

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTHONY HINRICHS, HENRY GERNER, LYNETTE HEROLD, et al.,

Plaintiffs-Appellees,

v.

BRIAN BOSMA, in his official capacity as Speaker of the
House of Representatives of the Indiana General Assembly,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division.
No. 05 C 813 – David F. Hamilton, *Judge.*

BRIEF OF ANTI-DEFAMATION LEAGUE, AMERICAN JEWISH COMMITTEE,
AND INDIANAPOLIS JEWISH COMMUNITY RELATIONS COUNCIL
AS *AMICI CURIAE* SUPPORTING APPELLEES

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INTEREST OF AMICI CURIAE

I. ANTI-DEFAMATION LEAGUE.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League (“ADL”) is today one of the world’s leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL’s core beliefs is strict adherence to the separation of Church and State embodied in the Establishment Clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy. ADL emphatically rejects the notion that the separation principle is inimical to religion, and believes, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can attest that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: “[A] union of government and religion tends to destroy government and to degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

II. AMERICAN JEWISH COMMITTEE.

The American Jewish Committee (“AJC”), a national human relations organization with over 150,000 members and supporters and 32 regional chapters, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of AJC that those rights will be secure only when the rights of all

Americans are equally secure. AJC strongly supports the constitutional principle of the separation of Church and State embodied in the Establishment Clause of the First Amendment. This principle, AJC believes, protects the religious freedom of members of minority faiths; protects the freedom of conscience of non-believers; and protects the government from debilitating power struggles among religious groups. AJC has participated as amicus in a wide array of cases in support of this vital principle.

III. INDIANAPOLIS JEWISH COMMUNITY RELATIONS COUNCIL.

The Indianapolis Jewish Community Relations Council (“JCRC”) is the public policy and intergroup relations arm of the organized Jewish community and a constituent agency of the Jewish Federation of Greater Indianapolis. JCRC is charged with safeguarding the rights of Jews here, in Israel and around the world. JCRC works to protect, preserve and promote a just American society, one that is democratic and pluralistic. One of JCRC’s core missions is to strengthen the principle of the separation of Church and State, a principle JCRC believes forms the bedrock of American democracy.

SUMMARY OF THE ARGUMENT

Appellant Bosma (hereinafter, the “Speaker”) seeks reversal of the District Court’s order enjoining him from continuing to permit the majority of legislative sessions to be opened with sectarian Christian prayer. Amici ADL, AJC, and JCRC (collectively, “Amici”) believe that the Speaker’s arguments on appeal are deeply flawed because they rest on an incomplete historical picture of the principle of non-

sectarianism that has guided public prayer in America since our nation's birth. Amici seek to complete the picture with three principal arguments.

First, the District Court's order prohibiting "sectarian" legislative prayer is firmly grounded in our nation's tradition of religious inclusiveness. The Speaker misinterprets the Founding Fathers' public prayers as a blessing on sectarian legislative prayer when they are the opposite. As Amici demonstrate below, it was the Founders who began the tradition of ecumenical public prayer that continues to this day. The Founders disapproved of "sectarian" public prayer—in the context of their time. In the America of our Founders—populated almost exclusively by Protestant Christians—impermissible "sectarian" public prayer was that which distinguished between different Protestant sects. But the Founders correctly anticipated that America would grow ever more religiously diverse and that what it means to be "sectarian" would evolve accordingly, as, in fact, it has. "Sectarian" prayer as it is understood today—*i.e.*, prayer that includes beliefs unique to one faith, thus excluding those of other faiths—has no place in legislative halls.

Second, distinguishing between sectarian and non-sectarian prayers is not, as the Speaker asserts, an "impossible" task that requires courts to make impermissible "theological judgments." To distinguish between sectarian and non-sectarian public prayers is only to distinguish between the prayers that include and those that exclude. It thus involves a sociological judgment, not a theological one. Far from being impossible, the distinction is one that both courts and state legislatures have commonly made for decades.

Finally, the District Court's order is not, as the Speaker maintains, discriminatory against Christians. Amici demonstrate below that Jews, like Christians, have "sectarian" prayers. These prayers are no more permissible under the District Court's order than the sectarian Christian prayers the District Court had before it.

ARGUMENT

I. THE DISTRICT COURT'S PROHIBITION ON SECTARIAN PRAYER IS FIRMLY GROUNDED NOT ONLY IN SUPREME COURT PRECEDENT, BUT IN THIS NATION'S HISTORY.

The Speaker's argues that state legislators should be empowered to invite clergy to open the majority of legislative sessions by invoking the name of Jesus Christ or offering other sectarian Christian prayers. The Speaker thus seeks a dramatic expansion of *Marsh v. Chambers*. As set forth below, this sort of legislative prayer runs contrary to a tradition of non-sectarian public prayer that began with the Founders and continues today around the nation.¹ More significantly, sectarian legislative prayer is fundamentally incompatible with any modern notion of inclusive civic prayer in a country as religiously diverse as ours has become since its birth.

