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

Civil Action No. 2:05-CV-00017-LKK-DAD

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,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA;
PETER LEFEVRE, LAW REVISION COUNSEL;
THE UNITED STATES OF AMERICA;
ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA;
RICHARD J. RIORDAN, CALIFORNIA SECRETARY FOR EDUCATION,
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.

# PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS

DATE: July 18, 2005

TIME: 10:00 am

COURTROOM: 4

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## I. INTRODUCTION

Plaintiffs have challenged the intrusion of the two purely religious words, "under God," into the nation's Pledge of Allegiance, and the use of that now monotheistic Pledge in the public schools. Defendants have challenged the standing of certain plaintiffs, the propriety of certain defendants, and have moved to dismiss the Complaint.

## II. LEGAL STANDARD

Plaintiffs agree with Defendants as to the legal standard. As stated in Nursing Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1229 (9th Cir., 2001):

> A dismissal for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001). The general rule for 12(b)(6) motions is that allegations of material fact made in the complaint should be taken as true and construed in the light most favorable to the plaintiff. Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle him or her to relief. Williamson v. Gen. Dynamics Corp., 208 F.3d 1144, 1149 (9th Cir. 2000).

## III. LEGAL ARGUMENT

### A. PLAINTIFF STANDING

#### 1. The Doe Plaintiffs have standing against EGUSD

The two Doe parents and DoeChild comprise an intact family with no custodial issues. DoeChild attends public school in EGUSD. Accordingly, these Plaintiffs unquestionably have standing to sue. Abington School District v. Schempp, 374 U.S. 203, 225 n.9 (1963) ("The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain.")

The Doe parents also have standing to sue as individuals who attend EGUSD functions where the Pledge is recited,[1] and as taxpayers.[2] Any conclusion to the contrary based on Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004), is inapplicable inasmuch as no "prudential" considerations are involved in their custodial relationship with DoeChild.[3]

#### 2. The Roe Plaintiffs have standing against EJESD and RLUSD

The School District Defendants (hereafter, "SDDs") attempt to have the Plaintiffs Roe dismissed due to purely hypothetical concerns for which nothing in the record provides justification.[4] Jan Roe is a parent with joint legal custody of the two Roe children, and there is nothing to suggest that such custody is in any way limited vis-à-vis this litigation. Unlike the

[1] See discussion, infra, at page 8.
[2] See discussion, infra, at page 11.
[3] See discussion, infra, at page 4
[4] Under the SDDs' scheme, no one would ever have standing, since confounding hypotheticals can be developed for any fact situation. Maybe the parties claiming to be parents aren't really the parents, and

situation that existed in Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 124 S. Ct. 2301 (2004), no family court ruling has in any way diminished Jan Roe's parenthood, and – until such time as that occurs – there is no reason or need to allege anything more than what has already been alleged. "As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend." Bender v. Williamsport Area School Dist., 475 U.S. 534, 551 (1986) (Burger, C.J., dissenting) (citations omitted).

Plaintiffs are in full agreement that the burden is upon them to allege facts sufficient to show standing. United States v. Hays, 515 U.S. 737, 743 (1995). They have met that burden by alleging that Jan Roe is a parent with joint legal custody of the two Roe children. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 501 (1975). Accordingly, the Roe Plaintiffs have standing.

Like the Does, Jan Roe also has standing as an individual who attends EJESD and RLUSD functions where the Pledge is recited, and as a taxpayer.

**3. Plaintiff Newdow has standing against EGUSD**

It should first be noted that – with the Doe plaintiffs' standing unchallenged – an examination of Newdow's standing (vis-à-vis EGUSD) is unnecessary. See, e.g., Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981) ("Because we find [one plaintiff party] has standing, we do not consider the standing of the other plaintiffs."); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 n.9 (1977) ("Because of the

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DNA samples ought to be required. Maybe the DNA reports will be forged, and deemed unacceptable unless notarized. Maybe the notaries were bribed …

presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit.").

If the Court still chooses to consider whether or not Newdow has standing on his own, the answer is that he does. Newdow has alleged standing on three grounds: (i) as a parent whose child attends public school within the EGUSD, (ii) as an individual who personally is forced to confront government-sponsored religious dogma, and (iii) as a taxpayer whose tax dollars are used to pay government agents to promote a purely religious idea with which he disagrees. With respect to the first two of those grounds, Plaintiffs agree that the Supreme Court has already spoken, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004), and that this Court is bound by the High Court's rulings. However, believing that the "prudential standing" determination was erroneous – and wishing to preserve the issue for appeal – Plaintiffs maintain that Newdow has standing on both bases (i.e., as a parent and as an individual forced to directly confront the Defendants' religious proclamations). Because the current circumstances of Newdow's taxpayer standing are distinctly different from those in Elk Grove, that case does not control. Rather, the Court is bound by Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

**(a) Newdow has standing as a parent**

In Elk Grove, the Supreme Court ruled that "having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court." Elk Grove, 124 S. Ct. at 2312. Yet not once – in either the *Petitioners' Brief on the Merits* or in the *Brief for the United States as Respondent Supporting Petitioners* – was the "prudential standing" argument raised. In fact, the word "prudential" never appeared even once … not only in both of those briefs, but in the respective Reply Briefs as well.

Accordingly, the need to brief the "prudential standing" issue never arose. "[B]y deciding cases … without benefit of oral argument and full briefing … [a] Court runs a great risk of rendering erroneous or ill-advised decisions." Harris v. Rivera, 454 U.S. 339, 349 (1981) (Marshall, J., dissenting). The fact that this "prudential standing" ruling was upheld only by a 5-3 majority in Elk Grove shows that full briefing on the "prudential standing" issue should have been provided prior to the Supreme Court's decision.

Newdow is a custodial parent with a custody order in place granting him joint legal custody of his child, and 30% physical custody. Appendix 2-A, ¶ 4. Although the mother has "final decision-making power," there has never been any indication that his love of, care for or dedication to his child is anything less than that of the most wonderful and devoted parent on Earth. Thus, the contention that what is actually a trivial legal imposition upon his parenthood[5] suffices to deprive him of his fundamental constitutional right to access the federal courts in order to protect his child or himself from additional constitutional injuries makes no sense whatsoever. This is especially the case since there is nothing in the family court order that is in any way affected by this (or the prior) lawsuit.[6]

Although the "prudential standing" ruling was portrayed as one stemming from a respect for state sovereignty, it is far more likely to have resulted from what is, in fact, the underlying problem that has given rise to this lawsuit: the lack of regard with which religious

[5] In a normal "joint legal custody" arrangement – where neither parent has final decision-making power – the status quo remains in effect, and the parent seeking to make a change must petition the family court. Under the arrangement currently in place with Newdow, he is always the one who must petition the family court. Thus, there is no difference under the mother-has-final-decision-making-power situation for any situation where Newdow would like to effect a change. The only difference is when the mother wants to effect a change, in which case Newdow has to use the same procedure he would otherwise have to use (if it were he who were instigating the change). In either case, the ultimate decision is made by the family court judge, not by either of the parents.

[6] The mother of Newdow's child has stated she prefers the God-infused Pledge. Yet there is nothing in the custody order that gives here – or any other parent – the power to have EGUSD violate the Constitution and impose a constitutional harm on her or any other child.

majorities treat infringements upon the religious liberties of minorities. Imagine, for instance, if EGUSD's teachers began every school day having their students stand up, face the flag, place their hands on their hearts, and say that we are "one Nation where whites are superior." Would the Supreme Court really have told a black parent with a custody order similar to the above that he couldn't seek relief in the federal courts to have his child's public school teachers stop spreading that unconstitutional racist notion to his own child? Would the fact that the mother was an avowed white supremacist, or that the mother claimed that the child also had racist opinions have made a difference? Clearly not, because the courts are now sensitive to the harms that occur when governmental condones racial bigotry. Palmore v. Sidoti, 466 U.S. 429 (1984). With religious bigotry, however, that sensitivity is often nowhere to be found. See, e.g., Minersville School District v. Gobitis, 310 U.S. 586 (1940).

Having children attend school in an environment where "the power, prestige and financial support of government is placed behind a particular religious belief" harms those children. Engel v. Vitale, 370 U.S. 421, 431 (1962). It interferes with their ability to reach their own, independent conclusions about religious belief, and it fosters animosity against those who come to conclude that other beliefs are more reasonable. Parents have a right to protect their children against those harms as much as against any others. Yet, in Elk Grove, the Supreme Court wrote as if this injury – which it has eloquently highlighted in the past[7] –

[7] "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. Furthermore, "the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools …" Consequently, the Court has been required often to invalidate statutes that advance religion in public elementary and secondary schools."

is of no consequence at all. "[The mother] tells us that her daughter has no objection to the Pledge," Elk Grove, 124 S. Ct. at 2311, stated the Court, as if the fact that a child's (or a parent's) failure to acknowledge an injury makes the injury less detrimental. If the issue were EGUSD's encouraging the nonuse of seatbelts, playing on railroad tracks, or snorting cocaine – none of which (unlike intruding religious dogma into a national pledge) is explicitly prohibited by the Constitution – one would hope that the Justices would have focused on ending those practices that put children at real risk of real injury. Yet in Elk Grove, more stock was placed in the fear that the child "would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child['s views on those issues]." Id. at 2307. Interestingly, such concerns were never expressed in West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943); Everson v. Board of Education, 330 U.S. 1 (1947); McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clausen, 343 U.S. 306 (1952); Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972) or Lee v. Weisman, 505 U.S. 577 (1992).

It is especially noteworthy that in Palmore v. Sidoti, 466 U.S. 429 (1984) – where the sole issue confronting the Court was the actual custody order issued by a family court judge – the Supreme Court assumed jurisdiction without any "prudential standing" caveats. The Court even went so far as to state that the constitutional mandate of governmental adherence to equal protection is so great that it supersedes actual injury to the child:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.

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Edwards v. Aguillard, 482 U.S. at 583-584 (citations and footnote omitted).`See, also, Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

Palmore v. Sidoti, 466 U.S. 429, 433 (1984). With the Supreme Court having acknowledged that Newdow has Article III standing,[8] the "prudential" concerns in this case provide no greater justification for depriving Newdow of his fundamental right to access the federal courts than they did for depriving the plaintiff in Palmore of that basic liberty.[9]

**(b) Newdow has standing as a person forced to confront government-sponsored religious dogma**

As with his parenthood-based standing, Newdow's standing as an individual unwillingly forced to confront government-sponsored religious dogma during the EGUSD School Board meetings must also be denied by this Court due to the Supreme Court's decision in Elk Grove. Again, however, Plaintiffs wish to preserve the issue for appeal.

The Court wrote:

> Newdow's complaint and brief cite … that Newdow … "has attended and will continue to attend" school board meetings at which the Pledge is "routinely recited," … Even if th[is] argumen[t] suffice[s] to establish Article III standing, it does] not respond to our prudential concerns.

Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 n.8 (2004) (citations omitted). The idea that litigation in the family court – which was initiated more than a year **after** Newdow's first challenge to "under God" in the Pledge (and which would have been completely unaffected by any ruling on the merits) – provides "prudential" reasons to deprive Newdow of his fundamental right to seek redress (as regards his parenthood) in the federal courts seems strange enough. That this "prudential" concern would extend to Newdow's own

[8] "To be clear, the Court does not dispute that respondent Newdow … satisfies the requisites of Article III standing." Elk Grove, 124 S. Ct. at 2313 (Rehnquist, C.J., concurring).

[9] Chief Justice Rehnquist went further, noting that "this case presents a substantial federal question that transcends the family law issue to a greater extent than Palmore." Elk Grove, 124 S. Ct. at 2314 (Rehnquist, C.J., concurring). Thus it appears that the Chief Justice believes that Newdow actually has a greater claim than the Palmore plaintiff to have the federal courts decide this case.

right not to be personally confronted with government-sponsored religious dogma – a right that would exist even if he never had a child – simply makes no sense.

Individuals unquestionably have standing to bring Establishment Clause challenges whenever they are forced to confront government-sponsored religion. This, in fact, is precisely the basis for standing in the two Ten Commandments cases currently before the Supreme Court. Van Orden v. Perry, 351 F.3d 173 (5th Cir. 2003), cert. granted, 125 S. Ct. 1240 (2005) (No. 03-1500) (individual forced to confront Ten Commandments monument when walking in governmental environment); ACLU v. McCreary County, 361 F.3d 928 (6th Cir. 2004), cert. granted, 125 S. Ct. 944 (2005) (No. 03-1693) (individuals forced to confront Ten Commandments postings in courthouses). The Court apparently granted standing on this ground in prior cases as well. Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (individuals forced to confront government-sponsored religious symbols during holiday season); Lynch v. Donnelly, 465 U.S. 668 (1984) (individuals forced to confront creche scenes depicting the birth of the baby Jesus).

Following the Supreme Court's lead, the Courts of Appeals have universally granted standing on this unwanted confrontation basis. In the Ninth Circuit, for example, those using public parks or otherwise trying to live their lives without the unwarranted imposition of government-sponsored religious belief have repeatedly been deemed to have standing.[10]

[10] See, e.g., Separation of Church and State Comm. v. City of Eugene, 93 F.3d 617 (9th Cir. 1996) (standing existed for plaintiffs forced to confront Latin cross in public park); Am. Jewish Congress v. City of Beverly Hills, 90 F.3d 379 (9th Cir. 1996) (standing existed for plaintiffs forced to confront menorah in public park); Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1999) (private citizens had standing when they confronted municipal sculpture alleged to be religious); Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 797 (9th Cir. 1999) (standing existed when the imposition of unwelcome government-sponsored religion resulted in "a person deprived of the right freely to attend public events"); Carpenter v. City & County of San Francisco, 93 F.3d 627 (9th Cir. 1996) (private citizens forced to confront Latin cross on public property deemed to have standing); Ellis v. La Mesa, 990 F.2d 1518 (9th Cir. 1993) (plaintiffs deemed to have standing when forced to unwillingly confront government-approved insignia and government-approved religious display); Hewitt v. Joyner, 940

Every other Circuit, too, has ruled in this manner.[11] In short, Newdow's being forced by governmental agents to confront religious dogma he finds offensive is a personal, particularized, individualized and concrete harm. Thus, he has "suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, … and (b) 'actual or imminent, not "conjectural" or "hypothetical."'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Because there is also "a causal connection between the injury and the conduct complained of … [and] it [is] 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision,'" Id., at 560-561, the requirements for standing are met.

As in the case of prudential concerns of parenthood-based standing, supra, this confrontational matter was also never fully briefed. In fact, it wasn't even within the ambit of the question accepted for certiorari.[12] As a result, full briefing should be obtained before the Elk Grove decision on this point is considered properly settled.

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F.2d 1561 (9th Cir. 1991) (standing existed when plaintiffs unwillingly forced to confront religion statues in public park).

[11] See, e.g., Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), aff'd, 505 U.S. 577 (1992) (plaintiffs confronted with prayer at graduation); Elewski v. City of Syracuse, 123 F.3d 51 (2d Cir. 1997) (plaintiffs confronted with municipality's religious display); Freethought Soc'y v. Chester County, 334 F.3d 247, 254-255 (3d Cir. 2003) (plaintiffs confronted with religious plaque at county courthouse); Suhre v. Haywood County, 131 F.3d 1083, 1085-1092 (4th Cir. 1997) (plaintiff confronted with Ten Commandments display in courtroom); Murray v. Austin, 947 F.2d 147, 151-152 (5th Cir. 1991) (plaintiff confronted with religious insignia); Washegesic v. Bloomingdale Pub. Sch., 33 F.3d 679, 681-683 (6th Cir. 1994) (plaintiff confronted with picture of Jesus when visited high school); Books v. City of Elkhart, 235 F.3d 292, 298-301 (7th Cir. 2000) (plaintiffs confronted with Ten Commandments monument on lawn of the Municipal Building); ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004) (plaintiffs confronted with ten commandments monument); Foremaster v. St. George, 882 F.2d 1485 (10th Cir. 1989) (plaintiff confronted with religious logo); Glassroth v. Moore, 335 F.3d 1282, 1291-1293 (11th Cir. 2003) (plaintiffs confronted with Ten Commandments monument walking through state Supreme Court building); Jewish War Veterans v. United States, 695 F. Supp. 3, 9-11 (D.D.C. 1988) (plaintiff confronted with Latin cross on Navy property).

[12] The Supreme Court in Elk Grove only agreed to hear a challenge to "a public school district policy **that requires teachers to lead willing students** in reciting the Pledge of Allegiance" (emphasis added),

**(c) Newdow has taxpayer standing**

Thomas Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."[13] James Madison echoed that sentiment: "Who does not see … that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[14] This view was unequivocally incorporated into the Establishment Clause. Everson v. Board of Education, 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."); McCollum v. Board of Education, 333 U.S. 203, 210 (1948) ("[U]tilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith … falls squarely under the ban of the First Amendment."); Flast v. Cohen, 392 U.S. 83, 103 (1968) ("Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general."); Grand Rapids School District v. Ball, 473 U.S. 373, 380 n.5 (1985) ("Petitioners alleged that respondents lacked taxpayer standing under Flast v. Cohen, 392 U.S. 83 (1968), and Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). The District

[13] Jefferson T. *A Bill for Religious Freedom*. *The Founders' Constitution*, Volume 5, Amendment I (Religion), Document 37 (citing *The Papers of Thomas Jefferson*. Edited by Julian P. Boyd et al., Princeton: Princeton University Press, 1950--.), Accessed at http://press-pubs.uchicago.edu/founders/documents/amendI_religions37.html on May 29, 2005.

[14] Madison J. *Memorial and Remonstrance*. The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43 (citing *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--)). Accessed at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html on May 29, 2005.

Court and the Court of Appeals rejected the standing challenge. We affirm this finding, relying on the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." (Citation of nine additional cases provided.)); Lee v. Weisman, 505 U.S. 577, 622 (1992) (Souter, J., concurring) ("The Framers adopted the Religion Clauses in response to a long tradition of coercive state support for religion, particularly in the form of tax assessments.").

Furthermore, the fact that it is only a tiny portion of the school day in which the religion is taught is irrelevant. "It matters not that the teacher receiving taxpayers' money only teaches religion a fraction of the time." Lemon v. Kurtzman, 403 U.S. 602, 641 (1971) (Douglas, J., concurring). See, also, United States v. SCRAP, 412 U.S. 669, 690 n.14 (1973) ("'[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.'" (citation omitted).).

