No. 00-16423

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,

Plaintiff/Appellant,

v.

U.S. CONGRESS *et al.*,

Defendants/Appellees

ON APPEAL FROM THE U. S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence is a project of The Claremont Institute for the Study of Statesmanship and Political Philosophy, a non-profit educational corporation that does not have a parent corporation and has never issued shares to the public.

QUESTION PRESENTED

1. Is the expansive interpretation given to the Establishment Clause by the panel compelled by controlling Supreme Court precedent or is it instead an unwarranted extension of that precedent that impermissibly intrudes on the core state function of providing for the health, safety, welfare, *and morals* of the people?

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the principles, at issue in this case, that among the core powers reserved to the states or to the people is the power to further the health, safety, welfare and morals of the people through education, and that all human beings are endowed by their *Creator* with certain unalienable rights. The Institute pursues its mission through academic research, publications, scholarly conferences and, through its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, on the importance—and constitutionality—of public devotion to moral and religious principles as the necessary condition to maintaining liberty and our republican form of government, including Harry V. Jaffa, *Equality and Liberty, Conditions of Freedom*; Larry P. Arnn and Douglas A. Jeffrey, "*We Pledge Allegiance*"—

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties except Plaintiff/Appellant Newdow, who neither consented nor refused consent. Accordingly, a motion for leave to file is being filed simultaneously with this brief.

American Christians and Patriotic Citizenship; Christopher Flannery, *Moral Ideas for America: Educating Americans*; Daniel C. Palm, ed., *On Faith and Free Government*; and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being*."

The Claremont Institute Center for Constitutional Jurisprudence has not previously participated in this case as *amicus curiae* but has participated as *amicus curiae* before the Supreme Court in such other important cases as *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002); *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and that "the giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. Cal. Educ. Code § 52720 (1989) (hereinafter "California

statute").[2] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."[3]

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172). On June 14, 1954, Congress amended Section 172 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the

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[2] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

[3] The court has already ruled that Newdow lacks standing to challenge the SCUSD's rule requiring recitation of the Pledge.

Republic for which it stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998).[4]

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge—compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Rather, Newdow claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's is 'one nation under God.'" Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge and defer any ruling on sovereign immunity. The

[4] Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.

United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. Newdow appealed from that judgment and a panel of this court reversed and remanded the case back to the trial court for further proceedings. The panel held that, in the context of the Pledge of Allegiance, the statement that the United States is a nation "under God" was an endorsement of religion, namely, a belief in monotheism. The panel further held that the school district's practice of teacher-led recitation of the Pledge aimed to inculcate in students a respect for the ideals set forth in the Pledge, and, thus, amounted to state endorsement of those ideals. The panel found that the Pledge adopted by Congress and the school district's policy embracing it failed the Supreme Court's endorsement test, coercion test, and the effects prong of the *Lemon* test for evaluating alleged violations of the prohibition against government establishment of religion. The panel finally held that Congress's addition of the words "under God" to the Pledge, and the school district's policy and practice of teacher-led recitation of the Pledge, were unconstitutional. Defendants-Appellees then petitioned this Court for rehearing en banc.

SUMMARY OF ARGUMENT

The addition of the words "under God" to the Pledge, and the school district's policy and practice of teacher-led recitation of the Pledge, do not violate the Establishment Clause. The people who wrote and ratified the Establishment Clause never intended that it should be read to prohibit a school district or a state from encouraging a profound respect for the Creator who is the source of all our rights. Indeed, the best evidence suggests just the opposite: The Establishment Clause was designed not just to prevent the establishment of a national church but to prohibit the federal government from interfering with state encouragement of religion as the states exercised their core police powers to protect the health, safety, welfare, *and morals* of the people. To hold that the Constitution prohibits the State or school district from allowing the recitation of a pledge that acknowledges the existence of God would ignore the history and intent of the First Amendment and would undermine the efforts of the States to foster the kind of moral virtue the Founders thought essential to the perpetuation of republican institutions.

ARGUMENT

I. The Recitation Of The Pledge Helps Foster An Appreciation For The Principles Upon Which The Nation Was Founded, Including The Principle That Government Is Instituted To Protect The Unalienable Rights With Which We Are Endowed By Our Creator.

