IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-1935

JUDITH M. KOENICK,

Appellant,

v.

REGINALD M. FELTON, et al.,

Appellees,

On Appeal from the United States District Court for the District of Maryland

Brief *Amici Curiae* of the American Jewish Congress, the National Council on Islamic Affairs, Americans United for Separation of Church and State, Freedom From Religion Foundation, Inc., Americans for Religious Liberty, The American Humanist Association and The American Ethical Union In Support of Appellant

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REGINALD M. FELTON, et al.,	)	
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The American Jewish Congress, the National Council on Islamic Affairs, Americans United for Separation of Church and State, Freedom from Religion Foundation, Americans for Religious Liberty, the American Humanist Association and the American Ethical Union respectfully submit this brief *amici curiae* in support of Appellants pursuant to Rule 29 of the Federal Rules of Appellate Procedure and Rule 29 of this Court. Consent to the filing of this brief has been granted by counsel for all parties and was approved by Order of this Court, dated September 15, 1997.[1]

[1] The American Jewish Congress submitted a Motion for Leave to File *Amicus Curiae* Brief on September 8, 1997, which was granted by this Court on September 15, 1997. The National Council on Islamic Affairs, Americans United for Separation of Church and State, Freedom from Religion Foundation, Americans for Religious Liberty, the American Humanist Association and the American Ethical Union have submitted a motion under separate cover requesting leave to join this brief.

INTEREST OF *AMICI*

Amici represent a broad coalition of religious and social organizations united to uphold the national commitment to religious freedom embodied in the Religion Clauses of the First Amendment, and particularly the Establishment Clause. Long-standing Establishment Clause jurisprudence protects the personal beliefs and values of *amici* and all other Americans, including "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." Wallace v. Jaffree, 472 U.S. 38, 52 (1985). This case challenges a Maryland statute that attempts to secularize Good Friday and Easter Monday -- important and respected Christian holidays -- and, at the same time, mandates the closure of public schools specifically because it is a Christian holiday. *Amici* are directly affected by such governmental directives.

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The *American Jewish Congress* is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious interests of American Jews. It has a long-standing commitment to the defense of the establishment and free exercise clauses of the First Amendment, having either represented one of the parties or filed briefs *amicus curiae* in most of the cases interpreting those principles before the Supreme Court of the United States. In addition, the National Capital Region of the American Jewish Congress has been actively involved in many local cases implicating the significant constitutional

issues presented by this case and filed an *amicus* brief in support of Appellant Koenick before the United States District Court of the District of Maryland.

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The *National Council on Islamic Affairs* was founded in 1960 for the purpose of promoting the role of American Muslims in the civil and political process of the United States. The National Council has a nationwide membership, with members living in Maryland. Additionally, there are approximately 50,000 Muslims living in the State of Maryland: the National Council on Islamic Affairs is an appropriate voice to represent their interests. The National Council has viewed the promotion of equality of religions through adherence to the First Amendment principles of free exercise and separation of state and religion as a central goal of the organization. The organization and its officers have either served as parties, or filed amicus briefs defending those principles before federal courts in the Southern and Eastern Districts of New York. Additionally, the National Council filed a brief in support of Appellant Koenick in the United States District Court of Maryland.

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Americans United for Separation of Church and State is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by the Supreme

Court. Americans United is composed of approximately 60,000 members nationwide and maintains chapters in Maryland, North Carolina, South Carolina and Virginia. Although Americans United members adhere to various religious faiths, they are united in their commitment to the long-standing American principle of church-state separation, which prohibits government preference of any religion.

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Freedom from Religion Foundation, Inc. ("FFRF") is a Wisconsin nonstock corporation. FFRF is a national organization whose purpose is to protect the fundamental constitutional principle of separation of church and state. FFRF successfully challenged a Wisconsin statute establishing Good Friday as a state legal holiday. Freedom From Religious Foundation v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996).

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Americans for Religious Liberty is a nonprofit public interest educational organization dedicated to defending religious liberty and the constitutional principle of separation of church and state. Americans for Religious Liberty has participated as an *amicus* in cases before the Supreme Court and other courts where these concerns have been implicated.

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The *American Humanist Association*, founded in 1941, has members and affiliates throughout the United States. The Association has adopted formal

statements supporting the principle of church-state separation and has participated as an *amicus curiae* in a number of cases involving religious liberty concerns.

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The *American Ethical Union*, founded in 1889, is a federation of Ethical Culture / Ethical Humanist societies and fellowships throughout the United States. Ethical Culture is a humanistic religious and educational movement inspired by the ideal that the supreme aim of human life is working to create a more humane society. The AEU has participated in a number of *amicus curiae* briefs in defense of religious freedom and church-state separation.

