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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW IN PRO PER, JAN DOE AND PAT DOE, PARENTS; DOECHILD, A MINOR CHILD; JAN ROE; PARENT; ROECHILD-1 AND ROECHILD-2, MINOR CHILDREN,

Plaintiffs,

vs.

THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; THE STATE OF CALIFORNIA; THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD"); DR. STEVEN LADD, SUPERINTENDENT, EGUSD; THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD"); DR. M. MAGDALENA CARRILLO MEJIA, SUPERINTENDENT, SCUSD; THE ELVERTA JOINT ELEMENTARY SCHOOL DISTRICT ("EJESD"); DR. DIANNA MANGERICH, SUPERINTENDENT, EJESD; THE RIO LINDA UNION SCHOOL DISTRICT ("RLUSD"); FRANK S. PORTER, SUPERINTENDENT, RLUSD;

Defendants.
_____/

Case No.: CIV 05-0017 LKK DAD

SCHOOL DISTRICT DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO DISMISS

DATE: **JULY 18, 2005**
TIME: **10:00 a.m.**
CTRM: **4**

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OTHER AUTHORITIES

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I.

INTRODUCTION

Plaintiffs are the parents of children enrolled in California public schools who object to the policies of the Elk Grove Unified School District "EGUSD"), the Sacramento City Unified School District ("SCUSD"), the Elverta Joint Unified School District ("EJESD") and the Rio Linda Unified School District ("RLUSD") (hereinafter collectively referred to as "Defendant School Districts" or "the Districts")[1] which provide for voluntary recitation of the Pledge of Allegiance (hereinafter "Pledge") in elementary schools at the beginning of each school day. Plaintiffs allege violations of the First, Fifth and Fourteenth Amendments as well as the Religious Freedom Restoration Act ("RFRA") based on inclusion of the words "under God" in the Pledge. Plaintiffs seek to have this Court find the 1954 Act unconstitutional and in violation of RFRA, remove the words "under God" from the Pledge, modify California Education Code Section 52720 to prohibit use of the "now-sectarian" Pledge and demand that the Defendant School Districts forbid use of same. Defendant School Districts submit that the U.S. Supreme Court has previously addressed this issue and found the Pledge constitutional. Therefore, by implication, the Districts' policies are also constitutional and Plaintiffs' claims should be dismissed for failure to state a cause of action upon which relief can be granted.

Additionally, the Districts seek to have Plaintiff Newdow and Plaintiffs Jan Roe, Roechild-1 and Roechild-2 dismissed as Plaintiffs in this lawsuit for lack of standing, consistent with the holdings of the Ninth Circuit and U.S. Supreme Court. A dismissal of their claims as Plaintiffs would result in the dismissal of all claims against the following Defendants: SCUSD, SCUSD's Superintendent, M. Magdalena Carrillo Mejia, EJUSD, EJUSD's Superintendent Dr. Dianna Mangerich, RLUSD, and RLUSD's Superintendent Frank S. Porter.

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[1] In the original complaint, Plaintiffs also named the Lincoln Unified School District and its Associate Superintendent Janet Petsche as Defendants. From the Amended Complaint it appears Plaintiffs have dropped their claims against these Defendants and thus these Defendants request that judgment be entered in their favor.

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II.

LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will be granted when "[A] plaintiff could prove no set of facts in support of his claim that would entitle him to relief." Parks School of Business v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995).

When deciding a motion to dismiss under Rule 12(b)(6), the court must accept as true all material factual allegations of the complaint while construing the complaint in favor of the complaining party. (Id.) A motion to dismiss may also be used where plaintiff has included allegations disclosing some absolute defense or bar to recovery. Quiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984). Merely "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a Motion to Dismiss." Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

III.

LEGAL ARGUMENT

A. Newdow Lacks Standing to Challenge SCUSD's Policy and Practice.

In the First Amended Complaint, Newdow is the only Plaintiff who sues the SCUSD and its Superintendent, Dr. Carrillo Mejia. Although his child does not attend EGUSD, he claims that he pays taxes that are used to fund the SCUSD. Exhibit A to Declaration of Terence J. Cassidy, First Amended Complaint, ¶9. The issue of Newdow's standing as against SCUSD has previously been addressed by this Court in a ruling rendered in his prior case against the SCUSD and the EGUSD regarding the Pledge. As Plaintiff's standing to bring suit against the SCUSD in that case was based on the same standing grounds that he is asserting in this case, Newdow is precluded under the doctrines of res judicata and collateral estoppel from asserting the claims (which necessarily require adjudication of the same standing issues) in the present matter. As such, these doctrines act as an absolute bar to Plaintiff Newdow's recovery, and he should be dismissed as a Plaintiff from this action. Moreover, as Newdow is the only Plaintiff alleging a claim against the SCUSD and Dr. Carrillo Mejia, these Defendants respectfully submit that they should be dismissed from the case.

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1. Res Judicata

Res judicata precludes a plaintiff from asserting the same cause of action more than once. "A party who has had one fair and full opportunity to prove a claim and has failed in that effort should not be permitted to go to trial on the merits of that claim a second time." Blonder-Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 313, 324 (1971). The claim will be precluded if: (1) the same claim was asserted in a prior litigation; (2) that litigation involved identical parties or their privies; and (3) the case resulted in a valid final judgment on the merits. Id. at 323-24.

On March 8, 2000, Plaintiff Newdow filed a complaint with this Court asserting constitutional claims identical to those asserted in the present action. In that case, Plaintiff also asserted that he had taxpayer standing to sue SCUSD and its Superintendent. *See* Exhibit A to School District Defendants' Request for Judicial Notice, Newdow's March 8, 2000 Complaint, ¶¶109-119.[2] The District Court dismissed the action holding that the Pledge ceremony did not violate the Establishment Clause and Newdow appealed. On appeal, the Ninth Circuit held that "Newdow has no standing to challenge SCUSD's policy and practice because his daughter is not currently a student there." Newdow v. U.S. Congress, 328 F.3d 466, 485 (9th Cir. 2003) [hereinafter "Newdow I"]. While the Ninth Circuit issued other rulings in connection with Newdow I which resulted in further rehearings and appeals, the decision regarding Newdow's standing to challenge SCUSD's policy was never challenged. Elk Grove Unified School District v. Newdow, 124 S.Ct. 2301, 2312 n.3 (2004) [hereinafter "EGUSD v. Newdow"]. As such, the decision of the Ninth Circuit stands.

