No. 10-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,

Plaintiffs-Appellees,

v.

BARACK OBAMA, *et al.*,

Defendants-Appellants.

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

BRIEF FOR APPELLANTS

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STATEMENT OF JURISDICTION

Plaintiffs filed this action to challenge the constitutionality of 36 U.S.C. 119, which directs the President to declare a National Day of Prayer. The complaint invoked the district court's jurisdiction pursuant to 28 U.S.C. 1331. As we explain below, however, plaintiffs lack Article III standing to bring this suit. On April 20, 2010, the district court entered judgment in favor of plaintiffs and against defendants President Barack Obama and White House Press Secretary Robert H. Gibbs. That judgment resolved all the claims of all the parties in this case, and is a final judgment for purposes of appeal. President Obama and Press Secretary Gibbs filed a notice of appeal from the judgment on April 22, 2010. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether plaintiffs lack Article III standing to bring this action because, among other reasons, 36 U.S.C. 119 does not cause them any personal injury that is cognizable under Article III of the Constitution.

2. Whether 36 U.S.C. 119 comports with the Establishment Clause because it reflects a tradition that dates to the beginning of our Republic and was approved by the First Congress, and because it has the secular purpose and effect of acknowledging our nation's religious heritage and culture.

STATEMENT OF THE CASE

Plaintiffs filed this action to challenge, *inter alia*, the constitutionality of 36 U.S.C. 119. Formalizing a historical tradition that dates to the founding of our Republic, that statute requires the President to issue a proclamation designating a National Day of Prayer. After the district court dismissed certain other parties, the federal defendants (President Obama and White House Press Secretary Gibbs) moved for summary judgment, arguing that the plaintiffs lack standing to bring this action and that plaintiffs' claims fail on the merits. In two separate orders, the district court rejected both arguments and granted summary judgment for plaintiffs, declaring 36 U.S.C. 119 unconstitutional, and enjoining the federal defendants from enforcing it. President Obama and Press Secretary Gibbs appeal both orders.

STATUTORY AND HISTORICAL BACKGROUND

A. General Background Concerning Governmental Expressions of Religion in American History.

"[R]eligion has been closely identified with our history and government," *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 212 (1963), and many Framers attributed the survival and success of the new Nation to the providential hand of God. For example, the Continental Congress announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by direct imposition

of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 *Journals of the Continental Congress* 477 (W. Ford ed., 1908). Similarly, in his first inaugural address, President Washington proclaimed that "[n]o people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States," because "[e]very step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency." *Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 2 (1989).

Against that backdrop, from the Nation's earliest days, the Framers considered official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of religious autonomy embodied in the First Amendment. For example, two documents to which the Supreme Court has often looked in its Establishment Clause cases — James Madison's Memorial and Remonstrance Against Religious Assessments (1785) and Thomas Jefferson's Bill for Establishing Religious Freedom (1779) — repeatedly acknowledge the Creator, *see* 5 *The Founders' Constitution* 77, 82 (P. Kurland & R. Lerner eds., 1987), as does the Declaration of Independence. *See* 1 U.S.C. at XLIII.

B. Historical Background Concerning Governmental "Day of Prayer" Proclamations.

Governmental proclamations calling the Nation to a day of prayer have been a consistent feature of our Nation's history. For example, the First Continental Congress designated July 20, 1775, as a "Day of Public Humiliation, Fasting, and Prayer," and ordered that the designation be signed by the President. *Journals of the Continental Congress, 1774-1789*, v. II, 1775, p. 81, 83, 87-88 (U.S. Library of Congress, edited by W. Ford). The Continental Congress continued that practice on numerous occasions in succeeding years. *See Letters of Delegates to Congress, 1774-1789*, v. 8, September 9, 1777-January 31, 1778 (U.S. Library of Congress, P. Smith ed.), pp. 189, 218, 223-24, 238, 141, 243 (proclaiming December 18, 1777 as a day reserved for thanksgiving for the recently organized United States).[1]

The tradition of Congress's calling upon the President to declare a day of prayer continued under the Constitution. The Supreme Court explained in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), that on "[t]he day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public

[1] For other day of prayer proclamations issued by the Continental Congress, see 4 Journals of the Continental Congress 208-209 (1776); 10 Journals of the Continental Congress 229-230 (1778); 18 Journals of the Continental Congress 919 (1780); 18 Journals of the Continental Congress 950 (1780); 19 Journals of the Continental Congress 284-285 (1781); 22 Journals of the Continental Congress 137 (1782); 23 Journals of the Continental Congress 187 (1782).

thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" *Id.* at 675 n.2 (citation omitted). In response to Congress's request, President Washington proclaimed November 26, 1789, a day of thanksgiving to "'offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions . . . .'" *Ibid.* (citation omitted).

The Nation's second President, John Adams, announced two different national day of prayer proclamations. The first, issued in 1798, "recommend[ed] that Wednesday, the 9th day of May next, be observed throughout the United States as a day of solemn humiliation, fasting, and prayer . . .." *A Compilation of the Messages and Papers of the Presidents 1789-1897, Vol. I*, (J. Richardson, ed.) 268, 269 (Government Printing Office, 1896). The second used the same phraseology in designating April 25, 1799 as a national day for prayer. *See id.* at 284, 285. Likewise, James Madison issued four presidential day of prayer proclamations, one per year from 1812 to 1815. *See A Compilation of the Messages and Papers of the Presidents 1789-1897, Vol. I*, (J. Richardson, ed.) at 513, 532-33, 558, 560-61. In each of those years, Congress, by joint resolution, had requested that the President set aside a day to be observed by the people as a day of public humiliation and prayer. *See ibid.*

Official day of prayer proclamations continued into the Nineteenth Century. *See* Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2115 (1996). For example, at the beginning of the Civil War, Congress passed a joint resolution requesting that the President "recommend a day of public humiliation, prayer, and fasting, to be observed by the people of the United States with religious solemnity, and the offering of fervent supplications to Almighty God for the safety and welfare of these States, His blessings on their arms, and a speedy restoration of peace." Joint Resolution No. 3, Chapter 5, 37th Cong., 1st Sess., 12 Stat. 328 (1861). President Lincoln issued that proclamation, *see* 8 Comp. Messages & Papers Pres. 3237 (1897), as well as several others,[2] as requested by Congress.[3]

C. Background and Legislative History of 36 U.S.C. 119

1. The 1952 Statute

In 1952, Representative Bryson introduced a Joint Resolution "[t]o provide for setting aside an appropriate day as a national day of prayer." 90 Cong. Rec. 1167 (Feb. 19, 1952). Shortly thereafter, the House Judiciary Committee unanimously

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[2] *See* 6 Comp. Messages & Papers Pres. 221 (1897) (proclamation for year 1864); 8 Comp. Messages & Papers Pres. 3365 (1897) (proclamation for year 1863).

[3] *See* Joint Resolution No. 66, 38th Cong., 1st Sess., 13 Stat. 415-16 (1864); S. Res. 40, 37th Cong., 3d Sess. (1863); S. Res., Cong. Globe, 37th Cong., 3d Sess. 1448, 1501 (1863).

reported out House Joint Resolution 328, which stated "[t]hat the President shall set aside and proclaim a suitable day each year, other than a Sunday, as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 98 Cong. Rec. 1546 (Feb. 27, 1952). The House of Representatives passed the Resolution by unanimous consent, *see ibid.*, and the Resolution was transmitted to the Senate the next day. *See* 98 Cong. Rec. 1575 (Feb. 28, 1952).

The Senate Judiciary Committee reported favorably on the Joint Resolution, without amendment, and issued a Report. *See* S. Rep. No. 1389, 82d Cong., 2d Sess. (Apr. 2, 1952). The Report noted that "both Houses of the Congress are opened daily with prayer," *ibid.,* and that "[i]t would certainly be appropriate if, pursuant to this resolution and the proclamation it urges, the people of this country were to unite in a day of prayer each year, each in accordance with his own religious faith, thus reaffirming in a dramatic manner the deep religious conviction which has prevailed throughout the history of the United States." *Ibid.* The Joint Resolution was approved by the Senate, *see* 98 Cong. Rec. 3807 (Apr. 9, 1952), signed by President Truman, *see* 98 Cong. Rec. 4238 (Apr. 22, 1952), and codified as Public Law No. 324, Ch. 216, 66 Stat. 64.

President Truman selected July 4, 1952, as the first National Day of Prayer to be proclaimed in accordance with Public Law No. 324, "to coincide with the anniversary of the adoption of the Declaration of Independence, which published to the world this Nation's 'firm reliance on the protection of Divine Providence.'" Proc. 2978, 3 C.F.R. 160 (1949-1953). President Eisenhower initially continued the practice of designating July 4 as a National Day of Prayer, *see* Proc. 3023, 3 C.F.R. 193 (1949-1953), but changed the date of the National Day of Prayer the following year to September 22. *See* Proc. 3064, 3 C.F.R. 17 (1954-1958). In subsequent years, Presidents selected many different dates for the National Day of Prayer.[4]

2. 1988 Amendment

On June 17, 1988, Senator Thurmond introduced a bill amending Public Law 324 "to provide for setting aside the first Thursday in May as the date on which the National Day of Prayer is celebrated." 133 Cong. Rec. 16385 (1987). The Senate Judiciary Committee reported the bill to the Senate without a written report, *see* 134 Cong. Rec. 7646 (Apr. 20, 1988), and the Senate passed the amendment by voice vote on April 22, 1988. *See* 134 Cong. Rec. 8547 (Apr. 22, 1988).

