Nos. 07-2398, 07-2400, 07-2445

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMERICAN ATHEISTS, INC.; STEVE WALKER; LAW OFFICES OF DENNIS G. VATSIS, P.C.; AND DENNIS G. VATSIS,

Plaintiffs, Appellants, and Cross-Appellees,

v.

CITY OF DETROIT DOWNTOWN DEVELOPMENT AUTHORITY,

Defendant, Appellee, and Cross-Appellant,

AND ST. JOHN'S EPISCOPAL CHURCH,

Defendant-Intervenor, Appellee, and Cross-Appellant.

On Appeal from the United States District Court for the Eastern District of Michigan

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BRIEF OF *AMICI CURIAE* AMERICAN JEWISH COMMITTEE; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; HINDU AMERICAN FOUNDATION; THE INTERFAITH ALLIANCE FOUNDATION; AMERICANS FOR RELIGIOUS LIBERTY; AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLANTS AND CROSS-APPELLEES

Philip W. Horton
Kimberley A. Isbell
Eric T. Rillorta
ARNOLD & PORTER LLP
555 Twelfth St., NW
Washington, DC 20004
Tel: (202) 942-5000
Fax: (202) 942-5999

(*Additional counsel listed on inside front cover*)

Carol Nelkin
Jeffrey P. Sinensky
Kara H. Stein
AMERICAN JEWISH COMMITTEE
165 East 56th St.
New York, NY 10022
Tel: (212) 751-4000

Shelley J. Klein
Julia Rubin
HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.
50 West 58th St.
New York, NY 10019
Tel: (212) 303-8136

Burton Caine
AMERICANS FOR RELIGIOUS LIBERTY
Box 6656
Silver Spring, MD 20916
Tel: (301) 260-2988

K. Hollyn Hollman
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY
200 Maryland Ave., NE
Washington, DC 20002
Tel: (202) 544-4226

Suhag A. Shukla, Esq.
Legal Counsel
HINDU AMERICAN FOUNDATION
5268G Nicholson Lane #164
Kensington. MD 20895
Tel: (301) 770-7835

Ayesha N. Khan
Richard B. Katskee
Jessica L. Wolland
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C St., NE
Washington, DC 20002
Tel: (202) 466-3234

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of the 6th Cir. R. 26.1 on page 2 of this form. Sign and date this form.

American Atheists, Inc.; Steve Walker; Law Offices of Dennis G. Vatsis, P.C.; and Dennis G. Vatsis (Plaintiffs, Appellants, and Cross-Appellees),

v.

City of Detroit Downtown Development Authority (Defendant, Appellee, and Cross-Appellant),

and St. John's Episcopal Church (Defendant-Intervenor, Appellee, and Cross-Appellant).

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Amici Religious and Religious-Liberty Organizations
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Amici curiae are all 501(c)(3) nonprofit corporations. None have any corporate parents, and no publicly held corporation owns or is an affiliate of any part of any of them.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Signature of Counsel

April 16, 2008
Date

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INTERESTS OF THE *AMICI*

Amici are the American Jewish Committee; the Baptist Joint Committee for Religious Liberty; Hadassah, the Women's Zionist Organization of America, Inc.; Hindu American Foundation; The Interfaith Alliance Foundation; Americans for Religious Liberty; and Americans United for Separation of Church and State. Descriptions of the *amici* appear in this brief's appendix.

Amici represent diverse religious and secular traditions. But despite our differences — or, perhaps, because of them — we come together in the view that it is religion, even more than government, that suffers when religious organizations obtain public funding. In our view, the extension of governmental largesse to houses of worship invites distortions of religious doctrine, encourages sectarian strife, and suggests that religion lacks the *bona fides* to flourish on its own.

All parties have consented to this filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

Justice Holmes noted that "'a page of history is worth a volume of logic.'"[1] Nowhere is that aphorism more pertinent than in Establishment Clause cases.[2]

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[1] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[2] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n.33 (1973) (noting aphorism's "special relevance" to Establishment Clause); *accord Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970).

The lessons of history are compelling: Governmental aid to construct and maintain houses of worship degrades religion and distorts government. As the Supreme Court has recognized, state support for churches at this nation's birth

> [had] bec[o]me so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries *and to build and maintain churches and church property* aroused their indignation. It was these feelings which found expression in the First Amendment.[3]

The Founders also recognized that freedom of conscience is a prerequisite to harmony in a pluralistic society,[4] and that religion flourishes best where government interferes with it least.[5] And so, the Establishment Clause's prohibition against using public money to maintain churches was born as much out of the desire to preserve the independence and robustness of religion as it was out of the aim to protect government from religious encroachments.

The decision below cannot be squared with these First Amendment values any more than it can be reconciled with controlling precedent — and most especially the

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[3] *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) (emphasis added); *accord Nyquist*, 413 U.S. at 777 n.33.

[4] *See, e.g.*, *id.* at 3.

[5] *See, e.g.*, Letter from James Madison to Edward Livingston (July 10, 1822), *in* JAMES MADISON, WRITINGS 786, 789 (Library of Am. 1999).

Supreme Court's strict prohibitions against both direct aid to churches and aid to maintain buildings put to religious uses.

But the decision is not just legally erroneous; it is also administratively unmanageable. In permitting cash aid for repairing allegedly secular items, the district court's approach requires government officials to divide churches into secular and religious components. But determining what is religious and what is not in a house of worship requires a deep, sympathetic understanding of the theology of the faith in question. Even if segregating secular from sacred in a house of worship were possible — and for many faiths it is not — ensuring that public dollars fund only secular components would require highly intrusive monitoring of church functions — a procedure that not only violates the Establishment Clause but also imposes unreasonable, ongoing burdens on public employees and courts.

