Nos. 05-4604, 05-4781

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANTHONY HINRICHS, *et al*.,

Plaintiffs – Appellees

v.

BRIAN BOSMA, in His Official Capacity as Speaker of the House of Representatives of the Indiana General Assembly,

Defendant – Appellant

On Appeal from the United States District Court for Southern District of Indiana

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BRIEF OF AMICI CURIAE

INDIANA FAMILY INSTITUTE, INC. and Certain Indiana Pastors
(full list on next page)

In Support of Speaker Bosma Seeking Reversal

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(continued from front cover)

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Interest of Amici Curiae

Amici curiae is the Indiana Family Institute ("IFI"). IFI is a nonpartisan public education and research organization that seeks to promote the health and well-being of Indiana's families through public policy, research, and education. The amici are also religious leaders from a variety of religious traditions who are the sort of persons often called upon to offer invocations in the Indiana House of Representatives. Some of the amici curiae have offered invocations in the Indiana House of Representatives. The amici have secured consent of both parties to file this brief.

The amici write to argue that Speaker Bosma's current practice does not constitute government speech and, as such, does not violate the Establishment Clause of the First Amendment to the Constitution of the United States. Instead, they assert that the District Court's ruling restricts the free speech and free exercise of religion of those who request to offer a prayer before each session and that such a policy should be reversed as unconstitutional.

Summary of the Argument

In its ruling, the District Court assumed the Establishment Clause was applicable to this case. However, the Establishment Clause only applies to government speech, speech that is not present in this case. The Speaker and the Indiana House do not exert control over the overarching message offered through prayer nor

are the prayers subject to final approval. Because government speech is not involved, Establishment Clause jurisprudence is not relevant.

Instead, the facts of this case demonstrate that the Indiana House constitutionally created a limited public forum, a forum of prayer designed to solemnize each legislative session. The House controls the scope of the forum to ensure that any speech offered serves the solemnizing purpose of the forum, but does not control what is said by those who offer prayers.

Because a limited public forum has been created, the District Court's injunction, which requires the Speaker to regulate the content of the prayers to ensure they are nonsectarian and make no reference to Christ or Jesus, results in a free speech violation for those who offer a prayer. In particular, the injunction requires the Speaker to engage in viewpoint discrimination, a most egregious form of speech regulation.

Additionally, the District Court's injunction causes the free exercise of religion of those who pray, including individuals such as amici pastors, to be violated. By specifically requiring all references to Christ and Jesus be omitted from any prayer offered in the Indiana House, the District Court creates a specific law aimed on one particular religion that serves no compelling interest.

For these reasons, the District Court's decision and resulting injunction

should be reversed.

Argument

I. Establishment Clause Analysis Is Irrelevant To This Case.

When considering whether the speech involved violates the Establishment Clause, the nature of the speech – whether it is that of the government or a private individual – is significant. As the District Court states, "the fact that the prayers are government speech is pivotal." *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1114 (S.D. Ind. 2005). In fact, assessing the type of speech involved is paramount because "government speech that endorses religion, or evidences hostility toward a particular religion, is constitutionally improper under the Establishment Clause, but [] private religious speech is protected by the Free Exercise Clause." *Bd. of Ed. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990). In analyzing the type of speech involved, the Supreme Court has specifically stated that private speech offered in a governmental forum is not inherently government speech. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 113 (2001). And, when private speech is implicated, the Court considers the nature of the forum, if any, that has been created, and the amount of control the government has over the speech offered in that forum. *See Widmar v. Vincent*, 454 U.S. 263, 276 (1981); *Good News Club*, 533 U.S. at 106; *Doe v. Village of Crestwood*, *Illinois*, 917 F.2d 1476, 1478-79 (7th

Cir. 1990). In the present case, the government's speech is not at issue, but rather that of private individuals offered in a limited public forum.

