No. 02-1624

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

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

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF PETITIONERS

PHYLLIS SCHLAFLY
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND
7800 BONHOMME AVENUE
ST. LOUIS, MO 63105
(314) 721-1213
Counsel for Amicus

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Pages

Cases

Statutes and Legislative Materials

Miscellaneous

No. 02-1624

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

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

INTEREST OF AMICUS CURIAE[1]

Eagle Forum Education and Legal Defense Fund ("EFELDF") is a nonprofit organization founded in 1981. For over twenty years it has defended principles of limited government, individual liberty, patriotism, and moral virtue. EFELDF has been actively involved in public school education, and has filed *amicus curiae* briefs in significant education cases. EFELDF has long advocated patriotism and morality in American society, and consistently defends voluntary

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

religious expression in public schools. EFELDF has a strong interest in protecting recitation of the Pledge of Allegiance.

SUMMARY OF ARGUMENT

Our public life is replete with references to "God", and properly so. The standard oath for witnesses and deponents references God. The federal investigation of President Clinton compelled him to swear to tell "the truth, the whole truth, and nothing but the truth, so help me God," and his impeachment charges were based on his attestation. Our coins declare our trust in God. Legislatures begin their sessions with prayers. This Court begins proceedings with the invocation "God save the United States and this Honorable Court." The United States Code references God numerous times. *See, e.g.*, 10 U.S.C. § 6031(b) (2003) ("[I]t is earnestly recommended to all officers, seamen, and others in the naval service diligently to attend at every performance of the worship of Almighty God."). Our founding documents, from the Declaration of Independence to the Articles of Confederation, expressly defer to a Supreme Being. So do many state constitutions. Nearly every President officially invoked God when sworn in by the Chief Justice of the United States. The constitutionality of these invocations cannot be seriously doubted, yet the decision below implicitly suggests otherwise.

The Pledge of Allegiance is less religious than all of the above, and must likewise be constitutional. Its phrase "under God" is attributable to the Gettysburg Address, and perfectly describes who we are as a nation. There is no adequate substitute to convey our unique disavowal of monarchy, dictatorship and nobility. Yet the decision below completely ignores the American origin of this phrase in the Gettysburg Address, and the lack of any substitute. The Establishment Clause does not require censorship of these words.

Review by this Court is necessary to resolve the sharp conflict between the ruling below and the Seventh Circuit on

the identical issue, which upheld the recitation of the Pledge on indistinguishable facts. *Sherman v. Community Consol. School Dist.*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). Review is also necessary to resolve the continuing contradiction between banning students' invocation of God while allowing legislative prayer. Non-compulsory prayer, whether in a legislature, a courtroom, a football stadium, or a classroom, does not violate the Establishment Clause. Application of the Bill of Rights through the Fourteenth Amendment should promote freedom, not restrain it.

The decision below is a tragic step towards uprooting and redefining our culture in a way not seen outside of literature. *See* George Orwell, *Animal Farm* (1945). The Ninth Circuit has created a direct conflict with the Seventh Circuit, and does violence to the teachings of this Court. This Court should grant the writ of certiorari to resolve the conflict among these Circuits and with precedents of this Court.

ARGUMENT

"Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men & citizens." So wrote President George Washington in his historic Farewell Address, published five years after the passage of the Bill of Rights. *Philadelphia Daily American Advertiser*, Sept. 19, 1796.[2] President John Adams echoed the same conviction: "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." 9 *The Works of John Adams, Second President of the United States* 229 (Charles Francis Adams, ed. 1854). Leading schoolchildren in voluntary recitation of the Pledge is as

[2] http://gwpapers.virginia.edu/farewell/transcript.html (viewed 6/24/03).

consistent with the Constitution as asking them to recite or explain these official pronouncements by our Founders.

The contested phrase "under God" is itself from the Gettysburg Address, as inscribed in the Lincoln Memorial:

> [W]e 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.[3]

If schoolchildren may not recite "under God," then should not this phrase also be sanded away from the granite walls of the federal monument? Just as Congress inserted the phrase into the Pledge, Lincoln later added "under God" to the prepared text of his remarks at Gettysburg.[4] Removing the phrase from the Pledge implies that the words should also be expunged from the federally funded Lincoln Memorial, illustrating the folly.

