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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendants.
_____/

Case No.: CIV 05-0017 LKK DAD

SCHOOL DISTRICT DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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

/ / /

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I.

INTRODUCTION

Plaintiffs' Response to Defendants' Motions to Dismiss is inadequate to support a finding that the Defendant School Districts' Motion should not be granted. Clear application of the law supports a finding that Plaintiffs Newdow and Roes lack standing. Furthermore, U.S. Supreme Court precedent compels a finding that the Pledge and the Defendant School Districts' policies are constitutional and therefore Plaintiffs' claims should be dismissed.

II.

THE ONLY DEFENDANT WHOM ANY OF THE PLAINTIFFS HAVE STANDING AGAINST IS THE EGUSD

A. The Court Must Evaluate the Standing of Each of the Plaintiffs.

At the outset, Plaintiff Newdow asserts that this Court need not concern itself with standing concerns raised against him because the standing of Doe Plaintiffs has not been challenged.[1] Plaintiffs' Response to Motions to Dismiss, 3:18-21. Specifically, Plaintiff Newdow cites Watt v. Energy Action Educational Foundation, 454 U.S. 151, 160 (1981) and Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 534, 551 (1986), for the proposition that the Court does not need to consider the standing of other plaintiffs in an action if one party has standing. While that may be true when more than one plaintiff is suing the same group of defendants for the same violation of law, that rule of law cannot be applied to a case such as here, where different plaintiffs sue different defendants for similar violations of law.

In Watt, the plaintiffs asserted claims against the United States, the Secretary of the Interior and the Secretary of Energy for abusing their discretion in relation to determining the appropriate process for oil and gas bidding. In Arlington Heights, the plaintiffs brought suit against the Village of Arlington Heights and a number of its officials for race discrimination based on the denial of a rezoning request. In both cases, the same group of

[1] Based on Plaintiffs' acknowledgment that the School District Superintendents (Dr. Steven Ladd, Dr. M.Magdalena Carrillo Mejia, Dr. Dainna Mangerich and Frank S. Porter) should be dismissed from this litigation (Plaintiffs' Response to Motions to Dismiss, 27:2-6), the School District Defendants' briefing will be solely limited to the claims asserted against the Districts themselves.

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plaintiffs brought the same claims against the same defendants. Here Roe Plaintiffs are the only ones who have sued the Elverta and Rio Linda School Districts. Newdow is the only one who has sued SCUSD. Thus, Defendants submit that this Court needs to review Defendants' standing arguments as they pertain to SCUSD, EJESD and RLUSD. As for EGUSD, given the readily apparent standing barriers facing Plaintiff Newdow's standing to challenge EGUSD policy (*see* Sections II.B.2-3), Defendants also submit that it is appropriate for this Court to address and dismiss him as a Plaintiff, leaving only Plaintiff Does as the appropriate party to challenge EGUSD policy.

B. Newdow's Standing.

1. Newdow's Standing as to SCUSD.

Plaintiff Newdow contends that the School District Defendants improperly rely on the Ninth Circuit's decision in Newdow v. U.S. Congress as the basis for their argument that Newdow is precluded from being a plaintiff against SCUSD due to principles of res judicata and collateral estoppel. 328 F.3d 466, 485 (9th Cir. 2003) (holding that Newdow "has no standing to challenge SCUSD's policy and practice because his daughter is not currently a student there.")[hereinafter "Newdow I"]. Newdow does not dispute that he is presenting the same issue against the same party. Rather, he argues that he had "no incentive" to further litigate the standing issue as to SCUSD in the Court of Appeals and he had no "reasonable incentive" to raise the issue at the Supreme Court. Plaintiffs' Response to Motions to Dismiss, 16:15-16. In support of this argument Newdow cites Haring v. Prosise, 462 U.S. 306, 311 (1983), wherein the U.S. Supreme Court reiterated the general principle that application of collateral estoppel requires that the party against whom the defense is asserted must have had an "adequate incentive to litigate" the issues in question. Further analysis of Haring, however, reveals that its ruling actually supports a finding in the present matter that Newdow had adequate incentive to litigate the standing issue, yet chose not to do so.