A. The Establishment Clause Is Only Relevant to This Case If Government Speech Is Involved.

The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion . . ." This provision has been incorporated through the Fourteenth Amendment to apply not only to Congress, but to the fifty states as well. *Everson v. Board of Education,* 330 U.S. 1 (1947). It does not, however, reach so far as to prohibit the religious exercises, or, more relevant here, the speech of private individuals. *See Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995) ("precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression"); *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948) ("the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct"). As the Supreme Court has noted, there is a "critical difference 'between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995)

(*quoting Mergens,* 496 U.S. 226, 250 (1990)); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310 (2000); *Doe v. Small*, 964 F.2d 611, 617 (7th Cir. 1992). The District Court recognized this distinction, noting in its decision that "[u]nder the First Amendment, the fact that the prayers are government speech is pivotal." *Bosma,* 400 F. Supp. 2d at 1114. Thus, for Establishment Clause jurisprudence to be relevant to this case, the case must involve government speech.

B. Indiana's Legislative Prayer Policy Does Not Constitute Government Speech.

For speech to be attributed to the government, that speech must satisfy the requirements laid out by the Supreme Court, most recently in *Johanns v. Livestock Mktg. Ass'n,* 125 S. Ct. 2055 (2005).

In *Johanns,* a beef promotional program created by Congress through the Beef Promotion and Research Act was challenged as compelling speech in violation of the Free Speech clause. 125 S. Ct. at 2059-2060. The Supreme Court stated that government speech is evidenced by government control over the overarching message and the government's approval of each word offered. *Id.* at 2062-63. In particular, the Court found that because Congress directed the implementation of a coordinated promotion program, specified in general terms what the promotional campaigns should and should not contain, and left the remaining details to an entity answerable to the Secretary of Agriculture, subject to the Secretary's final approval,

the federal government controlled the overarching message of the program and, consequently, was engaged in government speech. *Id.*

The Sixth Circuit in *ACLU of Tenn. v. Bredesen,* 441 F.3d 370 (6th Cir. 2006), *petition for cert. filed,* No. 05-1389 (U.S. April 28, 2006), following the Supreme Court's analysis in *Johanns,* held a state license plate program offering the plate "Choose Life" to be government speech. *Id.* at 376. In that decision, the court found that, much like the government in *Johanns,* the Tennessee legislature was engaged in government speech because it "spelled out in the statute that these plates would bear the words 'Choose Life,'" delegated "partial responsibility for the design of the plate to New Life, but retains a veto over its design," and required the plate to "be issued in a design configuration distinctive to its category and determined by the commissioner." *Id.* For these reasons, the court held that "[i]t is Tennesse''s own message" and constituted government speech. *Id.* In the present case, the District Court failed to consider this analysis, and it is a critical oversight.

The District Court asserts that "the prayers offered from the podium of the House of Representatives are government speech." *Bosma*, 400 F. Supp. 2d at 1114. It seemed to conclude this in light of the apparent agreement between the parties that the speech involved is, in fact, government speech. *Id.* The District Court's only analysis of the issue appears in a footnote, in which the court indicates an under-

standing of why the Speaker would agree to such an assertion:

> Establishing a true public forum of any variety addressing religious belief would open the podium to a very wide range of viewpoints. Such a forum could be difficult to manage, and the task could easily interfere with and distract from the legislature's principal purpose of governing the state. Government bodies that find they have created a public forum often respond to controversies over access by closing the forum entirely.

Bosma, 400 F. Supp. 2d at 1115.[1]

If the District Court had more thoroughly analyzed the facts of this case using *Johanns* as a guidepost, it would have concluded that the speech at issue is not government speech, despite the apparent assent to that position by both of the parties. First, unlike Congress and the Secretary of Agriculture in *Johanns* and the Tennessee legislature in *Bredesen,* the Speaker does not control the overarching message of the prayers offered. The Speaker demonstrates throughout the transcript the individual nature of the prayers offered:

> [T]he record shows that the Speaker does not know, before anybody gets up there to offer prayer, what they're going to say. And there's no evidence provided that any of the House members know except for the ones who offer the prayers themselves.

Tr. Transcript 40:3-7.

> [W]hat we have here is a self-selection system; people who come forward who want to offer the prayers. I think that just maybe that – for whatever

[1] This assertion, however, is not accurate. The Supreme Court has recognized more than just a public forum and a closed forum. *See infra* Part II.

> reason – there are many of the Christian faith who wanted to come forward.

Tr. Transcript 46:25-47:4.

> [T]his is a situation where the government is inviting individuals who are not otherwise involved with the government, except when perhaps a representative gives a prayer, to come in and lead according – lead the prayer according to their individual consciences.

