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

THE REV. DR. MICHAEL A. NEWDOW, *et al.* *Plaintiffs*, v. THE CONGRESS OF THE UNITED STATES OF AMERICA, *et al.* *Defendants*, and JOHN CAREY, *et al.* *Defendant-Intervenors*.	2:05-cv-00017-LKK-DAD **Defendant-Intervenors' Reply Memorandum in Support of Motion to Dismiss** Date: July 18, 2005 Time: 10:00 a.m. Judge: Hon. Lawrence K. Karlton Courtroom: No. 4

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT-INTERVENORS JOHN CAREY, *et al.*

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INTRODUCTION

For all the sound and fury of their 109 page journey through dissenting Supreme Court opinions, selective history, and the outer reaches of the dictionary, Plaintiffs never bring themselves to squarely address Intervenors' central argument: that Congress changed "nation" in the Pledge of Allegiance to "nation under God" in an effort to proclaim that ours is a nation of limited government. Instead, Plaintiffs repeat a series of unsupported assertions—that the words "under God" are "purely religious," that "God" refers to the monotheistic God of Christianity, and that the Founders would not have accepted "under God" in the Pledge. These assertions, sincere as they may be, fly in the face of both history and common sense. The Court should reject Plaintiffs' attempt, in the guise of tolerance and avoiding "divisiveness," to impose their belief system on the entire Nation.

ARGUMENT

I. Both the Establishment Clause and the Pledge Are Part of the American Tradition of Limited Government Created by the Founders and Continued Ever Since.

The Establishment Clause and the Pledge both serve the same purpose – limiting government power. One acts as a negative restriction on the government's ability to establish a state religion. The other is a positive statement of our nation's political ideology, including the words "nation under God," to preclude the government from claiming that it is the ultimate source of rights and freedoms. This phrase, recited without incident by millions of schoolchildren every school day for over a half-century, teaches that our government is not totalitarian[1] – that it does not and may not "crush[ ] all autonomous institutions in its drive to seize the human soul."[2]

The drafters of both the Establishment Clause and the Pledge of Allegiance based these limitations on the power of the state on the belief, commonly accepted in 1776, 1789, and 1954, that God is the ultimate source of human rights.[3] The government may take note of, acknowledge, or

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[1] The 31 words of the Pledge also teach about the values of loyalty, ceremonial respect, republicanism, unity, liberty, justice and equality.

[2] Arthur M. Schlesinger, Jr., *quoted in* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining "totalitarian").

[3] In fact, it can fairly be argued that no other grounds for the inalienability of human rights has ever been offered by American political leaders. Certainly Plaintiffs do not offer any reasons why human rights should be inalienable. One

even make use of these commonly held beliefs without acting to establish them. *See, e.g.*, *Cutter* v. *Wilkinson*, 125 S. Ct. 2113 (2005) (accommodating the religious beliefs of prisoners); *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (legislative prayer "a tolerable acknowledgment of beliefs widely held among the people of this country"); *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) ("government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society") (O'Connor, J., concurring); *Katcoff* v. *Marsh*, 755 F.2d 223, 228 (2d Cir. 1985) (military chaplains promote the national defense by aiding the practice of religion, thereby increasing troop morale). The Pledge does not become constitutionally suspect solely because it takes a widely-held belief—that some God or other exists—as its premise.

In short, the Pledge is simply another iteration of the view that the institutions of limited government "presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Plaintiffs' Establishment Clause challenge cannot be reconciled with this historical tradition of limited government and must therefore be rejected.

A. Plaintiffs Have No Response to Intervenors' Argument that a "Nation Under God" Is Merely a Nation of Limited Government.

Plaintiffs dismiss Intervenors' argument that the references to God in the Pledge, the Declaration of Independence, and the Gettysburg Address are part of a political philosophy of limited government as a "semantic attempt to deny the obvious." (Response 60.) They state that "belief that rights come from God is a religious belief, not politics or philosophy." (Response 60.) Of course, a belief that rights are unalienable because they come from God can be a religious belief (and certainly is for some). But the mere fact that a belief is religious does not preclude it from being a part of political philosophy, or so taint that philosophy that government actors may not espouse it consistent with the Establishment Clause.[4]

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wonders, for example, what philosophical basis Plaintiffs might have to assert individual rights of conscience against the government if the First Amendment were repealed in accordance with the Article V process.

