No. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN ROE and ROECHILD-2,
Plaintiffs-Appellees,
v.
RIO LINDA UNION SCHOOL DISTRICT,
Defendant-Appellant,
&
JOHN CAREY, *ET AL.*,
Defendant-Intervenor-Appellants,
&
THE UNITED STATES OF AMERICA,
Defendant-Intervenor-Appellant.

On Appeal from the United States District Court for the
Eastern District of California
Case No. CV-05-00017-LKK

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANT-APPELLANTS, IN SUPPORT OF REVERSAL

Roy S. Moore
Gregory M. Jones
Benjamin D. DuPré*
Foundation for Moral Law
One Dexter Avenue
Montgomery, Alabama 36104
Telephone: (334) 262-1245
Attorneys for Amicus Curiae *Foundation for Moral Law*
**Counsel of Record*

Jan Roe, et al. v. Rio Linda Union Sch. Dist., et al., 05-17257, 05-17344, 06-15093

CORPORATE DISCLOSURE STATEMENT

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Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

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Benjamin D. DuPré

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions & Statutes

Other Authorities

STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that the phrase "under God" in the Pledge of Allegiance constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of the United States as a nation. The Foundation believes that the government should encourage such acknowledgements of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the school districts' policies violate the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The Defendant school districts' policies concerning voluntary recitation of the Pledge of Allegiance in the classroom ("Pledge policies") in no way violate the Establishment Clause of the First Amendment because the policies do not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the Pledge policies, it becomes evident that the policies and the phrase "under God" in the Pledge do not dictate religion to anyone and do not represent a form of an establishment. The First Amendment was intended to protect religious freedom, but the district court's departure from the constitutional text perpetuates the already inconsistent manner in which the Establishment Clause is applied and foments hostility toward religion by

unnecessarily excising a recognized acknowledgment of God from the public schools.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. __, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring).

> *It does not take an Article III judge to recognize that the voluntary recitation of the Pledge of Allegiance in public school does not violate the First Amendment.*

Newdow v. Congress, 328 F.3d 466, 472 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of reh'g *en banc*).

I. THE CONSTITUTIONALITY OF THE PLEDGE POLICIES SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below made absolutely no attempt to base its determination on the words of the Establishment Clause; instead, it relied completely on this Court's reasoning in *Newdow v. Congress*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow 2003*"). *Newdow v. Congress*, 383 F. Supp. 2d 1229, 1242 (E.D. Cal. 2005) ("*Newdow 2005*") ("Because this court is bound by the Ninth Circuit's holding in [*Newdow 2003*], it follows that the school districts' policies violate the Establishment Clause."). However, the district court was not bound by *Newdow 2003*, first, because the United States Supreme Court nullified that opinion on appeal in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004)

("*Newdow 2004*"),[1] and second, because *Newdow 2003* followed the judicially-fabricated "coercion" test rather than the language of the First Amendment—the true law of the case.

In *Newdow 2003*, this Court correctly began its analysis of whether the Elk Grove School District's Pledge recitation policy was constitutional by quoting the Establishment Clause of the First Amendment to the United States Constitution. *See Newdow 2003*, 328 F.3d at 485. However, this Court quickly abandoned any pretext of examining the Pledge policy's fidelity to those words by, instead, surveying three "tests" used by the United States Supreme Court:

> the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 [(1971)]; the 'endorsement' test, first articulated by Justice O'Connor in her concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 [(1984)], and later adopted by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 [(1989)]; and the 'coercion' test first used by the Court in *Lee* [*v. Weisman*, 505 U.S. 577 (1992)].

Id. This Court then simply selected the "coercion" test as its weapon of choice to strike down the Elk Grove Pledge policy.

> We are free to apply any or all of the three tests, and to invalidate any measure that fails one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test as well.

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[1] To avoid replication of argument, the Foundation wholeheartedly agrees with and herein incorporates the arguments of the Defendant-Appellants in regard to *Newdow 2003*'s lack of precedential value (Section I of both *Briefs of John Carey* et al. and *Brief for the United States*, Section VII of *Rio Linda Union School District's Opening Brief*).

