No. 06-16344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v.

UNITED STATES CONGRESS, *et al.*
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,

in support of Defendants-Appellees
Supporting affirmance

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Barry C. Hodge
The National Legal Foundation
2224 Virginia Beach Blvd.,
Suite 204
Virginia Beach, VA 23454
(757) 463-6133

FRAP RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae WallBuilders, Inc. has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS & STATUTES

OTHER CITATIONS

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

The Brief is filed pursuant to consent by Counsel of Record for all parties.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION FOR ADDITIONAL REASONS THAT THE DISTRICT COURT DID NOT CONSIDER.

This Court reviews the district court's dismissal *de novo* and may affirm on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning. *Vestar Dev. II v. General Dynamics Corp.,* 249 F.3d 958, 960 (9th Cir. 2001). *Amicus* urges this Court to consider additional compelling arguments for affirming the district court's dismissal.

A. The National Motto Should Be Evaluated and Upheld Under *Marsh v. Chambers* Because it Falls Within Practices That Are "Deeply Rooted in Our History and Tradition."

Marsh v. Chambers, 463 U.S. 783 (1983) is the appropriate standard under which this case should be decided. In *Marsh*, the Supreme Court upheld prayers

offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislature's sessions. 463 U.S. at 786. The Supreme Court declared that the practice of prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id*., and that it had "become part of the fabric of our society," *id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court stated that the actions of the First Congressmen corroborated their intent that prayers before legislatures did not contravene the Establishment Clause. *Id*. at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id*. at 788.

Numerous courts have applied *Marsh* in Establishment Clause contexts and have held that it is applicable beyond the legislative chaplaincy setting. For example, courts have applied *Marsh* in upholding prayers or chaplaincy programs at deliberative bodies other than state legislatures. *Marsh* has been used to uphold such practices at school board meetings, e.g., *Bacus v. Palo Verde Unified School District Board of Education*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); at the United States Congress, *Murray v. Buchanan*, 720 F.2d 689, 689-90 (D.C. Cir. 1983); *Newdow v. Eagen*, 309 F. Supp. 2d. 29, 33, 36, 39-41 (D.C. 2004); at city council/board of supervisors meetings, *Snyder v. Murray City Corporation*, 159 F.3d 1227, 1233-34 (10th Cir. 1998) (en banc); *Rubin v. City of Burbank*, 124 Cal.

Rptr. 2d 867, 868-74 (Ct. App. 2002) (instructing city to tell all pray-ers that prayers must be non-sectarian); *Simpson v. Chesterfield Cty. Bd. of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005), and even at a Beer Board meeting, *Gurkin's Drive-In Market v. Alcohol & Licensing Comm'n*, 2003 Tenn. App. LEXIS 232, *7-10 (Tenn. Ct. App. March 21, 2003).

Prayer has also been upheld in the courtroom context. *Huff v. State*, 596 So. 2d 16, 22 (Ala. Crim. App. 1991); *March v. State*, 458 So. 2d 308, 310-11 (Fla. Ct. App. 1984). Prior to the Supreme Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), several courts used *Marsh* to uphold graduation prayers in public schools. *Albright v. Bd. of Educ.*, 765 F. Supp. 682, 688-89 (D. Utah 1991); *Griffith v. Teran*, 794 F. Supp. 1054, 1058 (D. Kan. 1992).

In *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1406-10 (6th Cir. 1987) the Sixth Circuit expressly stated that graduation prayers should not be governed by *Lemon*, but by *Marsh*. It remanded the case with instructions to grant plaintiffs equitable relief in the form of ensuring that the prayers would be neutral and non-proselytizing. *Id.*

Even after *Lee*, courts have used *Marsh* to uphold prayers at university graduations. *Chaudhuri v. Tennessee*, 130 F.3d 232, 237 (6th Cir. 1997); *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997).

