ORAL ARGUMENT SCHEDULED FOR DECEMBER 15, 2009

CASE NO. 09-5126

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL NEWDOW, et al.

Plaintiffs-Appellants,

v.

HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S. SUPREME COURT, et al.

Defendants-Appellees,

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

(District Court #1:08-cv-02248)

APPELLANTS' EMERGENCY MOTION SEEKING TO DISPENSE WITH THE COURT'S RELIGIOUS OPENING CRY

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INTRODUCTORY NOTE

Oral argument in this appeal has been scheduled for December 15, 2009. Pursuant to Fed. R. App. P. 27 and Circuit Rule 27, Plaintiffs move to have the Panel dispense with the religious opening cry (i.e., "God save the United States and this Honorable Court.") prior to that argument.

The undersigned has contacted opposing counsel regarding this motion. Counsel for Defendants PIC and the inaugural clergy oppose the motion. Counsel for the federal defendants stated they will "determine what response to offer, if any, to the motion after the motion is filed and counsel have had the chance to review it."

REQUEST FOR EXPEDITIOUS CONSIDERATION

Pursuant to Circuit Rule 27(f), Plaintiffs request expedited action on this motion. This request stems from the fact that oral argument in this appeal is scheduled for December 15, 2009, and the issue underlying this motion will become moot once the oral argument occurs. This request and the reason for it have been communicated by phone to the Clerk's office and by email to opposing counsel.

GROUNDS FOR THE MOTION

The Circuit has the power to determine its procedures under 28 U.S.C. § 2071(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business."[1]). Those procedures, however, must comply with the mandates of the Constitution, including the first ten words of the First Amendment: "Congress shall make no law respecting an establishment of religion."[2]

Additionally, the Circuit's procedures must comply with due process. Recognizing that "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), Plaintiffs submit that when a tribunal starts off its own proceedings in a manner that (as in this case) so closely resembles the gravamen of the Complaint being considered, that appearance does not exist.

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[1] Although 28 U.S.C. § 2071(b) states that "[a]ny rule prescribed by a court … shall be prescribed only after giving appropriate public notice and an opportunity for comment," Plaintiffs are unaware of any public notice or opportunity for comment having ever occurred in the Court's decision to spatchcock the religious opening cry into its proceedings. Similarly, 28 U.S.C. § 2077(a) states, "The rules for the conduct of the business of each court of appeals, including the operating procedures of such court, shall be published. The procedure of opening the Court's sessions with a religious cry is, as far as Plaintiffs are aware, unpublished.

[2] The First Amendment has been construed to apply to all branches of government, and is not restricted to actual "laws." *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995) ("The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.'" (Citation omitted)); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 511 (1982) (Brennan, J. dissenting) (noting that the First Amendment applies to "the Government as a whole, regardless of which branch is at work in a particular instance.")

Appearances are also critical for the judges themselves. 28 U.S.C. § 455(a), for example, states "[a]ny … judge … of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Likewise, Canon 3C of the Code of Conduct for United States Judges warns that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." In other words, "federal judges must maintain the **appearance** of impartiality." *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (2001) (emphasis added). Although perhaps not as flagrant a violation of the Establishment Clause as those violations which underlie this litigation (i.e., (i) the Chief Justice's alteration, without any legal authority, of the presidential oath of office (which is not only specified in Article II of the United States Constitution, but – unlike any other prose in the document – is uniquely placed there within quotation marks), and (ii) the intrusion into the ceremony of two clergy to lead the audience in (Christian) Monotheistic prayers), the religious opening cry is definitely of a similar species. Inasmuch as the Panel, at this stage of the proceedings, must assume the merits in Plaintiffs' favor, *Emergency Coalition to Defend Educ. Travel v. U.S. Dep't of the Treasury*, 545 F.3d 4, 10 (D.C. Cir. 2008), the appearance of impartiality is certainly questionable at best when the judges risk independently inflicting what may be yet one more "concrete and particular" injury to the First Amendment rights of those seeking their protection.

