No. 02-1624

October Term, 2002

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.*,

Respondent

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONERS

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1. The American Jewish Congress ("AJCongress") respectfully moves this Court for an order permitting the filing of the attached brief *amicus curiae*.

2. The American Jewish Congress is an organization of American Jews founded in 1918 to protect the social, civil, religious and economic rights of American Jews. It takes a particular interest in the separation of church and state in the public schools, and has filed briefs in all cases reaching this Court on that issue since *McCollum v. Bd. of Education* (1947).

This case requires a delineation of that doctrine's outer boundaries. AJCongress believes that this case can be decided without overruling or limiting the holdings of prior religion-in-school cases. Nevertheless, some of the grounds which have been, or likely will be, urged for reversal would provide a rationale for undoing the religious neutrality of the public schools.

AJCongress seeks to bring its experience to bear on this Court's deliberations, both so that this case is decided correctly and that the decision is placed on grounds which would not justify enlisting the public schools in a campaign of religious instruction, indoctrination and worship.

3. Pursuant to this Court's rules, the undersigned sought leave to file the attached brief. The United States and Petitioners consented; Respondent has not yet replied to *amicus*' request.

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December 17, 2003

AMICUS CURIAE BRIEF of the AMERICAN JEWISH CONGRESS

INTEREST OF THE *AMICUS*

The interest of the *amicus* is stated in the Motion for Leave to File this brief.

SUMMARY OF ARGUMENT

1. Because it is settled that a once religious practice may undergo a metamorphosis and become secular, *McGowan v. Maryland*, 366 U.S. 420 (1965), this Court must decide whether the Pledge of Allegiance now conveys a religious message, not whether it did so when first adopted at the height of the Cold War, when Congress sought to use religion to provide a unifying ideology to counter the appeal of communist ideology.

2. In undertaking that inquiry, a Court undertakes an inquiry that is in part historical and in larger part sociological. How does a practice function? What contemporary public role does it play? Why was it called into existence? Does it still serve that function? Is there a danger that it will now be seen as part of an established creed? Does it suggest that religion is now relevant to a citizen's political standing?

3. These same inquiries have guided the Court's approach, whether the question is whether a practice is seen as endorsing religion, *County of Allegheny v. ACLU*, 492 U.S. 573 (1992); whether a religious practice is perceived as that of a state or as that of a private party, *Capitol Square Review & Advisory Board v. Pinnette*, 515 U.S. 753 (1995); or, as here, whether a practice retains a religious character.

4. The Court undertakes these inquiries from the perspective of the reasonable observer. In this case, while consideration is given to the perspective of school children, because children know that the Pledge is recited by adults as well, the Court must give consideration to adult perspectives as well.

5. The inquiry into the perception of the reasonable observer is not with "isolated nonadherents," but with the "political community writ large," *Pinnette*, *supra*, 515 U.S. at 779 (O'Connor, J., concurring). Thus, the question is not whether a non-believer would regard the Pledge as relegating him to a political or social ghetto, but whether the "political community writ large" regards the Pledge as a means of separating good citizens from bad.

6. The reasonable observer would know that there are some notational markers of the place of religion in American civil life. These are labeled ceremonial deism.

7. The contexts of ceremonial deism are patriotic, not religious, and are not part of the ritual of any single religious group. Such references are typically short and generic, as is the reference to God in the Pledge.

8. In particular, the Pledge is to a flag and secular republic, not to a deity or sacred symbol. It has none of the trappings of a religious ceremony, and does not assert a faith in something to which all else is subordinate.

9. Ceremonies which fit under the rubric of ceremonial deism make no intense demands of believers; do not address ultimate questions of being; and do not directly

address God as does prayer. They create no lasting or meaningful religious commitments, and are "expression[s] of society's integration, rather than [a] source" of it.

10. It would be possible a theologian to interpret the reference to God as communicating substantial religious ideas. The average citizen, or the average school child, however, is not likely to parse the revised Pledge in this way.

11. Finally, the "civic religion" as a whole is patriotic and not religious, such that the Pledge, as part of that "civic religion," does not take on a religious aura.

12. However, the Pledge cannot be upheld as constitutional, as were legislative prayers or church tax exemptions, on the ground that it was a historical gloss on the First Amendment. Those practices were contemporaneous with the First Amendment; the Pledge is quite recent. And, unlike those practices, it cannot be said that in revising the Pledge, Congress gave careful consideration to constitutional issues.

13. In addition, the Founders deliberately referred to mention of God in the Constitution and Congress has repeatedly refused to do so since–factors cutting against any historical gloss here.

14. The fact that America's leaders sometimes make religious remarks in public pronouncements does not help Petitioner because those remarks are personal to the speaker, addressed to adults, and do not suggest the desirability of agreeing with those religious sentiments. None of these are true with regard to the Pledge.