The Supreme Court has recognized that the interpretation of the Establishment Clause should "comport with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). A key part of that history includes a substantial role for the public acknowledgment of a "Creator" as the source of "unalienable rights" and the use of religion to support that understanding. This is particularly true in educational settings, for America's founders believed that the education of children was vital to keeping America a free and functioning society. "If a people expect to be ignorant and free," wrote Thomas Jefferson, "they want what never was, and never can be, in the history of the world." *Letter from Thomas Jefferson to Charles Yancey*, (Jan. 6, 1816), *in* 10 THE WORKS OF THOMAS JEFFERSON 493, 497 (P. Ford ed. 1905). James Madison agreed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves

with the power which knowledge gives.

Letter from James Madison to William Barry, (Aug. 4, 1822), *in* MADISON: WRITINGS 790 (J. Rakove, ed., 1999).

But by "education," the Founders did not merely mean the dissemination of the facts of science or history; they meant also the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry, *see* MONTESQUIEU, THE SPIRIT OF THE LAWS 13, 15 (T. Nugent trans., Britannica Great Books 1952) (1748), our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality …." Mass. Const. of 1780, Pt. 1, Art. 3.

Perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be

encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, re-enacted Aug. 7, 1789); *see also, e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties"). Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," *Letter to the Danbury Baptist Association,* Jan. 1, 1802, *in* JEFFERSON: WRITINGS 510 (M. Peterson, ed. 1984), provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA *reprinted in id.* at 125, 273 (1785).

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address, *reprinted in* William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the*

Constitution 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786).

In addition, several of the States explicitly provided for religious education in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require…the several

> towns…or religious societies to make suitable provision at their own expense…for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety…will give the best and security to government ….

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.*, Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature … to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1; Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers

of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis added)).

Given the Founders' views on the subject, the panel's holding that the constitutional amendment those same Founders drafted and ratified mandates the *exclusion* of the words "under God" from a pledge recited in schools is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it hinders rather than fosters the public's appreciation of the principle upon which the very legitimacy of republican government is based, namely, that human beings are endowed *by their Creator* rather than by government with certain unalienable rights. See Decl. Of Independence ¶ 2 (recognizing as a self-evidence truth that all men "are endowed by their Creator with certain unalienable rights").

For most of our nation's history, religion was not barred from the public schools. It was thought to be a necessary component of public education and, indeed, of public life generally. The Establishment Clause of the First Amendment was designed simply to prevent the federal government from establishing a national church—that is, from giving preference by federal law to one religious sect over others with tax funds or otherwise, or from compelling attendance at such a church. It did not prevent non-sectarian prayer in public schools or aid to religion generally. That was an error in interpretation suggested

in dictum by the Supreme Court more than 150 years after the Amendment was ratified but subsequently treated as constitutional gospel. *Everson v. Board of Ed. Of Ewing Township*, 330 U.S. 1, 15 (1947) (erroneously noting that neither a state nor the Federal Government "can pass laws which aid one religion, *aid all religions*, or prefer one religion over another" (emphasis added)).

Certainly, the Founders never intended the Establishment Clause to bar public acknowledgement of the Creator credited by Jefferson himself in the Declaration of Independence as the Source of all our rights. Throughout our entire history, public pronouncements routinely acknowledged our dependence upon God for the good fortune of our nation. In his first official Act as President, for example, George Washington prayed that the "Almighty Being who rules over the universe" would "consecrate" the government formed by the people of the United States. George Washington, *First Inaugural Address* (April 30, 1789), *reprinted in* George Washington: A Collection 460-61 (William B. Allen ed., Liberty Classics 1988). And his proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and

Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness."

Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficient Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late ware, for the great degree of tranquility, union, and plenty, which we have since enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately

instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.

George Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), reprinted in George Washington: A Collection 534-35 (William B. Allen ed., Liberty Classics

1988).

Even Thomas Jefferson, the patron saint of the separation of church and state movement, began the Virginia Statute for Religious Freedom by invoking "Almighty God, "the Holy author of our religion," the "Lord of body and mind." *A Bill for Establishing Religious Freedom*, reprinted in Thomas Jefferson, Writings, 346 (Merrill Peterson, ed., Library of America 1984). Under the panel's expanded interpretation of the Establishment Clause, all of these references to God would constitute an unconstitutional establishment of religion by the very people who drafted and ratified the Establishment Clause.

Supreme Court Justice William O. Douglas acknowledged the Founders' views when, in the 1952 case of *Zorach v. Clauson*, he wrote for the Court: "We are a religious people, whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The very legitimacy of government by consent is based on the self-evident truth articulated in the Declaration of Independence (by Thomas Jefferson, no less) that all men, all human beings, are *created* equal. Decl. of Independence, ¶ 2, 1 Stat. 1. And the very idea that people have rights that precede and are superior to government is based on the self-evident truth articulated in the Declaration of Independence that human beings "are endowed, *by their Creator*, with certain unalienable rights," including the rights to life, liberty, and the pursuit of happiness. *Id*. (emphasis added). This is one of the

first principles of our regime. If our liberties are to be preserved against the encroaching tendencies of government, it is imperative that the next generation be educated with an appreciation of those principles.