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[4] *See*, *e.g.*, Proc. 3305, 3 C.F.R. 42 (1959-1963) (selecting October 7); Proc. 3617, 3 C.F.R. 57 (1964-1965) (October 21); Proc. 4112, 3A C.F.R. 33-34 (1972) (February 20); Proc. 4422, 3 C.F.R. 13 (1976) (May 14); Proc. 4532, 3 C.F.R. 55 (1977) (December 15); Proc. 5017, 3 C.F.R. 8 (1983) (May 5).

A similar bill was introduced in the House by Representative Tony Hall. *See* 134 Cong. Rec. 4153 (1988). In support of the bill, Rep. Hall noted that "[f]or the past 7 years, the day has been observed in May, but before this period it was observed at different times of the year." *Ibid.* Amending the law to provide a definite date each year for the National Day of Prayer, Rep. Hall argued, "will help bring more certainty to the scheduling of events related to the National Day of Prayer, and permit more effective long-range planning." *Ibid.* That same purpose was referred to by others who spoke in support of the legislation. *See* 134 Cong. Rec. 9520 (Apr. 29, 1988) (Sen. Helms); *id.* 9623 (May 2, 1988) (Rep. Dymally). The House Committee on the Post Office and Civil Service discharged the bill to the House by unanimous consent , and the House passed the bill on the same day by voice vote. *See* 134 Cong. Rec. 9623-24 (May 2, 1988).

President Reagan signed the bill into law on May 5, 1988, *see* 134 Cong. Rec. 10149 (May 9, 1988), and it became Public Law No. 100-307. As amended, the statute read as follows: "The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." Pub. L. No. 100-307, 102 Stat. 456.

3. 1998 Amendment

In 1998, Congress decided to codify without substantive change various laws related to patriotic and national observances, ceremonies, and organizations under Title 36 of the United States Code. *See* Pub. L. No. 105-225, Aug. 12, 1998, 112 Stat. 1253. Chapter 1 of that statute, which is entitled "Patriotic and National Observances," includes the text of what was previously Pub. L. No. 100-307. *See* 36 U.S.C. 119. The statute currently reads as follows: "The President shall issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."[5]

D. Other Contemporary Day of Prayer Proclamations

Congress also has called upon the President to proclaim a day of prayer on a number of other particular occasions. For example, in 1948, Congress requested the President to issue a proclamation "calling upon the people of the United States to observe Memorial Day, 1948, by praying, each in accordance with his religious faith, for permanent peace . . .." S.J. Res. 217, 80th Cong., Pub. L. No. 559, Ch. 350, 62 Stat. 275 (1948). Congress passed similar joint resolutions in 1949 and 1950, *see*

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[5] The other 42 proclamations found in 36 U.S.C. Chapter 1 include, *inter alia*, "Leif Erickson Day," 36 U.S.C. § 114; "National Forest Products Week, *id.* § 123; "Steelmark Month," *id.* § 139; and "Pan American Aviation Day," *id.* § 134.

S.J. Res. 6, Pub. L. No. 81-74, Ch. 144, 63 Stat. 111 (1949); S.J. Res. 138, Pub. L. No. 81-512, Ch. 182, 64 Stat. 158 (1950), and President Truman honored each request. *See* Proc. 2842, 3 C.F.R. 16 (1949); Proc. 2788, 3 C.F.R. 203 (1948); Proc. 2889, 3 C.F.R. 65 (1950).

Likewise, in 1969, Congress declared that "November 9, 1969 be declared a national day of prayer and concern on behalf of the American servicemen being held prisoner by the North Vietnamese." *See* Pub. L. No. 91-111, 83 Stat. 184 (1969). The following year, President Nixon similarly declared a day of prayer for prisoners of war." *See* Proc. 3982, 3 C.F.R. 43 (1970). Two years later, Congress authorized the President to designate Sunday, March 26, 1972, as a national day of prayer for prisoners of war and soldiers who are missing in action, *see* Pub. L. No. 92-248, 86 Stat. 61 (1972), and President Nixon issued an appropriate proclamation. *See* Proc. 4115, 3A C.F.R. 38 (1972). Congress also authorized President Nixon to designate "the moment of 7:00 p.m., e.s.t., January 27, 1973 a National Moment of Prayer and Thanksgiving for the peaceful end to the Vietnam War," Pub. L. No. 93-3, 87 Stat. 4 (1973), and the President issued that proclamation as well. *See* Proc. 4181, 3A C.F.R. 23 (1973). *See also* Procl. 4182, 3A C.F.R. 24 (1973) (declaring "International Clergy Week in the United States").

In 1990, Congress requested that the President proclaim a day of prayer dedicated to our nation's armed forces. *See* Pub. L. No. 101-547, 104 Stat. 2396 (1990) (requesting the President to designate November 2, 1990 as a national day of prayer for members of American military forces and American citizens stationed or held hostage in the Middle East, and for their families). *See also* Pub. L. No. 102-24, 105 Stat. 74 (1991) (requesting the President to declare a national day of prayer and thanksgiving "to express our gratitude for the heroic efforts of our troops"). In response, President Bush issued a number of different prayer proclamations. *See* Proc. 6221, 3 C.F.R. 242 (1990); Procl. 6243, 3 C.F.R. 4 (1991); Procl. 6257, 3 C.F.R. 23 (1991). *See also* Procl. 6394 (1991) (proclaiming a year of thanksgiving for the blessings of liberty). All in all, by the time the district court entered the orders at issue here, United States Presidents had issued at least 164 proclamations of a national day of prayer.[6]

STATEMENT OF FACTS

A. On October 3, 2008, the Freedom From Religion Foundation and six of its members filed the original complaint in this action, bringing claims against the then-President of the United States George W. Bush and his Press Secretary; the

[6] A brief summary of those proclamations can be found in Appendix A to the amicus curiae brief filed below by the American Center for Law and Justice. *See* Docket No. 59.

Governor of Wisconsin; and Shirley Dobson, who is the Chairman of the National Day of Prayer Task Force, a private entity. *See* Complaint, D. Ct. Docket No. 1, at ¶¶ 13-19. The complaint alleged, among other things, that 36 U.S.C. 119 violates the Establishment Clause of the United States Constitution. *See id.* ¶ 14.

Plaintiffs subsequently filed an amended complaint. The First Amended Complaint named President Barack Obama in his official capacity; Robert L. Gibbs in his official capacity as White House Press Secretary; Governor Jim Doyle; and Ms. Dobson. *See* First Amended Complaint, ¶¶ 13-19, D. Ct. Docket No. 38. Plaintiffs' new complaint asserted the same Establishment Clause claims as their original complaint, and added a claim for injunctive relief to their earlier request for a declaratory judgment. Thus, in pertinent part, the Amended Complaint seeks (1) "a judgment declaring that Public Law 100-307 is unconstitutional and enjoining its enforcement;" (2) a "judgment declaring that prayer proclamations disseminated by Presidential Press Secretaries violate the Establishment Clause and enjoining their publication;" and (3) a judgment "enjoining the defendants from issuing and disseminating further Prayer Day Proclamations and making designations of official days of prayer." *Id*. at 20-21.[7]

[7] The Amended Complaint also sought relief against Governor Doyle and Ms. Dobson, but as explained below, those claims are no longer in this case and are not at issue in this appeal.

The federal defendants and Ms. Dobson each moved to dismiss the First Amended Complaint, but the district court denied those motions as "premature." Opinion and Order at 5, D. Ct. Docket No. 67 (May 26, 2009). Thereafter, the federal defendants, Governor Doyle, and Ms. Dobson each moved for summary judgment, and the plaintiffs stipulated to the dismissal of Governor Doyle. *See* Stipulation of Dismissal, D. Ct. Docket No. 99 (December 1, 2009).

