wallace*, 472 U.S. at 74 (O'Connor, J., concurring); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Burger, C.J., concurring in the judgment in part and dissenting in part); *Meek v. Pittenger*, 421 U.S. 349, 386 (1975) (Rehnquist & White, J.J., concurring in the judgment in part and dissenting in part); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting, joined in part by Burger, C.J., & Rehnquist, J.) (opinion applying also to two consolidated cases); *Lemon*, 403 U.S. at 661 (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); *Walz v. Tax Com. of New York*, 397 U.S. 664 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, J.J.); and *Zorach v. Clauson*, 343 U.S. 306 (1952) (Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, J.J.).

All of these statements (except Justice O'Connor's in *Wallace*) were positive assertions of this fundamental principal of Establishment Clause jurisprudence. Thus, in light of *Wallace* and all of the opinions just cited, it is unmistakable that both permissible and impermissible encouragement exist under current Establishment Clause jurisprudence. Therefore, contrary to the district court's

holding, General Bunting's labeling of the prayers as "some affirmative support," *Mellen*, 181 F. Supp. 2d at 632, does not end the analysis. "Some affirmative support" could arguably be permissible encouragement, impermissible encouragement, or establishment.[2]

The district court never analyzed the VMI prayers under this framework. Rather, the district court merely asserted that the VMI prayers were analogous to the prayers declared unconstitutional in *Engel v. Vitale*. *Id*. at 632-33. As will be shown in the next section, the VMI prayers and the *Engel* prayers are entirely dissimilar. Therefore, absent any other support for the district court's conclusion and in light of the able arguments of General Bunting (which the court summarized but rejected, *id*.), the age of the cadets, the military educational context, and the non-compulsory nature of the prayers; the affirmative support for the VMI prayers is permissible encouragement.

B. Merely Because A State Officer Composes And Recites A Prayer Does Not Necessarily Make That Prayer An "Official" Prayer As That Term Is Used In *Engel v. Vitale.*

The district court relied on one statement made in *Engel v. Vitale*, 370 U.S. 421, 425 (1962), stating that 'the constitutional prohibition against the laws respecting an establishment of religion must at least mean that in this country it is

[2] For analytical thoroughness, the three categories are laid out like this. Actually, in a by-gone era, those things which today are "impermissible encouragement" may well have been lumped together with "permissible encouragement," while today "impermissible encouragement" is for all practical purposes "establishment." The point remains however, that such a thing as permissible encouragement still exists today.

no part of the business of government to compose official prayers for any group of the American people to *recite as a part of a religious program carried on by government*." *Mellen,* 181 F.Supp.2d at 633 (emphasis added). However, the district court misunderstood the import of the "official prayers" in *Engel* and wrongly equated them with the "official direction of the Superintendent," *id*., in the present case. This is a classic case of the logical fallacy of equivocation. The word "official" in the *Engel* quotation and the word "official" as used by the district court in its own opinion carry two different meanings. The distinctions between the two types of prayers are many and legally significant.

In *Engel,* the Board of Education of Union Free School District directed the school district's principals that the following prayer should be recited by *each* class at the beginning of *each* day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel,* 370 U.S. at 422. This prayer was composed by the State Board of Regents, an agency that the New York state legislature had "granted broad supervisory, executive, and legislative powers over the State's public school system." *Id*. at 422-23. The Regents composed the prayer as part of a larger state-wide program involving "Moral and Spiritual Training in the Schools." *Id*. at 423. In an official "Statement on Moral and Spiritual Training in the Schools" the Regents stated: "We believe that this Statement will be subscribed to by all men

and women of good will, and we call upon all of them to aid in giving life to our program." *Id*. The prayer, the same words recited every day faithfully, took on the character of a creed, reflecting the religious doctrine the State Board had officially adopted. It was because the Regents' prayer encouraged *adherence* to an officially adopted religious doctrine that it violated the Establishment Clause. The prayer *reflected* that establishment. In a word, it indoctrinated.

The prayers at VMI are not "official prayers" in the Engel sense. They do not reflect an establishment of religion. They do not promote adherence to an officially accepted religious doctrine of the state merely because the Superintendent of VMI directed the Chaplain to prepare the prayers. The Superintendent stated that the purpose of the prayers is to educate cadets about the spiritual dimensions in their lives, to introduce them to a means that others use to deal with spiritual dimensions, and to familiarize them with the kind of prayers they would hear were they to be commissioned, or even drafted, in the military, and "to teach the cadets of the American tradition of expressing thanks and seeking divine guidance and support in a manner familiar in a variety of patriotic contexts." *Memorandum in Support of Defendant's Motion for Summary Judgement* p. 15-17. The prayers at VMI are part of an educational program to encourage cadets to be aware of their *own* spirituality, as opposed to the prayers in *Engel,* which had the primary effect of promoting an *official state-adopted religious doctrine.*

The plaintiffs in *Engel* contended that the prayer violated the Establishment Clause because the "prayer was composed by the governmental officials *as a part of* a governmental program to further religious beliefs." 370 U.S. at 425 (emphasis added). The Court agreed with this contention, *id*., and went on to equate the Regents' prayer with the type of establishment represented by *the Book of Common Prayer* which was adopted in England in the 1500s and which set out the officially accepted content and form of prayer to be used at religious ceremonies. *Id*. at 425-26. It was in this context that the Court stated that it is "no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id*. at 425. It is prayers comparable in purpose and usage to those found in the *Book of Common Prayer* that the Court labeled official prayers, not merely a prayer composed and read at the direction of a chaplain—whose job after all is, *inter alia*, to pray.