[4] Plaintiffs' citation to concurring opinions in *Edwards* v. *Aguillard*, 482 U.S. 578 (1987), and *Lee* v. *Weisman*, 505 U.S. 577 (1992), provide no support for his argument. (Response 60-61). Unfortunately, citing to concurring or

Plaintiffs do not respond to Intervenors' arguments that (a) "under God" represents a statement of political philosophy (Intervenors' Memorandum *passim*); and (b) "Plaintiffs do not get to simply impose their subjective understanding of the word 'God' on the Court" (Intervenors' Memorandum 16), perhaps because these statements are irreconcilable with Plaintiffs' own religious belief system. For example, Plaintiffs aver in their Complaint that the words "under God" are "patently, facially, unquestionably and clearly religious text." (Complaint ¶ 42). The Complaint contains a *credo* that explains Plaintiff Newdow's own religious views:

> [Plaintiff Newdow's] ministry espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology. It recognizes that it is never possible to prove that something does not exist, but finds that fact to be an absurd justification to accept the unproved. The bizarre, the incredible and the miraculous deserve not blind faith, but rigorous challenge. To Plaintiff Newdow and his religious brethren, belief in a deity represents the repudiation of rational thought processes, and offends all precepts of science and natural law. His religion incorporates the same values of goodness, hope, advancement of civilization and elevation of the human spirit common to most others. However, it presumes that all these virtues must ultimately be based on truth, and that they are only hindered by reliance upon a falsehood, which its adherents believe any God to be.

Complaint ¶ 59. In this belief system, it is an article of faith that belief in God is "reliance upon falsehood" and a "repudiation of rational thought processes … ." *Id.* Plaintiff Newdow further claims that his beliefs "stem from reason rather than mythology." *Id.*

Plaintiff Newdow's beliefs are not, however, the unavoidable conclusions of science (though they may hold science in high esteem), but instead just require a leap of faith of a different kind. Since Plaintiff Newdow's religious beliefs are no more or less worthy of this Court's credence than anyone else's, this Court should not conform the Pledge to fit those beliefs. Indeed, there is particular reason to avoid enforcing Plaintiffs' particular beliefs on everyone else: it would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions." *Van Orden* v. *Perry*, 545 U.S. ____, 2005 WL 1500276, slip op. at 7 (June 27, 2005) (Breyer, J.,

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dissenting opinions is typical of Plaintiffs' Response. Their 57 citations to concurring opinions of Supreme Court justices and 43 citations to dissenting opinions underscore that the propositions thus supported are not actually the law. (See Response *passim*).

concurring in the judgment).

Adopting Plaintiffs' preferred concept of a public square hostile to religious thought would also lead to absurd results. Chief among them would be a ban on schoolchildren reciting the Declaration of Independence, the Gettysburg Address, the Rev. Martin Luther King Jr.'s "I Have A Dream" speech,[5] or any number of other important historically crucial texts of American history and political life.[6]

B. Those Who Drafted the Establishment Clause Saw Appeals to God as a Way to Limit Government.

1. Plaintiffs' Selective History Cannot Carry Their Burden of Persuasion.

In their Response, Plaintiffs concede that the historical utterances of the Founders offered by the Intervenors in their Motions to Dismiss are full of support for the language of the Pledge. (Response 45-47). Despite the overwhelming evidence provided by Intervenors, Plaintiffs quote in defense of their approach to the historical record Justice Brennan's concurring opinion in *Abington*

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[5] The rule proposed by Plaintiffs would ban the recitation or government approval of such statements from King's speech as:

- "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'"
- "No, no, we are not satisfied, and we will not be satisfied until justice rolls down like waters and righteousness like a mighty stream." (quoting Amos 5:24) and
- "I have a dream today. I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together. This is our hope."

A CALL TO CONSCIENCE, THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR., *available at* http://www.stanford.edu/group/King/publications/speeches/address_at_march_on_washington.pdf (last visited July 11, 2005). Of course most of King's speeches contained references to God and would therefore, under Plaintiffs' conception of the Establishment Clause, be banned from schools and other government arenas.