¹ Justice Scalia has specifically noted the "longstanding American tradition of nonsectarian prayer to God at public celebrations generally." *Lee v. Weisman*, 505 U.S. 577, 632 (1992) (Scalia, J. dissenting).

A. This Court Should Go No Further In Countenancing Any Establishment Of Religion Than Did The Supreme Court In *Marsh v. Chambers*.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court held that legislative prayer *per se* does not run afoul of the First Amendment’s Establishment Clause. This is contrary to the position some of Amici here advocated as *amici curiae* in *Marsh*. Nevertheless, *Marsh* is the law of the land, in all of its particulars. The *Marsh* court was very clear that legislative prayer is only constitutionally permissible if “there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-95. As the Court later elucidated in *County of Allegheny v. ACLU*, the legislative prayers in *Marsh* did not violate this principal because the chaplain there had “removed all references to Christ.” 492 U.S. 573, 603 (1989) (citations omitted). The *Allegheny* court emphasized that “not even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief.” *Id.* *Marsh* thus establishes the outer limits of constitutionally permissible legislative prayer, the most fundamental of which is that the prayer must be non-sectarian. Not a single member of the *Marsh* court (or any other court since) suggested that *Marsh* did not go far enough in permitting legislative prayer.

As explained more fully in Appellees’ brief, the legislative prayer at issue here stands in stark contrast to that permitted under *Marsh*. This case concerns legislative prayer that is unabashedly sectarian Christian prayer. The “substantial majority” of the prayers the Speaker permits are “offered in the name of Jesus,

Jesus Christ, the Savior, and/or the Son.” (District Court’s Order, App. 8A.) The Speaker bristles at the notion of restricting in any way the content of these prayers on the basis that some clergy feel compelled to pray at all times in Jesus Christ’s name. (See Appellant’s Br., pp. 53-54.) Amici reject the suggestion that the dictates of conscience of these few can—in the halls of government—trump those of the many whose faith will not permit them to be led in prayer in Jesus Christ’s name. Restricting the sectarian content of legislative prayer is not, as the Speaker asserts, inimical to all religion. Indeed, *Marsh* holds that such restrictions are the only way legislative prayer can be constitutional.

This Court should decline the Speaker’s invitation to dramatically expand the limits on legislative prayer established by *Marsh*. As discussed below, expanding *Marsh* to permit sectarian Christian legislative prayer is wholly inconsistent with the Founders’ intention that public prayer be non-sectarian and, perhaps more significantly, with the modern reality of religious diversity in this country.

B. Sectarianism In Governmental Speech Conflicts With Our Nation’s Tradition Of Religious Inclusiveness.

The Speaker’s suggestion that the Framers would have approved of opening the majority of present-day legislative sessions with sectarian Christian prayers (see Appellant’s Br., pp. 10, 25-28) is misguided for at least two reasons. First, the Founding Fathers intended governmental speech to be inclusive of all faiths, and they specifically disapproved of “sectarian” public prayer as they understood it at the time. Second, what the courts understand to be “sectarian” has evolved in tandem with the dramatic expansion of religious diversity in this country. Thus,

while the guiding principle that public prayer must be non-sectarian remains constant, that principle must apply to restrict “sectarian” legislative prayer as we know it today and not as the Founders understood it two centuries ago.

1. The Founders Eschewed “Sectarian” Prayers In Public Settings.

The Speaker argues that opening the majority of legislative sessions with prayers invoking Jesus Christ’s name comports with the “unique history” of legislative prayer because the Founders “routinely heard” such prayers in legislative sessions. (Appellant’s Br., pp. 25, 28.) Thus, the Speaker concludes, such prayers cannot be impermissibly “sectarian” under *Marsh*. (*See id.*, pp. 31, 32-33.) This argument is deeply flawed. It ignores both the historical context of the Founders’ public prayers and the principle of non-sectarianism that guided them. As demonstrated below, put in the proper historical context, the significance of the prayers the Founders “routinely heard” is not that they invoke Jesus Christ’s name—it is that they were inclusive of the religious beliefs of virtually all Americans at the time.

The Founders inhabited a nation populated almost exclusively by Protestant Christians. *See* Edwin Gaustad & Leigh Schmidt, *THE RELIGIOUS HISTORY OF AMERICA* 49, 74 (HarperCollins 2002). As a result of this, “sectarian” prayer as the Founders understood it was a comparatively narrow concept—it was simply prayer that distinguished between the different Christian denominations represented in America at the time. A perfect illustration of this is the exchange between Continental Congress delegates John Jay and Samuel Adams quoted by the District

