

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHEAL A. NEWDOW,
Plaintiff-Appellant

v.

U.S. CONGRESS, *et al.*
Defendants-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.
In support of *Defendants-Appellees'* Petition for
Rehearing and for *En Banc* Rehearing

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,)
)
Plaintiff-Appellant)
)
v.)
)
U.S. CONGRESS, *et al.*)
Defendants-Appellees)
)
_____)

Case No. 00-16423

AMICUS CURIAE
CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 *amicus curiae*
WallBuilders, Inc. certifies that it has not issued shares to the public, and has
no parent company, subsidiary, or affiliate that has issued shares to the
public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 1

I. THE PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE THE PANEL’S DECISION CONFLICTS WITH A DECISION IN THE SEVENTH CIRCUIT AND THE ISSUE IS ONE OF EXCEPTIONAL IMPORTANCE TO THE PUBLIC, THIS COURT, AND THE PARTIES 2

A. The petition for rehearing should be granted because the ninth circuit panel’s decision directly conflicts with a seventh circuit opinion 4

B. The petition for rehearing should be granted because the phrase “One Nation Under God” in the Pledge of Allegiance, which is one of several national mottoes and is broadly recited in public schools throughout the United States, is a matter of national importance that demands national uniformity in how our courts treat it 5

II. THE PANEL’S OPINION SHOULD BE REVERSED BECAUSE THE PANEL ERRED BY NOT GIVING DEFERENCE TO THE *DICTA* OF THE SUPREME COURT OF THE UNITED STATES WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL 9

CONCLUSION 15

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

CASES:

<i>Cerro Metal Products v. Marshall</i> , 620 F.2d 964 (3d Cir. 1980).....	11, 12
<i>County of Allegheny v. ACLU</i> , 492 U.S. 573 (1989)	13
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	6
<i>Navajo Nation v. U.S. Department of Health and Human Services</i> , 285 F.3d 864 (2002)	13
<i>Newdow v. United States</i> , 207 F.3d 662 (11th Cir. 2000)	7, 9
<i>Newdow v. United States</i> , 292 F.3d 597 (9th Cir. 2002)	<i>passim</i>
<i>Sherman v. Community Consolidated School District 21</i> , 980 F.2d 437 (7th Cir. 1992)	<i>passim</i>
<i>United States v. Baird</i> , 85 F.3d 450 (9th Cir. 1996)	12
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	10
<i>West Virginia Board. of Education v. Barnette</i> , 319 U.S. 624 (1943).....	14
<i>Zal v. Steppe</i> , 968 F.2d 924 (9th Cir. 1992).....	13

OTHER:

9th Cir. R. 35-1.....	1, 2, 3, 5, 6
Fed. R. App. P. 35(a)	1, 2, 3
Fed. R. App. P. 35(a)(2).....	5
H.R. Res. 459, 107th Cong. (2002).....	2
S. Res. 292, 107th Cong. (2002)	2

Douglas H. Ginsburg & Donald Falk, <i>The D.C. Circuit Review: September 1989 – August 1990</i> , 50 Geo. Wash. L. Rev. 1008 (1991).....	5, 6, 7, 8, 9
Evelyn Nieves, ‘ <i>Under God</i> ’ <i>Inconoclast Looks to Next Targets</i> , N.Y. Times, July 1, 2002, at 8, col. 5.....	8
<i>Meet The Man Behind The Pledge Court Suit</i> , Scripps Howard News Service, at http://www.shns.com (Jul. 17, 2002).....	8
Michael Sean Quinn, <i>Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles</i> , 74 Chi.-Kent L. Rev. 655 (1999)	11
Ninth Circuit Evaluation Committee, Report of Evaluation Committee (2000)	4
President’s Remarks Prior to Discussion With President Vladimir Putin of Russia and an Exchange With Reporters in Kananaskis, 38 <i>Weekly Comp. Pres. Doc.</i> 1099 (June 27, 2002)	2

INTEREST OF *AMICUS CURIAE*

WallBuilders, Inc. is a 501c3 organization that is dedicated to the restoration of the moral and religious foundation on which America was built. As such, the organization has a direct interest in seeing that students are allowed to say the full and official version of the Pledge of Allegiance in their schools. WallBuilders has a large base of supporters who are equally concerned with this issue.

