ORAL ARGUMENT SCHEDULED FOR DECEMBER 15, 2009

CASE NO. 09-5126

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MICHAEL NEWDOW, et al.,

Plaintiffs-Appellant,

v.

HON. JOHN ROBERTS, JR., CHIEF JUSTICE OF THE U.S. SUPREME COURT, et al.,

***Defendants-Appellees*,**

On Appeal from the United States District Court
for the District of Columbia
(District Court No. 1:08-cv-02248)

APPELLEES' JOSEPH LOWERY AND RICHARD WARREN'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION SEEKING TO DISPENSE WITH RELIGIOUS OPENING CRY

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INTRODUCTION

In his book, *The Supreme Court, How It Was, How It Is,* Chief Justice Rehnquist writes that the opening proclamation by the court crier is based on a practice spanning hundreds of years. The supplication "was a ritual that had been used to open Anglo-Saxon courts for many centuries."[1] Through an emergency motion, the appellants (herein referred to collectively as "NEWDOW") seek to disrupt a court tradition which predates this country. Yet, more than fifty years of Supreme Court dicta lend support to this tradition. In view of this, the clergy appellees, Drs. Lowery and Warren, oppose the motion.

ARGUMENT

I. Supreme Court Dicta Supports The Opening Supplication

No Supreme Court opinion has directly analyzed the traditional court cry. However, there is dicta from eleven U.S. Supreme Court opinions on this subject which together comprise sufficient authority to deny the motion. Indeed, every justice of the Supreme Court which has cited the opening court call has either explicitly approved of its use or has at worst been mildly

[1] William H. Rehnquist, William Morrow and Company, Inc., p. 31 (1987).

ambivalent to it, finding that it is an exception to ordinary Establishment Clause jurisprudence. In view of that, this opposition will summarize the relevant body of dicta which spans more than half a century.

The appellants complain that the opening invocation would not only violate their rights, but would create an improper appearance. "Recognizing that 'justice must satisfy the appearance of justice,' *Offutt v. United States*, 348 U.S. 11, 14 (1954), Plaintiffs submit that when a tribunal starts off its own proceedings in a manner that (as in this case) so closely resembles the gravamen of the Complaint being considered, that appearance does not exist." Motion at pg. 2. To the contrary. When this Court follows a tradition used by courts in this country for centuries, there is no appearance of partiality. Indeed, for this Court to interrupt that tradition for the benefit of NEWDOW would itself work to show partiality to the movant.

The motion represents an extreme legal position once imagined by Justice Douglas. In upholding a New York statute which allowed for religious release time in the public schools, Justice Douglas, writing for the majority, stated, "[a] fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'") *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). But Justice Douglas'

voice is not alone as to the legitimacy of the tradition as can be seen by a review of the fifty years of high court dicta, reviewed below.

In a case striking down the financing of school prayer, Justice Douglas explained that "[w]hat New York does on the opening of its public schools is what we do when we open court. Our Crier has from the beginning announced the convening of the Court and then added 'God save the United States and this Honorable Court.'" Justice Douglas further wrote that the "utterance is a supplication, a prayer in which we, the judges, are free to join, but which we need not recite any more than the students need recite the New York prayer." *Engel v. Vitale*, 370 U.S. 421, 439 (1962) (Douglas, J., concurring). In his dissent, Justice Stewart picked up the court invocation theme stating as follows: "At the opening of each day's Session of this Court we stand, while one of our officials invokes the protection of God. Since the days of John Marshall our Crier has said, 'God save the United States and this Honorable Court.'" *Id*. 446 (Stewart, J., dissenting). It is important to note that though the respective justices were on opposite sides in Engel, they both positively cited to the opening supplication as authority for their positions.

Two decades later, the constitutionality of legislative prayer was under review in the high court. The court call was revisited by both the majority and

dissenting opinions. Writing for the majority, Chief Justice Burger observed as follows:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God Save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court. *Marsh v.* Chambers, 463 U.S. 783, 786 (1983).

Again, Justice Brennan dissented asserting that the opening court cry, along with the national motto and the pledge of allegiance, have "lost any true religious significance." *Id*. 818 (Brennan, J., dissenting). Although the clergy appellants would note that Justice Brennan's assertion regarding the loss of religious significance has not gained much of an audience in the judiciary, the point being asserted is that the supplication has not been deemed violative of the Establishment Clause even by the dissent in Marsh.

In litigation, on Establishment Clause grounds, the presence of a crèche on public property, the court call was discussed in both the concurring and dissenting opinions. The crèche is "no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers* [citation omitted], government declaration of

Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening Court sessions with 'God save the United States and this honorable Court.'") *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring).

In his dissent, Justice Brennan is at worst ambivalent to the Court Marshal's cry. "Intuition tells us that some official 'acknowledgment' is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people." *Id*. 714 (Brennan, J., dissenting). Relevant to the present motion before the Court, Justice Brennan opined, "we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture." *Id*., 716. Through its motion, NEWDOW makes clear that the objective is precisely what Justice Brennan stated cannot be done. Namely, NEWDOW seeks a complete prohibition on the Court from recognizing, in its public actions, a tradition merely because that tradition has religious overtones.

