PETER D. KEISLER
Assistant Attorney General
McGREGOR W. SCOTT
United States Attorney
THEODORE C. HIRT
Assistant Branch Director
CRAIG M. BLACKWELL, D.C. No. 438758
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel.: (202) 616-0679
Fax: (202) 616-8470

Attorneys for the United States Congress,
the United States of America, and Peter LeFevre

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, et. al.,

Plaintiffs,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,

Defendants.

CIV. NO. 2:05-CV-00017-LKK-DAD

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Date: July 18, 2005
Time: 10:00 a.m.
Judge: Hon. Lawrence K. Karlton
Courtroom: No. 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 3

1. Legal Background 3

a. Federal Statute 3

b. California Statute 4

c. Prior Related Proceedings 4

2. Factual Background 8

ARGUMENT 11

I. PLAINTIFFS LACK STANDING 11

A. All Plaintiffs Lack Standing To Challenge The Federal Pledge Statute On Its Face 12

B. Newdow And The Roe Plaintiffs Lack Standing To Challenge The School Districts' Pledge Practices 16

II. PLAINTIFFS' CLAIMS AGAINST THE FEDERAL DEFENDANTS ARE BARRED BY IMMUNITY 18

A. Plaintiffs' Claims Against Congress And The Law Revision Counsel Are Barred By The Speech Or Debate Clause 18

B. Plaintiffs' Claims Against The Federal Defendants Are Barred By Sovereign Immunity 21

III. 4 U.S.C. § 4 IS CONSTITUTIONAL 22

A. The Establishment Clause Permits Official Acknowledgments Of The Nation's Religious History And Character 23

B. The Pledge of Allegiance, With Its Reference To A Nation "Under God," Is A Constitutionally Permissible Acknowledgment Of The Nation's Religious History And Character 27

IV. THE SCHOOL DISTRICTS' PLEDGE PRACTICES ARE CONSTITUTIONAL 31

A. The Purpose Of Reciting The Pledge Is To Promote Patriotism And National Unity 32

B. The Pledge Has The Valid Secular Effect Of Promoting Patriotism And National Unity 36

1. The Pledge must be considered as a whole 37

2. Reciting the Pledge is not a religious exercise 38

3. The School Districts' Pledge-recital policies are not Coercive 40

CONCLUSION 46

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203, 117 S. Ct. 1997 (1997) 32

Allen v. Wright,
468 U.S. 737, 104 S. Ct. 3315 (1984) 13

Ambach v. Norwick,
441 U.S. 68, 99 S. Ct. 1589 (1979) 33

Baker v. United States,
817 F.2d 560 (9th Cir. 1987), cert. denied,
487 U.S. 1204, 108 S. Ct. 2845 (1988) 21, 22

Bethel Sch. Dist.t v. Fraser,
478 U.S. 675, 106 S. Ct. 3159 . . . . 33, 34

Board of Ed. v. Mergens,
496 U.S. 226, 110 S. Ct. 2356 (1990) 35

Bowen v. Kendrick,
487 U.S. 589, 108 S. Ct. 2562 (1988) 13

Bowen v. Roy,
476 U.S. 693, 106 S. Ct. 2147 (1984) 30, 46

Bowsher v. Synar,
478 U.S. 714, 106 S.Ct. 3181 (1986) 15

Browning v. Clerk,
789 F.2d 923 (D.C. Cir.), cert. denied,
479 U.S. 996, 107 S.Ct. 601 (1986). 20

Cable News Network v. Anderson,
723 F. Supp. 835 (D.D.C. 1989) 19

Capitol Square Review & Advisory Bd. v. Pinette,
515 U.S. 753, 115 S. Ct. 2440 (1995) 43

Casey v. Lewis,
4 F.3d 1516 (9th Cir. 1993) 11, 12, 14

County of Allegheny v. American Civil Liberties Union,
492 U.S. 573, 109 S.Ct. 3086 (1989) 27, 28, 29, 30, 37

Diamond v. Charles,
476 U.S. 54, 106 S.Ct. 1697 (1986) 13

Doe v. Madison Sch. Dist. No. 321,
177 F.3d 789 (9th Cir. 1999) 17

Doremus v. Board of Ed. of Hawthorne,
342 U.S. 429, 72 S. Ct. 394 (1952) 17

ECash Tech., Inc. v. Guagliardo,
210 F. Supp. 2d 1138 (C.D. Cal. 2001) 8

Eastland v. United States Servicemen's Fund,
421 U.S. 491, 95 S. Ct. 1813 (1975) 19, 20

Edwards v. Aguillard,
482 U.S. 578, 107 S. Ct. 2573 (1987) 27, 31, 45

Elk Grove Unified Sch. District v. Newdow,
124 S. Ct. 2301 (2004) . . . . passim

Engel v. Vitale,
370 U.S. 421, 82 S. Ct. 1261 (1962) . . . . passim

FW/PBS, Inc. v. City of Dallas,
493 U.S. 215, 110 S. Ct. 596 (1990) 11

Federal Deposit Ins. Corp. v. Meyer,
510 U.S. 471, 114 S. Ct. 996 (1994) 21

Flast v. Cohen,
392 U.S. 83, 88 S. Ct. 1942 (1968) 14

Fleischfresser v. Directors of Sch. Dist. 200,
15 F.3d 680 (7th Cir. 1994) 43

Freethought Soc'y v. Chester County,
334 F.3d 247 (3d Cir. 2003) 36

Frothingham v. Mellon,
262 U.S. 447, 43 S. Ct. 597 (1923) 13

Gaylor v. United States, 74 F.3d 214, (10 Cir.),
cert. denied, 517 U.S. 1211 (1996) 26

Gilbert v. DaGrossa,
756 F.2d 1455 (9th Cir. 1985) 21

Gravel v. United States,
408 U.S. 606, 92 S. Ct. 2614 (1972) 19, 20, 21

Grove v. Mead Sch. Dist. No. 354,
753 F.2d 1528 (9th Cir.), cert. denied,
474 U.S. 826, 106 S.Ct. 85 (1985) 30, 43

Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter,
326 F. Supp. 2d 1140 (E.D. Cal. 2003),
appeal pending, No. 03-17343 (9th Cir.). 31

Helstoski v. Meanor,
442 U.S. 500, 99 S. Ct. 2445 (1979) 19

Hutchinson v. Proxmire,
443 U.S. 111, 99 S. Ct. 2675 (1979) 19

Illinois ex rel. McCollum v. Board of Ed.,
333 U.S. 203, 68 S. Ct. 461 (1948) 44, 45

Kaiser v. Blue Cross of California,
347 F.3d 1107 (9th Cir. 2003) 21, 22

Keener v. Congress of the United States,
467 F.2d 952 (5th Cir. 1972) 21

Lamberth v. The Board of Comm'rs,
— F.3d —, 2005 WL 1124721 (4th Cir. May 13, 2005) 26

Lane v. Pena,
518 U.S. 187, 116 S. Ct. 2092 (1996) 21

Lee v. Weisman,
505 U.S. 577, 112 S. Ct. 2649 (1992) 8, 25, 39, 40, 42

Littlejohn v. United States,
321 F.3d 915 (9th Cir.), cert. denied,
540 U.S. 985, 124 S.Ct. 486 (2003) 16, 20, 22

Lujan v. Defenders of Wildlife,
504 U.S. 555, 112 S. Ct. 2130 (1992) 11, 15, 16

Lynch v. Donnelly,
465 U.S. 668, 104 S. Ct. 1355 (1984) . . . . passim

Marsh v. Chambers,
463 U.S. 783, 103 S. Ct. 3330 (1983) 24, 26

McGowan v. Maryland,
366 U.S. 420, 81 S. Ct. 1153 (1961) 35, 36, 43

Mississippi v. Johnson,
71 U.S. 475 (1866) 15

Mozert v. Hawkins County Bd. of Ed.,
827 F.2d 1058 (6th Cir. 1987),
cert. denied, 484 U.S. 1066, 108 S.Ct. 1029 (1988) 43, 44

Myers v. Loudon County Sch. Board,
251 F. Supp. 2d 1262 (E.D. Va. 2003),
appeal pending, No. 03-1364 (4th Cir.) 8, 13, 33, 39, 43, 45

Newdow v. The Congress of the United States, et al.,
No. 2:00-cv-495-MLS-PAN 4

Newdow v. U.S. Congress,
292 F.3d 597 (9th Cir. 2002) 5

Newdow v. U.S. Congress,
313 F.3d 500 (9th Cir. 2002) 5

Newdow v. U.S. Congress,
328 F.3d 466 (9th Cir. 2003) 5, 17, 19, 20

Newdow v. United States Congress,
124 S. Ct. 386 (2003) 6

O'Shea v. Littleton,
414 U.S. 488, 94 S.Ct. 669 (1973) 12

Preston v. Heckler,
734 F.2d 1359 (9th Cir. 1984) 16

Rostker v. Goldberg,
453 U.S. 57, 101 S. Ct. 2646 (1981) 22

Santa Fe Indep. Sch. Dist. v. Doe,
530 U.S. 290, 120 S. Ct. 2266 (2000) 32, 36

Schlesinger v. Reservists Comm. to Stop the War,
418 U.S. 208, 94 S.Ct. 2925 (1974) 14

School Dist. of Abington Township v. Schempp,
374 U.S. 203, 83 S. Ct. 1560 (1963) 23, 24, 26, 29, 39

Seminole Tribe v. Florida,
517 U.S. 44, 116 S. Ct. 1114 (1996) 29

Sherman v. Community Consol. Sch. Dist. 21,
980 F.2d 437 (7th Cir.1992), cert. denied,
508 U.S. 950 (1993) 13, 25, 29, 32, 36, 45, 46

South Dakota v. Dole,
483 U.S. 203, 107 S. Ct. 2793 (1987) 14

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779, 115 S. Ct. 1842 (1995) 24

United States v. Johnson,
383 U.S. 169, 88 S. Ct. 749 (1966) 19

United States v. Mitchell,
445 U.S. 535, 100 S. Ct. 1349 (1980) 21

United States v. National Dairy Prods. Corp.,
372 U.S. 29, 83 S. Ct. 594 (1963) 22

United States v. O'Brien,
391 U.S. 367, 88 S. Ct. 1673 (1968) 35

United States v. Richardson,
418 U.S. 166, 94 S. Ct. 2940 (1974) 14

United States v. Salerno,
481 U.S. 739, 107 S. Ct. 2095 (1987) 23

United States v. Underwood,
717 F.2d 482 (9th Cir. 1983), cert. denied,
465 U.S. 1036, 104 S. Ct. 1309 (1984) 29

Valley Forge Christian Coll. v. Americans United
for Separation of Church and State, Inc.,
454 U.S. 464, 102 S. Ct. 752 (1982) 13, 14

Wallace v. Jaffree,
472 U.S. 38, 105 S. Ct. 2479 (1985) 29, 32, 33

Walz v. Tax Comm'n,
397 U.S. 664, 90 S. Ct. 1409 (1970) 27

West Virginia Bd. of Ed. v. Barnette,
319 U.S. 624, 63 S. Ct. 1178 (1943) 6, 36, 39, 40, 41

Zorach v. Clauson,
343 U.S. 306, 72 S. Ct. 679 (1952) 1, 30, 44

CONSTITUTION AND STATUTES

United States Constitution

U.S. Const., Art. I, §6, cl. 1 19

U.S. Const., Art. I, § 7 24

U.S. Const., Art. I, § 8 . . . . 13, 14

U.S. Const., Art. VII 24

Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380 3

Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 518 25

Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249 3
Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057 . . . . 3, 22, 23, 26
Religious Freedom Restoration Act,
42 U.S.C. §§ 2000bb-2000bb-4 10
42 U.S.C. § 2000bb 31
42 U.S.C. § 2000bb-2 31
2 U.S.C. § 285 15
2 U.S.C. § 285a 15
2 U.S.C. § 285b(1) 20
2 U.S.C. § 285c 15
4 U.S.C. § 4 . . . . passim
5 U.S.C. § 702 22
31 U.S.C. § 5112 26
36 U.S.C. § 302 . . . . 25, 40
Cal. Code of Civ. Proc. § 372 18
Cal. Educ. Code § 52720 12
Cal. Family Code § 6601 18