First, the language quoted by Plaintiff Newdow was merely a summary of the lower court's opinion in Haring. Second, Haring involved a plaintiff who pled guilty to drug charges and later brought a 1983 action based in part on an alleged violation of his Fourth

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Amendment Rights during a search of his apartment. The defendants argued that the Plaintiff's plea of guilty to a crime should constitute either an admission that the search was reasonable or a waiver of his Fourth Amendment claim because the plaintiff had an opportunity to challenge those issues in the criminal case rather than pleading guilty. The Supreme Court held that in a case where a plaintiff has pled guilty to a crime, the plaintiff is not barred from bringing an action under 42 U.S.C. §1983 because he or she did not have an adequate incentive to proceed to trial on the criminal charges to challenge those issues. Notably, the Haring Court stated that the defendants in that case were trying to bar the plaintiff from litigating an issue that had never been raised, argued or decided simply because the plaintiff had the opportunity to raise the issues in his criminal case. Id. at 318.

Haring is distinguishable from the instant case in that Newdow's standing in relation to SCUSD was raised, argued and decided by the Ninth Circuit Court of Appeal. Newdow I, 328 F.3d at 485. Newdow's standing as to assert a claim against EGUSD is completely separate from his standing as to SCUSD. If he wanted to pursue his challenge of SCUSD policies, he had the opportunity to challenge the Ninth Circuit's decision. Newdow chose not to. After the Ninth Circuit issued its opinion, he filed his own Petition for Certiorari with the United States Supreme Court, yet failed to challenge the Ninth Circuit's decision regarding his standing to sue SCUSD. That was his choice and did not involve a lack of incentive to litigate as that term was used in Haring. He cannot change his mind now and ignore the fact that the Court of Appeal previously addressed this exact issue. Therefore, the School District Defendants respectfully submit that the Ninth Circuit has ruled on the issue of Plaintiff Newdow's standing to assert a claim against SCUSD and that its ruling governs on this issue. Thus, this Court should dismiss Newdow's claims against SCUSD without leave to amend.

2. Newdow's Standing as to EGUSD (Non-taxpayer).

Newdow agrees that he does not have standing as a parent or as a person who must confront "government-sponsored religious dogma" to challenge EGUSD's policies. In his Response, he admits that this Court is bound by the decision of the U.S. Supreme Court in

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Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004)(hereinafter "EGUSD v. Newdow"). Plaintiffs' Response to Motions to Dismiss, 4:4-10. While Newdow continues to argue these standing issues, he admits that the arguments are solely for purposes of appeal and should not affect this Court's ruling. 4:10-13. Because the U.S. Supreme Court already determined that Newdow does not have standing to challenge EGUSD's policy, the School District Defendants respectfully submit that their Motion to Dismiss as it pertains to Newdow's claims against EGUSD should be granted.

3. Newdow Does Not Have Taxpayer Standing to Sue EGUSD.

Although he admits the Supreme Court has determined that he does not have standing as a parent or as a person subjected to "government-sponsored religious dogma," Newdow contends that he now has taxpayer standing to challenge EGUSD policies. The crux of his argument is that as a property owner in Elk Grove, he pays taxes directly to EGUSD, and therefore his tax dollars are "spent to support the governmental propagation of religious ideas...." Plaintiffs' Response to Motions to Dismiss, 12:22-26. Newdow fails, however, to allege how his grievance is any more than a "generally available grievance about government" based on "his and every citizen's interest in proper application of the Constitution and laws...." Lujan v. Defenders of Wildlife, 504 U.S. 555, 573 (1992). Thus, his alleged injury as a taxpayer is not actual or concrete. Id. at 560.

Newdow begins his challenge by citing several Supreme Court cases wherein the Court discussed the fact that tax monies cannot be levied to support religious activities or institutions. Plaintiffs' Response to Motions to Dismiss, 11:2-16, *citing*, Everson v. Board of Educ., 330 U.S. 1, 16 91947); McCollum v. Board of Educ., 333 U.S. 201, 210 (1948); Flast v. Cohen, 392 U.S. 83, 103 (1968). Nevertheless, none of those cases analyze a person's standing to bring a claim against a school district based on their taxpayer status. To the extent Newdow relies on Grand Rapids School Dist. v. Ball, 473 U.S. 373, 380 (1985), Defendants submit that Ball is distinguishable because it involved providing classes for nonpublic school students at the public's expense which is not at issue in the instant case.