Id. at 487.

The district court erroneously adopted this analysis despite the fact that it recognized that the "test" methodologies invented by the Supreme Court have resulted in "utterly standardless" jurisprudence that leaves district courts "without guidance" for deciding cases involving the Establishment Clause. *Newdow 2005*, 383 F. Supp. 2d at 1244 n.22. To apply a real standard and find the guidance it so desperately sought, the district court should have turned to the document it is sworn to uphold: the United States Constitution.

A. The Constitution is the "supreme Law of the Land."

Our American constitutional paradigm dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id. Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . .

. Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Instead of heeding these truths, the district court below merely adopted the reasoning of this Court from *Newdow 2003* which evaluated the Pledge policies under the guise of the coercion test at the expense of the carefully crafted words of the Establishment Clause.

B. The coercion test and other constitutional counterfeits form a confusing labyrinth that contradicts the text of the Constitution and the history of our country.

Contrary to this Court's pronouncement, the federal courts are not simply "free to apply any or all the three tests" concocted by the Supreme Court to replace the Establishment Clause and then "invalidate any measure that fails any one of them." *Newdow 2003*, 328 F.3d at 487. By adhering to the coercion test and other tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon* and *Lee v. Weisman* is a poor and improper substitute for the concise language of the Establishment Clause.

Experimentation with extra-constitutional tests in Establishment Clause cases began with the *Lemon* Court, which claimed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."). However, jurisprudential experiments with various extra-textual "tests" such as *Lemon* and the coercion test have produced a continuum of disparate results. As Justice Thomas recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application."[2] *Van Orden*, 545 U.S. at

[2] Several courts of appeal have expressed frustration with the difficulty in applying the *Lemon* test. For example, the Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence." *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Seventh Circuit acknowledged that "persistent criticism" has engulfed *Lemon* since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). The Tenth Circuit opined

__, 125 S. Ct. at 2867 (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The federal courts' abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow,"[3] "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. __, 125 S. Ct. at 2866

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that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

[3] Last year alone, in addition to the scathing critique of the district court below, *see Newdow 2005*, 383 F. Supp. 2d at 1244 n.22, courts observed that the Supreme Court's Establishment Clause jurisprudence is: "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); and "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005).

(Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. __, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting).

Indeed, the district court wholeheartedly agreed with the assessments of Justices Scalia and Thomas, stating that it felt "relieved" that it did not have to delve into the Supreme Court's "utterly standardless" Establishment Clause jurisprudence in which "ultimate resolution depends on the shifting subjective sensibilities of any five members of the High Court."[4] *Newdow 2005*, 383 F. Sup. 2d at 1244 n.22. In other words, the district court declined to do its job of interpreting and applying the law to the case because of the confusing mess produced in the field of Establishment Clause jurisprudence by these various, and varying, judicial tests.

Despite its complaints, the district court applied the holding of *Newdow 2003* in this case: that a child's "mere presence in the classroom every day as peers recite the statement 'one nation under God' has a coercive effect" which "enforce[s] a 'religious orthodoxy' of monotheism, and is therefore

[4] The district court also labeled the Supreme Court's pronouncements in this area "boundary-less slippery slope [by which] any conclusion might pass muster." *Newdow 2005*, 383 F. Sup. 2d at 1244 n.22.

impermissible." *Newdow 2003*, 328 F.3d at 488. However, the School Districts' Pledge policies do not violate the Establishment Clause because they are not laws "respecting an establishment of religion." U.S. Const. amend. I. Regrettably, this Court and the district court below chose the amorphous and extra-constitutional impressions of the coercion test over the "bright-line" of the law.

II. THE PLEDGE POLICIES ARE NOT LAWS "RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The Pledge policies do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an establishment of religion."

A. The Definition of "Religion"

In *Newdow 2003*, this Court concluded that reciting "one Nation, under God" in the Pledge of Allegiance is a "religious act" that students are impermissibly coerced to hear because of the Pledge policies.