ARGUMENT[1]

INTRODUCTION

The decision of the Ninth Circuit is not "ridiculous" as President Bush asserted, U.S. Court Votes to Bar Pledge, Washington Post, June 27, 2002, A-1; neither is it "just nuts" as Senate Minority Leader Tom Daschle charged, *id.* Contrary to the suggestion of the Solicitor General (Petition for Certiorari, *U.S.A. v. Newdow*, 02-1574), it is not even "manifestly contrary to precedent."[2] Nevertheless, the decision below goes beyond what the Constitution requires of public schools, and hence, despite its substantial logical appeal, cannot stand.

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1. Pursuant to Rule 37.6, the undersigned counsel of record certifies that only named counsel prepared this Brief. No person, organization or corporation other than the *amicus* assisted in its preparation or filing, or contributed to the costs of its submission.

2. The Solicitor General collects the statements of twelve Justices of this Court suggesting that the inclusion of the phrase "under God" in the Pledge of Allegiance is constitutional. Petition for Certiorari, 02-1574. Those statements are *dicta*, resting on sharply conflicting rationales. Compare *County of Allegheny v. ACLU*, 492 U.S. 573, 623, 625 (O'Connor, J.) with *id.* at 657 (Stevens, J.), with *id.* at 674, n. 10 (Kennedy, J.) In some cases, *e.g.*, *Engel v. Vitale*, 370 U.S. 421, 435, n. 21 (1962), the statements are nothing more than *ipse dixits*. Such statements are not conclusive as to a case in which an issue is squarely presented. *R.A.V. v. St. Paul*, 505 U.S. 377, 386, n. 5 (1992).

As a judge who is an eminent scholar of the Religion Clauses has written of another case: while "abstractly speaking, [the district court's] logic is impeccable …[yet] abstract logic …yield[s] to historical experience. A vital balance has been maintained rather than a syllogism parsed." *Kong v. Scully*, 341 F.3d 1132, 1139 (9th Cir. 2003) (Noonan, J.).

One should examine carefully the nature and history of a long-standing practice before concluding that the practice either is an unconstitutional violation of student rights, or conversely, is constitutionally permissible. Having engaged in such an analysis, we conclude that the Pledge of Allegiance, particularly since it has no coercive effect, is not unconstitutional.

I. THE RELIGIOUS REFERENCES IN THE PLEDGE DO NOT CONVEY A RELIGIOUS MESSAGE TO THE REASONABLE OBSERVER

A. The Pledge Today Conveys No Religious Message

The controlling question in this case is whether the daily school-sponsored recitation of the phrase "under God" as part of the Pledge of Allegiance conveys a religious message to students, or whether it has been sufficiently drained of religious meaning to be constitutionally tolerable. Put otherwise, the question is whether the officially commanded use of the phrase "under God" is distinguishable from the officially sanctioned prayers long proscribed by this Court's cases.

The Court must answer those questions as of today, no matter what the result should have been had this challenge been brought immediately following Congress' decision to on add "under God" to the Pledge. The newly sacralized Pledge was intended to provide a nation-unifying principle of belief in God to counter the supposed motivational advantage enjoyed by communist countries. Those countries benefitted from a political ideology quasi-religious in character and in the fervor with which it was held, and nation-building in effect. M. Silk, Spiritual Politics: Religion and America Since World War II (1988), pp. 96-99; S. Gey, "Under God": The Pledge of Allegiance and Other Constitutional Trivia, 81 N.C.L.REV. 1865, 1873-80 (2003) ("Gey").

When in 1954 the Executive and Legislative branches joined to proclaim the identification of a belief in God and "Americanism," their action forced itself prominently into the public consciousness and suggested something about the beliefs of 'good' Americans. Under the very different circumstances of today–with the all-but-total collapse of communism and the end of the Cold War–the same words no longer convey the same message.

It is familiar learning that governmental acts may undergo a metamorphosis from religious to secular. The Sunday Blue Laws are the best known example. Originating in a legislative intention to fortify sectarian religious observance, by the time those laws came before this Court they had been transformed to serve the secular function of mandating a common day of rest. *McGowan v. Maryland*,

366 U.S. 420, 431 (1961). Whatever residual benefit afforded religion was indirect, incidental and compatible with the Establishment Clause.

In *McGowan*, the Court relied on numerous factors in concluding that Maryland's Blue Laws were no longer nourished by their religious roots, and, reciprocally, no longer nourished religious practice nor perceived as doing so. Those factors were:

> (a) recent popular support of the laws was premised on secular considerations, 366 U.S. at 435, 450-51;
>
> (b) judicial decisions dating to the mid-19th century interpreting the Blue Laws treated them as secular enactments, 366 U.S. at 447, 449;
>
> (c) the Blue Laws did not single out for prohibition activities offensive to religious sensibilities, instead banning activities that would interfere with "providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment," *id*. at 448;
>
> (d) amendments to the laws systematically stripped them of religious references and content, *id.* at 448-449; and
>
> (e) there was no readily available alternative to achieve the state's secular purpose, *id.* at 449-52.

