

The following brief, James v. ACLU, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the Alabama Supreme Court on May 8, 1997.

In The Supreme Court of Alabama

THE STATE OF ALABAMA,
ex rel., fob James, Governor,
and
Bill Pryor, Attorney General,

Consolidated Case Nos.
1960927, 1960572, and
1960839

Appellants,

v.

AMERICAN CIVIL LIBERTIES UNION
OF ALABAMA, et al.,

Appellees.

On Appeal from the Circuit Court of
Montgomery County, Case No. CV-95-919

Brief Amicus Curiae of Alabama Clergy, Baptist Joint Committee
on Public Affairs, Clifton Kirkpatrick as Stated Clerk of the General
Assembly of the Presbyterian Church (U.S.A.), The Interfaith
Alliance, and Union of American Hebrew Congregations

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INTEREST OF AMICI

The statements of interest of amici are contained in the Appendix.

STATEMENT OF THE CASE

Amici herein adapt the statement of the case contained in the brief of Appellee American Civil Liberties Union of Alabama.

ARGUMENT

- I. SEPARATION OF CHURCH AND STATE IS GOOD FOR RELIGION AND IS ESSENTIAL FOR RELIGIOUS LIBERTY IN OUR RELIGIOUSLY HETEROGENOUS DEMOCRACY.

Separation of church and state is "a cornerstone principle" of our constitutional democracy. *Lee v. Weisman*, 505 U.S. 577, 588 (1992). More than two hundred years ago, the Founding Fathers established religious liberty and its corollary separation of church and state as the basis for the other liberties contained in the Bill of Rights.

In his *Federalist* no. 51, James Madison described how the Framers viewed the central role of religious liberty in our constitutional structure by noting that "[i]n a free government the security for civil rights must be the same as that for religious rights." As Justice Frankfurter restated that view one hundred and fifty years later, "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *McCullum v. Board of Education*, 333 U.S. 203, 232 (1948) (Frankfurter, J., concurring) (quoting *Everson v. Board of Education*, 330 U.S. 1, 59 (1947) (Rutledge, J., dissenting)).

This "spacious conception" of church-state separation, *McCullum*, 333 U.S. at 213 (Frankfurter, J., concurring), has been interpreted to mean "that government may not promote or affiliate itself with any religious doctrine or organization [and] may not discriminate among persons on the basis of their religious beliefs

and practices . . ." *Allegheny County v. ACLU*, 492 U.S. 573, 590 (1989). It also prevents government from endorsing or favoring one religion over others or religion over nonreligion. *Id.* at 593; *Larson v. Valente*, 456 U.S. 228, 244 (1982). As such, this constitutional proscription "prohibits government from appearing to take a position on questions of religious belief or from `making adherence to a religion relevant in any way to a person's standing in the political community.'" *Allegheny County*, 492 U.S. at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). "It is settled law that no government official in this Nation may violate th[is] fundamental constitutional right[]." *Id.* at 590.

As important as separation of church and state is to a full realization of civil liberty and the perpetuation of our democracy, it is also crucial to the vitality of religion. Church-state separation is not an anti-religious concept¹ but instead protects religious diversity and equality by ensuring that government remain neutral on religious matters, neither favoring nor inhibiting religion. *Abington School District v. Schempp*, 374 U.S. 203, 222 (1963); *Allegheny County*, 492 U.S. at 593.

More than three hundred and fifty years ago, Roger Williams, Baptist founder of Rhode Island, spoke about the importance of maintaining a "hedge" or "wall of separation between the garden of the church and the wilderness of the world." Williams' belief that church-state separation benefitted religion was echoed during the founding period by leading religious figures including John Witherspoon of New Jersey, Isaac Backus of Massachusetts, and John Leland of Virginia.² As James Madison remarked in 1819 in reminiscing on the nation's early battles to secure religious liberty, "the number, the industry, and the morality of the Priesthood, and the devotion of the people have been manifestly increased by the total separation of church and state."³

Madison's observation has been borne out. We live in a religiously diverse nation with more than fifteen hundred different denominations and faiths, many of which fall outside the

¹ "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers . . ." *Engel v. Vitale*, 370 U.S. 421, 435 (1962). Accord *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

² Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* (1991), at 69-87, 207; Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* (1964), at 41, 43-45, 62-63.