In Elk Grove, the Supreme Court appeared to corroborate this idea, emphasizing only the caveat that:

> As for taxpayer standing, Newdow does not reside in or pay taxes to the School District; he alleges that he pays taxes to the District only "indirectly" through his child support payments to Banning. Brief for Respondent Newdow 49, n 70. That allegation does not amount to the "direct dollars-and-cents injury" that our strict taxpayer-standing doctrine requires. Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 434, 96 L. Ed. 475, 72 S. Ct. 394 (1952).

124 S. Ct. at 2312 n.8. With Newdow now the owner of property in Elk Grove, thus paying taxes directly to EGUSD, Complaint at 2 (¶ 9) and at 10 (¶ 64),[15] and with the manner by which those tax dollars are spent to support the governmental propagation of religious ideas in which Newdow disbelieves being detailed, Complaint at 16 (¶ 109) through 19 (¶ 127), the criteria for taxpayer standing have been met.

[15] All references to "the Complaint" pertain to the First Amended Complaint, Docket Entry #33, submitted on April 11, 2005.

**4. Plaintiff Newdow has standing against SCUSD**

Newdow also owns property in Sacramento, and pays taxes that fund SCUSD and its employees. Thus, for the reasons just noted, he has taxpayer standing against SCUSD as well. [It should be mentioned that the Supreme Court has stated that not only do "[f]ederal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I, § 8, of the Constitution," Bowen v. Kendrick, 487 U.S. 589, 618 (1988), but those paying taxes to municipalities have this standing as well. Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 434 (1952) ("'The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate.'" (Citation omitted.)).[16]]

In addition to his taxpayer standing, Newdow is forced to countenance the government's endorsement of the purely religious claim that we are a nation "under God" when he attends SCUSD meetings. As noted, supra, individuals who are forced to confront government-sponsored religious dogma have standing.

Newdow has also avoided SCUSD meetings – either in their entirety, or coming late – because he does not want to deal in Sacramento with the sense of isolation and ostracism he has come to face in Elk Grove at EGUSD meetings. Appendix 2-A, ¶ 5-6. This need to alter behavior also suffices to give standing. Valley Forge Christian College v. Americans United

[16] Although taxpayer standing was denied in Doremus, this was only because Mr. Doremus's complaint was "niggardly of facts to support a taxpayer's grievance." 342 U.S. at 433. Plaintiff Newdow has more than adequately detailed how his taxes are used to further the challenged governmental activity. Complaint at 16-19 (¶¶109-127).

Additionally, it should be noted that California specifically grants its taxpayers standing to challenge illegal expenditures of tax funds. Cal. Code Civ. Proc. § 526a ("An action to obtain a judgment, restraining and preventing any illegal expenditure of … funds … of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, … by a citizen resident therein … who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein.") Prudential concerns, therefore,

for Separation of Church and State, Inc., 454 U.S. 464, 487 n.22 (1982) (standing exists when parties confronted with "unwelcome religious exercises … [a]re forced to assume special burdens to avoid them.")

Newdow's desire to run for public office, Complaint at 9 (¶ 58), and the impediments that SCUSD has placed in his path (due to its promotion of monotheism), also form a basis for standing. In the school district where he resides, parents as well as students – including those who are about to reach voting age – are told that "real Americans" believe in God, as the daily Pledge recitations reinforce the notion that atheists are second-class citizens. Newdow has already presented evidence of pervasive anti-atheist bias to this Court. See Complaint Appendices I, J, K and M. Far more could be provided just from our current President. See, e.g., President Bush's 2005 National Day of Prayer proclamation (stating that "prayer has given strength and comfort to **Americans of all faiths**," while contending that "**we** continue to be inspired by God's blessings, mercy, and boundless love," "**we** observe this National Day of Prayer," "**we** humbly acknowledge our reliance on the Almighty, express our gratitude for His blessings, and seek His guidance in our daily lives," **We** ask Him to care for all those who suffer or feel helpless," "God's purpose continues to guide **us**," and "**we** continue to trust in the goodness of His plans."[17]); President Bush's interview of January 12, 2005 ("I think people attack me because they are fearful that I will then say that you're not equally as patriotic if you're not a religious person,…I've never said that. I've never acted like that. I think that's just the way it is."[18]); President Bush's Proclamation regarding the National Day of Prayer, April 30, 2003 ("In prayer, we **share the universal desire to speak and listen to**

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dictate that Newdow should have taxpayer standing in this action brought in federal court. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[17] Accessed on May 30, 2005, at http://www.whitehouse.gov/news/releases/2005/05/20050503-2.html. Emphases added.

**our Maker**."[19]). Combined with the data showing that half of the American populace would refuse to vote for an atheist even if they agreed with his or her politics,[20] and the fact that not one of the 1328 state congressmen in the eight states that have constitutional clauses specifically excluding atheists from holding public office[21] has ever acted to eliminate those incredibly offensive provisions, it is difficult to deny Plaintiffs' allegation that Newdow's ability to obtain elected office is adversely affected by SCUSD's Pledge policy. This, too, comprises a personalized, concrete harm that is actual and redressable. Newdow, therefore, has standing to sue SCUSD on this basis.[22]

**5. Neither res judicata nor collateral estoppel bar Plaintiff Newdow's claims**

The SDDs argue that "Newdow is precluded under the doctrines of res judicata and collateral estoppel from asserting the[se] claims," School District Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss (hereafter, "SDDM") at 8:22-23, since they were ruled upon in prior litigation. As already noted, Plaintiffs are in agreement as to the parenthood and personal injury claims against EGUSD, but wish to preserve those claims for appeal. For the other of Newdow's claims, however, neither doctrine applies.

First of all, with respect to SCUSD, the decision in Elk Grove is of no relevance. The entire standing determination in that case was made based on "prudential" considerations related to the fact that Newdow's child was enrolled in an EGUSD public school. Newdow

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[18] Lakely JG. *President Outlines Role of His Faith*. Washington Times, January 12, 2005. Accessed at http://www.washingtontimes.com/functions/print.php?StoryID=20050111-101004-3771r on 2/5/05.
[19] http://www.whitehouse.gov/news/releases/2003/04/print/20030430-22.html (emphasis added).
[20] Complaint at 9, n.6.
[21] See Appendix 2-D.
[22] Newdow has not formally filed for any public office because to do so would be a futile gesture. Appendix 2-A, ¶ 7. Such futile gestures are not required in order to have standing. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365-66 (1977) ("When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he

has no child in SCUSD. Thus, unless EGUSD is to be read as saying that any effect on any parent who has been brought into a state family court ultimately in some way affects a child, the School Districts' claim that this cause of action works to "indirectly affect [his daughter's] rights"[23] is without any foundation. Unlike the argument that can be made in regard to EGUSD, Newdow's challenges to SCUSD's Pledge recitations are far too attenuated from his parental relationship with his child to allow "prudential" considerations to play any role in this matter.[24]

As regards the prior determinations by the Ninth Circuit, "the general view [is] that 'among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had … an adequate incentive to litigate "to the hilt" the issues in question.'" Haring v. Prosise, 462 U.S. 306, 311 (1983) (citing the lower court's opinion). Having been told that he had standing as a parent in the Ninth Circuit's initial opinion in the previous litigation, Newdow v. United States Cong., 292 F.3d 597 (2002), and then having had that ruling upheld when *en banc* review was denied, Newdow v. United States Cong., 328 F.3d 466 (2003), Newdow had no incentive to further litigate the issue of his taxpayer and individual standing in the Court of Appeals. Nor did he have any reasonable incentive to raise these issues at the Supreme Court. Accordingly, res judicata and collateral estoppel do not apply to any of the SCUSD challenges, nor to the taxpayer standing challenge to EGUSD.

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is as much a victim of discrimination as is he who goes through the motions of submitting an application.").

[23] SDDM, at 13:14.

[24] "Even if [Newdow's alternative standing] arguments suffice to establish Article III standing, they do not respond to the prudential concerns." Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 n.8 (2004). No such concerns exist regarding SCUSD.

**6. All Plaintiffs have standing to challenge 4 U.S.C. § 4**

The Federal Defendants (hereafter "FDs") have written:

> 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.

Federal Defendants' Memorandum in Support of Motion to Dismiss (hereafter "FDM") at 12:5-13. This passage reveals the mistaken analysis used time and again by those attempting to maintain the Establishment Clause violation – i.e., they immediately resort to showing a lack of a Free Exercise claim. Plaintiffs agree … there is no Free Exercise argument here. But there most certainly is an Establishment Clause issue, which is an entirely different matter.

Perhaps the easiest way to deal with this error is to simply have the Defendants ponder what no one can dispute is an Establishment Clause violation: a law passed by Congress stating, for example, that "We, the Congress of the United States, do hereby proclaim Protestant Christianity to be the established religion of the United States of America." Would the argument be that such a law is permissible because it "plainly does not 'injure' plaintiffs because it does not compel" anyone to recite anything? Would the fact that "[i]t merely sets forth" the historical truth that the United States was founded by people who were almost all Protestant Christians suffice to permit such a law? Or would it be recognized that there is precisely the harm described by James Madison: such a law "degrades from the equal rank of

Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[25]

Unlike all of the other clauses of the Bill of Rights – which speak of abridgments of the rights of individuals – the Establishment Clause is voiced in terms of what the government, on its own, may not do. "[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 250 (1990). This, however, does not mean that violations of the Establishment Clause do not cause harms to individual citizens. On the contrary, the Supreme Court has repeatedly announced the harm that these violations cause, merely using a different phraseology than that used by Madison. Justice O'Connor condensed the harm into a single word: "outsider." First enunciated in Lynch, she wrote that government may not "sen[d] a message to nonadherents that they are outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984). That government may not inflict this explicit harm upon any American citizen has been emphasized repeatedly since:

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants "that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community."

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-310 (2000);

> A government statement "'that religion or a particular religious belief is favored or preferred,'", violates the prohibition against establishment of religion because such "endorsement sends a message to nonadherents that they are outsiders, not full members

[25] The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43 (citing The Papers of James Madison. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--)). Accessed on May 29, 2005 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. (Emphases added.)

of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O'Connor, J., concurring);

A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith, and a stranger in the political community.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting);

"The Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it 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."

Lee v. Weisman, 505 U.S. 577, 607 n.9 (1992) (Blackmun, J., concurring);

[T]he concurrence recognizes any endorsement of religion as "invalid," because it "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."

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 595 (1989);

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community."

Id., at 625 (O'Connor, J., concurring);

If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

Id., at 627 (O'Connor, J., concurring);

> I also remain convinced that the endorsement test is capable of consistent application. Indeed, it is notable that the three Courts of Appeals that have considered challenges to the display of a creche standing alone at city hall have each concluded, relying in part on endorsement analysis, that such a practice sends a message to nonadherents of Christianity that they are outsiders in the political community.

Id., at 629 (O'Connor, J., concurring);

> [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community."

Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989);

> Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community."

Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).[26]

To be sure, simply being offended by a governmental action is insufficient to show a "personalized injury." But being offended because the government has infringed upon a person's societal status on the basis of his or her particular religious belief system is precisely the sort of personal injury that both the Establishment Clause and standing doctrine envision. If this weren't a harm, why would the Framers of the Bill of Rights ever have bothered with those first ten words of the First Amendment? They could easily have limited the protections afforded in religion to a Free Exercise realm. Yet, they didn't. "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

[26] All citations omitted from each of these quotes.

As one commentator has written:

> [I]f the evil prevented by the establishment clause is the sending of messages which make citizens feel like "outsiders," as [Justice] O'Connor contends, an establishment clause plaintiff logically should not be required to allege a "substantial" or "severe" burden on the exercise of his religion. It should be sufficient, rather, to assert that he feels like an "outsider" because of some governmental message touching upon religion.

S.D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich.L.Rev. 268, 300 (1987). Plaintiffs – individuals who do not adhere to the religious belief that there exists a God – have been turned into "political outsiders" by the intrusion of the religious words, "under God," into the Pledge. For each of them, this is 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 (1992) (quotations and citations omitted) (alteration in original).[27] Thus, each has standing to challenge 4 U.S.C. § 4.[28]

Plaintiffs also have federal taxpayer standing. The publication of the U.S. Code – in which the religious claim that the United States is "one Nation under God" is announced to the world – occurs under the taxing and spending clause of Art. I, § 8, as do the other activities noted in the Complaint. See, Complaint at 16-18 (¶¶ 110-125). These activities all involve exercises of power that exceed the constitutional limitations placed upon that clause. Flast v. Cohen, 392 U.S. 83, 102-03 (1968). The FDs contention that "plaintiffs do not

[27] Borrowed from the FDM at 11:14-18.

[28] Defendants' allusions to "generalized harms" and the Supreme Court's ruling in Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485-486 (1982) ("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.") are misplaced. The Valley Forge plaintiffs merely didn't like conduct that they thought violated the Establishment Clause, and sought to have that conduct terminated because of that displeasure. That is nothing like the situation here, where there are personalized harms of the very sort that the Framers envisioned. Proclaiming that the United States is "one Nation under God" "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority," i.e., all those – such as Plaintiffs – whose religious tenets are incompatible with the idea that that this is "one Nation under God."

challenge any of these activities," FDM at 14:25-26, simply makes no sense. The reason the Defendants know to address "these activities" is precisely because Plaintiffs have challenged them.

The FDs' argument that there is no "causal connection" between the injuries suffered and the FDs' actions exists only because the FDs continue to disregard the harms they have caused, returning – as always – to the Free Exercise issue that Plaintiffs are not raising. "As explained above, the Pledge statute does not compel anyone to recite the Pledge or lead others in reciting it." FDM at 15:2-3. Eventually they will get the point: it is being turned into second-class citizens, being turned into outsiders, and being degraded from the equal rank of Citizens that is the harm. These injuries are individualized, personalized, discrete and totally distinct from any Free Exercise infringements.

As regards redressability, this case presents a unique issue, in that the Establishment Clause is unlike any other in the Bill of Rights:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962). See, also, Marsh v. Chambers, 463 U.S. 783, 802 (1983) (Brennan, J., dissenting):

> Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.

Accordingly, the Establishment Clause must be treated differently when issues of standing and immunity arise. Otherwise, it becomes a legal nullity, an interpretation that is unreasonable for any legislative provision, much less a key clause in the Constitution:

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.

Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting). Certainly, the Framers – having passed the First Amendment with it's "Congress shall make no law respecting an establishment of religion" – never intended for Congress to have the power to pass such a law. Yet, unless the judiciary can in some way address such a constitutional infraction, then the people of this land – especially the religious minorities – have no protection at all. That, in fact, is precisely what this case is about. When Congress made a law establishing monotheism as the national religion – which is exactly what it did with the Act of 1954 – atheistic and other citizens were powerless to object. Certainly, as Complaint Appendices B-H demonstrate, there was no political means of preventing passage of the law. As Madison warned while introducing the Bill of Rights to the First Congress, "The great danger lies … in the body of the people, operating by the majority against the minority." 1 Annals of Cong. 455 (1789).

This situation is unlike that for all other provisions in the Bill of Rights, where some agent of government can be haled into court. When congressional establishments of religion take place – which never occurred until the 1950s – the only party involved is Congress. In other words, if there is an infringement upon freedom of speech, or the press, or search or seizure, or even free exercise, the mayor or police officer or other noncongressional actor that inflicts the harm can be named in a lawsuit. With the Establishment Clause, however – when Congress makes some unconstitutional religious decree – the "outsiders" are immediately injured without any other intervening individual. Thus, unless it is maintained that the Framers, in enacting a provision that states, "Congress shall make no law respecting an

establishment of religion," intended to allow Congress to make any law it wants actually establishing (a) religion, Congress, itself, must be held accountable.

Speech and debate immunity, sovereign immunity, and separation of powers are all essential ingredients in our constitutional scheme, instituted to ultimately protect "the people." When those important components of our government interfere with that protection, however, they must give way to the checks and balances – such as judicial review – that also safeguard individual liberties. Any other approach "would turn our system of checks and balances on its head." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004).

As regards separation of powers, this understanding dates back to the founding of our nation, when James Madison wrote in Federalist #48 – entitled "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other" – that:

> [T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[29]

"Judicial review" has long been recognized as one of the key checks and restraints. Accordingly, the judiciary has not only the right, but the obligation, to rein in the other branches of government when they disobey the Constitution's mandates. Marbury v. Madison, 5 U.S. 137 (1803). If it is true that "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," FDM at 15:7-9, it is also true that Congress – prior to the 1950s – had never made laws so blatantly respecting establishments of religion.

[29] Federalist #48. This notion was reinforced in Federalist #51, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." Additionally, the Supreme Court has noted that "separation of powers does not mean that the branches 'ought to have no partial agency in, or no control over the acts of each other.'" Clinton v. Jones, 520 U.S. 681, 703 (1997) (quoting James Madison from his writing in The Federalist #47).

The FDs' argument that Plaintiffs lack standing because the redressability requirement cannot be met (since there is no way for the judiciary to force Congress to comply with any court order) can be made for any plaintiff seeking invalidation of a federal statute. The reality is that the judiciary invalidates acts of Congress fairly regularly,[30] and Congress has accepted those determinations since Marbury, 5 U.S. at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.") There is no reason to believe it will not do so again when the courts rule that 4 U.S.C. § 4 violates the Establishment Clause.

Even if the judiciary has no power over Congress, itself, it does have such authority over the Law Revision Counsel. It is true that – were Congress to disregard the judiciary's ruling and continue to advocate for a Pledge that reflects the monotheistic majority's religious belief system – his removal of the religious verbiage from the U.S. Code would not give total relief. Nonetheless, partial relief will be had in knowing (and seeing) that those religious words are no longer published in the U.S. Code. This suffices to meet the redressability requirement for standing. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC),

[30] See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (Congress lacked authority to enact Violence Against Women Act under the Commerce Clause); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2000) (Congress violated First Amendment with Rescissions and Appropriations Act); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (Federal broadcasting restriction violated First Amendment); Clinton v. City of New York, 524 U.S. 417 (1998) (Line Item Veto Act violated the Constitution's Presentment Clause); City of Boerne v. Flores, 521 U.S. 507 (1997) (Congress exceeded its powers in passing Religious Freedom Restoration Act); Printz v. United States, 521 U.S. 898 (1997) (Congress's interim provisions of Brady Act violated dual sovereignty); United States v. Lopez, 514 U.S. 549 (1995) (Congress lacked authority to enact Gun-Free School Zones Act under the Commerce Clause); Plaut v. Spendthrift Farm, 514 U.S. 211(1995) (Congress lacked authority to force judiciary to reopen case after final judgment issued); United States v. National Treasury Emples. Union, 513 U.S. 454 (1995) (Congress's ban on governmental employees' acceptance of honoraria violated First Amendment); New York v. United States, 505 U.S. 144 (1992) (Congress violated Tenth Amendment in passing Radioactive Waste Policy Act); Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991) (Congress violated separation of powers doctrine with Airports Act); Bowsher v. Synar, 478 U.S. 714 (1986) (Congress lacked authority to discharge an "executive" official); INS v. Chadha, 462 U.S. 919 (1983): (Congress may not employ one-house veto of executive branch decision); United States v. Lovett, 328 U.S. 303, 321 (1946) (Congressional act was bill of attainder); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (Congress lacked authority to reopen proceeding after final judgment of court).