Court and the Speaker. That exchange does not, as the Speaker contends, signify the Founders approval of “sectarian” legislative prayer. In fact, it signifies precisely the opposite conclusion. Specifically, when Jay “opposed legislative invocations on the ground that Anglicans, Congregationalists, Presbyterians, Quakers, and Anabaptists—notably, all Christian denominations—were so divided in religious sentiments that they could not join in the same act of worship,” (Appellant’s Br., p. 26 (internal quotation omitted)), he was objecting to sectarian public prayer as he understood it. That is, he was objecting to public prayer showing preference for one denomination over another during a time in our history when virtually all Americans belonged to Christian denominations. When Adams responded, famously, that “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country” (*id.* at pp. 25-26), he was not, as the Speaker suggests, approving of Christian legislative prayer offered in the presence of non-Christians. Rather, Adams, like Jay, was endorsing non-sectarian legislative prayer offered by a “friend to his country” that reflected the values common to all Americans. At that time in our history, a belief in Jesus as the Messiah and Son of God was common to the religious beliefs of virtually all Americans, so a prayer in Jesus Christ’s name was non-sectarian prayer as the Founders understood it.²

² Even a generation after the Founders, this more limited understanding of “sectarianism” persisted. Thus, President Andrew Jackson could write:

I am no sectarian, though a lover of the Christian religion. I do not believe that any who shall be so fortunate as to be received to heaven though the atonement of our blessed Savior will be asked whether they belonged to the

Moreover, the Founders anticipated that America would become ever more religiously diverse and that the concept of “sectarianism” would expand accordingly. See Jon Meacham, *AMERICAN GOSPEL* 246 (Random House 2006) (The Founders “expected their system to be tested by people of many different creeds ...”). As George Washington observed:

The bosom of America [is to be] open to receive ... the oppressed and persecuted of all nations and religions; whom we shall welcome to a participation of all our rights and privileges ... they may be Mohometans, Jews or Christian of any sect, or they may be atheists.

George Washington, *THE FOUNDERS ON RELIGION* 120-121 (Hutson, ed. 2005).³ By invoking the image of a Founders’-era America designed to be a “Christian nation,” the Speaker falls prey to what scholars have called a “legend” and “a gross

Presbyterian, the Methodist, the Episcopalian, the Baptist, or the Roman Catholic [faiths]. All Christians are Brethren, and all true Christians know they are such because they love one another.

Jon Meacham, *AMERICAN GOSPEL* 112 (Random House 2006) (quoting Andrew Jackson, *CORRESPONDENCE OF ANDREW JACKSON* 4:447 (John Spencer Bassett, ed., 1929)).

³ Washington’s rhetoric was the rule and not the exception. Language reflecting the Founders’ anticipation of a more expansive understanding of non-sectarianism in the future was common in their rhetoric both at home and in dealing with other nations. See, e.g., John Adams, *THE FOUNDERS ON RELIGION* 127 (Hutson, ed. 2005) (“It has pleased the Providence of the first Cause, the Universal Cause, that Abraham should give religion not only to Hebrews but to Christians and Mahomitans, the greatest part of the civilized world.”); Treaty of Peace and Friendship between the United States and the Bey and Subjects of Tripoli of Barbary, 1797, *available at* http://www.stephenjaygould.org/ctrl/treaty_tripoli.html. (“As the Government of the United States is not, in any sense, founded on the Christian religion; as it has in itself no character of enmity against the law, religion, or tranquility of Musselmen [Muslims] ... it is declared by the parties that no pretext arising from religious opinion shall ever produce an interruption of harmony existing between the two countries.”).

distortion of history.” See Meacham, *supra*, at 18; William Martin, SECULAR STATE, RELIGIOUS PEOPLE—THE AMERICAN MODEL 6 (Rice Univ. Apr. 2006). As a newly published work on the subject has declared, “such talk is precisely what the Founders, who took care to root the country’s rights in the gifts of ‘Nature’s God,’ hoped to avoid.” Meacham, *supra*, at 219. For this reason, the Founders steadfastly refused to incorporate Christian imagery into even the cornerstones of their new government:

Properly understood, the God of public religion is not the God of Abraham or God of the Holy Trinity. The Founding Fathers had ample opportunity to use Christian imagery and language in the Declaration of Independence and Constitution, but did not. At the same time, they were not absolute secularists. They wanted God in American public life, but given the memory of religious warfare that could engulf and destroy whole governments, they saw the wisdom of distinguishing between private and public religion. In churches and in homes, anyone could believe and practice what he wished. In the public business of the nation, however, it was important to the Founders to speak of God in a way that was unifying, not divisive. “Nature’s God” was the path they chose, and it has served the nation admirably.

Id. at 22-23. Other scholars have come to the same conclusion. See, e.g., Martin, *supra* p. 10, at 6, 11 (“That gathering of grave young men [at the Constitutional Convention] contained some remarkable thinkers and fine writers. Had they wanted to establish a Christian nation, they could have stated the matter quite plainly.”).

