No. 98-1648

IN THE
Supreme Court of the United States

GUY MITCHELL, *et al.*,
Petitioners,

v.

MARY HELMS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. 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;

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court. *See* S.Ct. Rule 37. Counsel for the parties to this action did not write this brief, in whole or in part, and only *amicus* made monetary contributions to the preparation of this brief. *See* S.Ct. Rule 37.6.

National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; 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.

Contrary to Petitioners' claim, the Baptist Joint Committee did not advocate adoption of the Elementary and Secondary Education Act of 1965. Rather, when it became clear the bill would pass, the Baptist Joint Committee worked with Congress to ameliorate church-state concerns. It gave cautious approval to the provision for textbooks and teaching aids for students in private schools under the so-called "child benefit theory" and "public library concept." In 1966, however, the Baptist Joint Committee adopted a resolution opposing extension of the law, based on the actual implementation of the bill's provisions. The resolution stated in part:

> The impact of the Guidelines and of administrative practice for Title II would violate the public library ideal that inspired that title. We think the placing of materials for very extended periods of time in non-public school libraries when some of those materials do no circulate and when all of those materials are not catalogued for readily available public reference violates the intent of Congress and constitutes an improper aid to those schools.

The Baptist Joint Committee 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.

SUMMARY OF ARGUMENT

Amicus writes to correct historical errors and omissions in Petitioners' brief relating to Virginia's rejection of "A Bill Establishing a Provision for Teachers of the Christian Religion" ("Assessment Bill") and James Madison's position on the First Amendment's religion clauses. *Amicus* focuses solely on these historical issues, leaving the task of briefing the legal issues in this case to the parties and other *amici*.

Not only do Petitioners misconstrue some specific facts of this history, they mistakenly use the history to support their argument that the First Amendment's purpose "was not to exclude religious individuals or institutions from neutral, generally available public benefits, but to prevent favoritism or coercion in matters of religion." Petitioners' Brief at 33. Instead, this history and the First Amendment mandate the disassociation of the institutions of church and state, to promote maximum freedom for both. These goals—not mere evenhandedness in distribution of aid and the fact that the aid may be neutral—should control this and other Establishment Clause cases.

ARGUMENT

Against the backdrop of constitutional history, the federal courts, the Congress, presidents, scholars, attorneys and United States citizens have long debated the meaning of the religion clauses of the First Amendment. In the countless pages that have addressed this subject, one constant is evident. All sides focus on James Madison as the key architect of the First Amendment.

That is reasonable because from 1773 through 1789 Mr. Madison was at the center of most all the major events that affected the composition of the first sixteen words of the First Amendment. *See Rosenberger v. Rector*

& Visitors of the Univ. of Virginia, 515 U.S. 819, —— 115 S. Ct. 2510, 2535 (1995) (Souter, J. dissenting) (Madison's "authority on questions about the meaning of the Establishment Clause is well settled.") Madison's first recorded political action was to alter the Virginia Declaration of Rights by convincing the committee, and its chair, George Mason, to replace the phrase "the fullest *Toleration* in the Exercise of Religion, according to the Dictates of Conscience, . . ." with "the *free exercise* of religion, according to the dictates of conscience, . . ." *The Papers of James Madison* at 173-75 (Hutchinson & Rachal, eds., Vol 1, 1962) (emphasis added). Following the Revolution, Madison once more engaged his fellow Virginians in a series of decisions that resulted in the passage of Thomas Jefferson's "Bill for Establishing Religious Freedom in Virginia" in 1786. And, although he initially was reluctant to call for a Bill of Rights, Madison eventually became the First Amendment's primary architect and advocate.

In their brief, Petitioners discuss two events in which Madison was intimately involved: the Assessment Bill and the creation of the First Amendment. But their discussion of these events contains discrepancies, and they use this history to advance an argument with which Madison would have wholly disagreed: that the First Amendment's purpose "was not to exclude religious individuals or institutions from neutral, generally available public benefits, but to prevent favoritism or coercion in matters of religion." Petitioners' Brief at 33.

Any analysis of the applicability of the First Amendment's Establishment Clause must be informed by the events in Virginia from 1784-1786 and how those events illuminated Madison's views on religious freedom and the separation of church and state. Indeed, Madison's "Memorial and Remonstrance Against Religious Assessments,"

which responded to Virginia's Assessment Bill, "framed the debate upon which the Religion Clauses stand." *Rosenberger*, 515 U.S. at ——, 115 S. Ct. at 2536 (Souter, J. dissenting).