[6] For example, almost none of the abolitionists could be read aloud, or their opinions explained, much less agreed with:

> But, if they are men; if they are to run the same career of immortality with ourselves; if the same law of God is over them as over all others; if they have souls to be saved or lost; if Jesus included them among those for whom he laid down his life; if Christ is within many of them "the hope of glory"; then, when I claim for them all that we claim for ourselves, because we are created in the image of God, I am guilty of no extravagance, but am bound, by every principle of honor, by all the claims of human nature, by obedience to Almighty God, to "remember them that are in bonds as bound with them," and to demand their immediate and unconditional emancipation…

William Lloyd Garrison, *Abolitionist William Lloyd Garrison Admits of No Compromise with the Evil of Slavery*, LEND ME YOUR EARS, GREAT SPEECHES IN HISTORY 630 (William Safire ed., 1992)

School District v. *Schempp*, 374 U.S. 203 (1963), that "'the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.'" (Response 47 (quoting *Abington*, 347 U.S. at 237 (Brennan, J., concurring))). But the Court has since made clear that Justice Brennan's approach in *Abington* is misguided, because it improperly places the burden of historical persuasion on those who would prove that a practice is acceptable:

> We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society.

Marsh, 463 U.S. at 791 (rejecting argument from Justice Brennan's concurring opinion in *Abington*). Placing the burden of historical persuasion on Establishment Clause plaintiffs is only logical, as *any* evidence that a particular challenged practice was accepted by the Founders strongly suggests that they would have considered it consistent with the Establishment Clause.

Moreover, the history of the Establishment Clause provided by Plaintiffs is selective in the extreme. For example, Plaintiffs cite Madison's 1785 *A Memorial and Remonstrance Against Religious Assessments* for the proposition that the Pledge "violates that equality which ought to be the basis of every law … ." (Response 65). Yet Plaintiffs fail to mention that the *Memorial and Remonstrance* ends with a prayer that God would bring the authors of the religious assessments bill to their senses:

> [W]e oppose to [the religious assessments bill], this remonstrance; earnestly praying, as we are in duty bound, that the Supreme Lawgiver of the Universe, by illuminating those to whom it is addressed, may on the one hand, turn their Councils from every act which would affront his holy prerogative, or violate the trust committed to them: and on the other, guide them into every measure which may be worthy of his [blessing] …

A Memorial and Remonstrance Against Religious Assessments, *available at* (http://religiousfreedom.lib.virginia.edu/sacred/madison_m&r_1785.html) (visited July 11, 2005) (final alteration in original). In fact, the *Memorial and Remonstrance* itself repeats the very same idea of limited government that animates the Establishment Clause and the Pledge–the "holy

prerogative" that Madison hopes the Assembly will not affront is God's. "The Supreme Lawgiver of the Universe" has a prerogative over the conscience that the Assembly does not possess and should not arrogate to itself. The "trust committed to [the Assembly]" is the duty to "secure" inalienable God-given rights that is the only reason "Governments are instituted among Men[.]" DECLARATION OF INDEPENDENCE, para. 2. Madison thus agrees and acknowledges in the *Memorial and Remonstrance itself* that the Commonwealth of Virginia is "under God." It can hardly be cited as authority for the proposition that "under God" should be stricken from the Pledge of Allegiance.

Another example of Plaintiffs' extremely selective approach to the historical record is their claim that a discussion of the Oath Act, 1 Stat. 23 (1789), is "absent" from Intervenors' Motions to Dismiss. (Response 48-9). This argument is unpersuasive, because it reasons solely from the *omission* of any explicit reference to God in the oaths that the omission was somehow considered mandatory.

