

No. 05-17257

**In the
United States Court of Appeals
for the Ninth Circuit**

MICHAEL A. NEWDOW, *ET AL.*,
Plaintiffs-Appellees,

v.

RIO LINDA UNIFIED SCHOOL DISTRICT, *ET AL.*,
Defendants-Appellants.

On Appeal from the United States District Court,
Eastern District of California

**BRIEF OF TEXAS, IDAHO, OKLAHOMA, ALABAMA, ALASKA, ARIZONA,
ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA,
GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY,
LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA,
MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE,
NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH
DAKOTA, OHIO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH
CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA,
WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL**

GREG ABBOTT
Attorney General of Texas

R. TED CRUZ
Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697

LAWRENCE WASDEN
Attorney General of Idaho

DREW EDMONDSON
Attorney General of Oklahoma

TROY KING
Attorney General of Alabama

COUNSEL FOR *AMICI CURIAE*

ADDITIONAL COUNSEL

DAVID W. MÁRQUEZ
Attorney General of Alaska

TERRY GODDARD
Attorney General of Arizona

MIKE BEEBE
Attorney General of Arkansas

BILL LOCKYER
Attorney General of California

JOHN W. SUTHERS
Attorney General of Colorado

RICHARD BLUMENTHAL
Attorney General of Connecticut

CARL C. DANBERG
Attorney General of Delaware

CHARLES J. CRIST, JR.
Attorney General of Florida

THURBERT E. BAKER
Attorney General of Georgia

MARK J. BENNETT
Attorney General of Hawaii

LISA MADIGAN
Attorney General of Illinois

STEVE CARTER
Attorney General of Indiana

THOMAS J. MILLER
Attorney General of Iowa

PHILL KLINE
Attorney General of Kansas

GREGORY D. STUMBO
Attorney General of Kentucky

CHARLES C. FOTI, JR.
Attorney General of Louisiana

G. STEVEN ROWE
Attorney General of Maine

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

THOMAS F. REILLY
Attorney General of Massachusetts

MIKE COX
Attorney General of Michigan

MIKE HATCH
Attorney General of Minnesota

JIM HOOD
Attorney General of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

MIKE McGRATH
Attorney General of Montana

JON BRUNING
Attorney General of Nebraska

GEORGE J. CHANO
Attorney General of Nevada

KELLY A. AYOTTE
Attorney General of New Hampshire

ZULIMA V. FARBER
Attorney General of New Jersey

PATRICIA A. MADRID
Attorney General of New Mexico

ELIOT SPITZER
Attorney General of New York

ROY COOPER
Attorney General of North Carolina

WAYNE STENEHJEM
Attorney General of North Dakota

JIM PETRO
Attorney General of Ohio

HARDY MYERS
Attorney General of Oregon

TOM CORBETT
Attorney General of Pennsylvania

PATRICK LYNCH
Attorney General of Rhode Island

HENRY McMASTER
Attorney General of South Carolina

LAWRENCE E. LONG
Attorney General of South Dakota

PAUL G. SUMMERS
Attorney General of Tennessee

MARK L. SHURTLEFF
Attorney General of Utah

WILLIAM H. SORRELL
Attorney General of Vermont

ROBERT F. McDONNELL
Attorney General of Virginia

ROB MCKENNA
Attorney General of Washington

DARRELL V. MCGRAW, JR.
Attorney General of West Virginia

PEGGY A. LAUTENSCHLAG
Attorney General of Wisconsin

PATRICK J. CRANK
Attorney General of Wyoming

TABLE OF CONTENTS

Additional Counsel	ii
Index of Authorities	v
Interest of <i>Amici</i>	1
Question Presented	2
Summary of the Argument	3
Argument	4
I. Historical and Patriotic Acknowledgments of Our Nation’s Religious Heritage Are Not Inconsistent With the First Amendment’s Prohibition on the Establishment of Religion	6
A. Because of Their “History and Ubiquity,” Acknowledgments of Religion in Patriotic or Historical Contexts Are Entirely Consistent with the Establishment Clause	9
B. Virtually Every Reference to the Pledge of Allegiance—by the Court and Repeatedly by Individual Justices—Over the Decades Has Agreed that the Pledge Is Entirely Consistent with the First Amendment	13
II. Centuries of Historical and Patriotic Acknowledgment of Religion Have Not Threatened the First Amendment’s Prohibition on Established Religion	18
Conclusion	20
Certificate of Compliance	21