In analyzing the three requirements of res judicata, it is clear that Newdow is barred from asserting his claims as a plaintiff against SCUSD. First, the claims in both the prior case as well as the present matter are identical, save addition in the present action of the RFRA violation. *See* Exhibit A to School District Defendants' Request for Judicial Notice, Plaintiff's Complaint from Newdow I; Exhibit A to Declaration of Cassidy, Plaintiffs' First Amended Complaint. Both pray

[2] Newdow also alleged he had standing to sue the SCUSD and its Superintendent on a number of other grounds.

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for the same relief and challenge the constitutionality under the First Amendment of the 1954 Amendment, the California statute and the School Districts' policies requiring teachers to lead willing students in the recitation of the Pledge. Therefore, there is no question that Plaintiff is reasserting the same claims which were previously addressed by the Ninth Circuit.

Second, the present case involves the same parties in the same configuration. Newdow assumed the role of plaintiff in both cases, and in both cases named SCUSD and its superintendent as Defendants. In both cases he indicated his child attends EGUSD – not SCUSD.

Third, the prior litigation resulted in a final judgment on the merits. *See* Newdow I, supra at 485. The order of the Court was the final disposition of the matter. Additionally, Federal Rule of Civil Procedure 41(b) provides that a dismissal operates as an adjudication on the merits unless it was dismissed for lack of jurisdiction, improper venue or for failure to join a party. Newdow's claim against SCUSD was dismissed for lack of standing and therefore was adjudicated upon the merits. Id. As such, Newdow had a "full and fair opportunity" to litigate his claim, but failed. Blonder-Tongue Laboratories, 402 U.S. at 324. He should not be permitted a second bite at the apple.

2. Collateral Estoppel

Collateral estoppel prohibits relitigation of particular issues that were actually litigated and determined in a prior case. An issue will be precluded if: (1) it was the identical issue addressed in the first case; (2) the issue was actually litigated and decided; and (3) the issue was essential to support a valid and final judgment on the merits. Arizona v. California, 530 U.S. 392, 414 (2000). As noted above, the issue of Newdow's standing to challenge SCUSD's policies was decided by the Ninth Circuit. Newdow I, 328 F.3d at 485. In the present case, Newdow again challenges the policies of SCUSD and necessarily asks this Court to relitigate the same standing issue. Additionally, the issue of standing was actually litigated and decided. The Ninth Circuit determined that Newdow did not have standing to challenge SCUSD's policies because his daughter is not a student at SCUSD. That fact remains constant as Newdow has alleged that his child attends EGUSD. Exhibit A to Declaration of Terence J. Cassidy, First Amended Complaint, ¶9.

The final element of collateral estoppel requires that the issue be essential to support a valid

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and final judgment on the merits. Arizona, 530 U.S. at 414. As noted above, a holding based on standing is a valid final judgment on the merits pursuant to F.R.C.P. 41(b). Plaintiff's standing was also essential to the judgment, as courts are to avoid unnecessary adjudication of constitutional issues. Liverpool N.Y. & P.S. Co. v. Emigration Commissioners, 113 U.S. 33, 39 (1885). The Ninth Circuit properly avoided the constitutional issue as to SCUSD and focused on Newdow's failure to comply with standing requirements. As justiciability must be analyzed before First Amendment issues may be addressed, the standing issue was essential to the judgment.

Newdow improperly seeks to have this Court relitigate an issue on which he previously litigated and lost. Defendants SCUSD and Dr. Carrillo Mejia respectfully submit that his Court's time and resources should not be wasted readjudicating an issue previously addressed and properly disposed of by the Ninth Circuit.

B. Newdow Lacks Standing to Challenge EGUSD's Policy and Practice

The issue of Newdow's standing as against EGUSD has previously been addressed by the U.S. Supreme Court. Newdow is thus precluded under the doctrines of res judicata and collateral estoppel from asserting the same claims in the present matter. As noted above, these doctrines act as a bar to Newdow's recovery and Defendants EGUSD and its Superintendent Dr. Steven Ladd respectfully request that this Court grant its Motion to Dismiss Newdow as a Plaintiff in this lawsuit.

1. Res Judicata

The U.S. Supreme Court addressed Newdow's claims as asserted against EGUSD in EGUSD v. Newdow, 124 S.Ct. at 2301. The Court held that "Newdow lacks prudential standing to bring his suit in federal court." Id. at 2312. Despite the conclusion of the U.S. Supreme Court, Newdow seeks to have his claims against EGUSD readjudicated by this Court.

Again applying the three requirements of res judicata as enunciated by the U.S. Supreme Court, it is clear Newdow's claims against EGUSD are precluded. *See* Blonder-Tongue Laboratories, 402 U.S. at 324. Both the causes of action and the parties in the present matter are identical to those in EGUSD v. Newdow. *See* infra III.A.1. Additionally, pursuant to Federal Rule of Civil Procedure 41(b), the Court's dismissal of Newdow's claims based on lack of standing is a final judgment on the merits. *See* infra III.A.1.

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Newdow has failed to allege any new facts that would establish that his custody situation has changed since EGUSD v. Newdow was heard by the United States Supreme Court. As such, he is precluded from challenging the constitutionality of EGUSD's policies for a second time.

2. Collateral Estoppel

In EGUSD v. Newdow, the United States Supreme Court addressed the exact issue of Plaintiff's standing to challenge EGUSD's policies. The holding therein was that Newdow lacked such standing. Thus, the issue was actually litigated and was a valid final judgment. For the reasons noted above in Section III.A.1., a judgment based on the justiciability doctrine of standing is a final judgment on the merits of the case. Fed. R. Civ. Proc. 41(b). As all three elements of collateral estoppel are met, Newdow is precluded from challenging EGUSD's policies and practices.

C. Newdow's Additional Bases for Standing Fail to Establish Him as a Proper Party.

Newdow alleges several bases for standing in addition to those founded on his relationship with his daughter. First Amended Complaint, ¶¶ 58-64. While some of the bases are simply reallegations of the assertions in Newdow's complaint from his first lawsuit (his attendance at school board meetings and volunteering in his daughter's classroom), there are two noticably different arguments. First, he alleges that he "would like to run for public office" but that his effort would be "futile" because "50% of Americans would refuse to vote for an Atheist merely because of his religious beliefs." Id. ¶ 58. Second, Newdow relies on his status as a real property owner and taxpayer in both Elk Grove and Sacramento. Id. ¶ 64. In analyzing whether the first of these allegations warrants a decision different from those reached by the Ninth Circuit and U.S. Supreme Court it is necessary to look to the Supreme Court's language addressing Newdow's previous arguments of additional bases for standing.