Newdow next asserts that he has taxpayer status as it pertains to EGUSD because he

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now owns property in Elk Grove. As such, he believes that his allegations of injury have sufficiently addressed the concerns raised by the Supreme Court when it held that his allegations in the prior action that he indirectly paid EGUSD taxes through his child support payments did not amount to the "direct dollars and cents injury" required by Doremus v. Board of Educ. of Hawthorne, 342 U.S. 429, 434 (1952). EGUSD v. Newdow, 542 U.S. at 27, n.8. However, Newdow's allegations regarding the use of his tax dollars are vague and do not establish a "direct dollars and cents injury."

In Doremus, the Supreme Court held that the plaintiffs did not have taxpayer standing. 342 U.S. at 435. The Court noted that the plaintiffs did not allege that the Bible reading in public schools was supported by a separate tax, paid from a particular appropriation or that it added any sum whatsoever to the cost of conducting the school. Id. at 433. There was also no allegation that the Bible reading increased their tax liability or that they would be out of pocket any specific amount because of readings from the Bible. Id. In the instant case, Newdow has failed to allege any facts that establish that the recitation of the Pledge with the words "under God" is paid for out of a particular appropriation or that it has caused his own tax liability to be increased. Simply stated, Plaintiff Newdow cannot show that there is any increased cost to him of having students recite the Pledge with the words "under God" rather than without those words, nor can he show that there is any additional sum whatsoever to the cost of conducting the school. Instead, Newdow tries to apportion out how much time is taken out of the classroom day to say the words "under God" in the Pledge and attach a monetary value to that. First Amended Complaint, ¶119. As a matter of law, this attempted parsing out of two words from a school day does not amount to the "direct dollars and cents injury" required by the Supreme Court in Doremus. For those reasons, the School District Defendants respectfully submit that Plaintiff Newdow's allegations of taxpayer standing do not satisfy the strict taxpayer standing demands set forth in Doremus.

Assuming arguendo Newdow has taxpayer standing as to EGUSD and therefore has satisfied the Article III standing requirements, he has once again failed to satisfy prudential standing concerns. In fact, as to this point, Newdow agrees that the Supreme Court's

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decision denying him standing based on prudential concerns is controlling. *See* EGUSD v. Newdow, 542 U.S. at 27 ("Newdow lacks prudential standing to bring this suit in federal court."); Plaintiffs' Response to Motions to Dismiss, 8:10-11, 15:17-19. Therefore, regardless of whether he pays taxes that result in money going to EGUSD, he does not have standing to bring suit against EGUSD in this case.

C. Plaintiffs Jan Roe, Roechild-1 and Roechild-2 Do Not Have Standing.

In response to Defendant School Districts' contention that Plaintiffs Roe and Roe children lack standing, Plaintiffs argue that their statement that Jan Roe is a parent with joint legal custody of the two Roe children is sufficient to sustain their burden at the pleading stage. In EGUSD v. Newdow, the U.S. Supreme Court stated that "disputed family law rights are entwined inextricably with the threshold standing inquiry." 542 U.S. at 19, n.5. Plaintiff Roe only alleges she has "full joint legal custody" of the Roe children. Such an allegation fails to address who has the "tiebreaking vote" when it comes to the decision-making ability of the parents regarding the children's educational upbringing. Id. at 21, n.10. The School District Defendants bring this up at this time because this was such a crucial issue in Newdow's initial case. In that regard, Newdow had similarly alleged that he had joint legal custody throughout the litigation, yet ultimately the Supreme Court ruled that he did not have standing to bring his prior action.

If Jan Roe has joint legal custody, but does not have the "tiebreaking" vote, then the same standing issues that defeated Newdow in his first case would also preclude Jan Roe and her children as Plaintiffs in this case. These are not "purely hypothetical" concerns as Plaintiffs would label them. Of additional concern is the fact that Plaintiffs do not ask for leave to amend to add the simple fact that Jan Roe has the "tiebreaking" vote. Clearly if she had this vote, it would be easy enough to represent to the Court that the deficiency could be carried by a supplemental allegation. Failing request leave to so amend tends to show that she does not have the tiebreaking vote which puts her in the same position as Newdow in the predecessor case. The Supreme Court has already spoken as to Newdow's ability to bring this lawsuit based on this standing problem and determined he was not a proper Plaintiff.

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Further, per the Ninth Circuit, a parent only has standing to "challenge a practice that interferes with his right to direct the religious education of his daughter," not to bring a lawsuit on behalf of his child. Newdow I, 328 F.3d at 485. Thus, without decision-making authority regarding the educational upbringing of Roe children and without the ability to bring the suit on behalf of Roe children, Jan Roe is precluded from being a Plaintiff in this lawsuit. Therefore, the School District Defendants respectfully submit that their Motion to Dismiss the claims brought by the Roe Plaintiffs should also be granted.