The inquiry the Court applied in *McGowan* was not only historical–it was also sociological and cultural. A similar inquiry with regard to the Pledge will lead to the conclusion that what was once, perhaps, religious, is now securely secular.

More recently, in a context in which it determine whether a particular practice communicated a suggestion of government endorsement of a religious message, this Court undertook a similar inquiry. *County of Allegheny v. ACLU*, 492 U.S. 573, 629 (1992) (O'Connor, J.). In responding to the inquiry of how to evaluate a practice at the border between the religious and secular, this Court asked a series of questions: How does the practice function? Why was it called into existence? What public role does it play? How is the practice perceived by the public? Is there a "realistic danger that [in displaying a religious symbol] the community [was] endorsing religion or any particular creed?" *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 772 (1995) (O'Connor, J.), quoting *Lamb's Chapel v. Center Moriches U.F.S.D.*, 508 U.S. 384, 395 (1993).

In the context of the display's evident meaning and its social matrix, its form and surroundings, and available alternative means of achieving any legitimate secular purpose served by the display, a court must decide whether a challenged act signifies the government's adoption of a religious test of civic allegiance or whether, in displaying the object, the government is intentionally or otherwise signaling that some citizens, because of their religious views, enjoy enhanced or degraded status, for "[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 68_ (O'Connor, J., concurring); *County of Allegheny v. ACLU*, *supra.*

Similarly, when this Court has to determine whether private religious activity was perceived as official or private activity, *Capital Square Review and Advisory Bd. v. Pinette*, *supra*; *Lamb's Chapel*, *supra*; *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990), it has engaged in a historical and sociological inquiry[3] of the type described here.

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3. Inquiries about public perception have also been undertaken with regard to Establishment Clause challenges to religious accommodation, *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (O'Connor and Marshall, J J., concurring) and aid to religious schools, *Mitchell v. Helms*, 530 U.S. 793, 809 (2000), citing *Agostini v. Felton*, 521 U.S. 203, 226 (1997).

In *Capital Square Review and Advisory Bd. v. Pinette*, *supra*, the question presented (for a majority of the Court[4]) was whether a privately erected cross standing at the state capitol would be perceived by a reasonably informed observer (about whom more below) as state sponsored. In *Pinette*, the question was whether an unquestionably religious practice was perceived as the government's or that of a private sponsor.

Here, the Pledge is undeniably chargeable to government, but the question remains: is it perceived as a religious practice? The different focus of the inquiry should not change the approach the Court takes to answering it. Before applying that inquiry to the Pledge as reformulated in 1954, it is necessary to describe in greater detail the attributes of the reasonable observer.

B. The Reasonable Observer Knows Of Ceremonial Notations of Religion

4. For a plurality, Justice Scalia argued that the display of a private religious symbol in a public forum could never violate the First Amendment. 515 U.S. at 764-66. A majority of the Court disagreed, 515 U.S. at 774 (O'Connor, J.); *id.* at 785 (Souter, J.); *id.* at 799, 811-12 (Stevens, J., dissenting), *id.* at 817-18(Ginsburg, J., dissenting), and applied the tests described in the text of the brief.

As the statute codifying the Pledge indicates, 4 U.S.C. § 4, the Pledge is not intended for school use only. Children encounter the Pledge not only in their schools, but also in 'adult' surroundings. It is appropriate to give additional weight to a child's view of the Pledge, *Good News Club v. Milford Central School*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring in part) ("a child's perception that the school has endorsed …religion in general may also prove critically important."), but because the Pledge's recitation is not limited to students, it is also necessary to consider the perception of adults towards the inclusion of the phrase "under God," *id.* at 117-19.

The reasonable observer is expected to know of the physical, cultural and legal context in which the religious elements appear. Thus, in *Pinette*, the reasonable observer was held to the knowledge that the Ohio capitol grounds were a public forum. 515 U.S. at 780-81 (O'Connor, J.); *id.* at 787-90 (Souter, J.) The reasonable observer here will know of the patriotic context of the Pledge, and of other patriotic exercises embodying nominal references to religion.

The knowledge imputed to the reasonable observer also includes the fundamental thrust of First Amendment law. Thus, for example, Justices O'Connor and Marshall suggested that the reasonable observer would not see reasonable religious accommodation required by Title VII, 42 U.S.C. § 2000e(j), as a preference for religion because they would be expected to know of the legal notion of permissive religious accommodation. *Estate of Thornton v. Caldor, Inc.*, *supra*. Likewise, the reasonable observer is

expected to know that the Constitution does not affirmatively mandate that all vestiges of religion must be excised from official life.

Because the inquiry is about the public understanding of a governmental action in a communal context, the reasonable person inquiry does not focus on the perception of any individual. As Justice O'Connor explained in *Pinette*, *supra*:

> [B]ecause our concern is with the political community writ large … the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomforts of viewing symbols of faith to which they do not subscribe. Indeed, to avoid "entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens" …our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible …for the injection of religion into the political life of the citizenry.

