No. 02-1624

In the
Supreme Court of the United States

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

v.

MICHAEL A. NEWDOW, *ET AL.*,
Respondents.

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

BRIEF OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* 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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INTEREST OF *AMICI*

The State of Texas writes on behalf of all fifty States to urge the Court to reverse the judgment of the United States Court of Appeals for the Ninth Circuit and confirm that voluntary teacher-led recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause of the First Amendment to the United States Constitution. The *Amici* States have a significant interest in this case because adjudication of the issues presented may directly impact the validity of at least forty-three state statutes providing for the recitation or use of the Pledge of Allegiance by public schoolchildren.[1]

In addition to implying that numerous state statutes are unconstitutional, the decision below "threatens cash-strapped

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1. *See* ALA. CODE §16-43-5 (2001); ALASKA STAT. §14.03.130 (2000); ARIZ. REV. STAT. §15-506 (2002); ARK. CODE §6-16-122 (2003); CAL. EDUC. CODE §52720 (1989); COLO. REV. STAT. tit. 22, §22-1-106 (2003); CONN. GEN. STAT. §10-230(c) (2003); DEL. CODE tit. 14, §4105 (2003); FLA. STAT. ch. 1003.44(1) (2002); GA. CODE §20-2-310(c)(1) (2001); IDAHO CODE §33-1602(4) (2001); 105 ILL. COMP. STAT. 5/27-3 (2002); IND. CODE §20-10.1-4-2.5 (2003); KAN. STAT. §72-5308 (2002); KY. REV. STAT. §158.175(2) (2001); LA. REV. STAT. §17:2115(B) (2001); MD. CODE EDUC. §7-105(c) (2001); MASS. GEN. LAWS ch. 71, §69 (2003); MINN. STAT. §121A.11 (2003); MISS. CODE §37-13-7(1) (2001); MO. STAT. §171.021(2) (2003); MONT. CODE §20-7-133 (2001); NEV. REV. STAT. §389.040 (2002); N.H. REV. STAT. §194:15-c (2002); N.J. STAT. §18A:36-3(c) (1999); N.M. STAT. §22-5-4.5 (2001); N.Y. EDUC. LAW §802(1) (2000); N.C. GEN. STAT. §115C-47(29a) (1999); N.D. CENT. CODE §15.1-19-03.1(4) (2001); OHIO REV. CODE §3313.602(A) (1999); OKLA. STAT. tit. 70, §24-106 (2003); OR. REV. STAT. §339.875 (2001); 24 PA. CONS. STAT. §7-771 (1992); R.I. GEN. LAWS §16-22-11 (2001); S.C. CODE §59-1-455 (2000); S.D. CODIFIED LAWS §13-24-17.2 (2002); TENN. CODE §49-6-1001(c)(1) (2002); TEX. EDUC. CODE §25.082 (2003); UTAH CODE §53A-13-101.6 (2000); VA. CODE §22.1-202(C) (2002); WASH. REV. CODE §28A.230.140 (1997); W. VA. CODE §18-5-15b (1999); WIS. STAT. §118.06 (2003).

school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. §1983." *See* U.S. Pet. App., at 68a-69a.

Because the daily, voluntary recitation of the Pledge of Allegiance furthers the high, and nonreligious, purpose of nurturing active citizens who grasp the virtues of patriotic life and appreciate our Nation's distinctive heritage, the *Amici* States urge the Court to hold that the practice of reciting the Pledge of Allegiance in public schools is well within the confines of the Establishment Clause.

SUMMARY OF THE ARGUMENT

For nearly fifty years, schoolchildren have begun the day reciting the Pledge of Allegiance to "one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. §4. Until the Ninth Circuit's unprecedented holding in this case, no court had ever held that the voluntary recitation of the Pledge somehow violates the United States Constitution.

The Ninth Circuit's holding is contrary to the entire body of this Court's Establishment Clause jurisprudence. Indeed, virtually every single reference to the Pledge—by the Court and repeatedly by individual Justices—has confirmed its constitutionality.