SUMMARY OF ARGUMENT

The district court decision upheld the constitutionality of Section 7-103 of the Maryland Education Code, which establishes Good Friday and Easter Monday as public school holidays. This ruling should be reversed as it is inconsistent with the fundamental constitutional principle of separation of church and state. This statute is an official consecration of very respected, purely religious Christian holy days. By mandating a state-wide school vacation on these days, the state is telling its school employees, students and families that the state officially endorses the religious preferences of the largest religious group in the nation. This message undermines the central premise of the Establishment Clause, which prohibits *any* government action which has the purpose or effect of endorsing religion. County of Allegheny v. American Civil Liberties Union, 492 U.S. 573,

592 (1989). Moreover, the district court's summary judgment ruling should be reversed because it relies upon findings of material facts which are in genuine dispute.

ARGUMENT

STANDARD OF REVIEW

Appellate review of the district court's summary judgment ruling is de novo. Porter v. United States Alumoweld Co., 125 F.3d 243, 245 (4th Cir. 1997).

THE DISTRICT COURT'S SUMMARY JUDGMENT RULING SHOULD BE REVERSED

I. THE MARYLAND STATUTE'S ESTABLISHMENT OF GOOD FRIDAY AND EASTER MONDAY AS PUBLIC SCHOOL HOLIDAYS UNCONSTITUTIONALLY ESTABLISHES RELIGION IN VIOLATION OF THE FIRST AMENDMENT

The Establishment Clause, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, See Cantwell v. Connecticut, 310 U.S. 296 (1940), commands that a state "shall make no law respecting an establishment of religion." U.S. Const. amend. I. "[R]est[ing] upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere," McCollum v. Board of Education, 333 U.S. 203, 212 (1948), the Establishment Clause has long been held to prohibit not only the classic, 18th century establishments of official state religions but also "the symbolic union of government and religion," School Dist. of City of the Grand Rapids v. Ball, 473 U.S. 373, 392 (1985), overruled on other

grounds by, Agostini v. Felton, 117 S.Ct. 1997 (1997), as well as the preference of one religious denomination over another, or even religion over nonreligion. County of Allegheny, 492 U.S. at 589-90 (1989).[2] As the Supreme Court has explained: "Whatever else the Establishment Clause may mean. . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." County of Allegheny, 492 U.S. at 605.[3]

Section 7-103(c) of the Maryland Education Code expressly designates "the Friday before Easter and from then through the Monday after Easter" as public school holidays. Md. Code Ann. Educ. § 7-103(c)(1)(iii). In a very similar case, the Seventh Circuit recently held that requiring public schools to close on Good Friday because it is a religious holiday -- "a day of solemn religious observance, and nothing else, for believing Christians, and no one else" -- incorporates a purely religious day into the official state calendar in violation of the Establishment Clause. Metzl v. Leininger, 57 F.3d 618, 620 (7th Cir. 1995). Like the Illinois

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[2] See also Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 709 (1994); Torcaso v. Watkins, 367 U.S. 488, 492-95 (1961); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality. . . between religion and nonreligion").

[3] See also Board of Educ. of Cent. School Dist. No. 1 v. Allen, 392 U.S. 236, 254 (1968) (Black, J., dissenting) ("the only way to protect minority religious groups from majority religious groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide").

statute addressed by the Seventh Circuit in Metz, the Maryland law at issue violates the Establishment Clause.

A. The Maryland Statute Facially Differentiates Between Christianity and Other Religions

The threshold analysis under the Establishment Clause requires a court to determine whether the law at issue facially differentiates among religions. Hernandez v. Commissioner of Internal Revenue Serv., 490 U.S. 680, 695 (1989). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). No State may "pass laws which aid one religion" or that "prefer one religion over another." Everson v. Board of Education, 330 U.S. 1, 15 (1947); see also Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Where a statute, on its face, grants a denominational preference, the court must consider the law suspect and apply "strict scrutiny in adjudging its constitutionality." Larson, 456 U.S. at 246. Such a law "must be invalidated unless it is justified by a compelling governmental interest" and is "closely fitted to further that interest." Id. at 247.[4]

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[4] The district court glossed over the strict scrutiny standard. It relied on this Court's statement in Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337, 1343 n.11 (4th Cir. 1995), that the Lemon v. Kurtzman test (403 U.S. 602 (1971)) remains the analytical framework for evaluating the constitutionality of legislation under the Establishment clause. JA 350. While the Barghout court hesitated to apply the Larson strict scrutiny analysis based on the particular record before it, this Court certainly did not find that this analysis was somehow preempted by the Lemon test. To the contrary, this Court clearly acknowledged that the "initial examination" in any Establishment Clause challenge must be whether the government measure facially differentiates among religions. Barghout, 66 F.3d at 1342 n.9.