515 U.S. at 779 (citations omitted).

We do not in any way minimize the conflict perceived by Newdow and others who share his world-view between their beliefs and the words of the Pledge. Rather, we suggest only that those views, which regard even the most innocuous of religious reference in public life as

unremittingly hostile to their beliefs, are not determinative of the Pledge's constitutionality.

II. THE REASONABLE OBSERVER WOULD NOT SEE "UNDER GOD" IN THE PLEDGE AS INJECTING RELIGION INTO THE NATION'S POLITICAL LIFE

A. The Pledge Is A Permissible Form Of Ceremonial Deism

1. The Pledge Is Not A Religious Statement

The Pledge, with its passing and merely notational reference to God, is by no means unique in the American political culture. The reasonable observer would note that it is but one of many such notational references, which have not been understood to endorse religion, make it relevant to a citizen's standing, inject religion into the political life of the country, or relegate non-believers and atheists to a political ghetto. *A fortiori*, it has not served as the first step toward establishing a national religion.

These national markers of the place of religion in the culture are conveniently and accurately categorized, in Dean Rostow's felicitous phrase, as ceremonial deism. *Lynch v. Donnelly*, *supra*, 465 U.S. at 716 (Brennan, J., dissenting).[5]

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5. In *Lynch*, Justice Brennan, disagreeing with the majority, thought that the creche, unlike the revised Pledge, "retained [its] religious character," 465 U.S. at 700, for it was "the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world ..." *Id*. at 708.

Many, but not necessarily all, manifestations of ceremonial deism are not perceived by the reasonable observer as religious. The public and secular contexts of ceremonial deism drains it of substantial religious significance for the reasonable observer. So does the repeated rote recitation of the Pledge.

First, as is the case with the Pledge, the larger context of ceremonial deism is patriotic, not religious. Second, the challenged words in this case are recited in a forum which is not religious. The Pledge's recitation is sponsored by Elk Grove School District, which, under this Court's decisions, is barred from sponsoring religious exercises.

Moreover, the Pledge, even with the challenged words, is not, as far as *amicus* knows, a part of the religious ritual of any faith group in the United States, underscoring to those students who attend religious worship that this mention of God is qualitatively different than those invoked in the houses of worship.

In the revised Pledge, a non-denominational,[6] short and unelaborated religious reference is inserted into a larger patriotic statement. One can conceive of the religious

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6. Had Congress inserted a sectarian reference (under Jehovah, Jesus, Allah or Buddha, for example, the addition certainly would have been unconstitutional, as even the relevant House committee, p. 19, *infra*, acknowledged, and as cases such as *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 603; *Marsh v. Chambers*, 463 U.S. 783, 793, n. 14 (1983); *King v. Richmond County*, 331 F.3d 1271, 1281 (11th Cir. 2003) hold.

overwhelming the secular in what is ostensibly a civic statement, cf, *County of Allegheny v. ACLU*, 492 U.S. at 598-600 (secular framework overwhelmed by religious symbolism of creche), or of the secular serving as a pretext for what is intended as a religious exercise, *Wallace v. Jaffree*, 472 U.S. 39 (1983); *State Bd. of Education v. Bd. of Education of Netcong*, 57 N.J. 172, 270 A.2d 412, affirming, 108 N.J.Super. 564 (Chancery Div. 1970) (use of congressional chaplain's prayer as subterfuge for school prayer).

It will be recalled that counsel for the County of Allegheny thought it would be perfectly constitutional to have an official Christmas mass, just as it was constitutional to display a creche. *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 601. If this Court upholds the Pledge, it is unfortunately predictable that some malevolent public officials will cite the holding as justification for religious, even narrowly sectarian, observances. But cases should not be decided based on the undifferentiated fear that the result will be distorted.

In the case of the Pledge, the secular context dominates the religious reference. This is not a case where the religious tail wags the secular dog. There is no evidence that Elk Grove has its students recite the Pledge in order to sneak forbidden religion into its school program.

2. The Pledge's Objectives Are Secular

Further underscoring the reasonable perception by students of the Pledge as a secular statement is that it is a pledge to the "flag and to the Republic for which it stands," not to a recognizable deity, sacred object or religious faith. The flag is not a sacred symbol, *Texas v. Johnson*, 491 U.S. 397, 417-18 (1991); *U.S. v. Eichman*, 496 U.S. 310 (1990), in the manner of a Torah or a crucifix. Neither is the "Republic for which it stands" a sacred entity as is a religious congregation.

The Pledge is accompanied by none of the usual trappings of a religious ceremony. There is no bending of the knee, bowing or covering of the head; the ceremonies prescribed–suggested, really–by the statute for the recitation of the Pledge are purely civic in nature. 4 U.S.C. § 4.