Judicial censorship of "under God" cannot be rationalized on the ground that some may perceive it as too religious for their liking. It is irreplaceable. No other succinct phrase exists to express our nation's reliance on the Rule of Law rather than dictatorship, equality of opportunity rather than nobility, and religious freedom rather than oppression. It does not establish or endorse religion to recognize the basis on which our nation was founded. *See, e.g.*, *Sherman*, 980 F.2d at 448 (Manion, J., concurring) ("The Pledge of Allegiance with all of its intended meaning does not effectuate an establishment of religion."). The Fourteenth Amendment, the basis for the decision below, was enacted to liberate a people, and not to

---

[3] http://www.law.ou.edu/hist/getty.html (viewed 6/24/03).

[4] The authentic drafts preserved by Lincoln's secretaries, John Hay and John G. Nicolay, do not include the disputed phrase "under God." http://www.virtualgettysburg.com/exhibit/lincoln/feature.html (viewed 6/24/03).

enslave our nation to anyone who might be offended by speech of our citizenry.

I. REVIEW IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE SEVENTH CIRCUIT.

The decision below confronted the identical issue resolved ten years earlier by the Seventh Circuit. *Compare Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) *with Sherman v. Community Consol. School Dist.*, 980 F.2d 437 (7th Cir. 1992). Both decisions addressed the constitutionality of public schools mandating the patriotic, voluntary recitation by schoolchildren of the Pledge of Allegiance. But the reasoning of the two decisions and their outcomes are diametrically opposed.

In *Sherman*, the Seventh Circuit unanimously affirmed the constitutionality of a state mandate for schoolchildren to pledge allegiance with the "under God" phrase. "Does it follow that a pupil who objects to the content of the Pledge may prevent teachers and other pupils from reciting it in his presence? We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate." *Sherman*, 980 F.2d at 439. *Newdow* presents exactly the same issue, and the Ninth Circuit reached precisely the opposite result. Review by this Court is necessary to resolve this direct conflict.

The court below overlooked the compelling reasoning in *Sherman*. Judge Easterbrook, writing for the Seventh Circuit, noted that "[t]he Pledge tracks Lincoln's Gettysburg Address, which ends with a wish '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.'" *Id.* at 446. He added that President Lincoln's Second Inaugural Address contained "14 references to God among its 699 words." *Id.*

The *Sherman* decision cited numerous dicta by this Court, from both sides of the Establishment Clause debate, assuring that references to "God" in the Pledge and elsewhere are legal. The decision first invalidating school prayer, for example, stated that:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (quoted by *Sherman*, 980 F.2d at 446-47).

The *Sherman* decision explained how Justices Brennan, Goldberg, Harlan, O'Connor and this Court's majority in *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984), all implied the constitutionality of the Pledge with the "under God" phrase. 980 F.2d at 447. For example, Justice Brennan conceded that:

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

Abington School District v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (quoted by *Sherman*, 980 F.2d at 447).

Though Justice Brennan later opined that the references to God have lost meaning – a doubtful assertion – and could be upheld independently for that reason, he nevertheless contin-

ued his defense of the invocation. "[T]he reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content." *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting). *But see Sherman*, 980 F.2d at 448 (Manion, J., concurring) (upholding the Pledge while noting that "a court cannot deem any words to lose their meaning over the passage of time" and that "[e]ach term used in public ceremony has the meaning intended by the term").

Rejecting these precedents, the court below instead revived the discredited test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971). *Newdow*, 292 F.3d at 605-06 (invalidating any law intended to promote religion, or having the effect of advancing religion, or creating an entanglement between church and state). The Ninth Circuit found the voluntary Pledge to violate the *Lemon* test, and also the subsequent *Lynch* endorsement test and even the coercion test of *Lee v. Weisman*, 505 U.S. 577 (1992). *Newdow*, 292 F.3d at 611. "Our application of *all* of the tests compels the conclusion that the policy and the Act challenged here violate the Establishment Clause of the Constitution. Thus, we must respectfully differ from the Seventh Circuit." *Id.* (emphasis in original).

