Nos. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN ROE and ROECHILD-2, *et al.,*
Plaintiffs-Appellees,
v.
RIO LINDA UNION SCHOOL DISTRICT, *et al.*,
Defendants-Appellants,
and
THE UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellant,
and
JOHN CAREY, ADRIENNE CAREY, BRENDEN CAREY,
THE KNIGHTS OF COLUMBUS, *et al.,*
Defendants-Intervenors-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
Case No. 05-cv-00017

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION

In support of *Defendants-Appellants* and *Defendants-Intervenors-Appellants*
Urging reversal

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. The NLF has an interest, on behalf of its constituents and supporters, in the continued recognition of God in the Pledge of Allegiance. This brief is filed pursuant to the consent of counsel of record for all parties and intervenors.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE REVERSED BECAUSE IT DOES NOT GIVE THE PROPER LEVEL OF DEFERENCE TO *DICTA* OF THE SUPREME COURT OF THE UNITED STATES WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

As explained in the brief of the United States, (Appellant's Opening Brief at 12), this Court should recognize that, because of the United States Supreme Court's decision in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), this Court is not bound by its decision in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2002) (hereinafter *Newdow III*). [1] To put a finer point on the government's argument, this is one of those situations in which a

[1] Following the lead of the district court below, we will refer to the first opinion of the prior Pledge litigation as *Newdow I* and the third opinion (which amended the first) as *Newdow III*; however we will refer to the opinions collectively as the first panel opinion.

panel may overturn a prior precedent of this Court. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*). The panel need not wait for this Court to sit *en banc* to declare the precedent overturned. *Id.*

Therefore, this Court should re-examine the constitutionality of the recitation of the Pledge of Allegiance in the public schools. In so doing, this Court should declare that the first panel's decision on the merits is not bindging and declare the Pledge of Allegiance and its recitation in the public schools constitutional.

The potential difficulty in deciding this case—as was the situation in the first panel opinion—is whether to decide the issue by trying to extend the logic of the Supreme Court's Establishment Clause precedent or by using the Supreme Court's *dicta* regarding the Pledge of Allegiance. Compare *Newdow I,* 292 F.3d 597, 605-12 (9th Cir. 2002) (majority opinion) with 292 F.3d at 612-15 (Fernandez, J., concurring and dissenting). The problem with trying to use the Establishment Clause precedent is that the Supreme Court's application of its Establishment Clause jurisprudence has often been unpredictable, if not illogical. *See Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and "is difficult to apply and yields unprincipled results."). With this type of unpredictable Establishment Clause jurisprudence, this

Court should follow the lead of the dissent in the previous case, *Newdow I*, 292 F.3d at605-612, as amended 328 F.3d 466 (2002), as well as the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992). Following the Supreme Court's *dicta* is the best alternative for this Court. "[A]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court proclaims that a practice is consistent with the [E]stablishment [C]lause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Sherman*, 980 F.2d at 448.

Even the majority opinion in the first panel opinion which the district court in the instant case considered itself bound by, recognized that the United States Supreme Court has stated "in dicta that the presence of 'one nation under God' in the Pledge of Allegiance is constitutional." *Newdow I*, 292 F.3d at 611 n.12. However, the majority did not give deference to the Supreme Court's *dicta*, although it stated that the Supreme Court retains the ultimate authority to decide the issue. *Id.* The question for this Court to resolve—since it is free to re-visit the issue—is whether the first panel gave inadequate deference to the Supreme Court's *dicta*.

Dictum is "[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication . . . ." Michael

Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999). Judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* are opinions expressed in passing and have less persuasive value. *Id.* at 713. Judicial *dicta* are a "court's reasoned consideration and elaboration upon a legal norm" and have much more persuasive authority. *Id.* at 713-14.

In fact some courts, give judicial *dicta* great weight. For example, the Third Circuit Court of Appeals has noted that "[a] . . . distinction has been drawn between 'judicial *dictum'* and '*obiter dictum'*: Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight." *Cerro Metal Prods. v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme courts to be binding precedent: "A Wisconsin court has stated it thus: 'When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.'" Quinn *supra* at 710. (citation omitted).

However, the distinction between *obiter dictum* and judicial *dictum* is not

clear and is beset with many problems. *Id.* at 717-18. Hard and fast divisions "are probably wrong" and can lead to "intellectual chicanery." *Id.* at 730, 776. It is not easy to determine what constitutes judicial *dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. Judicial *dicta*, in which a court has more deliberately considered what it has said to guide future litigation and in which the parties may have briefed the issue, *id.* at 730, rest at the upper end of the continuum. However, it is important under this view to realize that *dicta*, other than that which is technically judicial *dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value.

