

CASE NOS. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MICHAEL A. NEWDOW; et al.,

*Plaintiffs-Appellees,*

v.

JOHN CAREY; et al.,

*Defendants-Intervenors-Appellants.*

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On Appeal from the United States District Court for the  
Eastern District of California  
(District Court No. CV-05-00017-LKK)

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**BRIEF *AMICUS CURIAE* OF MADISON-JEFFERSON SOCIETY,  
IN SUPPORT OF AFFIRMANCE**

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## **STATEMENT OF *AMICUS CURIAE***

Amicus, Madison-Jefferson Society, is a private association dedicated to honoring and preserving the social and political values of Presidents James Madison and Thomas Jefferson. The society advocates for essential liberties, including governmental respect for individual rights, absolute freedom of thought, and a national government that operates within the framework of the separation of powers. The society actively supports the proposition that the core ideals and values of Madison and Jefferson are as relevant and essential to the success of our Republic today as they were during the founding of the nation.

Amicus urges this Court to uphold the District Court's ruling because the Elk Grove Unified School District policy is unconstitutional under the Establishment and Equal Protection Clauses of the First and Fourteenth Amendments to the U.S. Constitution, as applied to the states through the Fourteenth Amendment. The issues presented in this case are of the utmost significance to all who cherish our national approach to religious liberty as embodied in the Establishment Clause. Amicus respectfully attempts herein to contribute historical context and old-fashioned logic to the debate surrounding resolution of this issue.

## **SOURCE OF AUTHORITY**

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than Amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

## ARGUMENT

Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?

- James Madison, Section 3 of A Memorial and Remonstrance, June 20, 1785

### **I. HISTORICAL EXAMPLES OF PUBLIC INVOCATION OF JESUS AND PROTESTANTISM ARE AS STRONG AS HISTORICAL EXAMPLES OF PUBLIC INVOCATION OF GOD**

#### **A. Historical examples of public invocation of God have been argued to provide justification for the Elk Grove district policy**

In his concurring opinion in *Elk Grove Unified School District v. Newdow*, Chief Justice Rehnquist stated, “The phrase ‘under God’ in the Pledge seems, as a historical matter, to sum up the attitude of the Nation’s leaders, and to manifest itself in many of our public observances.” *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 5 (2004) The opinion cites a list of historical examples of public invocation of God, with a particular emphasis on statements and writings made by American political leaders. One example prominently cited in his opinion is President Washington’s first Thanksgiving proclamation in 1789:

Whereas it is the duty of all Nations to acknowledge the problems of Almighty God, to obey His will, to be grateful for his benefits, and

humbly to implore his protection and favor—and whereas both Houses of Congress have by their joint Committee requested me to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness. *Id.* at 5. Papers of George Washington 131: Presidential Series (W. Abbot & D. Twohig eds. 1993).

Chief Justice Rehnquist went on to state, “Almost all succeeding Presidents have issued similar Thanksgiving proclamations.” *Elk Grove Unified School District v. Newdow*, 542 U. S. 1, 7 (2004) It is instructive to note, however, that President Thomas Jefferson refused to issue such Thanksgiving proclamations because he believed that to do so would, in fact, violate the Establishment Clause. *Van Orden vs. Perry*, 125 S. Ct. 2854, 30 (2005).

The Chief Justice’s opinion places great emphasis on the value of these historical examples of governmental invocation of God: “All of these events strongly suggest that our national culture allows public recognition of our Nation’s religious history and character.” *Elk Grove Unified School District v. Newdow*, 542 U. S. 1, 7 (2004). This rationale leads to the following questionable conclusion:

The phrase “under God” is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: “From the time of our earliest history our peoples



and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.” *Id.* at 8.

**B. Our national history and heritage includes a long list of examples of public invocation of Jesus and Christianity**

Chief Justice Rehnquist’s list of examples in *Elk Grove Unified School District v. Newdow* of references to God in our nation’s history can not include our guiding and defining document, the United States Constitution, because the word “God” appears nowhere in that text. It is notable, however, that the Constitution specifically refers to Jesus in declaring the date of the document:

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven and of the independence of the United States of America the Twelfth. United States Constitution, Article VII. Ratification completed, June 21, 1788.

Early settlers of our nation invoked the Christian faith in adopting the Articles of Confederation of the United Colonies of New England in 1643:

Whereas we all came into these parts of America with one and the same end and aim, namely, to advance the Kingdom of our Lord Jesus Christ and to enjoy the liberties of the Gospel in purity with peace; and whereas in our settling (by a wise providence of God) we are further dispersed upon the sea coasts and rivers than was at first intended, so that we can not according to our desire with convenience communicate in one government and jurisdiction; and whereas we live encompassed with people of several nations and strange languages which hereafter may prove injurious to us or our posterity.  
<http://www.yale.edu/lawweb/avalon/art1613.htm>

The Constitution of Delaware Article 22 adopted in 1776, recognized Jesus by requiring that all public office holders must take the following oath:

I, A B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.

