

No. 07-13611-JJ

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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BATS A/K/A GARY PELPHREY, EDWARD BUCKNER, ROBERTO MORAES, WESLEY CROWE, JEFFREY SELMAN, MARIE SHOCKLEY, and ROBERTA “BOBBI” GOLDBERG,

*Plaintiffs-Appellants,*

v.

COBB COUNTY, GEORGIA; SAM OLENS, Chairman of the Cobb County Commission; PHILIP T. “MURRAY” HOMAN, Chairman of the Cobb County Planning Commission,

*Defendants-Appellees/Cross-Appellants.*

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On Appeal from the United States District Court  
For the Northern District of Georgia, No. 1:05-CV-2075-RWS  
Hon. Judge Richard W. Story, U.S. District Judge

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**BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW,  
ON BEHALF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS**

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*Amicus curiae* Foundation for Moral Law, Inc., is a designated IRS Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of *amicus* in this or any other case in which it has been involved.

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Dated this 3rd day of December, 2007

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## **STATEMENT OF THE ISSUES**

1. Whether the “supreme law of the land” requires that the constitutionality of the Cobb County Commissions’ public prayers and clergy selection procedures be determined by the text of the First Amendment of the United States Constitution.
2. Whether the Cobb County Commissions’ public prayers and clergy selection procedures are “law[s] respecting an establishment of religion.”

## **STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE***

*Amicus Curiae* Foundation for Moral Law (“the Foundation”) is a national, non-profit, public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God, especially when exercised by public officials. The Foundation encourages the judiciary and other branches of government to return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country’s laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments and other public acknowledgments of God. The Foundation has filed several *amicus* briefs in federal circuits around the country defending the constitutionality of public prayer in legislative bodies.

The Foundation has an interest in this case because it believes that public prayer is one of the many ways in which government officials and entities may constitutionally acknowledge the sovereignty of God and seek His providential guidance. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the prayers offered at Cobb County Commission and Cobb County Planning Commission meetings, and the procedures for selecting clergy to pray at those meetings, violate the Establishment Clause of the First Amendment.

#### **SOURCE OF AUTHORITY TO FILE**

Pursuant to F.R.A.P. Rule 29(a), all parties have consented to the filing of this *amicus* brief.

#### **SUMMARY OF ARGUMENT**

It is the responsibility of this Court, and any court exercising judicial authority under the United States Constitution, to do so based on the text of the document from which that authority is derived and to which the oath of office is sworn. A court forsakes its duty and its oath when it rules based upon case tests rather than the text of the constitutional provision at issue. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the “supreme Law of the Land.” U.S. Const. art. VI.

Accordingly, the controlling “test” to be applied to the facts of this case is the text of the Establishment Clause, not *Marsh v. Chambers* or any other judicial opinion.

The text of the Establishment Clause states that “Congress shall make no **law** respecting an **establishment** of **religion**.” U.S. Const. amend. I (emphasis added). When these words of the law are applied to the Cobb County Commissions’ prayers, it becomes evident that none of the Christian prayers offered at Commission meetings are laws, they do not dictate religion, and they do not respect an establishment of religion. Likewise, the Commissions’ methods for selecting clergy for prayer invitations are not laws respecting an establishment of religion, as those words were understood by the Founders. While the opinion in *Marsh v. Chambers* compels the same result in this case, the supreme law of the land dictates that the prayers and clergy selection procedures in Cobb County are constitutional because they do not violate the words of the Constitution.

## ARGUMENT

*“We, therefore, the Representatives of the united States of America, in General Congress, Assembled, **appealing to the Supreme Judge of the world for the rectitude of our intentions**, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States . . . And for the support of this Declaration, **with a firm reliance on the protection of divine Providence**, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.”*

Declaration of Independence (1776) (emphasis added).

*“God save the United States and this Honorable Court!”*

Marshal, United States Supreme Court.