This Court has placed *dicta* issued by the United States Supreme Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to this Court, Supreme Court *dicta* is to be treated "with due deference." *Id.* One judge of this Court has stated that Supreme Court *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Servs.*, 285 F.3d 864, 877 (9th Cir. 2002) (Fletcher, J., dissenting). Another stated, "[d]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what the Court might hold. We should not blandly shrug it off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992)

(Noonan, J., concurring in part and dissenting in part). This Court, therefore, has placed Supreme Court *dicta* high on the continuum, giving it great weight—even when that *dictum* is not judicial *dictum*. For example, the Supreme Court *dicta* at issue in *Zal* must be considered *obiter dicta*, yet Judge Noonan pointed out the weight they deserved. *See id*.

Another example of this court recognizing the high level of deference given to certain *dicta* is Judge Tashima's concurring opinion in *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003) (Tashima, J., concurring). In that case, Judge Tashima argued that a portion of the *en banc* court's opinion was binding, even though it was *dicta*. *Id.* at 902. He said that when an *en banc* court addresses an issue that is not necessary to the determination of the case in order to give guidance to future panels it is still binding. *Id.* at 903-904.

Certainly, the Supreme Court's *dicta* regarding the Pledge of Allegiance is worthy of even more weight since they are much closer to the judicial *dicta* end of the continuum. While the constitutionality of the Pledge may not have been extensively briefed and argued, the pertinent Establishment Clause test and principles were briefed and argued in all the cases in which the Pledge was used as an illustration. For example, the Supreme Court has stated, "[o]ur 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." *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). The Supreme Court also stated that one's "religiously based refusal" to recite the Pledge should not interfere with the right of others to recite it. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (cited by *Newdow I*, 292 F.3d at 614 (Fernandez, J., concurring in part and dissenting in part)). In fact, three current Justices of the Supreme Court, as well as several prior Justices, have recognized that including "under God" in the Pledge of Allegiance does not impose a danger to society by establishing a theocracy or inhibiting one's religious beliefs. *Newdow I*, 292 F.3d at 614 n.3.

In the first panel opinion the majority dismissed the Supreme Court's *dicta* because the Court has never *directly* addressed the issue and has not applied the Establishment Clause tests to it. *Id.* at 611 n.12. Based on this Court's own precedent, Supreme Court *dicta* should be given great deference. *Baird*, 85 F.3d at 453. The Supreme Court has stated multiple times that the Pledge does not violate the Establishment Clause. *Newdow I*, 292 F.3d at 614 n.3 (Fernandez, J., concurring in part and dissenting in part). Because the Supreme Court has declared the Pledge to be constitutional on multiple occasions, because these cases addressed First Amendment issues, and because the Pledge is so exceptionally important to Americans, the Supreme Court did not make these statements regarding the Pledge without due consideration. Therefore, the first panel opinion

did not give adequate deference to the applicable Supreme Court *dicta*. Since the district court was not bound by that opinion—or at the very least, because this Court is not bound by it—the district court's decision should be reversed to correct this error and to reaffirm this Court's view of the precedential value of Supreme Court *dicta*.

II. THE PLEDGE OF ALLEGIANCE SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE IT FALLS WITHIN PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

In addition to recognizing the judicial *dicta* of the Supreme Court, *Amicus* urges this Court to reverse the district court's ruling and decide the case based on *Marsh v. Chambers*, 463 U.S. 783 (1983). The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace*, 472 U.S. at 63 n. 4 (Powell, J., concurring) (citation omitted). This approach is the valid one for the case at hand.

As Chief Justice Rehnquist noted, "[a]ny deviation from [the Framers'] intentions frustrates the permanence of that Charter and will only lead to . . . unprincipled decisionmaking . . . ." *Wallace*, 472 U.S. at 113 (Rehnquist, J., dissenting).[2] Therefore, the importance of deciding this case in light of history

[2] Similarly, James Madison, the chief architect of the First Amendment, stated that the proper approach to the Constitution was to "resort[ ] to the sense in which the

cannot be overstated. In making its decision, this Court should focus on the historical context, which gave rise to our long tradition of publicly expressing religious sentiments, and not on the religious reference in isolation or even on possible secular aspects of the Pledge's recitation. An inquiry conducted in the light of history will lead inevitably to the conclusion that the Pledge of Allegiance is consistent with the Framers' understanding of the First Amendment.

A. The Pledge of Allegiance Should Be Upheld Because *Marsh v. Chambers* Is the Appropriate Standard under Which This Case Should Be Decided.

We first note that some courts have tried to limit *Marsh* to chaplaincy cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D. Iowa 1985). However, the Supreme Court has never taken such an approach. In *Bowsher v. Synar*, 478 U.S. 714, 723 (1986), a majority of the United States Supreme Court relied upon *Marsh* in deciding that Congress cannot remove executive officers. In *Printz v. United States*, 521 U.S. 898, 905 (1997), the Court used *Marsh* in evaluating "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

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Constitution was accepted and ratified by the nation." *Letter from James Madison to Henry Lee* (June 25, 1824), *in* IX *The Writings of James Madison* 191 (Gaillard Hunt, ed. 1910).

