No. **06-15093**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DR. REV. MICHAEL NEWDOW, *et al.*,
Plaintiffs-Appellees

v.

U.S.A., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of California

MOTION OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF LEAVE TO FILE LONGER BRIEF; DECLARATION OF PETER D. LEPISCOPO, ESQ. IN SUPPORT OF MOTION

(FRAP 29(d), FRAP 27, and FRAP 32)

Amicus Curiae Pacific Justice Institute hereby moves the Court for leave to file a brief that exceeds the maximum provided for under F.R.A.P. 29(d) and F.R.A.P. 32.

This motion is based upon F.R.A.P. 29(d), F.R.A.P. 27, and F.R.A.P. 32 and the Declaration of Peter D. Lepiscopo in support hereof, which is attached hereto.

/////

Dated: May 31, 2006.

Respectfully submitted

LAW OFFICES OF PETER D. LEPISCOPO

By: _____

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**Counsel of Record and Member of the Bar of the 9th Circuit U.S. Court of Appeals*

DECLARATION OF PETER D. LEPISCOPO

I, Peter D. Lepiscopo, declare as follows:

1. I am an attorney duly licensed and admitted to practice law within the State of California and I am a member of the Bar of this Court. I represent the *Amicus Curiae* Pacific Justice Institute. I am over the age of eighteen and have personal knowledge of the herein stated matters, and, if called upon as a witness, could and would testify competently and accurately to the herein stated matters.

2. Pursuant to F.R.A.P. 29(a), all parties have provided their consent to *Amicus Curiae* Pacific Justice Institute to file a brief in support of Appellants U.S.A. and Rio Linda Union School District for reversal of the district court's decision.

3. In the first round of litigation regarding the Pledge of Allegiance, I represented Pacific Justice in the United States Supreme Court. See ***Elk Grove Unified School Dist. v. Newdow***, 542 U.S. 1 (2004)("*Elk Grove*"). Accordingly, I am completely familiar with not only the standing issues that were raised in *Elk Grove*, but also the substantive constitutional law issues (even though those issues were not decided by the Supreme Court).

4. As this case presents important issues of constitutional law, I have carefully reviewed the arguments set forth in Pacific Justice's *amicus* brief, a copy of which is attached hereto as Exhibit 1. In this regard, I spent considerable time revising and reducing the brief to a more succinct, reduced version. Even so doing, I was only able to reduce the brief to twenty-five **25** pages, which exceeds the page limit provided for by F.R.A.P. 29(d). As I attempted to further reduce it to the fifteen (15) page limit it became disjointed and somewhat incoherent.

The following is an outline of the issues that are addressed in the proposed amicus brief:

I. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE DOES NOT CREATE A JUSTICIABLE CLAIM UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

A. The Phrase "U*nder God*" in the Pledge of Allegiance is Neither a Religious Activity, Profession of Religious Belief, nor Prayer, But is Merely a Restatement of the Political Philosophy Underpinning this Nation's Form of Government

B. As The Phrase "*under God*" In The Pledge Is Not A Religious Act, Profession Of Religious Belief, Or Prayer, It Does Not Contravene The Establishment Clause

