Case No. 06-16344

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff and Appellant,
v.
CONGRESS OF THE UNITED STATES OF AMERICA, ET AL,
Defendants and Appellees

On Appeal from the United States District Court for the Eastern District of California,
The Honorable Frank C. Damrell, Jr., Presiding
United States District Court No. 2:05-cv-02339-FCD-PAN

BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND UNITED STATES SENATOR JIM DEMINT AND UNITED STATES REPRESENTATIVES ROBERT B. ADERHOLT, W. TODD AKIN, ROSCOE G. BARTLETT, KEVIN BRADY, JOHN CAMPBELL, STEVE CHABOT, CHRIS CHOCOLA, K. MICHAEL CONAWAY, GEOFF DAVIS, JO ANN DAVIS, PHIL ENGLISH, TOM FEENEY, VIRGINIA FOXX, TRENT FRANKS, SCOTT GARRETT, PHIL GINGREY, VIRGIL H. GOODE, JR., GIL GUTKNECHT, J.D. HAYWORTH, JEB HENSARLING, WALLY HERGER, BOB INGLIS, ERNEST J. ISTOOK, JR., BOBBY JINDAL, SAM JOHNSON, MICHAEL T. MCCAUL, PATRICK T. MCHENRY, SUE WILKINS MYRICK, RANDY NEUGEBAUER, CHARLIE NORWOOD, MIKE PENCE, CHARLES W. "CHIP" PICKERING, TODD RUSSELL PLATTS, DANA ROHRABACHER, PAUL RYAN, JIM RYUN, JOHN B. SHADEGG, MICHAEL E. SODREL, MARK E. SOUDER, THOMAS G. TANCREDO, LEE TERRY, TODD TIAHRT, ZACH WAMP, DAVE WELDON, LYNN A. WESTMORELAND, AND ROGER F. WICKER IN SUPPORT OF APPELLEES URGING AFFIRMANCE

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Shannon Demos Woodruff
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
202-546-8890

Attorneys for Amici Curiae

Douglass S. Davert
David C. Loe
DAVERT & LOE
110 Pine Ave., Suite 600
Long Beach, CA 90802
562-901-3060

John Casoria
LAW OFFICE OF JOHN CASORIA
23741 Via Robles
Coto de Caza, CA 92679
949-636-6159

CORPORATE DISCLOSURE STATEMENT

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Dated November 17, 2006

Jay Alan Sekulow
Counsel of Record
Stuart J. Roth
Colby M. May
Shannon Demos Woodruff
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
202-546-8890

Attorneys for Amici Curiae

Douglass S. Davert
David C. Loe
DAVERT & LOE
110 Pine Ave., Suite 600
Long Beach, CA 90802
562-901-3060

John Casoria
LAW OFFICE OF JOHN CASORIA
23741 Via Robles
Coto de Caza, CA 92679
949-636-6159

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INTEREST OF AMICI[*]

Amici United States Senator Jim DeMint and United States Representatives Robert B. Aderholt, W. Todd Akin, Roscoe G. Bartlett, Kevin Brady, John Campbell, Steve Chabot, Chris Chocola, K. Michael Conaway, Geoff Davis, Jo Ann Davis, Phil English, Tom Feeney, Virginia Foxx, Trent Franks, Scott Garrett, Phil Gingrey, Virgil H. Goode, Jr., Gil Gutknecht, J.D. Hayworth, Jeb Hensarling, Wally Herger, Bob Inglis, Ernest J. Istook, Jr., Bobby Jindal, Sam Johnson, Michael T. McCaul, Patrick T. McHenry, Sue Wilkins Myrick, Randy Neugebauer, Charlie Norwood, Mike Pence, Charles W. "Chip" Pickering, Todd Russell Platts, Dana Rohrabacher, Paul Ryan, Jim Ryun, John B. Shadegg, Michael E. Sodrel, Mark E. Souder, Thomas G. Tancredo, Lee Terry, Todd Tiahrt, Zach Wamp, Dave Weldon, Lynn A. Westmoreland, and Roger F. Wicker are currently serving in the One Hundred Ninth Congress.

These members of Congress and Amicus American Center for Law and Justice have dedicated time and effort to defending and protecting Americans' First Amendment freedoms. It is this commitment to the integrity of the United States Constitution and Bill of Rights that compels them to support affirmance of the

[*] This brief *amicus curiae* is filed with the consent of the parties. *Amicus*, ACLJ discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

dismissal of Appellant's Complaint by the court below. Appellant's strategy to purge all religious observances and references from American public life must not be permitted to move forward. If Appellant is successful, it will undoubtedly embolden further challenges to other religious expressions in government venues, including the several religious works of art[1] and various religious inscriptions[2] in the Capitol Complex and the prayer rooms in House and Senate Office buildings.

