No. 06-16344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REV. DR. MICHAEL A. NEWDOW,
Plaintiff-Appellant, pro se
v.
THE CONGRESS OF THE UNITED STATES OF AMERICA; PETER LEFEVRE, Law Revision Counsel; UNITED STATES OF AMERICA; JOHN W. SNOW, Secretary of the Treasury; HENRIETTA HOLSMAN FORE, Director, United States Mint; THOMAS A. FERGUSON, Director, Bureau of Engraving and Printing,
Defendants-Appellees,
&
PACIFIC JUSTICE INSTITUTE,
Defendant-Intervenor-Appellee.

On Appeal from the United States District Court for the
Eastern District of California
Case No. CV-05-02339-FCD

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR MORAL LAW, ON BEHALF OF DEFENDANTS-APPELLEES, IN SUPPORT OF AFFIRMANCE

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Michael A. Newdow v. The Congress of the United States, et al., 06-16344

CORPORATE DISCLOSURE STATEMENT

06-16344

THE REV. DR. MICHAEL A. NEWDOW,
Plaintiff-Appellant,
v.

THE CONGRESS OF THE UNITED STATES, *ET AL.*,
Defendants-Appellees,
&
PACIFIC JUSTICE INSTITUTE,
Defendant-Intervenor-Appellee,

Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of *Amicus* in this or any other case in which it has been involved.

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Benjamin D. DuPré

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the inalienable right to acknowledge God. The Foundation promotes a return in the judiciary (and other branches of government) to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, legislative prayer, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that the national motto, "In God We Trust," constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of this nation. The Foundation believes that the government should encourage such acknowledgements of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the statutes concerning the motto violate the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The statutes concerning the motto of the United States, "In God We Trust," in no way violate the Establishment Clause of the First Amendment because the statutes do not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption and for over two centuries since.

It is the responsibility of this Court and any court exercising judicial authority under the United States Constitution to do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the statutes in issue, it becomes evident that the statutes and the phrase "In God We Trust" do not dictate religion to anyone and do not represent a form of an establishment thereof. While this important statement about the religious conviction of the nation may offend someone, it properly expresses the spirit of "We the People" as a whole and does not offend the First Amendment to the Constitution.

ARGUMENT

> *"[This] would be quite an easy case . . . if the constitutional prohibition against the enactment of legislation 'respecting an establishment of religion' were to be read as meaning what it seems to have meant when the Bill of Rights (which includes the First Amendment, of course) was added to the federal Constitution."*

American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Bd., 243 F.3d 289, 293 (6th Cir. 2001).

I. THE CONSTITUTIONALITY OF THE NATION'S MOTTO SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court below correctly decided that the constitutional challenge to the national motto by plaintiff Michael Newdow should fail; however, it did so solely on the basis of the holding in *Aronow v. United States*, 432 F. 2d 242 (9th Cir. 1970), rather than on any independent determination that the motto does not violate the Establishment Clause of the First Amendment. As this Court is free to make such a determination, it should seize the opportunity to emphasize what the *Aronow* Court stated in passing, *i.e*., that "[i]t is quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has **nothing** whatsoever to do with the establishment of religion." *Aronow*, 432 F. 2d at 243 (emphasis added).

Because *Aronow* was decided prior to the advent of the *Lemon* test and the myriad tests subsequently formulated by the United States Supreme Court for

Establishment Clause cases, its analysis was markedly cleaner than cases in this area have been over approximately the last 30 years. Even so, the *Aronow* Court's reasoning foreshadowed the departures from the plain text of the Constitution that have been the only hallmark of the Supreme Court's fluid Establishment Clause jurisprudence. To get this case completely right, this Court should forego the temptation to analyze the motto according to judicial tests that are, as one of this circuit's own district courts labeled them, "utterly standardless," and instead it should apply the words of the First Amendment according to their meaning when they were first adopted. *See Newdow v. Congress*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005).