Meacham’s observation that the Founders were keen to avoid the sort of sectarian strife that religious divisions had produced in Europe is deeply embedded in our constitutional jurisprudence. Time and again the Supreme Court has recognized the Founders’ deep commitment to avoiding sectarian strife. Indeed, it

is the very reason they separated Church and State. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8-11 (1947) (tracing the history of “turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy” that led the Founders to adopt the Religion Clauses); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (“[P]olitical divisions along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.”); *Zelman v. Simmons-Harris*, 535 U.S. 612, 725 (2002) (Breyer, J., dissenting) (“In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife.”); *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J. dissenting) (“[T]he Founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife.”).

In short, history shows that the Founders did not give their blessing to sectarian legislative prayer but, rather, avoided public prayer that distinguished among Americans of different faiths. Moreover, as set forth below, the Founders accurately predicted America’s ever-increasing religious diversity and, along with it, the evolution of what it means to be “sectarian.”

2. As The Framers Anticipated, What Is Considered “Sectarian” Has Evolved As This Nation Has Become More Religiously Diverse.

Since our founding, America has evolved from an almost exclusively Christian Protestant nation to a people of enormous religious diversity. As

illustrated below, the courts' interpretation of what is "sectarian" has continually evolved to reflect this social change.

At the start of the 17th Century, religious diversity in America meant diversity within the leading Protestant religions of Methodist, Baptist, Presbyterian, Lutheran, Disciples of Christ, and Congregational. Apart from the exceptional Roman Catholic, virtually all of the colonialists were Christian Protestants. *See* Gaustad & Schmidt, *supra* p. 7, at 49, 74. Expansion into the West brought with it a corresponding expansion in religious diversity. Catholicism began flourishing with the Louisiana Purchase in 1803 and continued to grow as a result of a large influx of Irish immigrants. *Id.* at 169-70. Judaism also experienced some growth and, by the mid-19th Century, there were more than fifty synagogues across America. *Id.* at 176. Following the Civil War, Confucianism, Taoism, Buddhism, and Russian Orthodoxy also began to take hold in California. *Id.* at 181-83.

However, even as non-Christian religions began to flourish, until the mid-20th Century, our nation's population was still overwhelmingly a Christian one, and the courts reflected this social dynamic. On one hand, consistent with the predominantly Christian make-up of our population, courts frequently analyzed "sectarianism" exclusively in terms of distinguishing between Christian denominations, either Protestant or Catholic. *See, e.g., State v. Hallock*, 16 Nev. 373, 1882 WL 3785, at *9 (Nev. Jan. Term, 1882) (referring to "sectarian" as either Catholic or Protestant in holding that public funds could not be used for sectarian

instruction in schools or orphanages); *Hysong v. Sch. Dist. of Gallitzin Borough*, 30 A. 482, 484 (Pa. 1894) (nuns teaching public schools while wearing habits was not, in and of itself, “sectarian teaching” because “[m]inisters or preachers of many Protestant denominations wear a distinctively clerical garb.”); *Hackett v. Brooksville Graded Sch. Dist.*, 87 S.W. 792, 793 (Ky. 1905) (holding prayer in Christ’s name was not “sectarian” because “neither the form nor substance of the prayer complained of seem to represent any peculiar view or dogma or any sect or denomination ...”); see also *Zelman*, 536 U.S. at 720 (Breyer, J., dissenting) (“Those practices [of teaching Protestant religious ideals in public schools in the early years of the Republic] may have wrongly discriminated against members of minority religions, but given the small number of such individuals, the teaching of Protestant religions in schools did not threaten serious social conflict.”). By the same token, as America’s religious landscape began to diversify in the late 19th Century and the early 20th Century so, too, did courts begin to expand their understanding of “sectarianism” to include distinguishing between Christian and non-Christian denominations. For example, though many courts still viewed the Bible as a non-sectarian book,⁴ some recognized it as “sectarian” on the basis that it gives preference to the beliefs of Christians over Jews. See *State v. Dist. Bd. of Sch. Dist. No. 8*, 44 N.W. 967, 974-75 (Wis. 1890);

⁴ See *Donahoe v. Richards*, 38 Me. 379, 1854 WL 1994, at *3 (Me. 1854), *Spiller v. Inhabitants of Woburn*, 12 Allen 127, 1866 WL 6359, at *2 (Mass. 1866), *Pfeiffer v. Bd. of Educ.*, 77 N.W. 250, 251 (Mich. 1898), *Moore v. Monroe*, 20 NW 475, 476 (Iowa 1884), *Billard v. Board of Educ.*, 76 P. 422, 423 (Kan. 1904), *McCormick v. Burt*, 95 Ill. 263, 1880 WL 10033, at *1-2 (Ill. 1880), *Church v. Bullock*, 100 S.W. 1025, 1027 (Tex. Civ. App. 1907).