> Newdow's complaint and brief cite several additional bases for standing: that Newdow "at times has himself attended–and will in the future attend–class with his daughter,";...that he "has considered teaching elementary school students in [the School District],"...;that he "has attended and will continue to attend" school board meetings at which the Pledge is "routinely recited,"...; and that the School District uses his tax dollars to implement its Pledge policy.... *Even if these arguments suffice to establish Article III standing, they do not respond to our prudential concerns.*"

EGUSD v. Newdow, 124 S.Ct. at 2312 n.3 (emphasis added). Just as the U.S. Supreme Court dismissed Newdow's additional bases for standing in EGUSD v. Newdow, so should the Court in

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this matter. Article III standing limitations require a plaintiff to show that the conduct of which he complains caused him to suffer an "injury in fact" which may be redressed by a favorable judgment. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Prudential standing requirements prohibit a plaintiff from raising another person's legal rights or bringing a generalized grievance which is more appropriately addressed in the representative branches. Allen v. Wright, 468 U.S. 737, 751 (1984). Additionally, prudential standing requires that the plaintiff's complaint fall within the zone of interests protected by the law invoked. Id.

Newdow's allegation that his desire to run for office is hampered by recitation of the "under God" portion of the Pledge is precluded by the same lack of prudential standing as exists in the arguments addressed by the U.S. Supreme Court above. Newdow's claim, even with this argument, is still "founded on family law rights that are in dispute" and "may have an adverse effect on the person who is the source of the plaintiff's claimed standing." EGUSD v. Newdow, 124 S.Ct. at 2312. Because Newdow lacks the legal right to control the educational or religious upbringing of his child and is merely attempting to indirectly affect her rights, the Ninth Circuit's and U.S. Supreme Court's precedent in dismissing Newdow for lack of standing should be reaffirmed.

As for Newdow's second allegation based on his status as a taxpayer in both Sacramento and Elk Grove, he still has failed to allege facts sufficient to support standing. In Newdow I, the Ninth Circuit held Newdow lacked standing to challenge SCUSD's policies despite the fact that he paid taxes to the County of Sacramento. *See* Newdow I, 328 F.3d at 485; *see also* Exhibit A School District Defendants' Request for Judicial Notice, Complaint from Newdow I, ¶ 109 ("Plaintiff pays taxes to the United States, to the State of California and to the County of Sacramento."). The Ninth Circuit's decision was made under the same circumstances as exist in the present matter. Newdow paid taxes to Sacramento County at the time of his prior complaint; he does the same today. No new circumstances warrant a reconsideration of the Ninth Circuit's valid final judgment on the merits as to Newdow's standing to challenge SCUSD's policies and practices.

Similarly, Newdow's status as a property owner in Elk Grove does not suffice to establish him as the proper party to challenge EGUSD's policies and practices. While at the time of the U.S. Supreme Court's decision Newdow did not pay taxes to the EGUSD school district, it appears from

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his First Amended Complaint that he now does. EGUSD v. Newdow, 124 S.Ct. at 2312, n3. Newdow now alleges he owns real property in Elk Grove and therefore pays property tax to support EGUSD. Newdow's First Amended Complaint ¶ 9.[3] Notably, however, the bar on citizen standing is treated as constitutional, not prudential. Lujan, 504 U.S. at 573-74. In the present matter, Newdow is raising a "generally available grievance about government" based on "his and every citizen's interest in proper application of the Constitution and laws...." Id. at 573. Therefore, Newdow has not suffered an injury in fact as required by Article III, and he lacks standing to challenge EGUSD policy. However, even if Newdow's status as a taxpayer somehow satisfied the case or controversy constitutional requirement, as the U.S. Supreme Court noted, the additional standing arguments still "do not respond to...prudential concerns." EGUSD v. Newdow, 124 S.Ct. at 2312 n.3. Therefore, regardless of Newdow's status as a tax payer in Elk Grove, the U.S. Supreme Court's holding that he lacks prudential standing remains true.

D. Plaintiffs Jan Roe, Roechild-1 and Roechild-2 Do Not Have Standing and Therefore Are Not Proper Parties to This Action

The issue of standing boils down to whether Plaintiffs have alleged such a "personal stake in the outcome" as to assure that "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illuminations of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). It is the burden of the party seeking jurisdiction in his favor "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." United States v. Hays, 515 U.S. 737, 743 (1995) (citations omitted). As alleged in Paragraph 12 of the First Amended Complaint, Plaintiff Jan Roe states that he is the parent of Roechild-1 and Roechild-2, "with full joint legal custody of those children." Defendants submit that this statement is insufficient to support a finding that Plaintiffs Jan Roe and Roe children are proper

[3] While his taxpayer status in Elk Grove changed, Newdow's status in Sacramento has not. At the time of Newdow's original lawsuit, he was and continues to be an owner of property in Sacramento. *See* Exhibit A to Request For Judicial Notice, Original Complaint from Newdow I ¶ 109. The Ninth Circuit, with knowledge of this fact, properly determined that Newdow lacked standing to challenge SCUSD's policy because his daughter was not a student there. Newdow I, 328 F.3d at 485. No new circumstances exist to warrant deviation from the Ninth Circuit's holding, and therefore Newdow is precluded from challenging SCUSD's policy.

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parties to raise this dispute. Plaintiffs failed to allege that Jan Roe has final decision-making authority regarding the educational-upbringing of Roe children.

Defendants, in an attempt to resolve this issue without involvement of the Court, asked Plaintiffs' counsel for clarification. Declaration of Terence J. Cassidy ¶ 2. In response, Plaintiffs' counsel provided a Declaration of Jan Roe as well as a Family Law Stipulation and Order indicating that Jan Roe has joint legal and joint physical custody of Roe children. None of the materials provided indicate that he has final decision-making authority regarding the educational upbringing of his children. Id. ¶ 3. Moreover, in addition to the documents provided, Defendants were informed by counsel for Plaintiffs that a new custody arrangement is currently being negotiated which will likely alter the current custody situation. Id. ¶ 4.

Based on the information learned from Plaintiffs' counsel, it is clear that Jan Roe and consequently Roe children do not have standing to bring this lawsuit. California Education Code Section 51101(d) prohibits a school from allowing participation of a parent in the education of their child if it conflicts with a valid custody order. In the present case, insufficient information has been presented to clearly establish that Jan Roe has decision-making authority over the educational upbringing of Roe children. Consequently, Plaintiffs have also failed to establish that Roe children are properly represented in this action. *See* F.R.C.P. 17(c). However, even if Plaintiff had appropriate authority over the children's educational upbringing, that circumstance could change during the renegotiation of the new custody agreement. As the U.S. Supreme Court noted in EGUSD v. Newdow, "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's standing." 124 S.Ct. at 2312. The admitted unstable nature of the parents' custody agreement gives rise to "hard questions of domestic relations" which require the Court to "stay its hand rather than decide a weighty question of federal constitutional law." Id. at 26-27.

