

No. 11-1448

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

**ROBERT MOSS, individually and as general guardian for his minor child;
ELLEN TILLET, individually and as general guardian for her minor child;
FREEDOM FROM RELIGION FOUNDATION, INC.; and MELISSA
MOSS,**
Plaintiffs-Appellants,

v.

SPARTANBURG COUNTY SCHOOL DISTRICT SEVEN,
Defendant-Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,
in support of Defendant-Appellee
Supporting affirmance

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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, including those in South Carolina, are concerned with the outcome of this case because of the effect it will have on students' and parents' religious liberty in the public schools and on Establishment Clause jurisprudence.

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

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, The National Legal Foundation, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF THE ARGUMENT

Your *Amicus* expands upon two arguments made by the Defendant-Appellee Spartanburg County School District (the "School"). First, Plaintiffs-Appellants Moss, *et al.* ("Moss") may not bring their Establishment Clause Claim under §1983 because courts lack subject matter jurisdiction over such claims. This is so

because Congress never intended to include Establishment Clause protections to be an individual right, privilege, or immunity for the purposes of §1983 claims.

Second, even if this Court were to exercise its jurisdiction here, the Establishment Clause, rightly understood, permits the kind of release-time policy the School has implemented.

ARGUMENT

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

A. The Question of Whether Establishment Clause Claims Should Be Brought Under §1983 Is a Matter of First Impression in the Fourth Circuit.

Two federal courts of appeals have discussed the appropriateness of bringing Establishment Clause claims under §1983. First, the Ninth Circuit raised the question in *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991). There, residents of Hawaii challenged the law that made Good Friday a state holiday, alleging a violation of the Establishment Clause of the United States and the Hawaii Constitutions. Ultimately ruling on different grounds, the Ninth Circuit nonetheless questioned the “efficacy” of bringing the Establishment Clause claim under §1983:

Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under §1983. We note that this route has been traveled before without

exciting controversy (or even comment). *See, e.g., Marsh v. Chambers*, 463 U.S. 783, 785, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983) (noting that establishment clause challenge was brought under §1983); *ACLU v. County of Allegheny*, 842 F.2d 655, 656-57 (3d Cir. 1988) (same), *aff'd in part and rev'd in part*, 492 U.S. 573, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

Cammack, 932 F.2d at 768, n.3.

Since *Cammack*, additional cases—such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000)—have reached the Supreme Court in a similar posture to *Allegheny*, *i.e.*, the Establishment Clause claim has been brought under §1983 without the Court acknowledging that fact. However, only two cases, besides *Marsh*, have been brought under §1983 in which the Court has both acknowledged that fact and decided the claim on the merits, the companion Ten Commandments cases *McCreary County v. ACLU*, 545 U.S. 844 (2005), and *Van Orden v. Perry*, 545 U.S. 677 (2005).

The Tenth Circuit, however, has ruled on the question. In *Green v. Haskell County*, 568 F.3d 784, 788, n.1 (10th Cir. 2009), the court held that it had jurisdiction to hear an Establishment Clause claim brought under §1983.¹ That conclusion, however, is flawed for several reasons.

First, the Tenth Circuit grounded its jurisdiction on a faulty premise. The court noted that “both the Supreme Court and this court repeatedly have, without

¹ The Tenth Circuit was presented with the issue a second time in *American Atheists, Inc. v. Duncan*, 637 F.3d 1095, 1112, n.4 (10th Cir. 2010), but was bound by *Haskell County*.

comment, decided §1983 actions alleging Establishment Clause violations.” *Green v. Haskell County Bd. of Comm’rs*, 568 F.3d 784, 788, n.1 (10th Cir. 2009). Yet, this comment proves too little. Silence from the courts on issues not directly brought before them is just that—silence. Significantly, your *Amicus* presented the Tenth Circuit with identical arguments to those that follow, but the Tenth Circuit missed the import of those arguments. *See id.*, 568 F.3d at 788, n.1.