The Founders chose to spare both government and religion the indignity of that arrangement. This Court should respect their choice by reversing the decision below and enforcing settled Establishment Clause precedent.

ARGUMENT

I. The Decision Below Is Inconsistent With Fundamental Establishment Clause Principles And The Strict Legal Rules That Protect Them.

The Establishment Clause's limitations on government's ability to aid religion arose out of political and religious traditions dating back well before the founding of this nation. Those limitations protect individual conscience from coerced religious expression, ensure exercise of religion free from governmental oversight and interference, and avoid sectarian divisiveness and civil disharmony. The decision below disregards both those goals and the strict rules that the Supreme Court has instituted to implement them, establishing instead a new standard for assessing public-aid programs that would wreak havoc on the Founders' system for preserving religious freedom.

A. The Establishment Clause's prohibition against funding for religion safeguards religious freedom.

In describing the basic principles underlying the First Amendment's Religion Clauses, James Madison, their author and principal architect, explained that "religion & Govt. will both exist in greater purity, the less they are mixed together."[6] The Establishment Clause reflects "the Founders' plan of preserving religious liberty to

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[6] *Id.*

the fullest extent possible in a pluralistic society,"[7] allowing religion to flourish while quelling the civil strife that religious differences can so easily engender. And the prohibition against public funding for churches was, from the very beginning, the cornerstone of that plan.

The Establishment Clause was the culmination of British and American political thought grounded not only in John Locke's views on religious toleration and liberty of conscience,[8] but also in Martin Luther's and John Calvin's theology, as mediated by Roger Williams.[9] Williams was an early Baptist theologian who, after being expelled from Massachusetts for heterodoxy, founded Rhode Island in 1644 — creating perhaps the first experiment in total freedom of conscience.[10] Williams argued that for religious belief to be genuine, people must come to it of their own free will; coerced belief and punishment of dissent are anathema to true faith.[11] He also

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[7] *McCreary Co., Ky. v. ACLU of Ky.*, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

[8] *See generally* JOHN LOCKE, A LETTER CONCERNING TOLERATION 34-35, 42-43, 51-52 (James H. Tully ed., Hackett Pub. Co. 1983) (1689).

[9] *See* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U.L. REV. 346, 357-67 (2002).

[10] EDWIN S. GAUSTAD, ROGER WILLIAMS 13, 59, 70 (2005); BAPTISTS AND THE AMERICAN EXPERIENCE 16-17 (James E. Wood Jr. ed., 1976).

[11] ROGER WILLIAMS, *The Bloudy Tennant, Of Persecution for Cause of Conscience* (1644), *reprinted in* 3 COMPLETE WRITINGS OF ROGER WILLIAMS (Samuel

recognized that freedom of conscience flourishes only when churches act without governmental interference; for governmental sponsorship degrades religion's purity and integrity.[12]

A century and a half later, the Founders echoed Williams's concerns. As Madison noted:

> Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less, in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.[13]

He thus cautioned that an established religion would "weaken in those who profess this Religion a pious confidence in its innate excellence and the patronage of its

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L. Caldwell ed., 1963); *see also* WILLIAM LEE MILLER, THE FIRST LIBERTY 180 (1987) ("'Breach of the civil peace may arise . . . from that wrong and preposterous way of suppressing, preventing, and extinguishing such doctrines or practices by weapons of wrath and blood-whips, stocks, imprisonment, banishment, death, & co. — by which men commonly are persuaded to convert heretics and to cast out unclean spirits, which only the finger of God can do.'" (quoting Williams)).

[12] *See, e.g.*, RICHARD P. MCBRIEN, CAESAR'S COIN 248, at note 37 (1987) ("'[T]he Jews of the Old Testament and the Christians of the New Testament 'opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world' . . . if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world'" (quoting Williams)); WILLIAMS, *The Bloudy Tennant*, *supra* ("[T]rue religion does not need the support of carnal weapons." (quoted in CONRAD H. MOEHLMAN, THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 60 (1951)).

[13] Madison, *Memorial and Remonstrance* ¶ 7.

author; and . . . foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust to its own merits."[14] Similarly, Jefferson explained that government-established religion "tends . . . to corrupt the principles of that very religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments, those who will externally profess and conform to it."[15] Benjamin Franklin likewise observed, "[w]hen a religion is good, I conceive it will support itself; and when it does not support itself, and God does not care to support it, so that its professors are obliged to call for the help of the civil power, 'tis a sign, I apprehend, of its being a bad one."[16]

The Founders were also "aware that they were designing a government for a pluralistic nation — a country in which people of different faiths had to live together."[17] America in 1791 was religiously heterogenous: Congregationalists

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[14] *Id.* ¶ 6.

[15] THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom* § I, *in* JEFFERSON: WRITINGS 346 (Merrill D. Peterson ed., 1984).

[16] Letter from Benjamin Franklin to Richard Price (Oct. 9, 1780), *quoted in* THE AMERICAN ENLIGHTENMENT: THE SHAPING OF THE AMERICAN EXPERIMENT IN A FREE SOCIETY 93 (Adrienne Koch ed., 1965).

[17] JON MEACHAM, AMERICAN GOSPEL 101 (2006).

maintained a stronghold in New England;[18] Episcopalians dominated religious life in the South;[19] and Quakers strongly influenced society in Pennsylvania.[20] As the Supreme Court has noted, the Founders had ready examples of the dangers that this diversity might pose for the new Republic:

> A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews.[21]

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[18] WINTHROP S. HUDSON, RELIGION IN AMERICA 36-38 (3d ed. 1981).