Given that Plaintiffs Jan Roe and Roe children have failed to establish themselves as the proper parties to assert these claims, Defendants request that its Motion to Dismiss Plaintiffs Jan Roe, Roechild-1 and Roechild-2 as Plaintiffs in this action be granted. Similarly, as Jan Roe and

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Roe children are the only Plaintiffs who seek to challenge the policies and practices of EJESD and RLUSD based on the children's current enrollment in those Districts, Defendants also request that EJESD, Dr. Dianna Mangerich, RLUSD and Frank S. Porter be dismissed from this action as no proper party presently exists to require their participation as Defendants.

E. Plaintiffs' Claims Against Defendants Ladd, Mejia, Mangerich and Porter in Their Official Capacities Should Be Dismissed as Plaintiffs' Claims Are Actually Against the Defendant School Districts and Not the Individual Defendants.

Plaintiffs have asserted their claims against Defendants Ladd, Meija, Mangerich and Porter in their official capacities as superintendents of the Defendant School Districts. *See* Newdow's First Amended Complaint ¶ 21, 23, 25, 27. Thus, Plaintiffs essentially assert what amounts to a claim against the Defendant School Districts, not the individually-named Defendants. *See* Kentucky v. Graham, 473 U.S. 159, 165-160; 105 S.Ct. 3099, (1985) (noting that the real party in interest in an official capacity suit is the governmental entity and not the named official).

In Monell v. Department of Social Services of New York, 436 U.S. 658 (1978), the Supreme Court concluded that official-capacity suits are simply another way of pleading an action against the entity of which the officer is an agent. Monell, 436 U.S. at 690, n.55. "There is no longer a need to bring official-capacity actions against local government officials, for under Monell . . . , local government units can be sued directly for damages and injunctive declaratory relief." Graham, *supra*, 473 U.S. at 167 n.14. In an official-capacity suit, the government entity is the real party in interest. Id. at 159, 165-166. If individuals are being sued in their official capacity as municipal officials and the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed. Id. As held in Luke v. Abbott, 954 F.Supp. 202, 204 (C.D. Cal. 1997):

> After the Monell holding, it is no longer necessary or proper to name as a defendant a particular local government official acting in official capacity. To do so only leads to a duplication of documents and pleadings, as well as wasted public resources for increased attorneys fees. A plaintiff cannot elect which of the defendant formats to use. If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct defendant. If only the official-capacity officer is named, it would be proper for the Court upon request to dismiss the officer and substitute instead the local government entity as the correct defendant.

Thus, in this matter, the claims against the individual Superintendents of the Defendant

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School Districts are merely redundant and/or superfluous. Therefore, the Superintendent Defendants respectfully request that they be dismissed from this case.

F. The Patriotic Observance Policies of the Defendant School Districts Which Provide for Voluntary Recitation of the Pledge by Willing Students Are Constitutional Pursuant to the U.S. Supreme Court Decision in *West Virginia State Board of Education v. Barnette*.

Plaintiffs assert the Pledge violates the Establishment Clause and is thus unconstitutional because it contains the words "under God." Exhibit A to Declaration of Terence J. Cassidy, First Amended Complaint, Prayer for Relief II. Plaintiffs further argue that Defendant School Districts' Patriotic Observation policies which provide for daily voluntary recitation of the Pledge are unconstitutional restrictions on their First Amendment rights. Id. at ¶ 133. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] The purpose of the Establishment Clause is to prevent the intrusion of either the church or the state upon the other. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The First Amendment does not require that in every respect there should be separation of church and state. Zorach v. Clauson, 343 U.S. 306 (1952). In fact, "[s]ome relationship between government and religious organizations is inevitable." Lemon, 403 U.S. at 614. This is because we are "a religious nation," (Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892)[5]) and "a religious people whose institutions presuppose a supreme being." Zorach, 343 U.S. at 313.

The Supreme Court has previously addressed First Amendment freedom of religion issues in the context of the Pledge and necessarily upheld policies which provided for its voluntary recitation. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943), the U.S. Supreme Court held that a West Virginia regulation that required school children in the state to recite the Pledge[6] or be considered insubordinate was unconstitutional. The plaintiffs in Barnette were Jehovah's Witness students who, in accordance with their religious beliefs, refused to salute the flag.

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[4]These clauses apply to the states by incorporation into the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[5]This case cites numerous examples of expressions that ours is historically a religious nation.

[6] Defendants recognize the Pledge did not contain the phrase "under God" when Barnette was decided.

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Id. at 629. In deciding the case, this Court noted that compulsory recitation of the Pledge "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks," as well as " . . . affirmation of a belief and an attitude of mind." Id. at 633. Ultimately, this Court summarized its finding as follows:

> If there is any fixed star in our constitutional constellation, it is that 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. at 642.

Despite concerns that compelling students to recite the Pledge violated students' free speech rights under the First Amendment by compelling political ideology, this Court did not banish recitation of the Pledge in public schools. Instead, this Court determined that states (and school districts) cannot compel students to recite the Pledge. Since that time, the clear import of Barnette has been that the voluntary recitation of the Pledge by public school children throughout this country, which inspires patriotism and love of country, is constitutionally permissible. In EGUSD v. Newdow, the U.S. Supreme Court majority reiterated this sentiment by stating that "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." 124 S.Ct. at 2305. Chief Justice Rehnquist restated this sentiment in his concurrence wherein he noted that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church." Id. at 2320 (Rehnquist, C.J., concurring). Review of these statements clearly reveals a close alignment between beliefs of the U.S. Supreme Court and the policies of the Districts; both seek to promote patriotism and national unity.

The U.S. Supreme Court in Barnette refused to abolish voluntary recitation of the Pledge in schools. In doing so, it implicitly authorized continuation of the Pledge, so long as participation was voluntary. The result is that an objecting student's First Amendment rights are not violated when he or she is exposed to willing students reciting the Pledge. There is simply no logical reason to differentiate between the rights at stake in this case and those in Barnette. Both cases involve the question of whether students are compelled to declare a belief in violation of the First Amendment.

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In either case, the content of the Pledge is arguably inconsistent with or contrary to one's religious belief. The balance achieved by the Court in Barnette between the district's interest in impressing upon the minds of students principles of patriotism and the individual student's right of conscience is applicable to children of atheists just as it is to Jehovah's Witnesses. *See* California Education Code § 233.5(a). As the Defendant School Districts' policies are consistent with the holding in Barnette, they are constitutionally permissible.