MISCELLANEOUS

Brief for the United States as Respondent Supporting Petitioners, Appendix B, No. 02-1624 (U.S. Dec. 2003), available at 2003 WL 23051994 26
Declaration of Independence, 1 U.S.C. at 1 . . . . 24, 40
Fed. R. Civ. P. 17 18
H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942) 3
H.R. Rep. No. 659, 107th Cong., 2d Sess. (2002) reprinted in, 2002 U.S.C.C.A.N. 1304 35
H.R. Rep. No. 1693, 83d Conf., 2d Sess. (1954) reprinted in 1954 U.S.C.C.A.N. 2339 . . . . 3, 23, 33, 34, 35

Petition For A Writ Of Certiorari,
No. 03-7 (U.S. June 26, 2003),
available at, 2003 WL 22428407 6

Petition Of The United States For Rehearing And Rehearing En Banc,
No. 00-16423 (9th Cir. Aug. 9, 2002),
available at, 2002 WL 1948354. 5

Respondent's Brief On The Merits,
No. 02-1624 (U.S. Feb. 13, 2004),
available at, 2004 WL 314156 17

The Random House Dictionary of the English Language
(2d ed. 1987) 37

S. Rep. No. 1477, 77th Cong., 2d Sess. (1942) 3

S. Rep. No. 1287, 83d Cong., 2d Sess. (1954) 3, 33, 34

1 **PRELIMINARY STATEMENT**

2 This case challenges the constitutionality of 4 U.S.C. § 4, a federal statute codifying the
3 wording of the Pledge of Allegiance to the Flag ("Pledge"), and the practices of four California
4 public school districts of leading willing students in the voluntary recitation of the Pledge.
5 Plaintiffs' principal claim is that the Pledge, and the school districts' Pledge practices, violate the
6 First Amendment because the Pledge contains the words "under God." Plaintiffs seek various
7 forms of declaratory and injunctive relief, including a declaration that Congress, in adding these
8 words to the Pledge, violated the First Amendment, and an injunction requiring that Congress
9 "immediately act to remove" the challenged words from the Pledge statute.

10 The lead plaintiff, Rev. Dr. Michael A. Newdow ("Newdow"), filed an earlier, virtually
11 identical federal lawsuit in this District challenging the constitutionality of a local school
12 district's practice of leading willing students in the voluntary recitation of the Pledge. Newdow's
13 lawsuit was dismissed by the U.S. Supreme Court on standing grounds, although the three
14 Justices who would have reached the merits all expressed the view that the Pledge is
15 constitutional. See Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301 (2004). In an effort
16 to cure the standing defect, Newdow has now added as co-plaintiffs three minor children who
17 attend California public schools and certain of the children's parents. The United States of
18 America ("United States"), the United States Congress ("Congress"), and Peter LeFevre, a
19 congressional officer, are named as defendants (collectively "federal defendants"), as are the
20 State of California, the Governor of California, California's Education Secretary, and four local
21 California public school districts and their superintendents (collectively "state defendants").

22 Plaintiffs' claims against the federal defendants all relate to their contention that 4 U.S.C.
23 § 4 ("Pledge statute") is unconstitutional on its face. These claims should be dismissed, as an
24 initial matter, on two jurisdictional grounds. First, plaintiffs' claims should be dismissed because
25 they lack standing. The Pledge statute does not compel anyone to recite the Pledge (or lead
26 others in reciting it), and plaintiffs cannot establish that the statute has "injured" them. Second,
27 the federal defendants are immune from plaintiffs' claims. Plaintiffs' claims against Congress
28 and Peter LeFevre (the "congressional defendants") are barred by the Constitution's Speech or

Debate Clause and plaintiffs' claims against all federal defendants are barred by sovereign immunity.

Even putting these threshold issues aside, 4 U.S.C. § 4 plainly is constitutional. Two Supreme Court decisions have said without qualification that the Pledge is consistent with the Establishment Clause, and have used the Pledge as a baseline for adjudicating the constitutionality of other forms of government action. Those decisions, binding on the lower courts, make clear that the Establishment Clause does not forbid the government from officially acknowledging the religious heritage, foundation, and character of the Nation. That is all the Pledge does.

Plaintiffs' claims against the state defendants all relate to their contention that the school districts' Pledge practices are unconstitutional.[1] Certain plaintiffs, including Newdow, continue to lack standing to challenge the schools' Pledge practices. For those plaintiffs with standing, the Pledge's underlying constitutionality does not change when it is said by willing students in a public school classroom. Reciting the Pledge of Allegiance is a patriotic exercise, not a religious testimonial. The Pledge's reference to God permissibly acknowledges the role that faith in God has played in the formation, political foundation, and continuing development of this Country. Children may be taught about that heritage in their History classes, and acknowledging the same in the Pledge is equally permissible. For all of these reasons, plaintiffs' claims should be dismissed.

---

[1]Because these claims technically are only against the state defendants, simultaneously with this brief the United States is filing a motion to intervene to defend the constitutionality of 4 U.S.C. § 4 as applied to the school districts' Pledge practices. The arguments in Part IV of this memorandum support the constitutionality of those practices. The United States defended the identical Pledge practices in Elk Grove.

BACKGROUND

1. Legal Background

a. Federal statute

In 1942, as part of an overall effort "to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a Pledge of Allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). It read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge of Allegiance, set forth at 4 U.S.C. § 4, now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4. Both the Senate and House Reports expressed the view that, under Supreme Court case law, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954) (citing Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679 (1952)), reprinted in 1954 U.S.C.C.A.N. 2339, 2341; see also S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954).

In 2002, Congress also enacted legislation that (i) made extensive findings about the historic role of religion in the political development of the Nation, (ii) reaffirmed the text of the Pledge as it has "appeared . . . for decades," and (iii) repeated Congress's judgment that the legislation is constitutional both facially and as applied by school districts whose teachers lead willing students in its recitation. See Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-16, 116 Stat. 2057-2060.

b. California statute

California law requires that each public elementary school in the State "conduct[] appropriate patriotic exercises" at the beginning of the school day, and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Cal. Educ. Code § 52720. Plaintiffs allege that, in furtherance of this requirement, the school district defendants have led school classes attended by the plaintiff-children in the recitation of the Pledge. See First Amended Complaint ("Amd. Compl.") ¶¶ 66, 74, 77, 84, 87.[2] Actual recitation of the Pledge is voluntary. See id. ¶ 163 ("stipulat[ing]" that "none of the[] [plaintiffs] have ever been 'compelled' to say the Pledge"); see also id. at ¶ 56 (same).

c. Prior Related Proceedings

In March 2000, Newdow filed a virtually identical action in this District on his own behalf and on behalf of his child as "next friend" against the Congress, the President, the United States, the State of California, Elk Grove, and Elk Grove's superintendent. See Newdow v. The Congress of the United States, et al., No. 2:00-cv-495-MLS-PAN, Original Complaint. Newdow sought relief similar to the relief sought here, including: a declaration that Congress, by enacting 4 U.S.C. § 4, violated the Establishment Clause; an injunction requiring Congress to remove the words "under God" from the Pledge; a declaration that 4 U.S.C. § 4 violates the Establishment Clause; and an injunction against Elk Grove's policy requiring daily, voluntary recitation of the Pledge. See id. at Prayer for Relief, ¶¶ I, II, III, VI.

---

[2]Plaintiffs allege that two of the four defendant school districts, Sacramento City Unified School District ("Sacramento City") and Rio Linda Union School District ("Rio Linda Union"), have adopted policies stating: "'Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each school day. The Pledge of Allegiance to the flag will fulfill this requirement.'" Amd. Compl. ¶ 55 (quoting Rule AR 6115). Plaintiffs allege that a third defendant, Elk Grove Unified School District ("Elk Grove"), has adopted a policy stating: "'Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.'" Id. p. 8, n.4 (alteration in original). Plaintiffs allege they "have been unable to confirm" whether the fourth defendant, Elverta Joint Elementary School District ("Elverta"), "has implemented AR 6115," but that the plaintiff-child who attends school in that district "is being led in classroom Pledge recitations." Id.

District Judge Schwartz adopted Magistrate Judge Nowitzki's recommendation that the case be dismissed because the Pledge does not violate the Establishment Clause. See Elk Grove, 124 S.Ct. at 2307. The Court of Appeals reversed. In its initial opinion, the court concluded that Newdow had standing as a parent to challenge Elk Grove's Pledge practices and that he also had standing to challenge 4 U.S.C. § 4. See Newdow v. U.S. Congress, 292 F.3d 597, 602-05 (9th Cir. 2002) ("Newdow I"). The court also concluded that Newdow's claims against Congress were barred by the Speech or Debate Clause, see id. at 601-02, and that the President was not an appropriate defendant. Id. at 601. On the merits, over the dissent of Judge Fernandez, the court held both 4 U.S.C. § 4 and Elk Grove's Pledge practices unconstitutional under the Establishment Clause. See id. at 612. After learning that the mother of Newdow's child had "sole legal custody" over the child and that the California Superior Court had entered an order enjoining Newdow from including his child as an unnamed party or suing as her next friend, the court issued a second opinion holding that Newdow had standing "as a noncustodial parent . . . to object to unconstitutional government action affecting his child." Newdow v. U.S. Congress, 313 F.3d 500, 502-05 (9th Cir. 2002).

Upon petitions for rehearing en banc, the Court of Appeals issued an order amending its opinion in Newdow I and denying rehearing. Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003) ("Newdow II"). In its petition, the United States argued that the panel had erred in concluding that Newdow had standing to challenge 4 U.S.C. § 4. See Petition Of The United States For Rehearing And Rehearing En Banc, No. 00-16423 (9th Cir. Aug. 9, 2002), available at, 2002 WL 1948354, at *8-9. In amending its opinion, the court omitted the discussion in Newdow I of Newdow's standing to challenge 4 U.S.C. § 4 and declined to determine whether he was entitled to declaratory relief regarding the Act's constitutionality. See Newdow II, 328 F.3d at 484-85, 490.

The Supreme Court granted Elk Grove's petition for certiorari and reversed the Ninth

Circuit's judgment on grounds that Newdow lacked prudential standing to raise his claims.[3] The Court began its opinion by reviewing the history of the Pledge:

> As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

Elk Grove, 124 S.Ct. at 2305. With respect to the 1954 amendment to the Pledge, the Court stated: "The House Report that accompanied the legislation observed 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 2306 (quoting H.R. Rep. No. 1693, 83d Conf., 2d Sess., p. 2 (1954)). With respect to Elk Grove's Pledge practice, the Court observed that, "[c]onsistent with our case law," Elk Grove "permits students who object on religious grounds to abstain from the recitation" of the Pledge. See 124 S.Ct. at 2306 (citing West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943)).

Turning to the standing question, the Court concluded that Newdow lacked prudential standing to raise his own parental interests. Newdow's standing, the Court noted, "derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend." 124 S.Ct. at 2311. The Court acknowledged Newdow's "joint legal custody" over his child, but noted that, under the custody arrangement, the child's mother — who did not oppose the school's Pledge practice — had final decision-making authority in the event of a disagreement between the parents. See 124 S.Ct. at 2310 & n.6. The Court dismissed in a footnote Newdow's claim to standing based on the fact he (i) at times attends class with his daughter; (ii) attends school board meetings where the Pledge "'is routinely recited'"; (iii) has considered teaching

---

[3]Newdow also filed a petition for certiorari in part to seek review of the Ninth Circuit's decision finding Congress immune from suit under the Speech or Debate Clause. See Petition For A Writ Of Certiorari, No. 03-7 (U.S. June 26, 2003), available at, 2003 WL 22428407 at *18-*20. Newdow also sought review of the judgment below to the extent it declined to find the United States liable. See id. (disputing the United States' argument that no federal statute waives its sovereign immunity from a suit for declaratory or injunctive relief under the First Amendment). Newdow's petition was denied. See Newdow v. United States Congress, 124 S.Ct. 386 (2003) (Mem.).

elementary school at Elk Grove; and (iv) pays taxes indirectly to the School District which "uses his tax dollars to implement its Pledge policy." 124 S.Ct. at 2312 n.8.