III.

THE LAW SUPPORTS A FINDING THAT DISTRICTS' PLEDGE RECITATION POLICIES ARE CONSTITUTIONAL

A. *West Virginia State Board of Education v. Barnette* Allows Recitation of the Pledge in Public Schools.

The objections raised by Plaintiffs in the present matter are substantially similar to those raised by the plaintiffs in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) wherein the Court determined that the Pledge does not run afoul of the First Amendment. Plaintiffs contend that Defendants "lack an 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.'" Plaintiffs' Response to Motions to Dismiss, 39:12-16 (citing Westside Community Bd. Of Ed. v. Mergens, 496 U.S. 226, 250 (1990)). Both Barnette and the present matter involve constitutional challenges to Pledge policies. Moreover, the plaintiffs in both cases challenged Pledge policies based on an argument that recitation of the Pledge was coercive and in contravention of their religious beliefs. That the Pledge challenged in the present matter includes the words "under God" makes no substantive difference such that this Court should part with its ruling. The plaintiffs in Barnette challenged saluting the flag as part of the Pledge, while Plaintiffs in the present matter challenge the words "under God." The Court upheld the constitutionality of the Pledge so long as recitation was voluntary. Plaintiffs in this case are afforded the same

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protection as the Court in Barnette deemed adequate for protection of the Jehovah's Witnesses' constitutional rights. Voluntary recitation of the Pledge was sufficient in Barnette, just as voluntary recitation should be sufficient in this case. Thus, consistent with Barnette, mere exposure to the Pledge does not constitute a violation of the Establishment clause and the Districts' policies which direct willing students to recite the Pledge is constitutional.

B. Plaintiffs Erroneously Argue That Strict Scrutiny is the Appropriate Standard to Apply and Further Erroneously Argue That Application of This Standard Would Strike Down the Constitutionality of the Defendant School Districts' Policies.

As a preliminary matter, Plaintiffs argue that strict scrutiny test must be applied to the present matter because the Pledge "significantly interferes with the exercise of a fundamental right." Plaintiffs' Response to Motions to Dismiss, 31:24. Plaintiffs have failed to cite any case law which supports the proposition that the strict scrutiny test is the proper standard of review for the claims being asserted in this case. While strict scrutiny has been referenced in the context of religious freedom, the test is inapplicable if the statute is neutral. Larson v. Valente, 456 U.S. 228, 246 (1982)("When the court is presented with a state law granting denominational preference, the precedents demand that the court treat the law as suspect and that the court apply strict scrutiny in adjudging its constitutionality.") Here, the state law in question is Education Code Section 52720 which requires that school districts "conduct appropriate patriotic exercises" and further states that the Pledge satisfies this requirement. This Code Section is absolutely neutral. Furthermore, for the reasons set forth by the School Districts in their Motion to Dismiss, the Pledge as amended is not a religious exercise nor is it government speech which endorses religion. Thus the Pledge cannot infringe on an individual's constitutional right to freedom of religion and strict scrutiny is inapplicable. However, even if strict scrutiny was applied, Plaintiffs have failed to establish that a school district policy directing recitation of the pledge by will students significantly interferes with a fundamental right.

Furthermore, assuming arguendo that strict scrutiny is applied, the compelling

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government interest in maintaining the Districts' policies satisfies the standard. Plaintiffs misstate the purpose of Defendant School Districts' interests in maintaining the current policy as "infus[ing] the Pledge with religious dogma." While Defendant School Districts agree that "infusion" of "religious dogma" is not a compelling interest, certainly the true purpose of promoting patriotism is. Plaintiffs state that "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 the two words spatchcocked into the Pledge." Contrary to that assertion, all public school children in California, not just those who are "extraordinary," learn about such principles as part of the curriculum throughout their tenure in public schools. Content standards for California public schools set out in significant detail what children are to learn from kindergarten through grade twelve. Children from a very early age are taught principles of patriotism, and over time, the curriculum incorporates more and more detail surrounding the role of religion in America's founding. *History and Social-Science content Standards for California Public Schools Kindergarten Through Grade Twelve* §§ K.1, 11.3. Furthermore, "[a]s a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage." Edwards v. Aguillard, 482 U.S. 578, 606 (Powell, J., concurring). Examples of these materials which reflect the prominent role of religion in our Nation's heritage abound, including the Washington, Jefferson and Lincoln Memorials. Id. at *21, n.9.