A. The Constitution is the "supreme Law of the Land."

Our American constitutional paradigm dictates that *the Constitution itself* and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oath of office to support *the Constitution* itself—not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto are still relevant today and should control, above all other competing powers and influences, the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart

from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824). Justice Joseph Story later succinctly summarized these thoughts on constitutional interpretation:

> [The Constitution] is to be interpreted, as all other solemn instruments are, by endeavoring to ascertain the true sense and meaning of all the terms; and we are neither to narrow them, nor enlarge them, by straining them from their just and natural import, for the purpose of adding to, or diminishing its powers, or bending them to any favorite theory or dogma of party. It is the language of the people, to be judged according to common sense, and not by mere theoretical reasoning. It is not an instrument for the mere private interpretation of any particular men.

Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 42 (1840).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840). Following the carefully crafted words of the Establishment Clause will yield the correct result in this case, save the Court from the headache of having to guess which test Supreme Court would employ to evaluate the constitutionality of the motto, and ensure that the Court is adhering to its oath to uphold the Constitution.

B. Establishment Clause tests are constitutional counterfeits that contradict the text of the Constitution and the history of our country.

Plaintiff Newdow states in his brief that "it is often difficult to find a correct standard to use in following the Supreme Court's Establishment Clause jurisprudence." *Plaintiff's Brief*, p. 32. Several courts at the appellate and district court levels have made similar observations.[1] Unable to focus on a single test or

[1] The Third Circuit has observed that "[t]he uncertain contours of these Establishment Clause restrictions virtually guarantee that on a yearly basis, municipalities, religious groups, and citizens will find themselves embroiled in legal and political disputes over the content of municipal displays." *ACLU of New Jersey v. Schundler*, 104 F.3d 1435, 1437 (3rd Cir. 1997). The Fourth Circuit has labeled it "the often dreaded and certainly murky area of Establishment Clause jurisprudence," *Koenick v. Felton*, 190 F.3d 259, 263 (4th Cir. 1999), "marked by

argument for evaluating this case, Newdow instead covers all of the tests, attempting to illustrate that he should win regardless of which test is pulled out of the proverbial judicial hat to decide this case.

The fact that Newdow has so many tests to cover and that he can put forward a plausible argument for how he should win under each one demonstrates the folly and futility of deciding Establishment Clause cases according to judicially-created tests. By adhering to judicial tests rather than the legal text, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also* U.S. Const. art. VI.

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befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005). The Fifth Circuit has referred to this area of the law as a "vast, perplexing desert." *Helms v. Picard*, 151 F.3d 347, 350 (5th Cir. 1998), rev'd sub nom. *Mitchell v. Helms*, 530 U.S. 793 (2000). The Sixth Circuit has labeled it "purgatory." *ACLU of Ky. v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005). The Seventh Circuit has acknowledged the "persistent criticism" that the *Lemon* test has received since its inception. *Books v. Elkhart County, Indiana*, 401 F.3d 857, 863-64 (7th Cir. 2005). The Tenth Circuit opined that there is "perceived to be a morass of inconsistent Establishment Clause decisions." *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 561 (10th Cir. 1997).

District courts have likewise observed that the Supreme Court's Establishment Clause jurisprudence is: "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); "mystif[ying] . . . , inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005); "utterly standardless," *Newdow v. Congress*, 383 F.3d 1229, 1244 n.22 (E.D. Cal. 2005); and "hardly Paradise," but "more akin to Limbo" than Purgatory. *Green v. Bd. of County Comm'rs of the County of Haskell*, 450 F. Supp. 2d 1273, 1285 (E.D. Okla. 2006).

Experimentation with extra-constitutional tests in Establishment Clause cases began in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which the Supreme Court claimed that "[t]he language of the Religion Clauses of the First Amendment is at best opaque" and that, therefore, "[i]n the absence of precisely stated constitutional prohibitions, [the Court] must draw lines" delineating what is constitutionally permissible or impermissible. *Lemon*, 403 U.S. at 612. *See also Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984) ("[A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court . . . . In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed."). The *Aronow* Court foreshadowed this thinking by quoting verbatim language from *Walz v. Tax Commission*, 397 U.S. 664 (1970): "'The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited.'" *Aronow*, 432 F. 2d at 244 (quoting *Walz*, 397 U.S. at 669).