Inc., 528 U.S. 167, 186 (2000) (noting that even "a significant quantum of deterrence" against the challenged activity suffices for redressability purposes).

In sum, the Framers sought "to erect enduring checks on each Branch and to protect the people from the improvident exercise of power." INS v. Chadha, 462 U.S. 919, 957 (1983). When a matter concerns how one branch of government – e.g., Congress – functions, then speech and debate, sovereign immunity and separation of powers kick in.

> [I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [other] Branch from accomplishing its constitutionally assigned functions.

Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). However, when the issue is the abuse of the powers each branch holds – especially as it applies to the abrogation of the citizenry's fundamental constitutional rights – then it is the "checks and balances" that come to the fore.

> [T]he entire structure of our federal constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals.

New York v. United States, 505 U.S. 144, 206 (1992) (White, J., dissenting). Here, Congress has shown that tyranny. The judiciary must provide the checks and balances necessary to counter that abuse of power.

## B. DEFENDANT DISMISSALS

### 1. The School District Superintendents should be dismissed

Plaintiffs concur in the SDDs' reading of the case law that naming the Superintendents is unnecessary and duplicative. Monell v. Department of Social Services of New York, 436 U.S. 658 (1978). Apologies are offered for any wasted time and/or resources.

### 2. The State Defendants are proper parties

The State Defendants (hereafter "SDs") have written that, "The Governor and the Secretary of Education are sued only in their official capacities. Plaintiffs have failed to state claims for which relief may be granted against the State Defendants." State Defendants' Memorandum of Points and Authorities (hereafter "SDM") at 4:12-14. Plaintiffs disagree. Both the Governor and the Secretary of Education are responsible for ensuring that the Constitution's protections are afforded to the public school students and their families. They have not met their duties in this regard, and can be enjoined to remedy that deficiency:

> To ensure the enforcement of federal law, however, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. Ex parte Young, supra. This standard allows courts to order prospective relief, see Edelman v. Jordan, 415 U.S. 651, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); Milliken v. Bradley, 433 U.S. 267, 53 L. Ed. 2d 745, 97 S. Ct. 2749 (1977), as well as measures ancillary to appropriate prospective relief, Green v. Mansour, 474 U.S. 64, 71-73, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985).

Frew v. Hawkins, 540 U.S. 431, 437 (2004).

Plaintiffs have placed in their Complaint that

> Defendants Arnold Schwarzenegger, Governor of the State of California [and] Richard J. Riordan, California Secretary for Education … have deprived Plaintiffs of rights secured by the First, Fifth and Fourteenth Amendments to the Constitution of the United States of America. As such, this Court has jurisdiction pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3).[31]

[31] Complaint at 1:16-20.

and, at Complaint pages 20 (¶ 132) and 30 (¶¶ 166 and 168) have specified how those individuals have failed to act, thus furthering those deprivations.

**3. The United States is a proper party**

For reasons previously stated, Plaintiffs believe there is an inherent waiver of sovereign immunity in the Establishment Clause, and that the United States is a proper party Defendant in this case. Even if there is not an inherent waiver, however, statutory waivers can be found in 28 U.S.C. § 1346(a)(2) and 5 U.S.C. § 702.

28 U.S.C. § 1346(a)(2) states (in pertinent part) that, "The district courts shall have original jurisdiction … of … (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress …" Known as the Federal Tort Claims Act, this statute "was designed … to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity." United States v. Muniz, 374 U.S. 150, 154 (1963). The United States, therefore – responsible for the nation's laws – is a proper Defendant in this case, and cannot assert sovereign immunity.

A waiver of sovereign immunity is also found in 5 U.S.C. § 702, which states (in pertinent part):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States:

An "agency" is defined in 5 U.S.C. § 701(b)(1): "'agency'' means each authority of the Government of the United States, whether or not it is within or subject to review by another

agency."[32] Thus, the United States is explicitly named under this statute, which also encompasses the Office of the Law Revision Counsel. Sovereign immunity is accordingly waived. "[T]he waiver of sovereign immunity is to be found in 5 U.S.C. § 702, which waives the immunity of the United States in actions for relief other than money damages." Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 510 (1999) (Souter, J., dissenting).

**4. The Law Revision Counsel is a proper party**

As just noted, the Office of the Law Revision Counsel is subject to suit under 5 U.S.C. § 702. Because the placing of the now monotheistic Pledge of Allegiance into the U.S. Code has turned Plaintiffs into "political outsiders," because it is the Law Revision Counsel who is responsible for placing that now-religious verbiage into the U.S. Code, and because partial relief will be achieved when the Law Revision Counsel removes the religious dogma from the Pledge as printed in the U.S. Code (so that the Pledge will no longer have the "one Nation under God" phrase, and, instead, will be returned to the version stating that we are "one Nation indivisible"), the Law Revision Counsel is a proper party Defendant, and Plaintiffs have standing to sue in order to effect the desired change.

**5. Congress is a proper party**

Article I, Section 6 of the Constitution states, "The Senators and Representatives ... for any Speech or Debate in either House ... shall not be questioned in any other Place." Plaintiffs do not deny that this clause insulates the individual congressmen from personal liability for their actions, nor do they dispute that it serves the valid purposes of maintaining the

[32] There are a number of exceptions, including Congress. However, congressional offices – such as the Office of the Law Revision Counsel – are not among those exceptions.

separation of powers. However, "[i]f two laws conflict with each other, the courts must decide on the operation of each." Marbury v. Madison, 5 U.S. 137, 177 (1803). Here, two constitutional provisions are in conflict: the Speech and Debate Clause and the Establishment Clause. Thus, "a choice is necessary [because] there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other." Nebraska Press Asso. v. Stuart, 427 U.S. 539, 611-612 (1976) (Brennan, J., concurring). Plaintiffs recognizes the uncomfortable position in which the Court must find itself, since the Supreme Court has never intimated which is the right to be abrogated when these two clauses are in tension. Still, they feels it is obvious that the Establishment Clause (which affects the rights of the citizenry) should be placed above the Speech and Debate Clause (which affects the rights of the citizenry's paid servants). As James Madison stated:

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

Gravel v. United States, 408 U.S. 606, 641 (1972) (Douglas, J., dissenting) (quoting Brant, The Madison Heritage, 35 N. Y. U. L. Rev. 882, 900).

Even if the Court decides the Establishment Clause should be placed second, however, the judiciary still unquestionably has the power – and duty – to declare the challenged resolutions unconstitutional:

> The judgment in [Marbury v. Madison] is one of the great landmarks in the history of the construction of the Constitution of the United States, and is of supreme authority ... in respect of the power and duty of the Supreme Court and other courts to consider and pass upon the validity of acts of Congress enacted in violation of the limitations of the Constitution.

Myers v. United States, 272 U.S. 52, 139 (1926).

## C. DEFENDANTS' ARGUMENTS ARE DEEPLY MISLEADING

Before Defendants' arguments are considered, it should be recalled that the right to have a religiously neutral government is a fundamental constitutional right:

> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 589-90 (1989) (citations, footnote omitted). In order to abridge such "fundamental constitutional rights," strict scrutiny must be applied. "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." Clark v. Jeter, 486 U.S. 456,, 461 (1988) (citations omitted). Because "the Fifth and Fourteenth Amendments' guarantee of 'due process of law' [includes] a substantive component, … the government [may not] infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 301-302 (1993) (emphasis in original). "As we said in Zablocki v. Redhail, 434 U.S. 374, 388 (1978), if a requirement imposed by [government] 'significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.'" Cruzan v. Director, MDH, 497 U.S. 261, 303 (1990) (Brennan, J., dissenting). The fact is that the "interests" of the Defendants in attempting to maintain the words, "under God," in the Pledge of Allegiance can be distilled down to one goal: to infuse the Pledge with religious dogma. In other words, as absurd as it

sounds, their "interest" is to violate the Establishment Clause. This is certainly not a legitimate goal. And, even if it were, "the question is not whether the ... goals are legitimate, but rather whether the particular means chosen to achieve those objectives unduly infringe upon ... constitutional liberty." Cleveland Board of Education v. Lafleur, 414 U.S. 632, 648 (1974). Needlessly thrusting monotheism into any governmental ritual clearly unduly infringes upon the constitutional liberties of Atheists such as Plaintiffs in this case.

One additional requirement is that "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State. … The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations." United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted). As can be readily appreciated by reviewing their arguments, the Defendants here have not come close to meeting that burden.

**1. Plaintiffs are not objecting to pledging allegiance or other displays of patriotism**

Because all the Defendants characterize Plaintiffs' claims as challenging "patriotic exercises," Plaintiffs feel it is necessary to make it explicitly clear that the Complaint is totally devoid of any such challenge. No expressions of patriotism have been, are now being, or will be challenged by any of the Plaintiffs in this litigation.

**2. Pledging allegiance "under God" is not patriotic**

The Defendants repeatedly – over and over and over again – misdirect the argument by claiming that the Pledge is patriotic. "Reciting the Pledge of Allegiance is a patriotic exercise, not a religious testimonial." FDM at 2:14-15; "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." FDM at 32:15-18; "Education Code Section 52720 states that appropriate patriotic exercises must be conducted at the beginning of the first regularly scheduled class." SDDM at 20:22-24; "The Pledge is part of the larger curricular framework which emphasizes patriotism and dignity of American citizenship." SDDM at 31:21-22; "[The] California statute requires daily patriotic exercises and provides that recitation of the Pledge of Allegiance to the Flag satisfies this requirement." SDM at 6:16-17; "[P]atriotic acknowledgments of the United States' religious heritage, such as that embodied in the text of the Pledge of Allegiance, are not inconsistent with the First Amendment's prohibition on the Establishment of Religion." SDM at 6:25-27.

The Pledge was a patriotic exercise for sixty-two years without the inclusion of any religious doctrinal verbiage. What then, it must be asked, is that religious doctrinal verbiage doing within the Pledge now? And why did Congress pass an act that did nothing put intrude those religious words into that pledge?

Having religious dogma in the middle of the Pledge of Allegiance to the flag of a nation that has an Establishment Clause is not patriotic in any sense of the word. On the contrary, it is abjectly unpatriotic, and – for that reason – this lawsuit exists. Any attempt to depict the claims as one of a "patriotic Pledge" is nothing but a straw man designed to obscure the true matter at hand. To reiterate, there is nothing patriotic about infusing religious dogma – be it belief in God or anything else – into the government. "[W]hen [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

**3. There is no reason that "the Pledge must be considered as a whole"**

The SDDs set out an entire section entitled, "The Pledge Must Be Considered as a Whole." SDDM at 23:17. But that titular assertion is specious, undoubtedly made in the hope that the Defendants can keep the Court from looking at the real issue. Again, Plaintiffs are not challenging the Pledge. What they are challenging is the intrusion of the two purely religious words, "under God," into the Pledge, and the use of the Pledge now that those two purely religious words have been intruded.

Every Establishment Clause violation can be considered part of a larger secular endeavor, and focusing only on the latter would immunize every such violation from invalidation. In Lee v. Weisman, for example, the graduation exercises "as a whole" could have been examined, rather than only the challenged prayer. In Engel and Abington, "the whole" could have been the morning exercises, rather than the isolated prayer and Bible reading. (In fact, this argument was specifically rejected in Abington. 374 U.S. at 278-279 (Brennan, J., concurring).) The same is true for Stone v. Graham, 449 U.S. 39 (1980) (the classroom, not the Ten Commandments sign, could have been considered "as a whole"); Epperson v. Arkansas, 393 U.S. 97 (1968) (the science curriculum, not just the theory of evolution, could have been considered "as a whole"), Santa Fe (the football game, not the prayer, could have been considered "as a whole"), etc.

Here, "the whole" is the Act of 1954, and its intrusion of the words "under God" into the previously secular Pledge. The Pledge, itself, is not "the whole." To employ the SDD's vision would gut the Establishment Clause of all meaning. Ballots in elections could have crucifixes on their covers ("The ballot must be considered as a whole"); tax forms could have pictures of the Pope ("The tax form must be considered as a whole"), police stations could

have Mormon inscriptions (The edifice must be considered as a whole"). In fact, Congress could enact a law declaring, "The Episcopal Church is hereby deemed to be the established church of the United States." After all, "the U.S. Code must be taken as a whole."

The SDD's reference to Allegheny in this regard is inapposite. SDDM at 24:2-5. The entire justification given in Allegheny (and Lynch) was that the multiplicity of religious ideas mitigated the chance of any "establishment." Here, there is only one religious notion being – belief in God – that is being intruded into the otherwise perfectly secular and all-inclusive Pledge. It was the absence of such a one-sided ideology that allowed Allegheny (and Lynch) to be decided as they were.

**4. Establishment Clause violations are not limited to prayers**

The SDDs wrote:

> 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.

SDDM at 28:4-7. That's interesting, inasmuch as the President of the United States has remarked that:

> When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.[33]

That sounds like a pretty good description of a "religious act of prayer," as well as "a communication with God." This, of course, highlights that what is religiously clear and unequivocal to some may be the exact opposite to others. It was the respect for this reality that drove the Framers to include an Establishment Clause within the Bill of Rights. As the two

[33] November 13, 2002 Letter of President George W. Bush to Mitsuo Murashige and Associates, President of the Hawaii State Federation of Honpa Hongwanji Lay Americans, Hilo, Hawaii

individuals perhaps most responsible for the inclusion of religions freedom in our Constitution noted:

> [T]hat the Civil Magistrate is a competent Judge of Religious Truth … is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages;[34]
>
> [T]he civil magistrate … will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.[35]

Moreover, even if it were true that "[t]he Pledge with the phrase 'under God' is nothing like the clearly religious act of prayer," the point would be irrelevant. The case law demonstrates clearly that Establishment Clause violations aren't limited to prayer. See, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968) (Establishment Clause violation when the teaching of evolution is prohibited); Stone v. Graham, 449 U.S. 39 (1980) (Establishment Clause violation when Ten Commandments posted on wall.); Edwards v. Aguillard, 482 U.S. 578 (1987) ((Establishment Clause violation when "creation science" taught). More importantly, the principles underlying that great clause are far broader that such a limitation would imply:

> [G]overnment speech endorsing religion ... the Establishment Clause forbids.[36]
>
> As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.[37]
>
> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.[38]
> [A] principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.[39]

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[34] Madison J. *Memorial and Remonstrance*. The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43 (citing *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--)). Accessed at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html on May 29, 2005.
[35] Jefferson T. *A Bill for Religious Freedom*. *The Founders' Constitution*, Volume 5, Amendment I (Religion), Document 37 (citing *The Papers of Thomas Jefferson*. Edited by Julian P. Boyd et al., Princeton: Princeton University Press, 1950--.), Accessed at http://press-pubs.uchicago.edu/founders/documents/amendI_religions37.html on May 29, 2005.
[36] Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000).
[37] Agostini v. Felton, 521 U.S. 203, 223 (1997).
[38] Rosenberger v. University of Virginia, 515 U.S. 819, 839 (1995).
[39] Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 703 (1994).

> [T]he central meaning of the Religion Clauses of the First Amendment … is that all creeds must be tolerated, and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.[40]
>
> [T]he longstanding constitutional principle [is] that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs.[41]
>
> [T]he government must pursue a course of complete neutrality toward religion.[42]
>
> The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion.[43]
>
> [T]he core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.[44]
>
> [T]he State is constitutionally compelled to assure that the state-sponsored activity is not being used for religious indoctrination.[45]
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[46]
>
> [The Court] has consistently held that the [Establishment] clause withdrew all legislative power respecting religious belief.[47]
>
> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.[48]

[40] Lee v. Weisman, 505 U.S. 577, 590 (1992).
[41] Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 621 (1989).
[42] Wallace v. Jaffree, 472 U.S. 38, 60 (1985).
[43] Grand Rapids School District v. Ball, 473 U.S. 373, 382 (1985).
[44] Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982).
[45] Levitt v. Committee for Public Education, 413 U.S. 472, 480 (1973).
[46] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).
[47] Abington School District v. Schempp, 374 U.S. 203, 222 (1963).
[48] Engel v. Vitale, 370 U.S. 421, 431 (1962).

> We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.[49]
>
> [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.[50]
>
> Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.[51]

The intrusion of the words, "under God," into the Pledge of Allegiance does not comport with any of these principled statements … nor with the hundreds or thousands of others which the Supreme Court has spoken.

**5. Coercion is a sufficient, but not a necessary finding**

Despite Plaintiffs' anticipatory statements regarding coercion and compulsion, Complaint at 28 (¶ 161) – 29 (¶ 164), Defendants still attempt to have the Court focus upon the fact that none of the Plaintiffs are compelled to say the Pledge. To reiterate:

> 161. The issue of "coercion" is certain to be raised repeatedly by the defendants. It should first be noted that there is a difference between compulsion and coercion. See footnote 5, supra.
>
> 162. It should next be noted that (a) coercion is not a necessary element for an Establishment Clause violation, although (b) if coercion is present, that is sufficient to demonstrate an Establishment Clause violation.
>
> 163. Plaintiffs again all stipulate that none of them have ever been "compelled" to say the Pledge. Nonetheless, as defined by Lee v. Weisman, 505 U.S. 577 (1992), all the child Plaintiffs have clearly been coerced. APPENDIX L Thus, the Defendant's Pledge policies must be stricken. "Adherence to Lee would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in Lee." Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2328 (2004) (Thomas, J., concurring).
>
> 164. It is not an answer to maintain that Plaintiffs can "opt out" of the Pledge. To begin with, the Establishment Clause is violated when a citizen must alter his/her behavior

[49] Zorach v. Clausen, 343 U.S. 306, 313 (1952).
[50] McCollum v. Board of Education, 333 U.S. 203, 212 (1948).
[51] Everson v. Board of Education, 330 U.S. 1, 18 (1947).

> in order to avoid a governmental infusion of religion. Secondly, Plaintiffs have considered this possibility. It has been determined that it is not possible to accomplish such an "opt out" without the individual feeling like a "political outsider" and – in the public schools – without classmates realizing that the individual is "an outsider" as well. This is in direct violation of the Religion Clauses.