B. On March 1, 2010, the district court ruled on defendants' motions for summary judgment with respect to Article III standing. The court noted that plaintiffs "have not come into physical or visual contact with a religious display" in this case, March 1 Order at 3, Short Required Appendix ("SRA") 3, and that plaintiffs became aware of the national day of prayer and presidential proclamations only through media reports. *See id.* at 30 (SRA 30). The court nevertheless held that plaintiffs have standing to challenge the federal statute because it is a "national message intended to reach all Americans." *Id.* at 3 (SRA 3). The court found that plaintiffs lack standing to challenge prayer proclamations issued by the President other than the one required by section 119 however, because "none of the plaintiffs has read or heard such a proclamation except when they expressly sought one out." *Ibid.* The court further held that plaintiffs lack standing to sue Ms. Dobson because they failed to show that any of her actions injured them. *Ibid.*

The March 1 Order also rejected the federal defendants' argument that the court lacked jurisdiction to enter relief against the President in this action pursuant to the separation of powers. In that regard, the court remarked that "[a] judgment in plaintiff's favor would result in an order enjoining the President from enforcing an unconstitutional statute that involves a single, largely symbolic act that occurs once a year." March 1 Order at 34 (SRA 34). The court suggested that such relief is not intrusive enough to raise separation of powers concerns, *see id.* at 35 (SRA 35), but noted that the court "need not decide at this stage whether it is appropriate to enter declaratory or injunctive relief against the President in this case because plaintiffs have named the President's press secretary as a defendant as well." *Ibid.*

C. On April 15, 2010, the district court issued a second opinion, ruling on the merits of plaintiffs' claims against President Obama and Press Secretary Gibbs. In that opinion, the court held that 36 U.S.C. 119 violates the Establishment Clause because "its sole purpose is to encourage all citizens to engage in prayer, an inherently religious exercise that serves no secular function in this context," Opinion at 4 (SRA 53), and because "[a] reasonable observer of the statute or a proclamation designating the National Day of Prayer would conclude that the federal government is encouraging her to pray." *Id.* at 23 (SRA 72) (citation omitted).

The court's April 15 opinion also held that "the purpose of the National Day of prayer was to encourage all citizens to engage in prayer, and in particular the Judeo-Christian view of prayer," *id.* at 30 (SRA 79), and that the statute is not a tolerable acknowledgment of this country's religious heritage because it "'call[s] for religious action on the part of citizens." *Id.* at 34 (SRA 83) (citation omitted). The court rejected the federal defendants' argument that 36 U.S.C. 119 is constitutional because the First Congress, which drafted the Establishment Clause, passed a similar resolution, on the ground that "[n]o tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date." *Id.* at 51 (SRA 100).

D. On April 20, 2010, the district court issued a final judgment declaring that 36 U.S.C. 119 violates the Establishment Clause and enjoining President Obama and Press Secretary Gibbs from enforcing the statute. *See* Order at 1-2 (SRA 116-17). The judgment also states that "[t]he injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later." *Id.* at 2 (SRA 117). President Obama and Press Secretary Gibbs filed a notice of appeal on April 22, 2010.

E. On April 30, 2010, President Obama issued a National Day of Prayer proclamation in compliance with 36 U.S.C. 119. *See* Proc. No. 8514, 75 Fed. Reg. 25101 (2010).

SUMMARY OF ARGUMENT

1. Plaintiffs lack Article III standing to challenge 36 U.S.C. 119 because the statute has no direct or palpable impact on them. The statute requires no one to pray, and causes plaintiffs nothing more than the "psychological injury 'produced by observation of conduct with which [they disagree],'" which has never been sufficient to support Article III standing. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982).

Plaintiffs also lack standing to challenge President Obama's and Press Secretary Gibbs's enforcement of the statute. Plaintiffs can demonstrate no concrete injury resulting from the President's proclamation of a day of prayer, and separation of powers principles bar a court from issuing injunctive or declaratory relief against the President in any event. Plaintiffs likewise lack standing to sue Press Secretary Gibbs because they identify no concrete harm that is caused by him, as opposed to the President, who is charged with enforcing 36 U.S.C. 119. Thus, even if plaintiffs could conceivably allege to have sustained some harm as a result of the statute, such harm would be fairly traceable to the President and not to Press Secretary Gibbs. Because a court cannot issue declaratory or injunctive relief against the President due to separation of powers principles, this Court is thus without jurisdiction to reach the merits of plaintiffs' claims against the President or Press Secretary Gibbs.

2. If the Court were to reach the merits, it should reverse the judgment below based on *Marsh* v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, the Supreme Court rejected an Establishment Clause challenge to the practice of a state legislative session with a prayer delivered by a chaplain paid from public funds because the same First Congress that drafted the Establishment Clause engaged in that very practice. *Marsh* is controlling here because the same First Congress also called upon President Washington to declare a national day of prayer and thanksgiving.

This Court need not look beyond the Supreme Court precedent of *Marsh* to resolve the merits of this appeal. If the Court were to do so, however, it would find that 36 U.S.C. 119 is constitutional also because the statute has the primary purpose and effect of acknowledging and continuing a tradition that reflects the religious heritage and culture of our nation. Similar to the religious references in the Pledge of Allegiance, the National Anthem, the National Motto that is inscribed on our coins and currency by direction of Congress, and numerous other statutes and historical documents, section 119 reflects benevolent neutrality toward religion, and not establishment thereof.

STATEMENT OF THE STANDARD OF REVIEW

The issues raised in this appeal concern questions of law, which are reviewed *de novo*. *See*, *e.g.*, *Lino* v. *Gonzales*, 467 F.3d 1077, 1079 (7th Cir. 2006).

ARGUMENT

I. Plaintiffs Lack Article III Standing.

"Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing . . . enforces the Constitution's case-or-controversy requirement.'" *Hein* v. *Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 597-98 (2007) (citation omitted). In order to establish Article III standing, a plaintiff must "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Ibid.* (citation omitted).

"Strict[] adherence" to these requirements is necessary where a plaintiff requests a court to decide whether action taken by one of the other two branches of government is unconstitutional. *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 11 (2003). Plaintiff bears the burden of demonstrating Article III standing. *See*, *e.g.*, *Hein*, 551 U.S. at 599 (citation omitted). Moreover, because Article III standing is jurisdictional, federal courts must determine whether a plaintiff has standing before proceeding to address the merits of a case. *See Steel Co.* v. *Citizens for Better Environment*, 523 U.S. 83, 94-95 (1988).

Plaintiffs lack Article III standing to challenge 36 U.S.C. 119 because the statute causes them no direct harm, and the only injury plaintiffs can even conceivably attribute to it is the kind of abstract, psychological harm that the Supreme Court held does not create Article III standing, even in an Establishment Clause case. Separation of powers principles also bar a court from issuing an injunction forbidding President Obama to "enforce" the statute. Finally, plaintiffs lack standing to sue Press Secretary Gibbs because they have failed to explain how his issuance of President Obama's National Day of Prayer proclamations caused them any injury independent of the President's actions, or any injury that this Court could redress by an order addressed to Mr. Gibbs.

A. Plaintiffs Have Not Identified the Kind of Concrete Harm That Article III Requires.

To establish the kind of harm that will support Article III standing, a plaintiff must identify injury that is "concrete and particularized." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). *See also Valley Forge,* 454 U.S. at 488 (explaining that in order to prove Article III injury, a plaintiff must allege "distinct and palpable injury to himself").

In *Valley Forge*, the Supreme Court held that "a plaintiff does not sufficiently allege injury-in-fact for the purposes of Article III standing where the only harm is psychological injury 'produced by observation of conduct with which one disagrees.'" 454 U.S. at 485. *Accord Allen* v. *Wright*, 468 U.S. 737, 755 (1984) (noting that "abstract stigmatic injury" is insufficient by itself to create Article III injury in fact); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury).

Thus, as this Court has recognized on numerous occasions, a plaintiff does not have Article III standing, even in an Establishment Clause case,[8] merely because the plaintiff is offended by government action. Rather, an Establishment Clause plaintiff must show that he or she is "subjected to unwelcome religious exercises or is forced to assume 'special burdens' to avoid them." *Doe* v. *County of Montgomery*, 41 F.3d 1156, 1159 (7th Cir. 1994).

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[8] *Valley Forge* was an Establishment Clause case, and the Supreme Court there expressly rejected the notion that enforcement of the Establishment Clause "demands special exceptions from the requirement[s]" that Article III otherwise requires. 454 U.S. at 488. *Valley Forge* also reaffirmed that, even in an Establishment Clause case, "'[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.'" 454 U.S. at 488 (citation omitted).

For example, in *Doe*, this Court held that a plaintiff lacked standing to challenge a courthouse sign that had religious content because he had never been to the courthouse or seen the sign, and because he did not allege that he had refused to represent any client because of the sign. *See* 41 F.3d at 1161. Similarly, in *Freedom From Religion Foundation, Inc.* v. *Zielke*, 845 F.2d 1463 (7th Cir. 1988), this Court held that a plaintiff was unable to establish a "direct and palpable" injury resulting from the display of a Ten Commandments monument in a state park because the plaintiff "did not demonstrate that she lives anywhere near Cameron Park, that the monument is visible in the course of her normal routine, or that her usual driving or walking routes take her past the park." *Id.* at 1469. Other decisions of this court similarly hold that government action must have some direct and palpable impact on a plaintiff to create Article III standing to challenge it.[9]

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[9] *See Books* v. *City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) ("a plaintiff may allege an injury in fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid because of his right or duty to attend the government-owned place where the object is located"), *cert. denied*, 532 U.S. 1058 (2001); *Gonzalez* v. *North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993) ("[o]ffense to moral and religious sensitivities does not constitute an injury in fact and is insufficient to confer standing," but plaintiffs had standing to challenge crucifix display because plaintiffs curtailed their full use and enjoyment of a public park in order to avoid it); *ACLU* v. *City of St. Charles*, 794 F.2d 265, 268 (7th Cir.) (plaintiffs' alleged offense at the display of a cross on public property did not give them standing; plaintiffs had standing to challenge the display only because they altered their behavior to avoid seeing it), *cert. denied*, 479 U.S. 961 (1986).