³ Madison to Robert Walsh, March 2, 1819, reproduced in Robert S. Alley, ed., *James Madison on Religious Liberty* (1985), at 80-81.

Judeo-Christian tradition.⁴ In addition to enhancing religious diversity, separation has allowed religious devotion to flourish in America. A recent study of American religious life indicates that church membership and religious affiliation are at their highest levels since the nation's founding.⁵ Such studies are substantiated by periodic opinion surveys indicating that America is the most religious of all western industrialized nations.⁶ See also Schempp, 374 U.S. at 213 (noting the high percentages of Americans who profess a religious belief (97%) and maintain church membership (64%)). As Justice Blackmun explained more recently, separation of church and state "protects religious liberty on a grand scale; it is a social compact that guarantees for generations a democracy and a strong religious community -- both essential for safeguarding religious liberty." Lee, 505 U.S. at 606 (Blackmun, J., concurring).

Just as separation protects religious diversity and devotion, it also serves as a guarantee that no one faith will ever gain political dominance and seek to force its religion on others.

For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance.

Grand Rapids School District v. Ball, 473 U.S. 373, 382 (1985). The

⁴ J. Gordon Melton, ed., *The Encyclopedia of American Religions*, 3d ed. (1989), at xix; Kenneth B. Bedell, ed., *Yearbook of American and Canadian Churches 1994* (1994), passim. According to one reference, the state of Alabama has at least seventy different religious bodies, denominations, or sects with a significant membership, including Baha'is, Roman Catholics, Maronite Catholics, Melkite (Greek) Catholics, Friends/Quakers (conservative and Friends General Conference), Greek Orthodox, Latter-day Saints (Mormons), Mennonites, Muslims, Unitarian-Universalists, and various Jewish communities, all of which fall outside the category of mainstream or evangelical Protestantism. Martin B. Bradley, et al., *Churches and Church Membership in the United States 1990* (1992), at 12.

⁵ Roger Finke and Rodney Stark, *The Churching of America, 1776-1990* (1992), indicating that religious affiliation has grown consistently from 17% in 1776 to 62% in 1980.

⁶ A 1993 Gallup Opinion Poll found that 71% of Americans claim membership in a church or religious organization and 94% say they believe in God. In an average week 43% of the U.S. population attends church or some other place of worship, compared to 14% of the people in Great Britain. Princeton Religion Research Center, *Religious News Service*, July 12, 1993, at 5. See also "Spiritual America," *U.S. News & World Report*, April 4, 1994, at 48-59, indicating that 93% of Americans claim a belief in God, while 60% regularly attend worship.

Framers were keenly aware of this history and drafted a solution that would "jealously . . . guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religion, and between religion and nonreligion." Id.

In addition to creating an environment that allows faith to flourish, church-state separation protects the independence and autonomy of religious entities and preserves the integrity of both religion and government. *Lee*, 505 U.S. at 589-590 (religion clauses exist "to protect religion from government interference"); *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (noting the Framers' concerns for the "integrity of religion"). Only by the virtue of the First Amendment are religious organizations guaranteed "an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952). See also *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding a religious exemption to Title VII); *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) (affirming church autonomy over religious affairs); *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (same).

But separation does more than merely command government to stay out of religious affairs; it also prevents public officials from expropriating religion for their own political purposes and goals, however compelling or benign their reasons may be. The Court declared thirty five years ago that the "first and most immediate" purpose of the Establishment Clause "rested on a belief that a union of government and religion tends to destroy government and to degrade religion." *Engel*, 370 U.S. at 431-432. That purpose holds true today. "The Establishment Clause thus stands as an expression of principle on the part of the Founder of our Constitution that religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate." Id. By disabling government from staking out a position on religious matters or using religion for its own ends, the Constitution ensures the integrity of religion while it diffuses religious strife and contempt that always accompanies such alignments. Id.

Thus for all of these reasons, the Constitution wisely forbids public officials from endorsing or favoring religion generally or from expropriating religious symbolism for official uses. *Allegheny County*, 492 U.S. at 592-593.

"When the government arrogates to itself a role in religious affairs, it abandons its obligation as guarantor of democracy. . . . When the government appropriates religious truth, it `transforms rational debate into theological decree.' . . . [James] Madison warned that government officials who would use

religious authority to pursue secular ends `exceed the commission from which they derive their authority and are Tyrants.' "

Lee, 505 U.S. at 607, 608 (Blackmun, J., concurring).