Three Justices wrote concurring opinions addressing the merits. Chief Justice Rehnquist, joined by Justice O'Connor, would have upheld the Elk Grove policy. The Chief Justice reviewed the long tradition of "patriotic invocations of God and official acknowledgments of religion's role in our Nation's history," 124 S.Ct. at 2317 (Rehnquist, C.J., joined by O'Connor, J., concurring), noting that the phrase "'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." Id. "Reciting the Pledge, or listening to others recite it," the Chief Justice concluded, "is a patriotic exercise, not a religious one." Id. at 2320. Thus, "[t]he recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it." Id.

Justice O'Connor concurred separately to explain "the principles that guide my own analysis of the constitutionality of" the Elk Grove policy. 124 S.Ct. at 2321 (O'Connor, J., concurring). For Justice O'Connor, the constitutionality of Elk Grove's Pledge policy turned on whether a reasonable observer would view the Pledge recital as an endorsement of religion, id. at 2321, given the "history of the conduct in question . . . [and] its place in our Nation's cultural landscape." Id. at 2322. As Justice O'Connor observed, "some references to religion in public life and government are the inevitable consequences of our Nation's origins," id., such that a reasonable observer would not "perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion." Id. at 2323. In finding the Pledge an "instance of such ceremonial deism," id., Justice O'Connor relied on the Pledge's history and ubiquity; id. at 2323-24; its absence of worship or prayer; id. at 2324-25; its absence of reference to a particular religion; id. at 2325-26; and its minimal religious content. Id. at 2326-27.

Justice Thomas also would have upheld Elk Grove's Pledge policy. Justice Thomas'

conclusion was based in part on his view that an earlier Supreme Court decision, Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992), discussed infra, was wrongly decided. See Elk Grove, 124 S.Ct. at 2330 (Thomas, J., concurring). For Justice Thomas, the issue was whether the school district's Pledge policy would "expose anyone to the legal coercion associated with an established religion." 124 S.Ct. at 2333. Although Justice Thomas believed that "[a]dherence to Lee would require us to strike down the Pledge policy," id. at 2328; but see id. at 2320 n.4 (Rehnquist, C.J., and O'Connor, J., concurring) (disagreeing with Justice Thomas on this point), Justice Thomas would have "reject[ed] . . . Lee-style 'coercion'" (id. at 2330) as having "no basis in law or reason." Id. Justice Thomas would have upheld the school's Pledge policy because, "[t]hrough the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion." Id. at 2333.

Two lower federal courts have upheld state statutes providing for voluntary recitation of the Pledge by public school students. See Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) (upholding Illinois statute), cert. denied, 508 U.S. 950 (1993); Myers v. Loudon County Sch. Bd., 251 F.Supp.2d 1262 (E.D. Va. 2003) (upholding Virginia statute), appeal pending, No. 03-1364 (4th Cir.) (argued March 18, 2005).

2. Factual Background[4]

This case, like Elk Grove, challenges the constitutionality of 4 U.S.C. § 4 and the practices of California public school districts of leading willing students in the voluntary recitation of the Pledge. The challenge is again brought by Newdow, who, in addition to suing on his own behalf, is representing six additional plaintiffs: two parents, Jan and Pat Doe, and

[4]Although we accept the facts in plaintiffs' amended complaint as true for purposes of our motion under Rule 12(b)(6), plaintiffs' amended complaint largely consists of legal conclusions and argument, not allegations of fact. See ECash Tech., Inc. v. Guagliardo, 210 F.Supp.2d 1138, 1143 (C.D. Cal. 2001) (Rule 12(b)(6) does not require court to accept as true "conclusory legal allegations cast in the form of factual allegations"). Moreover, except for one declaration submitted by Newdow, the numerous exhibits attached to the complaint also consist of legal argument, not allegations of fact.

their minor child, DoeChild; and one parent, Jan Roe, and that parent's minor children, RoeChild-1 and RoeChild-2. On March 29, 2005, this Court entered a stipulated protective order permitting all plaintiffs but Newdow to proceed anonymously.

The Amended Complaint names federal, state, and local defendants. The federal defendants are the Congress, the United States, and Peter LeFevre, sued in his official capacity as the House of Representatives' Law Revision Counsel. See Amd. Comp. ¶¶ 15-17. The State defendants are Governor Schwarzenegger and Richard J. Riordan, the California Secretary for Education. See id. ¶¶ 18, 19. The local defendants are four public school districts — Elk Grove, Sacramento City, Elverta, and Rio Linda Union (collectively "school districts") — and their superintendents. See id. ¶¶ 20-27.

With respect to standing, plaintiffs allege the Doe parents have "full legal custody" over DoeChild; see Amd. Compl. ¶ 10; that DoeChild is enrolled in an Elk Grove school; see id. ¶ 11; and that the Pledge has been recited in DoeChild's class. See id. ¶ 74. Plaintiffs further allege that Jan Roe has "full joint legal custody" over RoeChild-1 and RoeChild-2; see id. ¶ 12; that RoeChild-1 is enrolled in an Elverta school; see id. ¶ 13; that RoeChild-2 is enrolled in a Rio Linda Union school; see id. ¶ 14; and that the Pledge has been recited in both Roe children's classes. See id. ¶ 77. Newdow's custody relationship with his child has not changed since the Supreme Court's decision in Elk Grove. See id. ¶ 60 (alleging that "the mother of [Newdow's] child currently has final decision-making authority for the child").

Plaintiffs also allege that each of the parent-plaintiffs has attended school classes where the Pledge was recited, see Amd. Compl. ¶¶ 63, 69, 79, and that Newdow and the Doe parents have attended "official governmental meetings," including school board meetings, where the Pledge was recited. See id. ¶¶ 59, 68. Plaintiffs further allege that each of the parent-plaintiffs pays local property taxes, California income and sales taxes, and federal income and sales taxes, see id. ¶¶ 64, 70, 80, and that the Doe and Roe parent-plaintiffs have purchased California lottery tickets. See id. ¶¶ 71, 81.

On the merits, plaintiffs challenge 4 U.S.C. § 4 and the school districts' Pledge practices on several grounds. Plaintiffs' principal claim is that the Pledge statute and the school districts' Pledge practices violate the Establishment Clause. See Amd. Compl. ¶¶ 128, 133. Plaintiffs also contend that 4 U.S.C. § 4 violates the Free Exercise Clause, the Due Process Clause, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, see Amd. Compl. ¶¶ 128-29; p. 33, ¶ I, II, and that the school districts' Pledge practices violate the Free Exercise Clause, the Due Process Clause, and analogous provisions of the California state constitution. See id. ¶ 133. Plaintiffs also challenge Cal. Educ. Code § 52720 — the California statute permitting public schools to satisfy a requirement to conduct daily patriotic exercises by reciting the Pledge (see Amd. Compl. ¶ 132) — although that claim appears to be subsumed by their challenge to the schools' Pledge practices themselves.

Plaintiffs seek several forms of relief. With respect to the federal defendants, they seek (i) a declaration that "Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses"; (ii) a declaration that the inclusion of the words "under God" in the Pledge "violates the Establishment and Free Exercise Clauses"; (iii) an injunction requiring Congress to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4"; and (iv) an injunction requiring the Law Revision Counsel to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4." Amd. Compl. p. 33, ¶¶ I-V. With respect to the state defendants, plaintiffs seek (i) an injunction requiring Governor Schwarzenegger and Secretary Riordan to "immediately act to alter, modify or repeal Education Code § 52720" so that the Pledge "is no longer permitted in the public schools"; and (ii) an injunction requiring the school district and superintendent defendants to "forbid" the use of the Pledge "in the public schools within their jurisdictions." Amd. Compl. p.33, ¶¶ VI, VII.

ARGUMENT

Our argument proceeds in four parts. Part I demonstrates that all plaintiffs lack standing to challenge the Pledge statute and certain plaintiffs also lack standing to challenge the school districts' Pledge practices. Part II demonstrates that plaintiffs' claims against the congressional defendants are barred by the Speech or Debate Clause and that their claims against all federal defendants are barred by sovereign immunity. Part III demonstrates that 4 U.S.C. § 4 is constitutional. Part IV demonstrates that the school districts' Pledge practices are constitutional.

I. PLAINTIFFS LACK STANDING

A plaintiff always has the burden "'clearly to allege facts demonstrating'" standing, i.e., that the plaintiff "'is a proper party to invoke judicial resolution of the dispute.'" FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231, 110 S.Ct. 596, 608 (1990) (citation omitted); see also Casey v. Lewis, 4 F.3d 1516, 1519 (9th Cir. 1993) ("[f]ederal courts are presumed to lack jurisdiction, 'unless the contrary appears affirmatively from the record'") (citation omitted). To establish constitutional standing, a plaintiff must make three showings: that he or she (i) has suffered (or will suffer) an "actual or imminent" injury; (ii) that is "fairly . . . trace[able] to the challenged action of the defendant"; and (iii) that is "likely" to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136 (1992) (quotations and citations omitted) (alteration in original).

As explained below, all plaintiffs lack standing to challenge 4 U.S.C. § 4 on its face. In addition, Newdow and the Roe plaintiffs lack standing to challenge the Pledge practices of Sacramento City, Elverta, and Rio Linda Union. The federal defendants do not at this time contest the standing of the Doe plaintiffs to challenge the Pledge practices of Elk Grove based upon plaintiffs' allegations (i) that Jan and Pat Doe are the parents, with full legal custody, of DoeChild; and (ii) that DoeChild attends an Elk Grove public school where the Pledge is recited.

See Amd. Compl. ¶¶ 10, 66; Elk Grove, 124 S.Ct. at 2312.[5]

A. All Plaintiffs Lack Standing To Challenge the Federal Pledge Statute On Its Face

Injury. With respect to their claim that 4 U.S.C. § 4 is unconstitutional on its face (see, e.g., Compl. ¶ 128), plaintiffs cannot establish the first standing requirement, injury-in-fact. As noted above, Congress, in 1954, amended 4 U.S.C. § 4 by adding the words "under God" after the word "Nation" in the Pledge, so that the Pledge now states: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." This statute plainly does not "injure" plaintiffs because it does not compel the State of California, the State's school districts, or anyone else to recite the Pledge; nor does it compel anyone to lead others in reciting the Pledge. It merely sets forth the words of the Pledge and provides the manner of addressing the Flag when the Pledge is recited.

Indeed, it is California law, not federal law, which requires that each public elementary school in the State "conduct[] appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720. And it is California law, not federal law, which provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" the "patriotic exercises" requirements. Id. To the extent plaintiffs are injured, therefore, they are injured "as a result of" the application of California law and the school district's policies, not the Pledge statute. See Casey, 4 F.3d at 1519 ("[t]he [injury-in-fact] inquiry is whether any named plaintiff has demonstrated that he has sustained or is imminently in danger of sustaining a direct injury *as the result of* the challenged conduct") (emphasis added) (citing O'Shea v. Littleton, 414 U.S. 488, 494-95, 94 S.Ct. 669, 675-76 (1973)). For that reason, in Sherman and Myers, the Pledge cases cited supra p. 8, the plaintiffs did not challenge the federal Pledge statute; they

---

[5] As set forth below, however, the federal defendants contest any claim of Doe taxpayer standing, or any claim of standing based on the Doe parents' allegation that they have attended public school classes and "official government meetings" where the Pledge was recited. See Amd. Compl. ¶¶ 68-70.

challenged (and the courts upheld) the application of the state statutes which required recitation of the Pledge. See Sherman, 980 F.2d at 439; Myers, 251 F.Supp.2d at 1263-64.

Plaintiffs appear to suggest they are injured by the mere fact that the Pledge exists and is codified in the United States Code. See Amd. Compl. ¶ 120. But those facts, standing alone, do not cause the kind of individualized, direct, and concrete injury required for Article III standing. See, e.g., Allen v. Wright, 468 U.S. 737, 755-756, 104 S.Ct. 3315, 3326-27 (1984). Even in the Establishment Clause context, "the psychological consequence presumably produced by observation of conduct with which one disagrees" is "not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485-486, 102 S.Ct. 752, 765 (1982). Plaintiffs plainly disagree with the inclusion of the words "under God" in 4 U.S.C. § 4 and believe the Pledge statute is unconstitutional. But absent some concrete injury, their disagreement with the law cannot create standing. Diamond v. Charles, 476 U.S. 54, 62, 106 S.Ct. 1697, 1703 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements").