INDEX OF AUTHORITIES

Cases

<i>Comm. for Pub. Educ. v. Nyquist</i> , 413 U.S. 756 (1973)	6
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989)	7, 8, 14-16
<i>Elk Grove Indep. Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004)	2, 6, 16, 17
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962)	13, 15, 17
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	7
<i>Everson v. Bd. of Educ.</i> , 330 U.S. 1 (1947)	7
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992)	9, 15, 16
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	4, 8-11, 13, 14, 18, 19
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	10, 18
<i>Myers v. Loudon County Pub. Schs.</i> , 418 F. 3d 395 (4th Cir. 2005)	3
<i>Newdow v. U.S. Congress</i> , 292 F.3d 597 (9th Cir. 2002)	6

<i>Sante Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	9
<i>Sch. Dist. of Abington Tp. v. Schempp</i> , 374 U.S. 203 (1963)	6-9, 15
<i>Van Orden v. Perry</i> , 125 S.Ct. 2854 (2005)	8, 10
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	6, 15, 17
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952)	7

Statutes, Rules and Constitutional Provisions

105 ILL. COMP. STAT. 5/27-3 (2002)	1
24 PA. CONS. STAT. §7-771 (1992)	1
4 U.S.C. §4	3, 5
42 U.S.C. §1983	1
ALA. CODE § 16-6B-2 (h) (2001)	12
ALA. CODE §16-43-5 (2001)	1, 12
ALA. CONST. pmbl.	12
ALASKA STAT. §14.03.130 (2000)	1
ARIZ. REV. STAT. §15-506 (2002)	1
ARK. CODE §6-16-122 (2003)	1
CAL. EDUC. CODE §52720 (1989)	1

COLO. REV. STAT. tit. 22, §22-1-106 (2003)	1
CONN. GEN. STAT. §10-230(c) (2003)	1
DEL. CODE tit. 14, §4105 (2003)	1
FLA. STAT. ch. 1003.44(1) (2002)	1
GA. CODE §20-2-310(c)(1) (2001)	1
IDAHO CODE §33-1602(4) (2001)	1, 12
IND. CODE §20-3-5-0.5 (2005)	1
KAN. STAT. §72-5308 (2002)	1
KY. REV. STAT. §158.175(2) (2001)	1
LA. REV. STAT. §17:2115(B) (2001)	1
MASS. GEN. LAWS ch.71, §69 (2003)	1
MD. CODE EDUC. §7-105(c) (2001)	1
MINN. STAT. §121A.11 (2003)	1
MISS. CODE §37-13-7(1) (2001)	1
MO. STAT. §171.021(2) (2003)	1
MONT. CODE §20-7-133 (2001)	1
N.C. GEN. STAT. §115C-47(29a) (1999)	1
N.D. CENT. CODE §15.1-19-03.1(4) (2001)	1
N.H. REV. STAT. §194:15-c (2002)	1

N.J. STAT. §18A:36-3(c) (1999)	1
N.M. STAT. §22-5-4.5 (2001)	1
N.Y. EDUC. LAW §802(1) (2000)	1
NEV. REV. STAT. §389.040 (2002)	1
OHIO REV. CODE §3313.602(A) (1999)	1
OKLA. STAT. tit. 70, §24-106 (2003)	1, 12
OR. REV. STAT. §339.875 (2001)	1
R.I. GEN. LAWS §16-22-11 (2001)	1
S.C. CODE §59-1-455 (2000)	1
S.D. CODIFIED LAWS §13-24-17.2 (2002)	1
TENN. CODE §49-6-1001(c)(1) (2002)	1
TEX. CONST. pmbl.	12
TEX. EDUC. CODE §25.082 (2003)	1
TEX. EDUC. CODE §28.002(h)	12
U.S. CONST. amend. I	6
UTAH CODE §53A-13-101.6 (2000)	1
VA. CODE §22.1-202(C) (2002)	1
W. VA. CODE §18-5-15b (1999)	1
WASH. REV. CODE §28A.230.140 (1997)	1