This brief is filed pursuant to the consent of the counsel of record for all defendants and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*. Plaintiff, Michael Newdow has withheld consent.

ARGUMENT

On July 24, 2002, the State of California, one of the appellees, filed a petition for panel hearing and a petition for *en banc* rehearing in the above-referenced case. Petition for Rehearing With Suggestion for Rehearing *En Banc* of Defendant-Appellee State of California at 1-2, *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002). Other defendants have followed suit.¹ The Ninth Circuit and the Federal Rules of Appellate Procedure list two reasons to grant a petition for a rehearing *en banc*. Fed. R. App. P. 35(a); 9th Cir. R. 35-1. These reasons include

¹ See Petition for Panel Rehearing and Petition for Rehearing *En Banc* of Appellees Jim Sweeney, Sacramento City USD, David W. Gordon, Elk Grove USD (9th Cir. docketed Aug. 5, 2002); Petition for Panel Rehearing and Petition for Rehearing *En Banc* of Appellee United States (9th Cir. docketed Aug. 12, 2002).

the need to maintain consistency in court decisions and the need to resolve matters of exceptional importance. Fed. R. App. P. 35(a); 9th Cir. R. 35-1. Because both of these reasons exist in this case, the court should grant the petition to rehear the case *en banc* to resolve an important question of law and to instill confidence in the Ninth Circuit and its decisions.

I. THE PETITION FOR REHEARING SHOULD BE GRANTED BECAUSE THE PANEL’S DECISION CONFLICTS WITH A DECISION IN THE SEVENTH CIRCUIT AND THE ISSUE IS ONE OF EXCEPTIONAL IMPORTANCE TO THE PUBLIC, THIS COURT, AND THE PARTIES.

The decision of the Ninth Circuit panel in *Newdow v. U.S. Congress*, 292 F.3d at 612, that the use of the phrase “under God” in the pledge of allegiance is unconstitutional caused a public outcry. Accordingly, both the legislative and executive branches of the Federal government criticized the decision. *See* President’s Remarks Prior to Discussion With President Vladimir Putin of Russia and an Exchange With Reporters in Kananaskis, 38 *Weekly Comp. Pres. Doc.* 1099 (June 27, 2002); H.R. Res. 459, 107th Cong. (2002); S. Res. 292, 107th Cong. (2002). Additionally, the decision conflicts with a decision in the Seventh Circuit. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992). The decision is exceptionally important and should be reheard *en banc* by this

Court.²

The question for the *en banc* court to resolve is whether, under Ninth Circuit Rule 35-1, the panel's decision, that daily recitation of the Pledge of Allegiance in public schools is unconstitutional, directly conflicts with an existing opinion of the Seventh Circuit in *Sherman* and whether the decision substantially affects a rule of national application in which an overriding need for national uniformity exists.

The Ninth Circuit's rules give two considerations for suggesting a rehearing *en banc*. 9th Cir. R. 35-1. The first is whether the panel's opinion directly conflicts with an existing opinion by another court of appeals. *Id.* The second consideration is whether the opinion substantially affects a rule of national application in which there is an overriding need for national uniformity. *Id.* These considerations parallel the two reasons stated in the Federal Rules of Appellate Procedure for determining when a hearing or rehearing *en banc* may be ordered. *See* Fed. R. App. P. 35(a).

An evaluation committee appointed by the Chief Judge of the Ninth Circuit recently issued a report recommending ways to improve the delivery of appellate services in the Ninth Circuit. One of these recommendations was to increase the number of cases that this Court hears *en banc* each year. Another recommendation

² *Amicus* suggests that the case be reheard *en banc*. In the alternative, the panel should rehear the case. Throughout this brief, we will refer to a rehearing *en*

suggested quarterly *en banc* sittings in order to make efficient use of the Court's limited resources while still rehearing important cases. Ninth Circuit Evaluation Committee, Report of Evaluation Committee 3, 5 (2000).