Plaintiffs dispute that the Pledge is a non-religious, patriotic exercise. They contend that the words "under God" are "religious dogma" "that is not patriotic in any sense of the word." After reiterating this point, Plaintiff cites Justice O'Connor as support for his argument: "[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). Given the remainder of Justice O'Connor's concurrence, however, it is clear that her statement was not intended to support a conclusion that the Pledge as amended is unconstitutional. In a footnote to her concurrence in Wallace, Justice O'Connor expressly addressed the issue at hand and stated: "[i]n my view, the words 'under

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God' in the Pledge...serve as an acknowledgment of religion with the 'legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" Id. at 78, n.5 (O'Connor, J., concurring)(citing Lynch v. Donnelly 465 U.S. 668, 693 (1984)(concurring opinion)). Furthermore, Justice O'Connor reiterated this sentiment in her concurrence in EGUSD v. Newdow in finding the Pledge constitutes ceremonial deism which serves the legitimate secular purpose of "commemorat[ing] the role of religion in our history. 542 U.S. at 56-59 (O'Connor, J., concurring). Thus, as the Pledge as amended is neutral, strict scrutiny is inapplicable. Nevertheless, because the Pledge serves the compelling purpose of promoting patriotism, regardless of the standard applied, the Pledge is constitutional.

C. The EGUSD Patriotic Observance Policy Does Not Violate the Establishment Clause.

Plaintiffs attack the constitutionality of the Pledge as it applies to the School Districts when, in reality, the issues that confront the Districts in this case are whether their respective Patriotic Observance policies violate the Establishment clause. A review of their policies reveal that the policies themselves are constitutional.

Even though there is much confusion as to which, if any, Establishment clause test should be applied in the context of analyzing the constitutionality of the Pledge or a school district's policy regarding recitation of the Pledge, an analysis of the School District Defendants' policies utilizing the Lemon, endorsement or coercion tests results in a finding that the policies are constitutional. A statute or policy violates the Establishment clause if it is wholly motivated by religious considerations. Lynch, 465 U.S. at 680. Here, there is nothing cited by Plaintiffs to establish or even infer that the EGUSD, SCUSD, RLUSD or EJESD policies were in any way motivated by religious considerations. Instead, their policies were adopted to promote patriotism as set out in California's content standard for public schools and satisfy California Education Code section 52720[2], which requires every

[2] See policies attached to Defendants' Request for Judicial Notice in Support of their Reply to Motion to Dismiss.

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public elementary school to conduct appropriate patriotic exercises each day. Recitation of the Pledge is recognized in the statute as satisfying this requirement. Id. Thus, their policies do not run afoul of the purpose prong of the Lemon and endorsement tests.

Likewise, the policies neither advance nor inhibit religion. Instead, they merely require willing students to recite the Pledge each day. The effect of the policies is that students recite or hear others recite the Pledge which in turn promotes unity and patriotism. Hence, a policy that requires teachers to lead willing students to recite the Pledge does not result in an Establishment clause violation.

As it pertains to the excessive entanglement prong of the Lemon and endorsement tests, Plaintiffs have not set forth any argument to establish how the Districts' Patriotic Observance policies constitute an excessive entanglement of religion. This is because no "comprehensive, discriminating and continuing state surveillance" results from the Districts' respective policies. Mueller v. Allen, 463 U.S. 388, 403 (1983). Therefore, the policies do not violate either the Lemon or endorsement tests.

While Plaintiffs rely heavily on the coercion test set forth in Lee v. Weisman, that test has only been used when a clearly religious activity is at issue. As demonstrated in the next section, the Pledge is not a religious activity; thus, the coercion test is inapplicable. Moreover, listening to other students recite the Pledge does not result in coercion any more than the Jehovah's Witnesses in Barnette were subjected to coercion. 319 U.S. at 642.

D. The Pledge Does Not Violate the Establishment Clause.

While the Districts' policies are at issue in the case as it pertains to them, the School District Defendants recognize that the two are intertwined to a certain extent. Thus, the School District Defendants submit the following argument to address the issues raised by Plaintiff regarding the constitutionality of the Pledge.

