NO. 02-1624

In the
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT,
AND DAVID W. GORDON, SUPERINTENDENT, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR SANDRA L. BANNING AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE
TO FILE AN AMICUS CURIAE
BRIEF IN SUPPORT OF PETITIONERS

Sandra L. Banning respectfully moves this Court for leave to file the accompanying *amicus curiae* brief in support of petitioners, the Elk Grove Unified School District. Petitioners have consented to the filing of this brief. Respondent, Michael A. Newdow, has withheld his consent. (Copies of letters granting and withholding consent are on file with the Clerk of this Court.)

Sandra Banning is the mother of the minor child identified as Michael Newdow's daughter and as an unnamed plaintiff in Mr. Newdow's lawsuit challenging the constitutionality of the Pledge of Allegiance. Under the existing custody arrangements, Ms. Banning, not Mr. Newdow, has the right to make ultimate decisions concerning where their daughter goes to school and what education their daughter should receive. Ms. Banning thus has a strong interest in the outcome of this case and seeks leave to file this brief in order to assist the Court in understanding her and her daughter's interests.

In particular, Ms. Banning seeks to make clear that, while she does not object to Mr. Newdow challenging the Pledge in his own name based on injuries (if any) that he himself may have suffered, her daughter has not been harmed in any way. Because Ms. Banning has the right to "make[] the final decisions" concerning the child's upbringing, Mr. Newdow may not override her decisions concerning what is best for her daughter's education or religious upbringing. He also has no right to represent the child in court. Ms. Banning does not want her young child to be involved in Mr. Newdow's personal litigation battles.

Ms. Banning believes that the Pledge is an important patriotic expression of American ideals, and she wishes for her daughter to be able to recite the Pledge at school. Ms. Banning is particularly concerned by the undemocratic nature of the Court of Appeals' decision, which, if permitted to stand, would allow Mr. Newdow to impose his own agenda and particular sensibilities on everyone else.

QUESTIONS PRESENTED

1. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teaches to lead willing students in reciting the Pledge of Allegiance.

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

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INTEREST OF AMICUS CURIAE

Sandra L. Banning is the mother of the minor child at the center of this lawsuit. As such, she has a strong interest in the outcome of this case and its implications for the education of her daughter. Indeed, because Ms. Banning has the right to "make final decisions" concerning the child's upbringing, Ms. Banning has an even stronger interest in this case than Mr. Newdow.[1]

SUMMARY OF ARGUMENT

1. Ms. Banning, not Mr. Newdow, has the right and responsibility to decide ultimately where her daughter goes to school and what education her daughter should receive. It is therefore significant that neither Ms. Banning nor her daughter objects to saying the Pledge. To the contrary, Ms. Banning believes that the Pledge is an important patriotic expression of American ideals that reflects the democratic beliefs of a diverse society. Ms. Banning wants her daughter to appreciate, and participate in, the traditional recitation of the Pledge.

2. The words "under God" in the Pledge, as this Court has consistently recognized, are intended to invoke certain civic ideas, not to establish any religion. These ideas appear and reappear in the most central documents of the American political tradition, which (like the Pledge) recognize the religious beliefs and practices of the American people as an

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[1] Pursuant to Supreme Court Rule 37.6, Sandra L. Banning states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than Ms. Banning and her counsel, has contributed monetarily to the preparation or submission of this brief. A trust fund has been established to help defray the costs and expenses incurred by Ms. Banning in connection with this litigation.

ineradicable dimension of our national history and culture. Because the words "under God" have multiple layers of meaning, citizens of good will with vastly differing religious (and nonreligious) views can share inclusively in the knowledge that the Pledge's recitation recognizes American civic ideals, but in no way conflicts with their own religious traditions.

3. Nullification of the Pledge would be profoundly undemocratic and call needlessly into doubt any number of patriotic exercises that might be construed as offensive to some in the community. Rather than allowing Mr. Newdow to impose his personal religious views on everyone else, this Court's Establishment Clause jurisprudence has reflected a more nuanced approach. The Court should remain true to this well-charted course. Most importantly, the Court should continue assiduously to respect individuals' freedom of conscience, while at the same time protecting the Nation's right to summon up its history and tradition.

ARGUMENT

I. THE COURT SHOULD GIVE PROPER CONSIDERATION TO THE INTERESTS OF MS. BANNING AND HER DAUGHTER IN THE CONTINUED RECITATION OF THE PLEDGE.

Mr. Newdow's lawsuit challenging the constitutionality of the Pledge was brought on behalf of his daughter, purportedly as her "next friend." Compl. ¶ 9. Mr. Newdow lacks authority, however, to sue on his daughter's behalf. The undisputed facts show that Ms. Banning, not Mr. Newdow, has the right and solemn obligation to make final decisions concerning the child's upbringing, including what litigation, if any, to join on her behalf. And neither Ms. Banning nor her daughter objects to saying the Pledge.

Since February 2002, Ms. Banning has been the "sole legal custod[ian]" of her daughter. She alone has had the ultimate right "to make the decisions relating to" her daughter's "health, education and welfare." Cal. Family Code § 3006. By including their daughter as a "next friend" in his challenge to the Pledge without consulting Ms. Banning and against her wishes, Mr. Newdow violated the California Superior Court's custody order. *See* Pet. App. 89.

