

No. 03-1364

In the
**United States Court of Appeals
for the Fourth Circuit**

EDWARD R. MYERS,
Plaintiff-Appellant,
v.

LOUDOUN COUNTY SCHOOL BOARD
and COMMONWEALTH OF VIRGINIA,
Defendants-Appellees.

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

BRIEF OF THE STATE OF ALABAMA FOR 30 STATES
IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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Table of Contents

Table of Authorities.....	ii
Interest of <i>Amici Curiae</i>	1
Summary of the Argument.....	3
Argument.....	4
I. Historical and Patriotic Acknowledgments of Our Nation’s Religious Heritage Are Not Inconsistent With the First Amendment’s Prohibition on the Establishment of Religion.....	7
A. Because of Their “History and Ubiquity,” Acknowledg- ments of Religion in Patriotic or Historical Contexts Are Entirely Consistent with the Establishment Clause.	9
B. Virtually Every Reference to the Pledge of Allegiance by the Supreme Court and Individual Justices Over the Decades Has Agreed that the Pledge is Entirely Consistent with the First Amendment.	14
II. Centuries of Historical and Patriotic Acknowledgment of Religion Have Not Threatened the First Amendment’s Prohibition on Established Religion.....	19
Conclusion.....	211
Certificate of Compliance.....	22
Certificate of Service.....	23
ADDENDUM.....	Following Page 23

Table of Authorities

Cases

<i>Committee for Public Education v. Nyquist</i> , 413 U.S. 756 (1973).....	7
<i>County of Allegheny v. ACLU, Greater Pittsburgh Chapter</i> , 492 U.S. 573 (1989).....	<i>passim</i>
<i>Elk Grove Independent School District v. Newdow</i> , 124 S. Ct. 2301 (2004).....	2, 16, 17, 18
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962).....	13, 14, 16, 18
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).....	7
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947).....	8
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	10, 16, 18
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984).....	<i>passim</i>
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983).....	10, 11, 20
<i>Newdow v. United States Congress</i> , 328 F.3d 466 (9th Cir. 2003), <i>rev'd sub nom. Elk Grove Independent School District v. Newdow</i> , 124 S. Ct. 2301 (2004).....	2
<i>Sante Fe Independent School District v. Doe</i> , 530 U.S. 290 (2000).....	10

<i>School District of Abington Township v. Schempp</i> , 374 U.S. 203 (1963).....	<i>passim</i>
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	7, 16, 19
<i>Zorach v. Claiborn</i> , 343 U.S. 306 (1952).....	8

Statutes

Federal Statutes

Act of June 22, 1942, ch. 435, § 7, 56 Stat. 377, 380	5
Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249	5
4 U.S.C. § 4	3, 5
42 U.S.C. § 1983	2

State Statutes

Ala. Code § 16-43-5 (2001)	1, 13
Ala. Code § 16-6B-2 (h) (2001).....	13
Alaska Stat. § 14.03.130 (2000)	1
Ariz. Rev. Stat. § 15-506 (2002).....	1
Ark. Code § 6-16-122 (2003)	1
Cal. Educ. Code § 52720 (1989).....	1
Colo. Rev. Stat. § 22-1-106 (Supp. 2004)	1
Conn. Gen. Stat. § 10-230(c) (2003).....	1
Del. Code tit. 14, § 4105 (2003).....	1

Fla. Stat. ch. 1003.44(1) (2002)	1
Ga. Code § 20-2-310(c)(1) (2001)	1
Idaho Code § 33-1602(4) (2001).....	1
105 Ill. Comp. Stat. 5/27-3 (2002)	1
Ind. Code § 20-10.1-4-2.5 (2003).....	1
Kan. Stat. § 72-5308 (2002)	1-2
Ky. Rev. Stat. § 158.175(2) (2001).....	2
La. Rev. Stat. § 17:2115(B) (2001)	2
Mass. Gen. Laws ch.71, § 69 (2003)	2
Md. Code Educ. § 7-105(c) (2001).....	2
Minn. Stat. § 121A.11 (2003)	2
Miss. Code § 37-13-7(1) (2001)	2
Mo. Stat. § 171.021(2) (2003)	2
Mont. Code § 20-7-133 (2001).....	2
N.C. Gen. Stat. § 115C-47(29a) (1999)	2
N.D. Cent. Code § 15.1-19-03.1(4) (2001).....	2
N.H. Rev. Stat. § 194:15-c (2002).....	2
N.J. Stat. § 18A:36-3(c) (1999).....	2
N.M. Stat. § 22-5-4.5 (2001).....	2
N.Y. Educ. Law § 802(1) (2000).....	2
Nev. Rev. Stat. § 389.040 (2002)	2