G. The Pledge of Allegiance, as Stated in 4 U.S.C. Section 4, is Constitutional.

The issue of whether the Defendant School Districts' policies violate the Constitution hinges on the constitutionality of the Pledge. Logically, if this Court finds the Pledge is consistent with the Establishment Clause and Free Exercise Clause, then the Districts' policies requiring its voluntary recitation are consistent as well. As clear precedent supports the constitutionality of the Pledge, Plaintiffs have failed to allege facts sufficient to support a cause of action for violation of their First Amendment rights, and Defendants' Motion to Dismiss should be granted.

The U.S. Supreme Court has affirmed the constitutionality of the Pledge on two occasions. In Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (questioned on other grounds by DeStefano v. Emergency Housing Group, Inc. 247 F.3d 397 (2d Cir. 2001)), the Court determined that inclusion of a nativity scene in a city's Christmas display was constitutional. The Court reasoned that the nativity scene depicted the "historical origins of this traditional event" and noted the words "under God" in the Pledge carry a similar purpose of "acknowledgment of our religious heritage." Id. at 676, 675. The Supreme Court came to the same conclusion in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 616-20 (1989), where it determined a Menorah was a permissible part of a holiday display under the Establishment Clause. The Court looked to the Lynch decision and opined that the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03 (citations omitted).

While neither Lynch nor County of Allegheny directly address challenges to the Pledge, the Supreme Court's analysis supporting its decisions is not "mere *obiter dicta*." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). Rather, it is well-established rationale upon which the Court based the results of its decisions. Id. at 66-67. Such dicta "have a weight that is greater than ordinary

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judicial dicta as a prophecy of what [the] Court might hold" and should not be "blandly shrug[ged]...off because they were not a holding." Zal v. Steppe, 968 F.2d 924, 935 (1992).

Aside from the Supreme Court opinions above, the Religious Clauses have not been construed by the U.S. Supreme Court "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970). As Justice O'Connor states in her concurrence, "[e]radicating...references [to divinty in symbols, songs, mottoes and oaths] would sever ties to a history that sustains this nation even today." EGUSD v. Newdow, 124 S.Ct. at 2322 (O'Connor, J., concurring). Instead, challenged conduct or statutes are reviewed based on whether they establish or interfere with religious beliefs or tend to do so. *See* Walz, 397 U.S. at 669. The Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Lemon, 403 U.S. at 614. The Religion Clauses do not prefer that the government "show a callous indifference to religion" or prefer those who believe in no religion over those who do believe. Zorach, 343 U.S. at 314. Moreover, they do not bar federal or state regulation of conduct whose effect merely happens to coincide with tenets of some or all religions. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

H. The District's Patriotic Observance Policies Satisfy the Tests Adopted by the Supreme Court For Identifying Establishment Clause Violations.

Plaintiffs allege that the Defendant School Districts' policies providing for voluntary recitation of the Pledge are unconstitutional based on inclusion of the words "under God." These policies were enacted to satisfy the mandates of California Education Code Section 52720 which is titled "[d]aily performance of patriotic exercises in public schools." Education Code Section 52720 states that appropriate patriotic exercises must be conducted at the beginning of the first regularly scheduled class or activity at which the majority of the students at the school normally begin the school day. The recitation of the Pledge is noted as satisfying the requirements of the statute. Id. In analyzing the constitutionality of the District Policies, it is necessary to review the tests used by the U.S. Supreme Court to assess whether a law or policy violates the Establishment Clause.

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In Schempp, the Court set forth a test for analyzing whether a legislative enactment violates the Establishment Clause. Id. at 222. Specifically, the issues in Schempp were: (1) whether a Pennsylvania law that required public schools to begin each day by reading ten verses from the bible to the students was constitutional; and (2) whether a Maryland statute which required the reading of at least one chapter from the Bible in conjunction with recitation of the Lord's Prayer at the beginning of each school day was constitutional. Id. at 205, 211. To analyze this, the Court looked to the purpose and primary effect of the enactment. Id. at 222. If either the purpose or primary effect is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power. Id. Thus, the enactment must have (1) a secular legislative purpose; and (2) a primary effect that neither advances nor inhibits religion. Id. at 222-23.

In evaluating the purpose of a statute, if the public entity enacting the legislation expresses a plausible secular purpose in either the text or legislative history, then courts should generally defer to the stated intent. Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). The U.S. Supreme Court is reluctant to attribute unconstitutional motives to public entities when a plausible secular purpose may be discerned from the enactment. Mueller v. Allen, 463 U.S. 388, 394-95 (1983). Instead, the Court has invalidated legislative or governmental actions finding a secular purpose is lacking only when it has concluded there is no question that the statute or activity was motivated wholly by religious considerations. Lynch, 465 U.S. at 680. Thus, the purpose of an enactment or action does not have to be exclusively secular. Id. at 681; Wallace, 472 U.S. at 64 (Powell, J., concurring).

In 1971, a third step was added to the test set forth in Schempp. The result is now commonly referred to as the Lemon test. The third step requires the Court to ensure the statute does not foster an excessive government entanglement with religion. Lemon, 403 U.S. at 612-13. In analyzing excessive entanglement, factors to evaluate include the character and purpose of the benefitted institutions, the nature of the aid provided and the resulting relationship between the state and the religious authority. Roemer v. Board Of Pub. Works, 426 U.S. 736, 748 (1976). To create excessive entanglement, "comprehensive, discriminating, and continuing state surveillance" is necessary. Mueller, 463 U.S. at 403. In 1983, the U.S. Supreme Court departed from the Lemon test in

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reviewing the constitutionality of legislative prayer in the Nebraska Legislature. Marsh v. Chambers, 463 U.S. 783 (1983). There the Court considered the Nebraska Legislature's practice of opening its daily sessions with a prayer lead by a chaplain who was paid by the state. In reaching a decision, the Court reviewed the history of legislative prayer at both the national and state levels. Id. at 792. Also considered was the fact that three days after Congress authorized the appointment of paid chaplains for the houses of Congress, the same men finalized the language of the Bill of Rights. Id. at 788. The Court went on to state, "it is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and, indeed, predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." Id. at 790. In light of this unbroken history, the Court concluded the practice of opening legislative sessions with prayer had become a part of the "fabric of our society" and thus did not violate the Establishment Clause. Id. at 792.

Thereafter, in 1984, Justice O'Connor proposed what has since been labeled the "endorsement test" in her concurring opinion in Lynch. 465 U.S. at 688. This test requires the Court to determine whether a government action or enactment: (1) creates an excessive entanglement with religious institutions; or (2) endorses or disapproves of religion. Id. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." Id. In answering the endorsement question, the Court must examine what the government intended to communicate and what was actually conveyed. Id. at 690.