1. Plaintiffs Err in Arguing That the Pledge Should Not Be Considered as a Whole.

Plaintiffs contend that Defendants are somehow missing the issue in that Plaintiffs only challenge the words "under God," not the Pledge as a whole. The School District

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Defendants' argument that the Pledge, as amended, is Constitutional is not mere oversight based on its failure to understand Plaintiffs' argument. Rather, pursuant to U.S. Supreme Court precedent, in conducting Establishment clause analysis, religious text and symbols must be viewed in context. *See* Lynch v. Donnelly, 465 U.S. 668, 680 (1984); *see* County of Allegheny v. ACLU, 492 U.S. 573, 616-20 (1989). The importance of examining Establishment clause challenges in context has been emphasized by the U.S. Supreme Court very recently. In Van Orden, 2005 U.S. LEXIS 5215, a six-foot monolith inscribed with the Ten Commandments and located near the Texas state capitol was upheld by the Court as Constitutional. In deciding this issue, the Court did not apply any specific test, but rather looked to the "nature of the monument and...our Nation's history." Id. at *16. The monument in question was one of seventeen monuments and twenty-one historical markers on the capitol grounds that commemorated the people, ideals and events that compose the identity of Texas. Id. at *7. Recognizing this fact, the Court held "Texas has treated her Capitol grounds monuments as representing the several strands in the State's political and legal history. .... We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment." Id. At *26.

Similarly, another recent U.S. Supreme Court decision also emphasized the importance of context in deciding Establishment clause challenges. McCreary County v. ACLU, 2005 U.S. LEXIS 5211. The Court in McCreary held that the display of copies of the Ten Commandments in a courthouse was unconstitutional. In coming to this conclusion, the Court held that "purpose needs to be taken seriously under the Establishment clause and *needs to be understood in light of context*...." Id. at *54 (emphasis added).

In support of their argument, Plaintiffs' cite School Dist. of Abington Township v. Schempp, 374 U.S. 203, 278-79 (1963) (Brennan, J., concurring) which they contend directly rejects the argument of considering the challenged item "as a whole." Plaintiffs' Response Brief, 34:14. Schempp, however, does not specifically address this issue. While it is true that the Court held the morning prayer unconstitutional, no portion of the opinion is dedicated to a discussion of the context in which the prayer should be analyzed. Plaintiffs

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cite other cases for the same proposition, though similar to Schempp, none specifically address the context in which they were analyzed because unlike the Pledge, they are individual symbols/events, easily separable from what Plaintiffs describe as the "whole." The Pledge on the other hand, is read together. No separation exists between the words "under God" and the remainder of the words. Thus, given the clear admonitions of the court to conduct Establishment clause inquiries "in light of context," the Pledge should be analyzed as a whole.

2. The Pledge is Not a Religious Activity.

Plaintiffs compare the Pledge to the prayer at issue in Engel v. Vitale, 370 U.S. 421 (1962), and assert that Engel is exactly on point. Plaintiffs' Response Brief, 79:9-80:21. In so doing, Plaintiffs suggest that the cases are identical because an insertion of the prayer that was found to be unconstitutional in Engel into the Pledge would create the same problem, i.e. one where religious material has been inserted into the Pledge. However, Plaintiffs overreach here as they insert what is clearly a prayer into the Pledge rather than the words "under God." Prayer is not at issue in this case, rather the Pledge is at issue and the two could not be more different.

A prayer is a "supplication or expression addressed to God" or an "earnest request or wish." The New Merriam-Webster Dictionary 570 (1989). Physically, prayer is done "with bowed head, on bended knee or some other reverent disposition." Newdow I, 328 F.3d at 478. On the other hand, "pledge" is defined as a promise. The New Merriam-Webster Dictionary 558 (1989). The Pledge "should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart." 4 U.S.C. § 4.

The Pledge is not a supplication to God, nor is it an "earnest request or wish." It is not delivered in any manner that is consistent with the way a prayer would be physically delivered. Thus, despite Plaintiffs' attempt to construe it otherwise, it is fundamental that a prayer is a religious activity while recitation of the Pledge is no more than a patriotic

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activity. This difference is acknowledged in Engel where the Supreme Court noted that documents that contain references to a deity which are patriotic or ceremonial expressions bear no resemblance to "religious exercise" (prayer in that case). Engel, 370 U.S. at 435 n.21. Therefore, Plaintiffs' assertion that Engel is exactly on point is erroneous.