The Pledge, like other words or symbols of ceremonial deism, has no role or counterpart in services found in synagogues, mosques and churches. Even adherents of faiths which reject ecumenical religious ceremonies, which separate men and women during religious services, or which require special garb during prayer, see no objection to reciting the Pledge without these requirements. The Pledge, and the ceremonies embodying it, are deliberately pale and insignificant replicas of the sacred worship of a deity that is the hallmark of a religious exercise.

In a house of worship, one pledges full personal allegiance to an omniscient and omnipotent God, Jesus or Allah, to the exclusion of all else, not to a fallible human political entity. The Pledge does not assert a "faith to which all else is subordinate or upon which all else is ultimately

dependent." *Seeger v. U.S.* 380 U.S. 163, 174 (1965). One prays for God's help and praises Him for His grace and past benefices. One does none of these in the pledge of political loyalty that is the Pledge of Allegiance.

B. The Pledge Lacks The Religious Significance Of School Prayer

Ceremonial deism in its constitutionally acceptable form is not the equivalent of, substitute for, or inseparable part of, the "religious beliefs and practices of the American people," *Lynch v. Donnelly*, *supra*, 465 U.S. at 716 (Brennan, J., concurring). The government may not use religious statements in that way. "The … precedent[s] caution us to measure the idea of civil religion against the central meaning of the Religion Clauses …. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction …." *Lee v. Weisman*, 505 U.S. 577, 590 (1992).

Ceremonial deism makes no urgent or compelling religious demands; it does not call for the adherent to do or not to do anything; it does not address "ultimate questions" of being, *Seeger v. U.S.*, *supra*, 398 U.S. at 184-85, the purposes, goals, and meaning of human life, or the existence of an after-life. In particular, it is crucially different than prayer, which is inescapably religious. It does not call upon God to do anything in response, if only to listen, as a prayer necessarily does.

A twentieth century Orthodox Jewish theologian described prayer: "[b]oth prayer and prophecy are basically dialogues between finitude and infinity. They differ only as to the respective roles assigned to creature and Creator. … [In prayer] God is the listener and man is the speaker." J.B. Soloveitchik, Worship of the Heart (S. Carmy, ed.) (2003) at 10-11. See also, 11 Encyclopedia of Religion, *s.v*. "Prayer" (1987) at 489a ("prayer [is] the human communication with divine and spiritual entities").

The very utterance of prayer assumes a Being to whom (to quote *Seeger*) "all else is subordinate or … ultimately dependent." Its recitation in a school is inescapably promotes religion, understood as Madison put it in his Memorial and Remonstrance, as the sum of the duties "man owes his Creator." Prayer, whether in the nature of petition or praise, is one of the most central of those duties. Even the lowest common denominator prayers at issue in *Engel*, *School District of Abington Twshp. v. Schempp*, 374 U.S. 203 (1963) and *Lee v. Weisman* were, by these criteria, significantly and inescapably religious. The reference to God in the Pledge is not.

The Pledge and other forms of constitutionally permissible ceremonial deism "address issues of political legitimacy and political ethics, but are not fused with either church or state." R.N. Bellah, Introduction in R.N. Bellah & P.E. Hammond, Varieties of Civil Religion (1989) p. xi. In addition, the Pledge is not unambiguously religious, because its reference to God may be understood not as a reiteration of

a present religious commitment, but a description of the supposed historical motivations of the nation's founders.

It follows that the primary content of such references is secular, albeit with some religious references. Ceremonial deism does not descend (or ascend) to specific religious ideas which generate serious, powerful and lasting religious commitments. Such references pose no realistic threat of creating an established church, *Marsh v. Chambers*, *supra*. The mention of God in the Pledge and other forms of ceremonial deism have no "substantial and significant [religious] import." *Schempp*, *supra*, 374 U.S. at 307 (Goldberg and Harlan, JJ., concurring). Neither does it give rise to the reasonable perception that the state is deeply involved in promoting religion. *County of Allegheny v. ACLU*, *supra*.

The "religious ideas such [ceremonial] symbols convey is more the expression of an integrated society than it is the source of a society's integration," P.E. Hammond, Pluralism and Law In The Formation Of American Civil Religion ("Pluralism") in Bellah and Hammond, Varieties of Civil Religion, *supra*, at 139 (emphasis in original). Ceremonial deism merely acknowledges the existence of private religious commitments. They do not generate them. Prayer does.

The attenuated religious obligation implied by ceremonial deism is relegated to "realms of some theoretical generality," Hammond, Pluralism, *supra*, at 145, citing J. Courtney Murray, We Hold These Truths (1964) at 27. Specific, differentiated and detailed theological ideas give

different faiths their force. It is those ideas that create commanding and lasting religious commitments. Statements like "In God We Trust," "One Nation Under God," and the like, do not make differentiated religious claims and accordingly do not have that power.