From the time of the Founding, our Nation has recognized her religious heritage, and the Constitution has never been understood to prohibit those acknowledgments. From the national motto "In God We Trust" to the House and Senate Chaplains to the frieze of Moses and the Ten Commandments in the Supreme Court, "because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

ARGUMENT

America was formed by those fleeing religious persecution. Seeking to forge a land where each person could live and worship God as he or she believed best, the Framers established a country predicated on a simple, yet profound, postulate—declared in the document that gave birth to our Nation:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

From that day forward, the United States has fought to protect the freedom of conscience of all her citizens, while at the same time acknowledging the heritage behind our Nation's founding. Abraham Lincoln, famously dedicating and consecrating that bloody Pennsylvania battlefield, put it this way:

> ". . . that we here highly resolve that these dead shall not have died in vain, 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." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

In 1942 we were again at war, and Congress adopted our Nation's Pledge of Allegiance to the United States flag. H.R. REP. NO. 2047, 77-2047 at 1 (1942); S. REP. NO. 77-1477, at 1 (1942). Twelve years later, at the height of the Cold War, Congress amended the Pledge of Allegiance by adding the words "under God." Act of June 14, 1954, ch. 297, §7, 68 Stat. 249. As amended and in its current form, the Pledge reads: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

The words "under God" were added to the Pledge of Allegiance in an effort to illuminate a key distinction between our government and those of Communist nations. Congressional Committee Reports from the time of the 1954 amendment note, for example, that whereas the Communists were "spiritual[ly] bankrupt[]," S. REP. NO. 83-1287, at 2 (1954), our government recognized the importance of each human "endowed by [God] with certain inalienable rights which no civil authority may usurp," H.R. REP. NO. 83-1693, at 2 (1954). The Reports also note the great number of similar references to God in historical and patriotic documents throughout our history. H.R. REP. NO. 1693, at 2; S. REP. NO. 1287, at 2.

Despite decades of patriotic acknowledgment of our Nation's religious heritage in the Pledge of Allegiance—and despite centuries of other similar historical and patriotic acknowledgments of religion by our government—Respondent Newdow successfully challenged the constitutionality of the Pledge of Allegiance's recitation to and by schoolchildren in the State of California. *See Newdow v. U.S. Congress*, 292 F.3d 597, 607-12 (9th Cir. 2002), *cert. granted*, *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S.Ct. 384 (2003). Because that decision by the Ninth Circuit Court of Appeals is contrary to this Court's well-settled Establishment Clause jurisprudence, the *Amici* States respectfully request that the Court reverse the judgment below.

I. HISTORICAL AND PATRIOTIC ACKNOWLEDGMENTS OF OUR NATION'S RELIGIOUS HERITAGE ARE NOT INCONSISTENT WITH THE FIRST AMENDMENT'S PROHIBITION ON THE ESTABLISHMENT OF RELIGION.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. Ultimately, both the

Free Exercise Clause and the Establishment Clause serve the same end: protecting and promoting religious liberty for all Americans.[2]

"It has never been thought either possible or desirable to enforce a regime of total separation [between religion and government]." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). Rather, the Establishment Clause ensures government neutrality towards religion. *See Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). That is, government cannot favor religion over nonreligion, and it cannot favor one religion over another. *See Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968); *Abington Township*, 374 U.S., at 226.

At the same time, government cannot "show a callous indifference to religious groups" because "[t]hat would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (stating that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary"). As Justice Goldberg wrote in *Abington Township*,

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such

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2. *Cf. Sch. Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.").

> results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion. . . ." 374 U.S., at 306 (Goldberg, J., concurring).

This Court has long held that the Establishment Clause is elastic enough to "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment and dissenting in part). The Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch*, 465 U.S., at 673.

Because it would prohibit the legitimate recognition of the "role religion plays in our society," and because it would constitute the "hostility" to religion that this Court has condemned, Respondent Newdow's position irreconcilably conflicts with the Court's Establishment Clause jurisprudence. Accordingly, the Court should reverse the Ninth Circuit's judgment and hold that the historical and patriotic acknowledgment of religion, such as the words "under God" in the Pledge of Allegiance, is not barred by the First Amendment to the United States Constitution.