5. I am not in the practice of addressing irrelevant issues or being verbose in my written arguments. I am an experienced litigator, including at the appellate level. For example, I have acted as lead and/or *amicus* counsel in the following published cases: ***McCreary County v. ACLU***, 545 U.S. ____ (2005)(Kentucky 10 Commandments case-represented Pacific Justice Institute in U.S. Supreme Court); ***Van Orden v. Perry***, 545 U.S. ____ (2005) (Texas 10 Commandments case-represented Pacific Justice Institute in U.S. Supreme Court); ***Elk Grove Unified School Dist. v. Newdow***, 542 U.S. 1 (2004) (represented Pacific Justice Institute in the ***Pledge of Allegiance case*** before the U.S. Supreme Court); ***Lockyer v. City and County of San Francisco*** (2004) 33 Cal.4th 1055 (represented California State Senators and Assembly Members in the California Supreme Court); ***Costco Companies, Inc. v. Gallant*** (2002) 96 Cal.App.4th 740 (freedom of speech and petition case relating to California Supreme Court decision in *Robins v. Pruneyard* (1979) 23 Cal.3rd 899); ***San Diego Unified Port District v. U.S. Citizens Patrol*** (1998) 63 Cal.App.4th 964 (freedom of speech case relating to political speech at the San Diego International Airport); ***Springfield v. San Diego Unified Port District*** (S.D.Cal.1996) 950 F.Supp. 1482 (freedom of speech case relating to religious speech at airports); ***San Diego County Gun Rights Committee v. Reno*** (9th Cir.1996) 98 F.3rd 1121 (constitutional challenge to 1994 Crime Bill's firearms ban based on 2nd and 9th Amendments, and Interstate Commerce Clause in light of U.S. Supreme Court decision in *United States v. Lopez* , 514 U.S. 549); ***San Diego County Gun Rights Committee v. Reno*** (S.D.Cal.1996) 926 F.Supp. 1415 (constitutional challenge to firearms ban in 1994 Crime Bill); ***Council for Life Coalition v. Reno*** (S.D.Cal.1996) 856 F.Supp. 1422 (constitutional challenge under 1st Amendment (free speech and association), Interstate

Commerce Clause, and Due Process Clause to 1994 Freedom of Access to Clinics Entrances Act); ***Pinnock v. International House of Pancakes*** (S.D.Cal.1993) 844 F.Supp. 574, *cert.den.* 114 S.Ct. 2726 (1994)(constitutional challenge to public accommodations section of the Americans with Disabilities Act based on the Interstate Commerce Clause, Doctrine of Separation of Powers, Due Process (retroactive legislation, void for vagueness, and over-broad), and 10th Amendment).

6. By way of the instant motion, *amicus curiae* Pacific Justice seeks leave to file an oversize brief consisting of twenty-five (25) pages instead of fifteen (15) in light of the complexity and intricacies surrounding the issues presented by this case. In the course of performing the research it became clear that in order to fully and adequately respond to the issues involved, additional length would be necessary.

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

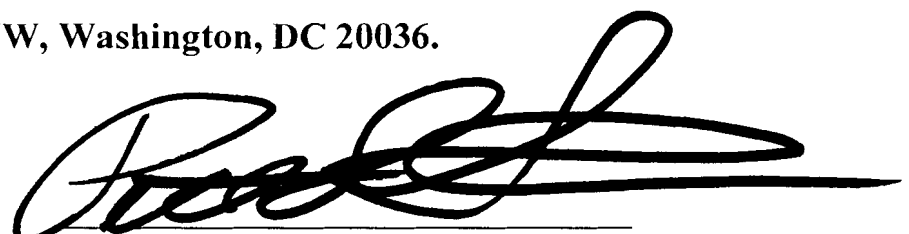
Executed this **31st** day of **May**, 2006 at San Diego, California.

Peter D. Lepiscopo, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of **May**, 2006, true and correct copies of the foregoing were served by U.S. Mail:

1. **Dr. Rev. Michael Newdow, P.O. Box 233345, Sacramento, CA 95823;**
2. **Lowell V. Sturgill, Esq., U.S. Dept. of Justice, Civil Division, Appellate Staff, Washington, DC 20530;**
3. **Terrence J. Cassidy, Esq., Porter, Scott, Weiberg & Delehant, 350 University Avenue, Sacramento, CA 95825;**
4. **Jared N. Leland, Esq., Becket Fund for Religious Liberty, 1350 Connecticut Avenue, NW, Washington, DC 20036.**



Peter D. Lepiscopo, Esq.

No. **06-15093**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DR. REV. MICHAEL NEWDOW, *et al.*,
Plaintiffs-Appellees

v.