[19] SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 199 (2d ed. 2004); DAVID HEIN, ET AL., THE EPISCOPALIANS 35 (2003).

[20] HUDSON, RELIGION IN AMERICA 46.

[21] *Everson*, 330 U.S. at 8-9; *see also, e.g.*, ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 284 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (1835) ("Religion . . . cannot share the material force of those who govern without being burdened with a part of the hatreds to which they give rise."); *id.* at 285 ("Insofar as a nation takes on a democratic social state, and societies are seen to incline toward republics, it becomes more and more dangerous for religion to unite with authority. . . . [I]f the Americans, who have delivered the political world to the attempts of innovators, had not placed their religion somewhere outside of that, what could it hold onto in the ebb and flow of human opinions? In the midst of the parties' struggle, where would the respect be that is due it? What would become of its

The Founders' principal bulwark against religious degradation and sectarian strife was the prohibition against public funding of churches. For "one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption . . . [was] that the taxing and spending power would be used to favor one religion over another or to support religion in general."[22] Accordingly, Jefferson's *Bill for Establishing Religious Freedom* — in which both Jefferson and Madison played leading roles, and which had the same objective and was intended to provide the same protection as the Establishment Clause[23] — not only rejected public funding for religion, but also specifically emphasized that publicly funded houses of worship are unacceptable, guaranteeing that no one "shall be compelled to . . . support any religious worship, *place*, or ministry whatsoever."[24]

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immortality when everything around it was perishing?"); Madison, *Memorial and Remonstrance* ¶ 11 ("Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinion.").

[22] *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

[23] *Everson*, 330 U.S. at 13.

[24] JEFFERSON, *A Bill for Establishing Religious Freedom* § II (emphasis added). Other states followed suit. *See, e.g.*, GA. CONST. Art. IV, § 10 (1789) ("No person within this State shall . . . ever be obligated to pay tith[e]s, taxes, or any other rate, for *the building or repairing* any place of worship, or for the maintenance of any minister or ministry." (emphasis added)).

Jefferson had introduced the Bill in 1779, but it initially languished, principally because of opposition from the Anglican Church (which was, until 1776, the official Church of Virginia). In 1784, however, Patrick Henry introduced a competing *Bill Establishing a Provision for Teachers of the Christian Religion*, thus sparking intense debate over the propriety of public funding for religion. Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern . . . ."[25] And Madison explained the need for a bright-line rule, warning that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[26] Jefferson and Madison's view ultimately won the day, with the adoption of Jefferson's Bill in 1786.

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[25] JEFFERSON, *Bill for Establishing Religious Freedom* § I.

[26] James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 3, *reprinted in Everson*, 330 U.S. at 66 (appendix to dissenting opinion of Rutledge, J.).

B. The Supreme Court has established clear rules that prohibit the funding challenged here.

In keeping with the Founders' aims, the Supreme Court has designed an Establishment Clause jurisprudence that safeguards the separation of church and state, and thereby protects sect from sect, insulates citizens against coerced support for religion, and immunizes religion from the harms of public funding and public control. The Court has done so by adopting two rules that are dispositive here: First, government may not provide direct cash aid to churches; and second, government may not provide money for constructing or maintaining buildings that might be put to religious uses.

1. The Supreme Court has recognized that when an institution is pervasively sectarian — when "'religion is so pervasive that a substantial portion of [the institution's] functions are subsumed in the religious mission'" — the religious components cannot be divorced from the secular ones.[27] Thus, "no state aid at all [may] go to institutions that are so 'pervasively sectarian' that secular activities cannot

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[27] *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988) (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)); *see also, e.g.*, *Johnson v. Economic Dev. Bd.*, 241 F.3d 501, 510 (6th Cir. 2001) ("A pervasively sectarian institution is one whose religious functions cannot be separated from its non-religious functions"); *Freedom from Religion Found., Inc. v. McCallum*, 179 F. Supp. 2d 950, 973 (W.D. Wis. 2002) ("religion is so integral to . . . [faith-based substance-abuse] program that it is not possible to isolate it from the program as a whole").

be separated from sectarian ones."[28] "The reason for this is that there is a risk that direct government funding, *even if it is designated for specific secular purposes*, may nonetheless advance the pervasively sectarian institution's 'religious mission.'"[29]

Churches are, of course, the quintessence of pervasively sectarian institutions. What would a church be without its religious mission? How could it pigeonhole its various functions as religious or nonreligious and keep them separate? The district court's approval of direct aid to houses of worship thus not only violates the rule against giving money to pervasively sectarian institutions, but disregards the very nature of a church.[30]

2. And while aid may, under appropriate circumstances and with adequate safeguards, be given to religiously affiliated institutions that are *not* pervasively sectarian (because their functions may be segregated to ensure that the aid supports

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[28] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976); *accord Hunt*, 413 U.S. at 743 ("Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission . . . .").

[29] *Bowen*, 487 U.S. at 610 (emphasis added).