State v. Schere, 91 N.W. 846, 847 (Neb. 1902); *Herold v. Parish Bd of Sch. Dirs.*, 68 So. 116, 120-21 (La. 1915).⁵

The mid-20th Century marked the beginning of the extreme expansion in diversity that transformed America into the religious tapestry we know today. Whereas John Jay, Samuel Adams, and Andrew Jackson spoke of sectarianism in exclusively Christian terms (*see, infra*, pp. 8-9), President Dwight D. Eisenhower’s rhetoric now included Christians and Jews alike:

In other words, our form of government has no sense unless it is founded in a deeply felt religious faith, and I don’t care what it is. With us of course it is the Judeo-Christian concept but it must be a religion that [believes] all men are created equal.”

Meacham, *supra* p. 9, at 177 n.176 (internal punctuation omitted) (quoting Eisenhower’s speech at the Waldorf-Astoria, N.Y. TIMES, Dec. 23, 1952).

Even as Eisenhower spoke about “the Judeo Christian concept,” American religious diversity was outgrowing that moniker. By the mid 20th Century, the “Protestant-Catholic-Jew” social construct became far too narrow. *See* Gaustad & Schmidt, *supra* p. 7, at 288. As the Immigration Act of 1965 eliminated quotas

⁵ Amicus Becket Fund for Religious Liberty makes much of the fact that 19th Century nativists used “anti-sectarianism,” in, for example, some of the Blaine Amendments, as a weapon against Catholics. (*See Amicus Becket Br.*, pp. 7-11.) But, as one scholar has sagely observed, the fact that “nativist organizations used [this principle] more from a dislike of Catholics than out of reverence for the Constitution . . . does not invalidate the principle.” Martin, *supra* p. 10, at 19. Martin’s observation is particularly relevant given the dramatic evolution of the meaning of what is “sectarian” throughout American history as discussed above. Thus, while Amici—whose own constituencies are no strangers to vitriol at the hands of nativist organizations—vigorously condemn the ugly use to which “anti-sectarianism” was put by 19th Century nativists, this Court should not confine its understanding of sectarian prayer to that of the Founders (or the 19th Century nativists) in the very different America in which they lived.

linked to national origin, “Muslims, Buddhists, Hindus, Sikhs, Jains, Zoroastrians, and others [began arriving] in increasing numbers, dramatically altering the religious landscape of many communities.” Jeffery L. Sheler, *Faith in America*, U.S. NEWS & WORLD REPORT, May 5, 2002, at 40. By the late 1990s, Asian immigrants numbered more than ten million, ascending to America’s fastest growing population. *See* Gaustad & Schmidt, *supra* p. 7, at 289. With a 43% growth rate in the last decade of the 20th Century, the religions of many Asian-Americans, including Buddhism, Taoism, Confucianism, Hinduism, Jainism, and Sikhism, became correspondingly widespread across the nation. *Id.*, at 413.

Once again, the judicial understanding in the mid to late 20th Century of what is “sectarian” evolved to reflect increasing religious diversity. *See, e.g., Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 241 (1963) (Brennan, J., concurring) (noting the “dramatic evolution of the religious diversity among the population ...”); *see also Zelman*, 536 U.S. at 720, 721 (Breyer, J.,dissenting) (“The 20th Century Court was fully aware, however, that immigration and growth had changed American Society dramatically since its early years ... [and t]he Court appreciated the religious diversity of contemporary American society.”). Now, as a matter of course, judicial understanding of sectarianism included distinguishing between Jews and Christians in addition to distinguishing among Christian denominations. *See, e.g., McCollum v. Bd. of Educ.*, 333 US 203, 207-209, 212 (1948) (public school program allowing interested students to attend weekly religion classes in Judaism, Roman Catholicism, and several different Protestant

denominations violated the Establishment Clause by providing special aid to “sectarian groups”); *Schempp*, 374 U.S. at 209 (Bible reading and recitation of the Lord’s Prayer in public schools violated Establishment Clause; citing expert testimony that portions of the New Testament were “not only sectarian in nature but tended to bring the Jews into ridicule and scorn.”).⁶

Today, at the start of the 21st Century, a panoply of non-Christian faiths are firmly established in this country. Hindus number more than a million and have established in excess of 200 temples across the country. *See* Gaustad & Schmidt, *supra* p. 7, at 413. Buddhism has experienced continued growth—Vietnamese, Cambodian, Laotian, and Thai Buddhists began opening hundreds of temples during the 1980s and 1990s—and today there are more than 300 Buddhist temples in Los Angeles alone, with another 1,500 located across the United States. *Id.* At 413, 416. The presence of Islam, too, has grown dramatically. In 2001, there were over 1,200 mosques and Islamic centers in the United States. *Id.* At 420.

⁶ The Speaker’s unwillingness to acknowledge what “sectarian” has come to mean and its long disfavor in American public prayer stands in stark contrast even to some who might be expected to share his perspective. Thus, Justice Scalia (speaking for himself and three of his brethren)

concede[s] that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington ... down to the present day, has, with a few aberrations, ... ruled out of order government-sponsored endorsement of religion—even when no coercion is present, and indeed even when no ersatz, ‘peer-pressure’ psycho-coercion is present—where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee v. Weisman, 505 U.S. at 641 (Scalia, J. dissenting).