> In the context of the Pledge, the statement that the United States is a nation 'under God' is a profession of a religious belief, namely, a belief in monotheism. . . . A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion.

Newdow 2003, 328 F.3d at 487. This reasoning erroneously assumes that the country is supposed to be neutral toward religion and that there is no distinction between a "religious act" and a law respecting an establishment of "religion."

1. The neutrality myth

Newdow 2003 assumes that complete neutrality with regard to religion is the goal of the Establishment Clause when the reality is that such a mythic neutrality concerning religion in the public square does not exist and was never intended in our law. Our United States was never intended to be "neutral" toward religion.

The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." Thomas Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). The Declaration of Independence itself states that "all Men are created equal" and are "endowed by their *Creator* with certain unalienable Rights . . . ." *Declaration of Independence* para. 2 (1776) (emphasis added). Like Jefferson, George Washington declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge

[are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853).

"The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). Even the Supreme Court has noted

that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963). In fact, "[t]here is an *unbroken history of official acknowledgment* by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674 (emphasis added); *see, e.g.*, *Van Orden*, 545 U.S. __, 125 S. Ct. at 2861-63 (2005) (listing numerous examples of the "rich American tradition" of the federal government acknowledging God). *See also, Newdow 2004*, 542 U.S. 1, 26 (noting that "official acknowledgments of religion's role in our Nation's history abound," and providing examples) (Rehnquist, C.J., concurring in part and concurring in the judgment).

Given that the United States has never been neutral toward religion, the fact that the Pledge contains some words of acknowledgment of God's vital role in the life of this nation is not the least bit surprising nor is it in contradiction to the Establishment Clause. As the Judiciary Committee in the House of Representatives observed in its 1954 report on why "under God" should be added to the Pledge, "The 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." House of Representatives Rep. No. 83-1693 (1954).

In fact, because of the long-standing religious tradition in America, forbidding the recitation of the Pledge because it contains the phrase "under God,"

rather than achieving neutrality, actually "confers a favored status on atheism in our public life. . . . . [It] creates a distorted impression about the place of religion in our public life. The absolute prohibition on any mention of God in our schools creates a bias *against* religion." *Newdow 2003*, 328 F.3d at 481-82 (O'Scannlain, J., dissenting from denial of reh'g *en banc*). Thus, even if neutrality with regard to religion were possible or desirable, *Newdow 2003* did not achieve that goal.

2. Distinguishing "religion" from the merely "religious"

Newdow 2003's labeling of the recitation of the Pledge as a "religious act" is highly questionable given that the focus of the Pledge is national identity, not ecclesiastical pronouncements.[5] However, even if it is granted that the recitation of the Pledge is a "religious" act, this Court never once explained how one religious act is equivalent to the establishment of a "religion."

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[5] "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." *Newdow 2004*, 542 U.S. at 31 (Rehnquist, C.J., concurring in part and concurring in the judgment).

> If reciting the Pledge is truly 'a religious act' in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem. Such an assertion would make hypocrites of the Founders, and would have the effect of driving any and all references to our religious heritage out of our schools and eventually out of our public life.

Newdow 2003, 328 F.3d at 473 (O'Scannlain, J., dissenting from the denial of reh'g *en banc*). *See also Newdow 2003*, 328 F.3d at 471-482 (same).

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[6] "Religion" was defined as: **"The duty which we owe to our Creator, and the manner of discharging it."** Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed

[6] The U.S. Supreme Court later reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent in *Torcaso v. Watkins*, 367 U.S. 488, 492 n.7 (1961).

both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . .). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[7] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

Everson, 330 U.S. at 13. The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached

[7] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339 U.S. at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship").

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as last year stated that such conflation is erroneous: "Simply having *religious* content or promoting a

message consistent with *religious* doctrine does not run afoul of the Establishment Clause."[8] *Van Orden*, 545 U.S. at __, 125 S. Ct. at 2863 (emphasis added).