Petitioners challenge the relevance of the defeat of the Assessment Bill during these years, arguing that it has no application in the current case. Petitioners' Brief at 35-36. There is no question that the Assessment Bill was intended to advance the cause of Christianity, but it was not nearly so limited as Petitioners suggest. The Assessment Bill would have allowed each taxpayer to designate a church to receive his tax money, *A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in* Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 72-74 (1947), thereby "provid[ing] choice at the individual level." Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L. J. 43, 49 n.34 (1997). It also would have provided an exemption for Quakers and Mennonites. The Bill stated that Quakers and Mennonites "may receive what is collected from their members, and place it in their general fund, to be disposed of in a manner which they shall think best calculated to promote their particular mode of worship." *A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in* Appendix to *Everson*, 330 U.S. at 74. And a taxpayer "could refuse to designate a church, with undesignated church taxes going to a fund for schools." Douglas Laycock, *"Non-preferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 897 (1986). Further, contrary to Petitioners' suggestion, there is no evidence that "teachers of the Christian religion" were clergymen in all instances. Petitioners' Brief at 35. The Bill instead references the need for "learned teachers." *A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in* Appendix to *Everson*, 330 U.S. at 72.

Most important, the authors of the Bill proposed a plural establishment of religion "without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians; . . ." *A Bill Establishing a Provision for Teachers of the Christian Religion, reprinted in* Appendix to *Everson*, 330 U.S. at 72. The Bill was intended to establish religion on the broadest base its sponsors could imagine.[2]

Madison vigorously opposed the Assessment Bill. His task was to delay consideration of and then defeat the Bill. Madison succeeded in delaying its consideration until the 1785 legislative session when he hoped that the public would have inundated legislators with demands for its defeat. *The Papers of James Madison* at 195-96 (Rutland & Rachal, eds., Vol. 8, 1973). He achieved this by a bold legislative ploy in which he agreed to an incorporation of the Episcopal Church. He described his strategy in a letter to his father, James Madison, Sr., explaining that:

> The Genl. Assesst. has been put off till the next Session & is to be published in the mean time. . . . The inclosed Act for incorporating the Episcopal Church is the result of much altercation on the subject. . . . I consider the passage of this Act however as having been so far useful as to have parried for the present the Genl. Assesst. which would otherwise have certainly been saddled upon us: & If it be unpopular among the laity it will be soon repealed, and will be a standing lesson to them of the danger of referring religious matter to the legislature.[3]

Armed with this delay, Madison, in the spring of 1785, decided to provide his fellow Virginians with fifteen powerful arguments against the Assessment Bill in his "Memorial and Remonstrance Against Religious Assessments." Madison argued, for example, that "the establishment proposed by the Bill is not requisite for the support of the Christian Religion. To say that it is, is a contradiction to the Christian religion itself; for every page of it disavows a dependence on the powers of this world: . . ." James Madison, *Memorial and Remonstrance Against Religious Assessments reprinted in* Appendix to *Everson*,

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[2] As Professor Laycock notes: "It is anachronistic to view aid to all denominations of Christians as preferential in 1786. There were hardly any Jews in the United States at that time, and no other non-Christians to speak of. . . . That some Virginians [such as Madison] could imagine the effects of establishment on non-Christians only shows how far Virginians had thought through the problem." Laycock, *"Nonpreferential" Aid to Religion*, 27 Wm. & Mary L. Rev. at 898 (footnote omitted).

[3] *Id.* at 217. Lest one arrive at the conclusion that Madison had no problem with "incorporation" as compared with "establishment," it is imperative to refer to President Madison's subsequent veto of a bill that would have incorporated the Episcopal Church in Alexandria, Virginia, in 1811. Madison put it quite plainly:

> Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that "Congress shall make no law respecting a religious establishment." The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration. . . . Because the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a percedent [sic] for giving to religious societies as such a legal agency in carrying into effect a public and civil duty. *James Madison on Religious Liberty* at 79 (Robert S. Alley, ed., 1985).

330 U.S. at 67 (1947). The fate of the Assessment Bill was sealed when the General Assembly of Virginia, in the fall of 1785, refused to entertain consideration of it, thus ending its legislative history. *The Papers of James Madison* at 296-97 (Vol. 8).