Plaintiffs also contend (see, e.g., Compl. ¶¶ 110, 120-21, 125) that they have federal taxpayer standing to challenge the Pledge statute. This is meritless. As a general rule, citizens may not rely on the "injury" of paying federal taxes as a basis for standing to challenge federal action (we discuss state taxpayer standing infra Part I.B). See Frothingham v. Mellon, 262 U.S. 447, 487-88, 43 S.Ct. 597, 601 (1923). This rule is subject to a "narrow exception" in certain types of Establishment Clause cases. See Bowen v. Kendrick, 487 U.S. 589, 618, 108 S.Ct. 2562, 2579 (1988). To qualify for this exception and demonstrate federal taxpayer standing, a plaintiff must show: (i) that the challenged government action is an "exercise[] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution"; and (ii) that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." Flast v. Cohen, 392 U.S. 83, 102-03, 88 S.Ct.

1942, 1954 (1968); see also Valley Forge, 454 U.S. at 481, 102 S.Ct. at 763 (Flast's two-part test is applied with "rigor").

This exception has no application here. 4 U.S.C. § 4 was not enacted under Congress' Taxing and Spending Clause authority.[6] The taxing and spending power provides constitutional authority for "federal taxing and spending programs," Flast, 392 U.S. at 101, 88 S.Ct. at 1953, i.e., congressional programs to promote the "'general welfare'" by the "'expenditure of public moneys for public purposes . . . not limited by the direct grants of legislative power found in the Constitution.'" South Dakota v. Dole, 483 U.S. 203, 207, 107 S.Ct. 2793, 2796 (1987) (citation omitted). It cannot be disputed that the Pledge statute does not establish a "federal taxing and spending program," nor does it require — or even authorize — the expenditure of federal funds; it merely codifies the words of the Pledge of Allegiance.[7]

Traceability and Redressability. Plaintiffs also cannot establish "a causal connection between the injury and the conduct complained of," i.e., that the injury is "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of

---

[6]The Supreme Court consistently has rejected claims of federal taxpayer standing where the plaintiff did not challenge an exercise of Congress' taxing and spending power. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228, 94 S.Ct. 2925, 2935 (1974) (no standing where plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); United States v. Richardson, 418 U.S. 166, 175, 94 S.Ct. 2940, 2945 (1974) (no standing where plaintiffs' challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA"); Valley Forge, 454 U.S. at 480, 102 S.Ct. at 762 (no standing where the challenged government action "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8").

[7]Plaintiffs also assert "injuries" arising from the fact that federal funds allegedly are used to: pay "federal . . . employees" who "recite the . . . Pledge" (see Amd. Compl. ¶ 114); print "the United States Code (including 4 U.S.C. § 4) as well as pamphlets, etc., that contain the Pledge of Allegiance" (id. ¶ 121); and "support the 'Pause for the Pledge of Allegiance' (Pub. L. 99 Stat. 97) annual festivities" (id. ¶ 123). The short answer to this argument is that plaintiffs do not challenge any of these activities. See Casey, 4 F.3d at 1519 ("[t]he [injury-in-fact] inquiry is whether any named plaintiff has demonstrated that he has sustained or is imminently in danger of sustaining a direct injury *as the result of* the challenged conduct") (emphasis added).

some third party[.]" Lujan, 504 U.S. at 560, 112 S.Ct. at 2136 (citations omitted) (alterations in original). As explained above, the Pledge statute does not compel anyone to recite the Pledge or lead others in reciting it. To the extent the plaintiff-children are exposed to the Pledge, it is a result of California law and the school district's policies. There is no "causal connection," therefore, between plaintiffs' "injury" and "the challenged action of the" federal defendants. See id.

Finally, plaintiffs' claims against the congressional defendants are not redressable. A court has never, to our knowledge, attempted to redress an injury caused by an allegedly unconstitutional statute by purporting to order Congress to repeal or amend the challenged law. See Amd. Comp. p.33, ¶¶ III, IV (seeking this relief). Indeed, as the Supreme Court has stated: "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation." Bowsher v. Synar, 478 U.S. 714, 733-34, 106 S.Ct. 3181, 3191 (1986); see also Mississippi v. Johnson, 71 U.S. 475, 500 (1866) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance").

Plaintiffs' claims against the Law Revision Counsel pose additional redressability problems. The Office of the Law Revision Counsel is an Office in the House of Representatives, see 2 U.S.C. § 285, responsible for "develop[ing] and keep[ing] current an official and positive codification of the laws of the United States." Id. § 285a. The Law Revision Counsel, appointed by the Speaker of the House, is responsible for the "management, supervision, and administration" of the Office. Id. § 285c.

Plaintiffs seek an injunction requiring the Law Revision Counsel to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4." Amd. Compl. p. 33, ¶ V. Even if the Court were to order the Law Revision Counsel to "remove"

"under God" from the United States Code, the Statutes at Large would still contain those words, and the Pledge would thus remain the law. See Preston v. Heckler, 734 F.2d 1359, 1367 (9th Cir. 1984). Thus, unless Congress were to approve the Law Revision Counsel's removal of the words "under God" from the Code by affirmatively enacting this change into positive law, the Pledge would continue to contain those words, see id., and any "injury" plaintiffs might suffer by the inclusion of "under God" would be left unremedied. See, e.g., Lujan, 504 U.S. at 561, 112 S.Ct. at 2136 (to satisfy redressability prong of constitutional standing, plaintiff must show the claimed injury is likely to be redressed by a favorable decision). For all of these reasons, plaintiffs lack standing to challenge 4 U.S.C. § 4.

B. Newdow And The Roe Plaintiffs Lack Standing To Challenge The School Districts' Pledge Practices

Newdow. Most of the issues surrounding Newdow's standing were litigated conclusively in Elk Grove and he is barred from re-litigating them here. See Littlejohn v. United States, 321 F.3d 915, 923 (9th Cir.) (issue preclusion bars re-litigation of identical issue previously litigated where the determination of the issue was a critical and necessary part of the earlier judgment), cert. denied, 540 U.S. 985, 124 S.Ct. 486 (2003).

For example, although Newdow asserts that his child "lives with him approximately 30% of the time," Amd. Compl. ¶ 60, his custody relationship has not changed since the Supreme Court found that relationship insufficient to confer standing because Newdow lacks controlling legal custody. See id. ("the mother of [Newdow's] child currently has final decision-making authority"). Moreover, Newdow's assertions that he has attended Elk Grove classes with his child where the Pledge was recited, see Amd. Compl. ¶ 63, and that he attends "official government meetings — including the [Elk Grove] and [Sacramento City] school board meetings — where the Pledge . . . is recited," id. ¶ 59, were specifically rejected by the Supreme Court as "not respond[ing] to our prudential [standing] concerns." See Elk Grove, 124 S.Ct. at 2312 n.8. Newdow also asserts that he is a state taxpayer and that he owns property in, and pays local property taxes to, Sacramento, the city where he resides. See Amd. Compl. ¶ 64. But again,

Newdow made these same assertions in his Supreme Court brief, see Respondent's Brief On The Merits, No. 02-1624 (U.S. Feb. 13, 2004), available at, 2004 WL 314156 *49 n.70, and they were either expressly or necessarily rejected by the Supreme Court as grounds for standing. See Elk Grove, 124 S.Ct. at 2312 n.8.

Newdow's only new assertion is that he owns property in, and pays local property taxes to, Elk Grove, the district in which his child attends school. See Amd. Compl. ¶ 64. These allegations add nothing to his case. State taxpayer standing, the Supreme Court noted in Elk Grove, is a "strict . . . doctrine," see 124 S.Ct. at 2312 n.8, and requires that a plaintiff show a "'direct dollars-and-cents injury'" from the payment of state tax revenues. See id. (quoting Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 434, 72 S.Ct. 394, 397 (1952), which denied state taxpayer standing to challenge on Establishment Clause grounds a state statute requiring Bible reading in public schools). To establish state taxpayer standing, a plaintiff must show that "'the activity challenged involves an expenditure of public funds which would not otherwise be made.'" Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794 (9th Cir. 1999) (en banc) (parenthetical) (citation omitted). Newdow cannot make that showing here: Elk Grove's expenditures for teachers' salaries for the (infinitesimally small) portion of the school day devoted to the Pledge recital are expenses it would incur regardless of whether the Pledge is said. See id.; see also Doremus, 342 U.S. at 434, 72 S.Ct. at 397 (no state taxpayer standing to challenge school Bible reading where plaintiff failed to "show[] a measurable appropriation or disbursement of school-district funds occasioned *solely* by the activities complained of") (emphasis added).[8] For all of these reasons Newdow lacks standing.

Roe Plaintiffs. Jan Roe, a parent of RoeChild-1 and RoeChild-2, also lacks standing to

[8]To the extent Newdow seeks to challenge Sacramento City's Pledge practices based on his payment of taxes to Sacramento, he lacks state taxpayer standing for the same reasons. Cf. Newdow II, 328 F.3d at 485 ("Newdow has no standing to challenge the [Sacramento City's] policy and practice because his daughter is not currently a student there"), rev'd on other grounds, 124 S.Ct. 2301.

challenge the school districts' Pledge practices. To the extent Jan Roe relies for standing on the nature of Jan Roe's custody relationship with the Roe children, the amended complaint does not allege that Jan Roe has controlling legal custody over the Roe children as defined by the Supreme Court in Elk Grove. See 124 S.Ct. at 2310 & n.6; Amd. Compl. ¶ 12. To the extent Jan Roe relies for standing on the payment of federal taxes, see Amd. Compl. ¶ 80-81, or Jan Roe's presence in the Roe children's classrooms when the Pledge was recited, id. ¶ 79, Jan Roe lacks standing for the same reasons as Newdow. See supra pp. 16-17. Plaintiffs have not provided any additional information demonstrating standing under these standards.

The Roe children lack standing because, as minors, they cannot bring this action on their own, see Cal. Code of Civ. Proc. § 372; Cal. Family Code § 6601; Fed. R. Civ. P. 17(b) (capacity to sue or be sued determined by the law of the individual's domicile), and Jan Roe, as explained above, cannot sue for them.

II. PLAINTIFFS' CLAIMS AGAINST THE FEDERAL DEFENDANTS ARE BARRED BY IMMUNITY

A. Plaintiffs' Claims Against Congress And The Law Revision Counsel Are Barred By The Speech Or Debate Clause

Plaintiffs raise three specific claims for relief against the congressional defendants. They seek a declaration that "Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses," see Amd. Compl. p. 33, ¶ I, an injunction requiring that Congress "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4," see id. p. 33, ¶¶ III, IV, and an injunction requiring that the Law Revision Counsel "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4." See id. p. 33, ¶ V. Plaintiffs also suggest they are seeking mandamus relief. See id. ¶ 4. All of these claims are barred by the Speech or Debate Clause in Article I of the Constitution.

The Speech or Debate Clause precludes courts from exercising jurisdiction over Congress, or any of its Members, for claims arising from the enactment or amendment of

legislation. The Clause provides that "[t]he Senators and Representatives . . . shall not be questioned in any other Place" for "any Speech or Debate in either House." U.S. Const., Art. I, § 6, cl. 1. The Speech or Debate Clause "reinforc[es] the separation of powers," United States v. Johnson, 383 U.S. 169, 178, 88 S.Ct. 749, 754 (1966), and its "guarantees . . . are vitally important to our system of government." Helstoski v. Meanor, 442 U.S. 500, 506, 99 S.Ct. 2445, 2448 (1979).