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law or policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored and preferred.

Wallace, 472 U.S. at 70 (O'Connor, J., concurring).

The relevant issue in the endorsement inquiry is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of religion. Id. at 76. The objective observer is similar to the "reasonable person" in

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tort law. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring).

Yet another means of analyzing the constitutionality of a statute for violation of the Establishment Clause was fashioned in Lee v. Weisman, 505 U.S. 577 (1992). In what became known as the "coercion test," this Court evaluated whether state sponsored invocation and benediction prayers at a public school graduation were constitutional. Essentially, Lee applied the standard set forth in prior school prayer cases which states that the government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes or tends to establish a religion or religious faith. Id. at 586-87.

With the various analytical tests set forth, it is clear that each new Establishment Clause challenge must be evaluated on its own merits to determine whether any of the aforementioned tests, or perhaps some other analytical tool, is best suited to determine whether the challenged action or statute is constitutional.[7] As Justice O'Connor noted in her concurring opinion in Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 720 (1984), "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches."

1. The Pledge Must Be Considered as a Whole

Regardless of the test applied, the focus of the Court's constitutional inquiry must be on the Pledge as a whole, not just the words "under God." When students recite the Pledge, they do not merely recite the words "under God," they recite the Pledge in its entirety. Thus, it is an analytical anomaly to examine the effect of those two words rather than the effect of the Pledge as a whole. Morever, in conducting the Establishment Clause analysis, the U.S. Supreme Court has consistently analyzed religious text and symbols in context rather than looking at merely the alleged religious content alone. Lynch, 465 U.S. at 680. For example, in Lynch this Court evaluated the effect of a creche that was included in a display that also contained secular symbols of Christmas and found that in context, the creche did not convey a message of governmental endorsement of religion. Id. at 680-

[7] Circuit Judge Fernandez noted, in addressing close adherence to established tests and elements, that there is a potential for judges to "fail[] to look at the good sense and principles that animated those tests in the first place." Newdow I, 328 F.3d at 493 (Fernandez, J., concurring in part and dissenting in part).

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86.

Similarly, in County of Allegheny, this Court looked at the entirety of a Christmas display that included a Christmas tree, a Menorah and a liberty sign and found the Menorah did not convey an endorsement of religion. 492 U.S. at 616-20. Thus, despite the fact the words "under God" were added to the Pledge in 1954, they must be evaluated in the context of the larger, patriotic message.

2. The Districts' Policies Satisfy the Lemon and Endorsement Tests

Under the first prong of the Lemon test, the policy has a secular purpose of encouraging patriotic exercises and helping teach children about the role of religion in the history of the United States. Of note is the fact that a statute only violates the Establishment Clause if it is wholly motivated by religious considerations. Lynch, 465 U.S. at 680. The secular purpose of encouraging patriotism has been explicitly recognized by the U.S. Supreme Court majority which stated that recitation of the Pledge "is a *patriotic exercise* designed to foster national unity and pride in those principles." EGUSD v. Newdow, 124 S.Ct. at 2305 (emphasis added). This sentiment was reiterated by the Chief Justice in his concurrence. Id. at 2317, 2319 (Rehnquist, C.J., concurring) ("[T]he Pledge itself is a patriotic observance focused primarily on the flag and the Nation....").

The legislative history underlying the enactment of the 1954 Amendment to the Pledge clearly establishes that the words "under God" were not added for the purpose of advancing religion. Specifically, the House Report reveals:

> From 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. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper.

H.R. Rep. No. 83-1693, at 2 (1954).

The House Report further noted references to God in the Declaration of Independence, the inscription of "In God We Trust" on currency and coins, and references to God in the Gettysburg Address. Id. Representative Louis C. Rabaut, in describing the need for the legislation, stated, "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government." Id. at 3. He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily

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impressed with a true understanding of our way of life and its origins." Id. These remarks reveal Representative Rabaut felt the amendment had the purpose of helping teach children about the role of religion in the history of the United States. Given the underlying patriotic message of the 1954 Amendment combined with the patriotic references by the U.S. Supreme Court, it is clear that the Districts adopted the voluntary Pledge recitation policies for the purpose of satisfying the Patriotic Observance requirement of California Education Code Section 52720, not to advance religion. Though the purpose of an enactment need not be exclusively secular to satisfy this prong (Wallace, 472 U.S. at 64 (Powell, J., concurring)), the foregoing clearly establishes secular patriotic and historical purposes sufficient to satisfy the first prong of the Lemon test.

The second prong of the Lemon test is also readily satisfied because the policy does not "advance or inhibit" religion. The effect prong of the Lemon test asks whether the practice under review conveys a message of endorsement or disapproval of religion. Id. at 56 n.42, *quoting* Lynch 465 U.S. at 690 (O'Connor, J., concurring). Similarly, the second prong of the endorsement test asks whether the practice endorses or disapproves of religion. Both are satisfied here because the effect of the policies does not convey a message of endorsement or disapproval of religion. Instead it merely endorses the Pledge as a patriotic observance.

In assessing whether a state's action endorses religion, the standard is whether a reasonable person would view a government practice as endorsing religion. Pinette, 515 U.S. at 777. The endorsement inquiry is not "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of [being exposed to] a faith to which they do not subscribe." Id. at 779 (O'Connor, J., concurring). A state has not made religion relevant to standing in the community simply because a person might be uncomfortable with an action. Id.

As noted by the author of the endorsement test, no reasonable person would find the Defendant School Districts adopted the Patriotic Observance policies to endorse religion. EGUSD v. Newdow, 124 S.Ct. at 2323 (O'Connor, J., concurring) (noting that no reasonable observer would perceive the references to God in solemnizing an occasion as signifying a government endorsement of any specific religion, or even of religion over non-religion). Moreover, there is no reasonable basis to find the Districts' policies in fact endorse religion because, as demonstrated *infra*, the Pledge

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is not a religious act nor does it convey a religious belief. EGUSD v. Newdow, 124 S.Ct. at 2319-20 (Rehnquist, C.J., concurring) ("The phrase "under God" is in no sense a prayer, nor an endorsement of any religion...."). Thus, the Districts' policies satisfy the second prong of the Lemon test as well as the effect prong of the endorsement test.

The policies also satisfy the excessive entanglement prong of the Lemon and endorsement tests as the Districts do not have to continually exercise governmental control over the recitation of the Pledge. Moreover, since the Pledge is not a religious act, there is not an excessive government entanglement with religion. Therefore, based on the analysis of the Lemon and endorsement tests, the District policies providing for voluntary recitation of the Pledge are constitutional.