In addition, while Plaintiffs argue that the Supreme Court has invalidated governmental endorsement of religion in nine of nine cases (Plaintiffs' Response to Motions to Dismiss, 80:22-81:23), it is important to note that the public school cases relied on by Plaintiffs are distinguishable as they either involved clearly religious activities or the teaching of creationism (*See* Engel, 370 U.S. 421; McCollum v. Board of Educ., 333 U.S. 203 (1948) (students received religious education at school if they chose, while others attended study hall)*;* Schempp, 374 U.S. 203 (readings from the Bible each day before classes)*;* Stone v. Graham, 449 U.S. 39 (1980) (placement of the Ten Commandments in public school rooms); Wallace v. Jaffree, 472 U.S. 38 (statute authorizing daily period of silence for meditation or voluntary prayer); Lee v. Weisman, 505 U.S. 577 (1992) (graduation prayer); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (prayer before football games); Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.S. 578 (1987).) The Pledge is not equivalent to those activities.

3. Plaintiffs' attempts to weaken controlling case law are erroneous.

Plaintiffs argue the Pledge should be deemed unconstitutional and criticize this Court's decision in Smith v. Denny, 280 F.Supp. 651 (E.D. Cal. 1968) and the Seventh Circuit's decision in Sherman v. Community Consolidated Sch. Dist. 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992), which have squarely addressed this issue. In their attempts, Plaintiffs have failed to explain how one can reconcile their position on this issue with the repeated statements by the Supreme Court about the constitutionality of the Pledge. *See* School District Defendants' Motion to Dismiss, 19:7-20:6. The fact is, they cannot do so.

In criticizing Sherman, Plaintiffs point out that the Sherman Court did not use the Lemon, endorsement or coercion tests in deciding the matter. Instead, the Court considered

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the Supreme Court's statements regarding the Pledge and looked at the Pledge in the context of history. This is similar to the way the Supreme Court considered Establishment clause issues in Marsh v. Chambers, 463 U.S. 783 (1983), and most recently in Van Orden 2005 U.S. LEXIS 5215. This flexibility in analyzing Establishment clause cases helps explain the Supreme Court's numerous pronouncements regarding the constitutionality of the Pledge and those pronouncements support the granting of the School District Defendants' Motion to Dismiss.

4. The Argument That "under God" Was Inserted into the Pledge to Explain About the History of the United States is not Post Hoc Justification.

Plaintiffs assert that the justification for abridging fundamental liberties must be genuine, not hypothesized or invested *post hoc* in response to litigation. Plaintiffs' Response to Motions to Dismiss, 50:13-15. Plaintiffs then go on to attack Congress's recent pronouncement regarding the historic role of religion in the political development of the nation and assert that Congress's claim that the words "under God" were injected into the Pledge for nonreligious reasons is a "sham." Plaintiffs' Response to Motion to Dismiss, 51:8-12. In doing so, Plaintiffs point out statements made by certain legislators back in 1954 regarding the addition of the words "under God" to the Pledge but fail to acknowledge the fact that legislators also discussed non-religious reasons for adding those words to the Pledge. School District Defendants' Motion to Dismiss, 24:6-25:9.

In fact, the congressional record cited by the School District Defendants in their moving papers reveals a political purpose behind the amendment, i.e. the political difference between the United States and Communist countries. The legislators believed that the United States was different from the Communist countries because our government is founded on the idea that people are important because they are created by God and endowed with certain inalienable rights. H.R. Rep. No. 83-1693, at 2 (1954). Thus, "under God" was added to the Pledge to highlight the underlying differences in the political philosophies of the countries, not for the purpose of recognizing the existence of God.

Further, the mere fact that some of the legislators may have considered the words

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"under God" to be a religious statement does not invalidate the amendment.[3] It is equally as settled that a statute does not have to be exclusively secular to satisfy the secular purpose prong of the test. Wallace, 472 U.S. at 64 (Powell, J., concurring). As recently affirmed by the Supreme Court, there only need be a serious or genuine secular purpose, not a "sham." McCreary, 2005 U.S. LEXIS 5211, *37. As shown in the School District Defendants' moving papers, a genuine secular purpose is easily discernible from the legislative history. This has been expressly confirmed by U.S. Supreme Court Justices. *See* EGUSD v. Newdow, 542 U.S. at 50, 56-59 (Rehnquist, C.J., concurring)(O'Connor, J., concurring). Thus Plaintiffs' assertion that certain legislators interpreted the addition to be religious in nature does not mandate a finding that the amendment violates the Establishment clause. Rather, the School District Defendants' respectfully submit that the 1954 amendment had a serious and genuine secular purpose and therefore does not violate the Lemon or endorsement tests.