The statute in Larson exempted from registration and reporting requirements only certain religious organizations. Similarly, section 7-103 facially discriminates among religions because it confers a benefit -- the freedom to observe religious holy days without sacrificing school attendance -- only on adherents of Christianity. Section 7-103 requires all public schools throughout the state to close on Good Friday -- "a day of solemn religious observance, and nothing else, for believing Christians, and no one else. Unitarians, Jews, Muslims, Buddhists, atheists -- there is nothing in Good Friday for them." Metzl, 57 F.3d at 620. But, it establishes no public school holidays for days of religious significance to members of non-Christian faiths. As a result of this denominational preference, the burden of religious observance is lighter on Christians than on the followers of other faiths.[5]

Section 7-103 cannot survive strict scrutiny. It is not "closely fitted" to furthering any compelling governmental interest.[6] The district court suggested that public schools need to be closed on Good Friday and Easter Monday because "the high number of students and teachers who would be absent. . . would disrupt the

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[5] See also Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 339 (1987) (explaining that "laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under Lemon") (emphasis in original).

[6] In the summary judgment briefing before the district court, the State did not offer any compelling governmental interests to support the Maryland Good Friday statute. Instead, it attempted to avoid the heightened strict scrutiny standard altogether, claiming that section 7-103 does not affirmatively burden or discriminate against other religions but merely establishes a public school holiday linked to Easter. Def.'s Reply Mem. at 6-7.

effectiveness of instruction." JA 352. Even if religious accommodation were considered a compelling state interest, shutting the doors of every public school throughout the state is hardly necessary to serve that interest. Individual school districts are in the best position to determine whether or not it is administratively necessary to close on days of religious importance For example, the Montgomery County, Maryland School Board has decided to remain closed on the Jewish High Holy Days of Rosh Hashanah and Yom Kippur because of the high absenteeism of students and teachers. JA 62-63, 352. In contrast, section 7-103 singles out Good Friday and Easter Monday for official state recognition, requiring all public schools to shut their doors no matter how few students or teachers in a particular district would be absent because of religious observance. This kind of sweeping, religious-based governmental action is exactly what the Establishment Clause was intended to prohibit.

A state law that simply allowed school districts to consider closing on days when so many students and teachers were absent -- creating secular, administrative burdens -- would survive strict scrutiny. A law that requires all schools to close because it is a religious holiday -- regardless of any administrative necessity -- cannot satisfy the strict requirements of the Establishment Clause.

B. The Maryland Statute is Unconstitutional Under the Three Prong *Lemon v. Kurtzman* Test

The Maryland Statute also is unconstitutional under the Supreme Court's Lemon test. See Lemon v. Kurtzman, 403 U.S. 602 (1971). Under the Lemon analysis, a governmental statute or practice which touches upon religion is

constitutional only if it satisfies each of the test's three prongs: (1) it must have a "secular legislative purpose"; (2) its "principal or primary effect" must neither advance nor inhibit religion; and (3) it must not "foster an excessive government entanglement with religion." Lemon, 403 U.S. at 612-13. If the statute or practice at issue fails any part of this test, it is unconstitutional as a matter of law. North Carolina Civil Liberties v. Constangy, 947 F.2d 1145, 1147 (4th Cir. 1991). Both the Supreme Court and this Court regularly have applied the Lemon test as the analytical framework for evaluating Establishment Clause cases.[7] The Maryland Statute at issue violates both the first and second Lemon requirements.

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[7] Recently, the Supreme Court has applied Justice O'Connor's "endorsement" analysis to evaluate government action under the Establishment Clause. Rather than replacing the Lemon test, this analysis provides a lens through which to evaluate the first ("purpose") and second ("effect") Lemon prongs. Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Additionally, the Supreme Court occasionally has applied standards other than the Lemon test to determine the constitutionality of a statute. See, e.g., Kiryas Joel, 512 U.S. at 702-05 (applying "neutrality toward religion" standard); Lee v. Weisman, 505 U.S. 577 (1992) (applying "coercion" test). Some Supreme Court justices even have sought to dismantle the Lemon test altogether. See, e.g., Lee v. Weisman, 505 U.S. at 644 (Scalia, J., dissenting).