The voluntary recitation of "under God" in the Pledge is an acknowledgment of God and His integral role in the life of the nation. The Pledge may contain a "religious" element, but it does not represent a "religion" under the Establishment Clause. Neither the Pledge policies nor the Pledge itself dictate *any* of the duties that students may owe to God or explain how those duties should be carried out; likewise, they do not list articles of a religious faith or the forms of worship for any faith.

This Court in *Newdow 2003* contended that "[a] profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with

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[8]

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989).

respect to religion," and therefore all such statements would violate the Establishment Clause. *Newdow 2003*, 328 F.3d at 487. However, "[w]ith respect to public acknowledgments of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting).

For example, prayers to God have been offered in Congress since its creation under the Constitution; since the Judiciary Act of 1789, federal law has designated that all federal judges take their oaths "So help me God," as do the oaths for military personnel, civil servants, and for citizenship; the national motto is "In God We Trust"; and President Abraham Lincoln's "Gettysburg Address" employed the very same phrase at issue in this case in a national dedication ceremony, stating 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. *See Marsh*, 463 U.S. at 786-789; 28 U.S.C. § 453; 10 U.S.C. § 502; 5 U.S.C. § 3331; 8 C.F.R. 337.1; 36 U.S.C. § 302; Abraham Lincoln, "The Gettysburg Address," Nov. 19, 1863, *reprinted in The Essential Abraham Lincoln* 300 (John G. Hunt, ed. 1993) (emphasis added). Such acknowledgments "exclude" atheism and agnosticism, and yet are permissible under the

Establishment Clause. Thus, the mere fact that the Pledge contains a monotheistic statement does not render it unconstitutional under the Establishment Clause.

In short, the Pledge policies do not fall under the definition of a "religion"; therefore, the district court erred in adopting the conclusion of *Newdow 2003* that the Pledge policies are laws respecting an establishment of "religion." U.S. Const. amend. I.

B. The Definition of "Establishment"

Even if it is assumed that the school districts' Pledge policies are laws that pertains to a "religion" under the First Amendment—which they do not—the school districts cannot be said to have "establish[ed]" a religion through their policies.

On its face, the coercion test captures a key component of the Establishment Clause's meaning: the prohibition on *establishments* of religion. The test holds that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee*, 505 U.S. at 599 (citation omitted). Use of government force to coerce belief in particular religious tenets or participate in the worship of a particular ecclesiastical denomination is characteristic of a government establishment of religion.

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment."[9]

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or

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[9] *See, e.g.*, Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

> We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). For example, in Virginia, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Newdow 2004*, 124 S. Ct. at 2331-32 (Thomas, J., dissenting). In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. __, 125 S. Ct. 2113, 2126 (2005) (Thomas, J., concurring) (citations omitted).

If the coercion test applied the concept of "coercion" in this historically accepted sense, *i.e*., force of law and threat of penalty, then it is clear that the Pledge policies would survive the test's scrutiny. The policies specifically state, "Individuals may choose not to participate in the flag salute for personal reasons," and the school districts allow students who object on religious grounds to abstain from the recitation. *Newdow 2005*, 383 F. Supp. 2d at 1233 n.5. This is in keeping, of course, with *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), which held that forced recitation of the Pledge violates the First Amendment's Free Speech Clause. The students are not compelled by force of the

law to recite "under God" or any other portion of the Pledge of Allegiance, and thus the policies do not implicate the Establishment Clause.

However, in *Lee* the Supreme Court expanded the concept of coercion beyond its plain meaning and historical understanding because, it said, "[l]aw reaches past formalism." *Lee*, 505 U.S. at 595. In discussing the constitutionality of a graduation prayer, the Court claimed that:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593. The Court declared the graduation prayer unconstitutional because "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." *Id*. at 594.

By changing the meaning of government coercion from the use or threat of actual force or the imposition of penalties to the subjective influences of "social pressure" and psychological coercion, the Supreme Court instantly and erroneously redefined the meaning of an "establishment" of religion. It changed the purpose of the Establishment Clause's prohibition from preventing the creation of a national church to "secure[ing] 'the right not to be made uncomfortable' by others publicly expressing their religious beliefs." Vincent Phillip Muñoz, "Doing *Newdow* Justice: The Case for Court Consistency," *National Review*, June 4, 2004,

available at http://www. nationalreview.com/comment/munoz200406091109.asp. This Court in *Newdow 2003* committed the same error by outlawing in public schools the *voluntary* recitation of the nation's Pledge because allegedly "even without a recitation requirement for each child, the mere presence in the classroom every day as peers recite the statement 'one nation under God' has a coercive effect." *Newdow 2003*, 328 F.3d at 488.