On September 11, 2003, the California Superior Court issued an oral statement of decision changing the custodial arrangements in a manner that would technically grant Ms. Banning and Mr. Newdow "joint legal custody." *See* Letter from Solicitor General T. Olson to Honorable William K. Suter (Sept. 22, 2003). Yet the court expressly stated that it was *not* awarding the parties joint legal custody as the term is defined in the California Code. The court made clear that, regardless of what "technical title[]" it might use to describe the custody arrangement, Ms. Banning has the right to "make[] final decisions" if she and Mr. Newdow are not able to reach mutual agreement on issues concerning their daughter's upbringing. According to the court, Mr. Newdow is not able to co-parent, as evidenced by his decision to involve the child in his lawsuit without Ms. Banning's consent. (The court has indicated that it intends to issue a written decision setting forth these new arrangements in January or February 2004.)

Ms. Banning nonetheless continues to encourage Mr. Newdow to be a positive influence in his daughter's life. She has consulted with Mr. Newdow on substantial decisions relating to their daughter's psychological and educational needs. *See* Pet. App. 89. She has not sought to prevent Mr. Newdow from spending time with their daughter, or discussing beliefs about religion or politics when he visits.

Where, as here, the two parents are unable to reach agreement with respect to their child's upbringing, however, it is unequivocally Ms. Banning's prerogative and responsibility to decide what is in the child's best interest.

The desirability of their daughter participating in public recitations of the Pledge of Allegiance is a matter on which Ms. Banning and Mr. Newdow have diametrically opposing views. Neither Ms. Banning nor her daughter objects to saying the Pledge in the course of daily patriotic exercises in public school. To the contrary, Ms. Banning has always believed—and has taught her child—that the Pledge embodies an important expression of American ideals. In her view, the Pledge has for half a century been an integral part of the fabric of our society, and reciting the Pledge is rooted in this country's foundational traditions. Ms. Banning considers the Pledge a part of the American tradition of inclusiveness—one that reflects the democratic beliefs of a diverse society. *See* Walter Berns, MAKING PATRIOTS 65 (2001) (Jefferson supported public education to make children "worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens").

Although Ms. Banning is a committed Christian, and intends to raise her daughter in the Christian faith, Ms. Banning does not expect her daughter to be inculcated with religious beliefs through reciting the Pledge at school. Such inculcation properly occurs at home and church. Ms. Banning further understands that her daughter, when she reaches an appropriate age, will decide for herself what religious beliefs, if any, to embrace. Looking forward to that day, Ms. Banning has never stood in the way of Mr. Newdow sharing his own differing views with their daughter.

It is Ms. Banning's expectation that, while her daughter is in grade school, she will be taught about American self-government and will study the civic ideals reflected in central documents of American history, including the Constitution, the Declaration of Independence, and the Gettysburg Address. *See* History-Social Science Content Studies for California Public Schools 10 (1998) (students will be taught "the histories of important … symbols[] and essential documents that create a sense of community among citizens and exemplify cherished ideals") *available at* http://www.cde.ca.gov. Reciting the Pledge provides schoolchildren a cue, as they study American history, to look for the political, social, and intellectual importance of civic events and documents associated with words and phrases such as "one nation," "indivisible," "liberty and justice for all"—and, yes, "under God."

Ms. Banning is profoundly concerned about the undemocratic character of the court of appeals' decision. Mr. Newdow seeks through this lawsuit to force *all* public schools to banish any statement that might be construed as a reference to religious values, no matter how benign, latitudinarian, or important that expression may be to the inculcation of civic virtue. Most immediately, Mr. Newdow would employ his particularistic beliefs to interfere directly with Ms. Banning's wishes that her child participate in traditional patriotic practices. If Mr. Newdow has any right to challenge the Pledge at all, it must be a right grounded in a case brought in his own name and based on injuries (if any) he himself may have suffered. *Cf. Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free … to make martyrs of their children"). Because neither Ms. Banning nor her daughter objects to the Pledge, and because Ms. Banning has the right to make final decisions regarding

her daughter's upbringing, Mr. Newdow should not be permitted to use the child as a surrogate for his *own* private agenda of imposing certain beliefs on the Nation's schoolchildren.

II. THE PLEDGE OF ALLEGIANCE IS A PATRIOTIC EXPRESSION OF AMERICAN IDEALS.

In case after case, this Court has recognized that allowing schoolchildren voluntarily to recite the Pledge is not an impermissible establishment of religion, but a tradition-laden expression of patriotism. The Court has made clear that the Pledge is part of a long-held tradition of recognizing, in an especially appropriate way, the religious beliefs and practices of the American people as an ineradicable dimension of our national history and culture. *See*, *e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). For reasons set forth below, this Court should remain true to this well-charted course. Most importantly, it should continue assiduously to protect individuals' freedom of conscience, while at the same time sustaining the people's right to summon up the Nation's history, tradition, and civic ideals.

A. The Court's Establishment Clause Jurisprudence Has Protected The Nation's Right To Summon Up Its History, Tradition, and Civic Ideals.

This Court has long recognized that religious beliefs and practices are an important aspect of our national history and culture. *See Abington*, 374 U.S. at 213 ("Today, as in the beginning, our national life reflects a religious people"). As

Congress acknowledged when it amended the Pledge in 1954, we are a religious people, and the ideals and fundamental values of liberty, justice, equality, and opportunity expressed in the Constitution are grounded in a shared community of faith. "From the time of our earliest history, our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954).