This understanding of God as the source of the rights of mankind is thus more than merely of historical interest. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983). Moreover, every one of the original States, and nearly every one of the current fifty, continues to acknowledge God in its constitution. The preamble to California's constitution is typical: "We, the people of California, *grateful to Almighty God* for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Cal. Const. of 1879, Preamble, *reprinted in* Francis Newton Thorpe, 1 The Federal and State Constitutions 412 (William S. Hein & Co., 1993) (1909). The Massachusetts Constitution of 1780 provided for "public instructions in piety, religion and morality" because "the happiness of a people, and the good order and preservation of civil government, essentially depend upon . . . the public worship of God." Mass. Const. of 1780, Pt. 1, Art. 3, *reprinted in* 1 Thorpe 1888, 1889-90. Although Massachusetts eliminated its established church in 1833, its constitution continues to recognize that "the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government." Mass. Const., Amend. XI (ratified Nov. 11, 1833), *reprinted in* 3 Thorpe 1888, 1914,

1922. Indeed, many of the state constitutions recognize that the *public* worship of God is a duty of mankind, even while they expressly protect against formal sectarian establishments and provide for the free exercise of religion. *See, e.g.*, Del. Const. of 1897, Art. I, Sec. 1, *reprinted in* 1 Thorpe 600, 601 ("Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; . . . yet no man shall or ought to be compelled to attend any religious worship");[5] Md. Const. of 1970, Art. 36 ("That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty"); Mass. Const. of 1780, Pt. I, Art. II, *reprinted in* 3 Thorpe 1888, 1889 ("It is the right as well as the Duty of all men in society, publickly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe").

Of course, a state constitution cannot trump the requirements of the federal Constitution. But because of the mechanism by which new states are added to the national union, *see* U.S. Const., Art. IV, sec. 3, we can assess whether Congress viewed state constitutional provisions that invoked God or encouraged public worship as contrary to the First Amendment. The first Congress, comprised of the same elected officials who drafted the First Amendment,

[5] Virtually identical language first appeared in the Delaware Constitution of 1792, Art. 1, Sec. 1, *reprinted in* 1 Thorpe 568.

admitted Vermont as a new State, with a constitution that provided: "every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." Vt. Const. of 1786, Ch. 1, Art. 3, *reprinted in* 6 Thorpe 3749, 3752.

If one looks instead to the time period of the adoption of the 14th Amendment (which is the more relevant time period, given that the 14th Amendment, via the Incorporation Doctrine, is the means by which the Court made the Establishment Clause applicable to the states), the same holds true. Nebraska's Constitution of 1866 contains the following preamble: "We, the people of Nebraska, grateful to Almighty God for our freedom, do establish this constitution." Nebr. Const. of 1866, Preamble, *reprinted in* 4 Thorpe 2349. Even more significantly, the Nebraska Bill of Rights, after recognizing freedom of conscience, contains the following passage, modeled after the Northwest Ordinance:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction.

Nebr. Const. of 1866, Art. I, sec. 16, *reprinted in* 4 Thorpe 2350. The language was repeated *verbatim* in the 1875 constitution, after adoption of the Fourteenth Amendment. *See* Nebr. Const. of 1875, Art. 1, sec. 4, *reprinted in* 4 Thorpe 2361, 2362. These passages are particularly significant because the enabling act for Nebraska specifically required that the state's constitution "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence," and "that perfect toleration of religious sentiment shall be secured." Enabling Act for Nebraska, 38th Cong., 1st Sess., sec. 4, *reprinted in* 4 Thorpe 2343, 2344.

Explicit religious invocations are also found in the "reconstruction" constitutions of the southern states, adopted after passage of the Fourteenth Amendment by Congress as those states were petitioning the same Congress for readmission to the Union. Georgia's 1868 Constitution, for example, "acknowledg[es] and invok[es] the guidance of Almighty God, the author of all good government," in its preamble, even while protecting "perfect freedom of religious sentiment." Ge. Const. of 1868, Preamble; Art. I, sec. 6, *reprinted in* 2 Thorpe 822. The preamble to North Carolina's 1868 Constitution reads like a prayer: "[G]rateful to Almighty God, the sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political, and religious liberties, and acknowledging our dependence upon Him for the continuance of those

blessings to us and our posterity." N.C. Const. of 1868, Preamble, *reprinted in* 5 Thorpe 2800. *See also, e.g.*, Va. Const. of 1870, Preamble, *reprinted in* 7 Thorpe 3871, 3873 ("invoking the favor and guidance of Almighty God"); Ala. Const. of 1867, Preamble, *reprinted in* 1 Thorpe 132 (same).