1. The Statute Has No Direct and Palpable Impact on Plaintiffs That Could Give Rise to Article III Standing.

a. Under the principles set out above, plaintiffs lack standing to challenge 36 U.S.C. 119 because it has no direct and palpable impact on them. The statute merely calls upon the President to declare a national day of prayer. It does not require anyone to pray, or impose any penalty or sanction on anyone who chooses not to pray. It follows, then, that the only injury plaintiffs can attribute to the statute itself is "psychological injury 'produced by observation of conduct with which one disagrees,'" *Valley Forge*, 454 U.S. at 485, which is insufficient to support Article III standing. *See ibid.*

Two recent Ninth Circuit decisions support this argument. First, in *Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010), the Ninth Circuit held that certain atheists lacked standing to argue that Congress's addition of "under God" to the Pledge of Allegiance violated the Establishment Clause. The Ninth Circuit reasoned that the "[p]laintiffs are unable to show the 1954 amendment causes them to suffer any concrete and particularized injury because nothing in the Pledge actually requires anyone to recite it." *Id.* at 1016. "Instead, plaintiffs would, at most, be asserting 'generalized grievances more appropriately addressed in the representative branches', which do not confer standing." *Ibid.* (citation omitted).

In a related case decided the same day, the Ninth Circuit held that other plaintiffs lacked standing to bring an Establishment Clause challenge to 36 U.S.C. 302, "which merely recognizes 'In God We Trust' as the national motto." *Newdow* v. *Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (footnote omitted). Although the plaintiffs there alleged that the national motto "turns Atheists into political outsiders and inflicts a stigmatic injury upon them," the Ninth Circuit ruled that "an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing." *Ibid.* (citation omitted). The plaintiffs' mere awareness of the motto statute did not provide the kind of "'unwelcome direct contact'" that can give rise to Article III injury-in-fact, the Ninth Circuit went on to observe, *see ibid.*, in contrast to "the placement of 'In God We Trust' on the Nation's money," which the Court held plaintiffs could challenge because it "forces [people] repeatedly to encounter a religious belief [they find] offensive." *Id.* at 642.

By parallel reasoning, plaintiffs' mere awareness that 36 U.S.C. 119 exists, and the offense they take to its existence, is not the kind of concrete, particularized direct harm that can support Article III standing. Thus, plaintiffs lack Article III standing to challenge the National Day of Prayer statute, and the district court lacked jurisdiction to enter the declaratory judgment it issued finding that the statute violates the Establishment Clause.

b. The district court held that 36 U.S.C. 119 causes plaintiffs Article III injury based on what plaintiffs describe as "the sense of exclusion and unwelcomeness, even inferiority, that they feel as a result of what they view as the federal government's attempt to encourage them to pray through a statute and a presidential proclamation." March 1 Opinion at 16 (SRA 16). That holding conflicts with the Supreme Court's cases and those of this Court.

In *Valley Forge*, the Supreme Court held that an Establishment Clause plaintiff must show more than a "'spiritual stake'" in the application of that Clause to have Article III standing. 454 U.S. at 482 (citation omitted). The Court held that the plaintiffs in that case lacked standing to challenge the government's transfer of surplus military property to a religious college because they had not been "subjected to unwelcome religious exercises or . . . forced to assume special burdens to avoid them." *Id.* at 487 n.22. Rather, as we have already noted, the Court ruled that the plaintiffs' asserted injury amounted to nothing more than the "psychological consequence presumably produced by observation of conduct with which [they] disagree," *id.* at 485, which does not create Article III standing. The "sense of inferiority" plaintiffs here allegedly feel because of 36 U.S.C. 119's mere existence does not represent anything more than that.

Likewise, the feelings of "exclusion" and "inferiority" plaintiffs claim to feel because of their awareness of 36 U.S.C. 119 surely do not exceed the allegations of stigma in *Allen* v. *Wright*, 468 U.S. 737 (1984), where the Supreme Court held that parents of African-American children attending public schools lacked standing to challenge the IRS's failure to deny tax-exempt status to racially discriminatory private schools located in the area where the parents lived. *See id.* at 755.

Moreover, under plaintiffs' view of the law, it would not have mattered that plaintiffs in *Winkler* v. *Gates*, 481 F.3d 977 (7th Cir. 2007), lacked taxpayer standing to bring an Establishment Clause challenge to the federal statute that authorizes the Department of Defense to provide certain support for the Boy Scout Jamboree, because plaintiffs' mere awareness of that law presumably would have caused them the same kind of abstract psychological harm the district court held satisfies Article III here. Likewise, in *Books*, this Court observed that "a plaintiff may allege an injury in fact when he is forced to view a religious object that he wishes to avoid but is unable to avoid . . .," 235 F.3d at 301 (citation omitted), but nothing forces plaintiffs to open the U.S. Code to 36 U.S.C. 119, or to have "direct and unwelcome contact," *id.* at 299, with the statute in any way.[10]

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[10] *See also Gonzales*, 4 F.3d at 1416 ("[o]ffense to moral and religious sensitivities does not constitute an injury in fact and is insufficient to confer standing") (citation omitted); *Zielke*, 845 F.2d at 1466 (mere "existence" of Ten

c. The district court also held that plaintiffs have standing to challenge 36 U.S.C. 119 because they are "part of the government's intended audience" for the message the statute allegedly disseminates. March 1 Opinion at 21 (SRA 21). Under this theory, however, *every* person in the United States would have standing to challenge the statute. Indeed, under this theory, every person in the United States would have standing to challenge *any* federal statute, because every statute can be said to express a message of approval for whatever it seeks to accomplish. This theory runs aground on the Supreme Court's repeated admonition that "'a plaintiff raising only a generalized available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'" *Hein*, 551 U.S. at 601 (plurality opinion) (footnote and citations omitted). To have standing, a plaintiff must show direct and palpable harm that is "particularized." *Id.* at 600 (plurality opinion) (citation omitted). The kind of diffuse, psychological harm plaintiffs allege here based on their mere awareness of section 119 falls far short of that standard. *See*, *e.g.*, *Valley Forge*, 454 U.S. at 485.

Commandments monument did not provide standing to Establishment Clause plaintiff who wished to challenge it).

d. The district court also misconstrued the law by suggesting that under various Supreme Court and circuit decisions, "if a particular school declared an official 'prayer day,' teachers or students at that school would have standing to challenge it even if they were not subjected to a particular religious exercise." No case of which we are aware has read the doctrine of Article III standing that expansively. For example, the public school teacher in *Metzl* v. *Leininger*, 57 F.3d 618 (7th Cir. 1995), one case the district court cited, had standing to challenge a state's practice of making Good Friday a paid holiday based on her "status as a taxpayer." *Id.* at 619. Plaintiffs do not assert taxpayer standing in this case, nor could they, since Congress has appropriated no funds in relation to 36 U.S.C. 119.

Likewise, in *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000), the Supreme Court evaluated the constitutionality of a public school's policy of allowing student prayer before a football game from the perspective of "members of the listening audience," *id.* at 308, not from the vantage point of anyone who was merely aware that the school had adopted that policy.[11] Thus, plaintiffs here, who can claim

[11] The Supreme Court in *Santa Fe* did state that "the mere passage by the District of a policy that has the purpose and perception of government establishment of religion" is a "constitutional injur[y]." 530 U.S. at 313-14. The Supreme Court did *not* state, however, that anyone who was merely *aware* of the policy could bring a federal suit to challenge it. Indeed, the Supreme Court did not address Article III standing at all in *Santa Fe*. Rather, the Court made the above observation only in connection with its holding that plaintiffs' challenge to the school district's prayer

nothing more than mere awareness of section 119, can draw no support from *Santa Fe*.

Santa Fe also is distinguishable from this case because the class of persons in the audience for the prayer at issue in that case was limited, and because those persons who were in the audience could potentially have demonstrated a palpable injury – *e.g.*, being required to leave to avoid being subject to the prayer. Where a person can show the government's action requires a change of behavior on his or her part, such as in *ACLU* v. *St. Charles*, *supra*, the injury element of Article III is satisfied. Such harm or alleged change of behavior is wholly absent here.