These statements erroneously assume that the language of the Establishment Clause is not clear and that somehow judicially-fabricated tests will succeed where the original language has purportedly failed, clarifying what is permissible and what is prohibited under the Establishment Clause. However, the exact opposite is the case: jurisprudential experiments with various extra-textual "tests" such as

Lemon, the Endorsement Test, and the Coercion Test have produced a continuum of disparate results. As Justice Thomas recently observed, "the very 'flexibility' of [the Supreme] Court's Establishment Clause precedent leaves it incapable of consistent application." *Van Orden v. Perry*, 545 U.S. 677, __, 125 S. Ct. 2854, 2867 (2005) (Thomas, J., concurring). Such impracticability is hardly surprising because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

The federal courts' abandonment of "fixed, *per se* rule[s]" results in the application of judges' complicated substitutes for the law. James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow," "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 125 S. Ct. at 2866 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial

opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, __, 125 S. Ct. 2722, 2751 (2005) (Scalia, J., dissenting). *Amicus* urges this Court to recur to the text of the Establishment Clause in order to decide this case according to principle.

II. THE STATUTES DECLARING THE NATIONAL MOTTO AND ORDERING ITS PLACEMENT ON CURRENCY ARE NOT LAWS "RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The statutes concerning the national motto[2] do not violate the Establishment Clause because they are not laws "respecting," *i.e.*, concerning or relating to, "an establishment of religion."

A. The Definition of "Religion"

Plaintiff Newdow repeatedly observes in his brief that the phrase "In God We Trust" is not neutral toward atheism and that this lack of neutrality constitutes a violation of the Establishment Clause. *See* Plaintiff's Brief, pp. 32, 33, 47, 54. This reasoning erroneously assumes that the language of the Establishment Clause requires the country to remain neutral with respect to anything religious rather than with respect to particular religions.

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[2] 36 U.S.C. § 302 (declaring "In God We Trust" as the national motto; 31 U.S.C. §§ 5112 & 5114 (commanding that U.S. coins and currency contain the national motto).

1. The neutrality myth

Despite the myriad of tests discussed by Newdow and the fact that *Aronow* was decided before the major judicial tests crowded the Establishment Clause scene, the theme that unites them is the assumption that the goal of the Establishment Clause is that government maintain complete neutrality with regard to religion. Newdow highlights the Supreme Court's main opinion in *McCreary County*, which calls "governmental neutrality between religion and religion, and between religion and nonreligion" the "touchstone" of Establishment Clause jurisprudence. *See* Plaintiff's Brief, p. 32. *Aronow*, quoting *Walz*, states that in this area there is a "policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses." *Aronow*, 432 F. 2d at 244 (quoting *Walz*, 397 U.S. at 669).

However, the reality is that neutrality between religion and non-religion has never been the practice of this country; it is a myth lacking both logical and historical underpinnings. Complete neutrality concerning religion in the public square does not exist and was never intended in our law.

The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." Thomas Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). The Declaration of

Independence itself states that "all Men are created equal" and are "endowed by their *Creator* with certain unalienable Rights . . . ." *Declaration of Independence* para. 2 (1776) (emphasis added). Like Jefferson, George Washington declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> [The Founders] had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a

> just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.

Senate Rep. No. 32-376 (1853).

"The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). Even the Supreme Court has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963). In fact, "[t]here is an *unbroken history of official acknowledgment* by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674 (emphasis added). *See also Van Orden*, 125 S. Ct. at 2861-63 (listing numerous examples of the "rich American tradition" of the federal government acknowledging God); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 26 (2004) (noting that "official acknowledgments of religion's role in our Nation's history abound," and providing numerous examples) (Rehnquist, C.J., concurring in part and concurring in the judgment).

Given that the United States has never been neutral toward religion, the fact that Congress adopted a national motto that acknowledges God's superintending

role in the life of this nation is not the least bit surprising nor does it contradict the Establishment Clause.