For instance, the Tenth Circuit did not address the argument that the Supreme Court has often allowed certain types of claims on multiple occasions without comment but then, when a party squarely raised the jurisdictional issue, the Court would decide that such claims were not properly brought. In fact, the Court has done this on several occasions in the §1983 context. For example, the Court often accepted cases in which a state had been sued under §1983 before deciding in *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), that a state is not a person for purposes of §1983. *See, e.g.*, cases collected in *id.* at 9 n.4. The *Will* Court noted that the “‘Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.’ *Hagans v. Lavine*, 415 U.S. 528, 535, n.5 (1974).” *Id.* (brackets in original).

And second, the Tenth Circuit asserted that *Maine v. Thibodout*, 448 U.S. 1, 6-8 (1980), stands for the proposition that the “Supreme Court has rejected the

notion that §1983's scope is limited to civil rights or equal protection laws," *Haskell County*, 568 F.3d at 788, n.1, without addressing the argument, made below, that *Thiboutot* did not address what is or is not a right, privilege, or immunity.

Therefore, as will be further articulated below, this Court should follow the lead of the *Cammack* court and question whether §1983 is a proper vehicle for bringing an Establishment Clause claim. The only reason that the *Cammack* court did not answer the question was because the parties did not raise it. However, your *Amicus* is hereby squarely raising the question,² and, for the reasons stated below, this Court should conclude that §1983 does not cover Establishment Clause claims and, therefore, the appeal should be dismissed for lack of jurisdiction.

B. The Legislative History of 42 U.S.C. §§1983 and 1988 Shows that the Establishment Clause was Never Intended to be Included within the Purview of §1983 Jurisdiction.

Nothing in the legislative history of or scholarship about 42 U.S.C. §1983 (2010), suggests that Congress intended Establishment Clause claims to be covered

² Although the School did not argue this theory below, "[s]ubject matter jurisdiction concerns a court's very power to hear a case, and because [that power] can never be forfeited or waived, the lack of subject matter jurisdiction can be raised at any time." *United States v. Beasley*, 495 F.3d 142, 147 (4th Cir. 2007) (internal citation and quotation omitted). Further, courts can *choose* to "consider arguments raised only in an *amicus* brief." *Davis v. United States*, 512 U.S. 452, 457, n.* (1994). And, of course, sometimes those arguments will be about jurisdiction. *See, e.g., United States v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004) ("The court has considered arguments of a jurisdictional nature raised only by *amici* . . .").

by the statute.³ Rather, §1983 was enacted to vindicate violations of individual rights. Furthermore, (as will be discussed in I.C below) the history of the Fourteenth Amendment shows that the Establishment Clause was not intended to be included within the purview of Fourteenth Amendment’s Privileges and Immunities Clause. Thus, because Establishment Clause violations are not a deprivation of any “rights, privileges, or immunities secured by the Constitution and laws” for which §1983 provides redress, §1983 does not give the federal courts jurisdiction in Establishment Clause cases.

Until the passage of §1988, The Civil Rights Attorney’s Fee Awards Act of 1976, virtually no Establishment Clause cases were brought under §1983. Since the passage of that act, however, the number of cases has exploded. For example, the number of opinions on LEXIS shows that prior to the enactment of §1988 (*i.e.*, from §1983’s enactment in 1871 until §1988’s enactment in late 1976), only 44 opinions are available in which both §1983 and the “Establishment Clause” are mentioned. In contrast, in the approximately thirty-five years following §1988’s

³ A comprehensive treatment of this history is available at *Paying Your Own Way: Creating a Fair Standard for Attorney’s Fee Awards in Establishment Clause Cases: Hearings on S. 109-756 Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the Comm. on the Judiciary*, 109th Cong. 67-92 (2006) [hereinafter *Hearing*] (statement of Steven W. Fitschen, President, National Legal Foundation).

enactment 1298 such cases can be found.⁴

Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot*, 448 U.S. 1 (1980):

There is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where ‘civil rights’ of any kind are at best an afterthought. . . . [I]ngenious pleaders may find ways to recover attorney’s fees in almost any suit against a state defendant.

448 U.S. at 24 (Powell, J., dissenting).⁵

Today strict separationists have turned this phenomenon into a virtual “blackmail scheme,” threatening localities and state defendants with the prospect of paying enormous attorney fee awards under §1988. *See, Hearing, supra* at 67-68, 91.