Even though the Lemon test lately has been the subject of considerable criticism, it remains the controlling standard. See, e.g., Agostini v. Felton, 117 S.Ct. at 2010 (applying Lemon's entanglement prong); County of Allegheny, 492 U.S. at 592 (the Lemon "trilogy of tests has been applied regularly in the Court's later Establishment Clause cases"); Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) ("The Lemon test has been applied in [virtually] all cases since its adoption in 1971"); Barghout, 66 F.3d at 1343; North Carolina Civil Liberties, 947 F.2d at 1149. As this Court noted, "until the Supreme Court overrules Lemon and provides an alternative analytical framework, this Court must rely on Lemon in evaluating the constitutionality of legislation under the Establishment Clause." Barghout, 66 F.3d at 1343 n.11.

1. Section 7-103 Does Not Further A Legitimate Secular Purpose

Good Friday is a sacred day of religious observance. It commemorates "Christianity's most solemn, most awesome, and most potent symbol: the Crucifixion." Metzl, 57 F.3d at 624. Unlike Christmas and Thanksgiving, Good Friday has developed no recognizable secular traditions:

> Christmas and Thanksgiving have accreted secular rituals, such as shopping, and eating turkey with cranberry sauce, that most Americans, regardless of their religious faith or lack thereof, participate in. Likewise with Easter egg hunts for children, not to mention photo sessions with the Easter Bunny. *Good Friday has accreted no secular rituals. That should come as no surprise. Good Friday commemorates the execution of the Christian Messiah. It is a day of solemn religious observance and nothing else, for believing Christians and no one else.*

Metzl v. Leininger, 57 F.3d at 620-21 (emphasis added). As a California Appellate court observed, Good Friday is "a wholly religious day." Mandel v. Hodges, 127 Cal. Rptr. 244, 254 (Cal.App. 1 Dist. 1976). "[T]he passage of time has not converted Good Friday into a secular holiday or freed it of its clearly religious origins." Griswold Inn v. Connecticut, 441 A.2d 16, 21 (Conn. 1981); but cf. Cammack v. Waihee, 932 F.2d 765, reh'g en banc denied, 944 F.2d 466 (9th Cir. 1991). The official consecration of this holy day into the Maryland state calendar has the purpose of promoting the religious observance of a sacred Christian holiday in violation of the first prong of the Lemon test.[8]

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[8] In examining the secular purpose of a statute, courts generally look to the legislative history. See Metzl, 57 F.3d at 620. In the present case, however, no legislative history exists for the 1865 Maryland statute which created the state-wide public school system and designated Good Friday and Easter Monday as

(continued...)

The district court portrayed section 7-103 as creating a four-day weekend coincidentally anchored around Easter. However, the plain meaning of the statute is to create a legal holiday for Good Friday and Easter Monday. Regardless of whether section 7-103 is characterized as establishing a holiday for "Easter" or "Good Friday," the result under the Establishment Clause is the same. Neither Good Friday nor Easter have developed secular components which mask the essential religious nature of the holidays. While the "Easter holiday celebrated by Christians may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts. . . it is nevertheless a religious holiday." County of Allegheny, 492 U.S. at 633 (O'Connor, J., concurring).[9]

The district court found that Easter is a secular holiday by comparing the Good Friday statute to the Maryland Sunday Closing laws upheld by the Supreme Court in McGowan v. Maryland, 366 U.S 420 (1961). JA 354. Section 7-103, however, bears little resemblance to the Sunday Closing laws. In McGowan, despite the religious origins of Sunday as the Christian Sabbath, the Supreme Court sustained the Sunday Closing Laws under the Establishment Clause, finding that such laws have the overriding purpose and effect of providing a

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[8](...continued)
public school holidays. Nonetheless, even in the absence of contemporaneous legislative history, courts have found that a state establishment of a Good Friday holiday serves an impermissible religious purpose. See Metzl, 57 F.3d at 620-23; Griswold Inn, 441 A.2d at 20-21; Mandel v. Hodges, 127 Cal. Rptr. at 254.

[9] Significantly, appellees conceded that the period from the Thursday before Easter through Easter Sunday is the "most solemn time of the Church year." Def's Mem. in Support of Summary Judgment at 15 n.17.

"uniform day of rest for all citizens." McGowan, 366 U.S. at 445. While Sunday has become a secular day of recreation, Good Friday, in contrast, remains a wholly religious occasion. Capturing the essential distinction between the Sunday Closing laws and a Good Friday holiday, such as section 7-103 challenged here, the dissent in Cammack v. Waihee explained:

> We need only think of the schoolchild who asks her teacher why she gets Sundays and Good Friday off. The answer must be that the former are days of rest and the latter a commemoration of the death of Jesus Christ.