### **I. THE CONSTITUTIONALITY OF CHRISTIAN PRAYERS OFFERED AT MEETINGS OF THE COBB COUNTY COMMISSIONS AND THE PROCEDURES USED TO INVITE CLERGY TO PRAY SHOULD BE DECIDED ACCORDING TO THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.**

The question before the court below was a simple one: whether “‘sectarian prayers’ offered by invited guests who participate in the invocation opportunity provided by the Commissions—and, in particular, those prayers mentioning ‘Jesus,’ ‘Christ,’ or ‘Jesus Christ’—violate the Establishment Clause of the First Amendment to the United States Constitution.” *Pelphrey v. Cobb County, Ga.*, 448 F. Supp. 2d 1357, 1358 (N.D. Ga. 2006) (“*Pelphrey II*”). In its order denying Plaintiffs’ request for a preliminary injunction, dated January 13, 2006, the district court *quoted* the words of the law at issue—the Establishment Clause—but never,

in any of its orders, did the court apply those words *as the law*. *Pelphrey v. Cobb County, Ga.*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (“*Pelphrey I*”). Instead, the court treated the Establishment Clause as a mere preface to the judicial opinions that have interpreted and reinterpreted the Clause.

To be sure, with the exception of its errant holding that the 2003-2004 clergy selection procedures employed by the Cobb County Planning Commission violated the Establishment Clause, the district court did an admirable job of applying *Marsh v. Chambers*, 463 U.S. 783 (1983), to this case and correctly concluded that the prayers offered at Commission meetings, whether overtly Christian or not, did not violate the Constitution. Likewise, Defendants/Appellees did an excellent job in their original brief of explaining why they should prevail under *Marsh* and other relevant cases.

Unfortunately, the court below thought that no straight-forward test was “attainable in this unique niche of First Amendment law.” *Pelphrey II*, 448 F. Supp. 2d at 1367.

Initially, the very idea of a “straight-forward” Establishment Clause analysis seems to the Court somewhat of an oxymoron. No message of *Van Orden v. Perry* and *McCreary County v. ACLU* is more clear than that the Establishment Clause tends to elude clear, black-and-white formulations of legality.

*Id.* (citations omitted). The court is almost correct: it is *judicial cases* like *Van Orden* and *McCreary County*, which yielded no less than ten (10) separate

opinions between them,<sup>1</sup> that elude the type of clarity and “black-and-white” formulations that must characterize any true rule of law. *Amicus* submits that the never-amended *words* of the Establishment Clause itself provide such a “straight-forward” analysis that is both clear and, according to the judicial oath, obligatory.

**A. The Constitution is the “supreme Law of the Land” and all judges are oath-bound to support it.**

Our Constitution dictates that the Constitution itself and all federal laws pursuant thereto are the “supreme Law of the Land.” U.S. Const. art. VI. All “judicial Officers” are “bound by Oath or Affirmation, to support *this Constitution*,” *id.* (emphasis added), and not a person, office, government body, or judicial opinion. *See* 28 U.S.C. § 453 (oaths of justices and judges). *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document’s fundamental principles. “[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . .

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<sup>1</sup> *See Van Orden v. Perry*, 545 U.S. 624 (2005); *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

. Why otherwise does it direct the judges to take an oath to support it?” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that “[a]s a guide in expounding and applying the provisions of the Constitution . . . the legitimate meanings of the Instrument must be derived from the text itself.” J. Madison, Letter to Thomas Ritchie, September 15, 1821, in *3 Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

*Gibbons v. Ogden*, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

[The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, “[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.” *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding these truths, the district court below evaluated the practice of prayer in the Cobb County meetings under *Marsh v. Chambers*, 463 U.S. 783 (1983), and other opinions about *Marsh*, at the expense of the carefully crafted words of the Establishment Clause.