As the *Sherman* decision and the dissent from rehearing *en banc* below made clear, no precedent justifies expunging a reference to God in a voluntary statement by schoolchildren. "The panel majority simply ignores, because they are inconvenient, the 'dominant and controlling facts' in *Lee* and its predecessors: that Establishment Clause violations in public schools are triggered only when 'State officials direct the performance of a *formal religious exercise*.'" *Newdow v. U.S. Congress*, 321 F.3d 772, 782 (9th Cir. 2003) (*en banc*) (quoting *Lee*, 505 U.S. at 586 (emphasis added) and citing *Schempp*, 374 U.S. at 210, and *Wallace*, *infra*, 472 U.S. at

58). Even if the *Lemon* test supported the decision below, the time has come to reject that test once and for all. *See, e.g.*, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.").

Review here is essential to resolve the sharp disagreement over the fundamental issue of whether recitation of the Pledge of Allegiance by schoolchildren is constitutional. *Newdow*, 292 F.3d at 611 (conceding its conflict with the Seventh Circuit decision by declaring it to be in "serious error").

II. REVIEW IS NECESSARY TO CLARIFY THAT RECITATION OF A PHRASE FROM THE INSCRIBED GETTYSBURG ADDRESS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The phrase "one nation under God" describes, at a minimum, that America is alone among nations in rejecting monarchy, nobility, military rule, dictatorship and presidency for life. There is no aphorism that accurately depicts our status other than the two simple words that we exist "under God." America is not "one nation under man" or merely "one nation"; we repudiate ultimate control by any individual. The court below offered no substitute language for this disputed line in the Pledge of Allegiance: there is no adequate substitute for describing us.

The words "under God" capture our history and our continuing adherence to the vision of Washington. It expresses our past and our present, and recognizing this fact does not require endorsement or rejection of religion. Nor does hearing someone else describe our nation in this manner compel any belief. "We are a religious people whose institutions pre-

suppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). It was not a violation of the Establishment Clause for this Court to appreciate our nature.

In striking the phrase, the court below has done far more than censor a popular and accurate expression. The court has also attempted to mandate denial of the fundamental nature of America, the attribute that sets us apart from every other nation. The God-less phrase "one nation with liberty and justice for all" could apply equally well to a benevolent dictatorship or even a country that bans religion. In contrast, "one nation under God, with liberty and justice for all" precisely describes our nation. The Establishment Clause surely does not censor admitting who we are.

The first Chief Justice of the United States, John Jay, argued for ratification of the Constitution based on our common faith:

> With equal pleasure I have as often taken notice that Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence.

The Federalist Papers No. 2, at 6 (Kesler and Rossiter ed. 1999). Chief Justice Jay successfully urged our "united people" under "the same religion" to ratify the Constitution. *See also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 The Writings of James Madison 185 (G. Hunt ed. 1901) (reprinted in *Everson v. Board of Ed.*, 330 U.S. 1, 28 app. at 63 (1947) (Rutledge, J., dissenting)) ("Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe**,"** wrote James Madison in 1785).

It was not until the cemetery at Gettysburg that this concept was transformed into "this nation under God." President Lincoln's drafts of his speech did not include the second half of this phrase. Perhaps Lincoln inserted "under God" after a Damascus-like inspiration on his train ride to Gettysburg, or maybe he was moved by his sight of the graveyard of fallen soldiers. Before that fateful day Lincoln's speeches had been markedly devoid of spirituality; afterwards they were increasingly pious, culminating in his Second Inaugural Address. It is inconceivable that schoolchildren are barred from sharing in Lincoln's growth, using the same words he found and expressed at Gettysburg. Students must be free to recite them as an expression of fact or faith or poetry or not at all. Listeners cannot censor this expression based on their own speculation about what speakers may mean by it.

However far the Establishment Clause may be stretched, it cannot conceal or erase historical fact. That America was founded and continues to rely on God cannot be seriously disputed. The ultimate safeguard of truth and integrity in our judicial system remains a witness's oath to God. All three branches of the federal government invoke God's protection in essential moments. The Constitution itself was the product of meetings begun with a daily prayer. The Declaration of Independence refers to God numerous times.