WIS. STAT. §118.06 (2003)	1
---------------------------------	---

Other Authorities

Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863)	4
--	---

Act of June 14, 1954, ch. 297, §7, 68 Stat. 249	5
---	---

H.R. REP. NO. 1693	5
--------------------------	---

H.R. REP. NO. 2047, 77th Cong., 2d Sess. (1942)	4, 5
---	------

H.R. REP. NO. 83-1693 (1954)	5
------------------------------------	---

Proclamation No. 2629, 9 Fed. Reg. 13,099 (1944)	11
--	----

Proclamation No. 3560, 28 Fed. Reg. 11,871 (1963)	11
---	----

Proclamation No. 3752, 31 Fed. Reg. 13,635 (1966)	11
---	----

Proclamation No. 4093, 36 Fed. Reg. 21,401 (1971)	11
---	----

Proclamation No. 4333, 39 Fed. Reg. 40,003 (1974)	11
---	----

Proclamation No. 4803, 45 Fed. Reg. 75,633 (1980)	11
---	----

Proclamation No. 5098, 48 Fed. Reg. 42,801 (1983)	11
---	----

S. REP. NO. 1287	5
------------------------	---

S. REP. NO. 1477, 77th Cong., 2d Sess. (1942)	5
---	---

S. REP. NO. 83-1287 (1954)	5
----------------------------------	---

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776)	4
--	---

INTEREST OF *AMICI*

The States of Texas, Idaho, Oklahoma, and Alabama write on behalf of all 50 States to urge the Court to reverse and vacate the District Court's permanent injunction, and confirm that voluntary teacher-led recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause of the First Amendment to the United States Constitution. The *amici* States have a significant interest in this case because adjudication of the issues presented may impact the validity of at least forty-three state statutes providing for the recitation or use of the Pledge of Allegiance by public schoolchildren.¹ In addition, the decision below improperly burdens school district and educational professionals with potential civil liability pursuant to 42 U.S.C. §1983.

For these reasons, all 50 States joined in an *amicus* brief filed in the United States Supreme Court urging the Court to hold that voluntary recitation of the Pledge

1. See ALA. CODE §16-43-5 (2001); ALASKA STAT. §14.03.130 (2000); ARIZ. REV. STAT. §15-506 (2002); ARK. CODE §6-16-122 (2003); CAL. EDUC. CODE §52720 (1989); COLO. REV. STAT. tit. 22, §22-1-106 (2003); CONN. GEN. STAT. §10-230(c) (2003); DEL. CODE tit. 14, §4105 (2003); FLA. STAT. ch. 1003.44(1) (2002); GA. CODE §20-2-310(c)(1) (2001); IDAHO CODE §33-1602(4) (2001); 105 ILL. COMP. STAT. 5/27-3 (2002); IND. CODE §20-3-5-0.5 (2005); KAN. STAT. §72-5308 (2002); KY. REV. STAT. §158.175(2) (2001); LA. REV. STAT. §17:2115(B) (2001); MD. CODE EDUC. §7-105(c) (2001); MASS. GEN. LAWS ch. 71, §69 (2003); MINN. STAT. §121A.11 (2003); MISS. CODE §37-13-7(1) (2001); MO. STAT. §171.021(2) (2003); MONT. CODE §20-7-133 (2001); NEV. REV. STAT. §389.040 (2002); N.H. REV. STAT. §194:15-c (2002); N.J. STAT. §18A:36-3(c) (1999); N.M. STAT. §22-5-4.5 (2001); N.Y. EDUC. LAW §802(1) (2000); N.C. GEN. STAT. §115C-47(29a) (1999); N.D. CENT. CODE §15.1-19-03.1(4) (2001); OHIO REV. CODE §3313.602(A) (1999); OKLA. STAT. tit. 70, §24-106 (2003); OR. REV. STAT. §339.875 (2001); 24 PA. CONS. STAT. §7-771 (1992); R.I. GEN. LAWS §16-22-11 (2001); S.C. CODE §59-1-455 (2000); S.D. CODIFIED LAWS §13-24-17.2 (2002); TENN. CODE §49-6-1001(c)(1) (2002); TEX. EDUC. CODE §25.082 (2003); UTAH CODE §53A-13-101.6 (2000); VA. CODE §22.1-202(C) (2002); WASH. REV. CODE §28A.230.140 (1997); W. VA. CODE §18-5-15b (1999); WIS. STAT. §118.06 (2003).