The values of freedom of conscience and non-establishment of religion derive from a fundamentally religious affirmation. *See Zorach v. Clauson*, 343 U.S. 306, 684 (1952) ("[w]e are a religious people whose institutions presuppose a Supreme Being"). As the Founders understood it, human liberty was not merely a conventional right to be granted or denied according to convenience, interest, or human whim; rather, it was, as Thomas Jefferson put it, a "gift of God"—bestowed on America by a higher power that transcended individuals' narrow or transient self-interests. Thomas Jefferson, *Notes on the State of Virginia* 289 (1781) ("And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"). Hence, the Virginia Statute for Religious Freedom of 1786, which became one of the models for principles enshrined in the First Amendment—and is thus "particularly relevant in the search for the First Amendment's meaning," *McGowan v. Maryland*, 366 U.S. 420, 437 (1961)—begins with a theological point: "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord of both body and mind, yet chose not to

propagate it by coercions on either, as was in his Almighty power to do.…" Because the argument for non-establishment was founded on a profoundly religious conviction, government stays within its sphere of authority and influence not by merely tolerating religious expression in the lives of the Nation's citizenry, but by protecting its free exercise. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000).

Judicial enforcement of these bedrock principles in no wise prevents government from taking into account the centrality, vitality, and diversity of religion in American life. *See Abington*, 374 U.S. at 305-06 (Goldberg, J., concurring) (the Constitution prohibits a "brooding and pervasive devotion to the secular"). The Court has therefore protected the Nation's right to "recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Marsh v. Chambers*, 463 U.S. 783, 810-11 (1983) (Brennan, J., dissenting). The Court has upheld, for instance, the practice of opening legislative sessions with prayer because that practice has "become part of the fabric of our society." *Marsh*, 463 U.S. at 792; *see also Lynch*, 465 U.S. at 680; *Allegheny*, 492 U.S. at 598.

To be sure, the Court has taken a more cautious approach in cases involving prayer in public schools. *See Santa Fe*, 530 U.S. at 290; *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Engel*, 370 U.S. at 421. Specifically, the Court has found violations of the Establishment Clause where (i) state officials themselves "direct the performance of a *formal religious exercise*," *Lee*, 505 U.S. at 586 (emphasis added); *see also Marsh*, 463 U.S. at 810 (Brennan, J., dissenting) ("prayer is fundamentally and necessarily religious"), or (ii) a student-directed prayer has "the improper effect of coercing those present to

participate in an act of religious worship," *Santa Fe*, 530 U.S. at 312. But in all such cases, the government "invalidated legislation or governmental action on the ground that a secular purpose was lacking," and "concluded [that] there was no question that the statute or activity was motivated *wholly by religious considerations*." *Lynch*, 465 U.S. at 680 (emphasis added). Hence, while the Court has invalidated state statutes requiring the posting of the Ten Commandments on public classroom walls, *see Stone v. Graham*, 449 U.S. 39 (1980), it has emphasized in doing so that the Commandments were posted "purely as a religious admonition, not integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Lynch*, 465 U.S. at 679 (internal quotations omitted).

B. The Pledge Of Allegiance Serves Compelling Governmental Interests And Is Not A Prayer Or Affirmation Of Religious Belief.

Application of these fundamental principles condemns the Court of Appeals' decision. Contrary to the Ninth Circuit's reasoning, the words "under God" in the Pledge are not reasonably construed as "an attempt to enforce a 'religious orthodoxy' of monotheism." Pet. App. 13. Nor can they be construed as a prayer or affirmation of religious belief. *Cf. Santa Fe*, 530 U.S. at 306-07.

The Pledge is what it purports to be—a patriotic statement of allegiance to country and flag. Indeed, no one can dispute that the Pledge itself is not intended to advance religion or particular religious beliefs. As this Court has long recognized, the Pledge has "very strong secular components and traditions." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). Moreover, the inclusion of the

words "under God" does nothing to alter the essential character or purpose of the Pledge. The words are transcendent and inspirational. They seek to connect a citizen's allegiance to country with her allegiance to her own conception of the absolute and the divine—whatever that conception might be. But just as surely, the phrase in no wise prescribes state-approved forms of religious belief, or turns the Pledge from a patriotic proclamation into a prayer. *See Lynch*, 465 U.S. at 680 (it is improper to "[f]ocus exclusively on the religious component of any activity"); *see also Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (Thomas, J., concurring) (erecting a cross may in certain contexts constitute political, not religious, speech). Most importantly, so far as the Ninth Circuit record shows, the Pledge has never "been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95.

When the Pledge is understood in context, and with a proper appreciation for American history and traditions, no reasonable observer would view the words "under God" as government endorsement of religion, government disparagement of religion, or a type of encoded religious message. *See Santa Fe*, 530 U.S. at 308 (one relevant question is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools") (internal citations omitted); *Allegheny*, 492 U.S. 630-31 (O'Connor, J., concurring) (applying reasonable observer test); *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring) (same). To the contrary, the acknowledgment of "God" in the Pledge serves, "in the only ways reasonably possible" in light of our shared religious history and civic ideals, "the legitimate secular purposes of solemnizing" a patriotic tribute to our Nation, "expressing confidence in the

future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). The Ninth Circuit's conclusion that the Pledge carries religious and exclusionary overtones is simply not sustainable in light of a proper understanding of American history and the connotations and denotations of the word "God" as used in the context of the Pledge.

1. The Words "Under God" Have Been Used Throughout The Nation's History For Concepts In Every Sense Secular.

The words "under God" were added to the Pledge not to promote traditional or nontraditional religious beliefs, but rather to "textually reject the communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, at 2; *see also* S. Rep. No. 1287, at 2. In amending the Pledge, Congress thus drew upon a phrase that has a long and meaningful association with the great statesmen and events in the Nation's history. In particular, Congress invoked imagery linked for centuries with America's foundational belief in the dignity of every individual. Nor was this resort to referencing the Divine in any manner novel or improper. From "colonial times through the founding of the Republic and ever since," the governmental use of such imagery for secular ends has freely "coexisted with the principles of disestablishment and religious freedom." *Marsh*, 463 U.S. at 786.