The judiciary's understanding in the 21st Century of what is "sectarian" continues to reflect this pattern of expanding religious diversity. Now, rather than routinely speaking of sectarianism in exclusively Christian terms, courts recognize that "sectarian" refers to any one of a large number of faiths, Christian and non-Christian alike:

As religiously diverse as America had become when the Court decided its major 20th Century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. And several of these major religions contain different subsidiary sects with different religious beliefs.

Zelman, 404 U.S. at 723 (Breyer, J., dissenting); *see also, e.g., Rubin v. City of Burbank*, 101 Cal. App. 4th 1194, 1205 (2002) (city council prayers in the name of "Jesus Christ" held to violate the Establishment Clause; defining "sectarian" as the "preference for one religious faith (or sect) over another"); *Bush v. Holmes*, 886 So.2d 340, 353 (Fla. App. Ct. 2004) (equating "sectarian" with a "denomination").

In short, since our nation's founding, American religious diversity has expanded dramatically, and the public prayers of our Founders are no longer inclusive of all Americans.

C. History And Contemporary Practice Demonstrate That Courts And Legislatures Can And Frequently Do Distinguish Between Sectarian And Non-Sectarian Prayers Without Making "Theological Judgments."

The Speaker protests that the District Court's order will result in excessive entanglement of Church and State because, in the Speaker's view, it is "impossible" to distinguish between sectarian and non-sectarian prayers without making

“theological judgments.” (Appellant’s Br., pp. 10, 11, 21, 40-41, 43, 55.) This argument fails because distinguishing between sectarian and non-sectarian prayers requires a sociological judgment, not a theological one.

“Four decades ago, the sociologist Robert N. Bellah published a landmark essay, *Civil Religion in America*, identifying a set of beliefs, symbols, and rituals in public life that illuminated the country’s understanding of itself as a nation set apart by God.” Meacham, *supra* p. 9, at 25 (internal quotation marks omitted).

“The cultural sensibility Bellah spoke of was not, he said, in any specific sense Christian but American.” *Id.* (quotation marks omitted). Rather:

Civil religion is a construct, a synthesis that plausibly explains some American practices but obscures the place of persons in creating the practices. Nations do not worship, persons do ... Attention needs to be focused on the intentions of those fulfilling the roles assigned to them in what is described as civil religion.

Id. at 25 n.25 (quoting John T. Noonan, Jr., *THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM* (Univ. of Ca. Press, Ltd., 2000))

Thus, to distinguish between sectarian and non-sectarian public prayers is only to distinguish between the prayers that include and those that exclude. It requires no “doctrinal” analysis, but, rather, a sociological judgment about whether a significant portion of the population will be excluded by the prayer. The Speaker essentially concedes the point: “To declare that a prayer is ‘nonsectarian,’ the court must conclude that it is consistent with the ‘common faith’ of a broad class of adherents – that it appeals to the lowest common Judeo-Christian denominator.” (Appellant’s Br., p. 44.)

The notion that courts are ill-suited to the task of making this sociological judgment is wrong. The Speaker asserts that these judgments should be confided to legislative bodies and it is from them and not the courts that adherents to minority religions should seek redress. (*See Appellant's Br.*, p. 55.) But it is bedrock constitutional law that this is the kind of dispute that courts are not only capable of resolving, but are duty-bound to:

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

The vast majority of the members of the Indiana House are Christians, and non-Christian members and constituents should not be relegated to depending on the forbearance of the majority from permitting exclusionary prayers in the well of the Statehouse. Notwithstanding the Speaker's insistence that he be left alone to regulate legislative prayer as a matter of comity, it is apparent from his conduct to date that he is unwilling to curb sectarian Christian prayer in House. In this case, therefore, if the courts will not judge what is impermissibly sectarian prayer, no one will.

Moreover, engaging in a task the Speaker characterizes as "impossible," both the federal government and state legislatures routinely make the distinction between sectarian and non-sectarian prayer without engaging in "doctrinal" analysis. (*See Appellees' Br.*, n.15 (citing instances where the federal and various

state governments have made the distinction).⁷ As this Court aptly observed in denying the Speaker’s stay motion, the District Court’s order simply requires “the [Indiana] legislature to perform a task undertaken by countless other public bodies that begin their proceedings with a prayer ...” *Hinrichs v. Bosma*, 440 F.3d 393, 402 (7th Cir. 2006).

In sum, while distinguishing between sectarian and non-sectarian public prayer is sometimes delicate, that is not reason enough to avoid it. Reversing the District Court’s order on the basis of the Speaker’s assertion that the order is an “extraordinary imposition” on a legislative body and “usurps their autonomy” (Appellant’s Br., p. 20) would render the First Amendment a nullity.