Courts have also used the principles from *Marsh* to uphold against Establishment Clause challenges practices such as public proclamations with religious content, *Allen v. Consolidated City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989) (upholding a city resolution urging residents to participate in a day of prayer and commitment to fighting drugs); *Zwerling v. Reagan*, 576 F. Supp. 1373, 1378 (C.D. Cal. 1983) (upholding Presidential Year of the Bible proclamation); chaplaincy programs in the Army, *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985), and in a sheriff's department, *Malyon v. Pierce County*, 935 P.2d 1272, 1285 (Wash. 1997); equal after-hours access to school facilities for religious purposes, *DeBoer v. Village of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001); the use of the phrase "in the year of our Lord" on law licenses, *Doe v. Louisiana Supreme Court*, 1992 U.S. Dist. LEXIS 18803, *18-19 (E.D. La. Dec. 7, 1992), and on notary public commissions, *id.*; state involvement in a Kosher food regulation, *Ran-Dav's County Kosher, Inc., v. State*, 608 A.2d 1353, 1375 (N.J. 1992) (relying on *Marsh's* "fabric of society" language); in-school recitation of the Pledge of Allegiance, *Sherman*, 980 F.2d at 447; and prayers at the presidential inaugural ceremonies, *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25937 (E.D. Cal. July 17, 2001); *Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. Dec. 28, 2001); *Newdow v. Bush*, 2002 U.S. Dist. LEXIS 27758 (E.D. Cal. March 26, 2002); *Newdow v. Bush*, 2005 U.S. Dist. LEXIS 524 (D.D.C. Jan. 14, 2005).

Courts have also applied *Marsh* in religious display cases. *E.g.*, *A.C.L.U. v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996), *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986); *A.C.L.U. v. Capitol Square Review & Advisory Board*, 243 F.3d 289, 296, 300-01, 306 (6th Cir. 2001) (en banc); and *Murray v. Austin*, 947 F.2d 147, 170 (5th Cir. 1991) (cross on city insignia).

Although some courts have tried to limit *Marsh* to chaplaincy cases, *e.g., Graham v. Center Community School District*, 608 F. Supp. 531, 535 (S.D. Iowa 1985), the Supreme Court has never taken such an approach. *Bowsher v. Synar*, 478 U.S. 714, 723 (1986) (majority relying on *Marsh* in deciding that Congress cannot remove executive officers); *Printz v. United States*, 521 U.S. 898, 905 (1997) (applying *Marsh*, the Court evaluated "the constitutionality compelled enlistment of state executive officers for the administration of federal programs . . . .").

Other courts besides the Supreme Court have followed suit. In *Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994), the Court of Appeals for the District of Columbia Circuit applied *Marsh* in affirming the constitutionality of a rule of the House of Representatives that granted voting privileges to delegates in the Committee of the Whole. In *National Wildlife Federation v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983), a district court cited *Marsh* in support of its historical

analysis of Article IV, Section 3 of the United States Constitution in deciding to enjoining the leasing of federal land for coal mining. In *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983), the court applied *Marsh's* historic approach in interpreting the Indian Commerce Clause of the Constitution. In upholding a Washington, D.C., statute that banned picketing without a permit outside embassies, the court in *Finzer v. Barry*, 798 F.2d 1450, 1457 (D.C. Cir. 1986), *aff'd in part and rev'd in part by Boos v. Barry*, 485 U.S. 312 (1988), invoked *Marsh* in support of its historical analysis of America's protection of foreign embassies. In *Sprint Communications Co. v. Kelly*, 642 A.2d 106, 110 (D.C. 1994), the court employed *Marsh's* historical principle in holding that the Council of District of Columbia had exercised a constitutionally permissible taxing power. In *United States ex rel. Wright v. Cleo Wallace Centers*, 132 F. Supp. 2d 913, 920 (D. Colo. 2000) (interacting with *Riley v. St. Luke's Episcopal Hospital*, 196 F.3d 514 (5th Cir. 1999)), a federal district court found the application of *Marsh* appropriate in holding that a *qua tam* provision of the federal False Claims Act was constitutional, despite noting that the Fifth Circuit had not found the *Marsh* approach appropriate. In *United States v. Cohen*, 733 F.2d 128, 150 (D.C. Cir. 1984), the court upheld the District of Columbia's decision to automatically confine prisoners who claimed an insanity defense. The court invoked *Marsh* as support for its historical analysis that undergirded its holding. *Id.* In *In re Sealed*