As Justice Brennan noted almost twenty years ago, the words used in the Pledge should be understood not as conveying some fixed "religious content," but rather as a vehicle for "inspiring commitment" to American ideas and ideals. *Lynch*, 465 U.S. at 716-17 (Brennan, J., dissenting); *see also West Virginia v. Barnette*, 319 U.S. 624, 634 n.14 (1943) (suggesting that the words in the Pledge are

"descriptive" not of the "present order," but of an "ideal"). Reciting the Pledge, like singing the national anthem, reciting the Declaration of Independence, memorizing the Gettysburg Address, or studying the numerous state Constitutions making reference to God, does not indoctrinate schoolchildren with religious beliefs. To the contrary, the words in the Pledge are a means of invoking certain civic ideas that are common to—and peacefully coexist with—a diverse spectrum of traditional and nontraditional belief in matters of religion. Among others, these ideas include the notion (i) that there is inherent dignity in each and every person and that government has no just authority to invade that dignity; (ii) that there is a superhuman ordering to human affairs, which governs the destiny of nations; (iii) that citizens should commit themselves to the interests of their country and their fellow citizens beyond what might be required by their own narrow sphere of self-interest. These ideas appear and reappear in the most central documents in the American political tradition. To purge these documents of their religious allusions and cadences would be to strip our history of many memorable descriptions of and telling reflections on American self-government.

The phrase "under God" was familiar to Americans long before the 1954 amendments to the Pledge; Congress self-consciously borrowed that phrase from Abraham Lincoln's Gettysburg Address, which has been memorized by schoolchildren from generation to generation. *See* 100 Cong. Rec. 7764 (1954) (statement of Rep. Rodino) ("These two words are … taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America"). In the Gettysburg Address, Lincoln famously proclaimed 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." *Address Delivered at the Dedication of the Cemetery at Gettysburg* (Nov. 19, 1863), reprinted in ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS (Roy P. Basler, ed., 1946) (emphasis added).

By inserting the words "under God," Lincoln did not transform a presidential address into a presidential prayer. Indeed, Lincoln has been variously described by those who knew him as being, at different periods in his life, a Deist, a Freethinker, and "at times, an atheist." *See* Edmund Wilson, PATRIOTIC GORE 99-106 (1962); Allen C. Guelzo, ABRAHAM LINCOLN: REDEEMER PRESIDENT 152-53 (1999).

Notwithstanding Lincoln's own very personal style in religious matters, the Gettysburg Address, like many of Lincoln's speeches, brims with references to God. As historians have noted, Lincoln believed that "the perpetuation of the free government established by the American Revolution depended on [a] patriotic law-abidingness and called on both politician and preacher to promote this 'political religion.'" Lucas E. Morel, LINCOLN'S SACRED EFFORT 2 (2000) (quoting *Address Before the Young Men's Lyceum of Springfield, Ill.* (Jan. 27, 1838)). "Democracy was to Lincoln a religion, and he wanted it to be in a real sense the religion of his audience." ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 42.

In crafting the Gettysburg Address, Lincoln combined elegiac themes with patriotic ones, "skillfully blending the hope of eternal life with the hope of eternal democracy." *Id*. It was no accident that, as Lincoln commemorated the history of American democracy and looked towards an uncertain future, "his words and allusions began, in his very first sentence, calling to mind a haunting phrase out of the Old Testament: 'the days of our years are three score and

ten,' and with it the symbolic act of consecration traditionally observed of old by Hebrew and Christian, dedicating their children to the service of God." *Id.* Lincoln used this allusion not for religious purposes, but to convey a pointed political message that he considered the nub of his disagreement with the Confederacy: "Fourscore and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty, and *dedicated to the proposition that all men are created equal.*" *Id.*

By using religious imagery to invoke quintessentially American ideals, Lincoln was continuing a tradition reaching back to Jefferson and the Declaration of Independence. Lincoln drew from the Declaration the "self-evident" truth that all persons "are endowed *by their Creator* with certain inalienable rights." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). The Declaration's purpose, of course, was to explain to a "candid world" how these God-given rights could authorize America's citizens to shake off old forms of government and assume the "equal station to which the Laws of Nature and of *Nature's God* entitle them." *Id.* (emphasis added).

Like Lincoln, the author of the Declaration was seen by many contemporaries to be at best ambiguous in matters of religious faith. *See* Daniel L. Dreisbach, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 18 (2002) ("Federalists vilified [Jefferson] as an unreformed Jacobin, libertine, and atheist"). To this day, Jefferson is often authoritatively described as a "deist." Nonetheless, Jefferson frequently referred to God and the divine in his speeches and writing. In his first inaugural address, Jefferson acknowledged an "overruling Providence," and then stated: "And may that Infinite Power which rules the destinies of the universe, lead our councils to

what is best, and give them a favorable issue for your peace and prosperity." Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801).

Like Lincoln, Jefferson was attuned to the indelible link between religious beliefs and the American experiment in self-government. Although he originated the metaphor of a wall of separation between church and state, Jefferson did not hesitate to make known that he had "sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man." Dreisbach, *supra*, at 41 n.48 (quoting a Letter from Jefferson to Benjamin Rush (Sept. 23, 1800)); *see also* James H. Hutson, *Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined*, 56 WM. & MARY Q. 775 (1999) (discussing the meaning behind Jefferson's wall-of-separation metaphor); Philip Hamburger, SEPARATION OF CHURCH AND STATE (2002) (same). Likewise, when asked to design an official seal for the United States, Jefferson, along with Benjamin Franklin, proposed the slogan, "Rebellion to Tyrants is Obedience to God." For the image on the seal, "[b]oth men suggested a familiar Old Testament episode that was a transparent allegory for America's ordeal, the account in the book of Exodus of God's intervening to save the people of Israel by drowning Pharoah (George III) and his pursuing armies in the Red Sea." James H. Hutson, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 51 (1998).