A. The petition for rehearing should be granted because the ninth circuit panel's decision directly conflicts with a seventh circuit opinion.

In *Sherman*, an elementary school student and his father challenged the school district's policy that students would daily recite the Pledge of Allegiance under Illinois' 1979 pledge statute. 980 F.2d at 439. The Seventh Circuit panel concluded that reciting the Pledge of Allegiance in public elementary school as required by school policy and state law is constitutional. *Id.* The court gave the following reasons to support its opinion: recitation of the Pledge was not compulsory, *id.* inclusion of "under God" in the Pledge of Allegiance continues the Founders' tradition of referring to God in civic speech, *id.* at 446, and reliance on Supreme Court *dicta* that declares constitutional references to God in civic speech, in general, and the Pledge of Allegiance, in specific, *id.* at 446-48.

The factual situation in the instant case is almost exactly like the situation in *Sherman*. See *Newdow*, 292 F.3d at 600. In the instant case, the father of his elementary school daughter challenged the school district's policy of daily recitation of the Pledge of Allegiance under a California statute. *Id.* The Ninth *banc*; however, we recognize that the case may be reheard by the panel.

Circuit panel ruled, however, that the school district's policy of daily reciting the Pledge of Allegiance that includes the phrase, "under God," violates the Establishment Clause. *Id.* at 612. The Ninth Circuit's recent opinion obviously conflicts with the Seventh Circuit's 1992 ruling. *See Sherman*, 980 F.2d at 439. This conflict between decisions of different courts of appeal satisfies one of the two considerations that the Ninth Circuit has established for granting an *en banc* rehearing. *See* 9th Cir. R. 35-1.

A direct conflict exists between the Ninth and the Seventh Circuits regarding the constitutionality of daily recitation of the pledge in public schools. Such a conflict between circuits is grounds for granting a petition for a rehearing *en banc*. Therefore, this Court should grant the appellee's petition to rehear the *Newdow* case *en banc*.

- B. The petition for rehearing should be granted because the phrase "One Nation Under God" in the Pledge of Allegiance, which is one of several national mottoes and is broadly recited in public schools throughout the United States, is a matter of national importance that demands national uniformity in how our courts treat it.

The second reason to grant a petition for rehearing *en banc* is to resolve a matter of exceptional importance. Fed. R. App. P. 35(a)(2). The Ninth Circuit has interpreted a matter of exceptional importance to be one in which the opinion in question substantially affects a rule of national application creating an overriding need for national uniformity. *See* 9th Cir. R. 35-1.

Judge Douglas H. Ginsburg of the D.C. Circuit has said the subject matter of a case is what makes an issue exceptionally important. Douglas H. Ginsburg & Donald Falk, *The D.C. Circuit Review: September 1989 – August 1990*, 59 Geo. Wash. L. Rev. 1008, 1047 (1991). Ginsburg also stated a case should be reheard *en banc* when the issue is exceptionally important to the public, to the court, or to the parties. *See id.* at 1025.

The phrase “One Nation Under God” in the Pledge of Allegiance is one of several national mottoes. *See Sherman*, 980 F.2d at 447 (citing *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting)).³ American children have recited it every school day for decades. The continuance of this nationwide practice throughout generations makes the Pledge of Allegiance a matter of exceptional importance with national application. The laws, as applied to this national motto that has been used for generations, must be uniform throughout the nation. Accordingly, the Ninth Circuit’s application of the “exceptionally important” reason to grant a petition for rehearing *en banc* has been satisfied. *See* 9th Cir. R. 35-1.