Were it not for one thing—congressional intent—all of this might be chalked up to the price of “doing business,” *i.e.*, the cost of governmental entities interacting with religion. Importantly, however, the legislative history of §1988 provides insight into the legislative history of §1983, and these histories show that Congress never intended §1983 to cover Establishment Clause claims.

⁴ Admittedly, not every opinion found using this search technique will actually deal with an Establishment Clause claim brought under §1983. However, the statistical point is still valid. A LEXIS search was performed by selecting “Federal Court Cases, Combined” and searching for “‘Section 1983’ and ‘Establishment Clause.’” The two searches were done restricting the dates as follows: from 01/01/1871 through 12/31/1976 and from 01/01/1977 through 08/11/2011.

⁵ The context of his remarks was different than that being addressed, however, Justice Powell’s concern is transferable.

Looking first at the legislative history of §1988, the purpose of the Act was to restore the availability of attorneys' fees *in civil rights lawsuits only*. The Act was a response to the Supreme Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975). The *Alyeska* Court declared that attorneys' fees were not available in federal lawsuits unless Congress expressly authorized fees by statute. *Id.* at 269-71. *Alyeska* involved environmental issues, not civil rights. Yet Congress' concern was with restoring attorneys' fees in traditional *civil rights* cases.

As Senator John V. Tunney, Chairman of the Senate Judiciary Subcommittee on Constitutional Rights noted when he introduced the original version:

[t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

Subcomm. on Constitutional Rights of the Senate Comm. On the Judiciary, 94th Cong. 2d Sess., *Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, §1988, S. 2278, Source Book: Legislative History, Texts, and Other*

Documents (1976) at 3. [Hereinafter, *Source Book*.]

The emphasis throughout the debates remained single-minded: Americans victimized by racial discrimination needed a fee-shifting provision to attract attorneys. Senator Edward Kennedy (D-Mass), for instance, repeatedly emphasized that he was concerned with providing a fee-shifting remedy to fight “discrimination” in areas such as “jobs, housing, credit, or education” using the “civil rights laws.” *Source Book* at 23. Establishment Clause claims were simply not contemplated to fall under §1988. *See generally, Source Book* throughout; *Hearing, supra* at 67-92.

Furthermore, the legislative history is clear that only two additional provisions were added as part of the political compromise needed to pass the Act: the Title IX provision protecting against sex discrimination in education and the provision for the protection of taxpayers defending themselves against proceedings by the Internal Revenue Service. *Source Book* at 21-22, 197-98. Congress did not intend to provide for fee-shifting in Establishment Clause cases.⁶

Secondly, the legislative history of §1983 confirms that the drafters of §1988 correctly understood the intended coverage of §1983. Section 1983 was originally a provision of the Ku Klux Act of 1871 (the “Act”). Numerous courts and commentators have documented that §1983 (called §1 at the time the Act was

⁶ Similarly, none of the post-enactment amendments by subsequent Congresses are in any way relevant to Establishment Clause claims. *See* 42 U.S.C. 1988(b).

passed) was one of the Act's least debated provisions. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 665 (1978). Despite the paucity of debate on §1, the meaning of the phrase “rights, privileges and immunities” is clear when one considers the debate over the entire act.

The Act was first entitled “A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes,” *Cong. Globe*, 42 Cong., 1st Sess. 597 (1871), and, after the Bill's introduction, Representative Stoughton (R-Michigan) spoke to set the stage. *Id.* at 599. He started by recounting the activity of the Ku Klux Klan in North Carolina, noting “murders, whippings, intimidation, and violence.” *Id.* at 599 ff. He also discussed the Klan's protection of its members by having other members commit perjury as witnesses or refuse to vote to convict as jurors. *Id.* at 600. Representative Stoughton's remarks were powerful portrayals of the evils of the Klan, made vivid by reading testimony of the witnesses who had appeared before the Senate committee. *See generally, id.* at 600 ff. He read testimony of Blacks who had been victims of violence and of Whites who knew the inner workings of the Klan, as well as judges who knew of perjury incidents. *Id.* Near the end of his remarks, he summarized the need for the Act:

When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally

prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to §five [of the Fourteenth Amendment], which declares that “Congress shall have power to enforce by appropriate legislation the provisions of this article.”