Plaintiffs' complaint that Defendants had not addressed the Oath Act is especially egregious in light Plaintiffs' vastly more conspicuous omission. Plaintiff Newdow has failed to inform the Court of the opinion in a case that he lost earlier this year, *Newdow* v. *Bush*, 355 F.Supp.2d 265 (D.D.C. 2005), *emergency motion for injunction pending appeal denied*, 2005 WL 89011 (D.C. Cir. 2005) (per curiam). There, Plaintiff Newdow sought an injunction barring any public prayer at the Inauguration of the President. *Newdow*, 355 F.Supp.2d at 267. Like this case, that one also focused on the actions and opinions of the Founders. The district court rejected Plaintiff Newdow's application, finding that the first Congress resolved that President Washington should attend a religious service immediately after taking the oath of office:

> Shortly before the first inauguration of George Washington in 1789, a Senate Committee resolved that "after the oath shall have been administered to the President, he, attended by the Vice-President, and members of the Senate, and House of Representatives, [shall] proceed to St. Paul's Chapel, to hear divine service, to be performed by the chaplain of Congress already appointed." Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2106 (1996) (quoting 1 Joseph Gales, *The Debates and Proceedings in the Congress of the United States* 25 (1834)). A House Committee passed a

> nearly identical resolution. Pursuant to these resolutions, immediately after the administration of the oath and the inaugural address, President Washington proceeded to St. Paul's Chapel, where the Chaplain of the Senate read prayers from the Book of Common Prayer. *Id.*

Id. at 286-87. The court went on to note that this tradition, begun with Washington, continues to the present day. *See id.* at 287. It is telling that the same Congress that passed the Establishment Clause resolved that President Washington should attend religious services that certainly included references to God.

2. The Founders Who Drafted the Establishment Clause Often Referred to the Role of God and Religion in the American Polity.

In addition to the many references already noted *supra* and in Intervenors' Motion to Dismiss (see Motion to Dismiss 7-13 & Appendix A), the Founders often referred to God and religion as a part of their various philosophies of limited government. Washington, imitated by all other Presidents, including Jefferson and Madison, offered "So help me God" at the end of the Presidential Oath of Office. Both Washington and Madison issued Thanksgiving proclamations referring to God. Article III of the Northwest Ordinance – which was drafted by Jefferson, first passed under the Articles of Confederation, and then reenacted under the Constitution at the same time the Bill of Rights was being drafted – declared that "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *See id.*, 1 Stat. 52 (1789).

The simple truth is that even those Founders cited most by Plaintiffs—Jefferson and Madison—spoke on both sides of the question, while the great majority of the Founders treated references to God and religion as a normal part of political discourse. As long as government activities with respect to religion were not coercive, the Establishment Clause would not come into play. Plaintiffs' lawsuit runs directly contrary to this historical tradition that began with the Founders.

C. Those Who Added "Under God" to the Pledge Sought to Distinguish Limited Government from the Unlimited Governments of Nazism and Communism.

The virtues of a limited government are most apparent when viewed in comparison to

governments that have no limits. The United States confronted several such governments during World War II and the Cold War that followed. The new phenomenon of totalitarianism, in which the state aspired to authority over the totality of its subjects' lives, took the form of fascism in Italy, Nazism in Germany, and Communism in the Soviet Union. In each of those countries there were no limits to the power the government claimed for itself. Therefore, Congress observed that

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. … [Including God in the Pledge] would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.

H.R. REP. NO. 83-1693, at 1-2 (1954). (*See also* Intervenors' Memorandum in support of Motion to Dismiss 9-11). This focus on the difference between the two systems—confronting each other across the better part of the globe in 1954—explains the reason for Congress' effort to amend the Pledge to proclaim the political ideology of limited government.

The amended Pledge is also something more than a statement of political ideology—it is, like the Declaration of Independence before it, an appeal to a "candid world" based on the invocation of universal principles. DECLARATION OF INDEPENDENCE, para. 2. Throughout World War II and during the Cold War that followed, the United States consistently argued that its was the better system of government because it was limited by the God-given rights of the people. The Pledge was a weapon in that clash of ideologies that the United States eventually won.

In the end, however, to discern legislative purpose, the Supreme Court has explained that

> the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.

Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, Nos. 04-70, 04-79, 2005 WL 1469477 at *15 (June 27,

2005). This means that the Court should assess the constitutionality of the Pledge based on the plain meaning of the statutory text, applying the canon of constitutional avoidance to read "one nation under God" as affirming a political philosophy of limited government, and therefore as constitutional. Indeed, in the particular context of the Pledge, the Supreme Court has already stated that the duty to avoid constitutional issues is especially important:

> The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by "a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision." *Ashwander* v. *TVA*, 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Always we must balance "the heavy obligation to exercise jurisdiction," *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 820, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), against the "deeply rooted" commitment "not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary, *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944). *See also Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 568-575, 67 S.Ct. 1409, 91 L.Ed. 1666 (1947).