Case, 838 F.2d 476, 482 (D.C. Cir. 1988), *rev'd, Morrison v. Olson*, 487 U.S. 654 (1988) the court, in deciding that the independent counsel was an inferior officer, relied upon *Marsh*'s historic principles to decide, as an intermediate step of logic, that federal heads of departments were principal, not inferior, officers. In *Evans v. Stephens*, 387 F.3d 1220, 1223 (11th Cir. 2004), the Eleventh Circuit cited *Marsh* as support for adding historical practice to the scales to tip the balance in favor of reading the Constitution's Recess Appointments Clause as reaching Article III judges. Finally, in *United States v. Woodley*, 751 F.2d 1008, 1012 (9th Cir. 1985), this Court upheld the President's right to appoint federal judges under the Recess Appointments Clause by invoking *Marsh*'s "fabric of our society" language. *Id*, *quoting Marsh*, 463 U.S. at 791.

The most significant consideration here is that the Supreme Court has never overturned *Marsh*, either explicitly or *sub silentio*. The Supreme Court had every opportunity to do so in *Lee*, and instead chose merely to distinguish the case. The Court also had an opportunity to overturn *Marsh* in *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. A.C.L.U.*, 545 U.S. 844 (2005), but in neither case did it do so.

In *Lee*, the Court noted *Marsh's* on-going viability and explained why it would not apply it. *Lee*, 505 U.S. at 596. The Court did not overturn, criticize, or even question *Marsh*; nor did it characterize *Marsh* as anomalous. Instead, it chose

to distinguish *Marsh* and then used a different standard because of the peculiar nature of graduation ceremonies in the public school setting. *Id*. Thus, nothing prevents this Court from concluding that *Marsh* should control this case.

Some courts have been willing to consider a challenged practice under *Marsh*, but have applied it at an improper level of abstraction. One of the most egregious examples is provided by the district court in *Glassroth v. Moore*, 299 F. Supp. 2d 1290 (M.D. Ala. 2003) (challenging a Ten Commandments monument in the Alabama Judicial Building). This is best understood by comparing that court's opinion with the opinion of the Sixth Circuit sitting en banc in *Capitol Square*, 243 F.3d 289 (approving display of state motto containing a religious inscription). *Capitol Square* is also instructive because it involves a motto similar to the one at issue in the instant case.

In *Capitol Square*, the A.C.L.U. sued to enjoin the placement of the state motto of Ohio, "With God, All Things Are Possible," and the state seal in a large display in the plaza in front of the state capitol. *Id*. at. 292. In rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit specifically noted the following: President Washington's congressionally- solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine state

constitutions to God or religion, court decisions calling for the veneration of religion, the upholding of blue laws, Thanksgiving Proclamations by presidents other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our nation's currency. *Id*. at 296-301.

Two points stand out about the Sixth Circuit's analysis. First, the court took one of *Marsh's* most cited principles and applied it directly to a display case. Having traced acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display, which also acknowledges God, was constitutional under *Marsh*:

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

Second, the Sixth Circuit did not consider historical evidence involving only religious displays. In fact, none of its examples dealt with were religious displays. Thus, the Sixth Circuit understood that the *Marsh* analysis must be done at the proper level of abstraction.

By comparison, the *Glassroth* court's analysis was conducted at the wrong level of abstraction. It asked whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 299 F. Supp. 2d at 1308.[1] Under this test, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that members of the Continental Congress had displayed it in their chambers. Merely to state the position is to demonstrate that the court applied *Marsh* at the wrong level of abstraction.

Similarly, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), *rev'd, Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition."

Here again, the *Capitol Square* court's approach is the better one. And when applied to the National Motto, this Court should—employing the proper level of abstraction—find that its references to God, just like other references to God or the "Almighty Being," are part of a larger tradition that does have an adequate historical pedigree (to be examined in the following Section of the brief).