⁷ In addition, Amici contacted the National Conference of State Legislatures and a number of individual state legislatures and determined that their own internal prayer guidelines distinguish between sectarian and non-sectarian prayer: National Conference of State Legislatures: Examples of Prayer Guidelines (“Religious sectarianism at public events is not only a breach of etiquette, but represents an insensitivity to the faith of others.”); Ohio House of Representatives Guidelines (“In accordance with the United States Supreme Court ruling regarding prayers offered for public functions, prayers before the House should be non-denominational, non-sectarian and non-proselytizing. ... Failure to do so will prohibit you from delivering your prayer.”) (emphasis in original); Nebraska Unicameral Legislature Chaplain of the Day Guidelines (“The prayer should be non-denominational.”); Colorado House of Representatives Letter to guest pastors (“Due to the religious diversity of our membership, we request that you keep your prayer or thought-for-the-day non-sectarian and non-political so that all of those present can benefit from your words.”) (emphasis in original); Virginia House of Delegates letter to guest clergy (“Since persons of different faiths will be present, we ask that your prayer be ecumenical in nature, consistent with your traditions.”); Maryland Senate’s guidelines for “Inclusive Public Prayer” (“uses universal, inclusive terms for deity rather than particular proper names for divine manifestations.”).

Amici could not obtain any publicly available citations for these guidelines, but felt that the Court should nonetheless be aware of their existence.

II. THE DISTRICT COURT’S INJUNCTION PROHIBITING SECTARIAN PRAYER IS NOT DISCRIMINATORY AMONG RELIGIOUS FAITHS.

The Speaker maintains that the District Court’s order unfairly discriminates among religious viewpoints because it prohibits those who “must invoke the name of a specific deity” from doing so and favors those who address God “in a generic way.” (Appellant’s Br., pp. 49-50.) This argument cannot withstand even minimal scrutiny.⁸

The District Court’s order is not discriminatory—the prohibition on “sectarian” prayers treats adherents of all religions the same. Indeed, while the Speaker may not know this, Jews, like Christians, have “sectarian” prayers. These prayers celebrate, for example, what Jews believe is their unique relationship to God as His chosen people:

With everlasting love did Thou love Thy people, the House of Israel; Torah and commandments, statutes and judgments did Thou teach us; Therefore O Lord our God, when we lie down and when we rise up, we will speak of Thy statutes; And we will forever rejoice in the words of Thy Torah and in Thy commandments, for they are our life and the length of our days, and on them will we meditate day and night. May Thou never remove Thy love from us. Blessed art Thou, Lord, who loves His people Israel.

Rabbi Hayim Halevy Donin, *TO PRAY AS A JEW* 161, 327 (Tal, ed., 1980) (“For thou hast chosen us and hallowed us above all nations.”); *see also*, *Wayne v. Town of Great Falls*, 376 F.3d 292, 300 n.5 (4th Cir. 2004) (in rejecting the Town’s contention that *Marsh* equated to approval of prayers that invoke Jesus Christ, the

⁸ The Speaker’s focus on whether the District Court’s order will result in viewpoint discrimination is wholly misplaced. The Speaker has conceded that “the prayers offered from the podium of the House of Representatives are government speech,” so there is no requirement that the Speaker “open the podium to a very wide range of viewpoints.” (See District Court’s Order, App. 27A and n.10.)

court recognized that Judaism, too, possesses “credo-statements typically included in Jewish prayers ...”). These sectarian Jewish prayers are no more permissible under the District Court’s order than the sectarian Christian prayers the District Court had before it.

Further, the Speaker’s suggestion that Christians “invoke the name of a specific deity” while others pray only “in a generic way” displays a startling condescension toward those who pray differently from Christians. The argument evidences a profound failure to appreciate the fact that minority non-Christian faiths routinely tailor their prayers in public settings to be ecumenical because, as the minority, they must. As Rabbi Arnold E. Resnicoff² has so eloquently explained:

Many of the prayers I regularly offer within Jewish settings would simply be inappropriate for interfaith groups. A widespread myth has it that Jewish chaplains are not asked to change their prayers and so it is “unfair” to expect such action on the part of Christians. The fact is that Rabbis, like the Christian clergy with whom we serve [in the military], must choose words carefully in interfaith groups. If the prayers offered by Jewish chaplains seem “acceptable” then perhaps we tread more softly, for we, like other minorities, know the pain of being ignored.”