By embracing this precedent, the undersigned amici, as religious groups, communities, and clergy do not argue that government may never recognize our nation's religious heritage or the important role that religion plays in the lives of a majority of its citizens. "It is true that religion has been closely identified with our history" and that "our national life reflects a religious people who, in the words of Madison, are `earnestly praying . . . that the Supreme Lawgiver of the Universe . . . may guide them into every measure which they may be worthy . . .'" Schempp, 374 U.S. at 212-213 (quoting Madison's Memorial and Remonstrance). Our history is replete with official and unofficial acknowledgements of our religious heritage, the majority of which fall short of favoritism or endorsement of religion. See Lynch, 465 U.S. 674-677; Allegheny County, 492 U.S. at 631 (O'Connor, J., concurring) ("Clearly, the government can acknowledge the role of religion in our society in numerous ways that do not amount to an endorsement."). However, amici share the Supreme Court's aversion to claims of a national "civic religion," especially where that concept connotes the ability of government to identify and then advance "common" religious principles. Lee, 505 U.S. at 589. As the Justice Kennedy continued in that case:

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere . . .

Id. The line to be maintained is one that separates government recognition of our nation's religious heritage, especially of its rich religious diversity, from government affirmations of faith. While that line may not always be a bright one, it is clearly crossed, as in this case, when government officials in positions of authority publicly embrace and promote one religious tradition. Allegheny, 492 U.S. at 592-594.

Moreover, attempts to justify governmental affirmations of faith or to identify America's purpose with that of God are inconsistent with our constitutional traditions and harmful to sincerely held belief. Claims that America is a "Christian nation" are always exclusive of other faiths and have historically been used

to inhibit, not enhance, religious devotion and equality.⁷ In fact, this Court, writing in 1881, rejected a prosecution argument that indictments for profane swearing and blasphemy were justified because of their tendency to "corrupt the morals of the community, as to undermine the foundations of Christianity, which is justly regarded, in a certain sense, as part of the common law of [the state]." The court noted that the "sounder view" was that before such statements could be indicted, they had to be "uttered under such circumstances as to constitute a public nuisance." *Goree v. State*, 71 Ala. 7, 9 (1881).

We are not a "Christian nation" as that term suggests a special relationship between our Republic and one faith, but a nation of people who hold diverse religious beliefs.⁸ That diversity and devotion are protected and enhanced by the Court's holdings on separation of church and state, including those decisions prohibiting public officials from favoring or endorsing religion.

II. PRAYER AND THE TEN COMMANDMENTS ARE INHERENTLY RELIGIOUS AND ARE RELIGIOUSLY EXCLUSIVE.

Before this Court can address the constitutionality of Judge Moore's use of prayer and the Ten Commandments, it must first consider the nature of the activities involved. Prayer is religious

⁷ Historically, claims of a special relationship between Christianity and the law were used to justify prosecutions for blasphemy, *People v. Ruggles*, 8 Johns. 290 (N.Y. 1811); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824), to deny citizens the privilege of testifying or serving on juries, *Atwood v. Welton*, 7 Conn. 66 (1828), and to enforce discriminatory application of Sunday laws. *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817). While some 19th century jurists did identify a Christian basis for the law, see Joseph Story, *Commentaries on the Constitution* (1833) §§ 1873-1874, others disputed those claims. *State v. Williams*, 26 N.C. 400, 403 (1844); *Andrew v. N.Y. Bible and Prayer Book Society*, 4 Sandf. 156, 182 (N.Y. Super. 1850). As scholars have shown, despite occasional references to a Christian basis for the common law in early legal decisions, there was no consensus on the meaning or application of that term. By the time of the Civil War, judicial reliance on such assumptions had ended. See W. Frank Way, "The Death of the Christian Nation," 29 *J. Church & State* 509-529 (Autumn 1987).

The modern U.S. Supreme Court has also refused to assign any legal significance to early declarations of a relationship between Christianity and the law and, in fact, has repudiated such claims. See *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting) (referring to claims that America is a Christian nation such as those found in *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), as "aberrations").