The district court also misinterpreted the Supreme Court's statement in *Lujan* that when "the plaintiff is himself the object of the action . . . at issue . . . there is ordinarily little question that the action or inaction has caused him injury." March 1 Opinion at 28 (SRA 28) (citing *Lujan*, 504 U.S. at 561-62). Plaintiffs are not the "object" of anything in 36 U.S.C. 119, at least in the same sense as the Supreme Court used that term in *Lujan*. The only "object" of section 119, pertinent to this aspect of *Lujan*, is the President, who is called upon to issue the proclamation provided in the

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policy in *Santa Fe* was not premature because no student had actually yet delivered any prayer. *See ibid.* The law is clear that where a Supreme Court opinion does not specifically address standing, the lower courts may not presume that the Court necessarily found standing to exist in such a case. *See Steel Co.*, 523 U.S. at 91 ("drive-by jurisdictional rulings of this sort . . . have no precedential effect").

statute. Thus, as in *Lujan*, this is a case in which any harm would have to arise from the "response of a . . . third party" – a context in which plaintiffs typically cannot satisfy the causation and redressability elements of Article III standing. *See Lujan*, 504 U.S. at 562. *Lujan* also is adverse to plaintiffs because the Supreme Court's ruling in that case reflects the fact that the mere awareness of asserted imminent damage to wildlife does not satisfy Article III. The Supreme Court ruled that the plaintiffs in *Lujan* lacked standing because none of them was "'directly' affected by the government's action apart from their "'special interest in the subject.'"" *Id.* at 563 (citation omitted). The same is true here.

Finally, the district court erred by hypothesizing that "adopting defendants' view of standing would allow the government to have unrestrained authority to demean members of any religious group without legal consequence." March 1 Opinion at 32 (SRA 32). The point amounts to the suggestion that a court should recognize Article III standing in a case on the "assumption that if [plaintiffs] have no standing to sue, no one would have standing." *Valley Forge*, 454 U.S. at 489. *Valley Forge* specifically rejected that notion. *See ibid.* Likewise, there is no conceivable analysis pursuant to which the district court's above reasoning can stand side-by-side with the Supreme Court's refusal to find standing in *Allen* v. *Wright*, *supra*, which involved a claim of racial stigma. For all the above reasons, therefore, the district

court erred by holding that plaintiffs have standing to challenge 36 U.S.C. 119.

2. Plaintiffs Lack Any Cognizable or Redressable Injury That Would Support Standing to Seek a Declaration or Injunction Against the President's or His Press Secretary's Enforcement of 36 U.S.C. 119 Through Issuance of a Proclamation or Otherwise.

The district court also lacked jurisdiction to enjoin the enforcement of 36 U.S.C. 119 because plaintiffs can demonstrate no concrete injury resulting from the President's proclamation of a day of prayer, and because and separation of powers principles bar a court from issuing injunctive or declaratory relief against the President in any event. Moreover, plaintiffs fail to identify any redressable injury caused by Press Secretary Gibbs.

a. Plaintiffs Can Identify No Concrete, Particularized Injury Resulting from the President's Issuance of the Proclamation Required by 36 U.S.C. 119.

The district court observed that "[th]e plaintiffs in this case learned of the National Day of Prayer and the presidential proclamations through media reports." March 1 Opinion at 30 (SRA 30). In that respect, plaintiffs are in the same position as the plaintiffs in *Valley Forge*, who lacked standing to challenge the government's transfer of excess military property to a religious college because their only exposure to the transfer was via a news release. *See* 454 U.S. at 486-87. That kind of harm is too generalized to support Article III standing, because to rule otherwise would

allow citizens "to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487. *See also Lujan*, 504 U.S. at 567 ("[i]t cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world").

The district court held that plaintiffs have standing to challenge the President's proclamation of a day of prayer under section 119 for the same reason it held they can challenge the statute itself – the fact that everyone in the country is part of the "intended audience" for the message the statute and proclamation disseminate. *Id.* at 21. As we have already explained, this holding directly conflicts with Supreme Court and Seventh Circuit case law. *See* p. 27, *supra*.

Indeed, the district court *itself* recognized that plaintiffs' "mere awareness" of National Day of Prayer proclamations, to the extent those proclamations go beyond "designating the First Thursday in May as a National Day of Prayer," March 1 Opinion at 37 (SRA 37), does not identify any concrete and particularized Article III injury. *Id.* at 38 (SRA 38) (noting that "[p]laintiffs fail to explain how their mere awareness of a proclamation in this context is distinguishable from the injury the Court deemed insufficient in *Valley Forge*"). For the same reason, the district court should also have held that plaintiffs lack standing to challenge the President's issuance of the proclamation required by 36 U.S.C. 119. Plaintiffs' "awareness" of

that proclamation does not materially differ for Article III purposes from their awareness of other presidential prayer proclamations.

b. Separation of Powers Principles Preclude a Court from Granting Injunctive or Declaratory Relief Against the President With Respect to His Implementation of 36 U.S.C. 119.

i. In *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), a state and two voters sued the President, the Secretary of Commerce, and various other government officials, seeking an injunction requiring them to eliminate overseas federal employees from the 1990 census apportionment count. *See id.* at 790-791. The district court issued an injunction against the President, the Secretary of Commerce, and the Clerk of the House of Representatives, but the Supreme Court reversed on the merits. *See id.* at 802, 806. The plurality in *Franklin* noted that the district court erred by failing to evaluate, at the threshold, "whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable." *Id.* at 803. Although prior cases had "left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty . . .," *see id.* at 802 (citation omitted), the plurality observed, "in general 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Id.* at 802-03, *quoting Mississippi* v.

Johnson, 71 U.S. 475, 501 (1867).

The plurality opinion in *Franklin* has the force of law in this respect because Justice Scalia, who issued a concurring opinion, stated an even broader view of the court's lack of authority to enjoin the President in the performance of his official duties. *See* 505 U.S. at 826 ("I think it clear that no court has authority to direct the President to take an official act"); *id.* at 829 ("we cannot direct the President to take a specified executive act"). *See Made in the USA Foundation* v. *United States*, 242 F.3d 1300, 1310 & n.24 (11th Cir. 2001), *cert. denied*, 534 U.S. 1039 (2001); *Swan* v. *Clinton*, 100 F.3d 973, 977 (D.C. Cir. 1996). *See also Clinton* v. *Jones*, 520 U.S. 681, 718-19 (1997) (Breyer, J., concurring) (acknowledging "the apparently unbroken historical tradition . . . implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts") (citation omitted).

The same principle precludes entry of a declaratory judgment against the President. As Justice Scalia explained in *Franklin*:

> For similar reasons, I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he can be compelled to defend his executive actions before a court . . . . The President's immunity from such judicial relief is a "functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history."

Franklin, 505 U.S. at 827 (Scalia, J., concurring) (quoting *Nixon* v. *Fitzgerald*, 457

U.S. 731, 749 (1982). *See Newdow* v. *Roberts*, 603 F.3d 1002, 1012 (D.C. Cir. 2010) (noting that "[a] court – whether via injunctive or declaratory relief – does not sit in judgment of a President's executive decisions") (citation omitted); *Swan*, 100 F.3d at 977 ("[S]imilar considerations regarding a court's power to issue relief against the President himself apply to [a] request for a declaratory judgment.").[12]

ii. The district court concluded that the Supreme Court has "recognized a distinction for a judicial injunction requiring the performance of a purely 'ministerial duty' by a President." March 1 Opinion at 34 (SRA 34) (citations omitted). *See generally Swan*, 100 F.3d at 977 (noting that in *Franklin*, the plurality "'left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty'") (citation omitted). The President's enforcement of 36 U.S.C. 119, however, does not fall within that exception.

A "ministerial" duty "is one in respect to which nothing is left to discretion." *Mississippi* v. *Johnson*, 71 U.S. 475, 498-99 (1866). *Accord Swan*, 100 F.3d at 977. That does not describe the President's role in enforcing 36 U.S.C. 119. The statute

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[12] *See also Newdow* v. *U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003) (holding that "[t]he President . . . is not an appropriate defendant in an action challenging the constitutionality of a federal statute"), *rev'd on other grounds*, 542 U.S. 1 (2004); *Newdow* v. *Bush*, 355 F. Supp. 2d 265, 282 (D.C. Cir. 2005) (noting that "[d]efendants contend that there has *never* been an injunction against the President issued and sustained by the federal courts, and this court is not aware of any") (emphasis in original).

does not require the President to intone the words "designating the First Thursday in May as a National Day of Prayer," March 1, 2010 Opinion at 37 (SRA 37), or to use any particular formulation in making that proclamation, and history shows that Presidents have in fact not always used that exact phraseology.[13]

The district court suggested that its injunction concerns only a ministerial Executive function because it does not direct the President to "take any affirmative action," but merely results in "an order enjoining the President from enforcing an unconstitutional statute that involves a single, largely symbolic act that occurs once a year." March 1 Opinion at 34 (SRA 34). This reasoning is flawed in several respects.