Tr. Transcript 25:8-12. The Speaker offers only one general term for the prayer – that they be as ecumenical as possible – and such a term is merely a request; it is not followed up on or enforced in any way. Stipulation of Fact ¶ 22, App. 129A ("At no time following the delivery of the Invocation was any cleric or Representative admonished, corrected, or advised in any way about the religious content of the Invocation").

Second, again unlike the facts in *Johanns* or *Bredesen,* neither the Speaker nor anyone else in the Indiana House reviews any of the prayers offered. When asked by the District Court whether the State would "anticipate, under the open system [it was] describing, any role for the Speaker in overseeing content or guiding volunteers who have stepped over a line," the State responded: "No. The tradition is not that way and [that it] would not anticipate that it would change." Tr. Transcript 49:23-50:2. No one controls the details of the prayer, and those who pray are not answerable to the Speaker for final approval of their prayer. Stipulation of Fact ¶¶ 7,

22, App. 127A, 129A. Unlike the federal government in *Johanns* and the state legislature in *Bredesen,* the Indiana House does not exercise sufficient control over the overarching message to establish government speech.

Because the District Court concludes without analysis that the speech at issue is government speech, the court also assumes the relevance of *Marsh v. Chambers,* 463 U.S. 783 (1983) to this case – again, apparently relying upon the assertions of the parties. *Bosma,* 400 F. Supp. 2d at 1115; Tr. Transcript 23:11-13 ("[Defendants] think both parties concede that legislative prayer is a specific issue dictated solely by Marsh.") However, the pertinence of *Marsh*, while superficially appearing relevant, becomes less so upon further examination.

In *Marsh,* a member of the Nebraska legislature challenged the constitutionality of the practice in the legislature of offering prayers before each session. *Marsh,* 463 U.S. at 785. In particular, the Nebraska legislature, using public funds, hired a chaplain biennially to offer the invocation every day before session began. *Id.* at 784-85. The Supreme Court held that the practice did not violate the Establishment Clause because of the unique tradition of such a practice since the first Congress. *Id.* at 791.

The facts in this case are significantly different from those presented in *Marsh*. In *Marsh,* the chaplain was hired biannually by Congress to pray before

every session. 463 U.S. at 784. In Indiana, no such arrangement is made.

Pursuant to Indiana House Rule 10, the session is called to order, a prayer is given, the pledge of allegiance is recited, roll is taken, and the session begins with reports from committees. Ind. House Standing R. 10, *available at* http://www.in.gov/legislative/session/houserules.pdf (last visited May 16, 2006); Stipulation of Fact ¶ 1, App. 126A. To determine who will offer the prayer, the floor is opened to House Representatives to schedule an individual who can offer the invocation by filling out a "Minister of the Day" form. Stipulation of Fact ¶ 3, App. 127A. Upon receipt of the form, that individual is scheduled to offer the prayer from the Speaker's stand. Stipulation of Fact ¶¶ 3, 4, App. 127A. The person scheduled to offer a prayer is notified by mail, Stipulation of Fact ¶ 6, App. 127A, and is requested by the Speaker to "strive for an ecumenical prayer as our members, staff, and constituents come from different faith backgrounds." *Letter from Cheryl Burns*, App. 135A. Beyond permitting individuals to pray from his stand and requesting that they pray as ecumenically as possible, the Speaker exercises no control over those who offer the invocation, unlike in *Marsh,* where the legislature hired – and consequently, could have exercised some control over – a pastor for sixteen years. 463 U.S. at 793.

Most importantly, however, the *Marsh* Court did not weigh the nature of the

speech involved in the case, but appears to have presumed that government speech was involved. As demonstrated above, such a presumption is erroneous in this case.

Because the Speaker has insufficient control over the prayers offered in the Indiana House, such prayers do not constitute government speech, and consequently, Establishment Clause jurisprudence, including *Marsh* and decisions that rely upon it, are of little relevance to the present inquiry.

II. The Indiana House Has Created a Limited Public Forum.

If the speech involved is not government speech, what, then, is it? In analyzing the type of challenged speech involved, the Supreme Court has employed forum analysis. The Court has recognized three types of fora. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 565 (7th Cir. 2001). First, there is a public forum. Public fora are "open for expressive activity regardless of the government's intent." *Arkansas Ed. Television Comm'n v. Forbes,* 523 U.S. 666, 678 (1998). Typical public fora include sidewalks or public parks. *Air Line Pilots Ass'n Int'l v. Dept. of Aviation,* 45 F.3d 1144, 1151 (7th Cir. 1995).