⁸ See Franklin H. Littell, *From State Church to Pluralism* (1962), at xx ("The whole image of early America as a 'Christian nation' (i.e. Protestant-controlled) is a lie which must be struck down"); Morton Borden, *Jews, Turks, and Infidels* (1984); Isaac Kramnick and Laurence Moore, *The Godless Constitution* (1996).

activity; it is communication with God or a higher source which for many people is highly personal. As one court has noted, "[p]rayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people." *Karen B.*, 653 F.2d at 901; accord *Jaffree v. Wallace*, 705 F.2d 1526, 1534 (11th Cir. 1983), *aff'd mem.*, 472 U.S. 38 (1985) ("prayer is the quintessential religious practice").

Moreover, various faith traditions pray in vastly different ways. Even within Christianity, prayer comes in many forms and has varying content. Some people pray audibly, others pray silently, still others may chant, dance, gesture or pray in glossolalia. For some people, corporate prayer is an oxymoron if not an anathema, while for others group prayer is preferable.⁹ Prayer may involve exhortation, adoration, thanksgiving, supplication, entreatment, or may be precatory. See Bruce M. Metzner, ed., *Oxford Companion to the Bible* (1993), at 606-608. In essence, there is no universal content or style of prayer, nor does any particular form of prayer meet the religious needs of all faith traditions.

As a result, any prayer (such as that documented in the record) will necessarily reflect one particular faith tradition. In this case, the prayer offered is particularly sectarian due to its closing reference to Jesus as "our Lord and as our Savior." See Def. Exhibit B. It is axiomatic that only Christians pray in the name of Jesus, and then even Catholics and Orthodox Christians usually pray in the name of the Trinity. *Oxford Companion to the Bible*, at 608. This is not to criticize the content of Reverend Phillip Ellen's prayer but merely to make the rather unremarkable point that any prayer will represent one particular faith tradition to the exclusion of others.¹⁰

The Ten Commandments is also inherently religious. *Stone v. Graham*, 449 U.S. 39, 41-42 (1980). Although some of its dictates may have universal qualities, others have meaning only within a religious context. When depicted in its complete form, it is a religious document that is particular to the Judeo-Christian tradition(s). *Id.* at 41 ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths . . ."); accord *Harvey v. Cobb County*, 811 F. Supp. 669, 677 (N.D. Ga. 1993), *aff'd mem.*, 15 F.3d 1097 (11th Cir. 1993). Even within that tradition, however, there is no

⁹ For example, for many Quakers, prayer is always silent and is highly personal. In other faiths, such as Orthodox Judaism, adherents prefer to pray in groups of like believers (*minyans*).

¹⁰ The sectarian nature of the prayers thus distinguishes it from that form of "ceremonial" prayer at issue in *Marsh v. Chambers*, 463 U.S. 783 (1983). *Amici* believe, however, that the Court's analysis in *Marsh* was flawed, as all prayer is inherently religious.

consensus on the wording, composition, or even order of commandments. The Ten Commandments appear twice in the Christian Old Testament with slightly different wording (Exodus 20: 2-17; Deuteronomy 5: 6-21), with each then varying depending on the particular translation used.¹¹ Even greater variety is evident when Protestant versions are compared with those used by Roman Catholics. The traditional Catholic version combines the first two "Protestant" commandments into one but divides the "tenth" commandment into two separate admonitions. See Felician A. Fay, *Catholic Almanac* (1987) at 1981 (noting also that the Catholic Church prefers the rendition in Deuteronomy). And as a court expert testified in *Harvey*, differences exist between Christian and Jewish renditions. 811 F. Supp. at 672 (noting that the Jewish version of the Sixth Commandment traditionally uses the term "murder" in place of "kill").

Accordingly, as with prayer, there is no unanimity of opinion among faiths as to the appropriate phrasing or form of the Ten Commandments. Any depiction of the Ten Commandments will necessarily reflect one particular source, translation, or denominational preference to the exclusion of others.