[30] *Compare Bowen*, 487 U.S. at 610 ("direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission'") *with Am. Atheists, Inc. v. Detroit Downtown Dev. Auth.*, 503 F. Supp. 2d 845, 866-67 (E.D. Mich. 2007) (identifying aid for repairs and improvements as secular where plaintiffs "have failed to provide evidence that the objects receiving the improvement[s] or repairs . . . contain iconography or images which convey a religious message").

only secular elements without advancing or endorsing religion[31]), the Supreme Court has forbidden provision of money for buildings — even for institutions that are not pervasively sectarian — if there is any risk that the facilities will ever be put to religious uses.[32] And if government may not pay to *construct* buildings, the Supreme Court has reasoned, it may not pay to *repair* them:

> If tax-raised funds may not be granted . . . where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed . . . for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not *maintain such buildings or renovate them* when they fall into disrepair.[33]

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[31] *See, e.g.*, *Bowen*, 487 U.S. at 609-10; *Hunt*, 413 U.S. at 743-44. *See generally Johnson*, 241 F.3d at 511.

[32] *Tilton v. Richardson*, 403 U.S. 672, 683-84 (1971) (plurality op.) (requirement that publicly funded buildings at religiously affiliated colleges be limited to secular uses for twenty years was insufficient because building would have value remaining at end of twenty-year period, and hence, if building were then put to religious use, "the original federal grant will in part have the effect of advancing religion"); *id.* at 692 (Douglas, J., joined by Black and Marshall, JJ., concurring in part and dissenting in part) ("The reversion of the facility to the parrochial [sic] school at the end of 20 years is an outright grant, measurable by the present discounted worth of the facility. . . . The Court properly bars it even though disguised in the form of a reversionary interest."); *id.* at 659-61 (opinion of Brennan, J.).

[33] *Nyquist*, 413 U.S. at 776-77 (emphasis added); *see also id.* at 774 (striking down statute providing money for maintenance and repair of nonpublic schools, "virtually all of which [were] Roman Catholic schools in low-income areas," because "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, *nor do we think it possible*

Thus, even if the recipients of the funds challenged here had been merely religiously affiliated, the district court's categorization of rehabilitation work as secular (and therefore eligible for aid)[34] would be legally and logically insupportable: Characterizing a religious institution's façade (or repairs to it) as secular just because secular buildings also have façades ignores the basic fact that structural components like walls, doors, and windows are integral to a building. So they are necessarily put to religious uses when the building is.

3. But more straightforwardly, the grant recipients here are not just religiously affiliated: They are full-fledged churches. So the district court's approval of public funding for repairs would have been especially noxious to those who adopted the First Amendment to ban "[t]he imposition of taxes to . . . build and maintain churches and church property."[35] And it would have been equally offensive to those who sought to maintain their cherished religious freedom by ensuring that their houses of worship could never develop an unhealthy dependence on governmental largesse. The decision below is thus irreconcilable with the First

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within the context of these religion-oriented institutions to impose such restrictions" (emphasis added)).

[34] *See Am. Atheists*, 503 F. Supp. 2d at 866-67 (identifying as secular such tasks as painting, cleaning brickwork, and expanding entrances).

[35] *Everson*, 330 U.S. at 11.

Amendment's fundamental aims to ensure both that government does not become corrupted by playing favorites among religions, and that religion does not become degraded by feeding at the public trough.

4. Intuiting a "jurisprudential shift" in the Supreme Court's Establishment Clause decisions,[36] the district court declined to enforce these constitutional absolutes, instead treating the Supreme Court's fragmented decision in *Mitchell v. Helms*[37] as effectively abolishing the *pervasively sectarian* doctrine, overturning the prohibition against direct aid to churches, and reversing the rule against aid for buildings put to religious uses. But while the court below read *Mitchell* as implicitly discarding half a century's Establishment Clause jurisprudence,[38] this Court has already flatly rejected that view — twice.[39]

As this Court held: "*Mitchell* is a plurality opinion. Thus, the district court, and this Court, are still bound by pre-*Mitchell* law with regard to the pervasively

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[36] *Am. Atheists*, 503 F. Supp. 2d at 857-58.

[37] 530 U.S. 793 (2000).

[38] *Am. Atheists*, 503 F. Supp. 2d at 858.

[39] *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 408-09 (6th Cir. 2002); *Johnson*, 241 F.3d at 510-11 n.2.

sectarian doctrine."[40] Recognizing that "the lower courts are to treat [the Supreme Court's] prior cases as controlling until the Supreme Court itself overrules them,"[41] this Court declared in *Steele* that, "[i]t is for the Supreme Court, not this Court, to jettison the pervasively sectarian test, *which it has not done*."[42] And in *Johnson*, this Court acknowledged that the rule against aid for buildings has that same status.[43] The district court's treatment of *Mitchell* as a watershed change in Establishment Clause jurisprudence cannot be reconciled with *Steele* and *Johnson* — or, for that matter, with *Mitchell* itself.[44]

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[40] *Steele*, 301 F.3d at 408.

[41] *Id.* at 408-09 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that . . . 'this Court [alone has] the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

[42] *Id.* at 409 (emphasis added); *accord Johnson*, 241 F.3d at 510-11 n.2 (Justice O'Connor's "controlling" opinion in *Mitchell* "does not abolish the distinction between 'pervasively sectarian' and 'sectarian' institutions").

[43] *Id.* (*Hunt*, which remains good law, rested on Supreme Court's conclusions both that benefitted institution was not pervasively sectarian and that challenged program prohibited aid to "projects involving any buildings or facilities used for religious purposes" (quoting *Hunt*, 413 U.S. at 743-44) (internal quotation marks omitted)).

[44] *Mitchell* dealt with in-kind aid. All nine justices reaffirmed the Supreme Court's "continued recognition of the special dangers associated with direct money grants to religious institutions." 530 U.S. at 855-56 (controlling concurring opinion of O'Connor, J., joined by Breyer, J.); *accord id.* at 818 (plurality op. of Thomas, J.,

II. The Line That the District Court Drew Is Administratively Unmanageable and Would Excessively Entangle Government with Religion.