932 F.2d at 786 (Nelson, J. dissenting).

This Court should not rely upon the Ninth Circuit's decision in Cammack v. Waihee, 932 F.2d at 765, which upheld an Hawaii law establishing Good Friday as a state holiday. Relying on McGowan, the Ninth Circuit found that the Hawaiian's traditional secular celebration of Good Friday diluted any official endorsement of Christianity conveyed by the designation of Good Friday as an official state holiday.

> Hawaii's recognition of Good Friday as a public holiday. . . is sufficiently focused toward its secular purpose and, after fifty years, has resulted in secular effects such than an objective observer, acquainted with the text, legislative history and implementation of the statute, would not consider the day's recognition an endorsement of religion.

Cammack, 932 F.2d at 782 n.19.

The Cammack decision, however, examined a rather unique culture. In contrast to the secularization of Good Friday in Hawaii, Appellees have proffered nothing to suggest that Good Friday has lost its purely religious meaning in

Maryland and concede that they are aware of no secular rituals or celebrations associated with this day. JA 169. In Maryland, Good Friday remains as it always has been -- a wholly religious day devoted to commemorating the Crucifixion. Given the continued religious significance of Good Friday, the official state recognition of this day as a public school holiday could not "plausibly serve a secular purpose." Griswold Inn, 441 A.2d at 21 (statute prohibiting sale and consumption of alcohol on Good Friday is unconstitutional); see also Metzl, 850 F. Supp. 740 (N.D. Ill. 1994), aff'd, 57 F.3d 618 (7th Cir. 1995) (declaring unconstitutional statute making Good Friday a public school holiday); Freedom from Religion Foundation Inc. v. Thompson, 920 F. Supp. 969 (W.D. Wis. 1996) (statute making Good Friday afternoon a legal holiday constitutes an unconstitutional establishment of religion); Mandel, 127 Cal. Rptr. at 244 (finding unconstitutional policy of closing state offices on Good Friday afternoon).

At the same time, section 7-103 cannot be justified as a secular "spring break" for Maryland public schools, as the district court held. JA 354. The impermissible religious purpose of the Maryland Good Friday statute cannot be cured simply because the state-mandated holiday also could function as an anchor for a mid-term vacation. The "purpose" prong of the Lemon test requires a scrutinizing probe into the intent behind the legislation. It "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes," Lynch, 465 U.S. at 690-91, but requires a "clear[ly] secular purpose." Wallace v. Jaffree, 472 U.S. at 56. "[T]he statement of purpose [must] be sincere,

and not a sham." Edwards v. Aguillard, 482 U.S. at 586-87 (finding Louisiana's asserted purpose behind the Creationism Act to be a sham); see also Abington - , 374 U.S. 203, 223-24 (1963) (public school prayer violates Establishment Clause "even if its purpose is not strictly religious"); North Carolina Civil Liberties v. Constangy, 947 F.2d at 1150.

In his compelling dissent to the Ninth Circuit's denial of a Petition for Rehearing *en banc* in Cammack v. Waihee, Judge Reinhardt identified the critical constitutional inquiry required in evaluating the purpose of a law like § 7-103:

> [I]f a state passed legislation requiring the erection at every other street corner of a pole containing a stop sign with the word "STOP" and a picture of Jesus Christ in the background, there is no doubt that a purpose of the statute would be to regulate the flow of traffic and require vehicles to stop. However, from a constitutional standpoint, the question that would have to be asked is: why the picture of Jesus Christ? Is the purpose of requiring the picture to be on the sign secular.

Cammack, 944 F.2d at 469. The same question must be posed here: having decided that the public schools need another holiday during the spring term, was there a legitimate secular purpose behind the legislature's further selection of Good Friday and Easter Monday as that holiday? Of course, even if selecting Good Friday and Easter Monday for an official school holiday was intended to provide a mid-term school break for students and teachers, there is no secular basis for this decision. Christmas, which occurs at precisely the same time every year, can serve a legitimate secular purpose by providing an anchor for a winter vacation. Easter, which fluctuates from year-to-year over a month long period, cannot serve a similar function in the spring semester. "[I]t would be difficult to

imagine a less appropriate holiday to select on the basis of 'calendar' concerns, since Good Friday does not occur on a fixed date or even in the same month each year." Cammack v. Waihee, 944 F.2d 466, 469 (9th Cir. 1991) (Reinhardt, J., dissenting from denial of rehearing en banc).