Ohio Rev. Code § 3313.602(A) (1999)	2
Okla. Stat. tit. 70, § 24-106 (2003)	2
Or. Rev. Stat. § 339.875 (2001)	2
24 Pa. Cons. Stat. § 7-771 (1992)	2
R.I. Gen. Laws § 16-22-11 (2001)	2
S.C. Code § 59-1-455 (2000)	2
S.D. Codified Laws § 13-24-17.2 (2002)	2
Tenn. Code § 49-6-1001(c)(1) (2002)	2
Tex. Educ. Code § 25.082 (2003)	2
Utah Code § 53A-13-101.6 (2000)	2
Va. Code § 22.1-202(C) (2002)	2
W. Va. Code § 18-5-15b (1999)	2
Wash. Rev. Code § 28A.230.140 (1997)	2
Wis. Stat. § 118.06 (2003)	2

Constitutional Provisions

U.S. Const. amend. I	7
Ala. Const. pmb.	12
Tex. Const. pmb.	12

Rules

Fed. R. App. P. 29(a)	1
Fed. R. App. P. 32(a)(5)	22

Fed. R. App. P. 32(a)(6)	22
Fed. R. App. P. 32(a)(7)(B)	22

Other Authorities

Brief of Texas et al. as <i>Amici Curiae</i> in Support of Petitioners, <i>Elk Grove Independent School District v. Newdow</i> , 124 S. Ct. 2301 (2004) (No. 02-1624), available at 2003 WL 23011472	2-3
The Declaration of Independence (July 4, 1776)	4
H.R. Rep. No. 77-2047 (1942)	5
H.R. Rep. No. 83-1693 (1954)	6
Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg, Final Text (Nov. 19, 1863) in 7 <i>The Collected Works of Abraham Lincoln</i> 22 (Roy P. Basler ed., 1953).....	5
Proclamation No. 2629, 9 Fed. Reg. 13,099 (1944).....	12
Proclamation No. 3560, 28 Fed. Reg. 11,871 (1963).....	12
Proclamation No. 3752, 31 Fed. Reg. 13,635 (1966).....	12
Proclamation No. 4093, 36 Fed. Reg. 21,401 (1971).....	12
Proclamation No. 4333, 39 Fed. Reg. 40,003 (1974).....	12
Proclamation No. 4803, 45 Fed. Reg. 75,633 (1980).....	12
Proclamation No. 5098, 48 Fed. Reg. 42,801 (1983).....	12
S. Rep. No. 77-1477 (1942)	5
S. Rep. No. 83-1287 (1954)	6

Interest of *Amici Curiae*

The State of Alabama submits this brief on behalf of itself and the States of Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, to urge the Court to affirm the judgment of the United States District Court for the Eastern District of Virginia and confirm that voluntary recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause of the First Amendment to the United States Constitution. The *Amici* States have a significant interest in this case because adjudication of the issues presented may impact the validity of at least 43 state statutes providing for the recitation or use of the Pledge of Allegiance by public schoolchildren.¹

¹ See Ala. Code § 16-43-5 (2001); Alaska Stat. § 14.03.130 (2000); Ariz. Rev. Stat. § 15-506 (2002); Ark. Code § 6-16-122 (2003); Cal. Educ. Code § 52720 (1989); Colo. Rev. Stat. § 22-1-106 (Supp. 2004); Conn. Gen. Stat. § 10-230(c) (2003); Del. Code tit. 14, § 4105 (2003); Fla. Stat. ch. 1003.44(1) (2002); Ga. Code § 20-2-310(c)(1) (2001); Idaho Code § 33-1602(4) (2001); 105 Ill. Comp. Stat. 5/27-3 (2002); Ind. Code § 20-10.1-4-2.5 (2003); Kan. Stat.