Id. at 606.

With this context, it is readily understandable that the most common view of “rights, privileges, and immunities” was one that equated it with life, liberty, and property. *See, e.g., Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). However, some Congressmen gave extended comments with examples of the concerns that animated the passage of the Act. None raised any Establishment Clause concerns. The following example by Representative John Coburn is typical of the more extended remarks:

Affirmative action or legislation is not the only method of a denial of protection by a State, State action not being always legislative action. A State may by positive enactment cut off from some the right to vote, to testify or to ask for redress of wrongs in court, to own or inherit or acquire property, to do business, to go freely from place to place, to bear arms, and many other such things. This positive denial of protection is no more flagrant or odious or dangerous than to allow certain persons to be outraged as to their property, safety, liberty, or life; than to overlook offenders in such cases; than to utterly disregard the sufferer and his prosecutor, and treat the one as a nonentity and the other as a good citizen. How much worse is it for a State to enact that certain citizens shall not vote, than allow outlaws by violence, unpunished, to prevent them from voting? How much more effectual is the denial of justice in a State where the black man cannot testify, than in a State where his testimony is utterly disregarded when given on behalf of his race? How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the

colored men? A systematic failure to make arrests, to put on trial, to convict, or to punish offenders against the rights of a great class of citizens is a denial of equal protection in the eye of reason and the law, and justifies, yes, loudly demands, the active interference of the only power that can give it.

Id. at 619-20.

This quotation and others like it demonstrate that one must never stray far from the historical context of Klan abuses if one wants to understand §1983's intent. Furthermore, the close connection between the concepts of equal protection and of rights, privileges, and immunities is illustrated. The Establishment Clause was simply not intended to be covered.

None of this is to say that governments may therefore willfully violate the Establishment Clause with impunity. Plaintiffs can sue directly under the Establishment Clause and 28 U.S.C. §1331 instead of under §1983—as was routine before 1976. *See, e.g., Flast v. Gardner*, 267 F. Supp. 351, 352 (S.D.N.Y. 1967) (ultimately reaching the Supreme Court on other grounds, *Flast v. Cohen*, 392 U.S. 83 (1968)). All that would be lost would be the “blackmailing” effect of the §1988 fees anticipated by Justice Powell.

Despite the historical support, some may believe that the position advocated here conflicts with *Maine v. Thiboutot*, 448 U.S. 1 (1980). In that case, the Supreme Court held that statutory §1983 claims should not be limited to civil rights statutes only.

However, the problem is illusory. The Ninth Circuit was well aware of *Thiboutot* when it questioned §1983 jurisdiction for bringing Establishment Clause claims (having, according to a Lexis search, cited or quoted it 28 times prior to issuing its *Cammack* opinion), yet it did not think that *Thiboutot* foreclosed the question.

Although this Court does not have the authority to ignore the Supreme Court's counter-historical conclusion that §1983 covers all laws (which after all by definition implicate "rights, privileges and immunities"), it *can* recognize that the Establishment Clause does not encompass *any* "rights, privileges [or] immunities" at all. While the validity of this distinction is arguably demonstrable from the legislative history of the Ku Klux Act (*see supra*, 10-12), it is even clearer when one looks at the legislative history of, and scholarship about, the Fourteenth Amendment itself.

C. Legislative History Shows that the Establishment Clause was Never Intended to be a Privilege or Immunity for the Purposes of the Fourteenth Amendment.

Many views existed as to what the Privileges and Immunities Clause of the Fourteenth Amendment was meant to include and, indeed, each of the dissenting opinions written in the *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873) could find support in the legislative history of that Amendment. *See, Hearing, supra* at 90. However, all of those views have one thing in common: none sees the term

“privileges and immunities” as implicating the Establishment Clause—even were it to be restated as “a right to be free from establishment of religion.”

Chester Antieau, a §1983 expert, collected writings and statements from Congressmen during the debates over the Civil Rights Bill of 1866 (which served as the model for the Fourteenth Amendment) and from Congressmen looking back on the passage of the Fourteenth Amendment. *See generally*, Chester Antieau, *The Intended Significance of the Fourteenth Amendment* (1997). These statements demonstrate that the free exercise of religion was intended to be covered by the term “privileges and immunities” but that “freedom from establishment” was not.