This centuries-old tradition—initiated by Jefferson and his contemporaries, and then extended by the "political religion" Lincoln invoked at Gettysburg—has remained central to American self-government in modern times. Most importantly, in his struggle against racial injustice, Martin Luther King, Jr., repeatedly returned to this same type of

imagery, including stirring invocations of God and divine ideals.

Dr. King's "I Have a Dream" speech, also recited by America's schoolchildren, begins with an intentional echo of Lincoln's Gettysburg Address and its timeless imagery: "Fivescore years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation. This momentous decree came as a great beacon light of hope to millions of Negro slaves who had been seared in the flames of withering injustice." *I Have a Dream* (Aug. 28, 1963), in A TESTIMONY OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 217 (James M. Washington ed., 1986). Like the Gettysburg Address, King's speech is not a prayer, but a political proclamation meant to prick the consciences of all Americans, regardless of religious persuasion. Like Lincoln before him, King concluded with a stirring peroration that, expressly invoking God, has come to be regarded as a canonical statement of American civic religion:

> And when we allow freedom to ring, when we let it ring from every village and hamlet, from every state and city, we will be able to speed up that day when all of *God's* children—black men and white men, Jews and Gentiles, Catholics and Protestants—will be able to join hands and to sing in the words of the old Negro spiritual, "Free at last, free at last; thank *God Almighty*, we are free at last."

Id. (emphasis added).

Dr. King's speech captures American patriotism at its core—what King himself described as a "deep and courageous determination to cast off the imprint of the past and become a free people." A TESTIMONY OF HOPE 377. Not surprisingly, Dr. King connected his movement to the

American tradition of watershed figures like Lincoln and Jefferson. King emphasized that "[i]f the problem [of discrimination] is not solved, America will be on the road to its self-destruction. But if it *is* solved, America will just as surely be on the high road to the fulfillment of the Founding Fathers' dream, when they wrote: 'We hold these truths to be self-evident….'" *Id*. (emphasis in original).

Further examples from other eras could be summoned forth, but the fundamental lesson to be gleaned from this distinctly American tradition is this: Any "reasonable observer" modestly acquainted with American history will understand that "under God" in the Pledge is intended to evoke America's civic and patriotic beliefs—not to steer individuals to preferred denominations of religious belief or even to religion itself. Erasing God from the Pledge would not make it more or less religious; but such surgery would set the judiciary full against our traditions and cut off our present and future from the most inspiring episodes of our past.

2. Permitting The Words "Under God" Allows For Broad Accommodation Of Religious And Nonreligious Beliefs.

Instead of interpreting "under God" in light of the Pledge's purposes and its roots in America's most prominent figures and sacred documents, the Ninth Circuit read those words wholly divorced from the Pledge's history. This attempt at "plain meaning" interpretation caused the court to veer into playing amateur philosopher, contending that "under God" constitutes on its face "the statement that the United States is a nation 'under God' is a profession of religious belief, namely, a belief in monotheism." Pet. App. 12.

The Ninth Circuit's philosophical detour was doomed to failure from the start. *First*, and most obviously, the Ninth Circuit erred by attempting to discern a plain meaning understanding of "under God." It should have been apparent that any phrase as pregnant as "under God" cannot be confronted, understood, and interpreted as if it were some garden-variety administrative regulation. Committed believers, Ms. Banning included, are called to prayerful reflection over what it means to live *their* lives "under God." In sharp contrast, the Ninth Circuit gave remarkably short shrift to quite similar words and ideas that—even allowing for fundamental differences between civic and religious interpretation—overflow with sententious meaning.

Second, even assuming that interpretation divorced from history and purpose were possible (it is not), the Ninth Circuit committed the further error of assuming that plain language (as opposed to understandings rooted in the Pledge's history and purposes) leads to interpreting "under God" as a profession of "religious belief" in "monotheism." A brief survey of possible connotations of the word "God" in monotheistic, polytheistic, and atheistic traditions shows instead that the word "God," judging solely according to the lights of plain meaning, has important significance for adherents to all of these belief systems. *Cf.* Bernardino M. Bonansea, God and Atheism 5 (1979) ("there is no agreement among authors as to the initial definition of God"). Such a survey establishes, most importantly, that citizens of good will with widely differing traditional and nontraditional views in religious matters can be comfortable joining in recitations of the Pledge—including the words "under God"—as a means of recognizing American civic ideals.

Polytheism versus Monotheism. Although the Ninth Circuit assumed that the formulation "under God" is not readily conformable to a broad spectrum of traditional polytheistic (as opposed to monotheistic) systems of belief, it cited no record evidence for this conclusion. The Ninth Circuit appeared to overlook, for instance, the known fact that deities or "Gods" have recognized responsibilities in polytheistic belief systems. Most importantly, polytheistic belief systems tend to recognize the role of one particular God as a protector of the polity. The goddess Athena was believed by ancient Greeks to be the protector of Athens. Marduk in the Babylonian pantheon was the protector of the city of Babylon. Moreover, polytheistic belief systems often posit and accept certain unopposable forces—such as the cruel fate that drove Oedipus to kill his father and marry his mother—that are frequently analogized to theistic elements in monotheistic religions. The upshot is that, for all the Ninth Circuit knew, a true polytheistic believer and American citizen might be perfectly comfortable assigning to either benevolent fate or some particular god the role of guiding and care and intercessions for the American polity, just as some Christian communities recognize particular saints as patrons of particular nations. The Ninth Circuit merely assumed, without any record foundation, that a reasonable polytheist would find the wording of the Pledge exclusionary.