**B. *Marsh v. Chambers*, like all Establishment Clause cases, is merely an opinion interpreting and applying the law, but it cannot supplant the law itself.**

Ordinarily in a case concerning the Establishment Clause of the First Amendment courts apply the aptly named *Lemon* test, crafted by the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to judge whether the practice in question is constitutionally permissible. Perhaps because of the “persistent criticism”<sup>2</sup> and noticeable shortcomings of *Lemon* and its progeny,<sup>3</sup> the

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<sup>2</sup> *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005).

<sup>3</sup> Courts of appeal have repeatedly expressed frustration with the difficulty in applying Establishment Clause jurisprudence. For example, the Third Circuit has observed that “[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays.” *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it “the often dreaded and certainly murky area of Establishment Clause jurisprudence.” *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999). The Fifth Circuit has referred to this area of the law as a “vast, perplexing desert.” *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir.

Supreme Court has declined several times since its inception to follow the three-part test. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding in part the constitutionality of the Religious Land Use and Institutionalized Persons Act (RLUIPA)); *Larson v. Valente*, 456 U.S. 228 (1982) (holding unconstitutional state law imposing regulations upon certain religious organizations). As the court noted below, *Marsh v. Chambers* carved out “one prominent exception” to *Lemon*. *Pelphrey I*, 410 F. Supp. 2d at 1328. However, the Supreme Court recognized in *Marsh* 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.” *Marsh*, 463 U.S. at 786. Consequently, it would have been strange indeed if the Court had determined such prayers to be unconstitutional. So, instead of stretching the *Lemon* test in some implausible manner to permit the practice of legislative prayer, the Supreme Court ignored it altogether and fashioned another rule for legislative prayer cases. But swapping one judicial rule—even a better one like *Marsh*—for another one still obscures the only law at issue.

The Supreme Court has invented interchangeable, substitutionary Establishment Clause tests precisely because it has rejected the idea that the constitutional text has a plain, objective meaning. In *Lemon*, the Supreme Court

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1998), rev’d sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Tenth Circuit opined that there is “perceived to be a morass of inconsistent Establishment Clause decisions.” *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

stated that it could “only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,” and that “[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines” delineating what is constitutionally permissible or impermissible. 403 U.S. at 612. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) (“[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed.”). It is the Court’s penchant for “drawing lines” instead of following the words of the law in the First Amendment that is the primary problem with Establishment Clause jurisprudence.

The judiciary’s abandonment of “fixed, *per se* rule[s]” results in the haphazard application of judges’ own complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

[i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

*The Federalist No. 62* (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The “law” in Establishment Clause cases changes so often and is so incoherent that “no man . . . knows what the law is today, [or] can guess what it will be tomorrow,” “leav[ing] courts, governments, and believers and

nonbelievers alike confused . . . .”<sup>4</sup> *Van Orden*, 545 U.S. at 694 (Thomas, J., concurring). “What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle.” *McCreary County*, 545 U.S. at 890-91 (Scalia, J., dissenting). *Marsh*, like all judicial tests that ignore the text of the Establishment Clause, fail this indispensable requirement. With each new variation on its amorphous tests, Supreme Court opinions in this area of the law only exacerbate the district court’s complaint that Establishment Clause jurisprudence “elude[s] clear, black-and-white formulations of legality.” *Pelphrey II*, 448 F. Supp. 2d at 1367.

**1. *Marsh* is incomplete and unhelpful to the extent that it ignores the legal text and preserves legislative prayer simply as historical tradition.**

“The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself . . . .” *Lake County v. Rollins*, 130 U.S. 662, 670 (1889).

Instead of using the opportunity to explicitly return to the text of the Constitution,

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<sup>4</sup> Not surprisingly, district courts also routinely observe that the Supreme Court’s Establishment Clause jurisprudence is: “marked by befuddlement and lack of agreement,” *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005); “convoluted, obscure, and incapable of succinct and compelling direct analysis,” *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); “mystif[ying] . . . inconsistent, if not incompatible,” *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); and “utterly standardless,” *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005).

the *Marsh* Court relied solely on history to bestow its constitutional blessing on legislative prayer. The Court in *Marsh* concluded:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making law is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of the country.