2. *The Effect of Section 7-103 is to Advance Observance of a Christian Religious Holiday*

The Maryland Good Friday Statute also violates the second prong of the Lemon test because it has the primary effect of advancing religion. Lemon, 403 U.S. at 612. The government need not actively advance religion to violate this prong of the analysis. Even a symbolic relationship between religion and the state is prohibited: "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-26 (1982).[10] The focus of the "effects test" is on the message the statute communicates: Is "the symbolic union of church and state effected by the challenged government action sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." Grand Rapids, 473 U.S. at 390.

[10] See also Wallace v. Jaffree, 472 U.S. at 70 (O'Connor, J., concurring in judgment) (Establishment Clause "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred").

The message communicated by section 7-103 is unmistakable. Good Friday is a wholly sectarian holiday which commemorates "Christianity's most solemn, most awesome, and most potent symbol: the Crucifixion." Metzl, 57 F.3d at 624. By consecrating this Christian holy day as a legal school holiday, the Maryland legislature effectively communicates to school employees, students and their families that adherents of the majority religion are entitled to state recognition and accommodations that members of the minority religion, such as *amici*, are not.

Like Maryland section 7-103, the Illinois statute at issue in Metzl designated only one purely religious holiday, Good Friday, as a day off for all public school students and teachers throughout the state.[11] The Seventh Circuit found that the statute had the impermissible effect of advancing religion in violation of the Establishment Clause:

> The state law closing all public school on Good Friday makes the burden of religious observance lighter on Christians than on the votaries of other religions. The Christian does not have to absent himself from school on a school day, and so perhaps have to incur the inconvenience of a make-up exam on a later day, as the observant Jew might have to do if his school district decided not to close for any

[11] The Maryland and Illinois statutes also identify Christmas and Thanksgiving as legal school holidays. While these holidays certainly have religious origins, both have since acquired significant non-religious components. See County of Allegheny, 492 U.S. at 631 ("the celebration of Thanksgiving as a public holiday, despite its religious origins, is now generally understood as a celebration of patriotic values rather than particular religious beliefs"); Cammack, 932 F.2d at 790 (Nelson, J., dissenting) ("I find this equation of Good Friday with Christmas and Thanksgiving both distasteful to practicing Christians, who do not wish a serious day permeated by mirth and levity, and unsettling to adherents of other religions or nonreligious persons, who would not desire their secular celebrations of Thanksgiving and Christmas to be linked to holiday they could not imagine honoring").

> Jewish holidays. . . . [T]he First Amendment does not allow a state to make it easier for adherents of one faith to practice their religion than for adherents of another faith to practice their religion. . .

Metzl, 57 F.3d at 621. Likewise, the natural effect of Maryland's official recognition of Good Friday as a state-wide public school holiday is to endorse and advance Christian religious observance and to convey to adherents of other faiths that their religious beliefs and values are undeserving of similar respect.

Similarly, the Connecticut Supreme Court found that the state prohibition on the sale and consumption of alcoholic beverages on Good Friday had the "primary effect" of advancing religion in violation of the Establishment Clause:

> *[T]he very existence of the legal prohibition of this major Christian religious holiday gives the state's clear stamp of approval both to the Christian rites and practices observed on that day and to Christianity in general.* It indicates a bias in favor of Protestant and Catholic forms of Christianity over Eastern Orthodox, nonChristian, and nonreligious practices and beliefs. It has long been recognized that because of the authority and influence of the state, such state approval of or identification with the tenets or practices of a particular religion clearly promotes that religion in violation of the Establishment Clause.
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> 441 A.2d at 21 (emphasis added).

The concerns of state endorsement of religion are even more compelling here than in Griswold. Because the law at issue in Griswold prevented the sale and consumption of alcohol, the statute's symbolic advancement of religion would be perceived only by adults of drinking age. In contrast, Section 7-103's designation of Good Friday and Easter Monday as public school holidays teaches hundreds of thousands of public school children that these Christian holidays are worthy of special treatment and entitled to official state support. Where, as here, the

governmental action impacts children in their "formative years," the Supreme Court has warned that Establishment Clause concerns are at their zenith:

> The inquiry into this kind of effect must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years. The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice.

Grand Rapids, 473 U.S. at 390.[12] By elevating Good Friday and Easter Monday to legal school holiday status throughout the state, Maryland has sent a clear message to youngsters that the state officially recognizes the religious practices of the majority and considers the beliefs of those in the minority to be unworthy of similar respect. This is the very message that the Establishment Clause is intended to prohibit. Edwards v. Aguillard, 482 U.S. at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion).[13]

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[12] For instance, the Supreme Court has held that prayers conducted at the commencement of a legislative session do not violate the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 795 (1983). But, the Court has never indulged a similar assumption with respect to prayers conducted at the opening of the schoolday, Abington School Dist., 374 U.S. at 223, or graduation ceremony. Lee v. Weisman, 505 U.S. at 592 ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy").