---

[1] Admittedly, Glassroth involved other factually unique asapects. Nonetheless, the statement quoted above was given as another reason why the monument violated the Establishment Clause.

Therefore, the National Motto should be upheld and the district court's decision affirmed.

B. The National Motto Should Be Upheld Because It Is Part of a Long-Standing Tradition of Governmental Acknowledgement of God and of the Role of Religion in Society.

The United States has a long-standing tradition of governmental acknowledgement of the role of religion in American life. At the time the First Amendment was drafted, officials of our new government took part in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

In *Marsh*, the Supreme Court cited much of this history in support of its finding that legislative prayer was a constitutional practice, and found this history relevant to its analysis. That Court noted that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, it reached final agreement on the language of the First Amendment. *Marsh*, 463 U.S. at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer in Congress.

This was true, moreover, for the executive as well as the legislative branch. George Washington, in his first inaugural address, also acknowledged America's

religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government . . . .

George Washington, First Inaugural Address, in I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897). In fact, it was the first Congress that urged President Washington to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the many . . . favors of Almighty God . . . ." *Id.* at 56. As the Supreme Court has noted, this Thanksgiving resolution was passed by the Congress on the same day that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788, n. 9; *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). President Washington did, in fact, set aside November 26, 1789 as a day on which the people could "unite in most humbly offering [their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions . . . ." Thanksgiving Proclamation October 3, 1789 *in* I *Messages and Papers* at 56. Furthermore, many of these acknowledgements go beyond acknowledging the role of religion in American life. They directly acknowledge God Himself.

Referencing God in the National Motto is perfectly consistent with our

centuries-old tradition of government publicly acknowledging God's sovereignty in our nation's affairs. The *Marsh* Court noted that consistency with historic practice is highly relevant. 463 U.S. at 794. The same is true in this case, and it is a factor to which this Court should give considerable weight. Examples too numerous to mention could be cited, but the following brief list illustrates the wealth of this tradition:

- Thomas Jefferson's Virginia Statute for Religious Freedom, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author of our religion," who is described as "Lord both of body and mind."[2]

- The Declaration of Independence acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."

- Benjamin Franklin admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[3]

- George Washington frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God . . . ."[4]

---

[2] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).
[3] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 210 (W.W. Norton & Co. Pub. 1987).
[4] See Thanksgiving Proclamation, October 3, 1789 *in* I *Messages and Papers of the Presidents* 56 (J. Richardson, ed. 1897) (emphasis added). Other examples, include (1) First Inaugural Address, April 30, 1789 (acknowledging "the Almighty

- Thomas Jefferson, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[5]

- Abraham Lincoln frequently made public expressions of religious belief. One of many examples is found in a Proclamation he issued on August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and bring down plentiful blessings upon our country."[6]

Lincoln apparently saw no conflict between the First Amendment and his very public exhortations to the citizens that they should "humble [themselves] before [God] and . . . pray for His mercy" and that they should "bow in humble submission to His chastisements." VII *Messages and Papers of the Presidents* 3237. Thus, this nation enjoys a long tradition of public officials acknowledging God and his sovereignty in our nation's affairs, and the tradition continues to this day.

Being who rules over the Universe"), *id*. at 43; (2) Message to the Senate, May 18, 1789 (seeking a "divine benediction . . . ."), *id.* at 47; (3) Fifth Annual Address to Congress, December 3, 1793 ("humbly implor[ing] that Being on whose will the fate of nations depends . . . ."), *id.* at 131; (4) Sixth Annual Address to Congress, November 19, 1794, *id.* at 160 ("imploring the Supreme Ruler of Nations to spread his holy protection over these United States . . . ."); (5) Eighth Annual Address to Congress, December 7, 1796, *id.* at 191 (expressing "gratitude to the Ruler of the Universe . . . ."); and (6) Farewell Address, September 17, 1796, *id.* at 213 (invoking "Providence . . . .").

[5] Thomas Jefferson, Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

[6] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

C. The National Motto Should Be Upheld Because It Is an Extension of This Long-Standing Tradition.

The long-standing traditions that have been explained above are the context in which the history of the Nation's Motto emblazoned on our currency should be evaluated.