A. Because of Their "History and Ubiquity," Acknowledgments of Religion in Patriotic or Historical Contexts Are Entirely Consistent with the Establishment Clause.

Although Respondent Newdow would contend that the First Amendment prohibits all government acknowledgment of religion, the Court has squarely rejected such an "absolutist approach" in favor of case-by-case analysis of "whether, in reality, [a challenged practice] establishes a religion, or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678.

Repeatedly, the Court has cautioned that the Constitution does not "require complete separation of church and state." *Lynch*, 465 U.S., at 673. Indeed, the undeniable link between our Nation and her religious foundation is illustrated by the fact that "the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Id.*, at 674. Although the Court has struck down some forms of compelled religious practices in public schools, *see, e.g., Abington Township*, 374 U.S., at 223; *Lee v. Weisman*, 505 U.S. 577, 586-99 (1992); *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000), it has never applied the same exacting standards to longstanding patriotic traditions that are part of the history and heritage of our Nation.

Hence, in *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983), the Court held that the Nebraska Legislature's practice of opening its legislative sessions with a prayer was not an unconstitutional establishment of religion. The Court explained,

> "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step

> toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, '[w]e are a religious people whose institutions presuppose a Supreme Being.'" *Id.*, at 792 (citation omitted).

Among the "countless other illustrations of the Government's acknowledgment of our religious heritage," *Lynch*, 465 U.S., at 677, is the "statutorily prescribed national motto 'In God We Trust,'" *id.*, at 676. And, of course, this Court itself begins its own proceedings with the cry, "God save the United States and this Honorable Court." *See Marsh*, 463 U.S., at 786.

In *Lynch*, the Court noted that "[o]ur history is replete with official references to the value and invocation of Divine guidance," including official Thanksgiving and Christmas holidays, House and Senate chaplains, the national motto "In God We Trust," the Pledge of Allegiance, religious paintings in the National Gallery, Moses holding the Ten Commandments on the frieze of this Court, and regular presidential proclamations for a National Day of Prayer.[3]

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3. The extent to which expressly religious and patriotic acknowledgments have been noted by this Court, without criticism, is well illustrated by the text of President Roosevelt's 1944 Proclamation of Thanksgiving, quoted at length by the Court in *Lynch*:

> "'[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands. . . .To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas.'" 465 U.S., at 675 n.3 (quoting Proclamation No. 2629, 9 Fed. Reg. 13,099 (1944) and citing similar proclamations by six Presidents since (Proclamation No. 5098, 48 Fed. Reg. 42,801 (1983); Proclamation No. 4803, 45 Fed. Reg. 75,633

465 U.S., at 673-77. As Justice O'Connor has observed, historical and patriotic acknowledgments of religion,

> "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring).

In the many States, likewise, acknowledgments of religious heritage are woven into history and ubiquitous. For example, the Constitution of the State of Texas begins, "Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution." TEX. CONST. pmbl. A "primary purpose" of Texas's required school curriculum, in turn, is statutorily prescribed as follows: "to prepare thoughtful, active citizens who understand the importance of patriotism and can function productively in a free enterprise society with appreciation for the basic democratic values of our state and national heritage." TEX. EDUC. CODE §28.002(h). And, the provision requiring districts to lead students in daily, voluntary recitations of the Pledge, *id.* §25.082, directly furthers that purpose.

Such patriotic and historical recognitions, manifested throughout the many States, *see supra* note 1, are entirely consonant with the First Amendment. As the Court explained in *Engel v. Vitale*,

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(1980); Proclamation No. 4333, 39 Fed. Reg. 40,003 (1974); Proclamation No. 4093, 36 Fed. Reg. 21,401 (1971); Proclamation No. 3752, 31 Fed. Reg. 13,635 (1966); Proclamation No. 3560, 28 Fed. Reg. 11,871 (1963)).

> "[t]here is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no resemblance to [conduct prohibited by the Establishment Clause]." 370 U.S. 421, 435 n. 21 (1962).