Instead of adopting this faulty redefinition through its application of *Newdow 2003* to this case, the district court should have followed the example of the Sixth Circuit in 2001 in *ACLU of Ohio v. Capitol Sq. Review and Advisory Bd*., 243 F.3d 289, 299 (6th Cir. 2001) (*en banc*). That court upheld Ohio's State Motto, "With God All Things Are Possible," against a claim that the Motto was a violation of the Establishment Clause in part by noting that the Motto

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

Id. at 299.

The Ohio Motto was not an "*establishment* of religion," and neither is *voluntary* recitation of the Pledge of Allegiance in schools. The school districts' Pledge policies do not in any fashion represent the setting up of a state-sponsored church, they do not involve the government's power of *real* coercion to force

anyone to believe in any particular religion's beliefs or to join any particular religion, and they do not in any way lend government aid to one religion over another. In short, the Pledge policies do not create, involve, or concern an "*establishment* of religion."

"Establishment," like "religion," clearly has been expanded far beyond its original context. *Amicus* urges this Court to interpret and apply the term "establishment" in its "just and natural" meaning and thus recognize that the Pledge policies do not even remotely entail an "establishment" of religion. U.S. Const. amend. I.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, __ U.S. __, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting). Such a clash exists in this case between *Newdow 2003* and the words of the Establishment Clause. The proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be reversed, and that this Court hold that the school

districts' Pledge policies do not violate the text of the Establishment Clause of the First Amendment.

Dated this 12th day of June, 2006.

Roy S. Moore
Benjamin D. DuPré (Alabama: DUP-006)*
Gregory M. Jones
Foundation for Moral Law
One Dexter Avenue
Montgomery, Alabama 36104
Phone: (334) 262-1245
Fax: (334) 262-1708
Counsel for *amicus curiae* Foundation for Moral Law
**Counsel of Record*

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Benjamin D. DuPré
Counsel for *amicus curiae* Foundation for Moral Law
Dated this 12th day of June, 2006.

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The undersigned hereby certifies that two (2) true and correct copies of this *Brief of* Amicus Curiae have been served on counsel (listed below) for each party, by first-class U.S. Mail, and that an original and fifteen (15) copies of this *Brief of* Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 9th Circuit, by first-class U.S. Mail, on this 12th day of June, 2006.

Service list:

Terence J. Cassidy
PORTER SCOTT WEIBERG & DELEHANT
2350 University Avenue, Suite 200
Sacramento, CA 95825

Jill Bowers
CALIFORNIA DEPARTMENT OF JUSTICE
1300 I Street, Suite 1101
P.O. Box 944255
Sacramento, CA 94244-2550

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

Robert M. Loeb
Lowell V. Sturgill, Jr.
Attorneys, Appellate Staff
Civil Division, Room 9140
U.S. DEPARTMENT OF JUSTICE
601 D Street, N.W.
Washington, D.C. 20530

Michael A. Newdow
FIRST AMENDMIST CHURCH OF TRUE SCIENCE
P.O. Box 233345
Sacramento, CA 92823

Benjamin D. DuPré

STATEMENT OF RELATED CASES

Michael Newdow, counsel for plaintiffs in this action, previously filed a similar suit on his own behalf challenging the constitutionality of a California school district's policy of leading students in the voluntary recitation of the Pledge of Allegiance. The district court dismissed that action on the merits. This Court reversed, *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003), but the Supreme Court reversed this Court's ruling for lack of prudential standing. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004). Counsel for *Amicus Curiae* Foundation for Moral Law are aware of no other related cases within the meaning of Ninth Circuit Rule 28-2.6.