> In approving the establishment clause, the framers had adopted a principle of institutional separation, but they had neither undertaken to impose a secular political culture on the nation nor consented to abandon their own religious values and culture when serving as public officials. Indeed, any such undertaking would have required a seemingly impossible intellectual and psychological surgery. Proclaiming a national day of thanksgiving, or inviting a chaplain to offer a prayer before congressional sessions, were actions of undeniable religious import. But through those actions the government did not intrude into the internal affairs of any church.

Capitol Square, 243 F.3d at 299 (quoting Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 Tex. L.Rev. 955, 973 (1989)).

The neutrality that Newdow asks for is, in fact, hostility toward religion by another name. Because this nation is so steeped in a tradition of recognizing God, to suddenly forbid expressions in the public square about God would place the government's imprimatur on *atheism*.

> [Even *Lemon*] does not require a relentless extirpation of all contact between government and religion. Government policies of accommodation, *acknowledgment*, and support for religion are an accepted part of our political and cultural heritage, and the Establishment Clause permits government some latitude in recognizing the central role of religion in society. Any approach less sensitive to our heritage would border on latent hostility to religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious.

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 576 (1989) (emphasis added).

By definition, a motto expresses the sense of the country, but it cannot capture everyone's feelings. As an expression of general sentiment, the motto will not be neutral toward everyone's beliefs, and it should not be stricken simply because it offends one person's sensibilities. In fact, "[w]ith respect to public acknowledgments of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits this disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists." *McCreary County*, 125 S. Ct. at 2753 (Scalia, J., dissenting). More specifically, a motto that is not neutral toward God is constitutional because it is neutral with respect to the ways people choose to worship Him.

2. A "religious" motto, but not a "religion"

The *Aronow* Court never explained or defined what constitutes "religion" under the First Amendment. Instead, its explanation for why it is "quite obvious" that the motto does not violate the Establishment Clause was that "In God We Trust" is "patriotic or ceremonial and bears no true resemblance to a governmental sponsorship of a religious exercise." *Aronow*, 432 F. 2d at 243. The Court went on to explain that, "While 'ceremonial' and 'patriotic' may not be particularly apt words to describe the category of the national motto, it is excluded from First

Amendment significance because the motto has no theological or ritualistic impact." *Aronow*, 432 F. 2d at 243.

This rationale errs to the extent that it is intended to diminish the importance of the religious character of the motto. It is impossible to deny the religious import of a statement declaring that the people of the United States have faith in God. Congress did not deny it when it adopted a concurrent resolution in honor of the 50th anniversary of the motto which stated that the "substance of the motto is . . . vital to the future success of the Nation." Senate Cong. Res. 96, 109th Cong. (2006) (enacted). The President certainly did not deny it in honoring the same event with a proclamation stating that "these words . . . guide millions of Americans," and that the anniversary of the motto is cause to "remember with thanksgiving God's mercies throughout our history, [to] recognize a divine plan that stands above human plans, and [to] continue to seek His will." Proclamation No. 8038, 71 Fed. Reg. 43,343 (July 27, 2006).

However, the fact that the motto is a religious statement does *not* automatically mean it violates the Establishment Clause, and in this way the *Aronow* Court was correct in observing that the motto "has nothing whatsoever to do with the establishment of religion" because "the motto has no theological or ritualistic impact." *Aronow*, 432 F. 2d at 243. A federal law must do more than contain religious content to implicate "religion" under the First Amendment.

The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, was quoted by James Madison in his *Memorial and Remonstrance,* was referenced in the amendments to the Constitution proposed by the ratifying conventions of Virginia, North Carolina, and Rhode Island, and echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).[3] In all of these instances, "religion" was defined as:

> The duty which we owe to our Creator, and the manner of discharging it.