Amici urge this Court to uphold the use of "In God We Trust" as our national motto by affirming the district court's dismissal of Appellant's claims. While the First Amendment affords atheists complete freedom to disbelieve, it does not compel the federal judiciary to redact religious references in every area of public life in order to suit atheistic sensibilities. [3]

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[1] For example, in the Rotunda of the Capitol Building are paintings with religious themes, such as *The Apotheosis of Washington*, depicting the ascent of George Washington into Heaven, and the *Baptism of Pocahontas,* portraying Pocohontas being baptized by an Anglican minister.

[2] For example, a wall in the Cox Corridor of the Capitol is inscribed with a line from Katherine Lee Bates' Hymn, *America the Beautiful*, "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the prayer room of the House Chamber, two distinctly religious statements are inscribed: 1) "Annuit coeptus," which means "God has favored our undertakings"; and 2) "Preserve me, O God, for in thee do I put my trust." Psalm 16:1.

[3] Appellant's overall strategy seeks to proscribe religious expression well beyond the national motto including presidential addresses invoking the name of God, the use of legislative chaplains, the invocation "God save the United States and this Honorable Court" prior to judicial proceedings, oaths of public officers, court witnesses, and jurors and the use of the Bible to administer such oaths, the use of "in the year of our Lord" to date public documents, the Thanksgiving and Christmas holidays, the National Day of Prayer, and the phrase "under God" in the Pledge of Allegiance.

SUMMARY OF ARGUMENT

The use of "In God We Trust" as this country's national motto is fully consistent with the Establishment Clause of the First Amendment to the United States Constitution. The words of the motto echo the conviction held by the Founders of this Nation that our freedoms come from God. Congress codified "In God We Trust" as our national motto for the express purpose of reaffirming America's unique history and understanding of this truth, and to distinguish America from atheistic nations who recognize no higher authority than the State.

Every court that has decided the issue has held that the national motto presents no Establishment Clause concerns. In fact, this Court's decision in *Aronow v. United States,* 432 F.2d 242 (9th Cir. 1970), is dispositive of Appellant's claims in this case. In *Aronow*, this Court dismissed an identical challenge to federal statutes requiring the national motto to be inscribed on U.S. currency:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise. . . . While "ceremonial" and "patriotic" may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact.

Id. at 243.

Although the Supreme Court has never decided a case involving the

constitutionality of the national motto, its Establishment Clause jurisprudence strongly indicates that the display of the national motto raises no Establishment Clause issues. The Supreme Court has repeatedly explained that government use of religious references is consistent with the Establishment Clause. Moreover, numerous pronouncements by past and present members of the Supreme Court expressly state that the motto "In God We Trust" poses no Establishment Clause problems.

The court below was correct to dismiss Appellant's claims. A decision holding the national motto unconstitutional would have far-reaching ramifications affecting countless other historical religious references that exist in the public arena. In addition, it would render constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education. For example, there is no principled means of distinguishing between the use of "In God We Trust" as the national motto and recitation of the Pledge of Allegiance or any other passages from historical documents reflecting the same truth. The Declaration of Independence and the Gettysburg Address contain the same recognition that the nation was founded upon a belief in God. Striking down the national motto would cast substantial doubt upon whether a public school teacher could require students to memorize portions of either one. Such a decision would also likely foreclose the nation's school

districts from teaching students to sing and appreciate the nation's patriotic music as well as a vast universe of classical music with religious themes.

ARGUMENT

It is commonly understood that our government, its Constitution and its laws are founded on a belief in God. Mere acknowledgment of God by the government or government officials cannot be said to be an "establishment of religion" in violation of the Establishment Clause of the United States Constitution.

I. THE MOTTO "IN GOD WE TRUST" ACCURATELY REFLECTS THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

The Founders of this Nation based a national philosophy on a belief in Deity. The Declaration of Independence[4] and the Bill of Rights locate the source of inalienable rights in a Creator rather than in government precisely so that such rights cannot be stripped away by government. In 1782, Thomas Jefferson wrote, "[C]an the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of

[4] The Declaration of Independence recognizes that human liberties are a gift from God: "all men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and "Nature's God." *Id.* para. 1. The Founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[ed] to the Supreme Judge of the world to rectify their intentions." *Id.* para. 32. In 1774, Jefferson wrote that "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Thomas Jefferson, *Rights of British America*, 1774. ME 1:211, Papers 1:135.