Of course, the phrase "under God" could be understood as conveying profound religious ideas. Read not as a statement about political legitimacy, but as a theological statement about God's special concern for the United States, the phrase "under God" could convey import religious ideas: the existence of God; His concern with human affairs; and the belief of the special place of the United States in the divine plan for the world. None of these religious propositions is universally accepted. The first (God's existence) is denied by atheists; the second (God's providence) is the subject of endless philosophical and theological debates; and the third (the special place of the United States in a divine plan) is equally controversial.[7]

If the Pledge expounded on these ideas, if they were unpacked from the condensed, general and ambiguous phrase "under God," if the average elementary and

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7. This latter view has been widely criticized from both the religious right and the left. The identification of secular political ideals with "scriptural revelation," several well-known Christian scholars have written, "leads to idolatry of our nation, and an irresistible temptation to national self-righteousness," M. Noll, N.O. Hatch, G.M. Marsden, The Search For Christian America (1989) at 23.

secondary school student would understand the Pledge as an excerpt from a full-blown creedal statement such as the Baltimore Catechism, the Westminister Confession or Maimonides' Thirteen Principles of Faith, its use by public schools as an opening exercise would be indistinguishable from the religious exercises invalidated in *School District of Abington Twshp. v. Schempp*, *supra*. The analogy fails, because the Pledge does not expound on these ideas, and because it is in fact not understood to convey those inescapably religious ideas. The Pledge is therefore not unconstitutional.

C. Religious Elements Do Not Dominate The American Civic Religion

American "civic religion"–that is the ideas, days and ceremonies which mark and celebrate American nationhood–of which the Pledge is a prominent part, is not dominated by recognizably religious themes such that any aspect of it is necessarily a religious act or statement. The American civic religious tradition includes a panorama of secular patriotic and community-building places, observances and ceremonies: Presidents Day; Memorial Day; Veteran's Day and their parades and other observances; Martin Luther King Jr.'s birthday; the Star Spangled Banner;[8] patriotic songs (*i.e.*, Hail to the Chief) which have no reference to God; the flag; the pomp accompanying a Presidential Inauguration and the State of the Union address; July 4th fireworks, concerts and the reading of the Declaration of Independence in the Congress; the monuments and battlefields dotting Washington and elsewhere; the reverential displays of the Declaration of Independence and Constitution in the National Archive, and on and on.

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8. Although some of the verses beyond the first verse of that anthem contain religious references, those additional verses are almost never sung publicly.

These markers of the unity of the American community, are primarily, or totally, secular, and comprise what is reasonably called a 'civic religion.' They do not purport to be "religious" as that term is understood either by believers or constitutional lawyers. The injection of religious statements (ceremonial deism) in some small percentage of these civic exercises does not substantially alter their overall secular character. Clinching the constitutional point here, the manifestation of ceremonial deism at issue in this case is not reasonably understood as a religious affirmation when placed in the larger context of the American civil religion.

III. HISTORY ALONE CANNOT CARRY THE DAY FOR INCLUDING "UNDER GOD" IN THE PLEDGE

A. The Revised Pledge Does Not Qualify As An Historical Gloss On The First Amendment

No one acquires a vested interest in a constitutional violation as one would acquire property by adverse possession. *Walz v. Tax Comm'r*, 397 U.S. 664, 678 (1970) (church tax exemption), cited with approval in *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (legislative prayer). Constitutional violations are not 'grandfathered' by the simple passage of time.

History may, however, gloss the meaning of the Constitution if a long-standing practice, arguably in violation of the constitutional text has long gone (largely) unchallenged. The weight to be accorded history is most

conclusive when a challenged practice began contemporaneously with the adoption of the First Amendment.

In both *Marsh* and *Walz*, the challenged practices co-existed with the Establishment Clause for practically the entire life of the Republic. Both legislative prayer and church tax exemptions enjoyed the approval of the very people who wrote the First Amendment. Both were widely replicated in the states, even though, to one degree or another, all espoused church-state separation. *Marsh*, *supra*, 463 U.S. at 789, n. 11; *Walz*, *supra*, 397 U.S. at 685 (Brennan, J., concurring).

By contrast, as the dissenters in *Lynch v. Donnelly*, 465 U.S. 668, 723-24 (1984) observed of this Court's opinion in that case upholding the display of a municipal creche, the practice of official religious Christmas observances was neither so longstanding nor so universally accepted to be sustainable as a 'historical gloss' on the First Amendment.

The isolated, but thoughtful, challenges to the practice of legislative prayer that did arise do not undercut the weight of that history. On the contrary, they "demonstrate that the subject [there legislative prayer] was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Marsh*, *id.* at 791-92. The same is true of church tax exemption. See P. Hamburger, Separation of Church and State (2002) at 304-05 (detailing 19th century objections).

It must be recognized that the Pledge does not meet the criteria for claiming the protection of history. The addition of the words "under God" is so recent (1954) that every member of this Court was alive when it was accomplished–and several were already practicing law. It was adopted quickly, all but unanimously, at a time that national hysteria prompted fears that ideologically-unified communism might prevail over individual-centered American liberty.