Va. Const. of 1776, art. I, § 16; *see also* James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *reprinted in* 5 *Founders' Constitution* at 82; *The Complete Bill of Rights* 12-13 (Neil H. Cogan ed. 1997); *Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

[3] Later in *Torcaso v. Watkins*, 367 U.S. 488 (1961), the U.S. Supreme Court reaffirmed the discussions of the meaning of the First Amendment found in *Reynolds*, *Beason*, and the *Macintosh* dissent. *See Torcaso*, 367 U.S. at 492 n.7.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . ."). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[4] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

Sixteen years later in *Everson*, the Supreme Court noted that it had

> previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [Jefferson's 1785 *Act for Establishing Religious Freedom*].

Everson, 330 U.S. at 13. The *Virginia Act for Establishing Religious Freedom* enacted the sentiments expressed in Madison's *Memorial and Remonstrance*. *See Virginia Act for Establishing Religious Freedom*, October 31, 1785, *reprinted in* 5

[4] *See Girouard v. United States*, 328 U.S. 61 (1946).

Founders' Constitution, at 84-85. The *Everson* Court emphasized the importance of Madison's "great *Memorial and Remonstrance*," which "received strong support throughout Virginia," and played a pivotal role in garnering support for the passage of the Virginia statute. *Id*. at 12. Madison's *Memorial* offered as the first ground for the disestablishment of religion the *express definition of religion* found in the 1776 Virginia Constitution. For good measure, Justice Rutledge attached Madison's *Memorial* as an appendix to his *Everson* dissent which was joined by Justices Frankfurter, Jackson, and Burton. *See Everson*, 339 U.S. at 64. Thus, the United States Supreme Court has repeatedly recognized that the constitutional definition of the term "religion" is "[t]he dut[ies] which we owe to our Creator, and the manner of discharging [them]." Va. Const. of 1776, art. I, § 16.[5]

The constitutional definition makes clear that not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). As the Sixth Circuit observed in upholding the constitutionality of Ohio's motto, "With God all things are possible,"

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government from acknowledging the existence of Him they were pleased to call

[5] *See also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship").

> "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, 'necessary to good government and the happiness of mankind.' The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center.

Capitol Square, 243 F.3d at 300-01.

For example, from its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). Federal judges have always taken their oaths "So help me God," as do military personnel, civil servants, and applicants for citizenship. 28 U.S.C. § 453; 10 U.S.C. § 502; 5 U.S.C. § 3331; 8 C.F.R. 337.1.

"There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation." *Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as last year stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run

afoul of the Establishment Clause." *Van Orden*, 125 S. Ct. at 2863 (emphasis added).

The motto, "In God We Trust," is an acknowledgment of God and His integral role in the life of the nation. It contains a "religious" element, but it does not represent a "religion" under the Establishment Clause. Neither the motto itself nor the statutes ordering that it be placed on the nation's coins and currency dictate *any* of the duties that students may owe to God or explain how those duties should be carried out; likewise, they do not list articles of a religious faith or the forms of worship for any faith. Like the Ohio motto, the national motto "is merely a broadly worded expression of a religious/philosophical sentiment that happens to be widely shared by the citizens of [the United States]." *Capitol Square*, 243 F.3d at 299-300.

In short, the motto does not fall under the definition of a "religion" under the First Amendment; therefore, the district court correctly ruled that the motto statutes are not laws respecting an establishment of "religion." U.S. Const. amend. I.

B. The Definition of "Establishment"

Even if it is assumed that the statutes concerning the national motto are laws that pertains to a "religion" under the First Amendment—which they do not—the Congress cannot be said to have "establish[ed]" a religion through these statutes.

At the time the First Amendment was adopted in 1791, "five of the nation's fourteen states (Vermont joined the Union in 1791) provided for tax support of ministers, and those five plus seven others maintained religious tests for state office." Mark A. Noll, *A History of Christianity in the United States and Canada* 144 (1992). To avoid entanglements with the states' policies on religion and to prevent fighting among the plethora of existing religious sects for dominance at the national level, the Founders, via the Establishment Clause of the First Amendment, sought to prohibit Congress from setting up a national church "establishment."[6]

An "establishment" of religion, as understood at the time of the adoption of the First Amendment, involved "the setting up or recognition of a state church, or

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[6] *See, e.g.*, Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 441 (1840):