As in the prior litigation, Defendants persist in alluding to West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), writing that "[t]here is simply no logical reason to differentiate between the rights at stake in this case and those in Barnette," and that "[b]oth cases involve the question of whether students are compelled to declare a belief in violation of the First Amendment." SDDM at 18:26-28. These statements demonstrate a complete lack of understanding of the issues, for "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Westside Community Bd. of Ed. V. Mergens, 496 U.S. 226, 250 (1990).

Barnette had nothing whatsoever to do with the Establishment Clause,[52] and would likely never even be mentioned were it not for the fact that, like the instant case, it centered around school children reciting the Pledge of Allegiance. The 1943 Pledge had not yet been interlarded with impermissible religious dogma, and that huge difference (which the Defendants repeatedly attempt to gloss over) forms the entire basis of this litigation. The 1943 Pledge was religiously neutral. The Pledge of today is manifestly monotheistic, and the Act of 1954 was clearly not in accordance with the Supreme Court's command for laws "administered neutrally among different faiths." Cutter v. Wilkinson, 125 S. Ct. 2113, ___ (2005). See, also, Complaint at 25 (n.22) (demonstrating unanimous agreement among the

[52] In fact, not a single mention of the Establishment Clause can be found in Barnette's majority opinion, and during its relatively tangential discussion by Justice Frankfurter, one finds sententious support for Plaintiffs' claim: "Religion is outside the sphere of political government." 319 U.S. at 654 (Frankfurter, J., dissenting).

Justices of the Supreme Court that the Establishment Clause demands governmental neutrality in matters of religion).

Again, Plaintiffs have stipulated that "none of them are or have been actually compelled to say the words, "under God," in the Pledge of Allegiance." Complaint at 9, ¶ 56. To be sure:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. **But the purposes underlying the Establishment Clause go much further than that.**

Engel v. Vitale, 370 U.S. 421, 431 (1962) (emphasis added). Thus, the principal constitutional infirmity is that government has placed its "power, prestige and financial support" behind the purely religious notion that there exists a God. That the current practices of the State Defendants fail the "coercion test," Lee v. Weisman, 505 U.S. 577 (1992), is proof of the constitutional infraction. "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion." Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring). But "this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis," Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring), and it is the fact that Government has taken a position not only on any purely religious question, but on the quintessential religious question – of whether or not God exists – that directs the outcome of this case.

**6. Every argument Defendants have made for "under God" could also be made for "under Jesus"**

If the arguments proffered by the Defendants are valid to show that "under God" is permissible under the Establishment Clause, then those same arguments should not be equally applicable to some other statement that is impermissible. For instance, "one Nation, under Jesus," which Plaintiffs assume no one would contend could survive an Establishment Clause challenge, ought to come out differently than "one Nation under God," using the Defendants' arguments.[53] But does it?

In fact, it does not, since – constitutionally – the two religious phrases do not differ at all. The "history" of our nation in terms of religion is virtually identical as far as monotheism or Christianity is involved. The Pledge with "under Jesus" is just as "patriotic" as the Pledge with "under God." "Under Jesus" could have been "woven into the fabric of our society" just as easily as "under God" has been. No one would be any more coerced to say, "under Jesus" than they are to say, "under God." In fact, the only difference is that the Constitution has "in the Year of our Lord" in Article VII – a direct reference to Jesus – as opposed to any direct reference to a "nonsectarian" deity. Thus, unless one is willing to accept "one Nation under Jesus" in the Pledge of Allegiance, it can be seen that nothing that the Defendants have argued justifies "one Nation under God."

**7. Every argument made for "under God" could also be made for "under white supremacy"**

If the point still hasn't been made, then applying the Defendants' arguments to racially offensive dogma (which, unlike (anti-Atheistic) religiously offensive dogma is virtually

[53] In fact, constitutionally, if "under God" is permissible, then "under" any religious entity should also be permissible. Because the Defendants claim that our religious "history" is relevant – a fact that

universally acknowledged to be illicit) ought to demonstrate the spurious nature of the Defendants' arguments. How would the analysis differ if "one Nation, under white supremacy" had been the 84th Congress's Pledge alteration?

Again, the analysis wouldn't differ at all. Except, perhaps, for the fact that the "history" of our nation in terms of racial bias is far more blatant than it is for monotheistic bias.[54] The words of the Presidents vis-à-vis their beliefs in God,[55] are no more probative than their acts in owning slaves.[56] The Pledge with "under white superiority" is just as "patriotic" as the Pledge with "under God." "Under white superiority" could have been "woven into the fabric of our society" just as easily as "under God" has been. No one would be any more coerced to say, "under white superiority" than they are to say, "under God." In fact, the only difference is that the Constitution has its "three fifths" clause in Article I, § 2; its Article I, § 9 provision that allows the continued importation of black slaves; and its Article IV, § 2 clause preventing slaves from obtaining their freedom by escaping to a different state. Thus, unless one is willing to accept "one Nation under white superiority" in the Pledge of Allegiance, nothing that the Defendants have argued justifies "one Nation under God."

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Plaintiffs adamantly dispute as being the antithesis of the ideals underlying the Religion Clauses – "under Jesus" is used for this example.

[54] This, however, is not because atheists weren't subject to severe discrimination as well. See, e.g., the common law of England at the time of our founding: denial of the existence of God was "punishable at common law by fine and imprisonment, or other infamous corporal punishment." 4 Blackstone Commentaries 59. The differences in treatment of atheists as opposed to racial minorities was likely only due to the fact that one can't readily identify an atheist by his or her physical characteristics. The Gallup poll in note 6 (page 9) of the Complaint showed a ten times greater disapproval of Atheists than of Blacks, and this greater antipathy goes back to when the first of those polls was conducted with questions about those two groups (in the 1950s).

[55] Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2317-19 (2004) (Rehnquist, C.J., concurring).

[56] Two thirds of the first eighteen presidents owned slaves – eight while in office. Warner GA. *Presidential Slave Owners*. Orange County Register, May 8, 2005. Accessed at http://www.ocregister.com/ocr/2005/05/08/sections/travel/ustravel/article_507139.php on June 19, 2005.

**8. Endorsements are quite different from Acknowledgments.**

"There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." Lynch v. Donnelly, 465 U.S. 668, 674 (1984). This is entirely compatible with the Establishment Clause, for government should not "show a callous indifference to religion," Zorach, 343 U.S. at 314. But endorsing religion – which the Establishment Clause forbids government from doing – is very different from acknowledging religion. As Justice O'Connor has written:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion in plain."

Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) (citation omitted) (emphasis added). There is no question that the words "under God" were added to the Pledge in order to demonstrate that belief in God - a purely religious belief - is "favored or preferred." To contend that having people stand up, face the American flag, place their hands on their hearts, and state that we are "one Nation under God" is merely an "acknowledgment" of our history is to deny reality. The myriad statements in the Congressional Record (Complaint Appendices E and H), the history surrounding the Act of 1954 (Complaint Appendices B, C, D and F), the statement of President Eisenhower (Complaint Appendix F at 2 (stating that "our school children will daily proclaim … the dedication of our Nation and our people to the Almighty")), and the congressional report accompanying the bill (Complaint Appendix F at 1 ("The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.

At the same time it would serve to deny the atheistic … concepts of communism)) make it unequivocal that the purpose of the Act was to endorse the religious idea that there exists a God, and that America – as a "people," as a "Nation," and as a "government" – adheres to that purely religious belief.

The claim that the Pledge is patriotic is simply a variant of the same argument. The Pledge for the sixty-two years prior to 1954 was also patriotic. In fact, it was more patriotic than it is now, because it contained no constitutionally prohibited wording. Pledging allegiance to the flag is patriotic. Pledging allegiance to the flag "under God," "under Jesus," "under Protestantism," "under white dominion," "under male superiority" or under any other notion that turns some citizens into second class citizens is anything but.

Despite the fact that the 84th Congress specifically stated that "the inclusion of God[57] … would acknowledge the dependence of our government and our people upon the moral directions of the Creator,"[58] the SDDs attempt to advance the argument that "the words 'under God' were not added for the purpose of advancing religion." SDDM at 24:17. Their "proof" of this is that "our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper." SDDM at 24:20-21 (citing H.R. Rep. No. 83-1693, at 2 (1954)). What they – and, apparently, Congress – fail to recognize is that such a claim is itself a violation of the Establishment Clause. "When the government appropriates religious truth, it 'transforms rational debate into theological decree.'" Lee v. Weisman, 505 U.S. at 607 (Blackmun, J., concurring). Government may no assert that it's an "inherent truth" that "government must look to God to survive and prosper" than it could take the position that "government must look to Jesus – or the Pope or Jim Jones or any other religious figure – to

[57] It should be noted that it was the entity, "God," about which the Congress spoke; not the phrase, "under God."

survive and prosper." None of these claims comprise an "inherent truth." All, constitutionally, are nothing but sectarian religious views, reflecting only the opinions of their respective adherents. As such, all are prohibited by the First Amendment.

**9. That "under God" teaches about the role of religion in history is bunk**

The contention that "under God" was inserted in the Pledge to "hel[p] teach children about the role of religion in the history of the United States," SDDM at 25:2-3, is totally disingenuous. First of all, it would take an extraordinary child, indeed, to even know about the religious history of the founding of the nation, much less associate that knowledge with two words spatchcocked into the Pledge. Moreover, the whole premise is a bogus *post hoc* claim that everyone knows to be untrue.. Does anyone for a moment think that the Knights of Columbus would ever have opted to thrust "one Nation under Protestant Christianity" into the Pledge … or that they would buy the argument that some Protestant group put it there merely to teach school children that "our colonial forebears recognized the inherent truth that any government must look to the Protestant faiths to survive and prosper?" Alternatively – again looking to race – would anyone accept that "one Nation under white superiority" was chosen to "help teach children about the role of race relations in the history of the United States?"

**10. Our religious history does not supersede (nor contradict) our Constitution**

Defendants discuss many of the religious activities that took place prior to the founding of our nation, unaware that those references only heighten the respect that should be paid to the fact that the Constitution – created by men who were fully aware of this history – decided nonetheless to create a secular document. Yes, the Mayflower Compact is filled with

[58] It should also be noted that Congress used the term, "the Creator," not "a Creator." That's because they had the (Judeo-)Christian Creator in mind.

divine references. But the Framers knew that those who came to this land aboard that ship then inflicted the same abuses in the name of their religion that caused them to flee Europe in the first place. Christopher Columbus set sail for the New World "In the name of Our Lord Jesus Christ."[59] And that he then – in the name of the King and Queen of Spain (whom the Pope had granted the "right" to conquer all non-Christian nations) – took by force the land of the Native Americans, enslaving them for the Saviour.

It is true that George Washington proclaimed a day of Thanksgiving during his first year in office. It is also true that James Madison – the "Father of the Constitution" – stated that "Religious proclamations by the Executive recommending thanksgivings & fasts … imply a religious agency, making no part of the trust delegated to political rulers."[60] Jefferson's Bill for Religious Freedom contains the language, "that Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain."[61] Yet, in regard to the failed attempt to amend the Bill with references to Jesus Christ, he wrote

> Where the preamble declares, that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion"; the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination."[62]

[59] Extracts from the Journal of Christopher Columbus's voyage of 1492. Accessed at http://www.fordham.edu/halsall/source/columbus1.html on June 19, 2005.
[60] Fleet, Madison's *Detached Memoranda*, 3 Wm. & Mary Q. (3d ser.) 560 (1946).
[61] The Founders' Constitution, Volume 5, Amendment I (Religion), Document 37 (citing The Papers of Thomas Jefferson. Edited by Julian P. Boyd et al., Princeton: Princeton University Press, 1950--.), Accessed on May 29, 2005 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions37.html.
[62] *Autobiography* of Thomas Jefferson, in Foner PS. Basic Writings of Thomas Jefferson (Wiley Book Co. New York; 1944) at 437.

Additionally, while the Constitution was being debated in Philadelphia, he wrote to his nephew, "Question with boldness even the existence of a god; because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear."[63]

In short, "the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition." Abington School District v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).[64] But the fact remains "that religious freedom is … likewise as strongly imbedded in our public and private life." Abington, 374 U.S. at 214. And it is only religious freedom – not belief in God or any other religious entity – that is reflected in the provisions of the Constitution. Accordingly:

> The Establishment Clause withdrew from the sphere of legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country.

McGowan v. Maryland, 366 U.S. 420, 466 (1961) (Frankfurter, J., separate opinion).

Along these lines, attention should be paid to Defendants' citations to Justice Douglas's famous quote from Zorach v. Clausen, 343 U.S. 306, 313 (1952).[65] Like most others with a monotheistic agenda, they fail to heed the words Justice Douglas wrote a decade later, when he saw how his statement had been taken out of context:

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[63] *Letter of Thomas Jefferson to Peter Carr*, August 10, 1787, in Foner PS. Basic Writings of Thomas Jefferson (Wiley Book Co. New York; 1944) at 561.

[64] This is what allows judges and justices to write opinions where constitutional principles are "to be followed or ignored in a particular case as our predilections may dictate." Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring). Thus, by simply filling up pages with historical examples of the activity they wish to perpetuate, they can justify obvious abrogations of basic liberties. See, e.g., Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2317-19 (2004) (Rehnquist, C.J., concurring).

[65] It might be pointed out that Justice Douglas's other statements in Zorach seem always to be ignored: "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception: the prohibition is absolute." 343 U.S. at 312.

> [W]e stated in Zorach v. Clauson, 343 U.S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being."
>
> But … if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others. … The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

McGowan v. Maryland, 366 U.S. 420, 563-564 (1962) (Douglas, J., dissenting) (citations omitted). This delineation of religion "worked into the affairs of our people … by individuals and groups, [as opposed to] by the Government," must always be kept in mind. Only in that way will the proper appreciation of history be maintained.

While on the subject of history, it might be reasonable to look at the Constitution, itself. The document, it will be recalled, has no reference to the Almighty in its Preamble. Its only oath of office – the President's in Article II – has no "so help me God." And – unlike the constitutions of nine of the eleven colonies that had constitutions – the federal Constitution has no religious test oath. On the contrary, the Framers decided to place in Article VI a clause that was unheard of prior to that time: "no religious test shall ever be required as a qualification to any office or public trust under the United States." Why are these constitutional textual facts never seen in the briefs of those working to keep endorsements of their religious preferences maintained by government? Why, instead, do the reference everything except the document around which the discussion revolves?

Similarly absent is any discussion of the first act ever passed by Congress. The Oath Act of June 1, 1789 – 1 Stat. 23 (1789) – has a very informative story behind it. On April 6, 1789, a committee of five individuals was assigned "to bring in a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution." 1 Annals of Cong. 102 (1789). It was resolved:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A.B., a Representative of the United States in the Congress thereof, do solemnly swear (or affirm as the case may be) in the presence of Almighty GOD, that I will support the Constitution of the United States. So help me God."

The final version of the oath, however – "as required by the third clause of the sixth article of the Constitution" – was, "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." 1 Stat. 23 (1789). Thus, it wasn't as if the First Congress – busy with all their duties creating a new nation – simply failed to consider bringing God into the oath. **They affirmatively removed both references to God.** To suggest that they would have wanted "under God" in an oath of allegiance recited by school children in a country that now has extraordinary religious diversity, when they affirmatively removed essentially the same language from their own oath during a far more monolithic period is fantasy.

It is also disrespect for the principles of religious freedom were part and parcel of the Framers' plan. "[N]o law respecting an establishment of religion" was an idea previously unknown among civilized governments. If this unequivocal textual mandate were meant to be trumped by remembrances that "the United States was founded on a fundamental belief in God," why would "He" be completely absented from the document? With that "defect" noted while the Constitution, itself, was being ratified,[66] why wasn't it "remedied?" Why not write "no law … except to recognize God," or otherwise replicate any of the similar colonial constitutional provisions in existence? The reality is that "freedom of conscience" was the

[66] See, *e.g.*, Letter of Luther Martin, January 27, 1788, as printed in *Elliot's Debates*, Vol. 1 at 385-86: "[T]here were some members so unfashionable as to think that a belief of the existence of a Deity, and of a state of future rewards and punishments, would be some security for the good conduct of our rulers, and that, in a Christian country, it would be at least decent to hold out some distinction between the professors of Christianity and downright infidelity or paganism." Accessed at http://memory.loc.gov/ammem/amlaw/lwed.html.

foundational idea, and "some explicit acknowledgment of the only true God and Jesus Christ whom He has sent, inserted somewhere in the Magna Carta of our country"[67] was specifically decided against by those prescient men who realized that religious freedom is a fraud unless it is available to everyone.

Of course, as the next section reveals, Defendants' discussion of history is nothing but an attempt to divert attention from the one historical fact that cannot be disputed: the 84th Congress was not concerned with the past when it placed "under God" into the Pledge of Allegiance. Rather – as is evidenced by the legislators' own words (provided in Complaint Appendix E) – it was driven by a desire to proclaim that the United States in 1954, as a people and as a nation, believed in Almighty God. This is a clear Establishment Clause violation.

**11. *Post hoc* justifications do not conceal reality**

In order for the government to abridge fundamental liberties, "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996). Nonetheless, in response to the Ninth Circuit's initial ruling in Elk Grove, Congress passed its Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-16, 116 Stat. 2057-2060, making "extensive findings about the historic role of religion in the political development of the Nation." FDM at 3:20-21. These findings are apparently supposed to demonstrate that the Act of 1954 "is constitutional both facially and as applied." FDM at 3:23 (quoting from the Act of Nov. 13, 2002).

[67] Letter of First Presbytery Eastward in Massachusetts and New Hampshire to George Washington, October 27, 1789; in McAllister D. *Testimonies to the religious defect of the Constitution of the United States*. Christian Statesman *Tract No. 7*, Philadelphia (1874) at 2-3. McAllister's tract was an attempt to demonstrate that "[t]his defect … never passed altogether unnoticed" by placing all "testimony" into "one complete summary." *Tract No. 7* at 1. Yet, for the 22 years between 1790 and 1812 – when Timothy Dwight gave his famous discourse (see *Petition for Writ of Certiorari*, No. 03-7 at 8-9) – McAllister apparently could find only three protestations within all of the colonial literature. *Tract No. 7* at 3-4.