Justice Jackson relied on an almost identical phrase in confronting – and nullifying – President Truman's nationalization of the steel mills:

> We follow the judicial tradition instituted on a memorable Sunday in 1612, when King James took offense at the independence of his judges and, in rage, declared: "Then I am to be *under* the law – which it is treason to affirm." Chief Justice Coke replied to his King: "Thus wrote Bracton, 'The King ought not to be under any man, but he is under God and the Law.'" 12 Coke 65 (as to its verity, 18 *Eng. Hist. Rev.* 664-675); 1 Campbell, *Lives of the Chief Justices* 272 (1849).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 n.27 (1952) (Jackson, J., concurring). The phrase has been handy in combating other abuses of power. For example, in 1649 the Rump Parliament passed this resolution after dethroning Charles: "'The Commons of England, in Parliament assembled, do declare, That the People are, under God, the original of all just power. And do also declare, that the commons of England, in Parliament assembled, being chose by, and representing the people, have the Supreme Power in this nation.'" Andrew M. Wayment, "The Second Amendment: A Guard for Our Future Security," 37 Idaho L. Rev. 203, 206 n.13 (2000) (quoting Douglas W. Kmiec & Stephen B. Presser, *The American Constitutional Order: History, Cases, and Philosophy* 54 (1998)).

The purpose of the Establishment Clause itself was to free America from an aristocracy of the clergy, not to censor homage to God. The Clause is rooted in Thomas Jefferson's Virginia Statute for Religious Freedom of 1786, which he designed to thwart an elite class of clergy. "The law for religious freedom, which made a part of this system, having put down the aristocracy of the clergy, ... restored to the citizen the freedom of the mind, and those of entails and descents nurturing an equality of condition among them." Letter by Jefferson to Adams, Monticello (Oct. 28, 1813).[5] This reflected Jefferson's conviction that a "pseudo-aristocracy" was a threat to the nation:

> At the first session of our [Virginia] legislature after the Declaration of Independence, we passed a law abolishing entails. And this was followed by one abolishing the privilege of primogeniture, and dividing the lands of intestates equally among all their children, or other representatives. These laws, drawn by myself, laid the ax to the foot of pseudo-aristocracy.

---

[5] http://spider.georgetowncollege.edu/english/coke/jefferson.htm (viewed 6/24/03).

Id. *See generally* Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 233-37 (2000). Reflecting agreement with Jefferson's concern, the Founders banned nobility in the Articles of Confederation and the Constitution. Affirmation that our nation stands "under God," not under an elite, advances the true goal of the Establishment Clause.

The court below insisted that the disputed phrase "is a profession of a religious belief, namely, a belief in monotheism" and thereby in violation of the Establishment Clause. 292 F.3d at 607. But nothing about the history of the phrase "under God" suggests any intent to preach monotheism. Lincoln was surely not attempting to advance monotheism by adding the phrase to his Gettysburg Address. Nor was Justice Jackson, Chief Justice Coke or the Rump Parliament. Chief Justice Jay's description above of our common faith was not designed to promote religion. "Under God" describes our nation, not God.

The decision below relies on legislative history for the current Pledge, but it merely underscores this historical use of the phrase. Representative Louis C. Rabaut, the sponsor in the House of adding "under God" to the Pledge, testified in Congress that "'the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins.'" 292 F.3d at 605 (quoting H.R. Rep. No. 83-1693, at 3 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341). This reflects the explanatory purpose of the phrase, giving meaning to what our nation is. It does not establish a religion.

The lower court censored the phrase based on its view that someone might feel "'less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.'" 292 F.3d at 608 (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 672 (1989) (Kennedy, J., dissenting)). Under that sweeping test, every statement of American history or politics

could be censored. There is no constitutional right to silence religious speech just because it may offend someone.

Nor does an intent to combat atheistic communism render the phrase "under God" constitutionally infirm. The court below objected to this legislative history:

> "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."

292 F.3d at 611 (quoting H.R. Rep. No. 83-1693, at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340). But acknowledging the faith of the overwhelming majority of Americans is factual, not coercive. Employing that fact to oppose communism falls well within the duty of our government to protect our constitutional republic.

In sum, the religious connotation of "under God" cannot obstruct its descriptive, historical, political and patriotic uses. The Establishment Clause does not require eradication of every phrase susceptible of religious interpretation. This Court should grant the writ of certiorari here to reverse the decision below.

III. REVIEW IS NECESSARY TO CLARIFY THAT THE FOURTEENTH AND FIRST AMENDMENTS DO NOT CENSOR VOLUNTARY SPEECH.

Nothing in the Fourteenth or First Amendments censors voluntary speech like the Pledge. The Fourteenth Amendment exists to promote, not impede, freedom. "When rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty." *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring). Neither its history nor its text supports infringement on the liberty of students in voluntarily reciting the Pledge. "There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice." *Id.* at 680.