Elk Grove Unified Sch. Dist. v. *Newdow*, 124 S. Ct. 2301, 2308 (2004) ("*Newdow I*"). This Court can thus avoid the constitutional issues by reading the phrase "nation under God" to have the meaning that most comports with the historical record—that "nation under God" embodies our nation's commitment, however often honored in the breach, to limitations on the government's ability to interfere with individual rights that precede the state.

II. No Establishment Clause Test Restricts Use of the Current Pledge.

Plaintiffs also attempt to show that the Pledge as it reads today constitutes a violation of various Establishment Clause tests. (Response 63-76). None of these tests bars the Pledge from being voluntarily recited by schoolchildren.

A. The Pledge Passes Even the Most Restrictive Test: the *Lemon* Test.

The state of Establishment Clause jurisprudence today can safely be described as "confused," *Van Orden*, slip op. at 3 (Thomas, J., concurring) or "Januslike," *Van Orden*, slip op. at 3 (plurality

opinion of Rehnquist, C.J.) , and that confusion extends especially to the role and viability of the test announced in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973). The Supreme Court has never universally followed that test, and during this past Term, the Court made clear that it need not be applied in every case. Unfortunately, the Court did not explain when, if ever, the *Lemon* test should apply.

In *McCreary County* v. *ACLU*, 545 U.S. ____, 2005 WL 1498988 (June 27, 2005), for example, the Court announced that there are no hard and fast rules in Establishment Clause jurisprudence: "Establishment Clause doctrine lacks the comfort of categorical absolutes." *McCreary*, slip op. at 11 n.10. In *Van Orden*, where no opinion commanded a majority, both the four-justice plurality opinion by Chief Justice Rehnquist and the controlling concurrence by Justice Breyer rejected the *Lemon* test as anything more than a general guide. Justice Rehnquist's plurality opinion explicitly rejected the application of *Lemon*, after citing several other cases where the Court simply ignored or dismissed *Lemon* as containing "no more than helpful signposts." *Van Orden*, slip op. at 3 (plurality opinion of Rehnquist, C.J.) (quoting *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973), and citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983), *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002), and *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001)). Justice Breyer also rejected the general applicability of *Lemon* by citing it as one of the cases useful only as non-binding guidance. *Van Orden*, slip op. at 3 (Breyer, J., concurring in the judgment) ("While the Court's prior tests provide useful guideposts and might well lead to the same result the Court reaches today, no exact formula can dictate a resolution to such fact-intensive cases.") (citing *Lemon*, 411 U.S. at 612-613, and *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U. S. 753, 773-783 (O'Connor, J., concurring in part and concurring in judgment)).

Thus, it is unclear whether *Lemon* should apply here. In the event that the Court finds that it does, Intervenors have demonstrated in their initial memorandum (Intervenors' Memorandum 1-18) how that test is satisfied and explain below how Plaintiffs have failed to rebut that showing.

1. The Pledge Has a Predominantly Secular Purpose

The first prong of *Lemon* inquires into the government's purpose for engaging in the

challenged action. Plaintiffs argue that the government's purpose in maintaining the Pledge is that "they want their religious belief system endorsed by the government" and that the Pledge therefore fails the purpose prong of *Lemon*. (Response 54). This claim fails for two reasons. First, there is little in the factual record to suggest that the purpose was purely or even partially religious. Second, the new standard for purpose set forth in *McCreary County*, and in Justice Breyer's controlling opinion in *Van Orden*, does not allow a court to find the Pledge of Allegiance or its voluntary recital unconstitutional.

Before evaluating Plaintiffs' claims, however, this Court must take into account two other purpose-specific aspects of the *McCreary* and *Van Orden* decisions. The *McCreary* Court's emphasis on the lack of "categorical absolutes," slip op. at 11 n.10, and on the details of the factual record, should prompt lower courts to focus on factual context. Indeed, none of the strictures of the Establishment Clause can be deployed as an absolute bar to a particular government action. Instead, courts will have to examine the *history and origins* of the challenged governmental action, in order to determine whether an objective observer *today* would perceive a "predominantly" religious purpose. *McCreary*, slip op. at 34; *see also id. at* 13 ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act.") (citation omitted).