463 U.S. at 792. *Marsh* got it almost right: while it is true that American history helps *demonstrate* the constitutionality of public prayer, it is the First Amendment’s text that *determines* it.

*Marsh* failed to offer the consistently applied principle of the text of the First Amendment and instead simply analogized by historical examples. Admittedly, *Marsh* arrives at the right result due to its reliance on the Founders’ example for guidance concerning what does *not* constitute an “establishment” under the First Amendment. However, the analysis is fundamentally flawed because nowhere does the *Marsh* Court actually *define* an “establishment” of religion. By sidestepping the First Amendment definition, the *Marsh* Court neglected the principle at issue and thus failed to provide guidance to courts for future cases—like this one—involving legislative prayer.

By grounding the decision of whether Nebraska’s legislative prayer was constitutional on the basis that it was a longstanding historical tradition practiced

by the Founders, the *Marsh* Court left more vulnerable any other public religious exercise or acknowledgment of God that is of more recent vintage than the first prayer in Congress. The antiquity or historical ubiquity (or lack thereof) of a public exercise of religion or divine acknowledgment ultimately has no bearing on whether the practice violates the text of the Constitution.

*Marsh*'s recognition of our religious tradition is laudable<sup>5</sup> and its emphasis on history makes its analysis more legitimate than *Lemon* and other judicially-fabricated tests. But its failure to ground its conclusions in the unchanging constitutional text is its fundamental flaw, one that continues to produce confusion and uncertainty regarding the kind of prayers "permitted" in deliberative, legislative bodies. In the case of Cobb County, it produced a court order allowing the Christian prayers to proceed but a declaration that one year's selection process used by the Planning Commission was "unconstitutional."

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<sup>5</sup> See, e.g., *Briscoe v. Bank of Commonwealth of Kentucky*, 36 U.S. 257, 267 (1837) ("It is evident, that the meaning of the term used in our own constitution, is most naturally to be sought for, first, in our own history."); *Legal Tender Cases*, 79 U.S. 457, 465 (1870) ("looking at the public history of the times . . . has [been] established as a proper guide to the construction of the Constitution."); *Wallace v. Jaffree*, 472 U.S. 38, 79 (1985) (O'Connor, J., concurring in the judgment) ("Particularly when we are interpreting the Constitution, 'a page of history is worth a volume of logic.'" (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921))).

**2. The district court’s myopic reliance on *Marsh* led to its errant extrapolation of an “impermissible motive” prohibition in clergy selection procedures.**

Because the district court “understood its obligation to be strict application of the precedent set by *Marsh*,” *Pelphrey II*, 448 F. Supp. 2d at 1366, instead of strict application of the Constitution’s text, the court teased out of *Marsh* an “impermissible motive” rule that is neither true to the case nor true to the Constitution.

[T]he [*Marsh*] Court rejected the idea that “choosing a clergyman of one denomination advances the beliefs of a particular church.” After underscoring that ‘guest chaplains have officiated at the request of various legislators and as substitutes during Palmer’s absences[,]’ the Court went on to hold: “Absent proof that the chaplain’s reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.”

The Court did not elaborate in *Marsh* on what motive or motives it would find “impermissible.” Read in context, however, the “impermissible motive” prohibition seems directed at the conscious selection of a speaker from one denomination or sect for the purpose of promoting or endorsing the beliefs held by that speaker. That is, the Court appeared to deem constitutionally unacceptable the selection and retention of a particular speaker *because* of that speaker’s sectarian affiliation or religious beliefs.”

*Pelphrey I*, 410 F. Supp. 2d at 1336 (citations omitted); quoted at *Pelphrey II*, 448 F. Supp. 2d at 1370.