ARGUMENT

> A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[3]

A "fastidious atheist or agnostic"? Would it be a "fastidious" Jew objecting to "Jesus save the United States and this Honorable Court"? Would a woman objecting to repeated supplications to the glory of the male gender be "fastidious" as well? What about blacks hearing "May the great White Race save the United States and this Honorable Court"? Even though the nation was built by Framers who were all white male Christians, it is doubtful that anyone would call such objectors "fastidious." In our society – with its repeated governmental espousals of the existence of God – only Atheists (and agnostics) have earned that distinction.

The Supreme Court has never ruled on the constitutionality of the opening cry. Nonetheless, it has been discussed at least fourteen times in its Establishment Clause cases, Exhibit A, suggesting that the practice is problematic. To be sure, most of those mentions have been in opinions where the author clearly felt that the practice was permissible. Plaintiffs believe, however, that this is because those justices were monotheists whose opinions were based upon their own religious myopia, rather than upon their adherence to constitutional principle.

[3] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

I. The Supreme Court Would Never Allow A Similar Protestant Opening Cry

To demonstrate that religious myopia, rather than constitutional principle, is behind the current religious opening cry, an analogous situation involving Catholicism – especially apt considering that six of the nine current justices are Catholic[4] – might be considered. Hatred of Catholics, after all, was part and parcel of the founding of the nation.[5]

The first settlers at Jamestown, for instance, held daily prayers referencing Catholics as "the scum & dregs of the earth."[6] Numerous colonies, in their original charters, specifically denied religious freedom to "Papists."[7] In fact, every one of the original thirteen colonies – including Maryland, Pennsylvania and Rhode

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[4] Goodstein, L. *Sotomayor Would Be Sixth Catholic Justice, but the Pigeonholing Ends There*. New York Times, May 31, 2009, at A20.

[5] *See* Van Tyne, Claude H. Influence of the Clergy, and of Religious and Sectarian Forces, on the American Revolution. *The American Historical Review*, Vol. 19, No. 1. (Oct., 1913), p. 60 (noting the "traditional fear and hatred of the Roman Church" adhered to by the colonists).

[6] Tracts and Other Papers, Relating Principally to the Origin, Settlement, and Progress of the Colonies in North America, from the Discovery of the Country to the Year 1776. Collected by Peter Force (New York: Peter Smith; 1947). Vol. III, part II, page 67.

[7] *See, e.g.*, Poore, Benjamin Perley. *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States*. 2nd. Ed. (Washington: Government Printing Office; 1878), Part I, p. 950 (Massachusetts' Charter of 1691 guaranteeing "a liberty of Conscience … in the Worshipp [sic] of God to all Christians (Except Papists)."); http://avalon.law.yale.edu/18th_century/ga01.asp, accessed on December 5, 2009 (Georgia's Charter of 1732 noting that "all persons … except papists, shall have a free exercise of their religion.").

Island – had laws at some point in time that explicitly denied to Catholics equal rights with their Protestant brethren.[8]

George Washington and John Adams were among the signatories to the Articles of Association, which spoke of "the free Protestant colonies."[9] In October, 1774, the Continental Congress wrote to the people of Great Britain as "their affectionate protestant brethren," complaining about the support for Catholicism, "a religion that has deluged your island in blood, and dispersed impiety, bigotry, persecution, murder and rebellion through every part of the world."[10] In fact, it has been claimed that the "principal cause" of the American Revolution "was the bigoted rage of the American Puritan and Presbyterian ministers at the concession of full religious liberty and equality to Catholics of French Canada."[11] This same anti-Catholicism is found even in the Declaration of Independence.[12]

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[8] Pyle, Ralph E. and Davidson, James D. *The Origins of Religious Stratification in Colonial America*. 42 Journal for the Scientific Study of Religion 57 (2003), pp. 66-68.

[9] Accessed at http://avalon.law.yale.edu/18th_century/contcong_10-20-74.asp on December 5, 2009.