<http://www.yale.edu/lawweb/avalon/states/de02.htm>

The Virginia Declaration of Rights. Section XVI, which was adopted unanimously in 1776, concluded as follows:

That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

<http://www.yale.edu/lawweb/avalon/states/virginia.htm>

In 1841, President William Henry Harrison invoked the Christian faith in his Inaugural Address when he stated:

I deem the present occasion sufficiently important and solemn to justify me in expressing to my fellow-citizens a profound reverence for the Christian religion and a thorough conviction that sound morals, religious liberty, and a just sense of religious responsibility are essentially connected with all true and lasting happiness; and to that good Being who has blessed us by the gifts of civil and religious freedom, who watched over and prospered the labors of our fathers and has hitherto preserved to us institutions far exceeding in excellence those of any other people, let us unite in fervently commending every interest of our beloved country in all future time.

<http://www.law.ou.edu/ushistory/harrison.shtml>

President James Buchanan referred to Christianity in the context of his approach to foreign affairs in his Inaugural Address in 1857 when he said:

We ought to cultivate peace, commerce, and friendship with all nations, and this not merely as the best means of promoting our own material interests, but in a spirit of Christian benevolence toward our fellow-men, wherever their lot may be cast.

<http://www.yale.edu/lawweb/avalon/presiden/inaug/buchanan.htm>

United States Supreme Court Chief Justice Earl Warren, in 1954, described the nation as “a Christian land governed by Christian principles.” *New York Times*, February 5, 1954, p. A-10, “Eisenhower Joins in a Breakfast Prayer Meeting.”

On June 14, 1954, following President Eisenhower’s signing of House Joint Resolution 303, adding “under God” to the Pledge of Allegiance, an official ceremony was held on the steps of the United States Capitol. As the flag was being raised, the following music was played:

Onward, Christian soldiers, marching as to war,  
With the cross of Jesus going on before.  
Christ, the royal Master, leads against the foe;  
Forward into battle see His banners go! 100 CONG. REC. S 8617  
(1954)

### **C. Our national history and heritage includes a long list of examples of public invocation of Protestantism**

The Resolutions of the Continental Congress of October 19, 1765, began with the following passage:

The members of this Congress, sincerely devoted, with the warmest sentiments of affection and duty to His Majesty's Person and Government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit the circumstances of the said colonies, esteem it our indispensable duty to make the following declarations of our humble opinion, respecting the most essential rights and liberties Of the colonists, and of the grievances under which they labour, by reason of several late Acts of Parliament.  
<http://www.yale.edu/lawweb/avalon/resolu65.htm>

The Constitution of South Carolina, Section XXXVIII, adopted in 1776, established Protestantism as the official religion of the state:

The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State. That all denominations of Christian Protestants in this State, demeaning themselves peaceably and faithfully, shall enjoy equal religious and civil privileges.  
<http://www.yale.edu/lawweb/avalon/states/sc02.htm>

The Constitution of New Jersey, Section XIX, adopted in 1776, provided for particular privileges for Protestants:

That there shall be no establishment of any one religious sect in this Province, in preference to another; and that no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect. who shall demean themselves peaceably under the government, as hereby established, shall be capable of being elected into any office of profit or trust, or being a member of either branch of the Legislature, and shall fully and freely enjoy every privilege and immunity, enjoyed by others their fellow subjects. <http://www.yale.edu/lawweb/avalon/states/nj15.htm>

The Constitution of North Carolina, Section XXXII, adopted in 1776, prohibited non-Protestants from holding public office:

That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State. <http://www.yale.edu/lawweb/avalon/states/nc07.htm>

The Constitution of Georgia Article VI, adopted in 1777, prohibited non-Protestants from serving as representatives:

The representatives shall be chosen out of the residents in each county... and they shall be of the Protestant religion, and of the age of twenty-one years, and shall be possessed in their own right of two hundred and fifty acres of land, or some property to the amount of two hundred and fifty pounds.  
<http://www.yale.edu/lawweb/avalon/states/ga02.htm>

The Constitution of Vermont, Chapter I, Section III, adopted in 1777, granted particular civil rights to members of the Protestant faith:

That all men have a natural and unalienable right to worship ALMIGHTY GOD, according to the dictates of their own consciences and understanding, regulated by the word of GOD; and that no man ought, or of right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his conscience; nor can any man who professes the protestant religion, be justly deprived or abridged of any civil right, as a citizen, on account of his religious sentiment...  
<http://www.yale.edu/lawweb/avalon/states/vt01.htm>

## **II. IF HISTORICAL EXAMPLES OF PUBLIC INVOCATION OF GOD PROVIDE CONSTITUTIONAL JUSTIFICATION OF THE ELK GROVE POLICY, THEN THE SIMILAR HISTORICAL**

## **RECORD FOR INVOCATION OF JESUS AND PROTESTANTISM WOULD JUSTIFY INCLUSION OF “UNDER JESUS” AND “UNDER PROTESTANTISM” IN THE PLEDGE**

In his concurring opinion in *Elk Grove Unified School District v. Newdow*, Chief Justice Rehnquist created a list of historical references to God and used these examples to conclude that “under God” in the Pledge is constitutionally acceptable in the context of the Elk Grove policy. *Elk Grove Unified School District v. Newdow*, 542 U. S. 1, 5-7 (2004). If one assumes that this is a reasonable approach to resolving the issue here presented, then - by that same logic - similarly strong examples of other historical religious references would lead to the inescapable conclusion that those references would be appropriate in the Pledge as well.