U.S.A., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of California

BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF APPELLANTS U.S.A. AND RIO LINDA UNION SCHOOL DISTRICT—FOR *REVERSAL*

(Pursuant to FRAP 29(a), all parties have consented to the filing of this Amicus Brief)

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**Counsel of Record and Member of the Bar of the 9th Circuit U.S. Court of Appeals*

May 31, 2006

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PURSUANT TO F.R.A.P. 29(a), ALL PARTIES HAVE CONSENTED TO THE FILING OF PACIFIC JUSTICE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS U.S.A. AND RIO LINDA UNION SCHOOL DISTRICT FOR REVERSAL OF DECISION OF THE DISTRICT COURT

Pursuant to Federal Rules of Appellate Procedure 29(a), prior to the filing of this *amicus curiae* brief, Pacific Justice Institute ("Pacific Justice") sought and obtained consent from all parties to filing of this brief in support of Appellants U.S.A. and Rio Linda Union School District ("school district") for reversal.

CORPORATE DISCLOSURE PURSUANT TO F.R.A.P. 26.1

As Pacific Justice is an independent, non-profit organization, there is no corporation or other entity that has any ownership interest in or controlling interest over Pacific Justice.

INTEREST OF PACIFIC JUSTICE INSTITUTE

Pacific Justice is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest and is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

Pacific Justice has participated in litigation involving significant constitutional issues in both federal and state courts, including the 1st Pledge of Allegiance case involving Appellee Dr. Newdow, which was decided by the United States Supreme Court in *Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004)("*Elk Grove*"). In addition, Pacific Justice was involved in the two Ten Commandments cases recently decided by the United States Supreme Court: *McCreary County v. ACLU of Kentucky,* 545 U.S. ____ (2005)("*McCreary*") and *Van Orden v. Perry*, 545 U.S. ____ (2005)("*Van Orden*").

As set forth above, this *amicus* brief is filed upon the written consent of all the parties. Pacific Justice, and its counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authorized this brief in whole or in part and that no person other than counsel of record drafted the brief. No person or entity, other than *amicus*, made any monetary contribution to the preparation or submission of this brief.

LEGAL ARGUMENT

I. SUMMARY OF ARGUMENT

Although Appellees challenge 4 U.S.C. section 4, California's Patriotic Exercise Statute (Gov. Code section 52720), and the school district's policy that requires teachers to lead willing students in reciting the Pledge of Allegiance (the "Pledge") at the beginning of each school day, this case will turn on this Court's determination of whether the inclusion of the words "*under God*" in the Pledge somehow converts it into a religious act, profession of religious belief, or prayer thereby contravening the First Amendment's Establishment Clause.

Pacific Justice will address the issue of whether the inclusion of the phrase "*under God*" in the Pledge renders 4 U.S.C. section 4, California's Patriotic Exercise Statute (Gov. Code section 52720), and the school district's policy of daily non-compulsory recitation of the Pledge invalid under the Establishment Clause. Specifically, Pacific Justice will argue that the phrase "*under God*" does **not** contravene the Establishment Clause because that phrase is neither a religious act, profession of religious belief, nor a prayer, but is merely a restatement of the political philosophy underpinning this Nation's form of government.

In essence, Pacific Justice will argue that Appellees' claim, that the inclusion of the phrase "*under God*" in the Pledge, is not justiciable, and, therefore, Appellees' entire complaint should have been dismissed by the district court.

II. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE DOES NOT CREATE A JUSTICIABLE CLAIM UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

This section is comprised of two sub-sections. Section A argues that the phrase "*under God*" is not a religious act, profession of religious belief, or prayer, but rather a statement of the political philosophy underpinning this Nation's form of government. Section B argues that Appellants' claim is not justiciable under Establishment Clause jurisprudence.

A. The Phrase "*Under God*" in the Pledge of Allegiance is Neither a Religious Act, Profession of Religious Belief, nor Prayer, But is Merely a Restatement of the Political Philosophy Underpinning this Nation's Form of Government

The following immortal words set forth in the Declaration of Independence serve as an appropriate starting point for this discussion:

> "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—That to secure these Rights, Governments are instituted among men, ***deriving*** *their just Powers from the* ***Consent of the Governed***..."