of Allegiance in public schools does not violate the Establishment Clause. *See* Brief of Texas et al. as *Amici Curiae* in Support of Petitioners, *Elk Grove Indep. Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *available at* 2003 WL 23011472. Subsequently, 30 States joined a similar brief in support of the State of Virginia in *Myers v. Loudon County Public Schools*, a case in which the Fourth Circuit upheld Virginia's recitation statute.

Because the daily, voluntary recitation of the Pledge of Allegiance furthers the high, and nonreligious, purpose of nurturing active citizens who grasp the virtues of patriotic life and appreciate our Nation's distinctive heritage, the *amici* States urge the Court to hold that the practice of reciting the Pledge of Allegiance in public schools is well within the confines of the Establishment Clause.

QUESTION PRESENTED

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

For nearly fifty years, schoolchildren have begun the day reciting the Pledge of Allegiance to “one Nation under God, indivisible, with liberty and justice for all.” 4 U.S.C. §4. Until the previous panel’s unprecedented holding in this case, no court had ever held that the voluntary recitation of the Pledge somehow violates the United States Constitution. Indeed, since the Supreme Court reversed this Court’s decision in *Newdow*, the Fourth Circuit Court of Appeals has expressly upheld Virginia’s recitation statute against the very same First Amendment challenge. *Myers v. Loudon County Public Schools*, 418 F. 3d 395 (4th Cir. 2005).

The district court’s holding with respect to this issue is inconsistent not only with *Myers* but also with the entire body of Supreme Court Establishment Clause jurisprudence. Indeed, virtually every single reference to the Pledge—by the Supreme Court and repeatedly by individual Justices—has confirmed its constitutionality.

From the time of the Founding, our Nation has recognized her religious heritage, and the Constitution has never been understood to prohibit those acknowledgments. From the national motto “In God We Trust” to the House and Senate Chaplains to the frieze of Moses and the Ten Commandments in the Supreme Court, “because of their history and ubiquity, those practices are not understood as

conveying government approval of particular religious beliefs.” *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).

ARGUMENT

America was formed by those fleeing religious persecution. Seeking to forge a land where each person could live and worship God as he or she believed best, the Framers established a country predicated on a simple, yet profound, postulate—declared in the document that gave birth to our Nation:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

From that day forward, the United States has fought to protect the freedom of conscience of all her citizens, while at the same time acknowledging the heritage behind our Nation’s founding. Abraham Lincoln, famously dedicating and consecrating that bloody Pennsylvania battlefield, put it this way:

[T]hat we here highly resolve that these dead shall not have died in vain, 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.

Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

In 1942 we were again at war, and Congress adopted our Nation’s Pledge of Allegiance to the United States flag. H.R. REP. NO. 2047, 77th Cong., 2d Sess., at 1

(1942); S. REP. NO. 1477, 77th Cong., 2d Sess., at 1 (1942). Twelve years later, at the height of the Cold War, Congress amended the Pledge of Allegiance by adding the words “under God.” Act of June 14, 1954, ch. 297, §7, 68 Stat. 249. As amended and in its current form, the Pledge reads: “I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” 4 U.S.C. 4.

The words “under God” were added to the Pledge of Allegiance in an effort to illuminate a key distinction between our government and those of Communist nations. Congressional Committee Reports from the time of the 1954 amendment note, for example, that whereas the Communists were “spiritual[ly] bankrupt[],” S. REP. NO. 83-1287, at 2 (1954), our government recognized the importance of each human “endowed by [God] with certain inalienable rights which no civil authority may usurp,” H.R. REP. NO. 83-1693, at 2 (1954). The Reports also note the great number of similar references to God in historical and patriotic documents throughout our history. H.R. REP. NO. 1693, at 2; S. REP. NO. 1287, at 2.