Thus Congress—the very Congress that adopted the Fourteenth Amendment—saw no Establishment Clause problem with state constitutions that acknowledged God, gave thanks to God, and even encouraged the public worship of God, nor did it see such acknowledgments as inconsistent with the Free Exercise and Establishment clauses of the U.S. Constitution or with comparable clauses in the states' own constitutions.

Nor have subsequent Congress or Presidents. All of the states created out of the Dakota Territory in 1889 were admitted with constitutions containing similar acknowledges of God and similar prohibitions of establishment. The people of Idaho, for example, announced in their first constitution that they were "grateful to Almighty God for [their] freedom," even though the constitution also provided that "no person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent." Id. Const. of 1889, Preamble; Art. 1, sec. 4, *reprinted in* 2 Thorpe 913, 918. Congress admitted Idaho to statehood on July 3, 1990, after finding that the proposed constitution was "republican in form and . . . in conformity with the

Constitution of the United States"—a constitution that had included the Fourteenth Amendment for more than twenty years. *See* An Act to provide for the admission of the State of Idaho into the Union (July 3, 1890), *reprinted in* 2 Thorpe 913, 918.

Wyoming's constitution announced that its people were "grateful to God" for their "civil, political, and religious liberties," even while it declared that "the free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this State." Wy. Const. of 1889, Preamble; Art. 1, sec. 18, *reprinted in* 7 Thorpe 4118. Congress admitted Wyoming to statehood after finding that its constitution was "in conformity with the Constitution of the United States." Act of July 10, 1890, *reprinted in* 7 Thorpe 4111, 4112.

Montana, South Dakota, and Washington were all admitted to statehood in 1889 by Presidential proclamation rather than directly by act of Congress. Before the President was authorized to issue the proclamation of statehood, however, he had to find that their constitutions were "not repugnant to the Constitution of the United States and the principles of the Declaration of Independence." *See* Act of Feb. 22, 1889. Montana's preamble expressed gratitude "to Almighty God for the blessings of liberty" even while the constitution elsewhere barred "preference . . . to any religious denomination or

mode of worship." Mt. Const. of 1889, Preamble; Art. III, sec. 4, *reprinted in* 4 Thorpe 2300, 2301. President Benjamin Harrison found the constitution consistent with the United States Constitution and proclaimed Montana a state on November 8, 1889. *See* Proclamation of Nov. 8, 1889, *reprinted in* 4 Thorpe 2299-2300. Similar provisions are found in the first constitutions of South Dakota and Washington. S.D. Const. of 1889, Preamble and Art. VI, sec. 3, *reprinted in* 6 Thorpe 3357, 3370; Wash. Const. of 1889, Preamble and Art. I, sec. 11, *reprinted in* 7 Thorpe 3973, 3974. Both received Presidential approval. Proclamation of Nov. 2, 1889, *reprinted in* 6 Thorpe 3355-57 (admitting South Dakota to statehood); Proclamation of Nov. 11, 1889, *reprinted in* 7 Thorpe 3971-73 (admitting Washington to statehood).

Even more significantly because of the fight over polygamy and its free exercise of religion overtones, the Utah Constitution of 1895 contained one of the most strongly-worded anti-establishment provisions:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; . . . There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions.

Utah Const. of 1895, Art. I, sec. 4, *reprinted in* 6 Thorpe 3702. Despite this

strong anti-establishment language, the preamble of the same constitution acknowledges that the people of Utah were "grateful to Almighty God for life and liberty." *Id*. President Grover Cleveland accepted Utah to statehood after finding that "said constitution is not repugnant to the Constitution of the United States and the Declaration of Independence." Proclamation of January 4, 1896, *reprinted in* 6 Thorpe 3700.

Neither the President nor Congress found such public acknowledges of God to be contrary to the Establishment Clause, well after adoption of the Fourteenth Amendment, and neither have the courts. These and similar constitutional acknowledgements of God remain in place to this very day, in nearly every one of the fifty states. It is a strange interpretation indeed that would prohibit the very public acknowledgement of God to which so many of the state constitutions give voice. It would be just as strange to interpret the Establishment Clause of the First Amendment in a way that actually prohibits acknowledgement of the very source of the rights claimed by those who oppose the teacher-led pledge, such as that articulated in the Declaration of Independence, yet that is precisely what the panel decision would require.

