No. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THE FREEDOM FROM RELIGION FOUNDATION; PAT DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3; JAN DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3,
Plaintiffs-Appellants

v.

UNITED STATES; THE STATE OF NEW HAMPSHIRE; MURIEL CYRUS; A.C., Minor; J.C., Minor; K.C., Minor; S.C., Minor; E.C., Minor, R.C., Minor; A.C., Minor; D.P., Minor; MICHAEL CHOBANIAN; MARGARETHE CHOBANIAN; MINH PHAN; SUZU PHAN; KNIGHTS OF COLUMBUS,
Defendants-Appellees

DRESDEN SCHOOL DISTRICT; HANOVER SCHOOL DISTRICT,
Defendants

On Appeal from the United States District Court for the District of New Hampshire, Hon. Steven J. McAuliffe, Civil Action No. 1:07-cv-356

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of *Defendants-Appellees*
Supporting affirmance

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FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae, WallBuilders, Inc., has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities:

INTEREST OF AMICUS[1]

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority in American history and the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812. Lastly, due to his expansive work and knowledge in American history, Mr. Barton has received numerous national and international awards that have distinguished him as a leading scholar in his field.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. While the role of religion in America's public schools has changed significantly

[1] No counsel for any party authored this brief in whole or in part and that no monetary contribution for preparing this brief was received from any person or entity other than *Amicus Curiae*.

over the years, and while historical practices no longer always govern there, WallBuilders desires to see religion treated neutrally, rather than with hostility. Even if the Pledge of Allegiance is seen merely as an acknowledgement of the historical role of religion, WallBuilders believes it is important to permit such acknowledgement.

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

SUMMARY OF THE ARGUMENT

In evaluating the constitutionality of the recitation of the Pledge of Allegiance in public school classrooms, the court below noted six putative Establishment Clause "tests" proffered by the Appellants (hereinafter "Freedom From Religion Foundation") and discussed the approaches of three federal courts of appeals to the question. Yet, in its analysis, the court below failed to mention a binding Supreme Court precedent, *Marsh v. Chambers*, 463 U.S. 783 (1983).

Marsh arguably controls this case and at a minimum should inform this Court's analysis. Under *Marsh*, the recitation of the Pledge is constitutional because it falls within the long-standing tradition of governmental acknowledgment of the role of religion in society and of God.

ARGUMENT

I. THE COURT BELOW CORRECTLY UPHELD THE VOLUNTARY RECITATION OF THE PLEDGE OF ALLEGIANCE, BUT DID SO WITHOUT NOTING A RELEVANT SUPREME COURT PRECEDENT.

The court below noted six different "tests" that the Freedom From Religion Foundation argue are employed by the United States Supreme Court in assessing the constitutionality of Establishment Clause claims. *Freedom from Religion Found. v. Hanover Sch. Dist.*, 665 F. Supp. 2d 58, 63 (D.N.H. 2009). The court also summarized the approaches of three federal courts of appeals. *Id.* Having done so, the court below chose to analyze the New Hampshire Pledge Statute under the three-pronged test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *id.* at 63-69, and to review the approaches of the three federal courts of appeals, *id.* at 69-70. The court's application of the *Lemon* test did reach the right conclusion, ruling that the New Hampshire Pledge Statute was constitutional. However, in light of the abundance of historical references by governmental institutions to God, the court below could have—and should have—based its opinion on historical acceptance test outlined by the Supreme Court in *Marsh v. Chambers*, 463 U.S. 783 (1983). Despite the numerous approaches summarized and analyzed by the court below, it inexplicably ignored *Marsh*. This Brief will explain why *Marsh* is

applicable and demonstrate that the recitation of the Pledge is constitutional under *Marsh*.

II. THE RECITATION OF THE PLEDGE OF ALLEGIANCE SHOULD BE EVALUATED AND UPHELD UNDER *MARSH v. CHAMBERS* BECAUSE ITS REFERENCE TO GOD IS "DEEPLY ROOTED IN OUR HISTORY AND TRADITION."