U.S. Decl. Of Indep. (emphasis added).

A sobering moment is being presented to the Court by way of the instant action. That is to say, if one may not recite the Pledge in a public school, one certainly may not recite the foregoing passage from the Declaration of Independence. Nor may one recite Abraham Lincoln's *Gettysburg Address* because it contains the phrase "**this Nation, *under God.***" In its lengthy opinion, the district court ignored this in its quest to excise the word "*God*" from the Pledge. In truth, that was the Appellees' goal, which subsequently became the goal of the district

court. The goal of those like Appellees has, and continues to be, the same, to wit: to remove any reference to "*God*" from any public discourse, ignoring the fact that in casting aside all references to "*God*" results in our Nation's history and form of government also being cast aside. To make this point, a summary review of the underlying political philosophy of the Founders is in order.

Thomas Jefferson and the other Founders were well versed in the works of Algernon Sydney ("*Discourses*")[1], Charles de Montesquieu ("*Spirit of Laws*")[2], and John Locke ("*2nd Treatise*")[3] relative to their political philosophy; hence, the phrase in the Declaration, "We find these Truths to be ***self-evident***..." Those truths are not, however, self-evident to the district court. If they were, then the conclusion reached by the district court would have been different. That is to say, the phrase "*under God*" would not have been interpreted as a religious act, profession of faith, or prayer, but rather as a paraphrasing of a political philosophy incorporated into the Declaration and Constitution, which finds its genesis in the works of Sydney, Montesquieu, and Locke.

It is important to note that Sydney's *Discourses* was written as a refutation to Sir Robert Filmer's *Patriarcha* (wherein Sir Filmer defends the divine and natural power of kings to rule with **absolute** power over the people and that any rights of the people originate from the king). Consequently, the predominating theme in Sydney's *Discourses* is the ***source*** and ***limits*** of governmental powers. Drawing on Aristotle, Sydney examines the ***source*** of power in a monarchy in order to illustrate how power in that form of government is circumscribed in relation to the source of that power:

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[1] Sydney, Algernon, *Discourses Concerning Government*, (1990) Indianapolis: Liberty Fund, Inc. ("*Discourses*").

[2] Montesquieu, Charles De, *The Spirit of Laws*, (1952) Great Books of the Western World (Vol. 38), Chicago: Encyclopaedia Britannica, Inc. ("*Spirit of Laws*").

[3] Locke, John, *Second Treatise of Government*, (1980) Indianapolis: Hackett Publishing Company, Inc. ("*2nd Treatise*").

> "But if Aristotle deserves credit, the princes who reign for themselves and not for the people, preferring their own pleasure or profit before the publick, become tyrants; which in his language is enemies to God and man."

Discourses, *supra*, at 288. Similarly, Sydney draws upon the experience of Israel[4] under Moses in order to demonstrate that even God-appointed leaders are answerable to the people:

> "[T]he Scriptures declare the necessity of setting bounds to those who are placed in the highest dignities. Moses seems to have had as great abilities as any man that ever lived in the world; but he alone was not able to bear the weight of government, and therefore God appointed seventy chosen men to be his assistants."

Id. Sydney goes on to identify the *source* of Israel's liberty and the *source* of Moses' reign and power: "*God by Moses gave liberty to his people to make a king.*" *Discourses*, *supra*, at 289. Clearly, Moses' leadership was the consequence of God vesting liberty in the people of Israel, not the other way around. Sydney recognized this principle that serves as a barrier between the liberty of the people and the power of the government. As a foreshadowing of the Declaration, Sydney clearly articulates the proper ends of government:

> "[G]overnments are not set up for the advantage, profit, pleasure or glory of one or a few men, *but for the* ***good*** of society."