Even if the Establishment Clause did not forbid dissecting church buildings into religious and secular components, the district court's line-drawing would still be unmanageable both for the officials administering grant programs and for the courts. Deciding which portions of a church are religious and which are secular requires delving into the religious doctrines of each denomination to determine the theological significance of the church, synagogue, temple, or mosque's structure as a whole, and the spiritual meanings and messages of each part. But "inspection and evaluation of the religious content" of a faith or its property is "fraught with the sort of entanglement that the Constitution forbids."[45] Moreover, churches might be induced

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joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) ("we have seen 'special Establishment Clause dangers' when *money* is given to religious schools or entities directly" (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 842) (1995)); *id.* at 890-91 (Souter, J., joined by Stevens and Ginsburg, JJ., dissenting). "[D]irect money grants" are "accord[ed] special treatment" because "this form of aid falls precariously close to the original object of the Establishment Clause's prohibition" — namely "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 856 (O'Connor, J., concurring) (quoting *Walz*, 397 U.S. at 668); *see, e.g.*, *Roemer*, 426 U.S. at 756 (it is "impossible" for cash aid to "subsidize separate secular functions" of pervasively religious institutions absent monitoring so strict that it unconstitutionally entangles government with religion).

[45] *Lemon*, 403 U.S. at 620 ("[S]tate inspection and evaluation of the religious content of a religious organization is . . . a relationship pregnant with dangers of excessive government direction of . . . churches. The [Supreme] Court noted 'the

to "secularize" their buildings contrary to their doctrines, or to distort the religious messages that their buildings send. The decision below is thus deleterious to the freedom of conscience that the First Amendment was intended to safeguard.

To many faiths, houses of worship are inherently religious objects,[46] and are frequently consecrated and built on consecrated ground.[47] And observers —

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hazards of government supporting churches' in *Walz* . . . and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses." (citation omitted)); *see also, e.g.*, *Hernandez v. C.I.R.*, 490 U.S. 680, 694 (1989) (where "petitioners' proposal would force the IRS and the judiciary into differentiating 'religious' services from 'secular' ones. . . . we do note that 'pervasive monitoring' for 'the subtle or overt presence of religious matter' is a central danger against which we have held the Establishment Clause guards").

[46] To some, the church building and all its constituent parts are objects of veneration, even though to others, a building may be little more than an appurtenance to the religious functions occurring there. *Compare* LEONID OUSPENSKY, THE MEANING OF ICONS 60-63 (1999) (describing structural elements of Greek Orthodox Church as objects of worship) *and* Anthony Batchelor, The Hindu Temple (July 1997), http://www.templenet.com/Articles/hintemp.html ("The temple is designed to dissolve the boundaries between man and the divine. Not merely his abode, the temple 'is' God. God and therefore by implication the whole universe is identified with the temple's design and actual fabric.") *with* Ian Serjeant, Historic Methodist Architecture and Its Protection, http://www.buildingconservation.com/articles/methodistarch/methodistarch.htm (2004) (last visited Apr. 12, 2008) ("[B]uildings were seen . . . essentially as tools for preaching and mission, not as objects for veneration in their own right. Pure functionality was the original driving force for their design, and this is the main pattern that has continued.")).

[47] *See, e.g.*, JOHN D. HOAG, ISLAMIC ARCHITECTURE 12-15 (2004) (describing historically sacred ground of mosques); Fr. George William Rutler, *Ten Myths of Contemporary Church Architecture*, SACRED ARCHITECTURE ¶¶ 9-10 (Fall 1998), *available at* http://www.catholicliturgy.com/index.cfm/FuseAction/Acrticle

irrespective of their religious beliefs — typically view houses of worship as a physical embodiment of a faith community. As the Conference of Catholic Bishops has explained in prescribing the features of Catholic church architecture, for example:

> [T]he ceremonies, elements such as the altar and ambo, and the religious art are all referred to as sacred — so are the buildings designed for them. Therefore, to seek to remove the distinction of the church as a sacred place for sacred activity is to diminish our reverence of God, which the buildings should help to engender.[48]

Put simply, houses of worship are as much a symbol of particular religious doctrines as they are a venue for religious activity.[49] Reducing a church or synagogue or mosque or temple to an agglomeration of religious and secular elements fails to recognize what makes that structure unique — and uniquely religious. It is an affront to those who believe that the form of their house of worship embodies or reflects their faith, and an absurdity to those who do not.

Text/Index/65/SubIndex/116/ArticleIndex/24 (describing religious significance of Catholic church structures).

[48] *Id.*

[49] *See, e.g.*, Quaker Meetinghouse Architecture: Amawalk Fiends Meeting House, http://www.sacredplaces.org/PSP-InfoClearingHouse/articles/Quaker%20Meetinghouse%20Architecture.htm (last visited Apr. 12, 2008) (meetinghouses' architectural simplicity reflects Quaker belief that worship involves "silent waiting for God without ritual"); NATIONAL CONFERENCE OF CATHOLIC BISHOPS, BUILT OF LIVING STONE: ART, ARCHITECTURE, AND WORSHIP (2000), *available at http://www.usccb.org/liturgy/livingstones.shtml#preface* ("provisions of universal law governing liturgical art and architecture" reflect Catholicism's basic tenets).

It is thus no surprise that houses of worship routinely incorporate theological elements into their design — sometimes into *every element* of that design.[50] The overall architectural style, inside and out, may reflect the tenets of the faith for which the building is constructed.[51] And even the parts that might appear entirely secular to a court may nonetheless have the deepest theological significance.