Defendants/Appellees have already superbly demonstrated, and *Amicus* will not belabor the point, that the district court’s presumptive psychoanalysis of what

the *Marsh* Court meant by the unelaborated “impermissible motive” is inconsistent with the *Marsh* opinion. See Br. of Appellees/Cross-Appellants at 46-56. More importantly, the “impermissible motive” rule is inconsistent with the *Constitution*, an unsurprising consequence of the district court’s treatment of a judicial opinion as the supreme law of the case. So long as constitutionality is adjudged based on consistency with *court opinions* rather than consistency with the *constitutional text*, the ever-shifting criteria that characterizes this area of the law will continue to raise the specter that “either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.” *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring).

The text of the Establishment Clause contains a definite and straight-forward meaning to which the judicial oath of office requires adherence in this case. See *Marbury*, 5 U.S. at 180. As Justice Thomas has observed, “When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution’s original meaning.” *Kelo v. New London*, 545 U.S. 469, 523 (2005) (Thomas, J., dissenting).

## II. THE CHRISTIAN PRAYERS OFFERED AT MEETINGS OF THE COBB COUNTY COMMISSIONS AND THE PROCEDURES USED TO INVITE CLERGY ARE CONSTITUTIONAL BECAUSE THEY ARE NOT “LAW[S] RESPECTING AN ESTABLISHMENT OF RELIGION.”

The First Amendment states, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. amend I. Prayers offered in meetings of the Cobb County Commission and the Cobb County Planning Commission, regardless of whether they mention Jesus Christ, are in no way “law[s] respecting an establishment of religion.”<sup>6</sup> Likewise, the procedures used by the Commissions for inviting clergy from the community to pray, regardless of sectarian exclusivity, are not “law[s] respecting an establishment of religion.”

### A. Public prayer and clergy selection procedures are not “laws.”

At the time of the ratification of the First Amendment, Sir William Blackstone had defined a “law” as “a rule of civil conduct . . . commanding what is right and prohibiting what is wrong.” I William Blackstone, *Commentaries on the Laws of England* 44 (U. Chi. Facsimile Ed. 1765). Several decades later, Noah Webster’s 1828 Dictionary stated that “[l]aws are *imperative* or *mandatory*,

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<sup>6</sup> *Amicus* will not address herein the compelling argument that the Establishment Clause, with its restriction upon only “Congress,” should not be “incorporated” against the states and local governments through the guise of the Fourteenth Amendment. Such an argument is a worthy pursuit for another brief (or book), but is hardly necessary to the textual argument raised in this brief.

commanding what shall be done; *prohibitory*, restraining from what is to be forborn; or *permissive*, declaring what may be done without incurring a penalty.”

N. Webster, *American Dictionary of the English Language* (Foundation for American Christian Educ. 2002) (1828) (emphasis in original). Alexander Hamilton explained what is and is not a law in *Federalist No. 15*:

It is essential to the idea of a law, that it be attended with a sanction; or in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will in fact amount to nothing more than advice or recommendation.

*The Federalist No. 15* (Alexander Hamilton), at 72 (Carey & McClellan eds. 2001).

The Commissions in the instant case are certainly a type of legislating body. But no matter how “sectarian” the prayers offered by invited clergy become, no matter how many times Jesus Christ is addressed or referenced therein, no matter the percentage of Christian prayers to “nonsectarian” or non-Christian prayers, prayers offered at Cobb County Commissions do not command any action from those in attendance, nor do they restrain attendees or citizens from any action or conduct that they wish to pursue. One cannot obey or disobey another’s prayer. There is no threatened sanction, no “penalty or punishment for disobedience,” no rule of civil conduct. A prayer is simply not a law.

Prayers and invocations are by nature words directed to God and not to those physically in attendance (although other listeners may certainly be edified—or

even motivated to sue—because of it). Similar to an executive Thanksgiving proclamation, the legislative prayer “has not the force of law, nor was it so intended.” See *Richardson v. Goddard*, 64 U.S. (How.) 28, 43 (1859) (“The proclamation . . . is but a recommendation. . . . The duties of fasting and prayer are voluntary, and not of compulsion . . . . It is an excellent custom, but it binds no man's conscience or requires him to abstain from labor”). In short, “[w]ords do not coerce.” *Books*, 401 F.3d at 870 (Easterbrook, J., dissenting). However effective or allegedly offensive the Commission meeting prayers may be, they do not rise to the level of a law under the First Amendment.