On this approach, relatively old government actions are more likely acceptable, because contemporary observers would more likely view them as akin to "ceremonial deism," part of the background noise of American public life. *See Marsh*, 463 U.S. at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."). Moreover, as Justice Breyer pointed out in *Van Orden*, older government actions are not only less divisive, but shutting them down will more likely reflect government hostility to religion. *See infra* Section II.B.2.

The second doctrinal conclusion the Court reached was that the lack of categorical absolutes

means that sometimes obviously religious legislative purposes *are permitted* under the Establishment Clause:

> In special instances we have found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious. *See, e.g., Marsh* v. *Chambers*, 463 U. S. 783 (1983) (upholding legislative prayer despite its religious nature).

McCreary slip op. at 11 n.10. Although Congress' purpose in enacting the Pledge was not religious, *see infra*, even if it were predominantly or purely religious this Court would have "good reason" to allow the Pledge and the practice of reciting it to continue. Among those reasons would be that the Pledge has been recited by literally millions of schoolchildren across the country for more than a half century, prompting only a small handful of challenges (including the one presently before the Court). Moreover, striking down the Pledge would be far more divisive (as evidenced by the public reaction to the Ninth Circuit's ruling in *Newdow I*) than allowing the Pledge to continue being recited voluntarily in its current form. *See infra* Section II.B.2.

The third relevant doctrinal lesson to be gleaned from *McCreary* and *Van Orden* is that the purpose inquiry focuses on two things: whether the purpose of a government action is "predominantly" or "preeminently" secular, and whether the secular purpose proffered by the government is actually a sham. *See McCreary*, slip op. at 16 ("the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective"). Where a government display of religious text "serv[es] a mixed but primarily nonreligious purpose" there is no violation of the Establishment Clause. *Van Orden*, slip op. at 7 (Breyer, J., concurring in the judgment) .

As set forth in Section I above, the Pledge had a preeminently secular purpose of proclaiming the United States' ideological commitment to limited government. That secular purpose may have "presuppose[d] a Supreme Being," *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), but that does not alter its secular character. Moreover, Plaintiffs' real argument with Congress's finding is that both the historical tradition the Pledge inhabits and its own text and legislative history indicate that Congress' preeminent purpose in amending it was this secular one.

Plaintiffs also claim that the purpose of the *Defendants* in protecting the Pledge in its current

form is that "they want their religious belief system endorsed by the government." (Response 54). This simply does not square with reality. Plaintiffs cannot plausibly claim that any defendant government is trying to spread a belief in God by defending this lawsuit to keep the words "under God" in the Pledge. More important, however, is the fact that the purpose inquiry looks to the purpose of those who *enacted* the Pledge, not those who currently *defend* it. Defendants' purposes in defending themselves against Plaintiffs' lawsuit are irrelevant to the purpose inquiry.

Likewise, there can be no reasonable argument that the purpose offered by the Congress for amending the Pledge was a "sham." Accordingly, Plaintiffs make no claim that the legislative purpose of Congress in enacting the 1954 amendments to the Pledge involved any intent to deceive. Instead, Plaintiffs straightforwardly assert (over and over again) that the Pledge is itself a "purely religious" statement that does not hide its motivations. (Response 51). In fact, the only "sham" Plaintiffs allege is in Congress' 2002 findings that the Pledge should be constitutional. (Response 50-53). These latter-day Congressional motivations are, like the Defendants' motives in defending this lawsuit, irrelevant to the purpose inquiry. The Court must look to the history surrounding the Pledge's amendment to divine the relevant purpose. That history all points to the secular purpose of underscoring the American commitment to limited government.

2. The Pledge Does Not Advance Religion.

The Intervenors' opening brief argued that the Pledge did not advance religion because it was a statement of political philosophy, not of religious "dogma." (*See* Intervenors' Memorandum 3). As Justice O'Connor wrote in her concurrence in *Newdow I*:

> It is true that some of the legislators who voted to add the phrase 'under God' to the Pledge may have done so in an attempt to attach to it an overtly religious message. . . . But their intentions cannot, on their own, decide our inquiry. . . . *[T]hose legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the "individuality and the dignity of the human being*."