For most of its history the Fourteenth Amendment did not incorporate the Establishment Clause. It was not until nearly 80 years after ratification that the Establishment Clause was applied against a state through the Fourteenth Amendment. *See Everson*, *supra*; *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (Black, J.). The Court subsequently declined opportunities to apply the Clause broadly against the states, until Justice Black again wrote for the Court in striking down school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962). This area of the law has been particularly troubled ever since, and it is time to reconsider its premise.

Chief Justice Burger, designer of the three-pronged *Lemon* test for applying the Establishment Clause against the states, ultimately admitted the rampant inconsistencies and implicitly abandoned his own test: "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679 (noting with approval the rejection of the *Lemon* test in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Larson v. Valente*, 456 U.S. 228 (1982)). The root problem is the fiction that free-

dom can somehow be promoted by censoring freedom of religious expression. As an example of the festering contradiction, this Court has upheld prayer before legislative sessions while prohibiting prayer before football games. *Compare Marsh*, 463 U.S. at 795 (upholding legislative prayer) *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (prohibiting student-led prayer before football games).

The Congress that passed the Fourteenth Amendment would have been astonished by its current application to censor speech. A mere seven years after its ratification, Republican Senator James G. Blaine introduced a constitutional amendment to prohibit states from establishing religion – which would have been pointless if the Fourteenth Amendment incorporated the Establishment Clause. The language of his amendment copied from the First Amendment: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." H.R. Res. I, 44th Cong., 1st Sess. (1875). The House supported the amendment, but it died in the Senate. *See generally* William P. Gray, Jr., "The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama," 49 Ala. L. Rev. 509, 526-30 (1998).

Twenty-three members of Congress who served during passage of the Fourteenth Amendment also considered the Blaine Amendment, yet none objected by claiming the Fourteenth Amendment incorporated the Establishment Clause. As one federal court has observed, "The Blaine Amendment, which failed in passage, is stark testimony to the fact that the adopters of the fourteenth amendment never intended to incorporate the establishment clause of the first amendment against the states …. This was understood by nearly all in-

volved with the Thirty-ninth Congress to be the effect of the fourteenth amendment." *Jaffree v. Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1126 (S.D. Ala. 1983), *rev'd sub nom., Wallace v. Jaffree*, 472 U.S. 39 (1985). Moreover, proposals similar to the failed Blaine Amendment were unsuccessfully introduced 19 times between 1875 and 1930. This Court should not impose by fiat what Congress repeatedly withheld.

The Due Process Clause of the Fourteenth Amendment should not be expanded to police religious expression, even if someone felt that were desirable. "The fact that a particular rule may be thought to be the 'better' view does not mean that it is incorporated into the Fourteenth Amendment." *Mu'Min v. Virginia*, 500 U.S. 415, 430-31 (1991). Nor should the Fourteenth Amendment encompass trifles such as potential offense at speech expressed by others. "[T]he concept of due process does not protect against insubstantial impositions on liberty." *Albright v. Oliver*, 510 U.S. 266, 287 (1994) (Souter, J., concurring). The phrase "under God" does not become unconstitutional simply because it may offend.

This Court has already rejected an attempt to convert the Establishment Clause into "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001). *See also Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[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 … discomfort ….") (citing *Allegheny*, 492 U.S. at 627 (O'Connor, concurring in part and concurring in judgment)). State and local governments always have, and always will, reflect the religious faith of their communities. The Establishment Clause does not and cannot stop this. *Cf. Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 668 (1970) ("It

is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

The same Congress that passed the Bill of Rights, including the Establishment Clause, requested President Washington to proclaim a day of thanksgiving. He duly proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." Presidential Proclamation, 1 *Messages and Papers of the Presidents, 1789-1897* 64 (J. Richardson ed. 1897). The Establishment Clause does not prohibit recitation of "under God," nor should the Clause be applied to censor religious expression in schools.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

PHYLLIS SCHLAFLY
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND
7800 BONHOMME AVENUE
ST. LOUIS, MO 63105
(314) 721-1213
Counsel for Amicus

Dated: July 7, 2003