The Supreme Court has read the Speech or Debate Clause "broadly to effectuate its purposes," such that any conduct falling within the "'sphere of legitimate legislative activity'" is absolutely immune from scrutiny by the courts. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501, 95 S.Ct. 1813, 1820 (1975); see also Hutchinson v. Proxmire, 443 U.S. 111, 126, 99 S.Ct. 2675, 2684 (1979) (immunity provided by the Clause applies "'to things generally done in a session of the House by one of its members in relation to the business before it'") (citation and emphasis omitted). The Clause applies equally to officers and other employees of the Congress when they are engaged in legislative activity. See, e.g., Gravel v. United States, 408 U.S. 606, 618, 92 S.Ct. 2614, 2623 (1972) (Speech or Debate Clause confers immunity upon a Senator's aide in situations where the conduct of the aide would be a protected legislative act if performed by the Senator himself); Eastland, 491 U.S. at 501, 95 S.Ct. at 1820 (actions of Chief Counsel protected by Speech or Debate Clause); Cable News Network v. Anderson, 723 F.Supp. 835, 841 (D.D.C. 1989) (dismissing case against defendants, including Clerk of the House, on Speech or Debate grounds).[9]

The passage of legislation is quintessential legislative activity. See, e.g., Gravel, 408 U.S. at 624, 92 S.Ct. at 2626 (voting by Members protected); Eastland, 421 U.S. at 504, 95 S.Ct. at

---

[9]Speech or Debate Clause protection applies regardless of whether the challenged conduct is alleged to violate the First Amendment. See Eastland, 421 U.S. at 509-11, 95 S.Ct. at 1824; see also Newdow II, 328 F.3d at 484 (rejecting contrary argument raised by Newdow), rev'd on other grounds, 124 S.Ct. 2301 (2004). The Clause also precludes courts from examining the "'motivation for'" legislative acts. Eastland, 421 U.S. at 508, 95 S.Ct. at 1824 (citation and emphasis omitted).

1821-22 (Clause protects all activities "'integral'" to the "'consideration and passage or rejection of proposed legislation'") (citation omitted). Plaintiffs' claims for relief against Congress for its passage of the 1954 amendment to the Pledge statute — including plaintiffs' request that Congress partially repeal or amend the Pledge by removing the words "under God" — squarely and plainly are barred by the Speech or Debate Clause. Accord Newdow II, 328 F.3d at 484 (identical claims for relief against Congress barred by Speech or Debate Clause immunity), rev'd on other grounds, 124 S.Ct. 2301 (2004).[10]

Plaintiffs' claim for injunctive relief against the Law Revision Counsel is barred for the same reasons. Plaintiffs seek an injunction requiring the Law Revision Counsel to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4." Amd. Compl. p. 33, ¶ V. This is precisely the type of conduct that would receive Speech or Debate immunity if performed by Congress itself. Indeed, plaintiffs seek the identical relief against Congress, see id. p. 33, ¶¶ III, IV, and, as explained above, it is barred by the Clause. Plaintiffs' claims against the Law Revision Counsel are barred as well, because the Law Revision Counsel is a House official whose duties are "directly related to the due functioning of the legislative process."[11] Browning v. Clerk, 789 F.2d 923, 929 (D.C. Cir.) (House Official Reporter's duties to "record floor and committee proceedings both for later use in forming legislation and to create a permanent record of the proceedings" directly related to the legislative process for purposes of the Speech or Debate Clause), cert. denied, 479 U.S. 996, 107 S.Ct. 601 (1986). See also Gravel,

---

[10]Newdow litigated the Speech or Debate issue to final judgment in Newdow II. See supra n.3. His attempt personally to relitigate the identical issue here is barred by issue preclusion. See Littlejohn, 321 F.3d at 923.

[11]See, e.g., 2 U.S.C. § 285b(1) (describing a function of the Law Revision Counsel as "[t]o prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law").

408 U.S. at 618, 92 S.Ct. at 2623 (Clause confers immunity upon congressional officers and staff to the same extent as upon Members of Congress).

B. Plaintiffs' Claims Against The Federal Defendants Are Barred By Sovereign Immunity

Plaintiffs' claims against the congressional defendants also are barred by sovereign immunity, as are their claims against the United States. A body of the sovereign "'is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351 (1980) (citation omitted) (alteration in original); see also Kaiser v. Blue Cross of California, 347 F.3d 1107, 1117 (9th Cir. 2003) ("Absent a waiver of sovereign immunity, courts have no subject matter jurisdiction over cases against the government"). Consent to be sued must be "'unequivocally expressed'" in legislation. Mitchell, 445 U.S. at 538, 100 S.Ct. at 1351 (citation omitted); accord Lane v. Pena, 518 U.S. 187, 192, 116 S.Ct. 2092, 2096 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 1000 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"). Plaintiffs bear the burden of establishing an unequivocal textual waiver of immunity. See Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987), cert. denied, 487 U.S. 1204, 108 S.Ct. 2845 (1988).

Plaintiffs have identified no statute waiving the sovereign immunity of Congress (or a congressional official sued in his official capacity) from their constitutional claims. The congressional defendants, therefore, are immune. See Keener v. Congress of the United States, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (affirming dismissal of suit because Congress is "protected from suit by sovereign immunity"); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) ("It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants").

As for the United States, it is not clear whether plaintiffs are even raising a separate

1 constitutional claim against that defendant, but if they are, the claim is barred.[12] Again, plaintiffs
2 have identified no federal statute waiving the immunity of the United States from a claim for
3 declaratory relief under the First Amendment.[13] Their claim against the United States,
4 accordingly, should be dismissed. See Kaiser, 347 F.3d at 1117; Baker, 817 F.2d at 562.

5 **III. 4 U.S.C. § 4 IS CONSTITUTIONAL**

6 If the Court determines to reach the merits of plaintiffs' challenge to 4 U.S.C. § 4, that
7 challenge should be rejected. Plaintiffs ask the Court "to judge the constitutionality of an Act of
8 Congress — 'the gravest and most delicate duty that [a court] is called upon to perform.'"
9 Rostker v. Goldberg, 453 U.S. 57, 64, 101 S.Ct. 2646, 2651 (1981) (citation omitted). It is well
10 established that Acts of Congress are presumptively constitutional. See United States v. National
11 Dairy Prods. Corp., 372 U.S. 29, 32, 83 S.Ct. 594, 597 (1963). Congress, in fact, expressly has
12 reaffirmed its view that 4 U.S.C. § 4 is constitutional. See Act of Nov. 13, 2002, Pub. L. No.
13 107-293, §§ 1-16, 116 Stat. 2057-2060. Moreover, because plaintiffs challenge the Pledge
14 statute on its face, see Compl., p. 33 at ¶¶ I-V; see also infra Part IV (discussing plaintiffs' other
15 challenge to the Pledge statute "as applied" by the defendant school districts), to be successful,
16 they must show that "no set of circumstances exists under which the [challenged statute] would

17

18 [12]Although plaintiffs named the United States as a defendant, four of their five claims
19 against the federal defendants are directed solely at Congress or the Law Revision Counsel. See Amd. Compl. p.33, ¶¶ I, III-V. The other claim — for a declaration that including the words
20 "under God" in 4 U.S.C. § 4 violates the Establishment Clause — references no defendant. See
21 id. p. 33, ¶ II. The only substantive mention of the United States in the Amended Complaint is plaintiffs' claim that the United States has "permit[ted]" Congress to "further (Christian)
22 monotheistic dogma." Amd. Compl. ¶ 131. We note that Newdow is barred from relitigating his personal claim against the United States. See supra n.3; Littlejohn, 321 F.3d at 923.

23

24 [13]Claims challenging federal statutory or regulatory provisions typically are raised against an Executive Branch agency or official who has taken some action, in administering or enforcing
25 the challenged provision, which "injures" the plaintiff, and the waiver of immunity typically is supplied by the Administrative Procedure Act. See 5 U.S.C. § 702. Plaintiffs have not sued any
26 agency or Executive Branch official here because, as explained above, 4 U.S.C. § 4 merely sets forth the words of the Pledge, and does not require or authorize any federal agency or official to
27 do anything. No federal agency or official, therefore, has "injured" plaintiffs.

28

be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987).

Plaintiffs cannot meet this test. As we show below, two Supreme Court decisions have said without qualification that the Pledge is consistent with the Establishment Clause, and have used the Pledge as a baseline for adjudicating the constitutionality of other forms of government action. Those decisions are binding on this Court. Numerous other Supreme Court opinions likewise have expressly addressed and affirmed the constitutionality of the Pledge. These decisions and opinions make clear that the Establishment Clause does not forbid the government from officially acknowledging the religious heritage, foundation, and character of the Nation. That is precisely what the Pledge of Allegiance does.

A. The Establishment Clause Permits Official Acknowledgments Of The Nation's Religious History And Character

"[R]eligion has been closely identified with our history and government." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 212, 83 S.Ct. 1560, 1566 (1963); see also Elk Grove, 124 S.Ct. at 2306 ("'[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'") (quoting H.R. Rep. No. 1693, 83d Conf., 2d Sess., p. 2 (1954)) (alteration in original). Many of the Country's earliest European settlers came here seeking refuge from religious persecution and a home where they could practice their faith. See Elk Grove, 124 S.Ct. at 2322 (O'Connor, J., concurring) (describing "a Nation founded by religious refugees and dedicated to religious freedom"). In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact in which they announced that their voyage was undertaken "for the Glory of God." See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. Settlers established many of the original thirteen colonies for the specific purpose of securing religious liberty for their inhabitants. See Engel v. Vitale, 370 U.S. 421, 427, 434, 82 S.Ct. 1261, 1265, 1268-69 (1962).

The Framers' deep-seated faith provided the philosophical groundwork for the governmental structure they adopted. See Lynch v. Donnelly, 465 U.S. 668, 675, 104 S.Ct. 1355, 1360 (1984) ("'[w]e are a religious people *whose institutions* presuppose a Supreme Being'")

(citation omitted) (emphasis added). In "perhaps their most important contribution," the Framers "conceived of a Federal Government directly responsible to the people . . . and chosen directly . . . by the people." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821, 115 S.Ct. 1842, 1863 (1995). That system of government was a direct outgrowth of the Framers' conviction that each individual was entitled to certain fundamental rights "endowed by their Creator." As most famously expressed in the Declaration of Independence: "[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." 1 U.S.C. at 1; see also Schempp, 374 U.S. at 213, 83 S.Ct. at 1566 ("[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself").

It is no surprise, therefore, that the Framers considered references to God in official documents and official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of religious autonomy embodied in the First Amendment. The Constitution itself refers to the "Year of Our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. See U.S. Const. Art. I, § 7; id. Art. VII. And the First Congress, which wrote the Establishment Clause, adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See Marsh v. Chambers, 463 U.S. 783, 787-88, 103 S.Ct. 3330, 3334 (1983).

Indeed, the day after proposing the Establishment Clause, the First Congress urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.'" Lynch, 465 U.S. at 675 n.2, 104 S.Ct. at 1360 n.2 (citation omitted). The President responded by proclaiming November 26, 1789, a day of thanksgiving to "offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other

transgressions." Id. (citation omitted). President Washington also included a reference to God in his first inaugural address, stating: "'it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe . . . that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.'" Newdow v. Bush, 355 F.Supp.2d 265, 287 (D.D.C. 2005) (quoting compilation of inaugural addresses).

This "tradition [of the Founders] has endured." Sherman, 980 F.2d at 446. Beginning with President Washington, references to God or a Higher Power have been a "characteristic feature" of presidential inaugural addresses, see Lee, 505 U.S. at 633, 112 S.Ct. at 2680 (Scalia, J., dissenting), and almost every President, beginning with Washington, has issued Thanksgiving proclamations. See Elk Grove, 124 S.Ct. at 2317 (Rehnquist, C.J., concurring). Since the time of Chief Justice Marshall, moreover, the Supreme Court has opened its sessions with "God save the United States and this Honorable Court." Engel, 370 U.S. at 446, 82 S.Ct. at 1271 (Stewart, J., dissenting).

Other examples abound. President Lincoln referred to a "nation[] under God" in his historic Gettysburg Address. See Elk Grove, 124 S.Ct. at 2317-18 (Rehnquist, C.J., concurring). In 1865, Congress authorized the inscription of "In God we trust" on United States coins. See Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 518. In 1931, Congress adopted as the National Anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto 'In God is our Trust.'" Engel, 370 U.S. at 449, 82 S.Ct. at 1277 (Stewart, J., dissenting). In 1956, Congress passed legislation to make "In God we trust" the National Motto, see 36 U.S.C. § 302, and provided that it be inscribed on all United States currency, see 31 U.S.C. § 5112(d)(1), above the main door of the Senate, and behind the Chair of the Speaker of the House of Representatives. See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 10, 116 Stat. 2058; Gaylor v. United States, 74 F.3d 214,

217-18 (10th Cir.), cert. denied, 517 U.S. 1211 (1996) (motto on currency does not violate the Establishment Clause); Lamberth v. The Board of Comm'rs, — F.3d —, 2005 WL 1124721 (4th Cir. May 13, 2005) (motto on government building does not violate Establishment Clause). The Constitutions of all 50 States also include express references to God. See Brief for the United States as Respondent Supporting Petitioners, Appendix B, No. 02-1624 (U.S. Dec. 2003), available at 2003 WL 23051994.