Newdow I, 124 S. Ct. at 2325 (O'Connor, J., concurring in the judgment) (quoting H.R.Rep. No. 1693, 83d Cong., 2d Sess., 1.) (emphasis added). Plaintiffs responded by repeating over and over

that the words "under God" are "purely religious" and could never therefore be a legitimate part of a political philosophy espoused by government. (*See*, *e.g.*, Response at 1, 13, 34, 40, 44). However, as Justice Breyer reaffirmed in *Van Orden*,

> [t]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious. Such absolutism is not only inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid.

Van Orden, slip op. at 2 (Breyer, J., concurring in the judgment) (citing *Marsh* v. *Chambers*, 463 U.S. 783 (1983), *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971), and *Lynch* v. *Donnelly*, 465 U.S. 668, 672-678 (1984)). Similarly, Chief Justice Rehnquist held that "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, slip op. at 3 (plurality opinion of Rehnquist, C.J.) (citing *Lynch*, 465 U. S. at 680, 687; *Marsh*, 463 U. S. at 792, *McGowan* v. *Maryland*, 366 U.S. 420, 437-40 (1961), and *Walz* v. *Tax Comm'n*, 397 U. S. 664, 676-678 (1970)). It is thus simply not the case that a government advances religion whenever a government actor utters the word "God."

Plaintiffs also claim that the Pledge has the effect of advancing religion because "A group 'expression of faith' – obviously in 'God' – has religious effects." (Response 72). In addition to the fact that mere recitation of the Pledge is not an "expression of faith," Plaintiffs' claim of religious "effects" fails because it misunderstands the "effects" prong of *Lemon*. The question is whether the government action tends to have the "principal or primary effect of advancing religion," not whether any person happens to experience any religious effects at all. *Van Orden*, slip op. at 6 n.6 (plurality opinion of Rehnquist, C.J.)(citation omitted) . Moreover, the type of expression at issue is clearly less overtly religious than the Bible-specific Ten Commandments monument at issue in *Van Orden*.

3. Plaintiffs Do Not Argue That the Pledge Creates Excessive Entanglement.

Plaintiffs appear to have conceded that the Pledge creates no entanglement, excessive or otherwise, as they do not argue the point in their Response. Therefore the Pledge satisfies this prong, like the other prongs of *Lemon*. That the Pledge satisfies the relatively restrictive *Lemon* test

confirms that it does not violate the Establishment Clause.

B. The Pledge Passes All the Other Tests Plaintiffs Cite.

Plaintiffs recite several other Establishment Clause tests that they claim each separately render the Pledge unconstitutional. (Response 63). Like many cases before them, *Van Orden* and *McCreary* make it clear that "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden*, slip op. at 2 (Breyer, J., concurring in the judgment) . *See also McCreary*, slip op. at 11 n.10 ("Establishment Clause doctrine lacks the comfort of categorical absolutes."); *Van Orden*, slip op. at 7 (plurality opinion of Rehnquist, C.J.) (refusing to apply any particular Establishment Clause to Ten Commandments monument case). Therefore, contrary to Plaintiffs' claims, the Pledge need not pass any single test or set of tests in order to be found constitutional under the Establishment Clause. Nevertheless, the Pledge is constitutionally valid under each of the tests cited by Plaintiffs.

1. The Pledge is Neutral.

The role of neutrality in Establishment Clause jurisprudence is almost as unclear as the role of the *Lemon* test. In the 5-4 *McCreary* majority opinion, which Justice Breyer joined, Justice Souter mounts an impassioned defense of the neutrality principle, stating that "[g]iven the variety of interpretative problems, the principle of neutrality has provided a good sense of direction …" *McCreary*, slip op. at 28. However, in his *Van Orden* concurrence, Justice Breyer argues that neutrality is an unreliable guide to Establishment Clause jurisprudence:

> Where the Establishment Clause is at issue, tests designed to measure "neutrality" alone are insufficient, both because it is sometimes difficult to determine when a legal rule is "neutral," and because
>
> > "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Ibid*.