1. The National Motto should be upheld because history reveals that it fits into the continuous and unbroken tradition of government acknowledgment of religion.

Congress adopted "In God We Trust" as our national motto officially by Act of July 30, 1956, Pub. L. No. 84-851 (codified at 36 U.S.C. § 302 (2000)). Our motto is inscribed on our coins, pursuant to 31 U.S.C. § 5112(d)(1) (2000), and on our printed currency, pursuant to 31 U.S.C. § 5114(b) (2000). Its appearance on our currency is an extension of a long-standing tradition of its appearance on various coins. The motto was actually first approved to appear on coins by Salmon P. Chase, the Secretary of the Treasury, on December 9, 1863. David K. Watson, *History of American Coinage* 213 (1899; reprinted 1970).

Secretary Chase's action was in response to a request by Reverend Mr. M. R. Watkinson of Ridleyville, Pennsylvania. Letter of Rev. M. R. Watkinson to Sec. Salmon P. Chase, November 13, 1861, *reprinted in* H.R. Rep. No. 84-662 at 2 (1955). The reverend's request was not without precedent. The colonial governments, as early as 1694 had issued coins bearing reference to God:

The Carolina cent minted in 1694 bore the inscription 'God preserve

> Carolina and the Lords proprietors.' The New England token of the same year bore the inscription 'God preserve New England'. The Louisiana cent coined in 1721-22 and 1767 bore the inscription 'Sit nomen Domini benedictum'—Blessed be the name of the Lord. The Virginia halfpenny of 1774 bore an inscription in Latin which translated meant "George the Third by the grace of God." Utah issued gold pieces in the denominations of $2.5, $5, $10, and $20 in 1849 bearing the inscription 'Holiness to the Lord.'

H.R. Rep. No. 84-662 at 2 (1955). Secretary Chase responded within a week to Rev. Watkinson's suggestion, and wrote to the Director of the Mint:

> No Nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins.
> You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible this national recognition.

Letter of Salmon P. Chase to James Pollock, Dir. of the Mint, *in* Watson, *History of American Coinage* 214. James Pollock, who in May 1861 had been appointed Director of the Mint by President Lincoln, began preparing appropriate designs for coins incorporating such mottoes as "Our country; our God," and "God, our Trust." On December 9, 1862, after reviewing Pollock's proposals, Secretary Chase approved the present motto, "In God We Trust." R. Patterson and R. Dougall, *The Eagle and the Shield: A History of the Great Seal of the United States* 516 (Washington, D.C.: Department of State) (1976).

On April 22, 1864, Congress passed new legislation authorizing one-and two-cent coins and granting the Director of the Mint and the Secretary of the

Treasury discretion to fix "the shape, mottoes, and devices" of the new coins. 13 Stat. 54 (1864). Consequently, the mint issued the new two-cent bronze coin on which the motto "In God We Trust" first appeared. R.S. Yeoman, *A Guide Book of United States Coins* 87 (Racine, WI: Western Publishing Company, 1974).

On March 3, 1865, Congress expanded the mint's authority to use the motto "In God We Trust" on still other coins. 13 Stat. 517 (1865). Pursuant to this law, the new motto was incorporated into the designs of the shield-type nickel, the quarter dollar, half dollar, dollar, half eagle ($5.00), eagle ($10.00) and double eagle ($20.00) coins beginning in 1866. H.R. Rep. No. 84-662, at 3; Yeoman, *Guide Book* 89, 118, 136, 150, 175, 181, 186. This permissive grant of authority was restated in the Coinage Act of 1873. 17 Stat. 427 (1873).

The use of the motto increased thereafter, being authorized by Congress to appear on all coins "as should admit of such motto" in the Coinage Act of 1873. Watson, *History of American Coinage* 212. As the modern era began, the motto was inscribed on a number of new coins for their debut, including the Lincoln Penny (1909), the Mercury Dime (1916), the Standing Liberty Quarter (1916), the Washington Quarter (1932), the Jefferson Nickel (1938), and the Roosevelt Dime (1946). *"In God We Trust" & Its Application to the Coins and Currency of the United States of America* 7 (The National Legal Foundation 2000).