Given this "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, 104 S.Ct. at 1360, the Supreme Court and individual Justices, time and again, have affirmed the proposition that official acknowledgments of the Nation's religious heritage and character are constitutional. See, e.g., Marsh, 463 U.S. at 792, 103 S.Ct. at 3337 (opening legislative sessions with prayer "has become part of the fabric of our society'"); Schempp, 374 U.S. at 213, 83 S.Ct. at 1566 (referring favorably to the numerous public references to God that appear in historical documents and ceremonial practices in public life, such as oaths ending with "So help me God"); Lynch, 465 U.S. at 676, 104 S.Ct. at 1361 (referring favorably to the National Motto, "In God We Trust"); Elk Grove, 124 S. Ct. at 2319 (Rehnquist, C.J., concurring) ("our national culture allows public recognition of our Nation's religious history and character."); id. at 2322 (O'Connor, J., concurring) (eradicating references to divinity in our Nation's symbols, songs, mottos, and oaths is unnecessary and "would sever ties to a history that sustains this Nation even today"); Lynch, 465 U.S. at 693, 104 S.Ct. at 1369 (O'Connor, J., concurring) ("In God We Trust" and "God save the United States and this honorable court" are constitutionally permissible acknowledgments of religion); Schempp, 374 U.S. at 307, 83 S.Ct. at 1616 (Goldberg, J., concurring, joined by Harlan, J.) ("today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause," citing to divine references in the Declaration of Independence and official Anthems); Engel, 370 U.S. at 449, 82 S.Ct. at 1277 (Stewart, J., dissenting) (citing as

consistent with the Establishment Clause the National Motto "In God We Trust," which is "impressed on our coins").

Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678, 104 S.Ct. at 1361-62; see also Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411 (1970) (Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity"). Rather, "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," Lynch, 465 U.S. at 686, simply takes note of the historical *facts* that "religion permeates our history," Edwards v. Aguillard, 482 U.S. 578, 607, 107 S.Ct. 2573, 2590 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of the Nation and the founding of its government. Because of their "'history and ubiquity,' such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625, 109 S.Ct. 3086, 3118 (1989) (O'Connor, J., concurring) (citation omitted).

B. The Pledge of Allegiance, With Its Reference To A Nation "Under God," Is A Constitutionally Permissible Acknowledgment Of The Nation's Religious History and Character

For four decades, opinions of the Supreme Court and of individual Justices have affirmed the constitutionality of the Pledge, characterizing its reference to God as a permissible acknowledgment of the Nation's religious heritage and character. See, e.g., Elk Grove, 124 S.Ct. at 2317 (Rehnquist, C.J., concurring) ("[t]he phrase 'under God' in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders"). Two opinions of the Supreme Court have expressly discussed the Pledge. In Lynch v. Donnelly, the Court held that the Establishment Clause permits a city to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly "depicts the historical origins of this traditional

event long recognized as a National Holiday." 465 U.S. at 680, 104 S.Ct. at 1363. Earlier in its opinion, the Court had noted that similar "examples of reference to our religious heritage are found," among other places, "in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children — and adults — every year." Id., 465 U.S. at 676, 104 S.Ct. at 1361. The words "under God" in the Pledge, the Court explained, are an illustration of "the Government's acknowledgment of our religious heritage," id., 465 U.S. at 677, 104 S.Ct. at 1360-61, similar to "countless other illustrations," id., such as the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers" that are "replete" in our nation's history. Id., 465 U.S. at 675, 104 S.Ct. at 1360-61.

Likewise, in County of Allegheny, the Supreme Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed Lynch's approval of the reference to God in the Pledge, noting that all of the Justices in Lynch viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603, 109 S.Ct. at 3105-06 (citations omitted). The Court then used the Pledge and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, id., and concluded that the display of the creche by itself would be unconstitutional because, unlike the Pledge and other "nonsectarian references to religion by the government," id., the creche gave "praise to God in [sectarian] Christian terms." Id., 492 U.S. at 598, 109 S.Ct. at 3103; see id., 492 U.S. at 603, 109 S.Ct. at 3106.

Although these decisions did not involve direct challenges to the Pledge, they are controlling regarding the Pledge's constitutionality. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida, 517 U.S. 44, 67, 116 S.Ct. 1114, 1129 (1996). The Supreme Court's analysis of the Pledge in Lynch and County of Allegheny was an integral

1 part of the rationale upon which the Court decided those cases. That analysis provided the
2 constitutional baseline for permissible official acknowledgments of religion against which the
3 practices at issue in each of those cases were then measured. For decades, in fact, the Supreme
4 Court and individual Justices "have grounded [their] decisions in the oft-repeated
5 understanding," Seminole Tribe, 517 U.S. at 67, 116 S.Ct. at 1129, that the Pledge of Allegiance,
6 and similar references, are constitutional. The Court's specific statements in Lynch and County
7 of Allegheny supporting the Pledge's constitutionality thus are decisive. See Sherman, 980 F.2d
8 at 448 ("If the [Supreme] Court proclaims that a practice is consistent with the establishment
9 clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.");
10 United States v. Underwood, 717 F.2d 482, 486 (9th Cir. 1983) ("[a] lower federal court cannot
11 responsibly decline to follow a principle directly and explicitly stated by the Supreme Court as a
12 ground of decision and subsequently applied by the Supreme Court as an integral part of a
13 systematic development of constitutional doctrine"), cert. denied, 465 U.S. 1036, 104 S.Ct. 1309
14 (1984).
15 Although controlling in their own right, the majority statements in Lynch and County of
16 Allegheny are consistent with the individual opinions of numerous Justices over the past four
17 decades which have specifically endorsed the constitutionality of the Pledge. See County of
18 Allegheny, 492 U.S. at 674 n.10, 109 S.Ct. at 3144 n.10 (Kennedy, J., concurring in part and
19 dissenting in part, joined by Rehnquist, C.J., and White and Scalia, JJ.); Wallace v. Jaffree, 472
20 U.S. 38, 78 n.5, 105 S.Ct. 2479, 2501 n.5 (1985) (O'Connor, J., concurring); id., 472 U.S. at 88,
21 105 S.Ct. at 2506 (Burger, C.J., dissenting); Schempp, 374 U.S. at 304, 83 S.Ct. at 1614
22 (Brennan, J., concurring); Engel, 370 U.S. at 440 n.5, 82 S.Ct. at 1272 n.5 (Douglas, J.,
23 concurring); id., 370 U.S. at 449-50, 82 S.Ct. at 1277 (Stewart, J., dissenting).
24 Most recently, in Elk Grove, the three concurring Justices who reached the merits
25 specifically concluded that recitation of the Pledge by willing students in public schools does not
26 violate the Establishment Clause. See id. at 2312, 2320 (Rehnquist, C.J., & O'Connor, J.,
27
28

concurring) ("[t]he recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it"); id. at 2321, 2323 (O'Connor, J., concurring) (phrase "under God" in the Pledge is a form of "ceremonial deism" permissible under the Establishment Clause); id. at 2333 (Thomas, J., concurring) (public school Pledge recitation policy constitutional because it does not create or maintain any religious establishment, grant government authority to an existing religion, or expose anyone to the legal coercion associated with an established religion).

These decisions and individual opinions make clear that the reference to God in the Pledge is not reasonably and objectively understood as endorsing or coercing individuals into silent assent to any particular religious doctrine. That is, the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief," County of Allegheny, 492 U.S. at 602-603, 109 S.Ct. at 3106, because the reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation's "institutions presuppose a Supreme Being." Zorach, 343 U.S. at 313, 72 S.Ct. at 684.

Finally, plaintiffs' claim that the Pledge statute violates the Free Exercise Clause is easily dismissed.[14] The Free Exercise Clause "affords an individual protection from certain forms of governmental *compulsion*." Bowen v. Roy, 476 U.S. 693, 700, 106 S.Ct. 2147, 2152 (1986) (emphasis added); accord Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.) ("[t]he free exercise clause recognizes the right of every person to choose among types of religious training and observance, free of state compulsion"), cert. denied, 474 U.S. 826, 106 S.Ct. 85 (1985). The Pledge statute, as explained supra Part I.A, does not, on its face or otherwise, compel anyone to engage or not engage in any activity; nor does it prohibit anyone

[14]Plaintiffs also contend that 4 U.S.C. § 4 violates the Due Process Clause. See Amd. Compl. ¶ 128. This contention is unsubstantiated and the Due Process Clause can have no possible relevance to plaintiffs' claims.

from engaging or not engaging in any activity. The statute merely sets forth the words of the Pledge and provides the manner of addressing the Flag when the Pledge is recited. 4 U.S.C. § 4 thus does not implicate the Free Exercise Clause.[15] For all of these reasons, plaintiffs' claims challenging 4 U.S.C. § 4 should be dismissed.

IV. THE SCHOOL DISTRICTS' PLEDGE PRACTICES ARE CONSTITUTIONAL

In addition to challenging 4 U.S.C. § 4 on its face, plaintiffs contend the Pledge is unconstitutional as applied to the voluntary recitation of the Pledge by public school students. See, e.g., Amd. Compl. ¶ 133. Plaintiffs' principal contentions are that the school districts' Pledge practices violate the Establishment Clause because they (i) constitute an unconstitutional endorsement of religion, (ii) have an impermissible religious effect, and (iii) are unconstitutionally coercive. See id. As we demonstrate below, none of these arguments has merit.

Although the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools," Edwards, 482 U.S. at 583-584, 107 S.Ct. at 2577, the Court's Establishment Clause precedent does not require public schools to expunge all references to God and religion from the classroom. Rather, in Engel v. Vitale, in the course of invalidating official school prayers, the Court took pains to stress:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of

---

[15]Nor does 4 U.S.C. § 4 implicate RFRA. While plaintiffs do not seek relief with respect to their contention that 4 U.S.C. § 4 violates RFRA, see Amd. Compl. p.33, we note that RFRA enforces the Free Exercise Clause. See 42 U.S.C. § 2000bb, id. § 2000bb-2(4). Because the Pledge statute does not implicate the Free Exercise Clause, it by definition also does not implicate RFRA. Cf. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 326 F.Supp.2d 1140, 1151 (E.D. Cal. 2003), appeal pending, No. 03-17343 (9th Cir.).

> belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [official prayer] that the State of New York has sponsored in this instance.

370 U.S. at 435 n.21, 82 S.Ct. at 1269 n.21.

In determining whether recitation of the Pledge in public school classrooms comports with the Establishment Clause, the question is "whether the government acted with the purpose of advancing or inhibiting religion" and whether recitation of the Pledge has the "'effect' of advancing or inhibiting religion." Agostini v. Felton, 521 U.S. 203, 222-223, 117 S.Ct. 1997, 2010 (1997); see also Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-308, 120 S.Ct. 2266, 2277-78 (2000). As we now show, recitation of the Pledge by willing students in public schools has no such impermissible purpose or effect.

A. The Purpose Of Reciting The Pledge Is To Promote Patriotism And National Unity

A statute or rule runs afoul of the Establishment Clause's purpose inquiry only if it is "entirely motivated by a purpose to advance religion." Wallace, 472 U.S. at 56, 105 S.Ct. at 2489; see also Lynch, 465 U.S. at 680, 104 S.Ct. at 1362 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). The defendant school districts adopted their policies of having teachers lead willing students in the daily recitation of the Pledge for the purpose of promoting patriotism, not advancing religion.