Van Orden, slip op. at 2 (Breyer, J., concurring in the judgment) (citation omitted). Thus it is unclear whether a "neutrality" test even exists, or if so, in what form it may exist. Nevertheless,

because the Pledge is primarily a statement of political ideology (albeit one that includes one religious idea), it is neutral for Establishment Clause purposes.

2. The Pledge Is Not Divisive.

Another factor that Justice Breyer examined in his *Van Orden* concurrence was whether a particular government action was likely to be "divisive." Justice Breyer sees one purpose of the Religion Clauses as "avoid[ing] that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden*, slip op. at 1 (Breyer, J., concurring in the judgment) (citation omitted). Justice Breyer went on to hold that the monument on the grounds of the Texas State Capitol was not divisive in part because it had been in the same place for over 40 years without incident. *Id. at* 7. The Pledge in its current format is even older than the monument in *Van Orden,* and has been far more conspicuous and ubiquitous in American culture, yet it has given rise to very few conflicts. The Pledge is not socially divisive.

Justice Breyer also pointed out that courts are under just as much of an obligation as the executive or legislative branches to avoid creating divisiveness by changing the status quo. Holding that the Pledge is unconstitutional would certainly "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Van Orden*, slip op. at 7 (Breyer, J., concurring in the judgment) (citing *Zelman*, 536 U. S. at 717-729 (Breyer, J., dissenting)). Therefore, this Court must weigh whether striking down the Pledge or allowing it to remain in its current form would be more divisive. Given the reaction to the Ninth Circuit's decision in *Newdow I* in 2002, it seems clear that a decision by this Court to strike down the Pledge would be much more socially divisive and conflict-inducing than maintaining the status quo.[7]

III. Plaintiffs Failed to Respond to Controlling Precedent That Eliminates Their Free Exercise and RFRA Claims.

In their Complaint, Plaintiffs also raise claims under the Religious Freedom Restoration Act ("RFRA") and the State and Federal Free Exercise Clauses, yet they completely failed to respond to

[7] The various other "tests" offered by Plaintiffs as grounds for striking down the Pledge are also not availing in this context because the Pledge is not at bottom a religious document—no government is coercing children into uttering the Pledge, the Pledge does not constitute an endorsement of a religion, proclaiming the Pledge does not put a government imprimatur on the Pledge, and the Pledge does not turn anyone into an "outsider."

the controlling precedent cited in Intervenors' Motion to Dismiss.[8] Lacking a good response to those arguments, Plaintiffs instead extracted phrases only from the State Defendants' arguments and addressed them by citing bad precedents.

First, Plaintiffs completely ignore the threshold requirement of a RFRA claim, which is to demonstrate a "substantial burden" on religious exercise. Whether the voluntary recitation of the Pledge amounts to a "substantial burden" is determined by whether the government is coercing Plaintiffs to either follow religious precepts and lose certain benefits or abandon religious precepts and obtain the benefits. *See Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963) . Here, participation in reciting the Pledge is voluntary. Plaintiffs neither lose benefits from their nonparticipation nor gain benefits through participation.

Second, Plaintiffs ignored binding precedent foreclosing their claim that the inclusion of the voluntary recitation of the Pledge in school curriculum violates their right to Free Exercise of religion. *See Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1543 (9th Cir. 1985). *See also Fleischfresser* v. *Directors of Sch. Dist. No. 200*, 15 F.3d 680 (7th Cir. 1984). They indicated no burden on their profession or exercise of religion other than the mere existence of the phrase "under God" in the Pledge. To fill the void, they imported an Establishment Clause argument that the government's action in passing the Act of 1954 evidenced intent to promote a specific religious belief. (Response 87-88).

[8] Plaintiffs appear to have entirely abandoned their claim that voluntary recitation of the Pledge violates their parental rights of privacy and parenthood. They offered no response to the precedent cited in our memorandum rejecting attempts by parents to edit the content of public school curricula based on their rights as parents to direct the upbringing of their children. (Intervenors' Memorandum 19).

CONCLUSION

For the reasons set forth above, Plaintiffs have failed to state a claim upon which relief can be granted. Intervenors therefore respectfully request that their Motion to Dismiss be granted and that Plaintiffs' First Amended Complaint be dismissed.

Respectfully submitted,

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