The constitutionality of reciting the Pledge of Allegiance in public schools is

³ While *Amicus* understands that the official national motto is “In God We Trust,” Justice Brennan in *Marsh v. Chambers* refers to “One Nation Under God,” along with the phrase “God save the United States and this Honorable Court” as “mottoes.”

also exceptionally important to each of the three categories of people identified by Judge Ginsburg. First, the decision in *Newdow* is exceptionally important to the public. *See* Ginsburg, *supra* at 1025. The decision created a strong backlash from most Americans and created a crisis of confidence in the panel’s opinion and in American courts, in general. Similar to the D.C. Circuit’s rehearing in the cases arising out of the Watergate affair,⁴ rehearing the *Newdow* case would “maximize public confidence in the court’s decision” *See* Ginsburg, *supra* at 1027. Additionally, because the Pledge of Allegiance is used so pervasively in schools throughout the nation, the effects of the opinion in *Newdow* are much broader than the typical decision. The “immediate and controversial effects” on a large number of Americans, American institutions, and American customs makes the opinion in *Newdow* exceptionally important to the public. *See id.*

Second, the decision in *Newdow* is exceptionally important to this Court. *See id.* at 1028. Judge Ginsburg stated that recurring issues that affect the administration of justice make the topic exceptionally important to the full court. *Id.* The plaintiff, Mr. Newdow, is a recurring litigant having filed claims in both the Ninth and Eleventh Circuits. *See Newdow*, 597 F.3d at 597; *Newdow v. United States*, 207 F.3d 662 (11th Cir. 2000) (challenging the Broward County, Florida,

⁴ *See* Ginsburg, *supra*, at 1026 n.91 (pointing out that the D.C. Circuit heard at least 10 Watergate-related cases *en banc*)

school board's policy of having children daily recite the Pledge of Allegiance); *Meet the Man Behind the Pledge Court Suit*, Scripps Howard News Service, at <http://www.shns.com> (Jul.17, 2002) (reporting that Newdow is appealing "the dismissal in May of his lawsuit seeking to bar references to God at presidential inaugurations" and asserting that Newdow currently has three First Amendment lawsuits in the courts). The panel's decision opens the door for Mr. Newdow and others to challenge "In God We Trust" that is printed on our money and other long-standing civic references to God. Evelyn Nieves, *'Under God' Iconoclast Looks to Next Targets*, N.Y. Times, July 1, 2002, at 8, col. 5.

Not only should this Court be concerned that Dr. Newdow is a recurring litigant, but it should be concerned about the volume of claims that must be litigated. A conflicting decision, like the one in the instant case, is exceptionally important to this Court to ensure that recurring claims arising from the decision in this pledge case do not bog down this or other courts in the administration of justice and that inconsistent decisions between the circuits are also not a hindrance to the efficient administration of justice throughout all circuits. An *en banc* rehearing will, therefore, be an efficient use of the Court's limited resources by timely resolving a controversial issue of national importance.

Third, the decision in the instant case is exceptionally important to the parties. *See* Ginsburg, *supra*, at 1031. Courts have granted *en banc* rehearings

because these cases were exceptionally important to the parties, although the cases themselves may not have had great precedential value. *Id.* at 1032. The daily recitation of the pledge in public schools is clearly important to the plaintiff, who has previously filed a similar lawsuit in Florida. *Newdow v. United States*, 207 F.3d 662 (11th Cir. 2000) (affirmance without opinion). The government defendants also represent all Americans many of whom feel strongly that “under God” belongs in the Pledge of Allegiance and that the tradition of daily reciting the Pledge in public schools should continue.

In summary, the panel’s decision affects a national motto for which national uniformity of laws is necessary. Additionally, the constitutionality of the Pledge of Allegiance is exceptionally important to the public, this Court, and the parties. Therefore, the second reason to rehear (i.e., the issue’s exceptional importance demands national uniformity in how different courts apply the law to the issue) the case *en banc* has been satisfied. Both reasons to grant a petition for a rehearing *en banc* have, therefore, been satisfied, which strongly reinforces the need for this Court to grant the appellee’s petition for rehearing *en banc*.