3. The Pledge is Constitutional under Marsh, as it Has Become Part of the "Fabric of Our Society"

In Marsh, the U.S. Supreme Court recognized that common sense and historical analysis were better suited to address Establishment Clause issues than were any specific tests previously formulated by the Court. In so doing, they looked at the history of legislative prayer and the actions of the founding fathers. Marsh, 463 U.S. at 791-92. Specifically of note was the fact that three days after Congress authorized the appointment of paid chaplains for the houses of Congress, the same men finalized the language of the Bill of Rights. Id. at 788. This led to the conclusion that the "First Amendment draftsmen [] saw no real threat to the Establishment Clause arising from a practice of prayer [in the legislature]." Id. at 791. As a result, this Court held that a state legislature's recital of a prayer is constitutional because it is a long standing, historically accepted practice that has become part of the "fabric of our society." Id. at 792.

As applied to the instant case, Justice Brennan opined that the Pledge has become so interwoven into the fabric of our society that it is consistent with the Establishment Clause. Schempp, 374 U.S. at 303. As Justice Brennan made that statement back in 1963 -- just four years after the phrase "under God" was added to the Pledge -- it appears he believed that an extensive practice of reciting the Pledge a specific way was not necessary in finding that it had become a part of the fabric of our society. Defendants submit it is even more interwoven into the fabric of our society now because it has been recited in its current form with the phrase "under God" for over fifty

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consecutive years.

Since "under God" was introduced into the Pledge, the population of the United States has increased by over 130 million citizens.[8] A substantial number of those citizens have been raised and attended school where they recite the Pledge. Those same persons have grown up only knowing the Pledge with the phrase "under God" and have passed this version of the Pledge on to their children. Thus, the Pledge with the phrase "under God" has become a part of the fabric of our society through constant repetition by schoolchildren and adults across the country during the past fifty years.

The importance of the Pledge as codified is exemplified by the national uproar caused by the Ninth Circuit's decision in the instant case. Congressional reaction to the Ninth Circuit's ruling in Newdow I was immediate. Multiple resolutions in support of maintaining the Pledge with the words "under God" were adopted starting June 26, 2002. *See* H. Res. 459, 107th Cong., 2d Sess. (2002) (stating that the Pledge, including the phrase "One Nation, under God," reflects the historical fact that a belief in God permeated the founding and development of our Nation); S. Res. 292, 107th Cong., 2d Sess. (2002) (declaring that the Senate strongly disapproves of the decision in Newdow I); H.J. Res. 26, 108th Cong., 1st Sess. (2003), S.J. Res. 7, 108th Cong., 1st Sess. (2003) (each proposing amendment to Constitution to protect the Pledge of Allegiance); S. Res. 71, 108th Cong., 1st Sess. (2003), S. Res. 292, 107th Cong. 2nd Sess. Such immediate uproar by Congress is indicative of how the Pledge has become woven into the fabric of our society.

As a result, the Pledge in its current form, as well as the Districts' policies, are constitutional and Defendants request that their Motion to Dismiss be granted.

4. The Pledge Is Not a Religious Act or a Prayer and Thus Does Not Fail the Coercion Test

As noted above, the coercion test was set forth and applied in Lee, in ruling on the constitutionality of prayers at graduation ceremonies. 505 U.S. 577. Throughout the opinion, Justice Kennedy of the majority refers to "prayers" and "religious exercises" or "religious acts," thereby limiting the Court's holding to those circumstances. Prayer has been defined by the U.S. Supreme

[8]The National Population Estimates prepared by the US Census Bureau estimates the national population of the United States as of July 1, 1954, to be 163,025,854 compared with an increase on July 1, 2001, to an estimated 293,655,404. *See* U.C. Census Bureau website, http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf.

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Court as "a solemn avowal of faith and supplication for the blessing of the almighty." Engel v. Vitale, 370 U.S. 421, 424 (1962). Prayer is also defined as "a humble communication in thought or speech to God or to an object of worship expressing supplication, thanksgiving, praise, confession, etc." THE NEW WEBSTER'S DICTIONARY 315 (1990). The Pledge with the phrase "under God" is nothing like the clearly religious act of prayer. In no way can the Pledge be construed to be a supplication for blessings from God nor can it be reasonably argued that it is a communication with God. The Pledge is, quite simply, a patriotic act – not a religious act.

A review of the U.S. Supreme Court's Establishment Clause jurisprudence reveals that at no time has the Court considered the Pledge to be tantamount to a religious act such as a prayer. In fact, the U.S. Supreme Court recently affirmed that the pledge is a "patriotic exercise." EGUSD v. Newdow, 124 S.Ct. at 2305; EGUSD v. Newdow, 124 S.Ct. at 2325 (O'Connor, J., concurring) (noting that no reasonable observer would believe the Pledge is a prayer). The Chief Justice, in his concurrence aptly states, "I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious exercise' of the sort described in Lee. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents." EGUSD v. Newdow, 124 S.Ct. at 2319-20 (Rehnquist, C.J., concurring).

In Engel, the U.S. Supreme Court held that state officials could not require the recitation of a prayer in public schools at the beginning of each school day, even if the prayer was denominationally neutral and students who did not wish to participate could be excused while the prayer was being recited. 370 U.S. at 430-33. In reaching its conclusion, the Court clearly separated patriotic exercises from prayer, noting that patriotic exercises, despite references to the Deity, are to be encouraged in schools.

> 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 there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bare no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21. Further, in his concurrence, Justice Douglas looked to the House Report

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recommending the addition of the words "under God" and found that the addition "in no way run[s] contrary to the First Amendment but recognize[s] 'only the guidance of God in our national affairs.'" Engel, 370 U.S. at 440 n.5 (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., p.3).

Acknowledgment by schoolchildren of the Nation's religious heritage through voluntary recitation of the Pledge is a far cry from forcing participation in a religious exercise. "[E]xposure to something does not constitute teaching, indoctrination, opposition or promotion of...any particular value or religion." Mozert v. Hawkins County Bd. Of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988). As noted below, the Pledge is incorporated into the curriculum of schools to teach children about patriotism and the beliefs and attitudes of those who founded our government. Such exposure is educational, not coercive.

Overall, considering the overwhelming support of the Pledge as amended by the U.S. Supreme Court as well as the legislative history of the Pledge and the role it has played in our nation's history, it is clear that the Pledge is constitutional, no matter which (if any) test is applied.