> We do not attribute this prohibition of a national religious establishment to an indifference to religion in general, especially to Christianity, (which none could hold in more reverence, than the framers of the Constitution,) but to a dread by the people of the influence of ecclesiastical power in matters of government; a dread, which their ancestors brought with them from the parent country, and which, unhappily for human infirmity, their own conduct, after their emigration, had not in any just degree, tended to diminish. It was also obvious, from the numerous and powerful sects existing in the United States, that there would be perpetual temptations to struggle for ascendancy in the National councils, if any one might thereby hope to found a permanent and exclusive national establishment of its own, and religious persecutions might thus be introduced, to an extent utterly subversive of the true interests and good order of the Republic. The most effectual mode of suppressing this evil, in the view of the people, was, to strike down the temptations to its introduction.

at least the conferring upon one church of special favors and advantages which are denied to others." Thomas M. Cooley, *General Principles of Constitutional Law*, 213 (Weisman pub. 1998) (1891). In Virginia, for example, "where the Church of England had been established [until 1785], ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches." *Elk Grove Unified Sch. Dist.*, 542 U.S. at 52 (Thomas, J., dissenting).

In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy, stating that an "establishment of religion"

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

The national motto does not meet this proper and historic definition of an "establishment." It does not involve any rite or ritual of a church; it does not force anyone to believe a certain article of religious faith; and it does not lend financial support to any religion or denomination. A court's decision to disregard this definition changes the purpose of the Establishment Clause's prohibition from preventing the creation of a national church to "secure[ing] 'the right not to be made uncomfortable' by others publicly expressing their religious beliefs." Vincent Phillip Muñoz, "Doing *Newdow* Justice: The Case for Court Consistency," *National Review*, June 4, 2004, *available at* http://www.nationalreview.com/comment/munoz200406091109.asp.

Instead of adopting a faulty redefinition of "establishment" in this case, this Court should follow the example of the Sixth Circuit in *Capitol Square,* upholding Ohio's State Motto, "With God All Things Are Possible," because the Motto

> involves no coercion. It does not purport to compel belief or acquiescence. It does not command participation in any form of religious exercise. It does not assert a preference for one religious denomination or sect over others, and it does not involve the state in the governance of any church. It imposes no tax or other impost for the support of any church or group of churches.

Id. at 299.

The Ohio Motto was not an "*establishment* of religion," and neither is the national motto of the United States. "Establishment," like "religion," clearly has been expanded far beyond its original context. *Amicus* urges this Court to interpret and apply the term "establishment" in its "just and natural" meaning and thus recognize that the statutes concerning the motto do not even remotely entail an "establishment" of religion. U.S. Const. amend. I.

CONCLUSION

> If our history demonstrates anything, it demonstrates that "[t]he people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety." The notion that the First Amendment commands "a brooding and pervasive devotion to the secular," to borrow the late Justice Arthur Goldberg's dismissive phrase, is a notion that simply perverts our history.

Capitol Square, 243 F. 3d at 300 (citations omitted).

To avoid a ruling that would pervert both the nation's history and its fundamental law, *Amicus* respectfully submits that this Court should resolve this case according to the text of the First Amendment rather than invented judicial tests, and therefore should affirm the district court's decision below that the national motto does not violate the text of the Establishment Clause.

Dated this 30th day of November, 2006.

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Dated this 30th day of November, 2006.

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The undersigned hereby certifies that two (2) true and correct copies of this *Brief of* Amicus Curiae have been served on counsel (listed below) for each party, by first-class U.S. Mail, and that an original and fifteen (15) copies of this *Brief of* Amicus Curiae have been dispatched to the Clerk of the United States Court of Appeals for the 9th Circuit, by first-class U.S. Mail, on this 30th day of November, 2006.

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STATEMENT OF RELATED CASES

This Court heard a challenge to the statutes concerning the national motto in *Aronow v. United States*, 432 F. 2d 242 (9th Cir. 1970). The court dismissed the complaint for lack of merit. Counsel for *Amicus Curiae* Foundation for Moral Law are aware of no other related cases within the meaning of Ninth Circuit Rule 28-2.6.