III. THIS OFFICIAL USE OF PRAYER AND DISPLAY OF THE TEN COMMANDMENTS HARMS RELIGION.

As an initial matter, amici concur with the appellees that both the prayers and the posting of the Ten Commandments are attributable to Judge Moore in his capacity as a state judge.¹² The prayers take

¹¹ The rendition of the Ten Commandments represented on Judge Moore's plaque appears to be based on Exodus. This rendition is not verbatim but is abbreviated, apparently reflecting those passages and phrases Judge Moore considers to be most theologically significant. As an example of the differences in translation, the Protestant King James' Bible, the version chosen by Judge Moore, translates Exodus 20:3 as "Thou shall have no other gods before me," while the Catholic edition of *The Living Bible* translates the same passage as "You may worship no other god than me." Other differences in word choice and emphasis exist in the remaining commandments. These differences do not exist only between Protestants and Catholics. Some Protestant Fundamentalists insist that the King James Bible is the only authentic translation of the Bible while other Protestant groups prefer other translations. See Nancy Tatom Ammerman, *Bible Believers: Fundamentalists in the Modern World* (1987), at 53, 87.

¹² Both of these activities take place inside the Etowah County Courthouse. Courts have identified such "core government" structures as being especially susceptible to appearances of government endorsement of religion. *Allegheny County*, 492 U.S. at 599; *American Jewish Congress v. Chicago*, 827 F.2d 120, 128 (7th Cir. 1987); *Doe v. County of Montgomery*, 915 F. Supp. 32, 38 (C.D. Ill. 1996). "The display of religious symbols in public areas of core government buildings runs a special risk of `mak[ing] religion relevant, in reality or public perception, to status in the political community," *Allegheny County*, 492 U.S. at 626 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 692

place in his courtroom at the beginning of jury selection, an important judicial function. Observers will reasonably assume that this religious activity takes place only through the consent and approval of the state. *North Carolina Civil Liberties v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991). Because Judge Moore's courtroom is not a public forum, see *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995), it is irrelevant that the prayers are offered by local clergy.¹³ "Indeed, the very concept of `endorsement' conveys the sense of promoting someone else's message." *Allegheny County*, 492 U.S. at 600-601. Similarly, the Ten Commandments plaque hangs on the courtroom wall directly behind Judge Moore's bench where he sits in his official capacity, not in his private chambers or in his home. All those who visit the courtroom will assume that the Ten Commandments are displayed only with the approval of Judge Moore or some other public official. Quite clearly, "no viewer could reasonably think that it occupies this location without the support and approval of the government." *Id.* at 599-600. The Circuit Court correctly found that the religious activity was attributable to the state through Judge Moore.¹⁴

As a result, the prayers and the display of the Ten Commandments indicate official preference for and favoritism of Christianity, if not Protestantism, over other faiths. This violates "the bedrock Establishment Clause principle that, regardless of history, government may not demonstrate a preference for a particular faith . . ." *Id.* at 605; accord *Larson*, 456 U.S. at 244 (the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"). On this point there is unanimity of opinion among the justices. See *Capitol Square*, 115 S. Ct. at 2448, ("the government's use of religious symbols is unconstitutional if it effectively endorses sectarian religious belief.").

Even if both activities could be considered to be nonsectarian, the Establishment Clause prohibits government officials from endorsing or favoring religion generally. *Allegheny*, 492 U.S. at 615 (Blackmun, J.) ("The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement

(concurring opinion)).

¹³ "The right to use government property for one's private expression depends upon whether the property has by law or tradition been given the status of a public forum, or rather has been reserved for specific official uses." *Capitol Square*, 115 S. Ct. at 2446.

¹⁴ Moreover, it is not reasonable to argue that Judge Moore has a protected free exercise right to engage in audible prayer and display the plaque in the courtroom. The Free Exercise Clause "has never meant that a [person] could use the machinery of the State to practice [his] beliefs." *Schempp*, 374 U.S. at 226.

of Christianity alone."). Even the dissenters in Allegheny acknowledged that the Establishment Clause would prohibit a city from erecting a Latin cross on a city hall. *Id.* at 661 (Kennedy, J., dissenting). Beyond those express constitutional concerns, such endorsement of religion violates fundamental notions of religious equality and respect for religious diversity.

The State and Judge Moore defend the prayer and the display of the Ten Commandments by arguing that they do not coerce anyone's religious belief and that, regardless, the prayer and plaque meet with the religious sentiments of at least 95% of the residents of Etowah County. *Def. Ex. A* at 214-215.