For the same reasons, the methods by which staff members for the Commissions choose local clergy to invite for prayer are not laws under the First Amendment. No matter how many pencil marks are made in a copy of the Yellow Pages book, no matter how many religions or denominations are excluded from the master list of clergy members, no matter how obvious or allegedly “impermissible” may be the motives behind the procedures used to select clergy, such decisions by Commissions’ staff members do not legislate a rule of civil conduct for Cobb County citizens. Even if only, say, Episcopalian priests were selected from this point on, such a policy would still fall short of being a “law” prohibited by the Establishment Clause.

**B. Public prayer and clergy selection procedures do not “respect[] an establishment of religion.”**

Just as they do not constitute a law, prayer and clergy selection do not “respect[],” *i.e.*, concern or relate to, “an establishment of religion” under the Establishment Clause.

**1. The Definition of “Religion”**

The original definition of “religion” as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance* in 1785, was referenced in the North Carolina, Rhode Island, and Virginia ratifying conventions’ proposed amendments to the Constitution, and was echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).<sup>7</sup> In each instance, “religion” was defined as:

**The duty which we owe to our Creator, and the manner of discharging it.**

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<sup>7</sup> The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

Va. Const. of 1776, art. I, § 16 (emphasis added); *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *The Founders' Constitution* 82 (Phillip B. Kurland & Ralph Lerner eds. 1987); *The Complete Bill of Rights* 12 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties “can be directed only by reason and conviction, and not by force or violence.” Va. Const. of 1776, art. I, § 16. Three states also included this definition of religion in their proposed amendments to the Constitution during ratification debates, demonstrating that Virginia’s definition was the prevailing definition of the term.

In *Reynolds*, the United States Supreme Court stated that the definition of “religion” contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of “religion.” *See Beason*, 133 U.S. at 342 (“[t]he term ‘religion’ has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will”). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which

years later was overturned by the Supreme Court,<sup>8</sup> quoted from *Beason* in defining “the essence of religion.” See *Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). Sixteen years later in *Everson*, the Supreme Court noted that it had

previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson’s 1785 Act for Establishing Religious Freedom].

*Everson*, 330 U.S. at 13.

The *Everson* Court emphasized the importance of Madison’s “great *Memorial and Remonstrance*,” which “received strong support throughout Virginia,” and played a pivotal role in garnering support for the passage of the Virginia statute. *Id.* at 12. Madison’s *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. See Madison, *Memorial and Remonstrance*, *supra*. For good measure, Justice Rutledge attached Madison’s *Memorial* as an appendix to his dissent in *Everson* which was joined by Justices Frankfurter, Jackson, and Burton. See *id.* at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term “religion” is “[t]he dut[ies]

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<sup>8</sup> *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

which we owe to our Creator, and the manner of discharging [them].” Va. Const. of 1776, art. I, § 16.

Even if, *arguendo*, the public prayers offered at the Commissions’ meetings are in some sense a “law,” they do not rise to the level of “religion” under the First Amendment. Although the prayer offered may be the discharge of one’s *religious* duty to God and the demonstration thereof, it is not itself a whole *religion*. Various religious elements may comprise a complete religion, but an independent exercise of one such element, however *religious* or *sectarian* or *Christian*, does not. Plaintiffs make much ado about how many Christians prayed at the Commissions’ meetings, or the percentage of prayers that mentioned Jesus Christ, or the particular religious affiliations of those clergy members giving the opening prayers; but they still have not shown that the Commissions established an official Cobb County religion. Christians giving Christian prayers in the name of Christ are indeed performing a *religious* exercise, but such prayers will never constitute a religion.