In addition to implying that numerous state statutes would be unconstitutional, a reversal of the decision below would “threaten[] cash-strapped school districts and underpaid teachers with the specter of civil actions for money damages pursuant to 42 U.S.C. § 1983.” *Newdow v. U.S. Congress*, 328 F.3d 466, 473 (9th Cir. 2003) (O’Scannlain, J., dissenting from denial of rehearing en banc), *rev’d sub nom. Elk Grove Indep. Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004).

For these reasons, all 50 States joined in an *amicus* brief filed by the State of Texas in *Newdow* urging the Supreme Court to hold that voluntary recitation of the Pledge of Allegiance in public schools does not violate the Establishment Clause. *See* Brief of Texas et al. as *Amici Curiae* in Support of

§ 72-5308 (2002); Ky. Rev. Stat. § 158.175(2) (2001); La. Rev. Stat. § 17:2115(B) (2001); Md. Code Educ. § 7-105(c) (2001); Mass. Gen. Laws ch.71, § 69 (2003); Minn. Stat. § 121A.11 (2003); Miss. Code § 37-13-7(1) (2001); Mo. Stat. § 171.021(2) (2003); Mont. Code § 20-7-133 (2001); Nev. Rev. Stat. § 389.040 (2002); N.H. Rev. Stat. § 194:15-c (2002); N.J. Stat. § 18A:36-3(c) (1999); N.M. Stat. § 22-5-4.5 (2001); N.Y. Educ. Law § 802(1) (2000); N.C. Gen. Stat. § 115C-47(29a) (1999); N.D. Cent. Code § 15.1-19-03.1(4) (2001); Ohio Rev. Code § 3313.602(A) (1999); Okla. Stat. tit. 70, § 24-106 (2003); Or. Rev. Stat. § 339.875 (2001); 24 Pa. Cons. Stat. § 7-771 (1992); R.I. Gen. Laws § 16-22-11 (2001); S.C. Code § 59-1-455 (2000); S.D. Codified Laws § 13-24-17.2 (2002); Tenn. Code § 49-6-1001(c)(1) (2002); Tex. Educ. Code § 25.082 (2003); Utah Code § 53A-13-101.6 (2000); Va. Code § 22.1-202(C) (2002); Wash. Rev. Code § 28A.230.140 (1997); W. Va. Code § 18-5-15b (1999); Wis. Stat. § 118.06 (2003).

Petitioners, *Elk Grove Indep. Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (No. 02-1624), available at 2003 WL 23011472. Given this cases's similarity to *Newdow*, the *Amici* States' arguments in this case will closely track their earlier arguments in *Newdow*.

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

Summary of the Argument

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

The district court's holding in this case is consistent with the entire body of Supreme Court Establishment Clause jurisprudence. Indeed, virtually every single reference to the Pledge in the Supreme Court's cases—

both by the Court itself and repeatedly by individual Justices—has confirmed the Pledge’s constitutionality.

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

Argument

America was formed by those fleeing religious persecution. Seeking to forge a land where each person could live and worship God as he or she believed best, the Framers established a country predicated on a simple, yet profound, postulate—declared in the document that gave birth to our Nation: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” The Declaration of Independence para. 1 (July 4, 1776).

From that day forward, the United States has fought to protect the freedom of conscience of all her citizens, while at the same time acknowledging the heritage behind our Nation's founding. Abraham Lincoln, famously dedicating and consecrating that bloody Pennsylvania battlefield, put it this way: "that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg, Final Text (Nov. 19, 1863) *in* 7 *The Collected Works of Abraham Lincoln* 22, 23 (Roy P. Basler ed., 1953).

In 1942 we were again at war, and Congress adopted our Nation's Pledge of Allegiance to the United States flag. Act of June 22, 1942, ch. 435, § 7, 56 Stat. 377, 380; H.R. Rep. No. 77-2047, at 1 (1942); S. Rep. No. 77-1477, at 1 (1942). Twelve years later, at the height of the Cold War, Congress amended the Pledge of Allegiance by adding the words "under God." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. As amended and in its current form, the Pledge reads: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4.

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

Despite decades of patriotic acknowledgment of our Nation’s religious heritage in the Pledge of Allegiance – and despite centuries of other similar historical and patriotic acknowledgments of religion by our government – Plaintiff challenges the constitutionality of the Pledge of Allegiance’s recitation to and by schoolchildren in the Commonwealth of Virginia. Because the district court’s decision is consistent with the Supreme Court’s Establishment Clause jurisprudence, the *Amici* States respectfully request that the Court affirm the judgment below.