In addition, not all prayers composed and read at the direction of someone who is a government official constitute an establishment of religion. For example, in *Marsh*, the prayers were recited and drafted by a state-employed clergyman at the direction of the state legislature. *Marsh,* 463 U.S. at 786. And yet, the Supreme Court found that the prayers were clearly not an establishment of religion, but were simply "a tolerable acknowledgment of beliefs widely held among the people of

this country." *Id.* at 792. Further, prayers are composed and read at military functions on a regular basis that do not constitute an establishment of religion. (*See* Reply Brief in Support of Defendant's Motion for Summary Judgment at 2-3). Merely because the military appoints a chaplain of certain faith or denomination does not imply that the military has officially adopted that faith or denomination for all of the troops to adhere to. Similarly, merely because that military chaplain, who is of a certain faith or denomination composes and reads a prayer at the direction of a military commander does not mean that the military has officially adopted that faith for all of the troops to adhere.

The views of Justice Souter best illustrate the above proposition. Justice Souter has gone on record as viewing as unconstitutional all of the following: prayer in public schools, moments-of-silence in public schools, state tax exemptions benefiting only religious periodicals, a display of a nativity scene on public property, legislative chaplains, and even Thanksgiving Day. *See Lee*, 505 U.S. 609-31 (Souter, J., concurring). But even Justice Souter, who appears, based on the foregoing, to be the most squarely in the "extreme separationist" camp among the current Justices, agrees that *accommodation* of religion does not *establish* religion. "The state may 'accommodate' the free exercise of religion . . . ." *Id.* at 627. As Justice Souter has pointed out, "[h]ostility, not neutrality, would characterize the refusal to provide chaplains and place of worship for

prisoners and soldiers cut off by the State from all civilian opportunities for public communion." *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 706 (1994) (quoting *School Dist. of Abington Township v. Schempp*, 374 US. 203, 299 (1963) (Brennan, J., concurring)).[3]

The "official" prayers in *Engel* can be further distinguished by the fact that the prayers were recited by school children. Two things are important here. First, the prayers were drafted for the children *to recite, i.e., for each child to personally say*. Second, the prayer was being recited in the *context of the public school*. As the court recognized in *Lee* "[o]ur decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to *distinguish* the public school context." *Lee,* 505 U.S. at 596 (citations omitted) (emphasis added). The elementary and secondary school setting have special significance in Establishment Clause analysis. However, as stated above, VMI is more akin to a military setting than a public school setting. Furthermore, there is no recitation of the prayer at VMI. The superintendent directed the Chaplain to compose the prayers, which the Corps Chaplain reads each night at dinner. The cadets are free to listen, disregard, speak quietly to a neighbor, or continue to eat while the prayer is read. There is no requirement that the prayer be recited. *Mellen*, 181 at 623. And most importantly, there is no officially adopted doctrine or creed.

[3] Although Justice Souter's comments are couched in terms of accommodation, his remarks at least inform the prior discussion of encouragement, since these concepts cannot be divided by bright lines. The accommodation required

Thus, there are no "official prayers" in the *Engel* sense of day-after-day creedal words to be recited by all. Rather there are prayers which serve to accommodate the religious needs of members of a military community, which are provided some constitutionally permissible assistance.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and summary judgment entered for General Bunting. In the alternative, the judgment should be vacated and the case remanded for trial.

Respectfully submitted,
this 15th day of July, 2002,

_____
Steven W. Fitschen
Counsel of Record
For Amicus Curiae
The National Legal Foundation
2224 Virginia Beach blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

---

by Justice Souter is not very far removed from the "affirmative support" of voluntary prayers at SRC.

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 4,940 words. This total was calculated with the Word Count function of Microsoft Word 97.

_____

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 *Mellen v. Bunting* No. 02-1215 and 02-1267, on all required parties by depositing two paper copies in the United States mail, first class postage, prepaid on July 15, 2002 addressed as follows:

Mr. Jerry W. Kilgore
Office of the Attorney General
900 East Main St.
Richmond, Virginia 23219

Representing Josiah Bunting, III as Counsel of Record

Ms. Rebecca K. Glenberg
The American Civil Liberties Union
of Virginia Foundation, Inc.
6 North 6th St., Suite 400
Richmond, Virginia 23219

Representing Neil J. Mellen and Paul S. Knick as Counsel of Record

_____

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