God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782). The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between the two." Philip Hamburger, *Separation of Church and State* 480 (2002).

The nation's history is replete with examples of acknowledgment of religious belief in the public sector. Since the Founding of the Republic,[5] American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. President Washington issued the first such proclamation at the request of the First Congress, in which he wrote that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." Jared Sparks, *The Writings of George Washington*, Vol. XII, p. T19 (1833-1837). He further "recommend[ed] and assign[ed]" a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be," so that "we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and practice of true

[5] The following historical summary was distilled from Justice Kennedy's dissenting opinion in *County of Allegheny v. ACLU*, 492 U.S. 573, 671-72 (1989).

religion and virtue . . . ." 1 J. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897*, p. 64 (1899).

Most of President Washington's successors followed suit, and the forthrightly religious nature of these proclamations has not waned with the years. President Franklin D. Roosevelt went so far as to "suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas" so that "we may bear more earnest witness to our gratitude to Almighty God." Presidential Proclamation No. 2629, 58 Stat. 1160. Similarly, our Presidential inaugurations have traditionally opened with a request for divine blessing.

The Executive has not been the only Branch of our Government to recognize the central role of religion in our society. Federal courts, including the Supreme Court of the United States, open sessions with the request that "God save the United States and this honorable Court." The Legislature has gone much further, not only employing legislative chaplains, see 2 U.S.C. § 61d, but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate. The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: "Preserve me, O God, for in Thee do I put my trust." Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag. See L. Aikman, *We the People: The Story of the United States Capitol* 122 (1978).

The United States Code itself contains religious references. Congress has directed the President to "issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 119. This statute does not require anyone to pray, of course, but it is a straightforward acknowledgement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." Likewise, our national motto, "In God we trust," 36 U.S.C. § 302, is prominently engraved in the wall above the Speaker's dais in the Chamber of the House of Representatives and, by mandate of Congress and the President, see 31 U.S.C. § 5112(d)(1) (1982 ed.), is reproduced on every coin minted and every dollar printed by the Federal Government.

Use of the slogan "In God We Trust" dates back to the War of 1812. In September 1814, fearing for the fate of America while watching the British bombardment of Fort McHenry in Baltimore, Francis Scott Key composed the poem the "Star Spangled Banner," of which one line in the final stanza is "And this be our motto—'In God is our trust.'"[6] When Congress codified the longstanding motto in 1956, it articulated a secular purpose of patriotic inspiration: "It will be of

[6] Steven Epstein, *Rethinking the Constitutionality of Ceremonial Deism,* 96 COLUM. L. REV. 2083, 2122 (1996) (citing George J. Svejda, *History of the Star Spangled Banner From 1814 to the Present* ii (1969)).

great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality in plain, popularly accepted English." House Report No. 84-1959, 1956 Cong. & Admin. News, p. 3720.

Just this year, in recognition of the 50th anniversary of the formal adoption of the motto, the United States Senate passed Concurrent Resolution 96, in which the House of Representatives concurred, in order to "reaffirm the concept embodied in [the] motto that—(1) the proper role of civil government is derived from the consent of the governed, who are endowed by their Creator with certain unalienable Rights; and (2) the success of civil government relies firmly on the protection of divine Providence[.]" S. Con. Res. 96, July 12, 2006. In this resolution Congress described the national motto as "a fundamental aspect of the national life of the citizens of the United States; and a phrase that is central to the hopes and vision of the Founding Fathers for the perpetuity of the United States . . . " and expressed its conviction "that the substance of the national motto is no less vital to the future success of the Nation[.]" *Id.*

II. THE FIRST AMENDMENT DOES NOT COMPEL THE REDACTION OF ALL REFERENCES TO GOD JUST TO SUIT ATHEISTIC PREFERENCES.

It is quite clear from the Supreme Court's Establishment Clause jurisprudence that the Constitution is not to be interpreted in a manner that would purge religion or religious reference from society. In 1892 the Supreme Court

stated that "this is a religious nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical role of religion in our society and concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). In *Abington v. Schempp*, 374 U.S. 203, 212 (1963), the Court recognized that "religion has been closely identified with our history and government." Such recognition of the primacy of religion in the Nation's heritage is nowhere more affirmatively expressed than in *Zorach v. Clauson*, 343 U.S. 306 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe*.