Some Christian denominations favor plain, red church doors, for example, in order, as one Episcopal Church explains, to "symbolize the blood of Christ, which is our entry into salvation. They also remind us of the blood of the martyrs, the seeds of the church."[52] But another faith's temple might have a red door because the designer preferred it that way — or because there was a sale on red paint. Likewise, a plain, stone pathway at one house of worship might "serve[] as the metaphor for the

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[50] *See, e.g.*, HOAG, ISLAMIC ARCHITECTURE 10-20 (describing significance of mosque doorways, roofs, domes, and arches); BUILT OF LIVING STONE § 29 ("The general plan of the building reflects the Church that Christ gathers there, is expressive of its prayer, fosters the members' participation in sacred realities, and supports the solemn character of the sacred liturgy."); Paul Goldberger, *The Gospel of Church Architecture*, N.Y. TIMES, Apr. 20, 1995, at C1-C6.

[51] *See, e.g.*, BUILT OF LIVING STONE §§ 27-45 (describing "Liturgical principles for Building or Renovating Churches"); ROBERT HILBRAND, ISLAMIC ART & ARCHITECTURE 7-12 (1988); Batchelor, Hindu Temple, *supra* (ground plan of Hindu temples is "representation of the cosmos" that is "based on a strict grid made up of squares and equilateral triangles which are imbued with deep religious significance").

[52] Saint David's Episcopal Church, Outside the Church, http://www.stdavidsepiscopal.org/outside.html (last visited Apr. 12, 2008).

sacred journey" to salvation,[53] whereas at another, it might simply be a device to keep visitors off the grass. Examples of seemingly secular elements such as doors, stairs, hallways, pillars, walkways, roofs, and towers having deep religious significance for some faiths — and none for others — are legion.[54]

Indeed, what the uninformed[55] might assume is a nonreligious element (or the absence of an inherently religious one) may in fact be every bit as theologically significant as a more overtly religious feature. The district court assumed, for example, that stained-glass church windows with iconography convey religious messages (and therefore cannot be publicly funded), whereas stained-glass windows without iconography carry no such message (and therefore may be restored at government expense).[56] But while the former assumption is certainly correct, the latter is not. Stained glass, whether with or without iconography, is "one of the most spectacular and vivid devices used in Christian architecture . . .[,] designed to

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[53] *Id.*

[54] *See, e.g.*, HILBRAND, ISLAMIC ART & ARCHITECTURE 10-22; BUILT OF LIVING STONE §§ 96-97.

[55] In determining whether government is advancing religion, what counts is the view of the hypothetical reasonable observer, who is familiar with history, culture, and context. *McCreary*, 545 U.S. at 846 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

[56] *Am. Atheists*, 503 F. Supp. 2d at 867, 869.

enlighten church interiors with an awe[-]inspiring brilliance *as well as* to perform the didactic function of religious edification."[57] And even ordinary window-glass may have profound religious significance. The Talmud requires windows in all synagogues, "to teach us that during our prayers we must be aware of the outside world. A Jew must not withdraw from the world and pray only for his own needs."[58] But the windows cannot include iconography, which Judaism forbids.[59]

The district court's rule thus would appear to permit government to pay for all synagogue windows and for stained-glass church windows with geometric or abstract patterns, notwithstanding their deep theological significance, while prohibiting support for the pictorial windows at Intervenor St. John's Episcopal Church. Or it requires delving into the theological underpinnings for each religion's architectural choices in order to determine what doctrinal significance, if any, windows might have — in which case it may turn out to be impermissible for government to fund

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[57] Thomas Pak, Note, *Free Exercise, Free Expression, and Landmarks Preservation*, 91 COLUM. L. REV. 1813, 1841 (1991) (citing PAUL CLOWNEY & TESSA CLOWNEY, EXPLORING CHURCHES 12 (1982)) (emphasis added).

[58] Rabbi Abraham Millgram, Synagogue Architecture and Interior Design (Jewish Publ'n Soc. 1971), http://www.myjewishlearning.com/daily_life/Prayer/TO_Synagogue/Synagogue_Architecture.htm (last visited Apr. 12, 2008) ("The rabbis based this ruling on the example of Daniel's place of prayer in which, the Bible says, 'his windows were open in his upper chamber.'" (quoting Daniel 6:11)).

[59] *Id.*

repairs to a synagogue's icon-free windows but not to fund repairs to identical windows on the church next door.

Similarly, the absence of steeples, minarets, or other presumptively religious features can be as much a theological statement as their presence is. While the traditional purpose of steeples in many Protestant denominations is to "encourage people to look towards God and heaven," at least one Unitarian Universalist temple was intentionally designed not to have a steeple pointing to a "God-Out-There" because the "focus should be inward as members look for divinity."[60] Similarly, while minarets have a spiritual function in Islam — calling the community together for worship[61] — they also serve the secular purpose of providing ventilation.[62] And in the 1920s, the Isaiah Israel Congregation in Chicago selected a minaret for the purely aesthetic purpose of covering a smokestack.[63] Thus, a steeple or other feature may be

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[60] Unity Temple Unitarian Universalist Congregation, Oak Park, Illinois, http://unitytemple.org/whoweare/history.htm (last visited April 7, 2008) (temple designed by Frank Lloyd Wright).

[61] *See* Huth Masterworks, Islamic Art and Architecture, Minarets, http://yeswecannewmexico.com/members/index.php?mbr=7&page=59 (Last visited April 12, 2008) .