While the court below correctly decided that the voluntary recitation of the Pledge of Allegiance in public schools was constitutional, it also could have relied on the historical acceptance test articulated in *Marsh*, a binding precedent of the United States Supreme Court. The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted).

Indeed, of the three federal appellate opinions examined by the court below that addressed the constitutionality of the Pledge of Allegiance two of them—the Fourth Circuit in *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 402-06 (4th Cir. 2005) (upholding the Virginia Pledge statute against an Establishment Clause challenge) and the Seventh Circuit in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437, 445-48 (7th Cir. 1992) (upholding the Illinois Pledge statute)—engaged in historical analyses as a significant part of their decisions. Only the Ninth Circuit in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2002) did not do so. However, the Ninth Circuit has recently—and

subsequent to the issuance of the opinion below—examined the Pledge again. On this occasion, the Ninth Circuit both upheld the use of the Pledge in a public school and engaged in extensive historical analysis. *Newdow v. Rio Linda Union School District*, Nos. 05-17257, 05-17344, 06-15093, 2010 U.S. App. LEXIS 5201, slip op. at *36-64 (9th Cir. Mar. 11, 2010).

A. The Pledge of Allegiance Should be Evaluated using the Historical Acceptance Test articulated in *Marsh v. Chambers*.

The historical acceptance test of *Marsh* recognizes the constitutionality of what Chief Justice Rehnquist described as "'an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). This deeply embedded practice of recognizing the role of God in our Nation's heritage has been repeatedly recognized by the Supreme Court:

> Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," and that "the history of man is inseparable from the history of religion[.]" This recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. Such a practice, we thought, was "deeply embedded in the history and tradition of this country."

Van Orden, 545 U.S. at 687-88 (footnote and citations (including two to *Marsh*) omitted).

By emphasizing *Marsh's* analysis, this brief adds an additional vantage point on the constitutionality of the New Hampshire Pledge Statue. In fact, this case rightly ought to be controlled by *Marsh;* but at a minimum, the *Marsh* analysis can reinforce analyses under other tests.

It is important to note that some courts have incorrectly tried to limit *Marsh* to legislative prayer cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, that has not been the Supreme Court's approach. Indeed, that Court has not even limited *Marsh* to Establishment Clause cases. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (evaluating history of federal use of state executives in law enforcement).

Lower courts have also applied *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez,* 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

Further, where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. Courts have used the *Marsh*

analysis in a wide variety of cases including those evaluating the constitutionality of the Pledge of Allegiance. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (upholding the Pledge of Allegiance in a public school; *ACLU v. Capitol Square Review & Advisory Board*, 243 F.3d 289 (6th Cir. 2001) (upholding the display of the Ohio state motto containing a religious inscription); *ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); and *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986) (upholding religious displays); *Bacus v. Palo Verde Unified School District Board of Education*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998) (upholding prayer in other deliberative bodies); *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) (upholding a prayer room at the Illinois statehouse); *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding public proclamations with "religious" content); *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986) (upholding the dating of government documents with "A.D."); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997) (upholding religious expression in the form of an invocation and benediction at a public university graduation ceremony).

Of course, the most significant consideration here is that the Supreme Court has never overturned *Marsh*, either explicitly or *sub silentio*. The Court could have

done just that in *Lee v. Weisman*, 505 U.S. 577 (1992), but instead chose merely to distinguish that case.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislative sessions. 463 U.S. at 786. The Court declared that prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.*, and that it had "become part of the fabric of our society," *id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court stated that the *actions* of the First Congressmen corroborated their intent that prayers before legislatures not contravene the Establishment Clause. *Id*. at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

Some courts have misapplied *Marsh* and thereby limited its applicability, as was the case in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." However, the prevailing legal understanding is that the Pledge of Allegiance is part of a larger tradition that *does* have an adequate

historical pedigree and should be upheld as constitutional using the historical acceptance test in *Marsh*.