Id. at 313-14 (emphasis added). Appellant asks this court to do exactly what the Supreme Court warned against in *Zorach*—prefer atheism above religion even to the extent of censoring the historical fact that the United States was founded upon

a belief in God.

One fundamental flaw in Appellant's understanding of the Establishment Clause is that he appears to conflate religious exercises and patriotic exercises. For example, the Supreme Court consistently has distinguished between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not.

In *Engel v. Vitale*, 370 U.S. 421 (1962), where the Court struck down New York State's law requiring school officials to open the school day with prayer, the Court explained:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.

Id. at 435, n.21 (emphasis added).

Just one year later, in *Schempp*, Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great

> consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

374 U.S. at 308 (Goldberg, J., concurring).

In *Lee v. Weisman,* 505 U.S. 577 (1992), a decision built in large part on *Engel*, *see* 505 U.S. at 590-92, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and throughout the course of the educational process,

> there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.

Id. (citations omitted) (emphasis added).

The misused concept of a wall of "separation of church and state" does not assist Appellant's cause. The United States Court of Appeals for the Sixth Circuit recently issued a stinging rebuke of the ACLU's repeated reference to that phrase, stating: "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion." *ACLU of Kentucky v. Mercer County*, 432 F.3d 624, 638-39 (6th Cir. 2005) (citations omitted). The reasonable observer would *not* conclude that the government has endorsed religion solely by authorizing the word "God" to appear on money because "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *See id.* at 639 (quoting *Van Orden v. Perry*, 125 S. Ct. 2854, 2863 (2005) (plurality opinion)). This is because "the reasonable person is not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions." *Id.* at 639-40 (citation

omitted). In other words, the mere *recognition* of America's religious heritage does not constitute an impermissible *endorsement* of religion because "[t]o endorse is necessarily to recognize, but the converse does not follow." *Id.* at 639; *see also id.* ("We will not presume endorsement from the mere display of the Ten Commandments.").

Although the primary issue in this case is whether the Establishment Clause prohibits use of "In God We Trust" as the national motto, far more is at stake. As the Sixth Circuit Court has explained, "[i]f the reasonable observer perceived all government references to the Deity as endorsements, then many of our Nation's cherished traditions would be unconstitutional, including the Declaration of Independence and the national motto." *Id.* A decision invalidating the motto would render constitutionally suspect a number of practices that traditionally have been considered an important part of American society. Nothing in the Supreme Court's Establishment Clause jurisprudence requires the relentless extirpation of public references to God that Appellant demands. Whether it be in the national motto, the Pledge of Allegiance, patriotic music, or the nation's founding documents, such references are wholly consistent with the First Amendment.

One of the more obvious casualties of such a holding would be the practice of requiring students to learn and recite passages from many historical documents reflecting the Nation's religious heritage and character. If the government violates

the Establishment Clause by inscribing "In God We Trust" on coins and currency, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact[7] and the Declaration of Independence contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *See Zorach*, 343 U.S. at 313; *see also Newdow v. United States Congress*, 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, J.J., dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a founding document, contains religious language and, historically, has been the subject of required recitations in public schools. President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom, and that Government of the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, *The*

[7] The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually *in the presence of God*, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

Mayflower Compact, *available at* http://www.project21.org/MayflowerCompact.html (emphasis added).

Gettysburg Address (Nov. 19, 1863) (emphasis added).

Indeed, the references to deity in these historical documents are presumably even more problematic according to the Appellant's reasoning because they proclaim not only God's existence but specific dogma about God—He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Subscribing to Appellant's position will threaten a type of Orwellian reformation of civic life by censoring American history.

III. THE CONSTITUTIONALITY OF THE NATIONAL MOTTO "IN GOD WE TRUST" IS WELL ESTABLISHED IN CASE LAW.

Although the Supreme Court has never decided a case involving the constitutionality of the national motto, numerous pronouncements by past and present members of the Court conclude that the motto "In God We Trust" poses no Establishment Clause problems. In addition, every lower court that has addressed the issue has held that the display of the national motto is constitutional.

A. The Supreme Court in Dicta Has Specifically Noted the Constitutionality of the National Motto.

In its Establishment Clause jurisprudence, the Supreme Court has suggested on numerous occasions that the national motto does not violate the Establishment Clause. For example, when the Court recently evaluated Appellant's challenge to the Pledge of Allegiance, Justice O'Connor used the national motto as a constitutional example of "ceremonial deism":

> Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (internal citations omitted). Justice O'Connor identified four factors that define an instance of ceremonial deism: 1) its history and ubiquity; 2) the absence of worship or prayer; 3) the absence of reference to a particular religion; and 4) minimal religious content or a "highly circumscribed reference to God." *Id.* at 37-43.