This argument is misplaced. First, the legal standard is not one of coercion,¹⁵ but of whether the activities "convey[] a message to nonadherents of Christianity that they are not full members of the political community and a corresponding message to Christians that they are favored members of the political community." *Allegheny County*, 492 U.S. at 626 (O'Connor, J., concurring); *id.* at 594.¹⁶ The legal perspective is appropriately that of a reasonable "non-adherent," not of one in the religious majority. *Id.* No citizen should be made to feel they are disfavored politically merely because they adhere to a different faith.

Second, and of equal offense to amici, Judge Moore and the State appear to have arrogated to themselves the authority to speak for the religious citizens of Etowah County. Few claims could be more presumptuous (and offensive to many people of faith) or more wrong. In contrast to the unsubstantiated claim that 95% of county residents agree with the prayers and plaque, reliable data indicates that only 81% of the residents maintain any religious affiliation, with that latter figure including several non-evangelical churches.¹⁷ The point here is not to argue over statistics but to reemphasize the religious diversity that exists in our communities and the problems that always follow when government officials purport to speak on behalf of people of faith. See *Lee*, 505 U.S. at 592 ("A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not

¹⁵ "The Court repeatedly has recognized that a violation of the Establishment Clause is not predicated on coercion." *Lee*, 505 U.S. at 604 (O'Connor, J., concurring); *Schempp*, 374 U.S. at 223.

¹⁶ *Capitol Square*, 115 S. Ct. at 2451 (O'Connor, J., concurring) (expressing the view of a majority of the justices that "the endorsement test asks the right question about government practices challenged on Establishment Clause grounds").

¹⁷ Included within that 81% figure for Etowah County are Catholics, Episcopalians, Christian Scientists, Latter-day Saints (Mormons), and observant Jews. Martin B. Bradley *Churches and Church Membership in the United States*, at 40.

imposed."). The indisputable fact is that people of varying faiths pray differently and hold different views on the Ten Commandments. Even if Judge Moore's figures were correct, they would be irrelevant, as the Court has conclusively held that the religious majority may never use the machinery of the state to practice its beliefs. Schempp, 374 U.S. at 226; Lee, 505 U.S. at 596 ("While in some societies the wishes of the majority might prevail, the Establishment Clause . . . is addressed to this contingency and rejects the balance urged upon us.").

Official use of prayer or the Ten Commandments depreciates religion and offends the religious sensibilities of devout people, especially when publicly-elected officials assume the role of "defenders of the faith." Public authorities too frequently use religious rhetoric and imagery in expeditious ways that offend the faithful and depreciate the very faith upon which they call. Faith that for many is rich and complex becomes simplified and cheapened. What should be a reconciling and affirming act becomes suspect and divisive. The inevitable result of government arrogating to itself the ability to speak religiously is that religion ends up the loser.

Then, only to make matters worse, the activities are justified in ways that strip them of all religious significance. Prayer becomes but a means of "solemnizing" an occasion; the Ten Commandments ceases to be the Word of God but a mere legal code or compendium of ethical principles to be equated with other codes. See Stone, 449 U.S. at 41; Ring v. Grand Forks Public School Dist., 483 F. Supp. 272, 273-274 (D.N.D. 1980) (finding the Ten Commandments to be religious, regardless of any influence on Western law). The religious content of these activities is minimized, with the inevitable consequence being that religion is undermined. Accordingly, few rules could be better for religion than the Court's prohibition on using religious means to achieve secular goals. Larkin v. Grendel's Den, 459 U.S. 116, 123-124 (1982); Schempp, 374 U.S. at 224, 265; Jager v. Douglas County School Dist., 862 F.2d 824, 830 (11th Cir. 1989), cert. denied, 490 U.S. 1090 (1989).

This Court should be heartened by the fact that neither prayer nor the Ten Commandments is in peril. Judge Moore's defense is thus not needed. To paraphrase the district court in Harvey, prayers may be given, and the Ten Commandments may be read and "displayed in every church, synagogue, temple, mosque, home, and storefront." Harvey, 811 F. Supp. at 671. The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard.

Schempp, 374 U.S. at 226. The numerous religious institutions in this country are best situated to nurture the religious life of this nation and its people and, in fact, are better able to do so without the assistance of government.

CONCLUSION

For the above reasons, amici pray this Court affirm the decision of the court below.

Respectfully submitted,

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APPENDIX A

INTEREST OF AMICI CURIAE

Alabama Clergy

The affixed signers of this Amicus Curiae Brief known as "Alabama Clergy" share the interest of preserving clear and careful distinction between state and church powers. They affirm four elemental reasons for holding state and church authority apart from one another.