The Supreme Court has seen through this sort of gamesmanship multiple times in past Establishment Clause cases. Stone v. Graham, 449 U.S. 39, 41 (1980) ("[A]n 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment."); Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring) ("It is of course possible that a legislature will enunciate a sham secular purpose for a statute."); Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.") If the justices were able to recognize the phony nature of the governmental claims in those instances, where the record was comparatively meager, then they will have no difficulty determining that "sham" is the perfect word to describe Congress's contention that "under God" was injected into the Pledge of Allegiance for anything other than purely religious reasons. After all, they have more than nine pages of the legislators' own words to peruse. Complaint Appendix E. Statements such as:

> Without these words, … the pledge ignores a definitive factor in the American way of life and that factor is belief in God.[68]
>
> [T]he fundamental basis of our Government is the recognition that all lawful authority stems from Almighty God.[69]
>
> The pledge of allegiance should be proclaimed in the spirit … recogni[zing] God as the Creator of mankind, and the ultimate source both of the rights of man and of the powers of government.[70]
>
> What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief, like that of their fathers and their fathers before them, in the all-present, all-knowing, all-seeing, all-powerful Creator.[71]

[68] 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance)
[69] 100 Cong. Rec. 17 (Appendix), A2515-A2516 (Apr. 1, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance)
[70] 100 Cong. Rec. 4, 5069 (Apr. 13, 1954) (Statement of Rep. Peter W. Rodino, Jr. in support of the resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

> [I]n times like these when Godless communism is the greatest peril this Nation faces, it becomes more necessary than ever to avow our faith in God and to affirm the recognition that the core of our strength comes from Him.[72]
>
> [The] principles of the worthwhileness of the individual human being are meaningless unless there exists a Supreme Being.[73]
>
> He is the God, undivided by creed, to whom we look, in the final analysis, for the well-being of our Nation. Therefore, when we make our pledge to the flag I believe it fitting that we recognize by words what our faith has always been.[74]
>
> It is a "fundamental truth … that a government deriving its powers from the consent of the governed must look to God for divine leadership."[75]
>
> [T]he Pledge of Allegiance to the Flag which stands for the United States of America should recognize the Creator who we really believe is in control of the destinies of this great Republic.[76]
>
> [I]t is well that when the pledge of allegiance to the flag is made by every loyal citizen and by the schoolchildren of America, there should be embodied in the pledge our allegiance and faith in Almighty God. The addition of the words 'under God' will accomplish this purpose.[77]

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[71] 100 Cong. Rec. 5, 5915 (May 4, 1954) (Statement of Sen. Alexander Wiley in support of Sen. Ferguson's resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

[72] 100 Cong. Rec. 5, 5915 (May 4, 1954) (Milwaukee Sentinel editorial printed in the Congressional Record – with the unanimous consent of the Senate – as requested by Sen. Alexander Wiley in support of Sen. Ferguson's resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

[73] 100 Cong. Rec. 5, 6077-6078 (May 5, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

[74] 100 Cong. Rec. 5, 6085 (May 5, 1954) (Statement of Rep. Francis E. Dorn, supporting passage of House Joint Resolution 502 which sought to insert the words "under God" into the previously secular Pledge of Allegiance)

[75] S. Rep. No. 1287, 83rd Cong., 2d Sess. 2, reprinted in 100 Cong. Rec. 5, 6231 (May 10, 1954) (Letter of Sen. Homer Ferguson, sponsor of the Senate resolution to insert the words "under God" into the previously secular Pledge of Allegiance, to Sen. William Langer, Chairman of the Senate Judiciary Committee, March 10, 1954)

[76] 100 Cong. Rec. 5, 6348 (May 11, 1954) (Sen. Homer Ferguson's explanation of the joint resolution to insert the words "under God" into the previously secular Pledge of Allegiance, to Sen. William Langer, Chairman of the Senate Judiciary Committee, March 10, 1954)

[77] 100 Cong. Rec. 5, 6919 (May 20, 1954) (Rep. Homer D. Angell's remarks on the joint resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

> Now that pagan philosophies have been introduced by the Soviet Union, there is a necessity for reaffirming belief in God.[78]
>
> I appear here today in support of any and all bills that would serve to recognize the power and universality of God in our pledge of allegiance.[79]
>
> The significant import of our action today … is that we are officially recognizing once again this Nation's adherence to our belief in a divine spirit, and that henceforth millions of our citizens will be acknowledging this belief every time they pledge allegiance to our flag.[80]

are unequivocal in their intent and in their meaning. There is no question that these statements – issued before the legislature had learned to create a deceptive record when acting to violate the Establishment Clause – run counter to the Constitution's demand for governmental neutrality in terms of religion. Congress should recognize that historical revisionism – which it so often condemned as an abject tool of repression when used by the "godless communists" – is no less obscene when employed by those who "believe there is a Divine Power."[81]

**12. Defendants have no valid purpose for having "under God" in the Pledge**

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For all the discussion provided by the Defendants, not once is a sincere or valid purpose provided for their insistence in maintaining the Pledge in its current religious form. With American citizens objecting to an obvious intrusion of religion in the midst of government, why not simply return the Pledge to its original form, which – with a sixty two year legacy of no religious divisiveness, getting us through two world wars and a great depression – served all the patriotic purposes they tout … without any question of unconstitutionality?

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[78] 100 Cong. Rec. 18 (Appendix), A4066 (May 24, 1954) (Newspaper article from the Malden (Mass.) Press of May 13, 1954, entered into the record by Rep. Angier L. Goodwin.)
[79] 100 Cong. Rec. 6, 7590-7591 (June 2, 1954) (Rep. John R. Pillion's statement provided on May 5, 1954 to Subcommittee No. 5 of the House Committee on the Judiciary.)
[80] 100 Cong. Rec. 6, 7757 (June 7, 1954) (Statement of Rep. Oliver P. Bolton in support of the joint resolution to amend the previously secular Pledge.)

The answer, of course, is that their purpose is the one about which everyone is fully aware: they want their religious belief system endorsed by the government. Unfortunately for them, but fortunately for the nation, that is precisely what the Establishment Clause precludes them from achieving.

**13. Prior case law regarding challenges to the Pledge of Allegiance are not at all controlling**

The only case in the Ninth Circuit that ever reached the merits on a challenge to the Pledge of Allegiance was Smith v. Denny, 280 F. Supp. 651 (E.D. Cal., 1968). This District Court case obviously is not binding precedent, especially since it was handed down more than three decades ago, and its author (Judge MacBride) specifically stated that he was basing his opinion on the Supreme Court dicta that existed at the time:

> While, as stated previously, the Supreme Court has not been faced with the precise issue here, the pronouncements of the Court set forth above provide me with sufficient guidance.

Smith, at 654. Obviously, Supreme Court dicta have changed greatly since then, when neither the Lemon, outsider, endorsement nor (Lee v. Weisman) coercion tests had yet been enunciated.

In his first footnote, Judge MacBride affirmatively stated that it was proper to disregard "the feelings of ostracism" that the Smith Plaintiffs alleged (Smith, at 653 (n. 1)). Since at least 1984, the Supreme Court has repeatedly declared that these feelings – in and of themselves – are sufficient to show an Establishment Clause violation:

> The second and more direct infringement is government endorsement or disapproval of religion. 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.

[81] 100 Cong. Rec. 6, 7833-7834 (June 8, 1954) (Statement of Sen. Homer Ferguson in support of the joint resolution to amend the previously secular Pledge.)

Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). See, also, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

Similarly, Judge MacBride did not know to look at the purpose of the Act of 1954, at the effects upon students of being led each day to vocalize the view that we are "one Nation under God," or at the obvious endorsement of that religious notion. Nor did he appreciate the "coercion" that takes place when teachers lead small children in such exercises. Had he done so, Smith would undoubtedly have been decided differently under any of these analyses.

It also needs to be kept in mind that the plaintiffs in Smith were never afforded an opportunity to appeal Judge MacBride's decision. By the time the case reached the Court of Appeals, it was deemed moot. Smith v. Denny, 417 F.2d 614 (9th Cir. 1969).

Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993), also involved the same issues[82] as the case at bar. As will be demonstrated here, that decision was deeply flawed.

Quoting Justice Jackson's famous passage from West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Sherman court began by recognizing that:

> [N]o 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.

319 U.S., at 642. One notes immediately that this statement is comprised of two clauses: (1) no official can prescribe what shall be orthodox, and (2) no official can force citizens to confess. Despite the fact that it is the first of these two clauses that is implicated with the words "under God" in the Pledge, the Sherman court totally disregarded that issue,

[82] This is true with respect to the School District Defendants only. The issues involving the Congress and the Law Revision Counsel are very different and have never previously been litigated.

concentrating – as it seems everyone who wishes to uphold this constitutional violation chooses to do – only on the second clause.

Even the manner in which it did this is extraordinary. Having, as just noted, chosen to not even look at the matter of official prescription of orthodoxy,[83] the Sherman court continued by prematurely announcing the demise of the Lemon test.[84] Thus, in what was supposed to have been a *de novo* review, the unjustified finding by the lower court that all three prongs of Lemon had been satisfied was simply ignored.

With the true issues eliminated, and with nothing really left to discuss, the Seventh Circuit court then focused on the question of "coercion." Coercion, of course, (a) is not a necessary element to demonstrate a First Amendment violation,[85] and (b) clearly exists under the test devised in Lee v. Weisman,[86] Incredibly, the Sherman court actually recognized these facts, and even enunciated the rule:

> If as Barnette holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, the Pledge of Allegiance becomes unconstitutional under all circumstances.

980 F.2d at 444. Can we do that one again? If what the Supreme Court held in one case is true, and if what the Supreme Court held in another case is true, then there is no escaping the

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[83] Which should have provided the plaintiff with an immediate judgment in his favor.

[84] More than two decades after Sherman, Lemon – despite criticisms concerning its nature – is still recognized as valid law by the Ninth Circuit. "[B]ecause the [Supreme] Court has not yet reached consensus on Lemon's successor, we continue to apply its test." Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940 (9th Cir. Cal. 1999). Likewise, it continues to guide California state courts (see, e.g., DiLoreto v. Board of Education, 74 Cal. App. 4th 267, 87 Cal. Rptr. 2d 791 (2d Dist. 1999); Schmoll v. Chapman Univ., 70 Cal. App. 4th 1434, 83 Cal. Rptr. 2d 426, (4th Dist. 1999)). However, the Supreme Court currently has before it a case in which the question of Lemon's continued vitality is being considered. In ACLU v. McCreary County, 361 F.3d 928 (6th Cir. 2004), cert. granted, 125 S. Ct. 944 (2005) (No. 03-1693), question 3 is "Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence."

[85] "[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause. The Supreme Court will analysis." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring).

conclusion that the Pledge of Allegiance is unconstitutional. And yet, the Sherman court goes on to escape that exact conclusion.

How this is done is astonishing. First, the Seventh Circuit used the ever-handy "Pledge is patriotic" line, 980 F.2d at 444, thereby ignoring the religious component that formed the basis of the litigation. Then, it characterized the Pledge as part of "the prescribed curriculum of the public schools," Id., disregarding multiple Supreme Court statements on this issue.[87] (As if the daily indoctrination of children in a rote exercise could be equated with "books, essays, tests and discussions." Id.)

The best, however, is yet to come. Completely confusing the Free Exercise Clause (that affords individuals the right to engage in religious behavior as they please) with the Establishment Clause (that forbids government from any form of religious behavior) the Sherman court made the absolutely incredible statement that:

> Government nonetheless retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 1070 (1925), and select private education at their own expense. The private market supports a profusion of schools, many tailored to religious or cultural minorities, making the majoritarian curriculum of the public schools less oppressive.

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[86] Sherman was handed down five months after Lee v. Weisman was decided.

[87] "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." Abington School District v. Schempp, 374 U.S. 203, 225 (1963); "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." Stone v. Graham, 449 U.S. 39, 42 (1980); "To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument." Westside Community Bd. of Ed. V. Mergens, 496 U.S. 226, 244 (1990).

980 F.2d at 445. This is a novel approach to the Bill of Rights from a federal Court of Appeals: "You don't like what we're giving you? You can go somewhere else."

Whether intentional or simply due to a failure to understand the issues, the arguments in this opinion are certainly not those upon which good law is constructed. Although the plaintiffs clearly objected only to "under God" in the Pledge, the court continued, writing that:

> Objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag 'and to the republic for which it stands.'

980 F.2d at 445 (emphasis in the original). This is an absolute deception that totally skirts the issue. As in the case at bar, there was never any objection in Sherman to the patriotism inherent in the Pledge. The objection then – as now – was only to the religious dogma that was unconstitutionally inserted in 1954. When, under the government's auspices, the Pledge is being made **under God**, then the duty of the courts – following the mandates of the Establishment Clause – is precisely to "reduce to silence the many who *want* to pledge" in that religious manner. If individuals wish to worship God in their private spheres, fine, and we have the Free Exercise Clause to ensure that the government doesn't abridge their right to do so. But to allow them to employ the machinery of the state to achieve this goal is absolutely forbidden. Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); Lee v. Weisman, 505 U.S. 577 (1992).

Continuing along in its rogue First Amendment jurisprudence, the Seventh Circuit court quoted Justice Holmes for the proposition that "a page of history is worth a volume of logic"[88] (980 F.2d at 445 (citation omitted)). However, under its historical account, the Congressional Record (which, as Plaintiff here has shown, details the unconstitutionally

[88] This is an apt quote for the Sherman court, which declared that "[y]ou can't understand a phrase such as 'Congress shall make no law respecting an establishment of religion' by syllogistic reasoning." 980 F.2d at 445.

religious purposes of the Act of 1954) was completely disregarded. Instead, the Sherman author alluded to the founders, who – more than two hundred years earlier[89] - knew nothing of public education or pledges of allegiance to the flag.[90]

From the foregoing, it is obvious that the Sherman court – like Defendants here – was intent on disregarding key constitutional principles to reach its desired conclusion. The government's assembling little children every day to pledge their allegiance to the Nation, and then incorporating "God" into that pledge, clearly violates every principle upon which the Religion Clauses lie. The only validity Sherman offers in understanding this matter comes from Justice Manion who, in concurrence, refused to accept the majority's characterization of "under God" as being "sapped of religious significance." 980 F.2d at 448. With this Plaintiff concurs … "under God" is clearly religious, and its presence in the Pledge of Allegiance therefore violates the guarantees of the First Amendment.

It should also be noted that Sherman was argued before the Seventh Circuit on January 24, 1992. Lee v. Weisman was decided on June 24, 1992. Thus, the plaintiffs in Sherman were precluded from utilizing the many points from Lee that would have been controlling and that unquestionably should have resulted in a favorable decision.

**14. The issue is not about "hearing others" endorse the existence of God. It is about "hearing government" endorse the existence of God.**

Defendant-Intervenors John Carey, et al (hereafter :"DIJC") begin their Memorandum in Support of Motion to Dismiss (hereafter "JCM") by writing "the thrust of Plaintiffs'

[89] In pondering this point, one might consider how much stock we expect the citizens living in this country in the year 2208 will take in our current interpretations of the laws we promulgate today.
[90] In fact, if this "let's look at what the Founders did" argument is to be made, it must be appreciated that they specifically kept all references to any deity out of the Constitution. This exclusion was extraordinary and unique, and – along with the fact that the First Congress affirmatively removed God from their own oath of office (see, at 49, infra) – provides overpowering support for the proposition that the Founders would never have allowed the words "under God" into any pledge of allegiance.

lawsuit boils down to a single claim: that hearing others voluntarily recite the Pledge of Allegiance constitutes an establishment of religion." This statement totally misses the point of this litigation. Plaintiffs thrive on the idea that ours is a land of religious diversity, and thrill in the notion that any individuals or groups may profess whatever religious ideas they choose. As long as government allows an equal freedom to all, DIJC and any others can do this in the public square to their heart's content. What they may not do, however, is use the machinery of the state to support those professions of religion. Thus, "the thrust of Plaintiff's' lawsuit" is not that they object to "others" imparting their religion into the Pledge of Allegiance, it is that they object to the government imparting their religion into the Pledge of Allegiance. Once this very simple distinction is recognized, perhaps they will end their crusade, and rejoice in the equality that defines our great land.

**15. That our rights come from a Supreme Being is religious dogma, not "political philosophy"**

DIJC claims that the Pledge of Allegiance "is a statement of political philosophy that depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been 'endowed' with such rights by its 'Creator.'" JCM at 5:6-8. This, of course, is merely a semantic attempt to deny the obvious: belief that rights come from God is a religious belief, not politics or philosophy:

> "Concepts concerning God or a supreme being of some sort are manifestly religious . . . . These concepts do not shed that religiosity merely because they are presented as a philosophy or as a science."

Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (citing the District Court opinion of a similar case). In Fact, claiming that government may advocate this religious belief because it has to do with politics increases, not diminishes, the dangers the Establishment Clause seeks to avoid.

> We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is fusion between religion and the political regime. We have believed that religious freedom cannot thrive in the absence of a vibrant religious community, and that such a community cannot prosper when it is bound to the secular. And we have believed that these were the animating principles behind the adoption of the Establishment Clause. To that end, our cases have prohibited government endorsement of religion, its sponsorship, and active involvement in religion, whether or not citizens were coerced to conform."

Lee v. Weisman, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring).

## D. THE ESTABLISHMENT CLAUSE IS CLEARLY VIOLATED

### 1. Interweaving a religious belief into the fabric of society is an establishment of religion

It is doubtful that a more powerful argument in Plaintiffs' favor can be made than the one given by the SDDs: i.e., that the religious doctrine being challenged in this case has been "interwoven into the fabric of our society." SDDM at 26:22-23 and 27-28. What better description is there of an "establishment of religion?" The Plaintiffs cannot improve upon the following characterization of the constitutional violation:

> Since "under God" was introduced into the Pledge, the population of the United States has increased by over 130 million citizens. 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.

SDDM at 27:2-7.

### 2. "Under God" was put into the Pledge of Allegiance for purely religious reasons

The argument that "under God" was meant merely to reference our nation's history is absolute poppycock. Those purely religious words were used in their purely religious form for their purely religious meaning, and the Defendants' attempts to revise history should be seen precisely for what they are. "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." United States v. Virginia, 518 U.S. 515, 533 (1996).