[62] *Id.*

[63] The Center for Religious Architecture, Models Under Construction, K.A.M. Isaiah Israel Congregation, http://www.religiousarchitecture.org/models/underconstruction.html (last visited Apr. 12, 2008).

religious on one structure; on another it may be nonreligious; and on a third it might be a heresy.

As a result, the attempt to categorize elements based on apparent religiosity, divorced from any understanding of theology or any appreciation for how observers view houses of worship, will inevitably lead the government to underwrite repairs for some religious elements. In presuming that church buildings are content neutral, and that only obviously religious elements are sectarian, the district court's decision ignores the fact that a church structure and its components have deep religious significance that may not be apparent to the uninformed eye.[64]

What is more, the decision creates a *de facto* preference for denominations that prohibit or disfavor iconography over those that employ it. For the only way to subdivide religious and secular without intrusive, entangling inquiries into church doctrine would be to make uninformed, standardless determinations that what *looks* religious, *is* religious. So the approach favors, with easier access to governmental largesse, those religions that eschew iconography as idolatry (such as Judaism and

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[64] *Cf., e.g.*, Richard S. Vosko, *Houses for Worship: Emerging Trends*, 40 FAITH & FORM 3, 12-14 (2008), *available at* http://www.faithandform.com/features/40_3_vosko/index.php (Evangelical Protestant "houses of worship . . . generally do not focus on overtly religious icons and architectural elements"); Quaker Meetinghouse Architecture, *supra*; KALMAN P. BLAND, THE ARTLESS JEW: MEDIEVAL AND MODERN AFFIRMATIONS AND DENIALS OF THE VISUAL 3-12 (2001).

Islam) or as a distraction from prayer (such as Quakerism),[65] as well as those that favor plain, humble architecture as signifying how one should approach the divine (such as congregationalist Protestant denominations).[66] Conversely, it disfavors faiths that assign iconography an important role (such as Catholicism and Greek Orthodoxy)[67] and those that favor lavish decoration as a way to celebrate or commemorate the divine (such as Jainism).[68] In preferring some faiths to others, the

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[65] *See, e.g.*, HOAG, ISLAMIC ARCHITECTURE 7-16; BLAND, THE ARTLESS JEW 3-12 (examining effect of Second Commandment's prohibition against "graven images" on Jewish aesthetic theory); Quaker Meetinghouse Architecture, *supra*.

[66] *See, e.g.*, Pak, *Free Expression*, 91 COLUM. L. REV., at 1841-42 (because "one of the aims of the Reformation was a plainer, simpler church service in which the emphasis shifted from the re-enactment of Christ's death at the altar to the preaching of God's word at the pulpit. . . . Protestants favored less cavernous structures and experimented with various shapes to find one that was best suited for preaching to a congregation rather than for exercising a ritual") (citing CLOWNEY & CLOWNEY, EXPLORING CHURCHES 72-74).

[67] *See, e.g.*, VLADIMIR LOSSKY, MEANING OF ICONS 23-40 (5th ed., 1982) (explaining religious significance of icons in Greek Orthodox Church).

[68] Division of Religion & Philosophy, University of Cumbria, Philosophy, Theology & Religion: Overview of World Religions, http://philtar.ucsm.ac.uk/encyclopedia/jainism/jains.html (Jain temples "are lavish, elaborate, and ornate to serve as replicas of the samavasarana, the celestial assembly halls of the Jinas. Every inch in a Jain temple is carved with figures and mythological scenes.").

decision fails to heed the Founders' concern with society's becoming a battleground for religious denominations competing for governmental benefits.[69]

Finally, the decision creates financial incentives for religious institutions to abandon aspects of their architecture that have religious significance.[70] When aid is available for what looks nonreligious (or more palatably religious) to a government official, the result is not just favoritism and religious discrimination, but also pressure on religious institutions to conform their buildings' spiritual messages to those that satisfy officials' predilections. In other words, government funding leads to the very intrusiveness on freedom of conscience that Roger Williams cautioned against, and that Madison designed the Establishment Clause to prevent.

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[69] *See, e.g.*, *McCreary*, 545 U.S. at 876 ("The Framers and the citizens of their time intended not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the Government weighs in on one side of religious debate; nothing does a better job of roiling society, a point that needed no explanation to the descendants of English Puritans and Cavaliers (or Massachusetts Puritans and Baptists)"); *cf. Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[70] *Cf.* Vosko, *Houses for Worship* ¶¶ 12-14 (describing how political developments affect design of religious buildings).

CONCLUSION

What is at stake in this case is far more than a few dollars for re-caulking brickwork and stained glass. As Justice O'Connor eloquently wrote:

> At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?[71]

The decision below makes that ill-advised trade, substituting subjective and potentially biased decisionmaking by government officials and intrusive monitoring by courts for the clear rules that have for more than two centuries enabled Christian, Jew, and Muslim, believer and nonbeliever, to live together in relative harmony. The change is one that, in the long run, would benefit none of us. The portion of the judgment below allowing payments to churches should be reversed.

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[71] *McCreary*, 545 U.S. at 882 (O'Connor, J., concurring).