II. Interpreting The Establishment Clause To Bar The School District From Inviting Students To Recite The Pledge That Acknowledges A Belief In God Is Incompatible With the Supreme Court's Recent Federalism Jurisprudence.

A. Moral Education is a Core Function, Perhaps *The* Core Function, of State and Local Governments.

The Supreme Court's recent federalism decisions further demonstrate the error of the panel decision. As the Court has often acknowledged, the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people. *See, e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. CONST. amend. X; Federalist No. 45 (J. Madison).

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people, and as the discussion in Part I above demonstrates, moral instruction, particularly including the kind of moral instruction fostered by religion, has for most of our nation's history been viewed as an essential component of that core state function. Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important place religion has always played in state efforts to undertake this core police power.

B. Applying An Expansive Interpretation of the Establishment Clause to the States Threatens to Undermine a Core State Police Power to Foster an Appreciation of God as the Source of All Our Rights.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law …" meant precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g., Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2481 (2002) (Thomas, J., concurring); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting); W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when the Supreme Court in *Everson* v. *Board of Ed.*, 330 U.S. 1 (1947), held that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, it merely cited its prior cases incorporating the Free Speech and Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case). *Everson*'s incorporation holding has now been called into question. *See Zelman*, 122 S. Ct. at 2481 (Thomas, J., concurring).

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and, via section 5 of the 14th Amendment, the

Congress, to do the very thing the clause was arguably designed to prevent, namely, interfere with state support of or reliance on religion in the exercise of its state police powers. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see Lopez*, 514 U.S. 549, or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, the Supreme Court has in recent years given renewed attention to the limits of federal power.

This Court need not revisit the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize, as Justice Thomas invited in *Zelman*, that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the Federal government.[6] Such a distinction is

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[6] Although the Pledge was adopted by the Federal government, in this case, it is the State and local governments that have decided to use its language in school. As Judge Fernandez noted in his opinion concurring and dissenting in part from the panel decision, "Congress has not compelled anyone to do anything. It surely has not directed that the Pledge be recited in class; only the California authorities

particularly important in light of the fact that the States rather than the federal government have historically been viewed as the repository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes v. Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the panel's decision were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government (which it is not, for the reasons articulated by appellees before the panel and in their respective petitions for rehearing), the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the 14th Amendment.

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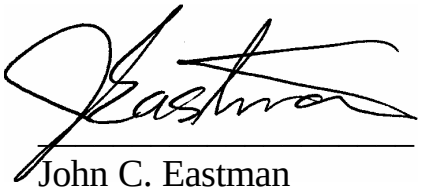
have done that." *Newdow v. U. S. Congress*, 292 F.3d 597, 612 n.2 (9th Cir., June 26, 2002).

CONCLUSION

The petition for rehearing should be granted, the decision of the panel vacated, and the decision of the district court affirmed.

Dated: August 19, 2002

Respectfully submitted,



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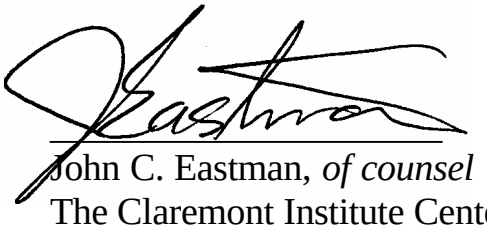
CERTIFICATE OF COMPLIANCE

I certify that the attached amicus curiae brief in support of the petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 6,753 words, less than the 7,000 words permitted under Rule 29(d) of the Federal Rules of Appellate Procedure for amicus curiae briefs on the merits but in excess of the 4,200 words permitted for a petition for rehearing pursuant to Ninth Circuit Rule 40-1. Accordingly, a motion for leave to exceed word limitation is being filed simultaneously.



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I am employed in the County of Orange, State of California. My business address is One University Drive, Orange, California 92866. I am over the age of 18 and not a party to the within action. I served the attached document described as: Brief of Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence In Support Of Petitioners For Rehearing, on interested parties in this action by service to:

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_x__ By U.S. mail on August 17, 2002, in a sealed envelope addressed to the name(s) and address(es) set out above, by depositing with the United States postal service on that same day with postage thereon fully prepaid at Orange, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 17, 2002, at Orange, California

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