To get an honest sense of what mainstream society was about in the 1950s, the pages of Life Magazine are about as good a source as one can find. In the April 11, 1955 issue of that periodical, there was an article that detailed instances of the Nation's "turn to religion" in the fifties:

> Once you begin to enumerate them, there seems to be no end. But just as a sample fistful, named almost at random, ponder the significance in the picture of "U.S.A. 1955" of the huge followings won by Billy Graham and Bishop Sheen, **of the insertion of "under God" into the schoolchild's pledge** and of "In God We Trust" into the design of our postage stamps, of the monster rallies which Catholics and Protestants and Jehovah's Witnesses have proved they can assemble, of the rush by the most adventurous modernistic architects to get into the designing of churches and synagogues, of the crowding in theological seminaries and rabbinical schools, of Hollywood's belief that any film spectacle combining a biblical or semibiblical theme with sufficient exposure of the fleshpots of carnality is sure to make a mint, of recent theatrical works by T.S. Eliot and Graham Greene and GianCarlo Menotti which leave critics at a loss but theaters filled with brooding audiences.[91]

The phrase, "under God," was intruded into the Pledge of Allegiance for one reason and for one reason only: to have the government endorse the majority's religious belief that there exists a God. As convinced as the majority may be that this is a good thing, it is precisely what the Establishment Clause forbids.

### 3. "Under God" in the Pledge of Allegiance violates every Establishment Clause test

The SDDs have written that "it is clear that the Pledge is constitutional, no matter which (if any) test is applied." SDDM at 29:13. Prior to 1954, that was unquestionably correct. Since that time, however, when Congress violated the Establishment Clause by introducing a purely religious claim within that oath of allegiance, the opposite has been the case. When Congress decided to claim that ours is a nation "under God," it made a "law respecting an establishment of religion." By every principled and honest application of every test, "under God" in the Pledge of Allegiance is unconstitutional

#### (a) "Under God" violates the equality upon which the Establishment Clause is based.

In 1784, Patrick Henry attempted to have the Virginia House of Delegates pass a *Bill Establishing a Provision for Teachers of the Christian Religion.* A motion to postpone a vote

[91] Hutchinson P. *Have We a "New" Religion?* Life Magazine, April 11, 1955, at 138. (emphasis

on the bill was passed, 45-38, on Christmas eve of that year.[92] Hoping to have the bill defeated, James Madison wrote his famous *Memorial and Remonstrance* over the next months, explaining his position. That *Memorial and Remonstrance* – referenced in virtually every one of the Supreme Court's major Establishment Clause cases[93] – speaks of equality no less than thirteen times. The bill should be defeated, Madison wrote, "[b]ecause the Bill violates that **equality** which ought to be the basis of every law," "[b]ecause … we cannot deny an **equal** freedom to those whose minds have not yet yielded to the evidence which has convinced us," and " [b]ecause … [i]t degrades from the **equal** rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[94]

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added).

[92] Accessed at http://www.loc.gov/exhibits/religion/f0504s.jpg on June 17, 2005.

[93] In 29 cases has Madison's famous work been cited: Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2332 (2004) (Thomas, J., concurring); Locke v. Davey, 540 U.S. 712, 722 (2004); Zelman v. Simmons-Harris, 536 U.S. 639, 711 (2002) (Souter, J., dissenting); Mitchell v. Helms, 530 U.S. 793, 871 (2000) (Souter, J., dissenting); City of Boerne v. Flores, 521 U.S. 507, 560-61 (1997) (O'Connor, J., dissenting); Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 853 (1995) (Thomas, J., concurring); Lee v. Weisman, 505 U.S. 577, 590 (1992); Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 605-606 (1987) (Powell, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 55 n.38 (1985); Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting); Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 502 (1982) (Brennan, J., dissenting); Meek v. Pittenger, 421 U.S. 349, 383 (1975) (Brennan, J., dissenting); Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 772, 783, 798 (1973); Lemon v. Kurtzman, 411 U.S. 192, 209 (1973) (Douglas, J., dissenting); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972); Lemon v. Kurtzman, 403 U.S. 602, 633 (1971) (Douglas, J., concurring); Tilton v. Richardson, 403 U.S. 672, 696 (1971) (Douglas, J., dissenting); Walz v. Tax Com. of New York, 397 U.S. 664, 675 n.3 (1970); Flast v. Cohen, 392 U.S. 83, 103 (1968); Board of Education v. Allen, 392 U.S. 236, 266 (1968) (Douglas, J., dissenting); School Dist. v. Schempp, 374 U.S. 203, 213, 225 (1963); Engel v. Vitale, 370 U.S. 421, 433 n.13, n.15, 436 n.22 (1962); Torcaso v. Watkins, 367 U.S. 488, 491 (1961); McGowan v. Maryland, 366 U.S. 420, 431 n.7 (1961); Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 214, 216 (1948); Everson v. Board of Education, 330 U.S. 1, 12, 13 n.12 (1947) (plus extensive discussion in Justice Rutledge's dissent); Reynolds v. United States, 98 U.S. 145, 163 (1878).

[94] The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43 (citing The Papers of James Madison. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--)). Accessed on May 29, 2005 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html. (Emphases added.)

The manner in which this equality will best be upheld, thought Madison, was to remove from government all power to legislate in any way upon religious matters. Thus, when he addressed the Virginia Ratifying Convention, he noted, "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation."[95] As he wrote later:

> Every new & successful example therefore of a perfect separation between ecclesiastical and civil matters, is of importance. And I have no doubt that every new example, will succeed, as every past one has done, in shewing that religion & Govt. will both exist in greater purity, the less they are mixed together.[96]

Chiseling purely religious verbiage into the nation's previously secular sole pledge of allegiance is anything but "a perfect separation between ecclesiastical and civil matters," and cannot plausibly comport with the idea that "[t]here is not a shadow of right in the general government to intermeddle with religion." Similarly, it "violates that equality which ought to be the basis of every law," and it "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." There are individuals who adhere to "religions based on a belief in the existence of God [and others who adhere to] religions founded on different beliefs." Torcaso v. Watkins, 367 U.S. 488, 495 (1961). Plaintiffs here are among the latter, and government is in no way treating them equally in terms of their religious beliefs when it claims that we are "one Nation under God." That statement - placed in the midst of the nation's oath of allegiance – "degrades from the equal rank of Citizens" perfectly loyal persons such as Plaintiffs. Thus, without doubt, the Establishment Clause is violated.

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[95] Id.

[96] Letter of James Madison to Edward Livingston, July 10, 1822. The Founders' Constitution. Volume 1, Chapter 18, Document 34. The University of Chicago Press. The Writings of James Madison. Edited by Gaillard Hunt. 9 vols. New York: G. P. Putnam's Sons, 1900--1910. Accessed at http://press-pubs.uchicago.edu/founders/documents/v1ch18s34.html on June 18, 2005.

**(b) "Under God" violates the neutrality espoused by every current justice**

When government interlarded the Pledge of Allegiance with "under God," it took one side in the quintessential religious question, "Does God exist?" That alone violates the neutrality that has been deemed essential by every member of the Supreme Court: Cutter v. Wilkinson, 125 S. Ct. 2113, ___ (2005) (Justice Ginsburg noted the Court's command for laws "administered neutrally among different faiths."); Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2003) (Chief Justice Rehnquist ruled that a voucher program accords with the Establishment Clause when it "is entirely neutral with respect to religion."); Mitchell v. Helms, 530 U.S. 793, 809 (2000) (Justice Thomas wrote, "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality."); Agostini v. Felton, 521 U.S. 203, 231 (1997) (Justice O'Connor approved of "neutral, secular criteria that neither favor nor disfavor religion"); Rosenberger v. University of Virginia, 515 U.S. 819, 839 (1995) (Justice Kennedy referenced "the guarantee of neutrality"); Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 704 (1994) (Justice Souter wrote that "civil power must be exercised in a manner neutral to religion."); Employment Div. v. Smith, 494 U.S. 872, 886 (1990) (Justice Scalia focused on "generally applicable, religion-neutral laws"); Wallace v. Jaffree, 472 U.S. 38, 60 (1985) (Justice Stevens explained that "government must pursue a course of complete neutrality toward religion"). Justice Breyer joined Justice Souter's dissent in Rosenberger, 515 U.S. at 879 (noting that it is key for a law to be "truly neutral with respect to religion") and Justice Stevens' majority opinion in Santa Fe, 530 U.S. at 304 ("'The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views'" (quoting Board of Regents v. Southworth, 529 U.S. 217, 235 (2000)).

**(c) "Under God" violates the endorsement test, by endorsing the purely religious ideas that (a) there exists a God, and (b) the nation is "under" that purely religious entity**

"Under God" fails the endorsement test, which "does preclude government from conveying … a message that … a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent …" Wallace, 472 U.S. at 70 (O'Connor, J., concurring). The "particular religious belief" that there exists a God – plus the notion that we are "under" Him – is preferred by the current version of the Pledge.

To determine whether a given governmental practice endorses a religious belief, "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement." Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). Notwithstanding Justice O'Connor's concurrence in Elk Grove, 124 S. Ct. at 2321-27, the fact is that it would be virtually impossible for any objective observer – "acquainted with the text, legislative history, and implementation" of the Act of 1954 – to conclude that not only Monotheism, but largely Christian Monotheism, was endorsed both then and now.

The idea of infusing the secular Pledge of Allegiance with religious dogma first came from the Knights of Columbus – "the largest Catholic laymen's organization" – in 1951.[97] The Knights recommended the change to our federal leaders in 1952,[98] the same year Congress requested that the president "set aside and proclaim … a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals."[99] On April 20, 1953 (two months after the introduction of H. Con. Res. 60, creating a "Prayer Room" in the Capitol "to seek Divine strength and

[97] Memorandum in Support of Motion to Intervene of Defendant-Intervenors John Carey, et al. (hereafter "MJC") at 8:4-12.
[98] Id. at 13-16.

guidance"[100]), the first of more than fifteen bills to place "under God" into the Pledge was proposed.[101] Authored by Michigan's Rep. Louis Charles Rabaut (who was soon to enter into the Congressional Record the outrageous statement that "An atheistic American … is a contradiction in terms"[102]), the bill gathered its main support on February 7, 1954, when the Rev. George M. Docherty spoke before his congregation at the New York Avenue Presbyterian Church. Thus, the chief catalyst for placing purely religious words into our perfectly functioning secular pledge was a Sunday sermon.[103]

Attending that sermon was President Eisenhower. Three days earlier, the President and other of the nation's leaders publicly joined in attending a prayer breakfast sponsored by the International Council for Christian Leadership.[104] On the afternoon of Rev. Docherty's sermon, the President took part in a radio and television broadcast of the American Legion's "Back to God" program. The program was "an appeal to the people of America and elsewhere to seek Divine guidance in their everyday activities, with regular church attendance, daily family prayer and the religious training of youth."[105] The President stated he was "delighted that our veterans are sponsoring a movement to increase our awareness of God in our daily lives."[106]

Over the next months, the House and Senate worked together on the legislation, with numerous congressmen openly expressing pro-Monotheistic and anti-Atheistic biases.

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[99] 66 Stat. 64 (1952); 36 U.S.C. § 169h.
[100] *The Prayer Room in the United States Capitol*, Document No. 234, 84th Cong., 1st Sess. (1954); US GPO, Washington: 1956, at 1.
[101] *Big Issue in D.C.: The Oath of Allegiance*. New York Times, May 23, 1954, E-7.
[102] 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance).
[103] *Id*.
[104] *Eisenhower Joins in a Breakfast Prayer Meeting*. New York Times, February 5, 1954, A-10.
[105] *Nation Needs Positive Acts of Faith, Eisenhower Says*. New York Times, February 8, 1954, A-1, 11.
[106] "Text of President's Talk on Faith." New York Times, February 8, 1954, A-11.

Complaint, Appendix E. (providing more than nine pages of citations). The final bill passed without objection in either house.[107] Preparing to celebrate the religious conversion of the previously secular Pledge as part of an enhanced Flag Day ceremony, Rep. Oliver Bolton of Ohio (a proponent of the change) called the White House regarding a picture taking. He recommended "that a Protestant, a Catholic and a Jew be in the group."[108] At the ceremony itself, *Onward Christian Soldiers* was played.[109] The lyrics to that song are:

> Onward, Christian soldiers, marching as to war,
> With the cross of Jesus going on before.
> Christ, the royal Master, leads against the foe;
> Forward into battle see His banners go!

Congress stated, "The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism …"[110] President Eisenhower noted, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[111]

This "text, legislative history, and implementation of the statute" demonstrates an unquestionable violation of the endorsement test. "Under God" was intruded into the Pledge to affirmatively proclaim that Americans, as a people, actively believe in God. Congress, therefore, not only made a law "**respecting** an establishment of religion," it made a law

[107] 100 Cong. Rec. H7757-66 (June 7, 1954); 100 Cong. Rec. S7833-34 (June 8, 1954).
[108] Complaint, Appendix G.
[109] 100 Cong. Rec. 7, 8617-8618 (June 22, 1954) (Statement of Sen. Homer Ferguson).
[110] H.R. 1693, 83rd Cong., 2nd Sess. (1954).
[111] 100 Cong. Rec. 7, 8618 (June 22, 1954) (Statement by President Dwight D. Eisenhower, as reported by Sen. Ferguson).

**establishing** religion – namely, Monotheism – in a country with millions of Atheistic[112] citizens.

**(d) "Under God" violates the Lemon test**

The Pledge had been serving its patriotic and unifying purposes for sixty-two years when Congress passed its Act of 1954.[113] Thus, it was neither a desire for patriotism nor for unity that instigated the intrusion of "under God" into that previously secular passage. Rather, the ostensible purpose was to distinguish us from the Soviet Union. Congress did that in an unconstitutional manner.

Highlighting the differences between the two societies was certainly reasonable, for the freedoms of American democracy were far superior to the subjugation of Soviet communism. But Congress misidentified the distinguishing feature. The repression of our rival fifty years ago was not due to Atheism any more than that of the Spanish five hundred years ago was due to Catholicism, or that of the Taliban five years ago was due to Islam. Our way of life was superior because we had religious freedom, not because of any one majority belief, and the reality is that – in declaring that ours is a land of Monotheists – Congress took a step backwards towards the religious totalitarianism it rightfully meant to protest. As a result, the purpose prong of the test from Lemon v. Kurtzman, 403 U.S. 602 (1971), was violated. "The proper inquiry under the purpose prong of Lemon … is whether the government intends to convey a message of endorsement or disapproval of religion." Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). As mentioned, Congress itself stated its purpose was: to "acknowledge the dependence of our people and our

[112] Others – such as polytheists, pantheists, and those with "no religion" – are also excluded. Still more – including staunch Christians – are offended as well by this involvement of their religion in government.
[113] Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249.

Government upon the moral directions of the Creator … [and] to deny the atheistic and materialistic concepts of communism."[114] Thus, both endorsement (of Monotheism) and disapproval (of Atheism) were intended by the Act of 1954. This, of course, is facially apparent from a statute that does nothing but intrude the purely religious phrase, "under God," into a Nation's sole Pledge.

The process by which the religion was injected mirrors the legislative sequence in Wallace, where an existing statute allowing for a period of silence "for meditation" was altered to read "for meditation or voluntary prayer." Id. at 59. Because of the religious purpose of the added words, that change was ruled unconstitutional. Surely, affixing "under God" to the nation's official Pledge of Allegiance is a far greater offense than merely letting a state's individuals know that they can silently pray if they so choose.

Plaintiffs acknowledge that it was Congress, not the SDDs, who committed this purpose prong violation. However, as the SDDs themselves admit, "[t]he issue of whether the Defendant School Districts' policies violate the Constitution hinges on the constitutionality of the Pledge." SDDM at 19:8-9. Because the Pledge is now unconstitutional, the SDDs' policies have perpetuated the religious biases, thereby advancing impermissible effects. In essence, they have created a religious "test oath, and the test oath has always been abhorrent in the United States." West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624, 644 (1943) (Black, J., concurring). Furthermore, no one can seriously deny that small children led by their teachers every day in reciting that ours is "one Nation under God" are inculcated with the belief that God exists. Is this not precisely how churches indoctrinate the children of their congregations? "Consciously or otherwise, teachers … demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

[114] H.R. 1693, 83rd Cong., 2nd Sess. (1954).

Inescapably, like parents, they are role models." Bethel School Dist. v. Fraser, 478 U.S. 675, 683 (1986). Finally, the effect of the SDDs' Pledge policies – especially when added to the "true Americans believe in God" view that has been promoted – is to "sen[d] a message to nonadherents that they are outsiders, not full members of the political community" Lynch, 465 U.S. at 688 (O'Connor, J., concurring).

School districts have an affirmative duty to remedy – not promote – situations where students are turned into "outsiders" due to their religious beliefs. As specified in the statement issued by the United States Department of Education on February 7, 2003,[115] "teachers and other public school officials may not lead their classes in … religious activities," since such "conduct is 'attributable to the State' and thus violates the Establishment Clause." With a claim that ours is "one Nation under God," clearly "attributable to the State," how can Petitioners even allow, much less require, their "teachers and other public school officials" to engage in this practice? As the prior Secretary of Education noted in response to the Ninth Circuit's ruling in this case, "under God" in the Pledge is an "expression of faith."[116] A group "expression of faith" – obviously in "God" – has religious effects, and violates Lemon's second prong.

**(e) "Under God" violates the "coercion" test**

The "coercion test" – noted in Engel v. Vitale and refined in Lee v. Weisman – is also violated. In Lee, the Court looked at public and peer pressure, recognizing that "though subtle and indirect, [this pressure] can be as real as any overt compulsion." Id. at 593. This was the

[115] *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*. February 7, 2003. Accessed at http://www.ed.gov/policy/gen/guid/religionandschools/index.html.
[116] Secretary of Education Rod Paige issued a statement on the Ninth Circuit's decision. Although he clearly disapproved of the ruling, he acknowledged that, "under God" in the Pledge is an "expression of

case with students on the brink of adulthood, who merely listened twice in their entire school careers as religious dogma was proffered by an invited guest. The coercion here – with younger, more impressionable children being encouraged by government-employed teachers to actively recite religious dogma more than 2000 times[117] – is vastly greater. "Adherence to Lee would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in Lee." Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2328 (2004) (Thomas, J., concurring).[118]

Coercion stems not only from the didactic nature of the teacher-student relationship (where pupils attempt to please their instructors), but also from the aversion youngsters have to being saddled with the "outsider" status just noted. "[There is] influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children …" McCollum, 333 U.S. at 227 (Frankfurter, J., concurring). See also Lee v. Weisman, 505 U.S. at 593-594 (citing research confirming "pressure from their peers towards conformity").

Couching the constitutional transgression within a patriotic exercise does not lessen the offense. On the contrary, it exacerbates "the real conflict of conscience faced by the young student." Lee v. Weisman, 505 U.S. 577, 596 (1992). "'All of the eloquence by which the majority extol the ceremony of flag saluting as a free expression of patriotism turns sour when used to describe the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public.'" Barnette, 319 U.S. at 635 (n. 15) (citation omitted). This is neither

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faith." Statement, June 27, 2002. Accessed at http://www.ed.gov/news/pressreleases/2002/06/06272002.html.