Atheism versus Monotheism. While professing concern for hypothetical polytheists, the Ninth Circuit was more concerned about the living and breathing atheist before it, Mr. Newdow. What the Ninth Circuit failed to understand, however, is that the words "under God"—in the context of a *civic* profession of allegiance—are also linguistically reconcilable with most, perhaps all, of the most important atheistic traditions of modern times.

Throughout history, individuals who have rejected the notion of a personal God, as understood in Judaism and Christianity, have nonetheless been comfortable employing the word "under God" in describing their belief systems. *See* Vincent P. Miceli, S.J., THE GODS OF ATHEISM xiii-xvii (1971) (arguing that atheism's vigor arises from a will to create a "New God" in the place of the "True God"). Georg Hegel, for example, considered himself to be a believer in God and frequently used the term. *See* Hegel's Logic, Being Part of The Encyclopedia of The Philosophical Sciences 9 (W. Wallace trans., Oxford Univ. Press 1975) (1830) ("God is actual"). Mainstream Christians nonetheless perceive Hegel as the patriarch of the most virulent strands of modern atheism. *See* Miceli, Gods of Atheism 23-24. Likewise, atheism's close cousin, pantheism, rejects the Judaic and Christian conceptions of God, preferring instead to identify God with the universe. *See* J.J.C. Smart & J.J. Haldane, Atheism and Theism 16 (1996) ("pantheism differs from ordinary atheism only in that the pantheist expresses certain emotions towards the universe that the atheist does not"). Benedict de Spinoza, the recognized father of modern pantheism, was nevertheless described in his lifetime as both "a God-intoxicated man" and "a hideous atheist." *Id*. at 15; *see also* Roger Scruton, Spinoza 6-20 (1999). Notable modern thinkers, like Albert Einstein, have also embraced conceptions of both God and atheism. Einstein saw no contradiction in laying claim to a belief in God (and to be religious), while at the same time "clearly identif[ying] himself as an atheist." *See* Michael R. Gilmore, *Einstein's God: Just What Did Einstein Believe About God?*, 5 Skeptic 62 (1997); *see also* Albert Einstein, The World As I See It 24-29 (A. Harris trans., Citadel Press 1995) (1956).

The phrase "under God" can therefore be reasonably construed as conformable to beliefs held by influential

atheist thinkers and found in prominent atheist thought. Indeed, even the Universal Life Church, of which Mr. Newdow is a legally ordained minister, teaches that "[e]very person has the inherent *God-given* right (and responsibility) to peacefully determine what is right." (*See* Addendum (emphasis altered).) It further promises that "[t]he Universal Life Church will not stand between *you and your God* and recognizes that each person must choose his own path." (*See id*. (emphasis in original).) On the level of plain meaning, then, the terms "God" and "under God" are readily conformable to a wide spectrum of "atheistic" belief—including those of Mr. Newdow's own "church."

Concededly, the question whether *every* thinking citizen must, as a matter of logic, believe in some conception of God—as the *ne plus ultra* of their belief system—is one of theological nicety. Arguably, some conception of God is discernable even in the self-professed nihilists who, in Justice Holmes's memorable rendering, "get[] upon a pedestal and profess[] to look with haughty scorn upon a world in ruins." O.W. Holmes, Collected Legal Papers 315 (1952) (1920). But even assuming that such nihilists cannot assimilate "under God" into their own world view, the solution in a free society is found in *West Virginia v. Barnette*, which makes clear that whether to say the Pledge (or the words "under God") is optional. *See* 319 U.S. 624 (1943), *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("The mere fact that the petitioner's religious practice is burdened" does not mean that an "exemption accommodating his" beliefs must be granted). Such an approach is far preferable to the gross Establishment Clause violation that would occur if the Court were to allow the most fastidious of skeptics to censor the civic discussion, debate, and ceremonies of the vast and diverse majority of American citizens. *See Lynch*, 465 U.S. at 692 (government

must not communicate a message of "endorsement *or disapproval* of religion") (emphasis added).

Finally, the Ninth Circuit's plain-language approach also failed to grapple with the most important lexicographical evidence. The Oxford English Dictionary, for instance, defines "God" using varied—and opposing—meanings. "God" is defined not only "[i]n the specific Christian and monotheistic sense," as "the Creator and Ruler of the Universe," but also "[i]n the original pre-Christian sense, and uses thence derived," as "an image or other artificial or natural object … which is worshipped, either as the symbol of an unseen divinity … or as itself possessing some kind of divine consciousness and supernatural powers." The Compact Oxford English Dictionary 639 (1989); *see also* The Oxford Dictionary of World Religions 378 (J. Bowker ed., 1997).

The Court of Appeals thus fundamentally erred in thinking that "under God" is "identical, merely as a matter of English usage, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' and nation 'under Zeus,' or a nation 'under no god'." Pet. App. 12. As used in ordinary English diction, "God" is not an unambiguous proper noun used for naming a specific deity, like Vishnu or Zeus; instead, "God" can be used as an appellative—a common noun that expansively embraces varying things, including, here, widely varying conceptions. *See* Oxford English Dictionary 640 ("as the God of philosophy, of pantheism, of Judaism"). Moreover, this critical distinction between "God" as a proper noun and "God" as a common noun—though overlooked by the Ninth Circuit—has been recognized from the very Founding. As Benjamin Franklin put it, "[w]e have in our Language no *proper Name* for God; the Word *God* being a common or general Name, expressing

all chief Objects of Worship, true or false." Benjamin Franklin, *A New Version of the Lord's Prayer* (1768) (emphasis added), *reprinted in* The Papers of Benjamin Franklin 301 (W. Wilcox et al. eds., 1959).

