



November 13, 2006

Walter G. Howard, President of Trustees  
Coast Community College District  
1370 Adams Avenue  
Costa Mesa, CA 92626

Dear Mr. Howard:

The American Center for Law and Justice (ACLJ) has recently learned that the student board of Orange Coast College (OCC) has decided to cease voluntary recitation of the Pledge of Allegiance at its meetings. It appears that some of the students who voted against allowing the Pledge to be recited mistakenly believed that reciting the Pledge on a public university campus violates the "separation of church and state."

This informational letter explains why the First Amendment to the United States Constitution does not forbid the voluntary recitation of the Pledge of Allegiance by public university students or otherwise require citizens to remove references to God from the public arena. While no person may be forced to recite the Pledge or other statements against his or her will, freely allowing such recitations to occur voluntarily does not raise any First Amendment concerns. It is our hope that this letter will address any concerns that OCC administrators, staff, or students may have about this issue.

By way of introduction, the ACLJ is a public interest law firm specializing in the area of the First Amendment's freedom of speech and religion clauses. Our organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of political and religious sentiments. I have argued and participated as counsel of record in numerous cases involving constitutional issues before the Supreme Court of the United States, and our law firm has extensive experience litigating constitutional issues before various federal and state courts.

## **The Establishment Clause, the Pledge of Allegiance, And Other Patriotic Expressions**

As a first principle, the First Amendment does not impose an amorphous “separation of church and state” standard but rather prohibits the establishment of an official church and similar coercive action. The Establishment Clause imposes no affirmative duty upon the government to suppress private religious expression. The Supreme Court has noted that “attribut[ing] to a neutrally behaving government private religious expression has no antecedent in our jurisprudence.” *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 764 (1995) (plurality opinion). The Constitution “requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*” *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added).

The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *See, e.g., Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb’s Chapel*, 508 U.S. at 395; *Widmar v. Vincent*, 454 U.S. 263 (1981). The Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Although a U.S. District Court judge has held that the Establishment Clause forbids recitation of the Pledge in public elementary school classrooms, *Newdow v. U.S. Congress*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), the Supreme Court has disagreed with this view and has recognized that public expressions of patriotism pose no Establishment Clause concerns. For example, as Justice O’Connor recently noted in a case involving a challenge to the Pledge:

Given the values that the Establishment Clause was meant to serve, . . . [the] government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of “ceremonial deism” most clearly encompasses such things as the national motto (“In God We Trust”), religious references in traditional patriotic songs such as the Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions (“God save the United States and this honorable Court”). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context *prevent them from being constitutional violations at all.*

*Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2004) (O’Connor, J., concurring in the judgment) (internal citations omitted) (emphasis added). Also, in *Wallace v. Jaffree*, Justice O’Connor stated that the words “under God” in the Pledge pose no constitutional problems because they “serve as an acknowledgment of religion with ‘the legitimate secular purpose of solemnizing public occasions, and expressing confidence in the future.’” 472 U.S. 38, 78 n.5 (1985) (O’Connor, J., concurring) (citation omitted). In *Allegheny County v. ACLU*, the Court observed that the reference to God in the Pledge of Allegiance is consistent with the Establishment Clause. 492 U.S. 573, 602-03 (1989).

The California Legislature has expressed its support for recitation of the Pledge of Allegiance by enacting CAL. EDUC. CODE § 52720. The relevant portion of the statute reads as follows:

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement.

While the requirements of § 52720 do not apply to public institutions of higher education, the statute reveals the California legislature's belief that reciting the Pledge of Allegiance in public schools is a beneficial, constitutionally permissible activity. Thus, while OCC students are not *required* to recite the Pledge, they certainly *may* recite the Pledge if they choose to without violating any federal or state law.

The California Pledge statute reflects the well-established principle that the Constitution is not to be interpreted in a manner that would purge religion or religious reference from society. As early as 1892, the Supreme Court noted that "this is a religious nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical role of religion in our society and concluded that "[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. In *Abington v. Schempp*, 374 U.S. 203, 212 (1963), the Court recognized that "religion has been closely identified with our history and government." Recognition of the primacy of religion in the Nation's heritage is nowhere more affirmatively expressed than in *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), where the Court stated, "[w]e are a religious people whose institutions presuppose a Supreme Being." Moreover, in *Lee v. Weisman*, 505 U.S. 577 (1992), the Court noted that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution."

While the most recent case to address the Pledge (*Elk Grove Unified School District v. Newdow*) was decided on standing grounds, three Justices wrote at length to expressly acknowledge the constitutionality of public Pledge recitation. Chief Justice Rehnquist wrote that "'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. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound." The Chief Justice gave many examples of our Nation's leaders seeking the

help of God and reminding us to thank God for blessing our Nation. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 26-30 (Rehnquist, C.J., concurring). These examples—along with the national motto “In God We Trust” imprinted on our coins and the opening request at sessions of the Supreme Court for “God [to] save the United States and this honorable Court”—all speak to the appropriateness of public references to God and their compatibility with the Establishment Clause. The Chief Justice stated that “[t]he phrase ‘under God’ is in no sense a prayer, nor an endorsement of any religion, but a simple recognition [that] . . . [f]rom 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 31 (citations omitted).

In the same case, Justice O’Connor similarly supported the constitutionality of the Pledge because it “commemorate[s] the role of religion in our history” and “some references to religion in public life and government are the inevitable consequence of our Nation’s origins.” *Id.* at 36 (O’Connor, J., concurring). Justice O’Connor added:

It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today.

*Id.* at 35-36. Justice Thomas also expressed his view that recitation of the Pledge poses no First Amendment problems. *Id.* at 49 (Thomas, J., concurring).

## **Conclusion**

In sum, no student may be required to recite the Pledge if he or she objects to doing so, but allowing the Pledge to be recited voluntarily at a public university raises no First Amendment concerns. The Pledge is a constitutionally permissible reference to this nation’s rich religious heritage. We hope that this informational letter has dispelled any confusion about the constitutionality of reciting the Pledge of Allegiance on public university campuses.

Sincerely,

Jay Alan Sekulow

**AMERICAN CENTER FOR  
LAW AND JUSTICE**

CC: Robert Dees, President, OCC