Despite decades of patriotic acknowledgment of our Nation’s religious heritage in the Pledge of Allegiance—and despite centuries of other similar historical and patriotic acknowledgments of religion by our government—Appellee Newdow successfully challenged the constitutionality of the Pledge of Allegiance’s recitation

before a panel of this Court. *See Newdow v. U.S. Congress*, 292 F.3d 597, 607-12 (9th Cir. 2002), *rev'd*, *Elk Grove Unified Sch. Dist.*, 542 U.S. 1 (2004).² Because that decision was contrary to the Supreme Court's well-settled Establishment Clause jurisprudence, the *amici* States respectfully request that the Court reject its reasoning, and reverse the District Court's injunction.

I. HISTORICAL AND PATRIOTIC ACKNOWLEDGMENTS OF OUR NATION'S RELIGIOUS HERITAGE ARE NOT INCONSISTENT WITH THE FIRST AMENDMENT'S PROHIBITION ON THE ESTABLISHMENT OF RELIGION.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" U.S. CONST. amend. I. Ultimately, both the Free Exercise Clause and the Establishment Clause serve the same end: protecting and promoting religious liberty for all Americans.³

"It has never been thought either possible or desirable to enforce a regime of total separation [between religion and government]." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). Rather, the Establishment Clause ensures government neutrality towards religion. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). That is, government cannot favor religion over nonreligion, and it cannot favor one

2. The previous panel's decision in this case was reversed due to lack of standing. *Elk Grove*, 542 U.S. at 16-18.

3. *Cf. Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

religion over another. *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Abington Township*, 374 U.S. at 226.

At the same time, government cannot “show a callous indifference to religious groups” because “[t]hat would be preferring those who believe in no religion over those who do believe.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment “requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary”). As Justice Goldberg wrote in *Abington Township*,

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion. . . .

374 U.S. at 306 (Goldberg, J., concurring).

The Supreme Court has long held that the Establishment Clause is elastic enough to “permit[] government some latitude in recognizing and accommodating the central role religion plays in our society.” *County of Allegheny v. ACLU*, 492 U.S.

573, 657 (1989) (Kennedy, J., concurring in judgment and dissenting in part). The Constitution does not “require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any.” *Lynch*, 465 U.S. at 673.

As the Supreme Court observed in *Abington Township*,

It is true that religion has been closely identified with our history and government. . . . The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are “earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing]”

374 U.S. at 212–13; *see also Van Orden v. Perry*, 125 S.Ct. 2854, 2859 (2005) (plurality) (quoting same).

Because the District Court’s injunction prohibits the legitimate recognition of the “role religion plays in our society,” and because it constitutes the “hostility” to religion that the Supreme Court has condemned, the injunction irreconcilably conflicts with the Supreme Court’s Establishment Clause jurisprudence. Accordingly, the Court should reverse and vacate the injunction and hold that the historical and patriotic acknowledgment of religion, such as the words “under God”

in the Pledge of Allegiance, is not barred by the First Amendment to the United States Constitution.

A. Because of Their “History and Ubiquity,” Acknowledgments of Religion in Patriotic or Historical Contexts Are Entirely Consistent with the Establishment Clause.

Although Appellee Newdow would contend that the First Amendment prohibits all government acknowledgment of religion, the Supreme Court has squarely rejected such an “absolutist approach” in favor of case-by-case analysis of “whether, in reality, [a challenged practice] establishes a religion, or religious faith, or tends to do so.” *Lynch*, 465 U.S. at 678. Repeatedly, the Supreme Court has cautioned that the Constitution does not “require complete separation of church and state.” *Lynch*, 465 U.S. at 673. The undeniable link between our Nation and her religious foundation is illustrated by the fact that “the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate.” *Id.*, at 674. Although the Supreme Court has struck down some forms of compelled religious practices in public schools, *see, e.g., Abington Township*, 374 U.S. at 223; *Lee v. Weisman*, 505 U.S. 577, 586-99 (1992); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000), it has never applied the same exacting standards to longstanding patriotic traditions that are part of the history and heritage of our Nation.