Second, there is a limited or designated public forum. Such a forum is created by the government to provide general access to the public or to a class of speakers. *Forbes,* 523 U.S. at 679. It can be reserved "for certain groups or for the discussion of certain topics" because of "the necessities of confining [the] forum to the limited

and legitimate purposes for which it was created." *Rosenberger,* 515 U.S. at 829; *see e.g., Cornelius v. NAACP*, 473 U.S. 788, 806 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983). The property opened to the forum is in the control of the government at all times and, consequently, can be closed at any time.

Finally, there is a nonpublic forum. In this context, the speech is considered to be government speech because the forum is "public property that is not by tradition or designation open for public communication." *Chiu v. Plano Indep. School Dist.,* 260 F.3d 330, 347 (5th Cir. 2001).

Of these various fora recognized by the Supreme Court, a limited public forum is the best fit for describing the prayers offered by amici and others like them, as we will now show.

A. The Indiana House Has Limited The Forum To Prayer.

"The Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *DeBoer*, 267 F.3d at 566 (*quoting Cornelius,* 473 U.S. at 802). As this Court has noted, "the more selective the government is in restricting access to its property, the more likely that property will be considered a nonpublic forum." *DeBoer,* 267 F.3d at 566.

In the present case, it is clear that the Indiana House has not created a public forum. The House has created opportunity to offer an invocation before a each session. Such a forum limits the topic of the forum to that of prayer. As such, the Indiana House floor is not sufficiently "open for expressive activity regardless of the government's intent" to create a public forum. *Forbes,* 523 U.S. at 678.

Likewise, the House has not created a nonpublic forum. General access is afforded to anyone who might wish to pray. The Speaker is not selective about the content or form of the prayer offered, but grants those who request to do so the opportunity as it is available. *See* Tr. Transcript 40: 3-7 ("the record shows that the Speaker does not know, before anybody gets up there to offer prayer, what they're going to say. And there's no evidence provided that any of the House members know except for the ones who offer the prayers themselves"). This Court highlighted this fact in its decision denying the Speaker's request for a stay, commenting that beyond a form letter from the Speaker which states: "[W]e ask that you strive for an ecumenical prayer as our members, staff, and constituents come from different faith backgrounds," *Hinrichs v. Bosma*, 400 F. Supp. 2d 1103, 1105 (S.D. Ind. 2005), "[c]lerics [] receive no instructions about the form their prayers should take. The Speaker does not participate in the selection of guest clerics, and he usually meets them for the first time immediately before introducing them at the opening of

a House meeting." *Hinrichs v. Bosma*, 440 F.3d 393, 395 (7th Cir. 2006).

Because those who wish to pray, including some amici, were granted general access to the House's forum designated for prayer, the forum should viewed as a limited or designated public forum.

B. The Purpose of The Indiana House's Forum Justifies Its Limitation to Prayer.

In creating the forum it did, the Indiana House sought to solemnize each legislative meeting day prior to each legislative session. Stipulation of Fact ¶ 28, App. 130A. This purpose is valid, as the legislature is seeking to reinforce the import and magnitude of the work done in the House while it is in session. It is a reasonable and legitimate purpose, as required by *Rosenberger*. 515 U.S. at 829.

The very creation of a forum for prayer to serve the state's purpose might in itself be viewed as an establishment of religion and thereby a violation of the Establishment Clause. However, such an inference is inconsistent with the precedent established in *Marsh*. Surely if a nonpublic forum with hired clergy to offer prayer before a legislative session does not violate the Establishment Clause, as was the case in *Marsh*, a limited public forum open to individuals to pray as their conscience dictates does not violate the Establishment Clause. An Establishment Clause violation seems much more imminent in the former context, where the speech is restricted to one speaker hired by the legislature, than in the latter context,

where individuals merely submit a form with their availability and are scheduled accordingly. Stipulated Facts ¶ 3.