The tradition of the court call was further discussed by two justices in a matter involving the display of a nativity scene in a county courthouse. Relying on the endorsement test, Justice O'Connor wrote that "[p]ractices such as legislative prayers or opening Court sessions with 'God save the United States and this honorable Court' serve the secular purposes of 'solemnizing public occasions' and

'expressing confidence in the future.'" *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring) (quoting *Lynch,* 465 U.S. at 693). Justice O'Connor continues:

> It is the combination of the longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with 'God save the United States and this honorable Court,' as well as their nonsectarian nature, that leads me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs. *Id*., 631-32.

It is worthy of note that Justice Kennedy, who concurred in the judgment in part and dissented in part, positively referred to the opening court invocation to bolster his position as well. *Id*., at 672.

The phrase "one nation, under God," in the pledge of allegiance was reviewed by the high court in 2004. In his concurrence, the Chief Justice pointed to the historical roots of the invocation. "Our Court Marshal's opening proclamation concludes with the words 'God save the United States and this honorable Court.' The language goes back at least as far as 1827. O. Smith, Early Indiana Trials and Sketches: Reminiscences (1858) (quoted in 1 C. Warren, The Supreme Court in United States History 469 (rev. ed.1926*))*." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 29 (2004) (C.J. Renhquist, concurring.)

Using the ceremonial deism theory, Justice O'Connor opined as follows:

> There are no *de minimis* violations of the Constitution-no constitutional harms so slight that the courts are obliged to ignore

> them. Given the values that the Establishment Clause was meant to serve, however, I believe that 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"). *Id*., (O'Connor, J. concurring, 36-37).

In two dissents (*Lee v. Weisman*, 505 U.S. 577 and *McCreary County, Ky. v. American Civil Liberties Union of Ky*., 545 U.S. 844, 886 (2005)) Justice Scalia noted, as did Chief Justice Rehnquist in *Elk Grove Unified School Dist. v. Newdow*, the historical basis of the opening court proclamation. "The Supreme Court under John Marshall opened its sessions with the prayer, 'God save the United States and this Honorable Court.'" 1 C. Warren, The Supreme Court in United States History 469 (rev. ed.1926) (internal quotation marks omitted). *McCreary Co.*, *Id*., 545 U.S. at 886 (Scalia, J., dissenting).

In a parallel case to *McCreary Co*., Justice Stevens mentions the opening court prayer inferring that it is not a violation of the Establishment Clause as would be, in his opinion, the presence of the Ten Commandments at, or around, a courthouse. *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens, J. dissenting).

The court invocation has made its most recent appearance in a Supreme Court opinion in 2007 in which Justice Scalia gives mention to the proclamation in

passing. *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 632 (2007) (Scalia, J., concurring).

Finally, it is important to note that this Circuit has joined the many other federal circuits[2] in citing to the recitation of the court cry in a positive manner. *Allen v. Morton*, 495 F.2d 65, 76 (D.C. Cir. 1973) (Tamm, J., concurring) (quoting *Zorach v. Clauson*); *Murray v. Buchanan*, 720 F.2d 689, 695 (D.C. Cir. 1983) (MacKinnon, J., dissenting) (quoting *Zorach v. Clauson*).

II. The Motion is Untimely.

The current motion was filed as an emergency motion pursuant to Circuit Rule 27(f). The motion could have been filed earlier. Indeed, the notice of appeal was filed April 9, 2009. Court Record at page 147, Document 75. Further, the briefing schedule order was dated July 17, 2009, and the order setting oral

[2] *O'Malley v. Brierley*, 477 F.2d 785, 792 (3rd Cir. 1973) (Aldisert, J.) (noting that Third Circuit opens its sessions with the supplication, "God save the United States and this Honorable Court."); *North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1151 (4th Cir. 1991); *Murray v. City of Austin*, 947 F.2d 147, 154-55 (5th Cir. 1991); *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1416 (6th Cir. 1987) (Wellford, J., dissenting) (noting that Sixth Circuit opens with "God save the United States and this Honorable Court."); *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 780 (7th Cir. 2001) (Coffey, J., dissenting); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1233 fn. 9 (10th Cir. 1998) (noting that oral argument in the case at bar opened with the cry, "God save the United States and this Honorable Court."); *Glassroth v. Moore*, 335 F.3d 1282, 1301 (11th Cir. 2003).

argument was issued and served on October 26, 2009. In light of the above dates, the motion is untimely.

CONCLUSION

Considering the foregoing, Reverends Lowery and Warren request that the motion be denied.

Date: December 8, 2009.

By: _/s/_Kevin T. Snider_____
Kevin T. Snider
Attorney for Appellees
Drs. Joseph Lowery and Richard Warren

CERTIFICATE OF SERVICE

CASE NO. 09-5126

I HEREBY CERTIFY that on this 8th day of December, 2009, a true and correct copy of **APPELLEES' JOSEPH LOWERY AND RICHARD WARREN'S OPPOSITION TO APPELLANTS' EMERGENCY MOTION SEEKING TO DISPENSE WITH RELIGIOUS OPENING CRY** were filed using the CM/ECF system and thus were served by e-mail upon all parties registered through the Court's ECF electronic filing system. I have served two copies of the brief by first-class mail, postage prepaid, upon all parties that are not so registered.

_/s/_Kevin T. Snider_____
Kevin T. Snider