Arnold E. Resnicoff, *Prayers that Hurt: Public Prayer in Interfaith Settings*, MILITARY CHAPLAINS REVIEW, 5 (Winter 1987); (see also District Court’s Order, App. 51A, n.16 (“Clerics of religious minorities often have substantial experience in getting along with a majority who believes differently and in avoiding giving offense to that majority in a public setting. Perhaps it is not mere coincidence that the only

² At the time of writing, Rabbi Resnicoff was a Rabbi on active duty with the United States Navy, and teaching at the Naval Chaplains School and the Naval War College, in Newport, Rhode Island. *Id.* at 8.

transcribed prayer in the 2005 session from someone outside the Christian religion, that of the imam, was inclusive and non-sectarian”).¹⁰

As to the Speaker’s assertion that the District Court’s order prevents some clergy from praying as their consciences dictate (*see* Appellant’s Br., pp. 53-54), Amici again submit that this is an inappropriate consideration in judging whether legislative prayer runs afoul of the Establishment Clause. This case concerns public prayer. “Public religion is not a substitute for private religion ...” Meacham, *supra* p. 9, at 23. “Serious believers will always find public religion wanting—lighter on substance, perhaps, than they would like, or vague to the point of meaninglessness. But part of the American gospel is that such lamentations should take place in churches or homes, not in the public arena.” *Id.* at 179; *see also* Resnicoff, *supra* p. 22, at 3 (“[I]f there is a right involved [in offering a public prayer], it is not the right to word the prayers as we please, but a right to decline to participate. It is the right of the chaplain who cannot offer a “general” prayer to decline, in the same way that we may choose not to participate in baptisms, weddings, or funerals.”); *see also* *Simpson v. Chesterfield County*, 404 F.3d 276, 287 (4th Cir 2005) (“In private observances, the faithful surely choose to express unique aspects of their creeds.

¹⁰ The Speaker also argues that the District Court’s injunction “unquestionably discriminates” against Christians because, the Speaker asserts, the District Court stated that the injunction would prohibit Christians from invoking the name of Jesus but would permit prayers to “Allah” or to “the Hebrew Elohim.” (Appellant’s Br., pp. 7, 49-50.) This argument is not only misleading but a red herring.

The Speaker studiously ignores the fact that the District Court’s references to Allah and Elohim are not a part of the District Court’s opinion or the injunction. (*See* App. 74A, 77A.) In fact, the District Court made no judgment on the use of the terms “Allah” or “Elohim” in legislative prayer.

But in their civic faith, Americans have reached more broadly. Our civic faith seeks guidance that is not the property of any sect. When we gather as Americans, ... our expressions evoke common and inclusive themes and foreswear ... the forbidding character of sectarian invocations.”). Simply put, it is contrary to the unifying purpose of public prayer for clergy to pray in a legislative forum just as they might at the pulpit.¹¹ See Resnicoff, *supra* p. 22, at 1 (“[I]nviting me to join in prayer and then using words which I cannot say is the same as inviting me for dinner and serving food I cannot eat.”).

In sum, the District Court order discriminates against no one. To the contrary, the order ensures that legislative prayer in the Indiana House does not remain a method of excluding those in the minority, however unintentionally. As

¹¹ Amici are not alone in this view. Prominent Christian organizations, such as the National Association of Evangelicals, recognize and embrace the principle:

The purpose of the prayers offered at these [public] events is neither to favor one religion over another nor to proselytize. It is to dignify and mark a public occasion by reflecting upon the deeper significance of that which has or is about to transpire. It is to honor the most basic human impulses of giving thanks and of invoking God’s protection, guidance, and blessing, and it is to reflect upon those religious values that unite the American people. ...

In general, civic prayer should be non-sectarian. One who would, in the setting of one’s own congregation, pray “in the name of Jesus,” or “in the name of Allah,” or “in the name of the Father, and of the Son, and of the Holy Spirit,” should consider if those formulations exclude believers from other faith traditions.

The National Association of Evangelicals Statement on Religious Freedom for Soldiers and Military Chaplains, <http://www.nae.net/militarypdf/NAE%20Statement%20on%20Military%20Religious%20Freedom%202-7-06.pdf> at 16-17.

such, the order is completely faithful to all that our Founders intended as well as to the overwhelming weight of the legal authority. The order should be affirmed.

CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Jonathan K. Baum, hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 6984 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), which is less than half of the 16,500 words .

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Century Schoolbook 12 point font.

3. Pursuant to Cir. R. 31(e)(1), a digital version of defendant-appellant's brief has been furnished to the court.

Dated: June 14, 2006

/s/ Jonathan K. Baum

Attorney for Anti-Defamation League,
American Jewish Committee, and
Indianapolis Jewish Community
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supporting Appellees

CERTIFICATE OF SERVICE

The undersigned counsel for Anti-Defamation League, American Jewish Committee, and Indianapolis Jewish Community Relations Council as *amici curiae* supporting Appellees, hereby certifies that on June 14, 2006, he caused two copies of the foregoing **BRIEF OF ANTI-DEFAMATION LEAGUE, AMERICAN JEWISH COMMITTEE, AND INDIANAPOLIS JEWISH COMMUNITY RELATIONS COUNSEL AS AMICI CURIAE SUPPORTING APPELLEES** as well as a digital version containing the brief, to be served on the following persons via U.S. Mail, proper postage prepaid:

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