[117] Schools are in session at least 175 days per year. Cal. Ed. Code § 41420(a). With thirteen years of attendance, at least 2,275 school days are scheduled for each child.

hyperbole nor an abstract construct concerning hypotheticals. These are real effects, foisted upon real children, that can have severe social and intellectual adverse consequences.[119] In fact, those consequences can be lifelong.[120] Petitioners have shown no countervailing benefits that outweigh these harms. The comfort the majority feels from governmental displays of its preferred religious dogma should not be paid for with stigmatization and emotional turmoil inflicted upon a subset – whatever its size – of our youngest citizens.

**(f) "Under God" violates the "outsider" test**

Largely due to governmental activities, atheists have always been "political outsiders" in this country. Complaint Appendices B and C. That this "outsider" status has been further imposed upon Plaintiffs directly as a result of the Pledge of Allegiance has also been detailed. See, e.g., Complaint ¶¶ 59, 90, 91, 92, 94, 102, 108, 164, and Appendices D-K. Appendix M reveals some of the very personal "outsider" effects that have been shouldered by Plaintiff Newdow due to his efforts to end this religious discrimination. Thus, the "outsider" test – perhaps the best test for capturing the essence of violations of the Establishment Clause – is failed by the Defendants' actions.

**(g) "Under God" violates the "imprimatur" test**

"When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." Lee v. Weisman, 505 U.S. 577, 606 (U.S., 1992) (Blackmun, J., concurring). It cannot be seriously argued that placing any verbiage in the midst of the nation's sole pledge of allegiance does not place

[118] See, also, Complaint Appendix L, demonstrating that recitations of the Pledge are far more coercive than participating in high school graduations.
[119] In Elk Grove, a *Brief amicus curiae* was filed by *Atheists and Other Freethinkers*. That Brief contained excerpts of testimonials from numerous individuals who suffered real harms as a result of the pervasive antiatheism that defines our current culture..

government's imprimatur upon those words. This is especially the case when that pledge is recited every day by school children who – led by their public school teachers – stand up, face the nation's flag, place their hands over their hearts, and actively voice the words in unison. Government's imprimatur has been placed on the fact that the United States is a republic which (generally, at least) strives to provide liberty and justice for all. Prior to 1954, it also strove to be "indivisible." Since that time, however, it has been divided by religion, after government placed its imprimatur on the purely religious notion that we are "one Nation under God." If "it is surely true that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such," Gillette v. United States, 401 U.S. 437, 450 (1971), then the words, "under God," in the Pledge of Allegiance unquestionably violate the Establishment Clause.

**(h) "Under God" violates the "divisiveness" test**

The Supreme Court has written that "divisiveness along religious lines [is] a result at odds with the Establishment Clause." Santa Fe Independent School District v. Doe, 530 U.S. 290, 311 (2000). This is especially true in the public schools:

> In no activity of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. 'The great American principle of eternal separation'-Elihu Root's phrase bears repetition-is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

McCollum v. Board of Education, 333 U.S. 203 (1948) (Frankfurter, J., concurring). Thus, it makes no sense at all to have religiously divisive verbiage within the Pledge of Allegiance. After all, pledging allegiance to the flag serves a compelling interest "inferior to none in the hierarchy of legal values. National unity is the basis of national security." Gobitis, 310 U.S. at

[120] Id.

595. Congress took "one Nation indivisible," and divided it along religious lines. If the courts are charged with "protecting the Nation's social fabric from religious conflict," Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting), then they need to remove "under God" from our only oath of allegiance.

**4. The history of "under God" in the Pledge proves the Supreme Court's point regarding "the power, prestige and financial support of government"**

It should be recognized that the process by which "under God" ended up in the Pledge demonstrates precisely the danger that the Establishment Clause exists to prevent. Apparently no one ever complained about the lack of God in the Pledge for the 59-year stretch from 1892-1951. This is the case even though every individual and group in this nation had – under the Free Exercise Clause – the right to intrude such religious dogma at any time. Then, in 1951, the Knights of Columbus exercised that right, JCM at 8:10-14, and that organization's member branches used that preferred (to them) monotheistic version of the Pledge at their meetings. Still, however, few others in society joined this religious bandwagon. It was only after the "power, prestige and financial support of government" weighed in that American society was driven to a state where a "national uproar," SDDM at 27:8-9, would take place over the removal of the words that no one for nearly three score years ever even thought about. It is now time for government to do as it has done in the past, and use its "power, prestige and financial support" to back the equality that truly defines the philosophy of our land. See, e.g., Brown v. Board of Education, 347 U.S. 483 (1954).

**5. Five Justices have acknowledged that application of the Supreme Court's Establishment Clause tests would invalidate the Pledge**

On five separate occasions, Supreme Court justices have recognized that the Court's Establishment Clause tests require invalidating the Act of 1954.[121] For instance, in Wallace v. Jaffree, 472 U.S. 38 (1985), "the established principle that the government must pursue a course of complete neutrality toward religion" was reiterated. Id. at 60. Chief Justice Burger appropriately queried, "Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method."[122] Id. at 88 (Burger, C.J., dissenting). Dissenting in Texas Monthly, In v. Bullock, 489 U.S. 1 (1989), Justice Scalia provided a list of practices (including the Pledge of Allegiance) which he indicated conflict with the plurality's "assertion … that government may not 'convey a message of endorsement of religion'" Id. at 29-30 (Scalia, J., dissenting).

The "outsider" test, as utilized in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989), was the third test noted to be unworkable in relation to the Pledge. There, Justice Kennedy noted what is irrefutable: "[I]t borders on sophistry to suggest that the '"'reasonable'"' atheist would not feel less than a '"'full membe[r] of the political community'"' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." Id. at 672-673 (Kennedy, J., dissenting). He continued, "Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court … constitute

[121] Enjoying – along with the majority – the governmental support of their religious beliefs, these justices clearly did not want the Pledge ruled unconstitutional. Nonetheless, they correctly assessed that the given majority analysis required such a conclusion.

[122] Incidentally, the Chief Justice's analysis showed that "under God" is religious, and that Congress inserted the words "under God" to endorse a religious view: "The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that 'our

practices that the Court will not proscribe, but that the Court's reasoning today does not explain." Id. at 674 n.10 (Kennedy, J., dissenting).

Justice Kennedy brought to the fore the very real issue of "coercion" in Lee v. Weisman, 505 U.S. 577 (1992). There is no question that small children have essentially no choice but to join their fellow students when led by their teachers in a daily ritual, or that the rare young person with sufficient fortitude to display her disbelief in God would not be ostracized in today's society by exempting herself from such a routine. Justice Scalia, in his Lee dissent, argued that "[i]f students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge." Id. at 639 (Scalia, J., dissenting).

In Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004), Justice Thomas also found that the coercion test would invalidate the Pledge, writing:

> Adherence to Lee would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in Lee. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.

Elk Grove, 124 S. Ct. at 2328. Thus, justices of this Court have acknowledged that the neutrality, endorsement, outsider and coercion tests all demand removal of "under God" from the Pledge. They may not have liked the result of those Establishment Clause methodologies, and they assuredly knew that the majority of citizens would also be displeased. Nonetheless, "[d]edication to the rule of law requires judges to rise above the political moment in making judicial decisions." Republican Party v. White, 536 U.S. 765, 803 (2002) (Stevens, J.,

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people and our Government [are dependent] upon the moral directions of the Creator.'" 472 U.S. 38 (Burger, C.J., dissenting) (n. 3) (citation omitted).

dissenting). See also Texas v. Johnson, 491 U.S. 397, 420-421 (1989) (Kennedy, J., concurring):

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.

**6. Engel v. Vitale is exactly on-point, and demands invalidation of "under God"**

In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court confronted a virtually identical situation to the case at bar, concluding that the practice of leading students in religious morning exercises violates the Establishment Clause. That this case provides controlling precedent is readily seen by simply considering the religious statements in each of the two cases, presented in the same form to the students.

In Engel, teachers in New York had their public school students recited the following prayer:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

370 U.S. at 422. This was ruled unconstitutional. [It might be noted – in view of the constant mentions by the Defendants here that the instant Plaintiffs are not compelled to recite the words, "under God," in the Pledge – that the Engel prayer was just as noncompulsory. "The prayer is said aloud in the presence of a teacher, who either leads the recitation or selects a student to do so. No student, however, is compelled to take part." Engel, 370 U.S. at 438 (Douglas, J., concurring). In fact, Engel stated the case quite clearly:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated ... whether ... laws operate directly to coerce non-observing individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962).]

Were the SDDs to have their students stand up every morning, face the flag of the United States, place their hands on their hearts, and say nothing more than, "We are one Nation under God," it is obvious that such a practice, under Engel, would be an Establishment Clause violation. Thus, the question is whether harboring the religious phraseology within the nation's Pledge of Allegiance avoids the constitutional infirmity.

That it does not can be seen by returning to Engel, and imagining that (instead of "under God") its prayer were incorporated into the Pledge by the Act of 1954. In other words, consider a Pledge that reads:

> I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under Almighty God, upon whom we acknowledge our dependence, and from whom we beg blessings upon us, our parents, our teachers and our Country, indivisible, with liberty and justice for all.

Would that now be permissible because, "the Pledge is patriotic, not religious?" Would the myriad supplications to the Almighty that have been uttered by our politicians and others throughout the nation's history be a valid excuse to permit such an exercise? The answer to both these questions is obviously no … for all of the identical reasons given by the Engel court. Neither Congress nor the School Districts nor any other governmental actors are permitted to hide religion within the Pledge, and then deny that it is religion because the words are nestled within that locale. This holds true for "under God," the prayer in Engel, or any other religious doctrinal passage.

**7. The Supreme Court has invalidated governmental endorsement of religion in nine of nine cases**

In addition to Engel, there are numerous other Supreme Court cases that stand for the proposition that governmental endorsement of religion will not be tolerated in the public schools. In fact, every single time the Court has been presented with such a case – nine out of

nine times – the result has been the same: "absolute equality before the law, of all religious opinions." Abington School District v. Schempp, 374 U.S. 203, 215 (1963) (citation omitted).

In 1948, religious teachers were permitted to enter the public schools in Champaign, Illinois, to teach religion. McCollum v. Board of Education, 333 U.S. 203 (1948). That was ruled to be a violation of the Establishment Clause. The prayer in Engel v. Vitale, 370 U.S. 421 (1962), as was just seen, was ruled to be a violation of the Establishment Clause. Bible readings in public schools were ruled to be a violation of the Establishment Clause the following year in Abington School District v. Schempp, 374 U.S. 203 (1963). Prohibitions on the teaching of evolution in the public schools were ruled to be a violation of the Establishment Clause in Epperson v. Arkansas, 393 U.S. 97 (1968). In Stone v. Graham, 449 U.S. 39 (1980), posting of the Ten Commandments on classroom walls was ruled to be a violation of the Establishment Clause. It was a violation of the Establishment Clause to have moments of silence – which were actually intended for prayer – in Wallace v. Jaffree, 472 U.S. 38 (1985). Teaching of "creation science" was ruled to be a violation of the Establishment Clause in Edwards v. Aguillard, 482 U.S. 578 (1987), as was the inclusion of clergy-leg prayer in Lee v. Weisman, 505 U.S. 577 (1992). Finally, in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), even student-led prayers at high school football games was ruled to be a violation of the Establishment Clause.

This unbroken series of cases demonstrates that – at least in the public school arena – the Supreme Court is serious about upholding the clear principles that underlie the first ten words of the Bill of Rights. School children may not – under the mandate of the Establishment Clause – be led by their government-employed teachers to make the purely religious claim that ours is "one Nation under God."

**8. Congress's hypocrisy reveals the Constitutional infirmity**

"The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." Board of Regents v. Southworth, 529 U.S. 217, 235 (2000). It is important, therefore, to point out that Congress has failed to exhibit that viewpoint neutrality in regard to the one subject area where that is required for itself under the terms of the Bill of Rights: religion.

In a report issued in 1965, entitled, "Antireligious Activities in the Soviet Union and in Eastern Europe,"[123] Congress condemned religious persecution in the Soviet Union. Among the practices criticized was "active propagation of the concepts of atheism."[124] Strange, then, that Congress found its own "active propagation of the concepts of monotheism" to be proper. Would Congress have viewed in a positive light Russian "teachers [who] lead willing students in the daily recitation of [a pledge to "one Nation that denies God's existence"] for the purpose of promoting patriotism?" FDM at 32:16-18. It seems doubtful.

The Report also decried the fact that under Soviet rule, "Islam was declared to be a 'hostile ideology,'"[125] and that "[v]irulent anti-Islamic propaganda is prevalent in newspapers and magazines."[126] Yet – while self-righteously engaging in this disapprobation – Congress had repeatedly been maligning "atheistic communism" for nearly two decades.

Obviously, this approach violates the requisite "viewpoint neutrality" in terms of religion, and is one more bit of proof that "under God" in the Pledge is impermissible under the First Amendment.

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[123] H.Rep. 532, 89th Cong., 1st Sess. (June 21, 1965) (as reported in House Miscellaneous Reports on Public Bills IV, 12665-4).
[124] Id., at 2.
[125] Id., at 4.

**9. All other Supreme Court case law demands a ruling in Plaintiffs' favor**

It isn't just the public school cases that demand the result sought by the Plaintiffs; all of the prior Supreme Court case law does this. Thus, the FDs' claim that "[t]wo 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," FDM at 2:-3-6, is odd, to say the least.

Lynch v. Donnelly, 465 U.S. 668 (1984) is the first of the two cases upon which the FDs base their assertion. Plaintiffs agree that Lynch might be confusing, with its *non sequiturs* such as:

> The display [depicting the birth of the baby Jesus] is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.

465 U.S. at 681. Nonetheless, the point of Lynch was that the display was permissible because "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental." Id. at 683. Taking the words, "under God," and placing them, alone, in the midst of the otherwise completely secular Pledge of Allegiance – which obviously needed no assistance in serving its patriotic purposes – does not fit this "indirect, remote, and incidental" description. On the contrary, it was direct, immediate, and the absolute essence of the Act of 1954.

The other Supreme Court case that the FDs bizarrely characterize as having "said without qualification that the Pledge is consistent with the Establishment Clause" is Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989). Yet Allegheny refined Lynch, making it even clearer that government cannot act in ways that advocate for one particular religious view. Like the creche on the Grand Staircase in Allegheny, "[n]o viewer

[126] Id., at 5.

could reasonably think that [the phrase, "under God"] occupies this location [in the midst of the Pledge of Allegiance] without the support and approval of the government." 492 U.S. at 599-600. There is nothing in Lynch or Allegheny that supports the notion that government can endorse one religious view in an ongoing religious debate. Yet this government has unquestionably done with the Pledge of Allegiance.

**10. Marsh v. Chambers does not control in this case**

Ignoring every principled application of the Establishment Clause – as well as the nine out of nine Establishment Clause cases involving the intrusion of religious ideology into the public schools – the Defendants try to justify the inclusion of "under God" in the Pledge by citing a case that has been described as one "carving out an exception"[127] to the Supreme Court's Establishment Clause jurisprudence, and as "a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine:"[128] Marsh v. Chambers, 463 U.S. 783 (1983). The SDDs do this, they claim, by employing a "common sense and historical analysis." "Common sense" is hardly the appropriate phrase to use when arguing that having chaplains, paid with tax dollars, leading other public officials in prayers to Almighty God at the start of every session in both houses of Congress, is a proper interpretation of the phrase, "Congress shall make no law respecting an establishment of religion." As regards a "historical analysis," James Madison – the "Father of the Constitution" – specifically stated that "The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles." Madison's *Detached Memoranda*, 3 Wm. & Mary Q. 534, 561 (E. Fleet ed. 1946). This is the same man who informed the Virginia Ratifying Convention that

[127] Rosenberger v. University of Virginia, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting).
[128] Kurtz v. Baker, 265 U.S. App. D.C. 1, 829 F.2d 1133, 1147 (1987) (R.B. Ginsburg, J., dissenting).

"there is not a shadow of right in the general government to intermeddle with religion,"[129] and who, as President, vetoed two bills (on Establishment Clause grounds) that had far less tangible "establishment" effects.[130] Thus, an analysis that better accords with common sense and history might be the one expressed by Justice Souter: "[L]ike other politicians, [the Framers] could raise constitutional ideals one day and turn their backs on them the next." Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring.) Marsh, it seems, suggests only that Supreme Court justices are subject to the same ailment.

In any event, the Supreme Court has expressly chosen to disregard Marsh in the setting of the public schools. Lee v. Weisman, 505 U.S. 577, 596-97 (1992). Furthermore, since Lee, the Court has written in a manner that is simply incompatible with the Marsh holding. In Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000) – another public school case – the Supreme Court wrote, "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." That Marsh continues to be good law in the face of that clear edict seems to be a consequence only of the fact that a new challenge has yet to appear before the justices.

The SDDs' resort to Justice Brennan's views in this same discussion is amusing. Justice Brennan, of course, wrote a strong dissent in Marsh, in which he specifically noted:

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[129] See at note 95, supra. Madison said this in 1788 … a year before the Establishment Clause had even been suggested!

[130] On February 21, 1811, Madison vetoed a bill that included a provision by which an Episcopal Church would be incorporated in the District of Columbia "[b]ecause the bill exceeds the rightful authority to which governments are limited, by the essential distinction between civil and religious functions, and violates, in particular, the article of the Constitution of the United States, which declares, that " Congress shall make no law respecting a religious establishment." Writings of James Madison, 8:132-133; The Papers of James Madison: Presidential Series, 3:176-177. One week later, on February 28, he issued another veto "[b]ecause the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'" The Writings of James Madison, 8:133; The Writings of James Madison: Presidential Series, 3:193.

> [S]ome 20 years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other state legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

Marsh v. Chambers, 463 U.S. at 796 (Brennan, J., dissenting) (footnote omitted).

Furthermore, Justice Brennan did not "opin[e] that the Pledge has become so interwoven into the fabric of our society that it is consistent with the Establishment Clause." SDDM at 26:22-23. On the contrary, he was merely considering ways in which it might be argued that "under God" passes constitutional muster.[131] In view of the Marsh passage just provided, it seems doubtful that he would have bought into such arguments.