“Recognition of the role of God in our Nation’s heritage” is heavily reflected in the Supreme Court’s decisions. *Van Orden*, 125 S.Ct. at 2861. For example, in *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983), the Supreme Court held that the Nebraska Legislature’s practice of opening its legislative sessions with a prayer was not an unconstitutional establishment of religion. The Supreme Court explained,

[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, “[w]e are a religious people whose institutions presuppose a Supreme Being.”

Id. at 792 (citation omitted).

Among the “countless other illustrations of the Government’s acknowledgment of our religious heritage,” *Lynch*, 465 U.S. at 677, is the “statutorily prescribed national motto ‘In God We Trust,’” *id.* at 676. And, of course, the Supreme Court begins its own proceedings with the cry, “God save the United States and this Honorable Court.” *See Marsh*, 463 U.S. at 786.

In *Lynch*, the Supreme Court noted that “[o]ur history is replete with official references to the value and invocation of Divine guidance,” including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national

motto “In God We Trust,” the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of the Supreme Court, and regular presidential proclamations for a National Day of Prayer.⁴ 465 U.S. at 673-77. As Justice O’Connor has observed, historical and patriotic 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.

Lynch, 465 U.S. at 693 (O’Connor, J., concurring).

In the many States, likewise, acknowledgments of religious heritage are woven into history and ubiquitous. For example, the Constitution of the State of Texas

4. The extent to which expressly religious and patriotic acknowledgments have been noted by the Supreme Court, without criticism, is well illustrated by the text of President Roosevelt’s 1944 Proclamation of Thanksgiving, quoted at length in *Lynch*:

“[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands. . . . To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.”

465 U.S. at 675 n.3 (quoting Proclamation No. 2629, 9 Fed. Reg. 13,099 (1944) and citing similar proclamations by six Presidents since (Proclamation No. 5098, 48 Fed. Reg. 42,801 (1983); Proclamation No. 4803, 45 Fed. Reg. 75,633 (1980); Proclamation No. 4333, 39 Fed. Reg. 40,003 (1974); Proclamation No. 4093, 36 Fed. Reg. 21,401 (1971); Proclamation No. 3752, 31 Fed. Reg. 13,635 (1966); Proclamation No. 3560, 28 Fed. Reg. 11,871 (1963))).

begins, “Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution.” TEX. CONST. pmbl.; *see also* ALA. CONST. pmbl. (“invoking the favor and guidance of Almighty God.”). A “primary purpose” of Texas’s required school curriculum, in turn, is statutorily prescribed as follows: “to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage.” TEX. EDUC. CODE §28.002(h).⁵ And, the provision requiring districts to lead students in daily, voluntary recitations of the Pledge, *id.* §25.082, directly furthers that purpose. *See also* IDAHO CODE §33-1602(4) (2001); OKLA. STAT. tit. 70, §24-106 (2003).

5. Likewise, in requiring the Alabama Board of Education to adopt a core curriculum, the Alabama Legislature expressly required the State and local school boards to develop “a comprehensive character education program . . . focusing upon the students’ development of the following character traits: courage, patriotism, citizenship, honesty, fairness, respect for others, kindness, cooperation, self-respect, self-control, courtesy, compassion, tolerance, diligence, generosity, punctuality, cleanliness, cheerfulness, school pride, respect for the environment, patience, creativity, sportsmanship, loyalty, and perseverance.” ALA. CODE §16-6B-2 (h) (2001). Recognizing the value of the Pledge in promoting many of these traits, the Alabama Legislature specifically provided that “[e]ach plan of instruction shall include the Pledge of Allegiance to the American flag.” *Id.*; *see also* ALA. CODE §16-43-5 (2001) (“The State Board of Education shall afford all students . . . the opportunity each school day to voluntarily recite the pledge of allegiance to the United States flag.”).

Such patriotic and historical recognitions, manifested throughout the many States, *see supra* note 1, are entirely consonant with the First Amendment. As the Supreme Court explained in *Engel v. Vitale*,

[t]here 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 [conduct prohibited by the Establishment Clause].

370 U.S. 421, 435 n. 21 (1962).

B. Virtually Every Reference to the Pledge of Allegiance—by the Court and Repeatedly by Individual Justices—Over the Decades Has Agreed that the Pledge Is Entirely Consistent with the First Amendment.

