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 *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, THE CENTER FOR PUBLIC JUSTICE, CONCERNED WOMEN FOR AMERICA, AND CHRISTIAN EDUCATORS ASSOCIATION INTERNATIONAL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are religious organizations that believe that the ultimate basis for religious liberty, as well as for all other inalienable rights, rests in the fact that individuals are "endowed by their Creator" with such rights, as stated in the Declaration of Independence. The *amici* further agree that only this fact adequately constrains the authority of government with respect to the exercise of inalienable rights. Finally, the *amici* agree that the government may affirm the fact that inalienable rights come from God without violating the religious neutrality that such rights impose upon government.

Representing its membership of Christian attorneys, law students, judges, and law professors, Christian Legal Society believes that the phrase "under God" in the Pledge of Allegiance is an important affirmation of the basis for this nation's concept of limited government that, in turn, is the basis of our legal system.

The Center for Public Justice is a national, public policy and civic-education organization that advocates the equal treatment of all faiths in the public square. For 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party. The Alliance Defense Fund has made a monetary contribution towards the preparation and submission of this brief.

Concerned Women for America ("CWA") is the nation's largest public policy organization for women. Located in Washington, D.C., CWA is a non-profit organization that provides policy analysis to Congress, state, and local legislatures, and assistance to pro-family organizations through research papers and publications. CWA seeks to inform the news media, the academic community, business leaders and the general public about family, cultural and constitutional issues that affect the nation. CWA has participated in numerous *amicus curiae* briefs in the United States Supreme Court, lower federal courts and state courts.

Christian Educators Association International ("CEAI") was founded in 1953 and became the first national organization of professional Christian educators serving in public, private and charter schools. CEAI currently has a national membership of approximately 7,500 professional educators, the majority of whom serve in public educational institutions. CEAI is a leader in promoting the rights of religious persons in public education and has actively promoted a "Declaration for Public Education" that encourages local church and community organizations to be active participants and supporters of public schools.

Statements of interest specific to each *amicus* are found in the Addendum.

SUMMARY OF ARGUMENT

Considered in its context, the phrase "under God" in the Pledge of Allegiance represents not an endorsement of monotheism, but rather a proposition from the Declaration of Independence that is both theological *and* political,

namely, that all individuals are "endowed by their Creator with certain inalienable rights." The phrase was adopted to affirm the basis for this country's concept of limited government.

Even though the phrase refers to a particular theological proposition, it does not implicate the Establishment Clause neutrality requirement. The focus of Establishment Clause neutrality is on government action and policy at the "operational" level, not on the principles underlying such action and policy – where in fact neutrality is not possible. Indeed, the neutrality requirement itself relies upon the religious doctrine that genuine religious faith cannot be coerced. Therefore, the neutrality requirement should not be construed to prohibit the government from affirming the principles upon which the requirement depends merely because such principles are religious in nature. To hold that the government cannot affirm such principles would ultimately weaken protection for religious liberty and other inalienable rights by undermining the basis for such rights.

ARGUMENT

I. THE PHRASE "UNDER GOD" AFFIRMS THIS COUNTRY'S SYSTEM OF LIMITED GOVERNMENT.

The court below correctly asserted that the phrase "under God" is "normative," but it incorrectly characterized the normative principle as an endorsement of monotheism. Appendix to the Petition for a Writ of Certiorari (hereinafter "App.") at 11a-12a. The relevant normative principle is, rather, one of limited government grounded in

the concept that individuals are endowed by God with certain inalienable rights. Put differently, the phrase asserts that government is not the highest authority in human affairs.

A. THIS COUNTRY'S FOUNDERS GROUNDED LIMITED GOVERNMENT IN THE PROPOSITION THAT INALIENABLE RIGHTS COME FROM GOD.

There can be little doubt that the Founders believed that the authority of government must be limited with respect to certain inalienable rights given to individuals by God. The existence of such rights is affirmed succinctly and powerfully in the Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness. That to secure these Rights, Governments are instituted among Men . . . .

The Declaration of Independence, ¶ 2 (U.S. 1776).

The right to religious liberty, sometimes referred to as our "First Freedom," provides the paradigmatic example of limited government with respect to an inalienable right. *See generally* Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243 (2000). The Founders started from the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. These propositions are reflected in James Madison's *Memorial and Remonstrance Against Religious Assessments*:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Ibid., *reprinted in Everson v. Board of Educ. of Ewing,* 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, in its beginning words: "Whereas, Almighty God hath created the mind free." Va. Code Ann. § 57-1 (West 2003). The Act continues by stating that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . ." *Ibid.*

The Founders argued that because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. In more general terms, the scope of governmental authority over individuals is inherently limited with respect to their exercise of inalienable rights given by God. McConnell, *supra,* at 1247.

B. THE PHRASE "UNDER GOD" WAS ADOPTED TO DISTINGUISH OUR SYSTEM of LIMITED GOVERNMENT FROM THE COMMUNIST SYSTEM.

The reliance upon God as the source of inalienable individual rights is the most fundamental distinction between the political theory underlying our democratic republic and the Marxist-Leninist theory underlying the communist regime of the former Soviet Union. By adding the phrase to the Pledge of Allegiance, Congress wished to emphasize this distinction, as the conference report makes clear:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340.