Virginia Baptists agreed with Madison and opposed the Assessment Bill, stating:

> [I]t is believed to be repugnant to the spirit of the gospel for the legislature thus to proceed in matters of religion; that the holy author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel wants not the feeble arm of man for its support; that it has made and will again through divine power make its way against all opposition; and that should the legislature assume the right of taxing the people for the support of the gospel it will be destructive to religious liberty.[4]

In his historical analysis of the Virginia assessment controversy, Professor Douglas Laycock provides the following conclusion about the import of this debate:

> Virginians understood the vote against the bill as a rejection of any form of financial aid to churches. The proof of that is that the ten-year-old controversy died with this bill. No one at the time perceived that only preferential aid had been rejected; no one proposed a new bill that included non-Christians and eliminated the exemptions for Quakers and Mennonites. Instead, the Act for Establishing Religious Freedom provided that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever"—language comprehensive enough to ban taxes for either preferential or nonpreferential aid. The Act also declared that any subsequent bill narrowing its terms would be a violation of natural right. Laycock, *"Nonpreferential" Aid to Religion*, 27 Wm. & Mary L. Rev. at 899 (footnote omitted).[5]

[4] This "Formula Petition" is reprinted in William R. Estep, *Revolution Within the Revolution* at 193 (1990).

The Bill is not an exact historical parallel to this case, but the rejection of it stands for far more than Petitioners will admit. Its rejection and the subsequent adoption of the Virginia Statute for Religious Freedom indicate that Madison and his fellow Virginians opposed any aid to religion, not simply "favoritism" of certain religion(s) over others. Madison and others took this position not to harm religion, but to protect it.

Also, contrary to Petitioners' suggestions concerning the Congressional debate on the First Amendment, there is no historical evidence even to suggest that Madison considered the First Amendment as only intended to prevent favoritism of a religion. Petitioners' Brief at 33 (citing 1 Annals of Congress 758-759 (J. Gales, ed., 1834)). Petitioners attempt to use an excerpt of Madison's comments from the Annals of Congress to support their view of the history and purpose of the First Amendment. Petitioners' Brief at 33. There are two problems with their tactic. First, their quotation from the Annals is selective.[6]

[5] Indeed, even Thomas Curry, cited by Petitioners in their brief at page 35, explicitly asserts that "[e]ighteenth-century American history offers abundant examples of writers using the concept of preference, when, in fact, they were referring to a ban on all government assistance to religion." Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* at 211 (1986).

[6] Petitioners state that "[i]n defending the proposed Amendment on the floor of Congress, James Madison explained that the 'object' that it was 'intended to prevent' was that 'one sect might obtain a preeminence [sic], or two combine together, and establish a religion to which they would compel others to conform.'" *Id.* (citing 1 Annals of Congress at 758-759 (J. Gales, ed., 1834). But the Annals

Second, the Annals are necessarily less reliable than other sources on Madison's views of the First Amendment. The Annals were not published contemporaneously with the debate, "but were compiled between 1834 and 1856, using the best records available, primarily newspaper accounts." Annals of Congress, *A Century of Lawmaking* Home Page, Library of Congress' Website, http://lcweb2.loc.gov/ammem/amlaw/lwac.html. Rather than verbatim quotes, speeches are paraphrased. *Id.* Petitioners make questionable use of this murky material, rather than draw from a wealth of more reliable and complete evidence making crystal clear James Madison's views on the subject.

Madison's own writings reflect his desire for a strict separation between church and state:

> It was the Universal opinion of the Century preceding the last, that Civil Govt could not stand without the prop of a Religious establishment, & that the [Christian] religion itself, would perish if not supported by a legal provision for its Clergy. The experience of Virginia conspicuously corroborates the disproof of both opinions. The Civil Govt. tho' bereft of everything like an associated hierarchy possesses the requisite stability and performs its functions with complete success; Whilst the number, the industry, and the morality of the Priesthood, & the devotion of the people have been manifestly increased by the total separation of the Church from the State.[7]

In short, James Madison's writings and public pronouncements do not provide even a scintilla of support for nonpreferential aid to religion.

CONCLUSION

Amicus respectfully requests that this history continue to animate the Supreme Court's Establishment Clause jurisprudence and that the decision below of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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of Congress actually record Madison responding to the comments of Congressman Huntington by stating:

> Mr. Madison thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent. 1 Annals of Congress at 758-759.

[7] This is an excerpt from a letter written to Robert Walsh in 1819. *The Writings of James Madison* at 431-432 (Gaillard Hunt, ed., Vol. VIII, 1908).