Antieau cites Representative Ralph Buckland’s statement that the Southern States regularly denied religious liberty to Blacks and that the federal government therefore needed to protect their free exercise rights. *Id.* at 91. By contrast, Antieau could find no evidence of any Senator or Representative mentioning “freedom from establishment.” *Id.* at 108 ff. There is more than mere silence to this argument, however. At least three important commentators, Senator Howard, Representative H. L. Dawes, and Fourteenth Amendment scholar Horace Flack, all made exhaustive lists of the rights intended to be included under the Privileges and Immunities Clause—none of which included the Establishment Clause. *Id.*

Additionally, Antieau examined practices of the states that ratified the Fourteenth Amendment and found it highly unlikely that they believed that the

Fourteenth Amendment included freedom from establishment as a privilege or immunity. *Id.* at 108 ff, 282-285. This evidence includes state statutes, constitutions, and court decisions. Some states, for example New Hampshire and Massachusetts, still had vestiges of true establishment. *Id.* at 110. It seems highly unlikely that these states would have ratified the Fourteenth Amendment if they thought it would endanger their establishments.

Therefore, there is no right, privilege, or immunity implicated by the Establishment Clause, and such a conclusion casts serious doubts on the applicability of *Thiboutot* to the instant case. As discussed more fully above, *Thiboutot* simply addressed whether a statute that created an individual right constituted a “law” for §1983 purposes. The Court noted that the text of §1983 itself supports the view that “law” was not restricted to a specific type of law and that the *right* created by the *Thiboutot* statute fit squarely within the bounds of §1983. 448 U.S. at 4-6. Pertinent to the instant case, however, *Thiboutot* did not address what is or is not a right, privilege, or immunity. But the legislative history discussed above demonstrates the Establishment Clause is none of them. Thus, *Thiboutot* is no obstacle to this argument.

Therefore, for the reasons stated above, Moss lacks standing to bring an Establishment Clause claim under §1983.

II. UPHOLDING THE SCHOOL’S RELEASE-TIME POLICY IS CONSISTENT WITH THE FRAMERS’ INTENT THAT THE ESTABLISHMENT CLAUSE PERMITS ACKNOWLEDGMENT, ACCOMMODATION, AND ENCOURAGEMENT OF RELIGION.

The Parties disagree on the proper role of religion in the public schools—in particular, whether the School may accept credits earned by student during off-campus release-time religious instruction. As will be demonstrated below, a brief look at some history will be instructive in understanding why the School’s practice is wholly permissible under the Constitution. In particular, the Framers recognized that acknowledgement, accommodation, and encouragement of religion were permissible and that only establishment should be forbidden.

A. True Establishment of Religion is Prohibited.

It is important to remember what the original concept of establishment was all about. The Framers conceived of three different ways in which religion could be established, as explained by Justice Joseph Story:

One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Joseph Story, *Commentaries on the Constitution of the United States* §1866

(Arthur E. Sutherland ed. 1970) (1833).

This definition makes it easier to distinguish acknowledgement, accommodation, and encouragement on the one hand from establishment on the other hand. Although some of these historical examples do not directly parallel the facts of the present case, it is important to obtain a fairly full-orbed view of these concepts. This Brief will look at each in turn.

B. Acknowledgment of Religion is Permitted.

One of the most famous explications of the meaning of the Establishment Clause is contained in then-Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting). There one reads the following:

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them."

Id. at 100-01 (Rehnquist, J., dissenting) (*quoting* 1 Annals of Cong. 914 (1789); citations omitted). Justice Rehnquist then documented some of the debate over the resolution, including objections on what today would be called establishment grounds. *Id.* at 101 (Rehnquist, J., dissenting). This shows that the First Congress did not simply engage in inconsistent action. Rather, they heard the minority view and rejected it.

Justice Rehnquist then described some of the final language of the Joint Resolution and quoted the Thanksgiving proclamation ultimately issued by President Washington:

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President “recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.” The Presidential Proclamation was couched in these words:

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all,

whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Id. at 101-03 (Rehnquist, J., dissenting) (*quoting* 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, at 64 (1897); citations omitted). The opening words of this same Thanksgiving Proclamation are these: “Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor”

http://avalon.law.yale.edu/18th_century/gwproc01.asp (last visited Aug. 11, 2011).