As plaintiffs note (see Amd. Compl. ¶¶ 54, 55 & n.4), the school districts adopted their Pledge policies to comply with California law, which requires that each public elementary and secondary school conduct daily "appropriate patriotic exercises." Cal. Educ. Code § 52720. The state law explicitly provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Id. The promotion of patriotism and instillation of "a broad but common ground" of shared values in the children attending public schools, Ambach v. Norwick, 441 U.S. 68, 77, 99 S.Ct. 1589, 1595 (1979), is a "clearly secular purpose." Wallace, 472 U.S. at 56, 105 S.Ct. at 2489; see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681, 683, 106 S.Ct. 3159, 3163-64 (1986) ("public education must

prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order"). The Supreme Court, moreover, expressly has recognized that the recitation of the Pledge is a "patriotic exercise" designed to "foster national unity and pride in those principles [our flag symbolizes]." Elk Grove, 124 S.Ct. at 2305; see also id. at 2317 (Rehnquist, C.J., concurring) ("the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation"); Myers, 251 F.Supp.2d at 1269 (statute providing for recitation by schoolchildren of Pledge has a secular purpose).

Relying on certain statements from the legislative history accompanying Congress' amendment of the Pledge in 1954 to include the phrase "under God," plaintiffs contend "the Act of 1954 was passed for the purposes of endorsing (Christian) Monotheism and disapproving of Atheism." Amd. Compl. ¶ 41. But the 1954 amendment did not have the single-minded purpose of advancing religion that plaintiffs suggest. The Committee Reports viewed the amendment as a permissible acknowledgment 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." H.R. Rep. No. 1693, 1954 U.S.C.C.A.N. at 2340; see also S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership"; and "Throughout our history, the statements of our great national leaders have been filled with reference to God"); see also Elk Grove, 124 S.Ct. at 2306 (quoting above language from the House Report). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, with the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, 1954 U.S.C.C.A.N. at 2340-41; S. Rep. No. 1287, supra, at 2.

The Reports further identified a political purpose for the amendment — to highlight a fundamental difference between the United States and Communist nations. See H.R. Rep. No.

1693, 1954 U.S.C.C.A.N. at 2340 (noting that "Our American Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp"); see also S. Rep. No. 1287, supra, at 2. Congress thus added "under God" to highlight the Framers' political philosophy concerning the sovereignty of the individual — a philosophy with roots in religious belief (see supra pp. 23-24) — to serve the political end of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, 1954 U.S.C.C.A.N. at 2340; see also S. Rep. No. 1287, supra, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon").

The House report also underscored the vital role the amended Pledge would play in educating children about the fundamental values underlying the American system of government. Through "daily recitation of the pledge in school," the "children of our land" will "be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us." H.R. Rep. No. 1693, 1954 U.S.C.C.A.N. at 2341 (quotation and citation omitted).

No doubt some Members of Congress may have been motivated, in part, to amend the Pledge because of their religious beliefs. Such intentions would not undermine the constitutionality of the Pledge, however, because "those legislators also had permissible secular objectives in mind — they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and dignity of the human being.'" Elk Grove, 124 S.Ct. at 2325 (O'Connor, J., concurring) (citation omitted). More broadly, moreover, the Establishment Clause focuses on "the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." Board of Educ. v. Mergens, 496 U.S. 226, 249, 110 S.Ct. 2356,

2371 (1990) (emphasis in original); see also McGowan v. Maryland, 366 U.S. 420, 469, 81 S.Ct. 1153, 1158 (1961) (opinion of Frankfurter, J.). That is because, among other reasons, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384, 88 S.Ct. 1673, 1683 (1968).

This suit also challenges contemporary practices. The purpose inquiry should focus, therefore, on the school districts' current Pledge policies and the federal government's modern-day purpose for retaining the Pledge intact.[16] In McGowan, for example, the Supreme Court acknowledged that Sunday closing laws originally "were motivated by religious forces," 366 U.S. at 431, 81 S.Ct. at 1108, but nevertheless sustained those laws against an Establishment Clause challenge because modern-day retention of the laws advanced secular purposes. Id., 366 U.S. at 434, 81 S.Ct. at 1109-10. To proscribe laws that advanced valid secular goals "solely" because they "had their genesis in religion," the Court reasoned, would "give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." Id., 366 U.S. at 445, 81 S.Ct. at 1115; see also Freethought Soc'y v. Chester County, 334 F.3d 247, 261-62 (3d Cir. 2003). As we have shown, the modern-day purposes of the school districts' Pledge policies and the federal Pledge statute are secular. See Elk Grove, 124 S.Ct. at 2325 (O'Connor, J., concurring) ("[w]hatever the sectarian ends [the] authors [of the 1954 amendment] may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context").

---

[16]As Congress recently made clear, in the course of reenacting the Pledge statute, the contemporary federal government's purpose for retaining the Pledge, including its reference to God, advances the legitimate, secular purpose of "acknowledgment of the religious heritage of the United States." H.R. Rep. No. 659, 107th Cong., 2d Sess. 4 (2002), reprinted in 2002 U.S.C.C.A.N. 1304.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. The Pledge Has The Valid Secular Effect Of Promoting Patriotism And National Unity

The school districts' Pledge policies, requiring public schools to lead willing students in the daily recitation of the Pledge, serve the secular values of promoting national unity, patriotism, and an appreciation for the values that define the Nation. Plaintiffs acknowledge, as they must, that "[t]he government certainly has the right to foster patriotism[.]" Amd. Compl. ¶ 134; see also Barnette, 319 U.S. at 640, 63 S.Ct. at 1186 ("[n]ational unity as an end which officials may foster by persuasion and example is not in question"); Sherman, 980 F.2d at 444 ("Patriotism is an effort by the state to promote its own survival, and along the way teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values.") (emphasis in original). There can be no question, moreover, that recitation of the Pledge "is a patriotic exercise" designed to "foster national unity and pride" in the principles our flag symbolizes. Elk Grove, 124 S.Ct. at 2305.

In analyzing whether recitation of the Pledge also has the effect of endorsing religion, the "relevant question[]" is "'whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement of prayer'" or religion "'in public schools.'" Santa Fe, 530 U.S. at 308, 120 S.Ct. at 2278 (citation omitted); see also Elk Grove, 124 S.Ct. at 2322-23 (O'Connor, J., concurring). There is no reasonable basis for perceiving such religious endorsement in the Pledge. Contrary to plaintiffs' suggestion, see, e.g., Amd. Compl. ¶¶ 154, 157, the Pledge is not a profession or endorsement of a religious belief, but a statement of allegiance and loyalty to the Republic itself. By common understanding, a "pledge" of "allegiance" is a "promise or agreement" of "loyalty of a citizen to his or her government." The Random House Dictionary of the English Language 55, 1486 (2d ed. 1987). Plaintiffs' contention that the Pledge somehow is transformed into an unconstitutional endorsement of religion by virtue of its inclusion of the words "under God" is wrong in three fundamental respects.

1. *The Pledge must be considered as a whole*

Plaintiffs err, initially, in divorcing the phrase "under God" from its larger context. In Lynch, the Supreme Court emphasized that Establishment Clause analysis looks at religious symbols and references in their broader setting, rather than "focusing almost exclusively on the" religious symbol alone. 465 U.S. at 680, 104 S.Ct. at 1362. Thus, in Lynch, the Court did not ask whether the government's display of a creche — a clearly sectarian symbol — was permissible. Rather, the Court analyzed whether the overall message conveyed by a display that included both religious and other secular symbols of the holiday season conveyed a message of endorsement, and concluded that it did not. Id., 465 U.S. at 680-686, 104 S.Ct. at 1363-66.

Likewise, in County of Allegheny, the Supreme Court analyzed and upheld the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and Menorah. 492 U.S. at 616, 109 S.Ct. at 3113. The Court looked at the content of the display as a whole, rather than focusing on the presence of the Menorah and the religious message that the Menorah would convey in isolation. Id., 492 U.S. at 620-21, 109 S.Ct. at 3115. The Court did this even though the city government had added the Menorah, after the fact, to a preexisting holiday display. Id., 492 U.S. at 581-582, 109 S.Ct. at 3095.

Read as a whole, the Pledge is much more than an isolated reference to God. Congress did not enact a pledge to a religious symbol, a pledge to God, or a pledge of "belief in God"; individuals pledge allegiance to "the Flag of the United States of America," and "to the Republic for which it stands." 4 U.S.C. § 4. See Elk Grove, 124 S. Ct. at 2319, 2320 (Rehnquist, C.J., concurring) ("participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church") (footnote omitted). The remainder of the Pledge is descriptive — delineating the culture and character of the Republic as a unified Country, composed of individual States yet indivisible as a Nation, established for the purposes of promoting liberty and justice for all, *and* founded by individuals whose belief in God gave rise to the governmental institutions and political order they adopted. The reference to a "Nation under God" is a statement about the

Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing demographic character — a statement that itself is simply one component of a larger, more comprehensive patriotic message.

2. *Reciting the Pledge is not a religious exercise*

As explained supra Part III, the decisions of the Supreme Court and opinions of individual Justices repeatedly affirm that not every reference to God amounts to an impermissible government-endorsed religious exercise, and they expressly refer to the Pledge and similar ceremonial references in contradistinction to formal religious exercises like prayer and Bible reading. See, e.g., Elk Grove, 124 S. Ct. at 2324, 2325 (O'Connor, J., concurring) (unlike "actual worship or prayer," "I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith"); id. at 2319-20 (Rehnquist, C.J., concurring) ("[t]he phrase 'under God' is in no sense a prayer, nor an endorsement of any religion").

In Engel v. Vitale, for example, the Supreme Court struck down the New York public school system's practice of reciting a nondenominational Regents prayer because that formal "invocation of God's blessings" was a religious activity, "a solemn avowal of divine faith and supplication for the blessings of the Almighty." 370 U.S. at 424, 82 S.Ct. at 1264. The Court contrasted the Regents prayer with the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity," concluding that "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored[.]" Id., 370 U.S. at 435 n.21, 82 S.Ct. at 1269 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York's practice of preceding the prayer with the recitation of the Pledge. See id., 370 U.S. at 438, 440 n.5, 82 S.Ct. at 1272 (Douglas, J., concurring).

Likewise, in the course of striking down school prayer in Schempp, the Court noted, without concern, that the students also recited the Pledge of Allegiance immediately after the

1 invalidated prayer. Schempp, 374 U.S. at 208, 83 S.Ct. at 1563. That is because, as the
2 concurrence explained, "daily recitation of the Pledge of Allegiance . . . serve[s] the solely
3 secular purposes of the devotional activities without jeopardizing either the religious liberties of
4 any members of the community or the proper degree of separation between the spheres of
5 religion and government." 374 U.S. at 281, 83 S.Ct. at 1602 (Brennan, J., concurring). "The
6 reference to divinity in the revised pledge of allegiance," the concurrence continued, "may merely
7 recognize the historical fact that our Nation was believed to have been founded 'under God.'"
8 374 U.S. at 304, 83 S.Ct. at 1614. Its recitation may be "no more of a religious exercise than the
9 reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical
10 fact." Id.; see also Lee, 505 U.S. at 583, 112 S.Ct. at 2653 (striking down graduation prayer,
11 without suggesting that the Pledge, which preceded the Prayer, was improper).
12 As these cases recognize, describing the Republic as a Nation "under God" is not the
13 functional equivalent of prayer, or any other performative religious act. No communication with
14 or call upon the Divine is attempted. The phrase is neither addressed to God nor a call for His
15 presence, guidance, or intervention. See Elk Grove, 124 S.Ct. at 2320 (Rehnquist, C.J.,
16 concurring). Nor can it plausibly be argued that reciting the Pledge is comparable to reading
17 sacred text, like the Bible, or engaging in an act of religious worship. The phrase "Nation under
18 God" simply has no established religious usage as a matter of history, culture, or practice.
19 It is true that the Pledge is a "declar[ation] [of] a belief." Barnette, 319 U.S. at 631, 63
20 S.Ct. at 1182. But contrary to plaintiffs' suggestion (see Amd. Compl. ¶¶ 103, 147), the belief
21 declared is not a belief in God or monotheism; it is a belief in allegiance and loyalty to the United
22 States Flag and the Republic that it represents. See Elk Grove, 124 S.Ct. at 2319-20 (Rehnquist,
23 C.J., concurring). That is a *politically* performative statement, not a religious one. See Myers,
24 251 F.Supp.2d at 1269 ("the practical message of the pledge is that the speaker supports the
25 political ideologies on which this country is founded"). A reasonable observer, reading the text
26 of the Pledge as a whole, cognizant of its purpose, and familiar with (even if not personally
27
28

subscribing to) the Nation's religious heritage, would understand that the reference to God is not an approbation of monotheism, but a patriotic and unifying acknowledgment of the role of religious faith in forming and defining the unique political and social character of the Nation. See Elk Grove, 124 S.Ct. at 2305 ("recitation [of the Pledge] is a patriotic exercise designed to foster national unity and pride in th[e] principles [our Flag symbolizes]").