Limited fora such as this are established in many other governmental contexts. For example, chapels are created on military bases and academies, public hospitals and publicly-owned airports. These locations are specifically designed with one purpose in mind: to afford individuals an opportunity to worship. They are not open to any public use, but only to those uses that comport with the purpose of the space. Beyond that, however, no control is exerted over the speech that might take place there. Different denominations and religions can be represented and God worshiped in a variety of ways. Just as these worship spaces have been created, so the Indiana House seeks to create its own space – one that is designated for prayer to solemnize the day's work ahead of each House Representative.

Because the Indiana House has created a forum designed for the purpose of solemnizing each session through prayer and because individuals are invited to pray as they see fit, this Court should reverse the District Court and find that this practice is a constitutionally created limited public forum that does not trigger Establishment Clause concerns.

III. The District Court's Injunction Impedes The Free Speech Rights of Those Who Offer Prayers In the Indiana Legislature.

While the policy of the Indiana House does not create an impermissible

establishment of religion through its limited public forum, the District Court's decision to enjoin the Speaker unconstitutionally restricts the free speech rights of those who use the forum. Because the prayers in the legislature are offered by private individuals in a limited public forum, the District Court's injunction, which requires the Speaker to require all official prayers offered before each session be "inclusive and nonsectarian," violates those individuals' rights.

Where a limited or designated public forum is involved, "regulation of speech [within that forum] is subject to the highest scrutiny." *Anderson v. Milwaukee County*, 433 F.3d 975, 979 (7th Cir. 2006). Once the State has created a limited public forum, it "must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829. Those who participate "in such a forum, declared open to speech ex ante, may not be censored ex post when the sponsor decides that particular speech is unwelcome." *Hosty v. Carter*, 412 F.3d 731, 737 (7th Cir. 2005) (en banc). Because of the District Court's ruling, this is precisely what the Speaker is now required to do.

Indeed, the District Court has created what the Supreme Court has declared a "most egregious form of content discrimination" – that of viewpoint discrimination:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R. A. V. v. St. Paul*, 505 U.S. 377, 391, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). Viewpoint discrimination is thus an

> egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. *See Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). These principles provide the framework forbidding the State from exercising viewpoint discrimination, even when the limited public forum is one of its own creation.

Rosenberger, 515 U.S. at 829. In particular, the Court has required the Speaker to ensure that all prayers offered before each legislative session be "nonsectarian and [] not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief, and (b) . . . should refrain from using Christ's name or title or any other denominational appeal." *Bosma,* 400 F. Supp. 2d at 1131. Such a policy goes beyond merely the content of speech offered before each session – that of prayer – and prohibits all prayers from a particular viewpoint – those from a Christological viewpoint.

Even Appellees did not ask for as much as the Court granted: "We are not asking the Speaker to review the prayers. We are not asking the Speaker to censor anyone." Tr. Transcript 18: 22-23. However, the District Court has done precisely that. It has censored those who wish to pray to the Christian God.

By enjoining the Speaker as it did, the District Court requires the Speaker to engage in viewpoint discrimination, something which the Supreme Court and this Court have found to violate the Free Speech clause. This Court should so find in

this matter, as well.

IV. The District Court's Injunction Restricts The Free Exercise Rights Of Those Who Pray Before Each Session.

In addition to treading upon the free speech rights of those who offer prayers in the Indiana House, the District Court's decision also undercuts the rights of those persons to freely exercise their religion. As this Court has noted:

> While the government's interest "in complying with its Constitutional obligations may be characterized as compelling," *Widmar [v. Vincent]*, 454 U.S. [263], 271 [(1981)] (emphasis added), the Supreme Court has refused to find the Establishment Clause to be a sufficiently compelling interest to exclude private religious speech even from a limited public forum created by the government.

Doe v. Small, 964 F.2d 611, 619 (7th Cir. 1992). Yet it is this interest that the District Court seeks to preserve by issuing the injunction that it did.

The Supreme Court in *Employment Division v. Smith,* 494 U.S. 872 (1990), held that the freedom to exercise one's religious beliefs can only be limited if "prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision." *Id.* at 885. A law is not generally applicable if it is underinclusive in its scope, drafted to target a particular religious group or religious conduct. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 543 (1993). In such a circumstance, the law must be demonstrated to serve a compelling interest. *Lukumi,* 508 U.S. at 546; *Smith,* 484

U.S. at 884.