I. This Court and other Courts have Held that the Pledge is Constitutional.

Prior to the instant case, the only appellate court to consider the constitutionality of the Pledge was the Seventh Circuit which held that a state statute requiring recitation of the Pledge each day in elementary schools is constitutional. Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993). Even though the Sherman court did not explicitly apply the Lemon, endorsement or coercion tests, it did utilize the analytical flexibility inherent in this Court's Establishment Clause decisions to formulate an appropriate analysis to examine the constitutionality of the Pledge. This analysis adopted the spirit of Lynch where it was stated in reference to the Establishment Clause, "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criteria in this sensitive area." 465 U.S. at 679, citing Tilton v. Richardson, 403 U.S. 672, 677-78 (1971).

In reviewing the Pledge, the Sherman Court asked whether ceremonial references in civic life to a deity constitute prayer or support for monotheistic religions to the exclusion of atheists. The Court answered the question by relying upon history as a guide, similar to the approach used by the Supreme Court in Marsh. Sherman, 980 F.2d at 445. The Seventh Circuit reviewed references to

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God by Presidents George Washington and James Madison, the author of the First Amendment, references to the opening of Court sessions with the cry "God save the United States and this honorable Court," and references to God contained in the Declaration of Independence. Id. at 445-46. From this, Judge Easterbrook gleaned that the founding fathers did not deem ceremonial invocations of God "established" religion. Id. He then examined this Court's statements regarding the constitutionality of the Pledge and found them to be consistent with the idea that ceremonial references to God are distinguishable from prayer or other actions "establishing" religion. Id. at 446-48. As a result, the Seventh Circuit ruled the Pledge is constitutional. Id.

Back in 1968, this Court was also faced with a question regarding the constitutionality of the Pledge. Chief Judge MacBride, of this Court, ruled in the case of Smith v. Denny 280 F.Supp. 651 (E.D.Cal., 1968) that the Pledge of Allegiance, including the term "under God," being recited in public schools does not constitute a violation of the establishment clause. In Smith, the plaintiff sought a declaration that Education Code §5521 was unconstitutional and asked for a three judge panel to be assigned to decide that the words "under God" be removed from the Pledge. Id. at 652. Education Code §5521 is the predecessor of Education Code §55720 of the State of California which mandates, in pertinent part, that school districts are compelled to "conduct appropriate patriotic exercises." This Court held that the statute did not violate the constitution. Id. at 654.

The constitutionality of the Pledge is also currently at issue in the Fourth Circuit Court of Appeals where the case of Myers v. Loudon County School Board, 251 F.Supp.2d 1262 (E.D. Va 2003) was recently argued on March 18, 2005. In that case, the District Court held that the Pledge does not violate the Establishment Clause of the United States Constitution. Id. at 1269-1271. As other courts that have reviewed the constitutionality of the Pledge have held that the Pledge is constitutional, Defendants respectfully submit that this Court should also find the Pledge to be constitutional which should result in the dismissal of all Plaintiffs' claims in their entirety.

J. Plaintiffs Have Failed to State Claims for Violation of the Free Exercise Clause and the Religious Freedom Restoration Act.

The clear import of the Free Exercise portion of the First Amendment is "the right to believe and profess whatever religious doctrine one desires." Employment Div. v. Smith, 494 U.S. 872, 877

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(1990) (questioned on other grounds). However, no violation of the Free Exercise Clause exists if the policy or law challenged is neutral and of general applicability. Id. at 879. The Religious Freedom Restoration Act is closely tied to the Free Exercise Clause and prohibits the government from substantially burdening religious exercise without compelling justification. 42 U.S.C. 2000bb ("RFRA"). However, government policies that "may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not infringe on free exercise rights protected by the First Amendment and do not require the government to produce compelling justification for its actions. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988). For the reasons explained in Section III.H.4, the Pledge is not a "religious exercise" and does not "coerce" students into acting contrary to their religious beliefs. As no compelling justification is needed, the Pledge does not violate the Free Exercise Clause nor RFRA.

K. The Defendant School Districts' Patriotic Observance Policies Are Constitutional.

A determination that the Pledge as amended is constitutional nullifies the need to examine the constitutionality of the Districts' policies. Therefore, as the foregoing analysis establishes, the Pledge complies with the First Amendment, it also establishes the validity of the District policies.

However, it is worth noting that the District policies requiring voluntary recitation of the Pledge serve a larger purpose as part of a curriculum of public schools which seeks to instill a sense of history and patriotism in students to better prepare them for citizenship. References to religion are absolutely permissible if they are incorporated into an appropriate study of "history, civilization, ethics, comparative religion, or the like." Lynch, 465 U.S. at 679. The Pledge is part of the larger curricular framework which emphasizes patriotism and dignity of American citizenship. This curriculum gives meaning to the words of the Pledge. "[P]ublic education must prepare pupils for citizenship in the Republic" and "schools must teach by example the shared values of a civilized social order." Bethel School District v. Fraser, 478 U.S. 675, 681, 683. Patriotism and love of country are such values, and voluntary recitation of the Pledge is a long-standing method of helping achieve the schools' and society's goals. *See* Exhibit B to School District Defendants' Request for Judicial Notice, *History and Social-Science Content Standards for California Public Schools*

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Kindergarten Through Grade Twelve §§ K.1, 3.4, 5.7, 8.3, 11.1, 11.3 (March 2005).

From the very first year children enter the pubic school system, they are taught principals of American patriotism. Id. § K.1. This incorporation continues throughout a student's career in the public school system as they learn a sense of community and about principles of American constitutional democracy, individual liberties and the foundation of the American political system. Id. §§ 3.4, 5.7, 8.3, 11.1. As students progress, they analyze "the role religion played in the founding of America, its lasting moral, social, and political impacts, and issues regarding religious liberty." Id. §§ 11.3. Clearly, the Pledge, as amended, reflects these impacts on the founding of America and is properly included as one piece of the learning experience necessary to teach the next generation of citizens values that are "essential to a democratic society." Bethel, 478 U.S. at 681. The content of the curriculum in California public schools is also reflected in the California Education Code which requires that:

> Each teacher shall endeavor to impress upon the minds of the pupils the principles of morality, truth, justice, *patriotism*, and a true comprehension of the rights, duties, and dignity of American citizenship, and the meaning of equality and human dignity,...and to instruct them in the manners and morals and the principles of a free government. (emphasis added)

Cal. Educ. Code § 233.5(a).

The foregoing clearly establishes that the Pledge is integrated into the curriculum of California public schools and is properly used as a tool to "impress upon the minds of pupils the principles of patriotism." *See* California Education Code § 233.5.

IV.

CONCLUSION

As the Pledge is a constitutional patriotic message, not wholly motivated by religious considerations, Defendants respectfully request that Plaintiffs' claims be dismissed for lack of standing and failure to state a claim upon which relief can be granted.

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Dated: May 16, 2005

Respectfully submitted,

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