II. THE PANEL’S OPINION SHOULD BE REVERSED BECAUSE THE PANEL ERRED BY NOT GIVING DEFERENCE TO THE *DICTA* OF THE SUPREME COURT OF THE UNITED STATES WHICH HAS STATED THAT THE PLEDGE OF ALLEGIANCE IS CONSTITUTIONAL.

The debate between the majority and minority opinions in this case is over

whether to decide the issue by trying to extend the logic of the Supreme Court's Establishment Clause precedent or by using the Supreme Court's *dicta* regarding the Pledge of Allegiance. *Newdow*, 292 F.2d at 605-612 (majority opinion), 612-615 (minority opinion). The problem with trying to use the precedent is that the Court's application of its Establishment Clause jurisprudence has often been unpredictable, if not illogical. *See Wallace v. Jaffree*, 472 U.S. 38, 107-12 (1985) (Rehnquist, J., dissenting) (stating that the application of the Establishment Clause since the late 1940s has little value because it has no basis in history and 'is difficult to apply and yields unprincipled results.'). With this type of unpredictable Establishment Clause jurisprudence, this Court should follow the lead of the dissent in the instant case as well as the Seventh Circuit's decision in *Sherman*. Following the Supreme Court's *dicta* is the best alternative for this Court. '[A]n inferior court had best respect what the majority [of the United States Supreme Court] says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.'" *Sherman*, 980 F.2d at 448.

The majority opinion in the instant case recognized that the U.S. Supreme Court has stated 'in *dicta* that the presence of 'one nation under God' in the Pledge of Allegiance is constitutional.'" *Newdow*, 292 F.3d at 611 n12. However, the

majority did not give deference to the Supreme Court's *dicta*, although it stated that the Supreme Court retains its ultimate authority to decide the issue. *Id.* The question for the *en banc* court to resolve is whether the panel gave inadequate deference to the Supreme Court's *dicta*.

Dictum is “[a]n opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of adjudication” Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 Chi.-Kent L. Rev. 655, 710 (1999).

Judges and attorneys often divide *dicta* into *obiter dicta* and judicial *dicta* to determine the precedential value of individual *dictum*. *Id.* at 712-13. *Obiter*, or mere, *dicta* is an opinion expressed in passing and has less persuasive value. *Id.* at 713. Judicial *dicta* are “court’s reasoned consideration and elaboration upon a legal norm” and have much more persuasive authority. *Id.* at 713-14.

In fact some courts, give judicial *dicta* great weight. For example, the Third Circuit Court of appeals has noted that “[a] . . . distinction has been drawn between ‘judicial *dictum*’ and ‘*obiter dictum*’: Judicial *dicta* are conclusions that have been briefed, argued, and given full consideration even though admittedly unnecessary to decision. A judicial *dictum* may have great weight.” *Cerro Metal Products v. Marshall*, 620 F.2d 964, 978 n.39 (3d Cir. 1980). Indeed, judicial *dicta* are of such serious consequence that some courts consider judicial *dicta* issued by supreme

courts to be binding precedent: “A Wisconsin court has stated it thus: ‘When a court of last resort intentionally takes up, discusses, and decides a question germane to, though not necessarily decisive of, the controversy, such decision is not a dictum but is a judicial act of the court which it will thereafter recognize as a binding decision.’” *Id.* (citation omitted).

However, the distinction between *obiter dictum* and *judicial dictum* is not clear and is beset with many problems. *Id.* at 717-18. Hard and fast divisions “are probably wrong” and can lead to “intellectual chicanery.” *Id.* at 730, 776. It is not easy to determine what constitutes *judicial dictum*. *Id.* at 735. In fact, *dicta* are better thought of as being on a continuum. *Id.* at 740. Under this view, *obiter dicta*, in which a court has not deliberated over what it has said, *see id.*, rest at the lower end of the continuum. *Judicial dicta*, in which a court has more deliberately considered what it has said to guide future litigation and in which the parties may have briefed the issue, *id.* at 730, rest at the upper end of the continuum. However, it is important under this view to realize that *dicta*, other than that which is technically *judicial dicta*, can lie very close to that end of the continuum and can be worthy of receiving precedential or near-precedential value.