[13] See also County of Allegheny, 492 U.S. at 594 (Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community'") (internal citations omitted); Abington School Dist., 374 U.S. at 305 (Goldberg, J., concurring) ("'The fullest realization of true religious liberty requires that government. . . effect no favoritism among sects or between religion and nonreligion. . .").

The fact that Section 7-103 may not require or even encourage people to attend church on Good Friday does not change the outcome of the Establishment Clause analysis. The critical inquiry under the "effects prong" of Lemon is not whether individuals actually choose to spend the day in religious observance, but whether Section 7-103 is *perceived* by the public as "convey[ing] a message of endorsement or disapproval" of religion. See Lynch v. Donnelly, 465 U.S. at 690. Applying this principle to a declaration by the Governor closing government offices from the hours of 12 through 3 on Good Friday, a California Appellate court concluded that the executive conduct impermissibly advanced religion in violation of the Establishment Clause:

> The fact . . . that the order does not require the employees to 'worship' during the three hour 'holiday' is not material. The decisive consideration is that it affords them the opportunity, and actually encourages them, to 'worship' if they are so inclined. Under the circumstances, the order is unconstitutional because its 'primary effect' is one which 'advances religion' within the meaning of the critical test.

Mandel, 127 Cal.Rptr. at 255 (internal citations omitted). Like the California Governor's declaration, Section 7-103's closure of the public school system provides students and teachers with the opportunity to "worship if they are so inclined," and thus advances religion in violation of the Establishment Clause.

II. SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE DISTRICT COURT RELIED UPON FINDINGS OF MATERIAL FACTS WHICH WERE IN GENUINE DISPUTE

This Court reviews grants of summary judgment de novo. Porter v. United States Alumoweld Co., 125 F.3d 243, 245 (4th Cir. 1997). Summary judgment is not appropriate unless "it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." Podberesky v. Kirwan, 38 F.3d 147, 156 (4th Cir. 1994) (citation omitted). Nor is it appropriate "even where there is no dispute as to the evidentiary facts but only as to the conclusions to be drawn therefrom." Overstreet v. Kentucky Central Life Ins. Co., 950 F.2d 931, 937 (4th Cir. 1991) (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir. 1951)). The burden is on the moving party to show that there are no "genuine issue as to any material fact" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the district court relied upon findings of material facts which were in genuine dispute, grant of summary judgment was inappropriate.

A. If the Lower Court Correctly Interpreted Section 7-103 as Establishing an Easter Holiday, There is a Material Dispute of Fact As To Whether Easter Is Highly Secularized

Amici does not dispute that this case can be resolved on summary judgment. Where section 7-103 is properly construed to establish a "Good Friday" holiday, there is no doubt that the statute is unconstitutional as a matter of law. Good Friday is a "wholly religious day," see Mandel, 127 Cal. Rptr. at 254, which has "accreted no secular rituals." Metzl, 57 F.3d at 620. A law that establishes

this purely religious day as a state public school holiday violates the First Amendment.

The district court, however, upheld the constitutionality of section 7-103, finding that the statute created a holiday for Easter, rather than Good Friday, and that Easter is "highly secularized." JA 351-52. If this Court concludes that the district court was correct to focus on Easter, then summary judgment was inappropriate because the district court relied upon a finding of fact -- that Easter is "highly secularized" -- which was intensely disputed by the parties. Significant evidence was presented which attested to the continued religious significance of the Easter holiday. An affidavit from a Catholic University Professor of liturgy and sacramental theology explained that "[i]n the Christian calendar of religious and liturgical observances that of Easter ranks as highest. This is true theologically because it commemorates the central mystery of the Christian faith, namely Christ's resurrection from the dead." JA 157. Statistical evidence revealed that church attendance soars on Easter from approximately 40% of the adult population during most weeks to 68% on Easter Sunday, more than three times greater than that on Christmas. JA 295-97 Even appellees themselves conceded that the period from the Thursday before Easter through Easter Sunday is the "most solemn time of the Church year." Def's Mem. in Support of Summary Judgment at 15 n. 17.

B. There is No Evidence to Support The District Court's Finding that All Maryland Public Schools Need to be Closed on Good Friday and Easter Monday Due to High Absenteeism

The district court also found that "the high number of students and teachers who would be absent on the Friday and Monday surrounding Easter would disrupt the effectiveness of instruction and would require monetary outlay for the hiring [of] substitute teachers." JA 352. This finding provides the basis for the court's holding that Section 7-103 satisfied the first prong of the Lemon test. *Amici* does not quarrel with the theoretical underpinnings of this asserted secular justification. It is entirely consistent with First Amendment principles to cancel classes on a religious holy day because the high absentee rate of teachers and/or students would render holding classes "a wasteful expenditure of educational resources." Metzl, 57 F.3d at 623.