By enjoining the Speaker as it did, the District Court has created an underinclusive law that serves no compelling interest and that violates the Free Exercise clause. The District Court held that:

> If the Speaker chooses to continue any form of legislative prayer, he shall advise persons offering such a prayer (a) that it must be nonsectarian and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief, and (b) that they should refrain from using Christ's name or title or any other denominational appeal.

Bosma, 400 F. Supp. 2d at 1131. While the initial portion of this policy appears to be a general law that satisfies the requirements of *Smith,* the latter portion is clearly directed at those individuals who wish to speak as their consciences dictate and pray in Jesus' name. Much like the *Lukumi* case, where a law prohibiting cruelty to animals was crafted to prevent religious sacrificing of animals by a religious group, this policy ensures that a particular religion – namely, Christian, and *only* Christian – is regulated. This policy is underinclusive and, as such, is not a generally applicable law.

Because the injunction is not generally applicable, it must serve a compelling interest. It is clear from the decision that the reason for this ruling was concern for Establishment Clause violations. *Bosma,* 400 F. Supp. 2d at 1114 (focusing the decision on "The Establishment Clause Claim" as raised by Plaintiffs). However,

this is not a compelling interest because the facts of this case demonstrate that no government speech is involved. *See supra* Part I. Consequently, the Establishment Clause is not an issue in this case, rendering the District Court's injunction a violation of the Free Exercise clause and the rights of amici and those similarly situated.

The Supreme Court has also recognized that where multiple constitutional claims are presented together – though inadequate on their own – they each strengthen each other to form a successful constitutional challenge. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972) (holding that a joint claim of a substantive due process violation and a free exercise violation successfully demonstrated a constitutional violation); *see also Thomas v. Anchorage Equal Rights Comm.,* 165 F.3d 692, *op. withdrawn, reh'g en banc granted,* 192 F.3d 1208 (9th Cir. 1999), *vacated en banc on other grounds,* 220 F.3d 1134 (9th Cir. 2000), *cert. denied,* 121 S. Ct. 1078 (2001) (holding that a claim against a landlord who refused to rent to unmarried couples presented a hybrid claim of religion and speech and rendered the policy unconstitutional); *Society of Separationists, Inc. v. Herman,* 939 F.2d 1207 (5th Cir. 1991) (finding that an atheist's challenge to the requirement that he take an oath as a juror was a religion-plus-speech hybrid and finding the requirement unconstitutional).

Here, amici can present a Free Exercise claim along with a Free Speech claim. Even if this Court should find their claims inadequate, together they form a valid constitutional claim against the injunction the District Court issued.

As the State noted before the District Court, "the best way to approach these things, if you're going to have a prayer, [is] to open it up and let people come in who can pray from their heart, and do it in a way that is consistent with their faith." Tr. Transcript 48:10-13. And that is precisely what the Speaker had in place. That is, until the District Court enjoined the practice.

This Court should reverse the District Court's decision as an impermissible restraint upon the free exercise of religion of amici and those similarly situated.

Conclusion

This case involves not an Establishment Clause claim, but rather Free Speech and Free Exercise issues. The District Court improperly framed this case and found an Establishment Clause violation in its decision. In so doing, the District Court's order effectuated a Free Speech and Free Exercise violation of amici pastors', and other similarly situated individuals', rights. Therefore, amici respectfully request that this Court reverse the District Court's decision and find Indiana's legislative practice of praying before each session is constitutional under the First Amendment.

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Respectfully Submitted,

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Certificate of Compliance

Pursuant to Federal Rule of Appellate Procedure 29, the undersigned certifies that this *Amici Curiae Brief* complies with the type-volume limitations of this Court.

1. In accordance with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), this brief contains 5081 words.
2. The Brief has been prepared in proportionately spaced typeface using Word Perfect 9.0 in Times New Roman, 14 point font.
3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the work or line printout.

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Circuit Rule 31(e)(1) Certification

Pursuant to Cir. R. 31(e)(1), counsel for amici curiae IFI and Indiana Pastors hereby certifies that a digital version of the foregoing brief has been furnished to the court.

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Certificate of Service

Counsel for amici curiae IFI and Indiana Pastors hereby certifies that on May 18, 2006, two copies of their brief, as well as a digital version containing the brief, were delivered by U.S. Mail to:

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