First, the Alabama Clergy agree that the framers of the United States Constitution intended to institute the liberty to believe and practice and to apply this liberty equally to all citizens. The Alabama Clergy are concerned that the integrity of one's participatory citizenship in no way be jeopardized by one's religious preference or practice. Because persons who do not adhere to Judeo-Christian faith are politically vulnerable in the religious demography of Alabama, they are well-served by careful and continual separation of church and state.

Second, the Alabama Clergy agree that the vitality of all faith traditions is served when each is constitutionally guaranteed that the state can neither dictate, define nor affect in any way its doctrines or practices. The Alabama Clergy defend the right of any faith tradition present in Alabama now or in the future to think, say, believe and act according to the dictate of its corporate conscience.

Third, the Alabama Clergy agree that persons employed in the service of the state who themselves adhere to the dominant Judeo-Christian faith tradition are at risk for preferential regard of those who share their personal faith tradition. The Alabama Clergy understand that distinguishing church and state powers both protects the state's welfare and facilitates the just and fair delivery of state services.

Fourth, the Alabama Clergy agree that it is the nature of religious passion to demand loyalty of an absolute kind, loyalty that transcends family, country, profession, and all vows thereunto pertaining. The Alabama Clergy caution that the casual mix of religious passion and political power is volatile and unpredictable.

A list of signees is included in Appendix B.

Baptist Joint Committee on Public Affairs

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist convention and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

Clifton Kirkpatrick as Stated Clerk of the General Assembly of the Presbyterian Church

(U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are all its deliverances or policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

Presbyterians have long supported the separation of church and state. It was Presbyterians that sought this separation at the founding of this Nation. They well remembered their oppression under the Church of England's influence on the English Parliament. They were among the architects of our system of government who designed a system that both fostered the freedom of religious belief and practice and prohibited the imposition of the tenets of any particular religious faith on the citizens. Recently the Presbyterian Church (U.S.A.) adopted a policy in conformity with that Presbyterian history that stated: "We oppose the permanent or unattended display of religious symbols on government property as a violation of religious neutrality required of government." Such prominent display and use of religious symbols as is at issue in this case can hardly avoid the color of religious establishment. We (I) urge this Court to preserve and protect the foundational bedrock principal of the separation of the Government and the Church.

The Interfaith Alliance

The Interfaith Alliance is a national grassroots organization headed by clergy and concerned lay people of faith. The Interfaith Alliance and its 109 local alliances and aligned groups in 35 states uphold the positive role that religion can play in public life. We recognize that diversity and tolerance are essential components of our democratic tradition and that they must be promoted, preserved, and celebrated. Mainstream religious leaders from across the country organized the Interfaith Alliance in 1994 to speak out against the divisive use of religion in the public sphere.

Union of American Hebrew Congregations

Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state, and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

APPENDIX B

Alabama Clergy Signees

AFRICAN METHODIST EPISCOPAL (AME)

Bishop Zedekiah Grady
Ninth Episcopal District AME Church
Birmingham

BAPTIST CHURCH — COOPERATIVE FELLOWSHIP

Rev. Gary P. Burton
Moderator, Cooperative Baptist Fellowship of
Alabama
Pintlala Baptist Church
Hope Hull

BAPTIST CHURCH — NATIONAL & AMERICAN

Rev. Chris Hamlin
16th St. Baptist Church
Birmingham

BAPTIST — SOUTHERN CONVENTION

Rev. Dr. Dale L. Chambliss
Southside Baptist Church
Birmingham

Rev. Roger Lovette
Baptist Church of the Covenant
Birmingham

Rev. Howard Roberts

First Baptist Church
Auburn

Layperson, Phyllis Parish Smith
First Baptist Church
Auburn

Rev. Hugh Tobias
Trinity Baptist Church
Madison

Rev. Dr. James F. Walters
First Baptist Church
Mobile

Rev. L. Dudley Wilson
Honorably Retired
Mobile

Rev. Michael Wilson
Trinity Baptist Church
Madison

CHRISTIAN CHURCH (DISCIPLES OF CHRIST)