[10] October 21, 1774 letter "to the people of Great-Britain." *Journals of the Continental Congress*. Ford WC, ed. (Washington, DC: Library of Congress (GPO); 1904) Volume I, p. 88.

[11] Cardinal Gasquet in *Tablet*, July 20, 27, 1912. Vol. CXX, as cited in Metzger, Charles H. *Catholics and the American Revolution: A Study in Religious Climate*. (Chicago: Loyola University Press; 1962), p. 2.

[12] The passage of the Quebec Act – placing the "arbitrary Government" and the "absolute Rule" of the papal system "in a neighbouring Province" – was one of the "Injuries and Usurpations" of King George III listed in the Declaration of Independence.

With the aforementioned history in mind, Plaintiffs request that the Court consider South Carolina's Constitution of 1778. Its Article XXXVIII stated that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State."[13] Were each of South Carolina's courts to begin its sessions, "Protestant Christianity save the State of South Carolina and this Honorable Court," would anyone deny that those opening cries would be acts "respecting the establishment of" that State's established Protestant Christianity? If that state constitutional provision still existed[14] and was challenged by a South Carolina Catholic, it seems highly unlikely that the current Supreme Court would not strike down both the provision and the continued use of that Protestant cry. Except for the fact that Monotheism has become an established religious ideology by way of repeated constitutional violations, rather than as a result of an explicit federal constitutional provision, the situation today is virtually identical.

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[13] http://avalon.law.yale.edu/18th_century/sc02.asp, accessed on December 5, 2009.

[14] That provision, obviously in conflict with the federal constitution's religion clauses, was subsequently dropped. Yet, like seven other states, South Carolina to this day has **in its Constitution** that "No person who denies the existence of a Supreme Being shall hold any office under this Constitution." South Carolina State Constitution, Article 17, § 4. *See also* the constitutions of Arkansas (Art. 19, § 1), Maryland (Art. 36), North Carolina (Art. 6, § 8), Pennsylvania (Art. I, § 4), Tennessee (Art 9, § 2) and Texas (Art. 1, § 4).

II. Government Has No Power to Make Supplications to God

Unlike the government of South Carolina (and the other states), the federal government is one of enumerated powers:

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.

McCulloch v. Maryland, 17 U.S. 316, 405 (1819). Accordingly, "[t]he government may not … lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Thus, not only with no enumerated powers to take sides in religious debates, but with a constitutional provision specifically prohibiting such activity, the United States' courts have no more right to start their sessions with "God save the United States and this Honorable Court" than they have to start it with "Protestant Christianity save the United States and this Honorable Court."

III. Courts Have No Power to Decree that Supplications to God Solemnize Public Occasions

It has been claimed that the religious opening cry is permissible because it "solemnizes" the court's proceedings. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668,

693 (1984) (O'Connor, J., concurring). To begin with, "government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice," *Abington School District v. Schempp*, 374 U.S. 203, 226, 265 (1963) (Brennan, J., concurring) (citing six Supreme Court cases, two Harvard Law Review articles, and a state court case). Since "appeals to patriotism, moments of silence, and any number of other approaches would be as effective," *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring and dissenting), the religious cry is impermissible.

Moreover, the claim that solemnization results from this cry is a slap in the face of those who believe otherwise, as Plaintiffs here do. *See* Complaint, ¶¶ 66-70. As the Supreme Court has written, "what is one man's comfort and inspiration is another's jest and scorn." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633 (1943). Plaintiffs should never be forced to suffer so egregious an insult to their religious tenets. To suffer that insult at the outset of a tribunal assembled to hear a case involving other governmental insults to their religious ideals cannot possibly be permissible.

"Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Employment Div. v. Smith*, 494 U.S. at 887. Contending that the opening cry

solemnizes the Court's proceedings necessarily entails a determination that Plaintiffs' religious claim to the contrary (i.e., that such endorsements of God's existence by government serve to "ridicule public occasions, making a mockery of the wonders of nature and of human achievement," Complaint ¶ 67) is false. This Court is prohibited from making such a determination.