That revision was not ratified by the repeated deliberations of federal and multiple state legislatures, as were both tax exemptions and legislative prayers. Despite the substantial constitutional and theological arguments which could have been mustered against the change, even a commentator sympathetic to the amended Pledge concedes: "the addition of these words was not the least bit controversial at the time." J. Pierson, Under God: The History of A Phrase, Weekly Standard, October 27, 2003 at pp. 19-20 ("Pierson"). That uniformity of opinion reflects not thoughtful consensus, but what Justice Jackson memorably indicted as the "unanimity of the graveyard," *West Va. B. Of Educ. v. Barnette*, 319 U.S. 641 (1943).

In the court below, in this Court and in contemporary professional journals and elsewhere, the insertion of the phrase "under God" into the Pledge has generated hundreds of pages of closely (and not-so-closely) reasoned constitutional analysis. But in the Congress, the constitutional reasoning undergirding this change consisted in its entirety of the following: "This is not an act

establishing a religion or one interfering with the "free exercise" of religion. A distinction must be made between religion as an institution and a belief in the sovereignty of God." H.R.Rep. 83-1693 at 3 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2341-42. See also 100 Cong. Rec.S. 6231 (similar language in Senate report).

That 'reasoning' would permit government to coerce expressions of belief in the sovereignty of God, contrary to now settled law, *West Va. Bd. of Educ. v. Barnette*, *supra*; *Torcaso v. Watkins*, 367 U.S. 488 (1961), even though at one time such assurances were a *sine qua non* of exercising the franchise or holding office. See M. Borden, Jews, Turks and Infidels (1984), pp. 15-44.[9] The contrary congressional conclusion in support of the reference to God in the Pledge is all the more remarkable for not being buttressed by any legal reasoning, precedential support, citations to academic writings or evidence of original intent.

The conclusion at bottom rests on the fatally flawed proposition that the Establishment Clause does not prohibit government from favoring religion over non-religion. Cf., *Wallace v. Jaffree*, 472 U.S. at 52-55; *Everson v. Bd. of Educ*., 330 U.S. 1, 16-17 (1947). The contrary view has been expressed by Justice Rehnquist in his solitary dissent in *Wallace*, 472 U.S. at 106, but it was rejected by repeated

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9. See also J. Krammick & L. Moore, The Godless Constitution: The Case Against Religious Correctness (1966), pp. 26-45; S. Schwartz, A Mixed Multitude: The Struggle For Toleration In Colonial Pennsylvania (1987), pp. 280-81

decisions of the Court, as the *Wallace* majority noted. *Wallace v. Jaffree*, 472 U.S. at 52-53; *County of Allegheny v. ACLU*, 482 U.S. 573, 589-93 (1989). Cf. also *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school vouchers constitutional only if they provide no preference for religious education).

The unavailability of a historic exception for the Pledge is underscored by the fact that for decades the Pledge–itself written by a minister–included no reference to God. That silence did not give rise to claims that the Pledge had a secularist, anti-religious thrust, sitting uneasily with the national commitment to religious neutrality.[10]

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10. No weight should be assigned the fact that in the fifty years since the Pledge's revision, only one other challenge was filed. *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir 1992). The ugly and vituperative attacks directed at Respondent Newdow demonstrate that only the thickest skinned citizen would initiate a challenge such as this. Similar attacks occur in school prayer cases. See, *e.g.*, *Santa Fe ISD v. Doe*, 530 U.S. 290 (2000) (threats); *Bell v. Little Axe School District*, 766 F.2d 1391 (10th Cir. 1985) (harassment). No one suggests that school prayers should be grandfathered into constitutionality because potential challengers are intimidated into silence.

B. History Shows A Pattern Of Rejecting Religious References In The Constitution

There are important arguments against finding an historic gloss in the Constitution capable of preserving the Pledge. In view of their insistence that the federal government had no role in matters of faith, the Founders (over sharp criticism) deliberately omitted a reference to God in the Constitution, H.J. Storing, What The Anti-Federalists Were For: The Political Thought Of The Opponents Of The Constitution (1981) at pp. 22-3; L. Pfeffer, Church, State and Freedom, 2d ed. (1967) at p. 240; Kramnick and Moore, The Godless Constitution, *supra*, at pp. 16-44. That deliberate omission suggests that it would be wrong to understand the Constitution's drafters as regarding official acknowledgments of God's superintendence of the republic as compatible with the limited federal government they had created.