Rev. John Mobley
Conference Minister for Alabama- NW
Florida

EPISCOPAL CHURCH

Father Peter Horn
St. Stephen's Episcopal Church
Birmingham

Rev. Virginia Hill Monroe
Episcopal Church of the Nativity
Huntsville

Rev. John Sloan
St. Thomas Episcopal Church
Huntsville

Rev. Dr. Leon P. Spencer
Greater Birmingham Ministries
Episcopal Diocese of Alabama
Birmingham

Rev. Sherry M. Travis
St. Thomas Episcopal Church
Huntsville

**EVANGELICAL LUTHERAN CHURCH
IN AMERICA
(E.L.C.A.)**

Rev. Mark A. Cerniglia
Chair of the Greater Alabama Conference,
Southeastern Synod
Our Redeemer Lutheran Church
Montgomery

HINDU

Chiman Patel
International Swaminarayan Satsung
Marrdal
Birmingham

ISLAM

Mustafa Abushagur
President, Board of Directors,
Huntsville Islamic Center
Huntsville

**JUDAISM — CONSERVATIVE
TRADITION**

Rabbi Cynthia A. Culpeper
Rabbi Emerita, Agudath Israel
Synagogue
Montgomery

Rabbi Steven Silberman
Congregation Ahavas Chesed
Mobile
Rabbi Michael H. Wasserman
Temple Beth-El
Birmingham

**JUDAISM - REFORM
TRADITION**

Rabbi Donald Kunstadt
Congregation Sha'arai Shomayim
Springhill Avenue Temple
Mobile

Rabbi Jonathan Miller
Temple Emanu-El
Birmingham

Rabbi Leon J. Weinberger, Ph.D.
Temple Emanuel
Tuscaloosa

NONDENOMINATIONAL

Rev. Peggy Shanahan
Light of Christ Center

Huntsville

PRESBYTERIAN CHURCH (U.S.A.)

Rev. Vernon Broyles III
Associate for Corporate Witness
National Ministries Division

Rev. Mark Burnham
First Presbyterian Church
Selma

Rev. Rhon V. Carleton
Chaplain Colonel, USAF (Retired)
Weogufka

Rev. William Cockrill
Trinity Presbyterian Church
Madison

Rev. Elizabeth M. Deibert
Immanuel Presbyterian Church
Montgomery

Rev. Richard I. Deibert, M.D.
Immanuel Presbyterian Church
Montgomery

Rev. Dr. Bill Giles
Executive Presbyter
Presbytery of Sheppards & Lapsley
Birmingham

Rev. Dr. John E. Kimbirl
Executive Presbyter
Presbytery of South Alabama

Rev. Dr. John Rickard
Executive Presbyter
of North Alabama
Huntsville

Rev. Joseph L. Johnson
Evergreen Presbyterian Church
Dothan

Rev. Harold B. Knox
Five Mile Presbyterian Church
Birmingham

Rev. Leeann Rogers Scarbrough
First Presbyterian Church
Piedmont

Rev. Gerald Austin Stephens Jr.
Chapel in the Pines Presbyterian Church
Birmingham

Rev. Dr. Henry Sun
Montevallo Presbyterian Church
Montevallo

Rev. Dr. G. Dana Waters III
South Highland Presbyterian
Church
Birmingham

QUAKER (SOCIETY OF FRIENDS)

Clerk, Connie LaMonte
Birmingham Friends Meeting
Birmingham

ROMAN CATHOLIC CHURCH

Richard Penaskovic, Ph.D.
Program Director for Religious
Studies
Auburn University
Auburn

UNITARIAN-UNIVERSALIST CHURCH

Rev. Karen K. Matteson
Unitarian Church of Birmingham

Birmingham

Rev. Doak Mansfield
Unitarian Universalist Church of
Huntsville
Huntsville

UNITED CHURCH OF CHRIST

Rev. Adrian Boone
Westminster Presbyterian Church
Montgomery

Rev. Dr. Timothy C. Downs
Conference Minister, Southeast
Conference
United Church of Christ

UNITED METHODIST CHURCH

Rev. Charles R. Britt
Auburn

Rev. Scott Douglas
United Methodist Church
Greater Birmingham Ministries
Birmingham

Rev. Lawton Higgs
Church of the Reconciler
Birmingham

Rev. A. Spencer Turnipseed Jr.
First United Methodist Church
Luverne