Similarly, even if they were “laws,” the procedures for selecting those clergy members to pray do not meet the definition of “religion” contemplated by the First Amendment. Cobb County Commission staff members are certainly inviting religious men and women to perform an admittedly religious act, but they are in no

wise articulating the duties one owes to the Creator and the manner of discharging them.

James Madison, the Chief Architect of the Constitution, in his Presidential Proclamation of 1812, recommended “a convenient day to be set apart, for the devout purposes of rendering the Sovereign of the Universe, and the Benefactor of Mankind.” James D. Richardson, II *A Compilation of the Messages and Papers of the Presidents* 498 (1897). Indeed, on September 25, 1789, the very day that “final agreement was reached on the language of the Bill of Rights,” the U.S. House of Representatives “resolved to request the President to set aside a Thanksgiving Day to acknowledge ‘the many signal favors of Almighty God.’” *Marsh*, 463 U.S. at 788 n.9 (citations omitted).

Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and *opening prayers* as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states.

*Id.* at 788-89 (footnote omitted) (emphasis added).

Thus, textually *and* historically, it cannot be reasonably held that the Commissions’ prayers or clergy selection procedures are an attempt to dictate the duties that Cobb County citizens owe to the Creator and the manner in which they should discharge those duties. Consequently, the challenged actions are not laws respecting an establishment of “religion.” U.S. Const. amend I.

## 2. The Definition of “Establishment”

The Establishment Clause does not broadly prohibit all legislative laws regarding religion: it proscribes “laws[] respecting an *establishment* of religion.” *Id.* (emphasis added). Even if prayers and clergy selection procedures are “laws” or “religion” under the First Amendment—which they are not—the Cobb County prayers and clergy selection procedures are still not an “establishment” of religion.

An “establishment” of religion, as it was widely understood at the time of the adoption of the First Amendment, involved “the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.” Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). Joseph Story explained in his *Commentaries on the Constitution* that “[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government.” II Joseph Story, *Commentaries on the Constitution* § 1871 (1833). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he “apprehended the meaning of the [Establishment Clause] to be, that *Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.*” 1 *Annals of Cong.* 757 (1789) (Gales & Seaton’s ed. 1834) (emphasis added). The

House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the Army and Navy:

What is an establishment of religion? It must have a creed, defining what a man must believe; it must have rites and ordinances, which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rites; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these.*

H.R. Rep. No. 33-124 (1854) (emphasis added).

At the time of its adoption, therefore, “[t]he text [of the Establishment Clause] . . . meant that Congress could neither establish a national church nor interfere with the establishment of state churches as they existed in the various states.” Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 690 n.19 (1992). “[E]stablishment involved ‘coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.*’” *Cutter*, 544 U.S. at 729 (Thomas, J., concurring) (quotations and citations omitted).

Just as it offered no definition of “law” or “religion,” the court below neither gave nor considered a definition of “establishment” in the Clause of the First Amendment which bears that name. Public prayers before legislative bodies do not amount to or even approach an “establishment” of religion, and Cobb County’s invocations, whether in the name of Jesus or not, are no exception. Prayers that open county meetings, however “Christian” in tone or content, regardless of to

Whom they are directed, and regardless of the denominational affiliation of the praying clergy member, do not set up a coercive religious orthodoxy. No one is compelled by Chairmen Sam Olens and Phillip Homan to offer, participate in, agree with, or attend the prayers. There are no penalties beyond alleged feelings of discomfort and disagreement for those who do not approve of the saying of Christian prayers at county meetings. Cobb County Commissions have levied no taxes to support one denomination or faith over another. Neither Cobb County nor any other county in Georgia has an official government religion established by law.<sup>9</sup>