First, the district court itself noted that the courts lack the authority to enjoin or grant declaratory relief against the President because such relief would "'distract him from his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" March 1 Opinion at 34 (SRA 34) (quoting *Franklin*, 505 U.S. at 826 (Scalia, J., concurring). The order on appeal, which bars the President from enforcing

[13] The text of every presidential national day of prayer proclamation issued under 36 U.S.C. 119 is reproduced as Exhibit 116 below, attached to an affidavit from plaintiff's counsel at Docket No. 95. Prior presidential national day of prayer proclamations employed an even wider variety of formulations. Moreover, if it should come to that, this Court should construe 36 U.S.C. 119 as permitting that breadth of phraseology in order to avoid unnecessarily raising a constitutional question. *See generally NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

36 U.S.C. 119, clearly implicates that concern, and the district court's belief that the statute is unconstitutional does not change that fact. *See*, *e.g.*, *Mississippi* v. *Johnson*, 71 U.S. at 480 (holding that the President "cannot be restrained by injunction from carrying into effect an act of Congress alleged to be unconstitutional").[14]

The district court's holding that 36 U.S.C. 119 "involves a single, largely symbolic act that occurs once a year," March 1 Opinion at 34 (SRA 34), is, if anything, even less pertinent. The only relevant fact for separation of powers purposes is that plaintiffs are seeking an injunction that precludes the President from enforcing a federal statute. The *nature* of the obligation a statute imposes on the President has no bearing on his *duty* to carry it out for present purposes, nor is there any case law suggesting a court has the authority to decide which statutory duties on the President are more important than others. The district court's statement that 36 U.S.C. 119 is unimportant because it involves only a "symbolic act" is inappropriate for the same reasons, not to mention unduly dismissive of the significant, secular purposes section 119 seeks to achieve. *See* pp. 49-52, *infra*.

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[14] For the same reason, the district court was wrong to hold that the relief it ordered against the President is consistent with the separation of powers because the court "*relieve[d]* the President of a duty imposed by Congress," instead of "impos[ing] a new one." March 1 Opinion at 35 (SRA 35). Article III of the Constitution invests the President with authority to see that the laws are faithfully executed, *see* pp. 36-37, *supra*, and the district court's injunction plainly interferes with the President's exercise of that authority.

The district court also held that an injunction barring the President from enforcing 36 U.S.C. 119 would not violate the separation of powers because "even if enforcement of the statute is enjoined, this would not prohibit the President from issuing 'prayer proclamations' as a general matter." March 1 Opinion at 35 (SRA 35). *See also id.* at 37 (SRA 37) (noting that the court's injunction is "limited to 'designating the first Thursday in May as a National Day of Prayer'"). To the extent the district court's above comments suggest that the President can comply with the court's injunction by rewording the annual National Day of Prayer proclamation to avoid reciting the exact words in 36 U.S.C. 119, the court's injunction is a mere "folly," *Newdow* v. *Roberts*, 603 F.3d at 1011, which should be reversed on that ground alone. If, on the other hand, the court did not intend its injunction to be so construed, allowing the President to issue other kinds of day of prayer proclamations does not negate the structural harm the court's injunction would do to our system of separated powers, since the injunction specifically precludes the President from enforcing a federal statute.

iii. The district court appeared to suggest that a court can issue injunctive or declaratory relief against a President even for an act that is *non*-ministerial. *See* March 1 Opinion at 33 (SRA 33). The cases the court cited to support that completely unprecedented notion, however, are not relevant. For example, *Clinton*

v. *City of New York*, 524 U.S. 417 (1998), which involved a challenge to the constitutionality of the Line Item Veto Act, presented a "basic case of judicial review of legislation," *Newdow* v. *Roberts*, 603 F.3d at 1012, not "a decision committed to the executive discretion of the President." *Ibid.* Likewise, *Clinton* v. *Jones*, 520 U.S. 681 (1997), merely held that the separation of powers does not require federal courts to stay all private actions against the President until he leaves office, *id.* at 705-06, and *United States* v. *Nixon*, 418 U.S. 683 (1974), ruled only that the President could be required to comply with a grand jury subpoena in a criminal case that sought tapes and documents. *Id.* at 697. None of those cases holds that a court has authority to preclude the President from taking a non-ministerial act.

c. Plaintiffs Lack Standing to Sue Press Secretary Gibbs Because He Has Caused Them No Redressable Article III Injury.

The district court held that it had authority to issue declaratory and injunctive relief against Press Secretary Gibbs because "defendants do not deny that the President generally has implemented § 119 through his press secretary and they offer no reason for believing that will change." March 1 Opinion at 36 (SRA 36). To demonstrate Article III standing, however, a plaintiff must be able to show "a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e]

result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560, 561 (citation omitted).

It is *the President* who is solely charged with, and responsible for, proclaiming the national day of prayer identified in 36 U.S.C. 119. As a result, even if plaintiffs could claim to have sustained harm by virtue of the statute and its issuance, such harm would be the result of actions taken by the President, and any such injury could be redressed by issuing relief only against the President (which, for the reasons explained above, is not available because of separation of powers concerns). *See*, *e.g.*, *Lujan*, 504 U.S. at 561 (no Article III standing where plaintiff's alleged harm results from the acts of a "third party").

For example, in *Newdow* v. *Roberts*, *supra*, the D.C. Circuit recently held that the plaintiffs in that case lacked standing to sue various defendants, including the Chief Justice of the United States, to challenge the practice of clergy-delivered prayers at presidential inauguration ceremonies, and the use of the words "so help me God" at the conclusion of the President's oath of office. *See* 603 F.3d at 1009, 1013. Noting that it is the President who is responsible for determining the content of his inaugural ceremony, the D.C. Circuit held that the harm the plaintiffs alleged was redressable only by relief against the President, who could not be sued because of separation of powers concerns. *See ibid.*

So too, it is the President alone who is charged with issuing the National Day of Prayer proclamation required by 36 U.S.C. 119, and it is the President who is responsible for the content of any proclamation made in fulfillment of the statute. Thus, for the same reasons *Newdow* v. *Roberts* held that the plaintiffs there lacked standing to sue anyone other than the President concerning the content of the President's inaugural ceremony, plaintiffs lack standing to sue Press Secretary Gibbs regarding *President Obama's* decision to issue any day of prayer proclamation under 36 U.S.C. 119.

II. 36 U.S.C. 119 Is Consistent With The Establishment Clause.

Because plaintiffs lack standing, the district court lacked jurisdiction to address the merits of their challenge to 36 U.S.C. 119. On the merits, the court also erred in holding the statute and its implementation unconstitutional. Section 119 is constitutional under each of the tests the Supreme Court has used to evaluate Establishment Clause cases, although the Court should apply the *Marsh* v. *Chambers* historical test because that analysis is most relevant here.

A. National Day of Prayer Proclamations Have Occurred Since Our Nation's Beginning and Were Specifically Approved by the First Congress, and Are Constitutional Under *Marsh* v. *Chambers*.

1. In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the Supreme Court noted that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. For example, "the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." *Id.* at 787 (citations omitted). Similarly, "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer." *Id.* at 787-88. Three days later, "the final agreement was reached on the language of the Bill of Rights . . .." *Id.* at 788 (citation omitted). Based on this history, *Marsh* held that "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment . . .." *Id.* at 788 (footnote omitted). The Court reasoned that it could "hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." *Id.* at 790.

The rationale of *Marsh* supports the constitutionality of 36 U.S.C. 119. The statute codifies a practice, similar to opening legislative prayer, that is "deeply embedded in the history and tradition of this country." *Marsh*, 463 U.S. at 786. As detailed above, the Continental Congress issued a number of proclamations calling the nation to a day of prayer, *see* p. 6, *supra*, and the same practice continued under the new Constitution. Indeed, on "[t]he day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" *Lynch*, 465 U.S. at 675 n.2 (citation omitted). *See also ibid*. (quoting part of the day of prayer proclamation President Washington issued in response).

As is true of the practice of opening legislative prayer that *Marsh* upheld, "it can hardly be thought" that in the same week Members of the First Congress both urged President Washington to proclaim a national day of prayer and thanksgiving and also voted to approve the draft of the First Amendment for submission to the States, "they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable." 463 U.S. at 790.[15]

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[15] Similar to the practice of opening legislative prayer upheld in *Marsh*, presidential national day of prayer proclamations also have continued since the days of the Founders. *See* pp. 6-12, *supra*. *See generally Marsh*, 463 U.S. at 795 (noting

The Supreme Court in *Marsh* did note that the history of the First Amendment would not require a court to approve opening legislative prayers that "proselytize or advance any one, or . . . disparage any other, faith or belief," 463 U.S. at 794-95, and 36 U.S.C. 119 transgresses none of those limits. The statute says nothing about the content of any prayer, does not coerce the giving of any prayer, and offers no judgment regarding anyone who chooses not to pray in accordance with the proclamation it calls upon the President to make. Therefore, under *Marsh*, the practice of governmental proclamations of national days of prayer is fully consistent with the Establishment Clause.

2i. The district court attempted to distinguish *Marsh* by claiming that "[n]o tradition existed in 1789 of Congress requiring an annual National Day of Prayer on a particular date." April 15 Opinion at 51 (SRA 100). Nothing in *Marsh*, however, requires that degree of specificity in determining whether a practice is constitutional because of its historical pedigree. To the contrary, *Marsh* upheld the practice of opening legislative prayer in the Nebraska legislature because it was "similar" to the historical practice at the time of the First Congress. 463 U.S. at 791.