The Supreme Court has repeatedly noted with particularity that the reference to God in the Pledge of Allegiance withstands Establishment Clause scrutiny. Illustrating the existence of “an unbroken history of official acknowledgment . . . of the role of religion in American life from at least 1789,” the Supreme Court in *Lynch*, for example, noted—with no hint of criticism—“the language ‘One nation under God’ . . . [in] the Pledge of Allegiance to the American flag.” 465 U.S. at 676. This language, like the national motto “In God We Trust” on United States currency and the frieze of the Ten Commandments in the Supreme Court, serves as an

“illustration[] of the Government’s acknowledgment of our religious heritage” that “help[s] explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause.” *Id.* at 676-78.

The Supreme Court repeated its view that the Pledge of Allegiance survives constitutional scrutiny in *County of Allegheny*, 492 U.S. at 602-03. The Supreme Court stated, “[o]ur previous opinions have considered in dicta the [national] motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.” *Id.* (citing *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring); *see also id.* at 716-17 (Brennan, J., dissenting)).

The opinions of the Supreme Court in *Lynch* and *County of Allegheny* were written or joined by Chief Justice Burger, Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Blackmun, Powell, Stevens, and O’Connor. In addition, individual Justices have repeatedly agreed as well.

For example, Justice Brennan wrote in concurrence in *Abington Township*,

The reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded ‘under God.’ Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln’s Gettysburg Address, which contains an allusion to the same historical fact.

374 U.S. at 304. Likewise, Justice O'Connor has expressed her view that the reference to God in the Pledge of Allegiance "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *See Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (citation omitted).

Other similar references are legion. *See, e.g., Lee*, 505 U.S. at 633-639 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.); *Engel*, 370 U.S. at 449 (Stewart, J., dissenting); *see also Abington Township*, 374 U.S. at 307-308 (Goldberg, J., concurring, joined by Harlan, J.).

Most recently in *Elk Grove*, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas all concluded that the Pledge of Allegiance is constitutional in their concurring opinions. The Chief Justice observed:

As the Court notes in its opinion, "the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: "From the time of our

earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Elk Grove, 542 U.S. at 31 (Rehnquist, C.J., concurring in judgment) (citation omitted).

Justice O’Connor joined Chief Justice Rehnquist’s concurrence and also wrote separately to express her view that the Pledge of Allegiance passes the “endorsement test.” *Elk Grove*, 542 U.S. at 32-45; *see also County of Allegheny*, 492 U.S. at 601, 615. According to Justice O’Connor, the “history and ubiquity” of the Pledge, combined with the “[a]bsence of worship or prayer,” the “[a]bsence of reference to [a] particular religion,” and the “[m]inimal religious content” of the Pledge made it a constitutional example of what she termed “ceremonial deism.” *Elk Grove*, 542 U.S. at 37-42. According to Justice O’Connor, “Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty.” *Id.* at 44.

Justice Thomas’s concurring opinion likewise supports the constitutionality of the Pledge. Although Justice Thomas did not accept the Chief Justice’s effort to distinguish *Lee v. Weisman*, 505 U.S. 577 (1992)—indeed, he concluded that the Pledge would violate the “coercion test” as applied in *Lee*, *Elk Grove*, 542 U.S. at 45-

49 (Thomas, J., concurring in judgment)—Justice Thomas went on to stress that he “believe[s] . . . that *Lee* was wrongly decided.” *Id.* at 49. Thus, Justice Thomas expressly concluded “the Pledge policy fully comports with the Constitution.” *Id.* at 49-54. Thus, all three of the Justices who addressed the merits of the constitutionality of the Pledge of Allegiance in *Elk Grove* agreed that the Pledge is constitutional.

Given that, for decades, virtually every reference to the Pledge by the Supreme Court or by an individual Justice of the Supreme Court has confirmed its constitutionality,⁶ to hold the Pledge unconstitutional would, as Chief Justice Burger directly observed in *Wallace v. Jaffree*, “make a mockery of our decisionmaking in Establishment Clause cases.” 472 U.S. at 88 (Burger, C.J., dissenting).