IV. Governmental Supplications to God Fail Strict Scrutiny

There exists within the Establishment Clause a fundamental constitutional right. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 589-90 (1989). Plaintiffs would argue that this right has best been characterized as the right not to be degraded from the equal rank of citizens due to governmental favoritism (or criticism) of a religious belief.[15] Yet, however one chooses to construe it, that right is violated when the government endorses one religious view at the expense of another, ignoring the Supreme Court's warning that "civil power must be exercised in a manner neutral to religion." *Board of Educ. v. Grumet*, 512 U.S. 687, 704 (1994).

[15] "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison, James. *The writings of James Madison : comprising his public papers and his private correspondence, including numerous letters and documents now for the first time printed.* Gaillard Hunt, ed. 9 vols. (New York: G.P.Putnam's Sons; 1901), Vol. II, p. 188.

Not only does the religious opening cry infringe upon this right, but it does so in a facially discriminatory manner. Thus, strict scrutiny is the proper legal tool for analysis. "It is correct that we require strict scrutiny of a … practice patently discriminatory on its face." *Lynch v. Donnelly*, 465 U.S. 668, 687 n.13 (1984). Strict scrutiny requires the challenged activity to be justified by a "showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board, Ind. Empl. Sec. Div.*, 450 U.S. 707, 718 (1981). That less restrictive ways to solemnize court proceedings exist is indisputable: every day – not only in state courts throughout the nation, but in federal district courts as well – judges preside over cases without a religious opening cry and without any loss of "solemn" character. In fact, even the United States Court of Appeals for the Second Circuit has no religious espousal in its opening cry. Exhibit B. Plaintiffs are aware of no evidence showing that solemnization is lacking there.

V. The Myriad Additional Forms of Government-Sponsored Monotheism Are Reasons to End, Not to Excuse, the Religious Opening Cry

When challenges are made to individual governmental endorsements of God's existence, the response is often to "justify" the given endorsement by listing numerous others, as if to suggest that although "[t]wo wrongs do not make a right," *Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 435 (D.C. Cir.

1986), three or more wrongs somehow do. *See*, *e.g.*, *McCreary County v. ACLU*, 545 U.S. 844, 888-89 (2005) (Scalia, J., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 29-30 (2004) (Rehnquist, C.J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 672-73 (1989) (Kennedy, J., concurring and dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 675-78 (1984). Recognizing that those who use this technique are not loathe to criticize "[t]he customary invocation of *Brown v. Board of Education*, 347 U.S. 483 (1954)," *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 96 (n.1) (1990) (Scalia, J., dissenting), one still has to wonder how such a rationale would have played out had the argument been, "Well, we have racial segregation in the movie theaters, we have racial segregation at the water fountains, we have racial segregation with swimming pools and railroad cars … of course we can have racial segregation in the public schools!"

If the analogy to *Brown* seems too tenuous, *see* Transcript of Hearing of January 15, 2009 (Document #49 at 20) ("I must say I just don't buy your analogy between Brown and this situation." – Judge Walton.), perhaps using the South Carolina example from above will seem more concrete. One can imagine an environment where that state's Pledge of Allegiance was made to "one State, under Protestant Christianity," its motto claimed "In Protestant Christianity We Trust," its legislatures started off each of their sessions with Protestant Christian prayers, its military code of conduct required a pledge to Protestant Christianity, its

governor's oath of office was altered by its chief justice's addition of "so help me Protestant Christianity," and Protestant Christian ministers being called upon to lead those in attendance in Protestant Christian prayers. Surely, in that milieu, it could not realistically be argued that "May Protestant Christianity save South Carolina and this Honorable Court" was not an act "respecting" that state establishment of religion.