Justice O'Connor continued, acknowledging the historical underpinnings of such religious references as "In God We Trust":

> Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses . . . it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths.* Eradicating such references would sever ties to a history that sustains this Nation even today.
>
> * Note, for example, the following state mottoes: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut

> ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God, All Things Are Possible"); and South Dakota ("Under God the People Rule"). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly-redesigned flag includes the motto "In God We Trust." The oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase "[S]o help me God." Many of our patriotic songs contain overt or implicit references to the divine, among them: "America" ("Protect us by thy might, great God our King"); "America the Beautiful" ("God shed his grace on thee"); and "God Bless America."

Id. at 35-36.

Finally, Justice O'Connor specifically rejected any claim of coercion by virtue of such acts of "ceremonial deism":

> Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test. This is not to say, however, that government could *overtly* coerce a person to participate in an act of ceremonial deism.

Id. at 44. Justice O'Connor's conclusion regarding the religious import of the phrase "one Nation under God" in the Pledge of Allegiance applies equally to the national motto:

> Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.

Id. at 41.

Justice O'Connor's recent opinion in *Elk Grove* is consistent with past references, both by her and other members of the Court, concerning the national motto. In *Lynch*, Justice O'Connor observed that government acknowledgments of religion, such as the declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God Save the United States and this honorable court" could not be reasonably perceived as a government endorsement of religion.

> Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

465 U.S. at 693 (O'Connor, J., concurring); *see also County of Allegheny*, 492 U.S. at 603-04 (again expressing the belief that the national motto poses no Establishment Clause problems).

Justice Brennan, perhaps one of the Court's strictest separationists, also thought that the national motto was constitutional:

> [S]uch practices as the designation of "In God We Trust" as our national motto . . . can best be understood . . . as a form of "ceremonial deism" protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions,

> or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

Lynch, 465 U.S. at 716-17 (Brennan, J., dissenting) (citations omitted); *see Schempp*, 374 U.S. at 303 (stating the motto is interwoven "so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits").

In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the national motto, they have concluded unequivocally that those references are constitutional. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

In *Allegheny County*, Justice Blackmun, writing for the Court and joined by Justices Marshall, Brennan, Stevens, and O'Connor, referred directly to the constitutionality of the motto:

> Our previous opinions have considered in dicta *the motto* and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of "ceremonial deism," . . . because

> there is an obvious distinction between creche displays and references to God in *the motto* and the pledge.

492 U.S. at 602-03 (emphasis added). The four other Justices in *Allegheny*, Chief Justice Rehnquist and Justices Kennedy, White, and Scalia, explained that striking down traditions like the national motto would be a disturbing departure from the Court's cases upholding the constitutionality of government practices recognizing the nation's religious heritage:

> Taken to its logical extreme, some [statements in the Court's past opinions] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

Id. at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

Criticizing the endorsement test as both flawed and unworkable, the dissent in *Allegheny* set forth a detailed description of every government acknowledgment of religion in public life, including the national motto, and concluded that these acknowledgments could not survive under a consistent and logical application of the endorsement test.

> Either the Endorsement test must invalidate scores of traditional practices recognizing the place religion holds in our culture, or it must

> be twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.

Id. at 674.

Both the majority and the dissent in *Wooley v. Maynard*, 430 U.S. 705 (1977), acknowledged the innocuous nature of the motto's presence on the nation's currency. In *Wooley,* the Court held that a New Hampshire statute requiring vehicles to bear license plates embossed with the state's motto, "Live Free or Die" violated the First Amendment. *Id.* at 707. In doing so, the Court specifically distinguished the use of the national motto on the nation's currency:

> It has been suggested that today's holding will be read as sanctioning obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Id. at 717, n.15. Justice Rehnquist, in his dissent, explained that bearing the state motto on one's license plate involved no affirmation of belief and therefore did not implicate any free speech rights of motorists. *Id.* at 720 (noting that motorists had not been forced to affirm or reject that motto). To illustrate his point, he noted that "[t]he fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God

We Trust.'" *Id.* at 722 (Rehnquist, J., dissenting).

B. Lower Courts, Including this Court, Uniformly Have Upheld the Constitutionality of the National Motto.

Every court that has decided the issue has held that the national motto presents no Establishment Clause concerns. This Court has already sustained the constitutionality of the national motto in *Aronow*. Like *Newdow*, *Aronow* challenged the constitutionality of federal statutes requiring the national motto to be inscribed on U.S. currency. In a two-page opinion, this Court dismissed the plaintiff's claim, concluding brusquely that

> [i]t is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise. . . . While "ceremonial" and "patriotic" may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact.