In the aftermath of the Civil War, some Protestants saw that war as divine punishment for the nation's failure to acknowledge God and Jesus Christ in its foundational document. The National Reform Association ("NRA") came into being to seek inclusion in the Constitution of an acknowledgment of God's unqualified sovereignty and Jesus' rule over nations. Although the NRA enjoyed the patronage of Justice William Strong of this Court, the effort was repeatedly rebuffed by other political leaders, including Lincoln and the Congress. M. Borden, Jews, Turks and

Infidels (1984) 58-74;[11] P. Hamburger, *supra*, at p. 293 , n. 18, citing Report 143, 43rd Cong., 1st Sess., Report from the Committee on the Judiciary: Acknowledgment of God and the Christian Religion in the Constitution (February 18, 1874).

There have been further unsuccessful efforts to amend the Constitution to acknowledge God without any overtly sectarian references as, for example, by twelve Senators in 1964, L. Pfeffer, Church, State and Freedom, 2d ed. (1967) at 240, n. 50. Repeatedly over the last decade, and as recently as two years ago, Congressman Ernest Istook has introduced such an amendment, see, *e.g.*, H.J.Res. 81 (107th Cong. 1st Sess.) All those efforts failed. These repeated rejections–old and new–are an insurmountable obstacle to any claim for a blanket "historic" exception for reference to God in official documents.

C. Religious References In Personal Pronouncements Of Government Leaders Are Readily Distinguishable

The phrase "under God" has long been used by American leaders in referring to our nation. Pierson, *supra*. It was used, even before the adoption of the Constitution and

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11. It is true that the effort was defeated in part because a reference to Jesus Christ was seen as too sectarian. Nevertheless, it is significant that no one seriously pursued adding just a "non-sectarian" reference to God.

the First Amendment, by George Washington in a General Order addressed to his troops, and then by Lincoln in his Gettysburg and Second Inaugural Addresses. Religious references are common in presidential inaugural addresses.

These isolated religious references are dispositively different than the classroom Pledge. Presidential invocations of God's special concern for the nation express only the personal belief of the speaker, and sometimes nothing more than a personal prayer for God's assistance; they are uncommon, occurring only at evidently ceremonial occasions; they are addressed to an adult audience; they are not presented in ways that suggest that listeners ought to accept the President's own view of God's special solicitude for the American Republic.

None of these is true of the Pledge. It is solemnly recited daily to initiate the school day, setting out the public school's most fundamental values. It is led by teachers, the officials charged with transmitting a school's values to its pupils. *Ambach v. Norwick*, 441 U.S. 68 (1979). If the Pledge with the reference to God is understood in a religious way (as we submit it is not, Point II, *supra*), it would be indistinguishable from the Ten Commandments displayed on classroom walls, *Stone v. Graham*, 449 U.S. 39 (1981), proclaiming that to be a good citizen a student should accept God's sovereignty. Because it is aimed precisely at impressionable school children,[12] the Pledge invites skeptical

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12. Upon signing the bill that added "under God" to the Pledge, President Eisenhower said "From this day forward, the millions of

judicial scrutiny. *Santa Fe ISD v. Doe*, *supra*; *Edwards v. Aguillard*, 482 U.S. 578 (1987); *School District of Abington Twshp. v. Schempp*, *supra*. See *Good News v. Milford Central School*, 533 U.S. 98 (2001).

The Elk Grove School District is free to urge on its students the necessity of patriotism, *Barnette*, *supra*; *Ambach*, *supra*, though it cannot compel acquiescence.[13] *Barnette*, *supra*; *Wooley v. Maynard*, 430 U.S. 705 (1977). However, Elk Grove is forbidden to even attempt to

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our school children will …proclaim …the dedication of our Nation and our people to the Almighty. In this way, we are reaffirming the transcendence of religious faith in America's heritage …. [I]n this way, we shall consistently strengthen those spiritual weapons which will forever [be] our country's most powerful resource, in peace or in war." 100 Cong. Rec. S8617-18 (1954). Were students today to understand the Pledge as President Eishehower did, Respondents' case would be far stronger. We do not believe that this is the case.

13. The Pledge without a reference to God was effective in expressing love of country. While it has sometimes been claimed that religious references are the only way this society can solemnize civic events, *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); *id.* at 717 (Brennan, J., dissenting), that cannot be the case here, where for seventy years the civic and educational function of the Pledge was satisfied without reference to God. So at least two school boards argued to this Court, *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940).

persuade its students to accept religious propositions as true. *Stone v. Graham*, *supra*. Were the Pledge perceived as a prayer or as a significant religious statement or acknowledgment, it would be beyond the authority of a school board. As we have already demonstrated, however, in Points I and II, that is not the case.

CONCLUSION

Were the modified Pledge religious, if it enjoyed contemporary religious significance, the fact that it has been widely recited for 50 years would not save it. However, as we have shown, the phrase "under God" in the Pledge has no substantial contemporary religious content. To remove a bare religious reference, without any palpable contemporary religious significance, after it has long been an accepted part of American life would be to fall into a trap Justice Goldberg long-ago cautioned against:

> [U]ntutored 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 with which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.

School District of Abington Twshp. v. Schempp, *supra*, 374 U.S. at 306.

For the reasons stated the judgment should be reversed.

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