Following as it does the discussion of inalienable rights endowed by God, the reference in the report to

"dependence . . . upon the moral directions of the Creator" should be understood as another way of saying that our political system relies upon the moral norms of inalienable rights that come from God.[2] The conference report suggests that by acknowledging a source of authority above government, such moral norms limit the power and scope of government and offer a principled basis for protection of individuals against the power of government. Congress sought to contrast this theory with that of the communist system, which did not rely upon such norms to limit government and protect individuals.

II. GOVERNMENT MAY AFFIRM A RELIGIOUS BASIS FOR INALIENABLE RIGHTS WITHOUT VIOLATING THE RELIGIOUS NEUTRALITY REQUIRED BY SUCH RIGHTS.

There is no doubt that the Establishment Clause requires the government to maintain a position of neutrality with respect to religion. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 651-53 (2002). But when choosing among foundational principles, the government cannot be neutral. As one commentator has put it:

> Madison . . . sought equal religious liberty at what might be called the operational level: how government actually treats citizens of different religious and non-religious persuasions. He did not, and no one can, seek total equality or

[2] *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("[W]hen there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.").

> neutrality at the justificatory level. The operational rule adopted by government must inevitably rest on some view or combination of views about the role of the state and the nature of religion, and some views will be rejected at that level.

Thomas C. Berg, *Religion Clause Anti-Theories*, 72 Notre Dame L. Rev. 693, 730 (1997).

The Establishment Clause neutrality requirement itself is based on a particular religious proposition that emphasizes private religious choice. Berg, *supra*, at 732. This proposition in turn is based upon the proposition that inalienable rights, including the right to religious exercise, come from God. McConnell, *supra*, at 1247. Although this choice of foundational propositions is not neutral with respect to religion, it does lead to neutral treatment of religion (and non-religion) at the operational level. In the same way, reliance on religious doctrine to ground other civil rights does not violate Establishment Clause neutrality at the operational level.

Further, the Establishment Clause should not be read to prohibit the government from expressly affirming the underlying principles upon which it relies merely because such principles may have religious substance. A statement of political theory with religious content must be distinguished from prayers and other religious exercises in which the government may not engage. *See, e.g., Engel v. Vitale,* 370 U.S. 421, 435 n.21 (1962). Put differently, there is a fundamental difference between a statement that "there is one and only one God" and a statement that "inalienable rights come from God." To the extent that the phrase "under God" refers to the proposition that inalienable rights come from God, the phrase is a statement of

foundational principle about which the government cannot be neutral. This is the one type of statement with substantive religious content that the government may affirm because it is the foundation upon which rests the requirement that the government must in all other respects be neutral toward religion.

III. GOVERNMENTAL AFFIRMATION OF THE RELIGIOUS BASIS FOR INALIENABLE RIGHTS PROTECTS RELIGIOUS LIBERTY.

By prohibiting the government from affirming underlying principles with religious content, the reading of the Establishment Clause by the court below would render unconstitutional the Declaration of Independence and the Virginia Act for Religious Freedom, both of which expressly rely upon particular religious propositions. Ironically, such a reading would strike down Jefferson's groundbreaking law establishing religious liberty on the basis that it violates the very principles of religious liberty it established.

Apart from these untenable results, the analysis of the court below would unmoor religious liberty from its underlying rationale. As one commentator has suggested:

> [W]ithout a plausible rationale for the commitment to religious liberty we cannot understand what that commitment entails. It is commonplace that legal enactments should be interpreted to effectuate their purposes. But a law's "purpose" arises out of, and is a projection of, its justification. Therefore, if we cannot articulate a convincing justification for the commitment to religious freedom then we cannot know its purpose,

> and we are accordingly paralyzed in our efforts to interpret the commitment.

Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. Pa. L. Rev. 149, 223 (1991).

Fortunately, this Court has never adopted the reasoning of the court below. Indeed, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), this Court relied upon the theological doctrines that underlie the First Amendment when it noted that religious liberty "derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful. . . ." *Wallace*, 472 U.S. at 53. Freedom of conscience and the importance of uncoerced religious belief are fundamentally religious propositions. *See* McConnell, *supra,* at 1250-51; Smith, *supra*, at 154. The Court has consistently invoked these religious concepts to protect religious liberty. *See e.g., Engel,* 370 U.S. at 432 ("[R]eligion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."). Indeed, the Court has expressly observed that this country's "institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Whether through reliance by the courts on religious propositions or through the phrase "under God" in the Pledge of Allegiance, governmental affirmation of the fundamental principles underlying religious liberty and other inalienable rights serves to strengthen the protection of such rights.

The court below held that the phrase "under God" results in governmental coercion of religious practice. App.

at 11a. *Amici* agree with the dissent below that, although relying on "elements and tests," the court below seemingly failed to consider "the good sense and principles that animated those tests in the first place." App. at 23a (Fernandez, J., concurring in part and dissenting in part).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 19, 2003

ADDENDUM

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by

the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . . "

The Christian Legal Society's national membership, years of experience, and professional resources enable it to speak with authority upon religious freedom matters before this Court.

The Center for Public Justice is a national, public policy and civic-education organization that advocates the equal treatment of all faiths in the public square. For 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

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