5. The "Fabric of Our Society" Test Provides an Appropriate Analytical Framework.

Plaintiffs attempt to discourage the Court from utilizing the analytical framework set forth in Marsh, 463 U.S. 783, by asserting it has been distinguished from the public school setting. In Lee, the Supreme Court reiterated the need for a fact-sensitive inquiry, particularly in the public school context. 505 U.S. at 597. In contrast to a graduation prayer which the Court found was a state sanctioned religious exercise, students' daily recitation of the Pledge is a customary patriotic exercise that more closely parallels Marsh. Our national Pledge must be viewed in the far broader context of playing an integral role in our citizenship and patriotism which is recited throughout our country, whether at school, government functions, a wide variety of extra-curricular activities and naturalization ceremonies.

In applying the Marsh framework, the School District Defendants agree that

[3] While some members of Congress might have been motivated in part to amend the Pledge because of their religious beliefs, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384 (1968).

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legislative prayer in Nebraska existed for a longer period of time than has the Pledge in its current form. In determining whether something has become a part of the fabric of our society, however, the issue is not merely the length of time the Pledge has existed in its current form, but also the extent to which it is ingrained in our society. In Marsh, only attendees of the opening of legislative sessions are affected by the legislative prayer, whereas here *every* citizen of the United States has likely participated or been exposed to the current form of the Pledge. Multiple generations of citizens have learned, recited and passed on the Pledge as it currently stands. Based on its customary usage in ceremonies and events for the past fifty years, the Pledge is an integral thread in the fabric of our society and therefore passes constitutional muster.

Furthermore, to the extent that the authors of the 1954 amendment harbored some sectarian purpose for its enactment, more than fifty years of repetition of the words "under God" in an "exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost." EGUSD v. Newdow, 542 U.S. at 67 (O'Connor, J., concurring). This is particularly true where the Pledge in its current form went almost forty (40) years without significant challenge. *See* Van Orden, 2005 U.S. LEXIS 5215, *45 (Breyer, J., concurrence). Thus any possible religious purpose in adding the words "under God" has eroded over time and fifty (50) years later the Pledge in its current form is purely a patriotic exercise that falls outside the realm of the Establishment clause.

E. Free Exercise.

Plaintiffs contend that the Free Exercise clause is violated in that children are "coerc[ed]" into promoting a "religious belief." Plaintiffs' Response to Motions to Dismiss, 88:7, 12. Plaintiff's cite Lee, 505 U.S. 577 to support this contention in spite of the express reference throughout the opinion to the challenged activity as "prayer." Plaintiffs' Response to Motions to Dismiss, 88:7. As has been clearly established in Defendants' moving papers, the Pledge is in no way equivalent to prayer and thus cannot be equated to the circumstances in Lee. Given the clear distinction between the Pledge and prayer, the coercion prevalent in

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Lee is not present in the Defendant School Districts' "Patriotic Observance" policies. Therefore, pursuant to Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988), the Pledge is not a violation of the Free Exercise clause.

Lastly, Plaintiffs fail to address the School District Defendants' argument that Plaintiffs cannot establish a claim under RFRA. In fact, Plaintiffs do not argue that the Pledge with the words "under God" substantially burdens religious exercise. Therefore, the School District Defendants respectfully submit that their Motion to Dismiss Plaintiffs' Free Exercise and RFRA claims should be granted.

IV.

CONCLUSION

Defendants submit that all Plaintiffs except Doe Plaintiffs are unable to establish that they have standing in the instant case. Because of this, the only claim that would move past the standing stage in reviewing this Motion is the Doe Plaintiffs' claims against EGUSD. In considering the merits of the case, Plaintiffs are unable to show that Defendants' patriotic observance policies are unconstitutional. Even if this Court looks at the constitutionality of the Pledge, the Pledge is a constitutional patriotic message. Defendants respectfully request that Plaintiffs' claims be dismissed for lack of standing and failure to state a claim upon which relief can be granted.

Dated: July 8, 2005

Respectfully submitted,

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