Beyond that, the Pledge is indistinguishable from other permissible acknowledgments of religion in public life. There simply is no coherent or discernible difference between inviting schoolchildren to say the Pledge and inviting them to, for example, sing the "officially espoused" National Anthem ("And this be *our* motto 'In God is *our* Trust'") (emphasis added), Engel, 370 U.S. at 435 n.21, 82 S.Ct. at 1269, n.21, or recite the National Motto ("In God *we trust*"), 36 U.S.C. § 302 (emphasis added), the Declaration of Independence, 1 U.S.C. at 1 ("*We* hold these truths to be self evident, that all men . . . are endowed by their Creator with certain unalienable Rights") (emphasis added), or the Gettysburg Address.

3. *The School Districts' Pledge-recital policies are not coercive*

Plaintiffs acknowledge that the school districts' Pledge policies do not involve the level of unconstitutional compulsion that would violate the Supreme Court's decision in West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178 (1943). See Compl. ¶ 163. Although plaintiffs claim the school districts' Pledge practices nevertheless are unlawfully "coercive" under a different Supreme Court decision, Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992), it is Barnette, not Lee, that establishes the relevant standard for analyzing whether a school's Pledge practice safeguards the constitutional rights of students who wish to "opt-out."

Barnette involved a challenge by Jehovah's Witnesses to a board of education policy that compelled public school students to salute the flag and recite the pre-1954 version of the Pledge (i.e., the version of the Pledge without "under God"), with no opportunity to opt out from the recital. See 319 U.S. at 629, 63 S.Ct. at 1181 ("[f]ailure to conform is 'insubordination' dealt with by expulsion"). The Jehovah's Witnesses claimed the Pledge ceremony violated their

religious beliefs by forcing them to salute a "graven image." Id. The Court agreed, and held the Jehovah's Witnesses could not be compelled to salute the flag and recite the Pledge: "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id., 319 U.S. at 642, 63 S.Ct. at 1187.

Barnette thus makes clear, with specific reference to the Pledge, that it is only compelled recitation of the Pledge without the possibility of opting out — the coerced "confess[ion] by word or act" (319 U.S. at 642, 63 S.Ct. at 1187) — that transgresses constitutional bounds. Mere exposure to classmates reciting the Pledge does not rise to the level of constitutionally proscribed coercion. Indeed, the Elk Grove majority recognized this point, stating: "The Elk Grove Unified School District has implemented the state law by requiring that "[e]ach elementary school class recite the pledge of allegiance to the flag once each day. *Consistent with our case law*, the School District permits students who object on religious grounds to abstain from the recitation." 124 S.Ct. at 2306 (citing Barnette) (footnote omitted) (alteration in original) (emphasis added). Barnette, therefore, is dispositive with respect to plaintiffs' "coercion" claim.[17]

Plaintiffs contend, however (see Amd. Compl. ¶ 163), that the school districts' Pledge policies violate the coercion principles the Supreme Court applied under the Establishment Clause claim in Lee v. Weisman. Even if Lee, and not Barnette, is the relevant touchstone, plaintiffs' argument fails because reciting the Pledge is not a religious exercise. As we explain below, the test for unconstitutional coercion under Lee is not whether some aspect of the public

[17]Although the claim in Barnette was discussed in free speech terms, the Jehovah's Witnesses' objection to reciting the Pledge was grounded in their religious views. See Barnette, 319 U.S. at 629, 633 & n.13, 63 S.Ct. at 1183. Thus, while plaintiffs' claims arise under the Establishment Clause, Barnette provides the controlling standard. See Elk Grove, 124 S.Ct. at 2306 (citing Barnette). Indeed, the government would have no greater right to "coerce" political orthodoxy (the issue in Barnette) than it would to "coerce" religious orthodoxy (the issue here). See Barnette, 319 U.S. at 642, 63 S.Ct. at 1187 ("no official, high or petty, can prescribe what shall be orthodox in *politics*, nationalism, *religion*, or other matters of opinion or force citizens to confess by word or act their faith therein") (emphasis added).

school curriculum has religious content. Rather, it is whether the government itself has become pervasively involved in or effectively coerced a religious exercise.

In Lee, the Supreme Court held that the Establishment Clause proscribed prayers at a public secondary school graduation ceremony. See 505 U.S. at 599, 112 S.Ct. at 2661. What made those prayers unconstitutionally coercive, however, was their character as a pure "religious exercise" and the government's "pervasive" involvement in institutionalizing the prayer, to the point of making it a "state-sponsored and state-directed religious exercise." Id., 505 U.S. at 587, 112 S.Ct. at 2655. Coercion thus arose because (1) the exercise was so profoundly religious that even quiet acquiescence in the practice would exact a toll on conscience; see id., 505 U.S. at 588, 112 S.Ct. at 2656 ("the student had no real alternative which would have allowed her to avoid the fact or appearance of participation"); and (2) the force with which the government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well. See id., 505 U.S. at 592-594, 112 S.Ct. at 2658-59.

Those concerns have little relevance here. As we have demonstrated at length, reciting the Pledge or listening to others recite it is a patriotic exercise. Elk Grove, 124 S.Ct. at 2305 (recitation of the Pledge "is a patriotic exercise designed to foster national unity and pride in those principles"). It is not a religious exercise at all, let along a core component of worship like prayer. See Elk Grove, 124 S.Ct. at 2319-20 & n4 (Rehnquist, C.J., concurring) (phrase "under God" in the Pledge does not "covert[] its recital into a 'religious exercise' of the sort described in Lee"); id. at 2327 (O'Connor, J., concurring) ("[a]ny coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character"); Myer, 251 F.Supp.2d 1272 (distinguishing prayer at issue in Lee from "the pledge of allegiance, which this Court holds is a secular statement and not a religious prayer").

Nor has the government, by simply acknowledging the Nation's religious heritage, so intruded itself into religious matters as to pressure or intimidate schoolchildren into violating the

demands of conscience. Mere classroom "'exposure to something does not constitute . . . promotion of the things exposed.'" Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987) (quoting affidavit that "framed the issue"), cert. denied, 484 U.S. 1066, 108 S.Ct. 1029 (1988). Accord Fleischfresser v. Directors of Sch. Dist. 200, 15 F.3d 680, 689 (7th Cir. 1994) (rejecting challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween); Grove, 753 F.2d at 1528 (rejecting challenge to use of The Learning Tree in high school English literature class).

The plaintiff-children allege that "opting out" of the Pledge recital would make them feel like "'political outsider[s].'" Amd. Compl. ¶ 164. But the government does not make "religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780, 115 S.Ct. 2440, 2455 (1995) (O'Connor, J., concurring). Whatever "incidental" benefit might befall religion from the government's acknowledgment of the Nation's religious heritage does not implicate the Establishment Clause. Id., 515 U.S. at 768, 115 S.Ct. at 2449-50 (Opinion of Scalia, J.). Put another way, the Establishment Clause is not violated just because a governmental practice "happens to coincide or harmonize with the tenets of some or all religions." McGowan, 366 U.S. at 442, 81 S.Ct. at 1113-14; see also Lynch, 465 U.S. at 683, 104 S.Ct. at 1364.[18]

Any analysis of the coercive effect of voluntary recital of the Pledge must also take into account the Supreme Court's repeated assurances that the "many manifestations in our public life

---

[18]See also Capital Square, 515 U.S. at 779, 115 S.Ct. at 2455 (O'Connor, J., concurring) (noting that the endorsement inquiry "is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe"; otherwise, the Establishment Clause would "'entirely sweep[] away all government recognition and acknowledgment of religion in the lives of our citizens'") (citation omitted); Zorach, 343 U.S. at 313, 314, 72 S.Ct. at 683 (noting that a "fastidious atheist or agnostic could even object to the supplication with which the [Supreme] Court opens each session: 'God save the United States and this Honorable Court,'" and other similar ceremonial references to God).

of belief in God," Engel, 370 U.S. at 435 n.21, 82 S.Ct. at 1269, far from violating the Constitution, are permissible, including in public school classrooms. See id. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, has become part of our national culture. See Elk Grove, 124 S. Ct. at 2323 (O'Connor, J., concurring) (noting that in the fifty years that have passed since Congress added the words "under God" to the Pledge, "the Pledge has become, alongside the singing of the Star-Spangled Banner, our most routine ceremonial act of patriotism"). Public familiarity with the Pledge's use as a patriotic exercise and a solemnizing ceremony for public events ensures that the reasonable observer, familiar with the context and historic use of the Pledge, will not perceive governmental endorsement of religion at the mere utterance of the phrase "under God."

Indeed, the public schools could not perform the educational function "essential to a democratic society," Bethel, 478 U.S. at 681, 106 S.Ct. at 3163, if they were required to expunge all classroom subjects and exercises with religious content. The Declaration of Independence, the Gettysburg Address, and many famous works of art, literature, and music all have religious content.[19] Political issues can have theological roots. See Mozert, 827 F.2d at 1064. The reality is that the Nation's history and culture have religious content, and "[i]f we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235, 68 S.Ct. 461, 477 (1948) (Jackson, J., concurring); accord Sherman, 980 F.2d at 444 ("[t]he diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons") (emphasis in original); Myers, 251 F.Supp.2d at 1269 n.11 ("[S]choolchildren

---

[19] Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235-236, 68 S.Ct. 461, 477 (1948) (Jackson, J., concurring) ("But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.").

throughout the country are made to learn and recite Lincoln's Gettysburg Address as part of their American History curicula. To adopt [plaintiff's] argument today [that recitation of the Pledge in school is unconstitutional] would be to invalidate all such requirements as violative of the Establishment Clause.").

Thus, public schools may teach not just that the Pilgrims came to this country, but also why they came. They may teach not just that the Framers conceived of a governmental system in which power and inalienable rights resided in the individual, but also why they thought that way. They may teach not just that abolitionists opposed slavery, but why they did. See Edwards, 482 U.S. at 606-607, 107 S.Ct. at 2590 (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."). The reference to a "Nation under God" in the Pledge of Allegiance is an official and patriotic acknowledgment of what all students — Jewish, Christian, Muslim, or atheist — may properly be taught in the public schools. Recitation of the Pledge by willing students thus comports with the Establishment Clause.[20]

---

[20]Plaintiffs' brief suggestion that the school districts' Pledge practices violate the Equal Protection Clause (see Amd. Compl. ¶ 99) is simply a restatement of plaintiffs' Establishment Clause claim, and fails for all the reasons discussed above. Plaintiffs also briefly suggest that the school districts' Pledge practices violate the Due Process Clause. See id. ¶ 133. As noted supra n.14, the Due Process Clause has no relevance to plaintiffs' claims. Finally, plaintiffs' equally brief suggestion that the Pledge policies violate the Free Exercise Clause (see Amd. Compl. ¶ 133) also is meritless. The Pledge policies do not implicate the Free Exercise Clause because plaintiffs may opt-out from the Pledge recital. See Bowen, 476 U.S. at 700, 106 S.Ct. at 2152 (Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion"). As the Seventh Circuit held in Sherman: "By remaining neutral on religious issues, the state satisfies its duties under the free exercise clause. All that remains is Barnette itself, and so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises." 980 F.2d at 445 (citation omitted).

CONCLUSION

For all the foregoing reasons, the federal defendants' motion to dismiss should be granted.

Respectfully Submitted,

PETER D. KEISLER
Assistant Attorney General

McGREGOR W. SCOTT
United States Attorney

THEODORE C. HIRT
Assistant Branch Director

/s/ *Craig M. Blackwell*
CRAIG M. BLACKWELL, D.C. No. 438758
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel.: (202) 616-0679
Fax: (202) 616-8470

Attorneys for the United States Congress, the United States of America, and Peter LeFevre

Dated: May 16, 2005