Indeed, *Amici* does not question this accommodation -- if it is the only basis for closing the schools. *Amici* applaud the Montgomery County School Board for closing school during the Jewish High Holy Days of Rosh Hashanah and Yom Kippur. In that case, however, the County Board compiled empirical data documenting the high absenteeism of students and teachers on these days ("more than 50% in some schools"). JA 62. Relying on this evidence, the County made a purely secular decision based on practical administrative concerns that Rosh Hashanah and Yom Kippur are "not productive instructional days." JA 62.

The district court conceded that there is no comparable empirical evidence to support the closings required by section 7-103. JA 352.[14] As the Seventh Circuit explained, however, evidence pertaining to the feasibility of holding classes on a religious holiday is critical to the court's analysis under the Establishment Clause:

> It is a question of fact . . . how many students and teachers, in each of the state's public school districts, would absent themselves from Good Friday if the challenged state law did not require the schools to be closed that day. It is a question of fact upon which no evidence was presented in the district court. We do not need evidence to determine that Christianity is the predominant religion of the people of Illinois; but we do need evidence to determine how many Christians in each district observe Good Friday.

Metzl, 57 F.3d at 621. Lacking this data, the district court simply speculated that the Good Friday absentee rate would be high enough to justify the public school closings because the "Christian population in Maryland is almost ten times the state's Jewish population."[15] JA 352-53. These statistics, however, are not probative of the likely absentee rate. They do not state the percentage of public school students or teachers who are Protestant or Catholic. They do not indicate the percentage of that group who actually attend Good Friday services. Nor do

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[14] The court contended that no evidence could exist on the likely Good Friday or Easter Monday absentee rate since public schools have been closed on these days for more than 130 years. JA 352. This argument ignores other reliable methods for compiling such data, including inter alia: (i) a survey designed to ascertain the likely absentee rate if school were held on Good Friday and Easter Monday; or (ii) keeping schools open during a test year to observe actual rates of absenteeism.

[15] The district court relies upon statistics provided by Appellees that "while 4.3% of Marylanders are Jews, nearly 44% of Marylanders are Christians." JA 353.

they express the percentage of that group who would attend Good Friday services during the day in lieu of attending classes. Moreover, they do not take into account that different Christian denominations celebrate Good Friday and Easter Monday on dates which can vary more than a month apart.[16]

Further, the state-wide statistics relied upon by the district court fail to account for differences in religious affiliations or attitudes among the more than 20 Maryland school districts. Section 7-103 requires the closing of all public schools throughout the state regardless of the preference of local school districts. Yet there is no evidence as to the number of students or teachers in *each district* who would be absent because of religious observance. Without this data, it is impossible to determine whether it would be "waste of educational resources" to hold schools open because so few students or teachers would attend. Addressing this precise issue in Metzl, the Seventh Circuit observed that "the choice of the statewide route fatally weakens the defense that the state has offered of the Good Friday school closing law -- the defense that it is infeasible to keep schools open on days on which very few students would attend school." Metzl, 57 F.3d at 623.

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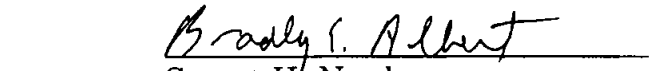
[16] Because the calendar used by Roman Catholic and Protestant churches to compute the date of Easter differs from the calendar used by Easter Orthodox churches, the day Easter is observed by these denominations may differ by more than a month: "According to Western custom, Easter may fall between March 22d and April 25th, but Eastern computation dates the feast between April 4th and May 8th inclusively." Encyclopedic Dictionary of Religion 1138 (Paul Kevin Meagher et al. eds., 1979).

CONCLUSION

The judgment of the district court should be reversed. Section 7-103 of the Maryland Education Code should be declared unconstitutional under the Establishment Clause.

Respectfully submitted,



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December 2, 1997

CERTIFICATE OF SERVICE

I hereby certify that, on the 1st of December, 1997, I caused two copies of the foregoing Brief *Amici Curiae* of the American Jewish Congress, the National Council on Islamic Affairs, Americans United for Separation of Church and State, Freedom from Religion Foundation, Americans for Religious Liberty, the American Humanist Association and the American Ethical Union In Support of Appellant to be served, via overnight delivery, on the following:

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