Discourses, supra, at 91. In short, Sydney was articulating the principle that governments may not be justly constituted except upon the ***consent*** of the people. We see this in the preamble of the Constitution:

> "***We the People*** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to

[4] It is worth noting that in his reliance upon the Scriptures, Sydney drew heavily upon the experiences of Israel under the reigns of Saul, David, and Solomon, and later under the kings who ruled Israel and Judah, in order to demonstrate his points relating to the ***source*** of and ***limits*** on governmental powers.

ourselves and our Posterity, do ***ordain and establish*** this Constitution for the United States of America."

Clearly, the preamble identifies the ***source*** of the powers vested in the federal government: the People. This is consistent with the consent theory mentioned by Sydney in *Discourses*, which is similarly discussed by Montesquieu and Locke in their political treaties.

Moving to Montesquieu, in the *Spirit of Laws* we see two distinct political principles emerge, which were incorporated into our founding principles. The first principle is that government is created by the people (as phrased in the Declaration: "***from the consent of the governed***"). As discussed by Sydney, this principle is fundamental to a republican form of government:

> "The people, in whom the supreme power resides, ought to have the management of everything within their reach: that which exceeds their abilities must be conducted by their ministers. But they cannot properly be said to have ministers, without the power of nominating them: it is, therefore, a ***fundamental maxim*** *that the* ***people should choose*** *their ministers*—that is their magistrates."

Spirit of Laws, supra, at p. 4, § 2 (emphasis added). According to both Sydney and Montesquieu the people are vested with plenary power of selecting those individuals through whom their governmental affairs will be conducted.

Second, Montesquieu argues that the powers reposed in government by the people should not be vested in any one person or small group of persons. This, of course, is the principle of separation of powers. Montesquieu articulates this principle by contrasting liberty with the concentration of governmental powers in any one person or persons. More specifically, the threat to liberty arises when combinations of legislative, executive, and judicial powers are joined and concentrated in one person or group of persons. As Montesquieu explains:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, ***there can be no liberty***; because

apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Spirit of Laws, supra, at p. 70, § 6 (emphasis added).

Consistent with the principles articulated by Montesquieu, on June 13, 1787 the first draft of the Constitution's provisions that established the federal government was introduced at the Constitutional Convention. This draft specifically created the three branches of government contemplated by Montesquieu, which had their constitutional powers clearly separated and circumscribed. *Madison's Journal* at pp. 160-61.[5]

In response to those who opposed ratification of the Constitution during the ratification debates, James Madison, echoing Montesquieu, addressed the issue of separation of powers in Federalist #47[6]:

> "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Federalist Papers, supra, at 301.

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[5] Madison, James, *Journal of the Constitutional Convention (kept by James Madison)*, (1840 Ed.) reprinted 1893, Chicago: Scott, Foresman and Company (*"Madison's Journal"*).

[6] Hamilton, Alexander, Madison, James, Jay, John, *The Federalist Papers*, (1961), New York: NAL Penguin, Inc. (*"Federalist Papers"*).

In his *2nd Treatise*, Locke starts with identifying that we, as humans, desire to enter into society with one another:

> "God have made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society..."

2nd Treatise, supra, at 42.

Locke reasons that in order to understand the origins of civil government, one must first understand the state of humans prior to entering into society. Locke posits what he calls the "*state of nature.*" In this state, humans are vested with all aspects of liberty, including the liberty to execute laws upon one another. Of course, this condition leads to every person being prosecutor, judge, jury, and executioner, which actually results in the **loss** of liberty. *Id.* at 8. That in order to secure liberty, humans enter into society by creating civil government. Hence, Locke argues in favor of consent theory (i.e., that government derives its powers from the consent of the governed). *Id.*

Locke further expounds upon the consent theory by presenting the argument that not only do humans have the plenary power to establish government, but also the power to alter or abolish their government in the event it becomes tyrannical:

> "But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouze themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected."

Id. at 113. This passage was paraphrased and incorporated into the Declaration by Thomas Jefferson as the legal basis for separating from Great Britain:

> "But when a long train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it