On the other hand, Plaintiffs' position that Cobb County prayers should be censored of all references to Jesus Christ is ironically closer to an establishment of religion than the prayers they challenge. Were the lower court or this Court to grant Plaintiffs' desire to enjoin any "sectarian references" during Cobb County prayers, the Commissions would be forced to exclude from invitation those clergy members who reference Jesus Christ in their prayers or, perhaps worse, invite said clergy to pray and then forbid them to utter the name of Jesus. Such a judicial order would smack more of an official religious orthodoxy of "non-sectarianism" than the current prayer practice and would require Cobb County to "enforce the

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<sup>9</sup> Indeed, the Georgia Constitution expressly prohibits aiding a church, sect, cult, or religious denomination or any sectarian institution with money from the public treasury. *See* Ga. Const. art. I, § 11, para. XII; *Pelphrey I*, 410 F. Supp. 2d at 1348.

legal observation of it by law, [and] compel men to worship God in [a] manner contrary to their conscience.” 1 *Annals of Cong.* 757 (1789). The district court was correct in declining the Plaintiffs’ request to mandate judicially-approved, generic prayers at Cobb County meetings.

The court erred, however, in holding that the clergy selection procedures employed by the Planning Commission in 2003-2004 violated the Constitution because some religious categories had lines drawn through them in the Yellow Pages. The practice of choosing someone of a particular religion or denomination to pray is not an establishment of that person’s religion. If that were the case, then Cobb County’s established religion has changed from meeting to meeting from one of the various denominations of Christianity to the Jewish, Muslim, and Baha’i faiths. *See Pelphrey I*, 410 F. Supp. 2d at 1326; *Pelphrey II*, 448 F. Supp. 2d at 1360 (stating that “adherents to the Jewish and Unitarian Universalist faiths,” “a Muslim Imam,” and a Baha’i representative have offered the opening prayer). Since an establishment of religion requires one official sect, no government establishment of religion would permit such diversity and competition as is seen at Cobb County meetings.

Yet even affirmatively *excluding* clergy members of certain denominations or religions from praying at Cobb County meetings does not rise to the level of an establishment. An establishment as defined by the Founders was necessarily

government sponsorship and legal support given to *one* particular faith, especially a particular denomination of the Christian religion. According to Justice Story, “The real object of the amendment was . . . to exclude all rivalry among *Christian* sects.” Story, *Commentaries, supra*, § 1871 (emphasis added). The Commissions are no more bound by the Establishment Clause to invite a representative of every religion than they are to invite a representative of just one. There is simply no evidence that Cobb County, in any year, established one religion or denomination in its clergy selection procedures.

In 2001, the 6th Circuit *en banc* upheld the Ohio’s State Motto, “With God All Things Are Possible,” against a claim that the Motto was a violation of the Establishment Clause because it acknowledged God. *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd.*, 243 F. 3d 289, 299 (6th Cir. 2001) (*en banc*). The Court rejected the claim and focused in part upon the fact that the Motto

involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

*Id.* at 299. The Ohio Motto was not an establishment of religion. Likewise, acknowledging God and Jesus Christ through public prayer at a legislative meeting, and selecting or refusing to select clergy members to invite, is not a “law respecting an establishment of religion.”

## CONCLUSION

As it is the responsibility of this Court to decide this case based on the text of the Constitution from which its authority is derived, this Court should reverse the district court's holdings that past clergy selection procedures of the Planning Commission were unconstitutional and reverse the award of nominal damages. The district court should be affirmed in its holdings that prayers in the name of Jesus given at the Commissions' meetings and all other clergy selection procedures employed by the Commissions do not violate the Establishment Clause of the First Amendment, and it should be affirmed for the simple reason that it does not violate the text of the Establishment Clause: "Congress shall make no law respecting an establishment of religion."

Respectfully submitted this 3rd day of December, 2007.

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Dated this 3rd day of December, 2007.

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of this Brief of *Amicus Curiae* have been served on counsel (listed below) for each party, in paper and electronic form, and that one (1) original and six (6) copies of said brief have been dispatched to the Clerk of the United States Court of Appeals for the Eleventh Circuit, by first-class U.S. Mail, on this 3rd day of December, 2007.

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