432 F.2d at 243. Relying on Supreme Court precedent, this Court explained that legislation would only violate the Establishment Clause where its purpose—evidenced facially, through legislative history, or in effect—is to use the state's coercive power to aid religion. *Id.* at 244 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)). After considering congressional intent[8] and societal impact, this Court

[8] *Id.* ("It will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality in plain, popularly accepted English." House Report No. 84-1959, 1956 Cong. & Admin. News, p. 3720).

concluded that the motto had no such purpose. *Id.* As to the First Amendment claims set forth in Appellant's complaint, *Aronow* is dispositive.

Relying on *Aronow,* the Tenth Circuit Court also rejected an Establishment Clause challenge to the use of the national motto, "In God We Trust," and its reproduction on United States currency. *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996). The court in *Gaylor* considered itself bound by the Supreme Court's various dicta on the constitutionality of the national motto "almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Id.* at 217. Applying the *Lemon* test first, the court found that all three parts were easily met:

> The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose. The motto symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future. The motto's primary effect is not to advance religion; instead, it is a form of "ceremonial deism" which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief. Finally, the motto does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state.

Id. at 216 (internal citations omitted). The court then applied the endorsement test, considering the motto and its use on currency from the perspective of the reasonable observer. Noting that a reasonable observer must be deemed to be aware of the purpose, context, and history of the phrase "In God We Trust," the court held that the reasonable observer would not consider its use or its

reproduction on U.S. currency to be an endorsement of religion. *Id.* at 217.

A number of district courts have also relied on *Aronow* to hold that the federal statutes requiring the national motto to be printed on the nation's currency are constitutional.[9] In *O'Hair v. Murray*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd per curiam*, 588 F.2d 1144 (5th Cir. 1978), the court, in a one-page opinion, quoted from Justice Brennan's concurring opinion in *Schempp*, 374 U.S. at 303, and concluded that the national motto "does not infringe on First Amendment rights."[10] *Id.* at 20; *see also Lambeth v. Bd. of Comm'rs*, 321 F. Supp. 2d 688 (M.D.N.C. 2004) (applying *Lemon* and upholding the motto); *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003) (relying on *Aronow* and *Gaylor* to hold that the motto's reference to God does not make the statement religious and recognizing Supreme Court dicta stating that the motto does not violate the Constitution); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (relying on *Aronow* and *Gaylor* to hold that plaintiff's Establishment Clause argument was meritless because the motto is not an encouragement of any particular religion). Similarly, in *Opinion of the Justices, Supreme Court of New Hampshire*, 228 A.2d 161, 164 (N.H. 1967), the Supreme Court of New Hampshire advised the New

[9] In addition, many federal courts have referred in dicta to the probable constitutionality of the national motto. *See, e.g., ACLU v. McCreary County*, 96 F. Supp. 2d 679, 688 (E.D. Ky. 2000).

[10] In both *Aronow* and *Murray,* the courts affirmed the grant of the defendants' Motions to Dismiss.

Hampshire Senate that a proposed resolution requiring all public schools to display in every classroom a plaque with the national motto inscribed on it would "not offend the Establishment Clause of the First Amendment."

CONCLUSION

The district court correctly dismissed Appellant's claims; existing case law offers no support for the argument that the national motto violates the Establishment Clause. For the foregoing reasons, Amici Curiae respectfully urge this Court to affirm the decision of the district court dismissing Appellant's claims.

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Respectfully submitted,

Jay Alan Sekulow
Stuart J. Roth
Colby M. May
Shannon Demos Woodruff
AMERICAN CENTER FOR LAW AND JUSTICE
201 Maryland Ave., NE
Washington, DC 20002
202-546-8890

Douglass S. Davert
David C. Loe
DAVERT & LOE
110 Pine Ave., Suite 600
Long Beach, CA 90802
562-901-3060

John Casoria
LAW OFFICE OF JOHN CASORIA
23741 Via Robles
Coto de Caza, CA 92679
949-636-6159

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points and contains less than 7000 words.

Dated November 17, 2006

_____
Jay Alan Sekulow

CERTIFICATE OF SERVICE

I certify that the appropriate number of copies of the attached brief amici curiae were served upon all the parties via a commercial carrier on November 17, 2006.

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Jay Alan Sekulow