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 enjoin 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), the Ninth Circuit 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).

Based upon what has been presented so far, a skeptic could perhaps say that these courts were simply looking to history in general terms and in completely different, i.e., non-Establishment Clause, contexts and that *Marsh* was just cited as "cover." However, numerous courts have also 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. So for example, *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 County Board 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 Commission*, 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). Also, prior to the Supreme Court's decision in *Lee*, 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 must be governed 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*, some 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;[3] 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,[4] for example*, ACLU 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); *ACLU 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).

Of course, the most significant consideration here is that the Supreme Court

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[3] The court in *Sherman* cited the *Marsh* dissent. *Marsh*'s dissent and its majority opinion are often cited for the same proposition, namely that practices which constitute ceremonial deism pass constitutional muster. Such is the situation here.

[4] In addition to the cases compiled here, in which religious displays were upheld directly under *Marsh*, several courts, in upholding such displays have used *Marsh* to help explain why the displays should pass constitutional muster under the endorsement test. *See, e.g., Ams. United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992); *Okrand v. City of Los Angeles,*

has never overturned *Marsh*, either explicitly or *sub silentio*. The Supreme Court had every opportunity to do so in *Lee v. Weisman*, 505 U.S. 577 (1992), and instead chose merely to distinguish the case. The Court also had an opportunity to overturn the case in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) and *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), but in neither case did it do so.

In *Weisman*, this Court noted *Marsh's* on-going viability and explained why it would not apply *Marsh*. *Weisman,* 505 U.S. at 596. This 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.*

However, the inapplicability of *Marsh* to the peculiarities of graduation ceremonies does not mean that *Marsh* cannot be applied to the issue at hand. Indeed, the *Weisman* Court itself noted that students encounter many things throughout their educational experience with which they would likely disagree. *Id.* at 591. Furthermore, the Seventh Circuit, writing post-*Weisman* noted that

> [t]he diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in

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207 Cal. App. 3d 566, 576-77 (Ct. App. 1989); *Suhre v. Haywood Co.*, 55 F. Supp. 2d 384, 396 (W.D.N.C. 1999).

every classroom.

Sherman, 980 F.2d at 444. Extending *Weisman* to inapplicable contexts would not solve this problem, only confound it. This Court should follow the example of the Seventh Circuit and decline to apply *Weisman* to the instant case. Thus, nothing prevents this Court from concluding that *Marsh* should control this case.

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.

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), the case in which the Ten Commandments monument in the Alabama Judicial Building was challenged. 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, which approved the display of the state motto containing a religious inscription.

In that case, the ACLU 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 currency. *Id.* at 296-301.

Two points stand out about the Sixth Circuit's analysis. The first point is that the *Capitol Square* 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.

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

In 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.[5] 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 stating this approach highlights its failings.

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

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 Pledge, 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). Therefore, the recitation of the Pledge should be upheld and the district court should be reversed.

B. The Pledge of Allegiance Should Be Upheld Because it is Part of a Long-Standing Tradition of Governmental Acknowledgement of the Role of Religion in Society and of God.

The Pledge of Allegiance is part of 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, for instance, that just three days after the First Congress authorized appointment of paid chaplains to open sessions of Congress with prayer, the same Congress 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 at the very seat of government.

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 . . . ." 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 Pledge of Allegiance 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."[6]

- *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."[7]

- *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 . . . ."[8]

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[9]

- *Abraham Lincoln* frequently made public expressions of religious belief. One of many examples is found in a Proclamation he issued on

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[6] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).

[7] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* 210 (W.W. Norton & Co. Pub. 1987).

[8] *See Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Other examples, include: (1) First Inaugural Address, April 30, 1789 (acknowledging "the Almighty 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 . . . .").

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

> 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."[10]

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.[11]

Thus, whether the Pledge of Allegiance 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

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

[11] Furthermore, the above examples serve to show that when the Capitol Square ordered that the New Testament attribution be removed from the Ohio motto display, *Capitol Square*, 243 F.3d at 310, it need not have done so.

constitutional. *County of Allegheny*, 492 U.S. at 670. (Kennedy, J., concurring in part and dissenting in part).

A decision in favor of Mr. Newdow's view would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations, and which continue to this present day. Throughout our nation's history, our government has openly declared its faith in, and reliance upon, God and His favor.

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 light of that history. Acknowledgement of God in the Pledge of Allegiance will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell, or the national motto on our coins.

Thus, this Court should reject 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 the concept of neutrality," *Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny students and teachers at Rio Linda School District this simple acknowledgement of their history and tradition.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the district court.

Respectfully submitted,
This 12th day of June, 2006

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