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that "[t]he unbroken practice for two centuries in the National Congress . . . gives abundant assurance that there is no real threat [of an Establishment Clause violation] 'while this Court sits'") (citation omitted).

Morever, this Court has specifically rejected the kind of crabbed reading of *Marsh* the district court adopted here. In *Van Zandt* v. *Thompson*, 839 F.2d 1215 (7th Cir. 1988), plaintiffs argued "that *Marsh*'s historical analysis applies only to specific practices with deep historical roots and that the defendants must fail because there is no record of a prayer room linked to the legislative chamber of the First Congress, nor any longstanding history of prayer rooms in other legislative precincts." *Id.* at 1219. This Court rejected that argument, upholding the Illinois House's creation of a prayer room for representatives in the state capitol building because *Marsh* "points to a . . . tradition . . . of legislatures' acknowledging, in relatively modest and nonintrusive ways, some role for spiritual values in their work," and because this Court did "not read *Marsh* as limiting this tradition to the specific practices that date back to the enactment of the Bill of Rights." *Id.* at 1219.

ii. The district court also held that *Marsh* is distinguishable because "the actions of early Presidents . . . does not point in one direction." April 15 Opinion at 52 (SRA 101). *See also id.* at 53 (SRA 102) (noting that one President (Jackson) refused to proclaim a day of prayer and that another (Madison) did so but later "regretted it") (citation omitted). In *Marsh*, however, the Supreme Court rejected a similar argument. The plaintiffs in *Marsh* argued that the Founders were divided on the question of opening legislative prayers because "John Jay and John Rutledge

opposed [a] motion to begin the first session of the Continental Congress with prayer," 463 U.S. at 791, and "Madison expressed doubts concerning the chaplaincy practice." *Ibid.* n.12. In response, the Supreme Court noted that "opposition to a measure" does not "weaken the force of the historical argument," but "infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly." *Id.* at 791. Thus, under *Marsh*, it is enough that the First Congress, which drafted the Establishment Clause, acted in a manner that is similar to the government action challenged here. *See Marsh*, 463 U.S. at 788. *Accord Van Zandt*, 839 F.3d at 1219; *Newdow* v. *Roberts*, 603 F.3d at 1018 (Kavanaugh, J., concurring) (concluding that traditional inaugural prayers are constitutional because they "closely resemble the legislative prayers upheld . . . in *Marsh*).

iii. Finally, the district court erred by seeking to distinguish *Marsh* based on three other grounds. First, the court held that the thanksgiving proclamations issued by Presidents at the founding and throughout history differ from 36 U.S.C. 119 "because thanksgiving proclamations serve an obvious secular purpose of giving thanks." April 15 Opinion at 51 (SRA 100). Those proclamations, however, called upon people to give thanks *to God*. *See* pp. 4-5, *supra*. There is no discernable constitutional difference between inviting people to give thanks to God and inviting

them to pray.[16]

Moreover, even the earliest of the proclamations explicitly were designated as calls for prayer. For example, on "[t]he day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" *Id.* at 675 n.2 (citation omitted). In response to Congress's request, President Washington proclaimed November 26, 1789, a day of thanksgiving to "'offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions . . . .'" *Lynch*, 465 U.S. at 675 n.2 (citation omitted).

Second, the district court held that "a President's statements of his *own* beliefs about prayer," which the court did not enjoin, "are less likely to the viewed as an official endorsement than a permanent statement from the government in the form of a statute encouraging all citizens to pray." April 15 Opinion at 51-52 (SRA 100-01) (emphasis in original). This distinction fails because, as we have noted, the First Congress *itself* passed a joint resolution requesting President Washington to proclaim

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[16] The district court's similarly erred by holding that other presidential prayer proclamations, such as Madison's pronouncements, "were more about taking notice of particular events rather than prayer" because they "were issued during war or other times," April 15 Opinion at 51 (SRA 100). There is no evident constitutional basis for distinguishing between prayer for a particular event and prayer in general.

a national day of prayer. *See* pp. 4-5, *supra*. 36 U.S.C. 119 does nothing more than that. The fact that section 119 makes that practice "permanent" is not a material change from what the First Congress itself approved, any more than the creation of a prayer room for state legislators, which this Court upheld in *Van Zandt* based on *Marsh*, materially differs from the historical traditions on which this Court relied in that case. *See* 839 F.2d at 1219.

Finally, the district court held that, "unlike §119, thanksgiving proclamations are not an attempt to help particular religious groups organize." April 15 Opinion at 52 (SRA 101). In this respect, the district court challenged Congress's decision to amend the statute in 1988 to select a particular date for the National Day of Prayer. As we have explained, however, the practice of legislative bodies identifying particular days for a day of prayer also goes back to the time of the Founders, *see* pp. 4-5, *supra*, and there is no reason to believe the First Congress would have thought the Establishment Clause precluded it from doing the same. Moreover, as we discuss below, the statute's inclusion of a specific date serves a valid secular purpose. *See* pp. 53-54, *infra*.

B. This Case Would Fail on the Merits Even if the Court Were to Apply the *Lemon* v. *Kurtzman* Test.

Because plaintiffs lack standing and because *Marsh* v. *Chambers* requires the dismissal of this action if the merits are nonetheless reached, this Court need not address whether 36 U.S.C. 119 is consistent with the *Lemon* test, which the Supreme Court sometimes uses to evaluate practices that were not approved by the First Congress. *See Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). Even if the Court were to apply the *Lemon* test, however, which focuses on the purpose and effect of government action, it would find that 36 U.S.C. 119 is consistent with that test.

1. As explained more fully above, *see* pp. 42-43, *supra*, "[o]ur 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*, 465 U.S. at 668 (referring, among other sources, to proclamations of the Continental Congress and official statements by President Washington and other Founders). As a result, the Supreme Court in *Marsh* 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 acknowledgment of beliefs widely shared among the people of this country." *Marsh*, 463 U.S. at 792.

The Supreme Court has repeatedly emphasized that the purpose and effect of government action under the Establishment Clause must be viewed in the context in which that action arises. *See, e.g., Lynch*, 465 U.S. at 679 (noting that "focusing exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause). *See also Van Orden* v. *Perry*, 545 U.S. 677, 690-92 (2005) (plurality opinion); *id.* at 700 (Breyer, J., concurring in the judgment); *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 866 (2005).

Guided by the above principles, it is apparent that 36 U.S.C. 119 has the primary purpose and effect of acknowledging our nation's religious heritage and culture, and continuing a practice that goes back to the beginning of our republic. *See* pp. 4-5, *supra*. Both the Continental Congress and the First Congress, which drafted the Establishment Clause, called upon the President to declare a national day of prayer and thanksgiving to God. *See ibid.* *See also Lynch*, 465 U.S. at 677 (noting that there are "countless other illustrations of the Government's acknowledgment of our religious heritage"). Moreover, the Supreme Court in *Lynch* expressly approved of the statute that calls upon the President to proclaim a National Day of Prayer, *see* 465 U.S. at 677, referring to it as merely one of many "accommodation[s] of all faiths

and all forms of religious expression," that the Establishment Clause permits. *Ibid.*[17]

Likewise, individual Supreme Court Justices have repeatedly stated their approval of presidential thanksgiving day proclamations. *See Elk Grove*, 542 U.S. at 27 (Rehnquist, C.J., O'Connor & Thomas, JJ., concurring in the judgment); *County of Allegheny*, 492 U.S. at 671 (Kennedy, J., joined by Rehnquist, C.J., White & Scalia, JJ.); *Wallace* v. *Jaffree*, 472 U.S. 38, 101 (1985) (Rehnquist, J., dissenting); *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).[18] Those proclamations share the same constitutional history as the proclamation required by 36 U.S.C. 119. *See* pp. 4-5, *supra*.

Indeed, if 36 U.S.C. 119 were to lack a secular purpose despite the historical tradition it reflects, it is difficult to think of a reason why the phrase "God Save the United States and this Honorable Court" by which sessions of the Supreme Court are called to order, *see Hein*, 551 U.S. at 632, should be viewed differently. The

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[17] In *County of Allegheny* v. *ACLU*, the Supreme Court later noted that it would express no judgment regarding the constitutionality of 36 U.S.C. 119 because that statute was not at issue in that case. *See* 492 U.S. 573, 603 n.52 (1989). In light of *County of Allegheny*, the government is not arguing in this appeal that the Supreme Court's approval of 36 U.S.C. 119 in *Lynch* is binding *dicta* here.

[18] Justice Stevens also announced his support for presidential day of prayer proclamations, *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting), although he did so because "they have embedded within them the inherently personal views of the speaker." *Ibid.*

Supreme Court noted in *Zorach* v. *Clauson* that this phrase too is a "supplication" to a Supreme Being. 343 U.S. at 313.

2. The district court held that 36 U.S.C. 119's sole purpose is to "encourage and facilitate prayer." April 15 Order at 37 (SRA 86). To reach that conclusion, however, the court had to ignore the historical background explained above and to analyze the statute out of context, contrary to how the Supreme Court has directed the courts to apply the Establishment Clause. *See* p. 50, *supra*.