In this same tradition, Congress added to the nation's Pledge of Allegiance the words "Under God" in 1954. This occurred just two years before President Eisenhower issued his executive order for the motto "In God We Trust" to appear on our currency. The House Committee on the Judiciary supported passage of the bill for the addition to the Pledge of Allegiance by stating, in pertinent part, that "[t]he inclusion of God in our Pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator." H.R. Rep. No. 83-1693 at 2 (1954). Congress then unanimously expanded the use of the motto "In God We Trust" in 1955, calling for it to appear on all coins *and* on all paper money as well. 101 Cong. Rec. 7796, 9449 (1955).

2. **The National Motto should be upheld because the numerous challenges it has withstood solidifies its consistency with the Framer's intent for the Establishment Clause.**

It is important to note that the use of the national motto on our currency has been held constitutional, despite three legal challenges. The district court properly relied on *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970), where this Court stated emphatically: "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." This Court further held that the use of the motto in this way bore "no true resemblance to a governmental sponsorship of a religious exercise." *Id.*

In *O'Hair v. Blumenthal*, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978), *aff'd per curiam* 588 F.2d 1114 (5th Cir. 1979), the court, relying on *Aronow*, held that the use of the national motto on coins and currency was consistent with the First Amendment. That court looked not only to *Aronow*, but to Justice Brennan's comments in *Abington v. Schempp*, 374 U.S. 203 (1963), in which "the Court recognized that in the national public life there are many manifestations of a belief in a Supreme Being which do not violate the First Amendment." *O'Hair*, 462 F. Supp. at 20. In *Abington*, Justice Brennan stated:

> It is not that the use of these four words [the national motto] can be dismissed as 'de minimis' . . . . The truth is that we have simply interwoven the motto 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."

374 U.S. at 303 (Brennan, J., concurring).

Furthermore, in *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), the use of our motto and its display on currency was upheld as constitutional under the "endorsement test," the court concluding that no reasonable observer of the motto would take it as a preference for one religion over another. *Id.* at 217.

D. The National Motto Should Be Upheld Because It Is Legally Indistinguishable from the Display of Religious References on Public Buildings.

This nation also has a long tradition of inscribing religious sentiments and scriptural references on government buildings, a practice nearly identical to public

acknowledgement of religion on the nation's currency. Here again, examples abound, but the following list illustrates the point:[7]

- In the House of Representatives Chamber, in our nation's Capitol, directly above and behind the Speaker's Chair is the inscription, "In God We Trust."

- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear this one has the most prominent position.

- In the Capitol is a private room dedicated for use by members for prayer and meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.

- In the main reading room of the Library of Congress are two statues, one of Moses, and one of "Paul, Apostle to the Gentiles."

- The Lincoln Memorial, on its north wall, bears the words of Lincoln's Second Inaugural Address, in which he uttered a number of religious sentiments and quoted directly from scripture, including the verse from the Old Testament: "The Judgments of the Lord are righteous and true, altogether."

- In Arlington National Cemetery, at the Tomb of the Unknown Soldier, these words appear: "Here lies in Honoured glory, An American soldier known but to God."

Apparently, neither our Founders, nor those who designed our nation's most prominent buildings, shared Appellant's view. It would be constitutionally inconsistent for our government to express the religious belief that the "Unknown Soldier" is "known but to God," yet forbid the nation to display its motto, *because* it expresses a *religious* belief. Reason is stretched to the breaking point when–

[7] Catherine Millard, *God's Signature Over the Nation's Capital* (1988).

despite the examples listed here–Appellant claims either that (1) the display of the National Motto is somehow different–*in a legally relevant way*–than what is described above; or (2) that the Framers cared so little for the import of their own work that they either violated it themselves, or willingly countenanced the same by others.

Appellant either ignores or misinterprets the rich vein of history that undergirds this case. As noted above, the Supreme Court has implied that longevity is a valuable asset in deciding these cases. This would seem particularly true when a historical practice is put to the daunting task of surviving the "strict separationist" point of view.