Justice Rehnquist also noted the views of the constitutional authority,

Thomas Cooley:

But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when

visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse

Thomas Cooley, *Treatise on the Constitutional Which Rest Upon the Legislative*

Power of the States of American Union, 470-71 (1868) (quoted in *Wallace*, 472

U.S. at 105-06 (Rehnquist, J., dissenting)). Here Cooley was addressing the

acknowledgment of God Himself. It naturally follows that if government can

acknowledge God, it can acknowledge religion; and Justice Rehnquist went on to

quote Cooley's discussion of the "public recognition of religious worship."

Wallace, 472 U.S. at 106 (Rehnquist, J., dissenting) (citation omitted).⁷

In sum, acknowledgement is not a hard concept. It meant then exactly what it means now—to recognize. Government can recognize the reality of God and the importance of religion.

C. Accommodation of Religion is Permitted.

Government can go a step beyond acknowledging religion to accommodation of various sects' religious views and acts. This approach was

⁷ This same quotation from Cooley also supports the concept of encouragement which this Brief will address below.

discussed by George Washington. “[I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.” Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in *George Washington on Religious Liberty and Mutual Understanding* 11 (E. Humphrey ed.1932).

And although individual justices have weighed in, disagreeing that such accommodation is *required*, the modern Supreme Court has agreed that it is constitutionally *permissible*. See, *City of Boerne v. Flores*, 521 U.S. 507, 562 (1997) (O’Connor, J., dissenting), and *id.* at 541-44 (Scalia, J., concurring in part). These accommodations include exemptions from military service and from oath taking, among others. *Id.* at 560-64 (O’Connor, J., dissenting); *id.* at 541-44 (Scalia, J., concurring in part).

Like acknowledgement, accommodation is not a hard concept. It means that the government changes what it otherwise might do. It generally takes the form of granting exemptions.

D. Encouragement of Religion is Permitted.

Governments can go yet further and encourage religion. Probably the most famous articulation of the encouragement principle is that found in the Northwest

Ordinance, which states: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” <http://www.earlyamerica.com/earlyamerica/milestones/ordinance/text.html> (last visited Aug. 11, 2011).

However, the Founders did not just talk about encouraging religion; they actually did so. Here we can return to then-Justice Rehnquist’s *Wallace v. Jaffree* dissent. There he noted that

[a]s the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson’s treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe’s Roman Catholic priest and church. It was not until 1897, when aid to sectarian education for Indians had reached \$500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. This history shows the fallacy of the notion found in *Everson* that “no tax in any amount” may be levied for religious activities in any form.

Wallace, 472 U.S. at 103-04 (Rehnquist, J., dissenting) (footnote and citations omitted).

Justice Rehnquist went on to note even more detail about Jefferson’s treaty:

The treaty stated in part: “*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church.” From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land “for the Society of the United Brethren, for propagating the

Gospel among the Heathen.” The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson. Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. In 1833 Congress authorized the State of Ohio to sell the land set aside for religion and use the proceeds “for the support of religion . . . and for no other use or purpose whatsoever”

Id. at 104 n.5 (Rehnquist, J., dissenting).

Thus, encouragement goes beyond acknowledging God and religion. It goes beyond accommodating a religious sects’ request for an accommodation or exemption. It even goes beyond pro-actively extending accommodations without being asked. It involves looking for ways to encourage the population to engage in religious pursuits. It certainly includes proclamations that encourage such actions. Sometimes the vehicle of encouragement will be one sect; sometimes a different one. The Framers truly believed that “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind” Therefore, government could encourage religion.

E. The Historic Concepts Persist in Modern Establishment Clause Jurisprudence.

Although current Establishment Clause jurisprudence has retreated from some of these last historical examples, the history lesson sets the stage for an important reality: even though watered down, the concepts of acknowledgement,

accommodation, and even encouragement have not fallen out of the Supreme Court's Establishment Clause jurisprudence.