B. The Pledge of Allegiance Should be Upheld Because it is Part of a Long-Standing Tradition of Governmental Acknowledgement of God and of the Role of Religion in Society.

The Pledge of Allegiance is part of a long-standing tradition of governmental acknowledgement of the role of religion in American life. When the First Amendment was drafted, officials of our new government participated in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

The *Marsh* Court found this history relevant in holding that legislative prayer was a constitutional practice. That Court noted that just three days after the First Congress authorized appointment of paid chaplains to open Congressional sessions with prayer, the same Congress finalized the language of the First Amendment. *Marsh*, 463 U.S. at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true for the executive as well. George Washington, in his First Inaugural Address, also acknowledged America's religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who

> presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government . . . .

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897).

In fact, it was the First Congress that urged President Washington to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging "'the many signal favors of Almighty God.'" *Marsh*, 463 U.S. at 790, n.9 (quoting H.R. Jour., at 123).

As the Supreme Court has noted, this resolution was passed by Congress on the *same day* that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Id*. President Washington did set aside November 26, 1789 as a day for people to "unite in most humbly offering [of their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions . . . ." I *Messages and Papers* at 56.

Furthermore, many of these acknowledgements go beyond recognizing religion's role in American life. They directly acknowledge God Himself. The phrase "one Nation under God" is consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty. Examples too numerous

to mention could be cited, but the following list illustrates the wealth of this tradition:

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[2]
- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."
- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[3]
- *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion

[2] Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).
[3] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[4]

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[5]
- *Abraham Lincoln* frequently made public expressions of religious belief. One example is found in a Proclamation he issued August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and bring down plentiful blessings upon our country."[6]

Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs that continues to this day.

Therefore, whether the Pledge of Allegiance is characterized as acknowledging the role of religion in American life generally or as acknowledging God, it is well within the long-standing tradition articulated in *Marsh*. As noted above, the historical acceptability and longevity of a practice should mean that we,

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[4] *Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Six other examples, from Washington can be found at *id.* at 43, 47, 131, 160, 191, 213.
[5] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).
[6] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

today, begin our analysis with the presumption that these practices, or those sufficiently similar, are constitutional.

A decision supporting the view of the Freedom From Religion Foundation would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations. Throughout America's history our government has openly declared its faith in, and reliance upon, God.

This Court should decide this case in light of that history. The voluntary recitation of the Pledge of Allegiance in public schools will no more endanger the Establishment Clause than do the numerous other historical references to God's providence over the course of our nation. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984).

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. As Judge Williams wrote in the majority opinion for the Fourth Circuit Court of Appeals in *Myers v. Loudoun County Schools*, 418 F.3d 395, 405 (2005):

> If the founders viewed legislative prayer and days of thanksgiving as consistent with the Establishment Clause, it is difficult to believe they would object to the Pledge, with its limited reference to God. The Pledge is much less of a threat to establish a religion than legislative prayer, the

open prayers to God found in Washington's prayer of thanksgiving, and the Declaration of Independence.

CONCLUSION

For the foregoing reasons and for other reasons contained in the Briefs of the various Appellees, this Court should affirm the judgment of the court below under *Marsh v. Chambers* or, at a minimum, allow *Marsh* to inform this Court's affirmance.

Respectfully submitted,
This 15th day of April 2010

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains 3,090 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2010, a copy of the Brief *Amicus Curiae* of WallBuilders, Inc., was served by use of the Court's CM/ECF system to the following counsel:

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Please note that on November 23, 2009, Attorney David Bradley, counsel for the School District Defendants, requested that the court and all parties remove his name from the service list, and the Court issued an order to that effect on January 22, 2010. Therefore, a copy of the United States' brief will not be mailed to Attorney David Bradley.

s/ Steven W. Fitschen