Appellant finds himself in the unenviable position of arguing against history in this case.[8] Though some would expunge our history of all things religious,[9] we cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a

---

[8] Admittedly, the Supreme Court qualified its reasoning from history in *Marsh*, stating that "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ." *Marsh*, 463 U.S. at 790, but the same reasoning that then saved the legislative prayer in that case, should also save the the National Motto in this one — as the Court also held, "their [the framers] actions reveal their intent." *Id.*

[9] *See Lee v. Weisman*, 505 U.S. 577, 633 (1992), for Justice Scalia's trenchant criticism of those who are so "oblivious to our history as to suggest that the Constitution restricts 'preservation and transmission of religious beliefs . . . to the private sphere.'" (Scalia, J., dissenting, quoting in part the majority opinion) (ellipsis in the original).

longstanding, uninterrupted tradition that has enriched our nation and one which should not fall under Appellant's unforgiving view of the Establishment Clause.

To display the National Motto would not be materially different from things done long ago by people who well understood the First Amendment's true meaning, nor from things done by each succeeding generation of Americans. The display of the motto is simply "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. As such, it should be permitted, if not encouraged, by every part of government, including the courts.

The prayers in *Marsh* were offered by the same Presbyterian minister for sixteen years and "in the Judeo-Christian tradition." *Id.* at 793. But the Court stated that it could not, "any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* Given an "unbroken history of more than 200 years," [t]he Court held that "to invoke Divine guidance on a public body . . . is not . . . an 'establishment' of religion or a step toward establishment . . . ." *Id.* at 792.

The Supreme Court having approved of prayers "in the Judeo-Christian tradition," offered by clergy of one particular denomination, this Court should not object to mere attribution of the National Motto to the United States traditional monotheistic beliefs. To omit such attribution might spare offense to certain

citizens, but these cases should not hinge upon such calculations. The Supreme Court has stated that it does not "hold that every state action implicating religion is invalid if one or a few people find it offensive." *Lee*, 505 U.S. at 597. The test this Court must employ is not whether the display of attribution offends "one or a few people," but simply whether it offends the First Amendment. Under this test, the judgment of the district court should be affirmed.

Whether the National Motto is characterized as acknowledging the role of religion in American life or as acknowledging God, it is well within a long-standing tradition validated by *Marsh*. The historical acceptability and longevity of a practice should mean that we, today, begin our analysis with the presumption that these practices, or those sufficiently similar, are indeed constitutional. *County of Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in part and dissenting in part).

CONCLUSION

Throughout our nation's history our government has openly declared its faith in, and reliance upon, God and His favor. Moreover, many of our public buildings bear words of religious import.

This history is a source of pride to some, and of embarrassment to others, but it is our history, nonetheless. This Court must therefore decide this case in the light of

that history. The display of our country's motto will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell. Thus, this Court should view with some skepticism, the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim should be placed firmly and irrevocably upon those who, by their "untutored devotion to neutrality," *Abington*, 374 U.S. at 306 (Goldberg, J., concurring), would make it their business to deny the citizens of the United States this simple acknowledgment of their history and tradition. For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,
This 4th day of December, 2006

_____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 6,067 words.

_____

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *Newdow v. United States Congress*, No. 06-16344, on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on December 4, 2006, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

Michael A. Newdow
First Amendmist Church of True Science
P.O. Box 233345
Sacramento, CA 95823
Counsel for Michael A. Newdow,
Plaintiff-Appellant

Theodore Hirt
Department of Justice
20 Massachusetts Ave., NW
Room 914
Washington, DC 20001
Counsel for U.S. Congress, *et al*
Defendants-Appellees

Kevin T. Snider
Pacific Justice Institute
P.O. Box 276600
Sacramento, CA 95827
Counsel for Pacific Justice Institute
Defendant-Intervenor-Appellee

_____

Steven W. Fitschen
Counsel of Record for Amicus Curiae
1000 Regent University Drive
Virginia Beach, Virginia 2364
(757) 226-4584