B. Virtually Every Reference to the Pledge of Allegiance—by the Court and Repeatedly by Individual Justices—Over the Decades Has Agreed that the Pledge is Entirely Consistent with the First Amendment.

This Court has repeatedly noted with particularity that the reference to God in the Pledge of Allegiance withstands Establishment Clause scrutiny. Illustrating the existence of "an unbroken history of official acknowledgment . . . of the role of religion in American life from at least 1789," the Court in *Lynch*, for example, noted—with no hint of criticism—"the language 'One nation under God' . . . [in] the Pledge of Allegiance to the American flag." 465 U.S., at 676. This language, like the national motto "In God We Trust" on United States currency and the frieze of the Ten Commandments in the Supreme Court, serves as an "illustration[] of the Government's acknowledgment of our religious heritage" that "help[s] explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Id.*, at 676-78.

The Court repeated its view that the Pledge of Allegiance survives constitutional scrutiny in *County of Allegheny*, 492 U.S., at 602-03. The Court stated, "[o]ur previous opinions have

considered in dicta the [national] motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* (citing *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring); *see also id.*, at 716-17 (Brennan, J., dissenting)).

The opinions of the Court in *Lynch* and *County of Allegheny* were written or joined by Chief Justice Burger, Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor. In addition, individual Justices have repeatedly agreed as well.

For example, Justice Brennan wrote in concurrence in *Abington Township*,

> "The reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." 374 U.S., at 304.

Likewise, Justice O'Connor has expressed her view that the reference to God in the Pledge of Allegiance "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *See Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (citation omitted).

Other similar references are legion. *See, e.g., Lee*, 505 U.S., at 633-639 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); *County of Allegheny*, 492 U.S., at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.); *Engel*, 370 U.S., at 449 (Stewart, J., dissenting); *see also Abington Township*, 374 U.S., at 307-308 (Goldberg, J., concurring, joined by Harlan, J.).

Given that virtually every reference to the Pledge by the Court or by an individual Justice of the Court has confirmed its constitutionality,[4] to hold the Pledge unconstitutional—as the Ninth Circuit did below—would, as Chief Justice Burger directly observed in *Wallace v. Jaffree*, "make a mockery of our decisionmaking in Establishment Clause cases." 472 U.S., at 88 (Burger, C.J., dissenting).

This case presents the Court with an opportunity to hold unequivocally what it has already recognized repeatedly—that the Pledge's reference to God is a patriotic acknowledgment of religion entirely permissible under the Establishment Clause. The Court should so hold, and should reverse the contrary judgment of the Ninth Circuit Court of Appeals.

II. CENTURIES OF HISTORICAL AND PATRIOTIC ACKNOWLEDGMENT OF RELIGION HAVE NOT THREATENED THE FIRST AMENDMENT'S PROHIBITION ON ESTABLISHED RELIGION.

Our Nation's acknowledgment of her undeniable religious heritage has never posed a threat of the dangers the Establishment Clause was intended to prevent, *see Lynch*, 465 U.S., at 686, and this case presents no exception. As the Court has noted,

> "[t]he 'fears and political problems' that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious

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4. *But see Engel*, 370 U.S., at 437 & n.1, 440 n.4, 441 (Douglas, J., concurring) (explaining that, in Justice Douglas's opinion, legislative chaplains, the use of the Bible for administration of oaths, the use of the GI Bill funds in denominational schools, the national motto "In God We Trust," federal tax exemptions for religious organizations, the cry "God save the United States and this Honorable Court," and the Pledge of Allegiance, *inter alia*, are all equally unconstitutional).

> leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed." *Id.* (internal citation omitted).

The Court should likewise conclude that the decades in which students have recited the Pledge of Allegiance in its current form have not created or tended to create an establishment of religion.

The *Amici* States therefore submit that between the two extremes of government endorsement of religion and government hostility against religion, there lies a broad zone in which government may recognize or acknowledge the important foundational role that religion has played in our Nation's history and heritage. Such practices are acceptable because they are "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S., at 792. And they are constitutional because, rather than establishing religion, such practices are part of "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S., at 674.

CONCLUSION

The *Amici* States urge the Court to reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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