**11. Analogous verbiage demonstrates the constitutional infirmity**

Indicative of the very dynamic that the Establishment Clause seeks to counter, individuals simply don't recognize their biases when religion is involved.[132] Thus, to demonstrate the clear constitutional violation that exists in this case, argument by analogy is again warranted. Accordingly, it must be asked how "one Nation under God" is any different from "one Nation under Jesus," "one Nation under Sung Myung Moon," "one Nation under David Koresh" or "one Nation under" any other entity or being.

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[131] Justice Brennan's entire discourse in Lynch – which began "While I remain uncertain about these questions," 465 U.S. at 716 – followed his admission in Marsh that he had "come to the conclusion that I was wrong [in Abington]." Marsh, 463 U.S. at 796 (Brennan, J., dissenting). That he was uncertain in Abington, too, can be recognized by the fact that he wrote most of his ideas (relevant to the issue here) in the subjunctive case: The practices "**may** not offend the clause;" "its present use **may** well not present that type of involvement which the First Amendment prohibits;" "The reference to divinity in the revised pledge of allegiance, for example, **may** merely recognize the historical fact that our Nation was believed to have been founded 'under God;'" etc. Abington, 374 U.S. 203, 303-304 (Brennan, J., concurring) (emphases added).

[132] How else can one explain the countless atrocities perpetrated by "religious" persons in the name of their Gods – atrocities of which the Framers were highly aware?

The answer, of course, is that there is no difference whatsoever. As demonstrated verbally at pages 41-42 , supra, and graphically in Complaint Appendix O, "one Nation under" any religious (or racial, or whatever) entity will always "sen[d] 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." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). In other words, "one Nation under God" to the atheist is constitutionally indistinguishable from "one Nation under Jesus" to the Jew, "one Nation under Buddha" to the Muslim, "one Nation under Joseph Smith" to the Presbyterian, and so on. "That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian, rather than pertaining to one sect, does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst, increases their sense of isolation and affront." Lee v. Weisman, 505 U.S. 577, 594 (1992)

## E. FREE EXERCISE AND RFRA ARE BOTH VIOLATED

The SDDs wrote:

> 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 (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 or RFRA.

SDDM at 30:27-31:12.

To suggest that leading atheistic children in reciting that we are "one Nation under God" "ha[s] no tendency to coerce [those children] into acting contrary to their religious beliefs" is inane. The government is coercing, Cf. Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962), atheists to affirm that there is a God. Even with an "opt out" provision, this is not a practice that is "neutral and of general applicability," or, as the Supreme Court has written, "a general law not aimed at the promotion or restriction of religious beliefs." Minersville School District v. Gobitis, 310 U.S. 586, 594 (1940). As has been shown, the Act of 1954 was aimed precisely at promoting the religious belief that (as the text shows on its face) ours is a nation that believes in God. Thus, unlike in Gobitis or Barnette, where such coercion without compulsion is permissible, here the coercion alone suffices to support a claim of an impermissible infringement of Free Exercise. As was stated in Lee v. Weisman, 505 U.S. 577, 591 (1992), "[t]he First Amendment protects speech and religion by quite different mechanisms."

## IV. CONCLUSION

The Pledge of Allegiance involves "an affirmation of a belief and an attitude of mind." West Virginia v. Barnette, 319 U.S. 624, 633 (1943). Since 1954, the beliefs being affirmed have included that there exists a God, and that ours is a nation "under God." Foisting that belief upon citizens – especially small children in the public schools – clearly violates every principle underlying the Establishment Clause. The Defendants in this case, in whom is entrusted the duty to maintain religious equality for all Americans, have violated that duty. Sworn to uphold the Constitution and remain neutral in terms of religion, they have also failed to abide by their oaths. Political realities make it clear that the federal judiciary is the only branch of government where an unpopular minority can see its rights secured. This Court should uphold the magnificent principles embedded in the First Amendment, and declare the current Pledge of Allegiance to be in violation of those principles. By restoring its verbiage to its previous constitutional form, a proud tradition of "'exten[ding] constitutional rights and protections to people once ignored or excluded,'" United States v. Virginia, 518 U.S. 515, 557 (1996) will be continued, and the nation will be yet stronger, freer, and better as a result.

Respectfully submitted,

___/s/ Michael Newdow_____

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**APPENDIX 2-A**

**DECLARATION OF MICHAEL NEWDOW**

I, Michael Newdow, declare as follows:

(1) I am competent to testify to the matters stated herein.

(2) I am the father of a wonderful child, and share joint legal custody of that child with the child's mother.

(3) Despite this "joint legal custody," the family court judge has granted the mother "final decision-making" authority.

(4) The physical custody order grants me approximately 30% physical custody of my child.

(5) I have attended EGUSD school board meetings. At those meetings, I refuse to give effect to the words, "under God," in the Pledge of Allegiance, and I thus become conspicuous on account of my religious beliefs. This causes me significant discomfort.

(6) I have also attended SCUSD school board meetings. At those meetings, I have chosen not to endure the same discomfort. Thus, I have either chosen to come late or to miss those meetings altogether.

(7) I have long desired to run for public office. However, knowing that my atheism would likely be disclosed, and that – due, I believe, in large part to the constant messages sent by government that atheists are "political outsiders" who do not warrant the respect accorded to monotheists – such disclosure would have a pernicious effect upon my chances of election, I have not bothered to invest the time and money to even begin a political campaign.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sacramento, California, on June 20, 2005.

/s/ - Michael Newdow

Michael Newdow

# APPENDIX 2-B

## SELECTION OF SUPREME COURT DICTA SHOWING THAT BELIEF IN GOD IS A CONSTITUTIONALLY SECTARIAN BELIEF

> [T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.

City of Boerne v. Flores, 521 U.S. 507, 537 (1997) (Stevens, J., concurring)

> The Establishment Clause … proscribes state action supporting the official endorsement of religion in preference to nonreligion.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 809 (1995) (Stevens, J., dissenting)

> [A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, or religion to irreligion.

Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 703 (1994)

> [H]istory neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some.

Lee v. Weisman, 505 U.S. 577, 616 (1992)

> [W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 605 (1989)

> We have … interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 644 (1989) (Brennan, J., concurring and dissenting)

> [R]eligion … can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.

School Dist. v. Ball, 473 U.S. 373, 382 (1985)

> Should government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion. Thus, in a series of decisions concerned with such acknowledgments, we have repeatedly held that any active form of public acknowledgment of religion indicating sponsorship or endorsement is forbidden.

Lynch v. Donnelly, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting)

> State governments, like the Federal Government, have been required to refrain from favoring the tenets or adherents of any religion or of religion over nonreligion,

McDaniel v. Paty, 435 U.S. 618, 638 (1978) (Brennan, J., concurring)

> [T]he Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion.

Walz v. Tax Com. of New York, 397 U.S. 664, 694 (1970) (Harlan, J., concurring)

> The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968)

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

School Dist. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)

> [N]either a State nor the Federal Government … can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (footnote omitted)

> The day that this country ceases to be free for irreligion it will cease to be free for religion - except for the sect that can win political power.

Zorach v. Clausen, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting)

> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers

Everson v. Board of Education, 330 U.S. 1, 18 (1947)

> Propagation of belief-or even of disbelief in the supernatural-is protected.

Minersville School District v. Gobitis, 310 U.S. 586, 593 (1940)

# APPENDIX 2-C

## ANALYSIS OF JUSTICE BLACKMUN'S DICTUM IN ALLEGHENY COUNTY V. GREATER PITTSBURGH ACLU, 492 U.S. 573 (1989)

**Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.**

The above quotation, from Justice Blackmun's plurality opinion in Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 602-03 (1989), has been used in an attempt to justify the intrusion of the purely religious phrase, "under God," into the Pledge of Allegiance. That's not unexpected, since (prior to the concurrences in Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004)[1]) it was one of the only dicta – in the face of an enormity of principled statements to the contrary – that one could have found making its claim. An analysis of this quotation readily reveals its lack of authority.

To begin with, it should be noted that this quotation meets none of the criteria the Ninth Circuit has endorsed for determining when Supreme Court dicta are controlling. "[R]easons for rejecting dicta [include] (1) unnecessary to the outcome of the case; (2) can be deleted without affecting the argument; (3) not grounded in the facts of the case; (4) issue addressed was not present as an issue in the case)." Batjac Prods. Inc. v. Goodtimes Home Video Corp., 160 F.3d 1223, 1232 (9th Cir. Cal. 1998). Each of these reasons existed with respect to Justice Blackmun's dictum.

Additionally, we see that not only is Justice Blackmun's comment a dictum, it is a dictum about dicta. The Justice could have written that "[o]ur previous opinions have

[1] An analysis of the Elk Grove concurrences is provided in Appendix 2-D.

considered the motto and the pledge," but he didn't. Instead he added the words "in dicta," and thereby signaled that those writings are to be accorded diminished precedential value.[2]

It should also be immediately noted that Justice Blackmun said nothing about his feelings on the constitutionality of the Motto or the Pledge. Rather, he merely made an observation about what some other members of the Court had said. Reviewing his personal Religion Clause dicta, of which there are many from his twenty-four years on the Supreme Court, one can only conclude that he would have immediately struck down the Pledge's validity had this case presented itself to him.

That these words were provided in response to Justice Kennedy's opposing words is also of importance. When a Supreme Court justice writes:

> The United States Code itself contains religious references that would be suspect under the endorsement test. … [B]y statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the "`reasonable'" atheist would not feel less than a "`full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

Allegheny, 492 U.S. at 672-673 (Kennedy, J., concurring in part and dissenting in part) (references and citations omitted), it makes no sense to completely disregard that statement and accept the opposing words of another justice. This is especially true when the issue (of "God" in the Pledge) was completely ancillary to Allegheny's holding. Furthermore, the sentiments expressed by Justice Kennedy were previously made by another Supreme Court Justice:

> The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that 'our people and our Government [are dependent] upon the moral directions of the Creator.' If this is simply

[2] In fact, one could argue that he was signaling his disagreement. United States v. Felix, 503 U.S. 378 (1992) lends support to this interpretation. In Felix, Chief Justice Rehnquist provided that, "We stated, in dicta, that … the Double Jeopardy Clause might protect the defendant." The Chief Justice then went on to declare just the opposite.

> 'acknowledgment,' not 'endorsement,' of religion, the distinction is far too infinitesimal for me to grasp.

Wallace v. Jaffree, 472 U.S. at 88 (Burger, C.J., dissenting) (n. 3) (citations omitted). With the justices all over the board in Allegheny,[3] Justice Blackmun was likely simply choosing his battles. He undoubtedly wished to avoid becoming a minority in what ended up as a 5-4 plurality opinion, and would certainly have wanted to play down what Justice Kennedy had just pointed out (i.e., that the Pledge's unconstitutionality was the logical extension of the endorsement test Justice Blackmun was enunciating). In his discussions with the other justices, it may well be that someone felt uncomfortable leaving Justice Kennedy's dictum naked for future reference. Thus, Justice Blackmun may well have determined that it was necessary to "deviate from [his] personal sincere views about the law to secure the most desirable collective decision possible."[4] Inasmuch as his statement was at complete odds with virtually all of the others he'd made throughout his distinguished career – including those in Allegheny itself[5] – this dynamic seems exceedingly likely.

The dicta to which Justice Blackmun referred also shows that his statement deserves little, if any, weight. Starting with the Lynch concurrence, we can immediately take note that Justice O'Connor never even mentions the Pledge. Whereas when other Justices had

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[3] The headnotes provided with the decision stated "BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, post, p. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, post, p. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 646. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, post, p. 655."

[4] "In certain contexts, a rational judge will deviate from her personal sincere views about the law to secure the most desirable collective decision possible." Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2299 (1999).

discussed the government's "acknowledgements" of God they included the Pledge with "In God We Trust," etc.,[6] Justice O'Connor specifically omitted this governmental activity. Thus, perhaps, she recognized in 1984 that people joining together to recite religious words as part of the nation's pledge is hardly a simple "acknowledgement." As a result, Justice Blackmun's reliance on her dicta was inappropriate when applied to the Pledge.[7]

Justice Brennan's Lynch dissent was equally unsupportive of the words Justice Blackmun used in Allegheny. Responding to another Justice's mention of the Pledge,[8] Justice Brennan prefaced his entire expose by the qualifier "While I remain uncertain about these questions." Lynch, 465 U.S. at 716. It can hardly be considered dispositive when Justice Blackmun uses the words of someone who specifically says he's uncertain about the given issue … especially when that someone was dissenting from an opinion that he felt was not adhering to the Establishment Clause.

Two other issues – Justice Blackmun's Allegheny footnote 52 and his characterization of the Pledge as "nonsectarian" – are also relevant. Footnote 52, also in response to Justice Kennedy's concurrence/dissent, stated:

> It is worth noting that just because Marsh sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. See post, at 672-673. Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality.

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[5] See Complaint Appendix S at 4-6.

[6] Engel v. Vitale, 370 U.S. 421 (1962) (Douglas, J. concurring) note 1; Id., note 5; Id., at 449 (Stewart, J. dissenting); Abington School District v. Schempp, 374 U.S. 203, 303-304 (1963) (Brennan, J., concurring); Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (Burger, C.J., majority) at 676; Id., at 716 (Brennan, J., dissenting); Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 602 (1989); Id., at 673 (Kennedy, J., concurring in part, dissenting in part).

[7] This is especially true in view of her writing that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion," Lynch v. Donnelly, 465 U.S. at 694 (O'Connor, J., concurring). Additionally, please see Appendix B.

[8] Justice Burger, writing for the majority, had mentioned the Pledge among his list of "reference[s] to our religious heritage."

Allegheny, 492 U.S. at 603 n.52. We immediately note that the Justice recognized that there is an enhanced Establishment Clause concern when – as is the case with the Pledge – government "urge[s] citizens to engage in religious practices." By changing the Pledge to include a reference to "God," Congress certainly engaged in such "urging." More importantly, we see the note's final sentence: "[A]s this practice is not before us, we express no judgment about its constitutionality." Obviously, "under God" in the Pledge was no more before the Court than was the National Day of Prayer. Thus, to suggest that Justice Blackmun's reference to the Pledge expresses judgment about its constitutionality – when he made it crystal clear that such is not the case – is completely disingenuous.

The issue of sectarianism – as it must be defined constitutionally – is key in this matter. Justice Blackmun intimated that "under God" in the Pledge is among a class of "nonsectarian references to religion by the government." But it is only nonsectarian in the eyes of those unwittingly limit their focus to some religious subset. Plaintiff/Appellant set out a series of examples of this myopia in his Complaint. Complaint at 22-24 (¶¶ 137-144).[9] Thus, "nonsectarian" has been used to apply to laws that only include Protestants, that only include Christians, that only include Judeo-Christians, and here – with the words "under God" in the Pledge – that only include theists. Justice Blackmun, himself, actually highlighted this logical defect in Allegheny: "The simultaneous endorsement of Judaism and Christianity is no less constitutionally infirm than the endorsement of Christianity alone." 492 U.S., at 615. And the

[9] As an additional demonstration of how people – especially legislators – can be totally insensitive to the religious beliefs of others, we can look to the Congressional Record. Representative Charles G. Oakman wrote "In my experience as a public servant and as a Member of Congress I have never seen a bill which was so noncontroversial in nature or so inspiring in purpose." 100 Cong. Rec. 6, 7989 (June 10, 1954). Plaintiff/Appellant has in his possession numerous letters from that time written by American citizens, protesting the introduction of this religious dogma into the Pledge. Certainly, these evidentiary items are important in the disposition of this case. If this Rule 12(b)(6) Motion is to Dismiss is upheld, such items will never be considered.

simultaneous endorsement of all theistic religions is no less constitutionally infirm than the endorsement of Judaism and Christianity.[10] This dictum combined with Justice Blackmun's other quotes in Allegheny – such as "A secular state establishes neither atheism nor religion as its official creed," Id. at 610, makes it impossible to interpret his reference to previous dicta as determining that Congress's insertion of "under God" into the Pledge is in any way valid under the Establishment Clause.

Perhaps most important in analyzing Justice Blackmun's quotation is to recognize that the reliance is placed in it alone. The quote, after all, says:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief.

Allegheny County, 492 U.S. at 602-603. If this is true, then shouldn't those characterizations be somewhere? Why is this quotation often repeated, and not the dicta to which it refers? The reason, of course, is that there are no such dicta or characterizations, mostly because even Supreme Court justices – straining to maintain the religious milieu they prefer – would never make so ridiculous a statement as "the words 'under God' in the Pledge don't endorse any religious belief." Justice Blackmun was simply not accurate: the Court has never said that the Pledge is consistent with the endorsement test … because it isn't.

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[10] The California Supreme Court has also made this point:

> The assertedly "nonsectarian" nature of the prayers at issue here does not render their government sponsorship constitutionally acceptable. As discussed earlier, a government practice violates the establishment clause when it appears to place the government's stamp of approval on a particular type of religious practice, such as public prayer. The United States Supreme Court has made clear that the establishment clause prohibits not only explicit denominational preferences, but also government favoritism of religion in general.

Sands v. Morongo Unified School Dist., 53 Cal. 3d 863, 876-877, 281 Cal. Rptr. 34, 809 P.2d 809, 832-833 (1991), cert. denied, 505 U.S. 1218, 120 L. Ed. 2d 897, 112 S. Ct. 3026 (1992).

Finally, honest application of constitutional principles demands that not only dicta, but even holdings, should be disregarded when their logical underpinnings are illusory:

> Although stare decisis is the "preferred course" in constitutional adjudication, "when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'"

United States v. Dixon, 509 U.S. 688, 712 (1993) (citations omitted). Plaintiffs doubt one could find anything more "unworkable or … badly reasoned" than the contention that the words "under God" in the Pledge – which Congress admitted it was including for their religious effect – doesn't endorse the religious ideas that (a) there is a God, and (b) ours is a nation "under God."

# APPENDIX 2-D

## STATE CONSTITUTIONS WITH OUTRAGEOUSLY OFFENSIVE PROVISIONS WRITTEN TO DENY ATHEISTS BASIC RIGHTS

**Arkansas State Constitution: Article 19, Section 1**

> "No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court."

**Maryland State Constitution: Article 37**

> "That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God."

**Mississippi State Constitution: Article 14, Section 265**

> "No person who denies the existence of a Supreme Being shall hold any office in this state."

**North Carolina State Constitution: Article 6, Section 8**

> "The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God."

**Pennsylvania State Constitution: Article 1, Section 4**

> "No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth."

**South Carolina State Constitution: Article 17, Section 4**

> "No person who denies the existence of a Supreme Being shall hold any office under this Constitution."

**Tennessee State Constitution: Article 9, Section 2**

> "No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state."

**Texas State Constitution: Article 1, Section 4**

> "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."