In short, the Ninth Circuit simply assumed—without specific citations to record evidence—that "under God" coveys a judgment against atheism merely as a matter of language. What the court should have seen is that this particular phrasing, divorced from its historical context and civic purposes, neither unambiguously affirms nor unambiguously disparages most nontraditional (even atheistic) belief systems.

3. Government Has Compelling Interests In Including The Words "Under God" In The Pledge.

The Ninth Circuit lapsed into error by "focus[ing] exclusively," *cf. Lynch*, 465 U.S. at 680, on language divorced from the interpretive lodestars of history, context, and purpose. Specifically, the Ninth Circuit failed to appreciate both the history of the Pledge and the function it serves in our Nation. Acknowledgment of "God" in the Pledge serves "in the only ways reasonably possible," "the legitimate secular purposes of solemnizing" a patriotic tribute and "expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). The concept of a nation "under God," while perhaps elastic in any purely linguistic analysis, has both concrete meaning and an essential political role, once viewed in light of American history and the civic purposes the Pledge is intended to serve.

Above all, the acknowledgment of "God" in the Pledge serves "in the only ways reasonably possible" to remind each

and every American of (at least) three tenets of American civic religion—all traceable to statements, made in close proximity to references to the Divine in the Declaration of Independence. These tenets include beliefs (i) that there is inherent dignity in each and every person and that government has no just authority to invade that dignity, *see The Declaration of Independence* para. 2 ("all men are created equal … they are endowed by their Creator with certain unalienable Rights"); (ii) that there is a superhuman ordering to human affairs, which governs the destiny of nations, *see id*. para. ("with a firm reliance … on divine Providence"); and (iii) that American citizens should commit themselves to the interests of their country and their fellow citizens beyond what might be required by their own narrow sphere of self-interest, *see id*. ("for the support of this Declaration … we mutually pledge to each other our Lives, our Fortunes and our sacred Honor").

The "under God" of the Pledge thus refers not to the Ninth Circuit's linguistic abstractions, but to a concrete system of American belief. The "God" referred to in the Pledge, purely as a matter of civic religion, asks every American generation to stand ready to protect, at the cost of great sacrifice in "Lives," "Fortune," and "sacred Honor," mankind's inalienable rights. With the certain knowledge that Americans will time and again be asked to sacrifice narrow self-interests for higher ends, the United States clearly has compelling interests in directly connecting, through the Pledge, the high ideals of the Nation and the corresponding duties of its citizenry.

C. Interpreting The Pledge As Consistent With The Widest Spectrum Of Religious Beliefs Is Consistent With Settled Precedent.

This Court has long held that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987)). It has held in particular that the Establishment Clause is flexible enough to allow a "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 669-70 (2002) (O'Connor, J., concurring). Federal and state officials thus enjoy leeway, through the give-and-take of representative democracy, to experiment with laws designed to serve regulatory goals, yet accommodate religious beliefs and practices. *See Walz*, 397 U.S. at 669.

Where, as here, Congress has attempted to accomplish compelling government purposes while at the same time accommodating religious beliefs, the Court has often construed Congress's intent broadly to accommodate any "sincere and meaningful belief" parallel to a belief in an orthodox God. *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163 (1965). The Court has thus avoided distinguishing between those "who believe[] in a conventional God as opposed to those who [do] not." *Welsh*, 398 U.S. at 338; *Seeger*, 380 U.S. at 185.

The Court has taken a different approach, however, in narrow circumstances where it has permitted courts to carve out judicial exceptions to generally applicable laws. *See Employment Div., Dep't of Human Res. of Or. v. Smith*, 494

U.S. 872 (1990); *Braunfeld v. Brown*, 366 U.S. 599 (1961). In such circumstances, the Court has put the burden on individuals seeking special treatment; specifically, the Court has demanded that such individuals prove that complying with the law offends some deeply held religious belief, more narrowly defined. This approach is concededly pragmatic, for the "very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Although "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others, in order to merit First Amendment protection," *Thomas*, 450 U.S. at 714, they must nonetheless be more than "merely a matter of personal preference," *Yoder*, 406 U.S. at 216. Philosophical and personal choices, as opposed to religious ones, therefore, do "not give rise" to grounds for judicially carved exceptions. *Id*.

To remain true to these principles, the Court should recognize that it was a Congress, echoing President Lincoln, not the judiciary proceeding by its own lights, that put the words "under God" into the Pledge. The Ninth Circuit should have assumed, as this Court's cases demand, that Congress intended—to the extent that religion is implicated at all—to accommodate the widest possible spectrum of religious beliefs. Interpreting those words narrowly to embrace only monotheistic religions, as the Ninth Circuit did, contradicts this Court's precedents by heightening, rather than defusing, constitutional concerns. Most immediately, such an interpretation puts this Court in the uncomfortable middle of ongoing religious debates over the identity of God. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 830-31 (1995) (government may take no official position on the debate between those

who view religion "from a religious perspective" and those who do not). To avoid such problems, the Court need only interpret "under God" broadly and in keeping with Congress's "long-established policy of not picking and choosing among religious beliefs." *Welsh*, 398 U.S. at 338 (quoting *Seeger*, 380 U.S. at 175).