Respectfully submitted,

Philip W. Horton
Kimberley A. Isbell
Eric T. Rillorta
ARNOLD & PORTER LLP
555 Twelfth St., NW
Washington, DC 20004
Tel: (202) 942-5000
Fax: (202) 942-5999

K. Hollyn Hollman
BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY
200 Maryland Ave., NE
Washington, DC 20002
Tel: (202) 544-4226

Suhag A. Shukla, Esq.
Legal Counsel
HINDU AMERICAN FOUNDATION
5268G Nicholson Lane #164
Kensington, MD 20895
Tel: (301) 770-7835

Carol Nelkin
Jeffrey P. Sinensky
Kara H. Stein
AMERICAN JEWISH COMMITTEE
165 East 56th St.
New York, NY 10022
Tel: (212) 751-4000

Shelley J. Klein
Julia Rubin
HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.
50 West 58th St.
New York, NY 10019
Tel: (212) 303-8136

Burton Caine
AMERICANS FOR RELIGIOUS LIBERTY
Box 6656
Silver Spring, MD 20916
Tel: (301) 260-2988

Ayesha N. Khan
Richard B. Katskee
Jessica L. Wolland
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
518 C St., NE
Washington, DC 20002
Tel: (202) 466-3234

Dated: April 16, 2008

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 29 AND 32

I certify that:

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) and 28.1(e) (the rule for cross-appeals), and the associated type-volume limitations for *amicus* briefs of Rule 29(d), because it contains _____ words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), as determined by the word-count utility in WordPerfect version 12.

2. This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced typeface.

Eric T. Rillorta
ARNOLD & PORTER LLP
555 Twelfth St., NW
Washington, DC 20004
Tel: (202) 942-5000
Fax: (202) 942-5999

Dated: April 16, 2008

CERTIFICATE OF SERVICE

I certify that on this 16th day of April 2008, I caused to be served, by first-class U.S. Mail, two copies each of the foregoing *amicus* brief to the following addresses:

Robert J. Bruno
ROBERT J. BRUNO, LTD.
1601 East Highway 13, #107
Burnsville, MN 55337

Counsel for Appellants and Cross-Appellees
American Atheists, Inc., et al.

Frederick A. Berg
Jeffrey M. Sangster
Kevin C. Clark
Elizabeth L. Sokol
KOTZ, SANGSTER, WYSOCKI & BERG, P.C.
400 Renaissance Center, Suite 3400
Detroit, MI 48243

Counsel for Appellees and Cross-Appellants
City of Detroit Downtown Development Authority

Kevin H. Theriot
Dale Schowengerdt
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, KS 66224

Counsel for Intervenor-Appellee and Cross-Appellant
St. John's Episcopal Church

I further certify that I caused to be sent, by first-class U.S. Mail, an original and six copies of the *amicus* brief to the Clerk of Court.

Eric T. Rillorta
ARNOLD & PORTER LLP
555 Twelfth St., NW
Washington, DC 20004
Tel: (202) 942-5000
Fax: (202) 942-5999

Dated: April 16, 2008

APPENDIX

DESCRIPTIONS OF INDIVIDUAL *AMICI*

American Jewish Committee

American Jewish Committee, a national organization of over 175,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews and is dedicated to the defense of religious rights and freedoms of all Americans. AJC has always strongly supported the constitutional principle of religious liberty and separation of religion and government embodied in the Establishment Clause of the First Amendment. We believe that this provides the best foundation for ensuring religious freedom for people of all faiths. Accordingly, AJC has participated as amicus in a wide array of cases through the years in support of this vital principle. We do so again in the conviction that it is important for this Circuit to continue to interpret and apply the Establishment Clause in accordance with settled Supreme Court precedent and fundamental Establishment Clause principles. AJC believes that a funding scheme that is aimed at ensuring that public dollars fund only secular components of religious houses of worship would require highly intrusive monitoring of religious functions — a procedure that not only violates the Establishment Clause but also imposes unreasonable, ongoing burdens on public officials and courts.

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty serves fifteen cooperating Baptist conventions and conferences in the United States, with supporting congregations throughout the nation. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans.

Hadassah, the Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest women's and the largest Jewish membership organization in the United States with over 300,000 members nationwide. In addition to Hadassah's long-standing mission of supporting health care institutions in Israel, Hadassah has a proud history of advocating for the rights of the Jewish community in the United States. Hadassah has long been committed to the protection of the strict separation of church and state that has served as a guarantee for religious freedom and diversity. Hadassah has participated in numerous *amicus curiae* briefs upholding this fundamental principle. Hadassah consistently opposes government funding of pervasively sectarian institutions.

Hindu American Foundation

The Hindu American Foundation is an advocacy group whose purpose is to provide a voice for more than two million Hindu Americans. The Foundation interacts with and educates leaders in public policy, academia and media about Hinduism and issues concerning Hindus nationally and internationally, including the separation of church and state, free exercise of religion, hate speech and hate crimes, human rights and portrayal of Hinduism. To this end, the HAF has filed *amicus* briefs in numerous cases addressing issues of *vital* concern to the Hindu American Community.

The Interfaith Alliance Foundation

The Interfaith Alliance Foundation is a 501(c)(3) nonpartisan organization created in 1994 to celebrate religious freedom and to challenge the bigotry and hatred arising from the religious and political extremism infiltrating American politics. Today, The Interfaith Alliance has 185,000 members across the country made up of 75 faith traditions as well as those of no faith tradition. The Interfaith Alliance believes that the longstanding prohibition against providing public funds to build and renovate houses of worship ensures religious autonomy and prevents religious institutions from becoming pawns of government.

Americans for Religious Liberty

Americans for Religious Liberty is a nonprofit educational organization founded in 1982 to defend the constitutional principle of separation of church and state. ARL has been an *amicus curiae* in numerous cases before the US Supreme Court and lower federal courts.

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization dedicated to defending the constitutional principles of religious liberty and separation of church and state. Americans United represents more than 120,000 members and supporters across the country, including thousands who reside in this Circuit. Since its founding in 1947, Americans United has served as a party, as counsel, or as an *amicus curiae* in scores of church-state cases before the United States Supreme Court, this Court, and other federal and state courts nationwide.