As listed above, noteworthy public references to Jesus and Christianity constitute a considerable part of our national heritage. Thus, following the reasoning of Chief Justice Rehnquist to its logical conclusion, including “one nation under Jesus” in the Pledge would be constitutionally acceptable. The record above also demonstrates that our history includes significant and substantial public references to Protestantism. The questionable logic of this analysis would lead to

the conclusion that “one nation under Protestantism” would be permissible as well.

### **III. HISTORICAL EXAMPLES OF PUBLIC INVOCATION OF GOD ARE NEITHER DETERMINATIVE NOR RELEVANT IN DECIDING WHETHER THE ELK GROVE POLICY VIOLATES THE ESTABLISHMENT CLAUSE**

#### **A. The record of prominent public references to religion does not provide a unified historical narrative**

Discerning constitutional justification for contemporary governmental policies by way of examples of celebrated public anecdotes and references is, in effect, an exercise in subjectivity. The notion that essential constitutional principles can be derived through the lens of selected historical snapshots would appear to be a risky proposition at best, given the wide array of historical examples from which one may choose.

In his dissenting opinion in *Van Orden vs. Perry*, Justice Stevens challenged Chief Justice Rehnquist’s reliance on similar historical references and stated, “[t]he presentation of these religious statements as a unified historical narrative is bound to paint a misleading picture.” *Van Orden vs. Perry*, 125 S. Ct. 2854, 30 (2005). Justice Stevens concluded as follows:

The history of the Establishment Clause’s original meaning just as strongly supports a preference for Christianity as it does a preference for monotheism. Generic references to “God” hardly constitute evidence that those who spoke the word meant to be inclusive of all monotheistic believers; nor do such references demonstrate that those who heard the word spoken understood it broadly to include all monotheistic faiths. *Id.* at 33.

**B. The full contents of public speeches are not necessarily transmissions from the government; public addresses are likely to include personal reflections as well**

The list provided by Chief Justice Rehnquist relies on numerous examples of statements made by prominent national leaders, in reference to God, to validate the addition of “under God” to the Pledge. *Elk Grove Unified School District v. Newdow*, 542 U. S. 1, 5-7 (2004). In his dissenting opinion in *Van Orden vs. Perry*, Justice Stevens challenged the reliability of such an approach:

Our leaders, when delivering public addresses, often express their blessings simultaneously in the service of God and their constituents. Thus, when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government because those oratories have embedded within them the inherently personal views of the speaker as an individual member of the polity. *Van Orden vs. Perry* 125 S. Ct. 2854, 29 (2005).

**C. Allowing historical examples of public invocation of God to provide constitutional justification for the inclusion of “under God” in the Pledge leads to the illogical conclusion that “under**



## **Jesus” and “under Protestantism” would be acceptable additions to the Pledge**

As discussed in Part II above, selected historical examples of events and anecdotes are of no practical utility in resolving these critical constitutional issues.

### **CONCLUSION**

It is well known that our nation’s history includes prolonged periods of religious discrimination and persecution. Any revisionist argument citing historical examples of public invocation of God to justify inclusion of “under God” in the Pledge of Allegiance, and ultimately leading to the conclusion that the Elk Grove policy passes constitutional muster, can be matched by similar extensive examples of public invocations of Jesus and Protestantism. Does anyone believe that the existence of such references would justify honoring and memorializing such disgraceful times in an oath effectively required of schoolchildren?

The historical record is expansive and necessarily ambiguous, but it is clear that the God invoked in many of the examples cited by Chief Justice Rehnquist in *Elk Grove Unified School District v. Newdow* is a Christian, Protestant God, one not encompassing the faiths of Judaism, Catholicism, and many other denominations. Who does not see that countenancing a

policy that results in effectively making Atheists outsiders in the schoolroom also provides justification for extending such outsider status to Jews, Catholics, and other outsiders as well?

Respectfully Submitted,

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July 24, 2006

**Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 05-17257**

I certify that: **(check appropriate option(s))**

1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

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2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App.P. 32(a)(7)(B) because

This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

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Date

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Signature of Attorney of Unrepresented Litigant

## CERTIFICATE OF SERVICE

I certify that on July 24, 2006, I filed and served the foregoing BRIEF FOR THE MADISON-JEFFERSON SOCIETY AS *AMICUS CURIAE* by causing an original and 15 copies to be filed with the Clerk of the Court by mail and by causing copies to be served on the following counsel by mail:

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