VI. *Marsh v. Chambers* Does Not Support Use of the Religious Opening Cry

In *Marsh v. Chambers*, 463 U.S. 783, 792 (1983), legislative prayer was upheld because it had an "unambiguous and unbroken history of more than 200 years," and "An Act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" *Id.* at 790 (citation omitted). Even assuming that *Marsh* remains good law in the face of *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000) ("[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer."), the religious opening cry does not date back to the founding and was not a result of passage of any act by the First Congress.

The opening cry of the Supreme Court apparently dates back to John Marshall's Chief Justiceship:

> The Supreme Court under John Marshall opened its sessions with the prayer, "God save the United States and this Honorable Court." 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926).

McCreary County, 545 U.S. at 886 (Scalia, J., dissenting). However, the trail of the citation provided goes back only to 1827:

> Our Court Marshal's opening proclamation concludes with the words "'God save the United States and this honorable Court.'" The language goes back at least as far as 1827. O. Smith, Early Indiana Trials and Sketches: Reminiscences (1858) (quoted in 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926)).

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring). This was during the latter part of Chief Justice Marshall's thirty-five year tenure.[16] Thus, the religious cry at issue may well have resulted from nothing but personal desire trumping constitutional duty, perhaps bolstered by the persistent objections of a vocal few who disapproved of the Constitution's secular nature.[17]

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[16] John Marshall served as chief justice from 1801-1835. *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions.* Friedman, Leon & Israel, Fred L., ed's. (New York: R.R. Bowker Company; 1969), p. 283.

[17] For example, Timothy Dwight, president of Yale College, was among those who continued to voice disapproval of the fact that, "We formed our Constitution without any acknowledgement of GOD." *A discourse in two parts*, delivered July 23, 1812, on the public fast, in the chapel of Yale College by Timothy Dwight, D.D.L.L.D., President of that Seminary. (New Haven: Howe and Deforest; Sold also by A.T. Goodrich and Co. No, 124, Broadway, New-York; Printed by J. Seymour), p. 40.

In fact, the practice may not have been initiated until well after 1827. The contention that the cry was in effect in that year was made in a book of recollections written three decades after the alleged fact.[18] In other words, the dating of the first time the Supreme Court's routine was imbued with Monotheism may be as flawed as the dating regarding the "so help me God" addition to the presidential inaugural oath. See Complaint ¶ 103-04. The opening cry, therefore, does not have the pedigree of the legislative prayer approved in *Marsh*.

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[18] The source of the claims regarding the introduction of the "God save the United States ..." opening cry was in the revised version of Warren, C. *The Supreme Court in United States History*. (Boston: Little, Brown and Company; 1923), Volume I of III, p. 469. That work cites Smith, O.H. *Early Indiana Trials and Sketches: Reminiscences by Hon. O. H. Smith.* (Cincinnati: Moore, Wilstach, Keys & Co.; 1858) as its source of the opening cry reference. This book is exactly as titled: reminiscences of the author. In it, he describes the contents (in an introductory note "To the Reader") as "sketches ... originally published in the Indianapolis Daily Journal," which were subsequently "revised and corrected by the author."

On page 137 of that book, there is a dispatch dated "Thursday Morning, September 10, 1857." That dispatch recounts the author's recollection of his first viewing of the Supreme Court in session, filled with excessively descriptive language that one might reasonably doubt as to much of its accuracy - e.g.:

> I had long heard of Chief Justice Marshall; had cited his opinions as of the highest authority; had read his life of Gen. Washington; and there he sat before me, aged and venerable. He was above the common hight [sic]; his features strongly marked; an eye that spoke the high order of his intellect. He wore a short cue, black coat, breeches buckled at the knee, long black-silk stockings, and shoes with fine buckles.

It is in that "reminiscence" that note is made of the "God save the United States ..." opening cry. In other words, the source of the claim that John Marshall's Court used those words in 1827 – i.e., already 36 years after the First Amendment was ratified – is a reminiscence written thirty years after that, in which the reference to the cry was one of myriad embellishments (obviously added for effect), and which was "revised and corrected" subsequent to its three-decades-after-the-fact original publication.