The district court also held that 36 U.S.C. 119's legislative history shows that Congress enacted it "to encourage all citizens to engage in prayer, and in particular the Judeo-Christian view of prayer." April 15 Opinion at 30 (SRA 79). The district court based that assertion on the claim that the idea for the statute came from the Rev. Billy Graham. *See id.* at 29 (SRA 78). No senator or congressman who expressed public support for the statute did so in sectarian language, however, and the relevant committee reports and congressional record citations regarding the statute all reflect that Congress enacted section 119 for the purposes *Lynch* holds are permissible – to acknowledge the history, traditions, and culture of this Nation regarding a day of prayer for the Republic. *See* pp. 6-9 *supra*.

None of the statements the district court cited from the statute's legislative history say anything different, and in any event, the Establishment Clause focuses on

"the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) (emphasis added); *see McGowan* v. *Maryland*, 366 U.S. 420, 469 (1961) (opinion of Frankfurter, J.). *See also Rio Linda*, 597 F.3d at 1014 (noting that a court is "called upon to discern Congress's ostensible and predominant purpose, not the purpose of an individual") (citation omitted).[19]

The district court also erred by holding that the 1988 amendment to the statute, which selected a specific day for the National Day of Prayer, "does not serve any purpose for the government or the country as a whole, but simply facilitates the religious activities of particular religious groups." April 15 Opinion at 32. Given the federal statute requiring a proclamation, there is nothing unconstitutional about regularizing the practice and establishing a fixed date.

Indeed, it is the norm in the context of other congressionally proclaimed days for Congress to specifically designate a particular month, week, or date. *See* 36

[19] The district court noted that one Senator who spoke in support of 36 U.S.C. 119 "associated communism with people who do not pray." April 15 Opinion at 31 (SRA 80) (citation omitted). Referring to this country's unique religious heritage and culture as a ground for drawing a *political* distinction with communism is not impermissible. For example, members of Congress used similar language in explaining why they supported adding the words "under God" to the Pledge of Allegiance, but those words are permissible because they serve the political purpose of acknowledging this country's religious heritage. *See*, *e.g.*, *Rio Linda*, 597 F.3d at 1032-34.

U.S.C. 101-143. The designation of a precise date allows members of the public to be aware of the occasion and to coordinate their actions with one another, to the extent desired. There is no reason the date of the Day of Prayer must remain unfixed, while every other such proclaimed date, such as those for "National Grandparents Day," 36 U.S.C. 125, "Stephen Foster Memorial Day," id. § 140, and "National Hispanic Heritage Month," *id.* § 126, is specified.

Moreover, that a fixed date may assist the planning of events by religious groups is of no constitutional moment. Where religious activity results from the genuine and independent choices of individuals, "[t]he incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributed to the individual . . ., not to the government." *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 652 (2002). Moreover, the Supreme Court has observed that government "follows the best of our traditions" when it "adjusts the requirements of public programs to accommodate" religious exercise. *Zorach*, 343 U.S. at 314. Thus, the 1998 amendment to 36 U.S.C. 119 reflects nothing more than "benevolent neutrality" toward religion, which is permissible. *See Corp. of Presiding Bishop* v. *Amos*, 483 U.S. 327, 334 (1987) (citation omitted).[20]

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[20] *See also Lynch*, 465 U.S. at 677 (describing 36 U.S.C. 119 as an "accommodation" of religion); *Employment Div.* v. *Smith*, 494 U.S. 872, 890 (1990) (Establishment Clause does not preclude religious organizations from seeking

3. That 36 U.S.C. 119 recognizes the act of prayer does not alter the statute's primary purpose and effect, which is to acknowledge this country's religious heritage and culture. *See* pp. 49-52, *supra*. The recognition of that history and its continuing import is reflected, among other places, in the text of the Pledge of Allegiance, *see* 4 U.S.C. 4; the National Anthem, *see Elk Grove*, 542 U.S. at 30; and our National Motto, which appears on our coins and currency. *See Newdow* v. *Lefevre*, 598 F.3d at 645. *See also Newdow* v. *Roberts*, 603 F.3d at 1018 (Kavanaugh, J., concurring in the judgment) (holding phrase "so help me God" in oaths for government officials is permissible because "deeply rooted in the Nation's history and tradition). Section 119 advances religion no more than those practices and laws. As Justice O'Connor noted in *Elk Grove*, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." 542 U.S. at 35-36 (O'Connor, J., concurring in the judgment). *See also ibid.* (noting that "[f]or centuries, we have marked important occasions or pronouncements with . . . invocations of divine assistance"); *DeBoer* v. *Village of Oak Park*, 267 F.3d 558 (7th Cir. 2001) ("prayers and the invocation of divine guidance have been accepted as part

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legislative accommodations of religion).

of the American political discourse throughout the history of this Republic").

Such acknowledgments of religion differ from coercive attempts by the government to promote prayer that fall outside this constitutional tradition, such as the state statute that provided for a "moment of silence or voluntary prayer" in public schools in *Wallace* v. *Jaffree*, 472 U.S. 38, 59 (1985); officially-sponsored prayer at public high school football games, *see Santa Fe*, 530 U.S. at 313; daily classroom invocations of God's blessings in public schools, *see Engel* v. *Vitale*, 370 U.S. 421, 435 (1962); or state-sponsored prayer before meals at state-operated military colleges, *see Mellen* v. *Bunting*, 327 F.3d 355, 375 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004).

4. The district court also erred in holding that 36 U.S.C. 119 has the effect of advancing religion because it includes a specific reference to "churches." *See* April 15 Opinion at 25 (SRA 74). The term "church" frequently appears in the United States Code as a convenient shorthand for houses of worship,[21] and the use of that term in 36 U.S.C. 119 reflects nothing more than Congress's reasonable expectation that "churches," along with "groups" and "individuals" (to quote the statute as it was originally enacted in 1952), might choose to commemorate the day.

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[21] *See*, *e.g.*, 4 U.S.C. 7(c); 10 U.S.C. 6031; 11 U.S.C. 303; 13 U.S.C. 101, 225; 18 U.S.C. 241; 16 U.S.C. 479; 16 U.S.C. 607(a).

There is nothing unconstitutional about that.

Additionally, the district court expressed concern that the original version of the statute stated that the President should not select a day other than a Sunday for the National Day of Prayer. *See* April 15 Opinion at 25 (74). This objection to the statute has no current relevance, however, because Congress has since amended section 119 to select a particular date for the National Day of Prayer, which sometimes falls on a Sunday. Moreover, the Constitution itself excepts Sundays from the ten-day period for exercise of the presidential veto, *see* U.S. Const. art. I, § 7, and the Supreme Court has held that Sunday closing laws are constitutional because in our culture, Sundays have traditionally been a day of rest. *See McGowan* v. *Maryland*, 366 U.S. 420 (1961). Thus, even as originally enacted, section 119 was not problematic because of its reference to Sundays.

5. Finally, in an attempt to distinguish *Van Orden* v. *Perry*, *supra*, where Justice Breyer provided the decisive vote to uphold the placement of a Ten Commandments display on the grounds of a state capitol building, the district court noted that "[a]t least in recent years, the National Day of Prayer has sparked a number of controversies throughout the country." April 15 Opinion at 57 (SRA 106). The court contrasted that with *Van Orden*, where Justice Breyer found it significant that the Ten Commandments display at issue there had not been divisive, at least before

that suit. *See* 545 U.S. at 704.

None of the instances the district court mentioned as having revealed "divisiveness" regarding the National Day of Prayer, however, involved any involvement by the government in promoting a particular religion or demeaning another religion in implementing section 119. The court was wrong to conclude that it could hold the statute unconstitutional because of how some groups have chosen to commemorate it. *Cf. DeBoer*, 267 F.3d 558 (holding that residents who wished to use village hall as part of their participation in the National Day of Prayer were entitled to use the hall under the Free Speech Clause).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the accompanying Brief is composed in Times New Roman typeface, with 14-point type, in compliance with the type-size limitations of Federal Rule of Appellate Procedure 32(a)(5)(B) and Seventh Circuit Rule 32(b). The Brief contains 13,999 words, according to the word count provided by Wordperfect 12.

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Lowell V. Sturgill Jr.

Seventh Circuit Rule 31(e) Certification

I hereby certify that the electronic copy of the brief that counsel has filed with the Court by use of the Court's CM/ECF system has been scanned for viruses and is virus free.

_____

Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2010, I filed an original and 15 copies of the Brief for Appellants and attached Required Short Appendix, along with 10 copies of a Separate Appendix, with the Court by delivering the Brief, Required Short Appendix, and Supplemental Appendix to Federal Express for next day delivery to the Clerk. On the same day, I provided the Court with an electronic copy of the Brief by use of the Court's CM/ECF system.

I also certify that on July 1, 2010, I served the above documents by causing two copies of the Brief and Required Short Appendix and one copy of the Separate Appendix to be delivered to Federal Express for next-day delivery to the counsel listed below:

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