III. STRIKING DOWN THE PLEDGE WOULD THREATEN ALL MANNER OF SALUTARY AND VOLUNTARY PRACTICES.

Nullification of the Pledge in this case—by casting aside over fifty years of settled jurisprudence—would "have wide and profound effects" and call into doubt any number of patriotic exercises with references that might be construed as offensive to some religion. *Zorach*, 343 U.S. at 313. "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment." *Id*. at 312-13.

Today, more than ever, diversity of religious belief "is a strong marker of our American manyness." Diana L. Eck, A New Religious America 30 (2001). Former President Clinton, for instance, issued a public proclamation honoring the Hindu festival of Diwali in the fall of 2000. *See id*. at 355. Fairfax County, Virginia has declared the week of March 21 to 28 every year as "Durga Temple Celebration Week." *See id*. at 352-53. Ohio Governor Bob Taft proclaimed April 14, 1999, to be "Khalsa Sikh Day" in honor of the three hundredth anniversary of the Khalsa, the brotherhood and sisterhood of initiated Sikhs. *See id*. at 353. And in 1997, Kansas Governor Bill Graves issued a

proclamation recognizing the month of Ramadan. *Id*. at 354. Government should not be stripped of language necessary to acknowledge our diverse religious traditions and connect them to American patriotism.

The perils of judicial censorship of government speech acknowledging diverse cultural and religious practices, much less core patriotic themes referencing "God," are heightened in this case by the fact that recitations of the Pledge in Ms. Banning's daughter's schoolroom came about through decisions of a particularly democratic and pluralistic character. As used in that school (and many others), the Pledge represents the democratic judgment of (i) the United States' Congress in 1954, which approved the Pledge for the entire country, (*see* 4 U.S.C. § 4); (ii) the United States' Congress in 2002, which reconfirmed that recitation of the Pledge is a "patriotic" act in the course of reenacting the Pledge by an overwhelming supermajority (*see* Pub. L. No. 107-293, §2(b)); (iii) the California legislature, which has required public schools to begin each day with "appropriate patriotic exercises," and provided that reciting the Pledge will satisfy that requirement (*see* Cal. Educ. Code § 52720); and (iv) the views of the local Elk Grove community, which specifically approved the use of the Pledge as an "appropriate patriotic exercise" under California law (*see* Pet. App. 3).

To be sure, the Pledge, like "[a]ny credo of nationalism," is "likely to include what some disapprove or to omit what others think is essential." *Barnette*, 319 U.S. at 634. But the use of the Pledge is consistent with our fundamental respect for rights of conscience because any child who prefers not to participate in this patriotic exercise can do so by choosing not to say the Pledge, or by conspicuously or

inconspicuously declining to say the words "under God." *Id*. at 638.

Mr. Newdow claims to know better. He takes the position that, because he finds the words "under God" offensive, he has the right to overrule in a single stroke the 1954 Congress, the 2002 Congress, the California legislature, the Elk Grove School District, and Ms. Banning, his daughter's custodial parent. But Mr. Newdow's odd Establishment Clause interpretation has never won acceptance in First Amendment jurisprudence, and rightly so. The rights of personal conscience guaranteed by the Constitution have never been thought to include corollary rights to prevent *others* from freely exercising their own religious liberties. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (noting that "[s]tate power is no more to be used so as to handicap religions, than it is to favor them").

In particular, while no student may be compelled against his or her conscience to salute or pledge allegiance to the American flag, the freedom not to salute does not include a corollary right to prohibit others from saluting the flag in order to honor, in an appropriate way, the "guaranties of civil liberty which tend to inspire patriotism and love of country"—even where such salutes contradict the deeply held beliefs of Newdow and others. *Barnette*, 319 U.S. at 631. To allow Mr. Newdow's personal religious beliefs to prescribe a standard directing the conduct of others would itself be the grossest violation of the Establishment Clause. As this Court held long ago, government may not "prefer[] those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314.

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision should be reversed.

Respectfully submitted,

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ADDENDUM

Universal Life Church

http://ulc.net
(printed October 2003—emphasis in original)

Become ordained here today and begin your own ministry! As a legally ordained minister, you may perform weddings, funerals, baptisms and other functions of the clergy. In existence since 1959, the Universal Life Church is headquartered in Modesto, California, and has congregations around the world. The sun never sets on the Universal Life Church. ULC ministers come from all walks of life and spiritual traditions. Our common thread is our adherence to the universal doctrine of religious freedom:

Do only that which is right.

Every person has the inherent God-given right (and responsibility) to ***peacefully*** determine what is right. If what you sincerely believe does not interfere with the rights of others, or break the law, it is not the province of the state or the church to govern your activity. We are advocates of religious freedom.

The Universal Life Church enables you to peacefully pursue your spiritual beliefs without interference from any outside agency, and to answer a calling which might otherwise be denied.

You may become a legally ordained minister for life, without cost, and without question of faith.

Information About The ULC

http://ulc.net
(printed October 2003—emphasis in original)

We believe everyone is already a member of the church and is just not aware of it as yet. The Universal Life Church will ordain *anyone* that asks ***without question of faith***, for life, without a fee. Just select "Be Ordained" to complete the process right here on our World Wide Web site. The church has two tenets: the absolute right of freedom of religion and to do that which is right. Anything else within the law is allowed.

As an ordained minister of the church, you too may ordain new ministers. The Universal Life Church will not stand between **you and your God** and recognizes that each person must choose his own path. Each person in the ULC is free to follow any path as long as it does not infringe on the rights of others.