This Court has placed *dicta* issued by the United States Supreme Court on the upper end of the continuum. *See United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996). According to this Court, Supreme Court *dicta* is to be treated “with

due deference.” *Id.* One Ninth Circuit judge has stated that Supreme Court *dicta* must not be discarded lightly. *Navajo Nation v. U.S. Dept. of Health and Human Services*, 285 F.3d 864, 877 (2002) (Fletcher, J., dissenting). Another stated, “[D]icta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what the Court might hold. We should not blandly shrug it off because they were not a holding.” *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring in part and dissenting in part). This Court, therefore, has placed Supreme Court *dicta* high on the continuum giving it great weight – even when that the *dictum* is not judicial *dictum*. For example, the Supreme Court *dicta* at issue in *Zal* must be considered obiter *dicta*, yet Judge Noonan pointed out the weight they deserved. *See id.*

Certainly, the Supreme Court’s *dicta* regarding the Pledge of Allegiance is worthy of even more weight since they are much closer to the judicial *dicta* end of the continuum. While the constitutionality of the Pledge may not have been extensively briefed and argued, the pertinent Establishment Clause test and principles were briefed and argued in all the cases in which the Pledge was used as an illustration. For example, the Supreme Court has stated, “Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.” *County of Allegheny v. ACLU*, 492 U.S. 573,

602-03 (1989). The Supreme Court also stated that one’s “religiously based refusal” to recite the pledge should not interfere with the right of others to recite it. *Newdow*, 292 F.3d at 614 (Fernandez, J., concurring in part and dissenting in part) (citing *West Virginia Bd. Of Educ. V. Barnette*, 319 U.S. 624, 642 (1943)). In fact, five current Justices of the Supreme Court, as well as several prior Justices, have recognized that including “under God” in the Pledge of Allegiance does not impose a danger to society by establishing a theocracy or inhibiting one’s religious beliefs. *Id.* at 614 n.3.

In the instant case, the majority dismissed the Supreme Court’s *dicta* because the Court has never *directly* addressed the issue and has not applied the Establishment Clause tests to it. *Id.* at 611 n.12. Based on the Ninth Circuit’s own precedent, Supreme Court *dicta* should be given great deference. *Baird*, 85 F.3d at 453. The Supreme has stated multiple times that the pledge does not violate the Establishment Clause. *Id.* at 614 n.3 (Fernandez, J., concurring in part and dissenting in part). Because the Supreme Court has declared the pledge to be constitutional on multiple occasions, these cases addressed First Amendment issues, and the pledge is so exceptionally important to Americans, the Supreme Court did not make these statements regarding the pledge without due consideration. Therefore, the panel erred by not giving more deference to the applicable Supreme Court *dicta*. The petition for rehearing *en banc* should be

granted to correct this error and to reaffirm this Court's opinion on the precedential value of Supreme Court *dicta*.

CONCLUSION

Because a conflict exists between circuits regarding the constitutionality of reciting the pledge in public schools and the issue is of exceptional national importance, both of the reasons to grant a petition for a rehearing *en banc* as stated by the Ninth Circuit and the Federal Rules of Appellate Procedure have been satisfied. Additionally, a rehearing *en banc* would permit this Court to correct an error made by the panel when the panel gave inadequate deference to Supreme Court *dicta* regarding the constitutionality of the pledge. For the foregoing reasons, WallBuilders, Inc. respectfully requests that this Court grant the petition for rehearing or rehearing *en banc*.

Respectfully submitted
This 15th day of August 2002

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief Amicus Curiae has been produced using 14 point Times New Romans which is proportionately spaced. This brief contains 3,585 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Amicus Brief in the case of *Newdow v. U.S. Congress*, No. 00-16423, on all required parties by depositing the required number of copies of the same in the United States mail, first class postage, prepaid on August 15, 2002, addressed as follows:

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