For example, the acknowledgement of both God and the role of religion in society continues to be addressed. For instance, in *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), the Court upheld Nebraska's legislative chaplaincy program. In so doing the Court noted that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not . . . an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." This principle was reiterated again in *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (plurality), when Chief Justice Rehnquist quoted from the Court's earlier Establishment Clause case, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984): "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."

Similarly, the concept of accommodation is alive and well and was discussed as recently as in *Salazar v. Buono*, 130 S. Ct. 1803, 1817-19 (2010) ("The land-transfer statute embodies Congress's legislative judgment that this dispute is best resolved through a framework and policy of *accommodation* for a symbol [a memorial cross] that, while challenged under the Establishment Clause, has complex meaning beyond the expression of religious views," and "The

Constitution does not oblige government to avoid any public acknowledgment of religion's role in society. Rather, it leaves room to *accommodate* divergent values within a constitutionally permissible framework.” (emphasis added) (citations omitted)). And *Lynch v. Donnelly* speaks to this concept, too: “Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” 465 U.S. at 673.

Also, *Van Orden* highlighted the Supreme Court's encouragement of religion: “When the state encourages religious instruction . . . it follows the best of our traditions.” 545 U.S. at 684. These words first appeared in *Zorach*, 343 U.S. at 313-14 (garnering the votes of Vinson, C.J., & Reed, Douglas, Burton, Clark, & Minton, JJ.). Since then the words have been quoted in whole or in part in twelve other Supreme Court opinions.⁸

⁸ See *Van Orden v. Perry*, 545 U.S. 677, 684 (2005) (Rehnquist, C.J., writing for the plurality, joined by Scalia, Kennedy & Thomas, JJ.); *Board of Educ. v. Grumet*, 512 U.S. 687, 744 (1994) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400-01 (1993) (Scalia & Thomas, JJ., concurring); *Allegheny County v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, White & Scalia, JJ., & Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 554 (1986) (Burger, C.J., & White & Rehnquist, JJ., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (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, JJ., concurring in the judgment in part and dissenting in part); *Committee for Pub.*

Finally, also as noted above, sometimes the Court has addressed more than one of the concepts together:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. . . . [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. Clauson, 343 U.S. 306, 313-314 (1952).

F. The School’s Policy Falls Short of Establishing a Religion.

The point for the present case is obvious, but important: Wherever on the continuum from acknowledgement to accommodation to encouragement this Court might place the School’s policy of cooperating with *any* release-time groups to accept credits earned for religious instruction, that policy does not violate the Framers’ principles of establishment.

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 v. Kurtzman*, 403 U.S. 602, 661 (1971) (White, J., concurring in two consolidated cases and dissenting in two consolidated cases); and *Walz v. Tax Com. of New York*, 397 U.S. 664, 671 (1970) (Burger, C.J., & Black, Stewart, White, & Marshall, JJ.). All but Justice O’Connor’s are positive invocations of this proposition. Justice O’Connor noted that the proposition was inapposite as used by appellants.

Importantly, the School here has merely encouraged religion by cooperating with religious groups to give the program an opportunity to be successful. This is evident by the email correspondence Moss cites. (Opening Br. at 16-17.) Superintendent White responded to a SCBEST representative encouraging him to “tell me about the successes of the Released Time program *and how we might can make it better.*” (Opening Br. at 16 (emphasis added by Moss).) Superintendent White later noted to SCBEST that he is “interested in growing [the] program.” *Id.* at 17. In other words, at most, White was *encouraging* the success of a religious program, an act far removed from establishment.

Although this Court is bound by the Supreme Court’s modern day precedents, those precedents are not totally divorced from their historic roots. If the acknowledgment, accommodation, and encouragement of religion are permissible (and the writings and the actions of The Founders demonstrate that they are), then religion cannot possibly be established merely when a public school accepts one or two credits earned for religious instruction. The School simply accommodates the religious instruction and encourages its success among those who choose to participate in it.

CONCLUSION

For the foregoing reasons and those stated in the School's Brief, the judgment of the District Court should be affirmed.

Respectfully submitted,
This 11th day of August, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 6,997 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

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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 *Moss, et al. v. Spartanburg*, No. 11-1448, on all required counsel of record through the CM/ECF system.

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