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8 Attorneys for defendant United States of America  
9 and defendant United States Congress

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12  
13 THE REV. DR. MICHAEL A. NEWDOW, )  
et. al., )

14 Plaintiffs, )

15 v. )

16 THE CONGRESS OF THE UNITED )  
17 STATES OF AMERICA, et al., )

18 Defendants. )  
19 )

NO. CIV. 2:05-cv-000017-LKK-DAD

**FEDERAL DEFENDANTS' RESPONSE  
TO PLAINTIFFS' MOTION FOR  
PROTECTIVE ORDER**

Date: March 7, 2005  
Time: 10:00 a.m.  
Judge: Hon. Lawrence K. Karlton  
Courtroom: No. 4

20 The United States of America and the United States Congress ("federal defendants")  
21 submit the following response to plaintiffs' motion for a protective order.

22 1. This case challenges the constitutionality of 4 U.S.C. § 4, a federal statute codifying  
23 the wording of the Pledge of Allegiance to the Flag ("Pledge"), and the practices of five  
24 California public school districts of leading willing students in a voluntary recitation of the  
25 Pledge. The plaintiffs are: (1) The Rev. Dr. Michael A. Newdow, whose earlier, virtually  
26 identical federal lawsuit challenging the Pledge and a California school district's Pledge practice  
27 was dismissed by the U.S. Supreme Court on grounds of standing; see Elk Grove Unified Sch.  
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1 Dist. v. Newdow, 124 S.Ct. 2301 (2004); (2) four minors who attend California public schools;  
2 and (3) four parents of the minor-plaintiffs (three of the minor-plaintiffs — two of which are  
3 siblings — are joined by one parent; one of the minor-plaintiffs is joined by both parents).  
4 Currently before the Court is plaintiffs' motion for a protective order to permit all plaintiffs but  
5 Mr. Newdow to proceed in this case anonymously.

6 2. "[U]se of fictitious names runs afoul of the public's common law right of access to  
7 judicial proceedings[.]" Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067 (9th  
8 Cir. 2000). Nevertheless, the Ninth Circuit has "permitted parties to proceed anonymously when  
9 special circumstances justify secrecy," id., including, for example, where "identification creates a  
10 risk of retaliatory physical or mental harm." Id. at 1068. When plaintiffs seek to proceed  
11 anonymously because of a fear of retaliation (as plaintiffs do here), the plaintiffs must provide  
12 evidence supporting the reasonableness of their fears. See id. at 1071.

13 In determining whether to grant a motion to proceed anonymously, "a district court must  
14 balance the need for anonymity against the general presumption that parties' identities are public  
15 information and the risk of unfairness to the opposing party." Advanced Textile Corp., 214 F.3d  
16 at 1068. The district court should determine the need for anonymity by evaluating three factors:  
17 "(1) the severity of the threatened harm; (2) the reasonableness of the anonymous party's fears;  
18 and (3) the anonymous party's vulnerability to such retaliation." Id. (internal citations omitted).

19 3. The federal defendants take no position with respect to whether the Court should grant  
20 plaintiffs' request to proceed anonymously. In part, defendants have not been able to fully  
21 evaluate the reasonableness of plaintiffs' fears of retaliation based on the information provided in  
22 plaintiffs' motion. None of the plaintiffs, for example, have provided a declaration addressing his  
23 or her particular circumstances or the nature of his or her particular fears. The federal defendants  
24 do not, however, oppose plaintiffs' request. Defendants base this non-opposition on: (1) a  
25 declaration attached to plaintiffs' complaint, which arguably could support the requested relief;  
26 see Complaint, Exhibit M (declaration of plaintiff Newdow); and (2) certain allegations in  
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1 plaintiffs' complaint which, if true, could support a need for anonymity. See Complaint, ¶¶ 77,  
2 88, 98. Defendants assume the good faith of these allegations, and that plaintiffs could, if  
3 necessary, support these allegations with declarations. Defendants also recognize that four of the  
4 plaintiffs are minors.

5 4. Any protective order that is entered, however, should enable defendants to obtain  
6 information relevant to their defense of this case. Plaintiffs seek an order that would limit  
7 disclosure of their identities to counsel for the parties and "as necessary to ascertain the residency  
8 status, taxpayer status, or school enrollment status of the Plaintiffs." See Plaintiffs' Proposed  
9 Protective Order at 1. This limitation is too restrictive. For example, in Elk Grove, the Supreme  
10 Court considered information about the custody relationship between plaintiff Newdow and his  
11 child in determining that Mr. Newdow lacked prudential standing to seek redress for an alleged  
12 injury to his parental interests. See Elk Grove, 124 S.Ct. at 2309-2312.

13 Plaintiffs' proposed order also appears overbroad. For example, it suggests that, in  
14 "ascertain[ing] the residency status, taxpayer status, or school enrollment status of the Plaintiffs,"  
15 see Plaintiffs' Proposed Protective Order at 1, defendants must also inform "[e]ach person to  
16 whom the identity of the Plaintiffs is disclosed . . . that, under penalty of perjury of contempt of  
17 th[e] [protective] order, they are not to make any disclosure of such names." Id.; see also id.  
18 (requiring, as well, that defendants provide each person to whom the identity of the plaintiffs is  
19 disclosed with a copy of the protective order). If, however, a defendant were to obtain  
20 information relating to plaintiffs' school enrollment status from a third-party (say, a school), and  
21 not from plaintiffs' counsel, it presumably would not be necessary to reveal to the third party that  
22 the person about whom the information pertains is also a plaintiff in this case. The language  
23 quoted above could be read to require a defendant to reveal that fact, and, if so interpreted, would  
24 appear contrary to plaintiffs' desire to remain anonymous. This point should be clarified. On the  
25 other hand, requiring persons to abide by the terms of the protective order makes sense when the  
26 person to whom the protected information is revealed also knows (or is made aware of) the  
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1 plaintiff's status as a plaintiff in this case (e.g., in the case of disclosure to counsel for the parties,  
2 or to paralegals, clerical, and other assistants working with counsel for the parties).<sup>1</sup>

3 In the event the Court determines to enter a protective order, undersigned counsel would  
4 be willing to work with all counsel in this matter to make any appropriate changes to plaintiffs'  
5 proposed order.

6 Respectfully Submitted,

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22 Attorneys for defendant United States of America  
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24 Dated: February 18, 2005

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27 <sup>1</sup>The federal defendants agree that, in the event a protective order is entered, the portions  
28 of any court filings identifying the anonymous plaintiffs should be made under seal.