VII. The Religious Opening Cry Violates the Neutrality the Supreme Court has Deemed the Touchstone of Its Establishment Clause Jurisprudence

The Supreme Court has written that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citation omitted). Clearly, "God save the United States and this Honorable Court" is a phrase that "necessarily 'entail[s] an affirmation that God exists.'" *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring). Thus, as between Atheists and agnostics such as Plaintiffs, and those who believe in God, the opening cry violates the High Court's "touchstone."

VIII. The Cry is "Directly Subversive of the Principle of Equality"

On June 11, 2007, the House of Representatives passed H. Res. 431, "recognizing the 40th anniversary of *Loving v. Virginia* legalizing interracial marriage within the United States." 153 Cong. Rec. 93, H6187-89 (June 11, 2007). Despite the history of antimiscegenation statutes dating back to 1661, the Supreme Court's upholding antimiscegenation statutes in *Pace v. Alabama*, 106 U.S. 583 (1882), and the fact that in 1948, antimiscegenation statutes existed in 38 of the 48 states in the union, 153 Cong. Rec. 93, H6187, the Supreme Court overturned

those statutes, claiming that they were "directly subversive of the principle of equality." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). This language was approved by the House with no dissent. 153 Cong. Rec. 93, H6189.

If it is true that "[j]ust as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion," *Employment Div. v. Smith*, 494 U.S. at 886 (n.3), then the opening cry must also be deemed "directly subversive of the principle of equality."

CONCLUSION

If not eliminated altogether, the religious opening cry that has become the standard protocol in this Court should be dispensed with on December 15, 2009 – the day of the oral argument in the instant case.

Respectfully submitted this 7th day of December, 2009,

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EXHIBIT A

Supreme Court Opinions Mentioning the Opening Cry

(1) *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 632 (2007) (Scalia, J., concurring)

(2) *McCreary County v. ACLU*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting)

(3) *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J., dissenting)

(4) *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 29 (2004) (Rehnquist, C.J., concurring)

(5) *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring)

(6) *Lee v. Weisman*, 505 U.S. 577, 635 (1992) (Scalia, J., dissenting)

(7) *County of Allegheny v. ACLU*, 492 U.S. 573, 630-31 (1989) (O'Connor, J., concurring)

(8) *County of Allegheny v. ACLU*, 492 U.S. 573, 672 (1989) (Kennedy, J., concurring and dissenting)

(9) *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)

(10) *Lynch v. Donnelly*, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting)

(11) *Marsh v. Chambers*, 463 U.S. 783, 786 (1983)

(12) *Marsh v. Chambers*, 463 U.S. 783, 786, 818 (1983) (Brennan, J., dissenting)

(13) *Engel v. Vitale*, 370 U.S. 421, 439 (1962) (Douglas, J., concurring)

(14) *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD UNITED STATES COURTHOUSE
40 CENTRE STREET
New York, New York 10007
212-857-8500

JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MACKECHNIE
CLERK OF COURT

August 29, 2006

Mr. Michael Newdow
P. O. Box 233345
Sacramento, CA 95823

Dear Mr. Newdow:

The text of the Second Circuit's opening court cry is:

> "Judges of the United States Court of Appeals for the Second Circuit.
> Hear ye! Hear ye! Hear ye!
> All persons having business before this, a stated term of the United States Court of Appeals for the Second Circuit,
> Draw near, give your attention, and ye shall be heard."

Very truly yours,

Roseann B. MacKechnie

Roseann B. MacKechnie

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CASE NO. 09-5126

Newdow v. Roberts

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, the following document:

APPELLANTS' EMERGENCY MOTION SEEKING TO DISPENSE WITH THE COURT'S RELIGIOUS OPENING CRY

Was electronically filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit, using the CM/ECF system. Accordingly, service will assumedly be made upon:

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