This case presents the Court with an opportunity to hold unequivocally what the Supreme Court has already recognized repeatedly—that the Pledge’s reference to God is a patriotic acknowledgment of religion entirely permissible under the Establishment Clause. The Court should so hold, and should reverse the District Court’s contrary injunction.

6. *But see Engel*, 370 U.S. at 437 & n.1, 440 n.4, 441 (Douglas, J., concurring) (explaining that, in Justice Douglas’s opinion, legislative chaplains, the use of the Bible for administration of oaths, the use of the GI Bill funds in denominational schools, the national motto “In God We Trust,” federal tax exemptions for religious organizations, the cry “God save the United States and this Honorable Court,” and the Pledge of Allegiance, *inter alia*, are all equally unconstitutional).

II. CENTURIES OF HISTORICAL AND PATRIOTIC ACKNOWLEDGMENT OF RELIGION HAVE NOT THREATENED THE FIRST AMENDMENT'S PROHIBITION ON ESTABLISHED RELIGION.

Our Nation's acknowledgment of her undeniable religious heritage has never posed a threat of the dangers the Establishment Clause was intended to prevent, *see Lynch*, 465 U.S. at 686, and this case presents no exception. As the Supreme Court has noted,

[t]he 'fears and political problems' that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.

Id. (internal citation omitted). The Court should likewise conclude that the decades in which students have recited the Pledge of Allegiance in its current form have not created or tended to create an establishment of religion.

The *amici* States therefore submit that between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role that religion has played in our Nation's history and heritage. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. And

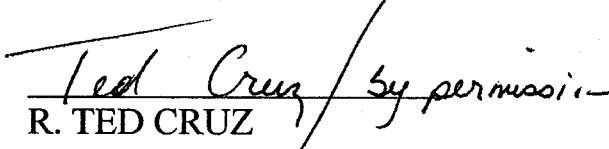
they are constitutional because, rather than establishing religion, such practices are part of “an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch*, 465 U.S. at 674.

CONCLUSION

The *amici* States urge the Court to reverse and vacate the district court's injunction.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas


R. TED CRUZ
Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 474-2697

LAWRENCE WASDEN
Attorney General of Idaho

DREW EDMONDSON
Attorney General of Oklahoma

TROY KING
Attorney General of Alabama

COUNSEL FOR *AMICI CURIAE*

CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that two true and correct copies of Brief of *Amici Curiae* were served via U.S. Certified Mail, Return Receipt Requested, on June 8, 2006, to:

Michael Newdow
P.O. Box 233345
Sacramento, California 95823

Theodore Hirt
U.S. DEPARTMENT OF JUSTICE
Civil Division/Appellate Staff
10th & Pennsylvania Ave., NW
Washington, DC 20530

Craig M. Blackwell
U.S. DEPARTMENT OF JUSTICE
Federal Programs Branch
P.O. Box 883, Ben Franklin Station
Washington, DC 20044

Terence John Cassidy
Michael W. Pott
PORTER SCOTT WEIBERG & DELEHANT
350 University Ave., Suite 200
Sacramento, CA 95925

Derek Gaubatz
1350 Connecticut Avenue N.W., Suite 605
Washington, DC 20036

Anthony R. Picarello
THE BECKET FUND FOR RELIGIOUS LIBERTY
1350 Connecticut Avenue N.W., Suite 605
Washington, DC 20036

Counsel also certifies that on June 8, 2006, Brief of *Amici Curiae*, 15 paper copies thereof, was dispatched to the clerk, as addressed below, via U.S. Certified Mail, Return Receipt Requested:

Cathy Catterson, Clerk of the Court
Office of the Clerk
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Ted Cruz / by permission
R. Ted Cruz

**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

Case No. 05-17257

I certify that:

The brief is

 X Proportionately spaced, has a typeface of 14 points or more and contains 4676 words

or is

 Monospaced, has 10.5 or fewer characters per inch and contains words or lines of text

or is

 In conformance with the type specifications set forth at Fed. R. App. P. 32(a)(5) and does not exceed pages

Ted Cruz / ^{by} permission
R. TED CRUZ
Solicitor General of Texas